

---

**LEGAL OPINION  
ON  
DIRECTORS' RESPONSIBILITIES  
AND  
CLIMATE CHANGE  
UNDER SINGAPORE LAW**

---

BY:

JEFFREY W T CHAN, SC  
JOSEPH CHUN  
ERNEST LIM  
PETER DORAISAMY  
QUEK WEN JIANG, GERARD

SINGAPORE, 14 APRIL 2021

## **Table of Contents**

### **SUMMARY**

|                                                                                                   |           |
|---------------------------------------------------------------------------------------------------|-----------|
| <b>INTRODUCTION.....</b>                                                                          | <b>4</b>  |
| <b>CLIMATE CHANGE .....</b>                                                                       | <b>6</b>  |
| <b>RISKS OF CLIMATE CHANGE.....</b>                                                               | <b>7</b>  |
| <b>INTERNATIONAL ACTION IN RESPONSE TO CLIMATE<br/>CHANGE.....</b>                                | <b>8</b>  |
| <b>ACTIONS BY INVESTORS, BUSINESSES AND CIVIL SOCIETY<br/>IN RESPONSE TO CLIMATE CHANGE .....</b> | <b>11</b> |
| <b>SINGAPORE’S RESPONSES TO CLIMATE CHANGE .....</b>                                              | <b>12</b> |
| <b>ROLE OF THE COMMERCIAL SECTOR IN ADDRESSING<br/>CLIMATE CHANGE .....</b>                       | <b>15</b> |
| <b>DIRECTORS’ DUTIES IN SINGAPORE .....</b>                                                       | <b>16</b> |
| <b>POTENTIAL LIABILITIES OF DIRECTORS IN RELATION TO<br/>CLIMATE CHANGE .....</b>                 | <b>19</b> |
| CRIMINAL LIABILITIES.....                                                                         | 19        |
| CIVIL RESPONSIBILITIES .....                                                                      | 21        |
| <b>CONSEQUENCES FACED BY DIRECTORS FOR FAILURE TO<br/>ADDRESS CLIMATE CHANGE ISSUES .....</b>     | <b>25</b> |
| <b>DISCLOSURE OBLIGATIONS IN RELATION TO CLIMATE<br/>CHANGE RISKS .....</b>                       | <b>28</b> |
| <b>CONCLUSION AND ADVICE .....</b>                                                                | <b>37</b> |

## **SUMMARY**

The Commonwealth Climate and Law Initiative, a research, education and outreach project focused on Commonwealth countries, has asked for this Legal Opinion on the obligations of directors in Singapore to have regard to issues associated with climate change in order to discharge their duties and disclosure obligations under Singapore law.

The term “climate change” refers to the collective effects of rising average temperature of the Earth’s climate system caused by the unprecedented atmospheric concentrations of carbon dioxide, methane and nitrous oxide. This has, among other things, caused a diminution in the amount of the world’s ice and snow which, in turn, gives rise to physical risks, such as rising sea levels, flooding and disruptions to industrial outputs. It also gives rise to transition risks such as changes in national policies and regulations designed to lower carbon emissions.

Since 1992, the United Nations (“UN”) has led efforts by the nations of the world to meet the challenges posed by climate change, and has formulated the United Nations Framework Convention on Climate Change (“UNFCCC”). 196 states, including all UN member states, are parties to the Paris Agreement of 2015, which aims to hold increases in global average temperature to below 2°C and pursue efforts to limit temperature increases to 1.5°C above pre-industrial levels.

National governments, as well as the commercial and civil society sectors, have responded to the challenges posed by climate change by enacting numerous laws as well as industry standards and practices to mitigate the emission of greenhouse gases. Foremost among these are the implementation of numerous laws and regulations that prescribe penalties for actions or omissions that can exacerbate carbon emissions.

Singapore, as a small and relatively flat tropical island-state dependent on international trade, is keenly aware of the dangers that it faces from the consequences of climate change. This includes being overwhelmed by rising sea

levels as well as disruptions in its international trade. The Government and statutory authorities have introduced numerous regulatory measures to address the emission of greenhouse gases. Singapore civil society has also responded to this concern by introducing numerous initiatives to inform and sensitise the public to climate change. A steady stream of information and knowledge about climate change and its dangers are put out by the government, regulatory authorities and civil society actors through official channels as well as through the media.

The business sector in Singapore, like in all other countries, has substantial stakes in climate change as their business activities are or can be affected by the consequences of climate change. Also, businesses can contribute to climate change through their operation. At the same time, businesses can contribute to the mitigation of climate change through sound business practices including compliance with regulatory measures for the amelioration of climate change. Failure to understand and take necessary actions to ensure that their business operations are sustainable and are safeguarded from issues pertaining to climate change can result in criminal and civil liabilities for companies and their officers, which include their directors.

Directors play a critical role in companies as they, acting as a board, are the directing mind of any company. Many regulations in Singapore, including regulations directed at mitigating climate change, prescribe that directors can, under certain circumstances, be made personally liable for the company's breaches of these regulations and punished with a fine or even imprisonment. Furthermore, under a number of circumstances, directors can be made liable in civil suits by aggrieved parties against their company for actions or omissions that failed to take into account climate change and which resulted in losses to the claimants.

Directors can also conceivably be subject to claims by aggrieved shareholders of their companies for failure to carry out their duties as directors in not taking action to ensure that the company is prepared for the challenges of climate

change. Additionally, given that strategic litigation initiated by concerned individuals and entities established to combat climate change has been occurring in many jurisdictions, directors of Singapore companies must be prepared for the possibility that they may be taken to court to compel them to take action to ensure that the business activities of their companies do not contribute to climate change, or, if such activities are in progress, to terminate such activities.

Given the emphasis Singapore is presently placing on mitigating climate change, directors of Singapore companies would be well advised to acquaint themselves with the activities of their companies which may impact, or may be impacted by, climate change, and take action as necessary to ensure that climate change issues are addressed by their companies. Failure to do so can result in criminal and civil liabilities for their companies and also themselves personally.

## **Introduction**

1 We have been instructed to advise the Commonwealth Climate and Law Initiative (“CCLI”) on the obligations of directors to have regard to the issues associated with climate change in order to discharge their duties and disclosure obligations under Singapore law. Accordingly, this Opinion addresses the position in Singapore law on the liability of directors in relation to climate change, with a particular focus on director duties and disclosure obligations. The views expressed in this Opinion should not be construed as providing legal advice tailored to any particular individual director, company, sector, or circumstance.

2 Directors play a crucial role in the governance of companies. Section 157A of the Companies Act (Cap 50, 2006 Rev Ed) (“CA”) provides that the business of a company shall be managed by, or under the direction or supervision of, the directors. Directors provide the governance of a company and ensure that a company conducts its business in accordance with the applicable laws, taking into account the interests of its stakeholders. These include a wide range of persons and entities, foremost among which would be the shareholders, employees, customers and business partners, and importantly, the government and the community. A crucial role of directors is to set the directions for the company and also to hold management accountable to the shareholders and other stakeholders.

3 Critically, directors may exercise *all* the powers of a company except powers that the CA or the constitution of the company requires the company to exercise in a general meeting. This underscores the legislatively-stipulated

centrality of directors to a company's operations.

4 This Opinion outlines the impact that climate change has and will have on the liabilities that directors are subject to. These liabilities arise through various means. For example, in criminal law, various statutes that impact on climate change specifically provide that directors are criminally liable if their respective companies are guilty of breaching the provisions of those laws. Directors also face civil liability, where they can be held liable for losses caused by breaches of various duties of a non-criminal nature. In relation to climate change, one area of civil liability which directors can be made liable for would be where there has been a breach of their duties of care and diligence in relation to matters that affect the business and activities of their respective companies. Increasingly, these matters include the effects of climate change as, depending on the nature of the business of their companies, the impact of climate change on the business and other activities of their respective companies can be substantial.

5 Furthermore, directors of listed companies also owe duties in relation to disclosure to the stakeholders of their respective companies and to the public as a whole. These already extend to disclosures in relation to climate change risks where these risks would have effect on their companies' business, activities, and even profitability. At this time, these duties in relation to climate change are still developing and will be influenced by both international developments as well as domestic concerns over the impact of climate change on human habitation, shifts in policy, and market stakeholder preferences.

## Climate Change

6 The term “climate change” refers to the collective effects of the rising average temperature of the Earth’s climate system. This includes, *inter alia*, changes in rainfall patterns, extreme weather, seasonal changes, rising sea levels, and general surface temperature increases. Issues arising from climate change can be seen as falling within the general context of concerns over the Earth’s environment.<sup>1</sup>

7 It has been noted that since the 1950s, the Earth’s atmosphere and oceans have warmed, the amount of snow and ice has diminished, and sea levels have risen. Numerous unprecedented extreme weather and climate events have occurred.<sup>2</sup>

8 The International Panel on Climate Change (“IPCC”), the United Nations body for assessing the science related to climate change, in its first Assessment Report published in 1990, highlighted the global consequences of climate change and underscored the need for international cooperation to address this dangerous trend. That report had a decisive role in the establishment of the United Nations Framework Convention on Climate Change (the “UNFCCC”).

9 In its most recent Assessment Report (the “Report”), which was released in 2014, the IPCC reported that the warming of the climate system was

---

<sup>1</sup> See for example J. Cohen *et al*, “Divergent Consensuses on Arctic Amplification Influence on Midlatitude Severe Winter Weather” (2020) 10 *Nature* 20-29, and J.C. Steckel *et al*, “Coal and Carbonization in Sub-Saharan Africa” (2020) 10 *Nature* 83-88.

<sup>2</sup> IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014), at [1.4] <[https://www.ipcc.ch/site/assets/uploads/2018/02/SYR\\_AR5\\_FINAL\\_full.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf)>.



unequivocal. Anthropogenic greenhouse gas emissions have increased since the pre-industrial era and have resulted in unprecedented atmospheric concentrations of carbon dioxide, methane and nitrous oxide. As these gases accumulate to trap heat in the Earth's atmosphere, this has led to clearly-observable warming in the average temperature of the earth since the mid-20th century. If left unchecked, further warming and long-lasting changes in all components of the climate system will come about.<sup>3</sup> This in turn will increase the likelihood of severe, pervasive and irreversible impacts for people and ecosystems.

## **Risks of Climate Change**

10 It is widely accepted in an entire plethora of scientific sources that climate change poses significant risks. The IPCC's 2018 report titled "Global Warming of 1.5°C" highlights a number of risks which may accrue.<sup>4</sup> Such risks may be broadly dichotomised into two categories – physical risks and transitional risks.

11 Physical risks include global warming affecting agricultural output and food production, rising sea levels affecting coastal regions and low-lying settlements, and weather pattern changes disrupting industries such as shipping and construction. In our region, climate change is believed to have worsened the impact of Typhoon Haiyan in 2013. The likelihood of severe typhoons in Southeast Asia is expected to triple by 2040.<sup>5</sup>

---

<sup>3</sup> IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014), paras SPM 1.1 and 1.2 <[https://www.ipcc.ch/site/assets/uploads/2018/02/SYR\\_AR5\\_FINAL\\_full.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf)>.

<sup>4</sup> See <https://www.ipcc.ch/sr15/>.

<sup>5</sup> John Woetzel, et al, *Climate Risk and Response: Physical Hazards and Socioeconomic Impacts* (McKinsey Global Institute, January 2020)

12 Transition risks are “financial and reputational risks posed to organisations by the extensive policy, legal, technology and market changes to address mitigation and adaption requirements that the transition to a lower-carbon economy may entail”.<sup>6</sup> These include changes to national policies and regulations to reduce their greenhouse emissions to net-zero by 2050 or sooner.<sup>7</sup> In this regard, it is noteworthy that Singapore has announced its “... [aspiration] *to halve emissions from its peak to 33 MtCO<sub>2</sub>e by 2050, with a view to achieving net-zero emissions as soon as viable in the second half of the century*”.<sup>8</sup>

### **International Action in response to Climate Change**

13 The increasing international awareness of climate change risks has manifested itself in the increasing number of discussions on environmental sustainability and climate change all over the world. A number of international agreements have been agreed upon and brought into force to address climate change.

14 The UN has been leading the discussions and international efforts to address this concern. As early as 1992, the UN convened the Earth Summit in Rio de Janeiro. A major impetus for this international conference was the First Assessment Report of the IPCC, which was published in 1990. The Rio Summit,

---

<https://www.mckinsey.com/~media/mckinsey/business%20functions/sustainability/our%20insights/climate%20risk%20and%20response%20physical%20hazards%20and%20socioeconomic%20impacts/mgi-climate-risk-and-response-full-report-vf.pdf>.

<sup>6</sup> See Task Force on Climate-Related Financial Disclosures, *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* (June 2017), p 5 <<https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-TCFD-Report-062817.pdf>>.

<sup>7</sup> See Energy & Climate Intelligence Unit, “Net Zero Emissions Race: 2020 Scorecard” (2020) <<https://eciu.net/netzerotracker>>. It should be added that China has also announced its intention to achieve net-zero emissions by 2060.

<sup>8</sup> National Climate Change Secretariat (“NCCS”), *Charting Singapore’s Low-Carbon and Climate Resilient Future* (2020), p 35 <<https://www.nccs.gov.sg/docs/default-source/publications/nccsleds.pdf>>.

which was also known as the United Nations Conference on Environment and Development (“UNCED”), was attended by 178 states, comprising almost all the states of the world. 109 heads of state attended and addressed the plenary of the conference. That was a clear statement of the high priority that the nations of the world placed on environmental sustainability, which includes combatting the adverse effects of climate change.

15 A major outcome of the Earth Summit in Rio was the 1992 UNFCCC. This treaty sought to mitigate climate change by establishing a goal to “... *stabilize [greenhouse gas] concentrations at a level that would prevent dangerous anthropogenic interference with the climate system*”.<sup>9</sup> This was followed by the 1998 Kyoto Protocol, in which Parties who are members of the OECD and Parties with economies in transition agreed to internationally binding greenhouse gas emission targets. Following the 2014 Fifth Assessment Report of the IPCC, the Paris Agreement was negotiated and adopted. This came into force in 2016. This agreement sought to “[hold] the increase in the global average temperature to well below 2°C above pre-industrial levels and [pursue] efforts to limit the temperature increase to 1.5°C above pre-industrial levels...”.<sup>10</sup> This would be achieved by “... [reaching] global peaking of greenhouse gas emissions as soon as possible ... and [undertaking] rapid reductions thereafter ... so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century ...”.<sup>11</sup>

---

<sup>9</sup> UNFCCC, Article 2.

<sup>10</sup> Paris Agreement, Article 4.1.

<sup>11</sup> Paris Agreement, Article 4.1.

16 As of December 2020, 196 states, including all member states of the UN, are parties to the Paris Agreement. This reflects the very wide and strong international consensus on the imperative to mitigate climate change<sup>12</sup>.

17 At the same time, regulators of financial markets have observed that climate change poses a systemic risk to financial systems and the economy and acted to address this. In 2015, the Financial Stability Board, which was established by the Group of Twenty (“G20”) to monitor and make recommendations about the global financial system, launched the Task Force on Climate-related Financial Disclosure (“TCFD”) to develop recommendations on climate-related financial disclosure.

18 In 2017, eight central banks and financial industry supervisors, including the Monetary Authority of Singapore (“MAS”), established the Network of Central Banks and Supervisors for Greening the Financial System (“NGFS”), with a view to “... *strengthening the global response required to meet the goals of the Paris agreement and to enhance the role of the financial system to manage risks and to mobilize capital for green and low-carbon investments in the broader context of environmentally sustainable development*”. Membership of the NGFS has grown to more than 66 central banks and prudential oversight authorities.

---

<sup>12</sup> See in addition: <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en)>.

## **Actions by Investors, Businesses and Civil Society in Response to Climate Change**

19 The concern of national governments over the adverse effects of climate change has been mirrored in the non-governmental sphere. Here, business groupings have also taken significant steps to recognise and address climate change as an issue. These include calls for, *inter alia*, the formulation of standards for different industries to mitigate climate change and significant shifts in business practices to combat climate change by reducing carbon emissions. The direction now taken by many automobile manufacturers to reduce the production of vehicles powered by combustion engines in favour of electric vehicles can be seen in this light. In a similar vein would be the calls all over the world to reduce dependence on fossil fuels for power generation in favour of renewable sources of energy such as solar and wind power, and, more controversially, nuclear power.

20 The emphasis that has been placed by governments as well as many businesses and business groups, in addition to the interest and efforts of academia and non-governmental groups, means that in today's world, there is a very large volume of widely accessible knowledge on climate change and the effects that it has and can continue to have on human habitation on this planet. This knowledge is regularly made available and flagged in reports by the media and other sources to the extent that it is no longer possible for any person holding a position of responsibility to claim that he or she has no knowledge of the adverse effects of climate change or what its major causes are.

## Singapore's Responses to Climate Change

21 As a low-lying island city-state, Singapore is particularly vulnerable to climate change risks. In recent years, Singapore has seen bouts of high temperatures and very intense thunderstorms that have led to flash floods. Its annual mean temperature rose from 26.6°C in 1972 to 28.3°C in 2015, which was both the warmest year and the second-driest year recorded up to that point.

22 Rising temperatures and reduced rainfall can affect our water supply, biodiversity and greenery, increase the energy demand for cooling and pose implications for public health. For example, a warmer environment increases the occurrence of vector-borne diseases such as dengue.<sup>13</sup>

23 In early 2014, Singapore also experienced its longest dry spell since records began in 1869. Phase 1 of the second National Climate Change Study projected that its temperatures could rise by between 1.4°C and 4.6°C by the end of this century (2070 to 2099), while mean sea levels could increase by between 0.25m and 0.76m in the same period.<sup>14</sup>

24 In line with the grave concerns regularly expressed over the effects of climate change, the Singapore government has in recent years placed mitigating and adapting to climate change as a policy priority. This was in no small part attributable to the direct impact which climate change and rising sea levels may have on a small island-nation like Singapore, which is wholly dependent on its

---

<sup>13</sup> NCCS, "Impact of Climate Change and Adaptation Measures" <<https://www.nccs.gov.sg/faqs/impact-of-climate-change-and-adaptation-measures/>>.

<sup>14</sup> NCCS, *Singapore's Climate Action Plan: Take Action Today, For a Carbon-Efficient Singapore* (2016), page 4, at <<https://www.nccs.gov.sg/docs/default-source/publications/take-action-today-for-a-carbon-efficient-singapore.pdf>>.

links to the rest of the world for its existence, as well as to more specific considerations of securing Singapore's food supply should climate change-induced scarcity break out. Reflecting the high public consciousness in Singapore on climate change, in February 2021 the Parliament of Singapore passed a multi-party motion declaring climate change to be a global emergency.<sup>15</sup>.

25 It bears noting that the UNFCCC, which the Paris Agreement builds on, was itself the product of, *inter alia*, the UNCED in Rio de Janeiro in 1992 (the "Rio Conference"). The preparatory committee of the UNCED and the Main Committee of the Rio meeting was chaired by Singapore's Ambassador-at-Large Tommy Koh, which was a clear indication of Singapore's sensitivity, even at that early time, to environmental sustainability, and its desire to contribute to international action to address environmental issues, which would include climate change.

26 This high priority accorded to climate change issues has been mirrored and enhanced by the increasing activities of non-governmental civil society organisations which are focused on combatting the adverse effects of climate change in Singapore. These organisations include environmental groups such as 350 Singapore, LepakInSG, and the SG Climate Rally. These organisations have mobilised to advocate for various measures to deal with climate change and have organised activities to inform and sensitise the general public about the need to put in place measures to mitigate climate change.

---

<sup>15</sup> The Parliament of Singapore has on 1 Feb 2021 declared climate change to be a global emergency. See < <https://www.straitstimes.com/singapore/politics/parliament-declares-climate-change-a-global-emergency> >

27 The major measures relied on by the government to achieve its goals in this area include the enactment and enforcement of various laws that address environmental issues and climate change. Singapore has always had legislation addressing environmental issues for the purpose of protecting public health. In more recent times, additional legislation on environmental protection has been enacted with the declared intent to combat climate change. These include the Carbon Pricing Act (Act 23 of 2018) (“CPA”), the Energy Conservation Act (Cap 92C, 2014 Rev Ed), the Transboundary Haze Pollution Act (Act 24 of 2014), and the Resource Sustainability Act 2019 (Act 29 of 2019). Many provisions in these legislative instruments criminalise various activities which may adversely affect the environment and directly or indirectly contribute to climate change. These are punishable with substantial fines and/or imprisonment.

28 In the financial sector, MAS, has recently issued environmental risk management guidelines across the banking,<sup>16</sup> insurance<sup>17</sup> and asset management sectors (collectively known as financial institutions or “FIs”).<sup>18</sup> These include expectations that directors and senior management of FIs should maintain oversight of FIs’ environmental risk management, and be assigned specific responsibilities in this regard. In particular, directors should be responsible for:

---

<sup>16</sup> MAS, *Guidelines on Environmental Risk Management for Banks* (8 December 2020) <<https://www.mas.gov.sg/regulation/guidelines/guidelines-on-environmental-risk-management>>.

<sup>17</sup> MAS, *Guidelines on Environmental Risk Management for Insurers* (8 December 2020) <<https://www.mas.gov.sg/regulation/guidelines/guidelines-on-environmental-risk-management-for-insurers>>.

<sup>18</sup> MAS, *Guidelines on Environmental Risk Management for Asset Managers* (8 December 2020) <<https://www.mas.gov.sg/regulation/guidelines/guidelines-on-environmental-risk-management-for-asset-managers>>.



- (a) approving an environmental risk management framework and policies to assess and manage the FIs' environmental risk exposures on an ongoing basis;
- (b) ensuring that material environmental risk is addressed within the FIs' risk appetite framework;
- (c) setting clear roles and responsibilities of board and senior management, including personnel who are responsible for oversight of the FIs' environmental risk; and
- (d) ensuring adequate management expertise and resources for managing environmental risk, including through training and capacity building.

29 MAS expects that FIs, at least annually, disclose the potential impact of material environmental risk on themselves in accordance with well-regarded international reporting frameworks, such as those of the TCFD. While these guidelines are not intended to be legally binding, they establish expectations on companies and their directors in respect of disclosures of climate change risks which can impact the business and other activities of companies.

### **Role of the Commercial Sector in Addressing Climate Change**

30 The importance that Singapore has placed on environmental protection extends beyond initiatives by the government. Considerations of environmental protection have been reflected in the actions and programmes of numerous functional groups. These include the Singapore Business Federation, National Trades Union Congress and Singapore National Employers Foundation. These

are Principal Members of the Singapore Chapter of the United Nations Global Compact Network, which drives multi-stakeholder action, including urgent action to address climate change and its impact, for a more sustainable future based on the United Nations Sustainable Development Goals.<sup>19</sup>

31 A significant development for Singapore was when, in November 2020, the Government of Singapore Investment Corporation (“GIC”), Singapore’s sovereign wealth fund, joined Climate Action 100+, an investor-led initiative which engages high-emission companies to reduce emissions of greenhouse gas, strengthen climate governance and enhance climate disclosure.<sup>20</sup>

32 It is thus plain that mitigating and adapting to climate change is a national priority in Singapore and that this concern has been made known to the general public. Hardly a day goes by in Singapore without the issue of climate change and the measures being taken to address it being mentioned in the media or through official channels. The question then that can be asked is what role the commercial sector in Singapore has in mitigating the adverse effects of climate change given the impact that these will have on their business activities. More specifically, what are the responsibilities that directors of companies have in relation to the known and possible effects of climate change on their respective companies?

### **Directors’ Duties in Singapore**

33 The general ambit of directors’ duties in Singapore is broad and

---

<sup>19</sup> See in particular, <<https://www.unglobalcompact.org/what-is-gc/participants>>.

<sup>20</sup> “GIC aligns with CDP, Climate Action 100+, and AIGCC”, <<https://www.gic.com.sg/news-and-resources/gic-aligns-with-cdp-climate-action-100-and-aigcc/>>.

multifaceted. As observed by the authors of *Corporate Law* (Academy Publishing, 2015, Hans Tjio Gen. Ed.) (“*Corporate Law*”), “[t]he imposition of duties on directors is a complicated mix of statute and general law”.<sup>21</sup> This Opinion does not seek to comprehensively set out the duties of directors in Singapore but rather will focus on directors’ duties which are germane to combating climate change. These are both statutory duties as well as duties which arise under Common Law.

34 Section 157 of the CA imposes a number of specific obligations on company directors. Section 157(1) of the CA provides that directors shall “...*at all times act honestly and use reasonable diligence in the discharge of the duties of his office*”, while section 157(2) requires that a director not make improper use of his office or any information in that capacity to gain, directly or indirectly, an advantage for himself or another, or to cause detriment to the company.

35 There are other specific obligations imposed under the CA, but this opinion will, for reasons of length, focus on the general section 157 duty of reasonable diligence in the discharge of their duties as directors. The duty imposed by this provision on directors to use reasonable diligence in the discharge of their duties as directors is in addition to the similar duty at common law to exercise care, skill and diligence in relation to the company.<sup>22</sup>

36 Directors owe duties at general law, which arise from their position as fiduciaries *vis-à-vis* the company. In the main, these duties are to act *bona fide*

---

<sup>21</sup> Corporate Law at [09.015].

<sup>22</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1 at 16.

in the interests of the company<sup>23</sup> and to avoid any action that may result in them being in a position of conflict of interests with the company.<sup>24</sup>

37 The common law duty comprises a subjective and an objective element (*Goh Chan Peng v Beyonics Technology Ltd* [2017] 2 SLR 592 at [35]–[36]). The subjective element requires that a director must exercise his discretion *bona fide* in what he (and not the Court) considers to be in the company’s best interests, while the objective element entails an intelligent and honest man in the position of that director, in the whole of the existing circumstances, reasonably believing that the transactions were for the company’s benefit.

38 Section 157(4) of the CA expressly provides that the CA obligations are not in derogation of the duties at general law. Rather, they operate in a *cumulative* fashion. Failure to take into account climate-related risks insofar as these risks have a material and adverse impact on the financial performance of the company will render the director in breach of both common law and statutory duties. In addition, the Listing Rules of the Singapore Exchange (“SGX”) prescribe certain obligations on companies, particularly in relation to disclosures which the companies are required to make. While the Listing Rules apply only to listed companies, section 25 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) (“SFA”) provides that the MAS, Singapore’s regulatory authority for the financial sector, may apply to the Court to enforce the Listing Rules against a defaulting director of a listed company.

---

<sup>23</sup> *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306.

<sup>24</sup> *Bray v Ford* [1896] AC 44 at 51.

39 A final, and possibly most significant, source of director duties in Singapore is the criminal law where there are numerous offence-creating provisions in Singapore’s environmental legislation that specifically provide for the directors of companies to be criminally liable for their companies’ breaches of these laws.

## **Potential Liabilities of Directors in relation to Climate Change**

### ***Criminal Liabilities***

40 Numerous Singapore statutes prescribe that when a company breaches any of their provisions, the directors of the company can be made personally liable and be subjected to a fine or imprisonment. The clear legislative intent underlying these provisions is to compel directors of a company to take actions to ensure that their respective companies do not commit such breaches. These statutes include several pieces of environmental legislation which addresses concerns over climate change risks in their implementation. It is to these that we now turn.

41 The Environmental Protection and Management Act (Cap 94A, 2002 Rev Ed.) (“EPMA”), consolidates the laws relating to environmental pollution control and seeks to provide for the protection and management of the environment and resource conservation. It replaces and develops earlier legislation which had the same purpose. The EPMA created a plethora of offences, ranging from offences relating to the control of air impurities, the prohibition of dark smoke from a chimney, and even offences pertaining to the discharge of trade effluent, oil, chemical, sewage or other polluting matter.

42 Section 71(1) of the EPMA provides that where an offence under the Act committed by a body corporate is proved to have been committed with the consent or connivance of an officer, or to be attributable to any act or default on his part, the officer *as well as* the body corporate shall be guilty of the offence. Thus, officers of a company can be liable for breaches of that legislation by the company if that breach took place not just on account of consent or connivance of these officers, but also if it occurred on account of any act or default on their part. As directors are officers of a company, these criminal provisions would apply to directors.

43 The principle establishing the criminal liability of directors for breaches by their companies of regulatory prescriptions is mirrored in much of the other environmental legislation of Singapore. In the CPA, which was passed with the clear intent of mitigating climate change, a range of offences relating to, *inter alia*, the submission of greenhouse gas emissions reports and monitoring plans were created. Section 68(2) of the CPA provides that where a corporation commits an offence under the Act, a person who is an officer of the corporation or an individual involved in the management of the corporation and in a position to influence the conduct of the corporation in relation to the commission of the offence and who either consented or connived, or conspired with others to effect the commission of the offence, or who is in any other way knowingly concerned in or party to the commission of the offence, shall be guilty of the same offence as the corporation.

44 It bears noting that the CPA, which is more recent than the EPMA, includes a specific provision under section 68(2)(b)(iii) that where an officer of

the corporation or an individual involved in the management of the corporation and in a position to influence the conduct of the corporation “... *knew or ought reasonably to have known that the offence by the corporation ... would be or is being committed, and failed to take all reasonable steps to prevent or stop the commission of that offence...*”, such an individual would be guilty of the same offence as the corporation. This goes above and beyond the provision creating liability on directors in the EPMA, and is illustrative of Singapore’s increasingly strict stance on potential criminal liability. Put in other words, even the *omission* by directors in a situation where they only *ought reasonably to have known* that an offence was being committed would suffice for criminal liability to arise.

45     These provisions impose a high duty on directors of companies. Directors thus must inform themselves of the activities of their companies and take necessary action to ensure that their companies do not breach these laws, including the laws on environmental protection which include mitigating climate change risks. Defaults on the part of directors would otherwise expose them to such criminal liabilities, and they can be liable even if they do not connive in or knowingly are party to breaches of these laws by their companies. They thus can be criminally liable if they fail to ensure that their companies have in place principles and systems for compliance with these laws.

### ***Civil Responsibilities***

46     Section 157 of the CA provides that:

(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 his position as an officer or agent of the company or 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.

[...]

47 The duty to exercise reasonable diligence within the meaning of section 157(1) of the CA was interpreted in *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 at [28] as being an objective assessment of whether the director has exercised the same degree of care and diligence as a reasonable director found in his position. This standard is not fixed, but instead is a continuum depending on various factors such as the individual's role in the company, the type of decision being made, the size, and the business of the company. Critically, the Court pointed out that this standard will not be lowered to accommodate inadequacies in the individual's knowledge or experience. Instead, it will be raised if the director holds himself out as possessing or in fact does possess some special knowledge or experience. It follows from this that directors should at the least be aware of the major factors that would affect the business and other operations of their respective companies.

48 This view is buttressed at [09.099] of *Corporate Law*, where the authors opine that "... [t]he prevalent view is that all directors are 'obliged to obtain at least a general understanding of the business of the company and the effect that a changing economy may have on that business',<sup>25</sup> and take 'reasonable steps to place themselves in a position to guide and monitor the management of the

---

<sup>25</sup> *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115 at 117.



*company*”. While this view is described as being most prevalent in Australian courts, the rule that a director cannot be a “dummy director” nonchalant to the company’s acts is clearly applicable in Singapore as well.<sup>26</sup>

49 One major factor which impacts businesses today is climate change, and in particular its effects on the present as well as future activities and directions of companies. Directors must therefore equip themselves with sufficient understanding of what climate change entails, and, in particular, how climate change risks and opportunities would impact their respective companies’ activities, strategies and financial planning. Due consideration must be factored into their oversight of the management of their companies as well as the decisions that they take as a board, especially decisions that set out the future directions of their companies. This can take a broad range of forms, including decisions to require mitigatory steps to be taken in relation to aspects of the company’s business which may be affected by climate change, or decisions to adopt company policies and practices to implement or require measures within the company to address climate change issues.

50 In the same vein, directors should be sensitive to the risk of potential public interest litigation initiated by non-governmental entities to challenge business activities of the company on the basis that these exacerbate climate change and must be curtailed. Such actions can affect negatively the profile as well as the profitability of their companies.

---

<sup>26</sup> *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153 at [86] to [93].

51 Directors therefore may wish to take steps to prevent their companies' business practices from providing opportunities for such legal challenges. This would be consistent with their responsibility to use reasonable diligence in the discharge of the duties of their office. At the very least, directors must evaluate or consider such risks in the decisions that they would have to make in their governance of their companies. They must "... *obtain at least a general understanding of the business of the company and the effect that a changing economy may have on that business*",<sup>27</sup> and take "...*reasonable steps to place themselves in a position to guide and monitor the management of the company*".

52 It would not be possible at this time for directors to take the position that it is unnecessary for them to consider climate change in their governance of their companies as they are unaware of the climate change risks and how these can impact their companies. The risks of climate change are widely-known and widely-publicised. Climate change is the subject of constant and widely-reported attention and comment by the media, governments, civil society and academia. Policy and legislative interventions in relation to climate change are numerous and widely-known. Information about climate change and the risks it poses thus has entered into the "general knowledge" of society as a whole.

53 It is thus only reasonable to expect that persons who make up the governance of companies, *i.e.* directors, would be aware of these and be held to be acting on the basis of such awareness. This means that any director who fails to factor in climate change considerations in their decisions *qua* director would be potentially exposing himself to not only criminal but also civil liabilities if

---

<sup>27</sup> *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115 at 117.

either their company breaches provisions of legislation that prescribe measures for addressing climate change, or legal action is brought against the director for causing loss to the company by not considering climate change issues in their governance of the company.

### **Consequences Faced by Directors for Failure to Address Climate Change Issues**

54 Should it be found that a director has failed to comply with the duties imposed on him, there exists a slew of penalties, both civil and criminal, which may apply.

55 Turning first to the consequences for breach of the statutory duty to use reasonable diligence in the discharge of a director's duties, section 157(3) of the CA provides that a director who breaches that duty is liable to the company for any profit made by him or for any damage suffered by the company as a result of his breach. In addition, under section 157(3)(b), a defaulting director can be fined up to S\$5,000 or imprisoned for up to 12 months. As outlined above, the failure to ensure that climate change considerations are at least assessed and given due and appropriate consideration can result in a director being punished under these provisions.

56 For breaching common law and fiduciary duties, directors are liable to being ordered to pay compensation (typically in the form of damages) at common law, equitable compensation, and also provide an account of profits received by them as a result of such breaches. For the purposes of this Opinion, it suffices to note that there exists a broad range of civil remedies that can be obtained to remedy breaches of director duties at common law. In several cases,

including *Chew Kong Huat v Ricwil (Singapore) Pte Ltd* [1999] 3 SLR(R) 1167, directors were made personally liable for breaches of their duties.

57 Unlike in some other jurisdictions, shareholder activism is relatively muted in Singapore. It is said that this is because institutional ownership of listed companies in Singapore is small, with many listed companies being either government-linked companies or companies whose shareholdings are tightly held by a small number of shareholders.<sup>28</sup> It also bears note that public interest litigation in Singapore is not as widespread as in certain other jurisdictions.<sup>29</sup> This may be in part attributable to the strict rules which apply on standing when one seeks to bring claims against a company.<sup>30</sup>

58 That said, Singapore is an extremely open economy and society, and influenced by developments in the rest of the world. There is an increasing trend of climate change litigation in other jurisdictions where either affected persons or stakeholders of businesses, as well as NGOs working with local interests, initiate public interest litigation in the courts to compel companies to refrain from business practices that may adversely affect the environment and lead to climate change.

59 It has been reported that as of May 2020, 1,587 instances of climate change-related litigation have been filed all over the world. The majority were

---

<sup>28</sup> Dan W Puchniak and Samantha S Tang, "Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret" NUS Law Working Paper 2019/022, October 2019, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3474151](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3474151)>.

<sup>29</sup> G Chan "The Right of Access to Justice: Judicial Discourse in Singapore and Malaysia" (2007) AJCL 2(1).

<sup>30</sup> *Corporate Law* at [09.004].

filed in the United States, Australia and Europe. However, cases have also been initiated in Asia, including in ASEAN Member States such as Indonesia and the Philippines<sup>31</sup>. A recent example of such climate change-related litigation is the recently-filed case of *Greenpeace Poland v PGE GiEK* (filed on Mar 11, 2020), where the local branch of Greenpeace, an international environmental advocacy NGO, filed a lawsuit in a Polish court against PGE GiEK, a subsidiary of state-owned utility PGE Polska Grupa Energetyczna, to require GiEK to halt any fossil fuel investments and achieve net zero greenhouse gas emissions from its existing coal plants by 2030.<sup>32</sup> In this regard, a notable pending cross-jurisdictional test case involves a situation where a farmer in Peru is suing a German utility company operating in Germany for damages caused in Peru by the utility company's greenhouse gas emissions. The case is supported by Germanwatch, an NGO, even although that NGO itself is not a party to the action.<sup>33</sup>

60 The possibility of such litigation being instituted in Singapore, although remote at this time, cannot be discounted. This is particularly so given the very strong advocacy by international NGOs for measures to combat climate change. Given this, directors who choose to ignore the possibility that their companies can be exposed to such litigation expose themselves to being held to account for failure to exercise due diligence when acting as directors.

---

<sup>31</sup> Setzer J and Byrnes R (2020) *Global Trends in Climate Change Litigation: 2020 Snapshot*. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, <<https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2020-snapshot/>>.

<sup>32</sup> *Greenpeace Poland v PGE GiEK*, summarised at <

<sup>33</sup> See <<http://climatecasechart.com/non-us-case/liiuya-v-rwe-ag/>>.

61 Notwithstanding the above, enforcement of directors' duties in Singapore is more likely to take the form of regulatory oversight and action as compared to shareholder or public interest litigation. Regulatory authorities in Singapore wield broad-ranging powers including fines, disqualification from holding directorships, and, in certain narrow circumstances, threats of delisting or suspension from the exchange. Where these authorities choose to prosecute directors for breaches of the regulations administered by them, a conviction can mean a fine as well as imprisonment for the directors concerned.

### **Disclosure Obligations in relation to Climate Change Risks**

62 The disclosure obligations of listed companies in Singapore are set out in the SGX Listing Manual.<sup>34</sup> Companies which seek to be listed on the SGX are required to issue a prospectus and thereafter comply with the continuing disclosure obligations of SGX Listing Rules. Rule 703(4) of the Listing Rules requires listed companies to disclose information necessary to avoid the establishment of a false market in its securities, or which is likely to have a material effect on the price or value of the securities of that issuer. Rule 703(5) clarifies that material information “... *includes information, known to the issuer, concerning the issuer's property, assets, business, financial condition and prospects; mergers and acquisitions; and dealings with employees, suppliers and customers; material contracts or development projects, whether entered into in the ordinary course of business or otherwise ... as well as ... any developments that affect materially the present or potential rights or interests of the issuer's shareholders*”.

---

<sup>34</sup> See <<http://rulebook.sgx.com/rulebook/mainboard-rules>>.

63 Developments related to climate change are conceivably “... *developments that affect materially the present or potential rights or interests of the issuer's shareholders.*” These can affect the business of the company and thus the value of its shares and returns to its shareholders. The fact that information is generally available, as may be the case concerning a company’s exposure to climate change risks, is not a reason for failing to disclose under Rule 703: Appendix 7A at [6].

64 There are numerous ways in which the price or value of a company’s securities might be materially affected by climate change and its associated risks, including but not limited to:

- (a) Legislative changes rendering certain company assets or activities unusable or untenable at cost (such as the phase-out of petrol and diesel vehicles);
- (b) Damage caused by extreme weather events in particular geographical locales which might be especially susceptible (such as flood-prone or coastal areas);
- (c) The commencement of climate change litigation against the company or one of its subsidiaries;
- (d) Rising financing or insurance costs for certain company activities or assets (such as coal-fired power plants); and
- (e) The exposure of its counter-parties to the above risks.

65 Where these are present, the company must make the required disclosure in compliance with the corporate disclosure policies of the SGX, and the responsibility for ensuring that the required disclosures are made falls on the directors.

66 In 2016, SGX promulgated Listing Rule 711A, which requires every listed company to prepare an annual sustainability report for its financial year no later than five months after the end of the financial year. In accordance with Rule 711B, the sustainability report must describe the listed company's sustainability practices with reference to the following components on a 'comply or explain' basis:

- (a) Material environmental, social and governance factors;
- (b) Policies, practices and performance;
- (c) Targets;
- (d) Sustainability reporting framework; and
- (e) Board statement

Of particular note in this regard is the fact that Practice Note 7.6 issued by the SGX expressly states at [3.1] in relation to the application of Listing Rules 711A and 711B that the board of directors is collectively responsible for the long-term success of the issuer, and that the board's role includes setting strategic objectives which should include an appropriate focus on sustainability. At [3.5] of the Practice Note, a performance measurement system is expressly outlined, while



[3.6] makes it clear that priority should be given to using globally-recognised frameworks and disclosure practices to guide the reporting.

67 While the Listing Rules are not statutory, in instances of non-compliance, SGX may sanction the company in various ways such as through reprimand(s) or de-listing the company. However, as section 203(1) of the SFA provides that a listed company must not intentionally, recklessly or negligently fail to notify SGX of such information as is required to be disclosed by the Listing Rules, this effectively enables the Listing Rules relating to disclosure obligations to have the force of law and enforceable as such. Furthermore, it is noteworthy that while the company itself may not be subject to criminal penalties for contravening the Listing Rules, the company's officers, including its directors who intentionally, recklessly or negligently fail to make the required disclosure(s), are subject to prosecution for an offence under section 203(1) of the SFA.

68 *Sensu stricto*, there is no equivalent public disclosure regime for non-listed companies. However, it bears noting that a company, whether listed or unlisted, is required by section 199(1) of the CA to prepare true and fair profit and loss accounts and balance sheets. The veracity of these accounts and balance sheets are the responsibility of the directors, who accordingly are required to take reasonable care to ensure that those documents present a true and fair view of the company.

69 The conclusion from these considerations is that directors who fail to disclose physical and transition risks to the valuation of the assets and liabilities under their stewardship may face various civil liabilities, even within the context

of *existing* financial reporting standards.<sup>35</sup> This view has gained increasing traction, and reports by investors,<sup>36</sup> a number of major accounting firms and the International Accounting Standards Board,<sup>37</sup> have confirmed their cognizance and increasing acceptance of obligations which might arise in this regard. This view has been confirmed by [2.1] of Practice Note 7.6 issued by SGX.<sup>38</sup> These obligations apply *a fortiori* where climate change poses a real and significant risk to the veracity and/or fairness of reported valuations and accounts, such as in the context of natural resource extraction or agriculture, coastal real estate or infrastructure, and utilities.<sup>39</sup>

70 In any event, there is also increasing pressure for disclosure of climate-change related risks from financiers and investors. Examples of instances where financiers and investors announced policies to mitigate climate change include Temasek Holdings (Private) Limited's pledge to become carbon neutral by 2020,

---

<sup>35</sup> Consider, for example, Sarah Barker and Ellie Mulholland (lead authors), "Directors' Liability and Climate Risk: Comparative Paper – Australia, Canada, South Africa, and the United Kingdom" (October 2019), at p 5, <<https://ccli.ouce.ox.ac.uk/wp-content/uploads/2019/10/CCLI-Directors'-Liability-and-Climate-Risk-Comparative-Paper-October-2019-vFINAL.pdf>>.

<sup>36</sup> See for example, Sarasin & Partners, "Auditors Must Report on Material Climate Change Risks" (11 January 2019), <<https://sarasinandpartners.com/stewardship-post/incorporate-climate-risks-into-company-accounts/#storeindividual>>.

<sup>37</sup> See, *inter alia*, Australian Accounting Standards Board and Auditing and Assurance Standards Board, *Climate-related and Other Emerging Risks Disclosures: Assessing Financial Statement Materiality Using AASB/LASB Practice Statement 2* (April 2019), <[https://www.aasb.gov.au/admin/file/content102/c3/AASB\\_AUASB\\_Joint\\_Bulletin\\_Finished.pdf](https://www.aasb.gov.au/admin/file/content102/c3/AASB_AUASB_Joint_Bulletin_Finished.pdf)>; KPMG, *Climate Disclosures Within the Annual Report: An Australian Focus* (1 June 2020), <<https://assets.kpmg/content/dam/kpmg/au/pdf/2020/climate-disclosures-within-annual-report-australian-focus.pdf?ExcludePageBreak=true>>; Deloitte, *Clarity in Financial Reporting: Disclosure of Climate-related Risks* (February 2020), <<https://www2.deloitte.com/content/dam/Deloitte/au/Documents/audit/deloitte-au-audit-clarity-disclosure-climate-related-risks-070220.pdf>>. and Nick Anderson, *IFRS® Standards and Climate-related Disclosures*, <<https://cdn.ifrs.org/-/media/feature/news/2019/november/in-brief-climate-change-nick-anderson.pdf?la=en>>.

<sup>38</sup> Mainboard Rules Practice Note 7.6, Singapore Exchange.

<sup>39</sup> See *IFRS Standards and climate-related disclosures* (November 2019) <<https://cdn.ifrs.org/-/media/feature/news/2019/november/in-brief-climate-change-nick-anderson.pdf?la=en>>.

as well as the announcements by DBS, OCBC and UOB Banks to no longer fund new coal-fired power plants moving forward. This underscores that even outside a formal statutory disclosure regime, there is increasing expectation on certain sectors of the economy such as the banking and finance sectors, for greater openness and disclosure *vis-à-vis* a company's involvement with significant carbon-emitting activities.<sup>40</sup>

71 Breach of disclosure obligations provided for under the Listing Rules (read with the SFA) results in both civil and criminal consequences. A breach of section 203(1) of the SFA which is not intentional or reckless can result in civil liabilities under the SFA. Section 199 read with section 204 of the SFA, however, provides criminal penalties for a disclosure which is false or misleading in a material particular and is likely to:

- (a) induce other persons to subscribe for, *inter alia*, securities;
- (b) induce the sale or purchase of, *inter alia*, securities by other persons; or
- (c) have the effect (whether significant or otherwise) of raising, lowering, maintaining or stabilising the market price of, *inter alia*, securities,

---

<sup>40</sup> See *Investor Expectations for Paris-aligned Accounts* (November 2020) <<https://www.iigcc.org/download/investor-expectations-for-paris-aligned-accounts/?wpdmdl=4001&refresh=5fdbfbd3363ee1608252371>>.

if, when the disclosure is made, the maker of the disclosure either does not care whether the disclosure is true or false, or knows or ought reasonably to have known that the disclosure is false or misleading in a material particular.

72 Where a breach of section 203(1) of the SFA is intentional or reckless, a director of the defaulting company is *personally* criminally liable under section 331(1) of the SFA if that director consented or connived at the company's commission of that offence, or that offence is attributable to any neglect on the part of that director.

73 Before concluding this segment on the potential consequences for breach of director duties, three observations of general application are germane to the broader discussion:

(a) First, under section 172(1) of the CA, any provision that purports to exempt or has the effect of exempting a director from the consequences of the above-outlined breaches of duty is void. This is so even if the provision which purports to do so is contained in the company's constitution: section 172(3) of the CA.

(b) Second, where criminal penalties are threatened against an errant director, the ultimate discretion on whether or not to commence criminal proceedings lies with the Public Prosecutor.<sup>41</sup> In the regulatory context, the relevant regulator (most likely the MAS) will be responsible for regulatory enforcement. Private prosecutions may also be brought, subject to the Public Prosecutor's control, where criminal offences are made out.

---

<sup>41</sup> See, for example, *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135.

(c) Third, there exists a whole range of enforcement options beyond those which have been outlined above. In particular, the relevant enforcement agencies can issue warnings, offer composition for particular offences, or use regulatory levers such as disqualifying a director, or even de-listing an errant director's company. The range of options available underscores the breadth of tools at a regulator's disposal in seeking to punish wrongdoing on the part of directors.

74 A relevant issue that arises in this context is whether directors who have properly applied their minds to relevant considerations for their companies and who act based on a rational and informed assessment of the company's best interests, but nonetheless elect not to disclose climate change risks, can avail themselves of what has been described as the "business judgment rule".<sup>42</sup>

75 The business judgment rule in Singapore, unlike in some other Commonwealth jurisdictions, is based not on statute, but on common law principles.<sup>43</sup> It provides a defence for directors whose companies encounter commercial losses in their dealings despite the directors acting properly, diligently and in the best interest of their companies. As VK Rajah JC (as he then was) observed in *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 at [17]:

It is the role of the marketplace and not the function of the court to punish and censure directors who have in good faith, made incorrect commercial decisions. Directors should not be coerced into

---

<sup>42</sup> *Corporate Law* at [09.047].

<sup>43</sup> Cf N Hutley SC and S Hartford-Davis "Climate Change and Directors' Duties", Centre for Policy Development and the Future Business Council, 7 October 2016 <[https://cpd.org.au/wp-content/uploads/2019/03/Noel-Hutley-SC-and-Sebastian-Hartford-Davis-Opinion-2019-and-2016\\_pdf.pdf](https://cpd.org.au/wp-content/uploads/2019/03/Noel-Hutley-SC-and-Sebastian-Hartford-Davis-Opinion-2019-and-2016_pdf.pdf)>.

exercising defensive commercial judgment, motivated largely by anxiety over legal accountability and consequences. *Bona fide* entrepreneurs and honest commercial men should not fear that business failure entails legal liability ... Undue legal interference will dampen, if not stifle, the appetite for commercial risk and entrepreneurship.

This view was specifically approved by the Court of Appeal in *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 at [39].

76     However, a director will not be protected by the business judgment rule if he fails to make a conscious decision, or does not exercise his judgment, or fails to properly inform himself of the relevant facts and circumstances before undertaking a course of action. Where a director is accused of failing to disclose climate change risks, his culpability must be assessed against the businesses of his company in order to determine whether or not these risks to the company should have been disclosed. This assessment will necessarily turn on the facts, but it bears noting that invocation of the business judgment rule will not necessarily protect directors seeking to avail themselves of this principle as a defence.

77     The scope and ambit of the business judgment rule is also likely to evolve as knowledge concerning climate change risks becomes more prevalent. Developing standards in Singapore and elsewhere are also likely to inform whether or not a particular decision would be protected by the business judgment rule. In particular, the adoption of international standards on disclosure, such as the recommendations of the TCFD, as well as the government's imposition of requirements in the CPA on emissions reports, are likely to contour and limit the

circumstances in which directors will be able to rely on the business judgment rule.

78 Thus, even where the business judgment rule might be perceived as rendering the disclosure of certain climate change risks unnecessary at that point in time, the precise *reasons* underpinning that conclusion should preferably be disclosed. This would insulate directors from potential allegations of not having fully complied with their disclosure obligations.

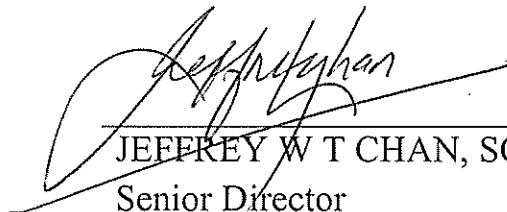
## **Conclusion and Advice**

79 To summarise: at this time, directors in Singapore are *obliged*, when carrying out their responsibilities as directors, to take into account climate change and its associated risks, particularly insofar as those risks are or may be material to the interests of the company. This is required, first and foremost, by the many written laws of Singapore that seek to address environmental sustainability and climate change. It is also necessitated by the duty of care and diligence as well as the requirement to act in good faith which all directors are required to observe by both the CA as well as by the general law. This requires, at the *very least*, consideration by directors of their companies' exposure to the physical, transitional and liability risks associated with climate change. As and when climate change litigation becomes more prevalent, it will become even more likely that litigation against directors who have failed to properly address or consider climate change risks would arise. Significantly, directors who fail to give due consideration to climate change risks, or who wilfully or recklessly fail to comply with their disclosure obligations, may face the spectre of criminal

prosecution by the relevant governmental agencies, as well as potential personal liability for their defaults.

80 Given the heightened public awareness of the risks of climate change, the strong legislative measures that have been promulgated for environmental protection, which also address climate change risks, and the increasing clamour for more stringent enforcement across the world against activities that would exacerbate climate change, directors should take commensurate steps to inform themselves of the risks of climate change that may impact their companies and manage these risks. These include instituting governance and management processes for identifying, monitoring, managing and reporting on these risks.

Dated this 14<sup>th</sup> day of April 2021



---

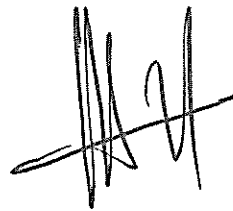
JEFFREY W T CHAN, SC  
Senior Director  
TSMP Law Corporation, Singapore



---

JOSEPH CHUN  
Partner  
Shook Lin & Bok LLP, Singapore





---

Dr ERNEST LIM  
Associate Professor  
Faculty of Law  
National University of Singapore



---

PETER DORAISAMY  
Managing Partner  
PDLegal LLC, Singapore



---

QUEK WEN JIANG, GERARD  
Partner  
PDLegal LLC, Singapore

*Note: The signatories to this Opinion would like to express our thanks for the research contributions provided by Mr Jarret Huang, MA (Cantab), LL.M. (Harvard), which were of an exceptional standard and made in his personal capacity.*

## List of References

1. Australian Accounting Standards Board and Auditing and Assurance Standards Board, *Climate-related and Other Emerging Risks Disclosures: Assessing Financial Statement Materiality Using AASB/IASB Practice Statement 2* (April 2019)
2. Carbon Pricing Act (Act 23 of 2018)
3. Companies Act (Cap 50, 2006 Rev Ed)
4. *Corporate Law* (Academy Publishing, 2015, Hans Tjio Gen. Ed.)
5. Dan W Puchniak and Samantha S Tang, "Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret" NUS Law Working Paper 2019/022, October 2019
6. Deloitte, *Clarity in Financial Reporting: Disclosure of Climate-related Risks* (February 2020)
7. Energy & Climate Intelligence Unit, "Net Zero Emissions Race: 2020 Scorecard" (2020)
8. Energy Conservation Act (Cap 92C, 2014 Rev Ed)
9. Environmental Protection and Management Act (Cap 94A, 2002 Rev Ed)
10. G Chan "The Right of Access to Justice: Judicial Discourse in Singapore and Malaysia" (2007) AJCL 2(1)
11. GIC Private Limited, "GIC aligns with CDP, Climate Action 100+, and AIGCC" (2020)
12. *IFRS® Standards and Climate-related Disclosures* (2019)
13. International Panel on Climate Change Assessment Report 1990
14. International Panel on Climate Change Climate Change Report 2018: *Global Warming of 1.5°C*
15. International Panel on Climate Change Climate Change Synthesis Report 2014: *Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*
16. J Setzer J and R Byrnes (2020) *Global Trends in Climate Change Litigation: 2020 Snapshot*. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science
17. J Cohen et al, "Divergent Consensuses on Arctic Amplification Influence on Midlatitude Severe Winter Weather" (2020) 10 Nature 20-29
18. J C Steckel et al, "Coal and Carbonization in Sub-Saharan Africa" (2020) 10 Nature 83-88
19. John Woetzel, et al, *Climate Risk and Response: Physical Hazards and Socioeconomic Impacts* (McKinsey Global Institute, January 2020)
20. KPMG, *Climate Disclosures Within the Annual Report: An Australian Focus* (1 June 2020)
21. MAS, *Guidelines on Environmental Risk Management for Asset Managers* (8 December 2020)

22. MAS, *Guidelines on Environmental Risk Management for Insurers* (8 December 2020)
23. Monetary Authority of Singapore (“MAS”), *Guidelines on Environmental Risk Management for Banks* (8 December 2020)
24. N Hutley SC and S Hartford-Davis “Climate Change and Directors’ Duties”, Centre for Policy Development and the Future Business Council, 7 October 2016
25. National Climate Change Secretariat (“NCCS”), *Charting Singapore’s Low-Carbon and Climate Resilient Future* (2020)
26. NCCS, “Impact of Climate Change and Adaptation Measures”
27. NCCS, *Singapore’s Climate Action Plan: Take Action Today, For a Carbon-Efficient Singapore* (2016)
28. Paris Agreement 2015
29. Resource Sustainability Act 2019 (Act 29 of 2019)
30. Sarah Barker and Ellie Mulholland (lead authors), “Directors’ Liability and Climate Risk: Comparative Paper – Australia, Canada, South Africa, and the United Kingdom” (October 2019)
31. Securities and Futures Act (Cap 289, 2006 Rev Ed)
32. Singapore Exchange Listing Rules (Mainboard)
33. Singapore Exchange Practice Note 7.6
34. Task Force on Climate-Related Financial Disclosures, *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* (June 2017)
35. Transboundary Haze Pollution Act (Act 24 of 2014)

### **List of Cases**

1. *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153
2. *Bray v Ford* [1896] AC 44
3. *Bristol and West Building Society v Mothew* [1998] Ch 1
4. *Chew Kong Huat v Ricwil (Singapore) Pte Ltd* [1999] 3 SLR(R) 1167
5. *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115
6. *Goh Chan Peng v Beyonics Technology Ltd* [2017] 2 SLR 592
7. *Ho Kang Peng v Scintronic Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329
8. *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135
9. *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848
10. *Luciano Lliuya v. RWE AG* (2015) (Essen Regional Court Case No. 2 O 285/15)
11. *Re Smith and Fawcett Ltd* [1942] Ch 304
12. *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162