World Trends in Corporate Governance to Note

全球企業管治的最新發展趨勢

Professor Jean du Plessis
Deakin Law School,
Deakin University, Australia

Victoria Supreme Court, Melbourne, Australia

I had the privilege of addressing delegates to the Directors' Symposium hosted by The Hong Kong Institute of Directors on 22 September 2015 entitled, "Hong Kong: City of Opportunities?" Although it was my first visit to Hong Kong, there is no doubt in my mind that it is indeed a city of opportunities.

My presentation touched upon four world trends in corporate governance, which I summarise here as food for thought for this magazine's readers.

Integrated Sustainability and Responsibility Reporting

Most modern capitalist corporate law systems are based on the "shareholder primacy theory," which, in its most simplistic form, stipulates the sole purpose of a for-profit company as maximising profits for shareholders. Directors must act in the best interests of current as well as future shareholders. Historically, this approach resulted in the sole focus being on the bottom-line. And for many years, corporations were basically required by statutory provisions only to report in details on financial performance.

However, in the last 30 years or so, the concept of "stakeholders" (as opposed to "shareholders") has become increasingly popular. Shareholders are no longer deemed the dominant or primary stakeholders. Employees, clients, consumers, the community, the environment and governments also are recognised as stakeholders.

Thus the concept of corporate social responsibilities (CSR) emerged. The public also has come to expect businesses, especially large publicly listed corporations, to adopt and adhere to environmental, social and governance (ESG) policies. More recently, corporate governance codes further raised the expectation that businesses voluntarily report on non-financial issues based on the principle of "comply or explain." This has resulted in three phases of reporting:

- *Phase One Reporting:* from the single bottom line of financial reporting to the triple bottom line that includes also reporting on social and environmental efforts;
- *Phase Two Reporting:* adding governance to complete what is now known as "ESG reporting;"
- *Phase Three Reporting:* from the triple bottom line to integrated sustainability and responsibility reporting.

Thus integrated, sustainability and responsibility is here to stay. These voluntary forms of reporting probably are best represented by two organisations:

- Global Reporting Initiative (GRI), an international independent organisation that champions sustainability reporting; and
- International Integrated Reporting Council (IIRC), a global coalition of regulators, investors, companies, standard setters, the accounting profession and non-government organisations that promotes integrated reporting or <IR> and thinking.

I foresee that within the next five years, a significant number of large corporations will start to adopt the idea of integrated thinking and integrated reporting as this dynamic trend takes hold worldwide.

Honest and Reasonable Director Defence

Somewhat related to the first theme, the second theme is an Australian trend that may require more thorough consideration for Hong Kong. Similar to section 465 of Hong Kong's Companies Ordinance of 2014, section 180(1) of the Australian Corporations Act 2001 (Cth) provides that a director or an officer of a corporation must exercise his or her powers and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if occupying a comparable position with the same responsibilities in such a corporation.

Section 180(2) contains a statutory "business judgment rule," which is supposed to protect directors against personal liability if they exercise "business judgments" under one or more of these conditions:

- The judgments are made in good faith for a proper purpose;
- Directors do not have a material personal interest in the subject matter of the judgment;
- Directors learn about the subject matter of the judgment to the extent that they reasonably believe to be appropriate; and
- Directors rationally believe that the judgment is in the best interests of the corporation.

From what I can observe, the statutory business judgment rule has been a failure. Australian directors have identified the following concerns:

- The protection is available only in relation to one of the directors' duties, namely, the "duty of care and diligence;"
- "Business judgment" is narrowly defined as only judgment related to the business "operations" of a corporation;
- The onus of proof of the above-mentioned conditions was supposed to be on the plaintiffs, but the courts have interpreted it as being on the directors; and
- The business judgment rule has never protected any Australian director against liability since it became effective in 2001.

The Australian Institute of Company Directors (AICD) raised the issue of a wider protection for directors against personal liability on rising expectations to do integrated sustainability and responsibility reporting. In 2014, AICD proposed to insert the "honest and reasonable director defence" into the Corporations Act. The "defence" can be summarised as follows:

- A director should not be liable as long as he or she acts "honestly, for a proper purpose and with the degree of care and diligence that the director rationally believes to be reasonable in all the circumstances;"
- The defence should apply to all types of

judgments, all decisions and under whatever provision a director is sued, provided that the director can prove that he or she acted honestly, for a proper purpose and with reasonable care (as stipulated as the first condition).

The media and investor organisations criticised the proposal on concern that the subjective elements of the defence will over-protect directors and reduce the high standards expected.

It is unlikely that the "defence" will be introduced by any Australian Government soon. However, Australian directors are getting more and more risk-averse for fear of personal liability, given that the Australian business judgment rule is considered to be a failure in offering them protection.

Some other wider form of protection for Australian directors is being proposed, but it will not be as wide as the "honest and reasonable director defence," which AICD no doubt will keep on pushing.

Widening Remuneration Gap between Executives and Ordinary Employees

Excessive executive and director remunerations have been a concern for several years. Based on findings of the Greenbury Report in 1995, disclosure of individual remuneration packages of the top executives was introduced in the UK. Several other countries followed suit, but it had no impact on curbing excessive director and executive remunerations. In fact, remunerations of chief executive officers showed steady increase over recent years.

Later initiatives to keep executive remunerations under control did not seem to curb the steepening upward climb. More recently, shareholder activists started to exercise non-binding vote on director remuneration reports. In Australia, the "two-strikes and a spill legislation" was introduced, meaning that if at two consecutive annual general meetings, the majority of shareholders vote against the board's remuneration report, the board shall be dismissed immediately to clear the way for a new board.

However, it is unlikely this will have a huge impact on a related problem, ie, the widening remuneration gap between ordinary employees and executives. Let me mention just two studies below:

- *"CEO Pay Continues to Rise as Typical Workers Are Paid Less"* by Alyssa Davis and Lawrence Mishel, Economic Policy Institute of the US, June 12, 2014 – available at http://www.epi.org/publication/ceo-pay-continues-to-rise
  "The Bucks Stop Here: Private Sector
- *Executive Remuneration in Australia"* by John Shields, Michael O'Donnell & John O'Brien, Labor Council of New South Wales – available at http://www.psa.asn.au/Oldsite/news/files/The_Buck_Stops_here.pdf

The worldwide trend is clear. While one may cite many reasons to defend this widening gap, but many other reasons also exist as to why it may become indefensible. What will be the consequences if we reach that stage and massive outcries about this widening gap are heard globally?

Mandatory Gender Quota Legislation

Mandatory gender quota legislation to improve board diversity is controversial, to say the least. It is a debate that probably evokes the most emotion. In 2003, Norway was the first country in the world to adopt legislation compelling listed companies to have at least 40 per cent of either gender on their boards. All Norwegian companies complied, probably because a breach could result in deregistration of a company. However, in some other Continental European countries with less severe sanctions, quotas of 30 per cent to 40 percent of each gender were achieved.

The "old boys' club" tradition is often blamed as to why boards do not appoint more women as members. The playing field is not level for women and it is a vicious circle that must be broken by legislation. To ensure that the playing field is level, one might consider adopting legislation requiring that companies (primarily listed companies) to appoint at least 40 per cent of either gender to their boards in, say, three years.

A number of sanctions can be considered for violation, including heavy personal fines to all the directors and heavy fines to the company as well. I do not favour deregistration as a sanction since the consequences of deregistering a large and successful public company is simply too immense even to contemplate. In addition, many totally innocent people, including women, will suffer from such a sanction.

I am also in favour of a sunset clause stating that once a company reaches the mandated gender quota and maintains it for three consecutive years, it gets exempted from the legislation. As it is, the playing field will then be level after a maximum of six years, enough for boards to pass a valid judgment as to the advantages of having at least 40% women serving as directors. After six years, companies are unlikely to revert to a situation in which one gender dominates. Moreover, female board members will have gained more experience by then to earn the respect of their male counterparts, making it unlikely that they get replaced by men even if the company is exempt from such legislation.

In most countries without mandatory gender quota legislation, the gender imbalance in favour of men is still stark. Opponents of mandatory gender quota legislation justify their objection to such legislation citing several reasons, the lack of any definitive proof of a "business case" for appointing more women being probably the most common.

I will again leave the readers with just one thought: The "business case" for a company has always been based on the "single bottom-line approach," ie, the financial performance of a company. If we

recognise other company responsibilities, the more relevant question nowadays seems to be whether more women should be appointed to boards to help the company fulfil its other non-financial obligations. It may well be that legislation, even if it only applies for a limited period of time, is the only way to create a level playing field for more women on boards of listed companies.

I believe that integrated sustainability and responsibility reporting is here to stay and corporations will have to accept this reality and start to prepare to fulfil their wider reporting responsibilities. In the near future, all listed companies probably will need to take into account IIRC's ongoing drive to promote <IR> and integrated thinking. Meanwhile, as long as Australian company directors fear they are not protected enough against personal liability, the issue of wider protection will continue to be debated in Australia. In addition, countries the world over will have to close the widening remuneration gap between executives and employees to avoid tensions reaching breaking point. And while mandatory gender quota legislation has proven effective to ensure more women being appointed to boards in some countries, others should consider whether this is also the way forward for their listed companies.

▲ Professor Jean du Plessis
▲ Jean du Plessis教授

我很榮幸可以出席香港董事學會於2015年9月22日舉辦、主題為「香港：機會之都」的「董事研討會」並向與會代表發表演說。雖然這是我首次來港，但毫無疑問香港真的是一個充滿機遇的城市。

我的演說觸及了企業管治的四大趨勢，在此我將為本刊讀者概述一次，以供思考。

可持續性發展及社會責任綜合性報告

大部分現代資本主義下的企業法體制都建基於「股東至上理論」（shareholder primacy theory），最簡單來說，就是凡是以盈利為目標的公司，便應以為股東賺取最大利潤為唯一的目的。董事必須本著現有股東及未來股東的最佳利益而行事。根據歷史，這做法的結果是利潤成為了唯一的焦點，而多年來企業亦根據法定條文的規定而提交詳盡的財務報告。

不過，隨着「持分者」（相對於「股東」）的概念在過去30年左右越來越普及，股東不再被視為是首要或主要持份者，同時僱員、客戶、消費者、社區、環境及政府亦被確認為持分者之一。

由此便衍生出企業社會責任的概念，而市民亦開始要求企業 — 尤其是大型上市公司 — 採取和遵守環境、社會及管治政策。最近企業管治守還更進一步，要求企業按照「不遵守就解釋」的原則，自願地匯報非財務事宜。結果是產生了三階段報告：

- 第一階段報告：由單一底線（只有財務報告）擴展至三重底線，即加入了社會及環境報告；
- 第二階段報告：加入有關管治的報告，以實現目前所謂的「環境、社會及管治報告」；
- 第三階段報告：由三重底線擴展至可持續性發展及社會責任綜合性報告。

如是者，除了財務表現外，越來越多企業會同時匯報其在可持續性發展及社會責任方面的工作，而其中的佼佼者包括以下兩個組織：

- 全球報告倡議組織（Global Reporting Initiative，簡稱GRI，是一個支持匯報企業可持續性發展的國際性獨立組織）；以及
- 國際綜合報告委員會（International Integrated Reporting Council，簡稱IIRC，是一個由監管機構、投資者、企業、制定標準的機構、會計專業人員及非政府組織組成的全球性聯盟，旨在提倡綜合性報告及綜合性思維）。

我預期，隨着這趨勢越來越明顯並在全球扎根，未來5年將有大量大型企業開始採用綜合性思維和綜合性報告的方式進行匯報。

真誠及合理的董事抗辯

第二個主題與第一個主題有些關聯，但因為這趨勢只在澳洲出現，是否適合香港還需多加考慮。與香港《2014年公司條例》第465條相似，澳洲《2001年法團法》第180(1)條規定董事及企業管理人員在行使其權力及執行其職務時，必須付出一個合理的人在一間類似企業中出任同等職位和擔當相同職務時應有的謹慎和努力行事。

第180(2)條包含一條法定的「商業判斷法則」，以保護董事在以下其中一個或多個情況下作出「商業判斷」時，不必承擔個人法律責任：

- 董事是真誠地就一個正當目的而作出判斷；
- 董事在要判斷事項上並無重大個人利益；
- 董事合理地相信自己已適當地了解要判斷事項的內容；以及
- 董事理性地相信判斷合符公司的最大利益。

據我觀察，法定的商業判斷法則並沒有成功。澳洲的公司董事認為此規則存在以下問題：

- 此規則只保護到董事的其中一項職務，即「謹慎和努力行事」；
- 「商業判斷」只狹義地定義為與企業業務「運作」有關的判斷；
- 上述情況的舉證責任應在起訴人身上，但法庭認為應由董事負責舉證；以及
- 自法定商業判斷法則於2001年生效以來，澳洲並未有任何董事曾受到規則保護。

澳洲公司董事協會（Australian Institute of Company Directors，簡稱AICD）建議為董事提供更廣泛的保障，以免他們因為社會對可持續性發展及社會責任綜合性報告有越來越高的要求而要承擔起個人法律責任。2014年，AICD提出把「真誠及合理的董事抗辯」加入《法團法》之中。這「抗辯」可總結如下：

- 只要董事是「本着真誠，根據正當目的，並以足以理性地相信自己在各方面均合理地謹慎和努力」而行事，便不應負上法律責任。
- 只要董事能證明自己已本着真誠，根據正當目的行事，以及已採取了合理程度的謹慎（如第一個條件所列），這抗辯便應適用於所有判斷、所有決定及董事被起訴的任何條文。

傳媒及投資者組織批評這項建議容許抗辯包含主觀元素，將會過分保障董事，進而令社會對董事的高標準有所降低。

對於此一「抗辯」，澳洲政府應不會在短期內推行。不過，由於澳洲的公司董事認為澳洲的商業判斷法則並不能保障他們，他們已因為擔心要承擔個人法律責任而變得越來越不願意冒險。

除了「真誠及合理的董事抗辯」外，也有建議提出了其他方式來保障董事。雖然這些方式也可提供較廣泛的保障，但卻始終不及前者。因此AICD將繼續推動政府落實此規則。

行政人員和普通僱員薪酬差距越來越大

行政人員和董事薪酬過高是多年來一直存在的問題。根據1995年《Greenbury報告》的結果，英國已規定要披露高層員工各自的酬金利益，亦有幾個國家跟隨英國的做法，但始終無法遏止董事及行政人員薪酬過高的問題——事實上，首席執行官的薪酬在近年一直穩定地增加。

即使其後再有其他控制行政人員薪酬的措施推出，但這個越升越快的趨勢似乎仍然無法遏止。最近維權股東開始就董事薪酬報告進行無約束力的投票，澳洲更已實施「雙振出局」的法規，只要大部分股東在連續兩次週年大會上投票反對董事會的薪酬報告，董事會便須立即解散，以便重選新的董事會。

然而，這看來並不會對普通僱員和行政人員薪酬差距越來越大這個相關的問題產生多大影響。以下讓我提及兩項研究：

- 《CEO薪金繼續上升，普通員工卻減薪》（CEO Pay Continues to Rise as Typical Workers Are Paid Less），Alyssa Davis及Lawrence Mishel著，美國經濟政策研究所，2014年6月12日——鏈結：http://www.epi.org/publication/ceo-pay-continues-to-rise
- 《錢不再流走：澳洲私營機構行政人員賺多少》（The Bucks Stop Here: Private Sector Executive Remuneration in Australia），John Shields、Michael O'Donnell及John O'Brien著，新南威爾勞工委員會——鏈結：http://www.psa.asn.au/Oldsite/news/files/The_Buck_Stops_here.pdf

世界的潮流很清楚。有人會列舉許多原因來說明差距只會越來多大，同時也有許多其他原因解釋為何這可能是站不住腳的。一旦事情繼續發展到世界各地都因為這個越來越大的差距而爆發大型抗爭的階段，那將會有什麼後果？

立法強制性別限額

立法強制性別限額以令董事會成員更多元化，不但是極具爭議性的議題，亦很易令人情緒爆發。2003年挪威成為全球首個立法規定在上市公司董事會成員中，必須有最少40%是女性（或男性）的國家。為免被除牌，挪威所有公司都遵守這個規定。部分歐陸國家的限制較為寬鬆，各性別只需佔董事會成員人數30%至40%便可。

董事會之所以不會委任女性為董事，很多時候是因為傳統上董事會成員都是男性。這個競爭環境對女性而言並不公平，亦唯有立法規管才能打破這個惡性循環。為建立一個公平的競爭環境，便需考慮採用立法的手段，例如要求企業（主要是上市公司）在3年內委任不少於40%的女性（或男性）進入董事會。

如有違反，可考慮多種不同的罰則，包括向所有董事徵收巨額個人罰款，以及向公司徵收巨額罰款。我不贊成以除牌作為罰則，因為對一家大型及成功的上市公司進行除牌的工作，單是想想便覺得太艱鉅了。

此外，許多完全無辜的人，包括女性都可能受到拖累。

我也贊成加入日落條款，一家企業只要達到法例要求的性別配額並連續維持3年，便可獲豁免，不再受法例的規管，因為照情況看，男、女性最多在6年之後便可以在一個公平的環境下競爭，屆時董事會便已有足夠的時間來判斷，最少40%董事由女性出任是否對公司有好處。而經過6年之後，企業應難以回復到由單一性別主導的局面，同時董事會的女性成員在吸收了更多經驗後，應可贏得男性同僚的尊重，即使公司獲法例豁免，其角色也難再被男性取代。

大部分沒有立法強制性別配額的國家，公司董事會則明顯地仍然由男性主導。反對立法強制性別配額主要有幾個原因，其中最普遍的是因為缺乏一個「商業個案」來確切證明有需要委任更多女性進入董事會。

讓我再請讀者思考一個問題：一家公司的「商業個案」都是以「單一底線的方式」，即公司的財務表現為基礎。如果我們意識到一家公司還有其他職責的話，那現時較相關的問題似乎是應否委任更多女性進入董事局，以協助公司履行其他非財務責任。立法很可能是唯一一個可以為女性加入董事會創造公平競爭環境的方法，即使有關法例只需實施一段短時間。

我相信可持續性發及社會責任綜合性報告已是大勢所趨，因此企業應該面對現實，裝備自己，以更全面地履行匯報責任。在不久的將來，所有上市公司都可能需要考慮IIRC持續推動「綜合性報告」及「綜合性思維」的努力。與此同時，只要澳洲的公司董事仍然憂慮自己因為法例保障不足而要承擔不必要的個人法律責任，為董事提供更廣泛保障的議題將會繼續辯論下去。此外，世界各國將要為收窄行政人員和僱員之間的薪酬差距而努力，以免將已經緊張的局勢推至臨界點。在性別配額方面，有些國家已經立法強制推行，並證明了這個方法對增加女性加入董事會的數目非常有效，至於其他國家，則應考慮這是否其上市公司的未來發展方向。

Jean J du Plessis (LLD) is a Professor of Law, Deakin Law School, Deakin University, Australia

Jean J du Plessis教授現為澳洲迪肯大學法律學院法律系教授