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Environmental Voice within Companies and Company Law:
Environmental Management Systems (EMSs)

*Reform proposal for the Sustainable Companies Conference
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1. Introduction

The reform I propose in this paper involves mandating Environmental Management Systems (EMSs) via company law. I use the EU's voluntary Eco-Management and Audit Scheme (EMAS) as an example of what the legal regulation of EMSs might look like. The aim of a mandatory EMS would be to open up a deliberative space *within* corporations for the vocalisation and expression of environmental concerns, or to 'amplify' what I term 'intra-corporate environmental voice'. This, in turn, offers a way in which to achieve the more meaningful integration¹ of environmental concerns within both company law and company decision-making than is presently the case in the UK. As I explain, the integration of environmental concerns under section 172(1)(d) Companies Act (CA) 2006 is somewhat weak, principally because it allows only a 'business case' approach to the value of environmental protection,² the likely effect of which is to 'mute' rather than amplify environmental voice.

The paper is structured as follows. In section 2, I explain the reasons for this particular reform proposal. As will be seen, properly designed procedural regulation may serve to amplify whispers of environmental voice existing within companies, but section 172 is unlikely to achieve this. In section 3, I outline EMAS as an example of the legal regulation of EMSs, and explain its superiority over section 172 as a potential way to amplify environmental voice. In section 4, I briefly make the reform proposal,

* I am indebted to David Kershaw, Maria Lee, Marc Moore and Joanne Scott for detailed comments and interesting discussion on an earlier (and longer) version of this paper. I am also grateful to the Company Law section of the 2013 Society of Legal Scholars (SLS) Annual Conference, for lively debate on a similar paper.

¹ See Beate Sjøfjell, *Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law, with the Takeover Directive as a Test Case* (The Netherlands: Kluwer Law International, 2009).

² And as I have argued elsewhere, see Carrie Bradshaw, 'The Environmental Business Case and Unenlightened Shareholder Value' (2013) 33(1) *Legal Studies* 141.

namely, that responsibility for ‘instituting and ensuring the proper implementation of an environmental management system’ should be mandated via the existing codified regime of directors’ duties. I then address some of the legitimate concerns that mandating EMSs might be ineffective or counter-productive.

2. Reasons for reform

The organisational muting of environmental voice³

The need for environmental ‘voice’, either within the company or outside, stems from the fact that unlike other corporate ‘stakeholders’ such as shareholders, employees, consumers or the local community, the environment cannot speak for itself.⁴ It requires advocates to voice its interests on its behalf. The starting point in locating environmental voice within companies, or in locating intra-corporate environmental voice, is the real individuals who comprise business organisations. Whispers of this voice can be heard in the normative or internalised commitments to environmental protection uncovered in the environmental compliance literature. However, as will be seen, a range of organisational factors can serve to ‘mute’ the expression of non-financial or counter-hegemonic views within companies, including environmental concerns.

Traditionally, compliance or non-compliance with regulatory obligations was explained by reference to the economic deterrence model of behaviour,⁵ which assumes that individuals and businesses will only undertake environmental protection measures when required by law.⁶ However, the deterrence model does not stand up to empirical scrutiny. More recent compliance research uncovers a pluralistic and complex account of motivations for environmental compliance. In addition to economic costs, there are also ‘social’ and ‘normative’ motivations for pro-environmental behaviour,⁷ both of which challenge the economic model of both

³ The following section is a *very* brief summary of the sixth chapter of my doctoral thesis, *Corporations, Responsibility and the Environment* (UCL, 2013).

⁴ See, for example, Christopher D Stone, *Should Trees Have Standing? Towards Legal Rights for Natural Objects* (Tahoe City, CA: Tioga Books, 1988).

⁵ See, for example, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992).

⁶ See Robert A Kagan, Neil Gunningham and Dorothy Thornton, ‘Fear, duty, and regulatory compliance: lessons from three research projects’ in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Regulatory Compliance: Business Responses to Regulation* (Cheltenham: Edward Elgar, 2011), p 39; Robert A Kagan and John T Scholz, ‘The “Criminology of the Corporation”’ in Keith Hawkins and John Thomas (eds), *Enforcing Regulation* (Boston: Kluwer-Nijhoff Publishing, 1984); Anthony Ogus and Carolyn Abbot, ‘Sanctions for Pollution: Do We Have The Right Regime?’ (2002) 14 *Journal of Environmental Law* 283.

⁷ Parker and Nielsen, ‘Introduction’ (n 6), pp 10-12; Kagan *et al*, ‘Regulatory compliance’ (n 6), pp 37-9.

individual and firm behaviour.⁸ For present purposes, I am interested in the third broad motivation for compliance behaviour—normativity. Normative motivations encompass internalised commitments to environmental compliance and environmental protection more broadly.⁹ Of course, normative motivations are idiosyncratic. For example, responses appear to be influenced by personality traits, allowing for differences in emotionality or morality.¹⁰ Nonetheless, normative motivations for complying with environmental regulation are found consistently to exist, suggesting that there is at least some genuine concern for the environment within corporations—that there are ‘whispers’ of intra-corporate environmental voice.

However, it is relatively uncontroversial that an individual’s values, environmental or otherwise, are affected by group membership.¹¹ That individuals are able to freely exercise and vocalise personal values in the corporate setting is ‘belied by both psychology and sociology’.¹² For a number of reasons, organisational life suppresses or constrains individuals’ own sense of conscience, in turn having the powerful potential to mute intra-corporate environmental voice as well as being a well-known underlying factor in incidents of corporate irresponsibility. For example, the psychologist John Darley, in analysing the various ways that corporations can encourage wrongdoing, cites the diffusion of responsibility felt in group scenarios.¹³ The organisational setting can ‘distance’ one’s actions from decisions, particularly in large institutions; when many are involved in decision-making, ‘none feels personal responsibility for the ultimate outcome’.¹⁴ Various psychological phenomena have been identified regarding organisational or group decision-making, such as ‘risk shift’ (taking riskier decisions because it is on behalf of an organisation), ‘groupthink’ (acting in accordance with organisational norms despite inconsistency with one’s own values) and the ‘Abilene paradox’ (agreeing to group decisions against one’s better

⁸ Kagan *et al*, ‘Regulatory compliance’ (n 6), p 4; see also Peter J May and Soren C Winter, ‘Regulatory enforcement styles and compliance’ in Parker and Nielsen, *Explaining Regulatory Compliance* (n 6).

⁹ See Kagan *et al*, ‘Regulatory compliance’ (n 6) and Dorothy Thornton, Neil Gunningham and Robert Kagan, *Shades of Green: Business, Regulation, and Environment* (Stanford: Stanford University Press, 2003).

¹⁰ Jennifer Howard-Grenville, Jennifer Nash and Cary Coglianese, ‘Constructing the License to Operate: Internal Factors and Their Influence on Corporate Environmental Decisions’ (2008) 30 *Law & Policy* 73.

¹¹ Larry May, *The Socially Responsive Self: Social Theory and Professional Ethics* (Chicago: University of Chicago Press, 1996), p 6.

¹² Lawrence E Mitchell and Theresa A Gabaldon, ‘If I Only Had a Heart: Or, How Can We Identify Corporate Morality’ (2001) 76 *Tulane Law Review* 1645.

¹³ John M Darley, ‘How Organizations Socialize Individuals into Evildoing’ in David M. Messick and Ann E. Tenbrunsel (eds), *Codes of Conduct: Behavioral Research into Business Ethics* (New York: Russell Sage Foundation, 1996).

¹⁴ Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge: Cambridge University Press, 1998).

judgment in order to avoid conflict).¹⁵ As such, people can ‘in concert’ behave in ways that they would never have found acceptable otherwise.¹⁶

Perhaps the most obvious cause of muted values in the workplace is economic vulnerability, especially if the individual has dependants.¹⁷ The business ethics literature is riddled with narratives of would-be whistle-blowers, who feared that acting according to their own values would lead to job loss or impede career development.¹⁸ Underpinning this vulnerability is the strict notion of hierarchy and authority which characterises business corporations: ‘What is right in the corporation is not what is right in a man’s home ... What is right in the corporation is what the guy above you wants from you.’¹⁹ So whilst individuals outside of the corporate setting may have multiple standards against which to judge their conduct, individual actors in corporations ‘are subsumed and socialised by organisational bureaucracies’.²⁰ As such, organisations can thus cause people to ‘bracket’ in the workplace any private values they might hold.²¹ So whilst the environmental compliance literature may provide us with whispers of intra-corporate environmental voice, a range of organisational and hierarchical factors present within the company can serve to ‘mute’ this voice.

As will be seen, EMSs institute a series of discursive and iterative processes which may have the potential to limit some of these organisational, muting factors, in turn opening up space within the corporation for the expression of environmental voice. Like section 172 CA 2006, EMSs are a form of procedural law, to which we now turn.

Section 172 CA 2006: proceduralisation and the environmental business case

EMSs are a type of regulatory tool referred to variously as procedural law, meta-regulation and reflexive law.²² Such regulatory strategies focus on harnessing

¹⁵ Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge: Cambridge University Press, 2010), p 33. See also Ronald R Sims, *Ethics and Organizational Decision Making: A Call for Renewal* (Westport, CT: Greenwood Press, 1994).

¹⁶ Christopher D Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (New York: Harper and Row 1975), p 5; May, *The Socially Responsive Self* (n 11), p 70.

¹⁷ May, *The Socially Responsive Self* (n 11).

¹⁸ See Kermit Vandivier, ‘Why Should My Conscience Bother Me?’ in M David Ermann and Richard J Lundman (eds), *Corporate and Governmental Deviance: Problems of Organizational Behavior in Contemporary Society* (Oxford: Oxford University Press, 1978); Frederick Bruce Bird, *The Muted Conscience: Moral Silence and the Practice of Ethics in Business* (Westport, CT: Greenwood Press, 2002); Robert Jackall, *Moral Mazes: The World of Corporate Managers* (Oxford: Oxford University Press, 2009).

¹⁹ Jackall, *Moral Mazes* (n 18), p 11.

²⁰ Parker, *The Open Corporation* (n 15), p 33. See also Lawrence E Mitchell, *Corporate Irresponsibility: America’s Newest Export* (New Haven: Yale University Press, 2002), pp 43-5.

²¹ Jackall, *Moral Mazes* (n 18), p 4.

²² These types of regulation find their theoretical origin in the work of Gunther Teubner, see, for example, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law and Society Review* 239; ‘Juridification: Concepts, Aspects, Limits, Solutions’ in Gunther Teubner (ed), *Juridification of*

and enhancing the self-referential and self-regulating capacities of institutions outside of the legal system towards those external public policy goals.²³ But rather than attempting direct ‘control’ through highly detailed substantive standards, procedural approaches are indirect mechanisms and structures which, in the context of environmental protection, encourage and engender environmental responsibility.²⁴ Such regulation seeks to create the structural conditions for ‘organisational conscience’, establishing self-reflective processes to ‘irritate’ businesses into creative, critical and continual thinking about how to minimise environmental harms.²⁵ In the language used above, they provide frameworks for the expression of environmental voice.

Christine Parker’s work on the relationship between procedural forms of law (particularly meta-regulation) and corporate responsibility offers a powerful basis for assessing existing and proposed corporate *environmental* procedures specifically. According to Parker, such regulation should be structured so that companies engage with external norms and values; that is, the types of norms and values which the organisational aspects of companies can mute.²⁶ So in the context of environmental proceduralisation, the aim is for companies to engage with the norms and values associated with environmental protection.²⁷ This engagement should also be in a manner which transcends their own corporate self-interest. This envisages the institutionalisation of corporate structures, cultures and management which are ‘open’ or ‘permeable’ to environmental values and the ways in which these may conflict with other (financial) corporate goals. In the context of regulating for environmental purposes, therefore, such regulation should involve frameworks where business enterprises put themselves through an environmental process oriented to environmental outcomes.²⁸ At the same time, and in the spirit of procedural approaches generally, such legal interventions should leave the greatest amount of

Social Spheres - A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare (Berlin: Walter De Gruyter, 1987).

²³ Eric W Orts, ‘Reflexive Environmental Law’ (1994) 89 *Northwestern University Law Review* 1227, pp 1231-2; Julia Black, ‘Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’ (2001) 54 *Current Legal Problems* 103, p 111.

²⁴ See Orts, ‘Reflexive Environmental Law’ (n 23), pp 1231-2; Gunther Teubner, Lindsay Farmer and Declan Murphy (eds), *Environmental Law and Ecological Responsibility: Concept and Practice of Ecological Self-Organisation* (Oxford: Wiley-Blackwell, 1994); Neil Gunningham, ‘The New Collaborative Environmental Governance: The Localization of Regulation’ (2009) 36 *Journal of Law and Society* 145.

²⁵ Julia Black, ‘Proceduralising Regulation: Part I’ (2000) 20 *Oxford Journal of Legal Studies* 597, p 603; Orts, ‘Reflexive Environmental Law’ (n 23), pp 1231-2.

²⁶ Christine Parker, ‘Meta-Regulation: Legal Accountability for Corporate Social Responsibility’ in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007), p 215.

²⁷ See also Sanford E Gaines and Cliona Kimber, ‘Redirecting Self-Regulation’ (2001) 13 *Journal of Environmental Law* 157, pp 169-70 and Leonie Breunung and Joachim Nocke, ‘Environmental Officers: a Viable Concept for Ecological Management?’ in Teubner *et al*, *Environmental Law and Ecological Responsibility* (n 24).

²⁸ Parker, *The Open Corporation* (n 15), p 237.

space possible for companies to work out how to meet their own goals, but within the framework of values set down by regulation.²⁹

Section 172(1)(d) CA 2006 might be regarded as a form of corporate/environmental proceduralisation.³⁰ It requires that directors, in promoting the success of the company for the benefit of its shareholders as a whole, have regard to the impact of the company's operations on the environment. However, for a number of reasons, section 172 integrates environmental concerns in to corporate decision-making in only a weak way; it provides space for the expression of a financially contingent (rather than 'normative' or 'internalised') form of environmental voice. This is because, as I have argued elsewhere, section 172 mandates a procedural 'business case' for corporate environmental responsibility.³¹ Directors are required to have regard to the environment *only to the extent* that doing so will promote the success of the company for the benefit of its shareholders. It does not permit profit-sacrificing in the name of the environment, but rather forces decision-making procedures towards looking for corporate / environmental 'win-wins'.

The rhetoric of the environmental business case—the idea that behaving environmentally responsibly 'pays'—is, for obvious reasons, highly seductive. But empirical evidence to this effect is elusive. Despite a large body of empirical research on the topic, no consensus emerges as to the existence of a generalised link between corporate responsibility (environmental, or otherwise) and corporate financial performance.³² Marc Orlitzky's meta-analysis suggests that corporate environmental performance seems negligibly but nonetheless positively related to business performance.³³ However, not only is this relationship very slight in any event, there are

²⁹ Ibid., p 217.

³⁰ It should be noted that s 172 is accompanied by an environmental reporting requirement, formerly known as the s 417 CA 2006 business review (many of these requirements are replicated, with some additions, in the new 'strategic report', see the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013). Given the short length of this paper, as well as the fact that other conference participants will be addressing the issue of sustainability reporting, I do not go in to any detail in this regard. For further analysis, see Bradshaw, *Corporations, Responsibility and the Environment* (n 3), Ch 7; Charlotte Villiers, *Corporate Reporting and Company Law* (Cambridge: Cambridge University Press, 2006); Iris HY Chiu, 'The Paradigms of Mandatory Non-financial Disclosure: a Conceptual Analysis: Part 1' [2006] *Company Lawyer* 259.

³¹ Bradshaw, 'The Environmental Business' (n 2).

³² The literature is extensive, a review of which is beyond the scope of this paper. See further Bradshaw, 'The Environmental Business Case' (n 2), pp 144-7; José Allouche and Patrick Laroche, 'The Relationship Between Corporate Social Responsibility and Corporate Environmental Responsibility' in José Allouche (ed), *Corporate Social Responsibility (Volume 2) – Performances and Stakeholders* (New York: Palgrave Macmillan, 2006); Marc Orlitzky, 'Corporate Social Performance and Financial Performance: A Research Synthesis' in Andrew Crane and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press, 2008); Joshua D Margolis and James P Walsh, *People and Profits?: The Search for a Link Between a Company's Social and Financial Performance* (Mahwah, NJ: Lawrence Erlbaum Associates, 2001).

³³ Orlitzky, 'Corporate Social Performance' (n 32), p 14.

a number of reasons for scepticism as to the empirical basis for the environmental business case, not least a string of methodological concerns.³⁴

Perhaps more problematically, the business case claim suggests that corporate/environmental win-win situations exist as a matter of course. The ready or easy compatibility of environmental and economic concerns is taken as a starting point, and this starting point is problematic: trade-offs and points of conflict between environmental and corporate-economic goals do, and will continue, to exist.³⁵ Furthermore, many of these trade-offs are deeply embedded in business practice and societal interactions, the reversal of which would require significant behavioural change.³⁶ With this in mind, the rhetoric of the business case, and hence the whole norm underpinning section 172(1)(d) CA 2006, sends a misleading and unhelpful message regarding the effort required to ensure environmental protection. Indeed, section 172, in procedurally mandating (and not permitting anything more than) a search for environmental and corporate-economic win-wins, has the potential to shut down all of the tensions that exist between environmental and corporate goals.

For John Parkinson, this is not necessarily problematic.³⁷ The aim of section 172-type requirements is to institute the ‘socialisation’ or ‘sensitisation’ of boardroom decision-making by requiring directors to reflect on the consequences for corporate actions; all in the hope that a better balancing of company and external interests will result.³⁸ But we should consider this claim against the thrust of regulatory scholarship, particularly Christine Parker’s prescriptions for robust procedural interventions. Section 172 provides only instrumental relevance to environmental concerns in terms of a goal of corporate success, rather than a procedure geared towards an environmental norm. In addition, the business case approach to decision-making under section 172 provides ample scope for the masking of environmental and corporate conflict, despite calls for procedural interventions to leave space for such conflicts to emerge. Insofar as section 172 assumes away conflicts in decision-making and provides space for only a financially contingent environmental voice, it seems arguable that few regulatory scholars would be convinced that section 172 encourages deep or deliberative reflection on corporate environmental impacts. Indeed, if anything, section 172 has the scope to mute rather than amplify the whispers of environmental voice seen in the environmental compliance literature. This is particularly the case given it requires consideration of the benefits of environmental protection in terms of benefits to the company, rather than environmental protection as a valuable goal in and of itself.

³⁴ See above (n 32).

³⁵ Bradshaw, ‘The Environmental Business Case’ (n 2).

³⁶ Ibid.

³⁷ JE Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Oxford University Press, 1993), pp 345-6.

³⁸ Ibid., pp 345-6; see also Lawrence E Mitchell, ‘The board as a path toward corporate social responsibility’ in McBarnet *et al*, *The New Corporate Accountability* (n 26).

3. Environmental management systems

In this section, I outline a more robust and holistic form of corporate environmental procedure than section 172: environmental management systems (EMSs). Properly instituted, EMSs seek to embed environmental considerations within corporate decision-making and operations, in turn implicating and drawing in participation from employees at various levels of hierarchy. Crucially, there is no ‘single’ EMS template. An EMS is generated by a corporation itself, and tailored to its own organisational needs. Whilst the specific shape and structure of an EMS will therefore vary across companies, there are some commonalities. EMSs tend to consist of a series of internal planning processes, all of which are designed and implemented to achieve certain environmental goals. These goals include ensuring regulatory compliance, as well as improving the company’s overall environmental performance. Employees at various levels of hierarchy will be trained and assigned responsibility for implementing parts of the plan, which in turn will be reviewed and audited internally and externally. The results of review and audit should be fed back into a process of revision and continuous improvement to the overall EMS, with any deficiencies made the subject of remedial action in accordance a ‘plan-do-check-act’ cycle.³⁹

Despite EMSs being tailor-made by the organisation itself, frameworks are available to corporations to assist in the preparation of their own EMS, sometimes coupled with additional requirements for external validation or certification. Most prominent is the ISO 14001 EMS standard, developed by the International Organization for Standardization (ISO).⁴⁰ This EMS has now been incorporated into the EU’s more exacting Eco-Management and Audit Scheme (EMAS III).⁴¹ Both standards directly compete with one another on a global stage, since EMAS registration is available to non-EU corporations.⁴² As already stated, EMAS operates

³⁹ Cary Coglianese, ‘The Managerial Turn in Environmental Policy’ (2008) 17 *NYU Environmental Law Journal* 54, pp 55-6. See also Leigh Holland and Yee Boon Foo, ‘Differences in environmental reporting practices in the UK and the US: the legal and regulatory context’ (2003) 35 *The British Accounting Review* 1, p 5; Michael Watson and Anthony RT Emery, ‘Law, economics and the environment: A comparative study of environmental management systems’ (2004) 19 *Managerial Auditing Journal* 760, p 762.

⁴⁰ In 2008, an estimated 188,000 companies from 155 countries were certified as ISO 14001 compliant; see Coglianese, ‘The Managerial Turn’ (n 39), p 56; Aseem Prakash and Matthew Potoski, *The Voluntary Environmentalists: Green Clubs, ISO 14001, and Voluntary Environmental Regulations* (Cambridge: Cambridge University Press, 2006).

⁴¹ Regulation (EC) 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), Art 4(1)(b) and Annex II. As of 30 March 2012, more than 4,600 companies and 7,800 sites were registered with EMAS, although only 59 organisations and 289 sites were registered in the UK; cf with Germany, where registration figures were 1348 and 1877, respectively. See http://ec.europa.eu/environment/emas/pictures/Stats/2012-03_Overview_of_the_take-up_of_EMAS_in_the_participating_countries.jpg (accessed 30 July, 2013).

⁴² EMAS, Art 1.

on a voluntary basis, so that firms may opt to ‘register’ for EMAS registration as a way in which to differentiate themselves (on an environmental basis) from competitors. In the following section, I briefly outline the requirements of the EMAS Regulation in order to provide a flavour of what the legal regulation of an EMS looks like. I then consider the relationship between EMSs and intra-corporate environmental voice, and highlight the superiority of EMSs over section 172 for amplifying this voice.

The EMAS Regulation

In order to receive EMAS registration, firms must first carry out an environmental review. This involves a comprehensive analysis of the firm’s environmental impacts and its environmental performance and management.⁴³ On the basis of the environmental review, they must then develop and implement an *environmental management system* meeting the requirements of ISO 14001.⁴⁴ Central to the management system is the organisation’s *environmental policy*.⁴⁵ This is formally expressed by top management, and provides the overall environmental intention and direction of the organisation, outlining detailed (and where practical, quantifiable) objectives and targets.⁴⁶ This self-setting of performance targets is a crucial aspect of EMAS, but it is important to reiterate that EMAS itself does not specify levels of performance; the firm to determines its own environmental performance objectives. The environmental policy should be communicated to employees and made available to the public.⁴⁷

The management system sets up and outlines the programmes for implementing the environmental policy and is based around the ‘plan-do-check-act’ methodology.⁴⁸ It should designate responsibility for achieving targets at appropriate levels and functions within the company, including a top management representative(s) responsible for implementing and reporting on the performance of the system.⁴⁹ In addition, EMAS outlines requirements for employee involvement and participation, acknowledging that active employee involvement is a driving force and prerequisite for continuous environmental improvement.⁵⁰ Management should in turn ensure the availability of necessary resources (financial, expertise, training where appropriate etc) to establish, implement, improve and monitor the EMS.⁵¹

⁴³ EMAS, Art 2.

⁴⁴ EMAS, Art 4 and Annex II.

⁴⁵ EMAS, Art 2 and Annex II.

⁴⁶ EMAS, Art 2.

⁴⁷ The policy is made public as part of the environmental statement (see below), EMAS, Art 2.

⁴⁸ I.e. a description of the measures, responsibilities and means taken or envisaged to achieve environmental objectives, targets and the deadlines thereof (EMAS, Art 2 and Annex II).

⁴⁹ EMAS, Annex II.

⁵⁰ Ibid. On the importance of employee involvement at all levels of hierarchy, see Bradshaw, *Corporations, Responsibility and the Environment* (n 3), Chs 6-7.

⁵¹ Ibid.

Firms must also carry out an internal environmental audit, both before registration and at least every three years.⁵² The audit is a systematic evaluation of environmental performance, as well as compliance and conformity with the environmental policy and management system.⁵³ Information on the results of audits should be provided to top management, who in turn should subject the EMS, and general environmental performance of the organisation, to periodic review.⁵⁴ All of this should be documented, accompanied by systems of document creation, control and review, and accompanied by procedures for internal communication.⁵⁵ This in turn assists firms in their preparation of a comprehensive environmental statement made publicly available (in essence, this is a reporting requirement).⁵⁶ The statement reports on both the environmental policy and the management system, necessarily detailing environmental impacts, programme, objectives, targets and performance, all reported against key environmental performance indicators (KEPIs). In order to receive EMAS registration from a competent body,⁵⁷ the environmental review, management system, policy, internal audit and statement, as well as the organisation's continuous environmental improvement, must be annually validated as compliant with the EMAS Regulation by an accredited verifier.⁵⁸

The relationship between EMSs and muted/amplified environmental voice

The framework set up by EMAS, which requires companies to embed recursive and reflective processes within their decision-making, seems particularly appropriate for opening up deliberative space within the company for the expression of environmental concerns. It envisages a 'fundamental structural change in the everyday life of business institutions ... [aiming at] the transformation of business culture.'⁵⁹ A recent study based on interviews with Israeli corporations adopting an ISO 14001 EMS (which now forms part of EMAS) provides evidence of the powerful *potential* of EMSs in this regard.⁶⁰ Perez et al's research suggests that an environmental

⁵² This is four years for those with a small organisation derogation (EMAS, Art 7 and Annex II). There are also specific matters to be taken into account when verifying small organisations.

⁵³ EMAS, Arts 4 and 9 and Annex III

⁵⁴ EMAS, Annex II.

⁵⁵ Ibid.

⁵⁶ EMAS, Arts 2 and 4 and Annex IV.

⁵⁷ Registration is renewed every three years. Any substantial changes require an additional review, with changes and updates to the environmental policy, programme, system and statement accordingly, see EMAS, Arts 4-6, 8 and 13-14.

⁵⁸ EMAS, Arts 2 and 18-20, and Chs V-VI generally.

⁵⁹ Orts, 'Reflexive Environmental Law' (n 23), p 1313; Cary Coglianese and Jennifer Nash, 'Environmental Management Systems and the New Policy Agenda' in Cary Coglianese and Jennifer Nash (eds), *Regulating from the Inside: Can Environmental Management Systems Achieve Policy Goals?* (Washington DC: Resources for the Future, 2001), pp 11-2; Edgar H Schein, 'Coming to a New Awareness of Organizational Culture' (1984) 25 *Sloan Management Review* 3.

⁶⁰ Oren Perez, Yair Amichai-Hamburger, and Tammy Shterental, 'The Dynamic of Corporate Self-Regulation: ISO 14001, Environmental Commitment, and Organizational Citizenship Behavior' (2009) 43 *Law & Society Review* 593.

management system, through the various new routines it introduces to a company's decision-making, can trigger positive changes in the company's internal dynamic. The routines of information generation, ordering and review ensure that environmental concerns 'receive stronger presence in the firm's decision making processes, allowing for the discursive expression of motivations and ideas that may have been suppressed' without a rigorous EMS.⁶¹ An EMS facilitates a shift into a 'new dynamic equilibrium', where environmental concerns are given more weight.⁶² The various recursive processes aimed at continual improvement provide a framework for involving employees in the environmental aspects of the organisation, in turn opening up space for the internalisation of environmental imperatives by employees and strengthening any intrinsic (normative or internalised) pro-environmental attitudes that might already have been held.⁶³

Importantly, while a firm obviously carries out certain profit-orientated cost-benefit analyses, an economic calculus will not necessarily be determinative where an EMS is in place; Perez *et al's* findings challenge assumptions that internal firm dynamics are entirely dominated by the logic of profit maximisation.⁶⁴ This of course has implications for scholars concerned that the profit motive of corporations leads to the occlusion of environmental or other social / ethical concerns. Key to this, they argued, was the way in which the EMS, by imposing a process of continual reflection, coupled with third-party auditing and certification, makes environmental issues more salient. This salience, or the weight attached environmental issues, forces organisations to 'deal with competing (internal) economic and environmental demands and to develop new mechanisms for resolving potential tensions between them.'⁶⁵ While an environmental management system does not offer a complete algorithm for resolving these conflicts, the processes instituted created more environmentally 'sensitive' mechanisms to address such tensions.⁶⁶

Revisiting section 172

In comparison to section 172, it is clear that EMAS is a more robust and detailed procedure, and much more akin to the type of proceduralisation familiar to environmental lawyers.⁶⁷ EMAS requires and provides the framework for the generation not only of a tailored environmental management system which details structures, plans, activities, practices and resources for addressing environmental

⁶¹ Ibid., p 598.

⁶² See also Kathleen M Eisenhardt and Jeffrey A Martin, 'Dynamic capabilities: what are they?' (2000) 21 *Strategic Management Journal* 1105.

⁶³ Perez *et al*, 'The Dynamic of Corporate Self-Regulation' (n 60), pp 599-600.

⁶⁴ Ibid., p 620.

⁶⁵ Ibid., p 598.

⁶⁶ Ibid., p 620.

⁶⁷ For example, Environmental Impact Assessment, see Jane Holder, *Environmental Assessment: The Regulation of Decision Making* (Oxford: Oxford University Press, 2006).

issues, but also the generation of a top-level environmental policy and an initial environmental review. Importantly, the environmental policy under EMAS requires corporations, top-management specifically, to set environmental goals in the form of measurable environmental performance targets and objectives. In view of Parker's call for environmental processes geared towards environmental norms, this is significant, and of course lacking under section 172, where the norm to which the process is geared is non-environmental.

In addition, it would seem that a rigorous and mandatory EMS would provide more salience to environmental issues than section 172, in turn suggesting the opening up of space within the corporation for the expression of environmental voice. Recall how the various recursive and iterative processes associated with an EMS can ensure that environmental concerns are given more weight, in turn allowing for the type of discursive expression of varying motivations and ideas that would in theory be suppressed by the financially contingent form of environmental voice required by section 172. Importantly, a continual process of reflection seemed to create more environmentally sensitive mechanisms to address competing and conflicting economic and environmental demands. EMSs thus are, as appropriate, open to corporate / environmental conflicts. This should be contrasted with the weak form of environmental integration under section 172. Here, business case logic shuts down various tensions and conflicts by tunnelling decision-making towards locating corporate / environmental win-wins. As a means by which to encourage deliberative reflection on environmental impacts, and to achieve a stronger and more holistic form of environmental integration within company law than section 172, EMSs would thus seem to have much to offer.

4. The reform proposal

As already mentioned, the reform I propose is mandating environmental management systems via company law. There is of course legislative detail which would be necessary for the institution of a mandatory EMS. A full consideration of this is beyond the scope of this work and, of course, more appropriately addressed via consultation processes. However, the EMAS Regulation provides a useful example of the legal regulation of EMSs. I do not suggest that the EMAS Regulation should necessarily be transplanted in its entirety, nor indeed do I suggest that EMAS is the only model. Outlining EMAS above serves an illustrative rather than prescriptive function. It is worth noting, however, that a mandatory EMS and associated requirements based on EMAS would of course require some more obvious modification in view of EMAS' voluntary nature. EMAS registration acts like a 'gold star' for environmental performance; firms seek registration as a way in which to differentiate themselves from competitors on the basis of environmental excellence. As

such, certain aspects of EMAS would be inappropriate within a mandatory regime.⁶⁸ Legislation could, however, provide for the acknowledgement of exceptional performance,⁶⁹ and thus some of the competitive advantage associated with EMAS could be maintained. And of course, companies could still apply for EMAS registration itself, which would continue to run alongside a mandatory regime.

For both practical and symbolic reasons, the responsibility for ‘instituting and ensuring the proper implementation of an environmental management system’ should be mandated via the existing codified regime of directors’ duties. Numerous strands of research confirm that top management and, in particular, directors, are crucial as regards their influence over corporate cultures. As was mentioned above, the hierarchical aspects of organisations have the potential to mute environmental voice. Such an obligation imposed at the apex of the corporation would lend support and weight to the EMS, and provide a legal incentive for leadership to ensure that the implementation and operation of a management system is taken seriously throughout the organisation.⁷⁰

However, the environmental process recommended here should be open (rather than closed) to the possibility of tensions between corporate and environmental goals. As already explained above, section 172 shuts down these tensions. Were an EMS mandated in an ideal reform environment, references to ‘the environment’ in section 172 CA 2006 should be entirely omitted from any kind of duty to promote the success of the company, or placed on an equal footing with the interests of shareholders. For example, section 309 of the (now repealed) UK Companies Act 1985 required directors to have regard to the company’s employees as well as the interests of shareholders. The phrasing is significant, given that there is at least a semantic equality between employees and shareholders, and certainly not the immediately noticeable subordinate or instrumental value afforded to stakeholders under section 172.⁷¹ An environmental variant of this duty would potentially allow limited space for

⁶⁸ For example, EMAS registration requires evidence of compliance with environmental law. This is an exacting requirement (regulatory non-compliance is fairly commonplace), and would thus be inappropriate within a mandatory regime.

⁶⁹ On these types of regulatory approaches, see especially Gunningham and Darren Sinclair, *Leaders and Laggards: Next Generation Environmental Regulation* (Sheffield: Greenleaf Publishing, 2002).

⁷⁰ Directors’ duties are of course owed to the company. I do not suggest any change to this, and the duty could be judicially policed in a similar way to other duties. For example, it is generally recognised that the directors’ duty of care (CA 2006, s 174), at least in larger companies, imposes significant procedural requirements. While the decided cases tend to deal with financial concerns, the duty requires the installation, maintenance and supervision of internal controls over employees and operations. See, for example, *In re Barings plc (No 5)* [2000] 1 BCLC 523 and *Equitable Life Assurance Society v Bowley and others* [2003] EWHC 2265 (Comm).

⁷¹ There was debate as to the precise effect of s 309. Some suggested that since section 309 gave ‘no indication’ that the interests of employees and shareholders were to be weighted differently that directors were thus required to balance the interests of employees with those of shareholders. Others, in rejecting any notion of balancing, pointed out that s 309 did not affect the ‘interests of the company’, which continued to be defined by reference to shareholders (see Parkinson, *Corporate Power* (n 37), pp 82-5).

the expression of internalised or normative environmental value and voice, by permitting some environmentally motivated profit sacrificing behaviour.⁷² This would also avoid the problematic business case or ‘win-win’ approach associated with section 172.⁷³ Nonetheless, a mandatory EMS would still offer considerable benefits for intra-corporate environmental voice, even within these changes, by opening up space within the company for its expression.

Possible negative effects and the limits of ‘engineering’ environmental voice

There are a number of potential objections to mandating EMSs, particularly a general concern seen particularly in corporate social responsibility literature that ‘compulsion’ can be inflexible and even counter-effectual to existing responsibility initiatives.⁷⁴ Kagan, for example, suggests that while mandatory requirements may work so as to induce ‘accountability according to law, they may tend to undercut the continuing exercise of responsibility and improvements in performance that the best self-regulatory regimes generate.’⁷⁵ On this basis, mandating EMSs may simply generate tick-box, formalistic compliance rather than real environmental reflection and thinking.⁷⁶ Relatedly, some argue that the success of EMSs lie in what their otherwise ‘voluntary’, rather than mandatory, uptake implies: true managerial and organisational commitment to environmental values.⁷⁷ In this sense, a voluntary EMS is symptomatic of environmental commitment, rather than causative, suggesting in turn that mandatory EMSs might be ineffectual in generating pro-environmental voice.

⁷² This would be a defence for directors in that they would be permitted to have regard to the environment other than instrumentally for shareholder wealth generation. Given the limited enforcement routes, this would be a ‘shield’ for director decision-making rather than a ‘sword’ for potential litigators. As with s 172, the s 309 duty was owed to the company, so that in turn any wrong was against, and the cause of action vested in, the company (on this, see Chapter 5). Employees therefore had no remedy under the provision. See generally Len S Sealy, ‘Directors’ Wider Responsibilities - Problems Conceptual, Practical and Procedural’ (1987) 13 *Monash University Law Review* 164, p 177; Andrew Keay, ‘Section 172(1) of the Companies Act 2006: an interpretation and assessment’ [2007] *Company Lawyer* 106; p 109; Ben Pettet, ‘Duties in Respect of Employees under the Companies Act 1980’ (1981) 34 *Current Legal Problems* 199, pp 200-4.

⁷³ As noted by Parkinson, *Corporate Power* (n 37), p 82, there is ‘inevitably’ conflict between the interests of employees and shareholders, so that the duty to have regard to employees is not necessarily harmonious with, or instrumental to, shareholder wealth generation. Win-win rhetoric, therefore, did not underpin s 309.

⁷⁴ Cary Coglianese and Jennifer Nash, ‘Management-Based Strategies: An Emerging Approach to Environmental Protection’ in Cary Coglianese and Jennifer Nash (eds), *Leveraging the Private Sector: Management-Based Strategies for Improving Environmental Performance* (Washington DC: Resources for the Future, 2006), p 19.

⁷⁵ Robert A Kagan, ‘American Adversarial Legalism and Intra-Corporate Regulatory Systems’ (paper presented at the annual meeting of the Law and Society Association, Aspen, Colorado (1998)), quoted in Coglianese and Nash, ‘EMSs and the New Policy Agenda’ (n 59), pp 21-2 (original emphasis).

⁷⁶ See, for example, Richard MacLean, ‘Environmental management systems: do they provide real business value?’ [2004] *Environmental Protection* 12, p 13; Coglianese, ‘The Managerial Turn’ (n 39), p 62.

⁷⁷ See, for example, Coglianese, ‘The Managerial Turn’ (n 39), p 62.

It is true that the EMAS regulation is detailed, but this does not necessarily mean that the regime is inflexible. In accordance with the general thrust of reflexive law, there is room for companies to tailor and design their own approaches. Indeed, as already mentioned, a management system will necessarily be idiosyncratic and company-specific, and the generation of the environmental policy within EMAS allows for a series of self-set targets, allowing corporations to take ownership over their environmental processes.⁷⁸ In this sense, mandating an EMS might be more appropriately characterised as facilitative, rather than a form of pure and inflexible compulsion typically associated with direct regulation or command and control.

Moreover, we ought to be very careful in assuming that ‘voluntary’ uptake is symptomatic of a commitment to environmental concerns or an indicator, in and of itself, as to the existence of strong environmental voice or advocacy within companies. Of course, in some instances, voluntary uptake will equate to this. But equally, some firms adopt EMSs for less palatable reasons of external image manipulation and other motivations not easily characterised by normative or internalised commitments to the environment.⁷⁹ In addition, that some firms have differing takes on the values and goals underpinning environmental regulation (ranging between hostility; reluctant, ritualistic or formalistic acceptance; and embedded, internalised or ‘spirit’ oriented compliance) is a criticism which applies to all types of EMSs indiscriminately, voluntary or mandatory, and indeed, to all forms of environmental law.⁸⁰

That an EMS will be unable to engineer or create pro-environmental corporate voice is a more valid criticism. However, this is not quite the argument being made here. As mentioned above, the starting point in locating intra-corporate environmental voice is to look to the individuals who comprise business organisations. There is some evidence to suggest that these real individuals are environmentally conscious. There are ‘whispers’ of environmental voice; the problem is that they are potentially muted by organisation and hierarchical constraints. As such, my argument is not that EMSs will manufacture corporate environmental voice. Rather, the various iterative processes of an EMS, implicating a range of employees across the organisation, have the potential to open up a deliberative space within companies for environmental concerns to be vocalised. In this sense, an EMS amplifies whispers of environmental

⁷⁸ Indeed, one of the virtues of EMSs over traditional regulation is that they are ‘adaptable to the organisations that create and use them’, see Coglianese and Nash, ‘EMSs and the New Policy Agenda’ (n 59), p 4.

⁷⁹ See, for example, Cary Coglianese and Jennifer Nash, ‘Bolstering Private Environmental Management’ (2001) (http://ssrn.com/abstract_id=266685) on the limits of the mere presence of an EMS as an appropriate metric for differentiating among firms.

⁸⁰ See, for example, Robert A Kagan and John T Scholz, ‘The “Criminology of the Corporation”’ in Keith Hawkins and John Thomas (eds), *Enforcing Regulation* (Boston: Kluwer-Nijhoff Publishing, 1984); Gunningham *et al*, *Shades of Green* (n 9); Gary Lynch-Wood and David Williamson, ‘The Receptive Capacity of Firms—Why Differences Matter’ (2011) 23 *Journal of Environmental Law* 383 and Coglianese and Nash, ‘Bolstering Private Environmental Management’ (n 79), pp 8-9 outlining a range of potential reactions to mandatory EMSs.

voice within the company, rather than engineering voice or pro-environmental behaviour more generally. Awrey, Blair and Kershaw make a similar argument regarding personal ethics in the context of financial irresponsibility; procedural regulation, they suggest, may give personal ethics the room they need to ‘breathe’.⁸¹ At the very least, it is arguable that an EMS, in the salience it affords to environmental concerns, opens up this space to a greater extent than the loose environmental procedures currently mandated within UK company law.

Indeed, if UK legislation were silent as to environmental matters (as was the case pre-2006), the case for mandatory EMSs might be weaker. However, as I have argued elsewhere, section 172, far from being a positive development from an environmental perspective, is actually a retrograde step which we might have been better off without.⁸² It seems only appropriate that the integration of environmental concerns to corporate decision-making be done properly. But by mandating a procedural business case for the environment, section 172 provides only a weak form of environmental integration, and fosters rhetoric to the effect that environmental and corporate goals can be easily reconciled. Mandatory EMSs of course are no panacea. For all the reasons above, however, they are superior to the current state of affairs.

5. Conclusion

In this paper, I propose that the responsibility for instituting and ensuring the proper implementation of an environmental management system ought to be made mandatory via the codified regime of directors’ duties. The aim of a mandatory EMS would be to open up a deliberative space within companies for the expression of environmental concerns, or what I termed the amplification of intra-corporate environmental voice. Mandatory EMSs could also achieve more meaningful integration of environmental concerns within company law.

The idea of a voice for the environment reflects the fact that, unlike other corporate stakeholders, the environment is unable to advocate for itself. We can hear whispers of this voice within companies via the environmental compliance literature, where normative or internalised commitments to environmental protection on the part of individuals are found to exist. However, it seems likely that a range of organisational and hierarchical factors within businesses can serve to ‘mute’ a number of non-financial, privately held values, including those relating to the environment. Procedural law, particularly forms that subscribe to Christine Parker’s prescriptions, has the potential open up room within companies for the amplification of this voice.

⁸¹ Dan Awrey, William Blair, and David Kershaw, ‘Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?’ (2012) 38 *Delaware Journal of Corporate Law* (available at SSRN: <http://papers.ssrn.com/abstract=2157588>), p 4.

⁸² Bradshaw, ‘The Environmental Business’ (n 2).

However, such interventions must be geared towards environmental rather than corporate/financial norms and outcomes, as well as being open to deliberative consideration of the potential conflicts and tensions between these goals. Section 172(1)(d) CA 2006, by procedurally mandating the business case for environmental responsibility, not only fails to institute a procedure geared to an environmental norm, but suppresses a range of existing and deeply embedded corporate/environmental tensions, conflicts and trade-offs. As such, section 172 is more likely to mute, rather than amplify, any existing whispers of intra-corporate environmental voice.

Environmental management systems, in contrast, would appear to have much to offer. The recursive and iterative processes required by the EU's Eco-Management and Audit Scheme are geared towards self-set *environmental* goals, and open to tensions between these and corporate/financial imperatives. Indeed, emerging empirical evidence suggests that these types of processes provide more salience or weight to environmental concerns within company decision-making than would have been the case without an EMS. Whilst mandatory EMSs are of course no panacea, they would seem to offer considerable potential for the amplification of environmental concerns within companies, certainly when compared with the existing 'environmental' procedures under the UK Companies Act. Were companies legislation silent as to environmental matters, then the case for EMSs might be weaker. However, given calls made for environmental integration within company law, it seems only appropriate that this is done properly and robustly, and not in the somewhat weak manner under section 172 of the Companies Act.