MULLINS business

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Changes to Corporate Governance Principles

Board structure, diversity, communication and remuneration

OLIVIA VERSACE

The ASX Corporate Governance Council released some proposed changes to their Corporation Governance Principles earlier this year. The changes are in response to several independent reviews of matters such as market integrity and diversity on boards.

The Corporate Governance Principles are not mandatory but listed companies are required to report on their compliance on an 'if not, why not' basis. The principles are a great foundation for all companies, listed and unlisted, who wish to adopt and practice good corporate governance.

Some of the changes are set out below:

Structure the Board to Add Value

The Council has proposed changes to this principle including that the Board Charter should include regular review of the proportion of women employed at all levels of the company and further that board renewal and succession plans should be developed to include diversity objectives, in particular gender diversity.

The Council has recommended that boards report on the mix of skills and diversity that the board is looking for in its membership. The objective of this change is to encourage more transparent board appointment processes.

Promote Ethical and Responsible Decision Making

As the ASX Listing Rules are to be amended to include a requirement on all listed companies to adopt and disclose a trading policy, the Council has proposed that its suggestion of a trading policy be removed so as to avoid duplication with the Listing Rules.

A further change is a new recommendation that requires companies to establish a diversity policy that includes measurable objectives in relation to gender diversity. The Council has stated that it considers that an 'if not, why not' recommendation for the establishment of a diversity policy provides a balanced approach by allowing boards to develop policies and objectives appropriate for their circumstances.

Respect the Rights of Shareholders

The Council has proposed that companies consider arranging for advance notification to shareholders of corporate briefings to analysts and make them widely accessible, including by the use of web casting. This change would rebalance a perceived inequity of disclosure between analysts and 'Mum and Dad' shareholders and therefore promote market integrity.

The Corporate Governance Principles are not mandatory but listed companies are required to report on their compliance on an 'if not, why not' basis.

Remunerate Fairly and Responsibly

The Council has proposed changes to the principle regarding the composition of the remuneration committee of a company. The ASX has decided to make it mandatory for ASX 300 companies to have a remuneration committee solely of non-executive directors.

The changes proposed by the Council outline the potential for a conflict of interest in having executive directors serve on the remuneration committee. However, at the same time they have acknowledged that for smaller companies it may not be appropriate (or possible from a costs point of view) for a remuneration committee to comprise solely non-executive directors.

The changes take effect from 30 June 2010 with listed companies required to report against the amended principles in the year commencing 1 January 2011.

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Disclosing the code

DAVID WILLIAMS

The Federal Government amended the Franchising Code of Conduct (the Code) effective from 1 July 2010. The amendments to the Code are intended to place franchisee in a better position to understand the risks of entering into a franchise system by providing additional information about the terms and conditions on offer.

The information to be included in your disclosure document from 1 July 2010:

- **Unforeseen significant capital expenditure.** Whether the franchisee will be required to undertake unforeseen significant capital expenditure that was not disclosed by the franchisor before the franchisee entered into the franchise agreement.
- **Unilateral variation of franchise agreement.** If you retain the right to vary the franchise agreement unilaterally then you need to disclose.
- **Amendment of the franchise agreement when transferring.** If on transfer or novation of the franchise you require an updated agreement then you must disclose.
- **Recurring or isolated payments.** Recurring or isolated payments that are reasonably foreseeable and are payable by the franchisee to the franchisor or the franchisor's associate then you must disclose.

- **Dispute resolution costs.** You must disclose whether your costs (including legal costs) of dispute resolution will be charged to the franchisee.
- **End-of-term arrangements.** You need to disclose the:
  › arrangements for the end of a franchise agreement; and
  › factors the franchisor will use to determine any renewal, extension or to issue a new franchise agreement.
- **Exit Payments.** Details must also be given for exit payments at the end of the franchise agreement and arrangements for unsold stock, any right of the franchisee to sell the business at the end of the franchise agreement, and any right of first refusal of the franchisor.
- **Confidentiality Obligations.** Details must be given whether a confidentiality obligation will be placed on the franchisee.

You will need to take care that your disclosure documentation is reviewed to ensure compliance with the Code. Please let us know if we can assist you with implementing these changes.

Do I need to notify the Foreign Investment Review Board (FIRB) **about my acquisition?**

ZOHEB RAZVI

One of the main changes to Australia's foreign investment regime was relaxing the monetary threshold applicable to foreign persons. The purpose of these changes was to improve Australia's image and competitiveness especially during the global downturn.

The following examples will assist foreign companies and nationals in determining whether notification and approval to the FIRB is necessary in Australia.

Example 1:

We are a British company acquiring the assets, and subsequently the control, of an Australian software business. The total value of the acquisition is AUS$215m. Do we need prior approval from the FIRB?

Before the new thresholds came into force on 22 September 2009, the British company would have been required to submit an application to the FIRB for approval. Now, as the value of the acquisition is below the new AUS$231m threshold, FIRB approval is not required.

Example 2:

We are a Singaporean company wishing to takeover a US company. The US has global subsidiaries including Australia. Those Australian subsidiaries or gross assets of the Australian subsidiaries exceed AUS$231m. Do we need prior approval?

Yes. Prior approval will be required where the foreign target company whose Australian subsidiaries or gross assets exceed AUS$231m.

Example 3:

We are a US company wishing to acquire the assets and control of an Australian telecommunications company. The total value of the acquisition is AUS$300m. Do we need the FIRB approval?

Yes. The US company requires the FIRB approval as the investment is within a prescribed sensitive sector and the threshold for investment in this sector has been changed to AUS$231m.

Example 4:

We are a Dutch corporation entering into funding arrangements with an Australian company. The funding arrangements have quasi-equity characteristics such as a convertible note. Do we need the FIRB approval?

Due to recent amendments, the Dutch company must notify the FIRB if it is acquiring securities which will take its holding in the entity that issued the securities past the 15% threshold (or 40% when aggregated with the holdings of associates) calculated on a diluted basis and where the Australian company is over the applicable threshold size. In other words, FIRB will treat convertible securities as though they were shares.

We can assist you in complying with foreign investment approvals.

Agreements, credit and the creator

ANDREW NICHOLSON

Many businesses fail to protect some of their most valuable assets by not regularly reviewing their core agreements.

A couple of recent decisions highlight the need for businesses to review their agreements, in particular their key employment agreements. Often, the position in relation to any core intellectual property that may be developed by employees is left to chance as a result of businesses not reviewing employment agreements or due to lack of understanding of the legal claims that may validly be made by employees.

As a starting point, the general rule is that businesses do not have any entitlement to claim the intellectual property that is created by employees or independent contractors, in the absence of any agreement to the contrary. There is an exception to that general rule where an employee has a 'duty to invent'. That exception applies as an extension of a Common Law principal that *"any product of the work which is created by the servant belongs to the master"*.

However, for the employer to claim ownership, it assumes that the employee has a duty to invent. That may depend on the nature of their work and/or the directions provided to them by their employer. Two recent decisions indicate the fine line that employers tread if those matters are left to chance.

In the *University of Western Australia v Gray*, Dr Gray was engaged as a Medical Researcher. It was found he had *"no duty to invent anything"*, although his research extended to technologies for the treatment of cancerous tumours. In the course of Dr Gray's research, he developed patents in relation to those treatments, which were registered. The University claimed an entitlement to the patents but the Full Court of the Federal Court found that Dr Gray was able to claim ownership as he was under no duty to invent, even though his research was likely to be carried out in relation to new technology.

In the second case heard in July 2010, (*Courier Pete v Metroll Queensland*) the Court held that an employee, who was engaged to coordinate production of water tanks, was entitled to the benefit of the registered designs in those tanks. The employee's role included the improvement of products. However, he was found not to have created a new design either in the course of his employment or at the direction of his employer that resulted in the creation of the invention.

Key Message for Employers

It is vital that employers regularly conduct a health check of their business, including any intellectual property. The check should include a review of core agreements, particularly those with key staff (and independent contractors). Those agreements should clearly state who owns any intellectual property created during the course of the work so that ownership is not left to chance. Employers should also consider creating detailed position descriptions and review of these regularly when employees' roles change (for example on promotion).

In the crosshairs of the ATO

MARK MADSEN

The *Tax Laws Amendment (Transfer of Provisions) Act 2010* (the Act) has commenced operation for the current financial year. Among other changes, the Act amends provisions in existing tax legislation for the collection and recovery of tax, targeting fraudulent phoenix activity.

Since June 1993, the Australian Taxation Office (ATO) has had the power to issue Director Penalty Notices (DPNs), requiring directors to take steps within 14 days if directors are not to be pursued personally for the company's tax liability for outstanding withholding amounts.

The recent legislative changes have to some extent tightened this regime:

1. DPNs will now take effect from the date they are posted to the address of the director as noted on ASIC's register;
2. The period for compliance will increase to 21 days;
3. The directors will also have 21 days within which to either pay the tax obligation in full, appoint a voluntary administrator or place the company into liquidation;
4. More importantly, two loopholes have now been closed:
    a. Entering into an repayment arrangement with the ATO will not absolve a director of his obligations; it simply prevents the ATO pursuing him whilst the arrangement is in force;
    b. It is now more difficult for a director to rely upon a defence that he did not take part in the management of the company as a result of an illness or for some other good reason – the director must now show that it would have been unreasonable to expect him to have taken part in the management of the company at that time.

Directors should be aware that this is not the full extent of the current changes.

Further, whilst not yet embodied in legislation, there are other items on the Government's agenda to combat phoenix activity. This includes expanding the ambit of DPNs to encompass other tax amounts, providing a longer period of time for directors to meet the company's tax liabilities but imposing personal liability upon the directors automatically after that period of time without the need for a DPN, making a new phoenix company and its directors liable for the old insolvent company's tax liabilities in certain circumstances, reinstating criminal sanctions against directors for failing to remit PAYG amounts and expanding the scope for disqualification of individuals from managing companies.

In circumstances where it is estimated that $600m is lost from the national revenue base through an increasing level of phoenix activity, the Government is getting serious about tackling the situation. Accordingly, directors need to maintain a close eye on their company's financial circumstances at all times.

Buying a business?
An employment issue to consider

NIGEL INGLIS

The *Fair Work Act 2009* (FWA) provides that when a business is purchased by an unassociated entity and where the purchaser continues to employ the employees of the business, the purchaser may, in certain circumstances, be able to dismiss an employee without facing the risk of an unfair dismissal claim. However, a number of steps must first be taken, including writing a letter to the employees informing them that their previous period of service with the old employer would not be recognised by the purchaser.

The provision of this letter was recently considered by Fair Work Australia in *Ahmed and Ors v Serco Australia Pty Ltd* (2010) FWA 5121.

In this case, the applicants were employed by G4S Australia Pty Ltd (G4S). Serco Australia Pty Ltd (Serco) purchased G4S and the applicants accepted positions with Serco. However Serco dismissed them some five months later.

Prior to employing the applicants, Serco sent a letter to each of them stating that their *"position at Serco is a new contract of employment and all qualifying periods set out in the Fair Work Act 2009…will apply"*.

Fair Work Australia had to consider, amongst other things, whether the letter met the requirements of the FWA. That is, whether Serco had properly informed the applicants, before their employment with Serco commenced, that Serco would not be recognising their period of service with G4S.

The issue in this case was that the letter did not clearly and plainly adopt the words of the FWA, namely that *"a period of service with the old employer would not be recognised"*. Whilst Fair Work Australia did not expressly say so, the words are, instead, those used in the now largely repealed *Workplace Relations Act 1996*. One would expect that the applicants would not have made the claim had the words of FWA been adopted.

Despite this, Serco successfully defended the claim as Fair Work Australia decided that the intent of Serco was to avoid having to recognise the applicants' previous service with G4S.

This decision is authority for the proposition that use of the words in the FWA are not necessary where the letter demonstrates a clear intent not to recognise an employees previous employment. However, if a letter is not carefully drafted then the purchaser may be liable for an unfair dismissal claim.

We therefore recommend that the words in the FWA be used in your letters to employees in any business sale transactions you enter into as a purchaser. We can assist with the preparation of these letters.

DAVID WILLIAMS
EDITORIAL

The economic conditions facing businesses today continue to be challenging. The collapse in consumer confidence, together with a significant reduction in the ability for business to access funding, either from the equity or debt markets will make growing businesses difficult. The repercussions of the credit crisis in Europe, together with the increased borrowing demands of the various levels of governments has further reduced the ability of business to borrow or raise equity.

With the Federal election now concluded and the Labour coalition in power, this will take away one element of uncertainty that has pervaded this year. It will be interesting to see the shape of how the Government deal with all the various interest groups and deliver on the promises made during the election. It may be that this is one election Mr Abbott may be lucky to have lost, only time will tell.

The resolution of the mining tax issue hopefully will see increased activity in that industry which will have a flow through of activity to business. There are noticeable signs of what could be called a "second wave" of businesses being placed into administration or liquidation occurring which is worrying but obviously a by-product of the prevailing economic conditions.

We are now seeing the full effect of the changes to the industrial relations legislation with the finalisation of a number of the modern awards. The extra costs being imposed by these awards will also severely test businesses in the current consumer depressed market.

It is important for business to survive the current economic climate and this requires strong leadership to be given, enable consumer confidence to return and hopefully businesses will take on more entrepreneurial risk that will create activity in the marketplace. We also do need the financial markets to open the doors of the debt market to assist business to face the current conditions.

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