International
Comparative
Legal Guides

Corporate Investigations

2024

Eighth Edition

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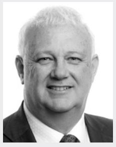

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Introduction

The unprecedented nature of the COVID-19 pandemic exposed poor corporate governance. It highlighted serious deficiencies in corporate disaster preparedness and crisis management plans, a lack of robust stress-testing, and poor communication with stakeholders. Despite the unprecedented nature of the pandemic, fundamental principles of good corporate governance remain essential for corporate health, wellbeing and legitimacy.

Controversies in corporate governance are nothing new. In 2019, Commissioner Kenneth Hayne AC, who oversaw the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in Australia, published in his report that "effective leadership, good governance and appropriate culture … are fundamentally important",[1] and 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]

Commissioner Hayne's verdict bears as much relevance today as it did in 2018. In Australia this year, the consulting firm PricewaterhouseCoopers (PwC) has become embroiled in scandal with the Federal Government. PwC has allegedly used confidential government information to assist multinational corporations to avoid taxation. Poor corporate governance is at the heart of this controversy.[3]

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 Asia-Pacific (APAC) region, and, indeed, globally. 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.[4] In 2023, Japanese courts gave a guilty verdict to the founder of Aoki Holdings.[5] The company was found guilty of handing over 28 million yen worth in bribes to the Tokyo Olympics Organising Committee in return for being the sponsor befitting the Japanese team.[6]

The Australian government is endeavouring to remain up to speed with corporate governance challenges domestically. Australia's primary regulator of corporate governance, the Australian Securities Investment Commission (ASIC), have corporate misconduct as an enduring enforcement priority.[7] Specifically: where that misconduct damages market integrity; where it involves a high risk of consumer harm; or where systematic compliance failures result in widespread consumer harm.[8] As ASIC indicate, these priorities have come because of emerging digital technologies and the uncertain economic environment.[9]

The COVID-19 pandemic was a watershed moment for banks and corporations alike to focus on financial risks and corporate governance. Yet challenges and scandals have not disappeared simply because of the pandemic's impact. Both authorities and consumers 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, we must return to the basic principles of good corporate governance.

As a professional, one is aware that governance is the framework that 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."[10]

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;

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.[11]

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 saw Japan slide three places, from fourth in 2016 to seventh in 2018, in the biennial survey conducted by the Asian Corporate Governance Association (ACGA) and Asia-focused brokerage group CLSA.[12]

There is also an economic argument for good governance. Failure to implement robust governance frameworks and compliance practices can result in: remediation, long-term financial difficulties, and lasting reputational damage.

A notable example of what penalties corporations can face involves French aircraft provider company Airbus SE. They agreed to pay combined penalties of more than US$3.9 billion to resolve foreign bribery charges with authorities in the US, France and the UK. Airbus admitted that it made payments to a business partner to use as bribes to Chinese government officials, and also engaged in bribery in multiple other APAC jurisdictions, including Malaysia, Sri Lanka, Taiwan and Indonesia.[13] Although France and the UK (with US prosecutors seeking an end to the prosecution) have dropped criminal charges in 2023, this far-reaching fine should serve as a warning of the consequences for systemic failures in corporate governance.[14]

Closer to home, Australian bank Westpac was ordered to pay AU$1.3 billion in October 2020 for its breaches of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006. This is the highest civil penalty in Australian history and reflects the seriousness of Westpac's compliance failures. Reflecting on this outcome, Nicole Rose, CEO of the Australian Transaction Reports and Anaylsis Centre (AUSTRAC), stated that "[f]inancial institutions must ensure they have strong compliance systems, processes and resources in place".[15]

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. ASIC Chair James Shipton said in October 2019, "[t]heir oversight was less developed than what we had hoped to see".[16]

Commissioner Hayne found during the Royal Commission that too often, boards did not get the right information about emerging non-financial risks; however, 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.

Commissioner Hayne, in the Royal Commission, provided an analysis of poor corporate oversight (an example of what not to do). One major bank evidenced a "complete inability to draw together information about instances of misconduct identified during the immediately preceding five years".[17] 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".[18]

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.

A type of misconduct that occurs because of this lack of oversight is bribery. To combat this, the Australian government has reintroduced a new combatting foreign bribery bill in June 2023.[19] The *Crime Legislation Amendment (Combatting Corporate Crimes) Bill 2023* (Cth)[20] follows in the steps of its predecessors that were introduced in 2017 and 2019, but both lapsed at the end of Parliament.[21] In addition to targeting direct misconduct,[22] the new Bill seeks to criminalise body corporates that fail to prevent bribery of foreign public officials by "associates" of the body corporates.[23] Under the proposed definition, a person can be an "associate" of another person if they are an officer, employee, agent, contractor, subsidiary, entity controlled by the other person or if they perform services for or on behalf of the other person in other respects.[24] As outlined in Section 70.5A (2), absolute liability applies with respect to the elements outlined in Section 70.5A (1). This is intended to make the new offence easier to prosecute and therefore more effective.[25] It also creates a strong incentive for corporations to implement stronger governance to prevent bribery of foreign public officials.[26] Section 70.5A(5) provides body corporates with a defence to this new offence, if they can prove that they "…had in place adequate procedures designed to prevent…" bribery of foreign public officials by any associates.[27] The term "adequate procedures" is not defined in legislation and would be left to the courts to interpret.[28] However, under Section 70.5B, the Minister would be required to "publish guidance" to aid body corporates with their obligations.[29]

While it remains to be seen how effective the proposed corporate offence will be in improving corporate governance, the explanatory memorandum noted that an equivalent offence in the UK resulted in an "...increased adoption of corporate compliance programs".[30] Section 7 of the *Bribery Act 2010* (UK) criminalises "relevant commercial organisations" for failing to prevent bribery.[31]

In China, the Anti-Unfair Competition Law (AUCL) imposes responsibility on businesses for bribery that is carried out by employees.[32] Article 7 of the AUCL states that "[a] bribery committed by an employee of a business entity shall be deemed to be committed by the business entity, unless the business entity has evidence that the activity of the employee is irrelevant to seeking a transaction opportunity or competitive edge for the business entity".[33] This places the onus on the business to distance itself from the actions of its employees in order to avoid liability. The implementation of firm-wide anti-bribery measures and policies would likely assist businesses from being held vicariously liable in these circumstances.

Companies should be focused on implementing better corporate governance procedures in light of the willingness of governments to impose liability on corporations for governance failures. Companies can do this by identifying procedural weaknesses and previous instances of misconduct, and by ensuring management is properly implementing governance reforms, including those recommended by government.

Methods to Address Oversight and Ease Compliance Burdens

Supervision

Ultimately, entities must be in "what amounts to an always-on cycle to monitor culture",[34] 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, established in 2018, is a supervisory initiative that aims, through heightened engagement, assessment and feedback loops, to improve corporate practices and address root causes of shortcomings before they culminate in breaches.[35]

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.

Enforcement and reform – ASIC's role

A punitive way to address corporate oversight is through law enforcement and litigation. ASIC has remained committed to enforcement and litigation in respect of corporate misconduct.[36] In their August 2023 report, ASIC provided an overview of its enforcement and regulatory work between 1 April and 30 June 2023.[37] The report further outlined ASIC's enforcement priorities, which notably included governance and directors' duties failures. Between 1 January and 30 June 2023, ASIC achieved a range of enforcement outcomes, which included prosecutions, civil penalties, bannings, infringement notices and court enforceable undertakings, as well as investigations.[38] In 2023, ASIC successfully pursued civil action against Australian Mines Limited (AML) and its managing director, Mr. Benjamin Bell, in relation to the company's breach of its continuous disclosure obligations.[39] Mr. Bell admitted to breaching his director's duty to act with the expected level of care and diligence when he made false and misleading statements at foreign investment conferences, causing AML to breach its continuous disclosure obligations.[40] AML and Mr. Bell were fined $450,000 and $70,000, respectively. Mr. Bell further received a two-year disqualification from managing corporations. Notably, in determining the appropriate penalty for AML, Colvin J took into account the fact that AML adopted a new continuous disclosure policy since ASIC's investigation.[41]

Law enforcement and litigation are not the only means ASIC uses to ensure good corporate governance. ASIC provides guidance on a variety of legal challenges facing corporations. One of those issues is emerging digital technologies and scams. ASIC, in their April 2023 report on scams and the four major Australian banks (Commonwealth Bank of Australia, Westpac, National Australia Bank and Australia and New Zealand Banking Group),[42] found that the banks' strategy, governance arrangements and reporting frameworks did not meet expected standards, and that a bank's approach to scams required "a strategy to address and respond to scams",[43] "appropriate governance arrangements",[44] and "effective reporting, including on customer experience and outcomes".[45]

Among other things, ASIC recommended that banks should:

- Have an internal reporting mechanism in which scam related matters are frequently reported to senior company managers and the board.[46]
- Implement competent scam systems to enable more sophisticated scam analysis.[47]
- Continuously review internal capabilities to prevent, detect and respond to scams.[48]
- Implement activities to increase customer awareness of scams and monitor the effectiveness of these activities.[49]
- Implement capabilities to identify and inquire into transactions that may be scams.[50]
- Allocate adequate resources to support an efficient and effective response to scams.[51]
- Improve and fully document their scam policies and procedures.[52]
- Improve their response to vulnerable customers by identifying such customers as well as documenting their strategy to provide additional care and assistance to vulnerable customers.[53]

The Scam Report shows ASIC's proactive role in proposing and advising on corporate governance reforms in response to emerging challenges. ASIC has indicated that they would "…be monitoring the actions taken by the four major banks in response to the improvement opportunities identified in this report".[54] Importantly, this indicates that ASIC is not simply interested in penalising individuals and corporations for breaches or deficiencies in corporate governance, but also in recommending and encouraging reforms that promote good corporate governance strategies and practices.

Technology to ease compliance burdens

Companies might also consider investing in technologies that will assist in managing compliance comprehensively. There has been increasing discussion on the role of artificial intelligence in easing the compliance burden, and the importance of having in-built algorithms able 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. The data generated by the internet has increased by over 20% annually over the past five years.[55] 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 messaging platforms like WeChat, which has overtaken email as the prime communicator of sensitive information used by employees),[56] 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, etc.) 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.[57]

- 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 effectively manage 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 are 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 (OECD)-led Common Reporting Standard (CRS).[58]
- Basel III.[59]
- Net Stable Funding Ratio (NSFR).[60]
- Base Erosion and Profit Shifting (BEPS) Action Plan.[61]
- US Foreign Account Tax Compliance Act (FATCA).[62]
- European General Data Protection Regulation (GDPR).[63]

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.

Thus, implementing measures that 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.

Managing conflicts of interest, crisis and trust - the PwC Australia tax scandal

In June 2023, the Finance and Public Administration References Committee ("the Committee") in Australia released a report titled, "PwC: A calculated breach of trust", which detailed PwC Australia's misconduct regarding proposed anti-avoidance tax legislation in Australia.[64] The PwC tax scandal is a cautionary tale to financial services, consulting and related industries about the potential consequences of failing to take corporate governance seriously. The governance failure at the centre of the PwC scandal was the failure to manage conflicts of interest.[65] It is alleged that former PwC partners misused confidential government information concerning new anti-avoidance tax legislation. They obtained this information while consulting with the Treasury on the proposed legislation.[66] These were grave breaches in the fundamental principles of transparency, accountability and responsibility.

It is alleged that PwC partners deliberately shared confidential information internally and externally in breach of their obligations.[67] This information was used to assist existing and potential clientele work around the anti-avoidance tax legislation, which was being brought in in 2016.[68] In their investigation into PwC, the Tax Practitioners Board ("TPB") found that PwC had breached Section 30-10(5) of the *Tax Agent Services Act 2009* (Cth) for failing "…to have in place adequate arrangements to manage conflicts of interest that arose in relation to its activities as a registered tax agent…".[69] In particular, the TPB noted that the confidential information held by the relevant PwC persons "…put PwC in a position of conflict due to the potential market advantage of having knowledge of this confidential information, and the fact that it could be utilised to advance the position of its existing taxation clients, as well as marketing its services to attract new clients".[70] As a result of the breach, the TPB ordered PwC to implement specified governance reforms with respect to managing confidentiality and conflicts of interest.[71]

The Committee pointed out that there was support within PwC for this misbehaviour, despite an awareness of the potential implications for PwC if this was brought before the public eye.[72] Perhaps worse still, PwC was uncooperative with the Australian Taxation Office in its request for documents related to the misuse of confidential information.[73] The Committee was of the view that PwC did this by improperly and wrongly claiming legal professional privilege in respect of a vast number of documents. The Committee further noted the recent Federal Court case of *Commissioner of Taxation v PricewaterhouseCoopers*[74] in support of their view.[75]

On 29 May 2023, acting CEO Ms. Kristin Stubbins published an open letter apologising for wrongdoing and identifying what has been and what will be done to rebuild PwC's culture and governance processes.[76] One of the reforms includes an external review of PwC's "governance, accountability and culture" by Dr. Ziggy Switkowski AO, which was announced on 15 May 2023.[77] The Committee was critical of PwC's late and minimalist engagement with the public, and stated that Ms. Stubbins' letter "…conspicuously avoids addressing the key issues at the heart of the matter".[78]

The PwC tax scandal should be a lesson to all companies on the dangers of failing to implement good governance practices to deal with foreseeable organisational risks. The legal and ethical risks associated with providing private clients with tax advice while simultaneously consulting with the government about anti-avoidance tax legislation are self-evident.[79] If adequate procedures had been in place to manage conflicts of interest, the PwC scandal may have not occurred. Furthermore, PwC would have been much less blameworthy if that was the case. Good governance practices can also assist companies with managing and responding to a crisis if and when it does occur. Procedures for cooperating with relevant authorities and engaging with the public should be in place to assist companies in maintaining trust with relevant stakeholders, while seeking to address significant issues such as misconduct by personnel.

Whistleblowing

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

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 for the provision of safe reporting channels and protection against dismissal or retaliation for whistleblowers. Member States have gradually implemented the Directive, with countries like Germany passing legislation in July 2023.[80]

Implementation in the APAC region has been mixed. 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.[81]

Australia on the other hand has taken a stance in respect of whistleblowing. In January 2020, the first comprehensive laws were passed for whistleblowing in corporations.[82] 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 are now required to implement a whistleblower policy, and to make that policy available to officers and employees of the company. These significant new responsibilities 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.[83]
- 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).[84]
- Allowing emergency disclosures to parliamentarians or journalists by whistleblowers if they believe there is imminent danger to the health or safety of a person.[85]
- Making reports anonymously with no requirement for disclosure, except confidentiality.[86]
- Increased civil penalties for breaching confidentiality. A penalty can be imposed on a body corporate of up to $14.085 million AUD (as of 2023), 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.[87]
- 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.[88]

ASIC has endeavoured to ensure these requirements are met. In 2020, ASIC initiated a review into the whistleblowing policies of 102 Australian companies.[89] ASIC found the majority of these policies did not comply with the new laws and were out of date.[90] This prompted ASIC in October 2021 to send the CEO's of public companies, large proprietary companies, and corporate trustees of registrable superannuation entities a public letter prompting them to update their policies.[91] To assist, ASIC published a market report in March 2023 which set out the best practice for handling whistleblower disclosures.[92] This involved ASIC reviewing the policies of large Australian companies, such as BHP Group, the Commonwealth Bank of Australia and Woolworths Group. *In sum*, ASIC recommended:

- A strong foundation for the whistleblower programme. A whistleblower policy should be documented, as well as having defined roles and responsibilities. This programme should have adequate procedures and supporting technology in place to ensure compliance with the *Corporations Act 2001* (Cth).[93]
- Fostering a whistleblowing culture and supporting whistleblowers. This involves considering how to actively support whistleblowers, and considering if there are adequate measures in place to support them. Where settlements are reached with whistleblowers, ASIC also indicated there should not be an attempt to limit the whistleblower from disclosing matters to regulators.[94]
- Resources and training for employees on how to handle disclosures and how to support whistleblowers in line with legal requirements.[95]
- Monitoring, reviewing and improving whistleblowing policy. This involves scheduling periodic reviews and identifying metrics to monitor the programme's effectiveness.[96]

Ensuring compliance with these requirements has not been limited to ASIC providing recommendations. In February 2023, ASIC commenced its first enforcement action for breaches in whistleblower protections. Specifically, this was against the mining resource company TerraCom Limited.[97] ASIC allege that TerraCom and its directors engaged in conduct which harmed a whistleblower who revealed supposed falsifications of coal quality certificates.[98] This caused detriment to the whistleblower's reputation, earning capacity and psychological state.[99] ASIC are seeking: declarations of contraventions by the directors; that the directors incur penalties; and that they are disqualified from managing corporations. The matter is scheduled for hearing in February 2024.[100]

This case will serve as precedence for whistleblower requirements in Australia. Should ASIC be successful in its action, TerraCom may be subject to harsh penalties. This should serve as a warning to other companies about the necessity of a developed whistleblower programme and strong corporate governance overall.

Dual-class shares

Over the last few years, APAC stock exchanges have permitted the listing of dual-class shares. In 2018, Hong Kong and Singapore changed their stock exchange rules to allow companies to list with two classes of shares in a bid to attract large companies.[101] In 2019, Shanghai followed, and this year in Malaysia proposals have been made to legislate such changes.[102]

Dual-class shares have gained traction with APAC policy makers. They have been seen as a necessary measure to stay relevant in increasingly competitive global markets, and to attract IPOs.[103] Others have treated dual-class shares with apprehension, especially in how it might affect good corporate governance.[104] The Asian Corporate Governance Association in their reports have stated that dual-class shares undermine corporate governance and that the government's implementing them are showing "a striking lack of interest" in the key principle of fairness.[105] Exponents have argued along these lines since dual-class shares enable company founders and executives to maintain control, even as their economic stake in the business diminishes. Dual-class companies are, in effect, building structural unfairness.[106] Moreover, 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.[107]

Despite the problems associated with dual-class shares, their listing on APAC markets has not resulted in widespread controversy. There are two reasons for this. Firstly, APAC countries have extensively regulated their listing to ensure fairness.[108] The Hong Kong, Singapore and Shanghai exchanges all cap each multiple voting share to a maximum of 10 votes.[109] Enhanced corporate governance standards for these companies are also in place across these jurisdictions.[110] In Hong Kong, for example, all dual-class companies must have a "Corporate Governance Committee".[111] This is made up of independent non-executive directors that monitor whether the listed issuer is for the benefit of all shareholders or merely the controllers. Secondly, only a limited number of companies have listed with dual-class shares. For example, on the Shanghai Stock exchange, only four of the 371 companies quoted were dual-class share issuers in 2021.[112] Time will tell, perhaps with an increased amount of listings and new jurisdictions, whether dual-class shares pose real problems for corporate governance in the APAC region.

Conclusion

Poor governance, poor compliance, and financial misconduct and crime (as well as, 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, proactive 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.

Acknowledgments

The authors would like to thank Jade Fodera, George Papasavvas and Richard Boesel for their assistance in the preparation of this chapter.

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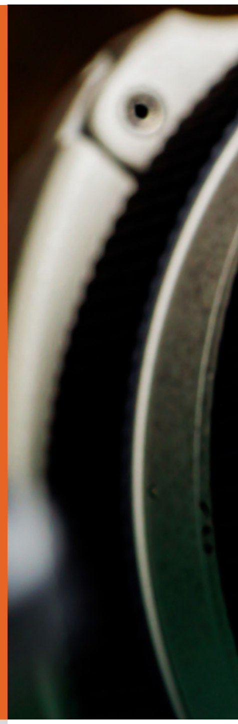

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