GENDER DIVERSITY ON AUSTRALIAN BOARDS (WITH REFERENCE TO APPROACHES IN EUROPE AND INDIA)

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I INTRODUCTION

Gender diversity on boards has been a controversial topic that has received attention in recent times. Although equal numbers of men and women attend university and participate in the workforce, the same cannot be said about corporate board participation which is dominated by men across the globe. This paper focuses on different countries such as Australia, Europe and India to illustrate a noticeable trend of a lack of women on corporate boards and proposes that gender diversity is integral for effective performance by companies. Part 2 looks at why corporate governance has suddenly become important. Part 3 examines the number of women on Australian corporate boards and discusses a number of initiatives including the voluntary code of conduct that Australia has adopted, to address this issue. The number of women on European corporate boards, and countries that have legislated gender quotas, and the number of women on Indian corporate boards are examined in Parts 4 and 5. Part 6 considers the reasons as to why there is a lack of women on boards and Part 7 examines why it is vital to include women on boards, such as for good corporate governance. Finally, the strengths and weaknesses of gender quota legislation versus voluntary codes of conduct are discussed in Part 8, and it is concluded that voluntary codes of conduct may be the best way to achieve gender balance on corporate boards.

II CORPORATE GOVERNANCE AND DIVERSITY

A *The attention on corporate governance*

It is thought that companies who exhibit higher levels of accountability and performance often have higher standards of corporate governance in their practise.

In the West, corporate governance has come into the limelight after an examination of some of the events that contributed to the Global Financial Crisis (GFC). The Enron Corporation for example which was declared bankrupt in 2001, provides a good example of corporate governance failure.[1] Some of the failures in that case included that the company's boards failed to safeguard the shareholders of the company, knowingly allowed the company to participate in risky accounting practices, ignored conflicts of interest, and allowed the company to mislead the public about its financial standing.[2] If the board had provided proper guidance and oversight to the company in the first place, it could have prevented Enron from being declared bankrupt.

As a result of the Enron and other corporate collapses, the *Sarbanes-Oxley Act of 2002* (SOX Act) was introduced in America, which set new standards of compliance for public company boards and

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[1] Thomas Clark, *International Corporate Governance: A Comparative Approach* (Routledge, 2007)191.
[2] Ibid.

management to abide by, such as certifying the accuracy of the company's financial state of affairs.[3] This Act also carried harsher penalties for fraudulent financial activities.[4]

Closer to home, the liquidation of HIH Insurance, Australia's largest insurance company in 2001 is perceived to be Australia's largest corporate collapse, with losses totalling up to $5.3 billion.[5] A Royal Commission was established to find the cause of HIH's collapse. Amongst other things, the Royal Commission report which was presented at Parliament on 16 April 2003, found that the primary reason for the failure of HIH was due to '..poor management and greed characterised by a lack of attention to detail and skills, a lack of accountability for performance, and a lack of integrity in the company's internal processes and systems.'[6]

B *Response from the Australian Securities Exchange Corporate Governance Council*

As a result of the HIH Royal Commission, the Australian Securities Exchange Corporate Governance Council - Principles of Good Corporate Governance and Best Practice Recommendations (ASX Corporate Code Recommendations) was released in 2003, and this voluntary code of corporate governance principles applies to all listed companies.[7] This code provides companies with a framework of guidance and if principles are not complied, companies are required to explain non-compliance.

The ASX Corporate Code Recommendations requires listed companies to publish the roles and responsibilities of both the board and the management. The company's governance framework intends to allow the board to provide guidance for the company and oversee management, and the roles and responsibilities of the board and senior executives are intended to assist board and management accountability.[8]

The ASX Corporate Code also provides a definition of corporate governance, as:

> The system by which companies are directed and managed. It influences how the objectives of the company are set and achieved, how risk is monitored and assessed, and how performance is

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[3] *Sarbanes-Oxley Act of 2002*, Pub L No 107-204, s 302, 116 Stat 745.
[4] Jason Beebe, *Sarbanes-Oxley as a Driver for Corporate EHS Compliance* <http:www.trinityconsultants.com/ WorkArea/DownloadAsset.aspx?id=3073>.
[5] LongGod & Associates, *How the collapse of Onetel and HIH Insurance changed corporate governance in Australia* (Discussion Paper 2011) <http://www.longdog.com.au/be-daring-not-risky/corporate-governance-and/collapse-corporate-governan-pdf>.
[6] Ibid, 5.
[7] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments* (2nd ed 2010) <http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations _with_2010_amendments.pdf>.
[8] Ibid 13.

> optimised. Good corporate governance structures encourage companies to create value and provide accountability and control systems commensurate with the risks involved.[9]

In particular, the corporate governance principles are defined as, laying solid foundation for management and oversight, structuring the board to add value, promoting ethical and responsible decision making, safeguarding integrity in financial reporting, making timely and balanced disclosure, respecting the rights of shareholders, recognising and managing risk, encouraging enhanced performance, remunerating fairly and responsibly and recognising the legitimate interests of stakeholder.[10]

While regulation (such as the SOX Act) is one approach in encouraging and maintaining high corporate governance amongst companies, it is argued that a diverse board of directors can also have the same effect (which is recognised in the ASX Corporate Code Recommendations as discussed below). Diversity by age, gender, ethnicity, disability, religion or sexuality brings a range of skills, knowledge and behaviours to a corporate board which can be beneficial for the board, through different forms of questioning management decisions, identifying risks and analysing the corporate market.[11] In relation to gender diversity on corporate boards specifically, which is the focus of this paper, former Goldman Sachs trader Lex van Dam stated in an interview with Forbes in September 2012, that the impact of the GFC could have been lessened if more women had been involved on boards. He stated, 'women have a much higher sense of risk control than men..and it can help avoid many of the disasters that risk taking by a male dominated trading environment has caused over the years'.[12] As will be discussed in detail below, women bring different approaches, styles, experiences and behaviours that can be beneficial to companies, to survive and perform effectively in today's competitive markets.

III AUSTRALIA

A *Facts and figures*

[9] Ibid 3.
[10] Ibid r 1.1 – 8.4.
[11] Yilmaz Arguden, 'Diversity at the Head Table – Bringing Complementary Skills and Experiences to the Board' (2010)19 *Private Sector Opinion* 3.
[12] Angela Priestley, *Women and the next financial crisis* (14 Septemer 2012) <http://www.womensagenda.com .au/talking-about/editor-s-agenda/women-and-the-next-financial-crisis>.

The average Australian director of a public company (not including companies limited by guarantee) is 53 years (directors of larger ASX listed companies are on average 59 years).[13]

As at 8 July 2013, the percentage of women on Australian boards is 15.8% on ASX 200 boards.[14] This has increased significantly in the last four years from 9.9% in 2009.[15]

The number of women on boards in different areas in the last two years include:

- In 2012, 33% of members of the governing councils of Group of Eight universities in Australia were women.[16]

- In June 2012, 34.8% of government board positions were held by women.[17]

- In August 2012, women comprised 23.4% of the board positions on Australia's National Sporting Organisation (compared with 3% of the presidents of the national Olympic bodies being women).[18]

- In 2013, 79 of the top 300 ASX listed companies which are mining companies had no women on their boards. This was compared to 8 women in construction, 4 in property, commercial services and drugs and 3 in IT. [19]

- In 2013, 48 boards on the ASX did not have any women. [20]

B *What has Australia done to address gender diversity on corporate boards?*

In 2010 several amendments were made to the ASX Corporate Code Recommendations on a number of issues including diversity.

With respect to diversity, recommendation 3.2 currently states:

> Companies should establish a policy concerning diversity and disclose the policy or a summary of that policy. The policy should include requirements for the board to establish measurable objectives for

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[13] Corporations and Markets Advisory Committee, *Diversity on Boards of Directors* (March 2009) 253.
[14]Australian Institute of Company Directors, *Appointments to ASX 200 Boards* (2013) < http://www.companydirectors.com.au/Director-resource-Centre/Governance-and-Director-Issues/board-Diversity/Statistics>.
[15] Lord Davies of Aberoch, *Women on boards* (February 2011) <https://www/gov.uk/government/ uploads/ system/ uploads/attachment_data/file/31480/11-745-women-on-boards.pdf>.
[16] Australian Institute of Company Directors, above n14.
[17] Ibid.
[18] Angela Priestley, *What it's like for women on sports boards* (16 August 2012) <http://m.thepowerindex.com.au/ women-in-power/what-it-s-like-for-women-on-sports-boards>.
[19] Patrick Durkin, 'Not enough women for boards, say miners', *The Australian Financial Review* (Australia) 8 April 2013.
[20] Australian Institute of Company Directors, above n 14.

> achieving gender diversity and for the board to assess annually both the objectives and progress in achieving them.[21]

This recommendation does not limit diversity to gender, but includes age, ethnicity and cultural background. The objectives should identify ways to measure the achievement of gender diversity, include procedures on implementing the policies properly and contain an internal review mechanism to assess effectiveness.[22]

In relation to gender diversity specifically, recommendation 3.4 states:

> Companies should disclose in each annual report the proportion of women employees in the whole organisation, women in senior executive positions and women on the board.[23]

These recommendations promote a diverse environment where members can work as a team to fulfil the company's corporate goals. They also recognise that increased gender diversity leads to better financial performance by companies.[24]

Under recommendation 3.5, companies who do not comply with the recommendations are obliged to explain in their annual report why they have not done so ('if not, why not?').[25] Any applicable code of conduct or a diversity policy is also required to be made available to the public, in the company's website under a corporate governance section.[26]

On 8 March 2013, the ASX released a report which looked at how the diversity provisions in the ASX Corporate Code Recommendations had been adopted. The results were:

- Companies that adopted a diversity policy or explained why not – 99% of ASX 200, 97% of ASX 201-500 and 92% of ASX 501+.[27]

- Companies with a diversity policy – 93% of ASX 200, 85% of ASX 201-500 and 58% of ASX 501+.[28]

- Companies which set measurable objectives – 82% of ASX 200, 59% ASX 201-500 and 28% of ASX 501+.[29]

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[21] ASX Corporate Governance Council, above n 7, r 3.2.
[22] Ibid.
[23] Ibid r 3.4.
[24] Ibid.
[25] Ibid r 3.5.
[26] Ibid.
[27] Australian Stock Exchange, 'Listed companies' adoption of diversity policies good news for gender diversity' (Media Release, 8 March 2013) <http://www.asxgroup.com.au/diversity-resources.htm>.
[28] Ibid.
[29] Ibid.

Smaller companies attributed not having policies in place to their size and stage of development.

C *Other initiatives*

In addition to the amendments to the ASX Corporate Code Recommendations, there are a number of other initiatives that Australia has engaged in to increase the number of women on its boards.

In April 2010, the Sex Discrimination Commissioner of the Australian Human Rights Commission, Elizabeth Broderick (Commissioner Broderick) formed a group called the Male Champions of Change Group.[30] The aim of this group which is comprised of influential and diverse male CEOs and Chairpersons, is to use their individual and collective influence and commitment to promote females to leadership positions, and also to provide support and advice to Commissioner Broderick on this issue.[31]

The Australian Institute of Company Directors (AICD) which is a membership body for directors in Australian and the leading Australian not-for-profit corporate governance organisation, offers professional and career development mentoring programs. These initiatives such as the Board Ready Program, the Board Diversity Scholarship Program and places reserved for women on the AICD's Company Director's Course, involve leading chairmen and senior directors of ASX 200 companies, mentoring qualified women over a 12 month period.[32] These programs also assist women in obtaining board positions after completion, and allow aspiring female directors to form contacts in the industry and acquire knowledge and insight into what is involved in working as a company director.[33]

The *Workplace Gender Equality Act 2012* (Cth) *(Workplace Gender Act)* which was renamed from *the Equal Opportunity for Women in the Workplace Act 1999* (Cth) has several objects, which are aimed at promoting and improving gender equality in the workplace.[34] The legislation requires reporting on a number of factors affecting a workplace, including the number of males and females employed and figures will be made public.[35] Sanctions for non compliance include being labelled as non compliant in a report to the Minister for the Status of Women and not being able to receive future Commonwealth grants or assistance.[36]

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[30] Australian Human Rights Commission, *Male Champions of Change* <http://www.humanrights.gov.au/male-champions-change>.
[31] Ibid.
[32] Australian Institute of Company Directors, *Board Diversity - Think outside the square – initiatives to increase gender diversity on Australian Boards* (2012) <http:www.companydirectors.com.au>.
[33] Ibid.
[34] *Workplace Gender Equality Act 2012* (Cth).
[35] Australian Government, *The Workplace Gender Equality Agency* <http://www.wgea.gov.au/>.
[36] Ibid.

The Gender Equality Blueprint 2010 sets out recommendations in various areas including strengthening national gender equality laws, agencies and monitoring, and includes targets of 40% representation of each gender on all publicly listed boards in Australia, to be achieved over 5 years.[37] If the targets in the recommendations (which are supported by Commissioner Broderick) are not met, the federal government will look to legislate this requirement with penalties for non-compliance.[38]

As a result of the 2013 Budget, the Labour government announced $4.3 million in funding over a period of 5 years for its BoardLinks program.[39] The BoardLinks program was set up in November 2012 and aims to increase gender equality in government boardrooms by using the skills and knowledge of Champions, Members and Affiliates and by developing women through mentoring, networking opportunities and formal training courses.[40]

By contrast to the private sphere, the Australian government and state and territory governments have favoured the quota approach and have put in place targets to increase the participation by women on government boards and committees. Kate Ellis, Minister for the Status for Women announced that the government will set a target of 40% for both men and women on federal government boards by 2015.[41] All of the States except for WA and NT have set targets of 50% for women to be on their boards.[42] WA and NT have adopted other initiatives to increase the number of women on government boards.

Therefore as illustrated from the above, in addition to the amendments in the ASX Corporate Code Recommendations (which has been adopted by a large number of companies), Australia has engaged in a range of other initiatives to increase the number of women on its corporate boards. If however, the number of women on corporate boards does not continue to grow, mandatory quotas could be legislated in Australia.

IV EUROPE

[37] Australian Human Rights Commission, *Gender Equality Blueprint* (2010) <http://www.humanrights.gov.au/publications/gender-equality-blueprint-2010>.
[38] Ibid.
[39] Nasim Khadem, *Budget 2013: Government finds $4.3m to boost women on boards* (14 May 2013) <http://www.brw.com.au>.

[40] Ibid.
[41] Australian Institute of Company Directors, *Representation of women on government boards* <http://www.companydirectors.com.au/Director-Resource-Centre/Governance-and-Director-Issues/Board-Diversity/Statistics/Public-Sector>.
[42] Ibid.

A *Facts and figures*

Compared to Australia, the average board member on a European company is a make is 58 years old.[43]

As at November 2012, 85% of non-executive board members and 91.1% of executive board members were men with women comprising 15% and 8.9% respectively.[44] In its resolutions of 6 July 2011 and 13 March 2012, The European Parliament called for legislation on gender equality in business leadership.[45] In response to these calls, on 14 November 2012, the European Commission proposed EU legislation which sets a minimum objective of 40% of females in non-executive board member positions in listed companies in Europe by 2020 (2018 for listed public undertakings).[46] The proposal will apply to approximately 5000 publicly listed companies in the EU however not to small and medium-sized companies that have less than 250 employees and an annual income of less than €50 000 000 or non-listed companies.[47]

The main elements of the proposal which is a temporary measure intended to expire by 2028, include:

- A complementary measure known as a flexi quota, which is an obligation for companies listed on the stock exchange to set their own self-regulatory targets in relation to the representation of both genders among executive directors to be met by 2020 (for public undertakings to be met by 2018). Annual reporting on progress will also need to be made by companies.[48]

- If a publicly listed company does not meet this quota of 40% it will need to introduce a new selection procedure for board members which prioritise the qualified female candidate.[49]

- The key selection criteria for a job on the board will remain to be qualification and merit.[50]

- Member states can determine their own sanctions for non-compliance.[51]

In January 2013, Vice-President Viviane Reding, the EU's Justice Commissioner (Vice-President Reding) reported on how this proposal had been adopted by member states and stated that there was

[43] Corporations and Markets Advisory Committee, above n 13, 254.
[44] European Commission Justice, 'Women on Boards: Commission proposes 40% objective' (Press Release, 14 November 2012) 1 <http://ec.europa.eu/justie/newsroom/gender-equality/news/121114_en.htm>.
[45] Ibid 4.
[46] Ibid.
[47] Ibid.
[48] Ibid 5.
[49] Ibid.
[50] Ibid.
[51] Ibid.

a clear increase in the number of women on boards from 13.7% in January 2012 to 15.8% in January 2013.[52] This change was most apparent in countries that had recently adopted legislation mandating quotas, such as France and Italy.

In order to become binding law, this proposal is required to be adopted by the European Parliament and by the EU Member States in the Council.[53]

The progress in individual European countries are as follows:

1 *France*

One of the highest rates of progress has occurred in France. In 2013, women made up 18.3 %[54] of boards in publicly listed companies, rising from 8.2% in 2009.[55]

In January 2011, France adopted legislation imposing quotas to increase female representation on boards of listed and non-listed companies.[56] The legislation allowed companies six years to ensure that women made up 40% of the board. This law is applicable to listed companies and companies that generate revenue of over € 50 000 000 and employ more than 500 staff.[57] Effective from 2017, board nominations which do not comply with this quota requirement will not be valid.[58]

In order to avoid the proposed legislation applying to them, in 2010, the French business community adopted the French AFEP MEDEF Corporate Governance Code of Listed Corporations which set targets for increasing board participation by women, however this code was made void by the legislation enacted in 2011.[59]

Many believe that the legislation mandating quotas has been the catalyst for more female representation on boards.

2 *Germany*

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[52] European Commission, 'Regulatory pressure gets the ball rolling: Share of women on company boards up to 15.8% in Europe' (Press Release, 25 January 2013). , IP/13/51 <http://europa.eu/rapid/press-release_IP-13-51_en.htm>.
[53] Ibid.
[54] Catalyst, *Board seats held by women, by country* (May 31 2013) <http://www.catalyst.org/knowledge/women-boards>.
[55] Lord Davies, above n 15.
[56] European Women's Lobby, *Women on Boards in Europe from a Snail's Pace to a Giant Leap*? (February 2012) 9 <http://womenlobby.org>.
[57] Ibid.
[58] Ibid.
[59] Ibid.

Germany has not legislated gender quotas to increase women's participation on corporate boards. In 2013, 14.1%[60] of its corporate board members were women, rising from 9% in 2009.[61]

Instead, in 2010, the German Corporate Governance Code, which applies to listed companies, was modified to contain recommendations to increase female representation on its Supervisory and Management Boards.[62] Unlike Australia which follows a unitary board structure (boards are comprised of executive and non-executive directors that are nominated by shareholders), the German board is comprised of a two tier board system where the management board manages and directs the company and the supervisory board is responsible for overseeing the management as well as appointing and removing members.[63] The German Corporate Governance Code states that the Management Board will consider diversity when filling managerial positions. The Supervisory Board will respect diversity when appointing the Management Board and specify objectives in relation to its composition that shall take into account female representation.[64]

Compliance with the recommendations is not mandatory, however noncompliance must be disclosed annually.[65]

Following the recommendations of the German Corporate Governance Code, in March 2010, Deutsche Telekom AG became the first DAX 30 company to propose that women were to fill 30% of management positions worldwide, by the end of 2015.[66]

While the top German top 30 listed companies have formulated their own individual voluntary targets in order to avoid legislation, these targets are not too high – some only aim to have 15% of women participating on their board by 2020.[67]

Although many Germans are not in favour of quota legislation, in 2011, the Minister for Labour, Ursula van der Leyen, introduced quotas on the political agenda. Kristina Schroder, the Minister handling this issue has also proposed a non-binding 'flexi-quota' whereby companies can set their own targets. Non-compliance is to attract a small financial penalty.[68] Moreover, the 'Berlin Declaration' which is a campaign that female MPS from all political parties and the leading

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[60] Catalyst, above n 54.
[61] Lord Davies, above n 15.
[62] Deloitte, *Women in the boardroom: A global perspective* (November 2011) 18 <http://www/deloitte.com>.
[63] European Women's Lobby, above n 56, 16.
[64] Deloitte, above n 62, 18.
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] European Women's Lobby, above n 56, 10.

women's organisations have bought about, supports binding quota legislation. This Declaration has also been signed by Vice-President Reding.[69]

3 *United Kingdom*

Like Germany, the UK has not legislated quotas for women on boards. Instead it advocates a business-led approach to increasing the number of women on corporate boards. In 2013 the percentage of women on boards was 17.3 %,[70] rising from 7.8% in 2009.[71]

In February 2011, Lord Davies conducted an independent review into Women on Boards which was commissioned by the Government and which revealed that at the current rate of progress, it would take 70 years to reach gender equality.[72] The Review however did not recommend quotas as the method of achieving equality. Instead several other recommendations were made including:

- UK listed companies in the FTSE 350 should set their own targets to be reached by 2013 and 2015.[73]

- FTSE 100 should aim for a minimum of 25% female representation on their boards by 2015.[74]

- The committee involved in this Review should meet six monthly to report on progress annually.[75]

In response to Lord Davies' report, the UK Corporate Governance Code was amended in 2011, to include the requirement that companies need to include in their annual report, its gender balance policy, the mechanisms by which gender balance would be met as well as progress, effective as of October 2012.[76]

In terms of evaluating how effectively Lord Davies' recommendations have been adopted by UK Boards, two years later, progress has been positive, as at:

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[69] Ibid.
[70] Catalyst, above n 54.
[71] Lord Davies, above n 15.
[72] Ibid.
[73] Ibid 4-5.
[74] Ibid.
[75] Ibid.
[76] Deloitte, above n 62, 23.

> March 2013, within the FTSE 100, women account for 17.3% of all directorships, up from 10.5% in 2010, women have accounted for 34% of all board appointments (45 out of 134), there are 94 boards with female representation and there are now 192 women directors on boards out of a total of 1110.[77]

If acceptable targets are not met by the proposed time, UK may also legislate for quotas.

4 *Spain*

The number of women on Spanish boards includes 9.5%[78] in 2013, rising from 6.6% in 2009.[79] Following Norway, The Law on Equality adopted in 2007 required companies to establish boards of directors with a 'balanced presence' of men and women (minimum of 40%).[80]

Other initiatives by the Spanish government include the Spanish Securities and Exchange Commission's (CNMV) Corporate Code, which recommends that listed company boards consider women who have the requisite business backgrounds, when looking to appoint directors.[81] Those companies that do not adhere to this recommendation must provide reasons.[82]

The lack of midterm targets and binding sanctions has been attributed to the slow progress of women's representation on Spanish boards.[83] However, while the Law on Equality does not consider sanctions, compliance with the legislation results in positive incentives such as companies being favoured in public procurement.[84] If targets are not reached by 2015, sanctions may be added to the legislation to address non-compliance.

5 *Italy*

The number of women on Italian Boards include 11% in 2013,[85] rising from 3.6% in 2009.[86] Following countries that adopted gender quota legislation, in June 2011, the Italian government adopted the 'Gender Parity Law' whereby the underrepresented gender shall receive 20% of the positions in the first renewal of the board of directors and 33% of board positions in the second and third renewal.[87]

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[77] Pooja Kondhia, *Women on boards – progress still to be made* (10 April 2013) <https:www.icsagloabl.com/governance-and-compliance/news/april-2013-women-on-boards-progress-still-to-be-made/>.
[78] Catalyst, above n 54.
[79] Lord Davies, above n 15.
[80] Deloitte, above n 62, 22.
[81] Ibid.
[82] Ibid.
[83] European Women's Lobby, above n 56, 13.
[84] Ibid.
[85] Catalyst, above n 54.
[86] Lord Davies, above n 15.
[87] European Women's Lobby, above n 56, 11.

Staged sanctions apply to non-compliance. Non-compliance will initially result in a warning by the Italian Securities and Exchange Commission.[88] If after 4 months of the warning, the quota is still not reached, the company will be fined upto €1 000 000.[89] If the company continues to not comply after three more months, the board will be replaced.[90]

6 *Norway*

Although not a part of the EU, Norway is an interesting country to consider when it comes to addressing the issue of gender on boards, as it was the first country to introduce binding legislation to increase the participation of women on boards (including for non state-owned companies) and has influenced a number of other countries to do the same. As a result of the legislation, the percentage of women on Norwegian boards is the highest in the world, at 40.9 % in 2013,[91] rising from 35.9% in 2009.[92]

In 2005, Norway amended the *Public Limited Liability Companies Act 1997*, to impose a quota of 40% females on boards of public sector entities.[93] The binding quota law provided:

- If the board of directors has two or three members, both genders must be represented.[94]

- If the board of directors has four or five members, each gender must be represented with at least two members.[95]

- If the board of directors has six to eight members, each gender must be represented with at least three members.[96]

- If the board of directors has nine members, each gender must be represented with at least four members, and if the board of directs has more than nine members, each gender must be represented with at least 40% of the board of directors.[97]

Public limited companies had to comply with the legislation by 1 January 2008. Strict sanctions were also put in place where non-compliance results in dissolving a company.[98] To date no companies in Norway have been dissolved for not complying with the gender quota legislation.

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[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Catalyst, above n 54.
[92] Lord Davies, above n 15.
[93] Deloitte, above n 62, 21.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] Ibid.

The legislation applied to boards of listed and non-listed public limited companies, inter-municipal companies, state companies, municipal companies and co-operative companies.[99]

Before the binding legislation came into effect, Norway had non-binding legislation in 2003 which required a similar target to be achieved by 2005.[100] As this target had not been met by self-regulation, legislation was enacted. Initiatives for increasing women on corporate boards such as mentoring programs and collating information on databases for qualified women that were looking for board positions, were also introduced before the legislation became binding.[101]

B *Other initiatives*

As with most parts of the world, mentoring programs to encourage women to participate on corporate boards also exist across Europe. As well as individual countries setting up their own mentoring programs, the Cross-Mentoring Program is an example of a program that is set up across Europe, which the UK, Germany and France participate in.[102] This program aims to support suitable and qualified women who are ready to be board directors, by supplying them with professional mentees from the same country (the only time a mentee may need to step outside their country in relation to this program is if they want to attend a conference that is held annually, in Luxemburg).[103]

Therefore it can be seen that countries in Europe have differing opinions on how to encourage gender diversity on corporate boards. Some countries favour quota legislation such as Norway, France and Italy, and the highest progress of women on boards can be seen in those countries. Other countries who are concerned about the merits of quota legislation, such as Germany and the UK, have resorted to voluntary codes to address this issue. Although it is clear that EU member states are all concerned with the issue of gender diversity on boards, given that countries have different methods of addressing this issue, it will be interesting to see what effect the EU Commission's quota proposal will have on individual member states.

[98] Ibid.
[99] European Women's Lobby, above n 56, 12.
[100] 'Women in Business: Still lonely at the top', *The Economist* (23 July 2011) 54.
[101] European Women's Lobby, above n 56, 98.
[102] International Cross Mentoring Program, *Leadership Development through Mentoring* <http://www.cross-mentoring.net/International_CMP_Women.pdf>.
[103] Ibid.

V INDIA

A *Facts and figures*

Another country in the Asia Pacific region is India. As with other Asian countries, businesses are largely family owned and boards can reflect particular family interests.[104] In India the proportion of women on its boards in 2013 is 6.5%[105] of the BSE100, rising from 4.1% in 2009.[106]

India has not legislated quotas to increase the representation of women on boards and nor does its voluntary code of conduct pertaining to corporate governance principles, contain any provisions on this issue. However in December 2012, the Lok Sabha (the lower house of the Indian parliament) passed the Companies Bill 2012 which requires companies of a certain category (un-defined) to have at least one woman on its board.[107] This Bill is pending in the Rajya Sabha (upper house) and is expected to be passed shortly.

Unlike in the West, the limelight on corporate governance in India has not arisen from a financial, banking or economic collapse. Instead the attention on the notion of corporate governance has come from identifying the need for increased regulation and greater transparency among corporations by the leading industry association, the Confederation of Indian Industry (Cll).[108]

A task force was formed in December 1995 to develop a voluntary code of corporate governance.[109] This code known as 'Desirable Corporate Governance: A Code' was released in 1998 and between the time that it was released and 2000, over 25 companies voluntarily complied with the code.[110]

The Securities and Exchange Board of India (SEBI) set up a committee under Kumar Mangalam Birla to develop a code for listed companies.[111] As a result of this, in 2000, SEBI inserted a new 'clause 49' in the listing agreement of the Stock Exchanges.[112] Initially the intention behind clause 49 was to outline basic corporate governance practices for companies in relation to governance and

[104] Aparna Banerji and Shalini Mahtani, Ruth Sealy and Susan Vinnicombe, *Standard Chartered Bank: Women on Corporate Boards in India 2010* <http://www.community business.org/images /cb/publications/2010/ WOB _India.pdf>.
[105] Catalyst, above n 54.
[106] Lord Davies, above n 15.
[107] Richa Bhattacharyya, 'India hiring icons like M Damodaran, Deepak Parekh & GM Rao to mentor women board members', *The Economic Times* (Mumbai), 5 July 2013.
[108] Banerji et al, above n 104, 11.
[109] Ibid.
[110] Ibid.
[111] Ibid 12.
[112] Ibid 12.

disclosures, such as the number of directors on board and the number of committees that a director could be a part of.[113]

In 2002, SEBI formed the Narayana Murthy Committee to analyse corporate governance practices and identify further areas for improvement.[114] This resulted in a further amended clause 49 in October 2004 (which had effect from 1 January 2006) in relation to the composition of the board, the definition of independent directors and other factors affecting boards and committees.[115]

B *Other initiatives*

Other initiatives by the Indian government to raise participation by women, include the Women's Reservation Bill or The Constitution (108th Amendment) Bill which was introduced in March 2010.[116] This Bill which was passed in the upper house and is pending in the lower house, proposes to alter the Constitution of India to reserve 33% of seats in the lower house and in state legislatures for women.[117]

Mentoring programs have also been introduced in India. For example, Mr Arun Duggal, the chairman of the Shriram Capital Limited (SCL), which is the parent company for the financial services and insurance entities of the Shriram Group, and whose subsidiary company Shriram Transport Finance company is listed on the BSE, has introduced a mentoring program to increase women's participation on corporate boards.[118] Mr Duggal has teamed a number of influential men from top listed BSE companies to mentor women who choose to undergo this program. To date, 40 women have signed up for the program which runs for 3 months and which allows women to gain practical experience in how a boardroom works and understand the roles of boards in corporate governance.[119] Upon completion of the program, women will be assisted in joining a board that is suitable for them, with the assistance of a mentor, program director and executive search firms.[120]

Although India, compared to the other countries discussed earlier in this paper has the lowest rate of participation of women on boards, change is visible, as seen from the pending Companies Bill and Women's Reservation Bill. Furthermore, the introduction of mentoring programs, aim to raise awareness of the importance of gender diversity, as well as to provide more opportunities for women to participate in the workforce.

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[113] Ibid 12.
[114] Ibid.
[115] Ibid.
[116] Ibid 10.
[117] Ibid 10.
[118] Bhattacharyya, above n 107.
[119] Ibid.
[120] Ibid.

VI REASONS WHY THIS IS THE CASE

Although the countries in Part 2 have been discussed separately, there is an obvious trend globally that illustrates an underrepresentation of women on boards. This section explores the reasons that contribute to the underrepresentation of women on boards and are applicable to women worldwide.

A *Lack of executive experience*

As fewer women have the level of executive experience required by a board member, the lesser their chance to get on a board. As was stated by women in a study done by the Standard Chartered Bank on women on boards in India in 2010 (the Indian Women Report), 'there is not enough of a pool of senior women to choose from..'.[121] Attributes of a director such as debating, decision making and critical thinking often cannot be gleaned from an interview and are instead, more easily seen when working in the same environment.[122] Therefore fewer women with executive experience can lead to the unfortunate cycle of fewer women participating on the board.

B *Family reasons*

Women all around the world are primarily responsible for the family and children. As board members can be subjected to long office hours or excessive travelling, these work demands may not be compatible to a woman's family and domestic demands and as a result, women may not pursue career advancements. Women in the Indian Women Report stated that 'to serve on a board requires a lot of time'[123] and 'there is a lack of flexibility in working patterns offered to employees'.[124] Furthermore starting a family and going on maternity leave requires time away from the work place. As women in the Indian Women Report stated, 'there are two points in a woman's life where they have to take a decision ridden by guilt and circumstances. One, where they have babies initially..'.[125] Family responsibilities therefore, may not be conducive to attaining a board position.

C *Old boys' network*

The old boys' network can also preclude women from participating on boards. People are invited onto boards and often as it is men that are on the boards in the first place and they are the ones who invite newer members, these newer members will also be males.[126] The newer members may be

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121 Banerjee et al, above n 104, 27.
122 Dominic Stuart, *Selecting Boards on merit: rhetoric and reality* (1 December 2006) <http://www.companydirectors.com.au>.
123 Banerjee et al above n 104, 26.
124 Ibid.
125 Ibid.
126 Stuart, above n 122.

known to them or men may simply be more comfortable inviting other men as they are the same gender, and therefore they know the actions and thought processes that other men will bring. Although it may not be an intentional thing, this becomes a vicious cycle which does not help women to get on the boards in the first place.

An example of an old boys' network existing was identified in a CGI report which conducted a study that revealed that 79 out of ASX 300 mining companies had no women in Australia in 2013.[127]

D *A woman's choice*

There is also opinion that some women do not want to progress beyond middle management as they are not interested in being a part of the cut throat nature of the corporate world and instead have other goals in life such as family responsibilities.[128] As a result, it is believed that women do not want to work as hard. However women such as Claire Braund (Braund), the executive director of Women on Boards (which is a global initiative formed to draw attention to and improve gender relations) does not agree and she states that 'masking a lack opportunity by calling it choice is the easy way out for both men and women'.[129] Braund does believe however, 'that women are culturally groomed to aim low'[130] and provided an example of a man and a woman holding the same qualification but aiming for different opportunities – the man wanted a job at a top tier company whereas the woman wanted to work on a not-for-profit organisation (confirmed by research conducted by Women on Boards in 2008, which demonstrated that there were more women represented on not-for-profit organisations than on publicly listed companies).[131]

E *Men and women's opinions of themselves and biology*

It is conceded that men tend to overestimate their contributions to a board whereas women are the opposite and tend to undermine their skills and their contribution to a board. According to neuroscientist and former Wall Street trader John Coates, biology could be blamed for men contributing to the GFC. He states:

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[127] Durkin, above n 19.
[128] Stuart, above n 122.
[129] Ibid.
[130] Ibid.
[131] Australian Institute of Company Directors, above n 14.

> Every blow-up in a bank of $1 billion or more occurs at the hands of a trader at the end of a multi-year winning streak. You become euphoric, delusional and overconfident. You take way too much risk and there are terrible risk-reward trade-offs'.[132]

Women are also conscious of the fact that if they are assertive, they may be labelled aggressive or bossy whereas no one questions men who displays these qualities. Sheryl Sandberg, executive of Facebook stated in her book Lean In:

> If a woman is competent, she does not seem nice enough. If a woman seems really nice, she is considered more nice than competent. Since people want to hire and promote those who are both competent and nice, this creates a huge stumbling block for women'.[133]

F *Lack of mentors*

Furthermore a lack of mentors may also affect the number of women that choose to be on boards. Just like men may feel more comfortable with men, women may also feel more comfortable with other women who could encourage them to aim for board positions.[134] Men can also avoid mentoring women for fear of overstepping boundaries or having their relationship questioned.[135]

G *Cultural considerations*

Specific to India which is a young and traditional nation by Western standards, Indian women perhaps face an extra layer of impediments to obtaining board positions that their non Indian counterparts do not face. These include a societal perception that women are inferior to men, lower education levels for female children than male children, and the fact that it is viewed highly to stay home and take care of children, husband and extended relatives. With these societal and family pressures, Indian women may be finding that there is not much room for them to concentrate on their careers.

VII WHY WE NEED DIVERSITY ON BOARDS

A *At a general level*

Putting gender aside briefly, diversity in general is positive for business as it brings about different perspectives, thought processes and actions to a company board. The following attributes for

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[132] Olivia Solon, *Testerone is to blame for financial market crashes, says neuroscientis*t (13 July 2012) <http://www.wired.co.uk/news/archive/2012-07/13/testosterone-financial-crisis>.
[133] Durkin, above n 19.
[134]Shital Jhunjhunwala,' Women on Boards – The Statistics Speak' (January 2013) *The Chartered Accountant* 141.
[135] Ibid.

example, will be beneficial for a board member to exhibit, as they contribute to more effective decision making, more innovation and a high standard of corporate governance:

Industry experience – previous industry experience from different boards can instil in members, the skills to guide a company in the right direction.[136]

Geographic experience and different nationalities - With globalisation and the presence of businesses in various countries, different nationalities may be able to bring insights into what types of decisions and actions will be favourable for the business in a particular country.[137]

Functional Expertise – expertise of a particular field, such as in the legal framework, capital markets, technological developments and social trends in relation to the company will be beneficial to the board.[138]

Stakeholder experience – an understanding on how key stakeholders relevant to the company operate will be beneficial in assisting a company to develop and implement stratgeies.[139]

Age and tenure- Younger board members are important as they can keep up to date with evolving technology and social trends of the modern world. This also means that as older board members depart the company, there will not be a vacuum of knowledge as the younger board members will possess this. Moreover, if members remain on the board for a lengthy period of time and become comfortable with one another there is a possibility that their personal relationships may cause them to question one another's decisions and actions less. Therefore newer members may keep board members alert and make sure that unfavourable actions do not go unnoticed.[140]

Gender – there are also a number of reasons why it is imperative for companies to include women on their boards. These are discussed below.

B *Why we need more women on boards*

Some studies have shown that women on boards do not make a great difference to a company's performance. In a 2009 study conducted by Adams and Ferreira for example, the impact of gender

[136] Arguden, above n 11.
[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Ibid.

diversity on 1939 US stocks from 1996 – 2003 was considered.[141] The data revealed that there was a positive relationship between the two, however using two different techniques to determine reverse causation, negative effects were found on profits and stock value after a woman was appointed to the board.[142]

Similarly, Farrell and Hersch considered 300 Fortune 500 companies between 1990 and 1999 and while it was found that more companies with strong profits are more likely to appoint female directors, this appointment did not affect subsequent performance.[143]

By contrast, a number of studies have proved otherwise:

1 *Business case*

In 2004, Catalyst, a US based non-profit research organisation established a relationship between companies with higher financial performance and a higher representation of women, in a report called 'The Bottom Line: Corporate Performance and Women's Representation of boards'.[144] This report identified:

> Return on Equity: Companies with the highest percentages of women board directors outperformed those with the least by 53%.[145]
>
> Return on Sales: Companies with the highest percentages of women board directors outperformed those with the lease by 42%.[146]
>
> Return on Invested Capital: Companies with the highest percentages of women board directors outperformed those with the least by 66%.[147]

In Australia, a study conducted by the non-profit organisation Reibey Institute in 2011, discovered that ASX 500 companies with women directors delivered 6.7% higher returns over a three year period, and 8.7% higher returns over a five year period than their counterpart companies without any women on their boards.[148]

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[141] Credit Suisse Research Institute, *Gender diversity and corporate performance* (August 2012) <http://www.women onboards.org.au/pubs/.../2012-creditsuisse-gender-diversity.pdf>.
[142] Ibid.
[143] Ibid.
[144] Catalyst, 'Companies with more women board directors experience higher financial performance, according to latest catalyst bottom line report' (Media Announcement, 2007) <http://www.catalyst.org/media/companies-more-women-on-board-directors-experienec-higher-financial-performance-according-latest>.
[145] Ibid.
[146] Ibid.
[147] Ibid.
[148] Reibey Institute, *ASX 500 Women Leaders* (August 2010) <http://www.asxgroup.com.au/media /PDFs/asx _500 _ women_leaders_reibey_institute_20101.pdf>.

The Chief Economist at then Goldman Sachs JBWere, Tim Toohey published ‘Australia’s Hidden Resource: The Economic Case for Increasing Female Participation’ in 2009 which stated that an equal number of men and women in the workforce would increase the level of Australia’s GDP by 11%.[149] This report proposed that ‘…an alternative source of highly educated labour is already at Australia’s disposal and with the right set of policy options this pool of labour can be unlocked’.[150] This is also confirmed by the fact that in Australia, as at 2011, the number of women graduates outweighed the number of male graduates at universities.[151] Therefore a lack of women on boards also means that female talent is not being utilised and the quality of appointments are being compromised.

Global consultancy firm, McKinsey & Co. supported diversity and a business case for it, in its Women Matter series between 2007 and 2010.[152] In their findings, they identified a link between a company’s output and the number of women on their board, explained the reasons for this performance by analysing the leadership styles of women, surveyed business leaders, and provided an analysis on how to achieve gender diversity.[153]

A study on Gender diversity and corporate performance by the Credit Suisse Research Institute released in 2012, also confirmed that companies with at least one woman on its board demonstrated superior share price performance (over 2,300 companies were analysed).[154]

Therefore it can be said from studies conducted in the last few years globally that there is a positive link between a company’s performance and having women on its boards.

2 *Consumer Demand*

Women are increasingly participating in the economy both as a contributor and as customer therefore it seems natural that they also be involved on boards of companies. In 2011, 95% of American women influenced the products and services sold while European women drove 70% of purchasing decisions.[155] As women are aware of consumer behaviour, by having them on boards,

[149] Goldman Sachs JBWere, *Australia’s Hidden Resource: The economic case for increasing female participation* (30 November 2009) <http://www.gs.com.au/documents/about/mediaroom/2009/gender_research_report_2009.pdf>.
[150] Ibid.
[151] Alan Olsen, *The Gender Agenda – Gender Differences in Australian Higher Education* (January 2011) <http://www.spre.com.au/download/SPREGenderAgenda.pdf>.
[152] McKinsey & Company, *Women Matter Making the Breakthrough* (2012) <http:www.mckinsey.com>.
[153] Ibid.
[154] Credit Suisse Research Institute, above n 141, 12.
[155] Jhunjhunwala, above n 134, 142.

they can identify opportunities for a company, assist in building a larger customer base and higher customer satisfaction can in turn, lead to more profit in a company.[156]

In 2011, Avivah Wittenberg-Cox, a leading gender equality advocate and author made some interesting observations, working with a group of Australian company executives.[157] She confirmed that economic growth is being driven by women, who will worldwide earn $18 trillion by 2014 and who are the main force in the middle class in emerging economies.[158]

3 *Investor confidence and organisational performance*

A woman on a board may signal that a company takes the issue of diversity seriously and this may in turn improve investor confidence. In Australia, top listed ASX companies such as BHP Billiton and Rio Tinto are including gender diversity indicators among their criteria, as well as appointing women on its boards. For example, Carolyn Hewson and Shriti Vadera currently serve on the BHP Billiton board and Vivienne Cox and Ann Godbehere serve on the Rio Tinto board.[159] Boards with women may also encourage other female employees within the organisation to seek director positions.

4 *Greater corporate governance*

Men and women possess different behavioural skills. While men are task focused and make decisions based on an analysis of the information, women are more intuitive and can multitask. They can also be better at building relationship (which can be beneficial when interacting with shareholders) and are good listeners (which can improve board room dynamics).[160]

While men tend to have autocratic leadership styles which is good for exercising control on management, women can adopt a more democratic leadership style which can encourage different views from stakeholders and ask more questions.[161] Men can be short term whereas women can have long term approaches which are more beneficial in building ties with management and protecting the interests of stakeholders, employees and customers. [162]

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[156] Ibid.
[157] Women on Boards, *Why women are good for business* <http://www.womenonboards.org.au>.
[158] Ibid.
[159] Durkin, above n 19.
[160] Jhunjhunwala, above n 134, 142.
[161] Ibid.
[162] Ibid.

Women also tend to have better attendance records, better record keeping records and are more independent as they do not operate in an old boys' network that many male board members tend to be a part of.[163] These traits ultimately lead to better corporate governance.

Therefore as can be seen from the reasons discussed, diversity and in particular, gender diverse boards bring about a better ability to understand customers and stakeholders and bring fresh perspectives and new ideas which are beneficial to the board. On a broader level, more women are also required on boards for their future security. If for example, poor career prospects discourage women from participating in the work force, this can increase the discrepancy between male and female participation on boards, and become a self perpetuating cycle.

VIII HOW TO INCLUDE MORE WOMEN ON BOARDS

The best way to address the lack of women on boards on a global level involves joint efforts by the government and the private sector at both the micro and the macro levels.

A *Micro level*

1 *Work / life balance*

As discussed above, most women bear the responsibility of taking care of their family and household, which coupled with starting a family, can lead to women taking a break from work. Being absent from the workplace means that there is a lesser pool that managers can choose from to elect someone to a board position.

A solution to this problem could be aligning the work environment to suit a work / life balance. From the public sector's point of view, tax breaks or credits could assist women with the cost of child care[164] (which is expensive in countries like Australia). Legislation on maternity and paternity rights (for those countries that do not already have them) would also be useful. From the private sector's point of view, solutions could include flexible working hours and location and the availability of child care services at the workplace.[165] Such solutions would assist women in balancing their work and family commitments.

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[163] David A.H. Brown, Debra L. Brown and Vanessa Anastasopoulos, *Women on Boards – Not just the right thing ..but the "bright" thing* (May 2002) <http://www.europeanpwn.net/files/women_on_boards_candada.pdf>.
[164] Credit Suisse Research Institute, above n 141, 26.
[165] Renee Adams, *To reach the board, women need support to stay in the workforce* (8 March 2013) <http://www.theconversation.edu.au>.

2 *Appointment processes*

Board positions are often filled through informal networking systems rather than being advertised. Therefore as stated earlier in this paper, where networks are dominated by men, board appointments will naturally be of other men. The solution to addressing this issue could be altering the recruitment process and increasing the pool of candidates from each gender to choose from.[166] Furthermore, networking opportunities are also important for women to be a part of so that they can gain valuable connections.[167]

3 *Mentoring processes*

Often women do not have appropriate mentors that can guide them to a board position. To address this, mentoring programs are useful as female participants gain valuable skills through these programs that are useful for board members.

To this end, most countries have in place some type of mentoring program that can assist them in obtaining board positions later. In Australia for example, the AICD's efforts to increase gender diversity on boards are commendable as it offers women places in its director's course, provides training and development programs, and also creates events, networking and directorship opportunities.[168]

The same can be said of SCL's mentoring program in India which aims to introduce qualified and interested women to the corporate board and assist them in finding suitable positions, as well as Europe's Cross-Mentoring program. Therefore it is important that such mentoring programs are promoted and maintained.

4 *Character traits*

To address the fact that women undermine their capabilities more than men and appear to have lower professional ambitions than men, employers could structure training and development to suit the traits of females.[169] Women could also receive particular types of coaching and mentoring that specifically addresses lower confidence and lesser ambition.[170]

[166] Credit Suisse Research Institute, above n 141, 28.
[167] Ibid.
[168] Australian Institute of Company Director's, above n 32.
[169] Credit Suisse Research Institute, above n 141, 38.
[170] Ibid.

5 *Industry action*

Industry forums could also establish programs to promote the representation of women on company boards and provide for example, a public database for aspiring male and female directors. An example of this in the public sphere in Australia is the Tasmanian government's Women's Register, which is a database of women who would like to be appointed to government boards and committees.[171] The Register assists in identifying suitable women who are skilled, experienced and interested in appointment.[172]

6 *Special recognition and assistance in business*

To encourage companies to focus on the issue of gender diversity in their dealings, the government could also provide rewards for their voluntary compliance in the form of providing tax benefits or avenues for them to enter new business segments. However this approach may not fare too well in the economic times of today.

B *Macro level*

On a macro level, the issue of gender diversity revolves around quotas which countries such as Norway, France, Italy and Spain have adopted, versus corporate governance codes which countries such as Australia, Germany and the UK follow. India has not legislated quotas or adopted provisions in its corporate governance code, however there is a pending Bill which will allow certain companies to have at least one woman on its board.

1 *Quotas*

(a) Strengths of the Quota approach

As discussed above, the number of women on corporate boards in Norway, France and Italy has risen considerably after those countries introduced legislation that mandated quotas.

In Australia, even though gender diversity on corporate boards is governed by the ASX Corporate Code Recommendations, the use of quotas is supported by prominent members of society such as Australian Senator and leader of the parliamentary caucus of the Australian Greens, Christine Milne

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[171] Department of Primary Indsutries, Parks, Water and Environment, *Increasing the Respresentation of Women on Boards* <http://www.dpiw.tas.gov.au/inter.nsf/WebPages/CART-7566FS?open>.
[172] Ibid.

(Senator Milne), who states that she did not advocate quotas for women on boards until she saw that that the number of women on corporate boards was very slow.[173]

Self regulation, although useful in bringing awareness to the community, does not always result in the intended outcome. In Norway for example, before binding legislation was introduced, it had a similar non-binding target to be achieved by 2005.[174] As this target was not met (in 2005 there was only 15% of women on boards compared with approximately 10% when this target was introduced),[175] legislation was introduced with the sanction of dissolving a company if the legislation was not complied with (to date all public companies have abided by the legislation).

(b) Weaknesses of the Quota approach

However the legislation of quotas is not free from problems. Senator Milne for example, states that when calling on the government in the Senate to legislate a 40% participation by women on board's requirement for ASX 200 companies within the next five years, this was rejected by both parties.[176] As Coalition Senator Michaela Cash stated, many are of the opinion that legalising quotas was 'demeaning to women, and has the potential to hinder the aspirations of women and develop a second class of citizen'.[177]

Binding quotas do not necessarily increase the number of female CEOs or board chairs. In Norway for example, while the number of women on boards has increased from 15% to 40% as a result of legislation, the number of female CEOs or board chairs has not risen in proportion.[178] 95% of boards remain chaired by men with 2% of CEOs of listed companies on the Oslo Stock Exchange being women.[179] Therefore further initiatives are required to address the gender balance in the presidents of companies. Moreover the representation of women on corporate boards has not exceeded the legislated targets. This suggests that companies are simply complying with the legislation to the minimum standard to avoid dissolution, instead of understanding that there is a real need for both genders to be equally represented in the boardroom.

Critics of the quota approach also state that the easiest means of complying with Norway's legislation is by selecting from a pool of women who have prior governance experience, and

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[173] Christine Milne, *Why I changed my mind about quotas for women on boards* (11 April 2013) <http://www.mamamia.com.au/news/christine-milne-quotas-for-women-on-boards/>.
[174] European Women's Lobby, above n 56, 15.
[175] Ibid.
[176] Milne, above n 173.
[177] Ibid.
[178] European Women's Lobby, above n 56, 16.
[179] Ibid.

therefore this only benefits a small group of elite women, referred to as the Golden Skirts[180] by the media.

It is also argued that the structure of a company, and who is on its board, should be decided by its shareholders and that there is a difference between the public and private sector.[181] The government is the public sector's sole shareholder and can chose the approach it takes in constituting the boards of entities for which it is responsible for.[182] The same however does not apply to the private sectors where the imposition of quotas would interfere with the power of shareholders to chose who they want, on the boards of the company that they have invested in.[183] A more effective approach than imposing quotas could be to encourage shareholders to pick well qualified people and considering both men as well as women for board positions.[184]

The level of sanctions attached to non compliance with quota legislation also makes a difference to how effective quota legislation is. In Spain for example, the effectiveness of the legislation is hindered from the absence of sanctions.[185] The slow progress can be seen by the fact that six years after the adoption of the non-binding 40% target, current levels are nowhere near that target and it is estimated that only 18% of women will be on boards by 2015.[186]

Furthermore, the degree of sanctions also makes a difference to the quota approach. While Norwegian companies who do not comply with the legislation will be dissolved, mere financial sanctions will not be as effective. A country that is fined €25,000 may also not feel as disadvantaged as a company who is fined 1,000,000.[187] This may create a feeling of disparity amongst different countries.

Quota legislation would also not work effectively in European counties that follow a two tiered board structure, such as Germany. There is an executive board where the control and power lies (2.6% of executive board members are women),[188] and a separate supervisory board (11.2% of supervisory board members are women).[189] While progress may be made in supervisory boards, executive boards may remain male dominated.[190]

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[180] Mark Lewis, 'Most of the women who make up Norway's 'golden skirts' are non-execs', *The Guardian* (online) 1 July 2011 <http://m.guardian.co.uk/business/2011/jul/01/norway-goldne-skirt-quota-boardroom>.
[181] Corporations and Markets Advisory Committee, above n 13, 49.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] European Women's Lobby, above n 56, 13.
[186] Ibid.
[187] Ibid 15.
[188] Ibid 16.
[189] Ibid.
[190] Ibid.

Another concern with the EU's approach in imposing quota legislation across member states is whether regulation would be imposed by the EU or whether it would occur at the national level. The EU Commission is of the view that different national laws could affect business transactions negatively amongst EU member states.[191] Given that EU member states have different views in relation to legislating quotas, any legislation requiring quotas could cut across countries powers to make decisions for their own state and become a constitutional concern. An attempt to legislate quotas across the EU will be met by resistance from certain countries.

2 *Voluntary codes*

(a) Strengths of self-regulation

Australia's form of self-regulation through compliance with the ASX Corporate Code Recommendations is a strong approach as discussed below.

In Norway, even though the number of women on boards has met the legislated quota of 40%, as at 2013, the participation of women has not grown beyond this. In Australia by contrast, board participation by women, in the absence of mandatory quota legislation, has risen steadily to 15.7% in 2013 in the last few years.

In a study by KPMG which looked at how the ASX Corporate Code diversity recommendations had been adopted, it was found that from a sample of 211 companies, 206 (98%) had reported that they had either established a diversity policy and the ones that had not, provided an explanation as to why not.[192] Companies such as Mirvac,[193] Telstra,[194] and Coca-Cola[195] are amongst the many companies that have diversity policies outlined in their annual reports and on their websites. In looking at the adoption by companies, Ms Jillian Segal, the non-executive director of ASX Limited stated 'the findings show that there is a strong commitment to report on gender diversity amongst the vast majority of listed companies'.[196]

By setting diversity policies in place, Australia's top listed companies would also be setting a strong example to the smaller companies, and perhaps influence them to do the same.

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[191] European Commission, *Women in economic decision-making in the EU: Progress report* (2012) <http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf>.
[192] KPMG, *ASX Corporate Governance Council Principles and Recommendations on Diversity* (2011) <http://www.asxgroup.com.au/media/asxz-diversity_report.pdf>.
[193] Mirvac, *Diversity Policy* <http://assets/mirvac.com>.
[194] Telstra, *Diversity and Inclusion* <http://www.telstra.com.au>.
[195] Danielle Bowling, *Coca-Cola signs up for Women's Empowerement* (11 March 2013) <http://www.foodmag.com.au/news/coca-cola-signs-up-for-women-s-empowerement>.
[196] Australian Stock Exchange, above n 27.

Working in tandem with the ASX Corporate Code Recommendations, other initiatives (discussed earlier in this paper) that Australia has undertaken through its AICD director's programs specifically tailored for women, the formation of the Male Champions of Change Group, Gender Equality Blueprint 2010, the Workplace Gender Act and the BoardLinks program implemented by the Australian Government, clearly demonstrate Australia's positive efforts and commitment to addressing the gender diversity issue.

Even though strict reporting deadlines such as that in the UK Code, are missing in the ASX Corporate Code Recommendations, the 'if not, why not' requirement poses an element of accountability on companies who have not complied with the recommendations.

In summary, companies ultimately like to run their own company. In the absence of mandatory quota legislation, companies will appreciate having the flexibility and autonomy in letting its shareholders select who goes on its boards, as well as in developing their own policies and procedures in relation to corporate governance.

(b) Weaknesses of self-regulation

Supporters of the quota approach may state that self-regulation in the form of a non binding voluntary code does not increase the participation of women on corporate boards, and may state that Australia's rise from 9.9% of women on corporate boards in 2009 to 15.7% in 2013, is at best, modest. Furthermore, critics may state that Australia's recommendations lack targets and deadlines. Similarly, the Finnish Code also sets an obligation to have males and females on its board but does not define the ratio.[197] An absence of ratios and deadlines may mean that such obligations are not going to be taken seriously. In relation to targets and deadlines specifically, the UK's approach is more appropriate as it requires the government to meet every six months and report on the progress of boards, annually.

Perhaps what will make the ASX Corporate Code Recommendations more effective is as per Lord Davies' recommendations, by involving a committee to regularly monitor gender diversity developments and reporting on it.

3 *Efforts in India*

The macro level of efforts of gender diversity has been discussed in the context of quotas versus voluntary codes of conduct. India has not been mentioned as progress there has been limited. The efforts surrounding the pending Bills that are intended to increase the participation of women on

[197] European Women's Lobby, above n 56, 16.

boards and government should not be undermined, however, India has traditionally battled with sexism and discrimination has affected Indian women on different levels, including, birth, education and personal safety. Therefore there are pivotal issues which the government needs to address, educate and raise awareness on first, which will ultimately have a positive effect on women's participation in the workforce. However, progress is taking place in India with more women gaining an education and entering the workforce. The pending Bills are also positive changes, which need to come into fruition for the benefit of Indian women.

In summary, the quota approach has certainly increased the participation of women on corporate boards of the countries who have legislated for it, but participation by women has not exceeded the targets. Australia's self regulation through a voluntary code on the other hand, has given companies an opportunity to become aware of the importance of gender diversity on corporate boards, and allowed them to develop policies and procedures in a flexible manner which is suited to them. Therefore the strengths of self-regulation outweigh the strengths of mandatory quota legislation. However if countries take advantage of the freedom that self-regulation offers them, and results are not delivered, mandatory quota legislation just may be implemented in the future.

IX CONCLUSION

This paper has aimed to demonstrate that although there is an obvious lack of women on corporate boards globally, diversity in general, and gender diversity in particular, is crucial for companies to implement in their boardrooms if they want to perform strongly in current economic markets. Diversity can bring about different ways of thinking and perspectives and can result in better decision making, greater innovation and higher corporate governance. Different countries have adopted different measures to improve gender relations on corporate boards including self-regulation by voluntary codes of conduct (Australia, UK and Germany) and mandatory quota legislation, which has resulted in higher numbers of female participation on corporate boards in the countries that have legislated it (Norway, France and Italy). While quota legislation delivers results, the quality of its results are questionable and its effectiveness needs to be considered in terms of the economic, political and social structures underpinning the particular country. It is concluded that voluntary codes of conduct are more desirable as it brings about awareness and gives companies the autonomy to implement their own policies and not just comply with legislation for the sake of it. Quotas should be the last resort when self-regulation over a period of time does not prove to be effective. Whichever method is desirable, one thing is for sure - improving diversity requires continuous efforts from investors, companies, regulators and policymakers.

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