Australian Journal of Corporate Law (AJCL)

Volume 35 Part 2

(articles and case note included in this part are linked to the LexisNexis platform)

CONTENTS

Articles

but has not mechanically applied the policy. This was illustrated during the takeover bid for Finders Resources Ltd, in which a substantial shareholder was ultimately not held to a statement that it did not intend to accept the bid. The Australian Securities and Investments Commission is undertaking a review of the policy, with the objective of providing greater certainty to the market, apparently echoing suggestions by commentators that a 'train wreck' should be embraced because market integrity will benefit from a strict application of the policy. This article argues that the Panel should resist such calls because the prejudice likely to result from a rigid application of the policy is unjustifiable in circumstances where the policy is working as intended in most takeover bids.

The rise of regulation, personal and criminal liability, interventionist regulators and reputational risk begs the question: has it become too difficult to be a company director in Australia, particularly in relation to a listed company? This article analyses the effect of overregulation of directors and officers of Australian businesses and its indirect effect on the economy as a whole. The authors explore one example of regulatory overreach, the criminal liability of directors under Australian corporate law, arguing that (1) directors are subject to too many criminal offences; and (2) too many of those offences allow conviction on the basis of strict or positional liability without the ordinary protections of the criminal law. This approach is not reasonable and is out of step with the regulation of other professions and occupations within Australia and the regulation of directors in other similar jurisdictions.

This article outlines the developments and challenges involved in introducing a new securities market in Cambodia, a developing country with a relatively open economy but some significant government-linked enterprises as well as family-linked firms. They operate in an environment characterised by an authoritarian democracy, limited regulatory capacity and access to courts, extensive corruption, and quite ready access to bank finance. Corporate and securities legislation has been enacted, and a new stock exchange has been established with support from Korea, but it has struggled to attracted many listings. The article focuses on the requirements introduced for independent directors, as well as non-executive directors more broadly, in Cambodia's listed companies. Recent research illustrates how such requirements reveal important features of corporate governance regimes across Asia. The article briefly compares developments in Singapore, Thailand and Malaysia, as well as other Southeast Asian states with more fledgling stock markets such as Laos and Myanmar. The path-breaking partly empirical analysis uncovers when and why independent director requirements were introduced in Cambodia, how they were implemented, who are the independent directors, and what the (likely) impacts are from independent directors.

Throughout its life in the law, corporate criminal responsibility has attracted controversy. This article seeks to answer two foundational questions about this method of regulating corporate behaviour. The first relates to the capacity of a corporation to be guilty of a crime. It is argued that the historical bar on corporate criminal responsibility arose more from limitations upon the capacity conferred on a

corporation by law than the law not recognising the corporation as an entity. Once those constraints were removed, corporate criminal responsibility came to depend upon whether the attribution method used appropriately captured the fault of the corporate entity. The second question addressed is why might criminalisation of conduct by a corporation be justified in a regulatory context heavily populated by civil penalty provisions? The answer to this second question lies in the unique expressive function of the criminal law.

Case Note