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Corporations and Markets Advisory Committee

DIVERSITY ON BOARDS OF DIRECTORS

Report

March 2009

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Advisory Committee

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2 March 2009

Senator the Hon Nick Sherry
Minister for Superannuation and Corporate Law
Parliament House
CANBERRA ACT 2600

Dear Minister

I am pleased to present a report by the Advisory Committee on diversity on boards of directors.

The report responds to your letter of 9 September 2008 on this subject.

The Committee considers that a focus on a more robust and open approach to board appointments, and initiatives to encourage the development of women in executive management, are the most effective ways to foster a governance culture that embraces diversity in the composition of corporate boards.

Yours sincerely

Richard St. John
Convenor

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1 Introduction

1.1 Reference

On 9 September 2008, the Minister for Superannuation and Corporate Law, Senator Nick Sherry, sought the Advisory Committee's advice on matters relating to board diversity, by way of background to consideration of that subject at the March 2009 meeting of the Ministerial Council for Corporations (MINCO).

The Minister's letter states, in part:

> The issue of diversity on boards has stemmed from observations by commentators that corporate boards tend to be homogenous groups, largely composed of men of similar ages and with similar demographic, ethnic, educational and professional backgrounds. There is some evidence that correlates diversity at board level with enhanced corporate performance. Although this does not necessarily demonstrate causation, it does indicate that the concept of board diversity in corporate governance is worthy of further investigation. In addition to this consideration, there are also broader issues of community participation and equality concerns.
>
> I believe that the issue of diversity on corporate boards, with particular regard to the participation of women, is worthy of further investigation. I therefore ask that CAMAC examine and advise on the issue of diversity in corporate boards. In particular, I seek your advice 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.

1.2 Consultation

The Committee has consulted with the Australian Government Office for Women and the Australian Government Equal Opportunity for Women in the Workplace Agency.

The views in this report are those of the Advisory Committee.

1.3 Background

The issue of diversity in the composition of boards of directors raises questions of corporate governance as well as broader considerations of participation and opportunity.

While similar issues may arise with public sector, not-for-profit and private sector companies, this paper looks at board diversity in the context of public listed companies. Companies of this kind are economically significant and have a high degree of visibility.

Public comment on the make-up of corporate boards, and the diversity, or lack thereof, of board membership, has largely focused on gender. Similar issues can arise with other measures of diversity, including tangible factors such as age, ethnicity, socio-economic or cultural background, and level of formal qualifications, technical skills and expertise, or intangible factors such as life experience, personal attitudes or perspectives.

While there are limited data on some aspects of diversity, information provided by ASIC indicates that there are currently 23,448 directors of listed and unlisted public companies (excluding public companies limited by guarantee, given that they are predominately non-commercial entities), of which:

- 29% are aged 60 or over
- 32% are aged between 50 and 60
- 27% are aged between 40 and 50
- 12% are aged under 40.

The average age of directors is 53 years. Information from another source indicates that the average age of directors of larger ASX listed public companies is 59 years.[1]

Information from ASIC indicates that 67% of directors of public companies were born in Australia, 10% in the United Kingdom, 3%

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1 Korn/Ferry International *Board of Directors Study Australia and New Zealand 2008* at 20.

in New Zealand, 2.8% in the USA, 2.2% in South Africa and the remaining 15% in over 100 other countries.

As noted above, the ASIC information relates to public companies, a category broader than listed public companies.

According to survey information, women constitute 8.3% of directors of ASX top 200 public listed companies.[2] The apparent under-representation of women on those leading corporate boards raises questions whether companies are adequately tapping and utilising available talent and whether women have sufficient opportunity to develop the skills and experience needed for effective board participation.

In considering diversity on corporate boards, this report looks at:

- the role and structure of boards, including:
  - the processes by which directors are appointed, and
  - the elements that make up an effective board
- the current state of diversity on boards

and possible ways to:

- promote an environment conducive to a more open approach by companies to the composition of boards, including recruitment of directors from a more diverse pool of qualified candidates, and
- assist in the development of a broader pool of skilled and experienced board candidates.

1.4 Advisory Committee

Details of the Advisory Committee are set out in Appendix B.

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2 See further Section 5.4.

2 Overview

2.1 Role of boards

Boards of directors play a central role in the governance of companies. The board has the ultimate responsibility on behalf of shareholders for the direction and performance of a company. The effectiveness of a board, and the decisions it makes, shape the viability and success of a company, affecting investors, employees, customers and others. The composition, attitudes and dynamics of a board also help set the internal culture of a company and influence the way it is perceived externally.

The boards of companies, particularly public listed companies, are accountable to investors and others in the performance of their duties. Boards are subject to scrutiny, as much by their shareholders as by regulators. Board members are subject to personal duties and obligations in carrying out their functions and may in some circumstances face criminal or civil liability for the actions of their companies.

In a challenging and evolving commercial and legal environment, a company needs to attract well-qualified individuals who can work together as directors to further the company's interests. Consideration needs to be given to the range of personal talents and experience required to meet the needs of the company and the dynamics of an effective board.

Section 3 sets out the legal framework within which boards operate and directors are appointed.

Section 4 looks to the elements that make up an effective board.

The point is made that in practice serving directors play a central role in the selection and appointment of new directors. A key factor in considering board diversity concerns the processes by which directors are selected for appointment and by which continuing board membership is reviewed. There is a question whether current practices lend themselves to consideration of a sufficiently wide pool of available talent.

2.2 Current state of diversity

Public interest in the degree of diversity in board memberships has been largely directed to gender. Similar issues may arise in relation to ethnic background, place of residence, educational background, age or other aspects of differentiation.

Statistical information on board diversity in Australia is limited and is directed mostly to gender. There is scope for further research.

It appears, on the information available, that women are relatively under-represented on the boards of listed public companies in Australia, a position in line with some countries overseas, and lagging behind others. However, care needs to be taken in drawing international comparisons, given differences in the corporate governance environment, such as two-tier boards or employee representation on boards in some countries. Also, the statistical information on female participation on boards does not indicate the level of availability of women who are seeking, or are otherwise open to, board appointments.

While there is some research pointing to a link between diversity in board membership and corporate performance, this is not an easy matter to tie down. It is more likely that an active and open approach to board composition and renewal – which is likely in practice to be more open to encompassing female or other less traditional categories of candidates – is more important in long-term corporate performance than a simple measure of diversity as such.

The current position does raise the question whether the boards of some companies are unduly limited in their approach and are failing to consider the benefits of greater diversity in their composition. Questions also arise whether the pool of candidates for board positions is restricted through relative lack of opportunity for women (and possibly other groups) to advance in managerial or other positions that would help them develop the skills and experience seen as relevant for board membership. The ultimate question, in terms of the governance culture of Australian companies, is whether the environment and current practices are conducive to boards being constituted by well-qualified candidates in an effective mix.

These matters are further discussed in Section 5.

2.3 Encouragement of diversity

The process by which boards are constituted and the ways in which individuals become qualified, and are selected, for board membership are a starting point in any consideration of further measures. While shareholders as a whole have the ultimate say on board composition, as a practical matter it is boards themselves that influence the continuing process of appointment and reappointment of directors. Although information is limited, there are some indications that the pool of directors of public companies in Australia is relatively limited, with appointees often being drawn from the ranks of other boards or senior corporate executives.[3] In practical terms, this may reflect the reality that company directors know other company directors whose names come to mind more readily when a new board appointment is being considered. Again, while some companies utilise the services of recruitment firms to identify potential new directors, some focus by those firms on established candidates would not be surprising.

The increasing emphasis in recent years on the compliance role of directors may itself have led to more emphasis on direct business or related professional experience at the expense of other disciplines or personal backgrounds that may add to the overall perspective of a board. Similarly, the development of the notion of the professional director, leading as it does to multiple directorships, has the effect of limiting opportunities for those not yet recognised within that rank.

2.3.1 Encouraging an open appointment process

The first step in any move to open up the range of candidates considered for board appointments is to encourage companies to make their appointment processes more structured and open, to keep the continuing composition of the board under review, and to develop their processes for evaluating the skills and performance of directors. A board that actively reviews its capability to meet the ongoing and changing needs of the company, and is prepared to turn over its membership as required, is more likely to be open to new

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3 GA Nicoll and R Tomasic: *The Role of Investment Managers as Corporate Shareholders* at 136–140—Unpublished empirical study annexed to PhD thesis of Geoffrey Nicoll, University of Sydney, 2007.

talent than one that regards directors, once appointed, as entitled in effect to continue in that role for term after term.

This is an area where some companies are already showing leadership, and their example may influence others in time. The demonstration effect may assist in persuading other boards and shareholders of the benefit to them of a more studied and open approach to board appointments.

In this context, the ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* seek to promote better processes for the selection and evaluation of directors of public listed entities. The Advisory Committee suggests for consideration some further refinements that could be included in the Council's discussion of the board selection and renewal process, including:

- drawing attention to the possible benefits of considering a wider pool of candidates
- further encouraging more structured selection processes
- providing shareholders with more information on the selection process.

These proposals are further described in Section 7.

2.3.2 Facilitating skills development

To the extent that companies place a premium on board candidates having management or other commercial skills and experience, the position of women in executive management is relevant. Initiatives such as executive mentoring programs and more accommodating career advancement practices may assist women to develop skills and experience that will equip them for board positions.

It is noted that women hold a significantly higher proportion of board positions in public sector entities than in commercial companies. This difference no doubt reflects the policies of governments to encourage participation of women on public sector boards. While not all public sector boards are comparable to those of corporate commercial enterprises, the public sector gives increasing numbers of women an opportunity to gain experience that may assist them to gain appointments on the boards of private sector enterprises.

These matters are further discussed in Section 8.

2.4 Problem with quotas

While it would encourage boards and shareholders in their own interests to adopt an open approach to board composition, including consideration of diversity, the Committee does not support any move to impose a particular model of board diversity on private sector companies, such as through gender or other quotas.

The governance structure of a corporate body, including the composition of any governing board, is essentially a matter for the constituent members or shareholders of that body. Given the ultimate responsibility of shareholders for the board which governs on their behalf, there would be obvious dangers in any initiative to cut across their choice and dictate elements of board composition.

Rather than attempting to impose diverse board composition through a quota approach, effective change will depend on convincing corporate leaders and shareholders of the benefits of a more open approach to board selection. The putting together of a well-qualified and effective board, without overlooking candidates from a less traditional mould, should be promoted as a key step in the pursuit of good governance and corporate success. That goal is unlikely to be advanced by simply requiring companies to satisfy indicative measures of diversity.

Targets for the appointment of more women to a board, or increased diversity by other measures, may be useful steps for a company that sets itself on such a course. However, for reasons similar to those given above, the Committee does not favour the setting of indicative targets for public listed companies across the board.

These matters are further discussed in Section 9.

3 The legal framework

3.1 Types of corporate structures

There is a range of corporate structures, with differing board or other internal governing arrangements, serving various purposes.

In the private sector, a general distinction can be drawn between companies funded through public offering of shares or other securities and listed on the Australian Securities Exchange (ASX) (listed public companies) and companies whose shareholding is more closely held, in particular proprietary companies.

There are other forms of corporate entities including not-for-profit cultural, philanthropic or recreational organizations,[4] and public sector entities performing advisory, economic or commercial activities.[5] The legislation regulating these entities may refer to boards or to equivalent governing bodies.[6]

Concerns about board diversity are generally raised in the context of boards of listed public companies, though practices in relation to not-for-profit and public sector entities are also relevant.

3.2 Role of the board

The role of a board of directors is to direct a company on behalf of the shareholders. This includes setting the strategic direction and aims of the company, providing resources for their implementation,

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4 These may be set up as companies limited by guarantee and regulated under the Corporations Act or as incorporated associations regulated by the *Associations Incorporation Act 1984* (NSW), *Associations Incorporation Act 1991* (ACT), *Associations Act 1984* (NT), *Associations Incorporation Act 1985* (SA), *Associations Incorporation Act 1964* (Tas), *Associations Incorporation Act 1981* (Vic), *Associations Incorporation Act 1987* (WA), *Associations Incorporation Act 1981* (Qld).

5 This includes entities regulated by the *Commonwealth Authorities and Companies Act 1997*.

6 For instance, under the various association incorporation statutes, the governing body that is the equivalent of a board of directors is called a ‘committee’ or a ‘management committee’.

and directing or overseeing the management of the company's business and compliance with its obligations. The board is answerable to the shareholders for the company's performance.[7]

3.3 Powers of the board

The powers of the board to carry out its responsibilities are granted in the corporate constitution and by legislation.[8] In exercising these powers, the board is not subject to shareholder direction,[9] and retains a considerable discretion in its decision-making, provided it acts

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7 The ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* (Second edition, 2007) at 13 indicates that the responsibilities of the board of a public listed company usually entail:

- overseeing the company, including its control and accountability systems
- appointing and removing the chief executive officer, or equivalent
- where appropriate, ratifying the appointment and the removal of senior executives
- providing input into and final approval of management's development of corporate strategy and performance objectives
- reviewing, ratifying and monitoring systems of risk management and internal control, codes of conduct, and legal compliance
- monitoring senior executives' performance and implementation of strategy
- ensuring appropriate resources are available to senior executives
- approving and monitoring the progress of major capital expenditure, capital management, and acquisitions and divestitures
- approving and monitoring financial and other reporting.

8 For instance, s 198A (a replaceable rule) provides that the business of a company is to be managed by or under the direction of the directors, except for any powers reserved to the shareholders under the Corporations Act or the corporate constitution.

9 The general principle, as set out in *NRMA v Parker* (1986) 4 ACLC 609 at 614, is that:

> It is no part of the function of the members of a company in general meeting by resolution, ie as a formal act of the company, to express an opinion as to how a power vested by the constitution of the company in some other body or person ought to be exercised by that other body or person.

However, the chair of an annual general meeting must allow a reasonable opportunity for the members as a whole at the meeting to ask questions about or make comments on the management of the company (s 250S).

The rationale for this managerial autonomy is reflected in the *OECD Principles of Corporate Governance* (2004), which observe that:

> As a practical matter … the corporation cannot be managed by shareholder referendum … Moreover, the corporation's management must be able to take business decisions rapidly. In light of these realities and the complexity of managing the corporation's affairs in fast moving and ever changing markets, shareholders are not expected to assume responsibility for managing corporate activities …

lawfully.[10] In larger companies in particular, it is common for directors to delegate day-to-day decision-making to a chief executive and management team, who are answerable to the board for the running of the company.

Boards do not have complete control. There are certain matters under the Corporations Act and the Australian Securities Exchange (ASX) Listing Rules (applicable to listed entities) that are reserved for decision by shareholders as a whole.[11] Shareholders also have some ability to pass resolutions at general meetings that may influence the future direction of a company.[12]

10 Directors, and other individuals involved in managing companies, are subject to common law, as well as statutory, duties and liabilities. Some, but not all, of those duties are set out in ss 180–184 of the Corporations Act, while s 185 makes clear that the statutory duties in the Act do not exclude the operation of other laws, including the general law. The powers and duties of directors are further outlined in the Advisory Committee report *The social responsibility of corporations* (2006) chapter 3 (available at **www.camac.gov.au**).

11 Some of the matters reserved for decision by shareholders under the Corporations Act and the ASX Listing Rules are summarised in the Advisory Committee report *Shareholder Participation in the Modern Listed Public Company* (2000) para 1.5, footnote 5 (available at **www.camac.gov.au**).

12 Shareholders of public companies who satisfy the numerical threshold requirements in s 249N may propose a resolution for consideration at the next general meeting of the company. Shareholders who satisfy the numerical threshold requirements in s 249D may requisition a general meeting of the company.

Shareholders need to frame their resolutions appropriately, as a general meeting does not have the power to pass binding resolutions that interfere with the exercise of powers vested in the board: *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89 at 105; *Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at 134; *Scott v Scott* [1943] 1 All ER 528; *NRMA v Parker* (1986) 4 ACLC 609. For instance, a proposed resolution by shareholders that, say, the company adopt a charter with particular environmental or social policies or goals could be part of a proposed amendment to the company's constitution (s 136(2)) (which requires a special resolution) or a proposal to appoint or remove one or more directors (ss 201E, 201G, 203D) (which requires an ordinary resolution). A charter of this nature could be seen as reducing board decision-making autonomy. However, in *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 291, the High Court stated that:

> the articles of a company may be so framed that they expressly or impliedly authorise the exercise of [a] power … for what would otherwise be a vitiating purpose.

The chairman at a general meeting may choose to permit resolutions to be put to the meeting, even though they are not necessarily linked to either of those matters. Non-binding resolutions that shareholders are entitled to pass are confined to executive remuneration (s 250R).

Although some board matters may be delegated to senior executives,[13] and some directors may be given particular responsibilities for which they are accountable to the board,[14] it is the board collectively that is responsible for meeting its legal obligations and acting in the best interests of the company.[15]

3.4 Structure of boards

There is no one model for the structure, size or composition of a board, apart from some minimum requirements.[16]

A board of a public listed company typically comprises one or more executive directors, who are also full-time managers and bring to bear their day–to-day knowledge of the business, and a number of non-executive part-time directors, whose role is to bring to the board a broader perspective on the company's activities, based on their knowledge, skills and experience. The larger ASX listed companies generally have between four and nine directors on their boards, with more than two-thirds of them being non-executive directors.[17] The ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* include a recommendation that a

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13 As observed in the ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* (Second edition, 2007) at 13:

> The nature of matters reserved to the board and delegated to senior executives will depend on the size, complexity and ownership structure of the company, and will be influenced by its tradition and corporate culture, and by the skills of directors and senior executives.

The Council (at 15) also recommends that:

> A statement of matters reserved for the board, or the board charter or the statement of areas of delegated authority to senior executives should be made publicly available, ideally by posting it to the company's website in a clearly marked corporate governance section.

14 For instance, the ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* (Second edition, 2007) recommendation 4.1 is that the board should establish an audit committee (with a structure and charter as set out in recommendations 4.2 and 4.3).

15 Directors may in some circumstances rely on information or advice provided by others: s 189 of the Corporations Act. In some circumstances they may also avoid responsibility for the actions of a delegate where they have delegated a power: s 190.

16 A public company must have at least three directors, of which two must ordinarily reside in Australia: Corporations Act s 201A(2). Only a natural person, and who is at least 18 years old, may be appointed as a director of a company: s 201B(1).

17 Korn/Ferry International *Board of Directors Study Australia and New Zealand 2008* at 16, 19.

majority of the board, including the chair, be independent directors.[18]

3.5 Appointment of directors

As a formal matter, the constitution of a board is in the hands of the shareholders, and their vote, provided for in the company's constitution, is normally unfettered on whom they choose.

As a practical matter however, boards largely determine their own continuing composition. The usual practice is for the directors of a company to appoint someone to fill a casual vacancy on the board.[19] In some cases the chair or another board member may be the main influence on board invitations. A large shareholder or institutional investors may have a say in some cases. A more formal approach, including the use of nomination committees, has been encouraged in recent years. Also, the process by which directors are renominated for shareholder approval (for public listed companies, the maximum board tenure for a director is 3 years, unless the director is reappointed by shareholders[20]) is largely controlled by the board.

While directors are usually first appointed, or renominated, through this board process, shareholders of public companies, who have their investments at risk, retain the ultimate control over who will manage the company on their behalf. A person appointed to fill a casual vacancy on the board of a public company can remain as a director only with the approval of shareholders at the company’s next annual general meeting (AGM).[21] Also, the shareholders of a public

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18 ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* (Second edition, 2007) Recommendations 2.1, 2.2, 2.3.

19 s 201H(1). This is a replaceable rule, which could be overridden by a contrary appointment provision.

20 ASX Listing Rule 14.4 provides that a director of a listed entity must not hold office, without re-election by shareholders, past the third annual general meeting following the director’s appointment or 3 years, whichever is the longer.

21 s 201H(3). This is also reflected in ASX Listing Rule 14.4, which provides that a director appointed to fill a casual vacancy on, or as an addition to, the board of a public listed entity must not hold office, without re-election by shareholders, past the next annual general meeting of the entity.

company may remove a director at any time by ordinary resolution.[22]

This appointment and renomination process can lead to inertia, whereby there is limited impetus or opportunity for shareholders to question the candidates put forward by the board. Also, while anyone can seek board appointment, candidates not supported by the board face obstacles in promoting their candidacy, including the costs of circulating promotional material and proxy forms to shareholders. This raises the question whether shareholders would be assisted by more information about the processes leading up to the vote on director appointments at the AGM, and whether those processes are robust enough to identify and put forward the best possible candidates.

22 s 203D. There is conflicting case law on whether the procedure under s 203D provides the only means by which shareholders can remove directors.

4 Elements of an effective board

The elements that make up an effective board are an appropriate mix of personal talents and experience, constructive dynamics and quality of leadership. These elements should be kept under review in the context of the needs of the company and renewal of the board.

As observed in the *Review of the Corporate Governance of Statutory Authorities and Office Holders* (the Uhrig report, 2003) in the context of public sector boards, but with equal application to private sector boards:

> In order to get the best from the board, and the entity itself, it is important to ensure the board has the necessary skills and experience to carry out its responsibilities. The ability of a board to provide effective governance will be placed in jeopardy if its members are inexperienced or inappropriately skilled or the board as a whole is dysfunctional.[23]

Constituting a board that effectively combines these elements can be critical to the success of a company. As observed in the context of the current economic climate:

> There is every chance that a quality contribution from a quality board will make the difference between corporate success and relative—or absolute—failure.[24]

4.1 Personal talents

Appointments to a board should be made with a view to contributing to the successful governance of the company in question.

A board member of a commercial company requires a combination of relevant knowledge and capacity; business acumen, experience and judgment; an interest in the business of the company and a commitment to contribute; application to the tasks of the board; and

23 Uhrig 2003, pp 97–98.
24 E Johnstone, L Warnick ‘Directors’ 2009 survival guide’ *The Australian Financial Review* 28 January 2009 at 55.

interpersonal skills.[25] The report *Agender in the Boardroom* (2008)[26] noted that the female directors of public listed companies that were interviewed typically had prior business experience (eg in profit and loss roles, as strategic consulting advisers or as investment bankers) and pointed to the importance of this experience in being a useful director of the company.[27]

The nature of the company's operations may influence the types of talents being sought. A resources company may place a premium on including candidates with particular technical knowledge or background, while a board faced with complex service provision and compliance issues may benefit from directors with particular expertise or experience in such areas as accounting, finance, management or law. For a company engaging in international business, it may be important to have on the board some directors with knowledge and experience in relevant foreign markets. A board may also need directors with an interest in, and understanding of, new business opportunities. Also, the growing governance and compliance obligations facing a board may lead to greater weight being given to board candidates with particular business or professional backgrounds, compared with individuals having a more generalist background.[28]

Apart from the board's contribution to business performance, the right depth and mix of talents can affect both the reputation of the company and the directors personally. For instance, the company, and its directors, may be exposed to liability if there is a failure, promptly or accurately, to disclose material financial or other

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25 C Carter and J Lorsch *Back to the Drawing Board* (Harvard Business School Press) 2004 at 116–118.

26 Conducted by EOWA in partnership with Egon Zehnder International, the methodology in *Agender in the Boardroom* (November 2008) comprised structured interviews with 19 women directors on the boards of Australian public listed companies and 16 current or former male chairmen, as well as a literature review.

27 id at 9.

28 For instance, the report by Deloitte, *Board effectiveness: The director's cut* (2008), which incorporated the views of over 100 company chairs and directors from the top 200 ASX companies, stated:

> Increasing regulation and compliance has almost doubled the workload of directors interviewed. Thirty seven percent (37%) of board directors believe that the current balance between governance and performance is out of kilter.

information to the market.[29] A board needs to have directors with the knowledge and skills to monitor the company's ongoing position and review internal financial reports and other information provided by management, to ensure proper reporting of the company's affairs. Also, a board must have directors with the ability to monitor the solvency of the company, given their duty to prevent a company trading while insolvent and their potential personal liability, as well as the harm to third parties dealing with the company if this occurs.[30]

4.2 Dynamics of the board

A well-functioning board is generally one that has a level of coherence, trust and common values between members, encourages and has regard to differing viewpoints and opinions, and is able to reach a board position without animosity.

Cohesiveness does not require directors of the same background or disposition. Companies may benefit from bringing together at board level a greater variety of perspectives, grounded in different experiences or backgrounds. In some instances, moving towards a more diverse board can enrich debate and promote independence of view and more constructive analysis. A range of perspectives can assist the quality of decision-making, including in relation to changes in the marketplace or possible new markets, community expectations about the industry in which the company operates and its accountability for its actions. A greater mix of directors may also reduce any tendency towards complacency or unwillingness to consider new ideas or options.

However, a board also needs to function effectively. A board that lacks sufficient underlying cohesion in terms of common understanding between directors, or is subject to ongoing and conflicting perspectives on matters central to the company's direction, may become incapable of effective decision-making. An

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29 For instance, the continuous disclosure obligations under ss 674 and 675 of the Corporations Act impose liability for breach on the company and on any person involved in the contravention. *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 is an example of a shareholder action against a company for alleged breach of the continuous disclosure requirements: see further the CAMAC report *Shareholder claims against insolvent companies: Implications of the Sons of Gwalia decision* (December 2008).

30 s 588G of the Corporations Act.

overly diverse board may run the risk of becoming divided and dysfunctional. As one commentator observed:

> Diversity of both backgrounds and perspectives is important in composing a board, but it needs to be achieved without sacrificing agreement on a common set of assumptions about the institution and its mission.[31]

In other words, a balance needs to be struck.

4.3 Needs of the company

The nature of a company's business may point to a need for some directors with particular skills or expertise. Changes in its direction, or challenges it is facing, may also influence the choice of new directors.

Ultimately, the size and composition of a board is a matter for judgment by each company, having regard to its nature and needs.

4.4 Board review and succession planning

A well-functioning board requires ongoing review of its performance and of the contribution of each director, as well as consideration of current and anticipated changes to the company's operations or business or the environment in which it operates.

In the report of the HIH Royal Commission *The failure of HIH Insurance* (2003), Justice Owen observed on the matter of board succession planning that:

> Part of the board's responsibility … is to keep its own composition and effectiveness under review. The chair should take the lead in this process and ensure that there are regular opportunities for review and consideration, whether through a formally constituted nomination committee or otherwise. This is an area where boards may find it of assistance to engage external advice, either in reviewing the continuing suitability of the board's mix of skills and experience to the requirements of the company or in identifying suitably qualified candidates for appointment….

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31 W Bowen, *Inside the Boardroom: Governance by Directors and Trustees* (John Wiley & Sons, New York, 1994) at 55.

> A healthy board will seek a balance between turnover of individuals, with the injection of new ideas and perspectives, and continuity and stability. The balance may vary according to the company's circumstances.[32]

Concerning the performance of the board collectively, Justice Owen further observed that:

> A process by which a board reviews its own performance as well as the effectiveness of its processes should be part and parcel of a board cycle of reviews of the company and its business. The review should include detailed consideration of the effectiveness of the current corporate governance model. Any ways in which it has failed or could work better should be addressed.[33]

Justice Owen went on to say that:

> … it is desirable that a board develop a practice by which the performance and contribution of individual board members can be reviewed in a constructive way. This involves an element of peer review, again possibly with external assistance. … There is no room on the board of a public listed company for any suggestion that the performance of a director once appointed is above review.[34]

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32 Section 6.2.10.
33 Section 6.2.11.
34 ibid.

5 Current position on diversity

5.1 Concept of diversity

Board diversity essentially concerns the degrees of similarity and difference between the individuals who make up a board.[35]

There are any number of ways to describe differences between individuals. They can include measurable factors, such as age, gender, ethnicity, socio-economic or cultural background, residence, formal qualifications, technical skills and expertise. They can also include less tangible factors such as life experience, personal attitudes or perspectives.

There is no single measure of board diversity. A board might comprise directors with a broad range of skills, expertise or background experience, yet have no female directors or individuals from differing socio-economic backgrounds. How that board might be described in terms of diversity would depend upon the relative weight given to the various factors.

While gender is only one aspect of board diversity, it is an obvious one and has received the most attention in studies on Australian companies. As has been noted, the available data on other aspects of diversity are limited.

5.2 Consideration of diversity

There have been a number of international studies of aspects of diversity in board membership. Some of these studies suggest a causal relationship between greater board diversity, measured by an increased proportion of women directors, and enhanced organizational effectiveness and financial performance, as well as

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35 Only natural persons can be company directors: Corporations Act s 201B.

greater opportunities for women in senior management.[36] According to the author of *Agender in the Boardroom* (November 2008):[37]

> A number of recent studies in various parts of the world have established a positive relationship between company

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36 There is a range of international studies on this matter. For instance, Catalyst [www.catalyst.org] (a US research and advisory firm focusing on women in the workplace) argues in a report, *The Bottom Line: Corporate Performance and Women's Representation on Boards* (October 2007), that there is a positive correlation in the USA between corporate financial performance and gender at board level:

> Fortune 500 companies with the highest representation of women board directors and women corporate officers, on average, achieve higher financial performance than those with the lowest.

A subsequent Catalyst report, *Advancing Women Leaders: The Connection Between Women Board Directors and Women Corporate Officers* (July 2008), stated that its research shows that the number of women on a company's board of directors positively affects the future of women in its senior management. Having women directors appears to increase the percentage of women in line management positions:

> The numbers tell the story—a gender-diverse board promotes continued success for women and for business….there is a clear and positive correlation between the percentage of women board directors in the past and the percentage of women corporate officers in the future.

Another study, by K Campbell, A Minguez-Vera 'Gender Diversity in the Boardroom and Firm Financial Performance' *Journal of Business Ethics* Vol. 83, No. 3, December 2008 at 435–451, states: 'Our study suggests that investors in Spain do not penalise firms which increase their female board membership and that greater gender diversity may generate economic gains'.

Some other international research suggests that firms with a higher proportion of women in senior managerial positions generally may have enhanced financial performance over time: C Francoeur, R Labelle & B Sinclair-Desgagné, 'Gender Diversity in Corporate Governance and Top Management' *Journal of Business Ethics* (2008) 81: 83–95; G Desvaux, S Devillard-Hoellinger & M Meaney 'A business case for women' *The McKinsey Quarterly* September 2008.

The evidence is not unequivocal. For instance, R Casper, in 'Does female board representation influence firm performance? The Danish evidence' *Corporate Governance An International Review* Vol. 15 Issue 2 (2007) at 404–413, found that 'contrary to a number of other studies, this article does not find any significant link between firm performance…and female board representation'. Also, according to R Adams & D Ferreira, 'Women in the boardroom and their impact on governance and performance' *Monograph, September 2008,* forthcoming in the *Journal of Financial Economics*, the evidence on the relationship between gender diversity on boards and firm performance is difficult to interpret. Also, while gender diversity on boards may improve some aspects of board effectiveness, 'this evidence does not provide support for quota-based policy initiatives. There is no evidence suggesting that such policies would improve firm performance on average'. See also R Adams 'If women ruled boards' *Business Review Weekly* January 15–21 2009 at 38–39, and 'Female board members tougher than men—report' *Courier Mail* 2 February 2009, quoting R Adams: 'Some firms do better with women on the board and some don't'.

37 Egon Zehnder International *Agender in the Boardroom* (November 2008).

> performance and the number of women on boards or in senior executive management positions. It is my view that those companies with enlightened management will inevitably perform better and they will inevitably be the ones who seek talent from all sources and to whom gender is a very secondary consideration.

There have also been studies suggesting a positive relationship between ethnic diversity on boards and corporate performance.[38] These studies tend to focus on particular circumstances relevant to the country under review.

While, as indicated, there is some research pointing to a link between board diversity and corporate performance, this is not an easy matter to tie down. A more sustainable proposition, drawing on the *Agender in the Boardroom* Report is that companies with enlightened management can be expected to perform better and 'they will inevitably be the ones who seek talent from all sources and to whom gender is a very secondary consideration'.

5.3 Age and country of birth

As previously set out (Section 1.3), there is some information available in Australia about age and place of birth of directors.

It is noted that the average age of directors of public companies in Australia (excluding companies limited by guarantee) is 53 years, with the average age of directors of larger ASX listed companies being 59 years. A similar pattern is found in other jurisdictions. For

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38 These studies include N van der Walt & C Ingley, 'Board dynamics and the influence of professional background, gender and ethnic diversity of directors' *Corporate Governance: An International Review* Vol 11 No 3 (2003) 218–234; S Brammer, A Millington & S Pavelin, 'Gender and ethnic diversity among UK corporate boards' *Corporate Governance: An International Review* Vol 15 No 2 (2007) 393–403; V Singh, 'Ethnic diversity on top corporate boards: a resource dependency perspective' *The International Journal of Human Resource Management* Vol 18 No 12 (2007) 2128–2146; M Marimuthu, 'Ethnic diversity on boards of directors and its implications for firm financial performance' *The Journal of International Social Research* Summer 2008 at 431–445; J Mitchell Van der Zahn, 'Association between gender and ethnic diversity on the boards of directors of publicly listed companies in South Africa and intellectual capital performance' (www.cbs.curtin.edu.au/files/vanZahn1.pdf).

instance, the average age of board members in Europe is 58 years, with the average age of female directors in Europe being 53 years.[39]

5.4 Gender diversity

5.4.1 Female directors

Recent research indicates a limited level of female participation or representation on the boards of larger Australian listed public companies. The *EOWA 2008 Australian Census of Women in Leadership* (October 2008)[40] (the census) indicates that the proportion of women on boards of the ASX top 200 public listed companies currently is 8.3%, down from 8.7% in 2006. The percentage of women directors in these top 200 companies has remained in the 8% band since 2002, when the figure was 8.4%.

The 8.3% female participation rate on the boards of the top 200 listed public companies compares with:

- 8.7% of board members of NZSX100 companies
- 9.7% of board members of major public companies in Europe overall (9.1%, excluding Norway)
- 11.5% of board members of larger UK listed public companies
- 13% of board members of FP500 companies in Canada
- 14.3% of board members of South African public companies
- 15.2% of board members of Fortune 500 companies in the USA.
- 44% of board members of listed companies in Norway (which has gender quotas)

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39 European Professional Women's Network: *3rd European PWN BoardWomen Monitor 2008*.

40 The role of The Equal Opportunity for Women in the Workplace Agency (EOWA) is to administer the *Equal Opportunity for Women in the Workplace Act 1999* (Commonwealth) and through education, assist organizations to achieve equal opportunity for women. EOWA conducts periodic reviews of the level of participation of women on company boards and in senior management positions.

Apart from Norway, with its gender quota requirements, the most marked contrast is with the position in the USA.

The largest companies in the ASX top 200 companies are more likely to include women directors. According to the census, 19 of the largest 20 companies have at least one woman on the board and nine of these 20 companies have two women on the board. Another report indicates that women currently constitute 12.4% of the directors of the ASX top 100 companies.[41] This suggests that these companies may be a little more advanced in tapping a wider pool of talent than the less capitalised companies within the ASX top 200 category.

The census indicates that some 51% of ASX top 200 companies have no female directors. This compares with 60% for NZSX100 companies, 40% of FP500 companies in Canada, 28% for major public companies in Europe (23% in the UK) and 13% of Fortune 500 companies in the USA.

Further details are set out in Appendix A.

The census does not provide information on the number of women who are seeking, or are otherwise open to, board appointments in Australia. Also, some care needs to be taken in drawing conclusions from differing participation rates between countries. For instance, in addition to the gender quota requirements in Norway, the gender balance in some European countries is influenced by local factors, such as employee representation requirements in countries with two-tiered board structures. Of the board seats occupied by employee representatives in Europe, 31% comprise women.[42]

5.4.2 Women in management

The same census indicates that the proportion of women in executive management positions in ASX top 200 companies currently is 10.7%, a decline from 12% in 2006 and 11.4% in 2004. Of those women, only half are in line management positions, which are still considered a valuable means to gain experience for board participation. Furthermore, the proportion of these companies with

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41 Korn/Ferry International *Board of Directors Study Australia and New Zealand 2008* at 18.

42 *Agender in the Boardroom* (November 2008) at 5.

no women in executive management positions rose from 39.5% in 2006 to 45.5% in 2008. By comparison, 15% of comparable US companies, 34% of comparable Canadian companies, and 40% of comparable UK and South African companies have no women in executive management positions. Further details are set out in the Appendix A.

5.4.3 Observations on census results

One suggested reason for the relatively low proportion of female directors in Australia is a greater reluctance on the part of public listed companies, compared with their overseas counterparts, to consider the possible benefits of greater gender diversity in board composition or an unwillingness to adjust their practices to encourage diversity. Commenting on the census outcome, the EOWA Director stated:

> The dearth of women at the top levels of business is the result of fewer opportunities, hostile cultures and outdated work practices that haven't kept pace with women's increased education levels, experience and ambition to be among the people influencing Australia's future.[43]

Further reasons suggested for these trends have been:

- the increase since 2006 in the number of mining and energy sector companies listed on the ASX200, which typically have low female board or senior management involvement, perhaps reflecting the relatively low number of women in their professional and technical disciplines
- a corporate culture for executive positions that values long hours in the office
- the costs of child care, which may discourage some women from returning to work or working full-time, and
- the trend towards downsizing of executive management teams, which could have disproportionately affected women.[44]

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43 EOWA media release 28 October 2008.
44 *The Australian*, 'Sharp drop in number of female executives' 28 October 2008.

The Federal Sex Discrimination Commissioner said that the census results are:

> incredibly discouraging for women at middle management level. It's sending a message to these women that opportunities for advancement are drying up.[45]

The current position raises the question whether the boards of some companies are unduly limited in their approach and are failing to consider the benefits of greater diversity in their composition. The census results may also point to some longer-term issues on the supply side concerning the number of women with relevant qualifications who are seeking, or are otherwise open to, board appointments. Questions arise whether the pool of candidates for board positions is restricted through lack of opportunity for women (and possibly other groups) to advance in managerial or other positions that would help them develop over time the skills and experience seen as relevant for board membership. The ultimate question, in terms of the governance culture of Australian companies, is whether the environment and current practices are conducive to boards being constituted by well-qualified candidates in an effective mix.

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45 *The Australian*, 'Sharp drop in number of female executives' 28 October 2008.

6 Encouragement of diversity

The Advisory Committee has been asked to provide 'advice 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', in particular in relation to women.

The Committee considers that the process by which boards are constituted and the ways in which individuals are selected for board membership are the starting point in any consideration of further measures to promote diversity. As already pointed out, while shareholders as a whole have the ultimate say on board appointments, as a practical matter it is boards themselves that influence the continuing process of appointment and reappointment of directors. A more structured and transparent approach by boards to their composition and succession is more likely to open up regard to available talent and provide shareholders with a better basis for questioning and voting on board appointments. A board that sees a need for new appointments arising only on the retirement of an established director, or relies only on informal business or social networks or contacts for new appointments, may be less likely to identify candidates outside a traditional mould.

There is further scope for enlightened companies to show leadership, and for shareholders, business groups and others to take an interest in the vitality of the approach by which the governing boards of companies are constituted. The object is to achieve boards that govern effectively and utilise the best available talent.

It is recognised that the inculcation of this kind of approach, with an emphasis on a more structured and open approach to board membership, will take time. There is unlikely to be a quick fix. However, change is possible if the issue is pursued in the context of governance and corporate success.

In Section 7, the Committee refers to initiatives already taken by the ASX Corporate Governance Council to provide guidance on opening up the process by which individuals are offered board positions and the role of shareholders in voting on board candidates, and proposes some further steps that could assist in that regard.

On the supply side, in regard to widening the pool of candidates, the Committee refers in Section 8 to the kind of measures companies can take to enhance the development of relevant skills and experience by women in executive management.

7 ASX corporate governance principles and recommendations

7.1 Operation of the principles and recommendations

The process of board selection for listed public companies (and other listed entities) is subject to the ASX Corporate Governance Council *Corporate Governance Principles and Recommendations*. These principles and recommendations were introduced in 2003, with amendments applying from January 2008.

The recommendations are not mandatory. If a listed company considers that a recommendation is inappropriate to its particular circumstances, it has the flexibility not to adopt it, provided it explains why. This is known as the 'if not, why not' reporting approach.

7.2 Board structure

7.2.1 The selection process

Corporate Governance Council Principle 2 states that:

> companies should have a board of an effective composition, size and commitment to adequately discharge its responsibilities and duties.

The commentary accompanying that principle points out that, while the directors are ultimately elected by the shareholders, the board and its delegates play an important role in the selection of candidates for shareholder vote. The commentary recommends that the board of a listed company establish a nomination committee for board selection[46] (board nomination committee). The commentary also sets out recommendations concerning the charter,[47] composition[48] and responsibilities[49] of the board nomination committee.

The commentary on the nomination committee observes that a formal and transparent selection procedure helps promote investor understanding and confidence in that process. Important issues to be considered in that context include:

- director competencies
- board renewal
- composition and commitment of the board.

7.2.2 Information for shareholders voting on candidates for the board

The ASX Corporate Governance Council recommends that the names of candidates submitted to shareholders for election as directors be accompanied by the following information, to enable shareholders to make an informed decision on their election:

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46 Recommendation 2.4. The commentary observes that a board nomination committee is an efficient mechanism for examination of the board selection and appointment practices of the company, though ultimate responsibility for these practices rests with the full board. For smaller boards, the same efficiencies may not be derived from a formal committee structure. However, companies without a nomination committee should have board processes that raise the issues that would otherwise be considered by the nomination committee.

47 The commentary states that a nomination committee should have a charter that clearly sets out the committee's roles and responsibilities, composition, structure, membership requirements and the procedures for inviting non-committee members to attend meetings. The terms of reference of the nomination committee should allow it to have access to adequate internal and external resources, including access to advice from external consultants or specialists.

48 The commentary states that the nomination committee should be structured so that it consists of a majority of independent directors, is chaired by an independent director and has at least three members.

49 The commentary states that the responsibilities of the nomination committee should include recommendations to the board about:
- the necessary and desirable competencies of directors
- review of board succession plans
- the development of a process for evaluation of the performance of the board, its committees and directors
- the appointment and re-election of directors.

- biographical details, including competencies and qualifications and information sufficient to enable an assessment of the independence of the candidate
- details of relationships between the candidate and the company, and the candidate and directors of the company
- directorships held
- particulars of other positions which involve significant time commitments
- the term of office currently served by any directors subject to re-election
- any other particulars required by law.

7.2.3 Ongoing evaluation and disclosure

The ASX Corporate Governance Council also recommends that companies disclose the process for evaluating the performance of the board, its committees and individual directors.[50] As this recommendation was introduced in January 2008, its effect may take some time to become apparent.

The commentary states that the performance of the board should be regularly reviewed against appropriate measures.

As part of that process, and to inform shareholders, the commentary states that the corporate governance statement in the company's annual report should include:

- the skills, experience and expertise relevant to the position of director held by each director in office at the date of the annual report
- the period of office of each director in office at the date of the annual report
- the names of members of the nomination committee and their attendance at meetings of the committee or, where a company

50 Recommendation 2.5.

does not have a nomination committee, how the functions that would be performed by a nomination committee are carried out

- whether a performance evaluation for the board, its committees and directors has taken place in the reporting period and whether it was in accordance with the process disclosed
- an explanation of any departures from the Corporate Governance Council recommendations on board structure.[51]

The commentary also states that the following material should be made publicly available, ideally by posting it on the company's website in a clearly marked corporate governance section:

- a description of the procedure for the selection and appointment of new directors and the re-election of incumbent directors
- the charter of the nomination committee or a summary of the role, rights, responsibilities and membership requirements for that committee
- the board's policy for the nomination and appointment of directors.

7.3 Possible refinement of Corporate Governance Council measures

As outlined above, the ASX Corporate Governance Council commentary already provides useful guidance on the board selection process. The Advisory Committee puts forward for consideration below some ways in which the commentary could be further developed.

Proposal 1: Consideration of board diversity matters

It has been suggested that a specific reference to board diversity be included in the commentary which deals with the board nomination

51 Commentary on Recommendation 2.6.

committee.[52] The Advisory Committee considers that the board nomination committee should be mindful of the need to consider appropriate board diversity, whether in terms of gender, ethnicity, age, professional expertise or otherwise, in assessing board candidates. Some reference to diversity in the commentary may be helpful in reinforcing the desirability of adopting an open approach to the identification of board candidates and not being locked into one mould.

While it is a matter for each company to plan the future composition of its board, the commentary on the role of the board nomination committee could usefully remind the committee that one approach open to it is to consider diversity goals for the board over the longer term, and ways to achieve those goals.

Proposal 2: A more structured approach to candidate selection

It has already been noted that a structured approach to the selection of board members, rather than relying on informal business or social networks or contacts, is more likely to identify a broader range of candidates.

The commentary could refer to the benefits of the board nomination committee undertaking a structured process, including possible use of consulting firms or databases maintained by industry bodies and interest groups, in identifying the pool of candidates for board positions.

Proposal 3: Information to shareholders

Shareholders are better placed to question the board's approach to its own composition, and to vote on candidates for board positions, if they are fully informed about the criteria and processes used to invite persons to become directors or seek re-election.

The ASX Corporate Governance Council commentary already gives guidance on the information to be provided to shareholders in voting for board candidates.

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52 Women on Boards: *WOB Road Map for Gender Diversity on Australian Boards* (October 2008) proposed a specific reference to board diversity in the commentary on Recommendation 2.4, in the discussion under *Director competencies* of the 'appropriate range of skills and experience' of directors.

The commentary might usefully be expanded to cover further information to shareholders, including:

- a statement by the board of the skills it is looking for in any new appointment to the board
- the steps taken to ensure that a range of candidates was considered
- whether professional intermediaries were used to identify or assess candidates
- factors that were taken into account in the selection process
- a statement why a particular person was nominated by the board.

The commentary could also recommend that the chair of the board nomination committee be available at shareholder meetings for questioning about the appointment process.

8 Skills development

8.1 Current position

A survey published in 2005 of male and female board members of ASX listed companies indicated that the factors considered crucial by directors for obtaining board membership, which are the same for both men and women, are *human capital* (what you know), comprising business knowledge, experience, performance and skills, and *social capital* (whom you know), comprising business contacts, often through membership of particular formal or informal social networks. In regard to human capital, appropriate business experience is often achieved through a history of successfully working in chief executive or other senior management positions.[53]

More recently, the report by Deloitte, *Board effectiveness: The director's cut* (2008), which incorporated the views of over 100 company chairs and directors from the top 200 ASX companies, stated that respondent directors considered it a challenge to find board members with appropriate industry and global experience:

> the demand for talent exceeds supply. Directors are keenly aware that the traditional methods of attraction, deployment and development of talent are not producing the right results.

These comments are consistent with the view that one factor inhibiting major Australian listed companies from embracing greater gender diversity may be the actual, or perceived, lack of women candidates, at least in some industries.

Part of this problem may lie in the limited number of women involved in management positions, which provide one of the key ways to develop the skills and experience considered necessary for

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53 A Sheridan and G Milgate, 'Accessing board positions: A comparison of women's and men's views', *Corporate Governance: An International Review*, (2005) 13(6) pp 847–855. Similar results, based on an earlier survey of female board members of ASX listed companies, are reported in A Sheridan, 'What you know and who you know: 'successful' women's views on accessing board positions', *Career Development International*, (2002) 7(4) pp 203–210.

undertaking a board role in these companies. This factor may become less significant over time, as increasing numbers of women advance their careers in professions such as accounting, law or finance, and thereby develop business-related skills.

Particular problems appear to remain, however, for women in attaining, or fully benefiting from, line management positions. The report *The Leadership Challenge: Women in Management* (March 2008)[54] described what it considered to be a range of impediments to the advancement of women to the executive management level of commercial entities, or their full utilisation in executive positions:

> Impediments to female advancement can be attributed to a number of interacting factors. These include short-term business drivers; cultures that undermine the female presence through narrow notions of ‘cultural fit’ and masculine leadership constructs that exclude women; complex dynamics around managing strategic relationships; and work/life balance issues.

In the same vein, the report *Agender in the Boardroom* (2008) commented that:

> The key issue which is holding back the growth in numbers of women directors is the earlier stage in their careers, when so few of them gain experience in senior management ranks, let alone as CEOs. Women’s progress is still hindered by a lack of access to the same training and development opportunities as men, their lack of mentoring and networks and a work culture that is at best unsupportive of women’s success and at worst, hostile to their presence.[55]

Stewardship of large organizations is a demanding task requiring skilled and competent people. Opportunities for relevant skills development are therefore a key to growth of the pool of candidates for board roles. As one observer has commented:

> Much of the discussion about board membership focuses on the topic of gender and ethnic diversity and the very low

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54 *The Leadership Challenge: Women in Management* (March 2008), conducted by the Hannah Piterman Consulting Group and published by the Australian Government Office of Women, involved interviews with 115 men and women in middle and senior management of Australian companies.

55 *Agender in the Boardroom* at 30.

> representation of women and minorities on boards. … We agree that it is important to address these issues. Having said that, we are wary of tokenism. Every board seat is important; there's no room for a director who doesn't possess, at the minimum, the [necessary personal talents and experience].[56]

The earlier *Report of the Industry Task Force on Leadership and Management Skills* (Karpin Report) (1995) focused on measures to strengthen management development and business leadership within Australian enterprises. It referred to the difficulties women faced in achieving board and senior management positions in the private sector. Improving this situation was seen as particularly important, as it was argued that women play an important role in instigating improved management styles within enterprises. The Task Force considered that the appointment of more women to boards would highlight the importance of women in senior management generally.

The Report recommended a national strategy involving:

- targets (as opposed to quotas) for the number of women in middle and senior levels of management, corporate boards and academia. It proposed that such targets be developed by the private sector itself
- creating a database of suitably qualified women for selection by private sector companies to sit on boards of directors
- improved targeting of women for management development
- increased funding for agencies promoting diversity in management and the workforce generally.

8.2 Possible steps

Various steps have been suggested or taken to assist a more diverse group, including women, to develop the skills that would enable them to take up board positions. These include mentoring programs and adoption of more accommodating employment practices at executive management level. Opportunities to gain experience on boards of not-for-profit or public sector entities may also help to

56 C Carter and J Lorsch, op cit, at 123.

increase the number of female candidates qualified for board positions in commercial enterprises.

8.2.1 Mentoring in management

One means open to companies to develop the skills and experience of women (or other identified groups) and advance their opportunities for appointment to boards is the promotion of mentoring or other networking programs for women in management.

An example in the United Kingdom is the FTSE 100 Cross-Company Mentoring Programme, begun in 2005 and currently sponsored by over 30 leading UK listed companies, which aims to mentor eligible women at the management level, and by increasing their networks, skills and visibility boost the pool of women board candidates.[57] Mentoring programs have been introduced elsewhere, including in France and Canada.[58]

Several interest groups in Australia already seek, through mentoring and other initiatives, to advance executive management and board opportunities for women.[59] Recognition has been given to management mentoring initiatives as a positive and useful step in

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57 'Advice that gets women on boards', *Financial Times* 9 October 2008, indicated that over 50 women had so far been involved in the mentoring program.

58 'Call for more women in the boardroom', *Telegraph* (UK) 20 October 2008. The Canadian initiative is referred to as the *Women on Board™ Mentoring Program.*

59 These organizations include:
- Women on Boards (WOB). Its goal is to promote diversity on boards in the not-for-profit, private, and public sectors [www.womenonboards.org.au]
- Australian Businesswomen's Network [www.abn.org.au]
- Chief Executive Women [www.cew.org.au].

Recent initiatives to assist women include:
- First National Diversity on Boards Conference, Sydney, May 2008, organized by Women on Boards. The Second Diversity on Boards Conference is planned for September 2009
- Women: get A-Board, Perth, August 2008, organized by CPA Australia and the Australian Institute of Company Directors.

The *WOB Map for Gender Diversity on Australian Boards* (October 2008) sets out a range of mentoring and other strategies for companies to encourage and support women who are potential future directors.

encouraging and assisting the process of skills development by women.[60]

8.2.2 Career advancement practices

As outlined above, studies suggest that there are still barriers to women seeking to undertake, or advance in, senior managerial roles.[61]

While there are some indications of change,[62] there is still scope for individual companies or industry groups to show leadership to assist women to advance in executive management positions, or overcome barriers to their appointment or retention, including in regard to flexibility in working arrangements for managerial staff and ensuring that promotion policies do not unfairly disadvantage women.

Corporate initiatives of this nature could reduce barriers to career advancement by women, better ensure that women managers can contribute, and provide an effective means for companies to encourage and manage executive talent for their future needs.[63]

8.2.3 Experience in not-for-profit and public sector bodies

Not-for-profit (NFP) entities are organizations that operate for social or community purposes, do not distribute profits to members, are

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60 For instance, in November 2008 the Equal Opportunity for Women in the Workplace Agency provided an award relating to the Women in IT Executive Mentoring (WITEM) program, established in 2005.

61 See also A Warren *Cascading Gender Biases, Compounding Effects: An Assessment of Talent Management Systems* (Catalyst)(February 2009).

62 The *2008 EOWA Survey on Workplace Flexibility* found, for instance, that 'Compared to 2003, managers' access to all flexible working arrangements has increased in 2007.'

63 By way of comparison, the report by Catalyst *Leaders in a Global Economy: Talent Management in European Cultures* (November 2008) states that European, as well as other, companies face unprecedented challenges in encouraging, retaining and managing talented executive leaders. Talented persons are more likely to stay and contribute to a company's performance where various barriers to workplace advancement are reduced, including where they receive constructive feedback on their performance, perceive organizational fairness and are provided with 'line of sight' career advancement goals.

self-governing and are independent of government.[64] The NFP sector is diverse, both in terms of the purposes served and the size of organizations.

Women are significantly more involved in positions of control in NFPs than they are in public listed companies. Women comprise some 30% of directors, or their equivalents, in the top entities by revenue in this sector.[65] Also, some 75% of NFP boards have at least one female director.[66]

Likewise, there has been a trend towards greater female participation on public sector boards. This has been assisted by government policies and strategies designed to encourage women to serve on boards, including through candidate registration systems such as AppointWomen.[67] Women comprise 38% of the membership of government boards and committees Australia-wide, with South Australia leading the government sector on 45%.[68] The South Australian outcome reflects a legislative requirement that the

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64 State Services Authority (Victoria), *Review of Not-for-Profit Regulation: Final Report* (2007) at 7.

65 C Braund and R Medd, *WOB Road Map for Gender Diversity on Australian Boards* (October 2008).

66 S Woodward & S Marshall, *A better Framework: reforming not-for-profit regulation* (Centre for Corporate Law and Securities Regulation, The University of Melbourne, 2004) at 97.

67 *AppointWomen* is a free and confidential on-line registration and search service managed by the Australian Government Office for Women, within the Department of Families, Housing, Community Services and Indigenous Affairs. It allows women to register their interest in being considered for appointment to Australian Government boards and bodies. As stated on the Office for Women website:

> The Australian Government recognises that women can make a difference and positively influence important decisions in their community. AppointWomen is aimed at raising the awareness that there is a pool of talented women who are actively seeking appointment to an Australian Government board or other decision-making body. Significant trends have shown that companies with women as board members excel in many areas, including exporting of goods and services. Boards with a greater diversity of skills, perspectives and knowledge will enhance decision-making processes for the Australian Government. The experiences gained will offer excellent professional development and networking opportunities, which can benefit both career progression and business advancement.

68 C Braund and R Medd: *WOB Road Map for Gender Diversity on Australian Boards* (October 2008). Women comprise 40.5% of members of Victorian Government boards: *Victorian Attorney General Media release* 23 July 2008.

membership of South Australian public sector bodies 'must, as far as practicable, be comprised of equal numbers of women and men'.[69]

Almost all of the female directors interviewed in *Agender in the Boardroom* had prior board experience, usually on a government authority or government commercial board or with an NFP, before serving on a public company board. This participation can provide valuable opportunities for developing the skills and experience needed for effective executive management or board involvement in companies:

> Typically, [the female directors interviewed] believe that this experience was useful as a way of introducing them to boardroom procedures and norms and in some cases contacts made or the network formed from these appointments led directly to their public company appointment.[70]

While it can be a large step from participation on an NFP or public sector board to a directorship of a public listed company, the public sector model provides opportunities to assist an increasing number of women to gain skills and experience relevant to board roles in the private business sector.

8.3 Reducing undue burdens on directors

Directors are subject to a range of statutory, as well as other, duties and liabilities in performing their duties and exercising their powers.[71] In addition, directors may be subject to personal criminal liability for breaches by the company of various environmental, occupational health and safety or other legislation without the need to prove personal fault. This extended form of personal liability may discourage some otherwise qualified persons from seeking board

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69 Subsection 36A(2) of the *Acts Interpretation Act 1915* (SA), operative from July 2005, provides that if a South Australian public sector body must nominate a panel of persons from which the Governor or Minister is to select a person for appointment to that body, the panel:

> '(a) must include at least 1 woman and 1 man; and
> (b) must, as far as practicable, be comprised of equal numbers of women and men.'

70 *Agender in the boardroom* at 9.

71 Some of the principal duties and liabilities of directors are summarised in Chapter 3 of the CAMAC report *The social responsibility of corporations* (December 2006).

positions, particularly if they do not have direct business experience or familiarity in those areas.

While well-run and successful companies may have effective internal processes and risk management controls to reduce the level of personal risk, this may not be the case with newer or less established businesses, where opportunities for new directors may first arise.

The Advisory Committee considered related issues in its report *Personal liability for corporate fault* (2006) and made recommendations to remove undue burdens on persons involved in the governance of companies, while maintaining appropriate levels of responsibility on their part.

The Council of Australian Governments has agreed to promote increased harmonization of the laws on company director liability, including in relation to personal criminal liability for corporate misconduct.[72] Measures of this kind, by moving to a clearer and more principled approach, may remove a possible deterrent to deepening the pool of candidates willing to take on board positions.

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72 Minister for Superannuation and Corporate Law *media release* 18 December 2008.

9 Problems with quota approach

9.1 Norway and Spain

In December 2003, Norway enacted legislation imposing board gender quotas on public sector entities as well as gender quotas from 2006 for all new public limited liability companies (PLCs), and gender quotas from 2008 for PLCs incorporated prior to 2006, with the sanction of possible delisting or liquidation for non-compliance. The legislation provided that:

- if the board of directors has two or three members, both genders must be represented
- if the board of directors has four or five members, each gender must be represented with at least two members
- if the board of directors has six to eight members, each gender must be represented with at least three members
- if the board of directors has nine members, each gender must be represented with at least four members, and if the board of directors has more than nine members, each gender must be represented with at least 40% of the board of directors.

The Norwegian legislation was an affirmative action measure to lift the proportion of women on Norwegian boards of PLCs from a level of 6%, as in 2002, as well as reflecting the view that greater gender diversity on boards 'is a value in itself, in that it creates wealth':[73]

> The intention was to make sure that both genders were represented on the boards of companies that either have a broad spread of shares or are publicly owned. Both types

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73 Arni Hole, Director General, Ministry of Children and Equality, Norway *Government action to bring about gender balance* (published at www.women-omics.com). See also, K Tranter 'Norway's big stick for getting women on boards' *ABC News* 11 June 2008; S Brammer, J Grosvold, B Rayton 'Board Diversity in the UK and Norway: An Exploratory Analysis', *Business Ethics: A European Review* (2007) 16 (4) at 344–357.

> were deemed to have a distinct responsibility for diversity and democratic representation.[74]

As at mid-2008, women comprised some 40% of directors in the approximately 500 Norwegian PLCs. However, despite the five-year lead-time since 2003, it appears that PLCs have encountered difficulty in finding a sufficient number of women with requisite experience or knowledge of the relevant industry for board appointment.[75] In consequence, companies have relied to a considerable degree on the same women directors:

> some of the best women have collected as many as 25–35 directorships each.[76]

In 2006, Spain enacted legislation aimed at ensuring greater gender equality at work and more widely in political, economic, social and cultural life.[77] One aspect of this legislation was a requirement that women make up at least 40% of the board of any company tendering for public contracts. Further legislation enacted in 2008, but not to become operative until 2015, follows the Norwegian model.

9.2 Advisory Committee view

The Committee would encourage boards and shareholders, in their own interests, to give full consideration to issues of diversity in board composition. Voluntary targets for the appointment of more women to a board, or increased diversity by other measures, may be a useful tool for a company that sets itself on this course.

The Committee does not support any move to go further and impose a particular model of board diversity on private sector companies, such as through gender or other quotas.

As already pointed out, the governance structure of a company, including the composition of its board, is ultimately a matter for the shareholders. A quota would run counter to the responsibility of

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74 Arni Hole, *Government action to bring about gender balance*, ibid.

75 A Maki, 'Norway's "Golden Skirts"' RiskMetrics *Risk & Governance Blog* 22 February 2008.

76 'Norwegian firms' boards', *The Economist* 3 January 2008.

77 The 2006 Spanish legislation is summarised in 'Government drafts equality legislation' *European Industrial Relations Review* May 2006 at 27–28.

shareholders in this regard and, by cutting across their choice of candidates, dictate elements of the composition of the board which is to be accountable to them.

As previously indicated, the Committee has noted various studies, some of which have suggested a causal relationship between greater board diversity, measured by an increased proportion of women directors, and enhanced organizational effectiveness and financial performance. While these studies give grounds for thought by companies in their approach to their board composition, they do not support the imposition of quotas.

There is a fundamental difference between public sector and private sector entities. In the public sector, the government is, in effect, the sole shareholder and therefore is able, through quotas or otherwise, to take whatever approach it chooses in constituting the boards of the entities for which it is responsible. In so doing, it may show leadership in demonstrating particular approaches. In the private sector, the imposition of quotas would cut across the powers of shareholders to choose the directors who will be accountable to them for the stewardship of their investments.

Rather than attempting to impose diverse board composition through a quota approach, effective change will depend on convincing corporate leaders and shareholders of the benefits of a more open approach to the identification and selection of directors. The putting together of well-qualified and effective boards, without overlooking candidates from a less traditional mould, should be promoted as an element of effective governance and corporate success. That goal is unlikely to be advanced by simply requiring companies to satisfy certain indicative measures of diversity.

10 Conclusion

The following points and comments are put forward by way of summary:

(a) this report looks at board diversity in public listed companies; similar issues may arise with public sector, not-for-profit and non-listed companies

(b) gender is just one, if one of the most obvious, of the measures of board diversity. Similar issues may arise with age, ethnicity or other measurable or less tangible aspects of differentiation

(c) surveys indicate a relatively low representation of women on the boards of public listed companies, 8.3% in the case of the ASX top 200 bracket. This is in line with the position of some other developed countries and lags behind others—USA and Canada in particular—although some care is called for in drawing comparisons

(d) in any event, and in the absence of information about the availability of women, there is an apparent under-representation of women on those boards

(e) this raises questions:

- about the possible overlooking and wastage of valuable talent as well as broader considerations of participation and opportunity
- whether some boards are unduly blinkered in their approach and are failing to consider the benefits of greater diversity
- whether lack of opportunity or other reasons are limiting the pool of qualified women for board appointments

(f) while some studies suggest a positive link between diversity and corporate performance, this is not an easy matter to tie down

(g) a more sustainable proposition, drawing on a recent report, is that enlightened companies can be expected to perform better and that ‘they will inevitably be the ones who seek talent from all sources and to whom gender is a very secondary consideration’

(h) in other words, diversity itself is not the issue in terms of effective governance; what counts is a studied approach to the constitution of a governing board with a mind open to available talent

(i) while a mix of backgrounds and perspectives is beneficial on a board, it is not a case of diversity at all costs; there need to be some common purpose and ability to work together

(j) nor is there an ideal pattern for the composition of a board. The number and mix of directors is a matter for consideration by each company in the context of its own business and needs

(k) the ultimate question in terms of the governance culture of Australian companies is whether the environment and current practices are conducive to boards being constituted with well-qualified candidates in an effective mix for the furtherance of their corporate purposes

(l) although information is limited, there is some indication of a relatively limited pool of directors of public companies in Australia, with appointees often being drawn from the ranks of other boards or senior corporate executives

(m) an increasing emphasis in recent years on the compliance role of directors may itself have led to more focus on direct business experience in board candidates at the expense of other disciplines or backgrounds

(n) again, the promotion of a class of professional directors, leading as it does to multiple directorships, has the effect of limiting opportunities for those not yet within that rank

(o) the governance structure of a corporate body, including the composition of its board, is a matter for the constituent members or shareholders of that body

(p) while shareholders as a whole have the ultimate say on board appointments, in practice it is the directors themselves who largely determine board composition

(q) a starting point in any move to encourage greater gender (or other) diversity on boards is to promote the move, already undertaken by some companies, to make their appointment processes more transparent and to formalise their processes for keeping board composition under review in the light of performance and changing needs

(r) a board that actively reviews its continuing capability, and is prepared to turn over directors as may be required, is more likely to be open to new talent than one that regards directors, once appointed, as entitled, in effect, to continue in that role from term to term

(s) more transparent board processes, and more information about the reasons for putting forward new directors, will assist shareholders in questioning a board's approach or in voting on board appointments

(t) the ASX Corporate Governance Council *Principles and Recommendations* seek to promote a more structured and open approach to board appointments. Attention is drawn in Section 7 to some further refinements that could be considered for inclusion in the relevant commentary

(u) the other side of the equation is possible action to increase the pool of women available for board appointment, in particular by addressing impediments to the advancement of women through executive management. Reference is made in Section 8 to the kind of mentoring programs and management practices that may assist the emergence of more female candidates for board positions

(v) initiatives at government level that have resulted in the appointment of more women to the boards of public sector authorities also provide opportunities for women to develop relevant skills and experience

(w) there would be problems in imposing a gender (or other) model of diversity on companies in the private sector. Such a move, by dictating aspects of board selection and composition, would cut across the right of shareholders to choose the directors who are to be the stewards of their investments, and is not supported

(x) there is, however, scope for governments, business leaders and others to encourage companies to take a more open approach to board selection, and to facilitate opportunities for women to gain experience that will equip them for board roles

(y) change is more likely to follow where a company sees the benefits of adopting a more open approach to board composition rather than simply being required to satisfy certain aspects of diversity

(z) while there is unlikely to be a quick fix, leadership by example, encouragement of a more robust and open approach to board appointments and attention to any impediments in the area of executive management should contribute to change including more diversity through better utilisation of valuable talent.

Appendix A Gender diversity on boards

Australian position

The *EOWA 2008 Australian Census of Women in Leadership* (October 2008) stated that the trend towards a modest increase since the mid-1990s in the percentage of board seats held by women in top 200 ASX companies had halted, with some decline in recent years in female representation on boards and in senior executive positions.

The findings for these ASX top 200 companies include that:

Directors

- women in 2008 make up 8.3% of board members, down from 8.7% in 2006, and only marginally higher than 8.2% in 2004. The percentage of women directors has remained in the 8% band since 2002, when the figure was 8.4%. This compares with 8.7% of board members of NZSX100 companies, 9.7% of board members of major public companies in Europe, 14.3% of public companies in South Africa and 15.2% of board members of Fortune 500 companies in the USA

- the largest companies in the ASX top 200 companies are more likely to include women directors. Nineteen of the largest 20 companies have at least one woman on the board and 9 of these 20 companies have two women on the board

- women chair 2% of boards

- of those companies with female board members, 11.5% had two or more women board members, down from 13.5% in 2006

- 51% of the companies have no female directors, up 1% since 2006. This compares with 60% of NZSX100 companies, 40% of FP500 companies in Canada, 28% of major public companies in Europe (23% in the UK) and 13% of Fortune 500 companies in the USA.

Executive management

- the proportion of women in executive management positions in these companies was 10.7% in 2008, a decline from 12% in 2006 and 11.4% in 2004

- the proportion of these companies with no women in executive management positions rose from 39.5% in 2006 to 45.5% in 2008. By comparison, 15% of comparable US companies, 34% of comparable Canadian companies and 40% of comparable UK and South African companies have no women in executive management positions

- in only 16.5% of these companies do women comprise 25% or more of the executive management team, down from 18% in 2006

- of the women in executive management positions, most are in support roles rather than in profit-and-loss or direct client responsibility roles, the latter being widely considered essential for further career advancement. Only 5.9% of these senior line management roles are held by women, down from 7.4% in 2006, though still higher than 4.7% in 2003.

A report by *RiskMetrics* also indicated that in 2008 women hold 12.4% [12.6% in 2007] of the board seats of the top 100 ASX companies.[78]

Overseas position

While care needs to be taken with comparisons in this area, the proportion of women on boards of major Australian listed public companies appears to be lower than the proportion of female directors on comparable boards in some other jurisdictions. However

78 Reported in the *Australian Financial Review* 17 September 2008 at 4.

the level of gender diversity on these Australian companies is still in advance of the level in some European jurisdictions.[79]

Europe

In 2008, women comprise 9.7% of directors of major public companies in Europe, up from 8.5% in 2006 and 8.0% in 2004.

The distribution is widespread, ranging from Norway: 44% (reflecting the quota approach), Sweden: 27%, Finland: 26%, Denmark: 18%, through to Holland: 12%, the United Kingdom: 11.5%, Ireland 10%, Germany: 8%, France: 7.6%, Belgium 7%, Spain, Switzerland and Greece: 6% to Italy: 2% and Portugal: less than 1%.

In the UK, the kinds of companies more likely to have women on their boards are smaller companies in the service sector.[80]

USA

The percentage of women on boards of Fortune 500 companies has grown from 9.6% in 1995 to 14.7% in 2006, 14.8% in 2007 and 15.2% in 2008. In 2008, approximately 13% of these companies had no female director, while 85% of these companies had at least one woman in an executive management position. In 2008, women held 15.7% of corporate executive management positions at Fortune 500 companies, a slight increase from 15.4% in 2007.

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79 The figures on overseas female participation rates at board and executive management level are drawn from various sources, namely, Egon Zehnder International *Agender in the Boardroom,* (November 2008) at 4, Catalyst *Women in Europe* (January 2009), European Professional Women's Network: 3rd European PWN BoardWomen Monitor 2008, Catalyst *2008 Catalyst census of women board directors of the Fortune 500* (January 2009), Catalyst *2008 Catalyst census of women corporate officers and top earners of the Fortune 500* (January 2009), Catalyst 2008 *Women in business in Australia, Canada, South Africa & the United States* (December 2008), Catalyst *Women in Management in Canada* (July 2008), Catalyst *2007 Catalyst census of women board directors of the FP500: voices from the boardroom* (June 2008).

80 LM Martin, I Warren-Smith, JM Scott & S Roper, 'Boards of directors and gender diversity in UK companies' *Gender in Management: An International Journal*, 28(3), (2008), 194–208.

Canada

The figures indicate that:

- in 1998, women held 6.2% of board seats of companies in Canada’s FP500; this increased to 12% by 2005, and to 13% in 2007
- in 2007, 40% of FP500 companies in Canada had no women directors and less than one third of companies had more than one woman on their boards
- women directors interviewed referred to the continued reliance on informal networks as a significant factor in how new board members are recruited.

Appendix B Advisory Committee

The Advisory Committee is constituted under the *Australian Securities and Investments Commission Act 2001*. Its functions include, on its own initiative or when requested by the Minister, to provide advice to the Minister about corporations and financial services law and practice.

The members of the Advisory Committee are selected by the Minister, following consultation with the States and Territories, in their personal capacity on the basis of their knowledge of, or experience in, business, the administration of companies, financial markets, financial products and financial services, law, economics or accounting.

The current members of the Advisory Committee are:

- Richard St John (Convenor)—Special Counsel, Johnson Winter & Slattery, Melbourne
- Zelinda Bafile—Lawyer, Director and former General Counsel and Company Secretary, Home Building Society Ltd, Perth
- Jeremy Cooper—Deputy Chairman of the Australian Securities and Investments Commission
- Ian Eddie—Professor of Accounting, School of Commerce and Management, Southern Cross University, Tweed Heads
- Alice McCleary—Company Director, Adelaide
- Marian Micalizzi—Chartered Accountant, Brisbane
- Geoffrey Nicoll—Co-Director, National Centre for Corporate Law and Policy Research, University of Canberra, Canberra
- Ian Ramsay—Professor of Law, University of Melbourne
- Robert Seidler—Partner, Blake Dawson, Sydney
- Greg Vickery AM—Chairman and Partner, Deacons, Brisbane
- Nerolie Withnall—Company Director, Brisbane.

The Executive comprises:

- John Kluver—Executive Director
- Vincent Jewell—Deputy Director
- Thaumani Parrino—Office Manager.