



Questions directors should ask before ASIC does



By Michele Levine
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High profile cases of fraud and misconduct have raised public awareness and resulted in calls for increased scrutiny of companies and political parties alike. Regulatory bodies need to raise their game.

Pauline Hanson might not have known that what she was doing was wrong, or perhaps it didn't seem very wrong to her. Perhaps this month's column would be more topically entitled "Questions Pauline Hanson should have asked because the Queensland Electoral Commission didn't".

Her experiences are a salutary lesson that ignorance is no excuse and that directors cannot rely on regulatory bodies to keep them honest, or out of jail - and that the penalties for misconduct can be huge.

Hanson's sentence - three years in prison for electoral fraud - has been greeted with outrage. Regardless of what the One Nation party stood for or what Pauline Hanson did or didn't do, the length of the penalty has disturbed Australia's sense of fair play and equity. It has raised many questions about other "unpunished" wrongs of greater magnitude. Australians of all political persuasions, and in all positions in society, are now asking questions, and wondering "Who will be next?" or "Where will it end?"

Are regulatory bodies irrelevant?

Until recently statutory or regulatory bodies were not even on the radar for most Australians. Recent events have obviously changed this.

While few in Australia would want a police state - with every action scrutinised by one regulatory body or another - law and order, including an economy relatively free from corruption, does require regulatory bodies that do their job and are seen to do their job.

Just as they want more than a figurehead for their Governor General, Australians

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also expect their regulatory bodies to be more than figureheads, or worse faceless institutions. They do not expect such bodies to have such narrow charters that they don't do a real job. They certainly expect them to have a real job to do.

Australians' expectations of a Governor General, the "ultimate independent director", tell us much about Australians' expectations for company directors. Similarly, Australians' views about the United Nations give us an insight into expectations of regulatory bodies.

On the issue of the UN, Roy Morgan Qualitative Research found that some

Australians felt the UN's inaction in relation to Iraq had devalued them. There was also a view expressed that a sign of strength and solidarity from the UN would have prevented the war. One respondent said, "I think that if the UN had acted we might not be in the mess we are now in".

These sentiments are not too far from the sentiments expressed in relation to the role of regulators in the recent well-documented corporate collapses.

Australians have been scathing of management and directors from the recent list of fallen companies because of "corporate governance irregularities, lack of regulatory control, general arrogance of senior business representations," according to one respondent.

But regulators must share the responsibility. For HIH in particular there were also feelings of blame, anger and disappointment over the mismanagement, cover-up, and failure or inability of the relevant bodies to act, and over governmental control generally.

Some Australians complained that "the Government did nothing." Others were astonished that this kind of disaster "could happen without detection by the appropriate authorities".

As one respondent succinctly put it, "there's not enough governmental control, it should have been picked up. The watchdog is to blame."

While directors interviewed for the Roy Morgan directors segment of the study did

not specifically blame the regulators, they did see that the regulatory bodies do have a critical role to play in ensuring we don't see more of these corporate collapses.

Who's watching the watchdog?

There is much talk about boards' values, ethics, and morality, but what about the regulators?

Boards don't generally set about being unethical, or immoral as their *raison d'être*. Rather they find themselves in difficult situations for all sorts of reasons - incompetence, inexperience, risks taken, international events and difficult competitive or financial pressure, corruption within their own organisation or incomplete and imperfect information.

Regulators are no different. They have time pressures and budget pressures (remember few boards have a budget for governance) as well as charter restrictions (restricted areas of responsibility).

I recall one company director claiming that "directors can do anything". This is not true of regulators. We need only look as far as the criticism of ASIC for its pursuit of Nick Whitlam and NRMA. However, regulators must take a more proactive approach while maintaining responsibility.

Then there are the other pressures on regulators - political pressure, corporate pressure, personal pressure and the ever-present culprit-time pressure. It's all there - but it is no excuse. ASIC, ASX and all regulators have to see themselves as restoring trust and faith in institutions, rather than masking and hiding problems.

What are appropriate key performance indicators (KPIs) for regulatory bodies? Should they be based not on numbers of cases explored and numbers successfully prosecuted, but somehow relate to the size and scope of the damage caused by their inaction?

For instance, in the case of HIH, the impact was financial

mayhem and long term insurance industry pain. There were no winners, only losers. If this was factored in to KPIs, it might help focus the priorities of the regulators.

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Fraud and corruption happens

The guidelines articulated in the New Australian Standards for Corporate Governance deal with fraud issues within companies. However, they don't deal with fraud issues between companies or political parties, or between companies and their suppliers, customers, partners, or the community.

Indeed fraud between companies has reportedly been described by ASIC

not only as "outside their charter", but as potentially "good business", if the shareholders of the fraudulent company are likely to, or in fact do gain from the fraudulent actions.

It is extremely difficult to manage double standards in a corporate environment. It is ok to lie, and falsify records for a joint venture partner, supplier or customer, but it is not ok for head office to lie.

Bob Falconer, former Victorian deputy police commissioner, suggests a crime and corruption authority. Professor Adams of UTS suggests a corporations panel to deal with these issues.

What about self-regulation?

ASIC recently identified a conflict of interest between investment bank analysts providing objective and independent research and investment banking revenue. This is similar to the conflict between auditors and their consultancy practices.

Even with the best intentions, businesses evolve and a bigger outsider perspective is sometimes needed.

Even the Federal Government and the judiciary need checks.

The Governor General model is useful as a comparison. The Federal Government is essentially a self-governing model, but the final check is there (rarely used, but there nonetheless).

Would shareholders be comfortable with the same degree of disclosure and transparency and the same level of accountability from their companies as the Federal Government provides the people of Australia?

It is time to welcome the regulators to the radar screen. In the public arena, scrutiny will not be about adherence to narrowly defined charters which leave gaps of momentous proportion between the regulatory bodies. It will be about regulatory responsibility, true governance, and the eradication of corruption. ■



Pauline Hanson