THE SOCIAL RESPONSIBILITY OF MODERN CORPORATIONS

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This article approaches the problem of making corporations exercise in a more socially responsible way their vast powers with respect to the social, economic and political life of the community. After delineating the problem, the authors argue that the only resolution to this important issue is an eclectic one, especially in that the measures advocated are complementary. While they suggest a number of measures which would ease or perhaps solve the problem, they do not do so optimistically. They conclude with a warning that if business fails to respond to the need for change, it may find its legitimacy undermined, and that even if change does occur it may not meet the objective needs and political pressures of the times.

I INTRODUCTION

The power that large corporations exert over nearly every aspect of our lives is considerable; it is reflected in the quality of the air we breathe, the food we eat and the quantity of income we have. However, the corporation has been seen as an entity with limited responsibility, "an association of stockholders [shareholders] formed for their private gain and to be managed by its board of directors with that end in view".[1] Thus, directors have been required to act solely for the benefit of shareholders through profit maximisation. Increasing recognition of the fact that business corporations have "a direct and decisive impact on the social, economic and political life of the nation"[2] is evidenced by the call from writers and others that corporations exercise their power in a socially responsible way. That is, to have regard to the interests of the society at large when making corporate decisions even to the short-term or long-term detriment of profits.

This article outlines and evaluates many *interconnected* proposals for reform geared to forcing or encouraging corporations to act in a more socially responsible manner. No one approach is enough, a "systems solution"[3] is needed since "it seems clear that in modern industrial democratic society, no single remedy can cope with the problem of private corporate power".[4] However, it is suggested that the emphasis should be

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[1] Dodd, "For whom are Corporate Managers Trustees?" (1932) 45 *Harv. L. Rev.* 1145.

[2] W. Friedmann, "Corporate Power, Governed by Private Groups, and the Law" (1957) 57 *Colum. L. Rev.* 155, 176.

[3] Chamberlain, *The Limits of Corporate Responsibility* (1973) 4.

[4] W. Friedmann, note 2 *supra*, 185.

on giving the different communities, which corporate decisions affect, greater effective power to determine the course of corporate conduct rather than merely increasing the power of managers within the corporation to act in the interests of society as a whole as they perceive those interests. It is not sufficient that managers be permitted to take the interests of employees, consumers, local residents and the host country itself into account as well as those of shareholders. Employees, consumers and other communities affected must *themselves* have a say in determining corporate conduct. Even if corporate managers were conscientious and "highminded" and so would be prepared to have regard to the social and environmental consequences of corporate acts, it would not be desirable to allow them to make major decisions on social policy without any check or control by the communities concerned.

The initial writing on corporate social responsibility concentrated on the role of the managers.[5] It was recognised that the managers had a great deal of discretionary control which became less subject to restraints as the corporation became larger and the shareholders further removed from the decision-making process. Thus, managers had to adopt a professional, statesman-like approach.[6] This view, which by implication rests the responsibility of the corporation with the collective responsibility of the managers, ignores the fact that the corporation exists as an economic institution. Although the scope of its power may mean that the corporation plays a highly significant social and political role, its legitimacy still rests with its economic role.[7] Thus, profit maximisation, and not the collective morality of the managers, must still be the guiding criterion.

It is long-term profit maximisation which must be considered.[8] The corporation must look beyond an annual profit to shaping an environment which will permit "economic growth"[9] to continue for many years. This involves a wider concept of costs than that which has

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[5] In a later famous exchange in the pages of the Harvard Law Review, Professors Dodd and Berle debated the question of the responsibility of the managers—were they fiduciaries of the shareholders? (Berle's original view) Or were they fiduciaries of the institution itself? (Dodd's view)—Berle, "For Whom Corporate Managers Are Trustees: A Note" (1932) 45 *Harv. L. Rev.* 1365; Dodd, note 1 *supra.*

[6] Dodd, note 1 *supra*; Berle, "Modern Functions of the Corporate System" (1962) 62 *Colum. L. Rev.* 433.

[7] This is emphasised by Manne, "The Higher Criticism of the Modern Corporation" (1962) 62 *Colum. L. Rev.* 399 and reflected in the views of those writers who argue that the economic market place is *the* determining factor: M. Friedman, "The Social Responsibility of Business is to Increase its Profits", *New York Times Magazine* 13 September 1970, 32, 122. Posner, *Economic Analysis of Law* (1972).

[8] This long-term profit maximisation or "enlightened self-interest approach" is adopted in various degrees by Blumberg, *Corporate Responsibility in a Changing Society* (1972) 6 ff.; Rostow, "To Whom and for What Ends is Corporate Management Responsible?" in Mason (ed.), *The Corporation in Modern Society* (1960) 49 ff., 67, 68; and Chamberlain, note 3 *supra.*

[9] Blumberg's term for long-term profit maximisation. See generally Blumberg, note 8 *supra*, 7.

existed up to now. These costs may be viewed in terms of damage to the environment, dislocation of the workforce, distribution of services and similar considerations.

The problem is "that every business, whatever its size, is in effect 'trapped' in the business system it has helped to create. It is incapable as an individual unit, of transcending that system and metamorphosing into something else".[10] It is only if all corporations act together that any meaningful change can be achieved. There is little reason for optimism about what can be expected from the corporate system. Unless severe and unlikely government regulation is imposed, the very legitimacy of the corporation indicates that only modest change can be expected.[11] The reforms suggested are geared to achieving this change in the hope that they will engender some change in social attitudes regarding the economic legitimacy of the corporation to enable more adaptive and far-reaching change to take place. The proposals stress that change can only be brought about by making corporations more accountable to the communities their actions affect, allowing those communities participation in corporate decison-making. In seeking greater accountability, more emphasis is placed on channels of disclosure, communication and effective participation *external* to the corporation rather than *internal* mechanisms of the corporation.

Legal theorists have tended to concentrate on achieving accountability *within* the traditional model of the corporation and so have discussed at great length the "pros" and "cons" of shareholder democracy, recently expanding this into the more contentious area of industrial or employee democracy. Mechanisms for generating internal debate within the corporation are valuable; for example, less restrictive procedures for submitting a shareholder resolution to the company for distribution to members at corporate expense. Their main value lies not in mobilising the shareholders themselves, but in the external publicity that can thereby be aroused.[12] As will be discussed later, shareholders in the large publicly held corporations are typically so widely dispersed and relatively lacking in voting power or even interest in exercising control that it is naive to expect internal workings to force corporations to be more responsive.

Even if shareholder democracy could be revitalised and become a reality rather than the illusion it is at present, this would not be enough to give a broad base to corporate accountability. Ideally, public debate and concern over social issues might encourage shareholders to see

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[10] Chamberlain, note 3 *supra*, 4.

[11] See generally Chamberlain, note 3 *supra*. Jacobs, "Pollution, Consumerism, Accountability" (1972) 1 *The Center Magazine* 43 similarly stresses the need for structural change if the corporation is really to be socially responsible.

[12] Manne, "Shareholder Social Proposals Viewed by an Opponent" 24 *Stan. L. Rev.* 481.

themselves as citizens as well as investors and to vote for directors who advocate a more socially responsible platform, but basically shareholders still have an economic interest to protect. Other communities must be represented to ensure that this economic interest does not necessarily dominate corporate decision-making. The impact of major corporations over every aspect of our lives is such that these corporations must be accountable to the public as a whole not just to the communities directly linked to the corporation such as shareholders and employees. The idea that social responsibility will be ensured by industrial democracy is rejected. To be fair, the proponents of industrial democracy, even in the fullest sense of equal membership of the board of directors, do not claim that general social policy will thereby be promoted other than the "democratic imperative" that "those who will be substantially affected by decisions made by social and political institutions must be involved in the making of those decisions".[13] The Bullock Report,[14] for example, states as a major justification for its extensive and quite radical proposals about industrial democracy that equal representation on the board of directors is essential to release the latent energies of the working population and so jolt Britain out of the industrial doldrums.[15] The Committee, chaired by Lord Bullock, argued[16] that employee representation on boards will increase the efficiency of industry by involving labour in the initial formulation at board level of policy decisions since, at present, unacceptable decisions made without employee involvement can later be blocked by the trade unions.

The employees of a large corporation are affected more directly by it than many shareholders and must be given effective avenues for expressing their views, but justifiable self-interest in employment, wages and conditions again could prevent the attainment of other socially desirable goals in some cases. Jacobs cites the example of the statement of the United Paper-makers and Paper-workers Union that, "the air and water pollutants which result from the operations of paper and pulp mills are certainly not desirable . . . [but], while there are certain exceptions, neither are they indicated to be hazardous to human health. The primary objections to paper and pulp mill emissions and discharges involve nuisance and aesthetic factors, not health hazards".[17]

In the following section both reforms directed towards increasing the corporation's accountability to its internal communities, the shareholders and employees, and reforms aimed at a broad accessibility and

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[13] E.E.C. Green Paper, Commission of the European Communities, *Employee participation and company structure*, Bulletin of the European Communities, p. 9 cited in the *Report of the Committee of Inquiry on Industrial Democracy* Cmnd 6706 (1977) 25 (the Bullock Report).

[14] *Ibid.*

[15] Bullock Report, note 13 *supra*, 160.

[16] *Id.*, 50 para. 32.

[17] Jacobs, note 11 *supra*, 44.

accountability to the public as a whole, are discussed. The reforms are divided into changes in substantive law that may be required to allow or force corporations to exercise social responsibility and procedural changes necessary to achieve accountability.

II SUBSTANTIVE PROPOSALS FOR REFORM

1. *Government Regulation*

An increase in the extent of government regulation and its effectiveness is required. The government must intervene where consumer demand operating in the market-place is ineffective to cause a change in corporate conduct[18] or where it is "necessary to protect conscientious companies from being at a competitive disadvantage compared to those who are less careful about [a socially desirable goal such as the abatement of] pollution".[19] As Chamberlain points out,[20] in such cases a "systems solution" is required rather than piecemeal efforts by individual corporations. Government regulation is required to delineate and control the "social role" of the modern corporation. Apart from governmental guidelines, what influences the executives in the exercise of corporate responsibility once the short term profits of investors is no longer their guiding light? How do they decide between conflicting social goals such as full employment or conservation of the environment?[21] Similarly, only government regulations can ensure the consistent national approach in many areas which may be necessary for the proper attainment of the social or environmental goals in question. Employees may be able to demand successfully protective clothing from one corporate manufacturer, but unless every manufacturer in that industry complies with the same standards the relevant social goal will not have been attained.

Government regulations must be effective which requires that they are thoroughly policed and that there are substantial penalties in store for those corporations and corporate managers who fail to comply with

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[18] Despite the arguments of people such as Milton Friedman who stress that business should be left to the workings of the free-enterprise competitive economic market place, we would suggest that it is increasingly evident that due to the imperfect workings of the market place it no longer acts as a sufficient control on large corporations. *E.g.*: A four-year investigation into the automotive repair industry by the Sub-committee on Antitrust and Monopoly of the U.S. Senate Judicial Committee estimated that the U.S. public were being "robbed" of at least $8-$10 billion per year in excessive repair charges, replacement costs, and built-in design obsolescence. The consumer market had proven powerless due to lack of information and a virtual four or five company monopoly cartel over the industry. Randall and Glickman, *The Great American Auto Repair Robbery* (1972).

[19] Du Bridge, *Toward A Better Environment* 10 (Address at the dedication of the Union Oil Co. Refinery, 29 June 1970), cited in Blumberg, note 8 *supra*, 96.

[20] Chamberlain, note 3 *supra*.

[21] See M. Friedman, note 7 *supra*, 122.

them.[22] It has been suggested that government regulations be policed from within the corporation by a salaried "public director" appointed by a government or consumer agency. However, regulations covering pollution controls, quality of goods and workers' conditions are already so vast and detailed that a single salaried public director within a corporation would not be able to cope with policing the existing regulations, let alone any extension of these. The policing function could best be performed by government inspectors attached to the relevant agencies administering the regulations,[23] making unannounced visits to corporations and corporate managers. Government agencies themselves may need policing and here small external groups of lawyers and others can provide the necessary monitoring. Ralph Nader in the United States has small groups of lawyers monitoring specific government agencies such as the Food and Drug Administration or the Highway Safety Bureau and "even that modicum of outside force has been enough to keep government officials on the line in a number of significant areas".[24]

Environmental legislation in Australia to date typically provides for relatively insignificant fines as the sole penalty for non-compliance.[25] Penalties must be drastically increased and made more of a deterrent. For instance, legislation could provide, as does the Western Australia and Queensland legislation at present,[26] that corporate officers as well as the corporation itself will be criminally liable to substantial fines and possible imprisonment. Measures must be taken to ensure that lenient judges do not water down penalties that pierce the corporate veil, for example, by prescribing in the legislation substantial minimum fines or terms of imprisonment. Some writers have suggested that directors and managers guilty of a dereliction of a social or environmental duty should be subject to suspension,[27] just as directors and managers guilty of financial dereliction are.[28] "The prospect of a forced vacation might

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[22] For a useful discussion of the different approaches to enforcement of government regulation, see Harding, "Lawyers and the Regulation of Economic Activity" in Hambly and Goldring (eds), *Australian Lawyers and Social Change* (1976) 183, 213-218.

[23] As well as being able to take an industry wide approach to enforcement an administrative body can play a vital role in research, policy formulation and the dissemination of information. See Harding, note 22 *supra*, 215. The Trade Practices Commission was designed to fulfil these functions to some extent—Trade Practices Act 1974 (Cth) s. 28.

[24] Jacobs, note 11 *supra*, 50.

[25] See generally Lanteri, "Legislative Control of Environmental Quality" in Lindgren, Mason and Gordon (eds), *The Corporation and Australian Society* (1974) 185, 191-194.

[26] *Id.*, 193-195.

[27] Jacobs, note 11 *supra*, 47.

[28] Companies Act 1961 (N.S.W.) ss 117, 122.

encourage executives to be a little less cavalier in deciding to what degree their company will comply with federal statutes".[29]

Directors and managers of corporations, as well as the corporations themselves, should also be civilly liable for damage caused by a failure to comply with government regulations.[30] The thought of paying substantial damages to all those whose livelihood, enjoyment of property or health has been affected by pollution of a river may give pause to corporate managers bent on not installing required pollution control equipment. To make the right to damages a reality, a successfully prosecuted or sued corporation should be compelled to disclose non-compliance with the law to all those who may have been thereby affected. Similarly, requirements for standing before the courts must be liberalised to allow public interest groups to take remedial representative actions and legal aid should be provided for.[31] The Trade Practices Act 1974 (Cth) is an example of an existing statute that fulfills these last requirements to some extent.[32]

Government regulations and regulatory bodies, however tough, do not detract from the fundamental characteristic of corporations—private ownership. It may be, as W. Friedmann[33] argues, that government regulations will be insufficient and that large industries or large corporations will only be socially responsible if owned by government and not by private individuals. Socialisation or nationalisation may be the ultimate answer.

2. *Directors' Duties and Good Faith*

Another change in substantive law that can force or encourage corporations to exercise greater social responsibility is a change to the law on directors' duties. Government regulation can control corporate conduct in specific areas of concern such as pollution abatement, but there will always remain areas where regulation is inappropriate or impossible and directors must exercise a discretion in determining corporate conduct. The law as it presently stands may well hamper directors who wish to follow a socially responsible course of conduct which benefits, for example, consumers or employees, if that course is not in the best interests of the shareholders.

In order to free directors from this legal necessity to always put shareholders first, we would advocate a change in the law on directors' duties of good faith to widen the range of interests directors are entitled to take into account when determining corporate conduct. However,

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[29] Jacobs, note 11 *supra*, 47. Professor Harding has expressed doubts about the utility of the criminal law in regulating corporate activity. Note 22 *supra*, 213-214.

[30] Piercing the corporate veil has been advocated by Nader, Green and Seligman, *Taming the Giant Corporation* (1976). See also Jacobs, note 11 *supra*, 47.

[31] An alternative is to adopt a system of contingent fees to encourage class actions. Harding, note 22 *supra*, 191, 214.

[32] See especially Trade Practices Act 1974 (Cth), as amended, ss 80(1)(c), 80A.

[33] Note 2 *supra*.

such a change is not likely to be of great practical significance. Challenges to corporate decisions on the grounds that the directors have not acted in the interests of the shareholders as a whole are rare and difficult to prove, and the courts are notoriously reluctant to intervene in management decisions. The freedom from court challenge by disgruntled shareholders that such a change would confer on public spirited directors is thus not of much moment.

In fact what is needed in this area is greater control over the exercise by directors of their powers. By expanding the range of interests directors are entitled to take into account, the legislature would be simultaneously reducing the role the courts can play in supervising directors. The courts already have a difficult task in determining whether a director has or has not acted for the proper purpose, that is, for the benefit of the company as a whole. This would become much more difficult if the director was entitled to take many different interests into account. Other methods must be looked at to provide checks on directors and corporate managers.

At the very least such a change in the law would bring it into line with current thinking. The Australian Institute of Directors as long ago as 1962 expressed the view that "[a] director's responsibilities extend to the company, its shareholders, its employees, customers and creditors, as well as his fellow directors and, to some degree, to the state".[34] Yet despite this commonly held view, the law is still that directors must act in good faith for the benefit of the company, defined to mean the shareholders present and future. Cases such as *Parke* v. *Daily News Ltd*[35] indicate that directors are not entitled to take the interests of other groups such as employees or consumers into account where these conflict with the interests of shareholders. In that case a board decision to set aside the entire net proceeds from the sale of the London *News Chronicle* as a fund for severance pay to employees was held invalid.

It may well be that decisions of directors or managers made with a view to the corporation's long-term as opposed to short-term profit interests are permitted within this existing legal framework.[36] However "the law still requires the benefit of shareholders to be the only *ultimate*

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[34] Institute of Directors, "Standard Boardroom Practice" *The Institute* (1962) quoted in Presbury, "What are the Legal Powers and Responsibilities of Corporate Management?" in Lindgren, Mason and Gordon (eds), *The Corporation and Australian Society* (1974) 27.

[35] [1962] Ch. 927.

[36] Blumberg, *Corporate Responsibility in a Changing Society* (1972) 48-52; and 1948 investigation into Savoy Hotel Ltd, reported in Gover, "Corporate Control: The Battle for Berkeley" (1955) 68 *Harv. L. Rev.* 1176 and cited in Ford, *Principles of Company Law* (1974) 339. Ford argues there that the test in Australia is slightly different after *Peters' American Delicacy Co. Ltd* v. *Heath* (1939) 61 C.L.R. 457 and "that the company is the totality of its members viewed in the light of their organisation and corporate objects". This may mean that in Australia directors are less free to take account of long-term profit from socially responsible acts which are detrimental to the short-term profit of shareholders.

object and concern of corporate management",[37] and judicial moves towards widening the community to which directors owe their duties of good faith have been slow and hesitant.[38] In these circumstances, we argue that the law should be changed by statute to compel directors to take account of the interests of employees as well as those of shareholders[39] and to permit them to take account of other interests, such as those of consumers, the public at large or the nation.

It would place an impossible burden on directors if they were compelled to consider all possible interests in managing the company, since this would force them to make extremely difficult decisions between conflicting social goals. An obligation to consider both shareholders and employees rather than just shareholders as at present will create conflict situations. The creation of further situations of conflict by requiring directors to consider other social interests can only have a damaging effect. However, as was suggested by the Bullock Committee in England,[40] the interests of employees are so directly tied to their corporate employer, even more directly in many cases than those of small investors, that management must take account of these interests whether or not employee representatives are put on to the board. At least the impact of a possible decision on employees should not be difficult to ascertain.

Directors should be enabled to take account of other interests so that a decision made *bona fide* which has the effect of favouring consumers over shareholders and employees, for example, could not normally be impeached in the courts. Clearly, proposals to include on the board of directors consumer representatives or other public directors and the proposal to change the law on directors' duties are complementary. Directors arguing the public or consumer interest would be powerless if the board as a whole could not act on their recommendations where they conflicted with the interests of shareholders. Similarly, a power in the board to act in the wider social interest would be dangerous without some means of obtaining guidance from and ensuring accountability to the public affected.

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[37] Presbury, note 34 *supra*, 43.

[38] In *Herald Co.* v. *Seawell* (1972) 472 F. 2d 1081 the U.S. Court of Appeals, Tenth Circuit, asserted in broad dicta that corporate management does need to pay some attention to social responsibility, in excess to business profit. In Australia, in *Walker* v. *Wimborne* (1976) 50 A.L.J.R. 446 Mason J. did not go so far, but in dicta extended the traditional shareholder electorate to one which may possibly include creditors.

[39] The formula accepted by the Bullock Report, note 13 *supra*, 84 was that in clause 19 of the Industrial Democracy Bill 1975 and repeated in the proposed amending Companies Bill 1976: "The matters to which the directors . . . of a company shall have regard in exercising their powers shall include the interests of the company's workers generally as well as the interests of its shareholders."

[40] *Ibid.*

However, as outlined earlier, judicial examination of an exercise of discretion by the board which favours one community over the other would be very difficult. An analogous situation already exists when a court has to examine a decision that favours one class of shareholders over the other. In *Mills* v. *Mills*[41] Latham C.J. expressed the view that "[i]n such a case it is difficult to apply the test of acting in the interests of the company. The question which arises is sometimes not a question of the interests of the company at all, but a question of what is fair as between different classes of shareholders".[42] This test could be extended so that the court would have to determine whether a director had acted *bona fide* in such a way as to be fair between competing interests. Presumably, a court would be reluctant to interfere with a director's *bona fide* decision as to what is "fair" in a particular case.[43]

Even if the scope of directors' duties is widened as is advocated above, the problem remains—for example, does a worker director owe a duty to shareholders as well as employees? A similar problem exists at present in respect of nominee directors representing a particular class of shareholders or debenture holders.[44] The Bullock Committee concluded[45] that all directors should have the same legal duties and liabilities. On this view it seems that outside directors (in the sense that they are not elected to represent shareholders) must in the final analysis place their duty and role as directors before their role as representatives of special groups, though they can argue their electorate's case as forcefully as they like before a decision is actually made.[46]

An analogous question arose in the New South Wales Supreme Court in 1967. A union appointed representative on the Board of Fire Commissioners sought a declaration that the Board was not entitled to refuse to supply him with a copy of a legal opinion it had obtained after he in turn had refused to give an assurance to the other directors that he would not pass the legal opinion on to his union. Street J. upheld the decision of the Board:

> Once a group has elected a member [of the Board] he assumes office as a member of the board and becomes subject to the overriding and predominant duty to serve the interests of the board in preference, on every occasion upon which any conflict might arise, to serving the interests of the group which appointed him. With this basic proposition there can be no room for compromise.[47]

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[41] (1938) 60 C.L.R. 150.

[42] *Id.*, 164.

[43] The general principles for court supervision of the exercise of a discretion would presumably apply.

[44] Gower, *The Principles of Modern Company Law* (2nd ed. 1957) 476.

[45] Bullock Report, note 13 *supra*, 83 para. 37.

[46] *Id.*, 85 para. 39.

[47] *Bennetts* v. *Board of Fire Commissioners of N.S.W.* (1967) 87 W.N. (Pt 1) (N.S.W.) 307, 311.

The issue involved in that case, the disclosure by an outside director to his electorate of confidential information, is another crucial one in this area. It has greatly concerned the opponents of worker representatives on the board[48] who argue that highly confidential information such as take-over proposals, financial policy, exclusive research data and the confidential affairs of other directors could be leaked accidentally or intentionally to competitors and the public at large, causing great damage to the corporation. The Bullock Report concluded[49] that these fears were exaggerated, a view strengthened by evidence from Sweden and West Germany where employees are represented on corporate boards and where breaches of confidentiality are extremely rare.

It may well be that in the case of outside directors who are in a position to exercise some control over actual decision-making because of equal representation on the board (as advocated in the Bullock Report) the risk of a breach of confidentiality is slight. In respect of worker directors it can also be argued that "there is no reason to think that the employee representatives will want to take any step which could damage the company's prosperity, in which employees as well as shareholders have a long term interest".[50] Other outside directors may be in a different position, such as public directors expressly appointed to disclose information relating to the responsibility record of the corporation and outside representatives who, because they are in a minority, are constantly frustrated in attempts to exercise real control and so may be tempted to force the company to be more responsible in the only way they can—by publicly disclosing damaging information. The law[51] may need some reform in this area, possibly to allow disclosure of confidential information to a government clearing house or agency which could then decide whether to take further action.

III PROCEDURAL PROPOSALS FOR REFORM

To render directors and managers effectively accountable to the various communities their corporate decisions affect major procedural changes are required. Such changes would need to provide an *inflow* of demands to the corporation from various groups—such as shareholders, employees, consumers, environmentalists *and* to enable these groups to make informed demands, that is, to provide a satisfactory *outflow* of information from the corporation. Once stimulated, public

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[48] See for example Griffen, "How much say should the workers have?" (Commentary on the Australian Council of Trade Unions industrial democracy policy) *Sydney Morning Herald*, 12 September 1977, 7 and the discussion in the Bullock Report, note 13 *supra*, 88-91.

[49] Bullock Report, note 13 *supra*, 89, para. 54.

[50] *Ibid.*

[51] Disclosure of confidential information exposes one to liability in equity (*Seager* v. *Copydex (No. 1)* [1967] 2 All E.R. 415), and to civil and criminal liability under Companies Act s. 124(3).

concern has a spiralling effect, for it forces or encourages greater disclosure and publicity which can provide its own abrasive stimulus for change as well as serving a preventive function.[52] At present, there are virtually no mechanisms for enforcing or even facilitating disclosure of any corporate conduct other than the strictly financial. There are a number of different ways disclosure of corporate social responsibility could be achieved.

1. *Information Outflow*

(a) *Disclosure by Employees*

Ralph Nader and others have argued that the common law and statutory duty[53] of loyalty owed by an employee to her employer should be relaxed.[54] This duty at present prevents disclosure by corporate employees of damaging information about the operations of the corporate employer on pain of summary dismissal and a possible action for damages. The issue has been stated by Blumberg as "the right of the employee of the large public corporations to take action adverse to the interests of [her] employer in response to the employee's view as to the proper social responsibility of [her] corporate employer".[55] Nader has followed through his proposals and established a Clearing House for Professional Responsibility to solicit and receive reports by employees of irresponsible corporate acts.[56]

While it is an attractive concept, there are a number of difficulties with the idea of employee "whistle-blowing". Who better after all than employee engineers to know of faulty car design in the latest model, or an employee research chemist to know that a new drug has not been fully tested, or employee factory hands to know that the company has discriminatory hiring practices? However, a major question is whether it should be a matter for the individual employee to decide what corporate conduct is irresponsible and should be reported.

Another issue is whether the threat of such disclosure will have the desired effect of encouraging greater responsibility on the part of corporate employers. It could merely result in the formation of an internal police state of suspicion and distrust where employees to be exposed to damaging information are carefully selected and screened as possible security risks. An employee who "blew the whistle" on her company still would risk her career and future employment prospects even if the company's right to dismiss her summarily was removed or

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[52] Blumberg, "The Public's 'Right to Know': Disclosure in the major American Corporation" (1973) 28 *Bus. Law.* 1025, 1026.

[53] See, *e.g.*, Sykes and Glasbeek, *Labour Law in Australia* (1972) 55-63. See also Companies Act 1961 s. 124(2).

[54] Blumberg, note 36 *supra*, 101.

[55] *Ibid.*

[56] Note 52 *supra*, 1057.

modified so that she could not be dismissed if her allegations proved correct. Thus, it is arguable that such a change in the law would not even increase the number of employees prepared to disclose corporate irresponsibility.

Some of the potential for abuse in unauthorised public disclosure by employees could be avoided by a system of disclosure of alleged violations of the law or irresponsible though not illegal conduct, to a government clearing house or the appropriate government regulatory agency.[57] This government body could then decide whether to proceed further with the matter, for instance, by prosecution or public exposure. The obvious flaw in such a system is that it is cumbersome, bureaucratic and would tend to keep even justified complaints from reaching the public, in favour of piecemeal prosecution or worse, no action at all on the part of the agency.

(b) *Voluntary Disclosure*

Public concern can of course generate voluntary disclosure on the part of corporations whose operations have been criticised. Blumberg cites several examples of such disclosure.[58] When confronted in 1972 with shareholder proposals seeking disclosure with respect to corporate activities in Southern Africa, International Business Machines and Mobil Oil voluntarily agreed to supply most of the information requested and the proposals were withdrawn. Similarly, in 1973, Burroughs Corporation agreed to provide information about activities in South Africa requested in a shareholder proposal and General Motors agreed to mail a booklet detailing such activities to all shareholders. Quite apart from this response to shareholder proposals specifically seeking disclosure, a number of corporations such as General Motors, Dayton Hudson and Quaker Oats have prepared and distributed special reports outlining their performance in the social or environmental arenas.

Such disclosure undoubtedly normally consists of self-justifying statements about the extent of corporate endeavour in these areas,[59] but it is significant in that it reflects a sensitivity to public opinion which is the major weapon in the hands of reformers. However, the danger is that by voluntarily providing the information requested in shareholder proposals a corporation will effectively deaden the publicity that could otherwise have been aroused by the proposal without providing enough facts to sustain informed debate.

Apart from this possible advantage, arguably the tactical thing for corporations to do is to lie low and refuse to engage in a public

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[57] Note 54 *supra*, 133.

[58] Note 52 *supra*, 1031, 1035-1038.

[59] Though *Business and Society* 1 August 1972, p. 1, described the Mobil Oil report mentioned as "a very valuable document" that "provides(s) [sic] good hard data on which evaluations and comparisons can be made", cited in Blumberg, note 52 *supra*, 1031.

exchange where every statement can unwittingly provide more ammunition for the critics.[60] The risk that corporations will follow this tack means that mechanisms for compulsory disclosure must be developed.

(c) *Compulsory Disclosure*

The price of limited liability for companies has always been disclosure. But disclosure to date in Australia has meant disclosure of the financial position of the company.[61] In the United States, the Project on Corporate Responsibility and other environmental groups have proposed that the Securities and Exchange Commission require disclosure of information on environmental pollution and pollution abatement, and minority employment policies without which they claimed it is "difficult, if not impossible for investors to make either socially responsible or financially sound investment decisions".[62] The Securities and Exchange Commission response to these proposals was to require disclosure only where compliance with pollution laws or civil rights statutes or legal proceedings arising from non-compliance materially affect the financial position of the business.[63] The Securities and Exchange Commission later proposed[64] that all proceedings instituted against a company under environmental protection statutes be disclosed, regardless of whether the company's financial position was materially affected in the established sense. To this extent it recognised a limited disclosure of corporate irresponsibility for its own sake. These 1972 proposals do not appear to have been put into force.

In England, a Labour Party Working Group has called[65] for compulsory disclosure of a wide range of information. Their suggestions include employment data (such as the annual rate of employee turnover and the total expenditure on training as a percentage of the payroll); the number of disabled persons employed; overseas employment practices, especially in developing countries (such as the number of local employees and their wages and working conditions); health and safety record; and environmental pollution policy. Such information could be required to be disclosed to government agencies who might also be empowered to receive and act on "leaks" from employees. Anonymity could be guaranteed to the corporation provided the figures revealed that accepted levels and standards had not been exceeded, with the threat of public exposure if the corporation had been derelict in its

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[60] This is certainly the advice given by Manne, "Shareholder Social Proposals Viewed by an Opponent" (1972) 24 *Stan. L. Rev.* 481, 493-494.

[61] See Div. 2 Part VI of the Companies Act in general and in particular ss 162 and 162A relating to annual accounts, also ss 37-47A regulating the issue and contents of prospectuses.

[62] Cited in Blumberg, note 52 *supra*, 1041.

[63] *Id.*, 1039.

[64] *Id.*, 1040-1041.

[65] *The Community and the Company*, Report of a Working Group of the Labour Party Industrial Policy Sub-Committee (Green Paper) London (1974) 29-30.

duty. Such government compilation of this type of information would be useful for research and statistical purposes but the disadvantage is that little of the information would find its way to the public to stimulate and inform debate.

On the other hand, if disclosure of the corporate responsibility record was required as part of the directors' report, which must be attached to the annual accounts,[66] then both the shareholders and the general public would have access to this information. The annual accounts must be presented to the annual general meeting[67] and every member is entitled, if not as of right then on demand, to a copy of the accounts.[68] All companies except exempt proprietary companies must also lodge at the Corporate Affairs Commission as part of their annual return a copy of all accounts and documents required by law to be attached thereto, which have been laid before the annual general meeting.[69] Requiring such disclosure would of course be contentious because it would add extra expense to the already heavy burden of preparation of financial information for disclosure.

(d) *Social Audit*

Many reformers have proposed that major corporations be subject to a regular social audit, the results of which should be made public, just as they are subject to a financial audit. Such a social audit would both *disclose* information about the company's social responsibility (or lack thereof) in different areas and *appraise* the company's social performance as a whole. Informal social audits of major corporations have been performed in America by external non-profit groups such as the Council on Economic Priorities and the Episcopal Church (which has large shareholdings in a number of major corporations).[70]

The difficulty with a formal audit as opposed to mere disclosure of the relevant information is that there are no guidelines for social accounting, and there is no single imperative—like profit maximisation as in financial accounting. Rather, there are a whole host of imperatives which may be mutually inconsistent, quite apart from being inconsistent with the profit motive. Therefore, it would not be easy to develop guidelines for social accounting. How does one assess a company which has excellent conditions for employees but at a cost to consumers of high prices? The difficulty is similar to that expressed by Berle in his original thesis;

> you cannot abandon emphasis on 'the view that business corporations exist for the sole purpose of making profits for their

[66] Companies Act 1961 (N.S.W.), as amended, s. 162A.
[67] *Id.*, s. 162.
[68] *Id.*, s. 164.
[69] *Id.*, Eighth Schedule.
[70] Note 52 *supra*, 1037.

> stockholders' until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else. . . .[71]

(e) *Public Director*

Some reformers propose that this sort of social audit be performed by a public director. Such a director could be a salaried full-time director appointed by the government to investigate and monitor the performance of the corporation in the social and environmental arena,[72] or a court appointed director where a particular corporation was suspected of not behaving as a good corporate citizen.[73] The role and likely efficiency of public directors is considered in our discussion on consumer representatives on the board.

2. *Information Inflow*

One of the reform proposals discussed below is the democratisation of the corporation. By democratisation we mean making the board of directors truly representative of and accountable to the different communities affected by the decisions of that board. The number of possible electorates is many but we will concentrate on three—the shareholders, the employees and the consumers.

(a) *Shareholder Democracy*

Many writers have discussed the "sham" that the general meeting is for the large publicly held corporation where ownership is completely separated from control.[74] Members of the public who hold shares in such a corporation typically hold a very small number of shares and are divorced from the monolithic enterprise, a small part of which they theoretically own. If they are dissatisfied they will simply sell their shares rather than even attempt to exercise the control rights traditionally assigned to ownership. Even were they to attempt to exercise some control, the membership of many large corporations is so scattered and so diffuse that it is impossible for shareholders to exercise any restraint over management. The investors who could exercise some effective control are the large investment companies such as life offices, or non-profit organisations such as churches and universities who hold large blocks of shares, but institutional investors have shown themselves consistently loath to exercise any such control and traditionally vote the management share at the Annual General Meeting.[75]

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[71] Berle, note 5 *supra*, 1367.

[72] See, *e.g.*, Townsend, "The Ups and Downs of Working Life" in (1972) 5 *Center Magazine* 34.

[73] Ottenweller (1976) 65 *Geo. L.J.* 737, where court appointed directors are discussed as anulliary relief in enforcing Securities Exchange Commission regulations.

[74] See, *e.g.*, Galbraith, *The New Industrial State* (2nd ed. 1972) 92-95.

[75] Rostow, "To Whom and For What Ends is Corporate Management Responsible?" in Mason, *The Corporation in Modern Society* (1960) 46, 53-54.

The use of proxy voting which, at least in the United States "has become the dominant mode of shareholder decision making in publicly held corporations",[76] exacerbates the ability of management to perpetuate itself and remain insulated from shareholder control. It would be an unusual shareholder of a large public corporation who, even if she voted at all, had the interest or information to exercise some independent judgment rather than simply filling in the proxy form posted out to her by the corporation, which is already made out in the name of the managing director, and returning it in the stamped addressed envelope provided.[77] Hopefully, shareholders will pay heed to the public debate generated by disclosure and publicity, as outlined earlier, but better procedures for internal debate within the corporation must also be developed if shareholders are to act at all as an internal force for greater responsibility.

Theoretically, resolutions are passed at the general meeting after discussion but in practice they are determined before the meeting is ever held through the use of proxy votes.[78] Any shareholder has free access to the register of members[79] and so prior to an annual general meeting can distribute a proposed resolution, material critical of the management and alternative proxy forms to all other shareholders. However, this is very expensive and it is only in rare situations that the corporation itself must bear the costs involved, whereas the corporate proxy machinery and corporate funds are always at the disposal of management. Section 143 of the Companies Act 1961 (N.S.W.) details when management must circulate notice of a shareholder proposal and supporting statements but the section has severe limitations. Unless the company otherwise resolves, the expense must be born by the requisitioning shareholders (section 143(1)) and most significantly, the company need only circulate the resolution at all where a substantial number of shareholders, or shareholders representing at least five per cent of total voting rights so request (section 143(2)). This effectively eliminates the possibility of a small concerned number of shareholders representing a very small proportion of the total interests in the company utilising this mechanism to generate internal debate within the company and external publicity as has been done with notable success in America. Generally, in New South Wales a large number of shareholders have to be united on a proposal before they can even raise

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[76] Eisenberg, "Access to Proxy Machinery" (1970) 83 *Harv. L. Rev.* 1489, 1490.

[77] The use of corporate funds for sending out such proxies, complete with stamped addressed return envelopes was approved as early as 1907: *Peel* v. *London and North Western Railway Co.* [1907] 1 Ch. 5.

[78] Gower, note 44 *supra*, 445, 457.

[79] Companies Act 1961 s. 153.

the issue and solicit support generally amongst members. This is virtually impossible in the case of large corporations with huge widely dispersed memberships.[80]

The most famous utilisation of the corporate proxy machine in the United States for this purpose was undoubtedly Campaign GM in 1970[81] but other reformers have swiftly followed suit.[82] In Campaign GM Round I in 1970 (Round II followed with less success at the 1971 Annual General Meeting of General Motors) a small group of people, holding only twelve General Motors shares out of the more than 286 million shares outstanding, submitted several shareholder proposals to General Motors calling for greater social responsibility on the part of the corporation. The Securities and Exchange Commission required that two of the proposals be included in the General Motors proxy statement, one proposing the election of a shareholders' committee for corporate responsibility and another proposing the election of three public directors nominated by Campaign GM. This became front page news in the *New York Times*.[83]

The success of Campaign GM clearly cannot be gauged by the actual result of the ballot (2.73 per cent in favour of the first proposal, 2.44 per cent in favour of the second) for its achievement was far more the enormous publicity generated. As well as using the corporate machinery for distributing their proposals, the campaign discussed them in the press and lobbied major institutional investors in General Motors who felt the need to issue "newsworthy, publicity-yielding explanations of their position on these Campaign GM proposals".[84] A whole spate of articles on corporate social responsibility were prompted in the newspapers[85] and legal periodicals and the General Meeting itself was covered extensively by the media. Although the proposals were resoundingly defeated, General Motors itself responded by appointing several new officers and consultants in charge of social and environmental questions.[86] (This response is discussed *infra* in the section on publicity.)

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[80] A further issue is whether directors are entitled to alter or censor the resolutions submitted to them. See the report in *Australian Financial Review*, 1 February 1978, 24 on a case which involved s. 137 of the Companies Act under which 200 or more members holding not less than one-tenth of voting shares have the right to demand an extraordinary general meeting.

[81] See generally Schwartz, "The Public Interest Proxy Contest: Reflections on Campaign GM" (1971) 69 *Mich. L. Rev.* 421.

[82] See note 52 *supra*, 1029-1030.

[83] Blumberg, note 36 *supra*, 64. The discussion of Campaign GM is taken substantially from Blumberg.

[84] *Ibid.*

[85] *E.g.*, M. Friedman, note 7 *supra*, 32.

[86] The most serious limitation in the U.S.A. was that SEC Rule 14a-8 excused corporations from the obligation to disseminate at corporate expense proposals relating to "any matter, including a general economic, political, racial, religious, social or similar cause that is not significantly related to the business of the [corporation]". There is no such limitation in s. 143 of the Companies Act though

Even if one assumes that the problems of arousing interest and concern in shareholders over the social responsibility of the corporation can be overcome, individual shareholders have very little power to implement their concern through the corporate voting system. The rule of one share-one vote disadvantages all of the widely scattered and diffuse membership of large corporations except institutional investors who alone have enough shares to take an effective stand. Reformers in the United States have attempted to rouse these large investors, particularly non-profit investors such as churches and universities, from their traditional reluctance to wield their voting power and to force them to take a stand on social issues.[87] Their success has not been outstanding. Institutional investors such as banks, life insurance companies and superannuation funds are important investors in Australia, but these commercial bodies would be much more difficult to arouse to a sense of their proper social duty than essentially non-profit institutional investors have shown themselves to be. Unless institutional investors are accountable to their own constituents and shareholders, any voting power they could be roused to use to effect social policy could be dangerous because it would be unchecked.

Professor Ratner has proposed that the answer is to change the "one share-one vote" rule to "one shareholder-one vote" (or more moderately, a diminishing scale of voting power as one's shareholding increases) as exists in many European countries.[88] He argues that institutional investors would be glad to be relieved of the burden of incipient control attached to large investments and that a one shareholder-one vote rule would create greater shareholder and public discussion and interest in the election of directors, because the voting process would be more meaningful and would give socially aware shareholders a better chance of electing socially aware directors.[89]

It seems a little misguided or naive to pin one's faith on an unlikely change in the voting rules. It is interesting to note that in Campaign GM Round I a change in the voting rules from "one share-one vote" to "one shareholder-one vote" would only have increased the percentage support for the two shareholder proposals from 2.73 and 2.44 to 7.19 and 6.22 respectively.[90]

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the sub-s. (1)(a) requirement that the resolution "may properly be moved" at an A.G.M. and sub-s. (5) may prescribe some limits on subject matter. The SEC has recently amended Rule 14a-8 (CCH Fed. Sec. L. Rep. 17, 565-2 para. 24, 012) effective 1 February 1977, so that the corresponding provision now excludes proposals dealing with "a matter that is not significantly related to the [corporation's] business". This may indicate a change in approach.

[87] Blumberg, note 36 *supra*, 68-83.

[88] Ratner, "The Government of Business Corporations: Critical Reflections on the Rule of 'One Share, One Vote'" (1970) 56 *Cornell L. Rev.* 1, 45.

[89] *Id.*, 49.

[90] Blumberg, note 36 *supra*, 64.

A more modest proposal for making shareholder democracy a reality, given that this will probably never be a major force for greater corporate social responsibility, is to allow cumulative voting by shareholders for directors. On this system, which is either optional or compulsory in most American States,[91] minority shareholders at least have a chance to elect a director to support their interests by being able to cast all their votes for one director rather than having to vote singly for each director standing for election.

(b) *Employee Democracy*

Employee democracy can take many forms, the least contentious of which is worker participation in ownership of shares in the company, possibly by the utilisation of a procedure like that provided by section 67(2)(b) of the Companies Act. From the point of view of achieving greater responsibility on the part of corporations this is a "bankrupt mechanism", for as it simply makes shareholders out of employees it is subject to the same limitations as restrict the role of shareholder democracy in this area. It may even militate against social responsibility because it seeks to make the interests of a potentially powerful force for greater responsibility on the part of the corporation—the employees—the same as those of the corporation and its shareholders and attempts to dilute the power of the unions by converting workers into "mini-capitalists".

The Confederation of British Industry has argued that while greater worker involvement may be desirable it should not extend beyond participation at plant level with consultative machinery to bring employee views to the attention of the board.[92] They call for "wider participation in the process of decision making and not some form of co-determination in legal form".[93] Participation without effective control is pointless and illusory,[94] though participation at levels below the board is necessary to provide channels for discussion of social issues and expression of employee opinion to the worker representatives on the board.[95]

Industrial democracy, in the fullest sense of representatives on the board, has existed in Germany and Sweden for some time.[96] The Bullock Report has strongly advocated it and the recently adopted[97] Australian Council of Trade Unions policy calls for a gradual move

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[91] Gower, note 44 *supra*, 119.

[92] *The Responsibilities of the British Public Company* London (1973) and evidence to the Bullock Committee of Enquiry, note 13 *supra*, 130 ff.

[93] *The Responsibilities of the British Public Company*, note 91 *supra*, 19.

[94] Bullock Report, note 13 *supra*, 160 para. 4.

[95] Bullock Report, note 13 *supra*, 41 ff. for a discussion of the role of participation below board level.

[96] Vagts, "Reforming the 'Modern' Corporation: Perspectives from the German" (1966) 80 *Harv. L. Rev.* 23, 66.

[97] At the 1977 Australian Council of Trade Unions Congress, 16 September 1977.

towards industrial democracy in Australia.[98] The main proposal of the Bullock Report was that worker representation on the board consist of equal numbers of elected employee and shareholder directors, with a third group of directors to be co-opted by agreement of a majority of each of the other two groups.[99] This third group should consist of an uneven number (greater than one) of directors forming less than one-third of the total board to break a deadlock where necessary, and generally acting as an influence against block voting by the employee and shareholder representatives. The Bullock Report also argues that this "2X + Y" board (where X equals the number of elected employees and the number of elected shareholder directors and Y equals the number of co-opted directors) would allow persons to be co-opted onto the board who have special expertise or can give a broader view of the company's affairs and express the wider public interest.[100]

Theoretically, then, the deficiencies of industrial democracy in ensuring that the corporation considers all relevant interests, not just those of employees and shareholders, could be corrected on this model by co-opted public interest representatives. However, both the worker directors and the shareholder directors must consent to the appointment of such a director, and it is unlikely that, even if they could agree, they would consent to the appointment of anyone who would forcefully represent an interest conflicting to any great extent with their own.

If worker directors are to have any power in decision making they must be at least equal in number to the shareholder representatives on the board. The German and Swedish experience has shown that where "outside" directors are in a minority on the board the major gain is merely increased access to information[101] but this raises the disclosure problems discussed in the section on directors' duties *supra.*

One question of relevance to all schemes for placing directors representing groups other than shareholders or management onto the board, including proposals for worker representatives, is whether there should be one board or two and, if two, on which should these "outsider" directors sit. In relation to worker representation the Bullock Report argues that a single board should be retained, rather than utilising the two-tier German model,[102] since it would be difficult to delineate precisely where the functions of the supervisory board stop and those of the managing board begin. Thus, either there will be continual conflict between a broadly based supervisory board consisting of both employee and shareholder representatives and the management board or, the management board would simply take over all but the most major

[98] *Sydney Morning Herald*, 17 September 1977, 6.
[99] Bullock Report, note 1 *supra*, 96 para. 13 ff.
[100] *Id.*, 96-97 paras 14-15.
[101] *Id.*, 56 paras 49-50.
[102] *Id.*, 76 para. 14.

policy-making functions and make it difficult for the board to retain its proper role of overall control of the company's affairs. The Committee concluded that the latter situation was the more likely result in Britain stating that the "effect of the introduction of a statutory two-tier system in this country would be to enshrine in the law the dominance of management to the detriment of the interests of both employees and shareholders".[103] The creation of a two-tier structure which has the practical effect of hiving off actual decision-making from the body on which the outside directors are to sit and placing it in the hands of a body of managers representative solely of management and accountable to no one at all, even shareholders, would not only not be conducive to greater social responsibility on the part of corporations, it would be positively counter-productive and dangerous.

Another issue significant to those who see industrial democracy as the way to greater corporate social responsibility is the relationship of the worker directors to the trade union movement. Unless these directors are elected through the trade union machinery, "piecemeal" representatives on the boards of individual corporations will break up the power of the unions, which are at present one of the few groups in the community with at least the potential to act as a strong countervailing force to the large corporations and effectively compel them to exercise greater responsibility.[104] As might be expected, the trade union movement has shown itself willing to embrace industrial democracy only if employee representation supplements and does not supplant existing trade union channels for expression of labour opinion.[105]

If industrial democracy does supplement the existing capital-labour relationship and if unions are prepared to advance general social policy, whether this be preservation of the environment or safer consumer goods, corporations will be exposed to trade union force at three levels. This exposure will occur nationally (taking the Australian position) through negotiations with the Australian Council of Trade Unions and national unions, at the level of corporate decision-making on the board of directors, and at the local level of the individual work sites. Industrial democracy could thus fill a gap in the present ambit of trade union influence at the top corporate level where major decisions on expansion into new enterprises, plant locations, prospective shut downs, mergers and takeovers are made.[106]

Worker representation on the board of directors is both philosophically and economically desirable. Philosophically, because the employees of

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[103] *Id.*, 75 para. 10.

[104] The American experience could indicate that unions are not prepared to take on this wider role: see Jacobs, note 11 *supra*, 44.

[105] Note 65 *supra*, 12; Australian Council of Trade Unions policy as discussed in *Sydney Morning Herald*, 12 September 1977, 7; Bullock Report, note 13 *supra*, 26 at paras 8-10. The Bullock Report also adopted this approach at 111.

[106] Note 65 *supra*, 12.

a corporation are so directly affected by its decisions that they must be given a voice in the making of those decisions and economically because, within the confines of the capitalist system, the efficiency of the individual corporation and even the nation as a whole may be eventually increased if industry becomes a more constructive partnership between labour and capital. However, employees and shareholders are not the only communities affected by corporate decisions and though employees and the trade unions generally may be stimulated by increasing world problems to, for example, advance the protection of the environment rather than their own interests, economic recession and high unemployment may make this hope unrealistic and even unfair. The corporation must be opened up to the wider public interest and accountability if there is to be any guarantee of greater corporate responsibility over a whole range of issues.

(c) *Consumer Representation on the Board*

Consumer representation on the board of directors could be secured either by persuading shareholders to elect as director a consumer representative, or by a system of appointing public directors to represent these interests independent of corporate election procedures.

If the latter approach is adopted, it is crucial who does the appointing, for a public director could easily become a mere token, or worse, lull the public into a false sense of security that their interests were being safeguarded. It may be naive to expect that a legislature and executive heavily influenced by big business would appoint anyone as a public director who was capable of achieving anything worthwhile, and consumer representatives appointed by the company, just as the representatives appointed by General Motors in response to Campaign GM, are not likely to be very effective. Even consumer representatives nominated or appointed by outsiders, such as consumer organisations, or effective consumer representatives appointed by the government or the company itself, still could experience obstructionism on the part of the other directors or the more insidious trap of being co-opted into the corporate way of thinking.

In any case a consumer representative, just like a worker director, in a minority of one, two or three on a board of perhaps twenty could exercise little effective muscle in actual decision-making. Nor is the answer simply to increase the number of representatives if several interests are to be represented. Were the board to consist of a number of different groups of representatives of consumer, environmentalist, shareholder, employee and managerial interests, then the board could be continually hampered in the execution of its powers by conflicts between different interests. Employees, for example, may argue that the company should maintain an environmentally harmful section of its activities while environmentalists would argue for withdrawal. Our

whole thesis assumes that efficiency should not be the sole aim of business but a deadlocked board can be of no benefit to anyone.

The most useful function for such directors (be they specifically consumer representatives or not) is a publicity function. They could utilise their access to internal information to publicly disclose dubious or scandalous corporate conduct, but again this raises the confidentiality and loyalty problems that beleager all directors representative of a special interest. Quite apart from this, the danger is that a public director or consumer representative who was effective at public disclosure would soon be hampered in her investigations by obstructionism and secrecy on the part of the other board members.

(d) *Managerialism*

Some writers abandon any hope of democracy within the corporation and rely on a spirit of professionalism on the part of the corporate managers themselves. They argue that managers either already have a social conscience and are at present only thwarted by restrictive rules about director's duties or that they can be encouraged to develop such an awareness of their social responsibilities.

(e) *Publicity*

If a sufficient level of public debate can be aroused and maintained so that corporations remain sensitive to public opinion, then that very publicity can act as an efficient mechanism for forcing a derelict corporation to change its ways or avoid irresponsible behaviour in the future. "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman".[107]

This hope must be balanced against the danger that the corporation's response will amount to mere tokenism, that is, giving the false impression that the public interest is being protected causing the debate to die down. An example is provided by General Motors' response to Campaign GM Round I in 1970 which Blumberg regards as at least part of the reason for the comparative lack of success of Round II.[108] General Motors appointed five of its public directors as a Public Policy Committee to advise it on the environmental and social impact of its operations; appointed a black director of urban affairs; designated a prominent authority on air pollution as a vice president in charge of environmental activities and appointed several distinguished scientists to advise it *inter alia* on the effects of General Motors' products and operations on the environment.[109] The success of any of these measures in effecting a change in General Motors' policies can be doubted.

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[107] Brandeis, *Other People's Money* (1933) 62, cited in Blumberg, note 52 *supra*, 1026.

[108] Blumberg, note 36 *supra*, 65.

[109] *Ibid.*

On the other hand, even if these developments initiate no immediate reform in General Motors' activities, they could still be a positive step in that they acknowledge that it is now part of our system of belief that corporations must take account of social policy and so make the next step of demanding actual evidence of such responsibility that much easier.

(f) *Negotiations and Confrontation Between the Corporation and External Bodies*

Democracy within the corporation is important, but for reasons outlined earlier it is not enough to give the necessary broad base of accountability to the corporation. The danger of relying on internal mechanisms is that conflict, if contained within the corporation, can easily be engulfed by it. Conflict may never even arise where it should, for "outsider" directors run the risk of conscious or unconscious co-option and institutionalisation by the corporation of which they become a part so that their ability to represent their constituents' interests may diminish. As Jacobs argues, "it is very difficult for those within mammoth corporate structures to do much more than serve as an ameliorating influence and occasionally to blow the whistle on some particular outrage".[110] He was speaking of executives and directors representative of shareholders rather than a more radical electorate such as consumers or employees, but we would argue that the same pressures would inhibit or at least frustrate "outside" directors.

For self preservation, then, it could be said that reformers should stay out of the corporate structure and consolidate themselves into communities of interests, such as consumer organisations or labour unions, or monitoring organisations like the Project for Corporate Responsibility. Eisenberg argues that the very idea of direct voting participation by any client group such as labour or customers is

> out of step with the fundamental nature of American institutions. Codetermination is a harmonizing and objectivizing principle; its basic premise is that persons with divergent objectives and training can work in tandem and make decisions in an objective way, even where self interest may be involved. In contrast, American institutions are generally premised on the deliberate exploitation of divergence and conflict to achieve socially desirable ends.[111]

The potential power of the unions to force social responsibility onto corporations is clear—"Green Bans" and bans on handling uranium are obvious examples. In addition, if corporations are forced to disclose information relating to their performance in the social and environmental arenas as we advocate above, then even small external groups

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[110] Jacobs, note 11 *supra*, 45.

[111] Eisenberg, "The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking" (1969) 57 *Calif. L. Rev.* 1, 21.

on the model of the Project for Corporate Responsibility can publicise this information and use it as the basis for social audits of major corporations which would in turn generate more public debate.

(g) *Litigation*

Public interest law firms on the American pattern could play a significant role in laying informations for criminal charges arising out of a breach of either substantive regulations or disclosure requirements and in undertaking civil suits for damages where these are provided for. At present in Australia, standing requirements and limitations on representative suits restrict the potential role of public interest law (quite apart from difficulty in raising funds), but the action instituted in the Federal Court of Australia by a group of concerned lawyers on behalf of the Movement Against Uranium Mining against the Uranium Producers Forum under sections 52 and 55 of the Trade Practices Act 1974 (Cth)[112] illustrates what can already be done.[113]

Derivative suits brought by shareholders on behalf of the company against directors should also be facilitated. This is not the place to go into this difficult area in any detail and we do not pretend to do more than simply mention it. However, it does seem that at present the difficulty of getting into court in the first place to complain of a breach of a director's duty to act *bona fide* in the interests of the company as a whole because of the interpretation placed on the rule in *Foss* v. *Harbottle*[114] and the difficulty of obtaining costs once there,[115] militate severely against any judicial examination of an allegedly derelict director. In accordance with our general aim of increasing accountability we advocate a liberalisation of these restrictions on the practical availability of derivative suits, while recognising at the same time that simply getting a director into court is not enough and that judicial examination may be very difficult especially if the law is changed to allow directors to consider a multiplicity of interests.

(h) *The Operation of the Market-Place*

On the classic free-enterprise-model, corporations compete to respond to changes in the consumer market place, thus the way to financially coerce corporations into more socially responsible conduct is for

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[112] *Australian Financial Review*, 27 September 1977, 11.

[113] Some attorneys in the U.S.A. make a very good living out of representing consumer groups and environmentalists in court battles and negotiations with large corporations. See, *e.g.*, the report "Nuclear plants fall on hard times" *Australian Financial Review*, 3 April 1978, 1, 4 and the report on the activities of the international mineral contract negotiations Mr Stephen Zorn, "U.S. advocate back to fight claims for Aborigines" *Australian Financial Review* 26 April 1978, 7.

[114] *Pavlides* v. *Jensen* [1956] 2 All E.R. 518: A shareholder cannot bring a derivative suit where the company in general meeting could ratify the act complained of. Hence a breach of a director's duty of good faith, which can be ratified by the general meeting, cannot normally be the subject of a derivative suit.

[115] *Wallersteiner* v. *Moir (No. 2)* [1975] 1 Q.B. 373, [1975] 2 W.L.R. 389 (C.A.).

consumers to demand it. If the social conscience of investors could be aroused as well (a more dubious proposition), then corporations would also have to become more responsible in response to investor preference.

Even if the difficulties of arousing concern in consumers and expressing this concern in a sufficiently concerted way are overcome this model still has great defects. Consumers cannot make a socially responsible choice of goods where they have no alternative. Consumers cannot reject the car altogether when there are no equivalent alternative means of transport and they cannot buy one make which is safer and less polluting than another if the market is divided up between "oligopolistic imitators".[116] The evidence of the four year enquiry into the automotive industry in the United States supports this conclusion.[117] Anti-trust laws must be enforced to ensure that consumers are "offered real choices between products competing on price and quality . . .".[118]

In many cases consumers may be too fragmented, uninformed or resigned for a general swell of public opinion to express itself in any sufficiently definite buying pattern. In these cases the public concern will hopefully be enough to generate government intervention, though not enough to economically coerce a more socially responsible approach on the part of corporations.

IV CONCLUSION

Quite clearly, the measures advocated in the preceding discussion are complementary. To take just one possible example, public interest and concern is necessary to take advantage of information compulsorily disclosed by corporations in their annual reports to use it to fuel further public debate. Such debate can in turn pressure the government into greater regulation of companies in areas as disparate as pollution control, working conditions for employees and product safety. Compliance with these regulations can be monitored by external groups of concerned lawyers and others who can use litigation, publicity or negotiation to enforce such compliance. All of this activity will generate further public discussion and concern which may manifest itself in consumer trends that force corporations unwittingly into more responsible conduct.

We have glossed over two fundamental questions: Who is to bear the cost of the reforms to force the corporation to take account of social policy in decision-making; and will business be able to survive the onslaught? There are three main groups of people who could bear the cost of increased disclosure on the part of corporations and corporate pursuit of socially desirable rather than necessarily profitable goals—

[116] Jacobs, note 11 *supra*, 46.
[117] Note 18 *supra*.
[118] Jacobs, note 11 *supra*, 44.

taxpayers generally through government subsidies to corporations; consumers through higher prices; and shareholders through reduced profits.[119] Corporations, naturally enough, tend to advocate either of the first two approaches and rarely the third. Caltex Oil has recently set what could become a trend in asking the Prices Justification Tribunal to approve a price increase to cover the costs of reducing the lead in their petrol in accordance with government regulation.[120] It is difficult to obtain information to refute a claim by a corporation that the cost of environmental protection must be passed onto the consumer and so, in the absence of effective control over corporations, reformers and government are faced with the hard choice between protecting the environment on the one hand and keeping down prices on the other.

If government is strong enough and public opinion vociferous enough to force some of the cost onto the corporations themselves and so ultimately their shareholders, one must ask whether business as we know it can survive? Will corporations be able to operate under threat of continual unauthorised leaks by employees or authorised or compulsory disclosure of information by public directors and the like? Can a board operate efficiently if its members represent interests as divergent as shareholders, employees and consumers? Will the cost of complying with environmental protection legislation eventually be so great that investors will move their money elsewhere? One answer to this last question at least could be that if all corporations are subject to the same strictures there may not be anywhere else for investors to go and they may just have to adjust to reduced profits.

The final questions must be Chamberlain's[121]—can we expect corporations to respond fully to articulated demands for greater responsibility on their part, and even if they do will this be enough to cope with the social and environmental problems of our times? Chamberlain concludes in the negative to both issues, stating that "[i]f social change is rapid, the alterations in its institutional strategy which business is willing to accept, even under pressure, may fail to satisfy the objective needs and political pressures of the times".[122] However, if the corporate structure is not sensitive to outside pressures and does not respond rapidly enough to the "objective needs" of the times, it may find its legitimacy undermined and the corporate system as we know it may well disappear.

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[119] Blumberg, note 36 *supra*, 100. The 1977 report of the Australian Department of Environment, Housing and Community Development reveals that the Federal Government is considering two different methods of preventing pollution—the use of economic incentives to industry to ensure that adequate steps are taken, and the introduction of a "polluter pays" principle: see *Australian Financial Review*, 20 December 1977.

[120] *National Times*, 19-24 September 1977, 14.

[121] Note 3 *supra*.

[122] *Id.*, 207.