LAW PUNDITS

THE ESSENTIALS FOR CONDUCTING BUSINESS GLOBALLY

COURSE MATERIAL

Using this material.

This material explores three major jurisdictions and the various aspects of doing business in these countries. [1] It is drafted in a question format, particularly, the key questions that needs to be considered when expanding a business globally.

I. Types of Business Entities.

1. What are the kinds of corporate entities used in:

AUSTRALIA

Proprietary companies and public companies are the main forms of corporate entity. Both must be registered under the Corporations Act 2001.

Proprietary companies
Proprietary companies can either be limited by shares or unlimited with share capital. Unlimited companies with share capital are rare.Limited proprietary companies have "Proprietary Limited" or "Pty Ltd" at the end of their name.Proprietary companies have different financial reporting requirements depending on whether they are "small" or "large", according to criteria set out in the Corporations Act.

Public companies
Public companies can be limited by shares (most common), limited by guarantee, unlimited with share capital, or no liability if the company's purposes are limited to mining.Limited public companies generally must have "Limited" or "Ltd" at the end of their name. No liability companies have "No Liability" or "NL" at the end of their name.

Listed companies
Listed companies are public companies that are included in the official list of the Australian Securities Exchange (Stock Exchange). They generally have at least 500 shareholders.

UK (ENGLAND AND WALES)
Limited liability companies are the most popular form of corporate entity in the UK, sub-categorised as companies where the liability of members is limited by shares or limited by guarantee, and also as public or private companies.

[1] **The research is as accurate as possible and correct at the date of publication. You are advised to recheck the information.**

In a company limited by shares, the liability of members is limited to any amount unpaid on the issued shares. In a company limited by guarantee, the liability of members is limited to the amount they have undertaken to pay if the company is wound up. A company limited by guarantee cannot be a public company (with very limited exceptions).

It is more common for companies to be limited by shares than by guarantee.

A private company can also be unlimited, where there is no limit on the members' liability, although these are rare (0.2% of companies in 2010/2011).

A private company is any company that is not a public company. The name must end with "Limited" or "Ltd" (unless it is not-for-profit).

There are two major differences between public and private companies. A public company can offer its securities to the public and must have a minimum nominal value of GB£50,000 or Euro equivalent of allotted share capital. Therefore, only public companies can be listed or traded. Public companies are subject to various restrictions and formalities not applicable to private companies. The name must end with "Public Limited Company" or "plc".

The vast majority of UK companies are private. Public companies comprise only 0.3% of all active companies, but account for most of the value and economic activity.

UNITED STATES

The vast majority of US public companies are formed as corporations. While many of the principles discussed below apply to private companies and to other forms of entities, the discussion below is limited to corporate governance rules applicable to, and the practices and principles of, US public corporations.

The focus is on federal securities law and Delaware law, as Delaware is the most common state of incorporation for major US corporations.

2. How are directors' duties and Corporate Governance treated in your country?

AUSTRALIA

The regulatory framework for corporate governance and directors' duties comprises:

- The Corporations Act and the Australian Securities and Investments Commission Act 2001 (*Cth*).
- The Listing Rules of the Stock Exchange (Listing Rules).
- The ASX Corporate Governance Council Corporate Governance Principles and Recommendations (Principles) (*see*Question 3).
- Bodies and committees such as the Corporations and Markets Advisory Committee (CAMAC).
- Industry-specific regulation such as prudential, environmental and workplace relations regulations. The financial services sector is also subject to significant regulation by the Australian Prudential Regulation Authority.

Under the Corporations Act, the internal management of a company may be governed by either or both of:

- Provisions of the Corporations Act known as replaceable rules (a table of replaceable rules is set out in the Corporations Act).
- A company constitution.

Replaceable rules can be displaced or modified by a company constitution. Most companies have a constitution that displaces the replaceable rules. Listed companies must have a constitution.

A company's constitution (and any replaceable rules that apply to a company) creates a statutory contract between:

- The company and its shareholders.
- The company and its directors.
- The shareholders.

Before the introduction of the concept of a company constitution in 1998, companies adopted a memorandum of association and articles of association that governed the internal management of the company and set out its purpose and powers. Some older companies still have a memorandum of association and articles of association, which are taken to be the constitution.

It is no longer necessary for the constitution to state the company's purpose and powers. A company has all the powers of a natural person.

INDIA

India has not adopted a specific corporate governance code for all companies. For listed companies, Clause 49 of the Listing Agreement sets out provisions relating to board composition, committees and the disclosures which must be made by a company.

Clause 49 of the Listing Agreement contains mandatory and non-mandatory provisions relating to corporate governance. The mandatory requirements concern the following, among others:

- The formation of audit committees.
- Disclosure requirements in relation to related party transactions.
- Accounting treatment.
- Risk management.
- Remuneration of directors and CEO/chief financial officer (CFO) certification.

In addition to the above, companies must submit a quarterly compliance report (signed by the compliance officer or the CEO) to the stock exchange on which the company is listed within 15 days of the end of a quarter.

Listed companies must comply with the mandatory provisions set out in Clause 49 of the Listing Agreement. The annual report of a listed company must have a separate section on corporate governance with a detailed report on corporate governance. Non-compliance with the mandatory provisions and the extent to which the non-mandatory requirements have been complied with by a company must be highlighted in the annual report. Contravention of the provisions of the Listing Agreement or of any rules or regulations made under it may attract a fine or imprisonment for the persons responsible for the company's affairs (*sections 23, 23A, 23C, 23E and 23H, Securities Contracts (Regulation Act) 1992*).

Some of the non-mandatory requirements set out in Clause 49 of the Listing Agreement are as follows:

- Independent directors should serve on the board of a company for a period not exceeding, in the aggregate, nine years.
- A remuneration committee may be set up by the board to determine on their behalf and on behalf of the shareholders, with agreed terms of reference, the company's policy on specific remuneration packages for executive directors, including pension rights and any compensation payment.
- A half-yearly declaration of financial performance including a summary of the significant events in last six months may be sent to each shareholder at his home address.
- A company may move towards a regime of unqualified financial statements.
- A company may train its board members in the business model of the company as well as the risk profile of the business parameters of the company, their responsibilities as directors, and the best ways to discharge them.
- A company may establish a mechanism for employees to report to the management concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy (*see Question 36*).

Clause 49 of the Listing Agreement was welcomed by companies, regulators and the shareholders as it provided for more transparency in the affairs of a company.

UK (ENGLAND AND WALES)

Corporate governance

All UK companies are subject to the Companies Act 2006 (Companies Act) and related regulations, which set out rules governing companies. The Companies Act requires each company to have articles of association and addresses other fundamental aspects of corporate governance. In many cases, the provisions of the Companies Act can be supplemented and in some instances contradicted in the articles.

The articles govern the internal management of a company and are a contract between the company and its shareholders. Model forms of articles are set out in regulations, which apply to newly incorporated companies unless modified or replaced by alternative articles.

All companies must make specified filings with the UK Registrar of Companies.

Major UK listed public companies are also subject to the Disclosure and Transparency Rules (DTRs) and Listing Rules (Listing Rules), regulated by the Financial Services Authority (FSA) and subject to the UK Corporate Governance Code (Governance Code). The Takeover Code regulates acquisitions of public and/or UK listed companies and certain other companies that have been traded.

Except for the Governance Code, the above rules are all mandatory in the cases where they apply.

Directors' duties

The general duties applicable to directors of all companies are set out in the Companies Act. The Companies Act also imposes specific obligations on directors. In addition, certain common law duties were not subsumed by the statutory duties.

UNITED STATES

Corporate governance practices and directors' duties are regulated by:

- Statutory law of the state in which the corporation is incorporated. Most US public companies are incorporated in the state of Delaware. The majority of other states base their legislation on Delaware law, or on the Model Business Corporations Act.
- Federal statutory law, including:
  - the federal securities laws, including the Securities Act of 1933 (1933 Act) and the Securities Exchange Act of 1934 (1934 Act);
  - regulations, rules and other guidance promulgated by the Securities and Exchange Commission (SEC).
- Listing standards published by registered stock exchanges, most notably, the New York Stock Exchange Listed Company Manual (NYSE Listing Manual) and the National Association of Securities Dealers Automatic Quotation System Marketplace Rules (Nasdaq Marketplace Rules).
- Common law rules.
- The corporation's certificate of incorporation and bye-laws. Corporate governance guidelines and policies adopted by the board of directors (board) and the charters of board committees also influence the corporation's governance.
- Shareholder activism and litigation, which often influences reform of corporate governance regulations and directors' duties.

3. Has your jurisdiction adopted a corporate governance code?

AUSTRALIA

The ASX Corporate Governance Council, a council of business, investment and shareholder groups chaired by the Stock Exchange, has developed the Principles to promote investor confidence and to assist companies to meet stakeholder expectations. They are not mandatory, but provide non-binding practical guidance. The Principles are directed at listed companies, which must report against the recommendations and give reasons where they are not followed.

Unlisted companies also often refer to the Principles as a benchmark for best practice in corporate governance.

The Principles cover:

- Management and oversight.
- The structure of the board of directors (board).
- Ethical and responsible decision making.
- Financial reporting.

- Disclosure.
- Shareholders' rights.
- Risk management.
- Remuneration.

UK (ENGLAND AND WALES)

The Financial Reporting Council publishes the Governance Code.
Its headings are Leadership, Effectiveness, Accountability, Remuneration, and Relations with Shareholders. Its content addresses:

- The role of the board, chairman (as against the CEO) and non-executive directors.
- Composition, appointments, training and performance of the board.
- Board committees.
- Risk management and financial audit/accountability.
- Director remuneration.
- Shareholders.
- Disclosure of corporate governance arrangements.

In each area, the Governance Code is structured as Main Principles with Supporting Principles and more specific Code Provisions. The Financial Reporting Council also publishes various pieces of guidance on how to apply the Governance Code.

All UK companies with a "Premium Listing" on the London Stock Exchange must report on how they have applied the Governance Code in their annual report. Certain provisions do not apply to companies smaller than the largest 350 companies in the FTSE share index (FTSE 350). Other listed companies can voluntarily adopt some or all of the Governance Code provisions as a mark of best practice.

The Listing Rules require listed companies to state how they have applied the Main Principles. They must also state that they have complied with the Code's provisions or explain where they have not. Deviations may result in shareholder pressure if they are seen as inappropriate. A failure to make the required statements would be a breach of the Listing Rules and may lead to FSA disciplinary action.

The Financial Reporting Council believes the "comply or explain" approach has general support.

UNITED STATES

The US has not adopted a corporate governance code. In the US, corporate governance requirements are imposed primarily by various federal laws, including the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and the federal securities laws, as well as regulations, rules and other guidance promulgated by the SEC.

In addition, the listing standards of registered stock exchanges require listed companies to maintain specified corporate governance practices.

4. What is the management/board structure of a company?

AUSTRALIA

Structure

Companies adopt a single governing board structure and do not adopt a supervisory board.

Management

The company's constitution generally vests management in the board. The board commonly delegates management of the day-to-day operations of the company to the chief executive officer and senior management.

Board members

The board may include executive and non-executive directors. Executive directors are those employed (usually full-time) by the company in management.

The board is responsible for the appointment and removal of the chief executive officer and strategy, performance monitoring and risk management. The chief executive officer is often a member of the board. Occasionally, the chief financial officer or other senior executives are also appointed to the board.

Employees' representation

There is no statutory right for employees to be represented on the board. It is rare for the company's constitution to impose such a requirement.

Number of directors or members

A proprietary company must have no more than 50 non-employee shareholders and at least one director.

A public company must have at least three directors. There is no limit on the number of members for public companies.
Unless provided for in the company's constitution, there is no maximum number of directors.

INDIA

Age restrictions

Generally, a director must be at least 18 years old. However, an independent director must be at least 21 years old and a managing director of a public company must be at least 25 years old.

There is no restriction on the maximum age of a director, except that a managing director of a public company cannot be older than 70 years.

Nationality restrictions

There are no nationality restrictions on the appointment of directors, except in certain sectors. For example, companies engaged in the telecommunications sector and the defence sector must have a majority of Indian directors, and companies providing security services (in the private sector) cannot have foreign directors.

UK (ENGLAND AND WALES)

Structure

UK companies have a unitary board structure. Directors may be executives (employees) or non-executives. The Companies Act treats all directors as having the same obligations. All directors are equal and operate as a board, unless acting with delegated authority. The identity of directors usually depends on the type of company:

- For non-listed companies directorships typically reflect the ownership of shares but they can have non-executive, unconnected directors.
- For listed companies, the board will comprise some directors that have employment and/or ownership connections to the company and some that are independent.

Management

The articles of most companies contain a provision stating that directors are responsible for the management of the company, for which purpose they may exercise all the powers of the company. The full board has responsibility for management. Senior executives are responsible for managing day-to-day operations.

Board members

The directors of a company comprise its board. One director is elected chairman, with the particular powers set out in the articles, in particular whether he has a casting vote on board decisions.

Employees' representation

Employees do not have any right to board representation.

Number of directors or members

A private company must have at least one director; a public company at least two. A company's articles may increase the minimum number and may also set a maximum. Every company must have at least one individual as a director. Subject to that, a director does not have to be an individual.

UNITED STATES

Structure

Corporations incorporated in the US almost always have a unitary board structure. Under most US state corporation statutes, the board members are elected for a term of one year. State laws commonly provide the option to institute a staggered or classified board, which ordinarily divides the members into three separate classes, with one class being elected annually to serve a three-year term. However, due to shareholder activism, classified boards have been declining in popularity over the past few years, with only 15 of the Top 100 US Companies having classified boards in 2012 compared to 37 of the Top 100 US Companies in 2006.

Management

The corporation’s board is responsible for appointing the corporation’s management. The board typically delegates the day-to-day operation of the business to a chief executive officer (CEO) and other management employees. The senior managers of the corporation generally include the CEO, the chief financial officer (CFO) and the chief accounting officer (CAO), among others.

Board members
Members of the board are generally independent directors or members of senior management of the corporation, although some boards have members who are non-executive directors who are not independent (such as former senior executives of the company). While state and federal laws do not, subject to certain limitations, govern director independence requirements, the NYSE Listing Manual and the Nasdaq Marketplace Rules require a majority of the board members to be independent. In 2012, independent directors constituted 75% or more of the boards at 93 of the Top 100 US Companies. The CEO was the only non-independent director at 56 of those top 100 US Companies.

Employees' representation
Employees are not entitled to board representation except in rare circumstances, and employee board members are nearly always executive officers.

Number of directors or members
Most states do not require a minimum number of directors and leave the size of the board to be set by the corporation's certificate of incorporation or bye-laws. The corporation's certificate of incorporation or bye-laws usually set the minimum and maximum number of directors that can comprise the board and provides that the exact number be set out in the bye-laws or established by a board resolution. In 2012, the size of the board of the Top 100 US Companies ranged from eight to 17 members, with an average of 12 members (*2012 S&S Corporate Governance Survey*).

5. Are there any general restrictions or requirements on the identity of directors?

<u>AUSTRALIA</u>
Age
A director must be at least 18 years old. There is no maximum age.

Nationality
A director may be of any nationality.
A proprietary company must have at least one director who is ordinarily resident in Australia.

A public company must have at least two directors who are ordinarily resident in Australia.

Gender
There are no gender requirements. However, the Principles recommend that listed companies implement a policy setting out measurable objectives for achieving gender diversity.

<u>UK (ENGLAND AND WALES)</u>
Age
A director must be aged at least 16. No maximum age limit is imposed by law but the articles can impose a limit.

Nationality
There are no nationality restrictions for directors of UK companies but the articles may impose restrictions, for example to achieve a tax objective.

Gender
There are no mandatory gender quotas.
For many listed companies, the Governance Code states that director appointments should be made with regard for the benefits of diversity, including gender. For financial years starting on or after 1 October 2012, the Governance Code requires companies to publish and report against their policy on boardroom diversity.

UNITED STATES
Age
There is no statutory age limit imposed on directors of corporations. A corporation may, however, impose these restrictions in its certificate of incorporation, bye-laws or corporate governance guidelines. However, 79 of the Top 100 US Companies have disclosed a mandatory retirement age for their non-employee directors with 33 of these companies permitting exceptions to be made by the board or a board committee. Of the companies that have a mandatory retirement age, the majority impose a retirement age of 72. It is common practice for employee directors (other than the chairman under certain circumstances) to retire from the board when they retire from employment with the company (*2012 S&S Corporate Governance Survey*).

Nationality
Generally, there are no nationality restrictions on directors, although nationality may be relevant in some regulated industries. In addition, a director need not be a resident of the state in which the corporation is incorporated.

Gender
While there is no requirement to have a certain number of men or women on a board, most boards strive to have their boards be diverse in as many ways as possible, including with respect to professional experience, cultural background as well as gender.

6. Are non-executive, supervisory or independent directors recognised or required?

AUSTRALIA
Recognition
The terms "non-executive director" and "independent director" are recognised in the corporate governance context.

Board composition
Companies are not required to have independent directors. However, the Principles recommend that listed companies have a majority of independent directors on the board.

Independence
The Principles describe independent directors as non-executive directors who are not members of management and who are free from any business or other relationship that could materially interfere with, or could reasonably be perceived to materially interfere with, the independent exercise of their judgement.

Duties and liabilities
Directors must exercise their powers and discharge their duties in the interests of the company and with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of that company (*see Question 16*).

INDIA
Recognition: Non-executive, supervisory and independent directors are recognised under Indian law.

Board composition: In the case of a listed company, at least 50% of the total number of directors must be non-executive directors. If the chairman of a company is a non-executive director, the non-executive directors can form one-third of the total number of the company's directors. There are no similar requirements in relation to private companies and unlisted public companies.

Independence: Clause 49 of the Listing Agreement sets out the following criteria for determining independence of directors:

- apart from receiving director's remuneration, an independent director should not have any material monetary relationships or transactions with the company, its promoters, its directors, its senior management or its holding company, its subsidiaries and associates that may affect the director's independence;
- an independent director is not related to promoters of the company or persons occupying management positions at the board level or at one level below the board;
- an independent director should not have been an executive of the company in the preceding three financial years;
- an independent director is not a partner or an executive, or was not partner or an executive during the preceding three years, of any of the following:
- the statutory audit firm or the internal audit firm that is associated with the company; and
- the legal firm(s) and consulting firm(s) that have a material association with the company.
- an independent director is not a material supplier, service provider or customer, or a lessor or lessee of the company;
- an independent director is not a substantial shareholder of the company (that is, owning 2% or more of the block of voting shares);
- an independent director must be at least 21 years old.

Duties and liabilities. The duties and liabilities of an independent director are as follows:

- duty of care (although the extent of responsibility of an independent director may differ from that of an executive director). A director must exercise independent judgement

with reasonable care, diligence and skill which should be reasonably exercised by a prudent person with the knowledge, skill and experience that may reasonably be expected of a director in his position and any additional knowledge, skill and experience that he has;
- to contribute to, and constructively challenge, development of the company strategy;
- to scrutinise management performance;
- to satisfy himself that the financial information of the company is accurate and ensure that robust risk management is in place;
- to have a greater exposure to major shareholders (this particularly applies to senior independent directors).

UK (ENGLAND AND WALES)

Recognition

UK company law does not recognise the difference between different types of directors. However, for many listed companies the Governance Code does recognise a difference and places great reliance on the separate role of independent, non-executive directors.

Board composition

There is no restriction on board composition for unlisted companies. A Governance Code Provision recommends that FTSE 350 companies have at least as many independent non-executive directors as executive directors (not counting the chairman). The Governance Code recommends that other listed companies have at least two independent non-executive directors.

Independence

The Governance Code states the board as a whole should decide whether a non-executive director is independent. The Governance Code indicates that a director's independence could potentially be affected by having links to the company or its advisers or employees, such as from employment, business dealings, remuneration (other than directors' fees), family, shareholder representation or long-term service as a director. If the board determines that a director is independent notwithstanding the above (or other relevant circumstances), it should state its reasons in the annual report.

Duties and liabilities

All directors have the same duties and liabilities.

UNITED STATES

Recognition

Federal securities laws require disclosure of the names of directors who are independent.

Board composition

The NYSE and Nasdaq require the board to consist of a majority of independent directors. 50 of the Top 100 US Companies have adopted policies requiring more than a simple majority of directors to be independent. State law does not place any restrictions on a board's composition.

Independence

The NYSE and Nasdaq have somewhat different rules for determining whether a director is independent. A director must not fall within one of the categorical standards of the exchange that would prohibit a board from determining that the director in question is independent. Corporations must identify their independent directors and under NYSE rules, disclose the basis for that determination. This disclosure is usually contained in the corporation's annual report or proxy statement filed with the SEC. Both the NYSE and Nasdaq require that independent directors have regularly scheduled meetings, referred to as executive sessions. The NYSE and Nasdaq listing standards differ slightly in this respect. The NYSE rules require either non-management directors or independent directors to meet at regularly scheduled executive sessions. In addition, if a company chose to include all non-management directors, it should hold an executive session including only independent directors at least once a year. The Nasdaq listing standards require executive sessions of independent directors only to occur at least twice a year.

Duties and liabilities

Non-executive directors owe fiduciary duties to the shareholders of the company. In short, these duties are the duty of loyalty and the duty of care. Directors may have liability for breaches of these duties under certain circumstances. However, the directors of most US corporations have some liability protection coverage in their bye-laws and/or in indemnification agreements with the corporation as well as through D&O insurance coverage.

7. Are the roles of individual board members restricted?

AUSTRALIA

The roles of individual board members are not restricted, although they are often invited to join the board for their particular skills and experience.

The Principles recommend that the chairman of a listed company should be an independent director and that the roles of the chairman and chief executive officer should be exercised by different people.

UK (ENGLAND AND WALES)

UK company law does not restrict the roles of the individual directors. No individual director has implied authority to act on behalf of the whole board or the company.

For many listed companies, the Governance Code provides guidance. A Main Principle recommends a clear division of responsibilities at the head of the company between running the board and executive responsibility for running the company's business, with no individual having unfettered powers of decision. The related Code Provision provides that the chairman and chief executive should be different people.

UNITED STATES

There are no legal restrictions on the roles of individual board members except that generally members of the audit, compensation and nominating and governance committees must be independent. It is also not unusual, especially in larger US public companies, for one individual

to serve as both CEO and chairman. Since 2010, the federal securities laws have required disclosure by public companies as to their board leadership structure and why they believe either the separation or combination of these roles is appropriate, based on the company's specific circumstances. Shareholder activists are increasingly advocating for the separation of these roles as a best practice, and separation has become more frequent in recent years, especially at smaller companies.
Of the Top 100 US Companies in 2012, the roles of the chairman and the CEO were separated at 29 companies, but only nine of these companies have adopted explicit policies requiring the separation of the two roles.

8. How are directors appointed and removed? Is shareholder approval required?

<u>AUSTRALIA</u>

Appointment of directors

Generally, the appointment of directors is governed by the company's constitution, which usually provides for the appointment of directors by shareholders' resolution. Generally, public company shareholders must pass a separate resolution for each appointee.

A sole director and shareholder of a proprietary company may appoint another director by signing a record of the appointment.

In other cases, the company's constitution often provides for the board to appoint directors. Shareholder confirmation of the appointment may subsequently be required (and is required for listed companies).

Removal of directors

Removal of proprietary company directors is governed by the company's constitution, which generally permits removal by shareholders by ordinary resolution.

Public company shareholders may remove a director by ordinary resolution. Certain shareholders can call a meeting to pass this resolution.

The Corporations Act contains the following procedural requirements:
- Shareholders must give a notice of intention to remove a director to the company at least two months before the meeting.
- The company must give the relevant director a copy of the notice.
- The relevant director is entitled to put their case to shareholders by circulating a written statement or speaking at the meeting.

A public company director cannot be removed by other directors.

The company's constitution may provide for automatic removal in certain circumstances, for example the commission of certain offences or consistent failure to attend meetings.

<u>INDIA</u>

Appointment of directors

Directors can be appointed at a board meeting. The appointment of a director must be confirmed by the shareholders in the shareholders' annual general meeting following the board meeting.

In a public company with a paid-up capital of INR50 million or more and which has 1,000 or more small shareholders (that is, a shareholder holding shares with a nominal value of INR20,000 or less in a public company), the small shareholders can appoint a director. Small shareholders intending to appoint a director need to propose a person and provide a notice to the company of their intention to appoint a director within the prescribed time frame. The notice must be signed by at least 100 small shareholders.

Removal of directors

A director can be removed if he (*Act*):

- Does not hold the required shares as specified in the articles of association of a company within two months from the date of his appointment.
- Is found to be of an unsound mind by a court of competent jurisdiction.
- Applies to be adjudicated as insolvent or is adjudged insolvent.
- Is convicted of an offence involving moral turpitude and the punishment exceeds six months of imprisonment.
- Is absent from three consecutive board meetings or from all the meetings of the board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the board.

In addition to the above:

- Directors can be removed by the shareholders in a shareholders' meeting by an ordinary resolution.
- Directors can resign from the board.

UK (ENGLAND AND WALES)

Appointment of directors

Provisions are usually included in a company's articles and/or any shareholders' agreement for appointment of directors. Articles frequently specify that directors may be appointed either by shareholder ordinary resolution or board decision. The Companies Act imposes requirements for directorship of companies and includes provisions enabling shareholders to propose a resolution to appoint a director but it confers no specific right of appointment.

The Governance Code requires that many listed companies appoint a nomination committee to lead the process and make recommendations for board appointments.

Removal of directors

Under the Companies Act, shareholders can remove a director by ordinary resolution although special notice (28 days) is required and the director is entitled to speak in his defence. A company's articles may stipulate more straightforward means of removal.

While the power to remove directors cannot be excluded, the Companies Act does not prevent the articles from granting enhanced voting rights to a director entitling him to defeat resolutions proposed to remove him.

UNITED STATES

Appointment of directors

Nomination. Generally, directors are nominated by the board for election at the annual shareholders' meeting (AGM). Companies listed on the NYSE normally must have a nominating/governance committee, composed entirely of independent directors, that identifies individuals qualified to become board members and recommends their nomination to the board. The Nasdaq has similar requirements, but does not require a formal committee.

Activist shareholders may also submit their own director nominees to a shareholder vote in what is referred to as a proxy contest. Currently, shareholders are allowed to conduct a proxy contest under SEC rules and can recommend to other shareholders one or more director candidates. However, shareholders find this process cumbersome and costly as they must provide proxy materials to other shareholders at their own cost. There has been much debate in recent years as to the circumstances, if any, under which shareholders should be able to nominate directors using the company's proxy materials (commonly referred to as "proxy access"). After a proposed SEC rule that would have allowed shareholders to have proxy access for all companies was struck down by a federal court, the SEC's rule permitting shareholders on a company-by-company basis to propose proxy access became effective.

In 2009, Delaware enacted important changes to its General Corporation Law (effective on 1 August 2009) to permit companies to adopt bye-law amendments that:

- Allow proxy access.
- Fix a record date for voting rights that is different from the record date for notice of meetings.
- Permit reimbursement of proxy contest expenses.

Election. Directors are elected by shareholders at the AGM. State corporate laws generally provide that directors are elected by a plurality vote, in which a director nominee who receives the highest number of votes cast for an open director's seat is elected to that position. Under the plurality voting standard, the only votes that count are votes that are cast for a director; withhold votes have no effect. However, there has been a significant movement toward adoption of a majority voting standard for election of directors in the past several years. Under most majority voting standards, directors must be approved by more than 50% of the votes cast.

Pressure from shareholders on voting standards in director elections has resulted in a dramatic increase in the number of companies adopting a majority vote standard. 91 of the Top 100 US Companies now require directors to be elected by a majority of the votes cast, up from 11 companies in 2006 (*2012 S&S Corporate Governance Survey*). Of those 91 Top 100 US Companies, 81 require incumbent directors to submit their resignation from the board following their failure to receive a majority of the votes cast in favour of their election.

Of the remaining nine Top 100 US Companies that continue to elect directors by a plurality of the votes cast, seven have adopted a policy that nominees receiving more votes withheld than votes for their election must submit or tender their resignation from the board.

Broker non-votes. In the US, a meaningful amount of the shares of US public companies are held by retail investors in brokerage accounts. Brokers that hold their customers' shares on behalf of the beneficial owner but registered in the broker's name, are said to hold those shares in "street name". Under NYSE Rule 452, brokers who hold shares in street name, and who do not receive voting instructions from the shares' beneficial owners, can use the shares' voting rights in their discretion to vote on routine matters.

Under a former version of NYSE Rule 452, routine matters included uncontested director elections. As a result, brokers who held shares in street name, and who did not receive voting instructions from the shares' beneficial owners, typically voted those shares in favour of the director nominees in the company's proxy statement. However, amendments to NYSE Rule 452 have made the uncontested election of directors a non-routine matter, thereby preventing brokers from being able to vote on the election of directors without specific voting instructions from beneficial owners of the shares. This rule also affects companies listed on other exchanges, such as Nasdaq, as the rule applies to the brokers, who are members of, and are subject to the rules of, the NYSE.

Removal of directors

State law and the corporation's certificate of incorporation and bye-laws set out the methods for removal. Generally, directors can be removed by the corporation's shareholders or pursuant to judicial proceedings. Shareholders can usually, by a sufficient vote, remove any director or the entire board with or without cause, although removal of directors where the board is staggered may be subject to different rules. Vacancies can generally be filled by a majority of the directors then in office, even if there are fewer directors than the quorum. A company's certificate of incorporation and bye-laws may also permit shareholders to fill vacancies.

9. Are there any restrictions on a director's term of appointment?

AUSTRALIA

The term of the appointment of directors of proprietary and unlisted public companies is governed by the company's constitution without statutory limits.

Directors of listed companies (other than managing directors) must be re-elected every three years. At least one-third of them must be put forward for re-election every year. A listed company must also hold an election every year.

INDIA

In the case of public companies and private companies which are subsidiaries of public companies, one-third of the total number of directors are permanent directors and two-thirds of the directors are rotational directors. One-third of the rotational directors must retire by rotation at every annual general meeting. The term of any director required to retire by rotation cannot exceed three years and this term can be extended by re-appointment only. A director retiring by rotation can be re-appointed at the same annual general meeting.

The above provisions do not apply to private companies, unless the articles of association of a private company specifically provide for a term of the directors' appointment.

UK (ENGLAND AND WALES)
The Companies Act is silent on a director's term of appointment. Instead, it is usual for restrictive provisions, such as retirement by rotation, to be included in a company's articles.

Retirement by rotation provisions is less common in private company articles. However, larger companies typically include provisions which require board appointments to be approved by shareholders at the first annual general meeting (AGM) following the appointment and enable shareholders to vote on the directors' re-election when they retire by rotation, commonly every three years.

Many listed companies are subject to the Governance Code's provisions, which specify that all directors of FTSE 350 companies should be subject to annual re-election by shareholders and that directors of listed companies outside the FTSE 350 should be submitted for re-election at the first AGM after their appointment and at least every three years thereafter.

UNITED STATES
Term limits for directors are relatively uncommon, although Delaware's General Corporation Law allows a corporation's certificate of incorporation or bye-laws to prescribe various qualifications for directors, including the term of appointment. While 72 of the Top 100 US Companies discuss the topic of term limits for directors in their proxy statements, only five have adopted mandatory term limits.

10. Do directors have to be employees of the company? Can shareholders inspect directors' service contracts?

AUSTRALIA
Directors employed by the company
There is no requirement for directors to be employed by the company and contracts for the role of director are rare. However, if the director is an executive of the company, there will usually be a contract governing their executive role.

Shareholders' inspection
Generally, shareholders do not have a right to inspect directors' service contracts.

However, Stock Exchange policy requires listed companies to disclose key terms of the chief executive officer's service contract, including remuneration.

The Principles recommend that listed companies disclose the process for the performance evaluation of senior executives.

INDIA

Directors employed by the company
Directors do not become employees of a company simply by virtue of directorship. However, if a director has been appointed for a dual role (for example, of a manager and a director or a managing director), the director will be considered to be an employee of a company.

Shareholders' inspection
The shareholders cannot inspect directors' service contracts.

UK (ENGLAND AND WALES)
Directors employed by the company
There is no statutory requirement for directors to be employees of the company.

Shareholders' inspection
The Companies Act requires that a company keep copies of every director's service contract (or, if no written contract, a memorandum of the terms) available for inspection by shareholders without charge.

The Governance Code, applicable to many listed companies, states that the terms of appointment of non-executive directors should be available for inspection at the company's registered office and for 15 minutes before and during each AGM.

UNITED STATES
Directors employed by the company
Directors do not have to be employees of the corporation. In fact, under the NYSE and Nasdaq listing standards, a majority of the board must be comprised of independent directors. In order to be considered independent, the director cannot be, nor have been within the last three years, an employee of the corporation.

Shareholders' inspection
Federal securities law requires extensive disclosure concerning directors' compensation arrangements, as well as related party transactions between the directors and the corporation. Public companies must disclose material transactions that exceed US$120,000 between the company and certain related parties, including directors. In addition, public companies must disclose their policies and procedures used in reviewing and approving these related-party transactions.

11. Are directors allowed or required to own shares in the company?

AUSTRALIA
Generally, there are no restrictions on directors owning shares in the company. There is usually no requirement for directors to hold shares, unless included in the company's constitution (which is unusual).

The shareholdings of directors of listed companies must be disclosed to the Stock Exchange and in the company's annual report. Shareholder approval is usually required before shares may be issued to, or acquired under an incentive scheme by, listed company directors.

INDIA

There is no mandatory requirement for directors to own shares in the company. However, the articles of association can provide that the director must procure the required shares within two months from the appointment.

UK (ENGLAND AND WALES)

There are no general restrictions or requirements in the Companies Act or Model Articles for directors to own shares in the company.

UNITED STATES

Directors are not required by law to own shares in the corporation. Share and stock option ownership by directors is often encouraged, and sometimes required by companies' corporate governance guidelines (or bye-laws), to align the directors' own interests with those of the corporation's other shareholders. Federal securities law requires disclosure of transactions by directors in the shares of the company in which they serve as a director and imposes disgorgement of rights on sales of shares by directors under certain circumstances.

12. How is directors' remuneration determined? Is its disclosure necessary? Is shareholder approval required?

AUSTRALIA

Determination of directors' remuneration

A person who is the only director and shareholder of a proprietary company can pass a resolution in relation to director remuneration by recording and signing the resolution.

In other cases, the directors' remuneration is governed by the company's constitution (and generally must be approved by shareholders).

Non-executive directors of listed companies can only be paid a fixed sum, which cannot be increased without shareholder approval.

Termination benefits cannot be paid to directors of listed companies in the event of a change in control of the company.

Disclosure

The remuneration paid to directors (whether paid to them as directors or otherwise) must be disclosed if requested by shareholders with at least 5% of the votes that can be cast at a general meeting or at least 100 shareholders entitled to vote at a general meeting.

A listed company must disclose directors' remuneration in its annual report.

Shareholder approval

Listed company shareholders must be asked to adopt the company's remuneration report at the annual general meeting each year. Although the vote is advisory only and non-binding on the board, if more than 25% of the votes cast oppose the report in two consecutive years, the shareholders must consider whether a further meeting should be called to consider reconstituting the board. Key management personnel and their associates cannot vote on the resolutions.

Shareholder approval is required for termination payments that exceed certain limits set out in the Corporations Act.

INDIA

Determination of directors' remuneration

The Act sets out provisions relating to the remuneration of a whole-time director or a managing director of a public company (*Schedule XIII*). If a listed company or its subsidiary does not make profits and the remuneration exceeds the limits set out in Schedule XIII, the prior approval of the central government is required.

There are no limits on the managerial remuneration of directors of private companies. However, if a director is also an employee of the company and his remuneration exceeds the prescribed limits set out in section 217 of the Act read with Companies (Particulars of Employees) Rules 1975, that must be disclosed in the directors' report.

Disclosure

Listed companies must disclose the remuneration of the directors. In relation to a private company or an unlisted company, if the director is an employee of the company, the remuneration must be disclosed in the directors' report if it exceeds the prescribed limits.

Shareholder approval

The shareholders' approval is required for the remuneration of a whole-time director or a managing director of a public company.

UK (ENGLAND AND WALES)

Determination of directors' remuneration

The remuneration of directors is typically determined by the board (a director cannot vote on his own remuneration), subject to any limits in the articles.

For many listed companies, the Governance Code requires the establishment of a remuneration committee with delegated responsibility for determining remuneration for executive directors and the chairman. The remuneration for non-executive directors should be fixed by the whole board.

The Governance Code and various best practice guidelines suggest that remuneration policies should include challenging performance based criteria that promote the success of companies in creating long term shareholder value.

Disclosure
All UK companies (other than those categorised as being "small") must disclose information on directors' remuneration in their annual report and accounts. (Subject to certain exclusions, a "small" company is one that meets two of the following three criteria: turnover less than GB£6.5 million, a balance sheet total less than GB£3.26 million and/or less than 50 employees.)

In addition, listed companies must publish a report on directors' remuneration, which must be available to their members.

Shareholder approval
Shareholder approval is only required for a "quoted" company (being those listed on the NYSE or Nasdaq, officially listed in an EEA state or on the official list of the London Stock Exchange, which excludes AIM), which must propose a resolution to approve the directors' remuneration report at its AGM. Failing to pass the resolution has no effect on the report or the remuneration.

UNITED STATES
Determination of directors' remuneration
Generally, unless otherwise restricted by the corporation's certificate of incorporation or bye-laws, the board can set the directors' compensation, subject to its common law fiduciary duties. This compensation may include cash, the corporation's shares or options on, or other derivatives of, the shares. Director compensation is generally determined by the board compensation or nominating/corporate governance committee.

Disclosure
Public companies are required by the federal securities laws to disclose their directors' remuneration in their annual proxy statement or annual report filed by the corporation with the SEC. There are separate requirements relating to disclosure of share ownership.

SEC rules require that investors receive a complete and accurate description of a corporation's director and executive compensation practices, including a detailed discussion and analysis of its compensation decisions and its philosophy on compensation in a section called "Compensation, Discussion and Analysis" (CD&A).

Shareholder approval
NYSE and Nasdaq listed companies must obtain shareholder approval of equity remuneration plans covering directors. However, shareholder approval of directors' cash compensation is not typically obtained.

In recent years, shareholder activists have pressed companies to adopt certain compensation-related measures, including "say-on-pay", a policy allowing shareholders to annually pass a non-binding advisory resolution regarding the pay of certain executive offices. In 2011, in response to the Dodd-Frank Act, which mandated a wide range of corporate governance reforms, the SEC adopted rules requiring that non-binding shareholder proposals be put forth on all of the following:

- A say-on-pay vote on executive compensation.
- A vote on the frequency of the management say-on-pay vote.

- A vote on “golden parachute” arrangements, which are triggered in connection with certain change in control transactions.

13. How is a company's internal management regulated? For example, what is the length of notice and quorum for board meetings, and the voting requirements to pass resolutions at them?

AUSTRALIA

A company's internal management is mainly regulated by its constitution.

Typically, the company's constitution provides that any director can call a board meeting by giving reasonable notice to all directors. Reasonableness depends on the circumstances, including the company's past practice.

The quorum for a meeting is usually specified in the company's constitution.

Usually, each director has one vote and board resolutions are passed by simple majority vote. The company's constitution may provide for certain matters to be decided by a special majority and may provide that certain directors have more votes than others.

A company's constitution may provide that the chairman has a casting vote to resolve a deadlock.

Company constitutions typically provide that resolutions can be passed without a meeting if all directors entitled to vote on the resolution sign a document setting out the resolution.

When voting, directors must be aware of their duty to avoid conflicts of interest.\

INDIA

Indian law does not prescribe the minimum length of notice for a board meeting. However, there is a requirement to give prior notice of a board meeting to all the directors.

The quorum is two directors or one-third of the total number of directors, whichever is higher. All resolutions at a board meeting can be passed by simple majority, subject to certain exceptions.

UK (ENGLAND AND WALES)

Internal management is principally governed by a company's articles. Additional provisions may be contained within any shareholders' agreement. With the exception of certain statutory requirements, a company is free to determine its internal management.

Subject to any specific requirement in a company's articles and/or any shareholders' agreement, a board meeting may be called with reasonable (in the circumstances) notice, which need not be written.

The quorum for a board meeting may be determined by the board. The Model Articles prescribes that the quorum is two directors unless otherwise fixed. For single director private companies the quorum is one. Where the articles are silent, a majority of directors constitutes a quorum unless the board's normal practice is different.

It is commonplace for the articles to permit directors to appoint alternates. An alternate director is a director as a matter of law and, subject to anything contrary in the articles or any shareholders' agreement, would count towards the quorum.

Unless otherwise provided for in a company's articles, any shareholders' agreement or board resolutions, a board resolution requires the support of the majority of the board attending at a quorate meeting.

When permitted by the articles, directors may pass resolutions in writing without a board meeting if the requisite number of directors approve the resolution.

UNITED STATES

A corporation's certificate of incorporation and bye-laws typically regulate internal management of the corporation and where these documents are silent state law provides default rules.

Under Delaware corporate law, a majority of the total number of directors constitutes a quorum, and a vote of the majority of the directors present at a meeting at which a quorum is present is required to take any valid actions. However, these requirements can be altered by the certificate of incorporation or bye-laws, with certain restrictions. The directors can also take valid actions without a meeting (that is, by written consent), unless the certificate of incorporation or bye-laws provide otherwise.

14. Can directors exercise all the powers of the company or are some powers reserved to the supervisory board (if any) or a general meeting? Can the powers of directors be restricted and are such restrictions enforceable against third parties?

AUSTRALIA

Directors' powers

Generally, day-to-day management of the company is vested in the board.

However, certain decisions must be approved by shareholders. For example, the Corporations Act provides that shareholder approval is required:

- To change the company's constitution (by special resolution).
- For related party transactions.
- To reduce capital.

The company's constitution may also require shareholder approval for additional decisions.

Listed companies must also seek shareholder approval for certain decisions, including:

- The issue of new shares exceeding 15% of the company's capital in any year.

- Changing the nature or scale of the company's activities.

Companies do not adopt a supervisory board.

Restrictions
Shareholders cannot pass a resolution restricting a director's power or requiring a director to perform a certain action. The only remedy available for shareholders who are aggrieved by the way directors exercise or intend to exercise their powers is to remove the directors or to seek to bring an action for oppression.

INDIA

Directors' powers
The directors of a company acting through the board can exercise all powers relating to the management of a company's affairs, subject to the following:
- Certain powers require the shareholders' approval.
- Restrictions on the directors' powers under the memorandum or articles of association of a company.

There are certain powers which can be exercised by the board only at an actual board meeting.

Restrictions
If a director acts contrary to the applicable restrictions, his actions will not bind the company.

UK (ENGLAND AND WALES)

Directors' powers
Directors exercise all the powers of the company save those required by statute to be resolved upon by members. Shareholder resolutions and the articles may further restrict directors' powers, as may any shareholders' agreement and a director's service contract. For listed companies, the Listing Rules and AIM Rules each require shareholder consent for certain transactions. The directors will in any event seek shareholder approval for substantial, non-ordinary course matters.

The UK does not operate a two tiered-board structure; consequently, powers cannot be reserved to a supervisory board.

Restrictions
Third parties who deal with directors acting in breach of restrictions are protected by the Companies Act, which deems that the power of the directors to bind their company is free of any limitation under the company's constitution. The constitution is deemed to include restrictions from a shareholders' agreement or from a resolution of the company or of any class of shareholders.

UNITED STATES

Directors' powers

State corporate law and the corporation's certificate of incorporation typically provide that the board can exercise all of the corporation's powers. However, certain actions and transactions require shareholder approval under state corporate law, such as mergers and amendments to the certificate of incorporation.

Restrictions
The board's powers can be restricted by the corporation's certificate of incorporation or bye-laws, and are subject to statutory limitations.

15. Can the board delegate responsibility for specific issues to individual directors or a committee of directors? Is the board required to delegate some responsibilities, for example for audit, appointment or directors' remuneration?

<u>AUSTRALIA</u>
The company's constitution commonly deals with the delegation of responsibilities.

Subject to the company's constitution, directors may delegate any of their powers to:
- A committee of directors.
- A director.
- An employee.
- Any other person.

The Corporations Act specifies the circumstances in which a director is liable for the actions of a delegate.

Audit committee
The Principles recommend the establishment of an audit committee to oversee internal control and financial reporting. Most listed companies are required by the Listing Rules to have an audit committee.

Remuneration committee
The Principles recommend that listed companies establish a remuneration committee with a majority of independent directors to focus the company on appropriate remuneration policies. Certain listed companies are required by the Listing Rules to have a remuneration committee of non-executive directors.

Nomination committee
The Principles recommend that listed companies establish a nomination committee to examine the selection and appointment practices of the company, including the appointment and re-election of directors.

<u>INDIA</u>

The board can delegate responsibility for specific issues to individual directors or a committee of directors. Every listed company and unlisted public company with a paid-up share capital of more than INR50 million must have an audit committee.

The audit committee must:

- Periodically discuss with the auditors internal control systems and the scope of the audit, including the auditors' observations.
- Review the half-yearly and annual financial statements before submission to the board.
- Ensure compliance with the internal control systems.

Since the directors are normally appointed at a board meeting, there is typically no committee formed for the appointment of directors.

A company may have a remuneration committee. A remuneration committee should consist of at least three directors, all of whom should be non-executive directors (the chairman of the committee must be an independent director).

UK (ENGLAND AND WALES)

A board can delegate responsibilities to a committee or individuals if delegation is reasonable and the delegate can reasonably be relied upon. However, the board cannot delegate its ultimate responsibility. The delegation may relate to a specific matter or be general in respect of a particular aspect of business.

It is recognised that some matters are better dealt with by committees. For many listed companies, the Governance Code requires audit, nominations and remuneration committees. Conversely, the Governance Code also requires many listed companies to produce a schedule of matters reserved for the approval of the main board.

UNITED STATES

State statutory law and a corporation’s certificate of incorporation normally expressly provide that the board can delegate many, but not all, of its powers to an individual director or to a committee of directors. For example, under Delaware law, a committee cannot generally:

- Amend the corporation’s certificate of incorporation or bye-laws.
- Adopt certain agreements of merger or consolidation.
- Declare a dividend or authorise the issuance of stock.

Although no particular committee structure is designated by state law, the US federal securities laws and NYSE and Nasdaq rules require public companies to have an audit committee composed entirely of independent directors. The NYSE also requires its listed companies to have a nominating and corporate governance committee and a compensation committee. Subject to certain exceptions, all of these committees must consist only of independent directors. In addition, in June 2012, the SEC issued final rules in response to the Dodd-Frank Act directing the national securities exchanges to adopt new listing standards relating to the independence of compensation committees and their selection of advisers. In September 2012, the NYSE and NASDAQ proposed changes to their listing standards in response to the SEC's final rule.

16. What is the scope of a director's duties and personal liability to the company, shareholders and third parties?

AUSTRALIA

The statutory directors' duties in the Corporations Act mirror their common law duties.

General duties

Common law duties of directors include the duty:
- To act in good faith in the interests of the company as a whole.
- Not to act for an improper purpose.
- Of care and diligence.
- Not to restrict future board decisions.
- To avoid conflicts of interest and conflicts of duty.
- Not to disclose confidential information.
- Not to abuse corporate opportunities.

The Corporations Act places the following statutory duties on directors:
- Care and diligence.
- Good faith.
- Not to improperly use their position to gain an advantage or cause detriment to the corporation.
- Not to improperly use information to gain an advantage or cause detriment to the corporation.

Breach of the statutory duties can result in civil penalties or, if the breach is a result of reckless or dishonest conduct, criminal penalties.

Theft and fraud

Theft or fraud is an offence carrying criminal penalties. Directors may also face criminal liability under federal, state or territory criminal law.

A company may be liable for the fraudulent acts of its officers, agents or employees where they were acting within their actual or ostensible authority for the company.

Securities law

The Corporations Act prohibits market misconduct, including:
- Market manipulation.
- False trading and market rigging.
- Dissemination of information about illegal transactions.
- Making false or misleading statements.
- Inducing persons to deal by publishing information that the person knows to be misleading, false or deceptive or by a dishonest concealment of facts.
- Engaging in dishonest conduct.

Breach of the misconduct provisions carries civil penalties.

The Corporations Act also imposes civil liability for conduct that is misleading or deceptive or that is likely to mislead or deceive in relation to shares and other securities.

Where a listed company is aware that incorrect information has been provided to the Stock Exchange that could influence an investor's decision, corrective disclosure should be made.

Insolvency law

The Corporations Act places duties on directors to prevent insolvent trading. A director breaches the insolvent trading provisions, and may be personally liable, where a company incurs a debt and there were reasonable grounds at the time for suspecting the company is insolvent or likely to become insolvent.

Health and safety

Each state and territory has occupational health and safety legislation covering breaches of safety duties by employers. The legislation also provides, in limited circumstances, for the prosecution of officers of employer companies.

Environment

The Federal government, as well as each state and territory, has passed environmental protection legislation that imposes liability for breaches of the respective legislation on all companies. In limited circumstances, liability may also extend to directors.

Anti-trust

Australian anti-trust laws impose severe sanctions for anti-competitive conduct. Cartel conduct (including price-fixing, market allocation and bid-rigging) is both a criminal offence and gives rise to civil monetary penalties and other orders. Other anti-competitive conduct has only civil sanctions. Directors who engage in, or are involved in, anti-competitive conduct can be jailed, fined, and be the subject of other court orders (such as adverse publicity or corrective statements). The legislation specifically prevents companies from indemnifying directors for civil penalties or the cost of defending proceedings in which civil penalties are imposed.

Cyber-crime

The Federal government has enacted legislation including the Cybercrime Act 2001 to address criminal activity using the internet and other new technologies. Offence provisions in that act are mirrored in legislation in most states and territories. Personal liability attaches to any individual engaging in the prohibited activities.

Other

State and territory governments have also imposed personal liability on directors for breaches of equal opportunity and fair trading legislation.

INDIA

General duties: Broadly, the duties of a director can be divided into those of good faith and of skill and care. Almost every duty imposed on a director by the Act can be categorised under either of these two broad heads. As a general rule, a director is answerable to the company.

A director must:

- act bona fide and in the interests of the company; and
- use his powers for the purposes for which they are intended to be exercised.

He is expected to exercise utmost good faith towards the company and to act honestly in the exercise of the powers conferred on him.

Theft and fraud: The directors of an Indian company are liable for breach of their fiduciary duties. Fiduciary duties are not defined by statute. However, Indian courts have interpreted them to include:

- the subjective duties of honesty and good faith in relation to all the actions which the directors believe are in the best interest of the company; and
- the objective duty of not placing themselves in a position of conflict between their fiduciary obligations to the company and their personal interests.

One instance in which the directors were held personally liable for breach of their fiduciary duties was where the directors condoned the use of company funds in a manner and for a purpose forbidden by law. Similarly, if directors of the company enter into an unlawful agreement, they would be liable to the company for a breach of their fiduciary duty.

Under Indian law, the directors are regarded as trustees of the company' assets. For example, directors receiving secret profits, accepting bribes or gifts, or utilising confidential information of the company in an unauthorised manner would be liable to the company for damages it incurs in connection with their receipt of such personal benefits.

In addition to the above, a director can be held criminally liable for the fraud or making a misrepresentation about the company's affairs.

Securities law: If a company commits an offence under securities law, every person (including a director or the managing director) who at the time the offence was committed was in charge of the conduct of the company' business, as well as the company, will be deemed guilty of an offence. The punishment under securities law extends to imprisonment and/or fine.

No person is liable under securities law, if the person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.

Insolvency law: On a members' voluntary winding-up (that is, a winding-up approved by a member's extraordinary resolution (at least 75% majority)), the directors or, if the company has more than two directors, the majority of the directors, must make a declaration verified by an affidavit stating that they have:

- made a full enquiry into the company's affairs; and
- formed the opinion that the company has no debts or that it will be able to repay its debts in full within a period not exceeding three years from the date of the winding-up, as specified in the declaration.

If a director makes a declaration without having reasonable grounds to believe that the company will be able to pay its debts in full within the period specified in the declaration, he can be subject to imprisonment of up to six months and/or a fine of up to INR50,000.

Health and safety: The Factories Act 1948 (Factories Act) contains provisions relating to health and safety requirements of workmen employed in a factory. If the provisions of the Factories Act are breached, the occupier and manager of the factory will each be guilty of an offence and subject to imprisonment and/or fine. In relation to a company, an occupier means a director of the company who has the ultimate control over the affairs of the factory (*Factories Act*).

Environment: If a company commits an offence under the environment statutes, and such an offence has been committed with the consent or connivance of, or is attributable to the neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer will also be deemed to be guilty of the offence.

No person is liable to any punishment provided under the environment statutes, if the person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.

Anti-trust: If a company commits offence under the Competition Act 2002 and the offence has been committed with the consent or connivance of, or is attributable to the neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer will also be deemed to be guilty of the offence.

No person is liable to any punishment provided under the Competition Act 2002, if the person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.

Other: Directors may be liable to the company under the tort of negligence. Proving negligence is a matter of fact. A director's role in relation to the alleged tortious act must be examined.

UK (ENGLAND AND WALES)

General duties

Although directors' general duties are now found in sections 171 to 177 of the Companies Act, they originate from common law, which must still be considered when interpreting and applying these duties. They can be summarised as follows:

- To act in accordance with the company's constitution and only exercise powers for the purpose conferred.
- To act in a way most likely to promote the success of the company for the benefit of shareholders as a whole.
- To exercise independent judgement.
- To exercise reasonable care, skill and diligence.
- To avoid a situation in which the director has, or could have, a direct or indirect interest that conflicts or possibly may conflict with the interests of the company.

- Not to accept benefits from a third party.
- To declare a direct or indirect interest in a transaction or arrangement with the company that is proposed or has already been entered into.

Additional duties are imposed by the Companies Act and other duties remain uncodified (such as the duty of confidentiality). Directors of listed companies must also consider a variety of regulatory requirements, such as the Listing Rules, Takeover Code, DTRs, Governance Code and/or AIM Rules.

Except in special circumstances, directors' duties are owed to the company and not to the company's shareholders or third parties. This principle is largely reflected in the Companies Act. A special circumstance would include, for example, during a takeover offer when directors are required to provide their views to shareholders and in doing so, incur direct obligations.

If a director breaches his duty, the company may ratify the breach or bring a claim against the director for damages.

Theft and fraud

A company cannot itself commit theft but may commit fraud under the Fraud Act 2006, in which case any director who consented to or connived in the act will also have committed the offence. If the business of a company is carried on with the intent to defraud creditors, every person who was knowingly party to the fraud will have committed an offence.

Securities law

Directors will commit a criminal offence if they knowingly or recklessly make a materially misleading, false or deceptive statement, promise or forecast to induce a person to buy or sell shares. There are further offences of market manipulation and market abuse.

Insolvency law

A director can be liable to make good creditor losses if he allows a company to continue trading when he knew or ought to have concluded that it had no reasonable prospect of avoiding insolvent liquidation. Such a claim may be brought by the company's liquidator and not directly by creditors.

A director may be disqualified from acting as a director for a maximum of fifteen years for fraud in connection with the winding up of a company.

Directors may also be sued by their company for misfeasance, that is, the misapplication or retention of the company's assets or a breach of a fiduciary or other duty. In addition, if a company goes into liquidation or administration, a court may set aside a gift made by the company or a transaction entered into at a significant undervalue and require a director to pay the difference.

Health and safety

UK companies have duties to ensure the health, safety and welfare of their employees, customers and third parties. If a company commits a health and safety offence, an individual director may be criminally liable if the offence was committed with his consent or connivance (that is, he was aware of the circumstances but turned a blind eye), or attributable to his neglect.

Environment

There are multifarious environmental offences that a company can commit, particularly in relation to pollution and waste disposal. A director may be liable where an offence is committed with the director's consent, connivance or neglect.

Anti-trust

Directors can be personally liable for serious breaches of EU and UK competition law. It is a criminal offence for an individual dishonestly to agree to enter into certain anti-competitive agreements, including direct or indirect price fixing, limiting of production or supply and market sharing or bid-rigging arrangements. A director may face disqualification from acting as a director for up to fifteen years.

Cyber-crime

Information security is the responsibility of the board of directors and it should be an integral and transparent part of a company's governance and risk management.

Under the Data Protection Act 1998 (DPA), a director may be liable for recklessly disclosing personal data. There may also be consequences for a data controller (an individual or company that determines the process and means for processing personal data): the DPA requires the data controller to implement appropriate technical and organisational security measures against unauthorised or unlawful processing (such as by hackers), accidental loss, destruction or damage of personal data. A director may also be liable where a data protection offence is committed by a company with the director's consent, connivance or neglect.

Other

The Bribery Act 2010 creates criminal offences for a company of bribing another person, accepting a bribe and bribing a foreign public official. It is a defence for a company to show that it had in place adequate procedures designed to prevent bribery. Directors of a company may also be guilty where the company's offence was committed with their consent or connivance.

The Pensions Act 2004 includes provisions that could make a director personally liable for a pension scheme deficit.

The Company Directors Disqualification Act 1986 provides that a director can be disqualified for a variety of offences, including persistent breaches of companies legislation.

UNITED STATES

General duties

Directors owe the corporation and its shareholders a:

- **Duty of care.** This generally requires that a director pay attention, ask questions and act diligently in order to become and remain fully informed and to bring relevant information to the attention of other directors.

• **Duty of loyalty.** This generally requires that a director make decisions based on the corporation's best interest, and not on any personal interest.

In determining whether a board of directors has satisfied its fiduciary duties, the courts generally apply the business judgement rule under which a board's decision is protected unless it is shown that the directors breached their duty of care or duty of loyalty.

Negligence on the part of a director does not result in personal liability unless the director failed to act in good faith.

Directors' decisions may be more strictly scrutinised with respect to certain transactions, including the sale or change of control of the corporation or in conflict of interest situations.

Theft and fraud
A director can be criminally liable under both federal and state laws regulating theft and fraud. In addition, directors can be held liable under other federal statutory schemes.

Securities law
Directors of public corporations can be held both civilly and criminally liable under state and federal securities laws in a number of circumstances. For example, directors cannot trade in a corporation's securities when in possession of material, non-public information (*Rule 10b-5, 1934 Act*). The federal securities laws also impose liability on directors for intentional or reckless misrepresentations or material omissions made in offering documents or proxy solicitations.

Insolvency law
In recent years many courts and commentators have looked at whether the directors of a corporation that is possibly insolvent (or in the zone of insolvency) or actually insolvent owe their fiduciary duties to the corporation's creditors. The Delaware Supreme Court has held that where a corporation is in the zone of insolvency or clearly insolvent, the directors have a fiduciary duty to exercise their business judgment in the best interests of the corporation. Creditors of an insolvent Delaware corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties but have no right to assert direct claims for breach of fiduciary duty against corporate directors (*North American Catholic Education Programming, Inc. v Gheewalla, 930 A.2d (Del 18 May, 2007)*).

Other
Directors are potentially personally liable under various federal statutory schemes in areas such as health, safety, the environment and anti-trust. For example, the Foreign Corrupt Practices Act of 1977 (FCPA) targets corrupt payments made by corporations to certain foreign officials. Directors may be criminally liable for knowing violation of the statute. The FCPA prohibits a company from indemnifying its directors and officers for fines under the FCPA. For additional information, see Shearman & Sterling LLP's 2012 *FCPA Digest/Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*.

17. Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

AUSTRALIA

Shareholders of a company may forgive directors for common law breaches by ratifying the breach. This ability does not extend to statutory breaches.

The Corporations Act allows companies to indemnify or exempt directors for liability and to pay insurance premiums and legal costs incurred by them. A company, however, must not indemnify a director against:

- A liability owed to the company or a related body corporate.
- Certain pecuniary or compensation orders.
- A liability that arose out of conduct that was not in good faith.

Specific legislation may further limit the ability of companies to indemnify directors against liability.

INDIA

In a limited company the memorandum may provide that the liability of the directors or of any director or manager is unlimited (*section 322(1), Act*). Otherwise, in a limited company, the director is not liable to the extent that it can be proved that the offence was committed without the knowledge of the director and that the director conducted necessary due diligence to prevent the commission of the offence.

A company cannot indemnify a director against any negligence, default, misfeasance, breach of duty or breach of trust of which he may be guilty in relation to the company (*section 201, Act*). However, section 633 of the Act extends special protection against a liability that may have arisen pursuant to an act of a director done in good faith.

UK (ENGLAND AND WALES)

A UK company cannot exempt a director from liability to the company for breach of duty, negligence or other default, although shareholders may ratify such a breach.

The scope for a company to indemnify its directors is limited to:

- The director's legal costs, and any court award against the director, in civil claims brought by a third party, even where the director loses.
- The director's costs in fighting civil proceedings brought by a regulator.
- The director's legal costs in criminal proceedings in which he is acquitted.

An indemnity cannot cover the following:

- Any liability the director has to the company itself.
- Legal costs in civil cases brought by the company where the final judgment goes against the director.
- Liability for fines for criminal conduct and civil fines imposed by a regulator.
- Legal costs in criminal proceedings where the director is convicted.

Insurance is permitted but subject to limitations both as a result of deductibles and limits on cover and the practical delays in approving a claim.

A company can both:
- Provide an infrastructure to cope with claims at corporate expense.
- Provide information and other support.

The risk of ultimate liability can also be ameliorated by procedural standards and reliance on expert advice, both encouraged by the Governance Code.

UNITED STATES

Limiting director liability

Most states allow a corporation to eliminate or limit directors' personal liability to the corporation or its shareholders for breach of their fiduciary duty. However, there are often restrictions on this limitation of directors' liability. For example, Delaware law provides that directors' liability cannot be eliminated or limited for:
- Any breach of the director's duty of loyalty.
- Acts or omissions not in good faith or involving intentional misconduct.
- Wilful or negligent conduct in paying dividends.
- Any transaction from which the director derives an improper personal benefit.

Corporations often adopt provisions in their certificates of incorporation eliminating directors' liability to the fullest extent permitted by law.

Indemnification

State law also provides that a company may indemnify a director in certain circumstances. Under Delaware law, any person made a party to proceedings for being the corporation's director is entitled to indemnification, provided that the individual both:
- Acted in good faith.
- Reasonably believed that he acted in the corporation's best interests.

Indemnification is mandatory if the director is successful in the proceedings. Indemnification statutes often have restrictions (for example, a corporation cannot normally indemnify a director against liabilities owed to the corporation). Many corporations also provide contractual indemnities to their directors, in addition to the indemnification provided by state law.

18. Can a director obtain insurance against personal liability? If so, can the company pay the insurance premium?

AUSTRALIA

Directors can insure against personal liability. It is very difficult, however, for directors to obtain comprehensive insurance coverage with respect to a breach of the law. Under the Corporations Act, a company or related body corporate must not pay an insurance premium for a liability arising out of conduct involving either:
- A wilful breach of duty.
- A breach of a director's duty not to improperly use information or their position to gain an advantage or cause detriment to the company.

INDIA

An Indian company typically obtains directors and officers (D&O) insurance policies for its directors and managers and pays the insurance premium for those policies. These polices provide relief against claims brought by the customers/clients or shareholders of the company against the directors.

UK (ENGLAND AND WALES)

The Companies Act provides that a company can purchase and maintain insurance for a director of the company or of an associated company against negligence, default, breach of duty or breach of trust in relation to the company. Criminal and civil fines and penalties cannot be covered.

UNITED STATES

Public companies typically obtain insurance on behalf of directors to cover any error, misstatement, misleading statement, act, omission, neglect or breach of duty. In addition, because one of the most serious concerns for officers and directors are the legal fees associated with frivolous claims, insurance typically covers the legal fees from a criminal proceeding or any formal civil administrative or regulatory proceeding. However, insurance cannot be purchased to protect directors against liability based on the director’s fraud, dishonesty or violations of criminal law.

19. Can a third party (such as a parent company or controlling shareholder) be liable as a de facto director (even though such person has not been formally appointed as a director)?

AUSTRALIA

The statutory definition of "director" includes:

- A person who is appointed to the position of director or alternate director regardless of the name given to that person.
- A person who may not be validly appointed as a director, but who acts in the position of director, or where the board is accustomed to act in accordance with the person's instructions or wishes.

Recent case law has established that a third party (such as a parent company or controlling shareholder) may be liable as a*de facto* or shadow director even though not formally appointed as a director. These decisions are most common in relation to insolvent trading.

Whether a person is acting as a director depends on all relevant factual circumstances, including the nature of the functions and powers that are exercised and the extent of their exercise.

INDIA

If a company does not appoint its first directors on formation, then the subscribers to the memorandum of association of the company who are natural persons will be deemed to be the company's directors and subject to the same duties as duly appointed directors.

UK (ENGLAND AND WALES)

The Companies Act contains no clear definition of the term "director", merely stating that it includes "any person occupying the position of a director, by whatever name called". The fundamental determinant of a director is not whether he has been duly appointed but whether he assumes the status and functions of a director.

A *de facto* director is someone who acts as a director without having been duly appointed or who continues to act after his appointment has ceased. The general duties of directors are owed by a *de facto* director in the same way as a properly appointed director.

A shadow director is different and is "a person in accordance with whose directions or instructions the directors of the company are accustomed to act". The definition excludes a parent company (but not a dominant individual at a parent company). A shadow director has some, but not all, of the responsibilities of board members.

UNITED STATES

A shareholder’s loss is normally limited to the amount of its investment in a corporation. However, where the corporate form is misused, most typically for fraud, the courts can pierce the corporate veil, and controlling shareholders may be held liable for the corporation’s obligations. Generally, the courts only pierce the corporate veil for closely-held corporations. Shareholders who hold a controlling interest may have “control person” liability under the federal securities laws. Shareholders who hold a controlling interest may also be deemed to owe a fiduciary duty to minority shareholders.

20. Are there general rules relating to conflicts of interest between a director and the company?

AUSTRALIA

Common law and statutory duties require a director to avoid conflicts of interest between the director and the company. A director must not misuse their position or information obtained as a director to gain an advantage for themselves or someone else, or to cause detriment to the company.

A director cannot put themselves in a situation where they have a personal interest that conflicts with the interests of the company, which they are bound to protect.

Conflicts of duty may also arise for directors who are appointed to represent the interests of a shareholder where they have conflicting duties to the company they are appointed by and the company they are appointed to. Where it is not possible for the person to comply with both duties, the only way to avoid the conflict may be to resign as a director. In some circumstances, where there is an actual conflict of duties, the director may have to take positive steps to ensure that the relevant company avoids material loss, even if that action would breach their duty to another company.

A director must give the board notice of any "material personal interest" in a matter that relates to the affairs of the company. In addition, directors of public companies who have a "material personal interest" in a matter that is being considered at a directors' meeting must not:

- Be present while the matter is being considered at the meeting.
- Vote on the matter.

INDIA

Directors have a fiduciary position towards the company. They must ensure that their personal interests do not conflict with the company's interests. A director must disclose any interest he may have in a contract or arrangement (*section 299, Act*). In relation to public companies, an interested director must not participate or vote in the proceedings of the board concerning a contract or an arrangement in which the director is interested, nor will his presence count for the purposes of quorum at the time of any such discussion (*section 300, Act*). The provisions of section 300 of the Act are not applicable to a private company.

UK (ENGLAND AND WALES)

A director is a fiduciary of the company, with a common law duty of confidentiality to the company. It is not uncommon for the articles to address information flows regarding other directorships. Directors also have a statutory duty to act to promote the success of the company for the benefit of its members as a whole.

There are two specific statutory duties regarding conflicts.

The first is a duty to avoid a situation in which he can have a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. A company's articles can make provision to deal with such conflicts, compliance with which precludes a breach of duty.

The duty is also not infringed if the particular conflict has been authorised. For a private company, authorisation can be given by other non-interested directors, unless the articles prohibit this. For a company existing before October 2008, this power can only be used if the members have so resolved. For a public company, authorisation must be permitted by the articles and then given by the non-interested directors.

The second duty requires any direct or indirect interest in a transaction or arrangement with the company to be declared. Provided a director has declared such interests he may, subject to the articles, participate in decision-taking relating to such a transaction.

For public and private companies, the duties above have effect subject to any authorisation given by shareholders.

UNITED STATES

The duty of loyalty requires a director to act in the best interests of the corporation and not for personal profit or gain or for other advantages that do not benefit the corporation. A director can be held liable to the corporation if he allows an actual or potential conflict between his personal interests and the best interests of the corporation to obscure his ability to make decisions objectively.

Under the corporate opportunity doctrine, where a business opportunity becomes known to a director due to his position with the corporation, the director owes a duty to the corporation not to use that opportunity or knowledge for his own benefit.

Self-dealing transactions are voidable under common law, but many states have safe harbour statutes (for example, §144(a) of the Delaware General Corporation Law) that generally provide that a transaction is not voidable if either:

- It is approved by either informed or disinterested directors or shareholders.
- The transaction is fair to the corporation.

21. Are there restrictions on particular transactions between a company and its directors?

AUSTRALIA

A public company must obtain shareholder approval before providing a financial benefit to a related party (including a director), subject to certain exceptions.

There are additional shareholder approval requirements for listed companies. The Listing Rules require shareholder approval for:

- The acquisition from or disposal to a related party (including a director) of a substantial asset.
- The issue of securities to a related party (including a director and certain associates of a director).

INDIA

A public company is subject to certain restrictions when granting a loan to its directors. A private company can freely grant loans to its directors.

Further, the following cannot enter into a contract with a company for the sale, purchase or supply of any goods, materials or services or for underwriting the subscription of any shares, or debentures of the company, except with the consent of the board (*section 297, Act*):

- A director of a company or his relative.
- A firm in which such a director or relative is a partner, or any other partner in such a firm.
- A private company of which the director is a member or director.

UK (ENGLAND AND WALES)

There are restrictions on the following types of transactions between a company and its directors:

- Payments to a director for loss of office or as consideration for retiring.
- Contracts between a company and its sole member who is a director or shadow director.
- Transfers of non-cash assets above a set value to or from a director (or connected persons).
- Loans from companies to directors or similar transactions. There are additional restrictions for public companies or associated companies relating to quasi loans, credit transactions and loans to persons connected with a director.

- Transactions and arrangements between a listed company or any of its subsidiary undertakings and certain group directors or their associates (or other persons if the purpose and effect is to benefit a director or associate).

UNITED STATES

Section 402 of the Sarbanes-Oxley Act prohibits directors from receiving personal loans or extensions of credit from the corporation, with limited exceptions. Also, certain transactions between a company and its directors could impair director independence.

22. Are there restrictions on the purchase or sale by a director of the shares and other securities of the company he is a director of?

AUSTRALIA

The Listing Rules require shareholder approval before issuing securities to a director of a listed entity.

A person must not engage in insider trading; that is, they must not trade in shares or other securities if they possess information that is not generally available and that a reasonable person would expect to have a material effect on the price or value of the securities. Insider trading attracts civil and criminal penalties.

Listed entities must have a security trading policy for directors and other officers that is disclosed to the Stock Exchange, including:

- The entity's closed periods.
- The restrictions on trading that apply to key management personnel.
- Any trading that is not subject to the policy.
- Any exceptions or circumstances in which key management personnel may trade during a prohibited period with prior written clearance and the procedures for obtaining prior written clearance.

Changes in security holdings of listed company directors must be disclosed to the Stock Exchange.

INDIA

A person cannot deal in securities of a company listed on a stock exchange if he (*SEBI (Prohibition of Insider Trading) Regulations 1992*):

- Has received or has access to unpublished price sensitive information.
- Is connected with the company and is reasonably expected to have access to such unpublished price sensitive information in relation to securities of a company.

UK (England and Wales)

A director of an unlisted company is not restricted at law from dealing in shares in that company, although restrictions could be imposed in any shareholders' agreement or the articles.

For listed securities, there are various restrictions.

Insider dealing is a crime. It applies where a director has inside information and he deals on certain markets or through an intermediary in securities whose price would be significantly affected by that information. Inside information is precise, non-public information regarding particular securities or companies that would be likely to have a significant effect on the price of any securities.

There is also a civil market abuse regime, which prohibits directors from insider dealing and other activities to manipulate the market or which fall below generally accepted standards. The definition of inside information for this regime is subtly different to the criminal regime, although the constituent elements are broadly the same.

The Listing Rules contain the Model Code on share dealing. This is mandatory for companies with a premium listing and is often adopted for companies with a standard listing or AIM listing. The Model Code and the AIM Rules prohibit dealings while inside information exists and also during a "close period", being roughly the period between the end of a financial year (or, where applicable, half year or quarter) and announcing the results for the relevant reporting period, subject to specified maximum timeframes for "close periods".

Under the Model Code, a director must seek clearance before any dealing. In addition to the restrictions above, clearance will not be given for a dealing with a maturity of one year or less. There are various exceptions to the Model Code.

The Takeover Code may apply further restrictions in the context of an offer for the company or other regulated transaction.

UNITED STATES

Generally, there are no restrictions on the purchase or sale of securities by a director of a public corporation, other than:

- Restrictions in relation to insider trading. A director cannot trade in corporation shares if he possesses material non-public information about the corporation. In addition, corporations usually have policies that regulate trading by officers and directors.
- Restrictions on trading during certain black-out periods tied to the corporation's pension fund.
- Restrictions on public resale of restricted and control securities in accordance with Rule 144 under the US federal securities laws. Rule 144 allows public resale of restricted and control securities if certain conditions are met, which may include a holding period and a limitation on the volume of securities to be sold.

Directors must disclose their holdings of shares and share options to the public, along with any transactions that result in a change in their holdings (*§16, 1934 Act*). In addition, when a director acquires more than 5% of the corporation's shares, certain additional disclosures must be made (*§§13(d) and (g), 1934 Act*). As noted above, the related pension disclosure rules may also require additional disclosure.

23. Do directors have to disclose information about the company to shareholders, the public or regulatory bodies?

AUSTRALIA

Companies must disclose certain information to the Australian Securities and Investments Commission (ASIC), including changes in issued share capital, directors and the company's registered office, within certain time limits.

The Corporations Act requires listed companies and certain other large public companies (Disclosing Entities) to disclose information:

- That is not generally available.
- That a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the company's securities.

This information must be provided by unlisted Disclosing Entities to ASIC and by listed entities to the Stock Exchange.

Exceptions apply where the information is confidential and it:

- Would be a breach of a law to disclose it.
- Concerns an incomplete proposal or negotiation.
- Comprises matters of supposition or is insufficiently definite to warrant disclosure.
- Is generated for internal management purposes only.
- Is a trade secret.

Failure to comply with the continuous disclosure obligations can give rise to civil and criminal liability for directors.

INDIA

Listed companies must comply with the mandatory provisions set out in Clause 49 of the Listing Agreement. The annual report of a listed company comprises the company's financial statements, the directors' report and such other disclosures as are required under Clause 49 of the Listing Agreement.

In relation to unlisted public companies and private companies, the directors must disclose in the directors' report (which is provided to the shareholders) information relating to the following:

- The state of the company's affairs.
- Any material changes and commitments affecting the financial position of the company which have occurred between the end of the financial year of the company to which the balance sheet relates and the date of the report.
- The conservation of energy, technology absorption, foreign exchange earnings and outgoings and so on.

The directors' report for all companies must be filed with the MCA.

UK (ENGLAND AND WALES)

There are various disclosure requirements within the Companies Act, including:

- The public's right to inspect the register of members.
- A member's right to receive notice of general meetings, inspect records of resolutions and meetings and receive annual reports and accounts.

For listed companies, the Listing Rules and DTRs impose additional disclosure obligations. Indeed, one of the six listing principles for a premium listed company states that, "a listed company must communicate information to holders and potential holders of its listed equity shares in such a way as to avoid the creation or continuation of a false market in such listed equity shares". This principle is reflected in more detail in the DTRs which require a company to notify the market of any inside information concerning the company. There are similar obligations in the AIM Rules.

If a director is "knowingly concerned" in a breach of the Listing Rules or DTRs, the FSA can censure or fine the director.

UNITED STATES

Directors generally do not disclose information about the company directly to shareholders, the public or regulatory bodies. These disclosures are made by the executive officers of the company and are often reviewed by the directors before the disclosure. The directors are signatories to certain documents filed with the SEC, including the company's annual report on Form 10-K.

24. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved?

AUSTRALIA

A proprietary company must only hold an annual general meeting (AGM) if required by the company's constitution.

The Corporations Act requires a public company to hold its first AGM within 18 months of registration. Subsequent AGMs must be held at least once in each calendar year and within five months after the end of the financial year, unless the company has only one member.

Issues usually discussed at an AGM include:

- The annual financial report.
- Directors' report and auditor's report.
- The election of directors.
- The appointment of the auditor and the fixing of the auditor's remuneration, if an auditor is appointed.

The chairman must allow discussion regarding:

- The management of the company.
- The conduct and preparation of the auditor's report.

Shareholders of listed companies have additional rights to discuss and vote on the company's remuneration report.

INDIA

A company must hold an annual general meeting (AGM) within six months from the date of close of a company' financial year. At this meeting the shareholders must:

- Adopt the financial statements, the directors' report and the auditors' report.
- Appoint the auditors.

If a director has been appointed between two AGMs, his appointment must be confirmed by the shareholders at the AGM.

UK (ENGLAND AND WALES)

A public company must hold an annual general meeting (AGM) within six months of its financial year end. Listed companies must make public their annual report and accounts within four months of the year end and usually call an AGM in that period.

The Companies Act does not require a private company to hold an AGM (although its articles may require it to) unless it is a "traded company" (those with shares admitted to trading on certain public markets in an EEA state with the company's consent). A traded company must hold an AGM within nine months of its financial year end.

The Companies Act requires the directors of a public company to put before a general meeting copies of its annual accounts and reports. This is usually done at the AGM. At this meeting, "quoted companies" must propose a non-binding resolution on the directors' remuneration report. There is no statutory requirement for shareholders to approve the accounts but usually a resolution is proposed for them to be received and, for listed companies, this is recommended by the Governance Code.

AGM's commonly also address declaring dividends, auditors, director appointments, and, within limits, authorisations for issuing new shares and share buybacks.

UNITED STATES

All public companies must hold an AGM. Under Delaware law for example, unless directors are elected by written consent an AGM must be held for the election of directors (*§211(b)*, *Delaware General Corporation Law*). Many large US public companies use the calendar year as their fiscal year and hold their AGMs in the spring. Matters typically submitted to a vote of shareholders (some of which are mandatory) include:

- The election of directors.
- Approval of stock compensation plans.
- Changes to the certificate of incorporation.
- Ratification of the selection of the company’s independent accounting firm.
- Company and shareholder sponsored corporate governance proposals, such as say-on-pay proposals.

In order to solicit proxies at an AGM, the 1934 Act requires a corporation to provide information to shareholders before the annual shareholders' meeting in the form of a proxy statement.

25. Can shareholders call a meeting or propose a specific resolution for a meeting? If so, what level of shareholding is required to do this?

AUSTRALIA

In some cases, shareholders can request directors to call a general meeting or can call a general meeting directly.

Shareholders can only call a general meeting for a proper purpose and put forward a resolution that it is within their power to consider (*see* Question 14).

The request for directors to call a general meeting can only be made by either:
- Shareholders holding at least 5% of the votes that may be cast at a general meeting of the company.
- At least 100 shareholders who are entitled to vote at the meeting.

The Corporations Act requires directors to call a general meeting within 21 days after the shareholders' request and the meeting must be held within two months after the request.

The shareholders identified above can also propose a specific resolution which the company must consider at the next general meeting.

The company must give written notice, setting out the nature of the meeting and any proposed resolutions, to each shareholder entitled to vote at the meeting and to each director. The Corporations Act governs the amount and contents of notice required for both listed and unlisted companies.

Shareholders holding at least 5% of the votes that may be cast at a general meeting of the company can call and arrange to hold a general meeting directly, in which case they must bear the cost.

INDIA

The board must call a shareholders meeting if it is requested by members whose shareholding is equal to or exceeds 10% of the company's paid-up share capital. The shareholders can propose the resolutions they intend to pass at the shareholders meeting provided that if there are two or more distinct matters, each proposed resolution must be supported by shareholders whose combined shareholding is equal to or exceeds 10% of the company's paid-up share capital.

UK (ENGLAND AND WALES)

The directors must call a general meeting if required by members representing at least 5% of the paid-up voting capital of the company (or 5% of the voting rights, if the company is limited by guarantee). A request must state the general nature of business to be dealt with and the text of any resolution that the members propose. The directors must call such a meeting within 21 days of request, to be held within 28 days of notice of the meeting. If the directors fail to call the meeting, the shareholders can do so at the company's expense.

For public companies, resolutions can be proposed by members for the AGM. For certain traded private companies, members can require a "matter" (other than a resolution) to be included in the business of the meeting. The level of shareholder support needed for both actions is the same as that noted in the following paragraph.

Members can also require the company to circulate a short statement on any business to be dealt with at a general meeting. The request must be submitted by either 100 members holding shares on which an average GB£100 per member is paid or members holding 5% of total voting rights.

UNITED STATES

Generally, state statutes provide that shareholders can call special meetings if the corporation’s organisational documents allow them to do so. It is becoming increasingly common for activist shareholders to call for a reduction in the percentage of shareholder votes required to call a special meeting. With proper notice, shareholders can generally make proposals at annual and special shareholders’ meetings, but the corporation is not required to accept certain proposals.

26. What action, if any, can a minority shareholder take if it believes the company is being mismanaged and what level of shareholding is required to do this?

AUSTRALIA

A shareholder may apply to court if the company's conduct is contrary to the interests of shareholders as a whole or oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member or members.

Successful oppression actions are rare, but the court has power to grant any order it considers appropriate, including an order:

- Regulating the conduct of the company's affairs in the future.
- Restraining a person from engaging in any conduct or act.
- Requiring a person to do an act.
- That the company be wound up.

Subject to the court's permission, a shareholder, former shareholder or person acting with the court's permission can bring proceedings on behalf of the company or intervene in proceedings to which the company is a party.

INDIA

A minority shareholder can file an application before the Company Law Board in the following circumstances:

- The company's affairs are being conducted in a manner which is prejudicial to the public interest.
- The company's affairs are oppressive to a member or members of the company.
- There has been a material change in the management or control of the company, whether through alteration in its board or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, provided that:
    - is not a change brought about by, or in the interests of, any creditors including debenture holders, or any class of shareholders of the company; and
    - by reason of the change, it is likely that the company's affairs will be conducted in a manner prejudicial to public interest or to the interests of the company.

An application before the Company Law Board can be brought by:

- Not less than 100 members.
- Not less than 10% of the total number of members.
- Any member(s) holding less than 10% of the total paid-up share capital of a company, provided that the shares of such member(s) are fully paid up.

UK (ENGLAND AND WALES)

Derivative claim

Any shareholder can take a derivative claim in the name of the company for a wrong done to the company, to obtain relief on behalf of the company. Such a claim can only be for negligence, default, breach of duty or breach of trust of a director. The director need not have benefited personally for a claim to be taken. The shareholder must file evidence establishing the basis for a claim and obtain the court's permission to continue. The court will not give permission if the impugned action has been or is likely to be authorised by a majority of independent shareholders.

Unfair prejudice

Any shareholder can apply to court if the company's affairs are being conducted in a manner that is unfairly prejudicial to some or all of the shareholders including the applicant. If the claim is proved, the court may make such order as it thinks fit. The type of order could include, but is not limited to, an order regulating the future conduct of the company or, most commonly, providing for the sale or purchase of shares by the complainant. In contrast to a derivative action, an unfair prejudice action is designed to compensate the aggrieved shareholder.

UNITED STATES

A minority shareholder can:

- Bring a claim, either on behalf of the corporation (referred to as a derivative action) or as a shareholder class action, against the corporation’s directors for breach of fiduciary duty.
- Call a special meeting of shareholders if the corporation’s certificate of incorporation and bye-laws allow.
- Submit shareholder proposals to the board.
- Engage the corporation in a proxy contest in an attempt to replace the board and the corporation’s management.
- Contact the board or senior management of the company to express the shareholder's view.

The company is generally not required to respond to the shareholder's inquiries but may do so as an investor relations matter.

- Use any other grievance methods provided for by a particular company.

27. Are there any formal requirements or guidelines relating to the internal control of business risks?

AUSTRALIA

There are no formal requirements relating to the internal control of business risks.

The Principles recommend the adoption of a risk management policy by listed companies and disclosure of a summary of the policy.

The Principles recommend that listed companies have an audit committee to oversee procedures relating to internal control and financial reporting. Larger listed companies must follow the Principles relating to the audit committee.

INDIA

At present, there are no formal requirements or guidelines relating to the internal control of business risks.

UK (ENGLAND AND WALES)

The requirement to manage business risks and implement appropriate internal controls is implicit in the Companies Act requirement that directors promote the success of their company and exercise reasonable care, skill and diligence.

For many listed companies, a Main Principle of the Governance Code applies, stating: "the board is responsible for determining the nature and extent of the significant risks it is willing to take in achieving its strategic objectives. The board should maintain sound risk management and internal control systems". The Financial Reporting Council's publications *Internal Control: Guidance to directors* and *Going Concern and Liquidity Risk: Guidance for Directors of UK Companies* provide further assistance on this area.

There are various requirements for disclosures in a company's report and accounts to show how the directors are meeting their responsibilities on risk and internal controls.

UNITED STATES

The rules adopted by the SEC under Section 404 of the Sarbanes-Oxley Act impose formal requirements on the corporation's internal control over financial reporting (ICOFR). ICOFR is a subset of the corporation's internal controls. A corporation's annual report filed with the SEC must generally contain an internal control report:

- Stating the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting.
- Identifying the framework used by management to evaluate the effectiveness of the corporation's ICOFR.
- Containing an assessment, as of the end of the most recent fiscal year of the corporation, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting.

- The corporation's independent auditor is required to issue an attestation report on the corporation's ICOFR.

The SEC regulations also require quarterly reports to discuss changes in ICOFR. In addition, the CEO and CFO must annually and quarterly provide certifications that relate, in part, to ICOFR.

28. What are the responsibilities and potential liabilities of directors in relation to the company's accounts?

AUSTRALIA

All companies must keep written financial records that:

- Correctly record and explain its transactions and financial position and performance.
- Enable true and fair financial statements to be prepared and audited.

Small proprietary companies, other than some foreign-controlled companies, are not required to lodge annual financial reports and directors' reports unless directed to do so by a shareholder with at least 5% of the votes, or by ASIC.

A proprietary company is a small proprietary company for a financial year if at least two of the following paragraphs apply:

- The consolidated revenue for the financial year is less than A$25 million.
- The value of the consolidated gross assets at the end of the financial year is less than A$12.5 million.
- The company has fewer than 50 employees at the end of the financial year.

Otherwise, it is a large proprietary company.

Large proprietary companies, some small foreign-owned proprietary companies and public companies (reporting companies) must prepare financial reports that comply with the accounting standards, including a statement of financial position, statement of comprehensive income and a statement of cash flows, notes to them and directors' declarations. The directors' report must contain certain additional information required by the Corporations Act.

Disclosing Entities (listed companies and certain other large public companies) must lodge accounts every six months.

There are additional reporting obligations for listed companies in the Listing Rules.

Many company groups enter into a deed of cross guarantee in a form provided by ASIC, under which they may prepare consolidated accounts rather than accounts for each entity in the group.

Failure to lodge financial statements with ASIC is a criminal offence.

INDIA

In relation to the company's accounts, the board of directors must (*Act*):

- Provide at every AGM the balance sheet and profit and loss account for the specified period. If the directors breach this requirement, they can be subjected to a fine and imprisonment.
- Authenticate the balance sheet and profit and loss account and approve it in a board meeting. If the board does not authenticate and approve the balance sheet and profit and loss account, then every director is subject to a fine.
- Attach a company's balance sheet and profit and loss account to the directors' report which is laid before the shareholders at the AGM. Non-compliance on the part of the directors is punishable with a fine and imprisonment.

UK (ENGLAND AND WALES)

Directors have responsibilities to prepare, approve and file accounts that give a true and fair view of the affairs of the company. Directors of listed companies are required to explain these responsibilities in a statement in the annual accounts. For many listed companies, the Governance Code requires a statement that the annual report and accounts are fair, balanced and understandable and provide the information necessary for shareholders to assess the company.

If the accounts do not comply with the Companies Act and related regulations, every director who knew of the failure, or was reckless about it, and who failed to take reasonable steps to ensure compliance, commits an offence.

A director may be liable for misstatements in the company's accounts but liability for investment decisions made in reliance on the accounts is difficult to establish. Following the decision in *Caparo Industries plc v Dickman [1990] UKHL 2* (*Caparo*), directors are unlikely to be liable for negligent misstatement as there is no general duty of care owed to shareholders.

The Financial Services and Markets Act 2000 creates a liability on listed issuers for fraudulent or reckless misstatements or omissions amounting to a dishonest concealment of a material fact.

UNITED STATES

Any director who makes or causes the making of any false or misleading statement in a document filed with the SEC can be held personally liable for the misstatement, including those made in connection with the corporation's accounts under various sections of the 1933 Act and the 1934 Act.

In the context of securities offerings, every director of an issuer corporation can be held personally liable for any untrue statement of a material fact in a registration statement or for any omission of a material fact required to be stated or necessary to make the statements not misleading (*1933 Act*). A director can avoid liability by proving that he had acted in good faith and with lack of knowledge. Under the Sarbanes-Oxley Act, directors can also face criminal liability for fraudulently influencing, coercing or misleading an accounting firm during an audit, with the intention of rendering the audit report misleading.

29. Do a company's accounts have to be audited?

AUSTRALIA

The financial accounts of small proprietary companies are not required to be audited unless directed by the company's shareholders or ASIC.

Reporting companies must have their annual financial reports audited and obtain an auditor's report. Half yearly accounts must also be reviewed by an auditor.

Public companies must also release audited general-purpose financial statements in accordance with the Australian Accounting Standards Board 101 Presentation of Financial Statements.

ASIC has the power to make specific exemption orders or class orders exempting a company or class of companies from the audit requirements under the Corporations Act.

INDIA

All companies' accounts must be audited in accordance with the prescribed accounting standards.

UK (ENGLAND AND WALES)

A company's annual accounts must be audited except in three cases, namely where:

- The company is "small" for the year concerned (*see* Question 12). Public companies and a number of other entities are excluded from this exemption.
- The company is dormant for the year, that is, it had no accounting transaction required to be entered in its accounting records.
- The company is a subsidiary company that fulfils certain criteria, including obtaining unanimous shareholder approval and a parent company guarantee of all its liabilities.

In each case, shareholders with at least 10% in nominal value of the company's shares can nonetheless require an audit.

UNITED STATES

The annual financial statements of public companies must be audited by a registered independent accounting firm. Interim financial statements are not required to be audited but must be formally reviewed under applicable accounting literature.

30. How are the company's auditors appointed? Is there a limit on the length of their appointment?

AUSTRALIA

Directors of a proprietary company may appoint a company auditor, if one has not previously been appointed by the company at an AGM.

Directors of a public company must appoint an auditor within one month of the company being registered. The auditor is appointed until the first AGM where shareholders either affirm the appointment or elect to appoint a new auditor. If there is a vacancy in the office of the auditor at any time during the financial year, the directors must appoint an auditor until the next AGM, when shareholders may confirm the appointment. ASIC has the power to appoint an auditor if the public company fails to fill the casual vacancy.

Auditors hold office until death, removal or resignation. An auditor will cease to be an auditor of the company if they are no longer qualified, the company is being wound up or there is a conflict of interest. In most cases, ASIC must consent to the resignation of an auditor.

The Corporations Act provides that an individual auditor must not play a significant role in the audit of a listed company for more than five successive financial years.

INDIA

The company's auditors are appointed by the board of directors, subject to the approval of the shareholders. The auditors are appointed from one AGM until the next AGM.

UK (ENGLAND AND WALES)

The auditor of a private company is appointed by the shareholders. Directors can appoint the auditor any time before the first accounts meeting, after a period of exemption or to fill a vacancy.

An auditor's term of office will usually run from the end of the 28 day period following circulation of the company's accounts until the end of the corresponding period in the next financial year. If no new auditor has been appointed, the auditor in office will be deemed to be re-appointed unless he was appointed by the directors, the members or directors have decided against re-appointment, or the articles require actual re-appointment.

The auditor of a public company is appointed by the shareholders at the general meeting at which the annual accounts are laid. There is no deemed re-appointment for auditors of public companies.

FTSE 350 companies should put the external audit contract out to tender at least every ten years (*Governance Code*). As this provision is to apply to financial years starting on or after 1 October 2012, there are transitional arrangements in place to avoid disruption to the audit market.

UNITED STATES

If the corporation is a public company, the corporation's audit committee is responsible for hiring an independent registered public accounting firm as its auditor. The auditor must then be approved by the entire board and the retention of the firm is typically put before the shareholders for ratification. While there is no requirement for the company to rotate the accounting firm, the accounting firm must change the audit partners responsible for co-ordinating and reviewing the corporation's audit every five years.

31. Are there restrictions on who can be the company's auditors?

AUSTRALIA

An auditor may be an individual, partnership or company. All auditors must be registered before acting in that capacity. ASIC must be satisfied that the person is appropriately qualified and a fit and proper person to be registered as a company auditor. To be registered as an authorised audit company, all directors of the company must be individually registered. If the appointed auditor is a partnership, a partner that wishes to sign off on an audit report must also be individually registered.

Auditors must make an annual declaration that the independence requirements under the Corporations Act have been complied with. Auditors may be restricted from acting if they fail to remain independent of the company.

INDIA

An auditor must be a chartered accountant within the meaning of the Chartered Accountants Act 1949. The following persons cannot be appointed as the company's auditor:

- A body corporate.
- An officer or employee of the company.
- A person who is a partner of, or who is employed by, an officer or employee of the company.
- A person who is indebted to the company for an amount exceeding INR1,000 or who has given any guarantee or provided any security in connection with the indebtedness of any third person to the company for an amount exceeding INR 1,000.
- A person holding any security of the company after a period of one year from the date of commencement of the Companies (Amendment) Act 2000.

UK (ENGLAND AND WALES)

The auditors of a company must be statutory auditors under the Companies Act. This means that they must be members of a recognised supervisory body and be eligible for appointment under the rules of that body, as well as being appropriately qualified.

An auditor cannot be an officer or employee of the company being audited or of an associated undertaking, nor a partner or employee of such a person.

UNITED STATES

A public company's auditors must be independent under the federal securities laws and the rules of the Public Company Accounting Oversight Board (PCAOB). Auditors of public corporations must also be registered with the PCAOB. Certain relationships can disqualify an auditor from being independent. The largest independent accounting firms audit a vast majority of the largest public companies.

32. Are there restrictions on non-audit work that auditors can do for the company that they audit accounts for?

AUSTRALIA

Auditors can also provide non-audit work, including management or tax advice and information technology consulting.

Reporting companies must state in their annual directors' report whether the directors are satisfied that the provision of non-audit services provided by the auditor are compatible with the standard of independence required by auditors under the Corporations Act. Details of the amounts paid to the auditor for non-audit services during the year must also be disclosed.

INDIA
Auditors cannot undertake non-audit work for the company they audit accounts for.

UK (ENGLAND AND WALES)
There are no statutory restrictions but professional rules and guidelines impose some constraints on other work that auditors can do for a company (*see Auditing Practice Boards Ethical Standard 5 (Revised)*).

Investors in listed companies are often wary of auditors carrying out such work and the Governance Code requires:

- An audit committee to decide what work is permitted and what is not.
- An explanation in the company's annual report as to how auditor objectivity and independence is safeguarded.

UNITED STATES
Federal securities laws prohibit a corporation's auditors from performing certain services for their audit clients. The following are prohibited non-audit services:

- Bookkeeping or other services related to the accounting records or financial statements.
- Financial information systems design and implementation.
- Appraisal or valuation services, fairness opinions or contribution-in-kind reports.
- Actuarial services.
- Internal audit outsourcing services.
- Management functions or human resources.
- Broker or dealer, investment adviser or investment banking services.
- Legal services and expert services unrelated to the audit.
- Tax services during the audit engagement period to a person (or an immediate family member) in a financial reporting oversight role at an audit client generally.
- Any other service that the PCAOB determines is impermissible.

All other non-audit activities must be approved in advance by the corporation's audit committee.

33. What is the potential liability of auditors to the company, its shareholders and third parties if the audited accounts are inaccurate? Can their liability be limited or excluded?

AUSTRALIA
Any breach of an auditor's duties may also be a breach of the contract of engagement with the company.

Shareholders, creditors and third party users of the financial statements may have an action in tort against the auditor for negligence. An auditor owes a duty of care to a third party if, on the balance of probabilities:

- The auditor knew or ought to have known that the auditor's report would be communicated to a third party.
- The audited financial statements would be communicated for the purpose of making investment decisions.
- The decision was made in reliance on the audited financial statements.

An auditor's duty to use reasonable care, skill and diligence and report fraudulent activity is owed not only to the company but to shareholders and other third parties who may rely on the audited financial statements when making investment decisions.

A company cannot exempt or indemnify an auditor from liability to the company or third parties.

INDIA

An auditor may be liable if, in any return, report, certificate, balance sheet and so on, he makes a statement which:

- Is false in any material respect, knowing it to be false.
- Omits any material fact.

A company cannot indemnify an auditor against any negligence, default, misfeasance, breach of duty or breach of trust of which he may be guilty in relation to the company (*section 201, Act*).

UK (ENGLAND AND WALES)

An auditor commits a criminal offence if he knowingly or recklessly allows an audit report to include anything that is materially misleading, false or deceptive or omit certain required statements. The auditors also have a liability to the company if their work is negligent or if they breach the terms of their engagement letter.

Following the decision in *Caparo*, it is difficult to establish a duty of care to shareholders and third parties.

The Companies Act makes it possible for auditors to limit their liability by agreement with the company providing the agreement is fair and reasonable. However, few companies have entered into such agreements given the tension with conflicting directors' duties.

UNITED STATES

Auditors are potentially liable to the company, shareholders and third parties if the audited accounts are inaccurate. Generally, auditors cannot limit their liability to their audit clients because these limitations are viewed as impeding their independence. It may, however, be possible for auditors to limit in their engagement letter the punitive damages an audit client can claim. An auditor can be held liable for negligent misrepresentation to third persons when the auditor knows the third persons will rely on the audit opinion or knows that the auditor's client intends for third persons to rely on the audit opinion. An auditor can be liable to shareholders for statements made either:

- In the audit or internal controls over financial reporting opinion.
- In the context of a securities offering by a corporation, under the 1933 Act, based on the financial statements and attestation to the corporation's internal controls over financial reporting included in the corporation's registration statement.

34. Is it common for companies to report on social, environmental and ethical issues? Please highlight, where relevant, any legal requirements or non-binding guidance/best practice on corporate social responsibility.

AUSTRALIA

There are no formal legal requirements for companies to report on social, environmental or ethical issues.

The Principles recommend adopting a code of conduct to promote ethical and responsible decision making. The board must assess how it wishes to demonstrate its commitment to corporate social responsibility and what is appropriate in the company's circumstances.

General social and ethical requirements of companies are regulated by industry and jurisdiction specific legislation, including environmental, employment and workplace health and safety legislation.

INDIA

In India, most leading companies are involved in corporate social responsibility (CSR) programmes in areas such as education, health, creation of employment, development of skills and empowerment of weaker sections of the society.

The MCA has issued Voluntary Guidelines for Corporate Social Responsibility. These Guidelines intend to encourage best practices in corporate social responsibility and state that the CSR initiatives of Indian companies should become integral to the overall business policy and aligned with the companies' business goals.

UK (ENGLAND AND WALES)

All companies, except "small" companies, must produce a business review in their directors' report. This must include the following information to the extent necessary to understand business performance: except for medium-sized companies, it must analyse non-financial key performance indicators, where appropriate, including information on environmental and employee matters. For "quoted" companies, it must include information on environmental, employee, social and community matters and related policies.

Businesses in particular sectors or with certain permits may have further environmental reporting obligations. Various voluntary environmental reporting guidelines also exist.

The Governance Code requires many listed companies to state the company's values and standards and ensure that its obligations to shareholders and others are understood and met.

There are many bodies that publish reporting guidelines that touch on corporate social responsibility, such as the Accounting Standards Board, the Association of British Insurers (ABI) and the Pensions and Investment Research Consultants (PIRC) (an independent advisory consultancy).

There is a wide spectrum of practice for corporate social responsibility reporting, which is seen as more relevant for larger companies. Almost every FTSE 100 company reports on corporate social responsibility in some form.

The government has consulted on draft regulations to impose a duty on "quoted" companies to report on greenhouse gas emissions. The consultation period closed on 17 October 2012 and the draft regulation is now being finalised.

UNITED STATES

Public companies often highlight their achievements related to social and ethical responsibilities in their annual reports or on their corporate websites. These disclosures are largely driven more by best practices and pressure from "watchdog" organisations than legal requirements. However, there are general disclosure requirements for certain of these matters as well as more extensive disclosure requirements on environmental matters and the potential impact of climate change.

35. What is the role of the company secretary in corporate governance?

AUSTRALIA

The Corporations Act requires the company secretary to:

- Ensure that company has a registered office.
- For public companies, ensure that the registered office is open to public.
- Lodge notices and financial reports with ASIC.

The actual role and duties of a company secretary are subject to the terms on which the company secretary is appointed and the company's constitution.

The company secretary is appointed and removed by the board and provides information to the board, but also reports to the chief executive and liaises with management in relation to the administration of the company.

INDIA

Every company with a paid-up share capital of INR50 million must have a company secretary who does the following:

- Maintains the corporate and statutory records of a company.
- Sends out the notices for the board and shareholders meetings and drafts the minutes thereof.

- Co-ordinates with the statutory auditors and the internal auditors.

UK (ENGLAND AND WALES)

Private companies are no longer required to have a secretary, although this may be required by the articles. Public companies must have a company secretary.

The secretary is an officer and an authorised signatory of the company for the purposes of the Companies Act and is permitted to sign most of the forms to be filed publicly with the UK Registrar of Companies. It is not uncommon in smaller companies for the secretary also to be a director.

Legislation does not set out specific duties and the variety of responsibilities will vary from company to company. The types of tasks that a secretary may be responsible for include:

- Arranging board and shareholder meetings.
- Public disclosure.
- Governance.
- Maintaining statutory records.
- Implementing policies for regulatory compliance.
- Certain administrative tasks.

For many listed companies, the Governance Code states the company secretary "should be responsible for advising the board through the chairman on all governance matters". Responsibilities set out in the Governance Code include ensuring good information flows among the persons running the company, director induction and professional development, and procedural compliance.

UNITED STATES

The company's general counsel (or an assistant counsel) is often also the company secretary and in this capacity:

- Attends board meetings.
- Assists the board with respect to corporate governance issues.
- Prepares minutes of the meetings.
- Maintains corporate records, among other things.

36. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? Please list any such groups with significant influence in this area.

AUSTRALIA

Some institutional investors extensively engage in enforcing good corporate governance but others are more reluctant to become actively involved.

The Australian Shareholders Association and the Australian Investors Association are not-for-profit organisations formed to advance the interests of investors. They liaise with a wide range of bodies such as regulators, industry groups and accounting bodies to raise the standard of corporate governance.

A recent development has been the increased influence of proxy advisory firms. These firms report on proposed company resolutions and suggest how to vote on each resolution in line with the investor's objectives.

INDIA

Active participation by the shareholders in monitoring and enforcing good corporate governance is still emerging in India. Institutional investors with a significant shareholding in Indian companies are developing the practice of questioning the corporate governance practices of a company.

UK (ENGLAND AND WALES)

Vocal and active shareholding is increasingly a feature of UK public company life.

The Governance Code states that there should be a dialogue with shareholders and that all directors should be made aware of shareholder opinion. The Stewardship Code sets out the ways in which institutional investors and their asset managers should monitor and engage with investee companies to discharge their duties of stewardship towards their own investors.

The Kay Review of UK Equity Markets and Long-term Decision Making was published in July 2012. One of its principles is that asset managers can contribute more to business performance through greater involvement with investee companies. Overall, if the recommendations of the review are taken up, this will encourage an increase in the role and influence of investors in monitoring corporate governance. The government's first detailed statement in response to the Kay Review welcomes the report, accepting its analysis and conclusions.

Groups that are vocal on behalf of institutional investors include the Association of British Insurers (ABI), the National Association of Pension Funds (NAPF) and PIRC. In addition, there is the Institutional Investor Committee, comprising the ABI, NAPF and the Investment Managers Association (IMA).

UNITED STATES

Institutional investors and other shareholder groups have become increasingly influential in monitoring and enforcing best practices in corporate governance. Many large investors have established corporate governance guidelines that they want corporations in which they invest to follow and have published these guidelines on their websites. In addition, there are institutional advisory firms, such as Institutional Shareholder Services Inc (ISS) and Glass, Lewis & Co, LLC, which recommend how shareholders should vote on matters proposed to shareholders in corporations' proxy statements.

In addition, traditional shareholder activists, such as large pension funds, continue to be a powerful influence and are often successful in encouraging corporations to adopt their desired practices. These institutional investors often submit shareholder proposals in corporate governance policies.

Institutional shareholders and hedge funds are increasingly engaging corporations in discussions of their perspectives on matters affecting the corporation, such as capital structure, use of capital, strategic investments and acquisitions. In 2012, 49 of the Top 100 US Companies included governance related shareholder proposals in their proxy statements.