

**The Merits and Effectiveness of Quotas vs Targets in the Gender Diversity Debate  
on Boards©**

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## **The Merits and Effectiveness of Quotas vs Targets in the Gender Diversity Debate on Boards.**

Much has been said and written, particularly recently, about the role of quotas and targets in the gender diversity debate on boards. A large proportion of this has focused on which method is more effective in increasing the number of women on boards and at what rate this should be occurring. This essay will explore the effectiveness of both quotas and targets, using the examples of Norway and Australia to illustrate this effectiveness and what ‘effectiveness’ actually means, before exploring the common issue of unconscious bias as a major detriment in the effectiveness of either measure adopted and the role it plays.

### **The case till now**

Even though there has been legislation in place for more than 40 years addressing the issue of equal opportunity in the workplace,<sup>1</sup> and the fact women are generally more highly educated than men,<sup>2</sup> there are still increasingly low levels of representation of women in senior levels of management, including the CEO and Board level.<sup>3</sup> This may seem surprising given that much has been done to address this, including affirmative action initiatives, the feminist movement of the 1970s and 80s<sup>4</sup> and the introduction of the *Workplace Gender Equality Act* in 2012.<sup>5</sup>

Indeed although a topic of debate in the corporate world, it was arguably not until the Global Financial Crisis and the collapse of several major corporations in the mid to late 2000s that really brought the issue of women on boards in particular to light. It was here that issues surrounding board structure and composition, as well as the independence of

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<sup>1</sup> Siri Terjesen, Ruth Sealy, and Val Singh ‘Women Directors on Corporate Boards: A Review and Research Agenda’ (2009) *Corporate Governance: An international review* 17(3) 321.

<sup>2</sup> Dr Jennifer Whelan and Professor Robert Wood, ‘Targets and Quotas for Women in Leadership: A Global Review of Policy, Practice and Psychological Research’ (2013) *Gender Equality Project*, Centre for Ethical Leadership 3 – 31.

<sup>3</sup> Australian Bureau of Statistics *Gender Indicators, Australia, Feb 2015*  
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4125.0main+features610Feb%202015>>

<sup>4</sup> ABC Radio National, ‘Leading by Example’, *Life Matters*, 21 April 2011 (Wendy McCarthy)  
<[http://mpegmedia.abc.net.au/rn/podcast/2012/01/lms\\_20120105\\_0905.mp3](http://mpegmedia.abc.net.au/rn/podcast/2012/01/lms_20120105_0905.mp3)>

<sup>5</sup> *Workplace Gender Equality Act 2012* (Cth)

board members came to the fore and diversity, particularly gender diversity, and its role at the board level, became a topic of heated discussion.

## Definitions and Framework

In much of the research, the terms ‘quota’ and ‘target’ appear to be used interchangeably. Certainly the word quota means ‘a proportional part or share of a fixed total amount quantity’<sup>6</sup> and comes from the Latin word *quota pars* meaning ‘how great a part?’ of which a target could also be seen. However the two are quite separate in their meaning and resulting outcome. Targets, as opposed to quotas, are seen as aspirational, voluntary based measures designed to reach a particular outcome. As such they will be treated as two quite separate concepts, although there are, as will be explained, common issues associated with both.

It should also be noted this essay will only focus on the gender debate of women on boards in the corporate sector as opposed to the political or Not for Profit arena. Historically female representation in these areas has always been higher<sup>7</sup> and there has been an even greater push recently, especially in political circles to increase the number of women on state governmental boards.<sup>8</sup>

The focus will also be on gender as a component of diversity, of which there are many aspects, including age, race and cultural background.<sup>9</sup> This is because gender can be seen as one of the most ‘obvious’ to focus on and has been the subject of the most debate.<sup>10</sup>

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<sup>6</sup> Macquarie Dictionary, <[https://www.macquariedictionary.com.au/features/word/search/?word=quota&search\\_word\\_type=Dictionary](https://www.macquariedictionary.com.au/features/word/search/?word=quota&search_word_type=Dictionary)>

<sup>7</sup> Workplace Gender Equality Agency, *Reflecting gender diversity: An Analysis of Gender Diversity in the Leadership of the Community Sector: Inaugural Survey results* (September 2012) <[https://www.wgea.gov.au/sites/default/files/YWCA\\_2012\\_Gender\\_Diversity\\_in\\_Leadershipship\\_NFP\\_Boards\\_tag.pdf](https://www.wgea.gov.au/sites/default/files/YWCA_2012_Gender_Diversity_in_Leadershipship_NFP_Boards_tag.pdf)>

<sup>8</sup> Steve Lillebuen, ‘Andrews Commits to Appointing Women to Half of All Legal and Government Board Positions’ *The Age* (Melbourne) 28 March 2015 <<http://www.theage.com.au/victoria/andrews-commits-to-appointing-women-to-half-of-all-senior-legal-and-government-board-positions-20150328-1m9thf.html>>

<sup>9</sup> Productivity Commission, ‘Attracting Talented and Experienced Candidates’ *Executive Remuneration in Australia* January 2010, S6.2, 140 - 167

<sup>10</sup> Corporations and Market Advisory Committee, *Diversity on Boards of Directors* 23

## Arguments for quotas

### Quotas can achieve structural equality

Mandating quotas for female representation on boards can be a way of breaking structural inequalities that exist within corporations.<sup>11</sup> Setting quotas not only achieves the desired outcome of having a certain number of women on the board, it has far wider reaching implications. It can allow for ‘critical mass’ to be achieved which in turn allows for a break down in the power structures and domination that has been beholden to a particular group, in this case men and the ‘old boys club’.<sup>12</sup>

As Kogut, Colomer and Belinky (2013) point out, traditionally there has been a tendency for male directors to recruit other male directors onto boards, through a ‘like attracts like’, or homophily,<sup>13</sup> also known as Social Identity theory or Similar Attraction Theory.<sup>14</sup> Men use their networks and social clubs to find other male directors whom they feel would be a ‘good fit’. On the other hand women have generally been recruited onto boards in a token response to increasing social and external pressures to have female representation to some degree on boards.<sup>15</sup> This ‘tokenism’ however does nothing to encourage the recruitment of more women, nor does it break down the structures needed to have an impact at the board level, as there is still a dependency on the dominant decision making group.

As a result of such few women on boards, female directors also tend to hold multi directorships.<sup>16</sup> Kogut, Colomer and Belinky (2013) cite the example that out of a group of 90 directors, if there is 1 female to every 9 men, a woman may hold directorships on 9 boards, whereas a man may hold just the one. It has also been found that as these one

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<sup>11</sup> Bruce Kogut, Jordi Colomer and Mariano Belinky ‘Structural Equality at the top of the corporation: Mandated quotas for women directors’ (2014) *Strategic Management Journal* 35, 892

<sup>12</sup> Ibid

<sup>13</sup> Ibid 894

<sup>14</sup> Terjesen, Sealy and Singh above n 1, 324

<sup>15</sup> Jean du Plessis, James O’Sullivan and Ruth Rentschler ‘Multiple layers of gender diversity on corporate boards: to force or not to force?’ (2014) *Deakin Law Review* 19(1) 5

<sup>16</sup> In one case in Norway, a woman was cited as having held 79 directorships.

or two women leave the board, there is a tendency to replace these outgoing female directors with other women. This in itself has not lead to a gender neutral policy.<sup>17</sup>

Quotas are seen as a way of breaking this, to allow for an increase in connectivity and ‘clustering’ of female directors. The aim is to have this self-organization and mobilization occur even after a quota has been removed. In a study conducted by Kogut, Colomer and Belinky (2013), simulated data was used to predict when critical mass would be achieved if quotas were placed on firms in the United States. In conducting the study, the researches paired the United States with Norway where gender quotas for boards have been used successfully.<sup>18</sup>

The researchers wanted to know when critical mass would be achieved and self regulation and organization would take place and structural equality would be achieved. For the United States, they found that this would be achieved at 20% female representation or higher. The results showed any lower percentage than this and there was either no change, or very little. 10% representation for example was seen to produce little change.<sup>19</sup>

However, as the authors note, and as will be discussed later, simply having quotas in place may change the structural equality issue, but it does not necessarily change beliefs and attitudes.<sup>20</sup> There has been evidence to the contrary however that this may occur with the use of political quotas. A study conducted in Indian Villages where political quotas were put in place showed that women who were put into political leadership roles had opinions about their capabilities change, but opinions on male leaders stayed relatively the same.<sup>21</sup>

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<sup>17</sup> Kogut, Colomer and Belinky above n 11, 894

<sup>18</sup> Ibid 893

<sup>19</sup> Ibid 900

<sup>20</sup> Ibid

<sup>21</sup> Lori Beaman, Raghavendra Chattopadhyay, Esther Duflo, Rohini Pande and Petia Topalova ‘Powerful women: Does exposure remove bias?’ (2009) *Quarterly Journal of Economics* 124, 1497

## Quotas achieve results faster

One of the main arguments that proponents of quotas state is that voluntary aspirational targets are not achieving the desired effect and that change has not occurred fast enough.<sup>22</sup> As Sam Mostyn the Australian Football League's (AFL) first female commissioner says, there needs to be a 'circuit breaker'<sup>23</sup> and the rate of change has not been quick enough.<sup>24</sup> Lord Davis reported in his 2011 report that at the pace being seen, it would take 70 years to reach a gender balance on boards<sup>25</sup> and in fact Richard Branson himself is on record as saying men "can't be trusted" to get equality on boards right.<sup>26</sup>

## Norway: A Case in Point

Norway appears to have achieved quota 'nirvana' as the first country in the world to reach 40% representation of women on boards.<sup>27</sup> With only 7% of female board directors women at the time of introduction in 2003,<sup>28</sup> female board directorship increased from 9% in 2004, to 12% in 2005, 18% in 2006, 25% in 2007, 36% in 2008 when the law was to have taken full affect, to the desired 40% in 2009.<sup>29</sup> Therefore in the space of 6 years, the quota had been achieved. This is in comparison to other countries around the world that have had much slower rates of change through the use

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<sup>22</sup> Alison Maitland 'Don't Ask, Tell!' *Conference Board Review*. Summer 2010, 47(4) 68

<sup>23</sup> Sam Motsyn in *Women in Leadership. Engaging Australian Business*  
[http://www.ey.com/Publication/vwLUAssets/Women\\_in\\_leadership\\_Engaging\\_Australian\\_business/\\$FILE/WomeninLeadership.pdf](http://www.ey.com/Publication/vwLUAssets/Women_in_leadership_Engaging_Australian_business/$FILE/WomeninLeadership.pdf).

<sup>24</sup> Australian Council Superannuation Investors 'ACSI sets 2017 goal for 30% women on boards' (media release, 5 February 2015).

<sup>25</sup> Lord Davis, 'Women on Boards' (2011)  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31480/11-745-women-on-boards.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf)

<sup>26</sup> James Thomson (ed) BRW 'Branson Backs Board Quotas for Women' (9 May 2013)  
[http://www.brw.com.au/p/leadership/branson\\_backs\\_board\\_quotas\\_for\\_women\\_bqUQFXpXuSWbY92cniOKN](http://www.brw.com.au/p/leadership/branson_backs_board_quotas_for_women_bqUQFXpXuSWbY92cniOKN)

<sup>27</sup> Plessis, O'Sullivan and Rentschler as above n 15, 14

<sup>28</sup> J. F. Corkery and Madeline Taylor 'The Gender Gap: A quota for Women on the Board' (2012) *Corporate Governance eJournal* <<http://epublications.bond.edu.au/cgej/27>>

<sup>29</sup> Mari Teigen 'Gender Quotas for Corporate Boards in Norway: Innovative Gender Equality Policy' in Colette Fagan, Maria Gonzalez Menendez and Silvia Gomez Anson (eds), *Women on Corporate Boards and in Top Management: European Trends and Policy* (Palgrave MacMillan, 2012) 74

of voluntary and aspirational targets. This is explored further under the section of 'Targets'.

Although there had been widespread representation of women in political boards and positions across the world,<sup>30</sup> Norway was the first country to introduce a quota of 40% specifically for the corporate sector.<sup>31</sup> That being the 40:40:20 rule, with 40% of board positions needing to be that of women, with 40% of the other gender and 20% of either gender.<sup>32</sup> The sanction for not abiding by this is dissolution of the board and the threat of de listing.<sup>33</sup>

Originally designed to be for state owned organizations and inter municipal companies, which came into effect in 2004,<sup>34</sup> it was extended to all newly publically listed entities in 2006. All existing publically listed companies had until 2008 to comply with the quota and more recently, 2009 saw the quota take effect for municipal and cooperative companies as well. Boards that once had no female representation at all now had almost parity, including major companies such as Telenor and Statoil, Norway's largest company.<sup>35</sup>

Under the Norwegian *Public Limited Liability Companies Act (2005)*, article 6-11a, it states under *Demand for Representation of both genders on the board* that the board must be comprised of:<sup>36</sup>

1. Where there are two or three members of the Board, both genders should be represented.
2. Where there are four or five members of the board, both genders should be represented with at least two members.

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<sup>30</sup> Kogut, Colomer and Belinky above n 11, 891.

<sup>31</sup> Barnali Choudhury 'Gender Diversity on Boards: Beyond Quotas' (2014), *European Law Review* 2015 Forthcoming, 236 <<http://ssrn.com/abstract=2442040>>

<sup>32</sup> Plessis, O'Sullivan and Rentschler as above n 15, 15

<sup>33</sup> Corkery and Taylor as above n 29, 8

<sup>34</sup> Mari Teigen 'Gender Quotas for Corporate Boards in Norway: Innovative Gender Equality Policy' in Colette Fagan, Maria Gonzalez Menendez and Silvia Gomez Anson (eds), *Women on Corporate Boards and in Top Management: European Trends and Policy* (Palgrave MacMillan, 2012) 70 - 90

<sup>35</sup> <http://theconversation.com/lessons-from-norway-in-getting-women-onto-corporate-boards-38338>

<sup>36</sup> Teigen as above n 35, 71

3. Where there are six to eight members of the board both genders should be represented with at least three members.
4. Where there are nine or more members of the board, the membership should comprise at least 40 per cent of men and 40 per cent of women.

Interestingly, at the time of introduction, Norway had very similar rates of female board directorships as many other countries at the time, including Australia.<sup>37</sup> Unlike those western countries though and in keeping with other Scandinavian countries, Norway has and still does, a deeply embedded sense of gender equality and fairness.<sup>38</sup> This is witnessed in the wide ranging measures that have been put in place across a broad spectrum, including measures to increase minimum representation in areas from education through to employment and even into family life.<sup>39</sup> At the time therefore not having the same equity in the corporate world appeared to be, as Teigen (2014) described it a gender ‘paradox’.<sup>40</sup>

Norway introduced the quota after a study known as the Norwegian Power and Democracy showed measures that were meant to be addressing inequalities in top management positions were not having the desired effect. That, along with the low numbers of women in these positions, spurred the legislation to be put in place.<sup>41</sup>

Ironically the quota legislation was introduced into parliament by a Neo Liberal government, whilst its counterpart Sweden, who were a Socio – Democratic party and one that would have been expected to introduce such legislation, did not.<sup>42</sup> Sweden still has no mandated legislative quota. Interestingly on this Sweden, through its own initiatives has achieved 27.6% of its board positions represented by women.<sup>43</sup>

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<sup>37</sup> Australian Bureau of Statistics, as above n 3

<sup>38</sup> Ibid 75

<sup>39</sup> Ibid

<sup>40</sup> Ibid 70

<sup>41</sup> Ibid 77

<sup>42</sup> Vibeke Heidenreich. ‘Chapter 5 Why Gender Quotas in Company Boards in Norway – and Not in Sweden?’ In *Firms, Boards and Gender Quotas: Comparative Perspectives*. (Published online) 9 March 2015; 147-183 [http://dx.doi.org/10.1108/S0195-6310\(2012\)0000029009](http://dx.doi.org/10.1108/S0195-6310(2012)0000029009)

<sup>43</sup> European Commission, ‘Gender Balance on Corporate Boards: Europe is cracking the glass ceiling’ (January 2015) [http://ec.europa.eu/justice/gender-equality/files/womenonboards/wob-factsheet\\_2015-01\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/womenonboards/wob-factsheet_2015-01_en.pdf)

The successful implementation of the legislation however was also through the initiative that was taken ironically in response to try and stop the legislation from being passed, and that was the Female Future program.<sup>44</sup> Designed to encourage female participation on boards, the program is still being run.<sup>45</sup>

The success of the quota legislation in Norway spread to other countries, with Finland and Iceland following suit with imposed quota legislation.<sup>46</sup> Other countries also followed with Spain introducing quotas in 2007 with 40% to be achieved by 2015,<sup>47</sup> and France in 2011, with legislation that there was to be 40% board representation by 2016.<sup>48</sup> This saw board positions rise in Europe by 1.2%, up from 0.6% in the previous decade. In fact France went from 8% in 2007 to 20% in 2012. Likewise in the Netherlands legislated quotas saw an increase from 7% of women on boards to 19%.<sup>49</sup>

### **How effective is effective?**

So how effective has the quota system been in Norway? It depends on the perspective taken. If the argument of effectiveness is taken to mean in terms of achieving a certain number of women at the board room table, then most certainly Norway is the shining ‘beacon of hope’ that this can occur. However, evidence has shown that higher levels of representation at the Board level have done nothing for women in executive positions lower down the rungs of the proverbial managerial ladder, nor has there been real cultural change.<sup>50</sup>

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<sup>44</sup> Teigen, as above n 35, 77

<sup>45</sup> Female Future <<https://www.nho.no/siteassets/nhos-filer-og-bilder/filer-og-dokumenter/female-future/femalefuture-english-web.pdf>>

<sup>46</sup> Terjesen, Sealy, Singh above n 1, 322

<sup>47</sup> Ibid

<sup>48</sup> Rohini Pande and Deanna Ford, ‘Gender Quotas and Female Leadership: A Review’ (Background Paper for the World Development Report on Gender, 9 April 2011) 10

<sup>49</sup> Corkery and Taylor, as above n 29, 7

<sup>50</sup> Marianne Bertrand, Sandra Black, Sissel Jensen and Adriana Lleras – Muney, ‘Breaking the Glass Ceiling? The Effect of Board Quotas on Female Labour Market Outcomes in Norway’, (National Bureau of Economic Research, Working Paper no. 20256, June 2014) <[http://faculty.chicagobooth.edu/marianne.bertrand/research/papers/Paper\\_and%20Tables\\_5\\_29\\_2014.pdf](http://faculty.chicagobooth.edu/marianne.bertrand/research/papers/Paper_and%20Tables_5_29_2014.pdf)>

A study conducted in 2009, a year after the full effect of the quota had taken place and the desired 40% target had been achieved, it was found that there was still male domination in leadership roles, with only 3 CEOs of the publically listed companies in Norway, which accounted for less than 1%.<sup>51</sup> This had risen to just 2% in 2012.<sup>52</sup> This is lower than statistics coming out of Australia and the United States which have a greater percentage of CEOs of publically listed companies.<sup>53</sup>

Research conducted in 2011 also showed there had been no change in the number of female chairmen, which was still at 5%, nor in the number of women in senior executive positions, also still at less than 10%.<sup>54</sup> There have also been no changes in recruitment practices, and on average female Directors were holding multi directorships of between 25 – 35 board directorships.<sup>55</sup>

Adding to this was the fact that many of the new board members recruited onto the board that were women were far less experienced than their male counterparts.<sup>56</sup>

Researchers believe this accounted for the loss in share price for those companies once the quota was put in place.<sup>57</sup> In fact the median profitability of firms decreased by more than 20%.<sup>58</sup> They also found that firms suffered a decrease of 2.6% of the firm's value after the law came into effect and companies that had no women at all on the board suffered an even greater loss of 5%, arguably because it was seen by the market that these companies would have to do even more work to comply with the laws.<sup>59</sup>

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<sup>51</sup> Teigen, as above n 35, 73

<sup>52</sup> Corkery and Taylor as above n 29, 8

<sup>53</sup> Deakin Law School 'Do We Need Mandatory Gender Quota Legislation?' 20 November 2014 <<http://www.deakin.edu.au/buslaw/news/icgl-forum-do-we-need-mandatory-gender-quota-legislation-for-boards>>

<sup>54</sup> ABC Radio National, 'Tomorrow's Boards', *Life Matters*, 9 August 2011 (Anthea McIntyre) <[http://mpegmedia.abc.net.au/rn/podcast/2011/08/lms\\_20110809\\_0905.mp3](http://mpegmedia.abc.net.au/rn/podcast/2011/08/lms_20110809_0905.mp3)>

<sup>55</sup> *Ibid.*

<sup>56</sup> Corkery and Taylor as above n 29

<sup>57</sup> Dr Jennifer Whelan and Professor Robert Wood, 'Targets and Quotas for Women in Leadership: A Global Review of Policy, Practice and Psychological Research' (2012) *Gender Equality Project*, Centre for Ethical Leadership, 24

<sup>58</sup> David Matsa and Amalia Miller (2013) 'A Female Style in Corporate Leadership? Evidence from Quotas' *American Economic Journal: Applied Economics* 2-13, 5 (3): 144

<sup>59</sup> Whelan and Wood as above n 55, 24

On a positive note, studies conducted later in 2011 found that as long as women were treated as equals, there was an improvement in board decision making<sup>60</sup> and an earlier study in 2006 found organizational innovation improved.<sup>61</sup>

The effectiveness of having reached the quota appears to only have occurred due to the strictness of the sanctions that have been imposed. In other countries, such as France and Spain even with the legislated mandate that has been put in place, these levels of effectiveness have not been achieved.<sup>62</sup> An ISS Governance Report<sup>63</sup> from September last year however showed countries were struggling to comply with the legislation, with France at 26% being one of the only countries that comes close to this, with the threat of dissolving board appointments if the quota is not met.<sup>64</sup>

It appears the sanctions in Norway had to be this way. When Norway first introduced the idea, there was wide spread backlash with concerns coming from two different angles; one being that it was considered an over step of political power (an argument very much still a concern to those countries that have not put in place quotas), and the other that there was simply not enough qualified women to fill the positions.<sup>65</sup> The numbers reflected this. As many as 23% of Norway's publically listed companies either exited or moved off shore to list on the London stock exchange, which saw a fourfold rise in the number of Norwegian companies listing, far greater than any other Scandinavian country.<sup>66</sup>

### **Germany: A case of 'follow the leader'**

This argument, that quotas means that there will be access to the available resources of women in a more rapid way was seen as one of the major reasons why Germany recently introduced legislation that by 2016, 30% of directors on company boards must

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<sup>60</sup> Morton Huse, *Women in Charge Means More Innovation* (7 February 2011)

<sup>61</sup> Ibid

<sup>62</sup> Edward Kamonjoh, *Gender Diversity on Boards: A Review of Global Trends* (25 September 2014) <<http://www.issgovernance.com/file/publications/2014-iss-global-board-diversity-report.pdf>>

<sup>63</sup> Ibid

<sup>64</sup> Ibid

<sup>65</sup> Kimberly Weisul, *Women on Boards: Are Quotas Really the Answer?* (5 December 2014) <<http://fortune.com/2014/12/05/women-on-boards-quotas/>>

<sup>66</sup> Kogut, Colomer and Belinky above n 11, 893.

be women, or if not the seat must be held vacant until it is filled by a woman.<sup>67</sup> As at the end of last year, out of the 114 listed companies, 22% of board positions were held by women, with only 6% of those on management boards.<sup>68</sup>

The German Chancellor Angela Merkel, has gone on the record saying “this is an important step for equality because it will initiative cultural change”.<sup>69</sup> It depends on what the Chancellor means by ‘cultural change’. If the change she may be referring to is that of increasing women’s representation in senior levels of management, then arguably this has a small chance of success if Norway is the example. The Chancellor also said “we can’t afford to do without the skills of women”.<sup>70</sup> That is an argument, as it will be seen in this paper that is well founded.

The move has not been a popular one with major companies such as BMW coming out and saying “we want to strive for diversity in our workforce in terms of gender, ethnicity and age”. They comment they have set their own goals and will manage this by the 2015 deadline.<sup>71</sup>

### **Quotas bring about greater economic benefits**

Proponents of quotas say it is not just about the numbers and the achievement of these, nor is it just a social justice<sup>72</sup> and equal opportunity issue. There is a good business case behind it too. One of the arguments for quotas often cited is that by not having quotas, firms are missing out on the economic and social benefits that having quotas gives firms more immediate access to.<sup>73</sup>

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<sup>67</sup> Weisul as above n 62

<sup>68</sup> Ibid

<sup>69</sup> Ibid

<sup>70</sup> Ibid

<sup>71</sup> Maya Rhodan, *BMW Hits Back at Germany’s Female Board Quota Plan* (26 November 2014) <<http://time.com/3608063/germany-business-merkel-bmw/>>

<sup>72</sup> Choudhury as above n 32, 232

<sup>73</sup> Elizabeth Broderick, ‘The State of Gender Equality in Australia on International Women’s Day: What More Needs to Happen?’ (speech delivered at NT Anti Discrimination Commission International Women’s Day Centenary Dinner, 12 March 2011)

<<https://www.humanrights.gov.au/news/speeches/state-gender-equality-australia>>

In actuality, there is mixed evidence in relation to the impact that diversity has at the board level. It is a difficult area to measure due to the nature of the different factors and influences<sup>74</sup> that are at stake, including the concept of reverse causation<sup>75</sup>. Reverse causation looks at the reason boards are performing well might not be correlated to the fact they have appointed women onto their boards, but rather they were already high performing and as such appointed women.<sup>76</sup> It has been shown in some studies that having diversity improves decision making and group thinking,<sup>77</sup> by reducing the phenomenon of ‘group think’<sup>78</sup> yet in other studies it has shown gender and racial diversity can cause greater conflict in smaller groups.<sup>79</sup>

What has been found however is the marked difference women on boards can make to Corporate Social Responsibility Programs. A study out of the Harvard Business School in 2007 showed that those companies that had three or more women on their boards made 28% more in donations than those without, a contribution over a ten year period which equated to \$2.3m per female board member.<sup>80</sup> Women are also seen as more risk averse, which would go to the third principle in the ASX recommendations of ‘ethical and responsible decision making’,<sup>81</sup> many of which believe would have circumnavigated the impact of the Global Financial Crisis.<sup>82</sup>

In regards to financial performance past studies have shown mixed evidence. Studies done at points in time have indicated an improvement in stock value and profitability,<sup>83</sup> however other studies have shown over a longer period of time the effect is either neutral or in some cases negative or elusive.<sup>84</sup> Credit Suisse reported in 2012 that having at least one woman on the board saw companies with ‘higher average returns on

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<sup>74</sup> Renee Adams and Daniel Ferreira ‘Women in the Boardroom and their impact on governance and performance’ *Journal of Financial Economics* 94 (2009) 308

<sup>75</sup> Plessis, O’Sullivan and Rentschler, as above n 15, 2

<sup>76</sup> Frank Dobbin, and Jiwook Jung, ‘Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?’, (2011) *North Carolina Law Review*, 89, 809

<sup>77</sup> Ibid

<sup>78</sup> Corkery and Taylor, as above n 29, 3

<sup>79</sup> Dobbin and Jung as above n 72, 812

<sup>80</sup> Corkery and Taylor, as above n 29, 3

<sup>81</sup> Ibid

<sup>82</sup> Ibid

<sup>83</sup> Whelan and Wood as above n 55, 24

<sup>84</sup> Dobbin and Jung as above n 72, 810,

equity’, citing that of those boards where there were women had an average return of 16%, whereas those that did not had only 12%.<sup>85</sup>

More recent data has shown that those companies that have 25% as a minimum number of women on their boards, run at 7% higher performance wise than their counterparts.<sup>86</sup> So buoyed by this, the Centre for Gender Economics and Innovation and partnered with Infinitas Asset Management to devise a performance index for those companies that do have 25% as a minimum number of women on their boards, in order to track performance for investors.<sup>87</sup> Investors appear to be calling for greater diversity.<sup>88</sup>

Although often cited as a reason for the implementation of quotas, as Adams and Ferreira (2009) says, this in itself does not lead to the argument for quotas,<sup>89</sup> but rather as evidence for more women being on the board.

## **Arguments against the use of Quotas**

### **Political ‘interference’**

This brings up the issue of how involved government and public policy should be in the workings of private enterprise. How far should government interfere with what is considered a social justice as well as an economic and business driven argument? One of the main contentions put forward by the business community, is that this interference is against corporate government principles.<sup>90</sup> Whereas in the political arena the government is the sole shareholder, in the private sector it is ultimately shareholders who should have the right to decide who represents them.<sup>91</sup>

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<sup>85</sup> Credit Suisse, *Gender Diversity and Corporate Performance* (August 2012)

<sup>86</sup> ‘Infinitas Asset Management and Centre for Gender Economics & Innovation Launch Diversity Index’ (Media Release 2015) <<http://centreforgendereconomics.org/wp-content/uploads/2015/04/Gender-Diversity-Index-Media-Release-20150423.pdf>>

<sup>87</sup> Ibid

<sup>88</sup> Governance Institute of Australia, *Boardroom Gender Balance*, (7 October 2014) <<http://www.governanceinstitute.com.au/news-media/news/2014/oct/boardroom-gender-balance/>>

<sup>89</sup> Adams and Ferreira as above n 70, 283

<sup>90</sup> Katherine Watson, The Conversation *Daniel Andrews, Board Quotas and the Myth of Insufficient Women* <<http://theconversation.com/daniel-andrews-board-quotas-and-the-myth-of-insufficient-women-39501>>

<sup>91</sup> Diversity on Boards as above n 10

## Quotas are Anti Meritocratic

One of the main objections to having quotas in place and one that is fiercely contested, including by women, is that quotas are seen as anti-meritocratic; the idea being that those who are appointed to board positions because of their gender and not skill set will have negative impacts and lessen the strength of corporate governance.<sup>92</sup>

Certainly data that has been gained from the experience in Norway was that in order to comply, there was a fair amount of ‘window dressing’ that took place and that many women were vastly less experienced than their male counterparts.<sup>93</sup> Research conducted by Dittmar and Arhene (2011) out of the University of Michigan found that in order to comply with the legislation, women appointed to the Boards were on average 8 years younger, had half the CEO experience as their male counterparts and were more educated than those that were hired prior to the law coming into effect.<sup>94</sup> It is this loss of experience that Dittmar and Arhene (2011) believe caused the drop in firm price and not the fact that it was women that were appointed to the board.<sup>95</sup>

Other evidence has shown that those appointed to board position have no less merit than others,<sup>96</sup> and argue saying quotas are anti meritocratic is oversimplifying the argument. The idea is that just because there is a mandate that a certain number of women have to be in board positions does not mean these women will be promoted with any less qualifications or are any less suitable than a male candidate.<sup>97</sup> Similarly when looking at attitudes towards women, even though the perception may be the case that these women are not as qualified, the evidence does not support this.<sup>98</sup> For many the concern is that the merit debate is misguided, as ‘merit’ would suggest there is an even playing field to begin with.<sup>99</sup> As this essay will explore later, this can be far from the case.

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<sup>92</sup> Whelan and Wood as above n 55, 9

<sup>93</sup> Ibid 22

<sup>94</sup> Ibid 24

<sup>95</sup> Ibid

<sup>96</sup> Ibid

<sup>97</sup> Gender Worx, *Quotas and the Merit Myth*, <<http://www.genderworx.com.au/quotas-and-the-merit-myth/>>

<sup>98</sup> Whelan and Wood as above n 55, 24

<sup>99</sup> Jennifer Whelan *The Myth of Merit and Unconscious Bias* (17 October 2013) <<http://theconversation.com/the-myth-of-merit-and-unconscious-bias-18876>>

## Entrenched formal equality

Having quotas can also set up and entrench the idea of formal equality, that is equality for almost the sake of equality; that men and women should be treated the same, regardless of any natural differences (such as the fact women can have children and men cannot), an ideology that is seen in our formal legal system and seen to underpin equal opportunity legislation.<sup>100</sup> There have been steps to rectify this however at a state level, particularly here in Victoria with the *Charter of Human Rights and Responsibilities Act*<sup>101</sup> and other legislation that focuses on encouraging systemic change, such as the Victorian *Equal Opportunity Act*<sup>102</sup> which has a positive duty on employers to actively monitor the environment for any harassment or discrimination that may be occurring.<sup>103</sup>

## Quotas actually make it harder for women

Ironically having quotas in place when it comes to selection and hiring practices of women to roles such as leadership positions might be making it actually harder for women once they get there.

In their paper, Whelan and Wood (2012) say that although there is no direct research that has been done as to whether women find it hard to be accepted in their roles if they have been put there by a quota or target, there is a large body of evidence and research that has been done into the affects and perceptions of both those that are seen as the beneficiaries and those that are not of selection and hiring practices under affirmative action.<sup>104</sup> Studies have shown that, in many cases, a negative reaction and stereotyping is a result.<sup>105</sup>

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<sup>100</sup> Reg Graycar and Jenny Morgan, 'Thinking about equality' (2004) *University of New South Wales Law Review* 10 (2) 5

<sup>101</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic)

<sup>102</sup> *Equal Opportunity Act 2010* (Vic)

<sup>103</sup> *Ibid* s15

<sup>104</sup> Whelan and Wood as above n 55, 22

<sup>105</sup> Dobbin and Jung as above n 72, 816

This has been the finding of a large body of research conducted by Heilman (2006), stemming back from the early 1980s and into the 2000s which have shown that women who are hired and selected based on their gender are seen as less competent, less deserving, less legitimate and less able to do the role.<sup>106</sup> This is even when there is clear evidence to show that these women do have the skills sets and qualifications to perform in the role. This perception is particularly for roles that tend to be male dominated.<sup>107</sup>

Women themselves have a negative self-perception that they are less deserving and less capable than their male counterparts if they have been hired using a criteria such as gender rather than through a merit based system.<sup>108</sup> Even if they were not told this was the criteria used but still had the perception this might be the case they felt marginalized and less able to perform the role.<sup>109</sup> This affect, known as the Stereotype Threat,<sup>110</sup> has shown those that believed they were hired because of a particular attribute associated with their minority status, such as gender, led to negative stereotyping that indeed appeared to ‘play out’. For example, performance levels in leadership roles held by women who were suffering from this belief was lower than their male counterparts.<sup>111</sup>

### **Women don’t want them**

Women have spoken out about how they do not want to be selected based on a quota. A case in point is a recent Fortescue Metal scholarship winner Julie Shuttleworth, General Manager of the Solomon Mine.<sup>112</sup> She is on the record as saying "I think it would be awful to be woman on board knowing you're there because of a quota. It's important that women are selected because of value they bring to the organization".<sup>113</sup>

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<sup>106</sup> Whelan as above n 55, 22

<sup>107</sup> Ibid

<sup>108</sup> Ibid

<sup>109</sup> Ibid

<sup>110</sup> Plessis, O’Sullivan and Rentschler as above n 15, 5

<sup>111</sup> Claude Steel and Joshua Aronson ‘Stereotype threat and the intellectual performance of African Americans’ *Journal of Personality and Social Psychology* 69, 797

<sup>112</sup> Nassim Khadem, ‘Rising Star Rejects Quota Promotion’ *The Age* (Melbourne), 27 May 2015

<sup>113</sup> Ibid

### **Quotas can create additional pressure**

If there is a quota in place, it may put those on the recruiting committee or panel under more pressure to put someone forward on the basis of their gender rather than skills or merit. This may be very conscious or unconscious however the pressure to recruit a certain number of women may greatly impact their ability to make an objective decision. If a woman is involved in that process, particularly if one is already on the board, it may also encourage a ‘similar to me’ type process. Training is needed as to how to put those biases to one side.<sup>114</sup>

### **The alternative: Targets**

Whereas quotas are seen to be ‘push’ methods of compliance, targets are seen to be a ‘pull’ method.<sup>115</sup> As it can be seen in Norway, this ‘push’ method, with the fear of dissolution of the board if the quota is not met, has been very effective. Fear can be highly motivational, however as the case in Norway has shown, it has done arguably little to address the deeper issues involved in the debate, mainly around mindset and attitudes. Although this is a common issue, and one which will be discussed later in this paper, targets, as ‘pull’ methods, supported by other initiatives, are seen as the better solution in the hope of realizing longer lasting and effective change.

### **‘Pull’ methods are more effective**

As a general principle using ‘pull’ methods in the areas of corporate governance have been shown to more effective in instigating change rather than laws.<sup>116</sup> In a report issued by the Financial Reporting Council in the UK, one of the dangers of using compliance and rule based methods listed is that they can become a ‘box ticking exercise’ for companies and lead to shorter term thinking rather than a focus on more strategic, forward thinking.<sup>117</sup> One of the greatest examples of a pull method, as

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<sup>114</sup> Karen Morley, ‘Getting to grip with unconscious bias’ (Working paper no.3, GenderWorx) 5

<sup>115</sup> Whelan and Wood as above n 55, 10

<sup>116</sup> Financial Reporting Council (UK) *Response to the European Commission Green Paper on the EU Corporate Governance Framework*, July 2011 31

<sup>117</sup> *Ibid* 34

opposed to a law is through the use of codes. Codes have had large measures of success in changing behavior in a number of areas of corporate governance and allow for greater flexibility and adaptation to the needs of the business.<sup>118</sup> The case has been no different for gender diversity here in Australia.

### **Australia: A Case in Point**

Like many other countries in the world, Australia has had a bleak past when it comes to the number of women in board positions and in senior levels within organisations. The number of female CEOs in Australia as at November last year sits at 3.5%, with 18.2% of women board members in ASX 200.<sup>119</sup> Statistics given by the Australian Government Equal Opportunity Workplace Agency (now known as the Workplace Gender Equality Agency) Census from 2010 showed that during the period of 2002 – 2010, there was only a 0.2% increase in the number of female board directors.<sup>120</sup>

Like other parts of the world, Australia was not immune to the effects of the Global Financial Crisis and the collapse of major corporations had ripple effects to all parts of the globe.<sup>121</sup> It was partly in response to this that the ASX introduced its ‘Best Practice Recommendations for Good Governance’ in 2009 to address issues of board responsibility and composition. Principle 2 is about ‘structuring the board to add value’ and that this should be a board ‘of an appropriate size, composition, skills and commitment to discharge its duties effectively’.<sup>122</sup>

Recommendation 1.5 states the listed entity should have a “diversity policy which includes requirements by the board... to set measurable objectives for achieving gender diversity”.<sup>123</sup> In their commentary the ASX state the diversity policy itself is unlikely to be successful unless there are appropriate and meaningful targets set, guidance for

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<sup>118</sup> Ibid 31

<sup>119</sup> Deakin Law School as above n 52

<sup>120</sup> Australian Bureau of Statistics, as above n 3

<sup>121</sup> European Commission High Level Group on Financial Supervision in the EU, *Report*, (25 February 2009) 11

<sup>122</sup> Australian Securities Exchange *Corporate Governance Council Corporate Governance Principles and Recommendations* 3<sup>rd</sup> Edition 2014

<sup>123</sup> Ibid

which can be taken from the Gender Equality Agency and their ‘equality indicators’.<sup>124</sup> They can include targets for women in senior roles within the organization and on the board within specific timeframes.<sup>125</sup> Although not a regulation, the ASX have taken a ‘if not, why not’ approach to businesses and their obligations to comply.<sup>126</sup>

The guidelines, along with initiatives such as the Australian Institute of Company Directors or AICD introduced 12 month mentoring program, have proved successful.<sup>127</sup> When they were first introduced in 2009, women comprised just 5% of all new board appointments, however by the next year this had increased to 27% of all new appointments.<sup>128</sup> The numbers of women on boards in the ASX 200 rose from 8.3% in 2009, to 12.7% in 2011<sup>129</sup> to 20% today in 2015,<sup>130</sup> and with the recent addition by Ramsay Health Care of two women to their board there is now only company in in top ASX 50 with no female directors.<sup>131</sup>

### Further evidence for targets

It is of no surprise that these voluntary targets have worked. Research has shown that targets, when set as being specific, measurable and time bound, with effective monitoring and feedback mechanisms in place, unequivocally lead to performance outcomes.<sup>132</sup> As the adage goes, ‘what gets measured gets done.’<sup>133</sup> The evidence is even greater for those goals that are set as challenging or stretch goals. As Whelan and Wood (2012) note,<sup>134</sup> although there has been no research as such that looks at the

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<sup>124</sup> Ibid

<sup>125</sup> Ibid

<sup>126</sup> Ibid

<sup>127</sup> ABC Radio National as above n 53

<sup>128</sup> Whelan and Wood as above n 55

<sup>129</sup> ABC Radio National as above n 53

<sup>130</sup> ABC Radio National, ‘Thirty Per Cent Club Launches in Australia in a Bid to Boost Female Numbers on Boards on RN Breakfast, *RN Breakfast* 5 May 2015 (Patricia Cross) <<http://www.abc.net.au/radio/programitem/pgJrGaja56?play=true>>

<sup>131</sup> Australian Institute of Company Directors ‘Ramsay Health Care’s Appointment of Female Directors Welcomed by AICD’ (Media Release 28 April 2015) <<http://www.companydirectors.com.au/~media/Resources/Media/Media%20Releases%20and%20Speeches/2015/Ramsay%20Healthcare%20-%20women.ashx>>

<sup>132</sup> Edwin Locke and Gary Latham ‘New directions in goal setting theory’ (2006) *Current Directions in Psychological Science*, 15 (5) 265

<sup>133</sup> Gender Worx, as above n 97

<sup>134</sup> Whelan and Wood as above n 55

effectiveness of setting gender diversity targets, there is no reason why the use of targets, appropriately adopted and put in place should not work equally as well and point to the fact targets research by Locke and Latham (2006) show the success of targets being used across cultures, ages, tasks and settings.<sup>135</sup>

This is seconded by organisations such as the WGEA. In a speech given by Dr Graeme Russell on gender target setting, he stresses the fact targets need to be set with vigorous analysis being done by the business, they need to be realistic over simply aspirational, there needs to be commitment by the business, along with strategic alignment and accountability.<sup>136</sup>

Setting targets have the backing of women already on boards too. Patricia Cross, a prominent Non-Executive Director who has sat on 7 boards of large listed companies, believes that targets are the answer. She believes it is about assisting companies, not shaming them, to reach the desired target.<sup>137</sup>

### **How effective is effective?**

Although seen as a success, did the guidelines achieve and are they achieving the ultimate desired outcome in Australia? It depends on what this is. If the aim was to increase the number of women at board level the answer would be a 'yes', as statistics have shown. If however it was to increase the number of women in senior positions within organisations, as Recommendation 1.5 in the Guidelines is also clearly about, then the answer would be 'no'. Statistics taken by the WGEA show that the percentage of women at the CEO level in the ASX 200 has improved very slightly since 2008 when it was a mere 2% to now 3.5%, however the figures have remained relatively stable.<sup>138</sup>

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<sup>135</sup> Locke and Latham above n 123, 265

<sup>136</sup> Workplace Gender Equality Agency, <<https://www.wgea.gov.au/lead/setting-gender-targets>>

<sup>137</sup> Amanda Gome, *Forget Quotas, Diversity Campaigns are Better for Women on Boards* (5 May 2015) <<https://bluenotes.anz.com/posts/2015/05/forget-quotas-diversity-campaigns-are-better-for-women-on-boards/>>

<sup>138</sup> ABS as above n 3

Interestingly the biggest percentage of CEOs in the top ASX 200 was taken in 2003 at 4.1%.<sup>139</sup>

Although the number of women on boards is at just over 20%, the question comes back to how effective is 20%? As evidence has clearly shown the ‘tipping point’ and critical mass needed to make an impact at the board level and not simply one of tokenism is 30%.<sup>140</sup> Although the ASX guidelines have produced a marked change in the numbers of women on boards, this has stagnated over the recent years.<sup>141</sup> The research shows that for every 7 men that are recruited onto boards each year, there are only 3 women, which means that the target of 30% will not be achieved until 2023.<sup>142</sup>

In an effort to change this, and with recent additional data coming to light that women on boards do actually impact the financial performance of companies, the Australian Institute of Company Directors has recently called for publically listed companies to have 30% of their board be represented by women by 2018.<sup>143</sup> This prominent body has 35,000 members and seen as possessing a lot of authority.<sup>144</sup> The Australian Council of Superannuation Investors, ACSI, have also come out saying they would like to see 30% achieved by 2017.<sup>145</sup> Both of these moves have been seen as ‘game changers’.<sup>146</sup>

Patricia Cross says if the rate of women to men was increased to 4 women for every 6 men recruited onto boards the desired levels would be achieved.<sup>147</sup> Cross says that unlike 50% as a target, there is widespread support across chairman of ASX 200 boards to reach the 30% target, and she doubts that even with those 35 boards that still do not have any women on them would not be discussing the issue seriously.<sup>148</sup>

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<sup>139</sup> Australian Bureau of Statistics, as above n 3

<sup>140</sup> Australian Institute of Company Directors, as above n 131

<sup>141</sup> ABC Radio National, as above n 5

<sup>142</sup> Gome, as above n 123

<sup>143</sup> Australian Institute of Company Directors, as above n 131

<sup>144</sup> Gome, as above n 123

<sup>145</sup> Ibid

<sup>146</sup> Ibid

<sup>147</sup> Cross in Gome as above n 123

<sup>148</sup> Ibid

This has prompted the introduction in May of this year, of the 30% Club into Australia. The aim of the 30% Club is the same; to achieve 30% of women on boards by 2018.<sup>149</sup> The Club is not just about achieving 30% at Board level, it is about the pipe line from the ‘schoolroom to the Boardroom’.<sup>150</sup> Through its education initiatives and encouraging and supporting chairmen to find suitable women for board positions and working with other related groups<sup>151</sup> they have seen remarkable success.

Such success has been seen in the UK, where in the space of 5 years FTSE 100 female Directorship rose from 12.5% to 23%.<sup>152</sup> It is currently sitting at 24.7%.<sup>153</sup> It has brought about heightened awareness of the issue, and the fact that better diversity means better performance and pathways.<sup>154</sup> The success of the club in the UK is hoped to bring about the same levels of success here in Australia due to the similarities between the two countries.

## **United Kingdom**

The UK, like Australia, has a similar regulatory set up with their corporate governance, with the Corporate Governance Code that has a ‘comply or explain’ on annual reports giving a description on Diversity and objectives in attaining this.<sup>155</sup>

In his 2011 report Lord Davis says targets should be set for companies, rather than quotas, and gives the recommendation that all Chairman of FTSE 300 companies should set out a percentage of women to be on their boards between 2013 and 2015, with those in the FTSE 100 to have 25% of women on their boards by 2015.<sup>156</sup>

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<sup>149</sup> 30% Club < <http://30percentclub.org/>>

<sup>150</sup> Ibid

<sup>151</sup> Ibid

<sup>152</sup> ABC Radio National as above n 117

<sup>153</sup> 30% Club as above n 133

<sup>154</sup> ABC Radio National as above n 117

<sup>155</sup> Kamonjoh as above n 60

<sup>156</sup> Lord Davis as above n 27

## The Downside of Targets - Addressing Mindset

Having targets as opposed to quotas means a greater hurdle has to be faced in getting to achieve the desired outcome, and that is of individual mindset.<sup>157</sup> Whereas a quota may have the advantage of somewhat bypassing this (indeed an argument for quotas), this is not the case where targets, even if they are linked to financial incentives. It is still partly up to the individual involved, particularly around their self-efficacy. As well as this, they need to believe in the reasons and values that underpin the need for such a target to be set in order to remain committed to its achievement. As Whelan and Wood (2012) state, for many managers the idea of putting in place targets that are associated with gender diversity will be new and its success will depend largely on implementation.<sup>158</sup>

This individual mindset, which can translate to a group or organizational framework, is thought to be one of the major issues facing women and their promotion into more senior roles in business and indeed to the board. There are many who believe that it can only be ‘merit or women’, rather than ‘merit and more women’.<sup>159</sup> This is seen as gender essentialism; the stronger the gender essentialism, the more likely it is that the individual will have the mindset that it is ‘merit or women’ and see women as being completely different to men and not suited to the same roles.<sup>160</sup>

Those that are seen to have ‘weaker’ gender essentialism see men and women as having differences, but that these differences are opportunities rather than detriments, and differences in experiences and successes in these are to be promoted and utilized.<sup>161</sup>

Those with a stronger gender essentialism mindset are more likely to believe the current systems and structures that are in place are fair and that changing these would be discriminatory. They are likely to be against any form of targeting or quota system designed to increase the number of women on boards.<sup>162</sup> As an aside, it would be interesting to observe how much age is a factor in which mind set is adopted.

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<sup>157</sup> Pande and Ford as above n 47, 11

<sup>158</sup> Whelan and Wood as above n 55, 25

<sup>159</sup> Ibid

<sup>160</sup> Ibid

<sup>161</sup> Ibid 26

<sup>162</sup> Ibid

### **The Supply Side: Where are all the women?**

The argument that usually closely follows this is that there are not enough available women and if there were they would be in these positions. Unlike in a quota system whereby boards would be forced to be ‘creative’ in looking for women this is not necessarily the case with the setting of targets.<sup>163</sup> Once again it depends on how this is set up and managed. If managers are encouraged to be creative and to look at how to address recruitment and selection practices to open the pool of availability to women this would increase chances of finding women that are available as directors.<sup>164</sup>

Patricia Cross, like other prominent female directors, has said however that this is not the case. “I work with a number of women”. It is not just anecdotal evidence either. Researches in the UK found that having an additional 200 women on boards would change the ‘landscape’ so they set about looking for suitable women. They found 2551 women with enough qualifications and experience at an executive level to be able to fill those positions.<sup>165</sup>

Interestingly research here in Australia has shown that of those appointed to the ASX 200, 80% of male directors had no prior experience, compared to just 57% of women.<sup>166</sup> Pleasingly however, more women were appointed to the ASX 200 this year than last. Out of 24 new appointments to the boards, 7 of these were women.<sup>167</sup> Only another five qualified women would the number of women required to bring parity. Last year, it would have taken 53 new appointments to bring parity.<sup>168</sup> Watson believes it is not the number of women available; it is the will to appoint them.<sup>169</sup>

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<sup>163</sup> Ibid 8

<sup>164</sup> Ibid

<sup>165</sup> Waston, as above n 85

<sup>166</sup> Ibid

<sup>167</sup> Ibid

<sup>168</sup> Ibid

<sup>169</sup> Watson, as above n 85

### Conscious and unconscious bias; the common ‘problem’

Both targets and quotas are ultimately looking to achieve the same outcome; that is to have a more equal representation of men and women on boards, critically to achieve ‘critical mass’. However one of the most insidious issues that face both targets and quotas as methods for achieving this and the successes of either of these is, as has been partly explored, is that of the inherent bias that still exists, particularly at senior levels in the organization.<sup>170</sup>

Arguably, as human beings, there will always be a certain level of bias that exists when making decisions,<sup>171</sup> and this is primarily the result of environmental factors such as upbringing, values and beliefs, education and the like. However by bringing these potential discriminatory ideas and practices to light, whether they are conscious or unconscious there can be a way forward of addressing these issues and the ultimate issue at hand.<sup>172</sup>

Unconscious bias is more difficult to address, as there are many factors that make up the causes of this.<sup>173</sup> In fact legislation in the area of discrimination in general has been more focused on dealing with overt cases of discrimination when it comes to race and / or gender for example, as those cases of unconscious bias are much harder to prove.

It is one of the challenges that the legislation has found hard to address, although measures introduced into the *Fair Work Act*,<sup>174</sup> such as Adverse Action, where there is a reverse onus of proof onto the employer for example in the cases where a workplace right, such as the right not to be discriminated against,<sup>175</sup> is to be made out. Cases however involving adverse action, particularly in the case where the motivation of the

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<sup>170</sup> Whelan as above n 94

<sup>171</sup> Matt Lee, *Gender Diversity: Quotas vs Targets* (27 March 2015)

<<http://www.diversecitycareers.com/news/gender-diversity-quotas-vs-targets/5486/>>

<sup>172</sup> Ibid

<sup>173</sup> Morley, as above n 105

<sup>174</sup> *Fair Work Act 2009* (Cth),

<sup>175</sup> Ibid S342

individual is at question, such as the case of *Barclay and Bendigo TAFE*,<sup>176</sup> have been difficult to make out however due to the idea of unconscious bias and the motivation of the individual.

Attitudes and perceptions that are seen lend weight to the argument that no matter how consciously there are efforts made to reduce this, it still very much exists. This is worst still in bias that can be overtly seen through a lack of ignorance rather than design. An example of this is still seen by men in their attitude towards women, with the belief that they are either not as capable,<sup>177</sup> or somehow will not be able to remain committed if they are caring for children.<sup>178</sup>

The role of bias appears to be more accentuated at top levels in organisations. This has become known as a 'gender stall';<sup>179</sup> the idea that women in top levels of management face more bias than at lower levels in organisations.<sup>180</sup> This can certainly be seen by the fact there are so few CEOs that are women. In the United States for example, CEOs still only make up around 4.6% of the CEO population in the S & P 500.<sup>181</sup> In fact the New York times labeled this the 'glass ceiling index', reporting there were more men named John running large companies than there were women CEOs.<sup>182</sup>

Here in Australia numbers are relatively the same, with 3.5% of women CEOs in the ASX 200.<sup>183</sup> Female CEOs were also on average 10 years older than their male counterparts, however once they became CEO they tended to earn a lot more, on

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<sup>176</sup> *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (9 February 2011)

<sup>177</sup> Pande and Ford, as above n 47, 7

<sup>178</sup> ABC Radio National as above n 5

<sup>179</sup> Kogut, Colomer and Belinky above n 11, 894.

<sup>180</sup> Whelan as above n 94

<sup>181</sup> Catalyst, Knowledge Centre *Women CEOs of the Top S & P 500*

<<http://www.catalyst.org/knowledge/women-ceos-sp-500>>

<sup>182</sup> David Leonhardt, *Fewer Women Run Big Companies Than Men Named John* (2 March 2015)

<[http://www.nytimes.com/2015/03/03/upshot/fewer-women-run-big-companies-than-men-named-john.html?partner=rss&emc=rss&abt=0002&abg=1&\\_r=3](http://www.nytimes.com/2015/03/03/upshot/fewer-women-run-big-companies-than-men-named-john.html?partner=rss&emc=rss&abt=0002&abg=1&_r=3)>

<sup>183</sup> Workplace Gender Equality Agency % *Gender Workplace Statistics at a Glance* (February 2014)

<[https://www.wgea.gov.au/sites/default/files/2014-02-10-Stats\\_at\\_a\\_Glance.pdf](https://www.wgea.gov.au/sites/default/files/2014-02-10-Stats_at_a_Glance.pdf)>

average \$4.1m per annum as opposed to men who earned \$2.1m a year.<sup>184</sup> The results of this are largely explained by the number of female CEOs that work in the Banking and Finance sector which traditionally pay higher wages than in other industries.<sup>185</sup>

Although the inherent biases that exist could be seen as an argument for the implementation of quotas, in that it may be seen to address these issues, they are not solved by the mere implementation of such a measure. This will arguably come more from reeducating and addressing the core issues that are involved. Quotas simply cover this. Although they are a ‘circuit breaker’ of sorts, they do not address the root cause. Targets have a far greater chance of doing that. It is important for organizations to realize however, that a focus on merit alone is not necessarily going to be able to remove the inherent bias that may exist.

A case in point of this occurring was seen in case of Virgin Blue. In this 2006 case, eight women successfully sued the airline for discriminating against them in the selection process based on age.<sup>186</sup> It was found that even though the process itself was ‘age neutral’, the recruiters themselves had received inadequate training and were unconsciously selecting individuals like themselves, the recruiters being young.<sup>187</sup> In fact, out of 750 only 1 was over the age of 35.<sup>188</sup> This was done intentionally however it shows the power of this occurring.

Another practical example of this, and one of the only studies of its kind, was done in 2001 by Rouse and Goldin.<sup>189</sup> Here the New York Philharmonic Orchestra had a very small number of women in its orchestra; a mere 10%. It was thought that men and women had distinct styles of playing. However blind auditions proved this not to be the case and the experiment showed no distinct difference in playing style. Female

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<sup>184</sup> Laura Close, *95 Percent of CEOs in Australia are Men, But Women CEOs Earn More* (8 November 2014) <<http://www.businessreviewaustralia.com/leadership/1402/95-Percent-Of-CEOs-In-Australia-Are-Men-But-Women-CEOs-Earn-More>>

<sup>185</sup> Ibid

<sup>186</sup> *Virgin Blue Airlines Pty Ltd v Stewart* [2007] QSC 075

<sup>187</sup> Ibid

<sup>188</sup> Ibid

<sup>189</sup> Whelan as above n 152

representation has since increased to 45%,<sup>190</sup> a classic case of stereotyping and making decisions based on this. One way of removing this from the process of recruitment and selection at a board level could be by removing gender identifying information from resumes and shortlists.<sup>191</sup>

### **Towards greater equity**

Other barriers need to be removed as well for women to be able to progress further in the corporate world. These include a focus and further attention on issues such as women returning to the workforce post maternity leave and having friendlier work practices for those with children. Catharine MacKinnon spoke of this many years ago as the Disadvantage Approach.<sup>192</sup> This looks at the power imbalance between men and women and the social and legal structures that have been set up and entrench the difference in power between men and women, of which women as traditionally primary care givers has been one.

Now, as roles in families begin to change, expectations as to child caring responsibilities, although traditionally female based, are increasingly towards men having an equal share in these responsibilities. Recently, the male CEO of a large software company MongoDB, stepped down from his role to spend more time with his children. The headline “CEO steps down to be a better dad”.<sup>193</sup> Men are seen to have to be ‘all in’ in order to succeed,<sup>194</sup> whereas women are seen as ‘wanting it all’.<sup>195</sup> There is still the expectation that men, in not a traditional care giving role work longer hours to ‘provide’; part of gender schemas that exist in relation to values and beliefs around gender roles.<sup>196</sup>

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<sup>190</sup> Ibid

<sup>191</sup> Ibid

<sup>192</sup> Graycar and Morgan, as above n 94, 6

<sup>193</sup> Alexander Kaufam, The Huffington Post, *CEO Steps Down to Be a Better Dad* (8 June 2014) <[http://www.huffingtonpost.com/2014/08/06/max-schireson-ceo-steps-down-dad\\_n\\_5654310.html](http://www.huffingtonpost.com/2014/08/06/max-schireson-ceo-steps-down-dad_n_5654310.html)>

<sup>194</sup> Scott Behson, *What's a Working Dad to Do?* (21 August 2013) <https://hbr.org/2013/08/whats-a-working-dad-to-do/>

<sup>195</sup> Jane Garapick, *Women Want it All and More – Why We Aren't Getting It* <<http://www.yourtango.com/experts/jane-garapick/women-want-it-all-and-more-why-arent-we-getting-it-expert>>

<sup>196</sup> Terjensen, Sealy and Singh, as above n 1, 323

## **Conclusion**

This essay has explored the merits and effectiveness of both quotas and targets in addressing the issue of gender diversity at the board level. Which method has had more success has been shown to depend on what is meant by 'effective'. In the case of quotas, effectiveness in actual numbers achieved has only been seen in Norway, backed by strong sanctions. Countries without these types of sanctions have not fared as well. Effectiveness in terms of cultural change remains dubious. There has also been little, if any, change in the levels of women in the senior ranks of organisations in Norway.

The same can be said for Australia, where targets have been used as opposed to quotas. Here the number of female CEOs in the top ASX 200 has remained relatively the same for the last ten years. Even though this is the case, and the use of targets has not brought about the same level of change at board level in terms of female representation, it has been shown that guidelines such as those introduced by the ASX regulations, along with other initiatives, can and have achieved progression.

Now, with a renewed focus and clearer focus on the importance of achieving a certain number of women at the board level, and through the strong backing from peak corporate bodies such as the AICD and ACSI with definitive targets being set, not only will these be achieved in a more timely manner but more holistic gains in women and leadership are likely to be made.

Addressing bias, particularly that of unconscious bias and other barriers facing women in the workplace will remain essential in achieving this effectiveness. That is the why the introduction of organisations such as the 30% Club, with its focus on the 'pipeline' of women is seen as so important. Maybe the victory will then become less of one focusing on the numbers at the top and more about those at all levels in the organisation.

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