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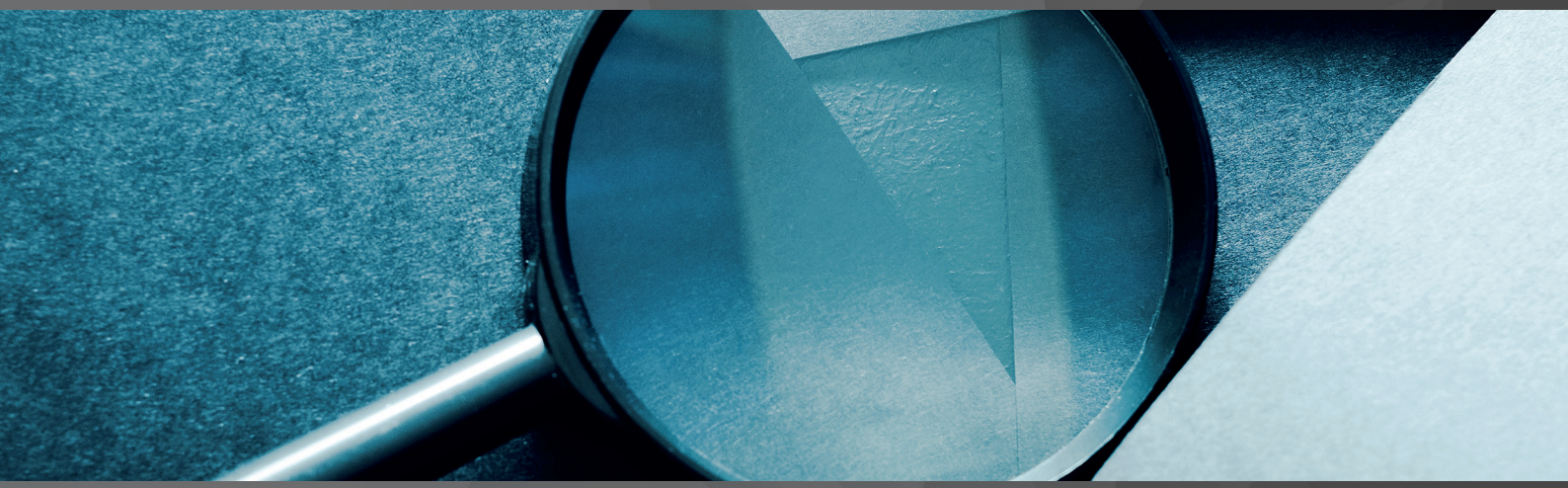

Corporate Investigations 2021

A practical cross-border insight into corporate investigations

Fifth Edition

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COVID-19 is a major ongoing global economic crisis and it would be remiss not to mention its impact in any corporate update this year. Of note for the APAC region, as of September 2020, all emerging economies excluding China will be in recession.[1]

While we may not know the true impact of the pandemic for some years, the speed and size of COVID-19 demanded emergency capital raisings and a pause on planned growth projects. It also highlighted serious deficiencies in corporate disaster preparedness and crisis management plans, a lack of robust stress-testing, and poor communication with stakeholders. In short, COVID-19 has exposed poor corporate governance. It is more likely that well-governed companies will provide much-needed transparency, consistency and accountability to stakeholders while acting decisively to contain the impact of the pandemic.

The pandemic is not the first time that good governance has been suggested as necessary for corporate health and wellbeing.

Only recently, Commissioner Kenneth Hayne AC, who oversaw the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in Australia, published in his interim report that "every piece of conduct that has been contrary to law is a case where the existing governance structures and practices of the entity and its risk management practices have not prevented that unlawful conduct".[2]

Although the Commissioner was speaking specifically to the failures of the Australian financial services sector, his sentiment can be equally applied to revelations of corporate misconduct in the APAC region, and indeed, globally. And, it has been a damning few years of corporate exposure. In late 2018, Nissan CEO, Carlos Ghosn, was arrested and charged with financial misconduct, specifically, misreporting income to financial regulators in Japan and using company funds for personal expenses. In 2019, under the US Foreign Corrupt Practices Act (FCPA), the US Department of Justice (DOJ) brought individual prosecutions against several high-profile executives, including the former Goldman Sachs executives in connection with the Malaysian sovereign wealth fund (1MDB), and the former president, CEO and Chief Legal Officer of Cognizant, accused of bribery in India.

Commissioner Hayne went on to publish a nearly 1,000-page final report with nearly 80 recommendations to redress the systemic failure of corporate governance. In the opening address of the final report, the Commissioner called out boards of directors and senior management: "There can be no doubt that the primary responsibility for misconduct in the financial services industry lies with the entities concerned and those who managed and controlled those entities."

The simple act of "improving governance" was a key strategic priority for the Australian Securities Investment Commission (ASIC) in 2019, and remains as such now. Ghosn's arrest brought the whole of the APAC region's corporate governance practices under the spotlight (although we may never see the outcome of that prosecution, as Ghosn has fled to Lebanon).

The global financial crisis was a watershed moment for banks and corporations alike to focus on financial risks. Now, 10 years on, in a new recession – the likes of which have not been seen since the Great Depression – authorities and consumers alike are crying out for a return to the basics of good governance.

Back to Basics – What is Corporate Governance?

In the fight against financial misconduct (and to attempt to mitigate the disastrous effect of COVID-19), we must return to the basic principles of good corporate governance.

As a professional, one is aware that governance is the framework which defines the relationship between shareholders, management, the board of directors and other stakeholders, and influences how a company operates. Sir Adrian Cadbury, in the seminal 1992 Report on Financial Aspects of Corporate Governance, set out the interplay of these relationships: "Boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them in effect, supervising the management of the business and reporting to shareholders on their stewardship. The board's actions are subject to laws, regulations and the shareholders in general meeting."

Ultimately, there are four basic principles of corporate governance:

1. transparency: directors and management should be able to communicate why every material decision is made;
2. accountability: directors should be held to account for their decisions, and submit to appropriate scrutiny exercised by stakeholders, in particular shareholders;

3. fairness: directors and management should give equal consideration to all shareholders, which assists in deterring entrenched management, bias and vested interests; and
4. responsibility: directors should fulfil their duties with honesty and integrity.[3]

It is clear, even by reading through these basic principles, that global events have revealed serious shortcomings in corporate governance practices, particularly the oversight and management of non-financial risks, such as conduct risks (including not treating stakeholders fairly) and compliance risks (not following the rules).

Failure to implement good governance has a real impact. For example, Japan's reputation, as an exemplar of strong governance after its stewardship code was introduced in 2014 which encouraged local fund managers to actively scrutinise and question directors and management, has suffered severely. A string of corporate scandals and questionable governance decisions has seen it slide three places, from fourth to seventh, in the biennial survey conducted by Asian Corporate Governance Association (ACGA) and Asia-focused brokerage CLSA.[4]

There is also an economic argument for good governance. The Royal Commission in Australia revealed the real cost of not implementing robust governance frameworks and compliance practices: remediation and catch-up spending, to say nothing of reputational damage.

A study by Credit Lyonnais Securities Asia in 2002 showed that, out of 495 companies examined in 25 global emerging market countries, those with the best corporate governance were eight percentage points higher in measures of "economic value added" than other firms.[5]

Research also demonstrates that investors are moving away from poorly governed markets.[6] Investors are, in fact, willing to pay extra for well-governed companies. The Global Investor Opinion Survey conducted by McKinsey & Company in 2002, of more than 200 professional investors who collectively manage approximately US$2 trillion in assets in 31 countries, revealed that a significant majority of investors were willing to pay a premium for well-governed companies. These premiums averaged 20–25 per cent in Asia.[7]

There is also the added economic benefit that companies with good governance may avoid, or significantly lessen, crippling criminal sanctions for misconduct. Of concern to the APAC region, of the nearly US$3 billion in fines imposed by US authorities in 2019 for violations of the Foreign Corrupt Practices Act (FCPA), nearly 100 per cent involved the Asia Pacific, primarily China and India, but also Indonesia, Vietnam, Thailand and South Korea. In one case, Samsung Heavy Industries, the South Korean engineering company, agreed to enter into a Deferred Prosecution Scheme to pay penalties of more than US$75 million. The US DOJ asserted jurisdiction under the FCPA against a South Korean company that bribed officials in Brazil, based on the involvement of the company's branch office in the US.[8]

Corporate governance frameworks exist to ensure that companies, even multinational corporations, remain transparent and accountable. The consequences are tangible, and expensive.

The Requirement for Better Oversight

A fundamental component of corporate governance is oversight by the board of directors and senior management. They are charged with the significant task of mitigating risk. However, regulatory authorities on review found that boards, some more than others, grappled with oversight of non-financial risks. "Their oversight was less developed than what we had hoped to see."[9]

Commissioner Hayne found during the Royal Commission that too often, boards did not get the right information about emerging non-financial risks; but he also found that the boards did not do enough to seek further or better information where what they had was clearly deficient, and did not do enough with the information they had to oversee and challenge management's approach to these risks.

For example, one major bank evidenced a "complete inability to draw together information about instances of misconduct identified during the immediately preceding five years". According to the Commissioner, this revealed an inability "to identify promptly, whether for its own internal purposes or for any external purpose, a single, reasonably comprehensive and accurate picture of whether and how it had failed to comply with applicable financial services laws. On the face of it, information of that kind would be important not only for managing compliance with those laws but also for identifying whether separate events stemmed from similar causes".[10]

This lack of oversight, and information, is particularly problematic where global companies are increasingly vulnerable to sanctions based on the actions of subsidiaries, or local agents.

On 2 December 2019, the Australian Commonwealth Government introduced the Crimes Legislation Amendment (Combatting Corporate Crimes) Bill 2019 (Cth) ("Bill"), updated from its 2017 counterpart. The Bill seeks to introduce a new strict liability offence for companies "failing to prevent" a foreign bribery. Companies will face absolute liability for bribery by "associates", including subsidiaries, if they do not have adequate procedures in place designed to prevent bribery of foreign public officials by their associates. The Bill will strengthen Australia's corporate crime framework and bring Australia in line with the regimes in the US and the UK, who have already taken significant steps to combat foreign bribery.[11] Indeed, one of the key policy objectives of the UK's failure to prevent bribery offence was "to influence behaviour and encourage bribery prevention as part of corporate good governance".[12]

However, if companies are not in a position to obtain adequate information about instances of misconduct, they will certainly not have the ability to implement adequate procedures to prevent bribery.

In China, the Amended Anti-Unfair Competition Law (AUCL) provides that "acts of bribery committed by a staff member of a business operator shall be deemed the conduct of the business operator, unless the business operator has evidence to prove that such acts of the staff member are unrelated to seeking business opportunities or competitive advantage for the business operator" (Article 7). The onus is on the company to prove that it has effective compliance controls, and that the offence was not committed to further the company's interests. The company must prove that it neither endorsed nor acquiesced to the scheme.

It would be difficult for a company to prove it has effective compliance controls if it lacks information about procedural weaknesses, previous instances of misconduct, and/or whether management is properly implementing any compliance practices.

Companies must meet their obligations under these regulations, but board and/or senior management must have increased awareness of, or access to information, regarding potential misconduct as part of good corporate governance.

Methods to Address Oversight and Ease Compliance Burdens

Supervision

Ultimately, entities must be in "what amounts to an always-on cycle to monitor culture"[13] to spot deficiencies in its corporate

environment that could translate into actual corporate misconduct, such as bribery.

In Australia, regulators are increasingly using supervision as a tool to identify problems before they cause significant harm. For example, the ASIC Corporate Governance Taskforce is one of two new supervisory initiatives that aims, through heightened engagement, assessment and feedback loops, to improve corporate practices and address root causes of shortcomings before they culminate in breaches.

There is no reason why this same practice cannot be implemented internally by corporations. Ideally, entities must constantly supervise and assess their culture and governance frameworks, identify any problems with these frameworks, address those problems, and then determine whether any changes made are effective. The "always-on cycle" may even assist entities to avoid criminal sanctions, either because they are aware of problems before they are reported or investigated, or because they are found by authorities to have adequate systems in place designed to prevent misconduct.

Technology to ease compliance burdens

Companies might also consider investing in technologies that will assist in managing compliance comprehensively. There was increasing discussion on the role of artificial intelligence in easing the compliance burden, and the importance of having in-built in algorithms the ability to identify risks, and send information to the right people at the right time. In any case, it is commonly held that any technologies (including AI) must ideally:

- Process large volumes of data. In 2018, Forbes published that 90 per cent of the world's data was generated over the past two years alone.[14] It is not only indicative of the vast amounts of information investigators need to review, but also the information that boards, senior management and compliance teams must have oversight of to ensure compliance.
- Process various forms of data. Data relevant to compliance and investigations is now held by social media platforms, mobile applications (including ephemeral messaging platforms like WeChat, which has overtaken email as the prime communicator of sensitive information used by employees[15]), mobile communications, "back office systems", and "customer relationship systems". New tools are now available that can house structured data (e.g. transaction data) and unstructured data (e.g. emails, chat messages) in the same review platform, and also automatically link between the two data sets. For example, an email referring to payment of an invoice would normally require review of two different data platforms. Now, the email can be reviewed, and the actual transaction the email refers to can also be located very quickly.[16]
- Use notifications, workflows and dashboards to flag when compliance reports are due or when compliance deadlines are looming.
- Link software with regulators enabling automatic updates, regulatory filing and reporting from the system directly to global regulatory bodies, such as ASIC.

For global companies, "governance technologies" also act to centralise, structure and manage effectively the corporate record. Data in an easily accessible, central location can mitigate non-financial risk, by facilitating an organisation-wide culture of compliance. It also supports governance frameworks, improving transparency, accurate and effective oversight (particularly within multinational corporations), and quick and informed decision-making.

Effective mechanisms to meet compliance standards consistently is needed now more than ever, particularly considering the number and pace of regulatory changes. Countries in the APAC region are voluntarily signing up to global and national initiatives (particularly in the banking sector) in a bid to stay globally relevant and attract foreign investment. These include:

- The Organisation for Economic Co-operation and Development-led Common Reporting Standard (CRS).
- Basel III.
- Net Stable Funding Ratio (NSFR).
- The Base Erosion and Profit Shifting (BEPS) Action Plan.
- US Foreign Account Tax Compliance Act (FATCA).
- European General Data Protection Regular (GDPR).

Most are data and information-sharing schemes, addressing how data must be handled outside of the governing region, and enhancing transparency with authorities. For example, the OECD-approved CRS facilitates the exchange of information gathered by financial institutions between countries to provide tax authorities with visibility of the overseas assets and income of residents. The GDPR dictates how entities handle personal data belonging to EU individuals, including data handled outside of the EU region.

However, studies have shown that APAC entities are struggling to deal with the pace and enormity of these changes. In a survey of over 100 senior legal and compliance professionals across the APAC region, when asked to rate on a scale of one to 10 their confidence in their company's ability to remain compliant in 2019, more than one-fifth of these professionals rated confidence at five or less.[17]

To implement measures which simultaneously increase oversight and confidence in compliance will go a long way in forging strong governance frameworks.

Foreseeable Risks

Despite a strong commitment to better practice in the APAC region over the last two decades, there are a few practices in the APAC region that have caused growing concern that entities are not prioritising governance.

Whistleblowing

Over the last few years, whistleblowing has come to the forefront as a global theme. In November 2019, the EU Whistleblowing Directive was finalised, requiring the 27 Member States to legislate to provide whistleblowers with safe reporting channels and protection against dismissal or retaliation.

Strong, effective whistleblower policy is a key component of corporate governance. It demonstrates a commitment to fair treatment, stakeholders' concerns, and transparent reporting frameworks.

However, the APAC region remains slow to implement similar requirements. For example, in Hong Kong, there remain no express protections for whistleblowers, the region favouring soft law over hard regulations. On 21 December 2018, the Hong Kong Monetary Authority (HKMA) issued a notice recommending to Registered Institutions (RIs) expected standards to prevent and manage misconduct risks in the financial industry, including: providing an effective feedback system to encourage reporting of misconduct or malpractice; a culture that supports reporting, and protects employees from retribution; and training programmes to cultivate reporting.

Australia has taken a stance in respect of whistleblowing. By January 2020, Australian public companies, large proprietary companies (with more than 50 employees or A$12.5 million

in assets), and corporate trustees of registrable superannuation entities were required to implement a whistleblower policy and to make that policy available to officers and employees of the company. In addition to this requirement, the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2019 (Cth) imposes significant new responsibilities on companies trading in Australia and protections for whistleblowers.[18] Some amendments include:

- The range of people who now enjoy protections. It is not limited to whistleblowers themselves, but applies also to relatives, dependents and spouses of whistleblowers.
- Clearer instructions on how to make a complaint, and the relevant entities to which a complaint should be directed (ASIC, the Australian Prudential Regulation Authority, or an "eligible recipient" recognised by the company, such as an independent whistleblower service provider).
- Allowing emergency disclosures to parliamentarians or journalists by whistleblowers if they believe there is imminent danger to the health or safety of a person.
- Making reports anonymously with no requirement for disclosure, except confidentiality.
- Increased civil penalties for breaching confidentiality. A penalty can be imposed on a body corporate up to A$10.5 million, or, if a Court can determine the benefit derived or detriment avoided because of the breach, up to three times the benefit or 10 per cent of the annual company turnover, up to A$525 million.
- The abolition of the requirement that the whistleblower's disclosure be made in good faith. Although whistleblowers are expected to have reasonable grounds for making the disclosure, an inquiry into the ulterior motive of a whistleblower is no longer relevant.

If whistleblower policies are upheld as a priority for corporate governance, the APAC region must move more quickly to implement hard laws, and express protections, to mitigate the risk of misconduct and corruption.

Dual-class shares

In addition, Hong Kong and Singapore recently changed stock exchange rules to allow companies to list with two classes of shares in a bid to attract large companies.

However, according to ISS ESG's Norm-Based Research, companies with dual-class share structures are more likely to face governance challenges or environmental or social controversies. The CG Watch Report of 2018 went further: "While a belief in the value of transparency and accountability remains largely intact, at least in official statements, some governments are showing a striking lack of interest in the third principle: fairness."[19]

For advocates, dual-class shares are necessary to "maintain competitiveness and fund innovation".[20] However, for exponents, dual-class shares means "second-class" shareholders whose rights are, for all intents and purposes, unimportant. Further, company founders and executives can maintain control even as their economic stake in the business diminishes, entrenching management and potentially skewing incentives. Dual-class companies are, in effect, building structural unfairness.[21]

In addition, fairness may not be the only governance principle at stake if companies increasingly rely on dual-class companies to mitigate financial risk. Dual-class companies exhibit weaknesses in multiple governance indicators. For example, dual-class companies are less likely to disclose their director evaluation process, which may serve as an indicator of poor board accountability, renewal, and diligence.[22]

Independent boards

In response to criticism from foreign investors, Japan is attempting to improve governance by introducing better oversight at board level. Japan is introducing new guidelines to prevent conflicts of interest between publically traded parent companies and their subsidiaries. It is proposed that at least one-half or one-third of boards of listed subsidiaries are to be made up of independent directors, outside the parent company. However, the reality of the boardroom has changed very little.[23] The shortcomings of these reforms are inherent in the form by which they are being introduced – soft law guidelines, and not hard regulatory change.

If corporate governance is prioritised, it becomes immediately apparent that certain trends in the APAC region are counterintuitive to core governance principles.

Conclusion

Poor governance, poor compliance, and financial misconduct and crime (and ultimately corporate investigations) are inextricably interlinked. To get their corporate governance frameworks in order, companies must take proactive steps to conduct targeted reviews into corporate governance, with a view to identifying areas for improvement, and dealing with those problems in an effective and timely manner. It is more difficult to sanction a company for non-compliance if it runs a tight ship, is up to date with regulatory requirements, and stringently maintains centralised and comprehensive data.

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