

## CORPORATE GOVERNANCE CODES AND GENDER DIVERSITY: MANAGEMENT-BASED REGULATION IN ACTION

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### I INTRODUCTION

Over the last two decades corporate governance codes have become a popular method of regulating corporate behaviour worldwide. Many stock exchanges now use the ‘comply-or-explain’ mechanism to encourage adoption of corporate governance practices seen to be beneficial to listed companies and their stakeholders.<sup>1</sup> The proliferation of these codes in recent years has been dramatic: 24 countries were reported to have a code of corporate governance in place in 1999;<sup>2</sup> 64 countries in 2008;<sup>3</sup> and 93 countries had provided their codes to the European Corporate Governance Institute in 2015.<sup>4</sup>

Codes have not only expanded their scope in a geographical sense but also in terms of their content. Initially most codes were aimed at restoring investor confidence through better board monitoring and accountability to shareholders but more recently they have been extended to encourage disclosure regarding social issues such as corporate responsibility and gender diversity. Not only is the disclosed information intended to enable better investment decision-making and

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1 Andrew Keay, ‘Comply or Explain in Corporate Governance Codes: In Need of Greater Regulatory Oversight?’ (2014) 34 *Legal Studies* 279, 279–80; King Committee on Governance, ‘King Code of Governance for South Africa 2009’ (Report No 3, Institute of Directors in Southern Africa, 1 September 2009) 6.

2 Ruth V Aguilera and Alvaro Cuervo-Cazurra, ‘Codes of Good Governance Worldwide: What is the Trigger?’ (2004) 25 *Organization Studies* 415, 419.

3 Ruth V Aguilera and Alvaro Cuervo-Cazurra, ‘Codes of Good Governance’ (2009) 17 *Corporate Governance: An International Review* 376, 376.

4 See European Corporate Governance Institute, *Index of Codes* (26 March 2016) <[http://www.ecgi.org/codes/all\\_codes.php](http://www.ecgi.org/codes/all_codes.php)>.

the smooth running of capital markets, but it also comprises a form of indirect regulation aimed at changing the behaviour of corporations.<sup>5</sup>

Thus codes of corporate governance have ambitious aims: to improve both the internal practice of corporate governance and the external provision of information about corporate governance. Yet in most countries code provisions are voluntary: codes tend to fall into the category of soft regulation rather than hard law, comprising general principles rather than prescriptive rules. It is widely accepted that ‘one size does not fit all’ in corporate governance and hence companies are permitted to choose to either adopt the recommendations of the code or explain why they are not appropriate – a regulatory mechanism known as comply-or-explain.<sup>6</sup> The only strict requirement is for disclosure of information: a corporate governance statement in the annual report of the company must describe the company’s approach as compared to the principles of the code.

The aim of this article is to explore how these codes take effect in terms of altering organisational behaviour. In order to do this the article takes part of the Australian corporate governance code (ASX code) as a regulatory case study.<sup>7</sup> It analyses the corporate response to the ASX code’s recommendations on gender diversity shortly after their introduction. By doing so the article is able to provide insights into the way in which code recommendations are implemented by companies and the management processes that can be instigated as a result of this kind of soft regulation. This is important because the debate over whether to regulate using hard or soft law is still very much alive, especially in the area of gender diversity in leadership.<sup>8</sup> Many countries in Europe have implemented mandatory legislative quotas for women on corporate boards whereas others, including the UK and Australia, have incorporated gender diversity into soft regulation, usually corporate governance codes.<sup>9</sup>

Despite the popularity of comply-or-explain codes, their effectiveness is far from proven. The Organisation for Economic Co-operation and Development admits that: ‘Although voluntary codes and principles have the advantage of maintaining flexibility and avoiding excessive and costly legal and regulatory measures, the question of their effectiveness does arise’.<sup>10</sup> Their widespread

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5 Laura F Spira and Michael Page, ‘Regulation by Disclosure: The Case of Internal Control’ (2010) 14 *Journal of Management and Governance* 409; Cary Coglianese and David Lazer, ‘Management-Based Regulation: Prescribing Private Management To Achieve Public Goals’ (2003) 37 *Law & Society Review* 691, 695.

6 Iain MacNeil and Xiao Li, ‘“Comply or Explain”: Market Discipline and Non-compliance with the Combined Code’ (2006) 14 *Corporate Governance: An International Review* 486.

7 See ASX Corporate Governance Council, ‘Corporate Governance Principles and Recommendations: 3<sup>rd</sup> Edition’ (Report, 2014).

8 Peta Spender, ‘Gender Quotas on Boards – Is It Time for Australia To Lean In?’ (2015) 20 *Deakin Law Review* 95; Alice Klettner, Thomas Clarke and Martijn Boersma, ‘Strategic and Regulatory Approaches to Increasing Women in Leadership: Multilevel Targets and Mandatory Quotas as Levers for Cultural Change’ (2016) 133 *Journal of Business Ethics* 395.

9 See, eg, Charlotte Villiers, ‘Achieving Gender Balance in the Boardroom: Is It Time for Legislative Action in the UK?’ (2010) 30 *Legal Studies* 533.

10 Organisation for Economic Cooperation and Development (‘OECD’), ‘Corporate Governance: A Survey of OECD Countries’ (Report No 53391, 13 April 2004) 52.

introduction has resulted in more corporate reporting regarding governance, yet it seems investors may not always engage with this information and it has certainly not prevented all incidence of corporate collapse.<sup>11</sup> On the other hand, the practices recommended by codes have been widely adopted and the composition of the average board has definitely changed. For example, 74 per cent of companies on the ASX 500 index had a majority of independent directors in 2011 whereas in 2004 (just after first introduction of the ASX code) the figure was only 38 per cent.<sup>12</sup> In terms of gender diversity there has been a steady increase in the number of women on Australian corporate boards from 8.4 per cent of board positions on the ASX 200 index in 2010 (when code recommendations were first introduced) to 22.7 per cent in February 2016.<sup>13</sup> Clearly codes exert a strong influence over corporate governance practice yet we do not fully understand how these practices flow through into organisational behaviour.

Most of the research done on the effect of corporate governance codes has measured levels of compliance with code provisions 'rather than the behavioural effects in corporate policies and processes which disclosure is intended to secure but which are far more difficult to assess'.<sup>14</sup> As has been demonstrated by some of the more famous corporate collapses in recent years, formal code compliance does not always equate to good corporate governance.<sup>15</sup> Also, the ethos behind corporate governance codes is that they should be flexible, permitting companies to design a governance system that suits their size, needs and organisational structure rather than adopting a fixed and possibly unsuitable set of standards.<sup>16</sup> For these reasons, compliance is not a good measure of effectiveness, instead there is a need for more qualitative research that examines the effectiveness of codes of corporate governance in a behavioural sense, including the processes through which code implementation can cause organisational change.<sup>17</sup>

This is an area rarely researched as it can be difficult to measure and assess internal change within organisations and even harder to link it to any particular cause. Yet this kind of research is vital if we are to continue along a path of code development and expansion. Aguilera and Cuervo-Cazurra point out that the lack of academic analysis of the behavioural effects of codes is creating a divergence between the fast developing practice in the real world and the slow

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11 Keay, above n 1, 292–3.

12 The ASX 500 index represents the 500 largest companies listed on the Australian Securities Exchange. See Australian Stock Exchange, '2005 Analysis of Corporate Governance Practice Disclosure' (Report, 22 May 2006) 7. See also Grant Thornton, 'Corporate Governance Reporting Review 2012' (Report, 2012) 14.

13 Thomas Clarke et al, '2012 Australian Census of Women in Leadership' (Report, Equal Opportunity for Women in the Workplace Agency, 2012) 8; Australian Institute of Company Directors, *Statistics* (2016) <<http://www.companydirectors.com.au/director-resource-centre/governance-and-director-issues/board-diversity/statistics>>.

14 Spira and Page, above n 5, 411.

15 Ronald R Sims and Johannes Brinkmann, 'Enron Ethics (Or: Culture Matters More than Codes)' (2003) 45 *Journal of Business Ethics* 243.

16 Keay, above n 1, 280.

17 Aguilera and Cuervo-Cazurra, 'Codes of Good Governance', above n 3.

pace of theoretical advancement.<sup>18</sup> Thus the aim of this article is to develop our understanding of how codes influence corporate behaviour, including both their advantages and limitations. This knowledge will hopefully have value in improving the design of code reforms and understanding the circumstances in which they are likely to be most effective.

Part I has set out the aims, objectives and general context for this article. Part II then discusses the comply-or-explain mechanism used by many corporate governance codes in the context of contemporary regulatory theory, analysing the processes through which it can both elicit information and change behaviour. Part III explores the limits of corporate governance codes, what we can expect them to achieve within a particular institutional environment and the conditions in which they may be most effective. Part IV then introduces an empirical example: the response of corporations to the Australian corporate governance code's recommendations regarding gender diversity. This data is used to demonstrate the mechanisms through which codes can encourage organisational change: the effects that codes can have on internal management practices and the processes through which code recommendations are implemented. Part V draws the article together, using the empirical evidence to draw conclusions relevant for future regulatory policy and design. It identifies the importance of supportive institutional forces and norms in the effectiveness of soft regulation and the role of regulatory design and disclosure in activating these forces. Where regulation provides flexibility and a level of choice it is vital that incentives exist to direct those choices in a coherent way that fulfils the spirit and purpose of the regulation.<sup>19</sup>

## II REGULATORY THEORY AND THE DESIGN OF CORPORATE GOVERNANCE CODES

As regulatory tools have become increasingly sophisticated and complex over time, so too has the field of regulatory studies. It is difficult to place any particular piece of regulation in a clearly defined category because each system tends to be unique to the task at hand and the domain in which it is to function. For this reason the terminology used by regulatory scholars is far from settled and labels applied to regulatory systems cannot be closely relied upon.<sup>20</sup> This article places corporate governance codes within two categories of regulation: management-based regulation and disclosure-based regulation, following the theory that codes are aimed at improving internal governance practices as well as encouraging disclosure of information.

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18 Ibid 377.

19 Donald Feaver and Benedict Sheehy, 'Designing Effective Regulation: A Normative Theory' (2015) 38 *University of New South Wales Law Journal* 392, 410, 422.

20 Alison L Dempsey, *Evolutions in Corporate Governance: Towards an Ethical Framework for Business Conduct* (Greenleaf Publishing, 2013) 87.

## A Corporate Governance Codes as Management-Based Regulation

Management-based regulation has been defined by Coglianese and Lazer as an approach that ‘requires firms to engage in their own planning and internal rule-making efforts that are supposed to aim toward the achievement of specific public goals’.<sup>21</sup> Gunningham and Sinclair similarly describe it as an approach that ‘involves firms developing their own process and management system standards, and developing internal planning and management practices designed to achieve regulatory or corporate goals’.<sup>22</sup> This article takes, as an example of management-based regulation, the ASX code recommendations that encourage firms to set and implement their own gender diversity targets and policies in order to achieve the public goal of increasing women in leadership.<sup>23</sup>

Gilad places management-based regulation within the wider family of ‘process-oriented regulation’,<sup>24</sup> in which she also includes ‘meta-regulation’,<sup>25</sup> as well as ‘new governance’ or ‘principles-based’ regulation.<sup>26</sup> These terms tend to be grouped together in the literature with authors recognising the similarities between them.<sup>27</sup> Meta-regulation refers to the layered aspect of modern regulatory systems, ‘the proliferation of different forms of regulation (whether tools of state law or non-law mechanisms) each regulating one another’.<sup>28</sup> Thus by adding a layer of independent oversight, self-regulation can become meta-regulation.<sup>29</sup> The Australian corporate governance code provides an example of this way of regulating. The meta-regulatory hierarchy starts with sections 674 and 1311 of the *Corporations Act 2001* (Cth), which set up the ASX and gives it power to draft the Listing Rules, compliance with which is enforced by sanctions. The Listing Rules require disclosure against the ASX code, a non-legal set of recommendations drafted by the ASX Corporate Governance Council. Thus if a company wishes to have its shares listed on the ASX, it must make comply-or-explain disclosures against the recommendations of the code or risk being

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21 Coglianese and Lazer, above n 5, 692, citing Eugene Bardach and Robert Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press, 1982) 224.

22 Neil Gunningham and Darren Sinclair, ‘Organizational Trust and the Limits of Management-Based Regulation’ (2009) 43 *Law & Society Review* 865, 865.

23 ASX Corporate Governance Council, ‘Corporate Governance Principles and Recommendations: 3<sup>rd</sup> Edition’, above n 7, 11.

24 Sharon Gilad, ‘It Runs in the Family: Meta-Regulation and Its Siblings’ (2010) 4 *Regulation & Governance* 485, 485.

25 Ibid. See also Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) ch 9; Christine Parker, ‘Meta-regulation: Legal Accountability for Corporate Social Responsibility’ in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 207.

26 Gilad, above n 24. See also Cristie L Ford, ‘New Governance, Compliance and Principles-Based Securities Regulation’ (2008) 45 *American Business Law Journal* 1.

27 Lorraine Talbot, *Progressive Corporate Governance for the 21<sup>st</sup> Century* (Routledge, 2013) 148; Coglianese and Lazer, above n 5, 692; Orly Lobel, ‘The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought’ (2004) 89 *Minnesota Law Review* 342, 346.

28 Parker, ‘Meta-regulation’, above n 25, 208.

29 Gunningham and Sinclair, above n 22, 866.

delisted. This is a complex regulatory system involving a mixture of hard law, principles and contractual obligations.

Talbot explains that '[m]eta-regulation in its simplest form, involves the regulator delegating authority to the regulatee to design its own standard setting and mode of compliance which is then overseen by the regulator'.<sup>30</sup> In the case of corporate governance codes, companies are free to choose their own unique governance structure as long as they disclose what it is. Although the regulator enforces the disclosure of this information, it leaves it to the investment market to judge the value or otherwise of the company's chosen corporate governance system. Talbot neatly summarises many of the advantages of taking a meta-regulatory approach including its ability to: avoid the 'one size fits all' problem; enable social goals; become integrated into organisational structures; and promote reflexive learning processes.<sup>31</sup> Reflexive, smart or responsive regulation are other terms that have been applied to similar regulatory mechanisms that permit learning and improvement over time.<sup>32</sup>

New governance appears to be a broader term used in the United States which encompasses a wide range of contemporary approaches to regulation.<sup>33</sup> Ford and Condon explain some of the elements agreed to be central to new governance including, 'a restructured and more collaborative relationship between the state and regulated entities, based on the recognition that regulation may operate most effectively when it incorporates private actors' context-specific experience and relevant expertise'.<sup>34</sup> Overall, new governance scholars recognise a reorientation in regulatory practice, 'away from the familiar model of command-style, fixed-rule regulation by administrative fiat, and toward a new model of collaborative, multi-party, multi-level, adaptive, problem-solving New Governance'.<sup>35</sup> Most corporate governance codes fall within this remit because they comprise general principles and voluntary recommendations that can be adapted to company circumstances. In other words they fall within the remit of soft law rather than hard law. Soft law has been defined to comprise 'regulatory instruments and mechanisms of governance that, while implicating some kind of normative commitment, do not rely on binding rules or on a regime of formal sanctions'.<sup>36</sup> Dempsey points out that one of the great strengths of principles-based regulation is that it leaves no loopholes and can cover unforeseen

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30 Talbot, above n 27, 151.

31 Ibid 151–2.

32 John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 *University of British Columbia Law Review* 475; Nina K Cankar, Simon Deakin and Marko Simoneti, 'The Reflexive Properties of Corporate Governance Codes: The Reception of the "Comply-or-Explain" Approach in Slovenia' (2010) 37 *Journal of Law and Society* 501; Gunningham and Sinclair, above n 22; Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998) pt 3.

33 Lobel, above n 27.

34 Cristie Ford and Mary Condon, 'Introduction to "New Governance and the Business Organization": Special Issue of *Law & Policy*' (2011) 33 *Law & Policy* 449, 450.

35 Bradley C Karkkainen, 'Reply: "New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping' (2004) 89 *Minnesota Law Review* 471, 473; Feaver and Sheehy, above n 19.

36 Anna Di Robilant, 'Genealogies of Soft Law' (2006) 54 *American Journal of Comparative Law* 499, 499.

situations.<sup>37</sup> On the other hand, some scholars still strongly believe that new governance style regulation is not capable of countering the effects of economic self-interest and therefore has limited use in the field of corporate governance.<sup>38</sup>

Although regulatory terminology is unsettled and likely to remain so, the trend away from traditional law towards soft, flexible regulation shows no sign of abating. In such circumstances it is vital to understand how soft regulation takes effect and how we can reduce its inherent limitations and expand its scope. Although management-based regulation has become a popular policy tool, very little is known about the conditions in which it can be most effective.<sup>39</sup>

## **B Comply-or-Explain as Disclosure-Based Regulation**

As well as being a soft, flexible form of regulation, designed to become integrated into organisational management practice, corporate governance codes fall within the category of disclosure-based regulation. Compliance with most codes can be achieved even if all recommendations are rejected, as long as the reasons for rejection are explained in a public statement, usually the company's annual report.

Disclosure of information has long been used as a mechanism of corporate accountability but more recently has also been viewed as a tool of regulation.<sup>40</sup> The distinction is subtle – if disclosure of information is purely an exercise in correcting for information asymmetries, for example, between corporate managers and shareholders, then disclosure is a regulatory goal rather than a regulatory strategy.<sup>41</sup> If, however, the information disclosure has another purpose – to change the behaviour of the firm and improve corporate governance practices, it can be viewed as a form of management-based regulation. Indeed, Kingsford Smith places behavioural change as the most compelling reason for corporate governance guidelines: the fact that they 'might help good governance practices to be internalised in the corporation's everyday operations'.<sup>42</sup>

The theory behind 'comply-or-explain' corporate governance codes is that the requirement to disclose will lead to enforcement of code principles by the investment market. The assumption is that there is a market for good governance – investors will assess each company's disclosures and good governance will be recognised in the value of the company's shares. In other words, the theory is based on an assumption that 'shareholders will consider non-compliance or unsatisfactorily explained non-compliance negatively. It also assumes that the market responds not just to disclosure or not, but also its content'.<sup>43</sup>

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37 Dempsey, above n 20, 83.

38 See, eg, Janis Sarra, 'New Governance, Old Norms, and the Potential for Corporate Governance Reform' (2011) 33 *Law & Policy* 576.

39 Gunningham and Sinclair, above n 22, 896.

40 Spira and Page, above n 5, 410.

41 Coglianese and Lazer, above n 5, 695.

42 Dimity Kingsford Smith, 'Governing the Corporation: The Role of "Soft Regulation"' (2012) 35 *University of New South Wales Law Journal* 378, 399.

43 *Ibid* 396.

However, several researchers have found that investor engagement over corporate governance disclosure has been much less active than expected.<sup>44</sup> Keay concludes that codes are not effective because investors, even the large institutional investors, do not assess and engage with companies over their corporate governance practices and ultimately do not base investment decisions on them.<sup>45</sup> MacNeil and Li also conclude that the ‘comply-or-explain’ approach does not work as envisaged, however for slightly different reasons: they found that investors did not value reasoned arguments for non-compliance because they used financial performance as a proxy.<sup>46</sup> Thus they describe the effect of the code as ‘comply or perform’. Although this suggests a lack of interest in governance it may amount to a higher standard for companies, requiring them to prove the value of alternative governance structures rather than simply explain them.<sup>47</sup>

Overall, the evidence suggests that the detail of corporate governance information is not a priority factor for fund managers when making investment decisions.<sup>48</sup> However, this does not necessarily make the ‘comply-or-explain’ mechanism ineffective at causing behavioural change within companies. Spira and Page point out that ‘the knowledge that disclosure is required may have an earlier and equally important effect on management behavior’.<sup>49</sup> This article, by reviewing corporate disclosures in response to the ASX code’s diversity recommendations, aims to explore the behavioural effects of corporate governance codes: their management-based effects, including how and why they occur.

Certainly, the evidence is that the large majority of listed companies do adopt the ASX recommendations.<sup>50</sup> If it is not fear of judgment by investors causing this behaviour, what does drive companies to implement the ASX recommendations? There are two theoretical possibilities: first that external expectations and a need for legitimacy are driving compliance (which may be relatively superficial); and, second, that companies are choosing to adopt practices because they see genuine value or efficiency gains in doing so.<sup>51</sup> In the first case the regulation taps into the external expectations of stakeholders to enforce compliance (if not investors’ expectations then perhaps ratings agencies or regulators); whereas in the second case the regulation also builds on existing ‘intrinsic motivation’ thereby encouraging co-operation with both the letter and

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44 Sridhar Arcot, Valentina Bruno and Antoine Faure-Grimaud, ‘Corporate Governance in the UK: Is the Comply or Explain Approach Working?’ (2010) 30 *International Review of Law and Economics* 193; Keay, above n 1; MacNeil and Li, above n 6.

45 Keay, above n 1, 293.

46 MacNeil and Li, above n 6, 492.

47 *Ibid* 493.

48 Keay, above n 1; Alice Klettner and Thomas Clarke, ‘Company Secretary: Board Performance Evaluation Post-Financial Crisis’ (2011) 63 *Keeping Good Companies* 200, 205.

49 Spira and Page, above n 5, 411.

50 Grant Thornton, above n 12, 8.

51 Alessandro Zattoni and Francesca Cuomo, ‘Why Adopt Codes of Good Governance? A Comparison of Institutional and Efficiency Perspectives’ (2008) 16 *Corporate Governance: An International Review* 1.



spirit of the regulation.<sup>52</sup> Clearly the second case is the preferred scenario and flexible regulation is generally seen to be more likely to achieve this outcome because it allows managers to choose how to implement governance systems rather than imposing systems upon them.<sup>53</sup>

### III REGULATORY EFFECTIVENESS: THE ROLE OF NORMS AND INSTITUTIONS

Norms can be defined as ‘observed behavioural regularit[ies]’, like wearing a suit for office work or forming a queue at the bus stop.<sup>54</sup> These are rules or standards of behaviour that are not legally enforceable but are enforced or encouraged by other social means: peer pressure, social acceptance, shaming or concerns about reputation. Norms relevant to corporate behaviour can be both internal and external. Internal norms make up the culture of the organisation and can be developed through either top-down processes (the board communicating its expectations) or bottom-up ones (employee agreement on methods of task performance). Rock and Wachter explain that ‘behavioral rules and standards for corporate actors are provided by corporate culture and are essentially norm-based’.<sup>55</sup> They stress the importance of studying the role played by norms in the corporate arena:

Norms may help explain the manner in which the law, in the absence of bright line rules, influences corporate governance. Norms may also explain why standards rather than rules work well in a corporate setting.<sup>56</sup>

External norms of behaviour develop as a result of institutional forces and have been explained by theories of institutional isomorphism that suggest that corporations facing similar external pressures will develop similar corporate governance practices in response.<sup>57</sup> These external norms affecting corporate behaviour are what we might call norms of best practice. Corporate social responsibility is an area where corporations are left with a great deal of discretion in terms of how to react and how to report. Yet a review of annual corporate responsibility reports demonstrates a norm of disclosure across areas such as employee relations, health and safety, environmental performance and community relations. There is a close relationship between this observed practice

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52 Gunningham and Sinclair, above n 22, 894.

53 Sumit K Majumdar and Alfred A Marcus, ‘Rules versus Discretion: The Productivity Consequences of Flexible Regulation’ (2001) 44 *Academy of Management Journal* 170.

54 Edward B Rock and Michael L Wachter, ‘Islands of Conscious Power: Law, Norms, and the Self-governing Corporation’ (2001) 149 *University of Pennsylvania Law Review* 1619, 1641.

55 Edward B Rock and Michael L Wachter, ‘Symposium: Norms & Corporate Law: Introduction’ (2001) 149 *University of Pennsylvania Law Review* 1607, 1608.

56 Ibid.

57 Matthew D Lynall, Brian R Golden and Amy J Hillman, ‘Board Composition from Adolescence to Maturity: A Multitheoretic View’ (2003) 28 *Academy of Management Review* 416, 416; Paul J DiMaggio and Walter W Powell, ‘The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields’ (1983) 48 *American Sociological Review* 147.

and the development of soft law initiatives such as the Global Reporting Initiative ('GRI') and other reporting guidelines. Black refers to a study that shows that norm building is often started by a 'small but global community of professionals rather than through the application of established legal rules'.<sup>58</sup> She notes there are only 'scatterings of empirical research' into how norms develop in financial markets despite many scholars noting their influence on behaviour.<sup>59</sup> Najarajan has looked at the issue of gender diversity in Australian companies and explains the polycentric nature of the governance of this issue: regulatory action was made possible due to the contribution of many different organisations and subtle steering by the state.<sup>60</sup>

### A Norms and Regulation

When regulation is voluntary, as is the case for codes of corporate governance, the interaction between norms and regulation becomes very important in determining regulatory effectiveness. Gunningham and Sinclair conclude that 'for sociolegal scholars ... the key theoretical and empirical issues have come to involve the relationships between regulatory norms and organizational behavior'.<sup>61</sup>

The close relationship between norms and soft regulation, such as codes of conduct, is evident in that norms often reflect a common interpretation of a code principle or – vice versa – the principle is based on common expectations of conduct. Indeed, one of the recurring questions regarding the relationship between soft law and norms is the question of which comes first: 'Does soft law evolve into social norms or do social norms generate soft law?'<sup>62</sup> Most scholars suggest that both of these propositions are correct and that norms and soft law are mutually reinforcing and develop in parallel.<sup>63</sup> Using human rights norms as an example, Moore Dickerson describes a feedback loop whereby '[a]s the actual behavior of multinationals becomes increasingly consistent with the evolving human-rights norms, the behavior both reinforces the norms, and is reinforced by them'.<sup>64</sup> She goes further to suggest that, despite being rather unstructured, this process is akin to democracy and tends to acquire the type of legitimacy afforded to democratically approved conclusions.

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58 Julia Black, 'Financial Markets' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 168, citing J Flood and E Skordaki, 'Normative Bricolage: Informal Rule Making by Accountants and Lawyers in Mega-Insolvencies' in Gunther Teubner (ed), *Global Law without a State* (Dartmouth Publishing, 1997).

59 Black, above n 58, 168.

60 Vijaya Nagarajan, 'Regulating for Women on Corporate Boards: Polycentric Governance in Australia' (2011) 39 *Federal Law Review* 255, 256.

61 Gunningham and Sinclair, above n 22, 894.

62 Ulrika Mörth, 'Introduction' in Ulrika Mörth (ed), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Edward Elgar Publishing, 2005) 4.

63 See, eg, E Norman Veasey, 'Should Corporation Law Inform Aspirations for Good Corporate Governance Practices – Or Vice Versa?' (2001) 149 *University of Pennsylvania Law Review* 2179, 2189.

64 Claire Moore Dickerson, 'Human Rights: The Emerging Norm of Corporate Social Responsibility' (2002) 76 *Tulane Law Review* 1431, 1460.

Similarly Mörth claims that norms are often codified as soft law and in this sense norm development can be seen as the first stage in the law-making process. She asks, 'to what extent should soft law be seen as a transitional mode of regulation? Or can it be seen as an independent form of regulation?'<sup>65</sup> Most regulatory theories posit that soft regulation can be a first choice rather than a transitional phase, 'preferred over legally binding rules when there is a need for flexibility and rapid reactions and when there is a concern about the possibility of non-compliance'.<sup>66</sup> Usually in the realm of corporate governance there is no expectation that codes will ultimately be hardened into legislation yet gender diversity may be different. Some countries, for example Denmark, have reduced code coverage of the topic and introduced legislative measures instead.

Norms and other institutional forces can either support regulatory objectives or work against them. In the case of the collapse of Enron, norms of good corporate governance were defeated by internal cultural norms that supported highly risky trading, dubious accounting and personal financial gain.<sup>67</sup> The importance of workplace culture on the effectiveness of management-based regulation was also revealed by Gunningham and Sinclair in their research on mining companies. They found that management-based regulation regarding occupational health and safety was only effective where there was already a culture of trust and commitment.<sup>68</sup> In the area of gender diversity Branson stresses the importance of 'energy and emphasis' in maintaining progress, demonstrating that this can emanate from non-legal initiatives such as mentoring schemes, education and investor engagement.<sup>69</sup> Other researchers also note the importance of international norms of practice and politics in the development of national regulation promoting gender diversity on boards.<sup>70</sup>

As discussed in Part II, the disclosures required by the comply-or-explain mechanism are designed to tap into external norms and expectations, indeed, they presume that such forces exist and will help to enforce code adoption. However, researchers have found these expected institutional forces to be weak (less investor engagement) and other unexpected institutional forces to be strong (pressure to comply rather than explain). Indeed, a common criticism of the effectiveness of corporate governance codes is that the flexibility provided by the

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65 Mörth, above n 62, 3.

66 Ibid.

67 Sims and Brinkmann, above n 15.

68 Gunningham and Sinclair, above n 22.

69 Douglas M Branson, 'An Australian Perspective on a Global Phenomenon: Initiatives to Place Women on Corporate Boards of Directors' (2012) 27 *Australian Journal of Corporate Law* 2, 21.

70 Jean du Plessis, James O'Sullivan and Ruth Rentschler, 'Multiple Layers of Gender Diversity on Corporate Boards: To Force or Not To Force?' (2014) 19 *Deakin Law Review* 1; Cathrine Seierstad et al, 'Increasing the Number of Women on Boards: The Role of Actors and Processes' (2015) *Journal of Business Ethics* <<http://link.springer.com/article/10.1007/s10551-015-2715-0>>.

comply-or-explain mechanism is not used by companies due to external pressures to conform (often in the form of compliance-oriented rating agencies).<sup>71</sup>

Hooghiemstra and van Ees examined the corporate response to the Dutch ‘comply-or-explain’ corporate governance code. They found that companies tended to comply with the code or confine themselves to accepted arguments to explain non-compliance. Their findings indicated ‘uniformity in adopting the standard of good governance which is not in line with the logic of corporate governance codes and casts doubt on the effectiveness of this form of soft law’.<sup>72</sup> They point to the institutional pressures that work against innovation and uniqueness in governance systems and their research provides evidence of ‘powers of isomorphism’ that hinder firms from using the discretion permitted by codes of corporate governance and instead push them towards uniformity.<sup>73</sup>

This pressure to conform to a code of corporate governance rather than make use of its flexible nature has been noted by other scholars, however, it may be limited to the early response to the introduction of a code.<sup>74</sup> Seidl, Sanderson and Roberts, in their recent research based on the UK and German codes, found that ‘the sheer number of deviations recorded would seem to suggest that concerns about companies being driven towards full compliance are largely unfounded’.<sup>75</sup> Confirming the importance of flexibility in cost-effectiveness, Luo and Salterio show that it can bring tangible financial benefits to shareholders.<sup>76</sup> The ASX Corporate Governance Council took steps to educate both companies and investors on the option of non-adoption of the code principles after its own survey revealed this early pressure to conform.<sup>77</sup> In this case, the pressure arose as a result of ratings agencies that were scoring companies’ corporate governance on the basis of the number of code principles complied with, rather than quality of disclosures.<sup>78</sup> In South Africa following similar problems, the third edition of the corporate governance code introduced an ‘apply-or-explain’ mechanism

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71 Reggy Hooghiemstra and Hans van Ees, ‘Uniformity as Response to Soft Law: Evidence from Compliance and Non-compliance with the Dutch Corporate Governance Code’ (2011) 5 *Regulation & Governance* 480; Nina K Cankar, Simon Deakin and Marko Simoneti, ‘The Reflexive Properties of Corporate Governance Codes: The Reception of the “Comply-or-Explain” Approach in Slovenia’ (2010) 37 *Journal of Law and Society* 501; Sridhar Arcot, Valentina Bruno and Antoine Faure-Grimaud, ‘Corporate Governance in the UK: Is the Comply or Explain Approach Working?’ (2010) 30 *International Review of Law and Economics* 193.

72 Hooghiemstra and van Ees, above n 71, 480.

73 Ibid 193–4.

74 Alice Klettner, Thomas Clarke and Michael Adams, ‘Corporate Governance Reform: An Empirical Study of the Changing Roles and Responsibilities of Australian Boards and Directors’ (2010) 24 *Australian Journal of Corporate Law* 148, 164.

75 David Seidl, Paul Sanderson and John Roberts, ‘Applying the “Comply-or-Explain” Principle: Discursive Legitimacy Tactics with Regard to Codes of Corporate Governance’ (2013) 17 *Journal of Management and Governance* 791, 800.

76 Yan Luo and Steven E Salterio, ‘Governance Quality in a “Comply or Explain” Governance Disclosure Regime’ (2014) 22 *Corporate Governance: An International Review* 460.

77 See ASX Corporate Governance Council Implementation Review Group, ‘Second Report to the ASX Corporate Governance Council’ (Report, February 2005).

78 See Klettner, Clarke and Adams, above n 74, 164.

instead of ‘comply-or-explain’: a simple change of terminology designed to convey the fact that ‘compliance’ was not the aim of the code.<sup>79</sup>

#### IV TESTING THE EFFECT OF MANAGEMENT-BASED REGULATION

This article aims to develop regulatory theory by using the ASX code as a case study. This is an approach used by other regulatory scholars: by testing theory against empirical case studies researchers have gained understanding of the limits of new regulatory approaches and their potential advantages.<sup>80</sup> Ford and Hess examined the United States’ post-global financial crisis corporate monitorship regulation in order to explore the limitations of ‘new governance’ style regulation.<sup>81</sup> They examined the practical effect of the monitorship regime against its theoretical potential in a similar fashion to this article’s assessment of the ASX code’s provisions on gender diversity. Their conclusion was that the monitorship regime did not fulfil its theoretical promise and they were able to identify some of the reasons why, including the sociological and institutional forces at play. Performing such an assessment is an important exercise, ‘[u]nderstanding how new governance initiatives will play out within the dynamics and institutional processes of particular regulatory regimes is an essential step in making new governance an effective tool for regulatory design’.<sup>82</sup> Corporate governance regulation has already gone through several cycles of reform and yet corporate collapses continue to occur.<sup>83</sup> Although we cannot expect to create a perfect system of corporate governance, we can do more to understand both the potential and limitations of the reforms we put in place.

##### A Methodology

This article focuses on a small element of the Australian corporate governance code, namely the recommendations encouraging gender diversity that were added to the code in 2010. The three main recommendations are as follows:

- Companies should establish a policy concerning diversity and disclose the policy or a summary of it (policy recommendation);
- Companies should disclose in each annual report the measurable objectives for achieving gender diversity set by the board in accordance

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79 King Committee on Governance, above n 1, 7.

80 Cristie Ford and David Hess, ‘Corporate Monitorships and New Governance Regulation: In Theory, in Practice, and in Context’ (2011) 33 *Law & Policy* 509; Spira and Page, above n 5; Gunningham and Sinclair, above n 22; Coglianese and Lazer, above n 5.

81 Ford and Hess, above n 80, 510.

82 Ibid 538.

83 Thomas Clarke, ‘Cycles of Crisis and Regulation: The Enduring Agency and Stewardship Problems of Corporate Governance’ (2004) 12 *Corporate Governance: An International Review* 153.

with the diversity policy and progress towards achieving them (targets recommendation);

- Companies should disclose in each annual report the proportion of women employees in the whole organisation, women in senior executive positions and women on the board (metrics recommendation).<sup>84</sup>

These provisions were added to the code in the context of an international debate over the lack of women on corporate boards.<sup>85</sup> In Europe many countries had put in place legislative quotas, while the Australian debate concluded in favour of a voluntary approach, implemented via the existing code of corporate governance.<sup>86</sup> Thus the broad objective of the recommendations was to increase the number of women in listed corporations, particularly in leadership. The corporate governance code was subsequently bolstered by a parallel legislative reporting regime set up and monitored by the Australian Government's Workplace Gender Equality Agency ('WGEA'). This required companies with over 100 employees to report on various 'gender equality indicators' including the gender composition of the workforce, gender pay equality and the availability and utility of flexible working conditions.<sup>87</sup>

Since the introduction of the gender diversity recommendations, there has been a steady increase in the number of women on Australian corporate boards.<sup>88</sup> However, the aim of this article is not to measure outcomes but to explore wider organisational change. Percentage increases of female board members across large listed corporations do not always equate to meaningful change. First these board level increases are not reflected in executive ranks; secondly they may not equate to a critical mass of individuals (said to be three or more women on a board); thirdly they may be confined to certain industry sectors; and lastly they do not necessarily prevent the loss of women from the corporate workforce at mid-management level.<sup>89</sup> The aim of this article is to examine the effectiveness of the more direct and immediate objectives of the ASX recommendations: to encourage company leaders to consider how they might improve overall workplace diversity, particularly gender diversity, through drafting policies, setting targets and measuring the number of women across their organisations. In other words, it examines the management systems and processes that are likely to

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84 Initially published as Recommendations 3.2, 3.3 and 3.4 under Principle 3: 'Promote ethical and responsible decision-making': ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations with 2010 Amendments: 2<sup>nd</sup> Edition' (Report, 2010) 24–5. These recommendations were moved, in the 2014 edition, to form a combined Recommendation 1.5 under Principle 1: 'Lay solid foundations for management and oversight': ASX Corporate Governance Council, 'Principles and Recommendations 3<sup>rd</sup> Edition', above n 7.

85 See du Plessis, O'Sullivan and Rentschler, above n 70, 23.

86 See Branson, above n 69; Corporations and Markets Advisory Committee, 'Diversity on Boards of Directors' (Report, March 2009).

87 See Spender, above n 8.

88 Australian Institute of Company Directors, above n 13.

89 See Klettner, Clarke and Boersma, 'Strategic and Regulatory Approaches', above n 8. Regarding critical mass, see Mariateresa Torchia, Andrea Calabrò and Morten Huse, 'Women Directors on Corporate Boards: From Tokenism to Critical Mass' (2011) 102 *Journal of Business Ethics* 299.

be implemented and improved as a result of the regulation – the process of creating change rather than the outcome.

The data presented in this article was obtained from the 2011 annual reports of the 200 largest companies listed on the Australian Securities Exchange as at 16 March 2012 ('ASX 200') and represents the early response of these companies to the diversity recommendations. Indeed, compliance statistics at this stage were not greatly meaningful because the new code recommendations were only formally in force for companies with a December financial year-end (only 17 per cent of ASX 200 companies). Despite this, a total of 114 companies (57 per cent) stated that they had put in place a diversity policy and 92 companies or 42 per cent had provided all of the suggested gender metrics. However, the aim of this research was not to count compliance but to explore, in a qualitative way, the sorts of changes that were being implemented as a result of the diversity policy (or the sorts of changes disclosed as intended to be implemented).

Content analysis was used to assess the number of companies that reported specific policy or process changes in their disclosures against the ASX code's diversity recommendations. These policy and process changes were generally described as being part of the diversity policy or as amounting to 'measurable objectives' set in accordance with the policy. The diversity disclosures, as a whole, generally comprised a well-delineated section of text within the corporate governance statement of the company's annual report which was copied into a software program for content analysis. The most important part of designing a process of content analysis is in deciding upon the coding categories: generally researchers are guided by existing theory and the hypotheses they wish to test.<sup>90</sup> Creswell recommends that if a 'prefigured' coding scheme is used in analysis, researchers should still remain open to additional codes emerging during the analysis.<sup>91</sup> For this research the ASX suggestions as to the content of a diversity policy (lettered A to E below) formed the basis of the 'prefigured' categories for content analysis.<sup>92</sup> As the research progressed, a further 'emergent' category F was added because the data revealed that many companies had set up a committee to lead and monitor diversity. The coding categories were finalised as follows:

- A. Articulation of the corporate benefits arising from diversity.
- B. Inclusion of diversity in recruitment and selection processes.
- C. Executive mentoring or training programmes for diversity.
- D. Creating a culture that supports diversity and recognises domestic responsibilities.
- E. Tying diversity targets to Key Performance Indicators.

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90 Katharina J Srnka and Sabine T Koeszegi, 'From Words to Numbers: How to Transform Qualitative Data into Meaningful Quantitative Results' (2007) 59 *Schmalenbach Business Review* 29, 36.

91 John W Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (SAGE, 3<sup>rd</sup> ed, 2013) 185.

92 ASX Corporate Governance Council, 'Principles and Recommendations: 2<sup>nd</sup> Edition', above n 84, 24.

F. Setting up a board or management committee responsible for diversity policy.

For each of the issues A to F above a selection of keywords was identified (see Table 1) and each word was searched for across all of the ASX 200 diversity statements. For each incidence of each keyword, the surrounding paragraph was taken as the unit of analysis and if the meaning of the paragraph corresponded with the relevant policy change the company was included in the score for that policy change.<sup>93</sup> As described below, for some issues, statements were further categorised as ‘well-articulated’ or ‘basic’ in terms of the quality of information provided, an approach taken by other studies of corporate disclosure statements.<sup>94</sup> The risk of subjectivity inherent in such judgments is accepted, however, as Spira and Page noted, ‘[i]t does not seem possible to distinguish between these kinds of disclosure through quantitative measurement such as word count or pre-defined content analysis: instead a holistic semantic analysis of the disclosures is required’.<sup>95</sup>

### **B Findings: Integration into Workplace Policies**

The keywords and overall results are summarised in Table 1 and discussed further below. It is accepted that the sample size and timing of this research (before the recommendations were fully in force) means that the quantitative results regarding the number of companies implementing certain policies do not represent a measure of regulatory effectiveness. Indeed this was not the purpose of the research – its objective was to explore in a qualitative manner the types of management processes that can be instigated as a result of soft regulation. Its limitations include the fact that we do not know how many companies will actually follow through with what they say they will do. Further research will be needed to assess whether these processes and policies are actually implemented and whether they achieve the long term outcome of increasing the numbers of women in corporate leadership.

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93 Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology* (SAGE, 2004) 59–60.

94 Spira and Page, above n 5, 418.

95 Ibid 428.



Table 1: Content Analysis of Annual Report Disclosures on Diversity

	Content	Search words	Number of companies
A	Articulation of the corporate benefits arising from diversity	'benefit' 'advantage' 'value'	71 (35.5%)
B	Inclusion of diversity in recruitment and selection processes	'recruit' 'appoint' 'select'	34 (17.0%)
C	Executive mentoring or training programmes	'mentor' 'train' 'develop'	50 (25.0%)
D	Articulation of a culture that supports diversity and recognises domestic responsibilities	'culture' 'leave' 'flexi'	54 (27.0%)
E	Linking diversity targets to executives Key Performance Indicators ('KPIs')	'key performance' 'KPI' 'remuneration' 'compensation'	4 (2.0%)
F	Responsibility for diversity objectives allocated to a specific committee or other body	'committee' 'council'	60 (30.0%)

### ***1 Articulating the Benefits of Diversity***

The benefits of diversity were articulated well by 38 companies and a basic statement was provided by a further 33 companies, making a total of 71 companies or 35.5 per cent of the ASX 200 that had made an effort to describe why diversity can be of value. Statements that only said that the company 'values diversity' or that it was an 'important consideration' were not counted as 'articulating' the benefits of diversity. Statements were considered 'well-articulated' if they demonstrated that thought had gone into the reasons behind diversity policies and the specific benefits for the company, for example:

Alacer values this diversity and recognizes the organisational strength, deeper problem solving ability and opportunity for innovation that it brings. (Alacer Gold Corp)

The Company recognises that building a diverse leadership and employee group is important to: drive innovation and step change growth through diversity of thought; enable a better understanding of the DuluxGroup consumer and customer base; and enable the Company to attract and retain top talent from the widest possible talent pool. (Dulux Group)

A basic statement, recognising the benefits but not actually articulating what they are, included the sentence below which was used by at least three different companies – a classic example of legal 'boilerplate' and the use of standardised precedents:

The company values diversity and recognises the benefits it can bring to the organisation's ability to achieve its goals. (Bathurst Resources; Billabong International; Extract Resources)

Spira and Page note that while the use of boilerplate has generally been deplored it may be both expected and serve a function.<sup>96</sup> As discussed above, institutional theory predicts that companies will exhibit a level of uniformity or isomorphism in their governance and this has been confirmed by empirical evidence.<sup>97</sup> Spira and Page argue that perhaps boilerplate disclosures are enough to assure the investment community that a satisfactory level of governance has been achieved and that it is the fact of having to disclose, rather than the form or content of a specific disclosure, that has the most impact on corporate behaviour.<sup>98</sup>

## **2 Including Diversity in Recruitment and Selection**

There were 34 companies in the ASX 200 that expressly stated that they had made changes to recruitment, selection or appointment policies to include diversity considerations. Here companies were included if they had reviewed or included recruitment practices in their diversity strategy or had made changes to policies to ensure diverse/female candidates were included. Common changes were a commitment to include female candidates in the pool for selection and to include female employees on the interview panel. Changes that encouraged the recruitment of a diverse range of candidates were included but not those that simply confirmed that recruitment practices were non-discriminatory. Anti-discrimination and equal employment opportunity legislation has been in place for many years and has not improved gender diversity in corporate leadership. Thus a company was not included if it only confirmed that it had equal opportunity policies in place, or recruited only on merit, or was transparent in recruitment decisions. The intended effect of the ASX recommendations, and of the creation of a diversity policy, is to go further and actively attempt to remove the unconscious bias that tends to exist in recruitment practices.<sup>99</sup> It is an example of how soft regulation can influence behaviour in areas where prescriptive law has failed. Indeed, three companies expressly mentioned the need to address unconscious bias and others had introduced proactive policy changes aimed at improving diversity:

Recruitment training was rolled out to 74 line managers in 2011 as part of the leadership fundamentals program, the objective being to emphasise the importance of considering diversity related issues while recruiting. (Coca-Cola Amatil)

Our objective is to implement recruitment practices which aim for a mix of appropriately qualified men and women shortlisted for both Board positions and senior roles within our organisation, and that men and women make the hiring decisions together. (Hastings)

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96 Ibid 428.

97 Hooghiemstra and van Ees, above n 71.

98 Spira and Page, above n 5, 431.

99 Brian W Collins, 'Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule' (2007) 82 *New York University Law Review* 870.

Some companies explained that changes to recruitment practices were part of a formal policy review to ensure all existing policies were updated in accordance with the diversity policy. Others expressed changes to recruitment practices as ‘measurable objectives’. The difference is that the ASX code suggests that progress towards achievement of ‘measurable objectives’ should be reported in future annual reports. This is likely to provide additional incentive to carefully define the objective and ensure implementation.

### **3 *Mentoring, Development and Training Programs To Increase Diversity***

There were 50 companies in the ASX 200 (25 per cent) that referred to the use of mentoring, development or training programs designed to increase diversity. Only programs that were designed to develop leadership capabilities, skills development or career progression, or those that were described as ‘talent management’ for increasing diversity were counted. General training around diversity awareness and the diversity policy was not included particularly as many were described as an addition to existing equal opportunity, anti-discrimination or general induction training. Also excluded were companies that mentioned such programs without linking them to the objective of increased diversity. The aim of the research was to identify positive change rather than maintenance of the status quo:

Our objective is a year-on-year increase in the percentage of women in management and professional positions, achieved through the enhancement and promotion of mentoring and educational initiatives to support high potential women to gain experience and skills required to move into management positions. (SP Ausnet)

The quote above was presented as a ‘measurable objective’ whereas other companies referred to mentoring and training in a more general sense as part of their diversity policy. Again, the significance of this is that by classing a program as a ‘measurable objective’ the company is setting up an expectation that it will report on progress in its next annual report.

### **4 *Creating a Culture that Supports Diversity***

The ASX’s suggestions as to the content of a diversity policy recognise the need for a culture that accepts employees’ domestic responsibilities and in doing so enables more carers to remain employed and progress their careers. In the ASX 200 sample, 54 companies (27 per cent) referred to the use of flexible working and leave policies, as well as general cultural change, as a way of increasing diversity. Here is evidence of the use of soft regulation as a tool to encourage cultural change in complex situations where prescriptive regulation would be inappropriate.<sup>100</sup> As with changes to other policies and processes, some of these changes were framed as ‘measurable objectives’ for increasing gender diversity whereas others were presented in a general discussion of the company’s approach to diversity.

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100 Coglianese and Lazer, above n 5.

Insurance Australia Group disclosed a particularly impressive set of policies to support the needs of its workers with a wide range of flexible working options including career breaks, working from home, compressed working weeks, job-sharing and flexi-time. Interestingly, the insurance industry is one of the only Australian industries to be consistently in the top five industries for female representation at board level.<sup>101</sup> Whether this is a result of this kind of policy or a reason for the existence of this kind of policy, is worthy of further research.

### **5 Linking Diversity to Key Performance Indicators**

The emerging concept of linking non-financial indicators to remuneration, perhaps through bonus schemes, is seen as a promising method for changing managerial practices in favour of corporate responsibility.<sup>102</sup> However, only four companies in the ASX 200 included mention of linking diversity objectives to KPIs and, of these, only two stated that KPIs had actually been linked to diversity objectives (as opposed to this possibly happening in future).<sup>103</sup> It will be interesting to see if this becomes more common in future and whether it proves effective at altering behaviour or becomes lost in the overall mix of performance incentives.

### **6 Committee Responsibility**

An interesting finding was that 60 companies (30 per cent) in the ASX 200 had reviewed the lines of accountability and responsibility for diversity and disclosed the fact that they had allocated responsibility to a particular board sub-committee (usually nomination or remuneration) or to a group such as a dedicated Diversity Council. This was not suggested in the ASX recommendations and therefore is a clear sign of companies taking the initiative and incorporating diversity into their corporate governance framework on the basis of intrinsic motivation.<sup>104</sup> Some companies explained that this had involved formal amendment of the board and committee charters to allocate responsibility to the committee to review and report progress to the board on a regular basis. Others detailed a more complex hierarchy of governance structures whereby an executive diversity committee would report to the board committee.

Statements that the nomination committee considers diversity when considering new candidates were not included. The aim was to count statements

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101 Clarke et al, above n 13, 11.

102 Pascual Berrone and Luis R Gomez-Mejia, 'The Pros and Cons of Rewarding Social Responsibility at the Top' (2009) 48 *Human Resource Management* 959, 968; Alice Klettner, Thomas Clarke and Martijn Boersma, 'The Governance of Corporate Sustainability: Empirical Insights into the Development, Leadership and Implementation of Responsible Business Strategy' (2014) 122 *Journal of Business Ethics* 145.

103 The companies were BHP Billiton, QBE Insurance (already incorporated in remuneration scheme), Goodman Group and OzMinerals (intended to be incorporated). It must be noted that many companies only provided a short summary or introduction to their diversity policy in their annual report, referring the reader to the company website for the full policy. Downloading and analysing each company's full diversity policy was beyond the scope of this research.

104 Gunningham and Sinclair, above n 22, 894.

that allocated specific responsibility for setting diversity strategy and objectives (and progress towards those objectives) to a certain group. In other words, this category was concerned with companies that had defined lines of accountability for diversity policy, not those who had reviewed their board selection processes. The board as a whole has ultimate responsibility for diversity objectives but it was interesting to see how companies had used existing corporate governance structures (or created new ones) to clarify responsibility, and presumably increase efficiency – an example of the innovation that is encouraged by flexible regulation.<sup>105</sup> It suggests that corporate governance structures can provide efficiency gains as well as legitimacy benefits.

## V DISCUSSION AND CONCLUSION

This article has examined how the ASX code recommendations suggest that companies establish a diversity policy and set voluntary targets for increasing gender diversity have resulted in wider management changes in many organisations. Firms have begun to articulate the benefits of diversity and make changes to recruit, train and retain women through policy amendments that will hopefully lead to broader cultural change. This slice of empirical evidence supports and contributes to three aspects of the theory behind management-based regulation: (1) the sorts of issues it might be effective at solving; (2) why and how it works to change behaviour; (3) its limitations and conditions required for effectiveness.

### A Issues Suited to Management-Based Regulation

First, the evidence described in this article supports the general theory behind ‘new governance’ or non-prescriptive regulation which is that it may provide a solution to problems that are too complex, dynamic and unpredictable for traditional regulatory approaches.<sup>106</sup> Corporate governance as a whole can be said to fall into this bracket because of the variable and dynamic nature of corporate operations and financial markets.<sup>107</sup> This article demonstrates how soft law can go ‘further than law’ to influence behaviour in the grey area of social responsibility.<sup>108</sup> Although hard law can address the issue of women in leadership through setting quotas and prohibiting gender discrimination, this has not so far been successful at preventing the exodus of women from middle management. Norway’s hard legislative quota for women on boards has achieved compliance at board level but, as yet, does not appear to have improved levels of female

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105 Majumdar and Marcus, above n 53.

106 David Hess, ‘The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue, and Development’ (2008) 18 *Business Ethics Quarterly* 447, 450.

107 Dempsey, above n 20, 95.

108 Parker, ‘Meta-regulation’, above n 25.

executives.<sup>109</sup> As a contrast, the Australian code recommendations on gender diversity have encouraged discussion around flexible work arrangements for both men and women that may assist families to maintain two incomes during important early career stages. Rather than only setting targets for women on boards, many companies have also set themselves targets for increasing women in their executive or management teams.<sup>110</sup>

This article supports Ford and Hess' conclusion that new governance techniques have the potential to encourage 'a more meaningful process of corporate cultural reform than more traditional enforcement techniques'.<sup>111</sup> New governance techniques can and are being used to tackle complicated social problems related to corporate behaviour, not only the lack of women in leadership but also wider issues of corporate responsibility and business ethics.<sup>112</sup> As Hess states, 'the challenge the law faces is to ... support internal change initiatives that may be unique to any particular corporation'.<sup>113</sup> Although many companies focused their diversity policy on gender, others had chosen to emphasise the employment of indigenous people or local workers as important within their industry.

## B How Management-Based Regulation Changes Behaviour

The findings of this article support regulatory theories that predict that by delegating problem solving to the targets of regulation, more effective solutions may be found. The idea is that because targets have greater knowledge about their operations than the regulator, they are more likely to be able to find the most cost-effective solution.<sup>114</sup> They may also perceive their own rules as more reasonable than those imposed by outsiders and therefore be more likely to comply with them.<sup>115</sup> Voluntary targets set in the early stages ranged from 15 per cent to 43 per cent for women on boards and 15 per cent to 50 per cent for women in management teams demonstrating both the variable existing levels of diversity and the challenges faced by different industries.<sup>116</sup> In some retail companies, improving diversity might involve recruiting more men, whereas mining and engineering have traditionally been very male-dominated industries

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109 See Klettner, Clarke and Boersma, 'Strategic and Regulatory Approaches to Increasing Women in Leadership', above n 8, 405; Aagoth Storvik and Mari Teigen, 'Women on Board: The Norwegian Experience' (Policy Analysis Report, Friedrich Ebert Stiftung, June 2010) 8.

110 Klettner, Clarke and Boersma, 'Strategic and Regulatory Approaches to Increasing Women in Leadership', above n 8, 409.

111 Ford and Hess, above n 80, 513.

112 For example the Global Reporting Initiative covers corporate responsibility for human rights, child labour, recycling, biodiversity and many other issues where corporate activity can have a material impact. See Global Reporting Initiative, *About GRI* <<https://www.globalreporting.org/Information/about-gri/Pages/default.aspx>>.

113 Hess above n 106, 452.

114 Majumdar and Marcus, above n 53.

115 Cary Coglianese and Evan Mendelson, 'Meta-Regulation and Self-Regulation' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 152.

116 Klettner, Clarke and Boersma, 'Strategic and Regulatory Approaches to Increasing Women in Leadership', above n 8.

where it will take longer to change the culture and demonstrate attractive roles for women.

The Australian corporate governance recommendations regarding gender diversity provide an interesting example of soft law in action: they not only suggest that companies draft a diversity policy and disclose information but ask companies to set their own targets for increasing gender diversity and report annually on progress towards those targets. They comprise many of the steps that organisational scholars include in change management theory: analysis of the need for change; strong leadership; and implementation and institutionalisation of success through formal policies, systems and structures.<sup>117</sup> They demonstrate how well designed 'comply-or-explain' regulation can do more than simply suggest the implementation of specific governance structures and procedures. These recommendations set up a cycle of self-measurement, self-set policy and self-monitoring made public through disclosure. This disclosure undoubtedly plays a part in encouraging change, especially when code recommendations are drafted to include both the planning stage (setting policies and targets) as well as the implementation stage (through requesting progress reports).<sup>118</sup> If regulation only deals with planning it makes it too easy for companies to fail to follow through and implement their newly drafted policies. Soft regulation may not be able to achieve large leaps, which may still require more traditional prescriptive techniques,<sup>119</sup> but it can start to change the norms of organisational behaviour.

### C The Interplay between Soft Regulation and Norms

Regulation has an important role in initiating discourse around social norms thereby developing and refining those norms. As FASTERLING comments, 'the potential of compliance disclosure regimes lies in their capacity to trigger a communicative process'.<sup>120</sup> Nagarajan describes a network of actors involved in regulatory conversations around gender diversity that generate expectations among stakeholders and the community.<sup>121</sup> Even if corporate governance codes are not effective in terms of disciplining certain behaviours they still have value in triggering dialogue and norm development. Thus norms and soft regulation work in parallel each reinforcing the other: the emerging international norm of including women on corporate boards is being encouraged by the ASX code recommendations and vice versa. By recommending disclosure of metrics, policies, targets and progress, the ASX code provides a soft law framework that each company can fill with its own norms that fit with its culture and operations. This article provides evidence of wider external norms developing in terms of the

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117 Rune Todnem By, 'Organisational Change Management: A Critical Review' (2005) 5 *Journal of Change Management* 369, 376.

118 Coglianese and Lazer, above n 5.

119 Neil Gunningham, 'Two Cheers for Prescription? Lessons for the Red Tape Reduction Agenda' (2015) 38 *University of New South Wales Law Journal* 936.

120 Björn FASTERLING, 'Development of Norms through Compliance Disclosure' (2012) 106 *Journal of Business Ethics* 73, 75.

121 Nagarajan, above n 60, 271.

content of diversity policies. Most companies will cover training, recruitment, promotion and flexible work in these policies. Since the introduction of the WGEA reporting regime, pay equity has also found its way onto the agenda. This evidence supports the theory that by building on emerging norms, soft regulation can encourage corporations to be ‘agents of social change’.<sup>122</sup>

As introduced above, the effectiveness of soft regulation lies in understanding the institutional forces at play and making sure that they provide appropriate incentives and do not work against regulatory objectives. This is a difficult task. Indeed, Julia Black describes the relationship between regulatory rules and market behaviour as ‘a complex dance in which market behavior and regulatory action shadow, anticipate, and react to each others’ moves in turn’.<sup>123</sup> Several researchers have pointed out that the market forces that the designers of corporate governance codes predicted would provide enforcement pressure have not interacted with the regulation exactly as expected.<sup>124</sup> Despite this, the comply-or-explain mechanism does appear to have been effective at encouraging internal change. It is beyond the scope of this article to determine whether it is primarily the need to disclose that causes widespread adoption of corporate governance codes or the fact that most code-recommended practices are seen as valuable (or indeed a mix of both). The article has the narrower aim of demonstrating how codes can be internalised into management practice and that this is done through a gradual process of amending governance structures, policies, procedures and incentive schemes.

## D Conclusion

The evidence presented here demonstrates that the ASX code recommendations regarding organisational gender targets have resulted in policies and procedures that, if implemented properly, could have a significant positive effect on women in the workforce at all levels of the organisation. The findings suggest that successful soft regulation both builds on and develops social norms. Voluntary behaviour is driven by both internal value and external expectations, and soft law reflects rather than dictates emerging behavioural norms. The effects of soft law are gradual and subtle – incremental change rather than a sudden turn-around. The Norwegian gender quota for boards demonstrates that more dramatic change can be achieved using hard law with its deadlines and sanctions but that this kind of change may be more superficial, at least at the start. Nevertheless, European quotas for women on boards have undoubtedly influenced the response of companies to codes of corporate governance worldwide by providing a clear demonstration that hard law approaches can be used when softer options fail.<sup>125</sup> The existence of these quotas adds to the

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122 Ruth V Aguilera et al, ‘Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations’ (2007) 32 *Academy of Management Review* 836, 848.

123 Black, above n 58, 166.

124 Keay, above n 1; MacNeil and Li, above n 6; Hooghiemstra and van Ees, above n 71.

125 Silke Machold et al (eds), *Getting Women on to Corporate Boards: A Snowball Starting in Norway* (Edward Elgar Publishing, 2013).



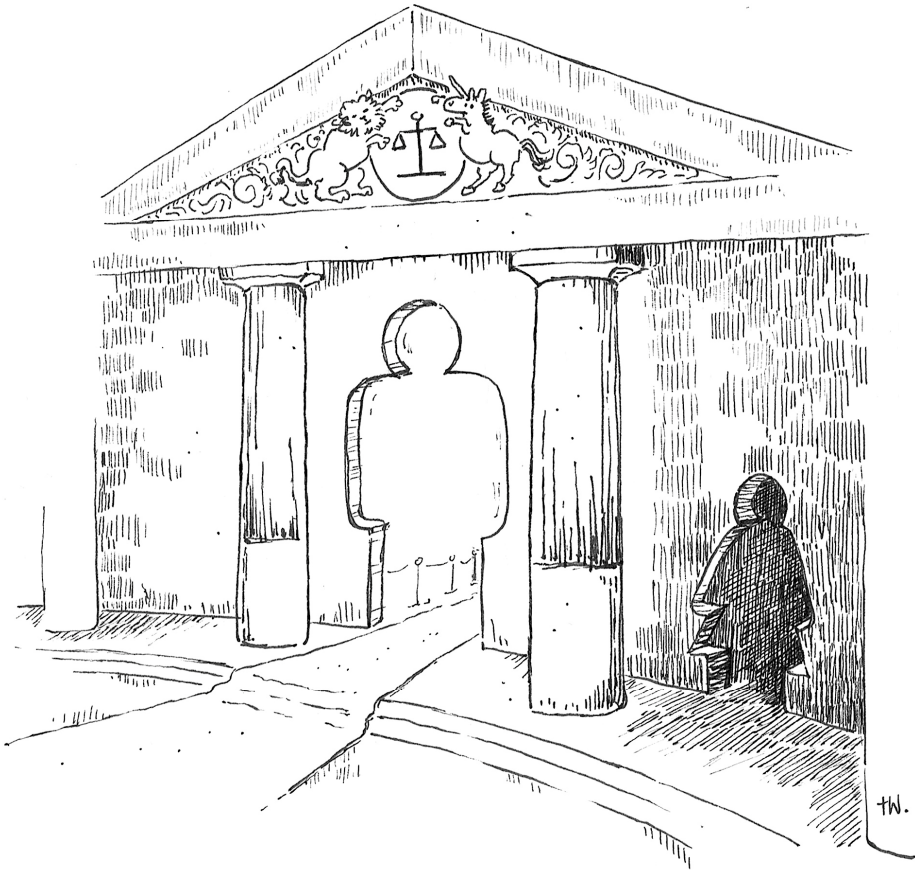
institutional forces encouraging cooperation with Australia's softer approach. Corporations will watch carefully any regulatory developments overseas and try to avoid strict regulation by voluntarily taking steps in that direction.<sup>126</sup> Of course codes of corporate governance, and most legislative initiatives, do not cover all companies: they tend to be directed at the largest and most prominent corporate citizens in society. This is also true for norms of practice which can be size or industry specific as well as dependent on brand reputation. There is a need for research that reviews the issue of gender diversity, and code implementation more generally, in the context of company size and industry sectors.

This article presents evidence suggesting that the Australian corporate governance code can influence management practices through recommending voluntary measurement, policy formulation and target setting. Regulation that combines these processes with a public disclosure regime, particularly one that asks for disclosure of progress towards self-set targets, can initiate change despite the lack of enforcement. Further research will be needed to monitor progress towards increased diversity but, in a supportive institutional environment, the code recommendations appear to have initiated a process of change that just might make the workplace more conducive to female career progression. As a regulatory case study, the story of gender diversity in Australia provides insights into the effectiveness of soft regulation more generally, demonstrating the importance of both micro and macro factors. Soft regulation must be drafted carefully to ensure a cyclical process of communication and change; it must also take into consideration the wider environment including cultural trends both internal and external to the firm.

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126 BlackRock, 'Glacial Change in Diversity at ASX 200 Companies: Can Corporate Australia Escape the Imposition of Diversity Quotas?' (Report, 2012).

**THEMATIC:  
BEYOND THE GENDERED SUBJECT:  
LAW AND FEMINIST THOUGHT**



*Illustration by Tilley Wood*