Key themes and issues regarding board diversity and mandatory gender quota legislation

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Transcript of paper delivered at the "Mandatory Gender Quota Legislation: Will Australia follow Europe", Board Diversity Forum, 20 October 2014, Melbourne, sponsored by the Deakin Law School and the German Alexander von Humboldt Foundation

There has been an increasing focus in Australia on improving the representation of women at senior executive and board levels for some years. For leading entities, this focus underpins a desire to improve long-term performance and optimise the human capital available to the organisation. There is an increasing body of research supporting the economic and business case for increased participation by women in senior roles, and gender balance at senior levels within organisations is an excellent basis for diversity more generally. For example, PA Consulting in 2013 conducted research on 50 private sector companies which are publicly listed, with global headquarters in the UK and North America, and showed that there is a 'virtuous' cycle of diversity, where gender diversity creates future opportunities for diversity.

The research across jurisdictions also tends to suggests that gender-diverse leadership may correlate with relatively stronger corporate performance. Indeed, Barclays Bank PLC is launching a new index, the Barclays Women in Leadership Total Return Index, which will be composed of companies which have a female CEO or women making up at least one-fourth of the board of directors (as well as meet specific market capitalisation and trading volume thresholds), together with exchange-traded notes which will track the index. That's investment talk for putting your money where you think the growth is.

However, I do not intend to speak to that growing body of research but to talk about the 'gap' between the research and the corporate response in Australia. The dissonance between the ongoing support for the business case for increased gender diversity at senior levels in organisations and the continuing low levels of gender diversity on boards and in executive teams in corporate Australia is why we are talking about quotas.

Measures to address low levels of gender diversity

First I will talk to the measures that have been introduced in Australia to address the low levels of gender diversity at senior executive and board levels. Importantly, the measures give the control of approach and targets to boards and companies. While disclosure of aspects of gender diversity is mandated, the question of how corporations address this matter is very much a matter for them to decide. This philosophy has underpinned every aspect of the approach in Australia to increasing gender balance in organisations at senior levels and on boards.

2010 ASX Corporate Governance Council's guidelines

Four years ago, in 2010, the ASX Corporate Governance Council introduced amendments to the *Corporate Governance Principles and Recommendations* addressing corporate Australia's historically poor performance on gender balance. Aimed at providing greater transparency as to how entities are progressing with increasing the participation of women in senior roles, entities listed on the Australian Securities Exchange (ASX) were for the first time recommended to establish a diversity policy and publish it, and boards of listed companies were also recommended to set measurable objectives for achieving diversity. Diversity was noted as including, but not limited to, gender, age, ethnicity and cultural background.

A separate recommendation was that companies were to disclose in the annual report the measurable objectives set by the board in accordance with the diversity policy and progress toward achieving them. While the Principle had noted that diversity included but was not limited to gender

diversity, the commentary to this particular recommendation noted that the focus was on the participation of women in the composition of corporate boards. This was followed by a third recommendation that companies disclose in the annual report the proportion of women employees in the organisation, in senior executive positions and women on the board.

The emphasis therefore was clearly on gender diversity rather than other aspects of diversity, with further commentary confirming this. The Council had specifically sought to shed light on gender diversity in listed entities in Australia through seeking disclosures on key elements of its operation, such as female participation on boards. This was clearly understood by the market, although a great deal of commentary ensued that other forms of diversity were important too. And given that the disclosures against the ASX Corporate Governance Council's guidelines are contained in the corporate governance statement in the annual report, the Council was also clearly noting that it is a board responsibility to consider gender diversity both at board and senior executive levels as a governance issue. It is not a matter for management, although the board can — and quite rightly should — delegate to management the implementation of any programs that affect gender diversity at senior executive levels. Gender diversity at board level remains a board responsibility.

'If not, why not' reporting

The reporting against the ASX Corporate Governance Council's guidelines is under the 'if not, why not' regime, where if a company considers that a recommended governance practice is inappropriate to its circumstances it has the flexibility not to adopt it — a flexibility tempered by the requirement to explain why. This means that no listed entity is *required* to adopt a diversity policy, set measurable targets, report on those measurable targets or report on the proportion of women employees in the organisation, in senior executive positions and women on the board. While it is mandatory under the Listing Rules to disclose against the ASX Corporate Governance Councils' guidelines, the recommendations themselves are not mandatory. However, the need to explain board decision making is central to the reporting regime. I will come back to this point, because the explanations in disclosures where boards have chosen not to follow recommendations speak to the dissonance I mentioned earlier.

Legislative reporting

The other disclosure requirement that has been introduced is mandatory under legislation. With the passage of the *Workplace Gender Equality Act 2012*, any business with more than 100 employees is required to report annually to the Workplace Gender Equality Agency (the WGEA) on relevant standardised gender equality indicators. They cover the gender composition of the workforce; the gender composition of governing bodies of relevant employers; equal remuneration between women and men; the availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities; consultation with employees on issues concerning gender equality in the workplace and any other matters specified by the Minister, such as sex-based harassment and discrimination.

The government indicated earlier this year that it would wind back the 2013-14 reporting matters and some of the additional 2013-14 reporting matters that also applied in the 2014-15 reporting year. This prompted a number of business leaders, industry associations and other interest groups to publicly state the importance of standardised gender reporting in driving improvements in gender equality and lifting female workforce participation. The government was responsive to stakeholder concerns and retained the reporting matters.

2014 ASX Corporate Governance Council's guidelines

In March this year, a third edition of the ASX Corporate Governance Council's guidelines were released, after a period of public consultation on an exposure draft. In this edition, the recommendations on diversity moved from Principle 3 focusing on acting ethically and responsibly to Principle 1 focusing on the respective roles of the board and management. Arguably this is an elevation of the need to formulate policies and programs to address gender diversity. The Council has clarified that this is not an 'ethical' or 'responsible' aspect of the governance framework, but central to how the organisation arranges its governing body and executive team.

The Council's guidelines also made it clear that if an entity is reporting to the WGEA it could report the URL of the webpage on the WGEA website where its latest gender equality indicators are available to meet its disclosure requirements against the *Corporate Governance Principles and Recommendations*.

The aim of disclosure

The aim of the disclosure recommendations is that without greater progress in companies on adopting gender balance initiatives as measurable objectives, and being accountable to stakeholders on progress toward achieving those measurable objectives, the participation of women in senior roles is viewed as unlikely to increase. Disclosure obligations are intended to address this. The ASX Corporate Governance Council has been very clear for a decade that the guidelines are predicated on the idea of sunlight being the best disinfectant — that is, the more transparent listed entities are about their corporate governance practices, the better placed investors will be to make informed decisions.

Reporting is also intended to assist entities to gather information so that they have a clearer understanding of gender balance within their organisations and what objectives they need to put in place to improve gender equality.

Concerns with disclosure and voluntary targets

There has been concern expressed that reporting to date is inconsistent and speaks at best to intention rather than action and at worst to unconscious bias that refuses to acknowledge the business case for gender diversity.

The largest fund manager in the world, Blackrock, has been tracking disclosures by ASX200 companies against the diversity recommendations. This is precisely how the Corporate Governance Principles & Recommendations are meant to operate — the market passes judgment on the corporate governance practices of Australian companies, not the Council or ASX. Blackrock's research reveals the 'gap' between the business case for increased gender diversity and the corporate response in Australia. In its survey of ASX200 companies for the financial year ending June 30, 2011, BlackRock found that women accounted for just a little over 14 per cent of the non-executive directors and 2.5 per cent of the executive directors of Australia's 200 largest listed companies. At the crucial key management personnel (KMP) level, eight per cent of KMPs were women and 19 per cent of companies who chose to report on diversity had complied with the ASX Corporate Governance Council's basic disclosure requirements.

To quote: 'The report concluded that the response to the new standards had been lacklustre. It highlighted a gulf in the gender representation at board level within corporate Australia, but – perhaps more importantly – identified a yawning gap of awareness of the standard and the underlying case for gender diversity'.

Blackrock's second report, based on 2012 annual reports, found positive improvements in gender diversity to be generally — and I will quote here — 'glacial in nature'. The percentage of women on the boards of ASX200 companies had risen to 17.8% but the number of female KMPs remained static at eight per cent.

By the third report into the gender diversity policies and disclosures of Australia's top 200 listed companies, published in July 2014, Blackrock found that at the very top of ASX200 companies, the underlying gender diversity in boards and at the crucial KMP level had risen, with 21 per cent of women non-executive directors; and 10 per cent of female KMPs.

Blackrock found that there were 33 female non-executive directors appointments during the year (the report is based on 2013 annual reports). Blackrock noted that: 'While the board statistic is generally a positive one, closer examination reveals that it is the increased number of men leaving boards that is having the greatest impact on overall statistics. Our research showed that of the 106 non-executive director resignations, only 10 were women, thereby leaving the above figure with something of a 'survivor bias'. The male resignations occurred after having served, on average, over nine years on the board'.

However, Blackrock also found that disclosures were, to quote, 'perfunctory'. Blackrock's 2014 report states that: 'The general tendency was for disclosure to simply state a company had a diversity policy, list some measurable objectives and disclose some statistics. It appeared from the board down, gender diversity is not included in the DNA of most companies'.

Blackrock made it clear that it is interested in the overall standard of disclosure; disclosure of the governance around diversity policies — that is, where responsibility for primary sponsorship lies and secondly who was accountable for the policy; disclosure of policies or processes in place to help improve diversity at senior executive ranks; and disclosure of policies around pay equity.

To quote from the report: 'Such disclosures are important as they provide a window into the culture of the boardroom. Boards that are willing to communicate with shareholders on corporate governance issues such as diversity and go well beyond basic disclosure demonstrate a better understanding of their purpose and relationship with shareholders. Blackrock has observed that high quality disclosure of corporate governance practices tends to correlate with high quality boards'.

The report asks: 'Is the disclosure of corporate governance policies, including diversity, a proxy for corporate culture?' and provides examples of excellent quality disclosures and very poor quality disclosures. The report notes that poor quality disclosure often has the feel of 'If you don't like our policies, don't buy our stock', but then goes on to note that this is not an option for large index funds, which have to replicate the S&P ASX200 index.

I have spent considerable time looking at Blackrock's research, because interest and pressure from shareholders — and in particular large institutional investors — has been the force driving change in ASX listed entities in relation to their corporate governance frameworks. With gender diversity now a key element in the corporate governance guidelines against which listed entities must report, the focus on progress or otherwise on gender diversity at both board and senior executive levels by institutional investors such as Blackrock should ring alarm bells for listed companies and their boards.

For example, the Blackrock 2014 research specifically states that investors see gender diversity as an opportunity for higher returns and returns at lower levels of risk, pointing to research to support this. And the 2014 report puts boards on notice that diversity is now included in the voting guidelines of the proxy advisers and may come into play when they are making recommendations on director elections and re-elections.

Blackrock also calls on boards to articulate the benefits of diversity policies and their assistance in building the long-term value of the company in their disclosures, as investors are looking to see if boards understand and get behind the business case for gender diversity. Blackrock wants boards to also demonstrate in their disclosures who in the organisation is accountable for effectively implementing such policies.

Improvements since introduction of disclosure requirements

Without doubt, the percentage of women on boards of ASX200 companies and the proportion of women comprising new appointments increased significantly in 2010, 2011, 2012 and 2013 — a direct result of disclosure requirements being introduced in the ASX Corporate Governance Council's guidelines in 2010. The figures are the highest they have been in Australia. AICD maintains statistics on gender diversity on ASX200 boards and their figures at the end of September 2014 show that:

- Women have comprised 29% of new appointments to ASX 200 boards to date in 2014.
- Women comprised 22% of new appointments to ASX 200 boards in 2013.
- Women comprised 22% of new appointments to ASX 200 boards in 2012.
- Women comprised 28% of all new appointments to ASX 200 boards in 2011, compared to 25% in 2010 and only 5% in 2009 and 8% in 2008.
- 41 women have been appointed to ASX 200 boards in 2014 to date (30 September 2014).
- 37 women were appointed to ASX 200 boards in 2013.
- 41 women were appointed to ASX 200 boards in 2012.
- 68 women were appointed to ASX 200 boards in 2011.
- 56 women were appointed to ASX 200 boards in 2010, a substantial increase on 2009 (10 women appointed).

However, a total of 36 boards in the ASX 200 as at the end of September 2014 still do not have any women.

What does this mean for quotas?

Quotas are becoming increasingly popular in Europe. The European Commission is considering imposing quotas across the EU. The UK government has threatened quotas if companies do not appoint more female directors voluntarily. The previous Federal Government made similar noises but the current Australian Government has made it clear that gender diversity is not a key issue for it. Nonetheless, governments come and governments go, and so the possibility of quotas remains.

A major reason why quotas keep coming up is the growing impatience with the glacial pace of voluntary change: women are the majority of all graduates almost everywhere in the developed world, but make up a smaller share of the workforce the further up the corporate ladder they go. If we look at the figures from Blackrock and AICD, we see women — comprising 50 per cent of the population and above 50 per cent of our tertiary education graduates — representing only about one-fifth of the membership of boards on ASX200 companies and one-fifth of new appointments.

The ASX Corporate Governance Council has clarified that it wishes to give ASX companies the opportunity to address gender diversity at board and senior executive levels in the manner best suited to them, but despite the 'if not, why not' reporting regime, that did not mean companies doing nothing. The members of Council, while clear about wanting to provide the opportunity for companies to take action on their own terms, are not sanguine that quotas will not be introduced if corporate Australia does not respond voluntarily to the business case for change.

The Blackrock 2014 report concludes with the words: '… the level of women in executive roles needs to increase at a faster pace than is currently occurring to keep quotas off the agenda', so it is clear that investors do not see boards doing nothing or not enough as sufficient. Women comprise 45 per cent of the workforce; account for 40 per cent of property investors; and 40 per cent of professionals in Australia are women. More than 50 per cent of our university students are women; and 90 per cent of spending decisions are made by women. From the investor perspective, companies that discount the retention and promotion of talented women to leadership roles as a strategic imperative will be challenged to remain sustainable. They won't be able to understand or meet the needs of their customers, or the communities in which they operate, or their employees. They will see the financial drain continue of hiring, training and developing talented women only to see them leave the company,

affecting productivity and capacity for innovation. They are under-utilising their human capital — that is, they are making poor decisions.

When the issue of quotas comes up, it is still common to hear from both directors and senior executives (both male and female) that quotas are anti-meritocratic. However, as an argument this does not hold up. The status quo is anti-meritocratic. It assumes that 50 per cent of the population (men) somehow have more merit to allow them to hold four-fifths of board and senior executive roles, despite women having equal education and expertise.

Furthermore, there is no research to support that men in such vast numbers have more 'merit', while there is a very large body of research demonstrating that women are evaluated less positively than identically qualified men when applying for stereotypically male jobs, such as leadership roles. The merit argument more commonly disguises a visibility issue. Women are not considered on merit because they are 'invisible' when consideration is given to new board or senior executive appointments. It is hard to be considered on merit if you are not seen in the first place.

My fellow speakers today will speak to the research on quotas — I will not be addressing this. My concern today was to set out how corporate Australia has responded to the voluntary measures that have been introduced and to point to increasing institutional investor interest in gender diversity as a 'window' onto board thinking and decision making. As was expressed to me by an investor — a very, very large institutional investor: 'If they are missing this, what else is the board missing?'.

That question is unlikely to go away. Which means that discussion of quotas is unlikely to go away, if corporate Australia does not increase the pace of change.