REGULATING FOR WOMEN ON CORPORATE BOARDS: POLYCENTRIC GOVERNANCE IN AUSTRALIA

Vijaya Nagarajan[*]

I INTRODUCTION

With close to five million women in paid employment and constituting over 45 per cent of the total workforce and 57 per cent of the Australian public service, holding 28 per cent of the seats in Senate and 25 per cent of the seats in the House of Representatives,[1] one could be forgiven for entertaining the thought that as a nation, we are beginning to acknowledge the importance of gender equality. However we are quickly reminded that this is far from the truth when it comes to corporate boards which are important sites of decision making that affect us all. In Australia, although women hold 27 per cent of senior positions in private companies, they only hold 10.9 per cent of the board positions in the top 200 listed companies on the Australian stock exchange.[2]Addressing this issue has taken on utmost importance with many governments threatening to introduce legislation to make it happen. Perhaps unlike some of the enormous challenges of climate change and the Global Financial Crisis, this area is one where nation states see that they can make a difference.

Tackling the gender gap on the boards of publicly listed companies provides us with an accessible and fascinating site to reconsider the effectiveness of the variety of regulatory tools and to reflect on the role of the various participants in the regulatory game in Australia. Whereas a small number of governments have elected to rely on hard laws to action this systemic shift, many other nations, including Australia, have outsourced this task to non-state regulators who have relied on soft laws to do the job. Often a hard law, once made, gives rise to the development of a range of soft laws that support and enforce it. Sometimes soft laws can solidify into hard laws, for example by being codified into legislation. At other times soft laws can become more like a hard

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* BEc/LLB, LLM, PhD; Macquarie Law School, Macquarie University. I would like to thank John Braithwaite, Cameron Holley, Ian Ramsay, Colin Scott, Archana Parashar, Chris Robson and the anonymous referees for their comments.

1 Department of Foreign Affairs and Trade, *Women – Towards Equality* (January 2011) <http://www.dfat.gov.au/facts/women.html>.

2 Women on Boards, *Boardroom Diversity Index 2011*, <http://www.womenonboards.org.au/pubs/bdi/2011/>; Grant Thornton International Business Report, *Proportion of Women in Senior Management Falls to 2004 Levels* (2011) Grant Thornton <http://www.internationalbusinessreport.com/Press-room/2011/women_in-senior_management.asp>.

law, for example moving from a standard to become a listing rule.[3] In any of these cases, epistemic communities have developed and many participants have been enrolled to undertake the continuous and laborious tasks of publishing, influencing, training, facilitating, coordinating and assessing progress. The participants are primarily non-state actors, consisting of both for-profit and not-for-profit organisations, while most government bodies remain in the background.

This article focuses on the Australian Stock Exchange's proposals on diversity in the Corporate Governance Principles and Recommendations which took effect on 1 January 2011. It argues that the manner in which Australia is regulating for more women on corporate boards of publicly listed companies is an example of polycentric governance. Polycentric is defined as many centers of decision making that are formally independent of each other.[4] Polycentric governance has three distinctive dimensions which make it a perfect fit for analysing this space: 'organisational, conceptual and strategic' dimensions.[5] Firstly at the organisational level, this site is not dominated by one specific body such as a government funded regulator. Rather than the government taking control to implement and enforce quotas, it is multiple non-state actors that are facilitating this, sometimes with the same objective in mind and sometimes for other ends. Secondly at the functional level, this site is a lucid example of hybrid regulatory strategies involving both hard law and soft law. These laws are multi-faceted (using different strategies), involving multiple actors (both state and non-state actors) and both direct and indirect. Thirdly at a conceptual level, it is an example of a changing conception of regulation, where the notion of the state being at the centre of regulation has given way to a polycentred notion of governance where a range of actors are involved in different facets of the regulatory regime.

This article is divided into five main sections. The first section examines the prominent reasons for increasing the number of women on corporate boards, all of which are contested. This contestation makes a centralized regulatory response, such as the imposition of legislative mandates, unlikely in Australia. The second section considers the manner in which this gender deficit can be addressed and the tools

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3 For example in South Africa from March 2010, all companies listed on the Johannesburg Stock Exchange were required to produce an integrated report on 'social, environmental and economic performance alongside financial performance' information. This report is expected to provide users with a more 'holistic' overview of a company see Sustainability South Africa (Press Release, 4 June 2010) <http://www.sustainabilitysa.org/PressReleases/PressReleases2010/Anintegrated reportisanewrequirement.aspx>.

4 See Vincent Ostrom, Charles Tiebout and Robert Warren, The Organization of Government in Metropolitan Areas: A Theoretical Inquiry' (1961) 55 *American Political Science Review* 831. See also: Elinor Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' (2010) 100(3) *American Economic Review* 200.

5 These three dimensions have been used by Julia Black, see Julia Black, 'Legitimacy and the Competition for Regulatory Share' (Working Paper No 14/2009, London School of Economics, 2009) 3. It is acknowledged decentered governance can also apply here. However as discussed by Black, decentering seeks to draw attention away from the state as having a central role whereas polycentric governance draws attention to the multiple sites in which regulation can occur (see discussion at 4). On decentred regulation see: Dimity Kingsford Smith, 'Beyond the Rule of Law? Decentred Regulation in Online Investment' (2004) 26 *Law and Policy* 439; Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems*, 103.

available to do so, namely through hybrid regulation in the form of hard law and soft law. In order to do so the national differences to soft law regulatory approaches in comparable countries are examined. The third section closely examines the polycentric nature of Australian regulation by scrutinizing the parties involved in regulation in Australia and their communicative interactions. These parties are cooperating in trying to change corporate behavior and create new interpretative communities. The fourth section tackles the main criticism of the polycentric approach — that the stakeholders of medium and smaller listed companies either do not, or cannot, have an influence on the policies of these companies. It argues that there is an important role here for an institution to act as a fulcrum point to nudge these companies towards compliance making polycentric governance work. Although there could be a variety of institutions that could undertake this role, it is argued that in this site, that fulcrum position is best occupied by the state in Australia. A brief conclusion follows.

II WHY HAVE MORE WOMEN ON THE BOARD?

There are four main reasons that are advanced in support of increasing the number of women on corporate boards: moving the corporate board to a more democratic representation of societies' diversity; improved decision-making by increasing the range of views, values and experiences represented; better corporate profitability; and finally an enhanced corporate image for shareholders, employees and consumers. Each of these arguments, that are heavily contested and are at times inter-related, is addressed below. The purpose of this discussion is to explain the reason why the Australian government has not acted and is unlikely to introduce legislation to increase women's representation on boards.

The first argument is that democracies should strive to cater for gender equality and this should be carried through to the boardroom of the corporation. Democratic societies, based on the principle of equality, should ensure that its institutions represent the community. It is by doing so that these institutions gain the public's confidence and hence legitimacy. This argument *has* been widely adopted by public institutions such as government businesses and political office where gender equality is actively pursued.[6] It can be argued that in our market economy, where many of the large public companies have operational and profit centres that are bigger than those of governments, often benefit from government policy, sometimes employ more workers than governments and whose actions can have an enormous impact on the community, this public-private distinction is no longer valid.[7] Accordingly it could be argued that public companies, which are dealing with the public's funds, should also be striving for gender equality. Although such an outcome could be mandated by legislation, this has not directly been adopted.[8] In reality it is large companies that have taken on these responsibilities motivated in part by gaining legitimacy through

6 Australian Government Office for Women, 'Women on Australian Government Boards Report 2009–2010' (Report, 2010) 3, 8.

7 See Jody Freeman, 'Private Parties, Public Functions and the New Administrative State' (2000) 52 *Administrative Law Review* 813, 816–17; Mark Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in Michael Taggart (eds), *The Province of Administrative Law* (1997) 40, 63, 69.

8 See Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) *Federal Law Review* 31.

gaining public confidence, in part competing for market share with less responsive competitors and in part fearing the fallout from the scrutiny by media, ratings agencies or other shareholders. The attempts by industry giants like Woolworths and Westpac, which have promised to increase representation of women on boards, and the subsequent accolades they have received, are current examples.[9]

The equality principle is also embodied in the International Convention on the Elimination of All Forms of Discrimination Against Women to which Australia is a signatory.[10] Using this hook, many governments have introduced equal opportunity legislation and many government bodies have sought to implement equal participation in boards. For example the Australian government has committed to a target of 40 per cent women and 40 per cent men by 2015[11] and many states have introduced measures to increase women's representation in the public service.[12] These treaties may also provide governments with the power to introduce domestic legislation that mandates private businesses to comply with the spirit of these treaties. However governments have not opted to do so. Rather corporations themselves are being encouraged to increase the participation of women. The Women's Empowerment Principles, resulting from collaboration between UNIFEM and the United Nations Global Compact, establishes a set of principles for business. This emphasises the need for corporate action to promote equality and provides for the establishment of 'company-wide goals and targets for equality' and 'affirms high level support and direct top-level policies for gender equality and human rights'.[13] These principles call for corporations to act unilaterally, setting targets and devising ways of giving effect to these targets. Many corporations have sought to do so and their initiatives are publicised on the Global Compact website.[14]

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9 For example, see Elizabeth Knight, 'About Time Women got Keys to the Boardroom' *Sydney Morning Herald*' (Online) 13 October 2010, <http://www.smh.com.au/business/about-time-women-got-keys-to-the-boardroom-20101012-16hvk.html>. See also Lisa Mayoh, 'Job For the Boys', *The Sunday Telegraph*, (Online) 18 April 2010 <http://www.dailytelegraph.com.au/news/job-for-the-boys/story-e6freuy9-1225854970277>.

10 *International Convention on the Elimination of All Forms of Discrimination Against Women* opened for signature 18 December 1979, 1249 UNTS 513 (entered into force 3 September 1981).

11 Department of Families, Housing, Community Services and Indigenous Affairs, *Increasing Leadership and Representation Opportunities* (1 February 2011), <http://www.fahcsia.gov.au/sa/women/progserv/equal/Pages/LeadershipRepresentationOpportunities.aspx>.

12 See, eg, NSW initiatives: NSW Government Premier and Cabinet, *Women's Employment and Development Strategy* (10 March 2011) <http://www.eeo.nsw.gov.au/women/womens_employment_and_development_strategy>. See also Siri Terjsen and Val Singh, Female Presence on Corporate Boards: A Multi-Country Study of Environmental Context' (2008) 83 *Journal of Business Ethics* 55.

13 United Nations Development Fund for Women and UN Global Compact, *Women's Empowerment Principles: Equality Means Business* <http://www.unifem.org/attachments/stories/WomensEmpowermentPrinciples.pdf>. See also Charlotte Villiers, 'Achieving Gender Balance in the Boardroom: Is it Time for Legislative Action in the UK?' (2010) 30 *Legal Studies* 533.

14 United Nations Development Fund for Women, *Companies Leading the Way: Putting the Principles into Practice* (July 2011) <http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/Companies_Leading_the_Way.pdf>. Westpac is the only Australian company on this website.

The second, third and fourth arguments are interrelated because they are based on the notion that women bring something different or new to the board and all these arguments are heavily contested. The second argument in favour of increasing the number of women on boards is that the number of women on the board can lead to an increase in company profitability. Women can bring a different experience into the boardroom and to decision-making within the boardroom. Some areas where this difference has been noted include a collaborative approach to leadership, a risk averse approach to investment and different ways of expression.[15] A number of empirical studies have found a correlation between the number of women and profitability including a study of 215 Fortune 500 companies over the period 1980 to 1998 which demonstrated that firms with a high number of women executives outperformed their industry median firms on all three measures of profitability.[16] Likewise another study found companies with more women board directors (in the top quartile) have a 53 per cent greater return on equity than those with the least number of women board directors (in the bottom quartile).[17] Another demonstrated that that there could be a direct causal effect between women directors and profitability – that women on boards positively affect company performance rather than it being the case that companies already performing well employing more women on their boards.[18] Yet another study found that companies with a higher proportion of women on their management committees outperform their sector in terms of return on equity, operating result and stock price growth.[19] However this approach, which stresses 'difference' does not go uncontested and there are two counter arguments that are worth emphasizing.

15 Productivity Commission, 'Executive Remuneration in Australia'(Final Inquiry Report, No 49, 19 December 2009), 155. Studies suggest that there are very different models of leadership for women and men with women's descriptors being akin to a transformational model and men's being closer to a transactional model see Beverly Alimo-Metcalfe, 'An Investigation of Female and Male Constructs of Leadership and Empowerment' (2010) 25 *Gender in Management: An International Journal* 630. On risk averse approaches see Sylvia Maxfield et al, 'Gender and Risk: Women Risk Taking and Risk Aversion' (2010) 25 *Gender in Management: An International Journal* 586–604, 595; Edeltraud Hanappi-Egger and Alexandra Kauer, 'Gendered Scripts: Studying Hidden Assumptions in Business Contexts' (2010) 25 *Gender in Management* 497; Claude Francoeur et al, 'Gender Diversity in Corporate Governance and Top Management' (2008) 81 *Journal of Business Ethics* 83.

16 Roy D Adler, 'Women in the Executive Suite Correlate to High Profits 'European Project on Equal Pay (2001) 2 http://www.csripraktiken.se/wp-content/uploads/adler_web.pdf.

17 Lois Joy et al, *The Bottom Line: Corporate Performance and Women's Representation on Boards* (October 2007) Catalyst <http://www.catalyst.org/file/139/bottom%20line%202.pdf>. See also Siri Terjesen Ruth Sealy and Val Singh, 'Women Directors on Corporate Boards: A Review and Research Agenda' (2009) 17 *Corporate Governance An International Review* 320.

18 Nina Smith, Valdemar Smith and Mette Verner, 'Do Women in Top Management Affect Firm Performance? A Panel Study of 2500 Danish Firms '(Discussion Paper No 1708, Institute for the Study of Labor, University of Bonn, August 2005), 2.

19 Georges Desvaux et al, *Women Matter: Gender diversity, a corporate performance driver*, (McKinsey & Company, 2007) <http://www.mckinsey.com/locations/swiss/news_publications/pdf/women_matter_english.pdf>. Note that this is based on 89 European listed companies with the highest level of gender diversity in top management posts who also have a stock market capitalization of over €150 million. See also, Goldman Sachs and J B Were Investment Research, *Australia's Hidden Resource: An Economic Case For Increasing Female Participation* (Research Report, 26 November 2009).

The first counter argument is based on empirical evidence which points to a number of studies that have concluded that there is no correlation between the number of women on the board and profitability. A study examining 186 listed Dutch and Danish firms from 2007 with 40 per cent of these firms had at least one woman on the board, found that there was no effect on firm performance.[20] Similarly another study which analysed 500 of the largest companies in Denmark, Norway and Sweden in 2005 found that board diversity was 'not significantly related to company performance'.[21] In a more nuanced study, Adams and Ferreira suggest that diversity has a positive impact on performance in firms that otherwise have weak governance, as measured by their abilities to resist takeovers.[22] In firms with strong governance, however, enforcing gender quotas in the boardroom could ultimately decrease shareholder value and the authors posit that greater gender diversity could lead to over-monitoring in those firms. The second counter argument is based on the arguments of social constructionists who are critical of emphasising difference, on the grounds that women have a 'care ethic' or adopt 'feminist ethics' to decision making.[23] They argue that this can be a double-edged sword as it requires women to bring a different voice which is assumed to be better or superior. In the context of the appointment of women judges this view creates an expectation that these women judges can hear all the voices which are raised in court; both 'the male because they are acculturated to it and the female because they live it'.[24] This is the assumption that has at times lead to the appointment of women to companies in precarious financial positions trapping these women with high expectations to save companies from collapse, and pushing these women over the 'glass cliff'.[25]

The third argument is that a diverse board will impact positively on corporate decision-making. This argument overlaps with the second argument and the points made above, namely that emphasizing difference is a double-edged sword, apply equally here. The role of the corporate board is to lead and control the company. It is the link between management and stakeholders.[26] The homogeneity of corporate boards and the problem of 'group think', where board members succumb to the persuasive power of peers, has meant that some boards have become focused on

20 Joanna Marinova, Janneke Plantenga and Chantal Remery, 'Gender Diversity and Firm Performance: Evidence from Dutch and Danish Boardrooms' (Discussion Paper Series No 10–03, Tjalling C Koopmans Research Institute, January 2010).

21 Trond Randøy, Steen Thomsen and Lars Oxelheim, 'A Nordic Perspective on Corporate Board Diversity' (Nordic Innovation Centre, Project Number 05030, November 2006) 4.

22 Renee Adams and Daniel Ferreira, 'Women in the boardroom and their impact on governance and performance' (2009) 94 *Journal of Financial Economics* 291.

23 For an examination of the manner in which women's decision may differ see, Teresa Gabaldon, 'The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders' (1992) 45 *Vanderbilt Law Review* 1387; see also Barbara Ann White, 'Feminist Foundations for the Law of Business: One Law and Economics Scholar's Survey and (Re) view' (1999–2000)10 *UCLA Women's Law Journal* 30.

24 Gill Gatfield, *Without Prejudice: Women in the Law* (1996) 259–60 cited in Kate Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 *Feminist Legal Studies* 1, 14.

25 SeeVilliers, above n 13, 545. In the context of the judiciary see Malleson, above n 24, 13-14.

26 *Corporations Act 2001* (Cth) s 198A(1) provides that the business of the company is managed by or under the direction of directors.

specific trains of thought and action.[27] Rather than monitoring the actions of management, which is more important than ever before in the post global financial crisis consciousness, 'group think' can result in the board backing management's call. Courts have been critical of directors for not being pro-active and for not asking the right questions, so as to add to, rather than echo management's views.[28] A diverse board, it could be argued, made up of people with diverse skills, experiences and backgrounds which brings fresh perspectives, may lead to consideration of a wider range of options resulting in critical debate with the ability of increasing creativity and innovation.[29] A McKinsey study found companies with three or more women on their governing boards score more highly on each of nine organizational criteria (capability, leadership, external orientation, accountability, motivation, coordination and control, innovation, direction, and work environment and values) than those with no women at the top. However, having only one or two women on the board yields no significant difference in company performance.[30] It has been found that boards with more women directors have greater participation in decision making due to increased attendance, often are more thorough in monitoring management and demonstrate greater alignment with the interests of shareholders.[31] However it appears that a critical mass of three of more women directors may be necessary to effect change in the boardroom and lead to healthier corporate governance practices.[32] On the corporate boards of large companies with 8 to 14 directors, having three women may be easier to

27 Equal Opportunity for Women in the Workplace Agency and EgonZehnder International, '(A)gender in the Boardroom' (Qualitative Report, Equal Opportunity for Women in the Workplace Agency, 2008) 18 <http://www.eowa.gov.au/Information_Centres/Resource_Centre /EOWA_ Publications/EOWA_Census/2008_Census/AGender_in_the_Boardroom_Report/%28A%29Gender_in_the_Boardroom_Full_Report.pdf> (hereafter referred to as 'Agender in the Boardroom'). See also Anne Ross-Smith and Colleen Chesterman, '"Girl Disease': Women Managers' Reticence and Ambivalence Towards Organizational Advancement' (2009) 15 *Journal of Management & Organization* 582.

28 See Commonwealth, HIH Royal Commission, *The Failure of HIH Insurance*, 2003. See also Cecily C Selby, 'From Male Locker Room to Co-ed Board-room: A Twenty-Five Year Perspective' in Ronald J Burke and Mary C Mattis (eds), *Women on Corporate Boards of Directors: International Challenges and Opportunities* (2000) 239, 240. See also Companies and Markets Advisory Committee, *Diversity on Boards of Directors*, (Report March 2009) 7, 18–19 where it is noted that professionalisation of directors with greater emphasis on compliance and the increased possibility of personal liability has meant that the direct experience in management, rather than experience in other disciplines, is being sought and this acts as a barrier for women.

29 See Equal Opportunity for Women in the Workplace, above n 27, 18; Productivity Commission, above n 15, 366; Smith, Smith and Verner, above n 18.

30 Sumru Erkut, Vicki W Kramer and Alison A Konrad, 'Critical Mass: Does the Number of Women on a Corporate Board Make a Difference?' in Diana Bilimoria, et al (eds), *Women on Corporate Boards of Directors: International Research and Practice* (2008) 222, 227.

31 Renée Adams and Daniel Ferreira, 'Women in the Boardroom and their Impact on Governance and Performance' (2009) 94 *Journal of Financial Economics* 291; Equal Opportunity for Women in the Workplace, above n 27, 13; Lord Davies of Abseroch, *Women on Boards* (February 2011) Department for Business Innovation and Skills (UK) <http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf> 10.

32 Erkut, Kramer and Konrad, above n 30.

accommodate in the present climate than in smaller companies, where the boards are smaller with some having as few as six directors.

The fourth argument advanced for increasing the number of women directors is that they will enhance the corporation in the eyes of stakeholders including employees, consumers and shareholders. This argument overlaps with the third argument that a diverse board will improve corporate governance.

Having women on boards can appeal to employees because it provides role models for young women[33] as well as providing a pipeline for career progression[34] and because it may influence creation of pro-women working spaces which address concerns such as maternity and paternity leave, childcare facilities and work-life balance.[35] A diverse board may be better placed to cater to consumers on the basis that women directors may better understand particular market conditions than men, which may bring more creativity and quality to board decision-making and impact positively on brand image[36] It has also been suggested that diversity on the board, which is given high ratings by ratings agencies measuring gender balance, has appeal for shareholders.[37] Furthermore the link between diversity and improved corporate governance may improve performance, as discussed above, resulting in increasing shareholder value.[38]

It is worth emphasizing that in spite the contested nature of the arguments, there is widespread acceptance that companies should have more women on their boards.[39] Nevertheless, their contested nature, coupled with the notion of the shrinking state in the expanding market economy means that there is little justification for the intervention by government to reconfigure the composition of corporate boards. These factors provide the grounding for polycentric regulation — because at an organisational level the government is unable or incapable of taking effective action, leaving it for others to do so.

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33 Catalyst, *Women on Boards* (2011) <http://www.catalyst.org/file/476/qt_women_on_boards.pdf>.

34 Equal Opportunity for Women in the Workplace, above n 27, 25. See Smith et al, above n 18. For another view see Marleen O'Connor, 'Women Executives in Gladiator Corporate Cultures: The Behavioural Dynamics of Gender, Ego, and Power' (2006) 65 *Maryland Law Review* 465.

35 Equal Opportunity for Women in the Workplace, above n 27, 21, 25, 26.

36 Smith, Smith andVerner, above n 18; Lord Davies of Abseroch, above n 31, 30. See also Stephen Brammer et al, 'Gender and Ethnic Diversity Among UK Corporate Boards' (2007) 15 *Corporate Governance: An International Review* 393.

37 For example, '[t]wo major investment funds, Calpers in the United States and Amazone in Europe, include a gender-balance indicator among their investment criteria. And rating agencies such as Innovest and Vigeo are developing tools to measure gender balance' Business New Zealand, Institute of Directors in New Zealand (Inc), Ministry of Women's Affairs, *Women on Boards: Why Women on Company Boards are Good for Business*, (2009), 5 <http://www.mwa.govt.nz/women-on-boards/be-inspired/women-on-boards-why-women-on-company-boards-are-better-for-business.pdf>.

38 Adams and Ferrieira, above n 31.

39 Adele Fergurson, 'Boardroom No Longer a Boys' Club', *Sydney Morning Herald* (Sydney), 26 February 2011, 8.

III HOW TO GET MORE WOMEN ON THE BOARD — DIPPING INTO THE REGULATORY TOOLKIT

Business regulation has always comprised of a range of regulatory tools made up of a hybrid of norms and laws where the traditional command and control way of governing with the State at the helm have made space for new governance techniques which rely increasingly on self regulation.[40] Different terms have been applied to this style of governing including 'responsive regulation', 'smart regulation', 'principled based regulation', 'hybrid regulation', 'decentered regulation', 'really responsive regulation', 'meta regulation', 'nodal governance' and 'polycentric governance'. The development of corporate social responsibility among global corporations is one strong example of the changing forms of business regulation. Here non-government actors play an important role in encouraging the adoption of codes prescribing social responsibility as well as monitoring the corporation's commitment to the code. The state is often not heard but its shadow can be cast on companies by approving codes of conduct, sometimes monitoring corporations, funding NGOs or government departments to collect data about industries, encouraging processes of accreditation and praising the establishment of networks to encourage compliance and monitoring. I am using polycentric governance here because regulation in this space is emanating from many centres, involving non-state and state actors who may be acting independently or in concert.[41] It should also be noted that governance is a broader term than regulation and can include regulation, but can also include notions of participation and equality.[42] As demonstrated below polycentric governance takes different forms in other countries with both the centres and actors being different.

When discussing these new forms of governance the terms, 'hard laws' and soft laws', are commonly used and a brief explanation is necessary. Hard laws have a number of characteristics: they are usually state mandated, deterrence oriented, buttressed by an enforcement regime and supported by sanctions that are attached to breaches. Soft laws are voluntary, can be made by either state or non-state bodies, rely on persuasion and are usually rolled out in the form of recommended guidelines or standards that may or may not be monitored. As will be discussed below, both hard laws and soft laws can be used to increase women on boards, with most countries electing to opt for the latter approach.

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40 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000), and Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59. See also Christine Jolls and Cass Sunstein, 'Debiasing Through Law' (2006) 35 *Journal of Legal Studies* 199.

41 Meta regulation (defined as regulation that regulates any other form of regulation) can also apply to many of the developments discussed here. However whereas meta regulation is linked to one specific type of regulatory outcome, polycentric governance may not be directly connected to regulating and can be motivated for different purposes. For example, companies that provide skills development for women may not necessarily be engaged in regulating for more women on corporate boards.

42 See Jacint Jordana and David Levi-Faur, 'The politics of regulation in the age of governance' in Jacint Jordana and David Levi-Faur (eds), *Politics of Regulation: Institutions and Regulatory Reform for the Age of Governance* (Edward Elgar Publishing Limited, 2004) 1, 3-4.

IV HARD LAWS

Although governments have found it easier to introduce hard laws prescribing quotas in government businesses or government owned companies as demonstrated by the experience in Finland, Quebec and Israel,[43] hard law has been less frequently used in regulating private corporations. Norway was the first country to introduce quotas via an amendment to the *Public Limited Company Act* (Norway) 1999 which required boards of publicly listed companies to ensure that women were represented. The legislation provides for a specific quota depending on the size of the board. For example if the board has two or three members, both sexes must be represented and if the board has more than nine members, each sex must make up at least 40 per cent of the representatives. However these quotas only apply to about 600 listed companies as the majority of the companies in Norway are either non-listed or privately owned.[44] Tough sanctions were attached to these rules allowing for the Brønnøysund Register Centre to refuse to register a company board, if these provisions are not met and also allowing for dissolution by the court. In practice most companies correct these irregularities where they are pointed out and it is unlikely that dissolution is resorted to.[45] It is also worth mentioning that there is another Act in Norway which regulates this area — it is the *Accounting Act* (Norway) 1998 which requires the board of directors to disclose the state of diversity within the company which usually includes a statement as to the gender policy on recruitment, salaries or promotion. Unlike the *Public Limited Company Act*, this does not carry any sanctions.

In contrast to Norway's company legislation, the Spanish laws, which require companies with more than 250 employees to meet the 40 per cent quota by 2015, are not backed up by sanctions. However companies meeting the targets are given preferential treatment when competing for publicly procured contracts. In a similar vein, the United States provides that:

> under the *Dodd-Frank* [*Wall Street Reform and Consumer Protection*] *Act*, Diversity Offices …[set up in government departments, are able to] implement rules to ensure the fair inclusion of…women in all firms that do business with government agencies.[46]

This is indirectly providing incentives for business to increase diversity.

In Iceland, legislation introduced in 2010 requires publicly owned companies and publicly listed companies with more than 50 employees to have 40 per cent of board members of both genders by 2013. France's quota legislation introduced in 2011 requires the boards of large companies to have at least 20 per cent of women by 2013

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43 Governance Metrics International, 'Women on Boards: A Statistical Review by Country, Super sector and Sector', (11 March 2010) <http://www.gmiratings.com/hp/Women_on_Boards_March_2010.pdf>. See also Lois Joy et al, above n 17; Deloitte Global Center for Corporate Governance, 'Women In The Boardroom: A Global Perspective' (Deloitte Global Services Limited, January 2011).

44 Aagoth Storvik and Mari Teigen, 'Women on Board: The Norwegian Experience' Friedrich Ebert Stiftung (June 2010) 10 <http://library.fes.de/pdf-files/id/ipa/07309.pdf>; see also, Deloitte Global Center, above n 43, 14.

45 Ministry of Children, Equality and Social Inclusion (Norway), *Representation of Both Sexes on Corporate Boards* <http://www.regjeringen.no/en/dep/bld/Topics/equality/rules-on-gender-representation-on-compan.html?id=416864>.

46 Lord Davies of Abseroch, above n 31, 23 and *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 18 Stat § 342 (2010).

and 40 per cent by 2016. This applies to women directors on the boards of all listed companies as well as companies with a turnover of over 50 million euros and with more than 500 employees. Non-compliance would mean the payment of the directors' fees will be suspended until the Board's composition complies with the law and the nomination would be void.[47]

Quotas have had a dramatic effect in Norway where there are 39.5 per cent of women on corporate boards and the government has extended the quota to cover all the boards of private companies in which the state municipalities has a two third ownership.[48] Although the results in Spain are 'less dramatic'[49] at 11 per cent, it represents a 66 per cent increase since the 2008 figures. The success of hard law in Norway has prompted a number of countries to consider legislation including the Netherlands,[50] Belgium[51] and Italy.[52] However a word of warning was issued recently urging us to consider these laws in the broader context of Norway's socio-political environment — a country with significant state support for childcare, a progressive welfare state and generous maternity and paternity leave.[53] Culture remains fundamental and cannot be ignored when considering possible regulatory approaches.[54]

It is generally argued that laws supported by 'big stick' sanctions are more prone to encourage compliance. However it has also been recognized that such an approach may not necessarily bring about the outcomes sought with companies adhering to the letter of the law rather than the spirit. The meaning of laws is constructed from the interaction of organisations and rather than being passive recipients, organisations become active co-producers of legal meaning.[55] This is reflected in the reaction to the laws mandating quotas which are critisised as tokenistic. Further in practice women

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47 This law has still to be enacted in the Journal Official. See: Ethics Board (France), *The Zimmermann Copé Bill voted by the French Senate* (28 October 2010) <http://www.ethicsandboards.com/node/22500/dossier/21986>. In relation to Iceland see Storvik and Teigen, above n 44, 13.

48 Local Government Act 1992 (Norway) Rules 36, 37 and 38.

49 Villiers, above n 13, 554.

50 The proposals were made to apply a 30 per cent quota for men and women for larger companies. Companies would have to explain any non-compliance. See Deloitte Global Center, above n 43, 12.

51 The proposed law is seeking a one third representation of women on boards of public. See also the example of the Netherlands where the government is now considering quotas to supplement the soft laws: European Women's Professional Network, 'EPWN Board Women Monitor' (2010) 8, <http://www.europeanpwn.net/files/europeanpwn_boardmonitor_2010.pdf> companies. It was filed with the Belgian Chamber of Representations on 16 December 2009. Deloitte Global Center, 2011, above n 43, 7.

52 The proposed bill seeks that all listed companies and state owned companies have at least one third women on their boards. This bill was approved by the lower house of parliament and requires approval by the Senate. See Deloitte Global Center, above n 43, 11.

53 Lord Davies of Abseroch, above n 31, 26.

54 Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law*, (Oxford University Press, 2008) 711.

55 See Lauren B Edelman, Mark C Suchman, *The Legal Lives of Private Organizations* (Ashgate, 2007) and Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002).

may be sidelined from the important decision-making roles or committees and recent studies suggest that even though the number of women on boards may be increasing, they are primarily being appointed as non-executive directors.[56]

Boards are made up of executive and non-executive directors. Executive directors are senior employees in the company and are members of the board in this capacity. Non-executive directors are independent of management, usually appointed for their specialist knowledge or expertise.[57] Although the focus on board composition through changes in laws and action by other non-government bodies has resulted in an increase in the appointment of women to corporate boards internationally, it is more common for women to be appointed as non-executive directors rather than as part of the executive.[58] Even in Norway where 39 per cent of boards are women, only 2 per cent of CEOs are women and only 10 per cent of executive committee members are women.[59] The concentration of the literature on the overall numbers of women on the board has detracted attention from whether women are appointed to the executive, specifically the all important role of Chief Executive Officer or Chair of the board of directors. Attention has also to be given to whether women are members of the important committees such as the remuneration committee, nomination committee, risk committee and audit committee, where the main game is played. For example a study of the Fortune 500 companies in the United States in 2010 showed that women accounted for 8.8 per cent of directors, 2.6 per cent of Chairs, 12.1 per cent of audit committees, 11.5 per cent of the compensation committee and 16.9 per cent of the nominating committee. Further research on these issues will help us assess the extent to which corporations have internalized the values inherent in these laws.[60]

V SOFT LAWS

Many governments have threatened to introduce hard laws but have stopped short of it.[61] This strategy may well be founded on the idea of the enforcement pyramid where the base represents non-intrusive soft laws (codes) which escalate up to intrusive intervention strategies (quotas with deregistration) at the apex. It may encourage corporations' uptake of soft laws, avoiding further intrusion.[62] Globally there are three types of soft laws: corporate governance codes which provide for gender diversity; the actions of individual companies themselves who see value in adopting policies that

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56 Anne Ross-Smith and Jane Bridge, '"Glacial at Best": Women's Progress on Corporate Boards in Australia', in Burke et al *Women on Corporate Boards of Directors: International Research and Practice*, (Edward Elgar Publishing Limited, 2008) 67, 71.

57 The larger ASX listed companies have between four and nine directors on the board with more than two thirds of them being non-executive. See Companies and Markets Advisory Committee, above n 28, 14.

58 Ross-Smith and Bridge, above n 56.

59 Lord Davies of Abseroch, above n 31, 26.

60 Christine Parker, 'Meta Regulation: Legal Accountability for Corporate Social Responsibility' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 207.

61 For example, in Sweden the government proposed legislation in 2004, but it was never passed. See *The Great Equality Debate – Whither Swedish Women?*, *The Local* (online), 18 June 2004, <http://www.thelocal.se/230/20040618>.

62 See Ayers and Braithwaite, above n 40.

promote women; and initiatives by industry associations which are directed at addressing the actions of the members of an association.

Corporate governance codes recommending disclosure have been a popular way to address this issue worldwide. Table 1 lists ten countries where a corporate governance code is the regulatory tool for reporting on diversity policy of listed companies where most have elected to adopt the 'comply and explain' provision in a code of conduct. Such an examination of the approach taken by other governments is useful when discussing the most suitable regulatory trajectory for Australia.

The responsibility for developing, monitoring and reviewing the codes lies with a range of parties: the stock exchange, government authorities/independent regulators and industry associations. In Australia, the Australian Stock Exchange is responsible for the Corporate Governance Principles and Recommendations which took effect from 1 January 2011. It recommends that all listed companies establish a policy concerning diversity and ensure it is disclosed. The policy should include requirements for the board to establish measurable objectives for achieving gender diversity and for the board to assess annually both the objectives and progress in achieving them. One example of measurement is to collate the proportion of women in the company, senior executive positions and on the board. It recommends that companies introduce procedures to ensure the diversity policy is properly implemented and it should identify ways to promote a culture supportive of diversity including recruitment from a diverse pool of candidates. It proposes that there be an internal review mechanism to assess the effectiveness of the policy and it states that a summary of the diversity policy should be posted on the company's website.[63] Likewise in the United States and Poland it is the stock exchanges that are charged with developing the corporate governance principles that have incorporated the diversity reporting clauses.

The second source of Corporate Governance codes is government authorities or independent regulators established by government. In Netherlands and Germany, government Ministers have delegated this task to a commission or committee. In Germany it is the Government Commission on the Corporate Governance Code established by the Ministry of Justice and in Netherlands it is the Corporate Governance Monitoring Committee established by the Minister of Finance. In the United Kingdom it is the Financial Reporting Council and in Spain it is the Securities and Markets Commission, both independent regulators established by governments.[64]

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63 See ASX Corporate Governance Council, *Principles and Recommendations with 2010 Amendments*', 2nd Edition, (30 June 2010) Australian Securities Exchange 13, 19, 22, 24, 25, 45 <http://www.asxgroup.com.au/diversity-resources.htm>.

64 This is referred to as the Comisión Nacional del Mercado de Valores, Comisión Nacional del Mercado de Valores<http://www.cnmv.es/index_en.htm>. It is not funded directly from the government but rather through levies imposed on industry bodies.

Table 1: Examples of soft laws dealing with gender diversity on corporate boards

Country	Soft Law
Australia	The Australian Stock Exchange's Corporate Governance Principles and Recommendations requires listed companies to establish a policy on diversity and to include measurable objectives for achieving gender diversity and to disclose the number of women on corporate boards in their Annual Report on an 'if not, why not?' basis.
Denmark	The Committee on Corporate Governance has developed a code that recommends a formal process for selection and nomination of candidates that takes gender into account.
France	The French Corporate Governance Code requires listed companies to comply with the quota legislation in the Annual Report. Any non-compliance must be explained.[65]
Germany	The German Corporate Governance Code applies to listed companies and requires the Supervisory Board to respect diversity and to set objectives on the degree of female representation and requires the Management Board to take diversity into account in recruitment.
Netherlands	The Dutch Corporate Governance Code requires the Supervisory Board to state its policy on diversity and prepare a profile of board members which should be available to the public.
Poland	The Warsaw Stock Exchange's Code of Best Practice for Listed Companies recommends that listed public companies ensure a balanced proportion of women and men in management and supervisory functions.
Spain	The Spanish Securities and Markets Commission's Corporate Governance Code recommends that listed company boards include women when seeking additional directors and if not following the recommendation, the board should give reasons for the situation and the initiatives to correct it. (This is in addition to the hard laws discussed above).
Sweden	The Swedish Corporate Governance Code, which applies to listed companies, recommends that companies should aim for equal gender distribution and non-compliance should be identified and explained.
United Kingdom	The Financial Reporting Council's UK Corporate Governance Code recommends that listed companies should take diversity into account in recruiting directors. This should be reported and reasons for the decision explained.[66]

65 This was inserted in April 2010 in anticipation of the quota legislation. See Association Françaisedes Entreprises Privées, Corporate Governance Code of Listed Corporations (Amended in April 2010 Rule 6 and 22 <http://www.ecgi.org/codes/documents/afep_medef_cgcode_listed_corporations_20apr2010_en.pdf>.

66 See Lord Davies of Abseroch, above n 31, 22. It recommends that companies establish a policy on boardroom diversity, including measurable objectives and that this should be annually disclosed in the Annual Report and if the objectives are not met reasons for the situation given.

Country	Soft Law
United States	The Securities Exchange Commission requires disclosure of any diversity policy and the manner in which the company considers diversity in recruitment and assess the effectiveness of its policy.

The third source of these codes is industry bodies. In Sweden this is the responsibility of the Swedish Corporate Governance Board set up in 2005 to promote corporate governance among listed companies. This Board is one of the three bodies that constitute the Association for Generally Accepted Principles in the Securities Market, an association set up by a number of corporate sector organisations to provide a structure for the self-regulation of private sector companies on the Swedish securities market.[67] In France the Association of French Private Sector Companies (AFED) and the French Business Confederation (MEDEF) develop the Corporate Governance Code and have incorporated provision on diversity, in anticipation of the hard law into the Code in April 2010.[68]

Many companies have sought to take a leadership role in this space by setting company targets and developing programs to increase gender equality. These companies by and large are in the industries where women dominate the workforce — namely retail, hospitality, health and community services and finance and insurance, in contrast to those industries where women are poorly represented including, manufacturing, property and business services.[69] Australian companies that are forerunners are Westpac, that has set a 40 per cent target for women in management, and the Commonwealth Bank, which has set a target of 35 per cent for senior management positions. It is no surprise that they are in the financial services industry where women constitute 56 per cent of the total workforce,[70] and where appropriate educational qualifications carry significant weight. This is also reflected in the constituency of the Superannuation Trustee Boards that have 18 per cent women on the board and credit unions that have about 20.5 per cent of women on their boards.[71] In both the superannuation trustee boards and credit union boards, 13 per cent of companies have 40 per cent or more women on boards.[72] Clearly having an available pool of candidates makes it possible to adopt and give effect to such targets. Further, many of the superannuation funds are public service based with a commitment to equal opportunity principles. This is reflected by the governments' in principle support for the creation of a Code of Trustee Governance for trustees of superannuation funds

67 Swedish Corporate Governance Board, 'The Swedish Corporate Governance Board Promotes good corporate governance' <http://www.corporategovernanceboard.se/>.

68 Association Françaisedes Entreprises Privées, Corporate Governance Code of Listed Corporations (Amended in April 2010) 7, 8, 11–12 <http://www.ecgi.org/codes/documents/afep_medef_cgcode_listed_corporations_20apr2010_en.pdf>.

69 Equal Opportunity for Women in the Workplace Agency, *EOWA Industry Snapshots: Finance and Insurance* (2011) <http://www.eowa.gov.au/Information_Centres/Resource_Centre/EOWA_Publications/Industry_Verticals/2011/finance%20&%20insurance_V1.pdf>.

70 Ibid.

71 Women On Boards, *Boardroom Diversity Index 2011*, <http://www.womenonboards.org.au/pubs/bdi/2011/>.

72 Ibid.

and their trustee directors which deals with diversity on boards and the Australian Council of Superannuation Investors has stated that it expects that all superannuation companies in the ASX 200 will have at least two position held by women within 2014.[73]

As discussed in the above section, large companies may see incentives in gaining community and stakeholder support for their activities. Both Telstra and Woolworths, which are actively competing for the consumer dollar and for shareholder loyalty, have introduced mentoring programs aimed at encouraging women into leadership positions. Currently both Telstra and Woolworths have two women on their board meaning women make up 18 per cent of Telstra's board and 22 per cent of Woolworths' board. These companies operate in female dominated industries with 41.7 per cent of employees and 8.6 per cent of CEOs being women in the telecommunications sector and 58.7 per cent of employees and 6.5 per cent of CEOs being women in the retail sector.[74] Not only do the companies in these sectors have potential candidates to appoint to boards, but there is also the possibility of greater pressure placed on them from employees, consumers and stakeholders.

Another way in which soft law can work is through industry bodies of associations which attempt to promote gender diversity by using educational programs, media campaigns or networking and coaching initiatives. In Australia the Australian Institute of Company Directors have taken the lead, introducing a package of initiatives on 24 November 2009. These included:

> recommendations for boards to adopt, and report on, diversity policies and goals…, [with measurable objectives]; recommendations for greater transparency in board selection processes'…; [a] new… mentoring program bringing together senior listed company chairmen and emerging women directors;… an enhanced… database and information services for current and aspiring women directors …[and] a … publication providing guidance for boards and search professionals on board appointments that highlight the advantages of diversity and widening the candidate pool.[75]

The ASX issued its proposals on diversity in the Corporate Governance Principles and Recommendations on 7th December 2009, taking effect on 1 January 2011.[76] Other industry bodies that have been active include the Australian Financial Markets Association, which established an Industry Women in Financial Markets working group in 2004 to consider initiatives to complement existing organisational strategies to attract and retain women in the industry.[77]Similarly the Business Council of Australia

73 Australian Prudential Regulatory Authority, *Annual Superannuation Bulletin: June 2010* (19 January 2011) 14 and 18 <http://www.apra.gov.au/Statistics/Documents/June-2010-Annual-Superannuation-Bulletin.pdf>.

74 Equal Opportunity for Women in the Workplace Agency, *Industry Verticals 2011*, <http://www.eowa.gov.au/Information_Centres/Resource_Centre/EOWA_Publications/Industry_Verticals/2011/2011_Industry_Verticals.asp>.

75 Australian Institute of Company Directors, 'AICD Takes Action on Board Diversity', (Media Release, 24 November 2009).

76 Australian Securities Exchange, 'New ASX Corporate Governance Council Recommendations on Diversity' (Media Release 7 December, 2009) and ASX Corporate Governance Council, above n 65, 7.

77 Letter from Duncan Fairweather, Executive Director Australian Financial Markets Association and Belinda Lawn Chairperson, Women in Financial Markers Working Group to the Australian Stock Exchange Regulatory and Public Policy Unit, 31 May 2010 <http://www.asx.com.au/documents/about/2010_cg_submission_afma.pdf>.

has established a scheme where leading CEOs who are members of the Council mentor high-achieving women employed by other member companies of the Council.[78]

Although these soft laws may not emanate from governments and may not be accompanied by mandates, governments are often still participating in regulation, usually working to give effect to the laws. For example in Belgium, the government works in partnership with the Ministry of Equal Chances of the Flemish Region, the Chambers of Commerce and the Belgian Institute of Directors. Together they have 'established a program to promote the representation of women on company boards and in management positions'.[79] In Canada this task is performed by the Canadian Board Diversity Council which was created in 2009 and which is partially funded by the government. It has the mandate of increasing representation of women in listed corporations and it plans to achieve its mandate by communicating how to engage in best practice and by producing an Annual Reporting Card on the practices of the top 500 companies in Canada as well as bringing together the Nominating Committee of Boards and potential candidates and running a media campaign to give positive coverage to complaint companies.[80]

VI POLYCENTRIC GOVERNANCE IN AUSTRALIA

Many actors have played a part in regulating for gender equality on corporate boards in Australia and this section charts their roles. The discussion here is focused on the current attempt to increase women's representation rather than at any earlier attempt to do so. What appears clear is that there are intricate networks developing where the actors are able to engage with each other and work collaboratively to strengthen governance. There are those that are collecting data and encouraging commitment. Others are designing and operating services that spring out of these attempts to govern, thereby also engaging in governing. Each of these actors are involved in regulatory conversations, defined as all forms of communicative interaction that occur, including policy documents, seminars, conferences, and interpersonal communications, [81] as well as officials' statements, policy proposals and all sound bites that generate expectations among stakeholders and the community. The point of these conversations is to give certainty to general guidelines and to deepen corporate commitment to the principle of gender equality in the corporate setting and to try to move these standards to become norms by changing corporate behaviour.

In 2008 the Minister for Superannuation and Corporate Law, Senator Nick Sherry sought advice from the Companies and Markets Advisory Committee (CAMAC), an independent Committee set up by the Australian government, on 'the options for creating an environment that will encourage companies in Australia to foster a governance culture that embraces diversity in the composition of their boards.[82] The Diversity on Boards of Directors report was published in March 2009 and it had an

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78 Business Council of Australia, 'CEOs Step up to Take Direct Action on Women in Top Jobs' (Media Release, 31 March 2010) <http://www.bca.com.au/Content/101669.aspx>.

79 Deloitte Global Center, above n 43, 7.

80 The other tasks of the Council include educating public sector leaders on 'diversity best practices'. See Canadian Board Diversity Council *Home* (2011) <http://www.boarddiversity.ca/en/home>.

81 Julia Black, 'Regulatory Conversations' (2002) 29(1) *Journal of Law and Society* 163, 170–1.

82 Companies and Markets Advisory Committee, above n 28, 1.

important role in acknowledging the underrepresentation of women and directing parties to consider the different soft laws that could be used to address the problem. More than anything else, this report raised awareness and promoted debate among the industry, government, media as well as other stakeholders. Similar sentiments were being expressed from other sources including the Equal Opportunity for Women in the Workplace Agency (EOWA),[83] the Australian Human Rights Commission and the Government of South Australia.[84] Large companies too were entering the debates and setting in-house targets, claiming attention from the media and consumers as well as their competitors for being good corporate citizens, illustrated by the examples of Telstra, Woolworths and Westpac discussed in the previous section.

Industry associations, seeing that the time was right, came to the fore and published recommendations and established networks and education programs. Technically it was the Australian Institute of Company Directors (AICD), which came up with its recommendations on 24 November 2009 quickly followed by the ASX's release of its diversity principles thirteen days later.[85] However in the networked business world, it is interesting to note that Rob Elliot, General Manager of AICD was also the Chairman of the ASX Diversity Committee when it made its proposal to expand the recommendations on diversity. It was clear that it was ASX, rather than the AICD that had greater legitimacy to become a regulator in this polycentric space. It has been argued that legitimacy can be pragmatically based — people believe that this organisation will pursue their interests; morally based — where people believe that this organisation will be morally appropriate; or cognitively based — where people accept this organisation as inevitable.[86] The choice of the ASX was most likely both pragmatically and cognitively based as it could use the Corporate Governance Principles and Recommendations to incorporate the gender diversity principles and it would be accepted as the appropriate body to make such recommendations in line with its overall regulation of listed corporations.

The announcement by the ASX was followed by extraordinary media attention and scarcely a week went by without a media story on the lack of women in business. The Sex Discrimination Commissioner, Elizabeth Broderick took on the role of harnessing support across a broad spectrum of the community taking the issue to the living rooms

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83 See Equal Opportunity for Women in the Workplace Agency, 'Women Directors May Punch Above Their Weight but Women Execs Are On the Ropes: EOWA Report' (Media Release, 17 June 2009).

84 In submissions to ASX Corporate Governance Committee, both these parties made recommendations that formal targets be considered. See Letter from Hon Gail Gago MLC (Government of South Australia) to Australian Stock Exchange Regulatory and Public Policy Unit, 25 May 2010 <http://www.asx.com.au/documents/about/2010_cg_submission_gov_of_south_australia.pdf>. See also Submission from the Human Rights Commission to the ASX Corporate Governance Council, 1 June 2010 <http://www.asx.com.au/documents/about/2010_cg_submission_aust_human_rights_comm.pdf>.

85 Whereas the Australian Institute of Company Director's announcements came on 24 November 2009, the ASX's proposal to expand its recommendations on Diversity came on 7 December 2009. See for the latter, Australian Securities Exchange, above n 76.

86 Black, above n 5, 10.

of Australians and engendering support for the proposals.[87] The Productivity Commission endorsed the initiative adding that 'outcomes will need to be monitored and evaluated and, depending on progress, the scope for stronger action should be considered'.[88] The EOWA supported the ASX changes and committed to measuring the number of women in senior position in the ASX listed companies.[89] This Agency requires non-government organizations with more than 100 employees to develop equal opportunity programs for women, to report annually on the program and its effectiveness. The regulatory conversations continued in boardrooms, universities and conferences.[90]

Many other regulators looked closely at specific sectors of the industry where women's participation could be increased including the Australian Prudential Regulation Authority.[91] Mentoring programs were announced by the Australian Institute of Company Directors[92] and the manner in which companies could set specific targets, converting the guidelines into practice was discussed by the Chartered Secretaries of Australia.[93] The Diversity Council Australia developed toolkits for its members achieving diversity and many businesses including legal and accounting firms developed specialist services on how to translate the ASX guidelines into outcomes including the possibility of linking the appointment of women to the Key Performance Indicators of senior executives.[94] Advice on developing a diversity policy, establishing measurable objectives, reviewing female participation in the companies' workforce, preparing disclosure in the annual report and reviewing the reassessing and revising the existing selection criteria are all part of the services offered. These are all strategies aimed at ratcheting a guideline to best practice.[95]

Further a number of organizations offering services to address the 'pipeline' problem with training programs and assistance with resume preparations entered the

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87 See Ruth Williams, 'Gender Mender on Agenda' *The Age* (Melbourne) 11 December 2009, 7 and Elizabeth Broderick, 'Mandatory quotas may be needed on boards' *Australian Financial Review* (Sydney), 8 April 2010, 63.

88 Productivity Commission, above n 15, 366.

89 Equal Opportunity for Women in the Workplace Agency, 'Annual Report 2009–2010' (Equal Opportunity in the Workplace Agency, 28 November 2010) 8.

90 See in relation to boards and conferences Women on Boards, 'Gender Matters: 3rd Women on Boards Conference' Sydney 27–29 April 2011 <http://www.womenonboards.org.au/events/conference2011/>; Corporate Women Directors International, Report on Accelerating Board Diversity, 2010 <http://www.globewomen.org/CWDI/CWDI.htm>.

91 Australian Prudential Regulatory Agency, above n 73, 3. See also NSW Premier & Cabinet Office for Women's Policy, *Increasing Women's Representation on NSW Government Boards and Committees*, (2 February 2011) <http://www.women.nsw.gov.au/leadership/women_on_boards_and_committees>.

92 Australian Institute of Company Directors, 'Directors take the lead in helping put women on boards', (Media Release, 22 April 2010).

93 Chartered Secretaries Australia and Women on Boards, 'Looming Issue for ASX Rules on Gender Reporting' (Media Release, 9 August 2010).

94 See ASX Group, 'Diversity — Resources for Listed Companies' <http://www.asxgroup.com.au/diversity-resources.htm> which includes the names of diversity consultants providing services in this area.

95 Parker, above n 55. See also Black, above n 81, 171.

field.[96] Other organisations offered networking services which included collaborative efforts between the Australian Institute of Company Directors and Business Council of Australia (industry groups) Sex Discrimination Commissioner (government) and individual CEOs (corporation) to increase the number of women and 'embed a culture of diversity and change the face of the business environment'[97] while others offer to effect cultural change. Private global organisations began to publish reports on the issue surveying the landscape and assessing national efforts.[98] All these strategies were aimed at facilitating and deepening commitment.

The Diversity Index for 2011 was released on International Women's Day, just 66 days after the ASX guidelines took effect, to a cacophony of comment, some cheering and others critical of the soft approach of the ASX guidelines.[99] The Governor-General and Government Ministers spoke up in support of quotas[100] and the debate on soft laws and quotas was revived for a few days with the general consensus being that quotas, however desirable, were unlikely to become a reality. The Diversity Index showed that there were more women represented in the larger companies with the ASX 50 having almost 13 per cent women on their boards compared to 10.9 per cent in the ASX 200 and the ASX 201–300 with less than 5 per cent.[101] A study examining the positions held by women directors in 2007 found that in the ASX 200, only 8.6 per cent of the women directors occupied roles as CEO or executive directors while in the ASX 50 this category was 13 per cent.[102] This aligned with the research conducted on non-executive directors which found that the larger the firm, the larger the board and the greater number of non-executive directors that could be accommodated.[103] Whether the ASX recommendations will encourage companies to appoint women to executive roles rather than to non-executive positions and to the crucial committees or the all powerful position of Chairman are complex issues.

Although it is too early to decide if the ASX initiative is a success, the debates have alerted the community to the problem and the initiative has harnessed a group of

96 For examples see: Australian Institute of Company Directors, *Director Pipeline Project,* <http://www.companydirectors.com.au/In-My-State/WA/Pipeline-Project>; Women On Boards, *Getting Serious: Your Directorship Action Plan* <http://www.womenonboards.org.au/professional-development/gettingserious1.htm>

97 Australian Human Rights Commission, 'Male Leaders Build Momentum for Women in Business' (Press Release, 18 April 2010).

98 Deloitte Global Center, above n 43. See also Ernst and Young, '*Women in Leadership: Engaging Australian Business*' 2011 <*http://www.ey.com/Publication/vwLUAssets/Women_in_leadership._Engaging_Australian_business/$FILE/WomeninLeadership.pdf*>.

99 Lenore Taylor and Kirsty Needham, 'Abbott Breaks with Hockey Over Board Quotas for Women', *Sydney Morning Herald* (online), 9 March 2011 <http://www.smh.com.au/national/abbott-breaks-with-hockey-over-board-quotas-for-women-20110308-1bmoi.html>.

100 Tony Wright, 'G-G Calls For Female Quotas' *The Age* (Melbourne), 8 March 2011 <http://www.theage.com.au/executive-style/executive-women/gg-calls-for-female-quotas-20110307-1bl80.html?from=smh_ft>.

101 Women on Boards, *Boardroom Diversity*, <http://www.womenonboards.org.au/pubs/bdi/2011/asx.htm>.

102 Ross-Smith and Bridge, above n 56, 72–73.

103 Geof Stapledon, and Jeffrey Lawrence, *Corporate Governance in the Top 100: An Empirical Study of the Top 100 Companies' Boards of Directors*, (Centre For Corporate Law and Securities Regulation University of Melbourne, 1996).

actors from government, private sector and not for profit organisations to build the architecture around these guidelines. In true polycentric style there are many centres. The ASX set out the non-mandatory Principles and Recommendations. Private businesses advise on how to comply with these guidelines. Industry bodies and government departments and private firms provide training, mentoring and networking to facilitate compliance. Government departments collate data and publish evidence on how corporations are faring with compliance and nurture the development of codes and commitment to compliance. Stakeholders, including the media, shareholders, proxy firms, customers and community are able to access and use this evidence to make decisions.

VII MAKING POLYCENTRIC GOVERNANCE MORE EFFECTIVE: FINDING A FULCRUM POINT

Polycentric governance is not a panacea. But is has resulted in experimental efforts with multiple benefits at multiple levels.[104] It is clear the top 50 listed companies record the best rates for compliance and this is attributable to the role of stakeholders. These firms are more alert to scrutiny from shareholders, consumers and the media. Large enterprises place greater value on their image and the literature on environmental governance shows that violation of their 'social license' can result in serious economic damage, which may not be as important for smaller companies.[105] The large companies have also taken on the responsibility of reporting on a range of social and environmental issues[106] and would have developed expertise in doing so. Their cost of compliance may be lower as they can access existing compliance frameworks compared to smaller companies. These companies also have larger boards that can accommodate women. They are also in the sectors where women have a presence including financial services, healthcare and retail.

However it is the smaller listed companies, where there are fewer directors on the board and less scrutiny that do not fare as well with compliance. These are the companies where the stakeholders have limited impact on internal governance. This is a very significant concern about polycentric governance and indeed all new governance approaches — that they seek to rely on stakeholder scrutiny that at best could be vigorous and at worst could be nonexistent. The stakeholders of companies are a variety of groups including shareholders, consumers, customers, financiers, employees, proxy firms and governments. The manner in which these stakeholders will react to the issue of women on boards is also diverse. However there is a rich opportunity here for an institution to act as a fulcrum that connects with these

104 Elinor Ostrom, A Polycentric Approach for Coping with Climate Change' (World Bank Policy Research Working Paper No 5095, World Bank, 2009).

105 Neil Gunningham, Dorothy Thornton and Robert Kagan, 'Motivating Management: Corporate Compliance in Environmental Protection' (2005) 27 *Law & Policy* 289, 311.

106 Large companies have been disclosing information about social and environmental issues through a variety of regimes including the continuous disclosure regime under ASX Listing Rule 3.1 where information that is likely to have a material effect on share price has to be disclosed; under s 1031D *Corporations Act 2001* (Cth) which requires specific product disclosure by superannuation and life insurance companies; and under the Australian Standard 8003 (2003) which requires integration of social and environmental concerns into their operations and their interaction with stakeholders.

companies, networks and stakeholders and tries to weave commitment to the principle of increasing women on boards. This will work to make polycentric governance more effective by seeking improved corporate commitment and increased stakeholder scrutiny. The notion of the fulcrum point, which steers others towards the regulatory outcome, can be occupied by either the state or a non-state institution. In this site, it is the state that is best placed to occupy this position. Although it is clear that the state is not interested in exerting direct control, it has been doing so indirectly. As discussed earlier in this article, these indirect modes of steering have included supporting the introduction of soft laws, providing for the collection of relevant data and engaging actively in the regulatory conversations. There is the possibility for the state to do more and here I will discuss three such possible means of steering.

However prior to discussing these means of steering, it is important to consider how the notion of the fulcrum point relates to meta regulating law and meta regulation. While this approach may have much in common with meta regulating law, defined as law that empowers other strands of governance,[107] it goes further because it does not restrict itself to using law for this purpose. Rather it uses a number of different strategies, to reach its goal. This approach also has a lot in common with meta regulation, defined as regulation that might regulate any other form of regulation. It is clear that meta regulation does not have to be undertaken solely by the state and neither does it need to solely involve legal instruments. Scott reminds us that 'the reconceptualization of pluralized and fragmented governance processes should steer us precisely towards recognizing that alongside diffuse capacity, changes in behaviour are likely to be engaged by diffuse modes of steering and not law alone'.[108] This is keenly illustrated by the Equator Principles, an initiative of nine international banks along with the International Finance Corporation (part of the World Bank Group), which developed a common standard for assessing and managing environmental and social risk in project financings. Under this regulatory framework, the financial institutions that have adopted these principles commit to not providing loans to projects where the borrower will not or cannot comply with the relevant environmental and social policies and procedures. This initiative, which regulates a space outside governments' direct purview, is an example of diffuse governance processes involving private institutions and non-law modes of steering. The approach used here is building on meta regulation. It is using the state as the fulcrum to employ a range of strategies to steer the participants in the polycentric space.

There are three possible ways that the state could steer here: guidance, incentives and feedback.[109] Guidance can be provided by the state defining the nature of the legal

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107 Parker, above n 60. See also David Levi-Faur, 'Jerusalem Papers in Regulation & Governance: Regulation & Regulatory Governance' (Working Paper No 1, The Hebrew University, February 2010).

108 Colin Scott, 'Reflexive Governance, Meta Regulation and Corporate Social Responsibility: the "Heineken Effect"' in Nina Boeger, Rachel Murray and Charlotte Villiers, *Perspectives on Corporate Social Responsibility* (Edward Elgar, 2008) 177–78.

109 See Cameron Holley, Neil Gunningham and Clifford Shearing, *New Environmental Governance* (Earthscan, 2011) 183–4. The authors use definitional guidance, participatory incentives and enforcement capability as the categories for state involvement. As the last of these categories, enforcement capability, is minimal in the area of women's participation on corporate boards, I have not adopted it for my analysis. Instead I have used 'feedback' as it better reflects the state's role in this particular regulatory site.

problem and by clearly stating the outcomes that are sought.[110] There are three specific ways in which the state can be involved in providing guidance to corporations. The first is by continuing to actively participate in encouraging compliance with the ASX Principles and Recommendations. Government departments at both federal and state levels have been involved in the regulatory conversations on increasing the representations of women on corporate boards. These conversations that encourage commitment could continue with greater bi-partisan support from governments as has been demonstrated in the recent past. Networked co-ordinated action by the government bodies including EOWA, Sex Commissioner with other non-government bodies including the Australian Institute of Company Directors and the Chartered Secretaries of Australia as well as private corporations could be directed at mounting an argument for upgrading the Principles and Recommendations to an ASX Listing Rule.[111] The second way of providing guidance is for government departments to demonstrate commitment to these targets by increasing gender equality on public service boards as well as superannuation companies dealing with public sector funds. In 2010 the percentage of women on superannuation boards stood at 23 per cent (while in the corporate sector this was 19.4 per cent)[112] far short of the 40 per cent recommended by the Cooper review.[113] Governments' actions can add to the importance of regulatory conversations and by making such appointments, governments will be taking the first steps in shifting norms and influencing private sector behavior.

Thirdly, governments should also recognize that corporations look for directors from both the public sector and the not-for-profit sector. By increasing the number of women on such boards, and by assisting women to network and enhance skills, governments can indirectly address the 'pipeline' issue on company boards. Adopting strategies and targets that will utilize the government sector as a platform to improve the position of women on boards in the private sector would produce results. After all it appears to work in all other aspects of corporate regulation, where highly qualified and skilled legal professionals go on to contribute to the private sector. Creating direct pathways to this end will take initiative.

Incentives, framed positively or negatively, are another way of steering corporations and three types of incentives are relevant here. Government contracts that preference corporations with better compliance records is a powerful way to change behaviour. In Spain, companies that meet the gender quotas are given preferential treatment when competing for publicly procured contracts.[114] In the United States diversity offices are able to implement rules to ensure the fair inclusion of women in all firms that do business with government agencies.[115] In Australia in government contracts, criteria provided in tenders for government work include complying with ISO9001, a quality management system. Encouragement to comply could also be in the

110 Ibid.

111 See Productivity Commission, above n 15, 366.

112 Australian Prudential Regulatory Authority, above n 73, 14.

113 Australian Government, 'Review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System', Super System Review Final Report Part Two: Recommendation Packages, 2010, 64.

114 Deloitte Global Center, above n 43, 15.

115 See s 342 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act,* 18 Stat § 342 (2010). See also Lord Davies of Abseroch, above n 31, 23.

form of incentive based policies by government agencies such as the Australian Prudential Regulation Authority or by liaising with government superannuation funds to scrutinize the companies where their funds are being committed. So, governments are able to indirectly preference companies that comply with this standard when tendering for procurement contracts which can also be termed meta regulating for compliance. A variation of this is for governments to decide only to borrow money from corporations that are complying with the diversity provision. Another type of incentive is to link government funding to specific targets addressing the gender deficit. Governments provide funds to many bodies in the form of grants including the National Sporting Organisations where 22.7 per cent of the directors currently are women,[116] Cooperative Research Centres where 18.4 per cent are women[117] and Rural Research and Development Corporations where 22.5 per cent of directors are women.[118] By these mechanisms governments can steer the other polycentric participants towards the outcome.

Feedback on the manner in which corporate boards are changing is important for assessing the regulatory strategies, reflecting on and altering government policies, as well as enabling stakeholder monitoring and engagement. One clear way of facilitating feedback is through the incorporation of a monitoring agency that could be forceful about compliance. In the Netherlands the Corporate Governance Code Monitoring Committee has the job of ensuring that the Code is up-to-date and to monitor compliance with it by Dutch listed companies.[119] Currently the EOWA collates data, but this data is not clearly linked to the ASX Guidelines and Recommendations. It would be useful for stakeholders to be able to easily access information about corporate boards, the number of women on corporate boards as well as information that tracks change in the corporation's board over time. By doing so the actions of complying corporations could be brought under the spotlight, encouraging other corporations to aim to belong to the corporate community where such information forms the basis of government contracts. Monitoring of companies in a market economy is generally left to the stakeholders. However stakeholder interest in this issue, especially among the ASX 200 to ASX 300, has either not been activated or has not brought about change to date as discussed earlier. Private action by stakeholders, including shareholders or consumers is unlikely to occur without significant incentives, which having more women on the board may not necessarily provide. But providing feedback on corporate boards to proxy firms and financiers, and coupling this with incentives to encourage these institutions to consider the manner in which companies incorporate gender equality policies, into their considerations, is a meta regulatory steering that governments should consider. Currently this is developing in the field of socially responsible investment, where state partnerships with NGOs and financial bodies, are able to activate real change to corporate behavior. Finally a

116 Women on Boards, *National Sporting Organisations 2011* <http://www.womenonboards.org.au/pubs/bdi/2011/nso.htm>.

117 Women on Boards, *Cooperative Research Centres 2011* <http://www.womenonboards.org.au/pubs/bdi/2011/crc.htm>.

118 Women on Boards, *Rural Research & Development Corporations 2011* <http://www.womenonboards.org.au/pubs/bdi/2011/ruralresearch.htm>.

119 Monitoring Commissie Corporate Governance Code, 'Corporate Governance Code Monitoring Committee', <http://commissiecorporategovernance.nl/Monitoring_Committee>.

function of feedback is for governments to consider the success of the strategies deployed and to strengthen, tweak or change them in a reflexive manner.

VIII CONCLUSION

The study of Australia's efforts to increase the participation of women on the board is an example of polycentric regulation where there are many actors involved in the regulatory game. It was made possible by the widespread acknowledgment that the inadequate representation of women on corporate boards was a problem that should be addressed. However it was not addressed directly. Rather than being at the centre of it, the government casts its shadow, encouraging compliance, collating data for stakeholders, collaborating with industry to provide mentoring and networking for potential women directors and being actively engaged in the regulatory conversations that build meaning and change behaviour. In line with the meaning of polycentric governance, there are many regulatory centres — the ASX which sets the guidelines, industry associations and private organisations which encourage commitment and translate the recommendations to compliance and the individual companies themselves that decide to lead by adopting voluntary targets. In this space has also grown a host of advisers and educators who take on the task of devising company diversity policies, reviewing the company's progress and preparing the reports for stakeholders.

However it is clear that polycentric governance does not provide straightforward ways to encourage compliance or facilitate stakeholder enforcement. There is the risk that all these centres may govern without any coordination and without achieving the regulatory outcome sought. Clearly there is the need for an institution or a group of institutions to occupy the fulcrum point and steer all the parties towards the outcome. In our case the state is best placed to occupy this position, using both law and non-law steering methods. Three categories of steering methods can be useful here: guidance, incentives and feedback. Steering thoughtfully can increase the effectiveness of polycentric regulation, using diverse methods to change business norms to move slowly to our goal.