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DIRECTORS' DUTY OF CARE AND LIABILITY FOR LAPSES IN CORPORATE DISCLOSURE OBLIGATIONS

Observations and Comments on Select Issues*

This paper provides some observations and comments on two key aspects of directorial criminal liability for lapses in governance – the directors' duty of care and the liability for lapses in corporate disclosure obligations. Select issues discussed include the rising standards expected of directors and the impact of this on the directors' performance of their role; criminal liability for negligence; the interaction between liability for negligence and liability for lapses in disclosure obligations; and liability for failure to comply with corporate disclosure requirements itself.

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I. Introduction

1 There are several roles which directors play as "gatekeepers" of companies in the context of good corporate governance. The first is to enhance the value of the company for the benefit of its shareholders (having regard to the interests of other stakeholders). The second, which may be seen as corollary to the first, is to prevent or minimise the destruction of value in the company. A third role, which applies to directors of companies which are publicly listed, is to ensure proper corporate disclosure of information so as to enable investors to make informed decisions relating to the issued securities.

2 This article provides the author's observations and comments on several issues of concern faced by directors in relation to two key aspects of directorial liability for lapses in governance – the directors'

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* A significant part of this article was first presented by the author at the Comparative Enforcement of Corporate Law Conference 2014 entitled "Directors, Corporate Governance and Issues on Directorial Liability for Governance Lapses" and published as part of the conference proceedings. This is an updated version of the article focusing on the portion dealing with the directors' duty of care and liability for lapses in corporate disclosure requirements.

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duty of care and the liability for lapses in corporate disclosure obligations.

II. Issue one: Directors' duty of care – Rising standards, rising costs

3 Directors owe a duty under both common law[1] and statute[2] to the company of which they are directors to act with reasonable care[3] in the discharge of their duties. The common law duty is often traced to *Re City Equitable Fire Insurance Co Ltd*[4] in which the court held that directors owed a duty to act with "reasonable" care. In determining the reasonableness of a director's actions, regard is to be given to the level of the specific director's knowledge and experience, thus suggesting a subjective approach to establishing liability. This has since evolved, incorporating a more objective standard by which a director's actions are to be measured.[5] This modern approach has been adopted in Singapore. In *Lim Weng Kee v Public Prosecutor*[6] ("*Lim Weng Kee*"), it was held that the tests for determining the standard of care and diligence is the same for both civil and criminal actions against directors[7] and that:[8]

> … [t]he law hence stands as thus: the civil standard of care and diligence expected of a director is objective, namely, whether he has exercised the same degree of care and diligence as a reasonable director found in his position. This standard is not fixed but 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. However, it is important to note that, unlike the traditional approach, this standard will not be lowered to accommodate any inadequacies in the individual's knowledge or experience. The standard will however be raised if he held himself out to possess or in fact possesses some special knowledge or experience.

4 In pegging the test to that of a "reasonable director found in his position", the standard of care expected of directors will continue to

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1 *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 501.
2 Companies Act (Cap 50, 2006 Rev Ed) s 157.
3 Section 157 of the Companies Act (Cap 50, 2006 Rev Ed) does not make reference to the duty of care but uses the word "diligence". However, courts do not appear to have distinguished between "care" and "diligence", and it has been generally accepted to also encompass such a duty: see *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848. This sub-issue and the correctness of such an approach are addressed at paras 6–15 below.
4 [1925] Ch 501.
5 See *Daniels v Anderson* (1995) 16 ACSR 607.
6 [2002] 2 SLR(R) 848.
7 *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 at [34].
8 *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 at [28].

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evolve over time as expectations of what is reasonable behaviour will progress as businesses get more sophisticated and complicated and directors more educated. The court is expected to "apply a standard of care that reflects contemporary community expectations".[9] The evolution of these expectations over time will cause the standard to drift higher and higher. The promulgation of various regulatory responses and codes of corporate governance and best practice which followed the collapse of huge corporations and corporate conglomerates in the developed world has also played a significant role in raising community expectations of standards that directors should be held up to.[10] While the decision in the landmark Australian case of *AWA Ltd v Daniels*[11] may have been "well received by the business community"[12] at the time, the more recent decision of *Australian Securities & Investments Commission v Healey*[13] raised levels of anxiety for directors significantly. In the latter case, non-executive directors were held liable for failing to note errors in the reported financial statements of a company relating to the categorisation of certain short-term debts and guarantees. The implication of that decision is that directors are now expected to be familiar with the relevant accounting standards applicable to the categorisation of certain transactions and to have a working knowledge of how these are to apply. A similar expectation has recently been voiced in Singapore. It has been explicitly stated by the Accounting and Corporate Regulatory Authority ("ACRA") that directors are expected to "have sufficient and up-to-date knowledge of the accounting principles and practices to perform an effective high-level review of the financial statements" in the context of financial reporting and review of their company's financial statements.[14] It is unlikely that this would have been a community expectation of directors a decade or so ago.

9 *Australian Securities & Investments Commission v Rich* (2003) 44 ACSR 341.

10 In this regard, industry standards and codes have been held to be relevant in determining the appropriate standard of care to be expected in cases involving negligence generally. See *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd* [2014] 2 SLR 360 and *Hotel Royal @ Queens Pte Ltd v J M Pang & Seah (Pte) Ltd* [2014] 3 SLR 967.

11 (1992) 10 ACLC 933; *Daniels v Anderson* (1995) 13 ACLC 614.

12 See John Farrar, "Directors' Duties of Care – Issues of Classification, Solvency and Business Judgment and the Dangers of Legal Transplants" (2011) 23 SAcLJ 745 at 752. It was the first instance decision of Rogers J in *AWA Ltd v Daniels* (1992) 10 ACLC 933 that appeared to be well received by the business community at the time it was delivered.

13 [2011] FCA 717.

14 See the Accounting and Corporate Regulatory Authority, Practice Direction 2 of 2014, "Directors' Duties in Relation to Financial Reporting and Review and Sanction Process of the Financial Reporting Surveillance Programme Administered by the Accounting and Corporate Regulatory Authority" Annex A at para 3.

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5 There are several practical implications which flow from these rising standards. First, the rising expectations of, and hence standards imposed on, directors will no doubt make directors pay closer attention to corporate affairs and their governance responsibilities. While this is no doubt a good thing, there is also a downside. First, there will be a direct increase in expenses (such as increases in premiums for directors' and officers' liability insurance, directors' fees, and advisory fees incurred as more and more directors seek professional advice for their decisions *etc*). Secondly, there are also likely to be indirect opportunity costs associated with directors spending an inordinate amount of time focusing on compliance and accountability issues, and insufficient time on issues that can enhance corporate performance at board meetings. Related to this is the possibility that directors (in particular non-executive directors) will be less inclined to take risks or may insist on checks which either limit or restrain the ability of the company to move forward quickly when opportunities present themselves. Finally, there is the question of whether these rising standards may dissuade candidates from taking up the role of non-executive directors. The fact that there may be criminal liability imposed on directors for breach of their duty of care only adds to these potential challenges. It is to this issue that the author next turns his attention.

III. Issue two: Criminal liability for breach of duty of diligence imposed by s 157 of the Companies Act

6 Another issue which continues to receive significant attention is the imposition of criminal liability for breach by a director of the duty of diligence imposed by s 157 of the Companies Act[15] ("CA"). The removal of criminal liability for breach of directors' duties was suggested and mooted during the consultation phase of the latest review of the CA.[16] It is likely that the impetus for the suggestion was, at least in part, the result of the increased expectations of directors discussed earlier and the concern which directors have in possibly being prosecuted for not meeting those standards. Some in the industry have also suggested that the potential for criminal liability, in light of the onerous duties imposed, have made it more and more difficult to get competent directors to step forward to serve on corporate boards.

15 Cap 50, 2006 Rev Ed.

16 See Ministry of Finance, *Report of the Steering Committee for Review of the Companies Act* (June 2011) ch 1, at paras 121–125. The issue before the Steering Committee then, however, was not limited to the directors' duty of care but also extended to other aspects of directors' duties covered by s 157 of the Companies Act (Cap 50, 2006 Rev Ed).

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7 The Steering Committee which reviewed the CA observed that jurisdictions such as Australia, New Zealand and the UK had already taken steps to decriminalise breach of duties provided for by statute.[17] It recommended, however, that Singapore not follow suit due to concerns that this may send a wrong signal and encourage misconduct.[18] In making its recommendation, the Steering Committee did not distinguish between the various duties covered by s 157. Section 157 deals not only with the duty of diligence but also the duty to act honestly as well as the duty not to make improper use of one's position[19] and information acquired by virtue of one's position to benefit oneself or to cause detriment to the company.

8 It is respectfully submitted that while keeping the criminal penalties for breach of a director's duty to act honestly and the duty not to make improper use of information under s 157 may be appropriate, the retention of criminal liability for breach of a director's duty of care and diligence may be somewhat onerous. It is difficult to ascertain whether removal of criminal liability will make directors less careful or diligent in performing their duties. The potential of being sued and the risks of facing possible disqualification from acting as directors or involvement in future management of companies and loss of reputation are already significant deterrents to such misconduct. Also, unlike situations where breach of a director's duty involves fraud or dishonesty or cases involving conflicts of interests, a failure to exercise care and diligence generally does not result in any benefits for the director. There is no intent of a reprehensible nature involved. The primary concern where breach of duty of care or diligence occurs should be the possibility that the company may suffer losses resulting from the breach, and to ensure that it is properly compensated. Consequently, the focus of the regulatory framework should be on whether adequate safeguards are in place to compensate the company for such losses and in holding the director accountable for the loss as opposed to penalising the

17 These relate to different aspects of breach of directors' duties, which include the breach of a director's duty of care and diligence. For a summary of the relevant aspects of breach covered in the various jurisdictions, see Ministry of Finance, *Report of the Steering Committee for Review of the Companies Act* (June 2011) ch 1, at paras 123–124, fnn 69, 70 and 71.

18 Ministry of Finance, *Report of the Steering Committee for Review of the Companies Act* (June 2011) ch 1, at para 122. While recommendation 1.23 states that the recommendation is pending the Accounting and Corporate Regulatory Authority's review, the recommendation has been accepted by the Ministry of Finance and the subsequent draft Companies Amendment Bill 2013 which was put out for consultation has kept the criminal sanctions with respect to breach of s 157 of the Companies Act (Cap 50, 2006 Rev Ed).

19 This was inserted by s 78 of the Companies (Amendment) Act 2014 (Act 36 of 2014).

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director.[20] This should fall squarely within the realm of the civil law with its focus on compensatory remedies.

A. "Civil penalty" as viable alternative

9 While the recommendation to retain criminal liability for breach of s 157 of the CA was accepted by the Ministry of Finance, an issue which was left open was the possible introduction of a civil penalty regime as an alternative form of deterrent.[21] Such a regime would be a good compromise and is already in place under the Securities and Futures Act[22] ("SFA") *vis-à-vis* securities offences.[23] A civil penalty would retain a punitive element to breach of the duty while doing away with the more serious consequences of being convicted of a crime, namely, obtaining a criminal record and facing the possibility of time in jail. The regime can also be designed to allow the company to ride on the imposition of a civil penalty to mount a civil claim against the errant directors along the lines similar to s 236 of the SFA. This would deal with the argument that there are significant difficulties for shareholders to enforce civil remedies due to the "proper plaintiff rule"[24] and the absence of a contingent fee system for civil litigation here in Singapore.

B. Giving narrower meaning to duty to use "reasonable diligence" for purposes of s 157 of the Companies Act

10 Another possible way to address the concerns of directors on the apparent harshness of s 157 of the CA is to give a narrower meaning to the phrase "reasonable diligence" in the context of the section. Courts in Singapore have generally not drawn any significant distinction between "care" and "diligence" when discussing s 157 and have generally treated the section as a statutory reflection of the directors' duty to act with *reasonable care and diligence* under common law.[25] In the often-cited decision of *Lim Weng Kee*, for example, the learned then

20 For a comprehensive analysis on the issue of decriminalising directorial negligence, see Timothy Liau, "Is Criminalising Directorial Negligence a Good Idea?" (2014) 14(2) JCLS 175.

21 *Review of the Singapore Companies Act: Ministry of Finance's Responses to the Report of the Steering Committee for Review of the Companies Act* (3 October 2012) at para 41.

22 Cap 289, 2006 Rev Ed.

23 See Pt XII, Div 4 of the Securities and Futures Act (Cap 289, 2006 Rev Ed).

24 This rule disallows shareholders from proceeding with a direct claim against a wrongdoer for wrongs suffered by the company as it is the company which is the proper plaintiff to initiate such proceedings. Shareholders can, however, initiate a derivative action under s 216A of the Companies Act (Cap 50, 2006 Rev Ed).

25 See, for example, the recent Court of Appeal decision of *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329.

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Chief Justice Yong Pung How held that the *civil standard* of *care and diligence* was applicable to breach of s 157, thus implying that s 157 also included a duty for directors to exhibit reasonable care. This statement has been affirmed and applied in numerous subsequent cases. It should be noted, however, that the case itself and subsequent cases citing it were primarily concerned with the test of the *standard* to be applied where directors were negligent. There does not appear to be any reported local decision in which the issue of whether "care" should be distinguished from "diligence" for the purpose of s 157 has been argued before the courts in Singapore.

11 The word "care" does not appear in the wording of s 157 of the CA. It has been suggested that, conceptually, the duty to be careful is distinct from the duty to be diligent.[26] Section 157 was taken from the Victorian Companies Act of 1958,[27] which was the model on which the Australian Uniform Companies Act of 1961 was based.[28] The word "care" was not present in those provisions. It was only in 1981 when a new Companies Code was introduced that the Australian legislation was amended to include the requirement for directors (officers) to exhibit a reasonable degree of care *in addition to* the requirement of reasonable diligence[29] and subsequent Australian cases approached the relevant statutory provision accordingly. This suggests that, in Australia, a legal distinction has been made between the concepts of "diligence" and "care". It may thus be argued that, since no similar amendment has been made in Singapore's legislation to include the word "care" in s 157 of the CA, the inference should be that the section only imposes a statutory duty to use "reasonable diligence" and not "reasonable care". The fact that s 157 is stated to be "in addition to … any rule of law relating to the duty or liability of directors" also lends support to an argument being made that the duties imposed by s 157 may not necessarily be the same as those imposed by common law despite the fact that case law has held that the test for the *standard* to be demonstrated in the exercise of both care and diligence should be the same.

12 One way of distinguishing the concept of "diligence" from "care" is perhaps to look at "diligence" as a subset of what it means to exercise "care" and to attribute conduct which is more reprehensible for establishing breach of the "duty to be diligent" than that which is to be

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26 See *Walter Woon on Company Law* (Tan Cheng Han ed) (Sweet & Maxwell, 3rd Ed, 2009) at para 8.14.

27 Companies Act 1958 (Vic) s 107.

28 Uniform Companies Act 1961 (Cth) s 124.

29 Companies Code 1981 (Cth) s 229. The Explanatory Memorandum to the corresponding Australian Companies Bill 1981 merely stated that the requirement of reasonable care was included as an additional requirement without explaining why it did so.

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required to establish breach of the "duty to be careful" (taken here to mean breach of the duty of care which does not amount to a failure to act with reasonable diligence). Such a possibility was suggested in the Australian case of *Byrne v Baker*[30] where the court opined that the statutory duty of reasonable diligence introduced "one aspect of the concept of negligence, as known and acted upon for many years by the courts on misfeasance summonses against directors".[31] The case provided no further guidance on what this aspect was save that it had reference to identifiable acts or omissions and not to any general characterisation of the conduct of a director over a selected period.

13 It is suggested that a possible interpretation of the word "diligence" is to give it a meaning which connotes some form of active act of putting effort into, paying attention to or doing something. Failing to act diligently would thus mean the failure to put effort into or pay attention to a matter where such effort or attention was required (such as failing to ask to have sight of a corporate announcement prior to agreeing to having it released)[32] or failing to embark on a course of action which a reasonable director would have taken, having regard to circumstances (such as failing to seek legal advice on the necessity of granting a corporate guarantee to a third party or failing to wait for cheques to clear prior to releasing pawned items to a person).[33]

14 The above may be distinguished from situations where the directors took pains to act on a particular matter but did not meet the requisite standard of care when so acting. This may arise, for example, where directors approve a company's financial statements after having gone through them but may have been less than careful when going through the statements in not realising that significant items are wrongly classified before releasing them to shareholders.[34] Here, the directors may be said to have acted diligently in spending the time and effort in examining the financial statements but may not have exercised the objective standard of care expected of them to ensure that significant items are properly classified in accordance with applicable accounting standards.

30 [1964] Vic Rp 57; [1964] VR 443. This was a decision of the full court of the Supreme Court of Victoria. The case concerned the interpretation of s 107(1) of the Australian Companies Act of 1958, which is *in para materia* with s 157 of the Singapore Companies Act (Cap 50, 2006 Rev Ed).

31 *Byrne v Baker* [1964] Vic Rp 57; [1964] VR 443 at 453.

32 See, for example, the facts in *Ong Chow Hong (alias Ong Chaw Ping) v Public Prosecutor* [2011] 3 SLR 1093.

33 See, for example, the facts in *Jurong Readymix Concrete Pte Ltd v Kaki Bukit Industrial Park Pte Ltd* [2003] 3 SLR(R) 1 and *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 respectively.

34 See, for example, the facts in *Australian Securities & Investments Commission v Healey* [2011] FCA 717.

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15 Yet another approach may be to distinguish "diligence" from "care" by adopting the "reckless" and "negligent" distinction used in s 203 of the SFA. In *Madhavan Peter v Public Prosecutor*[35] the High Court interpreted "reckless" for the purposes of s 203 of the SFA as comprising two elements: (a) subjective awareness of a risk; and (b) unreasonableness on the part of the offender in taking that risk.[36] One can adopt an interpretation of the duty to "use reasonable diligence" as the duty "not to act recklessly". If this interpretation is found suitable, it is suggested that s 157(1) may be amended accordingly.

IV. Issue three: Application of s 157 of the Companies Act to failure to comply with continuous disclosure obligations under s 203 of the Securities and Futures Act

16 Section 203 of the SFA provides that corporations should not "intentionally, recklessly or negligently fail to notify the securities exchange of such information as is required to be disclosed by the securities exchange under the listing rules" (referred to here as "failure to comply with continuous disclosure obligations").[37] Such failure will only amount to an offence if it was "intentional" or "reckless".[38] In practice, it is a corporation's board which is generally responsible for compliance with s 203. Hence, under rules of attribution, it is the board's mental state which is relevant in determining the type of mental element that should be applied to the corporation.[39] In cases where it is held that a corporation has negligently contravened s 203, the implication is that there must have been a finding that its directors[40] were the ones who

35 [2012] 4 SLR 613.

36 *Madhavan Peter v Public Prosecutor* [2012] 4 SLR 613 at [112]. The court adopted the definition put forward by the House of Lords in *R v G* [2004] 1 AC 1034; [2003] 4 All ER 765 in the context of s 1 of the English Criminal Damage Act 1971 (c 48).

37 The extent of the disclosure obligations imposed by s 203 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) was discussed in more detail earlier in this paper. A closer examination of the provision itself will follow later.

38 Securities and Futures Act (Cap 289, 2006 Rev Ed) s 203(3).

39 Attribution of *mens rea* for corporate crime is not a straightforward matter and requires a consideration of the how the relevant statutory provision should be interpreted having regard to the language used and purpose – see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 and *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329. It is submitted that, as the board has responsibility for deciding whether or not to make the necessary disclosures under s 203 of the Securities and Futures Act (Cap 289, 2006 Rev Ed), it would be the knowledge or acts of the board that should be attributed to the company for the purpose of determining whether the provision has been contravened.

40 There are, however, some challenges in applying this aspect of s 203 of the Securities and Futures Act (Cap 289, 2006 Rev Ed). These are highlighted at paras 18–21 below.

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were in fact negligent in causing the contravention. Where the corporation's failure to comply with continuous disclosure obligations under s 203 of the SFA is a result of negligence, this would not amount to an offence.[41] It flows then that the directors cannot be convicted under s 331 of the SFA (which imposes liability on directors for SFA offences committed by a corporation) read together with s 203 of the SFA if the failure to make the requisite disclosure was the result of the board's negligence as the operation of s 331 is predicated on an offence first being committed by the corporation.

17 There have, however, been cases where directors have been charged with, and convicted of, breach of their duty of diligence under s 157 of the CA where their companies are in breach of the s 203 of the SFA continuous disclosure provision. This occurred, for example, in a series of cases involving several directors of a company which failed to disclose that its executive chairman was no longer discharging his duties as such due to his having suffered a stroke.[42] There thus appears to be some degree of inconsistency in the two provisions *vis-à-vis* liability of directors for failure to comply with continuous disclosure obligations. On the one hand, the SFA specifically provides that "negligent" failure to comply with continuous disclosure obligations under s 203(1) shall not be an offence (for the company and, consequently, for the directors as well under s 331 of the SFA). On the other hand, directors can be convicted under s 157 of the CA for negligently failing to comply with s 203(1). While one can argue that the former provides for whether the company has committed an offence and the latter focuses on its directors, it is submitted that it does not make sense for directors to be prosecuted under the CA for an act that is attributed to the company which the SFA specifically provides not to be an offence by the company. This anomaly may be resolved if breach of a directors' duty of diligence is decriminalised or a narrower meaning, as discussed earlier, is given to the word "diligence" under s 157 of the CA.

V. Issue four: Observations on s 203 of the Securities and Futures Act itself

18 Section 203 of the SFA makes it an offence for a corporation to "intentionally" fail to comply with continuous disclosure obligations. The author has heard comments made at some workshops/seminars that the wording of the section suggests that it is contravened so long as a corporation has made a conscious decision not to make the requisite disclosures – even where this is done after the corporation took the

41 Other consequences, however, such as a civil penalty, may follow.

42 See *Public Prosecutor v Lee Thian Soon* [2008] SGDC 340 together with other related cases.

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necessary steps to seek legal advice and was wrongly advised on the need for disclosure. Such an interpretation appears possible on a plain reading of the provision. It is respectfully submitted, however, that it could not have been the intent to penalise corporations in such a situation. The focus when interpreting the section should hence not be on the intent or reason for *non-disclosure* but on why there was *non-compliance* with the disclosure requirements. The phrase "fail to notify the securities exchange of such information *as is required to be disclosed by the securities exchange*" [emphasis added] in s 203 should be read as referring to failure to *comply* with such disclosure requirements. A failure to comply can only be intentional if the corporation knew that it had to comply but failed to do so. As such, where it had properly sought and obtained advice that a failure to disclose a particular matter would not constitute a failure to comply with disclosure requirements, the corporation cannot be said to have intentionally failed to comply with the requirements;[43] rather, the non-compliance by the board was "innocent" (or possibly negligent). Admittedly, however, the section could be worded more clearly.

19 It was suggested earlier that the *mens rea* of the corporation's board be attributed to the corporation *vis-à-vis* the establishment of the mental element necessary for s 203 contravention. A challenge posed when attributing intent for the purposes of liability under s 203 relates to how the section is to operate in cases where various members of the board have different mental states in relation to the non-compliance.[44] This may arise, for example, where some directors intentionally failed to comply with disclosure requirements whereas others may have been negligent in relation to the non-compliance. How should the mental state of the corporation be ascertained in such situations? One solution would be to look at the mental state of the majority of the members of the board to determine the corporation's mental state.

20 This solution, however, is not without its own challenges. First, neither group may form the majority. Secondly, where it is found that the corporation is negligent (because the majority of the board is negligent) in not complying with s 203, the director(s) who intentionally did not comply would not be liable for prosecution under s 331 as no

43 Such an interpretation appears consistent with the approach taken by the court in *Madhavan Peter v Public Prosecutor* [2012] 4 SLR 613 where the court discussed whether the company was reckless in deciding not to disclose a matter in reliance on legal advice that no such disclosure needed to be made at the relevant point in time.

44 This issue is relevant to all situations where the rules of attribution need to be applied to corporations. A full discussion of this, however, is not within the intended scope of this article.

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offence has been committed by the corporation.[45] Thirdly, in the reverse situation where the majority has intentionally not complied with the section, the negligent director(s) may be liable under s 331 as the non-compliance may be said to be attributable to neglect on their part. It appears strange that the potential criminal liability of negligent directors under the section is dependent on whether they are in the majority or in the minority for breach of s 203 of the SFA.

21 This result, however, is due to the circuitous nature in establishing the criminal liability of directors for breach of s 203 through the operation of s 331. In this regard, it should be mentioned that s 331 is a general provision that is applicable in relation to all offences committed by a corporation under the SFA and is not specific to breach of s 203. Further study may need to be done to look at whether similar issues arise where corporations commit offences under other provisions of the SFA. Perhaps directorial liability for a corporation's breach of s 203 can be decoupled from the corporation's breach of the section itself so that sanctions may be taken against those responsible more appropriately. This anomaly can also be resolved in relation to negligent directors by removing "negligence" as one of the criteria for criminal liability under s 331 altogether. The SFA already has a civil penalty regime[46] together with a "piggy back" civil liability framework[47] which may be redesigned to hold negligent directors accountable for their negligence. This should provide sufficient deterrence to encourage directors to exercise their duties relating to corporate disclosure with the requisite care and to punish those who do not.

VI. Conclusion

22 Directors play a key role in setting and maintaining corporate governance standards for companies. The law plays a part in setting the tone taken by directors by, *inter alia*, imposing liability where directors are at fault for the destruction of the value of the corporation. Liability is further extended, in the case of companies whose securities are traded on a securities exchange, to situations where directors fail to ensure that their corporations comply with disclosure requirements designed to

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45 Such a director may, however, be liable for breach of s 157 of the Companies Act (Cap 50, 2006 Rev Ed) if the company in question is a Singapore-registered company.

46 See s 232 read together with s 236H of the Securities and Futures Act (Cap 289, 2006 Rev Ed).

47 See s 236 of the Securities and Futures Act (Cap 289, 2006 Rev Ed). Note, however, that the civil liability framework only operates where it may be shown that the offender had either gained a profit or avoided a loss as a result of the contravention.

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enable investors to make an informed decision as to the value which they may be willing to attach to the securities.

23 There has been a palpable rise in recent years of community expectations of how directors should go about fulfilling their duties to corporations. This has resulted in a rise in the standards of care and diligence which are expected of directors in the performance of their duties. As these standards rise, so too does the potential for being held liable for breach of these duties. This, coupled with the call for more active enforcement of directorial breaches by certain quarters and the fact that directors continue to face potential criminal liability for negligence, may in turn affect the manner in which directors go about managing the affairs of their companies. In many instances, the result is added costs for corporations. This may also deter qualified directorial candidates from being willing to serve on corporate boards. At the same time, the need to protect the interests of shareholders should not be ignored. The environment for business, business culture and community expectations continues to evolve at an ever-increasing pace. The challenge is to continually evaluate the corporate governance framework and to respond appropriately to these changes. What is required is to have a robust governance framework which facilitates accountability and appropriately penalises non-compliance while balancing the need not to unduly affect efficiency and efficacy in board responsibility for corporate performance.

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