2017 - Volume 1 - Issue 6

THE ACG REPORT

ACG Company Watch | Corporate Governance | Press Review

In This Issue:

Uber

Tensions between maverick founder and the board (and shareholders) finally tear the company apart at the top; we perform the usual ACG assessment (in mini) of Uber against our Golden Rules.

Barclays

We revisit corporate governance at the British banking giant as the UK's Serious Fraud Office prosecutes the company in relation to its crisis fundraising in 2008.

Toshiba/Japanese CG

Just three months after we feature the longstanding senior member of Japan Inc., the company is once more in the headlines, with bankruptcy being spoken of as a serious possible outcome.

Anglo American

Following our case study last year, we follow the fortunes of the 100 year old mining giant as it benefits from rising prices but continues to face pressure, especially from the push for black ownership in South Africa.

Introduction

In this sixth Report, we feature less companies but in more detail, as is especially warranted in the first case, a look at the disaster which passes for governance at Uber, the global disrupter of the taxi industry.

We also revisit two old friends, Barclays Bank and Toshiba to observe further turmoil for these governance-challenged corporations.

And we consider the strategic issues facing Anglo American's mining operation in South Africa..

Applied Corporate Governance
People Planet Profit

The Key to Good Corporate Governance

Dealing with uncertainty

All the companies in this month's report have faced uncertainty. How can our Golden Rules help an organisation through uncertain times?

- **Ethics**: most fundamentally, a strong ethical culture and *personal governance* ensures action is taken with the best of intentions for all stakeholders.
- **Clear, congruent goals**: working together towards agreed goals - and being prepared to change them - is the only way to sail successfully through uncertain seas.
- **Sound strategy**: a sound, yet flexible, strategy, missing in every failure, can mitigate uncertainty by focussing on core strengths.
- **Organisation**: strong organisations make sure their weakest link is as strong as possible to weather storms.
- **Accountability-Transparency**: being open and honest allows uncertainty and problems to be dealt with early before they become life-threatening.

We have been guiding organisations through uncertain times for over 40 years, since 1997 using our unique *applied corporate governance* approach. For training and implementation, contact us at info@applied-corporate-governance.com.

In the headlines this month

Uber

Uber has been in the headlines for most of its eight years of existence. However, in June the tensions its founder, Travis Kalanick, seems to have thrived on finally tore the company apart at the top.

In recent months, Uber has lost many of its key people. For two years it has operated without a Chief Financial Officer and more recently it has lost its Chief Operating Officer, Chief Marketing Officer, Head of Engineering, and General Counsel. During this time its revenue has increased to over $3bn in the first quarter of 2017, generated in more than 70 countries, but losing $700m in that period. It has raised more than $15bn, is valued at nearly $70bn and is regarded as one of the most successful start-ups ever.

The hard-driving style of its founder has led it into clashes with regulatory authorities in most of the regions in which it operates, most of which are still unresolved. Moreover, recent revelations about its culture include allegations of endemic sexual harassment and the admission that the medical records of the rape victim of one of its Indian drivers were accessed by a senior executive. On top of that, it had used a software device to avoid scrutiny by regulators and mislead them, and earlier this year has been accused of stealing intellectual property relating to self-driving cars from an affiliate of Google.

The board was becoming increasingly concerned about its inability to control Mr Kalanick, when in June his parents were involved in a boating accident which killed his mother. This had a traumatising effect on him and he departed on indefinite leave without naming a stand-in. At this point, the directors, fortified by two critical external reports into the company's culture, demanded and received his resignation, and Uber was now without a Chief Executive in addition to the other empty posts.

Was this a sensible move? One investor was quoted as saying that the board "had better know what it was doing by removing the CEO as it was now responsible for whatever followed". It was indeed a bold and risky decision to oust the person who had effectively single-handedly built a $70bn global business in just eight years. Moreover, the path to profitability is far from clear, and there will be no obvious way to use cost-cutting to eliminate losses. It really needs an entrepreneur rather than a professional manager to take Uber to profitable territory.

Perhaps there is a parallel with Apple, where Steve Jobs was ousted and a professional manager, John Sculley, was introduced to replace him. Sculley proved a failure and it took Jobs' reappointment to make Apple the huge success it ultimately became.

However, in corporate governance terms, Kalanick and Uber broke so many rules that the current situation was unsustainable. **Ethical**? No. **Goals** shared by all the key stakeholders? Well, drivers appear to have been exploited to the point of unacceptability. **Strategy**? The idea of world domination as a goal surely demanded a more robust strategy than deliberately seeking confrontation with regulators in every country to get round existing rules, and huge subsidies to beat competitors with no apparent end in sight. **Organisation**? Fourteen direct reports to the CEO left to run the business in his absence, and many key posts vacant doesn't sound very robust. **Accountability**? The voting structure left Mr Kalanick accountable only to himself and his founding partners, notwithstanding the billions of funding that he raised. Ultimately it was the revolt by key investors that forced him out.

Barclays

I A couple of months ago, we featured Barclays Bank in the context of whistle-blowing and its accident-prone newish Chief Executive, Jes Staley, who had intervened to try to track down the whistle-blower. Now one of his predecessors, John Varley, is in the headlines as the UK's Serious Fraud Office (SFO) has decided to bring a prosecution accusing Barclays, its CEO and three of its senior officers of fraud in connection with a crisis fund-raising in 2008.

This is apparently the first case of its kind in regard to the banking crisis of 2008, and oddly involves the bank successfully raising private funds and preventing the tax-payer having to bail it out. The accusation is that the full facts in connection with the emergency fund-raising were not disclosed to all the investors. In brief, Barclays was faced by the financial regulator in October 2008 with having to increase its capital by some £13bn to achieve a capital ratio of 8% with a deadline of June 2009.

In the atmosphere of the time, there was not much enthusiasm among the investing community for ploughing large sums into banks, especially since many had made big cash calls earlier in the year which cost the investors dearly. But Mr Varley and his team managed to satisfy the regulator (at the time, anyway) by getting investment commitments from the Qatar sovereign wealth fund, the Singapore sovereign wealth fund and Abu Dhabi for some £6bn and promising to sell its wealth management business for the balance.

Complicating the equity deal were related agreements to pay several hundred million pounds for advisory services to Qatar, the full details of which were not disclosed at the time, and a loan to Qatar of $3bn. The SFO's challenge is that the inadequate disclosures broke laws which were designed to protect creditors from being deceived as to the true financial position of the bank. Then there is the underlying issue as to whether the bank was actually lending Qatar funds to be invested back in itself. Needless to say, the bank says the loan agreement was drawn up carefully to prevent this happening, and there is the stand-off between the two sides.

It does seem strange that the bank should be attacked for saving the taxpayer £6bn, though a senior figure says that Barclays shareholders would have got a much better deal from the government. So the investors were hit rather than the taxpayer. Cynics also draw attention to the threat in the Conservative Party 2017 Election Manifesto to put the SFO out of existence by merging it with another agency, and suggest that this unusual and high profile prosecution at this time might not be a coincidence.

All in all, though, if the banks had not generated such a bad public image through the culture of mis-selling their services to their customers, culminating in huge fines for breaking the law, there wouldn't be such a focus on transgressions of a more technical nature such as this one.

Meanwhile, a banker of whom it was said that mentioning fraud and Varley in the same sentence was just wrong, is facing criminal proceedings.

Toshiba and Japanese Corporate Governance

In an article about Toshiba and its woes written as recently as three months ago, we spoke about the company's plans for a reorganisation. Since then its problems have become steadily more acute and bankruptcy is now being spoken of as a serious possible outcome.

Toshiba decided that it had to sell its chip operations after all, to raise some Y2 trillion (c $18bn) required to keep itself in business. The trouble is that its JV partner, US company Western Digital, is very anxious about the possible damage to its own business and has demanded a say in the sale process, applying for an injunction to halt it. Notwithstanding, Toshiba went ahead anyway and in an auction described as chaotic, selected a consortium with the government backed Innovation Network Corporation of Japan (INCJ) in partnership with Bain Capital and Korean chipmaker S K Hynix. In the process they turned down other bidders, including one involving Foxconn, prime supplier of chips to Apple, and an earlier one which had included Western Digital but which fell apart before bidding.

The immediate approval of one of the government ministers speaks to the interference throughout the auction process from a government highly concerned about losing a bastion of Japanese technology to foreign owners.

The commitment to the winning consortium was made in a rush to meet the promise to announce the winner at the company's AGM at the end of June. The AGM was reported as giving the impression that the board of Toshiba was not nearly as concerned about the situation as it should have been.

Nothing to do with Toshiba is straightforward these days, however, and Western Digital's lawsuit continues to threaten the sale, as does the fact that the members of the winning consortium apparently haven't quite sorted out the deal amongst themselves. So immediately after the AGM, Toshiba launched a suit against Western Digital, accusing them of improperly seeking to acquire proprietary information, but probably more concerned simply to lift Western Digital's actions to block the sale.

Toshiba's position as a longstanding senior member of Japan Inc. is now seriously in question as it is facing demotion to the second tier of the Tokyo Stock Exchange, and possibly even delisting altogether. The challenges it faces are both financial and technical, as its auditor still declines to sign off its latest accounts. If it fails to raise the $18bn it needs and PwC continue to refuse to sign its accounts, the big question is whether the Stock Exchange will bite the bullet and delist it or whether it will find excuses to kick the can down the road, waiting for the customary Japanese rescue by its peers.

Since Prime Minister Abe promised to improve corporate governance in Japan Inc. there has been the introduction of a Stewardship Code in 2014, and some feel that there is a growing willingness on the part of investors to challenge boards. The Toshiba saga will test how much progress the corporate governance improvements have made in practice.

Anglo American

Last year we wrote about Anglo American and traced its history from a business built by an entrepreneur, and kept under family control for many years, to a floundering giant which seemed to have lost its way. We pointed to a failure in strategy and a leadership that appeared to be lacklustre. The new strategy which later emerged envisaged exiting businesses deemed to be non-core, including iron ore and coal in South Africa, to focus on just three commodities, copper, diamonds and platinum.

Well, a rising tide lifts all boats and the turnaround in commodity prices not only tripled Anglo's share price but has halted the disposal programme, which is now deemed to be rather less necessary.

But part of the abandoned strategy appeared to be to progressively reduce exposure to South Africa, and possibly to make the company a more attractive takeover target. And several recent events suggest that this progression towards a smaller, more focused, more profitable mining company with less exposure to South Africa may still be on track. Possibly most important in the medium to longer term is the move by Jacob Zuma's government to further advance the black ownership of industry – a plan rejected by the Chamber of Mines which is planning legal action to prevent it. Secondly there is the recently announced appointment of a new chairman, whose background includes three big disposals of the companies which he has chaired or managed. And thirdly, there is the acquisition of an 11% stake in Anglo by the Indian billionaire who is chairman of Vedanta Resources, who currently denies any plan to merge the two companies.

So what is the future for Harry Oppenheimer's 100 year old mining giant? If the investors' interests are paramount, they will be pleased at the leap in value of their shares in the past 12 months, worried about political developments in South Africa and looking to the possibilities of a sale before things deteriorate. The customers are presumably less happy about the upturn in commodity prices but can do little about a cyclical industry when the cycle turns. But the employees are most vulnerable in this situation, and for all Mr Zuma's expressed concern about the welfare and standard of living of black employees, the actions he and his government are proposing can only further destabilise Anglo's mining business and hasten its shrinkage in South Africa. Whether the local, black-controlled companies which take over the abandoned businesses will look after their employees better is moot.

The last word...

It does seem that when a company's governance is allowed to deteriorate to the point where the public's unhappiness triggers action by the authorities, things get worse before they get better. And it can take a very long time for the consequences of the bad reputation acquired to be worked out of the system. In some cases, the damage can prove fatal. Let's hope that isn't the case for the companies we examine in these reports.

ACG is a Trading name of Tangley International Ltd
Tangley House, Tangley Lane, Guildford, Surrey GU3 3JZ United Kingdom

info@applied-corporate-governance.com

Help us deliver what you want

We hope you have found this ACG Report useful. We will be building up the range and types of content included in the report over the coming months (for example regional updates from our correspondents around the world), so would like to hear from you to find out what you would most like to see included.

If you would like to participate in our reader survey, please click on the link below - it should take you less than 2 minutes to complete:

https://survey.zohopublic.com/zs/y8B03L

As a thank you for for taking part, we would like to offer you **50% off the first year's subscription** when we launch the enhanced, paid version of this newsletter, following your feedback. If you are on our mailing list, we will send you details and your coupon codes by email.