Comparison between India and Australia with Respect to Corporate Governance

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Abstract:
Governance means monitoring the way in which activities are directed and controlled. When the term governance is used in context of companies, it becomes corporate governance, which means monitoring the way in which activities are directed and controlled in the companies. Because of the breakout of humungous number of scandals around the world since late 20th century, this concept of corporate governance has been able to gain prominence across the globe. Different nations have different kind to structures to deal with the prevention of scandals and collapses, but the economies can and should always learn from each others' experience and systems.

Keywords: *Company, Corporate Governance, Learn, Structure*

1. Introduction

In this paper, an attempt is made to bring out the comparative picture of differences between India and Australia with regard to corporate governance practices. This analysis would be of great use in drawing lessons from Australian Corporate Governance Practices and imbibe them in India's structure. The issue of corporate governance gained prominence with the publication of Jensen and Meckling's article (1976).[1] According to Sir Adrian Cadbury, who is the father of Corporate Governance, Corporate governance refers to the way by which corporations are directed and controlled.

Issue of Corporate Governance arises because of the separation of ownership from management and control in modern corporations. So, Corporate Governance Issues arise wherever agency problems exist. Therefore, discipline of Corporate Governance has developed as a way of ensuring that:

1. Investors other than promoters receive a fair return on their investment by protecting them against management expropriation or use of the investment capital to finance poor projects.
2. Other Stakeholders assume that their interests are properly catered for.

Absence of such assurance leads to a situation where fraudulent companies usually crowd out public investment from equity markets and victims of general investor apathy are 'genuine companies'. This situation can become particularly detrimental for smaller firms which find it difficult to fund their investment projects. Independent and effective corporate governance institutions thus become necessary in order to restore the credibility of capital markets to facilitate the flow of investment finance to firms. International creditors are also increasingly evaluating companies on the basis of this criterion – commitment to good corporate governance, shareholder rights, Board of Directors, transparency and disclosure.[2] Other benefits of corporate governance include: rise in turnover, increase in profits, reducing the cost of capital, satisfied stakeholders, etc. But, creating value that is not only profitable to the business but sustainable in the long-term interests of all stakeholders necessarily means that businesses have to run—and be seen to be run—with a high degree of ethical conduct and good governance where compliance is not only in letter but also in spirit.[3]

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[1] Som, L. S. (2013). Corporate Codes in India. *41*, 39.Available at http://www.jstor.org/stable /4418757
[2] Som, L. S. (2013). Corporate Codes in India. *41*, 39.Available at http://www.jstor.org/stable /4418757
[3] Pande, S., & Kaushik , K.V. (2012). Study on the state of corporate governance in India, evolution, issues and challenges for future. Available at http://www.iica.in/images/Evolution_of_Corporate_Governance _in_India.pdf

For achieving this on global scale, countries around the world are coming with codes, reports, rules, regulations, principles, recommendations, guidelines and practices on corporate governance. It appears from the analysis, that both the countries (India and Australia) have borrowed the corporate governance practices from UK Company Law. Before stepping into wholesome comparative analysis, there is a need to explain some terms used in the paper: There are two types of corporate governance models are prevalent in any part of the world:

1. **Single Tier System (Unitary Board Structure)**: Companies have a single board which might be small or large. Small board consists of, on an average 10 to 15 members and Large Board consists of more than 30 members.
2. **Two Tier System:** Company has two boards, generally termed as Supervisory Board and Management Board. In each country, the corporate governance structure has some characteristics which distinguish it from the corporate governance structure of other countries. Such characteristics include:

- Composition of board of Directors,
- Corporate Actions requiring shareholders' approval,
- Key players in the corporate environment,
- Disclosure requirements for publicly listed stock companies, etc.

These different elements can be summed up in two competing models: etc.

1.1 Outsider Model

An 'insider' is a person who is either employed by the corporation or has significant relationship with the company or management. An 'outsider' is a person who has no direct relationship with the corporation or corporate management. So, corporations following this model have a mix of inside and outside directors on their boards; have low concentration of voting power; information is public; high activity in corporate control market ,etc.

1.2 Insider Model

Corporations following this model have a large number of insider directors on their boards; have high concentration of voting power; low level of corporate control activity; information is private, etc. Both India and Australia seem to be following outsider model of Corporate Governance. But, let us find the differences among them with respect to corporate governance practices.

2. Relevance of the Study

India, being a developing country, should learn from other developing and developed countries, with special reference to those nations, whose company law foundation has been the same, as of India (UK Company Law). Of such nations, Australia is among the leads. So, an attempt is made to compare the corporate governance practices of these two countries and then explore as to what India can learn and absorb in its own structure.

3. Objectives

1. To compare and contrast the corporate governance practices of India and Australia.
2. To infer lessons from the analysis for improving India's Corporate Governance Framework.

4. Methodology

Secondary data is used. Paper is based on the analysis of information obtained through articles from various websites accessible in Ratan Tata Library, Delhi; various books on corporate governance; official websites of regulatory and legislative bodies of Australia and India and through newspapers.

5. Organization of the Study

The paper is further divided into three sections. Next section would comprise of comparative table for obtaining clear cut differences between two countries with respect to corporate governance, followed by summary, conclusion and references.

6. Comparison Table

Even though there are many differences between these two countries with respect to their corporate governance practices, but there are few similarities as well. For instance:

- The company law of both the countries is borrowed from UK Company Law.
- Both are common law jurisdictions with legal foundations and principles originating from British Colonial Area.

- Corporation Act has also undergone major changes since 1990s like Company Laws in India.

No.	Basis of comparison	Australia	India
1.	Stage of Development	Developed Country	Developing Country
2.	Model of Corporate Governance	Australia has almost, all the times, been traditionally characterized as following outsider system of corporate governance.	India also follows outsider system of corporate governance (Anglo American Model), but not since always. Companies started following it from 1991.
3.	First Company Formed	Was formed in New South Wales in 1817, as an unincorporated joint stock company governed by law of partnership and its deed of settlement.	'Carr Tagore and Company' was formed in 1834, as first equal partnership of Indian and European, under Managing Agency model.
4.	Legislation	Companies are governed under Corporation Act' 2001 (amended from time to time), listing rules, corporate governance principles and recommendations (comply or explain basis) and prudential standards. Corporation Act is administered by Australian Securities and Investment Commission (ASIC) and Parliament; listing rules and corporate governance principles and recommendations are administered by Australian Stock Exchange (ASX) and prudential standards are under Australian Prudential Regulation Authority (APRA).	Companies are currently governed under Companies Act' 1956 and 98 enforced sections of Companies Act' 2013 (gradually latter will replace the former completely); Securities Contract (Regulation) Act' 1956; Listing Agreement and Depositories Act' 1996. Companies Act is administered by Ministry of Corporate Affairs (MCA) and rest are administered by Securities Exchange Board of India (SEBI).
5.	Composition of Company Law	5 Volumes, 10 Chapters and 1471 sections are constituted under Corporation Act' 2001.	29 Chapters, 470 Clauses and 7 Scheduled are constituted under Companies Act' 2013. Under Companies Act' 1956: XIII Parts, 658 Sections, 6 Tables and 15 Schedules.
6.	First enactment for Joint Stock Companies	Was passed in New South Wales in 1839.	Was passed in 1850, following the similar Act of 1844 of UK.
7.	Introduction of LLPs	Introduced in New South Wales and Victoria in early 1850s for mining enterprises.	Limited Liability Partnership Act was enacted in 2008. First LLP was Handoo & Handoo, established in South India in 2009.
8.	Introduction of One Person Company	One Man Company was provided by Corporation Law Simplification Act' 1995.	One Person Company is provided for by Companies Act' 2013.
9.	Private Companies	Minimum of one director; name of the company to be suffixed by the words: Pty. Ltd.	Minimum two directors; name of the company to be suffixed by the word: Pvt. Ltd.
10.	Public Companies	Minimum 3 directors, out of whom 2 directors must be Australian Residents.	Minimum 3 directors, out of whom at least 1 director must be resident in India.
11.	Small Company	Classified on the basis of share capital and gross assets; eg: share capital shall not exceed $ 25 million to be called *Small Proprietary Company.*	Classified on the basis of share capital and turnover; eg: share capital shall not exceed Rs. 50 lakh (Rs. 5 million) to be called a small company.
12.	Board Structure	Unitary Board Structure, comprising of executive directors, non executive directors and independent directors. The trend is to appoint 3 independent non executive directors for every 1 executive director.	Unitary Board Structure, comprising both executive directors, non executive directors and independent directors with *one-third* of number of directors on board shall be independent directors.
13.	Gender Diversity in Board, as on 31/1/2014	Percentage of women on boards is 17.6%.	Percentage of women on boards is less than 7%. However, Companies Act' 2013 has made it mandatory for certain class of companies to have atleast one woman director on board.
14.	Independent Directors and Chairman of the Company	The trend is to have one-third of number of directors on board as independent non executive directors, with minimum 2 independent directors; *Chairman of the company to be an independent director*, if not, then there has to be a lead independent director.	One-third of number of directors shall be independent directors; *there is no as such requirement for Chairman to be an independent director.*
15.	Re-election of Directors	Apart from the case of two strike rule (as was discussed earlier), directors must submit for re-election at the third AGM following the appointment or after three years, whichever is longer (except for one Managing Director(MD)/CEO; if there are more than one, then only one MD/CEO will not be subject to re-election).	In a public company and in a private company which is a subsidiary of public company, not less than 2/3 of total number of directors shall be persons whose period of office is liable to determination by retirement by rotation and 1/3 of such rotational directors shall retire , at every AGM.
16.	Independent Directors and Chairman of the Company	The trend is to have one-third of number of directors on board as independent non executive directors, with minimum 2 independent directors; *Chairman of the company to be an independent director*, if not, then there has to be a lead independent director.	One-third of number of directors shall be independent directors; *there is no as such requirement for Chairman to be an independent director.*
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		to re-election).	1/3 of such rotational directors shall retire , at every AGM.
18.	Remuneration to Directors	Shareholders have a binding vote on any increases to the total pool of non executive director fees. Generally this pool is equally divided among directors, with additional fees for committee members, chairman of committees and board. With effect from 2011, two strike rule has emerged, i.e. if at two consecutive meetings over 25% of shareholders vote against the directors' remuneration package, the directors have to stand for re-election in 90 days; also it is mandatory that non executive directors are to be remunerated on fixed basis, but executive directors are to be remunerated on fixed plus performance based evaluation.	There is no such similar concept in India. However, Kumar Mangalam Birla Committee's mandatory recommendations included shareholders' approval of compensation to non executive directors and Companies Act' 2013 requires approval of the company in general meeting for remuneration to directors for higher than 11% of net profits.
19.	Removal of Directors by shareholders	Directors can be removed by the shareholders by passing ordinary resolution; in case of public companies, 2 months' notice before the meeting is required; in case of private companies, procedure can be made simpler.	Directors can be removed by shareholders by passing ordinary resolution, but here, 14 days special notice is required.
20.	Audit Committee	Consists only of non executive directors with majority of independent directors; Chairman of the committee shall be an independent director; atleast one member of the committee to be financial expert and others should be financially literate; committee to have a formal charter; committee to meet atleast twice a year.	Consists minimum of three directors with majority of independent directors; majority of members including chairman shall be able to read and understand financial statements; penalty for non compliance: company shall be liable to pay a fine which shall not be less than 1 lakh but which can extend to 5 lakhs rupees; every officer or director responsible, shall be liable to pay a fine which shall not be less than Rs. 25000 but which may extend to one lakh rupees or imprisonment of one year or both.
21.	Nomination and Remuneration Committee	Remuneration Committee: Consists of majority of independent directors with chairman necessarily to be an independent director.	Shall consist of three or more non executive directors with not less than half as independent directors; Chairman of the company shall not act as Chairman of the Committee.
22.	Stakeholders Relationship Committee	Nil	Board of Directors of a company which consists of more than 1000 shareholders, debenture holders, deposit holders and any other security holders at any time during a financial year shall constitute a Stakeholder's Relation Committee consisting of the chairperson (non executive director) and such other members as may be decided by the Board.
23.	Provision on political donations	Australia has few rules on political donations. It requires disclosure of donations.	For a company other than government company and a company which has been in existence for less than three financial years: Political Contribution in any financial year shall not exceed 7.5% of its average net profits during the three immediately preceding financial years. Provided such a contribution shall be made by the company through a resolution passed at the board meeting. Also, the name of the party and amount has to be stated in the Profit & Loss Account. If the provisions are contravened, penalty would amount to five times the amount contributed.
24.	Whistle Blowing	The Australian Government first signalled its intention to legislate in this area in 2002; ASX Corporate Governance Council Principles and Recommendations provide for it; Corporation Act restricts retaliation against any whistleblower and gives him/her civil rights including reinstatement of employment, qualified privilege against defamation; thus, protection is extensive; a proper website has been designed for the purpose.	The concept of whistle blowing caught attention in India in 2003 after the death of Satyendra Dubey; However, Public Interest Disclosure (Protection of Informers) Bill was drafted in 2010 which does not cover corporate sector; Companies Act' 2013 provides for it but not in such extensive manner as Australia provides. However, in India, whistle blower might even get direct access to Chairman of Audit Committee.
25.	Insider Trading	It is a common practice for Australian companies to introduce either 'trading windows', period when general restriction is imposed on trading, or, 'blackouts' (during which key management personnel are likely to be in possession of non-public material information), a period of no general restriction but a period of no trading might be imposed. Use of 'trading windows' and 'black outs' is encouraged, but it is left to the companies themselves to decide which of these should be adopted, having regard to the size of the company and nature of its activities. If 'trading windows' or 'black outs' are adopted, full details are to be disclosed; Company must immediately notify ASX of any material price sensitive information; If insider trading rules are contravened then maximum penalty is	

		10 years imprisonment and/or $ 4,50,000 fine.	
26.	Rotation of Auditors	A person engaged in auditing cannot provide audit services for a particular client for more than five out of seven financial years. A gap of two years is required after the auditor is involved in the audit for five successive years.	An individual auditor can have one term of 5 years; an audit firm can have two consecutive terms of 5 years. Than there comes mandatory cooling off period of 5 years.
27.	Dealing with the loss of experience with the outgoing auditor	For making up for the probable loss of experience with the outgoing auditor, Australia encourages long staff planning, i.e. to plan for overlapping terms for lead and review auditors.	Nil
28.	Class Action Suit	Required number of petitioners: Seven or more persons must claim against the same defendant; introduced in 1991.	Required number of petitioners: in case of company having share capital, 100 members; in case of company not having share capital, 1/5 of members. Introduced in 2013.
29.	Corporate Social Responsibility	In 2006, two significant public reviews were undertaken and it was found that no statutory or legal requirement was needed for Corporate Social Responsibility.	Considered first of its kind, the Companies Act' 2013 requires companies having net worth of at least Rs 500 crore or having minimum turnover of Rs1,000 crore or those with at least net profit of Rs5 crore to spend at least 2% of their three-year average annual net profit towards CSR activities. There is no penalty for not spending such an amount, but explanation for non compliance is sought in the Board's Report.

7. Conclusion

It appears from the study that what all practices have been imbibed by India in Companies Act' 2013 with respect to corporate governance, are being followed in Australia from past one and a half decade. For instance, concept of class action suit which will now be made effective in India through Companies Act' 2013, is being practiced in Australia since 1991; the concept of whistle blowing follows the same plot; concept of one person company which started in Australia in 1995, has been taken up by India in 2013. Another testimony to the finding comes from the observation that Australia has well developed and timely updated websites for almost every corporate governance practice. For instance: www.whistleblowers.org.au deals with every aspect associated with whistle blowing, including the rules and regulations, procedure for exposing the wrongdoing and all the safeguards and repercussions; similarly www.classactionsaustralia.com.au provides for class action suits.

Being a developing country, India should learn new practices from Australia. For example: Chairman of the company should also be an independent director; audit committee should have a formal charter, auditors' attendance in AGM, extensive protection for whistle blowers; practice of introducing either 'trading windows', period when general restriction is imposed on trading, or, 'blackouts' (during which key management personnel are likely to be in possession of non-public material information), a period of no general restriction but during which a period of no trading might be imposed along with disclosing full details of their application; for making up for the probable loss of experience with the outgoing(post rotation) auditor, encouraging long staff planning, i.e. to plan for overlapping terms for lead and review auditors. With regard to remuneration of directors, two strike rule, i.e. if at two consecutive meetings over 25% of shareholders vote against the directors' remuneration package, the directors have to stand for re-election in 90 days and that non executive directors be remunerated on fixed basis, but executive director be remunerated on fixed plus performance based evaluation, could also be considered. Along with absorbing such new methods, certain other issues associated with Companies Act' 2013 like ambiguity in eligibility and appointment of internal auditors; absence of consideration for size of the company (based either on turnover or profits) for application of rotation rules of auditors and lack of clarity in the meaning of material fraud, also need to be resolved. Finally, I would like to conclude as: That even though, as Corporate Governance has now become one of the essentials for survival of the company, resulting in uncountable rules and regulations cropping up from around the world; commitment has to come from within the persons responsible for running the company to make the organization as much clean and transparent as possible or as much ethical as required on the grounds of societal, national and international considerations and expectations.

Here, company can be compared to a human being. Just like, as we cannot expect a thief to completely quit theft and robbery because of higher stringency in the laws, similarly we cannot precisely say that introduction of all sort of corporate governance practices would lead to complete mental revolution of corporate mindset. But, these rules, regulations, practices, principles and guidelines can help in timely

tracking of the wrongdoings of the companies. Hence, it is very well said in the Cadbury Code that no system of checks, balances and regulations can eliminate the risk of fraud by the companies but these mechanisms can act as a means of detecting these activities before it gets too late. Therefore, India can still learn and imbibe a lot from other countries and from its own new experience that is going to be flashed in the near future after full fledged implementation of Companies Act' 2013.

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