

9-3-2010

# Corporate governance - A survey of Australian and South East Asian systems

Lenice Lim

*Bond University*, [Lenice\\_Lim@bond.edu.au](mailto:Lenice_Lim@bond.edu.au)

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## Recommended Citation

Lenice Lim. (2010) "Corporate governance - A survey of Australian and South East Asian systems" *Corporate governance eJournal*, 1-16.

<http://epublications.bond.edu.au/cgej/19>

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# Corporate governance - A survey of Australian and South East Asian systems

## **Abstract**

Legislators and civil society have an interest in ensuring that Australia's corporate governance framework is as effective as possible. There is a potential benefit to reviewing foreign corporate governance frameworks, because they may point the way to a more effective Australian framework. This paper is a survey of corporate governance frameworks in six South East Asian jurisdictions.

## **Keywords**

corporate governance, corporate governance laws, corporate governance codes and frameworks, South East

## **Disciplines**

Law

## **Publication Details**

Published Version.

Lim, L. (2010). Corporate governance - A survey of Australian and South East Asian systems. *Corporate Governance eJournal*, 1-16.

Access the [Journal's](#) homepage.

2010 HERDC submission. FoR Code: 180100

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# CORPORATE GOVERNANCE - A SURVEY OF AUSTRALIAN AND SOUTH EAST ASIAN SYSTEMS

Lenice Lim\*

Legislators and civil society have an interest in ensuring that Australia's corporate governance framework is as effective as possible. There is a potential benefit to reviewing foreign corporate governance frameworks, because they may point the way to a more effective Australian and South East Asian frameworks. This paper is a survey of corporate governance frameworks in six South East Asian jurisdictions.

Corporate governance is not a new concept: it is trite that it is an issue of great importance to Australian legislators, regulators and civil society. This concern can be traced back to the corporate collapses of recent decades, which led to an increased awareness of the importance of directors' duties and ethics, and an increased demand for accountability and reliability in the management of companies.<sup>1</sup>

Few would argue that the concept of corporate governance is in Australia to stay. The foreign experience of corporate governance may provide Australia with valuable lessons in how to fix potential problems with its system, or illustrate problems that can be avoided. To that end, this article will review, at a general level and as a basis for further research, corporate governance in several South-East Asian jurisdictions.

## SOUTH-EAST ASIAN CORPORATE GOVERNANCE

The issue of corporate governance began gaining importance in East Asian governments in general after the Asian financial crisis in 1997.<sup>2</sup> In 1998, the Asian Development Bank (ADB) launched a study to assist countries who were most affected by the meltdown and determine the factors which resulted

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\* BCom, PDLP, LLM, LLB (Hons), Adjunct Teaching Fellow, Bond University.  
lelim@bond.edu.au

<sup>1</sup> Wolfgang Harder, 'What's All the Talk about Directors' Ethics?' (2006) *Corporate Governance eJournal*  
<<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1005&context=cgej>> at 25  
October 2009.

<sup>2</sup> Ma Virginita Capulong, David Edwards and Juzhong Zhuang (eds), *Corporate Governance and Finance in East Asia: A Study of Indonesia, Republic of Korea, Malaysia, Philippines, and Thailand* (2001) 1.

in the extent of damage suffered by these countries.<sup>3</sup> The study was called 'A Study of Corporate Governance and Financing in Selected Developing Member Countries'. The findings confirmed preliminary observations 'that poor corporate governance was one of the major contributors to the building-up of vulnerabilities ... that finally led to the ... crisis in 1997'.<sup>4</sup>

A peculiar feature of companies in East Asia is that control by large family groups is prevalent.<sup>5</sup> A study carried out by the World Bank in 2003 showed that family businesses made up the following proportions of total market capitalisation in these South East Asian countries:<sup>6</sup>

Indonesia	57.7%
Philippines	52.5%
Thailand	46.2%
Malaysia	28.3%

The ownership structure of family business groups is characterised 'by significant family control and interlocking shareholdings among affiliated firms'.<sup>7</sup> Clearly, this has the potential to create problems for the companies' corporate governance, because the ownership structure gives insiders 'excessive power to pursue their own interests at the expense of minority shareholders, creditors and other stakeholders'.<sup>8</sup> The ADB stated that this problem was one that could be solved by external checks on the company structure,<sup>9</sup> and to this end many South-East Asian countries have enacted legislation regulating directors' duties as well as guidelines to achieving good corporate governance.

In certain countries where effective legislation is in place, the dominance of family business structures may be used to promote principles of good corporate governance. Family businesses have the valuable characteristic of having an incentive to keep in place long-term strategies that aim 'to transfer the company to the next generation in better condition than it was when received from the preceding generation'.<sup>10</sup> This differs significantly from the

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid 2.

<sup>5</sup> Haider A Khan, *Corporate Governance: The Limits of the Principal-Agent Approach in Light of the Family-Based Corporate Governance System in Asia* (Discussion Paper, University of Denver, 2003) 4.

<sup>6</sup> Ibid 14.

<sup>7</sup> Capulong, Edwards and Zhuang, above n 2, 2.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid 5.

short-term goals of most companies aiming to maximise profitability in the current period. By taking initiatives directed at the long-term improvement in performance, it is submitted that family businesses have encouraging prospects of practising good corporate governance.

The family business structure gives rise to various interesting discussions with regards to corporate governance, and these are reflected in many South East Asian legal frameworks.

## 1 Vietnam

Corporate governance in Vietnam is treated somewhat differently because of the large number of state-owned enterprises operating in the country. Based on data collected at the end of 2005, Vietnam 'had around 5,000 state owned enterprises with a combined capital [amounting to] approximately ... 60 [per cent] of the total capital of all businesses in the country'.<sup>11</sup> These enterprises were found to 'have operated ineffectively ... compared to the private [sector]', which causes significant complications to the corporate governance framework in Vietnam.<sup>12</sup>

There are two separate legal codes governing corporations in the country: the *Law on Enterprises* for private enterprises, and the *State Owned Enterprise Law* for state owned enterprises.

### *Law on Enterprises*

Enterprises in Vietnam are mainly governed by the *Law on Enterprises*. Article 9 of the *Law on Enterprises* sets out the obligations of enterprises as follows:

1. Conduct businesses in compliance with registered [industries] as stated in the Certificate of business registration; ensure business conditions as stipulated by law with respect to conditional industries;
2. Set up accounting books, make and submit true, accurate and timely financial reports in accordance with law on statistics – accounting;
- ...
4. Ensure the rights and interests of employees [are] in compliance with provisions of law on employment; pay in full amount social insurance, health insurance and other insurances for employees in accordance with the law on insurance;
5. Ensure and be responsible for quality of goods and services in accordance with registered or [publicised] standards;

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<sup>11</sup> Nguyen Hoang Duong, 'New Enterprise Law and Changes Related to State Management Over SOEs' (Presented on behalf of the Ministry of Finance of Vietnam, 2006) <<http://www.oecd.org/dataoecd/61/18/37340269.pdf>> on 2 September 2010.

<sup>12</sup> Ibid.

6. Implement statistic procedures as stipulated by law on statistic; periodically report under the stipulated forms to the State competent body of full and accurate information about the enterprise and its financial situation; promptly amending any declared or reported information which is found incorrect, insufficient;
- ...
8. Other obligations as stipulated by law.<sup>13</sup>

These provisions provide guidelines on the protection of 'rights and interests of employees', as well as obligations to consumers with regards to the supply of goods and services. 'Corporate governance [in this sector] follows the more traditional...application of building a responsible, ethical, and empowering environment for business'.<sup>14</sup> This approach thus takes the interests of various stakeholders into account.

However, shareholders' rights are treated differently. Shareholders do not have the right to bring derivative or class actions against directors equivalent to that of Australian shareholders pursuant to s 236 of the *Corporations Act*.<sup>15</sup> This indicates that there is a lack of external monitoring of the board's actions and decisions, which in many cases means that the corporate governance structure is weak.

### ***State Owned Enterprise Law***

State owned enterprises in Vietnam are considered 'poorly defined with respect to direct responsibility and the share of authority', particularly since 'generalised supervisory rights [are] distributed over several different line organisations'.<sup>16</sup> In addition, the setting of profit targets aimed to improve corporate governance is carried out by managers with 'key inside information of the capabilities of the firm'.<sup>17</sup> This provides them with the ability to create targets that are readily achievable without much effort.<sup>18</sup> In fact, 70% of state owned enterprise managers agreed in a survey that the general approach in target setting is 'to make no loss, and only a little profit'.<sup>19</sup>

Further to this, Vietnam's *State Owned Enterprise Law* contains various shields and biases in favour of state owned enterprises. The legislation provides for

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<sup>13</sup> *Law on Enterprises 2005* (Vietnam) Article 9.

<sup>14</sup> Nguyen Dinh Cung and Scott Robertson, 'Corporate Governance in Vietnam' (Policy Brief No 36, The William Davidson Institute at the University of Michigan, 2005) 2.

<sup>15</sup> The World Bank, *Corporate Governance Country Assessment – Vietnam*, Report on the Observance of Standards and Codes (2006) 4.

<sup>16</sup> Nguyen, above n 11.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> MPDF/IFC Survey, as cited in Nguyen *ibid*.

'tax exemptions, tax reductions, additional allocations of exports under a quota, and biased awarding of government contracts'.<sup>20</sup> These governmental protections adversely affect the performance of state owned enterprises, making managers and directors complacent and lacking incentives to perform. In light of this situation, it is no surprise that commentators have gone as far as saying that no country has become wealthy by relying on state-owned enterprises'.<sup>21</sup>

One proposed solution to these problems is equitisation-based restructuring of enterprise structures to provide clearer definitions of authority, responsibility and accountability in state owned enterprises.<sup>22</sup> 'Nearly 3,840 [state owned] enterprises have been equitised over the past 17 years, according to the Ministry of Industry and Trade,' and with the expiration of the *State Owned Enterprise Law* looming in 2010, the pressure is increasing on an estimated 1,500 remaining state-owned firms to follow suit.<sup>23</sup>

This transitional process has been a slow one which has not resulted in any major improvements thus far.<sup>24</sup> It has also been noted that the movement of large national companies playing significant roles in key industries to be governed under the nation's enterprise law may cause problems and create gaps particularly since 'the [*Law on Enterprises*] is mainly applicable to small-sized...enterprises' with less complicated structures.<sup>25</sup>

Nevertheless, this transition is a positive step towards promoting better governance in the future. With careful examination and reorganisation of the legislation, Vietnam may soon improve its standing in the region in terms of corporate governance best practice.

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<sup>20</sup> *State Owned Enterprise Law 2003* (Vietnam), as cited in Nguyen and Robertson, above n 14, 5.

<sup>21</sup> Fredrick Sjöholm, 'State Owned Enterprises and Equitization in Vietnam' (Working Paper No 228, Stockholm School of Economics, 2006) 2.

<sup>22</sup> Nguyen and Robertson, above n 14, 7.

<sup>23</sup> VNS, *Equitisation Process Slow for State-Owned Enterprises* (2009) <<http://vietnamnews.vnagency.com.vn/showarticle.php?num=02ECO281109>> at 9 December 2009.

<sup>24</sup> LookAtVietnam, *Times are Changing for State Businesses* (2009) <<http://www.lookatvietnam.com/2009/10/times-are-changing-for-state-businesses.html>> at 9 December 2009.

<sup>25</sup> Ibid.

## 2 Singapore

Singapore was less affected than other countries in the region during the Asian financial crisis.<sup>26</sup> Nevertheless, the crisis led to major restructuring of its corporate governance regulatory framework.

### *Companies Act*

The *Companies Act* is the governing legislation in Singapore for companies, both private and public.<sup>27</sup> Section 157 sets out the duties and liabilities of directors:

- (1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.
- (2) An officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.<sup>28</sup>

Subsection 1 of the provision bears similarities to Australia's 'good faith provision',<sup>29</sup> but does not have an express requirement to act in the best interests of the company. The generality in the wording of the provision means that, also similar to the Australian provision, there is a lack of specific guidelines setting out what constitutes 'honesty' and 'reasonable diligence', and thus what exactly satisfies the requirements for good governance.

The Act mandates the adoption of Articles of Association in companies limited by guarantee and unlimited companies, and recommends the same for companies limited by shares.<sup>30</sup> The Fourth Schedule of the Act sets out recommended articles which include provisions for the structuring of share capital and any subsequent variations, proceedings at meetings, the appointment of directors, and the powers and duties of directors.<sup>31</sup> While adding on to the general statement of directors' duties, the recommended articles make reference only to general duties to keep proper accounts as well

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<sup>26</sup> Yuen Teen Mak and Chee Kiong Chng, 'Corporate Governance Practices and Disclosures in Singapore: An Update' (Draft, NUS Business School, 2000) 4.

<sup>27</sup> *Companies Act 1967* Cap 50 (Singapore), as cited in Guide Me Singapore, *Singapore Companies Act – Recent Amendments* (2009) <<http://www.guidemesingapore.com/business/c645-singapore-company-act-amendments.htm>> at 1 December 2009.

<sup>28</sup> *Companies Act 1967* Cap 50 (Singapore) s 157.

<sup>29</sup> *Corporations Act 2001* (Cth) s 181.

<sup>30</sup> *Companies Act 1967* Cap 50 (Singapore) s 35(1).

<sup>31</sup> *Companies Act 1967* Cap 50 (Singapore) sch 4.



as powers to carry out particular financial transactions on behalf of the company.<sup>32</sup> These also lack specific guidelines on good governance practices.

However, the *Companies Act* does contain a 'well-developed oppression remedy'<sup>33</sup> allowing shareholders to take action if their rights are not adequately protected. This serves as an important check on directors who might act without having regard to the intentions and interests of the company's shareholders.

### *Code of Corporate Governance*

The Singaporean *Code of Corporate Governance* was first recommended in 2001 by the Committee of Corporate Governance, which is 'a private sector led committee'.<sup>34</sup> The Code was reviewed by the Council on Corporate Disclosure and Governance (CCDG) in 2004, resulting in the issue of a revised Code in 2005.<sup>35</sup> Similar to the 'if not, why not' approach taken in the application of ASX's Corporate Governance Principles and Recommendations, listed companies in Singapore are 'required to disclose their corporate governance practices and explain deviations from the Code ... in their annual reports'.<sup>36</sup>

The Code contains provisions in relation to the role of the board of directors, including to –

- (a) provide entrepreneurial leadership, set strategic aims ...;
- (b) establish a framework of prudent and effective controls which enables risk to be assessed and managed;
- (c) review management performance; and
- (d) set the company's values and standards, and ensure that obligations to shareholders and others are understood and met.<sup>37</sup>

Guideline 1.2 in the Code states that 'directors must objectively take decisions in the interests of the company'.<sup>38</sup> This effectively makes up for the absence of an express requirement under the *Companies Act* for directors to act in the best interests of the company.

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<sup>32</sup> Ibid.

<sup>33</sup> *Companies Act 1967* Cap 50 (Singapore) s 216, as cited in Melissa Hofmann, 'The Statutory Derivative Action in Australia: An Empirical Review of its Use and Effectiveness in Australia in Comparison to the United States, Canada and Singapore' (2005) *Corporate Governance eJournal* 8 <<http://epublications.bond.edu.au/cgej/13/>> at 1 December 2009.

<sup>34</sup> Singapore Institute of Directors, *Code of Conduct* (2009) <[http://www.sid.org.sg/main/code\\_of\\_conduct](http://www.sid.org.sg/main/code_of_conduct)> at 10 December 2009.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> *Code of Corporate Governance 2005* (Singapore) Guideline 1.1.

<sup>38</sup> Ibid Guideline 1.2.

The other guidelines in the Code are somewhat similar to those of the ASX Corporate Governance Principles and Recommendations. They include recommendations for the composition of the board of directors, requiring a level of independence to ensure that objective judgment is exercised in company transactions.<sup>39</sup>

An interesting element embodied in the Code is that a Nominating Committee should be established not only 'to make recommendations ... on all board appointments',<sup>40</sup> but also to formally assess 'the effectiveness of the Board as a whole and ... the contribution by each individual director to the effectiveness of the Board'.<sup>41</sup> While this appears to provide a form of 'external' evaluation of performance, the fact that the committee is to be made up of 'at least three directors', albeit being independent ones, means that the directors are ultimately scrutinised by their own board members.<sup>42</sup>

### *Institute of Directors*

Singapore also has an Institute of Directors (SID) whose mission is 'To promote the professional development of directors and corporate leaders and encourage the highest standards of corporate governance and ethical conduct'.<sup>43</sup> The SID published the Directors' Code of Professional Conduct to complement the Code of Corporate Governance.<sup>44</sup> The document 'amplifies the standards of ethics which should be adopted by individual directors in order to bring about the highest standards of conduct in the discharge of their [duties]'.<sup>45</sup>

The first principle in the Directors' Code iterates basic but vital responsibilities for directors to ensure that they have the required knowledge and understanding to carry out their duties.<sup>46</sup> The following principles set out guidelines on acting honestly, carrying out duties with due diligence and ensuring that directors constantly disclose all possible conflicts of interests and, if possible, avoid them.<sup>47</sup> The specific guidelines included are useful in providing benchmarks of good governance.

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<sup>39</sup> Ibid Guideline 2.

<sup>40</sup> *Code of Corporate Governance 2005* (Singapore) Guideline 4.1.

<sup>41</sup> Ibid Guideline 5.1.

<sup>42</sup> Ibid Guideline 4.1.

<sup>43</sup> Singapore Institute of Directors, *Mission and Objectives* (2009) <<http://www.sid.org.sg/main/mission>> at 10 December 2009.

<sup>44</sup> Singapore Institute of Directors, *Code of Conduct*, above n 34.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid A1.

<sup>47</sup> Ibid B1, B2 and B3.

Nevertheless, the fact that the principles are put in place by the Institute of Directors raises the same problem that there is little, if any external monitoring of performance. In particular, the final principle in the Directors' Code states that, 'A director shall set and maintain high personal standards by honouring and promoting the Code and encouraging other directors in its observance'.<sup>48</sup> There is no room in this instance for shareholders or any other stakeholders to intervene in deciding whether or not a particular director's personal standards are sufficiently high in accordance with this principle. As such, directors will be able to protect themselves by setting low standards and explaining that these reflect their 'high personal standards'.

Possibly due to a high level of discipline in the implementation of its codes and legislations, Singapore's corporate governance framework as a whole is seen to be better structured than many others, despite the weaknesses encountered. While having a good system of corporation governance is important, it is equally important that the system be enforced.

### 3 Malaysia

In the ADB study previously referred to, Malaysia was ranked as the country with the highest quality of corporate governance as compared to Indonesia, Korea, Thailand and Philippines. The reason for this was said to be that Malaysia 'initiated measures that attempted to strengthen and [modernise] the regulatory framework for the corporate sector and capital markets well before the outbreak of the Asian [financial] crisis'.<sup>49</sup>

However, there has also been commentary about Malaysia receiving 'much criticism in recent years since the failure of numerous companies during and after the financial crisis', leading to the realisation that its supposedly strong corporate governance structure is now facing 'systemic stability' issues and requires further improvement.<sup>50</sup>

Malaysia's corporate governance framework mainly centres on the country's *Companies Act 1965* and its *Code on Corporate Governance*.

#### *Companies Act*

Since Singapore adopted a *Companies Act* that was identical to Malaysia's immediately after the former's independence,<sup>51</sup> s 132 of Malaysia's *Companies Act* (setting out the duties of directors) mirrors the Singaporean provision.

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<sup>48</sup> Ibid C1.

<sup>49</sup> Capulong, Edwards and Zhuang, above n 2, 3.

<sup>50</sup> Kamini Singam, 'Corporate Governance in Malaysia' (2003) 15(1) *Bond Law Review* 314, 316.

<sup>51</sup> Guide Me Singapore, above n 27.

Directors are required to 'act honestly and use reasonable diligence in the discharge of the duties of [their] office' at all times.<sup>52</sup> Companies are also required to adopt Articles of Association describing 'regulations [specific to the company] governing the internal management of the affairs of the company and the conduct of its business'.<sup>53</sup>

### *Code on Corporate Governance*

Malaysia's Code on Corporate Governance was first introduced in 2000, '[marking] a significant milestone in corporate governance reform in Malaysia'.<sup>54</sup> A revised version of the Code was released in 2007, incorporating amendments 'aimed at strengthening the board of directors and audit committees, and ensuring that [these bodies] discharge their roles and responsibilities effectively'.<sup>55</sup> Companies must 'include in their annual report a narrative account of how they [have applied] the broad principles set out in the Code', but there is no prescriptive method for compiling such statements.<sup>56</sup> The imposition of a more flexible approach again aims to prevent directors from simply ticking the boxes instead of focusing on actual governance practices required for their respective companies.<sup>57</sup>

Again similar to the approach taken in both Australia and Singapore, listed companies in Malaysia have more stringent requirements in relation to the Code, with mandatory disclosure requirements pursuant to the Listing Requirements of Bursa Malaysia, which is the nation's stock exchange.<sup>58</sup>

Similar to the pattern followed by countries previously examined, Malaysia's Code does not contain provisions that largely differ from that of the ASX. The main principles set out in the Code relate to the constitution of directors, the determination of appropriate remuneration, the communication between the board and shareholders, and the importance of accurate and timely financial reporting.<sup>59</sup> This provides a guide for good governance of companies but is complicated by the governmental involvement in Malaysian businesses.

Where Malaysia differs is its Bumiputra Policy. This is 'designed to expand the economy and give [indigenous Malaysians] a bigger share of control in the

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<sup>52</sup> *Companies Act 1965* (Malaysia) s 132(1).

<sup>53</sup> Helpline Law, *Incorporation of Company in Malaysia* (2009) <<http://www.helplinelaw.com/article/malaysia/77>> at 1 December 2009.

<sup>54</sup> *Code on Corporate Governance 2007* (Malaysia) Preface.

<sup>55</sup> *Code on Corporate Governance 2007* (Malaysia) Preface.

<sup>56</sup> *Code on Corporate Governance 2007* (Malaysia) Introduction.

<sup>57</sup> *Code on Corporate Governance 2007* (Malaysia) Introduction.

<sup>58</sup> *Listing Requirements of Bursa Malaysia* (2009) para 15.26.

<sup>59</sup> *Code on Corporate Governance 2007* (Malaysia) Principles.

Malaysian capital markets'.<sup>60</sup> The introduction of this policy led to 'strong governmental and political involvement in business environments', which has significant drawbacks.<sup>61</sup> As was discussed in the situation with Vietnam, the intervention of the state or nation creates the tendency for complacency, particularly where a director is of indigenous Malay descent, whose position is protected by virtue of this, regardless of his/her performance.<sup>62</sup> The Bumiputra Policy potentially undermines the effectiveness of the country's corporate governance framework, albeit its highly positive rating on paper.<sup>63</sup>

#### 4 Philippines

The Philippines is another country where corporate governance is said to be 'weak in practice though the formal provisions have been assessed to be more than adequate'.<sup>64</sup>

##### *Corporation Code*

The provisions of the *Corporation Code* in relation to the duties and liabilities of boards of directors are quite distinct from those of other countries in the region. There is no express provision outlining the duties of directors, but s 31 sets out potential liability for any losses caused by the directors' conduct:

Directors ... who wilfully and knowingly vote for or assent to patent unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation or acquire any personal or pecuniary interest in conflict with their duty as ... directors ... shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members and other persons.<sup>65</sup>

The particular elements under this section are wilful knowledge, an agreement to the unlawful act, gross negligence, bad faith or a conflict of interest. Although the provision appears to be brief and less effective since there is no express provision for directors' duties, it in fact encompasses a broader scope than most directors' duties provisions. That a director with knowledge of the unlawful act can potentially be liable for damage by simply allowing it to take place leaves a strict onus on directors to act prudently in making decisions on company transactions, and not be willing to side with other members of the board without first considering the merits of a decision.

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<sup>60</sup> M Backman, *Asian Eclipse – Exposing the Dark Side of Business in Asia* (2<sup>nd</sup> ed, 2001) 205, as cited in Singam, above n 50, 323.

<sup>61</sup> Singam, above n 50, 327.

<sup>62</sup> Backman, above n 60, 2, as cited in Singam, above n 50, 317.

<sup>63</sup> Capulong, Edwards and Zhuang, above n 2, 3.

<sup>64</sup> Securities & Exchange Commission of Pakistan, *Philippines* <<http://www.secp.gov.pk/rc/CorpGovIntTrends/Philippines.pdf>> at 10 December 2009.

<sup>65</sup> *Corporation Code* (Philippines) s 31.

While this suggests that the Code provides an effective mode for ensuring good corporate governance, 'the regulatory system ... has a relatively poor enforcement mechanism in identifying and punishing poorly governed ... firms until an actual corporate crisis has occurred'.<sup>66</sup> When enforcement begins taking place, it is normally too late to rectify the condition.

### *Code of Corporate Governance*

The Philippines Securities and Exchange Commission (SEC) introduced a *Code of Corporate Governance* in 2002. The Code is similar to the others previously discussed, but places a greater emphasis on 'risk management and capability building as explicit functions of the [board of directors]'.<sup>67</sup> This focus reflects the view that good corporate governance does not only boil down to accountability and ethical behaviour, but also to competence.<sup>68</sup>

Companies are required to explain the extent of its compliance with the Code as well as reasons for deviations by issuing a certificate each year.<sup>69</sup> This is again similar to the ASX's 'if not, why not' approach.

### *Code of Proper Practices for Directors*

There is also an Institute of Corporate Directors established in the Philippines. This Institute has issued a *Code of Proper Practices for Directors* aimed at providing guidance in the governance of companies in the country.<sup>70</sup> Nevertheless, this Code does not add much to the *Code of Corporate Governance* except that it has a unique option for 'companies [that] wish to support the Code' to include a statement to that effect in their annual report.<sup>71</sup> This arguably opens up an avenue for companies who do not in fact comply with the provisions of the Code to appear to support its objectives.

## **5 Indonesia**

Indonesia was one of worst victims of the Asian financial crisis. During that event the rupiah depreciated by almost 80%, and there were a number of

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<sup>66</sup> Securities & Exchange Commission of Pakistan, above n 64.

<sup>67</sup> Benjamin A I Espiritu, 'The Effects of Corporate Governance Regulations on the Practices of Directors of Banks: A Philippine Experience' (Paper presented at the Conference 'Emerging Issues in Business and Economics: Governance and Innovation', 9 March 2005) 9.

<sup>68</sup> Ibid.

<sup>69</sup> Robert Goddard, *Philippines: SEC Adopts Revised Corporate Governance Code* (2009) Corporate Law and Governance <<http://corporatelawandgovernance.blogspot.com/2009/06/philippines-sec-adopts-revised.html>> at 10 December 2009.

<sup>70</sup> *Code of Proper Practices for Directors 2000* (Philippines).

<sup>71</sup> Ibid.

collapses in the banking and corporate sectors.<sup>72</sup> This was a clear display of (among other things) the weakness of Indonesia's corporate governance structure. A number of factors contributed to the downfall, including the fact that 'almost all listed companies in Indonesia are overvalued',<sup>73</sup> and that most companies rely heavily on debt financing.<sup>74</sup>

### *Company Law*

The Indonesian *Company Law 2005* is the primary framework governing corporate governance in Indonesia.<sup>75</sup> The legislation requires directors to carry out their duties 'in good faith and with full responsibility ... in the best interests of the company'.<sup>76</sup> There are also some general requirements for directors to keep proper accounts of the company and establish appropriate registers for the company including a Register of Shareholders,<sup>77</sup> but no additional standards worth noting.

### *National Committee on Governance*

The Indonesian National Committee on Governance (NCG) drafted and published the Indonesian *Code of Good Corporate Governance* in 2004.<sup>78</sup> The NCG aimed to 'broaden its scope to cover public as well as corporate governance ... to "transform Indonesia into a country with one of the best applications of good governance" and ... be among the top quartile of countries in international surveys of good governance by 2009'.<sup>79</sup> Unfortunately, there is little progress in this direction and nothing to suggest that these objectives will be achieved any time soon.<sup>80</sup>

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<sup>72</sup> William E Daniel, 'Corporate Governance in Indonesian Listed Companies – A Problem of Legal Transplant' (2003) 15(1) *Bond Law Review* 345, 345.

<sup>73</sup> McKinsey & Co, *Listed Companies in Indonesia* <<http://www.mckensey.com>>, as cited in Daniel, *ibid* 353.

<sup>74</sup> Daniel, *above n* 72, 354.

<sup>75</sup> Forum for Corporate Governance in Indonesia, *Corporate Governance in Indonesia: What is the Existing Law on Corporate Governance in Indonesia?* (2006) <<http://www.fcgi.or.id/en/aboutgc2.shtml>> at 14 November 2009.

<sup>76</sup> *Company Law 2005* (Indonesia), as cited in *ibid*.

<sup>77</sup> Forum for Corporate Governance in Indonesia, *above n* 75.

<sup>78</sup> Asian Corporate Governance Association, *Annotated Links – Indonesia* (2007) <[http://www.acga-asia.org/content.cfm?SITE\\_CONTENT\\_TYPE\\_ID=7&COUNTRY\\_ID=265](http://www.acga-asia.org/content.cfm?SITE_CONTENT_TYPE_ID=7&COUNTRY_ID=265)> at 3 September 2010.

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid*.

## 6 Thailand

Thailand ranked above world averages for many key standards in the World Bank's corporate governance assessment of the country in 2005.<sup>81</sup> The government undertook significant reforms in this area following the Asian financial crisis with substantial effort particularly in 2002, which was 'the year for good corporate governance', and the National Corporate Governance Committee (NCGC) was established.<sup>82</sup>

### *National Corporate Governance Committee*

The NCGC is constituted by the Prime Minister, Ministers of Finance and Commerce, the Governor of the Bank of Thailand, the President of the Stock Exchange of Thailand (SET), and various other significant figures in the corporate sector.<sup>83</sup> The committee's responsibilities include the establishment of 'policies, measures and schemes to upgrade the level of corporate governance among institutions, associations, corporations and government agencies in the capital market' and the promotion of 'guidelines of good corporate governance to the public and related parties'.<sup>84</sup>

### *Stock Exchange of Thailand*

The Stock Exchange of Thailand (SET) has also played an active role in the country's corporate governance reform initiatives. One of its major contributions is the issuance of 15 corporate governance principles<sup>85</sup> which 'cover most key points addressed by the Sarbanes-Oxley Act in the United States'.<sup>86</sup> These principles are considered far reaching and sufficiently broad with few flaws.<sup>87</sup>

In addition, the SET issued a policy statement containing its Code of Best Practice for Directors of Listed Companies.<sup>88</sup> The Code sets out the functions of listed company directors as well as a list of best practices recommended to

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<sup>81</sup> Chrissa La Porte, 'Thailand Ranks High on Corporate Governance' (2005) 14(10) *Thailand Investment Review* 1.

<sup>82</sup> *Ibid.*

<sup>83</sup> National Corporate Governance Committee, *Appointment of National Corporate Governance Committee* <[http://www.cgthailand.org/SetCG/about/ncgc\\_en.html](http://www.cgthailand.org/SetCG/about/ncgc_en.html)> at 7 December 2009.

<sup>84</sup> *Ibid.*

<sup>85</sup> La Porte, above n 81.

<sup>86</sup> Bureau of Economic, Energy and Business Affairs, *2009 Investment Climate Statement – Thailand* (2009) US Department of State <<http://www.state.gov/e/eeb/rls/othr/ics/2009/117189.htm>> at 21 September 2009.

<sup>87</sup> eStandards Forum, *Thailand – Principles of Corporate Governance* <<http://standardsforum.org/thailand/standards/principles-of-corporate-governance>> at 3 September 2010.

<sup>88</sup> *SET Code of Best Practice for Directors of Listed Companies* (Thailand).



be adopted. The best practice recommendations encompass a wide range of guidelines for listed company directors and independent directors.<sup>89</sup> These begin from issues of competence and skills required to effectively govern the company and proceeds to cover conflict of interest situations including requirements for full and frank disclosure.<sup>90</sup> The Code is a comprehensive but concise document (it is only three pages long).

The SET also developed a CG Rating Project in conjunction with the Office of Securities and Exchange Commission (SEC) and Thai Rating and Information Services Co Ltd (TRIS) whereby 'information about corporate governance ranking [is disseminated] for investor's decision making'.<sup>91</sup> The aim of this project is to encourage companies to ensure that their corporate governance reaches a 'qualified standard' to improve its standing in the CG Rating.<sup>92</sup>

As a whole, the corporate governance framework in Thailand is very well developed, with new initiatives to create incentives for good governance. The country's continuous progress in this sphere is expected to increase the level of confidence in Thailand's business environment in the long term.<sup>93</sup>

## CONCLUSION

This study of selected South East Asian countries raises several conclusions. First, these countries have considered there to be merit in setting up corporate governance frameworks. Secondly, each country appears to have recognised the correlation between an absence of corporate governance and corporate failure: each country's corporate governance framework appears to have been designed or revised, at least in part, as a response to the Asian economic crisis and its associated corporate collapses.

Further, the corporate governance frameworks are similar to that in place in Australia. Several key themes are repeated in each country's framework. The independence of the board of directors is emphasised in most corporate governance codes, as is the requirement that the board be effectively composed. That is, it has the required skill and knowledge for carrying out their duties. Other key themes include the identification of directors' duties, particularly those to act in good faith in the best interests of the company.

Finally, while most of the jurisdictions have adequate frameworks in place, the extent to which they are enforced varies widely. This variance has little to

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<sup>89</sup> *SET Code of Best Practice for Directors of Listed Companies* (Thailand).

<sup>90</sup> *Ibid.*

<sup>91</sup> National CG Committee, *CG Rating*

<[http://www.cgthailand.org/SetCG/award/award\\_en.html](http://www.cgthailand.org/SetCG/award/award_en.html)> at 3 December 2009.

<sup>92</sup> *Ibid.*

<sup>93</sup> La Porte, above n 81.

do with those jurisdictions' lack of recognition of the value of corporate governance. It is rather a result of a weak rule of law within the jurisdictions, and the existence of corruption at different levels of those societies. Another factor which may contribute to this is a lack of shareholder power: for example, in Singapore and Australia, a significant proportion of the population owns shares. At the risk of generalising, as a group, these people are politically empowered and legally aware, such that they would be unlikely to tolerate infringements on their rights. Poorer societies which lack an empowered, shareholding middle class (such as The Philippines) also lack this check on the potential abuse of power by management. The necessary links in a competent corporate governance regime between sound governance laws and their enforcement merits further research.