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FINANCIAL REVIEW

Peculiarly British report a hard act to follow by Alan Cameron, Chairman

The name Higgs can now be added to those of Greenbury, Hampel and Turnbull, as the latest in a line of reports since Cadbury in 1990 on aspects of corporate governance.

The report was released in the UK in January by British Land's deputy chairman, Derek Higgs, on the independence, accountability and pay of company board members in the UK.

It is proving influential in the Australian debate - indeed, it has already been quoted in Justice Austin's preliminary judgement in ASIC v Rich (concerning Greaves), but some of its prescriptions are either peculiarly British, or simply peculiar. I will look at two aspects, independence and leadership of the board.

Derek Higgs has stuck to the basic Cadbury premise - comply, or explain. This is to be welcomed, as mandating detailed structures for all public companies regardless of circumstances not only produces the risk of inefficiency and ineffectiveness, it also stifles innovation.

His approach to "independence" is welcome. His starting point is that a non-executive director can only be considered independent where the board determines that the director is "independent in character and judgement", and there are no relationships or circumstances which could affect, or appear to affect, the director's judgement.

These relationships and circumstances would include former employment, for five years; a material business relationship now or within the past three years; remuneration other than a fee, or participation in a share option or performance related pay scheme; cross directorships or significant links with other directors; representing a significant shareholder; or serving for more than 10 years.

So much for non-executive director options - but they were already on the nose. And who is not independent if there is a cross director - every director? Directors will resist the idea that they necessarily cease to be independent after 10 years, but if Higgs is adopted as best practice, no non-executives will be serving more than six years anyway.

And what about the director who is effectively a (cheap) consultant, or minding a personal stake which may, from the company's viewpoint, be less than substantial. These are not unusual circumstances in the Australian marketplace, but perhaps rare among the top 350 companies in the UK, for whom Higgs was principally writing. Perhaps a requirement for annual re-election after that period of service will ensure that each is continuing to play a useful role.

Indeed, his only concession to smaller companies, is not to insist on his usual "rule" that no one individual sit on all of the audit, remuneration and nomination committees. He recognises that some of his other prescriptions may be less relevant or manageable for smaller companies - I hope Australian policymakers read that qualification carefully!

But some of his other notions should not be blindly adopted either. His views on leadership within a board seem odd to Australian eyes. He argues that even if the chairman is non-executive, there ought to be a senior independent director. Their role is threefold: to be available to shareholders if they have concerns that contact through the chairman or the chief executive has failed to resolve; to chair meetings between non-executive directors where the chairman does not attend; and to lead the appointment process for chairman. In the Australian context, the first two roles seem to be the responsibility of the chairman. The circumstances in which the chairman cannot perform them should be very rare. While it is a good idea for the outgoing chairman not to lead the process of selecting her or his successor, any other member of the nomination committee ought to be able to do so.

None of these seems to provide sufficient reason for the creation of a special additional position. And a role for non-executive directors in dealing with investors seems like a recipe for confusion and angst among those investors not favoured with a briefing, not to mention a greater risk of inadvertent selective disclosure.

Justice Austin's judgement in ASIC versus Rich not only left open the possibility that the responsibilities of chairmen may in certain cases be much more onerous than their fellow directors, it reminded me that Higgs' predecessor, Adrian Cadbury, described chairmen in terms suggesting that they were not independent. Higgs believes that every chairman loses independence on appointment. Perhaps he should have said that a chairman who is independent when appointed may lose that independence of outlook after, say, five years.

Recent Australian experience (AMP, BHP Billiton, and so on) has shown that chairmen are capable of bucking, and sacking, management, even sons-in-law.

The Higgs prescriptions are based on his response to survey work among British companies. There is no evidence of any testing, or even rigorous analysis of the likely effect of what he proposes, but he does suggest an evaluation in two years' time of "progress against his recommendations" to look at why behaviour did not change as he envisaged, and involving some qualitative assessment.

But his list looks like a checklist, I'm afraid. How many will be prepared to say, we did not adopt Higgs because we disagreed with him?

Justice Austin described Higgs' annexure on "Guidance for the Chairman" as containing "some emphatic statements which appear to reinforce the commission's evidence" in ASIC v Rich; he has ensured that Higgs will be compulsory reading for chairmen and their advisers. Comply, or explain.

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