



Mandate of the Special Representative of the Secretary-
General (SRSG) on the Issue of Human Rights
and Transnational Corporations and other Business
Enterprises

CORPORATE LAW PROJECT

JURISDICTION: Papua New Guinea

FIRM: Allens Arthur Robinson

DATE: September 2009

This survey is an independent submission to the SRSG's Corporate Law Project. It is the sole work of Allens Arthur Robinson and the SRSG takes no position on any views expressed or implied in this report.

More information about the Corporate Law Project is available at:

<http://www.business-humanrights.org/SpecialRepPortal/Home/CorporateLawTools>.

A NOTE FROM THE UN SPECIAL REPRESENTATIVE ON BUSINESS AND HUMAN RIGHTS

September 2010

This survey is an independent submission to a project on corporate law and human rights under my mandate as Special Representative of the UN Secretary-General on Business and Human Rights: the “Corporate Law Project”. I am delighted that nineteen leading corporate law firms from around the world have agreed to make submissions to this project, and thank them for their engagement. The willingness of so many firms to provide their services pro bono in order to expand the common knowledge base indicates that corporate law firms worldwide appreciate that human rights are relevant to their clients’ needs.

It is important at the outset to understand how this project fits into my wider work. I was appointed in 2005 by then UN Secretary-General Kofi Annan with a broad mandate to identify and clarify standards of corporate responsibility and accountability regarding human rights, including the role of states. In June 2008, after extensive global consultation with business, governments and civil society, I proposed a policy framework for managing business and human rights challenges to the United Nations Human Rights Council (Council). The Framework of “Protect, Respect and Remedy” rests on three differentiated yet complementary pillars: the **state duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the **corporate responsibility to respect human rights**, which in essence means to act with due diligence to avoid infringing on the rights of others; and **greater access for victims to effective remedy**, judicial and non-judicial. You can read more about the Framework in my 2008, 2009 and 2010 reports to the Council, available at my website: <http://www.business-humanrights.org/SpecialRepPortal/Home>.

The Council unanimously welcomed what is now commonly referred to as the U.N. Framework and extended my mandate by another three years, tasking me with “operationalizing” the Framework—that is, to provide “practical recommendations” and “concrete guidance” to states, businesses and others on the Framework’s implementation. There has already been considerable uptake of the U.N. Framework by all relevant stakeholders. It has also enjoyed unanimous backing in the Council; strong endorsements by international business associations and individual companies; and positive statements from civil society.

A key aspect of the first pillar, the **state duty to protect**, is that states should foster corporate cultures respectful of rights both at home and abroad, through all appropriate avenues. In particular, I have been exploring the opportunities and challenges that corporate and securities law can provide in this regard. Corporate law directly shapes what companies do and how they do it. Yet its implications for human rights remain poorly understood. The two have often been viewed as distinct legal and policy spheres, populated by different communities of practice.

The Corporate Law Project will allow me to explore this area further by gaining knowledge from over 40 jurisdictions as to how national laws and policies dealing with incorporation and listing; directors’ duties; reporting; stakeholder engagement; and corporate governance more generally currently require, facilitate or discourage companies from respecting human rights. I am interested not only in what laws currently exist, but also how corporate regulators and courts

apply the law to require or facilitate consideration by companies of their human rights impacts and preventative or remedial action where appropriate.

The project thus formally comprises part of my work on the **state duty to protect**. It will assist me to understand whether and how national corporate law principles and practices currently encourage companies to foster corporate cultures respectful of human rights. I will in turn consider what, if any, policy recommendations to make to states in this area, following consultation with all relevant stakeholders. However it is just one element of my work on the state duty to protect, which also looks at other areas of the law and national policies which might help states to encourage companies to respect human rights.

The project will also support my work on the corporate responsibility to respect and access to effective remedy. In relation to the responsibility to respect, I have explained that in addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. To discharge the responsibility, I have recommended that companies conduct ongoing human rights due diligence whereby they become aware of, prevent, and mitigate adverse human rights impacts. The responsibility exists even where national laws are absent or not enforced because respecting rights is the very foundation of a company's social license to operate. It is recognized as such by virtually every voluntary business initiative, including the UN Global Compact, and soft law instruments such as the International Labour Organization Tripartite Declaration and the OECD Guidelines on Multinational Enterprises. Nevertheless, an understanding of national laws, including corporate law, remains vital to ensure companies understand and comply with their national legal obligations. Moreover, as my 2010 report to the Council highlights, companies may face non-compliance with corporate and securities laws where they fail to adequately assess and aggregate stakeholder-related risks, including human rights risks, and may thus be less likely to effectively disclose and mitigate them, as may be required.

The Corporate Law Project's website is <http://www.business-humanrights.org/SpecialRepPortal/Home/CorporateLawTools>. There you will find the original press release for this project; the research template the firms have agreed to follow; summary reports from two consultations held to date on the project; an over-arching trends paper bringing together the main themes from the firms' surveys; and all completed firm surveys.

My thanks again to all stakeholders who have contributed to this project.

A handwritten signature in blue ink, appearing to read 'J. Ruggie', is positioned above the printed name.

John G. Ruggie

Special Representative of the UN Secretary-General on Business and Human Rights

BRIEF FOR THE CORPORATE LAW TOOLS PROJECT: Papua New Guinea

**Prepared for Professor John Ruggie
United Nations Special Representative of the
Secretary General for Business and Human Rights**

25 September 2009

Please Note:

Allens Arthur Robinson (**AAR**) has prepared this brief for the Corporate Law Tools Project for the exclusive use of the United Nations Special Representative of the Secretary General for Business and Human Rights (**UNSRSG**). This brief is not intended to constitute any form of legal advice or recommendation otherwise than in accordance with the instructions provided to AAR by the UNSRSG. As a result, this report should not be relied on by any person other than the UNSRSG and AAR has no liability whatsoever to any party who acts (or decides not to act) in reliance on this brief in any way.

For further information regarding the content of this brief please contact:

Craig Phillips – Partner craig.phillips@aar.com.au Tel +61 3 9613 8951	Rachel Nicolson – Senior Associate rachel.nicolson@aar.com.au Tel +61 3 9613 8300
--	--

Table of Contents

Executive Summary	2
Setting the Legal Landscape	4
Regulatory Framework	6
Incorporation and Listing	7
Directors' Duties	9
Reporting	12
Stakeholder Engagement	15
Other Issues of Corporate Governance	17

Executive Summary

1. Setting the Legal Landscape

There are certain laws in Papua New Guinea (**PNG**) that may either directly or indirectly encourage a corporate culture respectful of human rights. The Constitution of PNG (the **PNG Constitution**) establishes the protection of a range of human rights. Although there is no specific human rights legislation, there is legislation protecting employment, property and environmental rights. In addition, the development of the underlying law by the courts may contribute to development of a corporate culture respectful of human rights.

2. Regulatory Framework

PNG's legal system and regulatory frameworks for companies significantly draw on those of the United Kingdom, Australia and New Zealand, in addition to common law and PNG custom. Companies are primarily regulated nationally; the key statutes are the *Companies Act 1997* (the **Companies Act**) and the *Securities Act 1997* (the **Securities Act**). The Listing Rules of the Port Moresby Stock Exchange Ltd are also relevant.

The restricted application of the definition of 'material effect' may prevent continuous disclosure requirements from obliging companies to report on the impacts of their operations on non-shareholders.

3. Incorporation and Listing

Neither incorporation nor listing generally require any recognition of a duty to society under PNG law.

4. Directors' Duties

Directors are bound by both statutory and common law duties, some of which are owed to shareholders and others to the company. Accordingly, both the company and the shareholders can take action for a breach of directors' duties. There is no specific duty on directors to avoid legal risk and damage to the company's reputation, nor any case law to suggest that such a duty exists. With the exception of s 113(1) of the Companies Act, which allows directors to consider the interests of employees in the context of a company ceasing to conduct part or all of its business, directors are not required to consider the company's impacts (direct or indirect) on non-shareholders. However, it may be argued that the duty to act in the best interests of the company incorporates a duty to avoid legal risk and damage to the company's reputation, and that consideration of the impacts of the company's operations on non-shareholders may be relevant to performance of the duty to act in the company's best interests. However, there is no case law in which these arguments have been considered.

5. Reporting

Both private and publicly listed companies have reporting obligations under the Companies Act and the Listing Rules. These generally relate to financial reporting and the production of annual reports. There may be some scope within these requirements for companies to disclose the impacts of their operations on non-shareholders, but it is not mandatory.

6. Stakeholder Engagement

The possibilities for stakeholder engagement in PNG appear to be limited. The board is responsible for the management of the company, in which shareholders may not interfere unless the company's constitution provides otherwise. However, shareholder approval is required for 'major transactions' and shareholders can raise matters for discussion or resolution at shareholder meetings. Shareholders are generally also empowered to pass a non-binding resolution, including a resolution relating to the company's human rights impacts, which may influence the board's decision-making. Institutional investors may have some limited discretion to consider impacts on non-shareholders in their investment decisions. Trustees of authorised superannuation funds (**ASF**) may arguably be required to consider such impacts in relation to risks to the ASF's investment, but they may only act on these impacts where this is in the best interests of members.

7. Other Issues of Corporate Governance

PNG laws do not currently require any specific kind of representation on company boards, either of certain constituencies or in relation to gender, race or ethnicity. Nevertheless, there does not appear to be any prohibition of the subsequent enactment of positive discrimination laws, as the Constitution permits laws that specifically benefit women or particular groups or areas.

Setting the Legal Landscape

1. Briefly explain the broader legal landscape regarding business and human rights.

- 1.1 PNG is a liberal democracy that is a member of the Commonwealth. The PNG Constitution protects a significant number of human rights. While these human rights can be enforced by individuals against corporations, the extent to which this occurs is limited. Notably, companies, as well as natural persons, are entitled to the protection of the constitutional human rights.¹
- 1.2 PNG has an abundance of natural resources and many businesses are engaged in this sector, in particular, in mining and petroleum and natural gas production, although a significant proportion of the population continues to be primarily involved in subsistence agriculture. All companies, whether public or private, are regulated by the Companies Act. Publicly listed companies are also governed by the Securities Act.
- 1.3 Division 3 of the PNG Constitution protects certain human rights, including the right to freedom, right to life, freedom from inhuman treatment and protection of the law as fundamental rights, and other rights (such as freedom of employment, religion, personal liberty and expression and the right to privacy) as qualified rights (ss 32 – 58). The Division applies to corporations and associations in the same way that it applies to individuals.
- 1.4 A review of the case law indicates that these rights have been asserted in relation to corporate activity, mainly against the State, but also against corporations. For example, individuals have asserted their constitutional rights against employers in cases in which the protections provided in s 41 of the PNG Constitution have been found to be an implied term in contracts of employment, incorporating the principles of natural justice and protection against harsh or oppressive treatment into employment contracts.² The right to freedom of information and the right to protection from unjust deprivation of property have been unsuccessfully asserted against the State in relation to corporate activities.³
- 1.5 The development of the underlying law by the Courts and its adaption to the circumstances of the country, are means by which the law could develop to encourage a corporate culture respectful of human rights. For example, a recent decision of the National Court held that the rule of the underlying law that an employer can dismiss an employee at will was no longer appropriate; rather, an employer's power of dismissal is subject to an implied term in the employment contract that an employee has a right to be heard prior to dismissal.⁴ The

¹ See e.g. *State v NTN Pty Ltd and NBN Ltd* [1992] PNGLR 1; *Koai Keke v PNG Color Laboratories* [1992] PNGLR 265.

² *Vitus Sukuramu v New Britain Palm Oil Ltd* (2007) N3124 (Unreported, Cannings J, 16 February 2007); *Bernbert Toa v Ly Cuong-Long* (2008) N3471 (Unreported, Cannings J, 15 September 2008).

³ See e.g. *Kuberi Epi and Others v Turama Forest Industries Ltd and The State* [1998] PNGLR 87; *PNG Ready Mixed Concrete Pty Ltd v The Independent State of Papua New Guinea* [1981] PNGLR 396.

⁴ *Vitus Sukuramu v New Britain Palm Oil Ltd* (2007) N3124 (Unreported, Cannings J, 16 February 2007).

court also noted that such a development was in line with PNG's obligations under the ILO *Termination of Employment Convention 1982*.⁵

- 1.6 PNG does not have dedicated human rights legislation. Some human rights standards are contained in other legislation that deals with criminal law, employment, labour, indigenous issues and land. For example, the *Fairness of Transactions Act 1993* aims to ensure the fairness of any transaction in which one party is disadvantaged for economic or other reasons, and to prevent any transaction which is manifestly unfair. Other rights including environmental rights, property rights and employment rights are recognised in other legislation including the: *Conservation Areas Act (Chapter 362)*, *Discriminatory Practices Act (Chapter 269)*, *Employment Act (Chapter 373)*, *Environment Act 2000*, *Geneva Conventions Act (Chapter 84)*, *Industrial Organizations Act (Chapter 173)*, *Industrial Relations Act (Chapter 174)*, *Industrial Safety, Health and Welfare Act (Chapter 175)*, *Land Act 1996*, *Mining Act 1992*, *Mining (Safety) Act (Chapter 195A)* and *Oil and Gas Act 1998*.
- 1.7 International law must be incorporated into domestic law through the enactment of a municipal statute before it is legally binding in PNG.⁶ Principles of international law may also be incorporated into PNG's common law system, but only to the extent that such international law is not inconsistent with the existing legislation or case law of PNG.⁷ Some international human rights law treaties have been incorporated into PNG's law. For example, aspects of the *International Convention on the Elimination of All Forms of Racial Discrimination*⁸ and the *Convention on the Elimination of All Forms of Discrimination Against Women*⁹ have been brought into effect through rights contained in the PNG Constitution. The establishment of a national Human Rights Commission has been proposed, and public consultation was conducted in 2008 accordingly. A Human Rights Commission Model was developed in July 2007 by a committee established to advise the PNG Government on the formation of a Human Rights Commission. The Model does not indicate whether the Human Rights Commission will consider complaints against companies.
- 1.8 The Anti-Discrimination and Human Rights Unit of the Ombudsman Commission of PNG has a limited role to investigate human rights violations both in the public and private sectors.
- 1.9 There are criminal offences relating to companies, for example, regarding forgery of books (s 506 of the *Criminal Code Act 1974*), but no provision for corporate criminal liability in relation to corporate culture.
- 1.10 This paper does not specifically address the autonomous region of Bougainville due to the developing nature of governance in that region.

⁵ ILO Convention No C158 (22 June 1982).

⁶ The Constitution of PNG (**PNG Constitution**), s 117(1).

⁷ *Supreme Court Application No 1 of 1985 Enforcement of Certain Constitutional Rights and Freedoms pursuant to s57 of the Constitution; Application by Tom Ireeuw, Jimmy Wawar, Cory Ap, and John Wakum and Others* [1985] PNGLR 430.

⁸ Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁹ Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

Regulatory Framework

2. To what legal tradition does the jurisdiction belong?

- 2.1 The hierarchy of laws in PNG consists of the PNG Constitution, the Organic Laws, the underlying law, statutes (both federal and provincial) and judge made law.
- 2.2 The PNG Constitution and the Organic Laws are the overriding source of law in the country.¹⁰ The PNG Constitution is prescriptive in nature, and entrenches an extensive range of human rights. Section 12(1) of the PNG Constitution defines 'Organic Law' as a law made by the Parliament, authorised by and consistent with the PNG Constitution, and expressed to be an Organic Law.
- 2.3 The underlying law consists of:
- (a) customary law derived from the culture and custom of various peoples of PNG; and
 - (b) principles and rules that formed part of the common law and equity in England immediately before PNG gained independence in 1975.

However, there are certain enumerated restrictions on the substance and operation of the underlying law, which generally concern inconsistency with the PNG Constitution and the Organic Laws.

- 2.4 PNG case law authorities differ as to whether English decisions subsequent to PNG independence have varied the common law in PNG.¹¹
- 2.5 The *Underlying Law Act 2000* provides that the principles and rules of common law shall be applied notwithstanding their modification through an amendment, repeal or alteration by statute of England unless the modifying statute has been adopted in PNG (s 3(3)(b)).
- 2.6 Much of the country's statute law is adopted from Australia, England and New Zealand.

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

- 3.1 Corporate and securities laws are regulated nationally. Each of the key pieces of corporate and securities legislation is a national statute.
- 3.2 Section 42 of the Organic Law on Provincial Governments and Local-Level Governments sets out the powers of provincial governments. Provincial governments have the power, in some contexts, to make laws relating to fishing and fisheries, trade and industry within the province, forestry and certain aspects of renewable and non-renewable natural resources.

4. Who are the government corporate/securities regulators and what are their respective powers?

- 4.1 Corporate regulation is generally managed by the Investment Promotion Authority (*IPA*), established by the *Investment Promotion Act 1992* (*Investment Promotion Act*). The IPA

¹⁰ PNG Constitution, s 11.

¹¹ See e.g. *The State v Bisket Uranguae Pokia* [1980] PNGLR 97; *Re Petition of MT Somare* [1981] PNGLR 265, in which a willingness to consider the application of UK decisions following PNG's independence was demonstrated. Cf *Vian Guatal v The Independent State of Papua New Guinea* [1981] PNGLR 230; *Collins v Motor Vehicles Insurance (PNG) Trust* [1990] PNGLR 580.

has powers to do all things necessary or convenient to be done in performance of its functions. The Department of Commerce and Industry oversees the operations of the IPA.

- 4.2 The Business Information and Facilitation Division is responsible for administering the Investment Promotion Act and regulations. This includes providing certification for foreign enterprises wishing to carry on business in PNG.
- 4.3 The Business Registration and Regulation Division administers the key business laws in PNG and provides services such as the registration of business names, the incorporation of companies and a register of company charges. It also houses the Registrar of Companies, which is required to keep a register of both local and overseas companies. The Registrar has powers of inspection and investigation for the purpose of performing the Registrar's powers and functions, and ensuring compliance with the Companies Act and the Securities Act.
- 4.4 The Securities Commission of PNG is also administratively located within the IPA. It is established under the Securities Act, and vested with regulatory and enforcement powers by, the Securities Act, the *Takeovers Code 1998* and the Companies Act. The Commission is vested with all such powers as are reasonably necessary to enable it to carry out its functions and duties. The Commission is responsible for the enforcement of the legislation administered by the IPA and has the power to take evidence and prosecute breaches. It has the power to prohibit trading in particular securities, suspend or cancel the registration of a registered prospectus, approve a person to act as trustee and formulate and recommend a takeovers code.
- 4.5 The Independent Consumer and Competition Commission (**ICCC**) is established by the *Independent Consumer and Competition Commission Act 2002*. Its functions include the promotion of competitive market conduct and fair trading, the prevention of the misuse of market power and the regulation of prices for certain goods and services. As with the IPA, the ICCC has powers to do all things necessary or convenient to be done in performance of its functions.

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

- 5.1 PNG has one stock exchange, the Port Moresby Stock Exchange Limited (**POMSoX**). This was formally opened in April 1999. The Business Rules and Listing Rules of POMSoX are licensed from the Australian Stock Exchange. As at 29 June 2009, there are 19 companies listed on POMSoX.

Incorporation and Listing

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

- 6.1 The concepts of limited liability and separate legal personality exist in the companies law of PNG.
- 6.2 All companies are presumed to be limited liability companies under the Companies Act. This presumption can be rebutted if a company's constitution provides that liability is unlimited (s 79(2)).

6.3 Section 16 of the Companies Act establishes that a company is a legal entity in its own right, separate from its shareholders. A company continues in existence until it is removed from the register. The Companies Act contains statutory mechanisms for an unsecured creditor to pierce the corporate veil where a company becomes insolvent and recover the debt due from a director or from the holding company (ss 348 & 349). It is also recognised in the underlying law that the corporate veil can be pierced in certain limited circumstances. Precise categorisation of the circumstances in which the corporate veil may be listed has been recognised as impossible and undesirable, although generally, some element of fraud may be required.¹²

7. Did incorporation or listing historically, or does it today, require any recognition of a duty to society, including respect for human rights?

7.1 With the possible exception of listed foreign entities, neither incorporation under PNG law nor listing require any recognition of a duty to society.

(a) Incorporation

7.2 The current incorporation process is set out in the Companies Act. The essential characteristics that a company must have for incorporation are: a name; one or more shares; one or more shareholders (with either limited or unlimited liability for the obligations of the company); one or more directors; a registered office; and an address for service (s 11). The Companies Act does not establish any other requirements for incorporation.

7.3 Previously, PNG followed the model of the UK *Companies Act 1862*, which required completion of a memorandum of association, followed by the issue of a certificate of incorporation by the Registrar.

7.4 In addition, an association may be incorporated under the *Associations Incorporation Act (Chapter 142)*, customary groups may be incorporated under the *Business Groups Incorporation Act (Chapter 144)* and customary land groups may be incorporated under the *Land Groups Incorporation Act (Chapter 147)*, although none of these Acts expressly prescribe any duty to society.

(b) Listing

7.5 Chapter 1 of the POMSoX Listing Rules sets out the requirements for general admission to the official list. For an entity (other than an entity incorporated outside of PNG or a debt issuer) to be admitted to the official list, it must satisfy the 10 conditions in the Listing Rules. These relate to the financial status, structure and operations of the company. The listing requirements for exempt foreign entities and debt issuers are generally similar. However, in addition, foreign entities must satisfy POMSoX that they comply with the listing rules of their home exchange. If the listing rules of a foreign entity's home exchange require a recognition of a duty to society, this will therefore indirectly be a requirement for that entity's listing in PNG.

¹² See *Odata Ltd v Ambusa Copra Oil Mill Ltd* (2001) N2106; *Pinpar Developer Pty Ltd v TL Timber Development Pty Ltd* (2006) N3075.

8. Do any stock exchanges within the jurisdiction have a responsible investment index, and is participation voluntary?

- 8.1 POMSoX does not have a responsible investment index. None of the companies listed on POMSoX participate in other responsible investment indexes.

Directors' Duties

9. To whom are directors' duties generally owed?

- 9.1 Directors of companies in PNG are bound by various duties, some of which are owed to the company and some to the shareholders.

(a) Statutory Duties

- 9.2 The Companies Act contains a range of duties that are owed by directors to the company and to the shareholders.
- 9.3 Section 112(1) provides that directors have a duty to act in good faith and in the best interests of the company. Section 147(3) specifies that this duty is owed to the company and not to shareholders.
- 9.4 Section 113(1) provides that s 112 does not limit 'the power of a director to make provision for the benefit of employees of the company in connection with the company ceasing to carry on the whole or part of its business'. This does not appear to be a duty per se, but a carve out of the duty in s 112 providing directors discretion in relation to employees.
- 9.5 Section 114(1) provides that directors have a duty to comply with the Companies Act and the constitution of their company.
- 9.6 Section 115 provides that directors owe a duty to 'exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation – (a) the nature of the company; and (b) the nature of the decision; and (c) the position of the director and the nature of the responsibilities undertaken by him.' This sets a standard of ordinary negligence, being the standard, of the reasonably competent director, rather than the previous common law standard, which required that the director must show the skill that may reasonably be expected from a person of his or her knowledge or experience.¹³ Section 147(3) specifies that this duty is owed to the company and not to shareholders.
- 9.7 Section 118(1) requires that where a director is interested in a transaction or proposed transaction, that director must cause the interest to be entered on the interests register and disclose the interest to the board of the company (if there is more than one director). Section 147(3) specifies that this duty is owed to shareholders.
- 9.8 Section 123(1) imposes a duty on directors not to disclose company information except for the purposes of the company or as required by law. Section 147(3) specifies that this duty is owed to the company and not to shareholders.

¹³ Beck, Andrew and Borrowdale, Andrew, *Papua New Guinea: Companies & Securities Law Guide* (1999), p 53.

- 9.9 Section 126(1) imposes a duty on directors to disclose dealings of a relevant interest in shares issued by the company. Section 147(3) specifies that this duty is owed to shareholders.

(b) Common Law/Underlying Law Duties

- 9.10 The statutory duties outlined above are essentially a restatement of duties from common law and equity with some modifications.¹⁴ Company law in PNG includes settled principles from the common law and equity¹⁵ through the reception of the common law and equity of England under the PNG Constitution (discussed above at Question 2).

- 9.11 While not binding on PNG courts, development of English law since 1975 in relation to directors' duties may be of persuasive value. However, PNG courts are unlikely to give any weight to developments in English law that arise from legislative change (such as s 172 of the *Companies Act 2006* (UK)). The PNG Companies Act is modelled on New Zealand's companies law,¹⁶ and relevant New Zealand court decisions may be of particular persuasive value.

10. Are there duties to avoid legal risk and damage to the company's reputation? If so, are they duties in their own right or are they incorporated into other duties?

- 10.1 In terms of directors' duties per se, it may be suggested that the duty to act in the best interests of the company may include a duty to avoid legal risk and damage to the company's reputation. However there is no case law on point, nor any other authority for the view that such an extended duty exists. Directors' duties under the Companies Act are distinct from general duties owed by the company, and sometimes also directors, to comply with the law.

11. More generally, are directors required or permitted to consider the company's impacts on non-shareholders, including human rights impacts on the individuals and communities affected by the company's operations? Is the answer the same where the impacts occur outside the legislating jurisdiction? Can or must directors consider such impacts by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?

- 11.1 Section 113(1) of the Companies Act (noted above in Question 9) allows directors to consider the interests of employees in the context of a company ceasing to conduct part or all of its business. This provision reflects s 719 of the *Companies Act 1985* (UK) (and s 247 of the *Companies Act 2006* (UK)), and effectively ends a line of authority in cases that found that directors did not have such power.¹⁷ Under s 113(2), 'employees' includes employees of a subsidiary.

¹⁴ Beck, Andrew and Borrowdale, Andrew, *Papua New Guinea: Companies & Securities Law Guide* (1999), p 48; *Spirit Haus Ltd v Robert Marshall* (2004) (2630 (Unreported, Kandaskasi J, 2-3 September 2004) 57.

¹⁵ See e.g., *Spirit Haus Ltd v Robert Marshall* (2004) N2630 (Unreported, Kandaskasi J, 2-3 September 2004) 56.

¹⁶ Beck, Andrew and Borrowdale, Andrew, *Papua New Guinea: Companies & Securities Law Guide* (1999), p v.

¹⁷ See e.g. *Hutton v West Cork Railway Co* (1883) 23 Ch D 654.

- 11.2 There are no other duties expressly relating to impacts on non-shareholders. However the duty to act in the best interests of the company under s 112(1) may incorporate the consideration of impacts on non-shareholders. Such an interpretation may be open to the courts, but there are, as yet, no cases on point.
- 11.3 Generally, the Companies Act does not indicate that directors need to consider such impacts by subsidiaries, suppliers and other business partners. There are certain financial reporting provisions for corporate groups¹⁸ and liability for insolvent trading by a subsidiary (s 349). However, there do not seem to be provisions regarding decision-making apart from those allowing directors of a subsidiary or joint venturer to act in the holding company's or joint venture's best interests (as applicable) in certain circumstances (s 112). Directors may consider the impacts of subsidiaries on non-shareholders as part of acting in the best interests of the company where such impacts expose the main company to risk.
- 11.4 Separate to directors' duties under the Companies Act, directors and companies have general obligations outside of company law as such to comply with all PNG law, including the PNG Constitution and the human rights contained therein.
- 11.5 The Companies Act makes no provision with regards to its geographical application. Section 2A of the *Interpretation Act (Chapter 2)* therefore applies, providing that laws are to operate within PNG's boundaries, airspace, ships and aircraft. This does not mean that the interests of the company have the same geographical limitations; directors may consider impacts on non-shareholders wherever they occur so long as those impacts are relevant to the interests of the company.
- 12. If directors are required or permitted to consider impacts on non-shareholders, to what extent do they have discretion in determining how to do so?**
- 12.1 Section 113(1) provides directors with a limited discretion in relation to employees in the circumstances of a winding up.
- 12.2 It is not clear to what extent directors have discretion to consider impacts on non-shareholders where they relate to the interests of the company. As discussed above at Question 9, there has been no judicial guidance in relation to directors' consideration of impacts on non-shareholders or whether and, if so, to what extent directors may have discretion to consider such impacts. However, as noted at Question 9, pursuant to s 115 of the Companies Act, the directors' duty to exercise the care, diligence and skill of a reasonable director sets a standard of ordinary negligence and appears to recognise the exercise of discretion usual and necessary in making management decisions.
- 13. What are the legal consequences for failing to fulfil any duties described above and who may take action to initiate them? What defences are available?**
- 13.1 Breaches of directors' duties owed to the company may be pursued by the company, or by the shareholders in a derivative action. Breaches of directors' duties owed to the

¹⁸ See e.g. Companies Act 1997 (**Companies Act**), ss 181 and 182.

shareholders may be litigated by the shareholders in a personal action.¹⁹ Section 419 of the Companies Act provides the following defences for directors charged with a breach of duty by the board or company:

- (a) the board/company took all reasonable and proper steps to ensure that the requirements would be complied with; or
- (b) the director took all reasonable and proper steps to ensure that the board/company complied with the requirements of the Companies Act; or
- (c) in the circumstances the director could not reasonably have been expected to take steps to ensure that the board/company complied with the requirements.

14. Are there any other directors' duties which might encourage a corporate culture respectful of human rights?

- 14.1 There do not appear to be other directors' duties that might encourage a corporate culture respectful of human rights. However, as noted above at Question 11, in addition to directors' duties provided by the Companies Act, directors are obliged to comply with all PNG laws. This includes constitutional laws that protect certain human rights and offer qualified protection of other rights, including freedoms of expression, privacy and employment.

15. For all of the above, does the law provide guidance about the role of supervisory boards in cases of two tier board structures, as well as that of senior management?

- 15.1 There is no two tier board structure provided for in law in PNG. There do not appear to be senior management duties in relation to non-shareholders. Senior management, as employees of a company, owe the company the general duties owed by employees, but senior management do not owe duties to the company or shareholders akin to the duties owed by directors.

Reporting

16. Are companies required or permitted to disclose the impacts of their operations (including human rights impacts) on non-shareholders, as well as any action taken or intended to address those impacts, whether as part of financial reporting obligations or a separate reporting regime?

- 16.1 Companies are not expressly required to disclose the impact of their operations on non-shareholders. However, reporting of such impacts is not prohibited, therefore it may be at the discretion of companies to do so. In particular, there may be some scope for companies, especially listed companies, to report such information in their annual report.
- 16.2 Both privately owned and listed companies have a range of reporting obligations under the Companies Act and the Listing Rules.

¹⁹ Companies Act, s 147(1). See also Beck, Andrew and Borrowdale, Andrew, *Papua New Guinea: Companies & Securities Law Guide* (1999), p 57.

**(a) Companies Act**

- 16.3 Financial reporting requirements exist under both the Companies Act and the Listing Rules. For example, the Companies Act requires companies to prepare financial statements, as well as group financial statements if a company has one or more subsidiaries. Periodic disclosure required by the Listing Rules includes both half yearly and annual disclosure.
- 16.4 Pursuant to s 209 of the Companies Act, most companies are obliged to prepare an annual report on the affairs of the company to be provided to shareholders. Section 212 sets out what an annual report must contain; none of these items specifically require that a company disclose the impacts of their operations on non-shareholders. This indicates that companies are not required to disclose the impact of their operations on non-shareholders, although as the Companies Act does not prohibit it, they may be permitted to do so at their own discretion.
- 16.5 Section 212(1)(a) of the Companies Act may be relevant. It states that a company must report on any change during the accounting period in the nature of the business of the company or any of its subsidiaries, or in the classes of business in which it has an interest. The board is only required to report such changes where it believes it is material to assisting shareholders to gain an appreciation of the company's affairs, and only to the extent that to do so will not be harmful to the business of the company or any of its subsidiaries. This provision may establish some scope to report on the impact of the company's operations on non-shareholders, however, there is no case law on point.

(b) Listing Rules

- 16.6 The Listing Rules set out a number of additional items about which a listed company is required to include information in its annual report. Rule 4.10.3 requires that an entity include a statement of the main corporate governance practices that the entity had in place during the reporting period. Appendix 4A of the Listing Rules provides an indicative list of corporate governance matters that an entity may take into account when complying with rule 4.10.3, and includes the entity's policy on the establishment and maintenance of appropriate ethical standards. While it is not a strict requirement that companies disclose the impact of their operations on non-shareholders, it establishes a framework for companies to report on the ethical implications of their business and the strategies they have adopted to address human rights impacts.
- 16.7 Continuous disclosure is mandated by rule 3.1 – once a listed company becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the company's securities, the company must immediately report that information to POMSoX. 'Material effect' is not defined in the Listing Rules or in the Companies Act. It is defined in the Securities Act but only for the purposes of insider trading. In that Act it is defined as information which would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, buy or sell the securities. Having regard to the restricted application of this definition, that obligation may not extend to require a company to report on the impacts of their operations on non-shareholders unless a reasonable person would expect such impacts to have a material effect on the price or value of the company's securities (as may be the case where large-scale litigation is foreshadowed).



- 16.8 The Listing Rules also require that a listed company inform POMSoX of any significant change it proposes to make, either directly or indirectly, to the nature or scale of its activities (Rule 11.1). This must be done before any change is made. Again, this is not an express requirement to report on impacts on non-shareholders, but may encompass such reporting if the impacts are connected to a change in the nature or scale of the company's activities.
- 17. Do reporting obligations extend to such impacts or actions outside the jurisdiction; to the impacts or actions of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?**
- 17.1 Reporting obligations only extend to impacts or actions of subsidiaries to the extent described above. That is, a company must prepare group financial statements if it has one or more subsidiaries. In the preparation of its annual report, a company must report on any change in the nature of the business or that of any of its subsidiaries (a change in the nature of the business is generally taken to mean a significant shift in the kind of business the company is engaged in). As noted above, the extent to which such obligations encompass a need to report on impacts on non-shareholders is limited.
- 17.2 Neither the Listing Rules nor the Companies Act expressly provide for reporting in relation to suppliers or other business partners, or impacts or actions on non-shareholders outside the jurisdiction. Such reporting would arguably be required, however, if a reasonable person would expect the relevant impacts or actions to have a material effect on the price or value of the company's securities.
- 18. Who must verify these reports; who can access reports; and what are the legal consequences of failing to report or misrepresentation?**
- 18.1 Reporting conducted pursuant to the Listing Rules must be provided to POMSoX. In the case of most companies, financial reporting under the Companies Act is verified by an auditor.
- 18.2 Annual reports must be provided to all shareholders, unless the shareholders elect not to receive the report. Listed companies must also give POMSoX a copy of their annual report. Members of the public are able to view these annual reports. Financial statements and the auditor's report are provided to shareholders together with the annual report.
- 18.3 Where there is failure to comply with the rules relating to financial statements under the Companies Act, each director has committed an offence. The penalty that can be imposed is a fine. Similarly, if the annual report is not prepared or sent to shareholders in accordance with the Companies Act, each director may be liable to a fine.
- 18.4 Failure to comply with the Listing Rules can result in POMSoX suspending a listed company's securities from quotation. For example, if a company fails to give POMSoX the necessary financial statements, or its annual report, on the day they are due, suspension will occur. POMSoX can also remove a company from the official list if the company is unable or unwilling to comply with, or breaks, a listing rule.

Stakeholder Engagement

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

- 19.1 Section 105 of the Companies Act provides that Schedule 2 governs proceedings at meetings of shareholders except to the extent that the constitution of a company provides otherwise. Schedule 2, clause 8 allows shareholders to raise a matter for discussion or resolution at the next meeting of shareholders subject to some procedural requirements, particularly in relation to timing.
- 19.2 Under s 109 of the Companies Act, management of the company is under the direction and supervision of the board of the company, subject to any provisions in the company's constitution. Management by the board appears to be mandatory under the Companies Act²⁰ unless the company's constitution provides otherwise. Therefore, shareholders may not interfere in the management of the company²¹ unless the company's constitution provides otherwise. The human rights impacts of a company's activities would very likely be a matter of the company's management. Shareholders' ability to directly control the management of the company in relation to non-shareholders may therefore be limited to appointing and removing the board.²²
- 19.3 However, s 90(2) empowers shareholders to pass a resolution relating to the management of a company that will be non-binding unless the company's constitution provides otherwise under s 90(3). This would include a resolution on the management of a company in relation to its human rights impacts. Such a resolution may be influential on the board's decision making, though not binding. We are not aware of specific resolutions of a company or its shareholders that deal with impacts on non-shareholders, including human rights impacts.
- 19.4 In addition, a company can only enter into a 'major transaction' if the transaction is approved by special resolution, or contingent on approval by special resolution under s 110(1) of the Companies Act. A major transaction is defined in s 110(2) as:
- (a) the acquisition of assets the value of which is more than half the value of the assets of the company before the acquisition; or
 - (b) the disposition of assets of the company the value of which is more than half the value of the assets of the company before the disposition; or
 - (c) a transaction which has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities the value of which is more than half the value of the assets of the company before the transaction.

²⁰ Beck, Andrew and Borrowdale, Andrew, *Papua New Guinea: Companies & Securities Law Guide* (1999), p43.

²¹ Beck, Andrew and Borrowdale, Andrew, *Papua New Guinea: Companies & Securities Law Guide* (1999), p 43.

²² Beck, Andrew and Borrowdale, Andrew, *Papua New Guinea: Companies & Securities Law Guide* (1999), p 43.

20. Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions?

- 20.1 A review of the Banking Corporation Act (Chapter 136), the Banks and Financial Institutions Act 2000 (the **Banks and Financial Institutions Act**) and the Investment Promotion Act revealed nothing in the regulation of banks and financial institutions that required the consideration of such impacts. Under the Banks and Financial Institutions Act, the focus of the relevant requirements for authorisation as a bank or a licensed financial institution is that business be conducted in a prudent manner, including maintaining adequate capital resources to safeguard the interests of depositors, maintaining adequate liquidity and limiting exposure to risk of loss. The requirement to conduct business in a prudent manner arguably requires, to an extent, consideration of impacts on non-shareholders. For example, where the impacts on non-shareholders can be viewed as a potential risk of loss, consideration and avoidance of such risk may be required under the Banks and Financial Institutions Act.
- 20.2 Superannuation directors may, but do not have to, consider impacts of investments on non-shareholders. Section 50(1) of the *Superannuation (General Provisions) Act 2000* provides that a director of a licence holder (i.e., a trustee or investment manager) has a duty to the members of the ASF to take reasonable care, and use due diligence, to see that the investment, administration and management of the property of an ASF, inter alia, gives priority to the interests of members and prospective members of an ASF. Section 71 provides compulsory governing rules for ASFs, including provisions to ensure that a trustee's powers are performed and exercised in the best interests of the members (s 71(c)). Trustees must formulate an investment strategy that has regard to, among other things, risks in relation to the ASF's investments (s 71(f)(i)). There are no restrictions preventing considerations of investments on non-shareholders (s 74). Impacts on non-shareholders may therefore arguably be required to be considered in relation to risks to the ASF's investments, but must be acted on only where this is in the best interests of the members.

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

- 21.1 The AGM of a company is, by definition, a meeting of the company, and non-shareholders (apart from auditors) are not generally entitled to attend such meetings under the Companies Act. Shareholders are entitled to attend general meetings (s 106 and more broadly, Div 6) and auditors must be permitted to attend (s 203). There are no statutory rules on attendance by non-shareholders. However, there is case law suggesting that the chair has broad powers over the admission or rejection of people in relation to the orderly running of a meeting,²³ subject to the company's constitution.
- 21.2 A more serious impediment may be that the business of a meeting must be set out in the notice of meeting (Schedule 2, clause 2), and it may therefore not be possible for a

²³ *Doyle v Falconer* (1866) LR 1 328, p 340; see also Magner, Ellis, *Joske's Law and Procedure at Meetings in Australia* (2007, 10th ed), p 39.



non-shareholder to raise new business at the meeting. Thus non-shareholders may only be able to speak on business that was included in the notice of meeting.

Other Issues of Corporate Governance

22. Are there any other laws, policies, codes or guidelines related to corporate governance that might encourage companies to develop a corporate culture respectful of human rights, including through a human rights due diligence process?

- 22.1 There are no government administered policies, codes or guidelines in PNG related to corporate governance that would encourage companies to develop a corporate culture respectful of human rights.
- 22.2 The Business Council of PNG is the peak body representing the private sector in PNG, and it takes part in policy development, research and debate. The Business Council of PNG has a code of conduct that provides for upholding the PNG Constitution, 'promoting fair and non-discriminatory behaviour within a safe, healthy and injury-free workplace for all' and confidentiality of information.²⁴ There are well over 100 members of the Council, including PNG companies and international companies or their subsidiaries. Generally, a company can become a member if it is engaged in, or otherwise interested in, trade and commerce in PNG. It is not clear to what extent this code of conduct is monitored or enforced.
- 22.3 As at 25 September 2009, no PNG companies are listed as members of the UN Global Compact.

23. Are there any laws requiring representation of particular constituencies on company boards?

- 23.1 A review of relevant legislation indicates that there are no laws in PNG requiring representation of particular constituencies on company boards.

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

- 24.1 A review of relevant legislation indicates that there are no laws in PNG requiring representation based on gender or racial/ethnic background on company boards. Neither are there anti-discrimination laws applicable to company boards.²⁵
- 24.2 However, the creation of laws that prohibit discrimination, and even require positive discrimination, is explicitly contemplated by the PNG Constitution. Section 55 of the PNG Constitution enshrines the equality of all citizens and makes it clear that the making of laws that specifically benefit women or particular groups or areas is permitted. This indicates

²⁴ See Business Council of Papua New Guinea, *BCPNG Code of Conduct* (2009) <http://www.bcpng.org.pg/Documents/BCPNG_Code_of_Conduct.pdf> as at 3 March 2009.

²⁵ The *Discriminatory Practices Act* (Chapter 269) is the only general anti-discrimination law, but it is of very limited application. It concerns holders of statutory licences, and seeks to ensure that the holders of such licences are not discriminatory in their business practices, but this seems to be directed at the operation of the business and therefore would not include the composition of the board of directors.

that a law requiring gender or racial representation on company boards would not contravene the provisions of the PNG Constitution.