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Australia and India: Common goals in corporate law and corporate governance reform

By arrangement of:
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Presented by:
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Corporate governance: common goals

- “Public companies built the railroads of the 19th century. They fill the world with cars and televisions and computers. They brought transparency to business life and opportunities to small investors. Because public companies sell shares to the unsophisticated, policymakers are right to regulate them more tightly than other forms of corporate organisation. But not so tightly that entrepreneurs start to dread the prospect of public listing. The public company has long been the locomotive of capitalism. Governments should not derail it.”(*The Economist*, 19 May 2012)
- Corporate governance, a relatively new discipline, must meet the global challenge to balance fairness and efficiency in corporate organisation
- A coherent regulatory framework will promote investor confidence and hence create value

Corporate governance: common goals (continued)

- That requires international sharing of ideas and experiences, with proper attention to local circumstances
- The US approach, centred around the agency problem and assuming widely held corporations, is not necessarily the best model for other countries, as the Godrej Committee has emphasised
- Better for the major economies of Asia to come together to have a greater voice in how corporations and markets should function in our region, to enhance our potential for fair and efficient markets



Some ideas from Down Under



- Australia's lawmakers and regulators have been especially active in corporate and securities regulation for the last 30 years
- Through trial and error, we have identified what seem to be a few good ideas
- I offer a brief survey of some good Australian ideas, and some not-so-good ideas, conscious that this is a time of intense focus on corporate law and governance in India
- I hope some of the ideas I touch upon will have resonance for you

Nine features of the Australian system

1. Single board structure with independent directors
2. Growing emphasis on board's duty to monitor management for the protection of shareholders
3. Active corporate regulator with strong powers
4. Directors' duties enforceable by disqualification
5. Dominant national stock exchange
6. Actively policed continuous disclosure obligation



1. Single board structure, independent directors



- Listed boards 'manage' the company
- In practice this means they appoint the CEO, approve major business decisions, and monitor/supervise management
- Directors are governed by statutory duties under the Corporations Act, administered by ASIC
- Additionally there are 'if not, why not' guidelines by the ASX Corporate Governance Council, and APRA standards for regulated financial institutions

2. Board's monitoring responsibility

- ASX guidelines mean large listed companies have a majority of independent directors and an independent chairman
- The underlying theory is that boards are no longer 'management in committee' but instead, they are expected to protect shareholders from management opportunism
- The Chairman's role is now crucial, as:
 - a conduit between management and board and between major shareholders and board; and
 - 'first among equals' leading the board through major decisions such as CEO removal

2. Board's monitoring responsibility (continued)



- Should a listed company be required to have a majority of independent directors if there is a dominant or controlling shareholder?
- Is a director who represents a dominant shareholder an “independent” director?
- This issue surfaced recently in Australia when independent directors of Leighton Holdings (54% owned) resigned
- Similar problems with some new listings in London (e.g. BUMI)

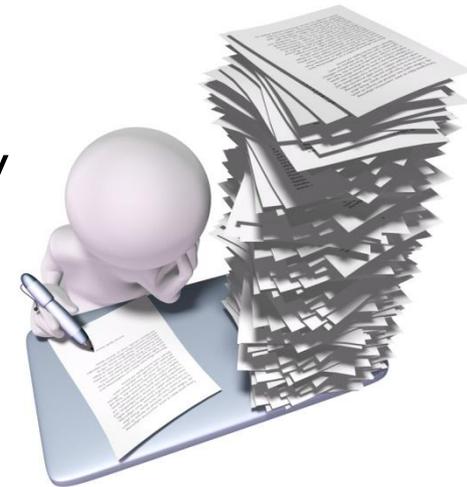
3. Active corporate regulator with strong powers

- In Australia, company law and financial services regulation are national matters, as States have surrendered constitutional power
- ASIC has wide responsibilities for company law, market regulation, the financial services industry and consumer protection on financial matters
- Wide powers to demand production of documents, interrogation, telephone tapping etc
- Power to bring proceedings for civil penalties including disqualification



4. Directors' duties enforceable by disqualification

- Civil penalties for breach of directors' statutory duties :
 - To act in good faith in the best interests of company and the proper purposes
 - Not to make improper use of position or information
 - To prevent the company from trading while insolvent
 - To act with due care and diligence
- These have produced to major litigation, usually prosecuted by ASIC
- Unusually, our main recent cases are about the duty of care (*James Hardie, Centro, One.Tel*)



4. Directors' duties enforceable by disqualification (continued)

- Breach of duty of care is a civil contravention, but ASIC has special powers to seek compensation, a pecuniary penalty and (importantly) a disqualification order preventing a director from managing corporations
- ASIC has used this power effectively, to establish and reinforce governance standards



5. Dominant national stock exchange

- ASX Ltd conducts the major national market for equities and derivatives
- ASX is an active regulator through Listing Rules, settlement system and broker regulation
- Listing Rules reflect important governance principles about shareholder involvement
- ASX works closely with ASIC in market surveillance, especially to enforce continuous disclosure Listing Rule



6. Actively policed continuous disclosure obligation

- Listing Rules oblige a listed entity to tell ASX of any information concerning it that a reasonable person would expect to have a material effect on price or value of the entity's securities
- Obligation is to 'immediately' tell ASX once the entity (i.e. any executive officer) becomes aware
- Exceptions from disclosure relating to (e.g.) incomplete proposal, matter of supposition, internal management information, only if:
 - the information remains confidential, and
 - a reasonable person would not expect disclosure.



6. Actively policed continuous disclosure obligation (continued)

- Breach of continuous disclosure obligation has statutory reinforcement:
 - ASIC or investors who suffer loss can sue for pecuniary penalty or compensation;
 - Both the listed entity and its directors (as persons involved in the contravention) are exposed to liability



7. Heavy liability for misleading conduct

- By statute, a person must not engage in conduct, in relation to a financial product or financial service, that is likely to mislead or deceive (e.g. a misleading market announcement)
- The person's intention is not relevant: the issue is the effect of their conduct on those who observe it (e.g. investors)
- The person, and others involved in the contravention (e.g. directors), are liable to compensate any person who suffers loss



8. Frequent class actions



- Australian courts (especially Federal Court) have rules to facilitate class actions for compensation
- Any person who suffers loss can claim compensation under continuous disclosure and misleading conduct laws
- 'plaintiffs' bar' actively review market announcements for litigation opportunities under contingency arrangements
- Consequently these laws have been the foundation for important class actions in recent times
- Class actions are normally settled but they provide an important compliance incentive

9. Takeovers Panel

- Australia has a detailed statutory takeovers code supplemented by broad Panel powers
- Central statutory principle prevents bidder from acquiring interest in target if voting power of bidder and associates exceeds 20%
- Panel is selected from takeovers practitioners, and is expected to act swiftly to rectify abuses in takeover context
- Panel has wide powers to declare acquisitions or conduct to be unacceptable, and consequently make orders

9. Takeovers Panel (continued)

- Key issues for inbound investment include:
 - Broad concept of 'associates' can cause bidder to exceed 20% limit inadvertently
 - ASIC's 'Truth in Takeovers' policy means parties may be held to market announcements about intended or current bid (e.g. 'This is our best and final offer')
 - Panel will object to 'frustrating action' by target directors

Speaker profile



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Robert (Bob) Austin taught equity and company law at the University of Sydney from 1969 to 1990, becoming Professor (1984) and Head of the Department of Law (1985). He is co-author of leading texts in company law.

He was a partner with Minter Ellison from 1990 to 1998. Amongst his achievements were designing the legal structures for the ASX's CHESSE settlement system and for the demutualisation of the AMP Society. He was a member of the Takeovers Panel from 2001 to 2006.

After serving as a Judge of the Supreme Court of New South Wales from 1998 to 2010, he has returned to full-time legal practice with Minter Ellison, and is Head of Minters' Corporate HQ Advisory Team.

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