

Corporate Law Reform Committee

Responses and Comments Received on Consultative Document “Clarifying and Reformulating the Directors Role and Duties”

Respondents:

A total of sixteen (16) responses were received from the following:

1. Malaysian Accounting Standards Board (MASB)
2. Mr Chan Hua Eng
3. Ms Judy Lim
4. Sunway Management Sdn Bhd
5. Malaysian Association of Company Secretaries (MACS)
6. Malaysian Institute of Accountants (MIA)
7. Khazanah Nasional
8. Institute of Approved Company Secretaries (IACS)
9. The Association of Banks in Malaysia (ABM)
10. Lee Hishammuddin Allen & Gledhill
11. Malaysia (MAICSA)
12. Johor Bahru (JB) Practitioners Group
13. Malaysian Investment Banking Association (MIBA)
14. Bank Negara Malaysia (BNM)
15. Minority Shareholder Watchdog Group (MSWG)
16. The Malaysian Institute of Certified Public Accountants (CPA)

Summary of responses and comments:

Respondents	Comments
MASB	<p>We support the efforts of the Company Law Reform Committee (CLRC) to review the Companies Act 1965 (CA) to clarify and reformulate the directors' role and duties. Having reviewed the document, we would like to comment on a couple of issues.</p> <p>Firstly, the CLRC recommends the CA to contain an expressed provision that the director will not be liable for the acts of the delegate if that director can satisfy that: (a) at all times the director believed on reasonable grounds that the delegate would exercise his power in conformity with the duties imposed on directors by the CA and the company's constitution; and (b) the company director believed on reasonable grounds, in good faith and after making proper inquiry, if the circumstances warrant an inquiry, that the delegate was reliable and competent in relation to the power.</p> <p>The above proposal seems to suggest that the responsibilities of the directors under sections 166A(3) and 167(1) of the CA¹ are now relegated to the chief financial officer (staff) of the company instead. With the proposal, the staff is the person responsible for compliance with sections 166A and 167(1) instead of the directors – a proposition which will dilute the responsibility of directors in the discharge of their duties as a directors. We are of the view that compliance of sections 166A and 167(1) should remain the responsibility of the directors of the company. After all, directors are the persons responsible over the financial and operating policies of the company and the staffs are merely carrying out and implementing those decisions reached by the directors.</p> <p>Secondly, the CLRC recommends the definition of the term 'remuneration' in relation to a director to include fees; any sum paid by way of expenses allowances in so far as those sums are charged to income tax in Malaysia, any contribution paid in respect of a director under any pension scheme and any benefit received by him otherwise than in cash in respect for his services as a director.</p> <p>In the interest of consistency in application of the provisions of the CA and approved accounting standards, we strongly recommend that the CLRC adopts the definition and provisions of the term 'compensation' as defined in FRS 124 – Related Party Disclosure. Our experience in the past indicated that consistency in the terms used across regulations had helped facilitate compliance by companies.</p> <p>Compensation includes:</p> <ol style="list-style-type: none"> a. Short-term employee benefits, such as wages, salaries and social security contributions, paid annual leave and paid sick leave, profit-sharing and bonuses (if payable within twelve months of the end of the period) and non-monetary benefits (such as medical care, housing, cars and free or subsidised goods or services) for current employees; b. Post-employment benefits such as pensions, other retirement benefits,

¹ Section 166A (3) requires the directors of the company to ensure that the accounts of the company are made out in accordance with the applicable approved accounting standards whilst section 167(1) requires directors of the company to keep accounting and other records that will sufficiently explain the transactions and financial position of the company.

	<p>post-employment life insurance and post-employment medical care;</p> <p>c. Other long-term employee benefits, including long-service leave or sabbatical leave, jubilee or other long-service benefits, long-term disability benefits and, if they are not payable wholly within twelve months after the end of the period, profit-sharing, bonuses and deferred compensation;</p> <p>d. Termination benefits; and</p> <p>e. Share-based payment.</p>
<p>Chan Hua Eng</p>	<p>SECTION C</p> <p>PART 1 – Directors, Directors’ Qualification, Appointment, Removal and Compensation</p> <p>A. <u>Definition of “Director” and “Shadow Director”</u></p> <p>In answer to question 1, although the proposed amendment does make it easier to establish a person intended to be covered by the section, it does not address the question of the status of a holding company. There is little doubt that, in practice, Directors of a subsidiary, especially a wholly-owned subsidiary, are in fact nominees of the holding company and where there are minority shareholders, there is no question of their being able successfully to nominate or secure the appointment of any Director and even if a Director suggested by them were appointed, it would only be with the good grace of the holding company and such person as is appointed could, by a small stretch of the imagination, be regarded as being a nominee of the holding company. The position as regards public companies, especially the listed ones, is less clear. However, the point here is that it is difficult to escape the conclusion that the whole Board of the subsidiary are nominees of the holding company and in most cases such Board would act in accordance with the directions of the holding company except where such directions conflict with the statutory duties of a Director.</p> <p>In the definition, the word “person” is used and that expression includes a corporation. The question is whether the holding company is deemed to be a Director although the concept of a corporation being a Director no longer exists in the Act. If not, does it mean, by extension, <u>all</u> the Directors of the holding company?</p> <p>My feeling is, in seeking to cure one ill, you may perhaps create another ill.</p> <p>F. <u>Resignation of Directors</u></p> <p>I do not agree that the Director may only give notice <u>in the event that the company does not do so</u>. In the first place, there is a time limit of one month by which if the company fails to do so before the retired Director can act and in the second place, more importantly, that Director should have the right to do so <u>at any time after the effective date of his resignation</u> as he may not wish to wait one month in order to find out if his resignation had been recorded.</p>

Even if a decision is taken to allow the Director to give notice, consideration must be given to what form it should take. For a start, he should not be required to file Form 49 as inevitably he would be required to do by the bureaucrats in the frontline who delight in insisting on full compliance. As you know, Form 49 contains a lot of the details which would not be relevant and more importantly, the Director concerned is unlikely to have. The alternative, equally undesirable is for yet another form to add to the many existing ones. My recommendation is that a simple letter, which if put on file would suffice for the purpose.

G. Directors' Compensation

Reply to question 9

Whilst I agree that Directors' remuneration be approved by shareholders in general meeting, I would comment that, in practice, especially in the case of Public Listed Companies, this is done.

Reply to question 10

I do not agree that company members should have a statutory right to inspect it's Directors' contracts of service. Such right carries the principle of transparency a little too far.

It must be remembered that the powers of the company and therefore it's management vests in the Directors and such Directors are appointed by the shareholders in the first place indicating that there resides in them the trust of the shareholder. Those powers include decision-making that can have far more serious implications than that of Directors' contracts of service.

The shareholders are not left in the dark entirely for, as you have pointed out, Directors' remuneration is disclosed in the audited accounts and even those accounts need not be approved by the shareholders.

To vest in each and every shareholder the right to inspect the Directors' contracts of service would, if abused, be at the very least, a nuisance to the management of the company and could be compared to being given the right inspect all the books of accounts and other records of the company which for the time being at least they do not have and is certainly not to be tolerated in the interest of the company. This would extend to micro-management of the company which is not in the interest of anyone including the shareholders. If they are dissatisfied with the performance of one or more the Directors, they are free to exercise their voting rights to demonstrate this but until they do, they must assume or accept the fact that such Directors are carrying out their duties effectively.

***PART II - Clarifying and Reformulating the Role and Functions
of Company Directors and The Board of Directors***

2.1 I would like to point out that reference to Article 70 in this clause should in fact be to Article 73.

I feel that there is good reason why the Act does not contain any

provision specifying the role and functions of the Board. In my view, as a corporation is a legal person but does not have the physical ability to act, it has its Board of Directors and they are almost without exception empowered by the Memorandum and Articles (E.g. Article 73 in Table A) to act in it's stead.

To specify the roles and functions of the Board is akin to a person restricting its own ability and limiting itself to act within a scope and that cannot be correct. The shareholders, in appointing the Directors, have by that act, conferred upon the Directors the authority to physically carry out the functions of the company which it by itself is unable to do so. This does not mean that they have free rein to do as they please but subject to their keeping within the ambit of the law and the Memorandum and Articles, they run the company.

However, this does not mean that the shareholders cannot by an express resolution, restrict such powers. Although I say so, I am not sure whether, as the law now stands, there is a doubt whether shareholders can in fact pass such a resolution but if they cannot, then the Act should provide that they can.

There is no doubt in my mind that unless a Director is an executive Director, his role must of necessity include, inter alia, the supervision of those that are charged with the management of the company. The extent of such supervision depends very much on the nature and operations of the company and it is difficult to distinguish those of one from the other and thus legislative provisions will not help the existing position and possibly to the contrary.

Reply to question 13

With respect, this question does not seem to follow on the CLRC's recommendation set out in Clause 2.7 which is that there should be incorporated in the Act a general statement of the Board's role and function whereas the question posed is whether the Act should provide that the Board of Directors' role and function is to manage the affairs of the company.

The picture becomes even more confusing when regard is had to Clauses 2.1 to 2.6 which seem to support the concept contemplated in Clause 2.7. But, as I pointed out above, the idea has not been carried through to your question.

If the proposal is that the Act is to set out the Board's role and function even in general terms, I do not agree. In my view the Board of Director's role and function is to manage the affairs of the company as this is already and generally accepted whether or not the Articles so provide but almost without exception, they do. Any provision however general, inevitably leads to disputes on interpretation and will engender a new series of case law which does not improve upon the existing situation which I consider is working well enough.

PART III – Directors' Duty of Care, Skill and Diligence and

Enacting a Business Judgement Rule

A. *Duty of Care, Skill and Diligence*

This is a matter that is of concern to those Directors who are careful enough to apply their minds to the subject and the fact that there is at present no legislative provision means that they have to rely on the common law and decided cases. Not even all lawyers are clear as to what they are and one can therefore hardly expect that any Director concerned enough to ask, will get straight and simple answers from their legal advisers.

It is therefore timely that the matter is considered so that Directors are at least clearer as to their position but this is easier said than done. At the end of the day, whatever may be written, there will and has to be a large element of subjectivity which unfortunately is unavoidable and any attempt to widen the general scope of the proposal as is now suggested will only lead to more questions and possibly even more confusion.

Judging by the various comments and suggestions by various Committees, there is one main vein and that is that none of them are seeking to impose strict liability upon Directors which, if it happens, will make it impossible except for the most reckless of persons to seek to become Directors and yet each company that is or seeks to be incorporated must have at least two Directors which makes for the need for a lot of Directors!

I have commented as above even though I agree with your suggestions set out in Question 14 because it is fundamental to the role of any Director that he has the ability to understand in principle what his role and responsibility is and my answer to Question 14 is a positive yes.

B. *Delegation, Reliance On And Supervision Of The Person(s)*

To Whom Power Has Been Delegated

In my view, one aspect of Directors' responsibility has not been fully addressed and that is the position where an employee, particularly one whose appointment was made by or approved by the Directors, commits a fraud upon the Company.

My understanding is that, provided that the employee concerned was qualified or otherwise fit for the job and providing the Directors had no reason to believe to the contrary, the Directors are not answerable for the wrongful act of the employee.

The carrying out of this work by such employee must, by its very nature, constitute a situation of delegation and the comments by you and elsewhere have addressed the question of delegation. What I am suggesting is that the reliance of Directors on "qualified" employees should not result in their being liable in the event of the employee turning out to be dishonest.

In your comments and in the manner in which your questions are phrased, the key is the Directors placing reliance on information supplied by a

delegate and do not address the question of the duty of care when appointing or approving the appointment of an employee or sub-committee whether of Directors or not or mixture of both.

Reply to question 15

As explained above an additional question to be included either under this heading or another that company Directors should not be liable for the default of an employee or sub-committee if the Directors have no cause to believe that the employee or sub-committee was not competent or unfit for the job or that there was any doubt on their or sub-committee honesty and integrity.

Save for the foregoing comment, my answer to the question is yes.

Reply to question 18

Unless there is an intention to change the name of the Companies Act, is reference in sub paragraph (i) to "Corporations Act" correct"?

PART IV – Clarifying and Reformulating Directors' Fiduciary Duties

A. Introduction

In your comments under Clause 4.8, you made the point that the Companies Act 1965 already provides that Directors already had the power to establish and support various facilities etc and the footnote (No. 73) refers to paragraph 7 of the Third Schedule to the Act in support of that proposition.

I would like to point out that the Third Schedule does not apply to all companies as, by the provisions of Section 19 of the Act, it is open to each company whether to exclude the applicability of the Third Schedule altogether and presumably in part and, in fact, companies do. Accordingly, it is incorrect to say that the Act already provides for such power.

The chances are that, even in excluding the provision of the Third Schedule and adopting it's own, a company is likely to include the like provisions but there is nothing to prevent it excluding the same if it wishes to do so. The point I am making is that such provisions are not enforceable in law.

However, I am in agreement with CLRC that the relationship between a company and it's creditors and employees should not be regulated under the Companies Act.

B. Clarifying Directors' Duty to act "Honestly" Pursuant to Section 132(1) of the Companies Act 1965

You have examined in Clauses 4.12 and 4.13 the duty of care of Directors with specific reference to the cases of *Marchesi v Barnes* and *Australia Growth Resources v Van Rensema* and the contrast between them.

Not having had the benefit of reading the case of *Marchesi v Barnes* and not intending to, I am a little bit concerned if the ratio decidendi is that if in the genuine belief that he is acting in the best interest of the company, he exercises his powers for an improper purpose, he will not be held liable.

I can visualise many instances where, if this were the law, some Directors would justify doing something improper purely because they consider it

beneficial to the company which is purely subjective and therefore difficult to refute. I believe strongly that no company should and by extension, their Directors, do anything which is wrongful and benefit by it.

If there is to be a legislative restatement of the ratio of the Marchesi case and thus codifying what is the common law position, it should not be on the basis that an improper act can be justified and in particular, absolve Directors of responsibility for their action.

The codification should go to the extent only that if the Director made an error of judgement in acting in the interest of the company, then he should be absolved and it should be specifically provided that their immunity from the liability does not extend to doing an improper or illegal act.

Reply to question 20

I agree only to the extent that the replacement should reflect the situation in New Zealand or as recommended by the GC report but subject to my comments on the question of "improper" purpose and extended to include illegal purposes.

C. Clarifying Directors' Duties to Avoid Conflict of Interest

On your comments in Clause 4.21, although it is not quite clear, I suspect you mean that Directors should avoid any conflict of interest situation (being a general but desirable statement) and should go on to state that without prejudice to the generality of that statement, he must not do the things set out in the aforesaid paragraph.

I note that there are different views on the subject but I would like to state my views as follows :-

- (a) Conflict situations do frequently arise between Directors and the company.
- (b) There is no conflict situation where a Director concludes a transaction which the company had previously considered and rejected.
- (c) Conflict situations should not be resolved by reference to the shareholders for their prior approval. There are practical difficulties involved to the extent that, in the case of the public companies the opportunity for a transaction will have been lost by the time a shareholders' meeting is convened and the subject no longer relevant.
- (d) The fundamental issue is that a Director should not be in a situation where his interest conflicts with that of a company and this can be adequately addressed by the Director making full disclosure to the Board of such conflict AND the Director, after having declared his interest and making full disclosure, abstains from deliberations and voting by the Board on the matter.

Reply to question 22

I agree but subject to my comments above.

D. Clarifying The Position of a Nominee Director

There is one hard fact that has to be faced when the position of a Director is considered and that is, in a situation where there is a controlling shareholder, any Director appointed to the Board cannot have been appointed without the support of the controlling shareholder and, to that extent, a Director so appointed is a "nominee" of the controlling shareholder to various degrees.

In the context of this background, I consider that the enunciation contained

in Clause 4.29 is as precise a summation of what a nominee Director is. Accordingly, any Director appointed by the good grace of the controlling shareholder has to consider whether he is a nominee Director and he is one if he considers himself as falling within the ambit of that summation. In the majority of cases, such a Director would and should, in the absence of any understanding with the controlling shareholder, consider himself independent and conduct himself as such a Director acting in the best interest of the company even though any decision to which he is party would be against the interest of the controlling shareholder. He thus ignores the fact that he holds his position by the good grace of the controlling shareholder and, although he is prepared to face the possibility of his not being re-elected, is nevertheless prepared to act in accordance with what he believes to be to the good of the company. He could then regard himself and be seen as independent and not a nominee Director. I am not sure what "adjusted fiduciary duty" means having regard to the various comments in the jurisdictions having a similar system but to my mind, it is clear that if such 'adjusted fiduciary duty' is predicated upon the fact that the interest of the company as a whole is paramount and that concept encompasses minority interest as a whole and not of individual such members, the interest of the minority is thereby taken care of, then I have no doubt in my mind that the Directors may and in fact could even be duty-bound to taken the interest of the controlling shareholder into account when making decisions for, at the end of the day, they are most affected.

Reply to question 24

I would say that the answer to this question is in the affirmative.

Reply to question 25

(a) A wholly-owned subsidiary

If, by the expression "adjusted fiduciary duty" as set out in the last paragraph of Clause 4.32 it means that a nominee Director is allowed to act in the best interest of the nominator and by that, it means that such duty transcends the interest of those of other shareholders, I agree only to the extent that it applies to wholly-owned subsidiary because there are no other shareholders but not otherwise.

The difference between a wholly-owned subsidiary and others is that, as far as that subsidiary is concerned, the Directors have no minority interest to consider and unless what he does or agree to is not justified legally or against the canons of what is right, he is free to act entirely in the interest of his nominator.

It must be remembered that in the case of a wholly-owned subsidiary, he can only have become a Director by nomination of the holding company and therefore all such Directors are ipso facto nominees.

Sometimes the interest of the subsidiary and that of the holding company do not coincide. An example of what frequently happens is that the holding company wishes the subsidiary to dividend out as much as possible or lend money to it but prudence in the management of the subsidiary dictates that there must be adequate fund's in it's coffers for it's own operations. In such a case, I think it would be proper to comply with the direction of the holding company particularly in the case of a wholly owned company as it is not illegal to do so. It is, after all, the holding company that stands to gain or lose by the action of the Directors.

(b) Companies within a corporate group structure as long as there is a holding-subsidiary relationship.

The way it is framed, the heading above could well include a wholly-owned subsidiary but as you have dealt with such relationship in (a) above, I am assuming that you mean a subsidiary other than a wholly-owned one.

Subject to my foregoing comments, I do not agree that an “adjusted fiduciary duty” principle should apply.

In my view, the strict approach as enunciated in Clause 4.32 of your comments should apply and that is that a Director must at all times act in the best interest of the company and subject thereto, may act in the best interest of the holding company.

(c) A joint-venture company

My view there is the same as expressed under paragraph (b) above save that in this case, there is the further question of a joint-venture partner or partners. The relationship between the joint-venture partners in relation to the company is usually governed by the terms of the joint-venture agreement (It is hardly likely that there is not one). Allowing for the unlikely possibility of there being a term in the joint-venture agreement. Unless in an extremely one-sided agreement, there is unlikely to be a provision giving one party the absolute right to dictate the running of the company to the extent may be of even preferring that party's interest above those of the others. Decisions will have to be made in accordance with the terms of the agreement. In cases involving other shareholders in addition to the joint-venture shareholders, the same duty as applies to the case of minority shareholders as discussed above should apply.

PART V – Exemption and Indemnification of Directors’ and Officers’ Liability

C. Section 140 and Directors’ and Officers’ Insurance (D & O Insurance)

Reply to question 31

I do not agree that the prohibition be extended to a related company which will have it's own Board of Directors. That company would then have to consider the question and the application of the Act, if amended, in the context of its own circumstances.

Reply to question 32

I am not sure whether the word “liability” is to be regarded as in “ejusdem generis” with the preceding words “...costs, expenses...” in which case it is rather limited in scope. In my view, “liability” should be extended to mean damages payable to a successful claimant unless arising out of the fraud or dishonesty of the Director. In situations faced by Directors on their part in the decision-making process of the Company, decisions are sometimes taken which ultimately turns out to be wrong or even ill-thought out but not motivated by improper motive. I think Directors should be covered against such liability.

Reply to question 33

I do not think it is necessary for such disclosure to be made and I would like to believe that it is or will soon be accepted practice and one of general knowledge to shareholders at large that the Directors be indemnified so as to ensure that there be no impediment to a good but cautious Director accepting office. The cost of the insurance could well be specifically

	<p>disclosed as a separate item in the accounts of the company if necessary but it should not even be necessary to be disclosed in the Director's report.</p> <p>ADDITIONAL POINT FOR THE CONSIDERATION OF THE COMMITTEE</p> <p>Alternate Directors</p> <p>By definition contained in Section 4 of the Act, an Alternate Director is defined as a "Director" and, as such, is as responsible and liable as any Director.</p> <p>The concept behind the principle of having an Alternate Director is that he acts when his appointor is unable to do so and his functions, almost without exception, are to sit at Board Meetings or sign circular resolutions instead of his appointor.</p> <p>In some instances, an Alternate Director is not called on to act at all and yet he bears same burdens and liabilities of a Director.</p> <p>If he is called on to act, he usually acts on the instructions of his appointor. He is usually not as "au fait" with the affairs of the company as his appointor and only sits in when needed. In my opinion, it is unfair to place responsibilities on him as if he were a full-time Director. It should be so that any Director appointing an Alternate Director should not appoint anyone unless he is confident that the Alternate Director will act and conduct himself as the appointor would and accordingly, the Appointor must be made responsible for the acts of his Alternate and not the Alternate.</p> <p>An amendment either to the definitions or any appropriate section of the Act so that an Alternate be excluded from liability as a Director or alternatively, a provision to the effect that, in the case of an Alternate Director, his appointor should be responsible for any act or omission on his part in the performance of his functions as such Alternate Director should be considered.</p>
Ms Judy Lim	<p>Reply to Question 1: YES.</p> <p>Recommendations :</p> <p>1.11 The CLRC recommends the deletion of section 124 of the Companies Act 1965.</p> <p>Answer : NO, I do not agree not unless an alternative system is employed to address the concerns of the existence of this requirement. The whole purpose of S124 is to impose a mandatory stake on the directors in order for them to be accountable for the profitability of the business where they are employed.</p> <p>Section 124 can only be deleted if there is an effective mechanism in place to replace Directors' mandatory stakes in shareholdings, which serves similar end result of accountability for the business profitability and sharing in the risks & rewards of the business performance.</p> <p>I would also recommend that a guideline be drawn up to educate Owners of the Companies concerning the options available in lieu of S124, to measure a director's performance and for effective delegation and appointment of directors in duplicating the owner's role in managing the business.</p> <p>Here are some of the options available for Owners selection :-</p> <ol style="list-style-type: none"> 1. GP (gross profit) & NTA (net tangible asset) forecast measurement 2. Sales Turnover & EPS (earnings per share) measurement 3. DY (Dividend yield) & WC (Working Capital) measurement 4. NP (net profit) & Gearing measurement

5. OP (operating profit) & Shareholders' Funds measurement

For instance : If the director appointed agreed to achieve a specified percentage of growth in GP & NTA but fails to do so in the quarterly review of the Companies financial performance, the quantum of differences will be immediately deducted out of the director's monthly remuneration. Likewise, a certain percentage of the annual profit will serve as a bonus payment to the director upon certification of successful business management for the whole year in review.

Reply to Question 2:

No, the qualifying age limit should remain as this will serve as an indication to the Company to groom and prepare internally, for a successor to take over the helm of the Company. The present system will also alert the non majority shareholders for an independent evaluation of the capability of the aging Director in adapting to the changing business climate globally.

Given the advancement of medicine, technology and invention, I would suggest for the age threshold to be pushed back by 5 years and that means when a Co Director reaches the age of 75 years old, such process will apply. This gradual change will serve to test the effectiveness of such age limit threshold, whether it serves for the benefit of our society as a whole. The rationale for such a recommendation is due to their experience of economic cycles which may only occur once in a century, eg. war, on a civil or global scale, economic depression which only the elderly would have the experience of coping in such a situation, of steering the Company prudently in times of uncertainties. However, during times of economic boom, it will be to the best interest of shareholders to have a young and dynamic Director on board, who dares to venture beyond boundaries and assume greater business risks. Hence, to balance up the pros & cons, age limit should remain, to serve as an indication and for common evaluation of the necessity of a senior staff on board.

Reply to Question 3:

Yes.

Reply to Question 4:

Yes.

Reply to Question 5:

Yes.

Reply to Question 6:

Yes.

Reply to Question 7:

Yes.

Reply to Question 8:

YES, and I would further suggest for this procedure to be mandatory on the part of the departing director, so that such information can be made public or is available for immediate public access.

Reply to Question 9:

	<p>Yes.</p> <p>Reply to Question 10: YES and to include part (b) of item 1.40.</p> <p>Reply to Question 11: Yes.</p> <p>Reply to Question 12: Yes.</p> <p>Reply to Question 13: Yes.</p> <p>Reply to Question 14: Yes.</p> <p>Reply to Question 15: YES, to add - (a) provided that such information is proven true and correct by another procedure or source similar to the environment for the application of the said info; (d) that a director shall attempt to procure the information from at least 2 or more sources for justification of its accuracy before relying on the information.</p> <p>Reply to Question 16: Yes.</p> <p>Reply to Question 17: Yes.</p> <p>Reply to Question 18: YES. On the basis that "belief" is a very vague term because it doesn't necessitate a conduct or action, eg. we may believe something to be true but we may not act on it, I suggest to add : (iii) and to prove that the negligence in the fulfilment of the duties of the director falls on the delegate and not the director himself because he has made it clear to the delegate that such responsibilities are expected of the delegate.</p> <p>Reply to Question 18: NO. According to details laid out in item 3.17 & 3.19, the end-effect is the same, regardless of the fundamental purpose, it still insulates the directors from liability and this would be deemed to contradict their fundamental duty of exercising care.</p> <p>Reply to Question 19: NO. I do not agree with item 4.8 and the approach taken by the NZ law committee which disregard the complexities of a society's make-up, its existence and subsequent evolution of corporate behavior. I am incline to adhere to the principles set out in the footnote no. 72, under S156 of UK Co Bill, especially part (a) & part (e) of subsection 3. Failure to follow such principles will undermine the integrity and confidence of a business and economic environment and thus foster the atmosphere of</p>
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	<p>distrust, leading to higher cost of business conduct and erosion of consumer confidence.</p> <p>We cannot be too simplistic as to ignore that an investor or shareholder, whether current or potential, may also one day be a supplier and consumer of that business venture, as all economic and social activities supporting the existence of any society are inter-connected. If we choose to ignore the long-term consequences of our business or corporate decisions, it could only indicate a pre-mature termination of business and a gradual decimation of our society's economy. Such a conduct will only benefit the employed Board of Directors or Venture Capitalist, who are only concerned with the short-term gains and rewards.</p> <p>Reply to Question 20: Yes.</p> <p>Reply to Question 21: YES, it has to be so because a Company will have different interest at different stage of its business cycle.</p> <p>Reply to Question 22: Yes, as per item 4.21</p> <p>Reply to Question 23: NO - a conflict of interest remains a conflict of interest and no business organisation should waste its resources to ratify such a conduct. A company director must be aware that an ethical and professional conduct is required of him at all times in the carrying out his duties and any interest he has beyond this scope cannot be pursued unless he relinquish his present position and responsibility, because, inevitably, the pursuit of one will serve to the detriment of the other.</p> <p>Reply to Question 24: Yes.</p> <p>Reply to Question 25: I disagree with adjusting the duties of Nominee Directors in any corporate structure simply because there may be other stakeholders who will be disadvantaged consequent to this action.</p> <p>For eg. A customer or supplier may be induced to engage in a business activity with a Company due to its ties with a Holding Company or a JV company which has an established and reputable record of business conduct and success.</p> <p>This happened in actual case with the house buyers of abandoned projects which had been contracted with a Subsidiary of a reputable Property Developer. When the Subsidiary failed to obtain sufficient sales to justify continuation of the property's construction, the parent Holding Company ordered the raw material supplied by its other subsidiaries to be charged to the failed project, thus depleting the Company's funds and rendering the Subsidiary Company insolvent. Some of the raw material can still be found dumped at the construction site of the abandoned project, to this day.</p> <p>In this instance, the Nominee Directors governing the subsidiary's construction project had not acted in the best interest of the Subsidiary</p>
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	<p>Company or its Stakeholders (customers) but only to the Holding Company's best interest. Such is the abuse of power that is capable of destabilising the whole economy, for lack of transparency, integrity and accountability.</p> <p>Reply to Question 26: Yes.</p> <p>Reply to Question 27: It is only fair to allow this only in relation to legal proceedings involving the position, duty and responsibility of the Director in its daily routine of execution.</p> <p>Reply to Question 28: Sometimes a successful relief from liability may be due to technicality of the case filed and not the innocence of the Director. Hence, it is only fair that the guilty Director be subject to a non reimbursable legal costs if he is found to be negligent in his/her conduct in that instance. This will also serve as one of the disciplinary actions taken against the Director for failing to exercise care in carrying out his duties.</p> <p>Reply to Question 29: Provided at all times, the Company's officer or auditor is not negligent in carrying out his/her duty as instructed by the Company.</p> <p>Reply to Question 31: Yes.</p> <p>Reply to Question 32: Yes, provided it is void of negligence on the part of the officer or auditor concerned in executing their duties.</p> <p>Reply to Question 33: Yes.</p>
Sunway Management Sdn Bhd	<p>Reply to Question 1: Agree that S4 (1) be amended to include "majority" and need not have a separate statutory definition of the term 'shadow director'.</p> <p><u>Practical Aspects</u> How to define "Majority"? The amended S 4 (1) needs to be expended to clearly define the following:- The word "Majority"-Need to be defined. If transaction involves interested parties i.e. Directors who need to abstain from voting, in determining the number of "majority", do you count majority numbers excluding those interested parties?</p> <p><u>Pros</u> With the above amendment, "shadow directors" who give instructions to the Board (i.e. able to instruct majority board members rather than one) on how to act could no longer be able to use the excuse that he is not a member of the Board and therefore be subject to the same duties and responsibilities as the directors. This usually happens whereby a representative director of a holding company sits in the board of the subsidiary company whose directions or instructions the majority board members of the subsidiary company is accustomed to act.</p>

	<p>Reply to Question 2: S 129 should be retained. Shareholders of PLC should have the right to decide to exercise their discretion in AGM in order to decide whether a Director of old age i.e. above 70 years of age is still capable to manage the company, able to make decision, can carry out their role and function as director or require new blood to inject new ideas to the company instead. For other than PLCs esp. family owned business Pte Ltd companies, S129 should not apply. In other words, Pte Ltd companies should not be subject to S129 but be governed by its own Articles of Association. <u>Any constructive suggestion</u> Propose to incorporate a new section to the Act in order to allow the appointment of a person of or over age of 70 as director by way of DR whereby the directors and shareholders are the same or EGM instead of only in AGM.</p> <p>Reply to Question 3: Agree. To ensure a director is matured and responsible in enforcing the compliance with the law.</p> <p>Reply to Question 4: Agree. The residency requirement imposed on directors should be retained so that the regulatory authorities can have a reachable/contactable address in Malaysia in enforcing the compliance with the law. <u>Practical Aspect</u> How to define the word "Resident"? it should be consistent with other Act/statutory regulations for e.g. Income Tax Act.</p> <p>Reply to Question 5: Agree to the above recommendations and to retain the current S126. Shareholders has the right to appoint whosoever they have the opinion that he/she is capable to manage and act for the best interest of the company.</p> <p>Reply to Question 6: Not agree. S128 should be extended to both public and private companies. S128 is important to govern those companies which is under joint venture basis and those companies which is not under family owned business.</p> <p>Reply to Question 7: Agree. To be fair, the director has sufficient time to prepare and defenses himself/herself in the EGM.</p> <p>Reply to Question 8: Agree to the above. SSM should come out with a prescribed form for it. <u>Any construsion suggestion</u> I would suggest that similar provision is incorporated to enable resigned Company Secretaries to give notice of his resignation to Regulators too. So far Company Secretary can vacate office only by filing Form 48E which is only applicable if the Directors are not contactable and not in any other case for eg. Client fails to pay the secretarial fee for service rendered or the directors do not accept Company Secretary's advice in regards to compliance of the Act.</p> <p>Reply to Question 10: Disagree. Contract of Service/Letter of employment is private and confidential to an employee likewise Executive Director. If Contract of Service were made a public document, it would affect the</p>
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	<p>existing harmonious relationship between Directors and Shareholders. Shareholders being investors should not interfere with the operation issue and management of the company.</p> <p>Reply to Question 11-12: Yes to (a) – So long that he is an interested party, he should refrain from voting. Agree to (b). However, the following practical aspects should be taken into consideration.</p> <ul style="list-style-type: none"> • Not practical for subsidiary that has immediate holding company, penultimate holding company and an ultimate holding company, which probably is a public listed company (PLC). PLC would then be required to convene an EGM in order for sub-subsidiary to make such payment. In this case, Remuneration Committee consisting of majority Independent Non-Executive Directors shall make a recommendation to the PLC's Board for approval before sub-subsidiary makes payment to the Director. • Only practical for holding company that is private limited company. <p>Reply to Question 13: Generally, we agree that there should be guidelines for the roles and functions of a Board of Directors. Currently the powers and duties of Directors are already provided in Table A and not all companies adopt table A. We do, however, have the following concerns:-</p> <ol style="list-style-type: none"> a. BOD's role and function differs from one company to another. The relationship between the Board and Management varies in accordance to the type and sizes of companies. It is only in large companies e.g. PLC, one witnesses a separation formulation may be confined to minimum functions of the Board and should be sufficiently flexible to accommodate to the varying type and sizes of companies. b. The word "manage" used in the above sentence may not be appropriate. It is inaccurate to say that Nominee Directors or Non-Executive Directors manage the affairs of the company as they do not manage the company. <p>Reply to Question 14: While it is a good recommendation, it is also difficult to prove that an action was taken with reasonable care, skill and diligence i.e. arguable in court. Should incorporate the areas on exercise of reasonable care, skill & diligence in a separate schedule as illustrated in the Malaysian Code of Corporate Governance. Directors would ensure that they keep themselves well equipped with knowledge/skill by attending more training/courses/workshops to ensure that they are able to handle problems/situations better.</p> <p>Reply to Question 15: Agreed. However it will be difficult to prove the 2 conditions have been satisfied if there is no documentation involved but due enquiry was made verbally.</p> <p>Reply to Question 16: Agreed. Good to spell out Directors' duties in the Act, well defined of Directors' duties.</p> <p>Reply to Question 17:</p>
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	<p>Agreed. Since the delegate representing the Directors and the delegate would exercise his power in conformity with the duties delegated by the Directors.</p> <p>Reply to Question 18: Disagreed. Directors would still be liable for the action of his delegates. However, it would be subjective to judge if a Director is in good faith and acting for the best interest of the Company. It is not easy to have a benchmark to judge if the Directors are acting in good faith and for the best interest of the Company.</p> <p>Reply to Question 18: Agreed. This would encourage Directors to make responsible decision that are risk-taking for the benefit of the Company. Such immunity is deemed necessary. This would also enhance good corporate governance. <u>Any constructive suggestion</u> How to define “rational belief”? Propose to have proper benchmark for judgement purpose.</p> <p>Reply to Question 19: Agreed. May restrict business opportunities. The relationship between a company and its creditors and employees is more rely on the diplomatic skill and management skill of the Company. Whereas, the relationship between employees and employer should be regulated in the employment letter and labour law, as per current practice. The harmony relationship between employer and employees is mainly rely on the management skill of the company, instead of mandatory as “carrot and stick” approach is not acceptable anymore in our society. People are well educated nowadays.</p> <p>Reply to Question 20: Agreed. However, it would be subjective to judge if a Director is acting for the best interest of the Company.</p> <p>Reply to Question 21: Disagreed. The phrase “to act in the best interest of the Company” should be clarified in order to enhance good corporate governance.</p> <p>Reply to Question 22: Agreed.</p> <p>Reply to Question 23: Agreed.</p> <p>Reply to Question 24: Agreed. A director’s primary obligation is to act in the interest of the company.</p> <p>Reply to Question 25: Should not allowed for the adjusted duty in relation to nominee directors. As shareholder has the rights on substantial project in the EGM, therefore, the nominee director would exercise his primary duty to act in the interest of the Company.</p> <p>Reply to Question 26: Agreed. A director should exercise reasonable care and always act in the</p>
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	<p>best interest of the Company. The rationale of the above is to strike down any provision which provides relief from liability in advance of any breach of duty by a director.</p> <p>Reply to Question 27: Agreed.</p> <p>Reply to Question 28: Agreed.</p> <p>Reply to Question 29: Agreed to indemnify its officer or auditor for costs and expenses incurred by that officer or auditor in defending an action commenced by a third party only when successful.</p> <p>Reply to Question 31: Agreed.</p> <p>Reply to Question 32: Agreed.</p> <p>Reply to Question 33: Disagreed.</p>
MACS	<p>Reply to Question 1: MACS is mindful that the definition of the word 'director' is primarily for the purposes of liability. In most cases board decisions are carried by majority votes. In this respect, it would accord with the aforesaid purposes if the definition is amended. A person who controls the working majority of the board should be deemed to be a director. He should also be fully accountable and liable for his deeds and actions as if he was a director. MACS is in agreement to the proposed amendment.</p> <p>Reply to Question 2: MACS is of the view that there should not be a statutory maximum age limit. Age per se should not be the sole criteria. What is more important is the suitability and competency of a director. In this respect, the shareholders in general meeting will be the best body to decide on who should be appointed as directors in the company. For the above reasons Section 129 should not be retained.</p> <p>Reply to Question 3: Section 122(2) provides that a director must be a 'natural person of full age'. MACS is of the view that the clarification is timeous bringing it in line with the Age of Majority Act 1971.</p> <p>Reply to Question 4: This important mechanism for promoting and enforcing compliance with the law, should be retained. The cost barrier for foreign investment is actually minimal and quite insignificant. Compliance with the law is paramount and should be promoted.</p> <p>Reply to Question 5: The right to appoint directors of their choice is vested in the shareholders in general meeting. The shareholders' right of appointment and freedom of choice will be fettered if bundled resolutions for directors' appointment are</p>

permitted. Accordingly, MACS is of the view that appointments of directors of a public company must be voted on individually.

Reply to Question 6:

Section 128 should be retained. However, its application should not be extended to private companies. Public companies are also governed by other legislation such as the Securities Industry Act 1983, the Securities Industry (Central Depositories) Act 1991, the Securities Commission Act 1993 and listing rules and regulations.

Reply to Question 7:

Special notice should be served. This will afford the director in question sufficient time to respond to the allegations and the right to be heard at the general meeting.

Reply to Question 8:

MACS is of the view that a person who has resigned as a director should be able to give concurrent notice of his resignation to the Regulators regardless of whether the company has done so or not.

A person who has resigned as a director is exercising his right and the exercise of that right must not be compromised by whatever means. Nevertheless, MACS recognizes that the right to resign is subject to the overriding provision in section 122(6).

Reply to Question 9:

MACS acknowledge the common law position that directors would have no authority to approve their own remuneration as this would amount to a conflict of interest situation. Consistent thereto, MACS agrees that the approving authority should be the shareholders in general meeting and provision be incorporated accordingly.

Reply to Question 10:

It is sufficient if the remuneration of directors is disclosed in the directors' report and in the financial statements. To allow members of the company further statutory right to inspect its director's contract of service would be unnecessary.

The contract of service may contain other information to which the members are not privy to and need not be concerned with. There will also be confidentiality and privacy issues.

Reply to Question 11:

Consistent with the need for transparency and accountability, interested directors or their agents or trustees should be prohibited from voting in the meeting which is convened to approve the proposed payments to directors under section 137.

Reply to Question 12:

MACS is of the view that the approval of shareholders of both the holding and subsidiary companies should be required. This requirement would operate as a preventive mechanism against the use of corporate structures to defeat the spirit of section 137.

Reply to Question 13:

MACS accords with the view that the Companies Act should provide for the board's role and function is to manage the affairs of the company. This provision is sufficiently flexible to cover all possible variations of the board's

role from that of a private company to that of a public listed company.

Reply to Question 14:

MACS is in favour of the objective standard of care. A director would be expected to exercise such degree of care and skill which would be exercised by a reasonable person who is a director. In addition, if the director in question possess any particular skill or expertise, then that director would also be assessed against a person who possess that additional skill or expertise. In this manner, the actual knowledge and skill of a director will also be taken into full account.

Reply to Question 15:

MACS is of the view that a director's right (i) to rely on information provided by others, and (ii) to delegate authority to others should always be exercised with proper care and diligence. In this respect, the exercise of that right by a director should be subject to (i) the information being made in good faith, (ii) after proper inquiry and (iii) after ascertaining that the information is reliable.

Reply to Question 16:

MACS takes cognizance of the management and supervisory functions of company directors. In large companies directors only supervise and do not in fact manage the affairs of the company. The day to day operations are often left in the hands of other individuals; individuals which directors often rely upon for information in making corporate decisions.

Consistent with this practice of delegation and reliance, MACS is of the view that it would be necessary to incorporate the proposed express provision.

Reply to Question 17:

In the interest of business efficacy, the exercise of power by a delegate should be validated as a matter of course save and except in cases where the exercise of power is outside the scope of the delegated power. Accordingly, MACS is of the view that the exercise of a delegate's power in the circumstances described in Question 16 above should be treated as if the directors have exercised that power in order to give efficacy.

Reply to Question 18:

The conditions described above are consistent with the objective standard of duty and care. So long as a director exercised reasonable care and skill in the delegation of powers, that director should not be liable for the acts of the delegate.

Reply to Question 18:

MACS is in agreement with the need to protect directors. A director is an officer of a company and his actions qua director are taken for and on behalf of the company. The business judgment rule will protect directors who make business judgments with reasonable care, skill and diligence and in the circumstances enumerated in para. 3.20.

Reply to Question 19:

The Companies Act 1965 is the principal statute relating to companies. As a legal entity, a company can enter into legal relations with third parties in the course of its business and operations. There are comprehensive laws relating to creditors and employees. The relationship between a company and its creditors and employees need not be regulated under the Companies Act.

Reply to Question 20:

The term 'honestly' is generally associated with truthfulness. The proposed replacement will make it clear and unequivocal that a director shall at all times act in the best interest of the company and to use their powers for a proper purpose.

Reply to Question 21:

What is in the best interest of a company is a question of fact. The circumstances determining this issue vary from case to case and should be left to judicial decision to develop.

Reply to Question 22:

MACS is in agreement with the above. However, MACS suggests that the provision contain (i) explanatory notes elaborating on the common law conflict situations, and (ii) illustrations of conflict of interest situations. The provision could take the format similar to section 26 Contracts Act, 1950.

Reply to Question 23:

In principle, MACS is agreeable to the above provided that the approval or ratification is by at least 2/3rds majority of the shareholders present at the general meeting.

Reply to Question 24:

A director is an officer of the company. The primary duty of a director is to act in the best interest of the company. That a director may only be a nominee director does not detract from the fact that he is still a director of the company and as such he is duty bound to protect the company's interest. There should be no double standards. MACS is in favour of the strict approach.

Reply to Question 25:

- a. The interest of a wholly-owned subsidiary and holding company are the same. In this regard, it would not be inappropriate to allow the nominee director to act in the best interest of the holding company even it conflicts with the interest of the wholly-owned subsidiary.
- b. In this situation, it is prudent that disclose should be made to the shareholders in general meeting. The nominee director may then only act in the interest of the holding company with the prior approval of the shareholders of the subsidiary company. However, what is in the interest of the holding company may not always be in the best interest of the subsidiary company.
- c. Subject to the express provision in the joint venture company's Constitution and/or the prior approval of the shareholders of the joint venture company in general meeting the nominee director may be allowed to act in the best interest of the party whose interest he represents.

Reply to Question 26:

Section 140(1) should be preserved. The provision of advance relief from liability is inconsistent with the public expectation that a director's primary duty is to protect the interest of the company.

Preserving section 140(1) would also be consistent with most Commonwealth company legislations invalidating any provisions of advance relief from liability.

	<p>Reply to Question 27: The provision of an indemnity is at the option of the company. In principle, if the director is successful in defending legal proceedings (as defined above), indemnification by the company would not be improper.</p> <p>Reply to Question 28: There is a distinction between the indemnity in this situation and the indemnity referred to in Question 27 above. Relief from liability merely releases the director from liability arising from his wrongful act. The fact remains that the director committed the wrongful act. In this premise, MACS is not agreeable to a company providing indemnity in this circumstances.</p> <p>Reply to Question 29: The words “any proceedings” is Section 140(2) means any proceedings. It does not appear to limit or exclude any particular class of litigant commencing the action against the director or auditor. Proceedings could have been commenced by the company, shareholders or other third parties. The provision of indemnity should be applicable irrespective of who the litigant is. Accordingly MACS is not agreeable to the proposed clarification. MACS suggest that the indemnity should only be provided to officers of the company. Since an auditor is not an officer of the company but an independent professional, there should be no indemnity for an auditor in this situation.</p> <p>Reply to Question 31: MACS agree that a company should not be allowed to purchase or maintain insurance for its officers for liability owed towards the company. By reason of the holding and subsidiary relationship of related companies, the prohibition by extention should also apply to related companies.</p> <p>Reply to Question 32: Presently, section 140(2) does not explicitly preclude indemnity insurance for liability owed towards the company. It is therefore advisable and prudent that section 140 be clarified in the manner as described. The scope of section 140 should be more defined as that relating owed to a third party other than company. MACS’ comments on the provision of indemnity for auditor in answer to Question 30 is reiterated.</p> <p>Reply to Question 33: The provision of indemnity insurance for officers of the company against liability owed to third parties is akin to a benefit in kind provided for the officer’s benefit and may arguably constitute part of the officer’s remuneration package. It should be disclosed to shareholders. Disclosure to shareholders should be made in the directors’ report and in the 9th Schedule.</p>
MIA	<p>Reply to Question 1: Yes, the Institute agrees to an amendment to the definition of the word ‘Director’. The Institute is of the view that the amendment definition will cover persons who are shown to have instructed or directed a majority of the board and not just any one director of the board.</p> <p>Reply to Question 2: Yes, the Institute agrees that section 129 of the Companies Act 1965</p>

	<p>should not be retained and that there should be no statutory age limit for a person to be appointed as a director.</p> <p>Reply to Question 3: Yes, the Institute agrees that the Companies Act 1965 should clarify that a director must not be less than 18 years of age.</p> <p>Reply to Question 4: Yes, the Institute agrees that the residency requirement imposed on directors should be retained. However, the Institute is of the view that the Companies Act 1965 should provide for a criteria on residency.</p> <p>Reply to Question 5: Yes, the Institute agrees that the appointment of directors of a public company must be voted on individually. The Institute however, notes that the practice of bundling of resolutions in larger companies is aimed at saving time and costs. The Institute is of the view that some form of flexibility should be allowed for such companies subject to shareholders agreement.</p> <p>Reply to Question 6: Yes, the Institute agrees that section 128 of the Companies Act 1965 which provides for the right of members of a public company to remove its directors should be retained. In the case of private companies, the right of its shareholders to remove a director from office is dependent upon the Articles of that private company. As such, section 128 of the Companies Act 1965 should not be extended to private companies.</p> <p>Reply to Question 7: Yes, the Institute agrees that the requirement to serve special notice in relation to the director's removal should be applicable if the removal is made under section 128 of the Companies Act 1965 only.</p> <p>Reply to Question 8: Yes, the Institute agrees and welcomes the proposal that the Companies Act should incorporate a provision that will enable a person who has resigned as a director to give notice of his resignation to the Regulators in the event the company does not. The Institute notes that in some situations, a company does not lodge the necessary documents of resignation of a director with the Regulators. This may cause difficulties to the director who still remains on record as a director even though he has resigned from office.</p> <p>Reply to Question 9: Yes, the Institute agrees that the Companies Act should incorporate a provision that requires directors' remuneration to be approved by shareholders at the general meeting. Further, the Institute</p> <p>Reply to Question 10: No, the Institute does not agree that the Companies Act should incorporate a provision that will provide company members with a statutory right to inspect its directors' contracts of service. The Institute is of the view that the current practice of disclosure of the terms of employment and directors' remuneration in the notes to the accounts laid before the shareholders at the general meeting is sufficient.</p>
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	<p>Reply to Question 11: Yes, the Institute agrees that interested directors or their agents or trustees should be prohibited from voting in the meeting which is convened to approve the proposed payments made to the directors pursuant to section 137 of the Companies Act 1965.</p> <p>Reply to Question 12: Yes, the Institute agrees that where a subsidiary is going to make a payment to its director (whether or not that director is also a director of its holding company) pursuant to section 137, that payment must be approved by the shareholders of the holding company in addition to the shareholders of the subsidiary company.</p> <p>Reply to Question 13: Yes, the Institute agrees that the Companies Act should provide that the board of directors' role and function is to manage the affairs of the company. This should be done via a general statement of the board's role and functions, which is to manage and supervise the affairs of the company.</p> <p>Reply to Question 14: Yes, the Institute agrees that there should be a reformulation and codification of a directors' standard of care and skill in accordance with the common law duty of care and skill expected of a director as enunciated above. The Institute notes the lack of case law development on the approach to the standard of care and skill in the country.</p> <p>Reply to Question 15: Yes, the Institute agrees that the Companies Act 1965 should contain provisions that recognize the practice of delegation and reliance of directors on others in the company by clarifying the rights of the directors to rely on others as well as the responsibilities of directors when there is delegation to and reliance on others.</p> <p>Reply to Question 16: Yes, the Institute agrees.</p> <p>Reply to Question 17: Yes, the Institute agrees.</p> <p>Reply to Question 18: Yes, the Institute agrees that the Companies Act 1965 should contain provisions that enable directors to rely on others to perform their functions as a defence under the law but subject to the necessary safeguards.</p> <p>Reply to Question 18: Yes, the Institute agrees to the introduction of the business judgement rule in the Companies Act 1965.</p> <p>Reply to Question 19: Yes, the Institute agrees that the relationship between a company and its creditors and employees should not be regulated under the Companies Act 1965.</p> <p>Reply to Question 20: Yes, the Institute agrees that the term 'honestly' appearing in section 132</p>
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(1) should be replaced with an express statement requiring directors to act in the best interest of the company and to use their powers for a proper purpose. This would clarify and restate the directors' fiduciary duties within the company legislation.

Reply to Question 21:

Yes, the Institute agrees that the express inclusion of the phrase 'to act in the best interest of the company' into section 132(1) should not be statutorily clarified and hence what is in fact 'the best interest of the company' should be left to judicial decision to develop.

Reply to Question 22:

Yes, the Institute agrees that the Companies Act should incorporate a provision which sets out the common law conflict of interest situations (as stated above) to be avoided by directors. The Institute is of the view that the restatement of the conflict of interest situations will clarify what is expected of directors and assist them in appreciating the situations of conflict which may cause them to act in breach of their duties to the company.

Reply to Question 23:

Yes, the Institute agrees that the Companies Act should include a provision that a company director will not be held liable if there is approval or ratification of the conflict of interest by the shareholders at the general meeting.

Reply to Question 24:

Yes, the Institute agrees that the company legislation should incorporate a provision that clearly states that the primary duty of a director (even if he is a nominee director) is to act in the best interest of the company that he has been appointed to. The Institute is of the view that a nominee directors' primary obligation is to act in the interest of the company and that his duty to his appointer is always subject his duty to act in the best interest of the company.

Reply to Question 25:

Yes, the Institute agrees that the adjusted duty in relation to nominee directors be applicable to the above situations and that a nominee director must always act in the best interest of the company. However, the Institute notes that the adjusted fiduciary duty may not be capable of being properly enforced taking into consideration commercial reality and facilitation of the business needs of a company.

Reply to Question 26:

Yes, the Institute agrees that the effect of section 140(1) that a provision, whether in a contract with the company or in the company's Articles that provides for exempting directors from any liability is void should be preserved.

Reply to Question 27:

Yes, the Institute agrees that a company may be allowed to provide indemnity for any costs of defending legal proceedings, whether civil or criminal, only when the director is successful.

Reply to Question 28:

Yes, the Institute agrees that a company may be allowed to provide

	<p>indemnity for the costs of a successful claim to the court for relief from liability.</p> <p>Reply to Question 29: Yes, the Institute agrees that section 140 should be clarified to provide that the company may indemnify its officer or auditor for costs and expenses incurred by that officer or auditor in defending an action commenced by a third party (the third party being a person other than the company).</p> <p>Reply to Question 31: Yes, the Institute agrees that a company should not be allowed to purchase or maintain insurance for its officers in relation to the liability owed towards the company. The Institute is of the view that the primary obligation of officers in a company is to always act in the best interest of the company. This strict duty to act in the best interest of the company would also be applicable to a related company. Therefore, the prohibition against the company to purchase or maintain insurance for its officers in relation to the liability owed towards the company should be extended to related companies.</p> <p>Reply to Question 32: Yes, the Institute agrees that section 140 should be clarified to allow a company to purchase or maintain insurance or to indemnify its officer or auditor for costs, expenses and liability incurred by the officer or auditor in defending an action commenced by a third party (the third party being a person other than the company).</p> <p>Reply to Question 33: Yes, the Institute agrees that any insurance or indemnification will have to be disclosed to the shareholders in the directors' report. However, the Institute is of the view that such a disclosure of any insurance or indemnification will be subject to whether such insurance or indemnification falls within the definition of 'remuneration' as proposed by the CLRC.</p>
Khazanah Nasional	<p>Reply to Question 1: Disagreed with the intention to recognize the concept of "Shadow Director". Any decision made by the Company is the responsible of the directors and its officers. No third party or outsider should be allowed to make decision for the company except the shareholder when required.</p> <p>Reply to Question 2: Agreed.</p> <p>Reply to Question 3: Agreed.</p> <p>Reply to Question 4: Agreed.</p> <p>Reply to Question 5: Agreed.</p> <p>Reply to Question 6: Agreed. Article 69 of Table A, Companies Act, 1965 provides that subject to Section 128, private companies may remove directors by ordinary resolution and special notice is not required.</p>

Reply to Question 7:

Agreed however this should be applicable to Public listed companies only. For public non-listed and private companies, the normal notice period should apply.

Reply to Question 8:

Agreed. There must be a time-frame i.e. the person should be able to do so i.e. after one month of the effective date of resignation. In addition, we would like to propose an alternate director after sending his notice of resignation to principal director would also be able to file it to the Regulators.

Reply to Question 9:

Agreed.

Reply to Question 10:

Disagreed. A detail on the contract of service is part of operational matter and is not shareholders' issue, thus should be confined to the company and the director. Current disclosure is suffice.

Reply to Question 11:

Agreed.

Reply to Question 12:

There should be a threshold on the amount to be paid for instance the amount should not be more than the payment to the director of the holding company.

Reply to Question 13:

Agreed that the Act should provide that the board's role is to "govern" not to "manage" the affairs of the company and the application of this provision should have only an informative effect.

Reply to Question 14:

Agreed.

Reply to Question 15:

Agreed.

Reply to Question 16:

Agreed.

Reply to Question 17:

Agreed.

Reply to Question 18:

Agreed.

Reply to Question 18:

Agreed that the immunity could be extended provided the decision made is in compliance with the law.

Reply to Question 19:

The 4th Consultative Document addresses issues relating to creditors in particular provisions on preferential creditors.

	<p>Reply to Question 20: Agreed that the act of the directors must be in compliance with the law.</p> <p>Reply to Question 21: Agreed.</p> <p>Reply to Question 22: This would mean that the conflict of interest can prevail so long it has been approved by the Board or the shareholders.</p> <p>Reply to Question 23: Agreed.</p> <p>Reply to Question 24-25: Agreed that the primary duty of a director is to act in the interest of the company that he has been appointed to. If there is a conflict between his personal view and his principal appointer, he should disclose that the view is his. Similar to the above, the director is to act in the interest of the company that he has been appointed to.</p> <p>Reply to Question 26: Agreed.</p> <p>Reply to Question 27: Agreed and it should cover all instances not necessarily when he is successful.</p> <p>Reply to Question 28: Agreed.</p> <p>Reply to Question 29: Agreed.</p> <p>Reply to Question 31: Disagreed, the company should be allowed to purchase insurance.</p> <p>Reply to Question 32: Agreed.</p> <p>Reply to Question 33: Agreed.</p>
IACS	<p>Reply to Question 1: IACS is agreeable to the above matter.</p> <p>Reply to Question 2: IACS agrees with the recommendation that director should be appointed based on their competency as in paragraph 1.13. however, IACS noted that in a scenario where the director has more than 51% control but less than 75% will still be able to get himself re-appointed.</p> <p>Reply to Question 3: IACS agrees in respect of the aforesaid matter.</p>

	<p>Reply to Question 4: IACS agrees that it should be retained.</p> <p>Reply to Question 5: IACS agrees with the above proposal.</p> <p>Reply to Question 6: IACS agrees with the above proposal.</p> <p>Reply to Question 7: IACS agrees with the above proposal.</p> <p>Reply to Question 8: IACS agrees to the above proposal provided the mechanism of resignation does not violate the company’s article neither does the resignation results in less than 2 directors in the company [Refer to section 122 (6)]. Further, IACS wishes to highlight to the Committee on the possibility of abuse by directors who back dates their resignation letters. IACS recommends that the mechanism of resignation of directors to be similar to section 139 (1C).</p> <p>Reply to Question 9: IACS agrees with this matter. This will enable the shareholder to judge the performance of the company against the remuneration of the directors and encourages the development of professional managers. For these measures to be effective, the word “remuneration” should be given a wide definition to capture all allowances and expenses paid to the directors so long as they are incurred for the benefit of the directors.</p> <p>Reply to Question 10: IACS does not agree with this proposal and recommends that full disclosure in the accounts as remuneration paid to directors as an alternative.</p> <p>Reply to Question 11: IACS agrees provided this applies to public companies.</p> <p>Reply to Question 12: IACS is agreeable in relation to the foresaid matter. This requirement should only apply to a wholly owned subsidiary. Otherwise, approval of the members of the subsidiary company should be sufficient.</p> <p>Reply to Question 13: IACS is of the opinion that the role and function of the directors should be left to the board of directors exclusively instead of incorporating into the Act.</p> <p>Reply to Question 14: IACS agrees provided this applies to public companies.</p> <p>Reply to Question 15: IACS is of the view that CLRC should also consider the definition of “information”. It should not be confined to factual information but also include advice and recommendations. This will mean that directors who have consulted experts (i.e. lawyers, engineers) for advice and relied on the advice should enjoy a certain degree of immunity.</p> <p>Reply to Question 16:</p>
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	<p>IACS agrees with the above proposal. Directors of large companies have been delegating their power. Due recognition should be given to this fact and issues that arise from it should be addressed. Delegate should have no more power than what was given to them. Delegate who acted beyond the authority given to them should bear the consequences of doing so.</p> <p>Reply to Question 17: IACS disagrees with the above matter. There are provisions to exonerate the directors of the acts of the delegate such as in Question 18.</p> <p>Reply to Question 18: IACS agrees with the above proposal. However, directors should not be totally exonerated from any blame. They must still exercise a degree of accountability.</p> <p>Reply to Question 18: IACS is of the view that business judgement rule should strictly deal with the grant of immunity to directors. There should not be a punitive element in the rule. Otherwise the rule will risk being muddled with directors' duty to exercise care and skill.</p> <p>Reply to Question 19: IACS concurs with this proposal. There are existing legislation and common law that deal with creditors and employees. The Companies Act should not restate these areas of laws.</p> <p>Reply to Question 20: IACS does not agree with the aforesaid proposal. IACS is of the opinion that to a non-legally trained person he may better understand the word "honestly" than the proposed words "in the best interest of the company". "Honestly" suggest not to cheat or lie. Further, the concern that the word "honestly" in section 132(1) may suggest the requirement of fraudulent intent before a director can be found to have breached the section is not that serious. There are also conflicting authorities that suggest a objective test be adopted. The Spedlery Securities Ltd (in Liq) v Greater Pacific Investment Pte Ltd (in Liq) (1992) 7 155 or Intraco –v- Multi Park Singapore Pte Ltd [1995] 1 SLR 313.</p> <p>Reply to Question 21: IACS disagrees with this proposal. The phrase 'to act in the best interest of the company' had the ability to incorporate w wide range of duties on directors. If the purpose of law reform is to clarify the law for the better understanding of directors, then the recognised duties of a director in common law should be expressly stated. Further, the Law Reform Committee has intention to codify the common law fiduciary duties of a company director within the company legislation (refer to paragraph 4.3.). Such recognised duties should be given legislative recognition. However, we do agree that the Court should also retain the ability to develop common law in line with development in the corporate world.</p> <p>Reply to Question 22: IACS agrees with the above proposal. Such express provision will certainly improve directors' awareness of the duty to avoid conflict of interest situations.</p>
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	<p>Reply to Question 23: IACS agrees. It is indeed unconscionable if the general meeting has ratified the conflict of interest and the directors are still held liable provided full disclosure has been made at the time of ratification.</p> <p>Reply to Question 24: IACS agrees and is of the view that nominee directors may also be appointed by banks and debenture holders. By this very nature, they are likely to put the interest of their appointer first. There is a clear conflict of interest but if the commercial entity has accepted the presence of these directors then effect should be given to it.</p> <p>Reply to Question 25: IACS is agreeable with the aforesaid proposal. All three scenarios there should be an adjusted duty to the nominee directors. By recognizing the existence of nominee directors, we should not be oblivious to these three commercial agreements. The rationale for appointing nominee directors are of course to first consider the interest of the appointer then the interest of the company.</p> <p>Reply to Question 26: IACS agrees with the above proposal.</p> <p>Reply to Question 27: IACS agrees with the above proposal.</p> <p>Reply to Question 28: IACS agrees with the above proposal.</p> <p>Reply to Question 29: IACS agrees with the above proposal.</p> <p>Reply to Question 31: IACS is of the opinion that by reason of Question 29, CLRC should also take the opportunity to clarify whether a company may insure the director for liability owed to third party (e.g director provides personal guarantee for banking facilities taken by the company).</p> <p>Reply to Question 32: IACS agrees with the above proposal.</p> <p>Reply to Question 33: IACS is agreeable to the above matter. The disclosure should be made either at the general meeting or the director's report.</p>
ABM	<p>Reply to Question 1: Yes, we agree.</p> <p>Reply to Question 2: Yes. However, the director should be required to disclose their age at the general meeting prior to his appointment or re-appointment.</p> <p>Reply to Question 3: Yes, we agree.</p>

	<p>Reply to Question 4: Yes, we agree.</p> <p>Reply to Question 5: Yes, we agree that the appointment of directors of a public company must be voted on individually.</p> <p>Reply to Question 6: Yes, we agree.</p> <p>Reply to Question 7: Yes.</p> <p>Reply to Question 8: A director whom has resigned can give notice of his resignation to the regulator but CCM should reconcile the notice of resignation with the official filing by the company concerned as there are instances such as where the director's resignation cannot be accepted until a new director is appointed in the case where the number of directors on the board is only 2 or where Bank Negara's approval may required before the director's resignation takes effect.</p> <p>Reply to Question 9: We are of the view that the requirement of the shareholders' approval for the directors; remuneration need not be incorporated in the Companies Act, 1965 because of practical difficulties. This is usually provided for in the Articles and should be left to the internal management of the company</p> <p>Reply to Question 10: We do not agree with the recommendation as it might not be practical approach especially for a public listed company. Any person with a nominal equity interest in a company will have the rights to inspect the directors' contract of service and it may be cumbersome for a company to fulfil this requirement.</p> <p>Reply to Question 11: Yes.</p> <p>Reply to Question 12: Generally we agree that section 137 of the Companies Act, 1965 should be tightened but it should not be made too cumbersome for companies.</p> <p>Reply to Question 13: We do not have any objections to the recommendation.</p> <p>Reply to Question 14: Yes, we agree.</p> <p>Reply to Question 15: Yes, we agree.</p> <p>Reply to Question 16: Yes, we agree.</p> <p>Reply to Question 17: Yes.</p>
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	<p>Reply to Question 18: Yes.</p> <p>Reply to Question 18: We have no objection to CLRC's recommendation to introduce Business Judgment Rule in the Companies Act, 1965.</p> <p>Reply to Question 19: Yes, we agree.</p> <p>Reply to Question 20: Yes, we agree with the recommendation as the term 'honestly' is ambiguous and does not assist directors in understanding their duties and obligations.</p> <p>Reply to Question 21: Yes.</p> <p>Reply to Question 22: Yes.</p> <p>Reply to Question 23: Yes.</p> <p>Reply to Question 24: Yes, we agree.</p> <p>Reply to Question 25: We are of the view that nominee directors should also be guided by the principle as stated in recommendation 4.37 i.e. to act in the interest of the company to which he has been appointed as a director even though he is a nominee in other companies.</p> <p>Reply to Question 26: Yes, we agree that section 140(1) be retained.</p> <p>Reply to Question 27: Yes, we agree with this view and the proposed amendments.</p> <p>Reply to Question 28: Yes.</p> <p>Reply to Question 29: Yes.</p> <p>Reply to Question 31: Yes, we agree that a company should not be allowed to purchase or maintain insurance for its officers in relation to the liability owed towards both the company and its related company.</p> <p>Reply to Question 32: In principle we agree subject to how section 140 will be reworded for clarification.</p> <p>Reply to Question 33:</p>
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	Yes, we agree. For better transparency.
Lee Hishammuddin Allen & Gledhill	<p>Reply to Question 1:</p> <p>1.1 We do not see the need for it to be amended. The proposed amendment can be interpreted as not applying to a 2-director company or arguably where the whole board is acting on the directions or instructions of an outsider.</p> <p>1.2 As noted by the CLRC, the definition of 'director' in s. 4(1) relating to a 'shadow director' is similar to s. 741(2) of the UK <u>Companies Act 1985</u>. in its recommendation, the CLRC was of the view that the current definition of s. 4 made it practically impossible to hold an outsider accountable to a company since "it must first be proven that the <u>entire</u> board is accustomed to act in accordance to the person's instructions nor directions".</p> <p>1.3 It may be helpful for the LCRC to consider the decision of Harman J. in <u>Re Unisoft Group Ltd (No. 2)</u> [1994] BCC 766 where his Lordship, in interpreting s 741(2) of the UK <u>Companies Act 1965</u> held that it was sufficient for the 'shadow director' to control the whole board or <u>at least a governing majority of it</u>.</p> <p>1.4 It may also be helpful for the CLRC to consider the decision of the English Court of Appeal in <u>Secretary of State for Trade and Industry v Deverell</u> [2000] 2 BCLC 133 where it was held at para. [36] "What is needed is that the board is accustomed to act on the directions or instructions of the shadow director. As I have already indicated such directions and instructions do not have to extend over all or most of the corporate activities of the company; not is it necessary to demonstrate a degree of compulsion in excess of that implicit in the fact that the board are accustomed to act in accordance with them."</p> <p>Reply to Question 2:</p> <p>2.1 We agree with the recommendation. The matter should be left to the members to decide.</p> <p>Reply to Question 3:</p> <p>3.1 It is not necessary. The present s. 122(2) provides that a director must be of "full age". Under s. 2 of the <u>Age of Majority Act 1971</u>, a person attaining the age of 18 years attains the age of majority.</p> <p>Reply to Question 4:</p> <p>4.1 We agree with the recommendation. The residency requirement is also important in other aspects, for example, where court papers have to be served personally on the directors, like an injunction order.</p> <p>Reply to Question 5:</p> <p>5.1 We agree with recommendation. We are of the view that the current provision in s. 126 should be maintained. The restriction on a composite motion will provide members of a company the discretion of either to vote for against the appointment of a particular individual standing for directorship, without being compelled to accept or reject all of them en masse.</p> <p>5.2 Section 126 itself does not absolutely prohibit a composite motion as it further provides that such motion could be made if 'it has been agreed to by the meeting without any vote being given against it'.</p> <p>Reply to Question 6:</p>

	<p>6.1 We agree with the recommendation. The present s. 128 which applies to a public company and not a private company should be maintained. There is nothing to prevent a private company from adopting in its articles the provisions in s. 128.</p> <p>Reply to Question 7:</p> <p>7.1 Whether a special notice is required to be served only if the removal is made under the s. 128 requires a proper construction of s. 128(2).</p> <p>7.2 It may be helpful for the CLRC to have in mind the decision of the Supreme Court in <u>Tien Ik Sdn Bhd v Peter Kwok Khoo Hwang</u> [1993] 1 CLJ 9; ([1992] 1 AMR 445; [1992] 2 MLJ 689). In that case, article 85 (f) of the articles of a company provided that the office of a director would become vacant if the director: “shall be required to resign his office by notice in writing lodged at the office signed by the holder or holders of not less than three-fourths in nominal value of the issued shares of the company.”</p> <p>7.3 The Supreme Court held at p 21: “On a proper construction of s. 128(2), we do not agree that it applies to the removal of a director by notice under Article 85 (f) under which the respondent was required to vacate his office as director of the two companies <u>but may apply to cases where the director is removed by a company by a resolution.</u>”</p> <p>Reply to Question 8:</p> <p>8.1 We do not support the proposal, unless the amendments are comprehensive. The CLRC considered that a director’s resignation should take effect with him giving written notice of his resignation to the company “and there is no need for any other further acts, such as acceptance by the company”. The CLRC was of the view that the effective date of resignation should be the date the notice was sent to the registered office or any other date as specified in the letter of resignation.</p> <p>8.2 It may be useful for the CLRC to consider the restriction imposed by s. 122(6) where a director is not allowed to resign if by his resignation, the number of directors of the company is reduced below the statutory minimum of two.</p> <p>8.3 Further, the CLRC should also take into consideration that the effective date of resignation may be provided for in the articles of a company, or where a director is appointed pursuant to a written agreement, the effective date provided under that written agreement.</p> <p>8.4 We are of the view that the proposed amendment should be considered only where there is in place a proper procedure for the Registrar to ensure that:</p> <ol style="list-style-type: none"> a. The resignation of such director is genuine and bona fide (to prevent fraud); b. The resignation of the director is in accordance with the provisions of the articles of the company, or any applicable written agreement; c. The resignation of such director would not contravene s. 122(6). <p>8.5 The current provisions in s. 141(6)(b) which requires a company to lodge the Form 49 with the Registrar is sufficient. There is nothing to prevent an affected director from lodging a report (complaint) with the Registrar if the company has failed to lodge the Form 49 within time. It is an offence under the Act if the return is not lodged with the Registrar within 1 month of the change.</p> <p>8.6 The CLRC should instead consider recommending:</p> <ol style="list-style-type: none"> 1. a heavier penalty for non-compliance of s. 141(6) as the current
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default penalty of RM1,000-00 does not have a sufficient deterrent effect;

2. that the officers in default (and not the company) be personally liable to pay the penalty for such non-compliance.

Reply to Question 9:

9.1 We agree that such a provision should be incorporated in the Companies Act 1965 and should apply to both public and private companies.

9.2 The CLRC has attempted to define the meaning of the word 'remuneration' in its recommendation. We are of the view that the CLRC should bear in mind the provision in Schedule 9, paragraph 1(o) in order to achieve consistency in the meaning of 'remuneration'.

Reply to Question 10:

10.1 We do not agree. A director's contracts of services, apart from information on remuneration, may contain other confidential information about a company's trade and business, the disclosure of which may have an adverse or prejudicial effect on the company. If the objective of disclosure is targeted at director's remuneration, the alternative may be that the information be disclosed, for example, in the registrar of directors.

Reply to Question 11:

11.1 It is not entirely clear in what way the recommendation will work. There is also no explanation as to who are these agents or trustees for the interested directors.

11.2 Section 137(1) requires the proposal for payment to be approved by the company in general meeting. Based on the recommendation, if all the shares in a company are held by the interested directors, his agents and/or trustees, it would mean that the proposal for payment can never be approved in general meeting.

11.3 A shareholder is entitled to vote as he thinks fit in his own interest. To prevent a director/shareholder, though interested, to vote in a general meeting would mean to take away his fundamental right, as shareholder, 'to vote as he thinks fit in his own interest': See **North-West Transportation Co v Hendry Beatty** (1887) 12 App Cas 589, PC; **Carruth v Imperial Chemecal Industries Ltd** [1937] 2 All ER 422; **Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd** [1996] 1 MLJ 661.

11.4 The CLRC should also consider whether it will be more appropriate to require a special resolution to be passed to approve the payment, instead of the current requirement of an ordinary resolution.

Reply to Question 12:

12.1 Subject to the view given in paragraph 11.1-11.4 above, we are in agreement with the recommendation. The CLRC should also consider whether it is more appropriate for a special resolution to be passed to approve the payment instead of an ordinary resolution, at the subsidiary and holding level.

Reply to Question 13:

13.1 We feel that it is not necessary as the matter can be resolved in the articles of a company.

13.2 This will also give more flexibility to shareholders who may want to reserve in the articles certain decisions to themselves and require that

these decisions be subject to shareholders' approval.

Reply to Question 14-18:

17.1 We support the proposed amendments. They will bring the Act in line with legislative development in other Commonwealth jurisdictions.

Reply to Question 18:

18.1 We support the proposed amendments. They will bring the Act in line with legislative development in Australia.

Reply to Question 19:

19.1 It is not entirely clear what this recommendation is. At present, the Companies Act 1965 does contain provisions that regulate the relationship in certain specified instances, for example, section 292.

19.2 it may be helpful for the CLRC to consider that, to a certain extent, the relationship between directors of a company and its creditors is also partly governed, in particular, by section 303(3), 304(2) and 305 which allow a creditor to seek remedies against delinquent directors of a company. See, inter alia, Eng Iron Works Ltd v Ting Ling Liew [1990] 2 MLJ 440; Sioh Yoon Keong v H Rosen Engineering BV [2003] 4 CLJ 68, CA, which were not considered by the CLRC in its recommendation.

Reply to Question 20-23:

21.1 We agree. As the CLRC has noted, other Commonwealth jurisdictions (UK, New Zealand and Australia) have incorporated similar provisions in their respective company legislation. These amendments will bring the Companies Act 1965 in line with these developments.

Reply to Question 24:

24.1 We agree with the recommendation that the strict approach be incorporated in the Companies Act 1965.

Reply to Question 25:

25.1 As the strict approach is the preferred one, the adjusted duty to the various entities may be irrelevant.

Reply to Question 26:

26.1 We agree with its retention since it is consistent with most of the Commonwealth's company legislation.

Reply to Question 27:

27.1 We are of the view that the current provisions are clear.

Reply to Question 28:

28.1 The question is not entirely clear.

Reply to Question 29:

29.1 We are view that the current provisions are clear. The words "against any liability incurred by him in defending any proceedings, whether civil or criminal ..." is s. 140(2) are wide enough.

Reply to Question 31:

31.1 We agree with the recommendation and that the prohibition be extended towards a related corporation.

	<p>Reply to Question 32: 32.1 We are of the view that the current provisions are clear.</p> <p>Reply to Question 33: 33.1 We agree with the recommendation. Arising therefrom, the CLRC should also consider the appropriate amendments to s. 169(6), which regulates the contents of a directors' report.</p>
MAICSA	<p>Reply to Question 3: Whilst we welcome the recommendation to have the age qualification for directors clarified, we feel that reference should continue to be made to the Age of Majority Act 1971 ("the Act") for the age qualification. The rationale is that if by the wisdom of the government, an amendment is made to the Act resulting in a certain age being considered "majority" thereby making such individual capable of entering into contracts, the Companies Act 1965 should therefore follow suit and only allow persons who meet this criteria, to be appointed as directors of companies.</p> <p>Tying the age limit for directors to the Act, rather than providing a separate age in the Companies Act 1965, would also make it easier if, for whatever reasons, the Act is amended. The Companies Act 1965 and amendments thereof would not have to be amended as it would follow the Act.</p> <p>Reply to Question 4: No. We suggest that the residency requirement imposed on directors be reduced to one (1) director. We see little reason why the current residency requirement of "two (2)" directors be maintained. Granted, we assume that the reason for having "two (2)" directors rather than "one (1)" director would mean that, if one "resident" director cannot be contacted, there is a chance that the other "resident" director may, hopefully, be contactable.</p> <p>However, we still feel that if the objective of maintaining a "resident director" is to ensure that there is a point of contact in Malaysia and for enforcement purposes, then "one (1)" resident director is sufficient. It is also felt that this would further assist in reducing the cost of doing business.</p> <p>Reply to Question 8: Yes, we welcome this recommendation. However, it should be stressed that measures must also be taken to ensure that sufficient procedures are put in place to safeguard against the abuse of this provision by directors who, for reasons best known to themselves, may choose to inform only the regulators of their resignation from the company, but not the company. This would leave the company oblivious and unaware of the fact that the director has "resigned".</p> <p>Although, we understand that the resignation would, in fact, not be effective unless it is first served on the company, such an abuse may nonetheless occur and cause a huge administrative inconvenience.</p> <p>In line with this recommendation, we would like to suggest that a director's notice of resignation to the Regulators should be made a mandatory requirement for all directors. This would enable Regulators to track companies that fail to lodge the Form 49, thereby assist in improving the compliance level of companies in Malaysia.</p> <p>In extending Question 8 further, we strongly recommend that <u>Company Secretaries be also allowed to inform the Regulators of their resignation if the Companies refuse to lodge the necessary forms to inform the Regulators of the same, where the Company Secretaries</u></p>

	<p>have first notified the companies of their resignation. We believe that this would further assist in regularizing the statutory information of companies in Malaysia.</p> <p>Reply to Question 9: We <u>disagree</u> with this and feel that this should be left as a matter to be decided by companies via their Articles of Association. Additionally, we feel that the definition for “remuneration” as suggested by the CLRC should also be re-worded. Firstly, it should state clearly that this remuneration should be for a person’s services in the capacity as a director and not the portion paid to him in his capacity as director. Secondly, since the proposed definition lists items to be classified as “remuneration”, it should also spell out that benefits-in-kind be included in the definition if this is meant to be so.</p> <p>Reply to Question 25: We do not agree with item (b). The definition of a corporate group structure is too vague and it may provide a loophole where companies may abuse the provision.</p> <p>Reply to Question 29: We agree to this recommendation, subject to similar provisions being incorporated as provided in the United Kingdom and as provided under paragraph 5.11 of the consultative document.</p>
<p>Johor Bahru (JB) Practitioners Group</p>	<p>Reply to Question 1: The concern on definition of “director” is basically to attach statutory liabilities and fiduciary obligations onto persons occupying or assuming that the said position. Both the existing and proposed definition of ‘director’ with regards to de facto directors is subject to interpretation, and in a litigious environment, witnesses’ testimonials and/or affidavits. We are of the view that in the proposed clarification and reformulation of directors’ roles and duties, the CLRC should take the opportunity to make a more definitive stand as to the definition of a ‘director’ by inserting further provisions in the Companies Act or issuing a statement of best practices that lay down clear-cut situations which would indicate the existence and facilitate the identification of de facto directors.</p> <p>Reply to Question 2: We do not agree with the recommendation. We are of the opinion that the present legislation should be retained and that it’s application be restricted to public listed companies.</p> <p>Reply to Question 3: We agree that the minimum age of a director should be clarified in the Companies Act and must not be less than 18 years of age.</p> <p>Reply to Question 4: In the current environment of global investment and liberalisation, we are of the view that the existing residency requirement is archaic and irrelevant, and as mentioned by CLRC in Para 1.14 of the Consultative Document, represents a cost barrier to foreign investment. The residency qualification requirement results in the appointment of nominee directors who effectively possess no statutory or operational</p>

control over the company, which in itself, defeats the purported purpose of this requirement i.e. a mechanism to facilitate the regulatory bodies' enforcement of compliance with the law.

We propose that, either:

(a) the residency qualification requirement be abolished in totality – in view of the current environment of global investment and liberalisation, and reducing the cost of foreign investment in Malaysia.

The regulatory bodies should contemplate other enforcement alternatives in ensuring that companies complies with the requirements of the law; or

(b) reduce the residency qualification requirement from the existing minimum two (2) to one (1) – so as to minimise the cost foreign investment in Malaysia.

Additionally, in retaining a reduced residency qualification requirement, the Companies Act should also define who is considered to be 'resident' for purposes of the Act.

Reply to Question 5:

Yes, we agree that the practice of bundling of resolutions, vis a vis, the appointment of directors should be specifically prohibited for public companies.

Reply to Question 6:

The removal of directors should be clarified and succinctly provided for in the Companies Act for both public and private companies.

As such, we do not agree with the Committee's recommendation of not extending section 128 to private companies. Subjecting the removal of directors in private companies to the companies own Memorandum and Articles will result in opaque corporate practices, and will not be in line with the current environment of corporate governance and transparency.

Additionally, we are of the view that section 128, in its existing form, is ambiguous and vague, resulting in conflicting interpretations in its application, as illustrated by the CLRC in its summation in Para 1.23 of the Consultative Document. Section 128 should be redrafted to ensure clarity to facilitate the straightforward application of its requirements.

Reply to Question 7:

Question 7 itself is ambiguous and vague, and open to interpretation.

As required under the existing section 128 for a simple resolution to be passed at a general meeting for the removal of a director, In line with the 'simple' resolution requirement, we suggest that only an ordinary notice be required. References or requirements of special notice for an ordinary resolution only serves to confuse and frustrate.

Reply to Question 8:

In our various secretarial practices, we have had numerous occurrences where shareholders are in dispute, of minority directors who disagree with the corporate management of the company, being unable to resign and effectively held 'hostage' by the majority directors cum shareholders.

The proposed provision will certainly facilitate the proper conduct and regulation of the Board of Directors in a company.

We would however further suggest that:

(a) to ensure that the provision is not abused, the resigning directors be compelled to furnish their reasons thereof for their resignation; and

(b) the Act provide for the Regulators to compulsorily review and investigate such companies upon the lodgement of the notices of resignation.

Reply to Question 9:

We agree that to ensure and facilitate good corporate governance practices and transparency, the Companies Act should provide for directors' remuneration to be approved by the shareholders at a general meeting.

We further propose that:

- (a) 'remuneration' should be clearly defined in the Act; and
- (b) directors' remuneration payable from subsidiary companies should also be included.

However, the CLRC should also consider situations where a director(s) is also a significant or majority shareholder of a company, and deliberate whether there would be a conflict of interests and as such, whether the director(s) would be allowed to vote on their own remuneration.

Reply to Question 10:

Yes, the proposed provision will facilitate good corporate governance practices and transparency. However, we propose that this provision to be extended only to public listed companies and their subsidiaries.

Reply to Question 11:

Yes, we absolutely agree that interested directors or their agents or trustees should be prohibited from voting with regards to section 137 proposed payments.

Reply to Question 12:

Yes, we absolutely agree that approval of the holding company's shareholders must be obtained where a section 137 payment is made to a director or the subsidiary company.

Reply to Question 13:

Inclusion of the roles and functions in the Companies Act, which must be comprehensive to ensure clarity, will make the Act cumbersome and unwieldy. However, if such roles and functions are included as a general statement in the Act, as proposed by the CLRC in Para 2.7 of the Consultative Document, may only provide a vague and imprecise impression to the directors of companies of their intended statutory roles and functions.

As such, we do not agree with the CLRC recommendation that the roles and functions of the Board of Directors be included in the Companies Act.

The directors would be better served by either a Statement of Best Practices or a separate publication similar to the existing published Code of Ethics of Directors. Such Statements or Codes may be referred to in the Act to possess the same statutory authority as that of legislative provisions of the Act.

Reply to Question 14:

S132(1) requires a director at all times to act honestly and use reasonable diligence in the discharge of his duties of his office. This, in our opinion, has set out clearly the code of conduct of a director. The proposed reformulation of a directors' standard of care and skill by the CLRC is subjective and open to interpretation, may serve to complicate matters and create "loop-holes" within.

We acknowledge that any attempt to define such standard of care and skill necessary in a director is subjective in its very nature, much more so, when applied to the nature of the company, the nature of the decisions made and the position and responsibility of the director within the company, and as

such will continue to prove to be elusive.
In view of the elusive nature of the issue at hand, we opine that the Companies Act should not attempt what is not legislatively possible, but rather persevere with a straightforward statutory prescription in the Act i.e. requiring a director to act honestly, in the best interests of the company and its members, and to use reasonable care and diligence in carrying out his function as a director.

Reply to Question 15:

We opine that whether or not company directors wishes to rely on information provided by the company's employees, professional advisors or another director or a directors' committee is the prerogative of the directors concerned.

Directors, in ensuring that they act honestly, in the best interests of the company and its members, and with reasonable care and diligence in carrying out their functions as directors, are expected to make proper inquiry of information provided by others before relying and acting on such information.

We are of the view that as S132(1) adequately protects the director and vice-versa, there would not be a need for an express provision, as proposed, to be incorporated in the CA.

Reply to Question 16:

As discussed in Question 15, we opine that such an express provision in the Act would be redundant.

Reply to Question 17:

The proposal of the CLRC in Question 17 gives a director an opportunity to evade the duty of care and skill required of a director and contradicts the CLRC's views as espoused in Part II(A).

A director must and should, take responsibility for their actions, and the actions of their subordinates.

Therefore, we do not agree with the CLRC proposal.

Reply to Question 18:

As discussed in Question 17, we do not agree that a director be allowed to claim not to be liable for the acts of their subordinates.

Reply to Question 18:

We agree with the CLRC proposal to include BJR in the Companies Act, particularly, in view of the inherently complex and competitive global economic environment that is existing today.

Reply to Question 19:

The relationship between a company and its creditors and employees are sufficiently dealt with in other relevant legislations, and as such, should not be regulated under the Companies Act.

We agree with the CLRC proposal.

Reply to Question 20:

We opine that the term 'honestly' is a common English word which would not require separate definition within the Companies Act (a contended 'weakness' of section 132(1) as mentioned in Para 4.11 of the Consultative Document).

We are of the view that the term 'honestly' should not be replaced, but rather, used in conjunction with, and be complementary to other expressed

	<p>care and skill considered to necessary in a director in their exercise of their duties. Our comments in Question 14 would also be relevant.</p> <p>Reply to Question 21: We are of the view that the usage of common English phrases and words in the business and corporate communities has served well and without ambiguities. Any attempts to re-define such terms or words, provided they can be statutorily defined, would create confusion and hence lead to a libel business society.</p> <p>Reply to Question 22: The law as it stands, does not expressly nor comprehensively provides for situations with 'conflict' situations arises, and may result in directors abusing their position in the company for their personal gain or benefit. We therefore agree that provisions should be provided in the Act to set out the common law conflict of interest situations as stated in Part III(C). Such provisions should also require directors to declare such interests, and prohibits them from exercising their equity voting interests in a general meeting of the shareholders to approve or ratify the 'conflict' transactions. Alternatively, or where appropriate, references may be made to relevant Statements of Best Practices or Codes of Conduct.</p> <p>Reply to Question 23: We opine that provisions for approval or ratification of the 'conflict' transaction by the members of the company in a general meeting should suffice. A separate provision dealing with the liability of a director, or lack thereof, would appear to be superfluous and unnecessary.</p> <p>Reply to Question 24: We are of the view that in the current corporate law reform exercise, the commercial reality vis a vis nominee directors should and must be addressed. Imposing standards of care and responsibilities on a nominee director similar and parallel to that of non-nominee directors does not reflect the actual role of the former nor will such provisions facilitate good corporate governance. Besides acting for and on behalf of principals in group companies and joint ventures, nominee directors are also a manifestation of residency qualification requirements, as discussed in Question 4. We vigorously urge the CLRC to consider the following:</p> <ul style="list-style-type: none">(a) provide for a separate legal definition of 'nominee director';(b) acknowledge that the roles of nominee directors are limited and restricted, in that, they are appointed to by principals to represent their interests and/or to ensure that the residency qualification requirement are complied with;(c) require directors to declare upon their appointment, whether their appointment is that of a 'nominee director' (to be defined as required in (a) above), and if so, to declare the person or person(s) who the nominee director is acting on behalf for. Where a director declare that his appointment is not 'nominee' as defined, he shall consequently be subject to the standard of care and responsibilities required as provided in the Act;(d) the duties and responsibilities of a nominee director should be limited and reflect the commercial reality of their position. Such duties and responsibilities should substantially comprise ensuring statutory compliance of Companies Act regulations and requirements by the
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	<p>company, which may include the following:</p> <ul style="list-style-type: none"> o Ensuring the company's compliance with the provisions and requirements of the Companies Act, and Memorandum and Articles in all material respects; o Convening of Board of Directors, and Annual and Extraordinary General Meetings to transact the statutory and normal business of the company; o Lodgement of relevant annual and periodic returns as required by the Act; and <p>(e) Nominee directors should also be absolve from the liabilities in respect of any acts of the Board of Directors outside their stated duties and responsibilities, with further provisions that such liability should be borne by their principals.</p> <p>We wish to also reiterate our proposal in Question 4 to abolish in totality the residency qualification requirement, which in our view, will minimise the number of nominee directors being appointed in Malaysian companies. We further propose that nominee directors be allowed to resign from the company on their own accord, in particular, in situations where they are prevented from exercising their statutory duties by his principals or members of the company, by lodging a notice of their resignation to the Regulator, as mentioned in Question 8 above.</p> <p>Reply to Question 25: Our views and comments in Question 24 refers.</p> <p>Reply to Question 26: We agree with the CLRC view that section 140(1) should be preserved. However, we propose that specific provisions be made in the Companies Act to provide for the subsequent ratification by the shareholders in a general meeting of officers' breach of duties and the liabilities arising therefrom.</p> <p>Reply to Question 27: We agree to the Proposal provided the director has acted in accordance with S132; but to exclude any proceedings brought about by another shareholder or the company against the director.</p> <p>Reply to Question 28: We agree to the Proposal provided the director has acted in accordance with S132; but to exclude any proceedings brought about by another shareholder or the company against the director.</p> <p>Reply to Question 29: We are of the view that officers and auditors should be viewed and treated separately and differently from directors, who by virtue of their position as directors, owes a fiduciary duty to the company and its members. We propose that:</p> <ul style="list-style-type: none"> (a) monetary financial assistance be granted to officers or auditors for costs and expenses that may be incurred by them in defending an action commenced by a third party, rather than just an indemnity by the company for such costs; (b) the advance of the proposed monetary financial assistance be subject to approval by the members in a general meeting, where due consideration should be given to the nature of such legal action initiated against the officers or auditors e.g. as to whether the legal action had been undertaken due to an alleged breach of duty by the
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	<p>officer or auditor to the company and its members.</p> <p>Reply to Question 31: We agree with the CLRC recommendation.</p> <p>Reply to Question 32: We agree with the CLRC recommendation, subject to our comments in Question 29. We further propose that such insurance should be extended to directors defending actions commenced by a third party.</p> <p>Reply to Question 33: We are of the view that disclosure of such insurance or indemnification be required in respect of directors, auditors and senior officers (to be defined) of the company. Advances for costs as proposed in Question 29 should also be a required disclosure.</p> <p><u>Further comments</u> Section 132G – Prohibited transaction involving shareholders and directors. Section 132G prohibits a company from acquiring the shares or assets of another company in which a shareholder or director of the acquiring company has an interests. Such prohibition, which is extended to persons connected to the shareholder or director, are not applicable only if the subject shares or assets were acquired more than three years before the current transaction. We are of the considered view that section 132G is convoluted, perplexing and confounding, and we could find no rationale for its codification. Notwithstanding the baffling use of the English language within section 132G, we surmise that the possible intention of section 132G is to protect the interests of the shareholders from transactions where certain shareholders or directors may have a conflict of interests. However, imposing an absolute prohibition within a three year period, other than certain group restructuring situations provided in S132G(5) is overly draconian. We opine that that there are adequate protection of shareholders provided within sections 132C and 132E and suggest either that: (a) section 132G be abolished forthwith; or (b) prohibited transactions as described in section 132G be subject to approval by the shareholders in a general meeting, with disclosure by shareholders or directors of their interests thereof. It was announced during the Budget 2005 that section 132G will be abolished. However, it appears that the bill to abolish section 132G has yet to be gazetted. We entreat the CLRC to reiterate the proposed abolishment in its Consultative Document and to facilitate the expedient gazette of the relevant.</p>
MIBA	<p>Reply to Question 1: Agree. However, in BAFIA the definition “director” is extended to include a spouse, parent or child or a director.</p> <p>Reply to Question 2: Disagree. Section 129 should be retained. Whilst it is proposed that the director’s age is to be disclosed at the AGM before he is to be appointed as a director or re-appointed as a director, the issue of a careful monitoring of that director’s performance may get overlooked. A director over the age of 70 when he get re-elected by the normal rotation process, will only become eligible for re-election in 2/3 years’ time. Should he “become of unsound</p>

mind etc ...” he would continue in office until his next retirement in 2/3 years’ time. Having this director to seek AGM’s approval for appointment every year since reaching 70 gives shareholders’ an opportunity to review their performance annually. This is also applicable in HK, NZ and Australia. This is the shareholders’ right and should not be removed.

Reply to Question 3-4:

Agree.

Reply to Question 5:

Yes, agree that the appointment of directors of a public company must be voted on individually. However, Section 126 of the Companies Act 1965 should also be extended to private companies to promote democracy and good governance in the re-election process

Reply to Question 6:

We would like to suggest that the right of the shareholders at a general meeting to remove a director be extended to private companies. Shareholders in private companies should be accorded this right as those in the public companies, where the shareholders “may be ordinary resolution remove a director ... notwithstanding anything in its memorandum or articles or in any agreement between it and him”. This extension should not be seen as not facilitate to business as directors owe a fiduciary duty to the company, which is to act in the best interest of the company. Interest of the company is usually taken to mean the collective interest of the company’s shareholders. Hence, should the majority of the shareholders want to remove a director, it would mean that the director is not acting in the best interest of the company and this will likely not sustain the business of the company. The shareholders should then be allowed to remove such a director, regardless of the private company’s Memorandum of Articles of Association.

Reply to Question 8:

We agree with CLRC that the Companies Act 1965 should incorporate a provision that a director who has resigned can give notice of his resignation to the Regulators in the event the company does not do so within one month pursuant to Section 141(6)(b) of the Companies Act, 1965.

Reply to Question 9:

It is recommended that only annual fees that is paid to directors or ‘golden handshake’ or gratuity payments be approved by shareholders. Allowances or payments for additional services rendered or responsibility for chairing committees should be left to the board to approve, as this allows flexibility and efficiency.

Reply to Question 10:

We disagree with the recommendation as it might not be a practical approach especially for a public listed company. Any person with a nominal equity interest in a company will have the rights to inspect the directors’ contract of service and it may be cumbersome for a company to fulfil this requirement. Suggest that perhaps the details of the directors’ remunerations and not just the directors’ fee be disclosed in the Financial Statements or Annual Report of a company. However, we agree that a company is required to keep a copy of any written contract of service that the company has entered into with its directors.

	<p>Where the contract of service is not in writing, the company is to keep a written Memorandum of its terms.</p> <p>Reply to Question 11-12: Agree.</p> <p>Reply to Question 13: It is recommended that the Companies Act should not provide that the board of directors' role and function is to manage the affairs of the company for listed companies. The role and responsibility of the board of directors is continuously being added upon by the dynamically evolving corporate governance requirements and by the regulatory authorities such as Bursa Malaysia, Bank Negara Malaysia and Securities Commission in keeping with the charges that were occurring worldwide. Legislation will not be flexible in adopting to changes however general it is in terms of its statement.</p> <p>Reply to Question 15-17 & 19: Agree. However, the degree and extent of care, skill and diligence to be exercised will vary with the circumstance of an executive director and that of a non-ex Director. As executive director is expected to exercise a higher degree of diligence by virtue of the terms of his employment requiring continuous participation in the business. (Question: Executive Directors are bound contractually with their companies. Doesn't this cover concerns over higher duty of care?)</p> <p>Reply to Question 20: Agree. We may want to adopt the NZ Companies Act, requiring directors to act in good faith and in what the director believes to be the best interest of the company ...”.</p> <p>Reply to Question 21: This should be statutorily clarifies ...</p> <p>Reply to Question 22: Agree.</p> <p>Reply to Question 23: Agree. In the subsequent meetings, we agree that a director's liability resulting from conflict situations must be ratified by shareholders in general meeting. This stems from the initial proposal that conflict of interest situations should be avoided by a company director. Such a transaction is not an ordinary commercial decision which is within the directors' powers to approve or disapprove. Also, since the conflict of interest involved directors in the first instance, their decision may be tainted with self-interest.</p> <p>Reply to Question 24: Agree. However, to include “best interest” instead of act in the interest of the company.</p> <p>Reply to Question 25:</p> <ul style="list-style-type: none">a. In relation to a wholly-owned subsidiary a nominee director should act in good faith in the best interests of the holding company;b. In companies within a corporate group structure he should act in the best interest of the individual companies within the groupc. A joint-venture company he should act in the best interest of his
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	<p>appointer subject to the IV company's shareholders' approval.</p> <p>Reply to Question 26: Agree. This clause should be retained – as it would allow for shareholders' ratification of the directors' breach of duty or authority.</p> <p>Reply to Question 27-28: Agree.</p> <p>Reply to Question 29: Agree.</p> <p>Reply to Question 31-32: Agree.</p> <p>Reply to Question 33: Agree. For better transparency.</p>
BNM	<p>Reply to Question 1: We agree that the definition of 'director' should be amended as suggested by the CLRC. We appreciate the fact that it will be easier to hold a person accountable as a director where the majority of the directors acted in accordance with his interest and instructions rather than proving that the entire board is accustomed to act on his instructions. We wish to point out that the question has omitted the words '<u>and an alternate or substitute director</u>' at the end of the suggested definition. It would appear that this may be unintended as paragraph 1.6 at page 17 of the Consultative Document includes the complete definition of the word.² In any event, please rectify the same to ensure that the complete definition appears in the amended text.</p> <p>Reply to Question 2, 3 & 4 : We agree that section 129 should not be retained based on the reasons set out in paragraph 1.13 at page 21 of the Consultative Document. In our view, there should not be an upper age-limit to restrict the directorship of any particular individual. This should be internally managed by the company and its shareholders. As for a minimum age, we agree to an inclusion of a provision in the Companies Act to impose a minimum age for a person to be appointed as director. We note that while in Australia³ and New Zealand⁴, the minimum age for a director is 18 the UK Company Law reform Bill⁵ sets the minimum age at 16. We are of the view that 18 is an appropriate age for Malaysian as it is also the age of majority in accordance with the Age of majority Act 1971 and the competent age to contract⁶. We agree that the residency requirement imposed on directors should be maintained to provide an important mechanism for the regulatory authorities be enforcing compliance with the law. In addition, CLRC may want to consider dispensing with the requirement of a minimum of two directors for a company. Some sole proprietorships who wish to 'corporatize' their</p>

² Complete definition should read as: 'any person occupying the position of a director of a corporation accustomed to act and an alternate or substitute director'

³ Section 201B(1) of the Australian Corporations Act 2001

⁴ Section 151(2)(a) of the New Zealand Companies Act 1993

⁵ Section 141(1) of the UK Company Reform Bill (HL Bill 34)

⁶ Section 11 Contracts Act 1950 (Act 136)

	<p>businesses are faced with the risk of having unreliable ‘sleeping’ directors or shareholders.</p> <p>In addition to the above matter, paragraph 1.10 explores the merits of section 124 of the Companies Act (Qualification of director) and the CLRC, in paragraph 1.11, recommends the deletion of the said section on the basis that any requirement of share qualification should be left to the company Articles rather than codifying it. We note that the ‘Questions for Consultation’ had omitted the question on the deletion of section 124. for the purpose of completeness and on the basis that the omission may have been inadvertent, we wish to advice that we agree with the deletion of section 124 for the reasons stated by the CLRC.</p> <p>Reply to Question 5: We agree that the appointment of directors of a public company must be voted on individually and correspondingly that section 126 of the Companies Act be retained.</p> <p>Reply to Question 6 & 7: We agree that section 128 of the Companies Act be retained and not extended to private companies. We note that the practice in Malaysia differs from that in other jurisdictions like Hong Kong⁷ and United Kingdom⁸. In those jurisdictions, members of any type of company can vote by ordinary resolution to remove a director. We understand that the distinction in Malaysia is in line with the Strategic Framework to facilitate businesses of private companies as explained by the CLRC. Thus, we are agreeable to maintaining the distinction in this jurisdiction.</p>
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⁷ Section 157B of the Hong Kong Companies Ordinance (Cap 32)

⁸ Section 303 of the UK Companies Act 1985

⁹ Section 157D(2) of the Hong Kong Companies Ordinance (Cap 32)

¹⁰ Section 318 of the UK Companies Act 1985

¹¹ Section 161 of the Hong Kong Companies Ordinance (Cap 50)

¹² See Lipton and Herzberg on ‘*Understanding Company Law*’ (13th Ed) at page 258

¹³ In this regard, there should be clear distinction between the roles and responsibilities of the Board and executives of the company.

¹⁴ Section 232(4) of the Australian Corporation Act, section 137 of the New Zealand Companies Act 1993 and section 158 of the UK Company Law Reform Bill 2005 (HL Bill 34)

¹⁵ See Article 86, Table A, Fourth Schedule to the Companies Act 1965

¹⁶ See section 180(3) of the Australian Corporations Act

¹⁷ See Adler v ASIC[2003]NSWCA 113 and discussed in Lipton and Herzberg: ‘*Understanding Company Law*’ (13th Ed) at page 359

¹⁸ Source: Legal Week, 19 July 2002

¹⁹ See section 159(a) of the Singapore Companies Act (Cap 50)

²⁰ See section 132 of the New Zealand Companies Act 1993

²¹ See section 156 of the UK Company Law Reform Bill (HL Bill 34)

²² See section 156(3)(b), 156(4) of the UK Company Law Reform Bill (HL Bill 34)

²³ Source: Bursa Malaysia’s website

²⁴ Source: Securities Commission’s website

²⁵ See section 155 of the UK Company Law Reform Bill 2005 (HL Bill 34)

²⁶ See section 131 of the New Zealand Companies Act 1993

²⁷ See section 184 of the Australian Corporations Act 2001

²⁸ See *Scottish Co-operative Society Ltd v Meyer & Anor* [1959] AC 324

²⁹ See Section 199A & 199B of the Australian Corporation Act 2001

³⁰ Source: www.delcorp.com

³¹ For instance, the business judgment rule that is codified in the Australian Corporation Law has its origin from the US common law.

The amendment proposed in Question 7 is for purposes of clarifying that a special notice will not be required if the director is not removed at the shareholders' general meeting. We are agreeable to the said amendment.

Reply to Question 8:

Yes, we agree. Such a provision would allow companies' information lodged with Regulators to be updated and available to the public. The CLRC may wish to consider imposing a duty both on the company and the director to inform the Regulatory Authority of the director's resignation. Such a provision will be easier to regulate than one which depends on the director having to show that 'he has reasonable grounds for believing that the company will not give the required notice⁹ before he serves the notice himself. This is the case in the Hong Kong jurisdiction and in Singapore by virtue of section 173(6A) of the Companies Act (Cap 50).

Reply to Question 9 & 10:

We agree with the proposal to incorporate a provision that requires directors' remuneration to be approved by shareholders at the general meeting. We have made a comparison of the similar provision in other jurisdictions and are of the view that the Australian provision is most suitable. Section 202A (1) of the Australian Corporations Act 2001 provides:

*'The **directors** of a company are to be paid the remuneration that the company determines by resolution'.*

Although the Australian Act makes a distinction between private and public companies (section 202A (1) above applies only to private companies), we are of the view that such distinction should not be made in Malaysia.

In addition to the above, there should be a provision on disclosure of the amount of remuneration. This could be done by including the quantum of remuneration when the proposed resolution to approve the director's remuneration is circulated to shareholders. Also, as suggested by the CLRC, the definition of 'remuneration' should be included in the Companies Act.

We agree that a provision to provide company members with a statutory right to inspect its directors' contracts of service should be incorporated in the Act. This would be in line with the position adopted by United Kingdom¹⁰ and Hong Kong¹¹ as explained in paragraph 1.37 of the Consultative Document.

Reply to Question 11:

We agree with the proposal that interested directors or their agents or trustees should be prohibited from voting in the meeting which is convened to approve the proposed payments made to directors.

Currently, we note that section 137 does not prohibit a director who is also a shareholder from voting in the meeting that is convened to approve the proposed payments made to a director pursuant to section 137. We have made a comparison of the similar provision in other jurisdictions and are of the view that the Hong Kong provision is most suitable. Section 163D (3) of the Hong Kong Companies Ordinance which is similar to our section 137 of the Companies Act provides:

'any director to whom it is proposed to make any payments, and any person who holds any shares in the company in trust for him, shall not be entitled to vote on any resolution to approve such statements'

Hence, we agree with the recommendation of CLRC for the inclusion of this type of provision within section 137 which will have the effect of ensuring

that no conflict of interest arises in the voting for payments to directors.

Reply to Question 12:

We agree that section 137 should be amended to address this concern by stating that where a subsidiary is going to make a payment to its director (whether or not that director is also a director of its holding company) pursuant to section 137, that payment must be approved by the shareholders of the holding company in addition to the shareholders of the subsidiary company. This is in order to comply with the spirit of section 137 i.e to ensure transparency and accountability.

Reply to Question 13:

We agree that the above statement should be included in the Companies Act. However, we are unclear how the rule is to be couched i.e whether the statement it is to be a general statement or include particular powers of management in the section. A similar section in Australia (section 198A) provides:

'(1) the business of a company is to be managed by or under the direction of the directors'.

The scope of this Australian section has been interpreted to be extremely broad¹². While we are agreeable in principle to the proposed section, the section must provide sufficient clarity to private and public companies on the role and function of their respective boards. The section should also reflect the supervisory role and function of the board including its management in order to cover the possible variations of the board's role as discussed in paragraph 2.5 of the Consultative Document¹³.

Reply to Question 14:

We agree to a reformulation of a directors' standard of care and skill as suggested by the CLRC. In our view, this amendment would:-

- i. Codify the common law principles with regard to the standards imposed on directors' duties,
- ii. Bring Malaysia at par with recent developments in other jurisdictions¹⁴ on the approach towards directors' standards of skill and care, and
- iii. Impose a mix of an objective and subjective standard to determine the required standard of care.

Reply to Question 15:

We agree that the Companies Act should incorporate an express provision on reliance by directors on information provided by employees, professional advisers or other directors. We note that both Australia and New Zealand have statutory provisions similar to section 138 of the New Zealand Companies Act 1993 should be adopted. You may also wish to consider section 189 of the Australian Corporations Act 2001 on the similar provision. That section has a stricter obligation in respect of the 'inquiry' process, which requires the director to make an *'independent assessment of the information or advice, having regard to the director's knowledge of the corporation and the complexity of the structure and operations of the corporation'*.

Reply to Question 16, 17 & 18:

We agree that the Companies Act should incorporate an express provision on delegation of directors' powers. This practice of delegation, although absent in the Companies Act, is contained in Table A (Articles of Association)¹⁵. However, we are of the view that the responsibility to delegate must be subject to the directors' duty of supervision and control.

As such, although we agree with the proposals in Question 17 and 18, there must be adequate protection in place to ensure that directors do not exercise the powers of delegation to the extent of abandoning overall responsibility. If there is negligence, the issue of whether the director exercised his powers accordingly and whether a director's decision to rely on a delegate was reasonable will be questions of fact for the court to decide. As stated in the Court of Appeal decision in *Re Westmid Packing Services Ltd*[1998]2 BCLC 646,

'A proper degree of delegation and division of responsibility is of course permissible, and often necessary, but total abrogation of responsibility is not.'

Reply to Question 18:

We agree to the introduction of the business judgement rule and suggest the adoption of section 180(2) of the Australian Corporations Act 2001 as discussed in paragraph 3.19 of the Consultative Document. We note that the Australian provision is based on the same American concept, but in the US, the rule is not codified but left to the courts to develop.

'Business judgement rule (BJR)' is defined to mean any decision to take or not to take action in respect of a matter relevant to the business operations of the corporation¹⁶. If the rule is to be codified here, the overriding principle must be to allow directors to make better business decisions within the defined parameters and not to insulate them from liability arising from breach of their duties. The rule also does not operate in relation to breaches of other duties.¹⁷

A matter to be considered by CLRC would be that the BJR may undermine the higher expectations placed on directors of financial institutions to ensure that financial institutions adopt sound financial and business practices that are also in the public interest. In Korea, the Korean Supreme Court highlighted the importance of banks as major players in the national economy and financial markets, stating that such institutions must therefore exercise a greater degree of care than other companies. The Court ruled that the directors could not hide behind the business judgement rule because an 'honest mistake' might not only result in the collapse of the bank itself, but might also threaten the Korean economy¹⁸.

Reply to Question 19:

Given that other jurisdictions like Singapore¹⁹ and New Zealand²⁰ have statutory provisions on a company's duty to employees and United Kingdom is considering the same in its UK Company Law Reform Bill²¹, we do not agree that the Companies Act in Malaysia should not regulate the same.

Currently, the only reference in the Malaysian legislation is Paragraph 7 of the Third Schedule (Powers of a Company) to the Companies Act. This is an objects clause which allows the company to carry out the prescribed object. There is no specific legislative provision to regulate the position. For example, in the UK Bill, it is provided that a director, in fulfilling his duty to promote the success of the company for the benefit of its members, must consider *inter alia* the interests of the company's employees, the creditors of the company and the impact of the company's operations on the community and the environment²².

The CLRC should re-consider its decision not to introduce provisions regulating the position in Malaysia. If companies want to develop good corporate governance, acknowledge their social obligation and sustain long-term growth, it would be commercially beneficial to these companies if the interests of the employees and creditors are considered and provided for under statute.

Another reason for CLRC to re-consider its decision would be the introduction of the Corporate Social Responsibility (CSR) Framework for Malaysian Public Listed Companies by Bursa Malaysia²³ and Securities Commission's initiative to include CSR as part of Corporate Governance²⁴.

Reply to Question 20 & 21:

We agree with the CLRC's suggestion to replace the term 'honestly' in section 132(1) with an express statement requiring the directors to act in the best interest of the company and to use their powers for a proper purpose. This amendment will bring the Malaysian position in line with the jurisdictions in United Kingdom²⁵, New Zealand²⁶ and Australia²⁷. As for the definition of the phrase 'to act in the best interest of the company', we agree that this should be left to the courts to interpret according to the facts before them. In our view, there is ample case law to guide the courts accordingly.

Reply to Question 22 & 23:

We agree that the Companies Act should incorporate a provision which sets out the common law conflict of interest situation to be avoided by a company director. We have made a comparison of the existing and proposed law in the various jurisdictions and are of the view that a provision similar to that contained in the UK Company Law should be adopted. Section 159 of the UK Company Law reform Bill 2005 (HL Bill 34) provides:

'(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).'

If the law on conflict of interest is codified, we agree with the CLRC that the existing sections 132A and 132B of the Companies Act 1965 should be deleted as they will become redundant.

On the appropriate organ of the company to approve or ratify the conflict of interest, this should be the shareholders in general meeting but only after full disclosure by the affected director. If ratification is done by the Board, the decision may be seen to be tainted with self-interest. We agree with the CLRC on this.

Reply to Question 24 & 25:

We agree that the Companies Act should incorporate a provision that clearly states that the primary duty of a director is to act in the interest of the company that he has been appointed to. Such a provision will codify into statute one of the main tenets of company law. This duty should apply even if the director is a nominee director as the law does not distinguish between the two²⁸.

As for the duty of a nominee director in respect of the 3 entities described in Question 25, it is our view that a nominee director may consider the interest of his appointer so long as the company's interest does not conflict with the interest of those he represents. If there is such a conflict, then the director must act in the best interest of the company. If the law tries to define the duty of a nominee director according to the type of arrangement or corporate structure the director represents, this may lead to various interpretation of the provision and the primary duty (of a director to act in the best interest of the company) which the Act sought to impose may be lost.

Reply to Question 26:

We agree that the effect of section 140(1) should be preserved based on the rationale put forward by the CLRC that the section is to prevent the director from being exempted from any liability as a result of a breach of duty in advance of the occurrence of the breach..

Reply to Question 27, 28 & 29:

With respect to section 140(2), we agree that the section should be clarified to allow a company to:

- i. Indemnify its director for the costs of defending legal proceedings, whether civil or criminal, only when the director is successful;
- ii. Indemnify its director for the costs of a successful claim to the court for relief from liability; and
- iii. Indemnify its officer or auditor for costs and expenses incurred in defending an action commenced by a 3rd party.

We agree with the CLRC that a company should not be allowed to advance to an officer any payment towards costs and expenses during the course of the legal proceedings. In our view this may indicate bias in favour of the officer and question the impartiality of the board.

We take note of CLRC's comment that the amendments to this section 140(2) are required only for the purpose of clarifying the section.

Reply to Question 31, 32 & 33:

We agree that a company should not be allowed to purchase or maintain insurance for its officers in relation to the liability owed by them towards the company or a related company, as the case may be. However, we agree that a company should be allowed to purchase or maintained insurance or to indemnify its officer or auditor for costs, expenses and liability incurred by that officer or auditor in defending an action commenced by a third party and the appropriate section to be amended is section 140 of the Companies Act.

We note that the Australian Corporations Act has a similar position but has been drafted to state what the prohibition is rather than what the company is allowed to do²⁹. We also agree that any insurance or indemnification be disclosed to the shareholders and this disclosure should be made in the director's report. We are of the view that the Directors and Officers insurance is useful to mitigate personal liabilities and it is timely that Malaysia introduces such type of insurance too.

Conclusion

We welcome the reforms proposed by the CLRC in this Volume 5 of the Consultative Document. This reforms seek to raise the standards of directorship in Malaysia while promoting self-regulation within the industry. In addition, we suggest that the CLRC would also like to gather feedback from industry associations such as the Association of Banks in Malaysia (ABM), General Insurance Association of Malaysia (PIAM), Life Insurance Association of Malaysia (LIAM), and the Association of Islamic banking Institutes Malaysia (AIBIM) on the Consultative Document.

As a general comment, we note that the Working Group referred to the laws of several commonwealth jurisdictions in formulating the proposals set out in the Consultative Document. In this respect, the Members of the Working Group as well as the Corporate Law Reform Committee may wish to consider the corporation law of the United States (and particularly the law of the State of Delaware) in its review exercise. As you may be aware, the State of Delaware has a conducive and advanced legal framework for its corporation law. It has actively kept its corporate laws at the leading edge

	<p>of corporate governance³⁰. In addition, countries such as the United Kingdom and Australia have looked to the law of Delaware in their company law review exercise³¹.</p>
MSWG	<p>Reply to Question 1: Yes. We agree with CLRC's recommendation.</p> <p>Reply to Question 2: Yes. This should be left for the discretion of the Board and shareholders to decide. In practice, at the AGMs approval is almost always given. What is important is for management at company to deal with such a Director as they have all information necessary to decide the fitness of the individual to be appointed as a director.</p> <p>Reply to Question 3: Yes and preferably to follow the Age of Majority Act (1971) now in force. The Companies Act can follow when the former Act reviews the age limit (upwards or downwards).</p> <p>Reply to Question 4: Yes, for practical purposes. It is better to have minimum of 2 directors resident in the country. In case of need, if one is not traceable, parties would still have a chance to contact the other director to resolve certain matters.</p> <p>Reply to Question 5: Yes. Perhaps do away with the no objection provision as it tends to negate the intention that each director must be treated separately. In practice, the Chairman in most cases for the sake of saving time, persuades members at the AGM to vote enbloc. At times, a shareholder pushes the issue. Time constraints should never be a reason for bundling the voting exercise. Furthermore, shareholders may be supportive of one (or several) candidates by not necessarily all. If they are grouped to be voted enbloc, shareholders are forced to decide on all altogether. If they do not vote at all, their preferred candidates do not get voted on at all too. We agree that Directors should be appointed by company – invariably initiated by larger shareholders or by Chairman/Managing Director to allow for business exigencies consideration – as in any case directors are subjected to voting at AGMs soon enough. We would, however, like to suggest that the letter of notification of appointment of a director should contain clear statement of duties, terms and conditions of fees/remuneration etc. (for all executive and non-executive directors) and much letter to be duly acknowledged and signed by the director. This letter may also be filed in the register of directors. Prospective directors are strongly advised to know and understand their responsibilities and obligations, paying particular attention to the Articles adoption of a Director's Service Contract and take proper professional advice. This is important in director training programme.</p> <p>Reply to Question 6: YES. We agree that section 128 should be retained. We are also of the view that section 128 should be extended to private companies too. This is to protect other stakeholders and the minority shareholders of the private companies. Directors in all types of companies have common basic responsibilities and duties. Even if there are only 2 directors (who may also be the only</p>

- shareholders) they owe responsibility to:-
- a. Each other as directors and shareholders;
 - b. To the company which is a corporate soul; and
 - c. To the company's stakeholders (external and internal).

Reply to Question 7:

YES. We agree with CLRC's recommendation.

Reply to Question 8:

YES. We agree that the director be given the right to lodge notice of resignation with the Regulators. i.e. Companies Commission of Malaysia (CCM). This adds authenticity to his resignation and also aids the authorities (CCM and bankruptcy department) to track companies that do not file the appropriate forms to report the director's resignation (and state thereto). This also helps to determine the cut-off date for his responsibility on the Board's decision and actions after his resignation.

Regarding the effective date, this should be clearly worded such that only if the effective date is not stipulated in the letter, would the date of acceptance of the letter by CCM be the effective date.

Giving of notice should be not only in the event the company does not act accordingly, it should be allowed in any event.

Reply to Question 9:

Whilst we agree that this is the right direction to take, we have the following concerns:-

1. Do we differentiate between Executive and Non-Executive Directors?
2. "Remuneration" requires clear definition. The term "remuneration" to include salary? Is the term "emoluments" the same as "remuneration"?
3. Do we want to allow access to the access to the contract of employment of each director to all members of the company?

Reply to Question 10:

YES. This is good for transparency and accountability. It does ensure that the Board as a whole would not risk being queried publicly of being incompetent if the terms of the director's contract of services are not in the interest of the company and shareholders.

Such contracts should be signed, sealed and effected preferably after the shareholders' approval.

Reply to Question 11:

YES. We agree with CLRC's recommendation.

Reply to Question 12:

YES. The amount to be paid should not be a matter for consideration. It can be insignificant, but approval should be secured regardless.

Reply to Question 13:

1. YES. Directors' duties should be set out in a statute but at a high level of generality, capturing the essential principles, and not in the form of detailed behavioural rules.
2. A consequential effect is perhaps to promote an annual Operating and Financial Review (OFR) to be made mandatory.
3. The law should not reinforce short-termist attitudes but rather make clear that director's obligation is to take a balanced view consistent with maximizing overall economic performance. In doing so, they have the explicit duty to take responsibility for the company's relationships

	<p>and broader impacts and for protecting its reputation.</p> <p>4. The core obligation should always be to promote the success of the company for the benefit of the shareholders subject to compliance with the company's constitution and the duty to act for a proper purpose.</p> <p>5. The Health and Safety at work should be emphasized, embodying statutory obligations of increasing significance to directors.</p> <p>The standard expected of directors is much higher now. Directors are now expected to be able to read and understand accounts, attend meetings as scheduled regularly to appraise themselves of the affairs of the company.</p> <p>Reply to Question 14: YES. This is an adoption of the UK Company Law Reform Bill 2005. This does seem to be the right direction to take as the scope of the hybrid test covers both tradition and realities. However, the Companies Act does not lay down any minimum standard of competency. Therefore, the present test to judge competency or the standard of a reasonable director is governed by common law. This may lead to absurd situations where a company's affairs are badly managed and yet its directors are able to avoid personal liability by proving that they honestly believe that their actions are beneficial to the company. To avoid this scenario, the law ought to impose a more objective standard on directors' duties pertaining to their standard of care and skill. In effect, the test of the degree of care exercisable by directors is stricter and objective one. Competent directors are needed to ensure that shareholder value is maximized by being able to provide direction to the company as well as monitoring the performance of management.</p> <p>Reply to Question 15: YES. This is relevant and significant amendment as indirectly it upgrades Directors' professionalism. If adopted, these provisions should also be incorporated in the letter of notification of appointment as director of the company. Some points to consider:-</p> <ol style="list-style-type: none"> i. Do directors have full and unimpeded access to all information and the company's records? ii. Can all reasonable requests for information be complied with unless complying with such request would be detrimental to the company? iii. If management refuses to comply with a request for information, can the Chairman or the CEO provide a written justification to the Board? <p>Nevertheless, while a director may at times have to make decisions based on information provided by other sources, he cannot accept them per se without seeking to satisfy himself on the quality of that information. He cannot later use that as an excuse for a failed decision. He can only fall back on the defence as envisaged here if the information is later determined to be totally unreliable, false, bad or tainted with the producer's ulterior motives.</p> <p>Reply to Question 16: YES. It is consequential to Question 15 and should also be expressly provided in the Act. Item 16(a) is a consequential item to be included in the proposed director's letter of appointment. For item 16(b), suffices to be in the Act. The Directors as a Board (or individually) may delegate their powers with appropriate instructions, terms of reference and limits of authority. These directions should be clear and precise to avoid blame reverting to the Directors (or a Director) should problems arise following the delegate's</p>
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	<p>actions. Just how far can directors go in delegating their duties without breaching an equitable duty to exercise a reasonable degree of care and skill is a vital one for all directors and their advisors.</p> <p>Reply to Question 17: YES. In the case of an Alternate Director, the latter has to be responsible for his actions (if he had not been given specific directions by his principal director). This is an important issue pertaining to the duties of directors involved in a group of companies especially where solvency and related matters are concerned.</p> <p>Reply to Question 18: YES. This is a necessary defence and consistent with the duty expressed in Question 14. While there may be room for requiring people below the board level to face some responsibility for their actions, it is also important that the blame for failure is not simply passed down the chain and that the overall duties imposed by the Companies Act are not diluted.</p> <p>Reply to Question 18: YES. We agree that the Act provides for business judgement rule (BJR) but, what, how and when applicable needs further discussion. A business judgement can be very subjective and would be dependent on wide ranging and varying terms, which can be fluid and dynamic. The BJR needs to be expressly worded so as to be fair and logical. Recent articles on BJR seem to state:- i. There is confusion in the nature of the rule ii. That the rule should not be applied for benefit of director's protection at the expense of the company's and shareholders' interests iii. Case laws so far favoured protection of directors if there is no breach of duty even if company suffers iv. There is a need to move towards "Abstention Doctrine" to save litigation expense amongst other things Some points to consider on 'business judgement':- i. Can business judgement mean any decision to take or not take action in respect of a matter relevant to the business operations of the corporation? ii. Can a business judgement be suffice to meet the requirements of directors' duties at common law and in equity? iii. For a business judgement made in good faith taking into consideration the material personal interest in the subject matter of the judgement, do directors have to reasonably and rationally believe that the judgement is in the best interest of the company? Directors' belief that the judgement is in the best interest of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold. The proposed merger of Sime Darby, Guthrie and Golden Hope could be an interesting study!</p> <p>Reply to Question 19: YES. We agree with CLRC's recommendation. However, issues covering Corporate Social Responsibility do need to be considered for incorporation into the Act. There is also the whole area of enforcement (duties are illusory if not</p>
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enforceable!) and the whole area of corresponding remedies for injured shareholders (are they sufficient and clear?).

There is a growing trend towards the recognition of a duty which is owed by directors of a company to the creditors and employees, particularly in circumstances where the company is insolvent or in a state of near insolvency. This trend has particular significance as seen in the recent Asian financial crisis and should be appreciated by directors, creditors and employees alike.

In appropriate circumstances, directors could find themselves liable in damages to creditors or employees for a failure to take reasonable care e.g. wrongful trading, health and safety at work.

Reply to Question 20:

YES. We agree with the CLRC's recommendation.

Case law has determined a director must act bona fide in what he considers as in the best interest of the company, not what a court may consider. It is up to the directors in the exercise of their business judgement to decide how the interests of the company can be best promoted.

Reply to Question 21:

YES. We agree with CLRC's recommendation.

Reply to Question 22:

YES. We agree with CLRC's recommendation.

Professionals who serve on the board of company including lawyers, accountants and others, provide and undertake professional work to the company they serve on the board. In such a case, often directors who undertake work in the company they serve on the board could place management staff of the company in an awkward position when they have to question such directors in respect of the advice rendered to the company. Directors will also have conflicting or cross directorships or another directorship in the same industry. In those circumstances, the most appropriate action is to ensure that full and frank disclosure has been made. It is essential that directors be made fully aware of their fiduciary duties as directors.

Reply to Question 23:

YES. Perhaps a sub-clause can be added stipulating that approval is deemed invalid in the absence of a full and frank disclosure.

It is also preferable that the law governing the holding company/subsidiary relationship be clarified further in the Companies Act. Directors of subsidiaries may feel obliged to agree to the directors of the holding company because subsidiaries' directors are usually nominated by the holding company.

Reply to Question 24:

YES. This is a basic tenet of corporate directorship. Current regime recognizes that there is no distinction between executive directors, non-executive directors, nominee directors; under the law they are all "director", subjected to ensuring that they act in the best interest of the company.

Nevertheless, nominee of a substantial shareholder may be put in a spot with tough decision which had not been envisaged earlier. He may even feel he needs to discuss and get guidance from his principals because apart from a difficult business decision, it could also be an issue which is detrimental to his principal. The Board of Directors could be more discerning and defer decision and allow that Director time grace.

	<p>Reply to Question 25: We agree to adjusted duty in relation to nominee directors in respect of a wholly-owned subsidiary only. We do not agree to adjusted duty in relation to nominee directors in respect of companies within a corporate group structure and/or a joint-venture company where protection of minority interests will be required.</p> <p>Reply to Question 26: YES. We agree with CLRC's recommendation.</p> <p>Reply to Question 27: YES. We agree with CLRC's recommendation. However, full and frank disclosure of the indemnity and costs is absolutely necessary for shareholders to assess and evaluate..</p> <p>Reply to Question 28: YES. We agree with CLRC's recommendation. However, full and frank disclosure is absolutely necessary.</p> <p>Reply to Question 29: YES. We agree with CLRC's recommendation. However, full and frank disclosure is absolutely necessary.</p> <p>Reply to Question 31: YES. We agree that a company should not be allowed to purchase insurance for its officers in relation to liability owed towards the company and this prohibition should also be extended for liability towards related companies.</p> <p>Reply to Question 32: YES. We agree with CLRC's recommendation. However, full and frank disclosure is absolutely necessary. Adherence to arm's length procedures need to be followed.</p> <p>Reply to Question 33: YES. Shareholders should know what their Directors are being indemnified against. Full and frank disclosure is absolutely necessary.</p>
CPA	<p>Reply to Question 1: No, the Institute does not agree to the proposed amendment to the definition of the word 'director'. What is the meaning of "majority of the board of directors is accustomed to act"? If this qualifying factor is not clearly defined, a person who is able to give directions or instructions to the board may in defence to an allegation of breach of duties, claim that he is not a director as NOT a majority of the board of directors acted according to his directions or instructions.</p> <p>The Institute is of the view that the existing definition of "director" is suffice. Alternatively, a separate definition of "de facto director" and "shadow director" could be included, similar to the provisions of the UK Companies Act 1985.</p> <p>Reply to Question 2: Yes, the Institute agrees that there should be no statutory maximum age-limit for a person to be appointed as a director. However, the Institute is of the view that a director of a public company who has reached the age of 70</p>

years can only be appointed to the board on an annual basis by ordinary resolution.

Reply to Question 3:

Yes, the Institute agrees that the Companies Act 1965 should contain such clarification.

Reply to Question 4:

Yes, the Institute agrees that the existing residency requirement should be retained.

Reply to Question 5:

Yes, the Institute agrees that the appointment of directors of a public company must be voted on individually.

Reply to Question 6:

Yes, the Institute agrees that section 128 of the Companies Act 1965 should be retained. However, the Institute is of the view that the section should be extended to private companies.

Reply to Question 7:

Yes, the Institute agrees to the provision.

Reply to Question 8:

Yes, the Institute agrees that the Companies Act should contain such a provision. However, the Institute is of the view that the person should be allowed to give notice of his resignation as a director irrespective of whether the company does so or not. It is sometimes difficult for the person to determine whether the company has given notice of his resignation to the regulators.

Reply to Question 9:

Yes, the Institute agrees in principle that the Companies Act should incorporate a provision that requires directors' remuneration to be approved by shareholders as this is in line with promoting greater transparency and good corporate governance. However, the CLRC should take into consideration potential practical difficulties in the implementation of this provision. For example, the remuneration offered to a managing director on his appointment may not be approved by shareholders at general meeting.

Reply to Question 10:

Yes, the Institute agrees that such a provision is in line with promoting greater transparency. However, the Institute is of the view that the right to inspect the directors' contracts of service should be available only to members who are substantial shareholders (a member who holds at least 5% of the shares in the company).

This is to avoid frivolous requests by individual disgruntled shareholders.

Reply to Question 11:

Yes, the Institute agrees that interested directors should be prohibited from voting on such resolutions. However, it is not clear from the consultative document who the "agents" and "trustees" are. We presume that the "trustee" refers to a person who holds shares in trust for the director and that the "agent" refers to a person appointed as a proxy to attend and vote on behalf of the director at the meeting. Further, the Institute anticipates that there could be difficulties in applying such a provision to closely held

	<p>companies (e.g., where all directors and shareholders are family members). The Institute also suggests that the proposed provision be applied to public companies only.</p> <p>Reply to Question 12: Yes, the Institute agrees to the proposal that the payment must be approved by the shareholders of the holding company in addition to the shareholders of the subsidiary company.</p> <p>Reply to Question 13: No, the Institute does not agree to the proposed provision. The Institute is of the view that guidance on the role and functions of the board of directors in terms of managing the affairs of the company should be set out in a non-legislative document such as the Malaysian Code on Corporate Governance.</p> <p>Reply to Question 14: Yes, the Institute agrees to the proposed reformulation of a director's standard of care and skill.</p> <p>Reply to Question 15 – 18A: The Institute does not agree that the provisions proposed in Questions 15 – 18A be incorporated in the Companies Act. These proposed provisions are intended to promote best practices in corporate governance. Such guidance should be set in a non-legislative document such as the Malaysian Code of Corporate Governance.</p> <p>Reply to Question 18: No, the Institute does not agree to the introduction of business judgement rule as it appears to insulate the directors from their liabilities.</p> <p>Reply to Question 19: Yes, the Institute concurs with the CLRC's view that the relationship between a company and its creditors and employees should not be regulated under the Companies Act. Such relationships are sufficiently dealt with under existing provisions.</p> <p>Reply to Question 20: No, the Institute does not agree that the term 'honestly' appearing in section 132(1) should be replaced with an express statement requiring directors to act in the best interest of the company and to use their powers for a proper purpose.</p> <p>Reply to Question 21: Not applicable. See our comments in Question 20.</p> <p>Reply to Question 22: No, the Institute does not agree to the proposed provision. By setting out a list of common law conflict of interest situations in the Companies Act may lead to the perception that the list is exhaustive.</p> <p>Reply to Question 23: No, the Institute does not agree to the proposed provision. By setting out a list of common law conflict of interest situations in the Companies Act may</p>
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	<p>lead to the perception that the list is exhaustive.</p> <p>Reply to Question 24: No, the Institute does not agree to the strict approach that the Companies Act include a provision that clearly states that the primary duty of a director, including a nominee director is to act in the interest of the company.</p> <p>Reply to Question 25: There should not be adjusted duties purely because the person is a nominee director.</p> <p>Reply to Question 26: Yes, the Institute concurs with the CLRC's recommendation that the effect of section 140(1) should be preserved in that any provision for exempting directors from any liability is void.</p> <p>Reply to Question 27: The Institute is of the view that the existing provision in the Companies Act should be retained.</p> <p>Reply to Question 28: Yes, the Institute agrees to the proposed provision.</p> <p>Reply to Question 29: The Institute agrees that the company may indemnify its officer or auditor for costs and expenses incurred in defending an action commenced by a third party only when the officer or auditor is successful in defending the action.</p> <p>Reply to Question 31: Yes, the Institute agrees that a company should not be allowed to provide insurance cover for its officers in relation to the liability owed towards the company or a related company.</p> <p>Reply to Question 32: Yes, the Institute agrees to the proposed provision.</p> <p>Reply to Question 33: Yes, the Institute agrees that any insurance or indemnification should be disclosed to shareholders in the directors' report.</p>
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