GENDER DIVERSITY QUOTAS ON AUSTRALIAN BOARDS:
IS IT IN THE BEST INTERESTS OF THE COMPANY?

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1. INTRODUCTION

Whether gender diversity quotas on Australian corporate boards are in the best interests of companies is a multifaceted question which requires analysis of what is in the best interests of a company, and whether the government intervening in relation to board composition is justified and indeed necessary. The current gender diversity statistics of Australian Stock Exchange listed companies will be reviewed in light of the changing social norm that corporate boards should comprise a meaningful number of female directors.

Whether board level gender diversity is in the best interests of the shareholders, officers, employees and other stakeholders will be assessed by looking into the advantages and disadvantages of quotas. Do quotas promulgate a lack of meritocracy for directorship appointments and do they encourage corporate citizens to window dress board appointments? Is it best that the government not interfere with the market as there is a distinct lack of uncontentious empirical evidence that diverse boards positively affect the share price of listed companies? Or rather, should the government intervene as to date the market has not rectified itself and, in failing to do so, the corporate world has diverged itself from the hegemonic view that equality should take precedence over share price? International examples from countries that have enacted quota legislation provide live examples that government mandated quotas are effective in increasing boardroom diversity when coupled with dissuasive sanctions. Whether quotas are suggested for Australia, or whether Australia should continue with voluntary codes and training solutions without mandatory regulations, will depend on whether gender representation at board level hits meaningful targets in the near future.

2. QUOTAS AND GENDER DIVERSITY:

A. <u>What is it?</u>

Before delving into the advantages and disadvantages of gender quotas on Australian boards, it is important to first outline that the ‘best interests of the company’ is not a settled term nor is the contention that diversity at board level affects the company either negatively or positively.

Gender Diversity

Post Global Financial Crisis (**GFC**) there has been increased pressure on companies to exhibit best corporate governance practice. The GFC brought the importance of corporate governance into the public eye as the failures affected economic wellbeing globally.[1]

It is widely argued that diversity in the board room can be used as a tool to strengthen overall corporate governance.[2] While 'diversity' relates to a range of innate and assumed characteristics and traits, this paper only seeks to address diversity in so far as it relates to the objective gender of the board member. Due to corporate boards historically being male dominated, the increasing female participation at board level is a topic of hot debate.

Quotas

Across jurisdictions internationally there have been various hard and soft law methods of addressing the imbalance of female and male directors on companies' boards. Mandatory quotas being the most criticised and contested of all forms of government intervention, yet also the most successful in gaining female participation on listed companies' boards.[3]

There are numerous studies on what is the correct number, or 'quota', of females on a corporate board that affects real change.[4] Three women on a corporate board has been found to be the 'tipping point' at which females are no longer viewed as outsiders on corporate boards.[5] If just one female board member, often that member is tasked as being the representative of all female kind and viewed as interrupting the boys' club.[6] If two females, there is the public perception that they should support each other or it otherwise be seen as a catfight. However, when there are three female board members, they can comfortably agree or disagree without being viewed negatively.[7]

In countries that have sought to apply mandatory quotas, 40 percent of either gender representation is the most commonly cited quota.[8] 40 percent reflects a fair split and 'the right

[1] Stephanie Shetler, 'Women on Corporate Boards: Non-Quota Initiatives to Increasing Board Gender Diversity in the US' (2014) 5 *Grove City College Journal of Law and Public Policy* 1.
[2] Nanette Fondas, 'Women on Corporate Boards of Directors: Gender Bias or Power Threat?' (2000) *Women on Corporate Boards of Directors* 171-177.
[3] This is shown by Norway having the highest percentage of female representation at board level on publically listed companies.
[4] Sumru Erkut, Wicki Kramer and Alison Konrad, 'Critical Mass: Does the Number of Women on a Corporate Board Make a Difference?' (2008) *Corporate Boards of Directors* 222-228.
[5] Shetler, above n 1.
[6] Interview with Jan Babiak, former Ernst & Young executive (Lipscomb University, 21 June 2012).
[7] Ibid.
[8] For example, Norway has 40% quota; Brazil has 40% quota for State controlled companies; Australia has 40% for government boards and committees; France is 40% by January 2017; Spain 40% for publically traded companies with over 250 employees; Finland 40%; Iceland 40%.

gender balance' with 50 percent often cited as too restrictive on companies. [9] Further, with the average board size of between 7 and 9 depending on company size on the Australian Stock Exchange (**ASX**),[10] 40 percent usually allows for the 'tipping point' of three members as discussed above to be met.

While progress is being made towards having a fairer representation on corporate boards of both genders in Australia, there is still a long way to go. The rate of increase of female representation on Australian boards has not exceeded 2% per year since 2011. As such, it is arguable that quotas should be applied mandatorily rather than as best practice guidelines.[11] However, without a business case that gender diverse boards are in the best interests of the company, it will be hard to obtain public approval, especially of those in the business community.

Best interests of the company

To determine whether gender quotas should be implemented in Australia, it is necessary to comprehensively consider whether having a gender diverse board is indeed in the best interests of the company. The 'best interests of the company' is an evolving term. Historically, the best interests of the company were seen solely as the interests of the shareholders. This is coined the 'shareholder primacy principle'. However, increasingly the stakeholders at large are considered when assessing what's best for the company.[12] That is, the employees, service providers, suppliers, the environment and the community in which the company operates. Ensuring that corporations act in the best interests of the wider stakeholders often correlates in turn to greater shareholder value in the long term as the company attracts better employees and more investors as it is seen externally as socially progressive. This change in mindset is crucial to whether gender diverse boards, and indeed quotas, are in the best interests of the company.

Determining what is in the shareholders' best interests is relatively straight forward, as it revolves around profitability and share price. This is arguably somewhat measurable by comparing share results and profitability of companies with varying diversity on their board.[13] However, determining what is in the best interests of the wider stakeholders is a contested and multifaceted task. Coupled

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[9] Jo Armstrong and Sylvia Walby, *Gender Quotas in Management Boards* (February 2012) European Parliament <www.europarl.europa.eu/RegData/etudes/note/join/2012/462429/IPOL-FEMM_NT(2012)462429_EN.pdf>.
[10] Australian Institute of Company Directors, *Governance of Listed Companies* (1 October 2012) Company Director Magazine < http://www.companydirectors.com.au/Director-Resource-Centre/Publications/Company-Director-magazine/2012-back-editions/October/Inside-Your-Institute-ASX-200-Snapshot-Report-2012-Governance-of-listed-companies>.
[11] According to the Australian Institute of Company Directors statistics in 2011 women accounted for 13.4% of directorships in the ASX200, in 2012 15.4%, in 2013 17.3% and in 2014 19.3%.
[12] Ronald Green, 'Shareholders as Stakeholders: Changing Metaphors of Corporate Governance' (1993) 50 *Washington & Lee Law Review* 1409.
[13] Note significant issues with such an argument as outlined on under heading 'lack of empirical evidence'.

with a corporate board's primarily supervisory and conciliatory role, determining if diverse boards are indeed in the best interests of the company is a difficult task.

B. Why discussion is needed

The imputation of gender quotas on Australian corporate boards is a topic of heated debate as it invokes both emotions of fairness and equality yet also is underpinned by inconclusive research. Two thirds of CEOs and senior executive in Australia agree that gender equality is needed.[14] However, often directors questioned cannot describe why it is they think that gender equality at board level is needed.[15]

Watson[16] indicates that there are three predominate lines of reasoning:

(a) social justice of women being represented proportionately as they are in the workforce;
(b) functional reasoning, being that boards are more efficient when females are represented; and
(c) empirical evidence argument in relation to the financial performance and governance of the company.

It is the social justice reasoning that is perhaps the most persuasive as it runs counter to the Australian community's current societal values of equality. Enshrined in anti-discrimination laws are Australia's values that prohibit direct or indirect discrimination based on gender. However, empirically corporate boards have disparate amounts of males as senior executives and in board roles. This glaring disparity between stakeholders' values and board composition has brought into the spotlight the question of whether mandatory State imposed quotas should be applied to Australia.

Rather than attempt to discuss why corporate boards are not already reflective of Australia's value of equality in the workforce, this paper seeks to determine whether Australia adopting a mandatory gender quota is indeed in the best interests of the company in the current corporate climate.

3. CURRENT STATE OF PLAY ON AUSTRALIAN BOARDS FOR GENDER QUOTAS AND DIVERSITY

In the latest Australian Institute of Company Directors (**AICD**) Director Resource Centre release, it has been found that female directorships in the ASX top 200 companies (**ASX200**) make up only 19.9

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[14] Serge Sardo and Paul Begley, *Gender Equity in the Workplace* (March 2011) Australian Human Resources Institute <www.wigb.gov.au/images/stories/pdf/AHRI%20gender_equity_in_the_workplace_2011.pdf>.
[15] Lissa Broome, John Conley and Kimberley Krawiec, 'Dangerous Categories: Narratives of Corporate Board Diversity' (2011) 89 *North Carolina Law Review* 759-760.
[16] Katie Watson, 'Gender Diversity on Corporate Boards' (2014) *Journal of the Australasian Law Teacher Association* 7.

percent of all director appointments.[17] While there are no mandatory quotas in the ASX Listing Rules or Guidelines, the Australian government has gone some way towards enhancing boardroom diversity. Under legislation passed in 2012, non-public sector employers with 100 or more employees are required to report to the government in relation to various gender equality indicators. Then in March 2015, premier Daniel Andrews announced that he would implement 50 percent quotas to ensure half of all representatives on government boards are female.[18] He also indicated that these changes should be applied to the judiciary and in time, public boards may follow suit. However, this has not yet translated to a mandatory quota applicable to the corporate sector. To date, the corporate approach has been to collaboratively emphasise desired compliance by stakeholders through voluntary guidelines.

While the number of women on Australian boards is increasing, there is still fear in the community that the pace will slow if the pressure to change reduces.[19] This fear is echoed in the United Kingdom (**UK**), who have a similar voluntary code to Australia yet are seeing a slight reduction in the appointment of females directors recently. UK Business Secretary, Vince Cable, noted that the 'momentum [for change] appears to be slowing' in the UK.[20] When compared to the quick pace of change in European countries with mandatory quotas and appropriate sanctions, the quotas by government legislation debate is reinvigorated.[21] In Australia, the business community must be careful that the slowing pace of change seen in the UK is not replicated if pressure is reduced on corporate citizens due to 'steadily' climbing percentage of females on boards.[22] Internationally, the progress of women onto corporate boards has been described as 'glacial' and inherently in need of government intervention.[23]

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[17] Australian Institute of Company Directors, *Appointments to S&P/ASX200 Boards* (31 May 2015) Company Director Magazine <www.companydirectors.com.au/Director-Resource-Centre/Governance-and-Director-Issues/Board-Diversity/Statistics>.

[18] Rick Wallace, 'Women to Make Up Half of Boards, Court Posts, Victorian Premier Says', *The Australian* (online), 28 March 2015 <www.theaustralian.com.au/national-affairs/state-politics/women-to-make-up-half-boards-court-posts-victorian-premier-says/story-e6frgczx-1227282264297>.

[19] Speech by Elizabeth Broderick titled 'Getting on Board: Quotas and Gender Equality' (Delivered at 'Gender Matters', the third Women on Boards Conference, Sheraton on the Park, Sydney 29 April 2011).

[20] Business and Human Rights Centre, *Drive to appoint more women in boardroom failing, study shows [UK]* (10 April 2013) <www.business-humanrights.org/en/drive-to-appoint-more-women-to-boardroom-failing-study-shows-uk>.

[21] Credit Suisse Research Institute, Gender Diversity and Corporate Performance, (August 2012) <///C:/Users/kate.stary/Downloads/2012-creditsuissse-gender-diversity.pdf>.

[22] Broderick, above n 19.

[23] 'Women to Make Up Half of Boards, Court Posts, Victorian Premier Says', above n 18.

A. Statistics and reports

In Australia, women are graduating with university degrees now in greater proportion than men, yet there is still a huge disparity of women in senior executive positions and on corporate boards.[24] In its 2014 All Industries Snapshot, the Workplace Gender Equality Agency (**WGEA**) found that females make up 48 percent of all employees in WGEA reporting organisations but only 35.4 percent of managers and 13.5 percent of CEOs.[25] These numbers are significantly lower across all publically listed companies and private companies that do not report to WGEA. For example, only 5.75 percent of chairs and CEOs in the ASX200 are women.[26] This sentiment is replicated in many industries globally with only 25.7 percent of new partners of top-tier Australian firms being female, yet 63.2 percent of graduates recruited being female.[27] Somewhat surprisingly, countries with mandatory quotas seem to also have the same gender diversity issues at the higher leadership levels. However, at board level countries such as Norway, France and Finland with quotas have female directorship representation of 40.5 percent, 25.1 percent and 26.8 percent respectively.[28]

B. ASX view

Without doubt the ASX and Australian Competition and Consumer Commission (**ACCC**) are in a regulatory position to compel gender quotas should the government or business community at large elect to introduce quotas. Through updating the ASX Corporate Governance Principles and Recommendations (**CGPR**) in 2011, the ASX has signalled its intention to keep gender diversity as a high priority. The CGPR provide that ASX listed entities will be required to disclose their achievement against gender objectives set by their board and the proportion of women on the board, in senior management and employed throughout the whole organisation.[29] If listed companies have not complied with the CGPR they must state in their annual reports why not they have not complied. Outside of the ASX, various other industry bodies and non-governmental organisations have launched voluntary quota systems with varying degrees of success and uptake by the corporate world.

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[24] Watson, above n 16.

[25] Workplace Gender Equality Agency, *All Industries Snapshot* (February 2014) <www.wgea.gov.au/sites/default/files/2013_All_industries_fact_sheet_1.pdf>.

[26] Georgina Dent, *There are more men called Peter leading ASX 200 companies than women,* (6 March 2015) Womens Agenda <www.womensagenda.com.au/talking-about/editor-s-agenda/there-are-more-men-called-peter-leading-asx-200-companies-than-women/201503065406#.VZxob2cw-Uk>.

[27] Nicola Berkovic, 'Women trail in legal partnerships despite dominating graduate intake', *The Australian* (online) 3 July 2015 <http://service.meltwaternews.com/mnews/redirect.html?docId=5722109&userId=3007567&type=3&agentId=533589&cId=133194>.

[28] Based on data from the European Stock Exchange in October 201: Catalyst, *2014 Catalyst Census: Women Board Directors* (13 January 2015) <www.catalyst.org/knowledge/2014-catalyst-census-women-board-directors>.

[29] ASX Listing Rules, 4.10.3.

C. Other industry bodies' views

Overwhelmingly other industry bodies' are in favour of gender diversity on corporate boards, yet fall short of calling for mandatory quotas. The AICD's CEO John Brogden has stated that there is 'an undeniable case for gender diversity on boards' and noted that the AICD supported a voluntary non-legislated 30 percent quota by 2018.[30] Similarly, in the G20 Labour and Employment Minister Meeting held in September 2014, the OECD recommended increasing women in decision making positions by introducing mechanisms to improve the gender balance in public sector leadership positions. These mechanisms include target setting or voluntary quotas. However, the OECD fell short of recommending mandatory quotas.[31] The Australian Human Rights Commission 'Gender Equality Blueprint' stated that all listed companies should aim to have at least 40% women by 2015, failing which government should consider legislating mandatory quotas to achieve this within a set time frame.[32] One step further is the Business Council of Australia which has called for a 50% quota for women in senior roles in the next 10 years.[33]

Despite the above support for meaningful gender diversity, there is still vastly unequal female representation on corporate boards. This begs the question, what type of evidence or support in the corporate world is needed to determine if gender quotas are in the best interests of the company on a micro level and corporate world on a macro level? Does this disparity still exist because having a gender diverse board is not in the best interests of the company?

4. IS A GENDER QUOTA IN THE BEST INTERESTS OF THE COMPANY?

Whether gender quotas and equal female board representation is in the interests of each of the key stakeholders of a company depends on the stakeholders' interests. Outlined below are the conventional main motivators for shareholders, employees, officers and the community at large, and an overview of whether current research or policy consideration has found a link between increased board gender diversity and the stakeholders' interest.

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[30] Nassim Khadem, 'Australian Institute of Company Directors wants 30% women on boards by 2018' *The Sydney Morning Herald* (online) 10 April 2015 <www.smh.com.au/business/australian-institute-of-company-directors-wants-30-women-on-boards-by-2018-20150409-1mh0qt.html>.

[31] G20 Labour and Employment Ministerial, '*Achieving stronger growth by promoting a more gender-balanced economy*' (15 August 2014) <www.oecd.org/g20/topics/employment-and-social-policy/ILO-IMF-OECD-WBG-Achieving-stronger-growth-by-promoting-a-more-gender-balanced-economy-G20.pdf>.

[32] Broderick, above n 19.

[33] Fiona Smith, 'Push for women to fill 50 percent of senior roles', *The Sydney Morning Herald* (online) 5 November 2013 <www.smh.com.au/business/the-economy/gender-targets-push-for-women-to-fill-50-per-cent-of-senior-roles-20131104-2wxuq.html>.

A. Shareholders' interests

Historically one of the biggest influences on the appointment, resignation and tenure of directors' was their perceived effect on the interests of the shareholders. Shareholders' interests are usually aligned with the profitability and share price of the company. Research into female board participation and its effect on financial performance of companies has been largely inconclusive.[34] Some studies have found a positive relationship exists and conversely others a negative.[35]

A reoccurring issue with board research when correlated to financial performance is that so many constantly changing elements are reflected in a company's performance that it is almost impossible to remove all variables to determine the true effect one board member has on corporate performance. Commentators have been divided as to whether a high level of female board participation increases share price by attracting investors as the company displays confidence and legitimacy; or whether it detracts investors and therefore reduces share price.[36] Fanto[37] argues that exhibiting gender diversity is a worthy value in its own right, therefore the effect on the share price and profitability of the company is not a significant concern.

B. Employees, contractors and officers?

Outside of shareholders, other key stakeholders that influence the nomination, appointment and tenure of directors are the employees and other key officers. Employees, contractors and other officers are at their core driven by the long term sustainability of the company. However, beyond that such stakeholders are motivated by employment conditions, the working environment and the possibility for career progression. Hence having females in appropriate proportions in senior executive and director positions incentivises females in the workforce as it provides realistic pipeline career progression goals.[38] It signifies that the company does not discriminate and senior positions are attainable to candidates who hold the right skills regardless of their gender. Further, commentators have found correlations with female board participation and pro-worker conditions

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[34] Thomas Reuters, *Average Stock Price of Gender Diverse Corporate Boards Outperform those with No Women* (10 July 2013) < http://thomsonreuters.com/en/press-releases/2013/average-stock-price-of-gender-diverse-corporate-boards-outperform-those-with-no-women.html>;Renuka Rayasam, 'Do more women on the board mean better results? *The New Yorker (online),* 19 November 2013 <http://www.newyorker.com/business/currency/do-more-women-on-the-board-mean-better-results>; Shivali Nayak, 'More women in the boardroom can improve profitability: Pros' *CNBC Asia Pacific (online*), 7 March 2012 <http://www.cnbc.com/id/>.

[35] Kenneth Ahern and Amy Dittmar, 'The changing of the Boards: The impact of firm valuation and mandated female board representation' (2012) 127 *The Quarterly Journal of Economics* 137.

[36] Vijaya Nagarajan, 'Regulating for Women on Corporate Boards: Polycentric Governance in Australia' (2011) 39 *Federal Law Review* 258-279.

[37] James Fanto, Lawrence Solan and John Darley, 'Justifying Board Diversity' (2010) 89 *North Carolina Law Review* 901.

[38] Watson, above n 15.

being established in the workforce such as appropriate leave and child care.[39] Again the effects of these employee motivations are difficult to measure in relation to the long term profitability of the company.

C. Other interests?

Not only does having relatively even representation of all genders at a senior level provide a positive corporate image to those stakeholders internally, but it also represents externally to the broader community that the company promotes the interests of fairness and admonishes discrimination.[40] Broader community values are those of the public in which the company operates. In Australia, it is viewed as progressive and socially responsible to have representative gender diversity throughout a company. The portrayal of this external image is particularly relevant if the company's main clients or purchasers are female. However, gender diversity at senior level provides a good corporate image to a large sector of the community, male and female alike.[41]

5. SHOULD A QUOTA BE APPLIED TO AUSTRALIA?

As outlined above, rarely is it argued that gender diversity in some form is not in the best interests of the company. Where the heated debate lies is whether a set quota should be mandatorily applied to companies. In June 2010, Elizabeth Broderick Sex Discrimination Commissioner stated that if progress is not made, there should be a mandatory 40 percent quota with penalties for non-compliance.[42] Heated debate ensued when this statement was rejected by the then Prime Minister Julia Gillard noting that it was against government policy to impose quotas on the private sector.[43] To determine whether applying a mandatory quota to Australian corporations would be in the best interests of the company it is necessary to review the research in favour of and against both board gender diversity and gender quotas.

A. BENEFITS

I. Diversity is good for share price (shareholder value perspective)

Over the years numerous researchers have conducted studies on the effect of gender diverse board on aspects of companies that are of value to the shareholders. If a clear business case could be made

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[39] Christopher Thomas, Agender in the Boardroom (2008) *Equal Opportunity for Women in the Workplace Agency* <www.eowa.gov.au/Information_Centres/Resource_Centre/EOWA_Publications/EOWA_Census/2008_Census/AGender_in_the_Boardroom_Report_Full_Report.pdf>.

[40] Shetler, above n 1.

[41] G20, above n 31.

[42] Broderick, above n 19.

[43] 'PM against quotas for women on boards' *The Australian (online),* 9 March 2011 <www.theaustralian.com.au/news/latest-news/pm-against-quotas-for-women-on-boards/story-fn3dxity-1226018170923>.

that gender diverse boards increase shareholder value, it would greatly enhance the likelihood that mandatory quotas could be enacted with little argument from the corporate world.

In 2007, Catalyst performed a detailed research study on the effect of board gender diversity on profitability and other financial measures of companies. It was found that gender diverse boards reported 53 percent higher return on equity, 42 percent higher on savings and 66 percent higher on invested capital.[44] This finding has been substantiated in part through Smith, Smith and Verner's study which found a causal effect between women directors and profitability, rather than just better performing companies happening to have more women on their boards.[45] This increase in profitability has been attributed by some to be a result of the purchasing power of female consumers. That is, that female directors are more easily able to adapt companies' goods or services to sway female consumers.[46] Further still, other studies have found that boards with female directors are more likely to consider the long term objective of the shareholders which increases the long term value and corporate brand image of the company.[47]

To review the effects of gender quotas on the profitability and share price in companies and establish a business case researchers need look no further than Norway which has had gender quotas since 2006. Matsa and Miller's Norwegian study found that gender quotas in the short term decreased companies' value, but had a long term positive effect.[48] This is explained by diverse boards initially having difficulty working cohesively but more becoming more effective over time.

Despite the above findings, the key issue with all board studies is that it is difficult to determine whether one individual or even three individuals are able to affect a company's performance by sitting on the board. Further, due to differing market conditions, industries, foreign relation issues amongst many others, it is very difficult to compare the performance of two different large companies' boards. If the research correlating gender diversity with company performance, especially financial performance, could remove the variables and be relied upon, it would likely be significantly decisive as to whether Australia should be moved to a mandatory quota system. Reason being, that the key arguments against gender quotas come down to the inconclusive research undertaken.

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[44] Lois Joy et al, The Bottom Line: Corporate Performance and Women's Representation on Boards (2007) *Catalyst* <www.catalyst.org/system/files/The_Bottom_Line_Corporate_Performance_and_Womens_Representation_on_Boards.pdf>.

[45] Nina Smith, Valdemar Smith and Mette Verner, 'Do Women in Top Management Affect Firm Performance? A Panel Study of 2500 Danish Firms' (2005) *IZA Discussion Paper No.* 1708.

[46] Anna McPhee, 'Australia's Boardrooms Closed to Women' (2006) *Equal Opportunity for Women in the Workplace Agency* <www.wgea.gov.au/sites/default/files/2006__EOWA_Census_Publication_tagged.pdf>.

[47] Avivah Wittenberg-Cox and Alison Maitland, *Why Women Mean Business* (John Wiley & Sons, 2009).

[48] David Matsa, Amalia Miller, 'A Female Style in Corporate Leadership? Evidence from Quotas' (2013) 5(3) *American Economic Journal of Applied Economics* 137.

II. Correlation between female directorship and good corporate governance

Studies suggest a correlation between female leadership and increased corporate governance functioning of a board.[49] Areas of particular focus are:

- Female directors being better able to test decisions and advocate differing viewpoints;[50]
- Diverse boards having improved strategic decision making power and risk management;[51]
- Female directors enhancing the strategic protocols of an organisation and improving intra board communication;[52] and
- Female directors being more aware of social dynamics and human issues.[53]

In addition, when a quota or 'tipping point' of female directors are on a board there is evidence to suggest that those boards score more highly on the nine key organisational criteria.[54] These being: capability, leadership, external orientation, accountability, motivation, coordination and control, innovation, direction, work environment and values. As the role of a corporate board is primarily supervisory of the executive, it is in the best interests of the company for the board to be the best equipped it can be to test strategies and ideas in a risk adverse and thorough way.

Champions of diverse thought

It is widely argued that when women are represented at board level they are often key inhibitors of 'groupthink' and champions of diverse thought in the board room.[55] Groupthink is a social phenomenon where management or board adopt a certain identity that excludes outside viewpoints.[56] This can lead to risky decisions as crucial decisions are not questioned or tried and externally provided evidence is ignored.[57]

Female participation at board level can assist to prevent groupthink and the board automatically backing the executives decisions as their 'outsideness' or liminality enables them to better objectively monitor other directors and risky behaviour that can arise when there is a separation of

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[49] Thomas, above n 39.
[50] Broderick, above n 18.
[51] Vanessa Brown, David Brown and Debra Brown, 'Women On Boards: Not Just the Right Thing… But the 'Bright' Thing' (May 2002) *The Conference Board of Canada* <http://www.utsc.utoronto.ca/~phanira/WebResearchMethods/women-bod&fp-conference%20board.pdf>.
[52] Peninah Thomson and Jacey Graham, *A Woman's Place is in the Boardroom* (Palgrave Macmillan 2005) 119.
[53] US Policy and Impact Committee of The Committee for Economic Development, 'Fulfilling the Promise: How More Women on Corporate Boards Would Make America and American Companies More Competitive' (2012) <www.fwa.org/pdf/CED_WomenAdvancementonCorporateBoards.pdf>.
[54] Erkut et al, above n 4.
[55] Fanto et al, above n 37.
[56] Claudia Fernandez, 'Creating Thought Diversity: The Antidote to Group Think' (2007) 13 *Journal of Public Health Management and Practice* 6.
[57] Irving Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascoes* (Wadsworth, 2nd Edition, 1983).

ownership and control.[58] In turn, heightening the risk oversight and corporate governance of the board as a whole.[59] Adams and Ferreira found that a women's influence is similar to that of an independent director for governance issues.[60]

Interestingly, psychological literature suggests that having a small minority of diverse thinkers within the group does not remedy groupthink problems or transform the group without more.[61] Arguably reaching the critical mass, or tipping point, may change this.

Risk management and decision making

Foreshadowed above is the notion that, when there are sufficient numbers, female directors are able to achieve improved levels of risk management. Key to the role of the board is the ability to be able to effectively monitor the executive and other directors. As such, theoretically having a board that has a wide degree of perspectives with all genders having relatively even representation is desired to conduct this function. It has been found that companies with a higher percentage of female directors tend to be involved in fewer governance related controversies, including fraud, accounting, bribery, and corruption-related scandals.[62]

Heterogeneity not only lessens the likelihood of groupthink but it also aids in group decision making.[63] Research suggests groups with diversity are more effective at problem solving than those without.[64] Understandably there are the unmeasurable variants like personality or ideology diversity that can affect this also. However, when diversity it at a critical mass (usually considered to be between 15% and 30%) then research shows team work is improved.[65] Accordingly, there is an argument that for risk management and decision making three or more women on a board or directors can change dynamics and lead to improved performance.[66]

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58 Peta Spender, 'Gender Diversity on Boards in Australia: Waiting for the Great Leap Forward?' (2012) 27 *Australian Journal of Corporate Law* 22.
59 Renee Adams and Daniel Ferreira, 'Women in the Boardroom and Their Impact on Governance and Performance' (2009) 94 *Journal of Financial Economics* 308.
60 Ibid.
61 Janis, above n 57.
62 MSCI Inc, '2014 Survey of Women on Boards' (November 2014) <http://30percentclub.org/wp-content/uploads/2014/11/2014-Survey-of-Women-on-Boards-1.pdf>.
63 Jean Du Plessis, James O'Sullivan and Ruth Rentschler, 'Multiple Layers of Gender Diversity: To Force or Not To Force?' (2014) 19 *Deakin Law Review* 1.
64 Karen Bantel and Susan Jackson, 'Top Management and Innovations in Banking: Does Composition of the Top Team Make a Difference?' (1989) 10 *Strategic Management Journal* 107.
65 Fanto, above n 37.
66 Erkut et al, above n 4.

Opponents of gender diversity quotas argue that too much gender diversity may in fact hamper effective decision making processes due to divisive views and interfere with corporate efficacy.[67] Dhir[68] noted that there is no evidence from Norway that boards were divided and hampered in their decision making after the quota was introduced. Further, the board room is the appropriate environment for ideas and strategies to be tested and dissected from different vantage points and perspectives.

III. Reflects diversity paradigms in society

Perhaps the strongest argument in favour of equal, or at least workforce representative, gender diversity in the boardroom is the social justice argument. Currently there is no strong or definitive enough evidence to support the chain of causation that diverse boards increase shareholder value.[69] However, representative gender diversity is hard to dispute on social justice grounds of fairness, anti-discrimination, and equal access to the opportunity of higher learning. [70] This argument carries such significant weight that the gender diversity debate in Australia is quickly turning from "why" to "how" despite the lack of empirical evidence.[71] It is often argued that corporate boards should reflect the composition and demographic of the community, or at the very least the composition and demographic of the entire company.[72] Perhaps an alternative to mandatory gender quotas on board at set percentages is mandatory gender quotas on boards in line with the industry gender representation.

ASX listed companies are critical actors in the public sphere. Their boards influence public debate and social policy therefore it is vital for there to be fair representation of key groups in the wider community. Rather than direct shareholder value add, the social justice argument seeks gender equality in the boardroom as a matter of fairness and to abolish discrimination.[73] That said, matters of corporate social responsibility such as gender diversity can have other indirect benefits to the company through more public investment, increased community support and the attraction of better employees from the entire talent pool.

[67] As per case discussion in Akshaya Kamalnath, 'Are Gender Diverse Boards Better for Corporate Governance? Evidence from Australian Judicial Decisions' (2015) 30 *Australian Journal of Corporate Law* 58.
[68] Aaron Dhir, 'Norway's Socio-Legal Journey: A Qualitative Study of Boardroom Diversity Quotas', (2014) 10 *Osgoode Legal Studies Research Paper* 65.
[69] Ahern and Dittmar, above n 35.
[70] Ibid.
[71] Shetler, above n 1.
[72] David Thomas and Robin Ely, 'Making Differences Matter: A New Paradigm for Managing Diversity' (1996) 74(5) *Harvard Business Review* 79.
[73] Boris Groysbery and Deborah Bell, 'The Women Who Become Board Members' (2013*) Harvard Business Review* 3.

IV. Use of entire talent pool

The lack of gender diversity at board level must be viewed not only as a social justice issue but also as a talent resource issue.[74] By failing to promote women to senior roles corporations are missing out on use of a huge proportion of the workforce. As outlined above, women are increasingly becoming as, if not more, successful than men at a collegiate level and early on in their careers. However, when they reach senior positions the attrition rates significantly increase in a much more expedient rate than their male colleagues.[75] These attrition or 'failure to launch' issues are non-more-so prevalent than when directorship appointments are reviewed.

A wide variety of reasons are argued to be the cause of this attrition. However, inhibitants such as taking a period of time for carers duty should not be preventative of reaching those senior positions provided the carers return to the workforce. It is uncontentious that fair gender representation at senior executive and board level has not yet happened organically. However, it is the method to address this that sparks heated debate.

V. It just is not happening without State intervention

If gender diversity at board level is found to be in the best interests of the company in the wider sense, perhaps the strongest notion in favour of implementation of a mandatory quota is that gender diversity it just not happening at a meaningful speed organically. Australian Governance Institute President Trisha Mok reiterated this stating 'Blackrock's latest report for the 2014 year … clearly demonstrates that a commitment to gender diversity is not in Australia's corporate DNA'.[76]

If the market's current trajectory continues, it is likely to take decades before true gender equality is achieved.[77] Currently, only 29 percent of Australian and New Zealand companies have a clearly defined strategy regarding the development of female directors.[78] There needs to be a disrupter to this pattern of change that forces companies to seriously consider gender diversity and proactively engage and manage female talent. When coupled with true company engagement and appropriate non-compliance sanctions, mandatory quotas provide just this opportunity to compel reflection of firm wide gender quotas, gender equality at all levels and active management of female talent.

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[74] Tim Smedley, 'Glacial Rate of Progress Brings Calls for Quotas' (2013) *Financial Times* 1.
[75] McPhee, above n 46.
[76] ProBono Australia, 'Gender Quota Warning for Top Corporations' (11 March 2015) <http://www.probonoaustralia.com.au/news/2015/03/gender-quota-warning-top-corporations>.
[77] Mercer, 'When Women Thrive, Business Thrives' (2014) <www.mmc.com/content/dam/mmc-web/Files/Gender-Diversity-When-women-thrive-businesses-thrive-Mercer.pdf>.
[78] Ibid.

B. DISADVANTAGES

Despite the arguments above in favour of gender diversity quotes, such quotas are still the topic of much staunch opposition in the business community. The prevailing arguments being:

- There is no empirical evidence that having gender diverse boards is beneficial to corporate performance or governance.
- Females may be elevated to senior positions that they are unqualified for just so a company can comply with the quota.
- Quotas could cause tokenism.
- There is the possibility of corporations' window dressing board roles to fit within the quota.
- The government should not intervene in corporate affairs, the market will drive the correct levels of gender diversity.

I. Reverse causation and lack of empirical evidence

Evidence and causation

The overwhelming argument against gender quotas is that there is no unequivocal empirical evidence that diverse boards lead to either better corporate governance or stronger company performance. Research has been divided with results being inconclusive and inconsistent.[79]

Dobbin and Jung (2011) found that strong corporate performance leads to increased board diversity, but not the other way around. This has been coined as 'reverse causation'.[80] There are significant evidentiary problems with finding any type of conclusive evidence on individual board members' causative effect on the performance of a company. This is shown by the hugely varying results in correlation studies for board gender diversity. By way of example:

- A Dutch and Danish board room study found gender diversity at a board level had no effect on the company's performance.[81]
- A Danish study found a positive correlation with women on boards and top management and company performance. [82]

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[79] Siri Terjesen, Ruth Sealy and Val Singh, 'Women on Corporate Boards: A Review and Research Agenda' (2009) 17 *Corporate Governance: An International Review* 320.
[80] Frank Dobbin and Jiwook Jung, 'Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Bias?' (2011) 89 *North Carolina Law Review* 809.
[81] Joanna Marinova, Janneke Plantenga and Chantal Remery, 'Gender Diversity and Firm Performance: Evidence from Dutch and Danish Boardrooms' (2010) *Tjalling C Koopmans Research Institute* 10-03.
[82] Smith et al, above n 45.

- Farrell and Hersch found that female director appointments do not affect a company's subsequent performance and that companies with strong profit results or return on assets appointed more female directors. [83]
- Other studies have found that female director appointments have a negative effect on company performance. [84]
- The Reibey Institute found that ASX500 companies with female directors had higher return on equity than those companies that did not have any female directors.[85]
- Other Australian, US ad Spanish studies have found a positive correlation between gender diversity and corporate performance.[86]
- Yet Prior and Faria and other studies have found no convincing correlation between female directors and corporate performance.[87]

Amongst other terms, research on board diversity has been described as 'unconvincing', 'methodically challenged' and offering 'no conclusive evidence one way or the other'.[88] Correlations have been found between diversity and a variety of board performances. However, correlations do not establish causality. The causal chain between board composition and financial shareholder value is described as 'an impossibly long one'.[89] Due to the large number of variables that apply to corporate citizens, excluding all influencing factors or measuring and adjusting for them, can be difficult, if not impossible. Corporate boards are there to ensure the right questions are asked of the executive's operational conduct and ratify the executive's decisions. The board's contribution to firm value is likely to be minimal and near impossible to establish empirically.[90]

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[83] Kathleen Farrell and Philip Hersch, 'Additions to Corporate Boards: The Effect on Gender' (2005) 11 *Journal of Corporate Finance* 85.

[84] Adams and Ferreira, above n 59; Oyvind Bohren and Oystein Strom, 'Governance and Politics: Regulating Independence and Diversity in the Board Room' (2010) 37(9) *Journal of Business Finance and Accounting* 1281.

[85] The Reibey Institute, ASX500 Women Leaders (2011) <http://www.reibeyinstitute.org.au>.

[86] Niclas Erhardt, James Werber and Charles Shrader, 'Board of Director Diversity Performance and Firm Financial Performance' (2013) 102 *Corporate Governance: An International Perspective* 11; David Carter et al, 'The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance' (2010) 18(5*) Corporate Governance: An International Review* 396; Kevin Campbell and Antonio Minguez-Vera, 'Gender Diversity in the Boardroom and Firm Financial Performance' (2008) 83 *Journal of Business Ethics* 435.

[87] Elaine Prior and Felipe Faria, 'Citi-ESG: ASX100 Women on Board Analysis – Increasing Focus on Board Diversity' (2011) < http://30percentclub.org/wpcontent/uploads/2014/08/ESG_ASX100_WomenOnBoard Analysis.pdf> (Notably, in Prior and Faria's study there was a relatively small sample size and the lag period between directorship appointments and change in company performance was not allowed for); Trond Randoy, Steen Thomsen and Lars Oxelheim, 'A Nordic Perspective on Corporate Board Diversity' (2006) *Nordic Innovation Centre Project* 4.

[88] Eleanore Hickman, 'Boardroom Gender Diversity: A Behavioural Economics Analysis' (2014) 14(2) *Journal of Corporate Law Studies*.

[89] Fanto, above n 37.

[90] Renee Adams et al, 'The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey' (2010) 48 *Journal of Economics Literature* 58.

Timing

The post hoc ergo propter hoc fallacy is a similar but slight different argument to Dobbin and Jung's reverse causation. It outlines the fallacy of assumed correlation because of the order in time and is often cited against corporate performance related research. [91] As previously touched on, it is misconceived to review a company's performance based on one individual board member's performance unless there is serious misconduct.[92] Variables (company size, industry, market and so forth) that are not controlled could be responsible for the correlation. However, it is an important contention that just because something cannot be empirically proven does not mean that it lacks truth. This lack of empirical evidence should not be used as a barrier to improve status quo.[93] If empirical evidence could be found to be in favour of board diversity, then this might promulgate change quicker than status quo. However, the 'punishment' (being a potential fall in share price and added investor pressure) for proceeding with gender diversity on corporate boards without empirical evidence does not outweigh the negative consequence of failing to address gender diversity.[94]

Institutional bias

Another theory put forward by Dobbin and Jung (2011) is that share prices may be reduced and investor pressure increased if progressive action is taken by boards on gender diversity.[95] Dobbin and Jung found through survey evidence that boards that have an increase in gender diversity have a negative effect on share value.[96] They hypothesised that institutional investors react badly to heightened female directors as institutional investors thought women lacked the human capital and business experience. This has been coined 'institutional bias'.

At the time of their study, institutional shareholders in the US held 80% of the shares in US public companies. However, it is notable that this study was before the GFC and is generally no longer reflective of institutional investors' ethos. An example of this is AMP Capital which actively monitors and reports on the female representation on boards of directors of the companies in which it invests.[97] In its most recent report, AMP Capital noted that if the rate of increase of female directors

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[91] Ibid.
[92] James Meindl, Sanford Ehrlich and Janet Dukerich, 'The Romance of Leadership' (1985) 30 *Administrative Science Quarterly* 78.
[93] Hans De Wulf, 'Do Gender Quotas Contribute to Better Corporate Governance?' in *Gender Quotas for Company Boards* (Intersertia, 2014) 30.
[94] Erhardt, Werber and Shrader, above n 86.
[95] Dobbing and Jung, above n 80.
[96] Ibid.
[97] AMP Capital in *Corporate Governance Report: ESG insights & proxy voting* noted that in 2010, 60 percent of Australian companies it invests in had no female directors, this is now 33%.

and key management personnel slows before considerable ground is won the introduction of prescriptive quotas ‘may well be necessary’.[98] This investor sentiment that gender diversity is beneficial is reflected globally by CalPERS and CalSTRS in the US who include gender diversity as an investment criteria and support the 30 percent coalition which demands 30% of board positions to be held by females by 2015. [99]

If a clear business case based on empirical evidence could be found for gender diverse boards, or indeed any board composition issues, then measures to ensure the right board level representation and composition would have likely already been demanded by institutional investors and the community alike then implemented.

II. Under skilled directors and lack of meritocracy

Many commentators oppose quotas on the basis that director appointments will not be made on merit but instead for legal compliance and that such appointments are ‘not only methodologically doubtful but also unnecessary and potentially condescending to women’.[100] It is argued that quotas may produce unqualified trophy directors or ‘golden skirts’.[101] Such ‘under skilled’ appointments will be a threat to corporate governance, which in turns equates to a threat to the performance of the company.[102] Instead of the State intervening, the market should dictate who is best suited for board roles. This argument has numerous high profile supporters including Toby Abbott and Michaela Cash of National Liberals[103] and is premised on the notion that over time as women are given the opportunity to obtain experience and qualification their representation on boards will organically increase.

Yet this argument fails to address the reality that despite women completing university degrees and diplomas in higher numbers than men, they are still failing to be represented in the board room at equal levels to their workplace and university participation. In selecting new directors, it is argued that board nomination committees have an unconscious bias of male dominance and tend to

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[98] AMP Capital, ‘Corporate Governance Report: ESG insights and proxy voting’ (March 2015) <www.ampcapital.com.au/AMPCapitalAU/media/contents/Articles/ESG%20and%20Responsible%20Investment/2014-Full-year-report-March-2015.pdf>.
[99] Thirty Percent Coalition, ‘Gender Diverse Boardrooms’ (2011) <http://www.30percentcoalition.org/files/Major%20Approaches%20to%20Making%20Change.pdf>.
[100] Spender, above n 58.
[101] Douglas Branson, ‘An Australian Perspective on a Global Phenomenon: Initiatives to Place Women on Corporate Boards of Directors’ (2012) 27 *Australian Journal of Corporate Law* 1.
[102] Ibid.
[103] Commonwealth of Australia *Parliamentary Debates* 13 March 2013, 1616; Lenore Taylor and Kirsty Needham, ‘The Opposition Leader, Tony Abbott, has rejected Joe Hockey’s push for quotas’ *Sydney Morning Herald* (3 September 2011).

replicate themselves.[104] Allowing the market to organically drive board diversity does not prevent this self-replication nor does it prevent the similar theory that male board directors only listen and promote male directors that are similar to them.[105]

Burke, Singh and Vinnicombe argue that the prevailing gender imbalance in the board room relates to discriminatory practises.[106] That is, women are held to a higher standard of proof for their capabilities than their male counterparts.[107] By not allowing women to obtain the same learning opportunities and experience as their male colleagues, then only nominating board members based on their requisite experience, females are being arguably indirectly discriminated against. Yet such a form of discrimination is almost impossible to prove due to the private nature of the board nomination process and that it is relatively easy to find a business case for why one person's skill set is a more appropriate fit with the company than another's.

III. Could cause tokenism or stereotyping

In a similar vein to the lack of meritocracy argument, is the contention that gender quotas could promulgate tokenism or stereotyping of female directors and as such be counter-productive to the ends quotas are trying to achieve.[108] That is, female directors will be employed or promoted for political or legal reasons rather than based on true acceptance and embrace of gender diversity. Even if token directors have the same merit or qualifications of those who were appointed, they are scrutinised more closely as they are viewed as obtaining their position by representation not on individual merit.[109]

Professor Kanter (1977) notes three key consequences of tokenism: visibility, polarisation and assimilation.[110] 'Visibility' in the intense scrutiny the token member has; 'polarisation' of other members of the group making it hard to integrate; and 'assimilation' in not being seen as an individual but as a representative of the whole of the minority group. Token board members arguably have to work harder than other board members to have their achievements noticed.[111]

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[104] Rakesh Khurana, *Searching For the Corporate Saviour* (Princeton University Press, 2002).
[105] Ibid.
[106] Ronald Burke, Val Singh, Susan Vinnicombe, Diana Bilimoria and Morten Huse, *Women on corporate boards of directors: International issues and opportunities* (Edward Elgar Publishers Cheltenham 2008).
[107] Ibid.
[108] Deborah Rhode and Amanda Packel, 'Diversity on Corporate Boards: How Much Difference Does Difference Make?'(2014) 39 *Delaware Journal of Corporate* Law 377.
[109] Barbara Reskin, Debra McBrier and Julie Kmec, 'The Determinants and Consequences of Workplace Sex and Race Composition' (1999) 25 *Annual Review of Sociology* 335.
[110] Rosabeth Moss Kanter, *Men and Women of the Corporation* (Basic Books Inc, 1977).
[111] Ibid.

Tokenism or stereotyping is claimed to decrease minority groups' performance as the person or group feels they are judged as a group not individually therefore their performance dwindles.[112]

Token directors arguably create a divisive and inharmonious environment in the boardroom. Yet if women were represented on corporate boards in sufficient quotas then they would no longer be seen as token or in the vast minority. Further, as the number of suitably experienced female directors increase over time so would the perception that women are not being appointed merely for political or legal reasons but instead their experience would speak for itself. The upside of fair representation of women in meaningful roles on corporate boards far outweighs the downside of the potential of tokenism and stereotyping.

IV. Cross-pollination and window dressing

<u>Secondary roles</u>

If quotas were made mandatory in Australia, many companies might be encouraged to window dress senior roles as board appointments to meet the legislative requirements.[113] Rather than embracing the true spirit of gender diversity, boards will be abiding by law because of the 'big stick' sanctions.

In Norway, while 40.5 percent of directors are female, less than 1 percent of CEOs of Norway's largest companies are women.[114] As of 2014, there were no female CEO's of Norway's 32 large cap companies and only 3% in the top 145 large cap companies.[115] It is argued that while quotas increase female board participation, the female directors are being put on boards primarily through non-executive roles and are sidelined for important decision making committees and leadership positions.[116] While in Norway that the number of female CEOs has not organically increased in line with the quotas, jurisdictions such as Australia face the same gender diversity issue at leadership level regardless of whether there are mandatory quotas. In the ASX200, as of 2013 only 3% of chairs were female and 3.5% of CEOs were female despite female board representation being much more significant.[117] It is clear that mandatory quotas are effective at increasing female board appointments but not senior executive roles. At the very least, quotas are permitting females the opportunity to have the requisite experience to be contenders for chair and CEO roles.

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[112] Ibid.
[113] The Economist, ' Women in Business: Still Lonely at the Top' (2011) <http://www.economist.com/ node/18988694>.
[114] Catalyst, above n 28.
[115] Maria Saab, 'The Surprising Countries With More Women in Corporate Leadership Than the U.S.—Or Even Scandinavia' (12 June 2014) *Time* <http://time.com/2861431/female-executives-gender-quotas>.
[116] Workplace Gender Equality Agency, above n 25.
[117] Australian Bureau of Statistics, 'Women in Leadership' 11 December 2012) <www.abs.gov.au/AUSSTATS /abs@.nsf/Lookup/4102.0Main+Features30Dec+2012>.

Cross-pollination

An ancillary argument put forward to the above is that the female directors who are sufficiently qualified to obtain the board appointment on their own merit will be requested to sit on an untenable number of boards if quota legislation is introduced. In Norway, it was claimed that rather than the pool of candidates enlarging drastically when the quotas were implemented, that there would be a selection of women who sit across many boards. These women were referred to as 'golden skirts'.[118]

Being a 'golden skirt' damages a director's reputation as if a director sit on numerous boards there is the perception that they cannot give adequate time to all roles. However, the issue of 'overboarding' is not unique to women and arguably already exists without the imposition of a quota. Interestingly, since the quota legislation has been introduced in Norway, female board directors are more likely to have a degree than male directors yet it is still men that are more than twice as likely than females to sit on more than one board, conversely dubbed 'golden trousers'.[119] To some extent this quells the argument that quotas will encourage the suitably qualified females to sit on numerous boards, or at least more so than males.

V. Government should not intervene

Perhaps the most passionately argued in the business community, is that the government should not force mandatory quotas on all corporate citizens as each companies' needs are different to one another and as such companies have varying board composition needs.[120] Corporate boards must work together to function and only persons within that company are in a position to determine what board composition is the best fit to facilitate the right outcomes. Government mandated diversity might force boards to appoint female directors who may hamper the effective decision making process due to divisive views.[121]

This argument is fraught with danger in that the board's role is to test and examine the executive's suggestions and actions. While there should not be a hung board, ideas and strategies should be tested from differing viewpoints. Further, Dhir[122] noted that there is no evidence from Norway that boards are divided and hampered in their decision making after the implementation of mandatory quotas.

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[118] Anne Sweigart, 'Women of Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada' (2012) *Northwestern Journal of International Law and Business* 81.
[119] The Economist, 'The Spread of Gender Quotas for Company Boards' (25 March 2014) <www.economist.com/blogs/economist-explains/2014/03/economist-explains-14>.
[120] Kamalnath, above n 67.
[121] Adams and Ferrier, above n 59.
[122] Dhir, above n 68.

Another variable that has not been accurately quantified and measured is that gender 'characteristics' are by no means set in accordance with a person's sex. Much of the research and associated gender quota arguments are based on social norm female characteristics, but these vary from individual to individual. Female directors can exhibit predominantly male characteristics in the board room and vice versa. 'Personality' diversity is not addressed in this paper but it creates an interesting aspect for arguments both for and against gender quotas. Arguably, hiring a female with male characteristics and viewpoints does not assist with enhanced decision making yet also is less likely to hamper decision making and divide boards.

C. ADVANTAGES AND DISADVANTAGES OVERALL

While desirable, unequivocal empirical evidence is not needed for legislative change. Change can be derived from changing social norms not just financial performance of companies. A recent example is the rising advent of boards consisting of independent directors. Independent director studies too yield little conclusive evidence that they affect the profit margins or share price of the company, yet it is rarely disputed that non-executive directors assist with the corporate governance of boards.[123]

Considering the sluggish rate of change of diversity on corporate boards to date despite the changing social norms, gender quotas should be implemented if board equality does not reach acceptable levels in the near future.

D. QUOTAS OR OTHER FORMS OF ENFORCEMENT/ENCOURAGEMENT

I. Will change happen organically and why hasn't it thus far?

There are two key considerations as to why the public debate has reached the point of government imposed gender quotas. They are (a) the slow pace of change; and (b) the authenticity of that change from the business community.

Running contrary to the notion that gender diversity at board level will happen organically in line with social values is the glacial momentum of change. In Australia, the percentage of females on ASX200 boards has only risen on average 2% per annum since 2011.[124] This is not just happening in Australia, a UK government release confirmed the momentum appears to be slowing.[125] It is a concern among quota supporters that when gender diversity reaches a certain point, there will no longer be the political drive and public support to seek mandatory equality.

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[123] Ahern and Dittmar, above n 35.
[124] *Appointments to S&P/ASX200 Boards,* above n 17.
[125] Susan Vinnicombe and Ruth Sealy, *The Female FTSE Board Report 2013: False Dawn of Progress for Women on Boards* (Cranfield University School of Management 2013) 20.

Research has found that female directors are only actively sought to the extent they are needed to meet minimum expectations of gender diversity in the community.[126] Further, with gender composition at an executive and key management personnel level largely unchallenged by corporations' board diversity efforts, it is necessary to question how genuine the efforts of the business community are.[127]

II. Do quotas work? International evidence

The best way to consider the worth of implementing gender quotas in Australia's corporate environment is to consider the effects of quotas in the many countries that have implemented such measures.

<u>Norway</u>

Norway was the first country to introduce quotas through the amended *Public Limited Company Act (Norway)* 1999, providing corporations with a specific quota depending on the size of their board. Larger boards of nine members or more require a minimum of 40% of either gender. This is coupled with tough sanctions for non-compliant companies including being rejected registration or ultimately deregistered if already registered.[128] The implementation of the gender quota in Norway was motivated by a fairer distribution of power in society; a more efficient use of the workforce and improved business performance.[129]

Currently, Norway has 40.5% female representation on listed corporate boards.[130] Arguably with the highest level of female representation on corporate boards, Norway's quota system has been a success in relation to the social objectives it sought to obtain. Immediately upon introduction of the legislative quotas in 2006 (with compliance due by 2008), listed companies experienced a decline in value in Norway. However, Dittmar and Ahren[131] argue that this is not as a result of the gender of the new board members but instead attributed to the lack of experience of the directors with the company and the new dynamics of the board that take some adjusting. Notably, in Norway a majority of companies are privately owned or non-listed. As such, only approximately 600

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[126] Farrell and Hersch, above n 83.
[127] Baysinger and Butler, 'Corporate Governance and the Board of Directors: Performance Effects of Changes in Board Composition' (1985) 1 *Journal of Law, Economics, & Organization* 101, 119.
[128] Ministry of Children, Equality and Social Inclusion (Norway), 'Representation of Both Sexes on Corporate Boards' (2014) <http://genderindex.org/country/norway>.
[129] Seierstad and Opsahl, 'For the Few Not the Many? The Effects of Affirmative Action on Presence, Prominence, and Social Capital of Women Directors in Norway' (2011) 27 *Scandinavian Journal of Management* 44, 46.
[130] Catalyst, 'Women on Boards' (2014) < http://www.catalyst.org/knowledge/women-boards>.
[131] Dittmar and Ahern, above n 31.

companies were affected by the changes when they were introduced. [132] Norway's achievement in successfully implementing a gender quota encouraged other countries to adopt similar quota legislation.[133]

<u>Others</u>

Increasingly foreign countries are introducing mandatory gender diversity quotas for corporate boards. For example:

- Iceland: Companies with over 50 employees must have a 40% quota.[134]
- France: Large companies (that is €50 million turnover and 500 or more employees) must have 20 percent women by 2013 and 40 percent by 2017. Non-compliance means directors' fees are suspended.[135] Over 80 percent of French boards now have at least three female directors.[136]
- Spain: In 2007, a law was introduced that stated publically traded companies with over 250 employees must have 40 percent of each gender by 2015.[137] Spanish laws are not backed up by sanctions. However, compliant companies are given preferential treatment when applying for government tender work. As of March 2014, Spain only had 9.5 percent female board representation, far below the 40 percent required for 2015. [138] The lack of enforceable penalties has been blamed for Spanish companies' failure to appoint more females.[139]
- Germany: After a failed previous attempt to change the law in 2013, in March 2015, German parliament passed a law that requires 30 percent of supervisory seats to be given to females commencing in 2016.

In support of mandatory quotas, in 2012 the EU Justice Commissioner, Vivence Reding proposed implementing a mandatory quota of 40 percent by 2020.[140] This was fervently opposed by the UK and Germany and was subsequently diluted to be a 40 percent objective rather than mandatory quota that allowed member states to determine their own sanctions as long as they are appropriate and dissuasive.

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[132] Catalyst, above n 28.
[133] Smith et al, above n 45.
[134] Catalyst, above n 28.
[135] Catalyst, above n 28.
[136] MSCI Inc, above n 62.
[137] Catalyst, above n 28.
[138] Catalyst, above n 28.
[139] MSCI Inc, above n 62.
[140] Jean Du Plessis, Ingo Saenger and Richard Foster, 'Board Diversity of Gender Diversity? Perspectives for Europe, Australia and South Africa' (2012) 17 *Deakin Law Review* 2.

Outside of mandatory quota systems, some jurisdictions have implemented soft law measures, including:

- Malaysia: Has introduced a mixed quota system which strongly recommends gender diversity but does not mandate it for old appointments. This method has achieved only mixed results.[141]
- US: Has a similar 'comply or explain' policy to Australia where the SEC requires listed corporations to disclose their diversity policy and describe its implementation if they have one in place.[142] The rate of increase of female board representation in the US is also very slow.[143]
- UK: Also has a similar 'comply or explain' policy and reporting requirements with a modest voluntary target of 25% by 2015 for all FTSE100 companies. [144] Interestingly, the UK government commissioned the Davies Report on boardroom gender diversity. The underlying objectives in the Davies Report were business performance of widened talent pool; increased responsivity to market; improved corporate governance and improved corporate performance. Despite the Davies Report calling for more women in the boardroom, the UK is still yet to implement gender quotas.[145]

In summary, it is indisputable that mandatory quotas with appropriate sanctions for non-compliance have the effect of increasing gender diversity on corporate boards. However, whether internationally these quotas have been in the best interests of the respective nation's companies depend on what is presupposed to be the best interest of the company. If share price and profitability, then the evidence is unclear. However, if argued for social justice and equality reasons then the effect has been clear in facilitating more even representation of both genders but not yet a more even representation in the leadership positions of chair and CEO.

III. Differences in Australian landscape

In Australia there is an appetite for board room diversity. Treasurer Joe Hockey, former Governor General Quentin Bryce, and numerous high profile business leaders are among those that have spoken in favour of implementing gender quotas.[146] However, what has not yet been adequately

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[141] Shamsul Abdulla et al 'Women on Boards of Malaysian Firms: Impact on Market and Accounting Performance (2012) *Social Science Research Network* 8.
[142] Julie Suk, 'Gender Parity and State Legitimacy: From Public Office to Corporate Boards' (2011) 10(2) *International Journal of Constitutional Law* 449.
[143] Smith et al, above n 45.
[144] Ronald Burke, Val Singh, Susan Vinnicombe, Diana Bilimoria and Morten Huse, *Women on corporate boards of directors: International issues and opportunities* (Edward Elgar Publishers Cheltenham 2008).
[145] Business and Human Rights Centre, above n 20.
[146] Christine Milne, 'Why I Changed My Mind About Quotas For Women on Boards' (2013) *Mamamia* <www.mamamia.com.au/news/christine-milne-quotas-for-women-on-boards>.

gauged is Australia's appetite for mandatory State intervention to facilitate a fairer distribution of board room gender diversity.

Further, Australia is a somewhat differing corporate environment in that we have the ASIC and ACCC which are successful and persuasive corporate regulators. ASIC's non-mandatory guidelines amount to persuasive best practice for the top ASX listed companies that are usually complied with or at the very least, explanation given as to why they are not complied with. As such, there is an argument that if ASIC were to release voluntary set quotas for Australian boards these may be a more suitable yet effective method to aid gender diversity on Australian boards.

6. OTHER ALTERNATIVES

In determining whether implementing 'hard' laws such as government mandated quotas is in the best interests of companies in Australia the effectiveness of all other key methods to enhance gender diversity on boards need to be evaluated. 'Soft' law methods include voluntary codes, regulation and standards which are usually set either by the government or by industry bodies. These are usually combined with mentoring and training programs. Either approach can increase women's representation on boards in varying degrees of success as outlined below.[147]

A. VOLUNTARY CODES

Voluntary codes addressing corporate gender equality can come from a variety of sources but are most often government or industry led. The key benefit to voluntary quotas is that they allow companies to progress towards board room gender equality at a pace that is realistic considering the culture and gender make-up of the business.[148] Further, abiding by voluntary codes conveys true commitment to gender equality as it is the desire for equality rather than the fear of sanction that is promulgating the change. This allows the board to show its commitment to diversity and also sends a message to stakeholders that the company takes the issue seriously and is not merely complying because it is mandatory.[149]

Industry codes

Corporate and business regulation increasingly relies on self-regulation, or industry codes, rather than the traditional statute driven governance as such measures enable corporate governance to be

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[147] G20, above n 20.
[148] Spender, above n 58.
[149] Douglas Branson, *No Seat at the Table: How Corporate Governance and Law Keep Women Out of the Boardroom* (NYU Press, 2007) 66.

responsive and adaptable.[150] Currently in Australia the ASX Corporate Governance Principles and Recommendations have an 'if not, why not' voluntary code. That is, that listed companies should have a disclosable policy on gender diversity and set measurable objectives and if they do not, they should disclose why. Outside of Australia the United Kingdom has a similar 'soft law' Corporate Governance Code (the **Code**). This Code recommends that listed companies (a) take diversity into account when recruiting and (b) report on their diversity policy and implementation and explain when it has not been followed.[151] Similarly to Australia, in the UK the Code allows companies to set their own internal diversity policies, however those policies and the adherence to them is publicly measurable.

Outside of the ASX, various other industry bodies have set best practice guidelines for boardroom diversity in the hope that the corporate world will adopt the same practices. By way of example, the AICD have set a target of 40 percent of board seats to be female directorships by the end of 2018 for ASX200 companies and the Business Council of Australia has set an ambitious 50 percent target in the next 10 years.[152] While some entities have adopted the AICD targets in their internal gender diversity policies, there are still many companies yet to uptake quotas in their strategies.[153]

Internal policies

In Australia, many progressive companies have sought to enhance gender diversity by establishing company targets and developing internal programs to increase gender diversity at a senior level. This early adoption appears to be led by the banking industry, for example:

- Westpac Banking Corporation (**WBC**) had a 40 percent target for women in management by 2014 which was reached in 2012. WBC then announced a market leading target of 50 percent of leadership positions to be females by 2017;[154]
- Commonwealth Bank of Australia (**CBA**) has a 35 percent target for management roles by December 2014. To date CBA has 43 percent female representation in management roles;[155] and

[150] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).
[151] Financial Reporting Council Ltd, The UK Corporate Governance Code (September 2014).
[152] Smith, above n 31.
[153] A KPMG study found 59% of companies have set gender diversity policy with measurable objectives.
[154] ProBono Australia, 'Gender Diversity at Westpac' (March 2015) <www.probonoaustralia.com.au /news/2015/03/gender-diversity-westpac>.
[155] Notably, on its website CBA does not comment on how many women it has in senior management. See https://www.commbank.com.au/about-us/who-we-are/our-company/our-approach-to-diversity/diversity-in-leadership.html.

- NAB has pledged to increasingly the number of women in the top three layers of the bank from 23 percent to 33 percent by 2015.[156]

The insurance and financial services industries are well ahead of the norm. Notably, the Australian Council of Superannuation Investors, which represents superannuation funds owning about 10 percent of the ASX200 companies, has stated that it expects that all superannuation companies in the ASX200 will have at least two positions held by women in 2014.[157] This has now changed to a desire to have 30 percent of board members female across the ASX200.

Unfortunately the above internal quota targets are not entirely reflective of the policies of the majority of the ASX200. Internal transparent policies can address numerous different indirect elements that combine to add to the gender disparity at board level. That is, the mentoring and training opportunities at all levels of a company, the director nomination process and policies that address the 'leaky pipeline' issues of women proceeding to board level. However, positive internal policies stand little chance of developing if senior management does not commit to changing the company's culture.[158] Leaving the corporate world to its own devices to rectify the disparity has not worked to date.[159] Internal and voluntary gender diversity polices are usually in industries with more women such as finance, insurance, retail, hospitality and health. The often cited reason for this is that these industries have a greater pool of female board candidates and therefore greater stakeholder pressure to equitably appoint directorship positions. Industries that need gender diversity policies the most, that is those with less women, like manufacturing and property and business services are less likely to have policies.[160]

When adopted at an appropriate level with executive level commitment, it is clear that voluntary industry codes are a preferable method of achieving board diversity to government mandated quotas. However, as noted above, voluntary codes have been implemented in Australia since 2011 with still only 19.9 percent of ASX directorships are female with likely even less so in the private sector. While some industries are implementing meaningful quotas, it appears voluntary codes on their own are not facilitating the change demanded by the broader community in a timely way.

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[156] ProBono Australia, 'Bank Aims to Boost Gender Diversity' (February 2015) <www.probonoaustralia.com.au/news/2015/02/bank-aims-boost-gender-diversity#>.
[157] APRA, 'Annual Superannuation Bulletin: June 2010' (2011) <www.apra.gov.au/statistics/documents/june-2010-annual-supperannuation-bulletin.pdf>.
[158] Georges Desvaux, Sandrine Devillard and Sandra Snacier-Sultan, *Women Matter 2010: Women at the Top of Corporations - Making it Happen 6* (McKinsey & Co., 2010).
[159] Evidenced by female representation at ASX board level to be 19.9 percent yet female workforce participation being around 48 percent.
[160] Equal Opportunity for Women in the Workforce Agency, EOWA Industry Snapshots: Finance and Insurance (2013) < https://www.wgea.gov.au/sites/default/files/2013_All_industries_fact_sheet_1.pdf >.

B. INDUSTRY BODIES TO PROVIDE TRAINING, MENTORING AND RELEVANT EXPERIENCE

Increasingly corporate citizens are implementing and promoting targeted mentoring and training programs to increase the eligibility of females for leadership roles to increase the diversity of the pool of board candidates. Both Telstra and Woolworths have highly publicised mentoring programs including diversity councils and working groups. Alongside private sector programs is the AICD mentoring program, Business Association of Australia and the Women on Boards networks working towards attracting and retaining women on corporate boards. All these entities together provide an opportunity for women to obtain relevant guidance and experience to assist their passage to corporate boards. Such programs step away from historic reliance on networks and provide women with the opportunity to gain the experience needed to be considered for board positions on their merit.

Experience is critical to ensuring the gender divide is diminished as board selection is often based on the person who the CEO and executive believe have had the requisite amount of board experience and training.[161] Further, the networking function of directors should not be underestimated, often directors are selected based on these networks as lobbyists for the company. The networking function is crucial and often referred to as the 'symbolic capital' of a director.[162] Where women are excluded from senior levels of executive, they do not obtain these networking opportunities.

In Australia, there is a polycentric network of organisations that have been actively trying to increase women's representation on boards from mentoring programs to voluntary codes.[163] Unfortunately, to date the combination of these non-mandatory measures has not achieved true gender diversity at board level.

C. GOVERNMENT QUOTAS TO LEAD THE WAY

The Victorian government has taken affirmative action for gender diversity on government enterprise boards by introducing a quota of 50%. Politically it is easier to introduce hard laws prescribing quotas in government businesses or companies as has happened in Australia, Finland, Quebec and Israel.[164] It is hoped that government quotas may pave the road for the private sector to follow suit.

Alternatively, or in addition to, the government could seek to introduce incentives and indirectly facilitate female senior executive appointments. Forbes in its 2012 Global Diversity Rankings study

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[161] Colin Carter and Jay Lorsch, *Back to the Drawing Board* (Harvard Business School Press, 2004) 67.
[162] Burke et al, above n 106.
[163] Nagarajan, above n 36.
[164] Nagarajan, above n 36.

suggested that flexi-time initiatives, subsidised child care, and tax breaks be offered for married couples both of whom work are proven approaches to increase economic equality.[165]

It appears that no method can be focussed on individually when determining the best approach to facilitate meaningful female representation at board level. To date in Australia, reasonable female board representation in ASX listed companies has not been achieved through soft law measures whether codes, training and/or government initiatives.

7. CONCLUSION

On social justice grounds, it is clear that female representation at board level is in the long term best interests of the company. That is, not only the best interests of the shareholders but of the stakeholders of the company at large. Finding shareholder value and financial performance grounds for appointing female directors, or any individual directors, is extremely difficult due to the number of variables that need to be excluded and the indirect role in operational management that a board plays. However, on social justice and equality grounds, as Thomson and Lloyd famously stated 'fair to say that insofar as the business case for appointing more women to boards is provable, it is proven'.[166]

The question then becomes the means to create this end. Soft law methods have had varying degrees of success in increasing female board appointments and are indisputably needed to ensure companies engage to culturally change their board appointment processes and biases. However, substantial changes in the form of mandatory quotas are needed in Australia if the soft laws do not hit meaningful targets in the near future.

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[165] Forbes Insights, 'Diversity and Inclusion: Unlocking Global Potential: Global Diversity Rankings by Country, Sector and Occupation' (2012) <http://www.forbes.com/forbesinsights/diversity_2012/>.
[166] Peninah Thomson and Tom Lloyd, *Women and the New Business Leadership* (Palgrave Macmillan, 2011).

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