
MEMORANDUM



WONGPARTNERSHIP LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
Tel: +65 6416 8000
Fax: +65 6532 5711/+65 6532 5722
Email: contactus@wongpartnership.com
Website: www.wongpartnership.com

The responses in this survey have been developed at the request of Robert G. Eccles, Professor of Management Practice, Harvard Business School. It is for general information only and does not constitute legal advice. Please seek specific legal advice before acting on any of the contents below.

SETTING THE LEGAL LANDSCAPE:

- 1. Briefly explain the broader legal landscape regarding the obligations that a company has to its stakeholders or with regard to its impact of stakeholders, and in particular whether its primary duty is or is not to shareholders over all other stakeholders.**

In Singapore, the obligations of companies and their directors are contained mainly in the Companies Act (Chapter 50 of Singapore) (the "**CA**"), the Securities and Futures Act (Chapter 289 of Singapore) (the "**SFA**"), the Main Board and Catalist Rules (collectively, the "**Listing Rules**") of the Singapore Exchange Securities Trading Limited ("**SGX**"), applicable to entities listed on the Main Board and Catalist Board respectively of the Singapore Exchange, the Code of Corporate Governance 2012 (the "**Code**") (which applies to SGX-listed entities on a 'comply or explain' basis), as well as common law.

Directors of Singapore-incorporated companies are required to act *bona fide* and in the best interests of the company¹ in their management, direction and supervision of the business of the company². As long as the company remains solvent, these 'interests' generally refer to the interests of shareholders as a collective body³, although the interests of other stakeholders such as employees may also be taken into account⁴. Where a company is insolvent, the interests of its creditors generally take precedence and supplant those of its shareholders and employees⁵.

For SGX-listed corporations, the Code recommends that regular dialogue with shareholders be maintained in order to gather input and address shareholder concerns⁶. It also exhorts the company to foster greater shareholder participation at general meetings⁷. However, shareholder primacy is qualified to the extent that the Code also recommends that the board of directors (the "**Board**") recognise that the perceptions of key stakeholders affect the company's reputation⁸, and ensure that obligations owed to them are understood and met⁹. The Board is also asked to consider sustainability issues such as environmental and social factors as part of its strategic formulation¹⁰.

¹ Section 157(1) CA as interpreted by the Singapore High Court in *Vita Health Laboratories v Pang Seng Meng* [2004] 4 SLR(R) 162, as well as section 159(a) CA

² Section 157A(1) CA

³ *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 as applied by the Singapore High Court in *Re S Q Wong Holdings (Pte) Ltd* [1987] SLR(R) 286

⁴ Section 159(a) CA

⁵ *Tong Tien See Construction Pte Ltd (in liquidation) v Tong Tien See and Others* [2002] 3 SLR 76

⁶ Guideline 15.3 Code

⁷ Principle 16 Code

⁸ Guideline 1.1(d) Code

⁹ Guideline 1.1(e) Code

¹⁰ Guideline 1.1(f) Code

REGULATORY FRAMEWORK:

2. To what legal tradition does the jurisdiction belong, i.e. civil/common law, mixed?

Singapore belongs to the common law tradition as derived from the English common law system. English common law (including the principles and rules of equity) up till 11 November 1993 continues to be part of the law of Singapore, subject to some qualifications¹¹. The other main source of law takes the form of statutes, being laws passed by Parliament, and the primary responsibility for interpreting such laws lies with the judiciary.

3. Are corporate/securities laws regulated federally, nationally, provincially or both?

Corporate and securities laws are regulated on the national level in Singapore.

4. Who are the government corporate/securities regulators and what are their respective powers (in summary only)?

Generally, the Accounting and Corporate Regulatory Authority of Singapore ("**ACRA**") administers the CA¹², which provides for a range of sanctions including criminal sanctions and civil liability for a range of breaches.

The Monetary Authority of Singapore ("**MAS**") enforces the SFA, which provides for criminal sanctions, civil penalties, and civil liabilities for third parties affected by a breach.

Both the Accounting and Corporate Regulatory Authority Act (Chapter 2A of Singapore) (the "**ACRA Act**") and the SFA provide ACRA and MAS with certain investigative powers and powers of inspection. Under Part IX of the SFA, MAS, in connection with an investigation, has the power to, *inter alia*, require a person to appear for examination¹³ under oath or affirmation¹⁴, to order the production of books or information¹⁵, and to enter any premises without a warrant¹⁶. The ACRA Act grants ACRA the power, in relation to any offence specified under the CA¹⁷ to, *inter alia*, require any person to furnish any information or produce any book, document, or copy thereof in his possession¹⁸, examine orally any person believed to be acquainted with the facts of the case¹⁹, as well as require the owner or occupier of any premises to grant access to such premises without charge for the purpose of investigating an offence²⁰.

The SGX, which is both a listed corporation as well as a regulator, enforces the Listing Rules at first instance. It has the ability to impose penalties ranging from public censures

¹¹ Section 3 of the Application of English Law Act (Chapter 7A of Singapore)

¹² Section 8 CA

¹³ Section 154 SFA

¹⁴ Section 156 SFA

¹⁵ Section 163 SFA

¹⁶ Section 163A SFA

¹⁷ Section 31 read with the Second Schedule to the ACRA Act

¹⁸ Section 31(1)(b) ACRA Act

¹⁹ Section 31(1)(d) ACRA Act

²⁰ Section 31(1)(f) ACRA Act

and reprimands (for minor infractions) to suspensions and delisting (for more serious breaches). Further, the SGX may refer a matter to the MAS or other appropriate authority for further investigation if it perceives that an offence may have been committed. In addition, the SGX will be amending the Listing Rules (effective 7 October 2015) pursuant to which, *inter alia*, a Listings Disciplinary Committee and Listings Appeals Committee have been formed with the intention of enhancing the transparency and independence of SGX's disciplinary process and ensuring fair and independent administration of sanctions. A wider range of sanctions will be able to be imposed by the Listings Disciplinary Committee for breaches of the Listing Rules, including monetary penalties and denial of market facilities.

It was recently announced in March 2015²¹ that the MAS and the Commercial Affairs Department ("**CAD**") of the Singapore Police Force would jointly investigate from the outset market misconduct offences such as insider trading and market manipulation under the SFA, thereby enhancing the enforcement process by consolidating the agencies' investigative resources and expertise and bringing about greater efficiency. Under the arrangement, MAS officers taking part in joint investigations are gazetted as Commercial Affairs Officers, giving them the same criminal powers of investigation as CAD Officers²².

5. Does the jurisdiction have a stock exchange(s)?

There are presently three licensed approved exchanges in Singapore, the SGX, ICE Futures Singapore Pte Ltd and Singapore Exchange Derivatives Trading Limited.

INCORPORATION AND LISTING:

6. Do the concepts of "limited liability" and "separate legal personality" exist?

Yes. Briefly, the CA provides²³ that a company shall be a "body corporate... capable... of... suing and being sued", and also stipulates that, for a company limited by shares, the liability of shareholders in the event of winding up is limited to any amounts left unpaid in respect of subscribed shares only²⁴.

There are three forms of company under the CA²⁵: a company limited by shares, a company limited by guarantee, and an unlimited company. The liability of members to contribute towards the assets of a company limited by either shares or guarantee is limited to the amount paid up (or owing) in respect of the shares²⁶, or the amount of the guarantee²⁷, as the case may be. However, in the case of an unlimited company, every

²¹ Refer to <http://www.mas.gov.sg/news-and-publications/media-releases/2015/mas-and-cad-to-jointly-investigate-market-misconduct-offences.aspx>

²² Section 64 of the Police Force Act (Chapter 235 of Singapore) grants CAD Officers all the powers of investigation conferred on police officers in relation to the investigation of offences under the Criminal Procedure Code (Chapter 68 of Singapore)

²³ Section 19(5) CA

²⁴ Section 250(1)(d) CA

²⁵ Section 17(2) CA

²⁶ Section 250(1)(d) CA

²⁷ Section 250(1)(e) CA

present and past member is generally liable to contribute²⁸ towards paying off its debt upon winding up, subject to certain qualifications.

The corporate vehicle used in the case of a commercial entity would usually be a company limited by shares.

Notwithstanding the above, limited exceptions under common law exist which allow the court to 'pierce the veil of incorporation' and disregard the separate legal personality of a company, rendering its owner or controller liable for its acts. Such limited exceptions apply where the company structure is primarily used as a vehicle to evade legal obligations²⁹ and commit fraud³⁰, as well as in situations where a person uses a company as an extension of himself and makes no distinction between the company's business and his own³¹.

7. Did incorporation or listing historically, or does it today, require any recognition by the company or its directors of a duty to society, an obligation to take account of the company's social or environmental impacts, or to respect its stakeholders?

[For these purposes, the term "stakeholders" is distinct from "non-shareholder" and from "shareholder" in that it encompasses both "material audiences" (the providers of financial capital, both debt and equity), as well as "significant audiences" (non-financial stakeholders, such as employees, customers, suppliers, contractors and subcontractors, regulators etc. some of whom may be material to a firm at an entity specific level)].

Currently, there is no strict legal obligation for a company or its directors to recognise a wider duty to society, to respect its stakeholders generally, or to take account of its social or environmental impact (assuming that these have no bearing on the interests of the company, its shareholders, employees or (when the company is insolvent) creditors).

This may however change over time. The Code, while not mandatory and strictly applicable only to SGX-listed entities, is recognised in Singapore as setting a best practice standard of good corporate governance. As mentioned above in the response to question 1, the Code recommends the Board of a listed company to recognise that the perceptions of key stakeholders affect the company's reputation³², and ensure that obligations owed to them are understood and met³³. The Code also recommends that the Board consider sustainability issues such as environmental and social factors as part of its strategic formulation³⁴.

The SGX also issued in 2011 (and amended in 2014) a Guide to Sustainability Reporting for Listed Companies (the "**GSRL**"). In the policy statement, SGX recognised that "sustainability reporting is an important aspect of holistic disclosure" and encouraged

²⁸ Section 250(1) CA

²⁹ *Gilford Motor Co v Horne* [1933] Ch 935; *Jones v Lipman* [1962] 1 WLR 832

³⁰ *Re Darby* [1911] 1 KB 95

³¹ *Alwie Handoyo v Tjong Very Sumito and another* [2013] SGCA 44

³² Guideline 1.1(d) Code

³³ Guideline 1.1(e) Code

³⁴ Guideline 1.1(f) Code

listed companies (in particular those operating in high-impact sectors such as agriculture, air transport, oil and gas and shipping)³⁵ to "assess and disclose the environmental and social aspects of their organisational performance". To this end, the GSRL sets out broad principles in order to assist listed companies in formulating their own sustainability reporting frameworks, and also suggests the adoption of internationally-accepted reporting frameworks such as the Global Reporting Initiative Sustainability Guidelines (the "**GRI Framework**"). For now, there is no requirement for listed corporations in Singapore to produce a sustainability report.

In May 2015³⁶, SGX commenced a consultation exercise on sustainability reporting with a view to moving it to a 'comply or explain' basis, with a view to target implementation for financial year 2017. Special mandatory disclosure standards are already in place for listed mineral, oil and gas corporations. The Listing Rules require such companies to disclose their policies and practices in relation to operating in a sustainable manner³⁷ (including the impact of their business practices on the environment and the communities in which they operate) in their annual reports and prospectuses.

8. Do any stock exchanges have a responsible investment index, and is participation voluntary? (See e.g. FTSE4Good, Dow Jones Sustainability Index, the Johannesburg Stock Exchange's Socially Responsible Investment Index.)

The SGX does not presently have a responsible investment index. In a speech made in March 2013, Mr Magnus Böcker (then-Chief Executive Officer of SGX) said that to support investors and companies, SGX might explore the possibility of a Singapore sustainability index.

DIRECTORS' DUTIES

9. To whom are directors' duties generally owed?

Directors' duties are generally owed to the company while it remains solvent. As stated in the response to question 1, these 'interests' generally refer to the interests of shareholders as a collective body, although the interests of other stakeholders such as employees may also be taken into account. Where a company is insolvent, the interests of its creditors will take precedence³⁸. Breach of certain duties may attract criminal as well as civil liability³⁹ (see the response to question 13 below).

10. What are the duties owed by directors – please state briefly.

As in many common law jurisdictions, directors' duties in Singapore flow from statute and

³⁵ Para 3.3 of the GSRL

³⁶ Refer to

http://www.sgx.com/wps/wcm/connect/sgx_en/home/regulation_v2/consultations_and_publications/PC/Consultation-Exercise-on-Sustainability-Reporting

³⁷ Rule 1207(21)(d) read with para 3.1(f) of Practice Note 6.3 Main Board Rules

³⁸ *Tong Tien See Construction Pte Ltd (in liquidation) v Tong Tien See and Others* [2002] 3 SLR 76

³⁹ See for example sections 157(3)(b) and 339(3) CA

common law⁴⁰. There is a certain degree of overlap between the duties imposed by both sources. The main duties may be distilled into the following three main categories:

The duty to be loyal and to act *bona fide* in the best interests of the company

Directors owe a statutory duty to act *bona fide*⁴¹ and in the best interests of the company⁴². As fiduciaries⁴³, directors owe a duty of loyalty⁴⁴ to the company, and are forbidden from placing themselves in a position where the interests of the company come into conflict with their own⁴⁵ or third party⁴⁶ interests, unless disclosure is given in accordance with the CA⁴⁷ and the company's articles of association, and (where required) the informed consent of the company is obtained.

The duty to use reasonable care, diligence, and skill

Directors are statutorily required to "use reasonable diligence in the discharge of (their) duties"⁴⁸. This has been interpreted as referring to an aspect of the common law duty of care⁴⁹, with one modification - that a director must meet the minimum objective standard of care expected of a person discharging the responsibilities he has assumed⁵⁰.

With regard to the duty to use reasonable skill, common law stipulates that non-executive directors need only exhibit the level of skill expected of persons of their knowledge and experience⁵¹. Executive directors however, are subject to a minimum objective standard of skill, and must possess the level of knowledge and expertise expected of those in their position⁵².

The duty to exercise powers for the proper purpose

Directors must not misapply their directorial powers for an extraneous or wrongful purpose⁵³, as doing so is a breach of the fiduciary duty owed to the company⁵⁴. It is no defence to say that such an act was done in the best interests of the company⁵⁵, or honestly, in ignorance of the law⁵⁶. This prohibition against exercising powers for an extraneous or wrongful purpose seems to have been given statutory voice by the

40 Section 157(4) CA
41 Section 157(1) CA as interpreted by the Singapore High Court in *Vita Health Laboratories v Pang Seng Meng* [2004] 4 SLR(R) 162
42 *Chua Boon Chin v JM McCormack* [1979] 2 MLJ 156
43 *Chua Boon Chin v JM McCormack* [1979] 2 MLJ 156
44 *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] SGCA 13
45 *Creanovate Pte Ltd v Firstlink* [2007] 4 SLR 780
46 *Chew Kong Huat v Ricwil (Singapore) Pte Ltd* [2000] SGCA 90
47 Sections 156 and 158 CA
48 Section 157(1) CA
49 *Jurong Readymix Concrete Pte Ltd v Kaki Bukit Industrial Part Pte Ltd (Chng Heng Tiu, Third Party)* [2000] SGHC 174
50 *Lim Weng Kee v PP* [2002] 4 SLR 327
51 *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407
52 *Permanent Building Society (in liquidation) v Wheeler* [1994] 14 ACSR 109
53 *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo* [2003] SGHC 307
54 *Mills v Mills* [1937] 60 CLR 150
55 *Ho Kang Peng v Scintronix Corp Ltd* [2014] SGCA 22
56 *Steen v Law* [1963] All ER 770

Companies (Amendment) Act⁵⁷, which modifies the existing section 157(2) CA to provide, *inter alia*, that Directors, as officers⁵⁸, are forbidden to make improper use of their positions as officers or agents of the company to gain, directly or indirectly, an advantage for themselves or any other person or to cause detriment to the company⁵⁹.

Please indicate if there are express or implied duties to avoid damage to the company's reputation?

While there is no express duty to avoid damage to the company's reputation, it is possible that such a duty may be implied under the broader duty of directors to act *bona fide* in the best interests of the company.

- 11. More generally, are directors required or permitted to consider the company's impacts on non-shareholders, including impacts on the individuals and communities affected by the company's operations? Is the answer the same where the impacts occur outside the jurisdiction?**

Can or must directors consider such impacts by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction? (See e.g. s. 172 UK Companies Act 2006)? What additional liabilities, if any, do the board or individual directors assume in exercising such discretion?

Directors of both listed and non-listed companies are statutorily permitted to take into account the interests of employees⁶⁰, regardless of whether they are shareholders of the company. For more information, please see our response to question 7 above.

Although no other specific groups of stakeholders are expressly mentioned, the Code exhorts the Boards of listed corporations to recognise that the perceptions of key stakeholders may affect the company's reputation, and states that the Board's role includes the consideration of sustainability issues (such as environmental and social factors, which may impact individuals and communities) in the company's strategy formulation. In addition, the Board is required to ensure that the listed company's obligations to stakeholders other than shareholders are understood and met.

In addition, directors may take into consideration the company's impacts on other non-shareholders if they reasonably believe (as discussed above in question 10) that it is in the best interests of the company to do so. This answer does not change even where the impacts occur outside the jurisdiction.

Unlike the UK, Singapore does not have specific legislation mandating directors to have regard to such impacts by or on the company's subsidiaries, suppliers, and other business partners.

⁵⁷ Please refer to the response to question 26 which states when the changes will be implemented
⁵⁸ Section 4(1) CA
⁵⁹ Section 78 of the Companies (Amendment) Act 2014
⁶⁰ Section 159(a) CA

12. If directors are required or permitted to consider impacts on non-shareholders to what extent do they have discretion in determining how to balance different factors including such impacts?

As discussed above, directors may only take into consideration matters which they believe in good faith to be in the best interests of the company. In any given factual scenario, directors will exercise their discretion to determine how to balance various impacts the company may have, but their overriding duty is to act in the interests of the company.

13. What are the legal consequences for failing to fulfill any duties described above; and who may take action to initiate them?

Breach of the duty to be loyal and to act *bona fide* in the best interests of the company

A breach of the statutory duty to act honestly in the best interests of the company attracts criminal liability in the form of imprisonment or a fine⁶¹, in addition to the director being made liable for any profit made or damage suffered by the company as a result of such breach⁶². A failure to disclose any personal interests in a transaction when required to do so by statute⁶³ attracts similar criminal penalties⁶⁴. Significantly, where dishonesty is involved in the commission of the above offences, the director in breach will be disqualified from assuming directorships or taking part in the management of companies⁶⁵ (whether directly or indirectly) for a period of 5 years⁶⁶.

A breach of fiduciary duties also triggers heavy legal consequences for directors, including being made to account for any secret profit made, or being deemed to hold such profits on constructive trust for the benefit of the company⁶⁷.

Breach of the duty to use reasonable care, diligence, and skill

Failure to use reasonable care (i.e. negligence) results in the usual common law remedy of damages for losses caused. Failure to use reasonable diligence may also attract criminal liability in the form of imprisonment or a fine⁶⁸, in addition to being made liable for any profit made or damage suffered by the company as a result of such failure⁶⁹.

Breach of the duty to exercise powers for the proper purpose

A director's wrongful exercise of the managerial powers vested in him is a breach of fiduciary duty⁷⁰ which renders him liable to indemnify the company for any resultant

⁶¹ Section 157(3)(b) CA

⁶² Section 157(3)(a) CA

⁶³ Section 156 CA

⁶⁴ Section 156(10) CA

⁶⁵ Section 154(1) CA

⁶⁶ Section 154(4) CA. Section 153(6) CA allows him to apply to Court for leave to act as a director or to take part in the management of the company during the period of disqualification.

⁶⁷ *Attorney-General for Hong Kong v Charles Warwick Reid* [1994] 1 AC 324 followed in *Thahir Kartika Ratna v PT Pertamina Minyak dan Gas Bumi Negara (Pertamina)* [1994] SGCA 105

⁶⁸ Section 157(3)(b) CA

⁶⁹ Section 157(3)(a) CA

⁷⁰ *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821

losses⁷¹. Lastly, if SGX is of the opinion that a director of a listed company wilfully breached his duties to the company, it may publish the name of the offending director along with relevant information about the contravention⁷².

Parties who may initiate action for breach of duty

The company (and not its members) is the proper party for initiating legal action against errant directors⁷³, and the right to authorise a proceeding lies with the person or organ in which the function of management is vested⁷⁴. This is usually the Board⁷⁵, the liquidator in the case of a company in winding up⁷⁶, or the judicial manager in judicial management⁷⁷. If the Board refuses or neglects to bring an action against one of its number where there has been a breach of duty, shareholders may (with leave of the court) pursue a statutory⁷⁸ or common law⁷⁹ derivative action, join the company as a nominal defendant, and litigate on its behalf. In addition, if the breach comprises oppressive behaviour which causes personal damage to a creditor or shareholder, the oppressed creditor or shareholder may also apply to court under section 216 CA (the "**Oppression Remedy**") to, *inter alia*, authorise civil proceedings to be brought by them in the name of the company⁸⁰.

What defences are available?

The court has the power to grant relief to directors in breach of their duties⁸¹, except where the breach involves receiving the company's property in breach of trust⁸². However, this statutory power is limited to granting relief from civil liability, and does not apply to the criminal penalties⁸³ which breaches may attract or to proceedings brought by persons other than the company⁸⁴. Defendant directors seeking relief under this head are not required to plead it specifically, but may raise it as a defence during the course of proceedings⁸⁵.

Three elements must be met before statutory relief may be obtained⁸⁶. It must be shown that the director (a) acted honestly; (b) acted reasonably; and that (c) it is fair to excuse the director having regard to all the circumstances of the matter.

⁷¹ *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo* [2003] SGHC 307

⁷² Rule 720(4)(c)(i) Main Board Listing Rules

⁷³ *Foss v Harbottle* [1843] 2 Hare 461

⁷⁴ *United Investment & Finance Ltd v Tee Chin Yong* [1967] 1 MLJ 31

⁷⁵ Section 157A CA

⁷⁶ Section 272(2)(a) CA

⁷⁷ Section 227G(2) CA

⁷⁸ Section 216A CA

⁷⁹ *Barrett v Duckett* [1995] 1 BCLC 243

⁸⁰ Section 216(2) CA

⁸¹ Section 391 CA

⁸² *Hytech Builders Pte Ltd v Tan Eng Leong* [1995] 2 SLR 795

⁸³ *Re IDEAGLOBAL.COM Ltd* [2000] 3 SLR 100

⁸⁴ *Long Say Ting Daniel v Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased)* [2012] SGHC 250

⁸⁵ *Re Kirbys Coaches Ltd* [1991] BCLC 414

⁸⁶ Please refer to the wording of section 391(1) CA as construed by the court in *Chng Joo Tuan Neoh v Khoo Tek Keong* [1932] SSLR 100

Can these issues give rise to other causes of action or regulatory routes whereby a stakeholder can exert pressure on a company with regard to its actions?

The CA does not provide any avenues for stakeholders who are not shareholders or creditors to exert pressure on a company with regard to it or its directors' actions. As discussed above, shareholders have the option of pursuing a derivative action, while both creditors and shareholders may pursue an Oppression Remedy.

It should be noted that the usual tortious actions in negligence and vicarious liability are also available under Singapore law for stakeholders who are not shareholders or creditors, provided that the relevant legal elements are satisfied. This is further elaborated upon below in the answer to question 25.

14. Are there any other directors' duties which are relevant to the interests of stakeholders?

Directors of listed corporations are required under the SFA to disclose to the corporation, *inter alia*, any interests in shares, debentures and other securities of the corporation⁸⁷. This information must then be disclosed by the corporation⁸⁸ on SGX's web portal, SGXNet.

There are statutes regulating specific industries or activities which may hold directors to be responsible for breaches by the corporations. One example is that directors may incur secondary liability⁸⁹ for their company's breaches of the various duties owed⁹⁰ under the Workplace Safety and Health Act (Chapter 345A of Singapore) (the "**WSHA**") to its stakeholder-employees.

15. For all of the above, if these exist in your jurisdiction, does the law provide guidance about the role of supervisory boards in cases of two tier board structures.

Two-tier board structures do not exist under Singapore company law.

What obligations are owed by senior management who are not board directors? Is this determined by law if no specific contractual provision applies?

Under the CA, officers who are not directors (such as the company secretary, as well as persons employed in an executive capacity such as senior management⁹¹) are under a statutory duty not to improperly use information acquired by virtue of their station to advantage themselves or third parties, or to cause detriment to the company⁹². Breach of this duty exposes the officer to both civil and criminal liability⁹³.

⁸⁷ Section 133 SFA
⁸⁸ Section 137G SFA
⁸⁹ Section 48 WSHA
⁹⁰ See sections 10 to 14 WSHA
⁹¹ Section 2(1) CA
⁹² Section 157(2) CA
⁹³ Section 157(3) CA

Senior management, *qua* employees, also owe their employer company an implied duty of care at common law even if such a duty is not provided expressly by contract⁹⁴. The standard of care expected is naturally higher where such senior management personnel expressly or impliedly hold themselves out as possessing particular skill or expertise⁹⁵. In addition, the law imposes an implied duty of good faith⁹⁶ and fidelity, such that the senior manager must, *inter alia*, have due consideration for the company's interests⁹⁷ and forbear from misappropriating company property⁹⁸ and competing with his employer⁹⁹. Senior management entrusted with significant responsibilities also may have fiduciary duties to the company similar to those applicable to directors¹⁰⁰.

REPORTING

- 16. Are companies required or permitted to disclose the impacts of their operations (including stakeholder impacts) on non-shareholders, as well as any action taken or intended to address those impacts? Is this required as part of financial reporting obligations or pursuant to a separate reporting regime? Please specify for each reporting route whether it is mandatory or voluntary.**

Please describe any mandatory reporting requirement, major voluntary initiative or trend towards voluntary reporting with regard to transparency (for example, payments to government or state-owned entities, reports on government orders to undertake surveillance or interception, reports on tax payments etc.).

(For completeness, there are mandatory reporting requirements relating to certain types of criminal conduct but given the thrust of the question, we have not addressed those specific requirements below.)

As stated in the response to question 7 above, special mandatory disclosure standards are in place for listed mineral, oil and gas companies. The Listing Rules require such companies to disclose their policies and practices in relation to operating in a sustainable manner¹⁰¹ (including the impact of their business practices on the environment and the communities in which they operate) in their annual reports and prospectuses.

As stated in the response to question 7 above, the SGX has released the GSRL, and has stated its intention to move to sustainability reporting on a 'comply or explain' basis, with a view to target implementation for financial year 2017.

Listed corporations are statutorily obliged¹⁰² to comply with the Listing Rules or any other requirement of the SGX to notify the SGX of information on specified events or matters as they occur, for the purpose of making such information available to the market. In

⁹⁴ *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR (R) 663

⁹⁵ *Harvey v RG O'Dell Ltd* [1958] 1 All ER 657

⁹⁶ *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR (R) 663

⁹⁷ *Nottingham University v Fishel* [2000] IRLR 471

⁹⁸ *Kogan Singapore Pte Ltd v Chang Li Chieh* [2010] SGHC 303

⁹⁹ *Helukabel Singapore Pte Ltd v Ng Tuck Chuan* [2008] SGHC

¹⁰⁰ *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] SGCA 39

¹⁰¹ Rule 1207(21)(d) read with para 3.1(f) of Practice Note 6.3 of the Main Board Listing Rules

¹⁰² Section 203 SFA

particular, the Listing Rules provide that any information which would be likely to materially affect the price or value of an issuer's shares¹⁰³, or which disclosure is necessary to avoid the establishment of a false market in the issuer's securities¹⁰⁴ must be immediately announced. This includes, *inter alia*, information regarding significant litigation¹⁰⁵, disputes with any party¹⁰⁶, or other material information concerning the business¹⁰⁷.

It is conceivable that adverse stakeholder impacts caused by the listed corporation may damage the corporation's reputation or expose the corporation to potential liability, thereby requiring an announcement by the listed corporation as explained above. Failure to make the requisite announcement intentionally or recklessly is an offence¹⁰⁸ on the part of the corporation. If such an offence was committed with the consent or connivance of, or was attributable to any neglect on the part of an officer¹⁰⁹ of the corporation, such officer will also be found guilty of the offence¹¹⁰.

17. Do legal reporting obligations extend to such impacts outside the jurisdiction; to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?

The mandatory disclosure standards in place for listed corporations under the Listing Rules (see the response to question 16 above) do not restrict disclosure to impacts within the jurisdiction.

18. Who must verify these reports?

Who can access reports? What are the legal or regulatory consequences of failing to report or misrepresentation?

This answer is provided on the basis that the question refers to sustainability reports.

There is no requirement for third party verification of sustainability reports. As such reports are not mandatory, a failure to report does not attract any legal or regulatory consequences.

However, where such reports are produced, directors are responsible for ensuring the factual accuracy of the information disclosed. Failure to do so may result in directors falling foul of the duty to exercise due care, skill, and diligence, as well as the duty to act in good faith, the scopes of which have been explained in the response to question 13

¹⁰³ Rule 703(1)(b) Main Board Listing Rules

¹⁰⁴ Rule 703(1)(a) Main Board Listing Rules

¹⁰⁵ Paragraph 8(m) of Appendix 7.1 Main Board Listing Rules

¹⁰⁶ Paragraph 8(o) of Appendix 7.1 Main Board Listing Rules

¹⁰⁷ Paragraph 4 of Appendix 7.1 Main Board Listing Rules

¹⁰⁸ Sections 203(2), 203(3), and 204(1) SFA

¹⁰⁹ 'Officer' is defined by section 331(5) SFA to mean, in relation to a body corporate, a director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body, and includes a person purporting to act in any such capacity

¹¹⁰ Section 331(1) SFA

above.

Officers¹¹¹ of a corporation who, with intent to deceive, make or furnish, or who knowingly and wilfully authorise or permit the making or furnishing of, any false or misleading statement or report relating to the affairs of the corporation to directors, auditors, members, debenture holders, or their trustees, will also be guilty of an offence¹¹².

False or misleading statements in a report made by the company which are likely to induce other persons to subscribe for, sell, or purchase securities may also be an offence under the SFA¹¹³, if such statements are made knowingly, recklessly, or negligently. In addition to this, if such an offence was committed with the consent or connivance of, or was attributable to any neglect on the part of an officer¹¹⁴ of the corporation, such officer will also be found guilty of the offence¹¹⁵.

Is there a regulator tasked with investigating complaints of misreporting?

The regulators tasked with investigating complaints of misreporting or non-compliance with the above requirements are SGX and MAS (for breaches of the reporting requirements in the Listing Rules or the Code) and ACRA (for breaches of the reporting requirements in the CA).

What is the external assurance regime for reporting on a company's impacts on stakeholders? Please specify any mandatory requirements and also where reporting is voluntary what the current market practice is as regards third party assurance.

As stated in the response to question 8 above, the GSRL currently encourages, but does not mandate, the adoption of accepted sustainability reporting frameworks such as the GRI Framework. The GRI Framework in turn recommends the use of an external assurance regime, and states that external assurance reports, if prepared, should be included in the content index¹¹⁶. However, the GRI Framework also recognises that the use of an external assurance regime is not a requirement to be 'in accordance' with the GRI Framework¹¹⁷.

With regard to market practice, a study conducted by the Singapore Compact for Corporate Social Responsibility in collaboration with the National University of Singapore Business School¹¹⁸ revealed that out of 537 Main Board listed companies assessed in

¹¹¹ 'Officer' is defined by section 2 CA to mean, in relation to a corporation, any director or secretary of the corporation or a person employed in an executive capacity by the corporation

¹¹² Section 402 CA

¹¹³ Section 199 SFA

¹¹⁴ 'Officer' is defined by section 331(5) SFA to mean, in relation to a body corporate, a director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body, and includes a person purporting to act in any such capacity

¹¹⁵ Section 331(1) SFA

¹¹⁶ Section 3.3 to the GRI Framework

¹¹⁷ *Ibid*

¹¹⁸ Accountability for a Sustainable Future' (2014) – refer to:

http://www.csrsingapore.org/c/images/stories/publications/FA_Singapore%20Compact%20Research%20Study%20Publication_290714.pdf

2013, 19 had produced sustainability reports. Only 8 of these reports had been externally assured.

Please summarise any regulatory guidance on reporting that relates to impacts on non-shareholder stakeholders.

Please refer to the response to question 7.

STAKEHOLDER ENGAGEMENT

19. Are there any restrictions on circulating shareholder proposals which deal with impacts on non-shareholders, including stakeholder impacts?

Under the CA, the extraordinary general meeting provides a mechanism by which shareholders may propose agendas for the consideration of the other shareholders.

Two or more shareholders holding at least 10% of shares (excluding treasury shares) may call a meeting by giving notice in writing¹¹⁹ as provided in the company's articles of association. If they hold 10% of the paid-up capital, they may also requisition the directors to convene the meeting¹²⁰. Any proposals put forth by the shareholders (including proposals dealing with impacts on non-shareholders) must be clearly stated in the requisition given to the company and in the notice given to shareholders, and should not include matters which contravene the company's memorandum and articles of association (together, its "**Constitutional Documents**") or which are unlawful¹²¹.

Notwithstanding the above, it should be noted that the exercise of the company's powers of management statutorily vests in the board of directors¹²², and shareholders cannot normally¹²³ control the board in the exercise of those powers by passing a resolution at general meeting.

20. Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions? What is legal duty that pension funds owe with regard to investment decisions in this regard?

How does the legal duty of the fund align with term and contractual performance criteria of fund managers – does this facilitate or deter consideration of such impacts?

Aside from anti-money laundering and anti-terrorism financing prohibitions¹²⁴, and save as may be provided for in the fund's constitutional or contractual documents, funds are

¹¹⁹ Section 177 CA

¹²⁰ Section 176 CA

¹²¹ *Credit Development Pte Ltd v IMO Pte Ltd* [1993] 2 SLR 370

¹²² Section 157A CA

¹²³ *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] SGHC 192

¹²⁴ Guidelines to MAS Notice SFA04-N02 on Prevention of Money Laundering and Countering the Financing of Terrorism released on 6 August 2012; MAS Notice SFA04-02 (Amendment) 2014 released on 1 July 2014

not legally required to consider the impact that their investment decisions have on stakeholders.

21. Can non-shareholders address companies' annual general meetings?

Generally speaking, non-shareholders have no legal right to attend or address a meeting. However, the chairman of the meeting has the discretion, if he deems fit, to admit observers into the meeting. Such observers may include the legal counsel of shareholders. Such non-shareholders may even be permitted by the chairman to address the meeting should he deem it appropriate.

What is the minimum shareholding required for a shareholder to raise a question at a company's AGM?

Subject to any restrictions set out in a company's Constitutional Documents, there is no minimum shareholding required before a shareholder may raise a question at a company's AGM. It should also be noted at this juncture that requiring such a minimum shareholding in listed companies might offend the spirit of the Code, which stipulates that listed companies should encourage greater shareholder participation at general meetings, and allow shareholders the opportunity to communicate their views on various matters affecting the company¹²⁵. The Code also encourages companies to treat all shareholders fairly and equitably, and to recognise, protect and facilitate the exercise of shareholders' rights¹²⁶.

OTHER ISSUES OF CORPORATE GOVERNANCE

22. Are there any other laws, policies, codes or guidelines or standards applied in the context of particular contractual relationships (for example project finance) or through adherence to particular sustainability principles (for example the Global Compact, the OECD Guidelines for Multinational Enterprises etc.), related to corporate governance that might encourage companies to consider in a structured way their impacts upon and the interests of their wider stakeholders including through a stakeholder engagement process?

As stated in the response to question 8 above, the GSRL encourages listed companies to adopt internationally accepted reporting frameworks such as the GRI Framework.

The OECD Guidelines for Multinational Enterprises are explicitly referenced¹²⁷ in article 13.11 of the draft EU-Singapore Free Trade Agreement (the "**EU-SG-FTA**"), along with two other non-legally binding sustainability regimes, viz, the UN Global Compact and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

However, it should be noted that the EU-SG-FTA, although negotiations were completed in October 2014, has not yet come into force. Also, the EU-SG-FTA does not require

¹²⁵ Principle 16 and Guideline 16.1 Code

¹²⁶ Principle 14 of the Code

¹²⁷ Refer to http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151766.pdf

member countries to impose legislation compelling adherence for all companies within jurisdiction; instead, countries are obliged to "make special efforts to promote corporate social responsibility practices which are adopted on a voluntary basis"¹²⁸.

The US-Singapore Free Trade Agreement, while less specific in this regard than the EU-SG-FTA, similarly states (in article 18.9)¹²⁹ that "recognizing the substantial benefits brought by international trade and investment as well as the opportunity for enterprises to implement policies for sustainable development that seek to ensure coherence between social, economic and environmental objectives", each country should "encourage enterprises... to voluntarily incorporate sound principles of corporate stewardship in their internal policies.

23. Are there any laws requiring representation of particular stakeholder constituencies (i.e. employees, representatives of affected communities) on company boards?

There are no laws requiring such representation on company boards.

24. Are there any laws requiring gender, racial/ethnic, religious or other stakeholder representation; or non-discrimination generally, on company boards?

There are no laws which prescribe racial, religious or other stakeholder representation on company boards. However, the principle of non-discrimination is enshrined under article 12(2) of the Constitution of the Republic of Singapore (the "**Constitution**"), which expressly states that "there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent, or place of birth... in the appointment to any office or employment under a public authority... or the establishing or carrying on of any trade, business, profession, vocation or employment", except where such office or employment is "connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion"¹³⁰. Hence, save for the religious institutions exception, the prohibition against discrimination on the grounds set out in article 12 is legally supreme¹³¹.

As for gender, the Code states that the board and its committees should comprise directors who as a group provide an appropriate balance and diversity of skills, experience, gender and knowledge of the company¹³². In addition, the SGX Disclosure Guide, which is intended to assist companies in preparing meaningful disclosure that complies with the requirements of the Code, suggests¹³³ that the Board should, *inter alia*, elaborate on its composition (with regard to skill, experience, gender and knowledge) with numerical data where appropriate, state its policy with regard to diversity in identifying director nominees, and outline what steps it has taken to achieve the balance and diversity necessary to maximise its effectiveness.

¹²⁸ Paragraph 4 of Article 13.11 of the draft EU-SG-FTA
¹²⁹ Refer to http://www.fta.gov.sg/fta_ussfta.asp?hl=13

¹³⁰ Article 12 of the Constitution

¹³¹ Article 4 of the Constitution

¹³² Guideline 2.6 Code

¹³³ Questions for Guideline 2.6 in the SGX Disclosure Guide

- 25. In your jurisdiction is there any legal route whereby a parent company can incur liability with regard to the impacts that one of its subsidiaries has had on stakeholder groups? Are there any serious proposals to impose such responsibility?**

As subsidiary companies are usually limited liability companies, the doctrine of separate legal personality would normally apply to preclude liability accruing to the parent company for the actions of its subsidiary. Nevertheless, various exceptions exist which could, should the appropriate circumstances arise, affix the parent company with such liability. A few of these are briefly discussed below:

Piercing the veil

Please refer to the response to question 6 above.

Liability in negligence

Depending on the degree of involvement and knowledge a parent company has in relation to its subsidiary's operations and the negative impact those operations could have on stakeholders, a tortious duty of care may arise between the parent company and its subsidiary's stakeholders which could potentially render the parent company liable.

Express contractual terms

It is not uncommon for parent companies to provide guarantees to creditor-stakeholders of their subsidiaries, in order to secure financing for the subsidiary as part of the group's operations. Parent companies may also be required to guarantee performance of subsidiaries of contracts with government bodies or commercial entities, for example, if the subsidiary is a limited liability, limited resource special purpose vehicle incorporated by the parent company to enter into that contract. In addition, parent companies looking to sell off their subsidiaries in an acquisition are commonly asked for warranties and indemnities covering potential legal action which may be brought against the target subsidiary in the future. One example is where there have been prior environmental pollution incidents caused by the subsidiary company. In such a scenario, a parent company may incur liability should affected stakeholders subsequently instigate legal action.

- 26. Are you aware of any incoming law or proposals that are relevant to the issues raised in this questionnaire? If so please describe, providing an indication of the anticipated date the legislation will come into force or be adopted.**

SGX implementation of a 'comply or explain' model for Sustainability Reporting

On 17 October 2014, Magnus Böcker, the then-Chief Executive Officer of SGX, gave a speech¹³⁴ intimating SGX's intention to move towards a 'comply or explain' model for

¹³⁴

Refer to http://sgx.com/wps/wcm/connect/sgx_en/home/highlights/speeches/Sustainability-Reporting-SINGAPORE-COMPACT-CSR-SUMMIT-17-Oct-2014

sustainability reporting, and its plan to allocate one year for listed companies to work towards the adoption of sustainable reporting standards. In May 2015, a consultation exercise was commenced to gather information from listed companies, institutional investors, professionals, and the investing public to review the existing GSRL. SGX also revealed that it was aiming to implement sustainability reporting on a 'comply or explain' basis in the 2017 financial year¹³⁵.

EU-SG-FTA

As discussed above in question 22, the EU-SG-FTA is expected to come into force in the near to medium-term future.

Amendments to the CA affecting Directors' Duties and Penalties for Breach

The Companies (Amendment) Bill, which introduced a number of changes to the CA, was passed by Parliament in October 2014. The first phase of changes was implemented on 1 July 2015, and the second phase is predicted to take effect in the first quarter of 2016¹³⁶.

Numerous CA amendments have been introduced; briefly, the changes include, *inter alia*, extending the disclosure requirements for directors who are in any way, whether directly or indirectly, interested in a transaction or proposed transaction with the company to Chief Executive Officers involved in the same¹³⁷, strengthening such disclosure requirements¹³⁸, as well as granting the registrar of companies the power to debar directors or secretaries of companies who have breached their duties under the CA¹³⁹.

WongPartnership LLP

22 September 2015

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¹³⁵ Refer to http://www.sgx.com/wps/wcm/connect/sgx_en/home/regulation_v2/consultations_and_publications/PC/Consultation-Exercise-on-Sustainability-Reporting

¹³⁶ As announced by ACRA. Please refer to [https://www.acra.gov.sg/Legislation/Two-Phase-Implementation-of-Companies-\(Amendment\)-Act-2014/#](https://www.acra.gov.sg/Legislation/Two-Phase-Implementation-of-Companies-(Amendment)-Act-2014/#)

¹³⁷ Section 77 of the Companies (Amendment) Act 2014

¹³⁸ *Ibid*

¹³⁹ Section 76 of the Companies (Amendment) Act 2014