

LEGALESE

A LEGAL HANDBOOK FOR COMMUNITY ORGANISATIONS



LEGALESE: A legal handbook for community organisations
Published by the Law Society of Singapore ('Law Society').

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The Law Society regrets that it cannot provide any legal advice.

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ISBN:

E-book: 978-981-09-9267-5

Paperback/Softcover: 978-981-09-9266-8

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Welcome to LEGALESE 2016!

In 2013, we published the *Legalese* handbook, a legal toolkit specifically tailored for youth social entrepreneurs to help them not only to start up, but also to empower them to run their businesses. We are delighted to be issuing a reprinted and updated edition of the *Legalese* handbook, the content of which has been expanded beyond social enterprises to cover non-profit organisations as well.

This handbook will help social enterprises and other non-profit organisations in three main ways. First, we deal with the legal issues of start-ups, e-commerce and internet related issues. Second, we address the typical legal concerns that social enterprises and other non-profit organisations face, such as protection of assets. The final chapter considers legal obligations that arise in the event of winding up a social enterprise or other non-profit organisation.

The *Legalese* handbook was enthusiastically received by the social enterprise community. We ran out of copies. We are confident that this new edition, *Legalese*, will be equally well received by its expanded target audience. No one likes legal jargon more than lawyers, but we have, by popular demand, taken the lawyer out of the *Legalese* handbook 2016. We have repackaged the key legal aspects to make it easier to read, but without diminishing the legal concepts presented in it.

We believe that the idea of good corporate citizenship will galvanise businesses into expanding beyond profit maximisation, to focus on being values driven – finding, and filling, gaps in social needs. Over the past year or two this has proven to be the case. Social entrepreneurship has gone from strength to strength and social entrepreneurs are zealously contributing to the “social impact” by setting up organisations that address social needs within our community and yet deliver acceptable financial returns. Social entrepreneurship is well on its way to becoming entrenched in the business eco-system.

In May 2015, President Tan launched the Singapore Centre for Social Enterprise, also known as *raiSE*, a dedicated facility to nurture the growth of social enterprises in Singapore. In November 2015, President

Tan presented President's Challenge Social Enterprise Awards in three categories to winners from a field of 42 social enterprises nominated for the award. It was intended to recognise outstanding social enterprises that play an integral role in our community.

This ecosystem is also supported through grants to budding social entrepreneurs by *raiSE*, the National Youth Council and the Nation Volunteer & Philanthropy Centre. For example, the *VentureForGood* grant, administered by *raiSE*, provides funding for new and existing social enterprises up to a maximum of SGD\$300,000.

At the same time, let us not forget the significant efforts contributed to the broader non-profit sector in Singapore, whether in social and welfare services, education, health care, sports or the arts. The sector is evolving and moving away from reliance on public funds. Civil society bridges this gap, supported by the growth in charitable donations and volunteerism.

The Law Society of Singapore hopes to make a modest contribution to this vibrant growth by enabling both entrepreneurs' and other non-profit organisations easy access to basic legal knowledge to progress and develop in their visions

The success of the original *Legalese* handbook would not have been possible without our volunteer lawyers, who invested much time and demonstrated exemplary skill in crafting the original edition. My heartfelt thanks goes out to them and to the editorial team for our new edition of *Legalese*. They were drawn from the Project Law Help committee members as well as all the volunteers listed in the acknowledgements. We acknowledge with gratitude the social enterprises and other non-profit organisations who have continued to provide crucial feedback and pro bono opportunities for our corporate and transactional lawyers.

Moving forward, we plan to take the *Legalese* online, and transform it into an open and interactive "e-format" that will make it more accessible to a wider audience.

Mr Thio Shen Yi, SC
President
The Law Society of Singapore

Messages

The Charity Council is pleased to support the Law Society's latest publication of *Legalese*. First published in 2013, this revised version has expanded its scope from social enterprises to include charities as well.

Legalese is a useful legal toolkit for anyone who is keen to set up a charity. It will help many more to understand through its clear and simple writing on some of the key legal information covering the operations of a charity, from setting up to winding down.

The Charity Council would like to encourage all charities to read *Legalese* in conjunction with the Charities Act and Regulations. This will help charities gain a better understanding of their legal obligations, as they strive for good governance, transparency and accountability.

Mr Gerard Ee
Chairman
Charity Council

The first edition of *Legalese* was very well received by the sector. The Singapore Centre for Social Enterprise (raiSE) is happy to hear of the launch of this 2nd Edition. We congratulate and thank The Law Society for their initiative to educate social enterprises on some of the fundamental issues of their structure and operations. We are heartened by the continued support of The Law Society as we work towards the common goal of a strong and sustainable social enterprise ecosystem in Singapore.

Mr Alfie Othman
Executive Director
Singapore Centre for Social Enterprise (raiSE)

Preface

Volunteerism and the spirit of enterprise – these two elements drive both the non-profit and not-for-profit sectors in our society. But it takes more than gumption and good intentions to achieve results. It takes wise counsel, and careful preparation. A key step is to understand how best to comply with the law, and to use it to help safeguard one’s interests. This is why *Legalese* exists.

Legalese is a toolkit which equips organisations with essential legal information with which they can better structure and expand their activities. The first edition of *Legalese*, published in 2013, focused solely on social enterprises. In this revised edition, we expanded the scope to include, not only social enterprises (businesses with a social mission), but also non-profit organisations, in order to better support all the key players that serve the community.

Legalese is the culmination of the hard work of dedicated volunteers who have drafted, reviewed and updated the content. Each of these individuals (together with legal volunteers who work with Project Law Help tie-ups and its community clinics) stand as Exhibit A in the evidence for the case that the law is not merely a business or a profession, but a vocation of higher calling.

The Law Society would like to express its gratitude in particular to the following individuals:

Abigail Dawes, Achsah Ang, Adam Maniam, Alex Toh, Alex Ye, Alvin Chen, Amira Nabila Budiyano, Benjamin Ng Tze Ming, Bruno Poh Teck Boon, Chandra Mohan Rethnam, Charmian Aw, Cheryl Mok, Chris Chua, Dahlia Ho, Dayne Ho, Dhiraj Joseph, Doreen Chia, Doris Chia, Elizabeth Tong, Foo Yuet Min, Francis Goh, Gerald Tham, Giouw Rong Zhen Jolie, Goh Pei Shan, Helena Whalen-Bridge (co-editor), Hugh Turnbull, Jonathan Yuen, Kaylee Kwok, Kwa Su Ai, Lee Ming Hui Kelvin, Lin Shumin, Lye Hui Xian, Lynette Maureen Boxall, Melissa Lim Yingli, Melvin Chan, Mohamad Rizuan Bin Pathie, Moses Tan, Nadia Yeo, Nithia Dory, Ong Wei Jin, Patrick Wong Pak Wing, Pauline Tan, Quek Kay Hian, Renu Rajan Menon, Richard Tan Ming Kirk, Roshini

Prakash, Samuel Seow, Sarah Soh Wei Teng, Sarita Misir, Shawn Desker, Sim Kwan Kiat, Soo Bei Han (co-editor), Swee-Sum Lam, Tan Chong Huat, Timothy Hia, Tom Chou, Tom Yeoman, Usha Chandradas (co-editor), Valmiki C Nair, Waldersee Chan, Yap Cui Xian, Yip Wai Ping Annabelle (co-editor), Yuen Wei Loon Samuel.

This publication would not have been possible without the generosity of our sponsors, DBS Bank, SBF Foundation and Withers Khattarwong. We would also like to thank the NUS Pro Bono Group, graphic design company Pagesetters and illustrator Low Yi Lin, for their invaluable contributions to this publication. Special thanks go to the Law Awareness Committee for initially spearheading this project four years ago.

I am grateful to every member of the Project Law Help Committee who has been a part of *Legalese* in one way or another, for their input and support throughout the whole project.

Finally, I hope that this publication will continue to help organisations to do their work legally, and more effectively, as they play their part in assisting the under-privileged, marginalized and differently-abled, all of whom are vital members of our nation's collective family.

Mr Jeffrey Lim
Chairperson, Project Law Help Committee
The Law Society of Singapore

About the Law Society of Singapore Pro Bono Services Office

The Pro Bono Services Office (PBSO) is a Charity (Charity Registration No. T07CC2064L) and approved Institution of Public Character (IPC Registration No. IPC 000571).

PBSO was established on 10 September 2007 with the mission to help bring free legal assistance to those in need in our community, as part of the Law Society's stated mission – to ensure access to justice for all.

PBSO runs a wide range of programmes and activities to (a) serve the community (b) support our volunteers and (c) assist or collaborate on pro bono initiatives with other agencies. These can largely be categorised under:

1. Law Awareness initiatives such as talks, publications and partnerships with organisations for their members and beneficiaries;
2. Free Legal Clinics which provide free general legal guidance to qualifying applicants;
3. Representation for qualifying applicants under the Criminal Legal Aid Scheme (CLAS); and
4. Assistance in the form of legal advice and pro bono corporate transactional services for Non-Profit Organisations and Social Enterprises.

For more information on PBSO and the work that we do, please visit our website at <http://probono.lawsociety.org.sg/Pages/default.aspx>.

Overview: For-profit Legal Structures (1/3)

FOR PROFIT STRUCTURES (Social Enterprises)			
	SOLE PROPRIETORSHIP 	GENERAL PARTNERSHIP 	
WHAT IS IT?	One person in business for himself.	An association of two or more persons carrying on business with a common view to profit.	
HOW MANY OWNERS? 	1	2 to 20 If more than 20 partners, must incorporate as a company.	
SUITABLE FOR? 	Small business with one owner. The owner is willing to take on all the risks of the business.	Small business with multiple owners. The owners are willing to take on all the risks of the business.	
WHO CONTROLS MANAGEMENT? 	Sole proprietor has exclusive control of management.	Partners have equal control of management (unless otherwise agreed).	

			
	<p>A partnership with limited partners, who bear limited liability (limited to their individual contributions); and, at least one general partner, who bears unlimited liability.</p>	<p>Combines the features of a partnership and a company. The business takes on the form of a company, but the management structure and internal workings resemble a partnership. For instance, the mutual rights and duties of the partners are governed by the partnership agreement.</p>	<p>An incorporated association. Once formally incorporated, it has an existence apart from the persons who formed it.</p>
	<p>2 or more At least one general partner & one limited partner. Partner can be a person or a corporation.</p>	<p>2 or more Partner can be a person or a corporation.</p>	<p>Exempt Private Company 20 members or less and no corporation holds beneficial interest in the company's shares Private Company Less than 50 members Public Company More than 50 members</p>
	<p>Partners or investors who want limited risks in the business, and do not wish to participate in the day-to-day management of the company.</p>	<p>Partners who want the business to take on the form of a company, but retain the flexibility of managing the business as a partnership.</p>	<p>Members who want limited risks in the business. Certain government incentives may also be available only to companies.</p>
	<p>General partner controls management. Limited partners cannot take part in management.</p>	<p>Partners have equal control of management (unless otherwise agreed).</p>	<p>Directors control management. Members cannot take part in management, but can exercise certain rights.</p>

Overview:

For-profit Legal Structures (2/3)

FOR PROFIT STRUCTURES (Social Enterprises)			
			
CAN OWNER BE SUED? 	Sole Proprietor can sue or be sued in his own name.	Both firm and partners can sue or be sued.	
WHO OWNS PROPERTY? 	Property is owned in sole proprietor's own name.	Property is owned by partners.	
WHO IS RESPONSIBLE FOR DEBTS AND LOSSES? 	Sole proprietor is personally liable for all debts and losses.	Partners are personally liable for all of the debts and losses incurred by the partnership's and/or other partners	
HOW TO REGISTER? 	All registration is through ACRA		
	If sole proprietor not resident in Singapore, must appoint local manager	If all partners not resident in Singapore, must appoint local manager	

			
	Both firm and partners can sue or be sued.	Firm (not individual partners or members) can sue or be sued.	
	Property is owned by partners.	Property is owned in LLP's or Company's name	
	<p>General partner is liable for all debts and obligations.</p> <p>Limited partner's liability is restricted to his agreed contribution.</p>	<p>Generally, partners are not personally liable for any business debts incurred by LLP.</p> <p>Partners not personally liable for debts and losses incurred by other partners.</p> <p>But, a partner is personally liable if losses arose from his wrongful act or omission.</p>	<p>Liability limited by value of shares owned.</p> <p>Members are not personally liable for debts and losses of company.</p>
	<p>General partner must be lodged with Registrar of Limited Partnerships</p> <p>Limited partner must be registered with ACRA</p> <p>If all general partners not resident in Singapore, must appoint local manager</p>	<p>Every partner must be lodged with the Registrar of Limited Liability Partnerships</p> <p>Must appoint at least 1 manager (ordinarily resident in Singapore)</p>	<p>Submit Memorandum and Articles of Association and other prescribed information to Registrar of Companies</p> <p>At least one shareholder</p> <p>At least one director ordinarily resident in Singapore</p>

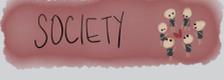
Overview: For-profit Legal Structures (3/3)

		FOR PROFIT STRUCTURES (Social Enterprises)	
		SOLE PROPRIETORSHIP 	GENERAL PARTNERSHIP 
SETUP FEES 	\$65 (\$15 name application fee and \$50 registration fee)		
TAX ON PROFITS 	Personal income tax rates (Sole proprietor's/Partners')		
REGULATORY REQUIREMENTS 	Minimal compliance requirements		
HOW LONG DOES IT LAST? 	Exists as long as the owner is alive and desires to continue the business.	Exists subject to the partnership agreement.	

			
	\$65 (\$15 name application fee and \$50 registration fee)	\$315 (\$15 name application fee and \$300 incorporation fee)	
	Partners' personal income tax rates (if individual) Corporate tax rate (if corporation)		Corporate tax rates
	LP must keep accounting and other records which sufficiently explain its transactions and financial position for at least 5 years. Need not be lodged with ACRA but may be required by the Registrar of LPs for inspection N.A.		Must appoint: <ul style="list-style-type: none"> • company secretary within 6 months of incorporation; and • auditor within 3 months after incorporation Must file annual returns with ACRA Must comply with statutory requirements for annual general meetings, directors, share allotment, etc.
	Exists subject to partnership agreement. If no limited partners, LP registration will be suspended. But, once a new limited partner is appointed, LP registration will be restored.		Exists until wound up or struck off.

Overview:

Non-profit Legal Structures (1/3)

NON-PROFIT STRUCTURES (Non-profit Organisations)			
			
WHAT IS IT?	A society is a club, company, partnership or association of 10 or more persons.	A charitable trust is a trust which is set up to benefit a segment of the public.	
SUITABLE FOR? 	Membership or volunteer based groups that are small and do not depend heavily on donations or external funding. Relatively easy and inexpensive to establish.	Typically used by individuals who wish to set aside some of their assets or income for charitable causes. Costs of establishing and managing charitable trust can be quite high.	
WHO CONTROLS MANAGEMENT? 	Management rests with the committee.	Managed by Trustees to give effect to the specified charitable purpose.	
CAN OWNERS BE SUE OR BE SUED / OWN PROPERTY? 	No	No	
WHO IS RESPONSIBLE FOR DEBTS AND LOSSES? 	Members personally liable for all losses.	Trustees liable for all losses.	

		
	<p>A type of company where a member need only contribute the amount that he agreed to guarantee.</p>	<p>An entity which has both a social mission and business objectives.</p>
	<p>Organisations that want the advantages of incorporation without engaging in business.</p>	<p>Organisations that are business-oriented and aim to remain financially viable. Members make equitable contributions to the capital required and accept a fair share of the risks and benefits.</p>
	<p>Management rests with directors of company.</p>	<p>Management rests with the committee</p>
	<p>Yes</p>	<p>Yes</p>
	<p>Limited to the guarantee given by each member.</p>	<p>Limited to the shares of / guarantee given by each member.</p>

Overview: Non-profit Legal Structures (2/3)

NON-PROFIT STRUCTURES (Non-profit Organisations)			
	<div style="display: flex; justify-content: space-around;"> <div style="text-align: center;">  <p>SOCIETY</p> </div> <div style="text-align: center;">  <p>CHARITABLE TRUST</p> </div> </div>		
<p>REGISTRATION</p> 	<table border="1" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;"> <p>Must submit proposed constitution to Registry of Societies for approval</p> </td> <td style="width: 50%; vertical-align: top;"> <p>Trust Deed Board of Trustees containing at least 3 persons (at least 2 of whom shall be Singapore citizens or permanent residents)</p> </td> </tr> </table>	<p>Must submit proposed constitution to Registry of Societies for approval</p>	<p>Trust Deed Board of Trustees containing at least 3 persons (at least 2 of whom shall be Singapore citizens or permanent residents)</p>
<p>Must submit proposed constitution to Registry of Societies for approval</p>	<p>Trust Deed Board of Trustees containing at least 3 persons (at least 2 of whom shall be Singapore citizens or permanent residents)</p>		
<p>TAX</p> 	<p>Registered Charity</p> <p>Full tax exemption. NPO must prove to the Commissioner of Charities' satisfaction that NPO has:</p> <ul style="list-style-type: none"> (i) an exclusively charitable objective; (ii) at least 3 governing board members (2 of whom are Singapore citizens or permanent residents); and (iii) purposes that will wholly or substantially benefit the community in Singapore. <p>Deductions</p> <p>Donations made to an IPC will entitle donors to enhanced deductions</p> <ul style="list-style-type: none"> • 300% for donations in 2015; and • 250% for donations in 2016 to 2018 <p>of the value of the qualifying donations made</p>		

		
	<p>Submit constitution and other prescribed information to Registrar of Companies</p>	<p>Setup Pro-tem Committee with at least 3 members to undertake a feasibility study, to determine the economic and financial viability of the proposed society.</p> <p>Submit viability statement, particulars of each committee member, draft by-laws to Registry of Co-operative Societies</p> <p>Convene preliminary meeting of at least 10 persons qualified for membership to adopt the by-laws and pass resolution</p> <p>Submit application form, by-laws, business plan and 3 year financial projection and minutes of preliminary meeting</p>
	<p>Registered Charity</p> <p>Full tax exemption. NPO must prove to the Commissioner of Charities' satisfaction that NPO has:</p> <ul style="list-style-type: none"> (i) an exclusively charitable objective; (ii) at least 3 governing board members (2 of whom are Singapore citizens or permanent residents); and (iii) purposes that will wholly or substantially benefit the community in Singapore. <p>Deductions</p> <p>Donations made to an IPC will entitle donors to enhanced deductions</p> <ul style="list-style-type: none"> • 300% for donations in 2015; and • 250% for donations in 2016 to 2018 <p>of the value of the qualifying donations made</p>	

Overview: Non-profit Legal Structures (3/3)

NON-PROFIT STRUCTURES (Non-profit Organisations)			
	<div style="display: flex; justify-content: space-around;"> <div style="text-align: center;">  <p>SOCIETY</p> </div> <div style="text-align: center;">  <p>CHARITABLE TRUST</p> </div> </div>		
<p>REGULATIONS</p> 	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; padding: 5px;"> <p>Governed by the Societies Act</p> <p>Constitution cannot be altered without approval from the Registrar of Societies.</p> <p>Must have place of business.</p> <p>Must hold annual general meeting.</p> <p>Required to submit annual return and audited account.</p> </td> <td style="width: 50%; padding: 5px;"> <p>Governed by the Trustees Act</p> <p>Strict accounting and auditing regulations.</p> </td> </tr> </table>	<p>Governed by the Societies Act</p> <p>Constitution cannot be altered without approval from the Registrar of Societies.</p> <p>Must have place of business.</p> <p>Must hold annual general meeting.</p> <p>Required to submit annual return and audited account.</p>	<p>Governed by the Trustees Act</p> <p>Strict accounting and auditing regulations.</p>
<p>Governed by the Societies Act</p> <p>Constitution cannot be altered without approval from the Registrar of Societies.</p> <p>Must have place of business.</p> <p>Must hold annual general meeting.</p> <p>Required to submit annual return and audited account.</p>	<p>Governed by the Trustees Act</p> <p>Strict accounting and auditing regulations.</p>		

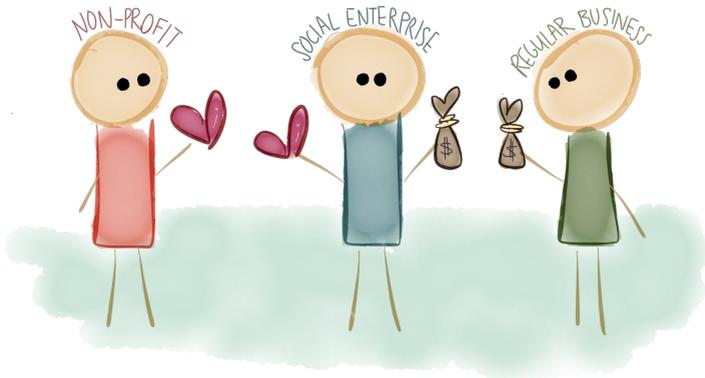
		
	<p>Governed by the Companies Act</p> <p>Stringent statutory obligations, including annual audit of accounts, holding of AGMs and filing of annual returns with ACRA.</p> <p>Minimum of 3 persons to act as the governing board members, at least 2 of whom shall be Singapore citizens or permanent residents</p> <p>Prohibited from paying dividends and profits to its members</p>	<p>Governed by Co-operatives Societies Act</p> <p>Submit annual report with copy of audited financial statements and audited report to Registrar of Co-operative Societies.</p>

STARTING UP



1

WHAT ARE SOCIAL ENTERPRISES AND NON-PROFIT ORGANISATIONS?



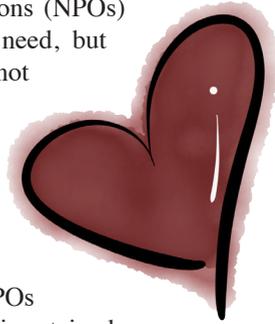
WHAT IS A SOCIAL ENTERPRISE?

The term 'social enterprise' means a business which seeks to create social impact through its trading activities¹. Social enterprises come in many forms: they can be co-operatives, restaurants, retailers, fair trade organisations, travel agencies, tailors, moving companies, and even career consultancies.

On top of attaining their social and/or environmental goals, social enterprises, like any other commercial entity, aim to make a financial profit. They have a conventional bottomline to measure financial performance, a second bottomline to determine social outcomes (double bottomline) and sometimes even a third bottomline to assess environmental outcomes (triple bottomline). As organisations operating in the commercial sector but having, at their core, interests which are traditionally associated with the non-profit sector, the work of social enterprises is both challenging and invigorating².

WHAT IS THE DIFFERENCE BETWEEN A SOCIAL ENTERPRISE AND A NON-PROFIT ORGANISATION?

Social enterprises are like non-profit organisations (NPOs) in that social enterprises serve a community need, but they are different from NPOs because NPOs do not seek to earn a profit. In other words, a social enterprise would have a business model to generate profits while serving a social need. NPOs are legally constituted organisations whose main purpose is to support or engage in activities of public or private interest without any commercial or monetary profit. When NPOs earn money over and above their expenses, it is retained by the organisation for its future activities, and unlike a profit-making organisation and some social enterprises, NPOs do not distribute their earnings among members. NPOs, also referred to as Voluntary Welfare Organisations (VWOs) in Singapore, can be registered under the law as a public company limited by guarantee, society, or charitable trust³.



Examples of NPOs in Singapore include the Assisi Hospice, Chinese Development Assistance Council (CDAC), Make-A-Wish Foundation, National Kidney Foundation, and Ren Ci Hospital⁴.

WHAT IS 'PROFIT'?



Most groups need money to carry out their activities. A group may raise money by charging its members fees, holding raffles, seeking donations from the public, applying for grants of money from the government or in other ways. A group will have a 'profit' (a surplus) if it has extra money left over, after it has paid all its bills and expenses (for example, room hire, coffee and tea expenses, telephone bills, insurance premiums and employee wages).

CAN A NON-PROFIT ORGANISATION MAKE PROFIT?

Non-profit groups can make a profit in the sense that they can generate funds over and above their expenses. In fact, it might be a good idea for a non-profit group to aim to have a small profit each year to be able to pay for unexpected expenses or to start new programmes. Non-profit groups can also:

- Employ people and pay them reasonable salaries;
- Make money by charging members of the public for services;
- Make money by selling or leasing property; and
- Invest money in shares and receive money back.

It is what the group does with the profit, rather than whether it has made a profit, which makes the group non-profit. In a non-profit group, profits (such as from the sale of services or property) must be used to carry out the group's purpose and must not be distributed to members or any other individuals.

WHAT IS THE DIFFERENCE BETWEEN A NON-PROFIT ORGANISATION AND A BUSINESS?

In a 'for-profit' group (such as a business), the profit may be distributed to the group's owners or to individuals, members or shareholders. In a 'for profit' group, people who are involved in the group are entitled to receive a personal benefit from the profits of the group (such as a dividend, or money when they sell their shares, or a payment directly from the profit). Identifying NPOs can be a little confusing as some 'for-profit' groups operate in the community sector (for example, in childcare and aged care). The main difference between NPOs and social enterprises is that social enterprises can adopt a for-profit structure.



HISTORY OF SOCIAL ENTERPRISES

Social enterprises are not new. While the term has seen a resurgence in the last forty years or so, one of the first successful social enterprises, the Rochdale Society for Equitable Pioneers, was formed more than 160 years ago, in December 1844, in the United Kingdom.⁵ A co-operative society, the members of the Rochdale Pioneers worked together to help one another meet their financial needs and aspirations. Using a set of seven guiding rules known as the 'Rochdale Principles', the society supplied good quality products such as butter, candles, soap, flour and blankets to its members cheaply, and then re-distributed the profits back to them.⁶ The Rochdale Principles include open membership, democratic control and political neutrality, and are credited as the basis for the development and growth of the modern co-operative movement.⁷

Around the same time, a different form of social enterprise was taking root across the ocean in the United States. In 1889, Jane Addams and Ellen Starr started running a centre for higher civic and social life called Hull House in Chicago, which instituted and maintained educational and philanthropic enterprises as part of its mandate.⁸ By its second year of operation, Hull House was host to two thousand people every week, and services such as a kindergarten and adult night school were partially supported through a public kitchen selling soups and stews, a coffee house and a coal co-operative.⁹

Soon after, in 1902, a Methodist minister, Edgar J. Helms established Goodwill Industries in Boston to give poor city residents, many of whom were considered unemployable, a job in repairing and reselling household goods and clothing donated by the wealthy.¹⁰ Employees received \$4 a day for their work, and when money was scarce, \$5 in clothing vouchers.¹¹

One of the best known Asian social enterprises is the more recent Grameen Bank, a microfinance institution started by Professor Muhammad Yunus in Bangladesh in 1983.¹² The Bank makes small loans to the poor to enable them to build their businesses and pull themselves out of poverty. In just over 20 years, the Grameen Bank has expanded its reach to over 1,000 branches across Bangladesh and collects an average of \$1.5 million in weekly instalments.¹³ Its methods are also applied in projects in 58 countries, including the US, Canada, France, the Netherlands and Norway.¹⁴ In 2006, Professor Yunus and the Bank were jointly awarded the Nobel Peace Prize.

SOCIAL ENTERPRISES IN SINGAPORE



Social enterprises have a long history in Singapore too. One of the first social enterprises to be established was The Singapore Government Servants' Co-operative Thrift and Loan Society Ltd, formed in October 1925 with 32 members.¹⁵ At that time, there were no banks or other financial institutions that workers could turn to when they needed financial assistance, so they banded together to form co-operatives as a form of mutual aid. Indeed, in the 15 years between 1925 and 1940, over 43 thrift and loan societies were formed to cater to the needs of civil servants, teachers, custom officers and those working in the private sector.¹⁶ Today, one in three working Singaporeans is a member of a cooperative, and the movement contributes an estimated \$600 million to the Singapore economy (based on 2010 Gross Domestic Product).¹⁷ The 80 active co-operatives not only provide access to loans and credit facilities, but also moderate

prices at grocery stores and food courts, cater to early childhood education needs, and ensure the affordability of healthcare and medicine.¹⁸ While co-operatives are the more established form of social enterprise in Singapore, they are by no means the only form. As of February 2016, the number of social enterprises registered as members of the Singapore Centre for Social Enterprise (raiSE) reached almost 400.¹⁹ Together, they address a wide range of social needs, from supporting youth-at-risk and environmental issues, to skills-training and employment for the disadvantaged and underprivileged.

While social enterprises in Singapore can be registered in different legal forms, including private companies, companies limited by guarantee and limited liability partnerships, they tend to share the following intrinsic characteristics:²⁰

A contextually relevant social mission at (re)birth with a business model

From the time of its inception, a social enterprise has a clearly articulated and institutionalised social mission or purpose that it seeks to address through business processes. The mission could encompass a range of social or environmental issues, but these have to be relevant to domestic, demographic, historic or even geographic circumstances.

A social mission which flows through the products, services and operations, and where all social impact achieved is consistent with the mission

The social mission of the social enterprise should be evident not only through the products and services it offers, but also in the way it operates and the impact it achieves on the ground. Unlike traditional businesses conducting projects as part of corporate social responsibility, the social good done by a social enterprise is a part of the core business of the company. Even if delivering the social good is not its only core business, the organisation is a social enterprise as long as its social mission is visible in every aspect of its work.

An intention and roadmap to sustainable financial performance (may have multiple revenue streams)

A social enterprise is not a charity, so the business model should not depend on government grants and charitable donations as its primary source of funding. Even if it initially has to rely on grant-funding to run, it should have a clear aim to become sustainable through earned revenue and have a well-designed plan to achieve this goal. This may require multiple revenue

streams, including some element of grant-funding, but the organisation's continued existence should not depend on this alone.

Based on business processes and thinking

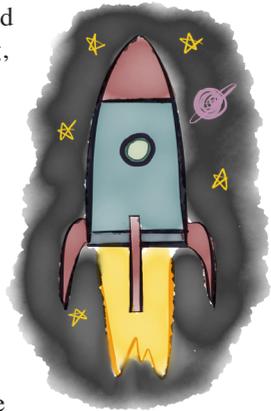
Having business processes and thinking to underpin a social enterprise is central to its characteristic. When a social enterprise is being conceptualised, the first thought should be how to design the business to achieve the desired social objectives. This is unlike a regular for-profit engaging in corporate social responsibility and designing the project to leverage the company's pre-existing business advantage. A social enterprise should run on strong business fundamentals designed to address the social objective.

Continuous balancing of dynamic tensions across business and social objectives

A social enterprise would face challenges of having to continuously manage the tensions between its social and business objectives of a social enterprise. There are several hidden benefits and costs to running a social enterprise that are not immediately evident from looking at the company's balance sheet. For example, a social enterprise hiring staff from a particular beneficiary group may have to adapt their business processes to suit their staff's needs and capabilities, thus compromising on production efficiency.

WHAT IS THE FUTURE FOR SOCIAL ENTERPRISE?

As the world becomes more urbanised, integrated and interdependent, threats such as global warming, infectious diseases, global terrorism and economic crises may hit several countries at the same time. There are a few implications. Firstly, as some social and environmental concerns become borderless, the solutions may need to transcend geographical borders. Secondly, the solutions should be such that they can be easily enhanced or expanded to adapt to changing circumstances. Thirdly, the germination of the social enterprise requires deep compassion enabled by strong skills and resilience in the social entrepreneur. It begins with the entrepreneur believing that the whole is greater than the sum of its parts. Growing this conviction goes beyond all incentives that any government, agency or corporation can provide.



While there are no known estimates of the size of the global social enterprise space, there is evidence to suggest that more and more new organisations and movements are emerging to address issues ranging from education, healthcare, environmental protection, access to microcredit, landmine eradication, to even the creation of an international criminal court.²¹ In the UK alone, government data suggests there are approximately 70,000 social enterprises, contributing at least 18 billion pounds to the economy and providing jobs to about a million people.²² Figures from the United States are still pending the completion of The Great Social Enterprise Census, but preliminary findings suggest that the small sample of respondents already represent over \$300 million in annual revenues and about 14,000 employees across 28 states.²³ These are not trivial figures. It is clear that the role of social enterprises in communities around the world is increasing, and the time is ripe for you to consider starting one of your own.

SHOULD YOUR ORGANISATION BE A SOCIAL ENTERPRISE OR AN NPO?

In deciding what type of structure your organisation should have, it is important to first have a clear idea about the aim and proposed structure of your group. This will help you to make decisions about the best way to set up your group, as well as highlight any legal issues that your group may need to consider, both at present and in the future. Though you may be just starting out, it is important to think about the long term goals of your organisation.

Answering the following questions below will give you a clearer idea of what the aim of your group is and what the best structure for your group will be.²⁴



Questions about your group

1. What are the aims and purposes of your group? What does your group aim to achieve and what is the need it will fulfil? Does it have a feasible business model or not?
2. Are there groups that already exist that have similar aims or purposes to the group you want to start? If so, is there still a reason for starting a new group? Have you or your group considered joining the existing



one rather than starting a new one? (Remember, there can be extra expense and paperwork involved in running a separate group.) List any similar groups that currently exist and the reasons why a new group is needed.

3. Is your group forming to produce a one-off, short-term project (for example, organising a one-off event, raising awareness about an upcoming issue)? Or will the group be a long-term venture (for example, assisting youth from a particular cultural group, starting a self-help group for people suffering from a certain condition)?

Questions about the people involved

1. Do you have people who are interested in being involved in the group? If so, how many people might get involved now? And in the future? If not, how will you attract people to join your group?
2. Will the group have members? Who will be the members of the group? If there are members, are there membership requirements? Will there be a membership fee?
3. How will the group be organised? Are there (or will there need to be) rules by which the group operates? If there are rules, are they written down or just 'known' by the group? Will the group have a formal structure (for example, hold regular meetings, have people who hold positions in your group) or just be quite informal?
4. How will the group be managed or run? Will it have a board or committee of management? Will it be run completely by volunteers, or will it employ staff? What about in the future?
5. If the group is going to employ staff (either now or in the future) will it employ a person involved in setting up the group or a member of the group?

Activities of your group

1. What will be the main activities of the group, or what programmes or services will the group provide?
2. Where will the group be located? Where will the group operate or where will its activities take place? (For example, within Singapore or overseas?) What about in the future?
3. Will your group be providing activities, programmes or services to the public generally, to a targeted group of the public or just to members of the group?

4. What equipment, buildings or infrastructure will be needed to carry out the activities of the group?

Money and Resources

1. Do all the people involved in your group agree that it is going to be a ‘non-profit’ group, with all of the funds going back to the group?
2. How much money (funding) or other resources do you estimate that your group will need to carry out its activities?
3. Does your group currently have any money or access to any resources?
4. How is your group planning to raise money or resources for its activities? (Possible sources include: government grants, philanthropic (private) or corporate funding, membership fees, fund-raising activities, fee for services, investments, bequests or donations, etc.)

Once your group is clear about its aims, membership and activities, your group will need to decide whether it is going to operate as a social enterprise or non-profit group.

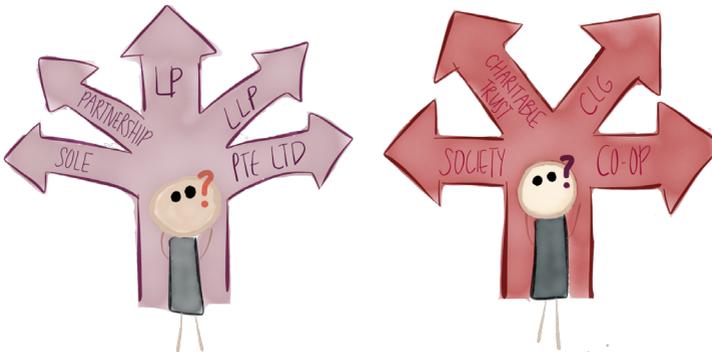
WHY MUST YOU DETERMINE WHETHER YOUR ORGANISATION IS A SOCIAL ENTERPRISE OR A NON-PROFIT?

There are different laws that apply to for-profit and non-profit groups. Many of these laws treat non-profits favourably, as the resources of the group will be put back in to helping the community. For example:

- Legal structure: if your group wants to adopt a legal structure, there are particular legal structures that are only available to non-profit groups (such as a “charity”);
- Tax laws: the tax laws offer a number of tax exemptions, concessions or benefits to eligible non-profit groups (although being non-profit is only one of a number of requirements);
- Funding: some government grant programmes and many private philanthropic bodies are set up only to fund non-profit groups; and
- Fundraising: some laws only allow non-profit groups like charities and community groups to apply for registration to conduct certain fundraising activities (like minor gaming activities).

2

LEGAL STRUCTURES FOR SOCIAL ENTERPRISES AND NON-PROFIT ORGANISATIONS



WHY ADOPT A LEGAL STRUCTURE?

Adopting a legal structure for your organisation has various potential benefits, depending on whether the organisation is a non-profit organisation (NPO) or social enterprise (SE):

1. **Protects organisers from legal responsibility;**

Business owners, volunteers, employees and officers are protected from personal responsibility for any debts or legal responsibilities when undertaking activities on behalf of your organisation (unless arising out of your own fraud or negligence) except for sole proprietorships and partnerships as explained below.

2. **Encourages proper management and governance;**

Adopting a legal structure promotes administrative compliance that encourages proper management and governance within your organisation.



3. Provides tax benefits;

Adopting the legal structure of a charity qualifies your organisation for tax benefits. For more information, please refer to Chapter 7 of this handbook on Taxation.

4. Promotes public recognition and trust; and

Adopting a more complex legal structure can ensure the protection, sustainability and accountability of your organisation because your officers work according to rules, hold meetings and provide financial information to government. This formal legal structure in turn promotes recognition, public support and trust for the cause of your organisation.

5. Enables perpetual succession.

Some legal structures allows your organisation to exist in perpetuity because the organisation has a legal identity separate to that of the people involved in it. This means that your organisation will continue to exist even when membership changes.

BENEFITS OF NOT ADOPTING A LEGAL STRUCTURE

Nonetheless, not adopting a legal structure for your organisation may also have its benefits:

1. Informality;

Your organisation can remain informal and does not have to hold meetings in a specific format (although it still can have rules or a constitution to govern these matters).

2. Privacy; and

Your organisation does not have to register with the government or tell the government or the public who its members are or what its financial situation is.

3. Reduced administrative costs.

Your organisation does not have to pay any registration or annual fees to government.

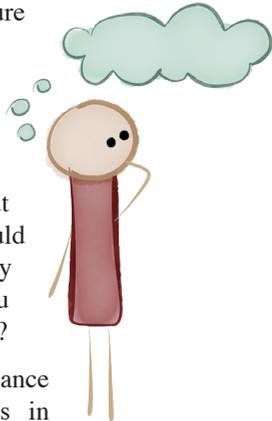
! If your organisation has 10 or more persons (including any overseas employees), it is compulsory under the Societies Act for you to have a legal structure. On the other hand, if your organisation is under 10 persons and decides not to adopt a legal structure, it should regularly review its position at least every year or when there is a significant change (for example, upon employing a paid staff member). In addition, if your organisation grows and wants to take on further activities or seek funding, it may wish to re-consider the decision about adopting a legal structure.

! Organisations that do not adopt a legal structure will still have legal obligations and will need to comply with employment law, occupational health and safety law, tax law and a range of other laws that apply to all organisations, regardless of whether they adopt a legal structure or not.

CHOOSING THE RIGHT LEGAL STRUCTURE

Your choice of a legal structure will depend on a number of different factors. Here are some questions you might want to ask yourself (and a lawyer) before deciding on the type of structure to adopt:

- (a) What kind of potential legal liability might you face in the course of your operations?
- (b) Do you intend for the organisation to start out big? How many partners or investors would you have? Do all of them expect to have a say in how the organisation is to be run? Do you want to have full control of the organisation?
- (c) Are you prepared to spend time on compliance issues to ensure that the organisation is in compliance with the various rules and regulations applicable to the legal structure chosen?
- (d) Do you intend to undertake any general fund-raising from the public or will the social mission of your enterprise be self-funded entirely from the profits generated by the business? Do you want to be able to have relatively quick access to additional funding (e.g. banks, financial institutions)?
- (e) Will operations be limited to Singapore? If you intend to conduct part



of your operations overseas, will the chosen legal structure have any effect on cross-border issues? (For example, if you are transferring profits or funds overseas, would the legal entity receiving / paying the funds face any restriction or have to pay any additional tax on such funds? Would the position be different if a different legal entity is chosen?)



Choosing the right legal structure will help your NPO/SE to start off on the right foot. The different types of legal structures discussed below are broadly categorised into “For-Profit Legal Structures” and “Non-profit Legal Structures” and are accompanied by the advantages and disadvantages of each structure.

FOR-PROFIT LEGAL STRUCTURES

If you are setting up a SE (i.e., a business with a social mission), you will be running a business with some kind of profit-making structure, so you need to consider adopting one of the for-profit structures for your business. NPO structures are also included toward the end of the chapter in case that structure makes more sense for your organisation.

There are a number of different social enterprise models that you can consider. Some people may even choose to set up different arms for the same social enterprise and have each arm adopt a different legal structure. For example, under the ‘plough-back profit’ model of a social enterprise, one may choose to set up a purely commercial business (i.e. under a for-profit legal structure), whereby such profits earned are subsequently channelled into a separate Institute of Public Character (IPC) or charity which has been set up by the same founders of the commercial business, for the purpose of executing a particular social mission.



For-profit legal structures are applicable if you intend your organisation to be a social enterprise. However, if you intend your organisation to be a charity, you cannot adopt the for-profit legal structures of sole-proprietorship, general partnership, limited partnership, limited liability partnership and private limited company, because charities are not supposed to distribute profits.

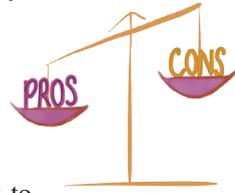
Sole-Proprietorships

A sole-proprietorship is the simplest and most flexible business structure. Owned by one person, the sole-proprietorship has no partners and the proprietor has absolute say regarding its daily operations and management

affairs. This structure is suitable for small individually-owned enterprises whose business carry minimal risks.

Pros

1. Sole-proprietorships are simple to set up due to their minimal administrative requirements.
2. Sole-proprietorships are also relatively easier to maintain and manage.
3. Sole-proprietorships can be terminated swiftly with fewer legal formalities.



Cons

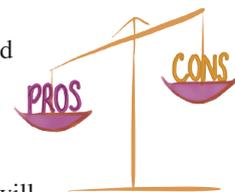
1. Little legal protection is afforded to sole-proprietors because sole-proprietorships are not distinct legal entities from the person running them. The sole-proprietor's personal wealth and assets may not be protected from business risks. The sole-proprietor will be held personally accountable for all the liabilities arising from his business.
2. The limited availability of tax benefits or incentives for sole-proprietors may restrict capital needed for expansion.
3. Issues of perpetual succession may arise in the event of the demise or departure of the proprietor due to the sole-proprietorship's lack of a separate legal personality.

General Partnerships

A partnership is a business firm formed by more than one individual. All general partnerships must be registered with the Accounting and Corporate Regulatory Authority (ACRA) and the maximum number of partners in a partnership is capped at 20 persons. Partnerships with more than 20 partners must be registered as a company under the Companies Act (Cap. 50) (CA) (as discussed below).

Pros

1. Partnerships are relatively easy to set up and administer.
2. As partners are taxed on their respective shares of income from the partnership at their respective tax rates (i.e., an individual partner will



be taxed at his personal rates of income tax), paying tax purely in respect of personal income may be more advantageous than setting up a company and being liable for corporate tax which is currently fixed at a rate of 17%. However, this is dependent on the level of income of the partners.

3. Funding may also be easier to obtain compared to sole-proprietorships, as a wider assembly of partners may provide access to a bigger pool of funds or assets for the purpose of providing security if loans are to be obtained from banks.
4. Partners are incentivised to contribute by pooling expertise and experience to increase the partnership's profitability.

Cons

1. Partnerships are not distinct legal entities. As such, in any legal action, the partnership can be sued in the names of individual partners, which may be detrimental to each partner.
2. As with sole-proprietorships, there is also no perpetual succession of partnerships. The partnership will thus dissolve with the departure or the death of any one of the partners. However, most partnership agreements provide for these types of events, with the share of the departed partner usually being purchased by the remaining partners in the partnership.

Limited Partnership (LP)

An LP offers both limited liability and tax transparency to investors who do not wish to participate in the day to day management of a partnership. The liabilities of limited partners (in respect of the partnership's debts and obligations) are limited to their individual contributions to the venture in accordance with what had been agreed at the outset. Such partners forgo their rights to be involved in the management of the business in return for their limited liability protection. They will however have access to the partnership's books and may offer advice on the state of the business.



If however, a limited partner participates in the management of the business, he forfeits his 'limited liability status' and will then be liable for the debts and obligations incurred by the limited partnership during his period of forfeiture¹. The First Schedule to the Limited Partnerships Act (Cap. 163B) (LPA), contains a list of 'safe harbour activities' which are activities a limited partner may undertake that will not be construed as 'participation in



management'. Examples of 'safe harbour activities' include: contracting with the limited partnership, and acting as an agent or employee of the limited partnership within the scope of the authority conferred by the partners.

An LP requires one or more persons to be registered as a limited partner pursuant to the LPA. If the LP therefore fails to have a limited partner, its LP status will be suspended and the general partners will become registered under the Business Names Registration Act 2014 (Act 29 of 2014) (BNRA)². In addition to having at least one limited partner in the LP, there must, at the point of registration, be at least one general partner who will undertake full liability for all the debts and obligations incurred by the business. The general partners of an LP are, in all major aspects, in the same legal position as the partners of a conventional general partnership³. They have management control and are jointly and severally liable for the debts of the LP.

Like a general partnership, an LP is not required by law to have its accounts audited or filed with the regulators. It is only required to keep proper accounting records that will enable true and fair financial statements to be prepared if necessary. There is also no maximum number of partners in an LP. Partners can either be individuals and/or foreign or local corporations.

Pros

1. In practice, LPs can be easier to administer, with only basic account-keeping requirements and without the need to formally file annual returns unless requested by ACRA. The limited partners are not required to disclose the capital contributions made at the point of registration.



2. As an LP is not considered a separate legal entity, it will be tax transparent and each partner will be taxed on an individual basis for the profits he gains from the LP.

Cons

1. As an LP is not considered a separate legal entity, the general partner(s) would be personally liable for all the debts and obligations incurred by the business⁴. On the other hand, the legal responsibilities of limited partners (in respect of the firm's debts and obligations) are limited to their individual contributions to the venture in accordance with what had been agreed at the outset⁵.

Limited Liability Partnership (LLP)

An LLP combines the features of a partnership and a company. Governed by the Limited Liability Partnership Act (Cap. 163A) (LLPA), an LLP gives partners the flexibility of operating as a partnership while protecting their investment in ways similar to private limited companies.

Pros

1. LLPs have separate legal identities, can own properties, enter into contracts and sue or be sued in their own names. Therefore, a partner of an LLP enjoys limited personal liability and thus will not be held personally responsible for the wrongful acts of another partner with the exception of such claims and losses that result from his/her own wrongful act or omission.
2. LLPs benefit from perpetual succession. Thus, the resignation or death of any of the partners does not affect its existence, rights or liabilities.



Cons

1. An LLP must be registered with ACRA and is required to keep accounting records that adequately explain the transactions and financial position of the LLP⁶.
2. An LLP must also submit to ACRA an annual declaration of solvency or insolvency (i.e. being able or unable to pay its debts) which will also be made publicly available⁷.

Private Limited Company

An incorporated company has the fundamental characteristic of having a separate legal personality. It can be limited by shares and the liability of its members is confined to each member's capital contribution towards the company. Regardless of its private or public status, registered companies are taxed at the prevailing corporate tax rate. Note however, that private companies are limited to not more than 50 shareholders under the CA. Every company must have a constitution which governs the company and its members⁸.

Pros

1. A company's existence does not depend on the continued membership of any of its members. As a company is regarded as a separate legal entity, it may:

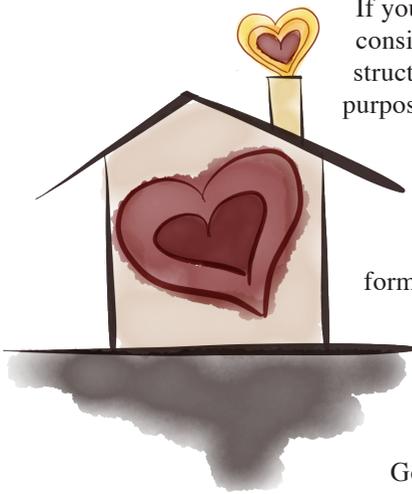


- raise capital from investors or banks;
 - sue and be sued in its own name without incurring further liability to its members; and
 - hold land in its own name.
2. Certain government incentives may also be available only to companies.

Cons

1. Public and private companies have to comply with a number of requirements under the CA, including those concerning the appointment of directors, the conduct of annual general meetings (AGM) and the appointment of company auditors and the company secretary.

NON-PROFIT LEGAL STRUCTURES



If you are setting up an NPO, you will need to consider adopting one of the non-profit legal structures below that will be suitable for your purpose.

With non-profit legal structures, the relevant legal considerations are not so much the advantages and disadvantages of the different legal forms but rather whether the legal structure chosen is a suitable vehicle which will enable the founders to achieve the end result sought by them.

Society

Governed by the Societies Act (Cap. 311) (SA), societies are usually NPOs whose core structure is not profit-driven. Societies are suitable for membership or volunteer-based groups that are small but strongly linked to communities and do not depend heavily on donations or external funding. Members of societies may be required to contribute to the funds of the society by way of subscription or annual fees, although many societies generate funds through donations from the public and fund-raising activities. A society would have to submit its proposed

constitution to the Registry of Societies for approval before the society may be formed.

Upon formation, the Constitution cannot be altered without approval from the Registrar of Societies. In general, the Constitution sets out:

- The aims and objects for which the society is formed, or which it may pursue, or for which its funds may be applied;
- The qualifications for membership and for the holding of any office;
- The method of appointment or election to any office;
- The rules by which the society is to be governed;
- The formation of committees to carry out approved projects and programmes of the society;
- The formulation of by-laws which do not conflict with the Constitution for carrying out the day-to-day administration of the society; and
- The method and manner by and in which any of the above matters may be amended⁹.

For a sample Constitution and further instructions, please refer to the Registry of Societies website.



Societies are also required to have a place of business which refers to the place where the records and books of accounts of a society are kept.

Societies can have a president, a secretary and members of the committee of a society. These officers do not require particular qualifications. However, no person shall act as an officer of a registered society if he has been convicted for an offence involving the unlawful expenditure of the funds of the society or of other criminal offence(s)¹⁰.

Societies are required to hold its AGM in accordance with the provisions in the society's Constitution. The society is required to submit the annual return and audited account within one month of the holding of its AGM to the Registrar of Societies, or if no AGM is held, once in every calendar year within one month after the close of its financial year.

One practical benefit of establishing a society is the fact that it is relatively easier and inexpensive to establish, as compared to other legal structures. Societies can also be appealing to donors who prefer donating and funding entities which are formally and legally recognised.



Societies which are registered charities do not have to pay any income tax. Societies are required to have a place of business and a constitution which cannot be altered without approval from the Registrar of Societies. Furthermore, unlike a company, a society does not have a separate legal entity from its members. This means that all of its members will be held personally liable for its losses.

An example of a society is the Singapore Children's Society which aims to protect and nurture children and youth of all races and religions, with a special focus on children and youth who are being abused, neglected, and/or are from dysfunctional families. Other examples include the Securities Association of Singapore and the Photographic Society of Singapore.

Charitable Trusts

A charitable trust is a trust which is set up for a specific charitable purpose. These purposes can be classified under four main categories:

- The relief of poverty;
- The advancement of education;
- The advancement of religion; or
- Other purposes beneficial to the community which include, amongst others:
 - ◇ The advancement of health;
 - ◇ The advancement of citizenship or community development;
 - ◇ The advancement of arts, heritage or science;
 - ◇ The advancement of environmental protection or improvement;
 - ◇ The relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantages;
 - ◇ The advancement of animal welfare; and
 - ◇ The advancement of sport, where the sport promotes health through physical skill and exertion.

Charitable trusts are governed under the Trustees Act (Cap. 337), along with all other types of trusts in Singapore. They are typically managed by a Board of Trustees, which may sometimes involve a corporate entity (such as the HSBC Trustee (Singapore) Limited), or include the family members of the individual.

A charitable trust does not require (i) a permanent place of business or (ii) regular AGMs to be conducted. Trustees of charitable trusts have the power to manage the trust fund to give effect to the specified charitable purpose and, must do so to the best of their knowledge and experience.

A charitable trust does not have a separate legal personality. All liabilities arising from the charitable trust will be borne by its trustees. This will not be ideal if the charitable trust is involved in many daily transactions as that may expose its trustees to an excessive number of liabilities. Generally, there are strict accounting and auditing regulations that must be complied with by the trustees, and failure or negligence in doing so will result in a penalty. Consequently, the costs of establishing and managing a charitable trust can be quite high.

Some examples of charitable trusts in Singapore include: Chen Su Lan Trust, Isaac Manasseh Meyer Trust Fund, and the Mrs. Lee Choon Guan Trust Fund.

Company Limited by Guarantee (CLG)

Unlike a company limited by shares, a CLG is primarily used for NPOs with a corporate status (i.e., trade associations, educational and religious bodies or professional societies). Similar to a company limited by shares, every CLG has a constitution that governs the conduct and relationships between the company and its members, with liabilities limited to the guarantee given by each member. It is also prohibited from paying dividends and profits to its members. In the event of a winding up, any residual property left behind shall not be distributed to its members, but instead to institutions having similar objects as the CLG or to a registered charity as determined by the Commissioner of Charities¹¹.

The amount guaranteed by each member of the CLG can be nominal. It may sue or be sued in its own name, as the CLG is considered to have separate legal identity. The CLG may enjoy full tax exemption on its income if it has been awarded charity status.

Similar to non-exempt private companies and public companies limited by shares, a CLG is required to meet stringent statutory obligations under the CA, including those related to the annual audit of accounts, the holding of AGMs and the filing of annual returns with ACRA.

Some examples of CLGs in Singapore include: Singapore Mediation Centre, the Singapore Internet Exchange, the Singapore Chamber of Maritime Arbitration, and the Singapore Insurance Institute.

Co-operative

A co-operative is a business entity which is underpinned by a social mission.



Co-operatives are often created for the purpose of uplifting the socio-economic well-being of their members. A co-operative identifies social problems and attempts to provide solutions to alleviate or address such issues. It serves the needs of its members without sacrificing the financial bottom line of the co-operative.

Compared to most non-profit legal structures, co-operatives are more mindful of their financial position and aim to remain economically viable. Members make equitable contributions to the capital as required by the co-operative and accept and undertake a fair share of the risks and benefits. Co-operatives work on the principles of self-help and mutual assistance to provide services to their members.

An example would be the NTUC FairPrice Co-operative Limited (a chain of supermarkets run by the National Trades Union Congress, commonly known as NTUC Fairprice). Since its inception, NTUC FairPrice has aspired to be Singapore's leading world-class retailer with a heart. As a co-operative, NTUC FairPrice provides to its group of 500,000 strong members affordable food staples and other essentials.

A co-operative is governed by the Co-operatives Societies Act (Cap. 62) and the Co-operative Societies Rules 2009 of Singapore and has to be registered with the Registry of Co-operative Societies. There are generally two pre-requisites:

- Members of a co-operative get together to undertake feasibility study of the society including its objects, constitution and by-laws; and
- They have to submit a business plan of the co-operative to the Registrar.

For more information on setting up a co-operative, please refer to Chapter 3.

REGISTRATION OF AN NPO AS A CHARITY/ INSTITUTION OF PUBLIC CHARACTER ("IPC")

Charity

If your NPO is registered as a charity, it can enjoy certain tax benefits.

Charities are organisations which:

- Operate on a not-for-profit basis;
- Are set up exclusively for charitable purposes; and
- Carry out activities to achieve these purpose(s) which benefit the public.

Before awarding the charity status, the NPO must prove to the Commissioner of Charities' satisfaction that the NPO's objectives (i) meet an exclusively charitable objective, (ii) have at least 3 governing board members (at least 2 of whom are Singapore citizens or permanent residents) and, (iii) have purposes that will wholly or substantially benefit the community in Singapore.

As long as your organisation is set up as above, it must apply to be registered within 3 months of its establishment.

The following are recognised as charitable purposes:

- Relief of poverty;
- Advancement of education;
- Advancement of religion; or
- Other purposes beneficial to the community, which include commonly recognised ones such as:
 - ◊ Promotion of health;
 - ◊ Advancement of citizenship or community development;
 - ◊ Advancement of arts, heritage or science;
 - ◊ Advancement of environmental protection or improvement;
 - ◊ Relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantages;
 - ◊ Advancement of animal welfare; and
 - ◊ Advancement of sport, where the sport promotes health through physical skill and exertion.

If your NPO is registered as a charity, it can enjoy certain tax benefits. The Commissioner of Charities has to be satisfied that the NPO's objectives meet a charitable objective before awarding this status.

The key benefits of obtaining charity status include:

- Tax exemptions; and
- Greater credibility of NPOs so as to encourage donations and funding, especially where donors require recipients to be recognised charities.

For more information regarding the tax exemptions available to charities, please refer to Chapter 7 on Taxation.



Institution of Public Character (IPC)

An IPC status is independent of charity status. If your NPO registers itself as an IPC, it may issue “Tax-Deductible” receipts which will qualify the donor for tax relief in relation to donations made to the IPC. In order to qualify as an IPC, your NPO must first have a legal structure and be administrated by a group of independent board members, half of which are required to be Singaporean citizens¹². It is worth noting that IPC status is granted to a NPO that serves the community as a whole and not merely the sectional interests of specific groups of persons. Your NPO must also comply with other requirements under the Charities Act (Cap. 37) (ChA).

The tax benefits associated with entities having IPC status are addressed further in Chapter 7 on Taxation. However, given the IPCs’ appeal to donors in attracting donations, an entity having IPC status will require greater administrative upkeep. This includes:

1. The need for transparency;
2. Making information public and available online;
3. Providing clear records of donations; and
4. Renewing the IPC’s auditors at least once every 5 years.

CONCLUSION

Whether an organisation chooses to adopt a particular legal structure would depend in part on the objectives sought by it as well as the business model being contemplated. Admittedly, there are advantages of not adopting a legal structure, such as the informality and flexibility afforded. The absence of onerous administrative compliance can also translate to lower overall costs for a start-up business.

However a legal structure offers numerous benefits including legal insulation, continuity, tax benefits and better accountability to stakeholders, amongst others. Regardless of the objective of your organisation, it is thus prudent to consider the use of formal structures, including the pros and cons of each structure, when determining the framework that best meets the needs of your organisation.

3

SETTING UP A LEGAL STRUCTURE FOR THE SOCIAL ENTERPRISE OR NON-PROFIT ORGANISATION



Chapter 2 dealt with the different kinds of vehicles which you may set up for your social enterprise or non-profit organisation. Chapter 3 will describe how you can go about setting up each of the different business vehicles.

SETTING UP A LEGAL STRUCTURE FOR A SOCIAL ENTERPRISE

To recap, a social enterprise may be set up as a:

- Company limited by shares;
- Company limited by guarantee;
- Sole Proprietorship;
- Partnership;
- Limited Liability Partnership;
- Limited Partnership;
- Society; or
- Co-operative Society.



Company

A company may be incorporated by submitting the constitution of the proposed company together with such information that the Registrar of Companies may prescribe and by paying the prescribed fee (see below).

As a starting point, for companies limited by shares, you may wish to consider adopting or referring to the sample constitution which is provided by Accounting and Corporate Regulatory Authority (ACRA).

Sole Proprietorship or Partnership

If you intend to set up a sole proprietorship or partnership (maximum 20 partners in total), prior to carrying on business in Singapore, you must register the business unless you are exempted from such a requirement, failing which, this will constitute an offence.

You and your partners should draw up a partnership agreement which defines certain partnership matters such as the roles and responsibilities of the partners as well as how the profits are to be distributed amongst the partners.

Where the sole proprietor or all the partners of the partnership reside outside Singapore, the Registrar will require a local manager (who must either be a Singapore Citizen or Singapore Permanent Resident) to be appointed.

Limited Liability Partnership (LLP)

A LLP may be registered if a statement by every person who is to be a partner of the LLP is lodged with the Registrar of Limited Liability Partnerships.

You and your partners should also draw up an LLP agreement to govern matters such as the mutual rights and duties of the partners as well as the mutual rights and duties of the LLP and its partners. In the absence of this agreement, the provisions set out in the First Schedule of the Limited Liability Partnership Act (Cap. 163A) (LLPA) will apply.

The LLP will also need to appoint a manager (who is ordinarily resident in Singapore and who is a natural person at least 18 years of age, and of capacity).

Limited Partnership (LP)

A LP may be registered if a general partner of the LP lodges with the Registrar of Limited Partnerships a statement containing certain particulars.

The partners of the LP should draw up an LP agreement to govern the

various matters related to the LP such as the contribution of the partners to the LP and the relationship between these partners.

The LP will be required to appoint a local manager if every general partner is ordinarily resident outside Singapore. The local manager will be subject to the same responsibilities, liabilities and penalties as a general partner.

Additional regulations will apply in relation to the setting up of the LP if the LP is set up primarily for investment funds

Any partnership (or club, company or association) of 10 or more persons, whatever its nature or object should seek registration with ROS, unless you are any of the following¹:

- Any company registered under any written law relating to companies for the time being in force in Singapore;
- Any company or association constituted under any written law;
- Any limited liability partnership registered under the LLPA
- Any trade union registered or required to be registered under any written law relating to trade unions for the time being in Singapore;
- Any co-operative society registered as such under any written law;
- Any mutual benefit organisations registered as such under any written law relating to mutual benefit organisations for the time being in force in Singapore;
- Any company, association or partnership, consisting of not more than 20 persons formed for the sole purpose of carrying on any lawful business that has for its object the acquisition of gain by the company, association or partnership, or the individual members thereof;
- Any class, society or association of foreign insurers carrying on insurance business in Singapore under any foreign insurer scheme established under Part IIA of the Insurance Act (Cap. 142);
- Any school or management committee of a school constituted under any law regulating schools for the time being in force in Singapore.

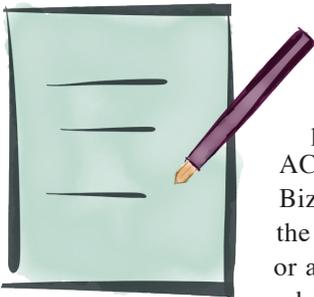
Society

The Societies Act (Cap. 311) (SA) prescribes that for certain ‘specified’ societies, the majority of the committee members of your society must be Singapore Citizens. The President, Secretary, Treasurer and their deputies must also be Singapore Citizens or Singapore Permanent Residents. Foreign

diplomats cannot serve as committee members. The Ministry of Home Affairs (MHA) considers the following categories to be specified societies²:

- Religious societies;
- Societies which identify themselves publicly as or whose membership is confined exclusively to members of a single race;
- Any society whose object, purpose or activity, whether primary or otherwise, is to represent, promote any cause or interest of, or discuss any issue relating to a class of persons defined by reference to their gender or sexual orientation;
- Any society whose object, purpose or activity, whether primary or otherwise, is to represent persons who advocate, promote or discuss any issue relating to any civil or political right (including human rights, environmental rights and animal rights);
- Any society whose object, purpose or activity, whether primary or otherwise, is to promote or discuss the use or status of any language;
- Any arts groups except those promoting classical music/works.

REGISTERING A BUSINESS



How to Register a Company, Sole Proprietorship, Partnership, LLP, or LP

You may register a company, sole proprietorship, partnership, LLP or LP through ACRA by submitting an application online via BizFile. Alternatively, you may wish to engage the services of a professional firm (e.g., a lawyer or a chartered accountant) or a service bureau to submit an online application but these options will cost more.

If you are submitting an online application, ACRA's website contains a useful step-by-step guide.

You should first refer to information that is available on the ACRA's Bizfile website. The Bizfile service is generally available 24 hours a day, 7 days a week.

If you require further assistance, you may contact the ACRA Helpdesk.

What can the business be called?

If you are intending to set up a company, sole proprietorship, partnership, LLP or LP, the name of your social enterprise will generally not be accepted if the relevant Registrar is of the opinion that the name³:

- Is undesirable;
- Is identical to that of another business;
- Is identical to a name already reserved by another business; or
- Is a name of a kind that the Minister has directed the Register not to accept for registration (e.g., Temasek).



The relevant Registrar has the discretion to direct a change of your social enterprise's name if your social enterprise's name so nearly resembles the name of another business as to be likely to be mistaken for it⁴.

What sort of address may be used for the business?

Generally, a PO Box cannot be used as a business address. You may use a residential address as a business address if you satisfy certain terms and conditions under the Home Office Scheme⁵.



The Home Office Scheme is generally available to the owners, tenants or authorised occupiers of Housing Development Board (HDB) flats or certain private property. Further, the business has to be one which is either registered with ACRA unless it is exempted from registration under the Business Names Registration Act (Cap. 332). One of the conditions of the Home Office Scheme is that the business can only be a small-scale business with not more than two non-resident employees. The requirements, terms and conditions, and restrictions on the type of business that may be carried out on residential premises under the Home Office Scheme may vary depending on the type of property.

For private residential property, more information on the scheme is available at the Urban Redevelopment Authority (URA) website: www.ura.gov.sg. For HDB flats, more information on the scheme is available at www.hdb.gov.sg. These websites also provide information on what businesses are permissible under the Home Office Scheme. Registration for the URA scheme can be done through the Online Business Licensing Service (OBLS) which is also a one-stop online licensing portal (covering most licences and permits) set

up by the Singapore Government (see Chapter 5 on “Licences and Permits”). Registration for the HDB Scheme can be done through the LicenceOne website, www.licence1.business.gov.sg. Starting from 2015, the OBLs system has been replaced by the LicenceOne system. You should refer to the information on the OBLs website for details on whether applications for the Home Office Scheme made to URA should be done on the OBLs or LicenceOne system. A non-refundable administration fee of S\$20.00 is payable on registration for the Home Office Scheme. Approval is immediate upon online registration.

The HDB also operates a separate Home Based Small Scale Business Scheme, under which, you may use a HDB flat to conduct certain business activities that meet the relevant guidelines. No prior approval from the HDB is required under this scheme. The URA and HDB websites provide guidelines for the scheme as well as a list of permitted businesses under the scheme.

How much will it cost to name and register your business?

The name reservation fee is S\$15. Registration fees vary⁶:

- Company limited by shares: S\$300
- Company limited by guarantee: S\$300
- Sole Proprietor/Partnership: S\$100
- Limited Liability Partnership: S\$100
- Limited Partnership: S\$100

How long will it take?

A company, sole proprietorship, LLP or LP can usually be incorporated or registered within 15 minutes after the registration fee is paid. However, it may take between 14 days and 2 months if the application needs to be referred to other authorities for approval or review (for example, the setting up of a private school will need to be referred to the Ministry of Education (MOE)).

REGISTERING A SOCIETY

How to register a society

You must register your society with the Registry of Societies (ROS). There are 2 types of registration processes: Automatic and Normal, as explained in the following paragraphs.

It is relatively cheaper to register your society online via the Integrated Registry of Societies Electronic



System (iRoses). The 3 key office bearers of the society, i.e., President, Secretary and Treasurer will be required to verify and submit the application online using their SingPasses.

As part of the application for registration, you will first need to submit a proposed constitution. A sample may be found at the ROS' website. For societies affiliated to another entity, you will also need to submit:

- A copy of the affiliated body's constitution; and
- A letter from the affiliated body supporting the registration of the society.

The ROS may require additional information on the society including the place of business and information on the members. If your society does not fall under any of the specified societies listed in the Schedule of the Societies Act (Cap. 311) (SA), you will be eligible for the 'automatic' registration process, in which case, your society will be able to start its activities upon registration.

Otherwise, you will need to go through the 'normal' process, in which case, you will be required to await the Registrar's in-principal approval first, before you can proceed to pay the registration fee and have your society registered. Your society will be able to start its activities once its registration is published in the Gazette.



You should first refer to the website of the ROS for the most updated information.

Naming a society

Your society's name should not be the same or similar to that of another entity that is already registered. To check, you may refer to the Unique Entity Number's website.

- Acronyms/abbreviations are not encouraged. Where an acronym/abbreviation is used, its meaning must be clearly explained. Specifically, the word "Singapore" or its abbreviation can generally be used only within brackets at the end of the society's name to indicate the society's place of registration, e.g. ABC Society (Singapore).
- The word "Foundation" cannot generally be used unless the society is an institution or association with a permanent fund dedicated to charitable, educational, religious, research or other benevolent purpose, and the society is financed by a donation endowment or legacy to aid the society's intended charitable purposes.



- In addition, if you are using any of the following words as part of the name of the proposed society, you would require a letter of support from the relevant authorities:
 - ◇ Academy;
 - ◇ Asean;
 - ◇ College (with exception of an alumni);
 - ◇ Council;
 - ◇ Government;
 - ◇ Institute (with exception of an alumni);
 - ◇ Merlion;
 - ◇ Ministry;
 - ◇ National;
 - ◇ Raffles;
 - ◇ Republic;
 - ◇ Registry;
 - ◇ State;
 - ◇ Stamford Raffles; or
 - ◇ Temasek.

Generally, names of locations such as Orchard, Sentosa or Raffles Place would require a letter of support from the relevant authorities. Please refer to the ROS website for more details.

What is a 'place of business' for societies?

A "Place of Business" is defined in the Societies Act as the place where the records and books of accounts of a society are kept. The following addresses are prohibited from use as the society's place of business:

- HDB flat;
- PO Box;
- Undeveloped sites;
- Mobile premises (for example, containers);
- Unofficial addresses (for example, rooftops or void decks);
- Embassy/High Commission;
- Public places (for example, hawker stalls or retail stores).

A letter of consent from the relevant authorities would be required if any of the following addresses are used as a place of business:

- Community Centre;
- Government agencies or statutory boards;
- Schools; or
- Hospitals.

Mailing address

Your society's mailing address should be the same as your place of business, because the ROS will send all correspondences to your society's place of business.

How much does it cost?

The approval fee for a specified society is S\$400 (for applications supplied online) and S\$450 (for applications submitted over the counter or via post). For a society other than a specified society, the approval fee is S\$300, regardless of the method of application⁷.

How long will it take?

A society can usually be registered immediately under the 'automatic' registration process or in approximately 2 months under the 'normal' registration process.

What obligations does your society have upon successful registration?

Registered societies are generally self-governing. In carrying out your activities, your society has to abide by the prevailing laws in Singapore and by the rules of your own respective constitutions. Under the Societies Regulations, registered societies are required to:

- Maintain proper accounts and records of the transactions and affairs of the society and get its accounts audited annually;
- Submit an Annual Return and its audited statement of accounts to the ROS annually;
- Submit to the ROS an audited statement of accounts of any fund raising appeal 60 days after its completion;
- Make an application to change its name, place of business and rules when the need arises; and
- Make an application to use any flag, symbol, emblem, badge or other insignia when such a need arises.



REGISTERING A CO-OPERATIVE

Naming your co-operative

Your co-operative society's name will not be accepted if the Registrar of Co-operative Societies is of the opinion that the name⁸:



- Is likely to mislead members of the public as to the true character or purpose of the society;
- Is identical to or so nearly resembles the name of some other society as is likely to deceive or confuse members of the public or members of either society; or
- So nearly resembles the name of any body corporate as is likely to be mistaken for it or for being related to it; or
- Is undesirable or offensive.

Special information for co-operative societies

The following are general steps which are required to form a co-operative society:

1. You will need to first set up a Pro-tem Committee with at least 3 members to undertake a feasibility study to determine the economic and financial viability of the proposed society, prepare a viability statement, and consider the objectives, constitution and by-laws of the society.
2. You will then need to submit, for the Registrar of Co-operative Societies' comments:
 - The viability statement (containing a business plan and the cash flow projections for at least 3 years);
 - Particulars of each committee member, including name, NRIC number, date of birth, citizenship, occupation, address and contact numbers;
 - A draft By-laws which include matters spelt out in the Schedule of the Co-operative Societies Act (Cap. 62) (CSA).
3. After obtaining the Registrar's comments, you will need to convene a preliminary meeting of at least 10 persons qualified for membership to:

- Adopt the By-laws (which have incorporated the Registry's comments; and
- Pass the resolution to accept all the rights, duties and legal responsibilities prescribed by the By-laws.

In order to qualify for membership, an individual member must:

- Be at least 16 years old;
- Be a citizen or resident in Singapore;
- Not be legally or mentally disabled;
- Not be an undischarged bankrupt;
- Meet residence, employment and profession requirements as prescribed in the By-laws;
- Not have been convicted of an offence punishable with imprisonment;
- Be able to meet such other requirements prescribed by the By-laws; and
- Belong to a pre-existing common bond of association or community of interest.

An institutional member of a co-operative must be a registered co-operative society itself or trade union.

4. You will then have to submit the following documents to the Registrar to apply for registration:
 - The duly completed relevant application form providing the necessary details (name, NRIC or FIN number, nationality, occupation and address) and signatures of at least 10 members;
 - By-laws;
 - Business plan (which should include the co-operative's business strategy, products and service, target customers, expected demand etc.) and 3-year financial projections (which should include the balance sheet, income and expenditure as well as cashflow statements of the co-operative); and
 - Minutes of the preliminary meeting, with the signatures of all who were present at the meeting.



The time taken by the Registrar to process and approve the registration will depend on the complexity of the application. No fees are payable for the registration of a co-operative society.

5. Upon registration, the Pro-tem Committee shall continue to manage the affairs of the co-operative society until the first meeting of the members which must be held within 3 months after receiving the notice of registration and shall include the election of officers who shall serve until the first AGM.



You should first refer to information that is available on the website of the Registry of Co-operative Societies and the Ministry of Culture, Community and Youth (MCCY) website. If you require further assistance, you may contact the Registry of Co-operative Societies directly for general assistance or advice.

RELATED MATTERS AND OTHER CONSIDERATIONS

Licences and permits

Depending on the type of business that your social enterprise is engaged in, you may need to apply for certain licences or permits from the relevant authorities or agencies before you can commence business, failing which you may commit an offence. Licensing issues are discussed further in Chapter 5, which covers regulatory frameworks.

There are basically three types of licences and permits:

1. Compulsory Licences

These are licences which are required by law (such as a Child Care Centre licence) before you are allowed to commence a particular business. The failure to obtain such compulsory licences before the commencement of business would constitute an offence.

2. Occupational Licences

These are licences which are required if you are providing certain professional services (e.g., doctors, lawyers, architect and accountants). Application for these licences would usually be made directly with the respective professional organisations or bodies.

3. Business Activity-Specific Licences

These are licences which are required for certain types of business activity, such as the sale of liquor or the import or export of goods for sale.

Business planning

Preparation in advance of the set-up of your social enterprise can minimise business risk. Careful and thorough market research, business planning and due diligence should be undertaken before you embark on your social enterprise. As a starting point, the SME Portal website provides a useful guide and summary of the considerations which you may wish to take into account in planning the business that your social enterprise will undertake. In addition, the Spring Singapore (an agency under the Ministry of Trade and Industry (MTI) website contains various useful toolkits which you may refer to for guidance on various aspects of running a business (such as financial management, customer service, human resource, marketing and productivity).

The SME Portal and Spring Singapore websites also contain further information on grants, incentives, loans and other types of financial assistance that may be available to a social enterprise.

Laws and regulations

Depending on the type of entity used to set up your social enterprise, you will be required to comply with different laws and regulations in Singapore.

To better understand how these laws and regulations may affect your social enterprise, you may wish to consider attending seminars and courses organised by organisations such as the Singapore Business Federation and the Association of Small & Medium Enterprises. You should also consider engaging professional advisers such as auditors, consultants and/or lawyers who will be able to give you more detailed and specific advice.

SETTING UP A LEGAL STRUCTURE FOR NON-PROFIT ORGANISATIONS

If your organisation is a non-profit organisation (NPO) and not a social enterprise (SE), you may be registered under the law as a:

- Society;
- Charitable Trust; or
- Public Company Limited by Guarantee.

You will need to decide which legal structure may best suit the aims, activities and culture of your group. As a general rule, you need to choose between (1) more flexibility but with more legal responsibility; or (2) less flexibility and less legal responsibility.



For example, a small non-profit group with few members may be more efficiently run as a society. This will save the group the hassle of filing annual returns to ACRA. However, as the group grows and assumes more projects, the risk and liabilities of the group will also increase. Under such circumstances, a society may not be the most ideal structure because the members of a society are exposed to unlimited liability.

The process of registering a Society has already been explained above. The processes for registering a Charitable Trust and a Public Company Limited by Guarantee are set out in the following sections.

SETTING UP A CHARITABLE TRUST

To set up a trust for charitable purposes under the Office of Commissioner of Charities, a trust deed is required as the governing instrument of the trust. A Board of Trustees containing at least 3 persons is also required. The trust deed should generally include the following:

(a) Objectives of Establishing the Charity

- The objects must be exclusively charitable and must also be clearly and concisely stated. The purposes of the charity must be wholly or substantially beneficial to the community in Singapore

(b) Management

- There should be at least 3 trustees, at least 2 of whom shall be Singapore citizens or permanent residents. The duties and terms of office of the trustees should be specified.

(c) Conflict of Interest Policy

- There should be proper procedures in place to manage conflicts of interest. Whenever a trustee in any way, has an interest (either directly or indirectly) in a transaction, project or other matter to be discussed at a meeting, the trustee should disclose the nature of his/her interest before the discussion on the matter begins.
- In addition, the trustee concerned should not participate in the discussion or vote on the matter, and should also offer to withdraw from the meeting. The board of trustees shall then decide if this should be accepted.

(d) Quorum

- The number of trustees present to form a quorum for any meetings should be clearly stated. The minimum number to form a quorum should be three.

(e) Dissolution

- The circumstances under which the trust can be terminated should be clearly stated. Upon cessation to be a registered charity under the Charities Act (Cap. 37), any remaining funds and assets (after settling all debts and liabilities) should be given to other registered charitable organisations or exempt charities with similar objectives.

You should also refer to the Charities (Registration of Charities) Regulations and the Charities Portal, www.charities.gov.sg for more information.



REGISTERING A PUBLIC COMPANY LIMITED BY GUARANTEE

Before you can set up a non-profit organisation as a Public Company Limited by Guarantee, a company needs to be set up first through ACRA by submitting an application online via BizFile. The constitution must be lodged in order to register the company. A model constitution for CLGs can be found in the Second Schedule of the Companies (Model Constitutions) Regulations 2015, which is available at [www.statutes .agc.gov.sg](http://www.statutes.agc.gov.sg).

How much will it cost?

The name reservation fee is S\$15 and the application for incorporation of a public company limited by guarantee is S\$300.

How long will it take?

A CLG can usually be incorporated or registered within 15 minutes after the registration fee is paid. However, approval may take up to 14 days or longer in some circumstances.

REGISTERING A SOCIETY AS A CHARITY

Applications for registration may be made through the Charities Portal found at the website www.charities.gov.sg, which is also an excellent source for more information on this process and a list of all registered charities in Singapore. The following documents must be submitted together with the application form:



- Signed copy of the governing instrument (Constitution for Society, Trust Deed for Charitable Trust and Constitution for Public Company Limited by Guarantee);
- Certified statement of accounts for the last 3 financial years (if applicable);
- 2-year activities and fund disbursement plan; and
- Particulars of all charity trustees (name, passport or National Registration Identity Card (NRIC) number, address, date of appointment and the position of the office held in the committee).

You will also need a valid Singpass Account to proceed with the registration.

Each application takes about 3 months to process, but there is no fee charged for registering a charity under the Charities Act.

If the Commissioner or Sector Administrator is satisfied that the application will not be against public interest, he will register the society as a charity. In assessing the application, the Commissioner or Sector Administrator will consider the following:

- Whether the society is related to any other institutions that has been removed from the Register of Charities or has been refused registration as a charity;
- Whether the society has flouted any law or provided any false, misleading or inaccurate information;
- The policies and plans of the society;
- Whether the members, who are to act as charity trustees, will be able to administer the society properly; and
- Whether the activities planned are sufficient to further the charitable purposes of the society.



Although registration is not required to conduct charitable operations in Singapore, it will be difficult to engage in any meaningful and sustainable activities unless you are a registered entity. In addition having to pay taxes, you may have difficulty raising funds from non-members or otherwise successfully soliciting donations, since many donors use registration as an important criteria to evaluate requests for funds.

Application to the Commissioner for registration as a charity by any organisation operating for charitable purposes in Singapore is mandatory and should be made within three months of the commencement of operations. In the event the application is rejected, operations do not have to cease, but the organisation will ultimately be required to pay income tax as it will not be eligible for the benefits associated with being a registered charity.

Your organisation must set up as a legal entity before it can apply for charity status through the Charity Portal. To transact with the Charity Portal, your organisation must also have a valid Singpass account.



REGISTERING A SOCIETY AS AN INSTITUTION OF PUBLIC CHARACTER

For an institution/fund to be an Institution of Public Character (IPC), its activities must be beneficial to the community in Singapore as a whole, and not confined to sectional interests or group of persons based on race, creed, belief or religion, unless otherwise approved by the Minister, and must meet its objectives under its governing instrument and the objectives of the Sector Administrator.

The institution/fund must also be administered by a group of independent trustees, of which at least half must be citizens of Singapore.

You may apply for IPC status online via the Charity Portal with the following information:

- A valid Registry of Societies number;
- Governing Instrument (Constitution, Rules & Regulations);
- Statement of Accounts for the last 5 financial years, if available;
- Particulars of the organisation;
- Particulars of the contact person;



- Particulars of Board Members;
- Particulars of key position holders;
- Particulars of patrons (if any);
- Objectives and Vision or Mission;
- Annual income and sources of main income;
- Affiliations (if any);
- Assets (if any);
- Particulars of personnel allowed access to the charity portal;
- Information of the person making the declaration and submitting the application; and
- Singpass Account.



All grants of IPC status are provisional, lasting only two years at first, subject to an extension for an additional five. IPCs are also subject to rules related to the issuance of tax deduction receipts and the retention of donor records.

4

BUSINESS VEHICLES AND CORPORATE GOVERNANCE



Corporate governance refers to the procedures by which an organisation is operated and managed, including its obligations of financial disclosure and accountability to, amongst others, its owners, members, or shareholders. It involves the ways in which rights and responsibilities are distributed among different stakeholders, and also provides the structures and rules which govern decision-making within an organisation.

The corporate governance requirements for social enterprises vary depending on the business vehicle chosen (see Chapter 2) because of different public interest needs. For instance, a company is a separate legal entity and may incur its own liabilities. As such, higher governance standards are required to, for example, prevent a director of a company from placing his own interests above those of the company. On the other hand, the higher governance standard imposed on a company is not imposed on a business owner of a



sole-proprietorship as a sole-proprietor is personally accountable for all liabilities incurred during the course of the business.

Once you have chosen a particular business vehicle for your social enterprise, you will need to ensure that your social enterprise complies with all the corporate governance requirements applicable to that business vehicle on a continuing basis. The corporate governance requirements for each business vehicle are generally governed by statute law. Each statute usually governs a specific category of business vehicle. These statutes include the Companies Act (Cap. 50) (CA), Business Names Registration Act 2014 (Act 29 of 2014) (BNRA), Partnership Act (Cap. 391) (PA), Limited Partnerships Act (Cap. 163B) (LPA), Limited Liability Partnerships Act (Cap. 163A) (LLPA) and Co-operative Societies Act (Cap. 62) (CSA).

Failure to comply with the corporate governance requirements applicable to your chosen business vehicle for your social enterprise may lead to criminal sanctions and/or financial penalties imposed on you or your social enterprise.

This chapter sets out a brief summary of the corporate governance requirements for each business vehicle that you may choose for your social enterprise.

SOLE-PROPRIETORSHIP

Sole-proprietorships, which do not enjoy separate legal entity status, generally have minimal compliance requirements to fulfil since they are the simplest and most flexible business vehicle which your social enterprise can adopt.

The management of a sole-proprietorship rests with the owner, who has exclusive control and management of the business, with full liberty to make all decisions concerning the business.

Sole-proprietorships are not required to audit their accounts annually or file annual returns with the Accounting and Corporate Regulatory Authority (ACRA). However, sole-proprietorships should still keep proper accounts and records of all business transactions which have been carried out.

PARTNERSHIP

A partnership, like a sole-proprietorship, is not a separate legal entity.

The management of a partnership rests with all the partners of the partnership,

who will have equal rights in the management and decision-making of the partnership unless there is a partnership agreement specifying otherwise.

A written partnership agreement is not a statutory requirement. However, having a written partnership agreement allows you and your partner(s) to formally structure your business relationship. A partnership agreement may address the following issues: responsibilities of each partner, management and control of the partnership, capital contributions and methods of funding the partnership, profit and loss allocation, salaries of partners, and dissolution of the partnership. A written agreement, as opposed to an oral one, can spell out which partner is responsible for what activities and what authority is vested in that partner. Setting out the duties and responsibilities of a partner in a partnership agreement clearly will ensure that each partner knows his role in the partnership.

A partnership is not required to audit its accounts annually or submit its annual returns to the ACRA. However, the partnership should still keep proper accounts and records of all business transactions which have been carried out.

LIMITED PARTNERSHIP (LP)

Like a partnership, an LP, which must consist of a minimum of 2 partners (at least 1 general partner and 1 limited partner), is not a separate legal entity.

The management of an LP rests with the general partner, and not the limited partner. If a limited partner participates in the management of the LP, he will be treated as a general partner and lose his limited liability status.

Like a partnership, a written partnership agreement for an LP is not a statutory requirement. However, having a written partnership agreement allows you and your LP partner(s) to define the scope of the rights and liabilities of a general partner as well as the extent of the liability of the limited partners for the debts and obligations of the LP.

An LP is not required to audit its accounts annually or submit its annual returns to the ACRA. However, the LP must keep accounting and other records which sufficiently explain its transactions and financial position for at least 5 years. Although these records need not be lodged with the ACRA, they may be required by the Registrar of LPs to be produced for inspection.



LIMITED LIABILITY PARTNERSHIP (LLP)

An LLP operates as a partnership while having a separate legal identity like a private limited company. Every LLP must have at least 2 partners at all times. The partners can be individuals or companies.

Generally, all partners in the LLP may take part in the management of the LLP, unless otherwise agreed. In addition, every LLP must appoint at least 1 manager. A partner of the LLP can also be the LLP's manager. The manager is required to file annual declarations with the ACRA stating whether the LLP, as of the filing date, is able to pay its debts as they become due in the normal course of the LLP's business.

The mutual rights and liabilities of the partners and their rights and duties in relation to the LLP are governed by the LLP agreement or, in the absence of any agreement as to any matter, by the relevant provision relating to that matter set out in the First Schedule to the LLPA.

An LLP is not required to audit its accounts annually or submit its annual returns to the ACRA. However, an LLP is required to keep accounting and other records which sufficiently explain its transactions and financial position, as well as prepare profit and loss accounts and balance-sheets. These documents need not be lodged with the ACRA, but the LLP must keep the above-mentioned records for not less than 5 years and may be required to produce such records to the Registrar of LLPs for inspection. If the LLP does not comply with any of these requirements, the LLP and every partner of the LLP would be guilty of an offence. If a partner of the LLP commits such an offence, he would be liable on conviction to a fine or imprisonment, or both.

COMPANY

A company has its own legal personality that is distinct from its shareholders and directors.

Constitution

Every company must have a constitution. The constitution sets out the basic structure and objects of the company, as well as the internal regulations of the company. The company must abide by the rules and regulations as set out in its constitution.

Directors

The management of a company rests with the directors of the company. Every company must have at least 1 director who is ordinarily resident in Singapore. Directors have certain duties pursuant to the CA, any breach of which will result in very serious criminal or civil sanctions against the director who is in breach. A director should familiarise himself with these directors' duties. The following two cases illustrate directors' duties.

CASE STUDY 1

Directors' duty of reasonable diligence and care

The Singapore High Court case of *Lim Weng Kee v PP* [2002] 2 SLR(R) 848 provides a good example of the extent of skill and care required of a director. In this case, the managing director (MD) of 3 pawnshops, who had been in the business for 20 years, released certain pawned jewellery items without waiting for the cheque that was used as payment for the goods to be cleared. The court held that a reasonable MD having 20 years' experience in operating 3 pawnshop businesses of similar scale would not have released the pawned items before the cheque had been cleared. The court held that the MD had failed to exercise reasonable diligence and had committed an offence under section 157(1) of the CA. Hence, the court upheld the MD's conviction and total fine of S\$12,000. It is important to note that if the MD had been totally lacking in experience or knowledge, this would not lower the standard of care expected of him. However, where, as in this case, the MD had been running the business for 20 years, the standard expected of him was raised by virtue of his special experience.

CASE STUDY 2

Directors' fiduciary duties to the company

In *DM Divers Technics Pte Ltd v Tee Chin Hock* [2004] 4 SLR(R) 424, there were two directors of a company (Company A). One director was not involved in the day-to-day operations of Company A, while the other director was the managing director (MD) of Company A. The MD was subsequently discovered to have misappropriated Company A's funds. He had also placed himself in a situation of conflict by



employing his wife from another of his companies (Company B) and charging Company B's expenses to Company A. Further, he failed to disclose material information to the detriment of Company A. The court noted that directors owed fiduciary duties to the company and shareholders, which included the duty to act honestly and in good faith in the best interests of the company; not to exercise their powers for an improper purpose; and not to place themselves in a position in which there is a conflict between their duties to the company and their personal interests or duties to others. The court found that the MD had breached all the fiduciary duties set out above. In an action brought by Company A, the MD was ordered to pay back all amounts misappropriated (in excess of S\$300,000) and to indemnify Company A for fines resulting from summonses issued by the authorities.

Company Secretary

The company secretary also plays an important role in the governance of a company. A company secretary should have the experience and requisite knowledge to discharge the functions and duties required of his role. A public company is required to appoint a suitably qualified person, details of which are prescribed in legislation, as a company secretary. A private company, however, does not have to satisfy this requirement unless required by the Registrar of Companies. The position of company secretary cannot be left vacant at any time for more than 6 months.

Annual General Meeting (AGM)

Generally, every company is required to hold an AGM once in every calendar year within 15 months of the previous AGM. A company should hold its first AGM within 18 months of its incorporation. Matters dealt with at an AGM usually include obtaining shareholders' approval for the audited accounts, the election of directors and the appointment of auditors for the new financial year.

Audits and Annual Returns

Generally, a company's financial reports must be audited. Currently, a company is exempted from having its accounts audited if it is an exempt private company with an annual revenue of S\$5 million or less, although it will still need to prepare unaudited accounts for the purposes of its AGMs and for filing with the ACRA.

A small company may qualify for audit exemption if it is a private company and meets at least two of the three criteria relating to total annual revenue, total assets and number of employees.

All companies are required to lodge an annual return with the ACRA. In addition, every company is required to keep accounting and other records which sufficiently explain its transactions and financial position, as well as enable true and fair profit and loss accounts and balance-sheets (collectively known as financial statements) and any documents required to be attached to them, to be prepared from time to time. Such records must be kept in such manner as to enable them to be conveniently and properly audited and for a period of not less than 5 years from the end of the financial year in which the transactions or operations to which those records relate are completed. If any of these requirements is not complied with, the company and every officer of the company who is in default would be guilty of an offence and would be liable on conviction to a fine or imprisonment, or both.

CO-OPERATIVE SOCIETY

A co-operative society does not constitute a separate legal entity from its members. An example of a co-operative society in Singapore is the NTUC Fairprice, which was established with the social mission to moderate the cost of living in Singapore.

A co-operative society may make its own by-laws that are necessary or desirable for the purposes for which the co-operative society is established, subject to the approval of the Registrar of Co-operative Societies. A co-operative society must make by-laws dealing with certain matters mentioned in the Schedule to the CSA, which include the objects of the co-operative society and the purposes to which the co-operative society's funds may be applied.

The management of a co-operative society rests with the committee of management. A co-operative society is required to provide in its by-laws for an AGM to be convened by the committee of management and to be held as soon as practicable, but not later than 6 months after the end of its financial year, unless the approval of the Registrar of Co-operative Societies has, within that 6-month period, been obtained to extend that deadline. The AGM is meant to consider issues such as the approval of the financial statements and the election or removal of members from the committee of management.



As soon as practicable but not later than 6 months after the close of each financial year, a co-operative society is required to submit to the Registrar of Co-operative Societies an annual report on its activities during the year together with a copy of its audited financial statements and its audit report for that year. Any co-operative society which fails to provide such financial statements in compliance with accounting standards as may be made or formulated by the Accounting Standards Council would be liable on conviction to a fine.

Every co-operative society is also required to keep proper accounts and records of its transactions and affairs and must do all things necessary to ensure that all payments out of its moneys are correctly made and properly authorised and that adequate control is maintained over the assets of, or in custody of, the co-operative society, and over the expenditure incurred by the co-operative society. Every co-operative society, officer, agent, employee or member of a co-operative society or other person who fails to comply with this requirement would be liable on conviction to a fine.

OTHER USEFUL RESOURCES



Singapore Statutes Online

<http://statutes.agc.gov.sg/>

All the statutes mentioned in this chapter can be found at this website.

MAS Code of Corporate Governance

<http://www.mas.gov.sg/>

This Code is intended to be a guide for public companies whose shares are listed on a stock exchange, but it provides a useful blueprint for best practices that may be adopted by social enterprises structured as companies.

Corporate Secretarial Services

<http://isca.org.sg;> <http://www.saicsa.org.sg;> <https://www.lawsociety.org.sg/>

Please refer to the information provided by the Institute of Singapore Chartered Accountants, the Singapore Association of the Institute of Chartered Secretaries and Administrators, and the Law Society of Singapore for listings of professionals who are able to provide you with corporate secretarial services.

Co-operative Societies

https://www.mccy.gov.sg/Topics/Charities/Articles/Cooperative_Societies.aspx

Please refer to the information provided by the Ministry of Culture, Community and Youth on co-operative societies.

<http://www.sncf.org.sg/web/form-a-co-op/corporate-governance>

The Code of Corporate Governance for Co-operatives was launched by the Singapore National Co-operative Federation in 2006. The Code is meant to assist all co-operative societies to examine and raise their governance standards. It provides principles and guidelines in several areas, including board matters, conflict of interest policy, and accountability and audit.

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REGULATORY REQUIREMENTS



KNOW YOUR REGULATORY FRAMEWORK

Under Singapore law, social enterprises are recognised and regulated just like any other business. It is the underlying legal structure you choose for your business that will determine your legal rights and obligations.

The common legal structures which may be considered (and their respective corporate governance requirements) have been addressed in previous chapters. In this chapter, we seek to explain the wider regulatory framework within which non-profit organisations and social enterprises operate, and which you should take note of, regardless of your particular business vehicle.



CHARITY STATUS

If your organisation is:

- A Company Limited by Guarantee (CLG), a Society or a Trust;
- Is set up for exclusively charitable purposes beneficial wholly or substantially to the community in Singapore; and
- Carries on its activities, including business activities, to achieve these charitable purposes,

you may wish to consider applying to register as a charity with the Office of the Commissioner of Charities, also known as the Charities Unit, under the Ministry of Culture, Community and Youth (MCCY). Applications are made online through the Charity Portal.

Registered charities automatically enjoy full income tax exemption. Further, upon application and review by the Comptroller of Property Tax at the Inland Revenue Authority of Singapore (IRAS), charities may also be exempted in full from property tax for properties used exclusively for charitable purposes or partially if only parts of the property are used for charitable purposes.

Contrary to popular belief, a charity may carry on business activities. However, there are limits on the scope of business that the charity may be engaged in that must be observed. An organisation registered as a charity is expected to focus its efforts in carrying out its primary purpose activities, which are the activities, including business activities, which contribute directly to the advancement of the charitable objects for which the charity was set up to promote, and as stated in its governing instrument. So for example, a theatre charity promoting the arts in Singapore may sell tickets for a theatre performance.

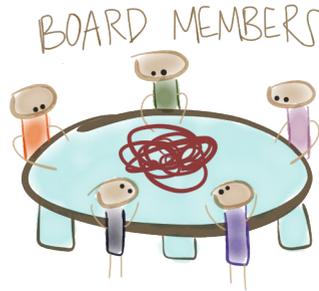
Other incidental activities which support the advancement of the charity's objects may also be carried out. Following on from our theatre charity example, the charity may sell drinks and snacks in a concert hall operated by it, to provide convenience for theatre-goers and to enhance the theatre-going experience. However, a charity wishing to engage in non-primary purpose business activities that do not directly advance or support the objects of the charity (usually involving the provision of goods and/or services solely in return for income) must set up a business subsidiary to undertake them, unless such business activities have no material impact on the financials of the charity and do not expose the assets of the charity to significant risk. The subsidiary can be 100% owned by the charity, but there must be an arm's

length relationship between the charity and the subsidiary to ensure that the charitable resources are protected from significant risk exposure. Do note that, if necessary, the Commissioner of Charities can direct a charity to cease funding or to terminate its business activities in order to protect its charitable assets. Charity boards are responsible for the proper use of their charities' assets and resources, and if investments are made, they must ensure that their investment decisions are transparent and accounted for. Such investments must not deviate from the charity's core purposes.

Charities must comply with the requirements and obligations set out in the Charities Act (Cap. 37) and its regulations. We discuss the more important ones here:

Board Members

The charity's governing board must have at least 3 members, of whom at least 2 must be Singapore citizens or permanent residents. The board is responsible for the charity's performance, including ensuring that the charity is delivering the charitable outcomes for which it has been set up and also that it is solvent. The Code of Governance for Charities and Institutions of a Public Character, which sets out principles and best practices on key areas of management, should be followed by the charity board. There is also the Guidance for Charities Engaging in Business Activities, which is useful in guiding charity boards in managing both their business and social and/or environmental objectives. These guides can be found on the Charity Portal website.



Annual Reports and Statements of Accounts

The annual report and statement of accounts of the charity must be filed with the Commissioner of Charities. The annual report must set out certain required information, including a review of the policies, activities, and financials of the charity for that financial year. If your organisation is set up as a CLG, and/ or has annual income/expenditure over S\$500,000, a summary of your organisation's financial information must also be posted online on the Charity Portal (for financial years ending on or after 1 January 2013).

Large Charities

Large charities are charities with gross annual receipts of S\$10million or more in each of the last 2 financial years. There must be at least 10 governing board members for large charities. The charity's auditor must first be approved by the Commissioner of Charities and must also be changed every 5 years.

INSTITUTIONS OF A PUBLIC CHARACTER (IPC) STATUS

Institutions of a Public Character (IPC) is conferred by the Office of the Commissioner of Charities (Charities Unit, MCCY) on non-profit organisations whose activities are beneficial to the community at large in Singapore. IPCs are authorised to issue tax deduction receipts for tax-deductible donations received. Donors to the IPC are allowed tax deduction for twice the amount of donations made to these organisations (and up to three times the amount for donations made between 2009 to 2018 depending on the year the donation was made) in the Singapore government's bid to encourage greater charitable giving. By contrast, donations made to a charity without IPC status are not tax-deductible. Because of this latter feature, IPCs are governed by stricter guidelines as compared to charities. More information on the requirements and application for IPC status and compliance requirements under the Charities (Institutions of a Public Character) Regulations can be found on the Charity Portal.

If your organisation is intended to be for-profit or if you envisage your business activities to expose its charitable assets and financials to significant risk, the IPC or charity may carry on its business activities through a separate business subsidiary, or any non-charitable entity owned by one or more IPCs or charities to carry on a trade/business on their behalf. The profits of the business subsidiary can then be ploughed back to the IPC or charity in the form of dividends to enable it to fulfill its charitable objectives.

While the subsidiary can be 100% owned by the IPC or charity, do note that there must be an arms-length relationship between the IPC or charity and the subsidiary, such that the IPC or charity's assets are protected from the risks of the business and creditors. Such an arrangement ensures that the organisation's businesses are independent of its charitable activities and that charitable resources are protected from significant risk exposure. Further, the governing board of the IPC or charity must always act in the best interests of the IPC or charity when making decisions relating to the business subsidiary.

LICENSING REQUIREMENTS

Depending on the nature of the business activities your organisation is carrying out and subject to exemptions granted under law, licences may have to be obtained from the relevant authorities before you may legally commence operations. Application for the necessary licences should be done at the time you register your organisation with Accounting and Corporate Regulatory Authority (ACRA) or the Registry of Societies (ROS), as may be applicable.



You can get a general indication of the licence(s) you may need to run your organisation by searching the Online Business Licensing Service (OBS). Licence applications are also to be made on the OBS, which is a one-stop portal for application of all the government registrations and licences you may be required to hold. While most trades do not require any licences to carry on business, please do ensure that you obtain the correct licences where these are necessary.

The following is a list of licenses and permits commonly applied for:

REGULATORY AUTHORITY	LICENCE / PERMIT
Building and Construction Authority	Outdoor advertisement licence
Urban Redevelopment Authority	Use of premises and zoning regulations
Composers and Authors Society of Singapore	Copyright licence and permit
Ministry of Social and Family Development	Licence to operate a child care centre Licence to operate an old folks' home
Ministry of Education	Certificate of registration of schools including early childhood centres
Central Provident Fund Board	Registration as an Employer (for the hiring of employees)
Ministry of Manpower	Employment and work permits Employment agency licence

EMPLOYMENT

Employment issues in Singapore are largely governed by the Ministry of Manpower (MOM). We highlight 3 main issues here that you may wish to take note of.

Terms of employment

While the terms of employment between your organisation and its employees are generally a matter of negotiation between the parties, the Employment Act, (Cap. 91) (EA), provides for certain minimum protections for the employee. Where the employment contract is in violation of these minimum standards, it may be invalid. It should be noted however, that such EA protection generally does not cover certain limited classes of persons including those persons in managerial or executive positions earning more than S\$4,500. Further detailed information on the EA can be found in Chapter 10 on Employment.

Age of Employment

You may wish to take note that the minimum legal age to work in Singapore is 17 years old. You are permitted to employ children and young persons aged between 13 years and 16 years old, subject to restrictions on the type of work that these young persons can perform. For instance, children 13 to 15 years of age can only engage in light work, and cannot work in any industrial undertaking or vessel unless in the personal charge of his/her parent.

At the other end of the spectrum, under the Retirement and Re-employment Act (Cap. 274A) (RRA), which took effect on 1 January 2012, while there is a statutory minimum retirement age of 62, employers are required by the RRA to offer re-employment to eligible employees who turn 62, up to the age of 65. The criteria and conditions of re-employment as well as the penalties for non-compliant employers are set out in the RRA.

Foreign Employees

If your organisation intends to employ foreign employees, you need to obtain a work pass such as an employment pass or work permit for them before they can commence work in Singapore. You should take note of the different categories of passes and their requirements, generally categorised based on the qualifications of the foreign employee. Employment pass applications, as well as passes for dependents accompanying the employee, can be made online on the MOM website. Similarly, where your organisation carries out its operations overseas and hires the locals there, the employment laws of the foreign country must be complied with.



All employers are required by law to make monthly contributions to the Central Provident Fund (CPF) accounts of any employee who is a Singapore citizen or permanent resident, as long as the employee earns more than S\$50 a month. This requirement applies equally to student-employees, family member-employees, and part-time casual employees. CPF contributions for employees who are foreigners on employment and work passes are not allowed.

CENTRAL PROVIDENT FUND (CPF)

If you are a sole proprietor, or a partner in a partnership or limited partnership, you are only required to contribute to your medisave account at the prevailing mandatory rate. You may nonetheless wish to make voluntary contributions to your CPF accounts to build up your retirement savings. These contributions can also be used for your housing and healthcare needs. Further, voluntary contributions to your Medisave account only may entitle you to tax relief in the following year of assessment (YA).

Employers must be registered with the CPF Board to make the requisite contributions to their employees' accounts. CPF contributions are calculated based on the employee's total earnings for the month, including bonuses, commissions and allowances. The CPF Board has several online contribution calculators to assist you in calculating the amounts payable. Do also take a look at the Employers' Guide to CPF, which will provide you with a better understanding of your statutory obligations relating to CPF matters.

TAX ISSUES

The governmental authority responsible for taxation in Singapore is the IRAS. More information on Taxation may be found in Chapter 7.

All employers must report employee earnings to IRAS using the requisite forms, i.e., Form IR8A and the relevant appendices, on or before 1 March every year. From YA 2016 onwards, employers with 11 or more employees are required by law to participate in the IRAS Auto-Inclusion Scheme for Employment Income, which allows employers to submit details of their employee's employment income to IRAS online.

Under this Scheme, employers no longer need to distribute hardcopies of the IR8A Form and the relevant appendices to their employees, as the electronically submitted income and deduction information will be

automatically included in the employees' income tax assessment, and they may view their annual remuneration via their payslips or online through the IRAS tax portal. If as an employer you have less than 11 employees, you may also volunteer to participate in the Auto-Inclusion Scheme for Employment Income.

If you hire foreign employees in your organisation, do note that, subject to certain exceptions, IRAS requires an employer to notify IRAS and seek tax clearance that a foreign employee (i.e. an employee who is not a Singapore citizen nor permanent resident) has paid all his taxes, when this foreign employee ceases employment with you in Singapore or plans to leave Singapore for more than 3 months. Tax clearance must be sought at least 1 month before the foreign employee ceases to work for you or leaves Singapore in the abovementioned scenario, otherwise there may be a fine of S\$1,000 imposed on the employer. Further, where your foreign employee has outstanding taxes, the employer is required by law to withhold all monies due to him for onward payment to IRAS. Not withholding such monies when required, and not having a valid reason for the non-compliance, may result in you as employer being held liable for the tax that is owed by your foreign employee.

Finally, do note that IRAS requires all employers to keep in safe custody sufficient accounting records including that of your employees' remuneration for at least 5 years for accounting periods ending on or after 1 January 2007.

LIABILITY WHEN SELLING GOODS

If your organisation engages in the selling of consumer goods and perishables, you should take note of the aptly named "lemon law", set out in the Consumer Protection (Fair Trading) Act (Cap. 52A) (CPFTA), which makes it compulsory for a seller of a defective product (lemon) to repair, replace, refund or reduce the price of the defective product, within 6 months of purchase. The "lemon law" does not apply to real property, i.e., land, and rental goods.

Should you as the seller refuse to make good on the defective product, the customer may bring the issue up to the Consumers Association of Singapore (CASE), a non-profit, non-governmental organisation which will investigate into the matter.

Find out more about the lemon law in Chapter 13.

CESSATION OF BUSINESS

The process for the cessation of a business is relatively simpler for business structures which are not separate legal entities from their owners. Thus, for the sole

proprietorship, the partnership, and the limited partnership, owners of the business can cancel the registration of the entity with ACRA when it is time for the business to end.

On the other hand, separate legal entities such as the limited liability partnership and the company have to go through the process of winding up, where the assets of the business are used to pay off any debts of the business before being returned to the owners (if possible), in accordance with a formal procedure.

The issues associated with winding-up are discussed further in Chapter 19.



6

SINGAPORE'S PERSONAL DATA PROTECTION ACT



The Personal Data Protection Act 2012 (Cap. 26) (PDPA) entered into full force on 2 July 2014, establishes a general data protection law governing organisations' collection, use and disclosure of personal data, administered and enforced by the Personal Data Protection Commission (PDPC). The PDPA also introduces certain rules in relation to the Do-Not-Call Registry (DNC Registry). You need to ensure that your organisation complies with all the requirements set up by these rules.

For personal data collected before 2 July 2014, you do not need consent from the relevant individuals, so long as you continue using such data for the same purposes for which you collected it. If you wish to use it for other purposes, however, then you need to seek consent.

This chapter should provide you with a rough overview of the data protection and DNC Registry rules so that you may ensure that your organisation does not violate these rules.



WHAT IS PERSONAL DATA?

‘Personal data’ simply refers to information about an individual person who can be identified either from that data alone, or from that data in conjunction with any other information. For example, an NRIC or passport number, which are distinctive pieces of information unique to the holder, would constitute such ‘personal data’. A series of data (for example, one’s name, occupation, address), when considered in totality, could also be ‘personal data’ for the purposes of the PDPA, if that series of information operate to reveal the identity of a person. Other data that may be considered personal data include an individual’s name, occupation, marital status, address, contact information and photographs. Nevertheless, an individual’s business contact information (e.g. business telephone number) is not subject to the main data protection obligations under the PDPA.



WHY THE NEED FOR THE PDPA?

In today’s business environment, there is a real economic value attached to data and information, which can be used to analyse trends and provide key insights into consumer behaviour. The PDPA aims to enhance Singapore’s competitive advantages as a secure hub for data hosting and management.

The data protection rules were instituted in recognition of the rights of individuals to protect their personal data, and to ensure that the use of such data by organisations is legitimate and reasonable. The DNC Registry rules complement this, by allowing individuals to register their telephone numbers for the purpose of ‘opting-out’ of telephone marketing initiatives.

Both the data protection and the DNC Registry rules will be explained in further detail in this chapter.

Consequences of breaching the PDPA

Organisations can face up to S\$1 million in financial penalties for breaching the PDPA. Non-compliance with certain provisions may also constitute an offence, for which a fine or a term of imprisonment (or both) may be imposed.

For example, under s 51(5) of the PDPA, obstructing a PDPC officer in the course of an investigation, or giving a false statement to the PDPC, could attract:

- In the case of an individual, a fine of up to S\$10,000 or imprisonment for a term up to 12 months (or both); and
- In the case of an organisation, a fine of up to S\$100,000.

TO WHOM DOES THE PDPA APPLY?

The PDPA applies to private sector organisations in Singapore, regardless of their size, and it is quite likely that your organisation will fall within the scope of the PDPA. An ‘organisation’, as defined by s 2(1) of the PDPA, includes any individual, corporate body, association or body of persons, whether or not it is formed or recognised under Singapore law, or is a resident or has an office or place of business in Singapore.

Sole proprietorships, private exempt companies and partnerships are all ‘organisations’ for the purposes of the PDPA.

However, the following groups do not fall within the scope of the PDPA:

- (a) Individuals acting in a personal/domestic capacity (for example, an individual’s personal address book with information on his friends’ addresses, birthdays and telephone numbers);
- (b) Employees acting in the course of their employment (although the employer organisation may be held liable instead, if the employee was acting within the scope of the employer’s instruction/authorisation, which then resulted in a breach of the PDPA); and
- (c) Public agencies, or organisations acting on behalf of a public agency in relation to the collection, use or disclosure of personal data. These public agencies have been identified and set out in the Personal Data Protection (Statutory Bodies) Notification 2013.

If your organisation engages volunteers, you may wish to take note that the PDPA’s definition of an ‘employee’ includes a volunteer. Thus, individuals who undertake work without any expectation of payment would also fall within the exception carved out for employees at (b) above. Similarly, if a volunteer breaches the PDPA while acting under the instructions or authorisation of the enterprise, the enterprise will be held liable for the breach.



If an organisation merely processes data on behalf of another organisation, then the former organisation will be considered as a ‘data intermediary’. For example, a data intermediary could be a company that provides hosting or storage services of personal data for an organisation. This relationship will typically be governed by a separate contract between the organisation and the data intermediary, and where these arrangements exist, the data intermediary will only be required to comply with the rules on the protection and retention of personal data. In particular, the data intermediary must:

- Make reasonable security arrangements to protect such data; and
- Cease to retain data where there is no longer any legal or business purpose for keeping it.

However, the organisation that engages the data intermediary will have to comply with all the data protection rules under the PDPA.

OBTAINING CONSENT FROM INDIVIDUALS

Under the PDPA, organisations must obtain consent from an individual before collecting, using or disclosing his personal data, unless:

- The collection, use or disclosure is required/authorised by law (for example, in the course of an investigation conducted by a governmental agency); or
- An exception under the PDPA applies.

Some of the relevant exceptions under the PDPA are:

- Where the personal data is publicly available;
- Where the collection, use or disclosure is necessary for any investigation or proceedings, if (in respect of collection) it is reasonable to expect that seeking the consent of the individual would compromise the availability or the accuracy of the personal data;
- Where the collection, use or disclosure is for the purpose of debt recovery;
- Where the collection, use or disclosure is necessary for evaluative purposes; and
- Where the collection is by an employer and is reasonable for the purpose of managing or terminating the employment relationship.



Personal data may be collected, used, or disclosed for certain purposes only. An organisation cannot collect, use or disclose personal data for purposes other than those to which the individual has consented to, unless an exception under the PDPA applies.

Where specific individuals are concerned, donees appointed by a Lasting Power of Attorney under s 11(1) of the Mental Capacity Act (Cap. 177A) may generally provide consent on behalf of an individual who lacks mental capacity. In the event that an individual loses capacity but there is no proxy decision-maker, an application can be made to the court to appoint a deputy for him to make such decisions on his behalf. For minors below the age of 21, the practical rule of thumb is that a minor who is at least 13 years of age is able to give consent, unless there is evidence to suggest that he or she does not have sufficient understanding of the nature and consequences of giving consent.

Furthermore, even if consent is provided, it may not be valid under s 14(2) of the PDPA. Consent is not valid if it is not reasonable for an organisation to require such consent as a condition of it providing a product or service to an individual. For example, if a spa refuses to provide any therapy services unless the customer consents to his personal data being sold to a third party marketer, this is likely to be considered as unreasonable.

There will also be no valid consent, if the organisation provides false or misleading information, or uses deceptive or misleading practices to obtain consent. Examples of such practices include using illegible font in a consent form, or not giving the individual an opportunity to read through the clauses in a contract before asking him to sign it.

Consent may be ‘deemed’ (i.e. need not be expressed). This is where an individual voluntarily provides the personal data to the organisation for the purpose for which the organisation is collecting, using, disclosing it; and it is reasonable for the individual to do so. For example, a customer who uses a credit card to buy a movie ticket is deemed to have consented to the cinema and relevant banks using his personal data for processing the payment of his booking.

Withdrawal of consent

Individuals can choose to withdraw any consent previously given to an organisation to collect, use or disclose their personal data. S 16(1) of the PDPA provides for how the withdrawal of consent works:



- First, the individual needs to give reasonable notice to your organisation (it is not prescribed what ‘reasonable notice’ means, and this will depend on the individual facts of each case);
- Upon receipt of such notice, your organisation must inform the individual of the likely consequences of his withdrawal of consent;
- However, your organisation should not prohibit the individual from withdrawing consent; and
- Where the individual has withdrawn his consent, your organisation must inform whomever it has passed on the relevant information to stop collecting, using or disclosing that individual’s personal data.

PERSONAL DATA MUST BE ACCURATE

Organisations must ensure that personal data is accurate and complete.

Your organisation must make a reasonable effort to ensure that personal data which they collect is accurate and complete, if it is likely to be used to make a decision that affects the individual, or disclosed to another organisation.

What constitutes ‘reasonable effort’ will depend on the exact circumstances at hand, and will likely depend on factors such as the nature of the data and its significance; the purpose for the collection, use or disclosure of the data; the reliability and currency of the data; and the impact on the individual concerned if the data is inaccurate or incomplete. You can refer to the illustrations and examples in the PDPC’s Advisory Guidelines on Key Concepts in the PDPA, revised on 8 May 2015, for further guidance on this issue.

RETENTION OF PERSONAL DATA

Personal data should not be retained for longer than necessary

Organisations may keep or retain personal data as long as they serve any legal or business purpose. However, personal data should not be kept ‘just in case’ it may be needed. As long as the organisation retains the data, it is responsible for complying with the rules under the PDPA.

Such legal or business purposes include:

- Where the personal data is required for an on-going legal action involving the organisation;

- Where the organisation needs to retain the data to comply with its obligations under other laws; or
- Where the organisation requires such data to carry out its business operations, such as to generate annual reports or performance forecasts.

Generally, if one or more of the purposes for which the data was originally collected are still valid, the organisation may continue to retain it. However, if personal data is no longer needed for all purposes for which it was collected, then your organisation should take reasonable steps to remove it permanently and completely.

Data intermediaries are also subject to this requirement.

SECURITY ARRANGEMENTS

Organisations must make reasonable security arrangements

Organisations must make reasonable security arrangements to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks to personal data in their control or possession. Data intermediaries are also subject to this requirement.

Ultimately, how the data is to be protected depends on the nature of the data, the form in which it was collected, the form in which it may be leaked, and the possible impact to the individual if it is obtained, modified and/or disposed of by a third party.

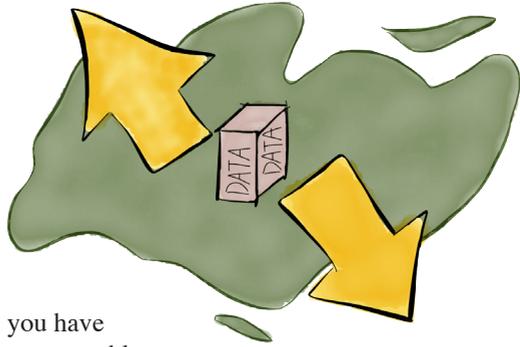
Security arrangements include the following:

- Locking up physical logbooks containing visitor information;
- Encrypting personal data before transferring the personal data to other online databases;
- Having reliable and well-trained personnel responsible for ensuring information security;
- Putting in place robust policies and procedures for ensuring security for personal data of varying levels of sensitivity; and
- Being prepared and able to respond to information security breaches promptly and effectively.

TRANSFERRING DATA OUT OF SINGAPORE

Restrictions on cross-border transfers of personal data

Under s 26(1) of the PDPA, your organisation cannot transfer personal data out of Singapore, unless you have given a standard of protection comparable to that under the PDPA to the personal data that is transferred. Your organisation should inform the individual in writing of the extent of the protection overseas, and get his consent to transfer his information.



These requirements are found in the Personal Data Protection Regulations 2014.

Importantly, the transferring organisation must ensure that the recipient is bound by legally enforceable obligations to provide the personal data with a standard of protection that is comparable to that under the PDPA. ‘Legally enforceable obligations’ include obligations imposed under any law; contract; binding corporate rules (where the transferring organisation and recipient are ‘related’); or any other legally binding instrument.

However, organisations are deemed to have satisfied this requirement if:

- Subject to certain conditions, the individual consents to the transfer of his personal data;
- The transfer is necessary to perform a contract between the organisation and the individual, or to do anything at the individual’s request with a view to the individual entering a contract with the organisation;
- The transfer is necessary for the conclusion or performance of a contract between the organisation and a third party which is entered into at the individual’s request, or which a reasonable person would consider to be in the individual’s interest;
- The transfer is necessary for a use or disclosure in certain situations where the consent of the individual is not required under the PDPA,

e.g. where the use or disclosure is necessary for any purpose which is clearly in the interests of the individual (and consent cannot be obtained in a timely way), or to respond to an emergency that threatens the life, health and safety of an individual;

- The personal data is data in transit; or
- The personal data is publicly available in Singapore.

INDIVIDUALS' RIGHTS IN RESPECT OF THEIR PERSONAL DATA

Access to personal data

An individual has a right to request for access to:

- (a) His personal data that is in the possession or under the control of an organisation; and
- (b) Information about the ways in which that personal data has been or may have been used or disclosed by the organisation up to one year before the date of request.

Organisations are allowed to charge a reasonable fee to recover the incremental costs of responding to the access request.

Nonetheless, organisations are not required to comply with an access request in certain situations, such as in respect of:

- 'Opinion data' kept solely for an evaluative purpose (e.g. a post-interview assessment of a candidate seeking employment);
- A document related to an ongoing prosecution;
- Personal data which is subject to legal privilege (i.e. confidential communications between a lawyer and his client);
- Personal data which, if disclosed, would reveal confidential commercial information that could, in the opinion of a reasonable person, harm the competitive position of the organisation;
- Personal data collected, used or disclosed without consent for the purposes of an investigation if the investigation and associated proceedings and appeals have not been completed;
- Any request:
 - ◊ That would unreasonably interfere with the organisation's



operations because of the repetitious or systematic nature of the requests;

- ◇ If the burden or expense of providing access would be unreasonable to the organisation or disproportionate to the individual's interests;
- ◇ For information that does not exist or cannot be found; or
- ◇ For information that is trivial, or otherwise frivolous or vexatious.

Moreover, organisations are not allowed to comply with an access request where doing so could reasonably be expected to:

- Threaten the safety or physical/mental health of an individual other than the requesting individual;
- Cause immediate or grave harm to the safety or to the physical/mental health of the requesting individual;
- Reveal personal data about another individual;
- Reveal the identity of an individual who has provided personal data about another individual and who does not consent to the disclosure of his identity; or
- Be contrary to the national interest.

In addition, organisations must not inform an individual if it has disclosed that individual's personal data to a prescribed law enforcement agency without his consent, pursuant to the exceptions to consent under the PDPA or under any other written law.

Correction of personal data

Individuals can also request organisations to correct any error or omission in their personal data that is in the possession or under the control of an organisation.

Your organisation should correct the personal data as soon as practicable, unless reasonably satisfied that the correction should not be made. The corrected data must then be sent to other organisations where the personal data was disclosed within a year before the date of the correction or, with the individual's consent, only to selected organisations. Organisations are not allowed to charge a fee for responding to correction requests.

However, organisations need not correct any error or omission in respect of:

- ‘Opinion data’ kept solely for an evaluative purpose;
- Personal data of the beneficiaries of a private trust kept solely for the purpose of administering the trust;
- Personal data kept by an arbitral institution or a mediation centre solely for the purposes of arbitration or mediation proceedings; or
- A document related to an ongoing prosecution.



APPOINT A DATA PROTECTION OFFICER

Your organisation must designate one or more persons to be your organisation’s Data Protection Officer. This can either be a person whose scope of work solely relates to data protection or a person in the organisation who takes on this role as one of his multiple responsibilities.

The business contact information of at least one Data Protection Officer has to be made known to the public, e.g. via the organisation’s website. This information must be readily accessible from Singapore and the officer must be contactable during Singapore business hours.

The Data Protection Officer is responsible for ensuring that the organisation complies with the PDPA. Hence, it is ideal for the Data Protection Officer to have oversight of the data processing activities within the organisation. Nevertheless, the Data Protection Officer will not be held personally liable for your organisation’s breach of the PDPA, if any, unless the officer himself is guilty of an offence under the PDPA (e.g. by obstructing an investigation by the PDPC, or misleading the PDPC). Your organisation is still responsible for carrying out your duties under the PDPA.

DO-NOT-CALL REGISTRY

Generally, the DNC Registry rules regulate the sending of telemarketing messages of a commercial nature (‘specified messages’) to Singapore telephone numbers, and apply to all persons (including individuals and companies, associations and other bodies of persons, corporate or unincorporated).





A message will be a ‘specified message’ if at least one of its purposes is to advertise, promote, or offer to provide:

- Goods or services;
- Land or an interest in land; or
- A business opportunity or an investment opportunity; or
- To advertise or promote a provider of these items.

However, messages sent for the following purposes are exempt from these rules:

- Soliciting donations for charitable causes;
- Messages sent to organisations for the purpose of the receiving organisation; and
- Messages sent by a public agency under, or to promote, any programme carried out by any public agency (not for commercial purposes).

Individuals can subscribe to the DNC Registry to have their phone numbers registered. If an individual’s Singapore phone number is registered under the DNC Registry, organisations cannot send telemarketing messages to that number unless they have clear and unambiguous consent, evidenced in writing or in any other accessible form from the user, or unless it has been specifically exempted under an Exemption Order.

There are 3 DNC registers set up, for:

- Voice messages;
- Text messages (including SMS, MMS and messages sent via any data applications using telephone numbers such as Whatsapp, iMessage, and Viber); and
- Fax messages.

All persons sending specified messages to Singapore telephone numbers must:

- Check with the DNC Registry, within 30 days before sending the message, to confirm that the number is not listed on the relevant DNC register; and
- Include sender information in the message and, in the case of voice calls, not conceal or withhold the calling line identity of the sender.

Organisations in Singapore that outsource telemarketing activities to overseas organisations will also generally be required to comply with these rules. However, organisations do not need to check the DNC Registry to send specified messages to Singapore telephone numbers if they have clear and unambiguous consent to send such messages, which is supported by evidence. In addition, organisations sending text and fax specified messages do not need to check the DNC Registry if they have an ongoing business relationship with the recipients of these messages.

The DNC Registry rules do not apply to post or email. However, please note that you must comply with the data protection rules in the PDPA, as well as the Spam Control Act (for example, by inserting an <ADV> in the subject header, and allowing recipients to unsubscribe from/opt-out of receiving such emails, etc.).

OTHER USEFUL RESOURCES

Personal Data Protection Commission

<http://www.pdpc.gov.sg>

A diverse website which provides comprehensive guidance for organisations faced with the challenge of complying with the PDPA. The PDPA and its associated regulations and subsidiary legislation, as well as the PDPC's Advisory Guidelines on Key Concepts in the PDPA, Advisory Guidelines on the PDPA for Selected Topics, and other sector-specific advisory guidelines, e.g. the Advisory Guidelines for the Social Service Sector, can be found here too.

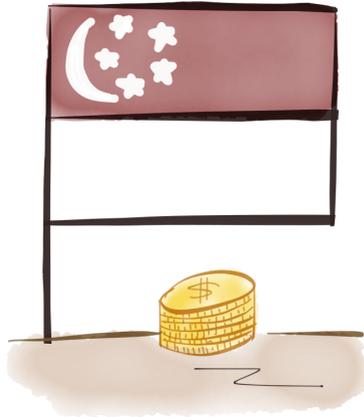
DNC Registry

<https://www.dnc.gov.sg>

Organisations may check the DNC Registry via this website.

7

TAXATION IN SINGAPORE



The Inland Revenue Authority of Singapore (IRAS) is the government body responsible for administering tax laws enacted by Singapore's Parliament. Its website can be found at www.iras.gov.sg. The website sets out rates of taxation, and also contains useful information in the form of circulars (or 'e-tax guides') issued by IRAS which explain tax concepts in further detail, as well as the practical application of such concepts.

Singapore's tax policy aims to raise funds for government operations while promoting economic and social goals. Tax rates are generally kept competitive to encourage hard work, promote entrepreneurship and attract foreign investments. This chapter seeks to inform you about the tax system in Singapore, and to highlight issues that might be particularly relevant to your organisation. If you are unsure about any aspect of taxation relating to your social enterprise or non-profit organisation, it is best to consult IRAS through its hotline, or to seek help from a lawyer or tax adviser. As an entrepreneur, it would be



good practice to check the IRAS website from time to time, and to pay attention to the Minister for Finance's yearly Budget Speech, which typically introduces the main tax-related changes and incentives for the year.

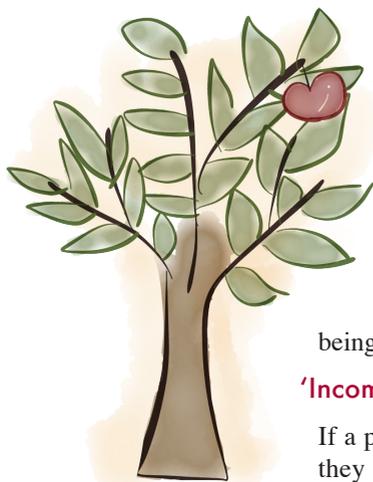
"The art of taxation consists in so plucking the goose as to get the most feathers with the least hissing." - Jean-Baptiste Colbert (France's Minister of Finances, from 1665-1683, under King Louis XIV)

INCOME TAX

Taxability of income

Under the Income Tax Act, (Cap. 134) (ITA), various receipts are recognised as being taxable as 'income'; including:

- Gains or profits from a trade, business, profession or vocation
- Gains or profits in respect of employment (for example-wages, stock option gains, commissions, bonuses etc.);
- Dividends;
- Interest;
- Rent; and
- Royalties, amongst others.



Income which is 'sourced' in Singapore will be subject to Singapore income tax. For businesses, foreign-sourced income will generally not be taxable in Singapore unless it is received (or deemed by law to be received) in Singapore.

Fundamentally, it is important to understand the concepts of income, source and when income is regarded as being received in Singapore:

'Income'

If a person's receipts are 'income' in nature, they may be subject to tax. By contrast,



Singapore does not impose tax on ‘capital gains’. Hence, capital gains from the sale of long-term investments or other capital assets are not subject to tax in Singapore. How then does one tell the difference between a receipt that is income in nature, and one that is capital in nature? An analogy is that of a tree and its fruit. Capital is like a tree that produces fruit, which is income. For example, a house that is rented out to a tenant would be considered as the ‘tree’, while the rental income obtained from the tenant would be the ‘fruit’. The rent received by the landlord would be taxable as income, but if the house were sold, any profits from that sale would not be taxable (unless the seller trades in properties).

‘Source’

Income which ‘accrues in or is derived’ from Singapore will be subject to income tax. A number of factors are considered when determining if a business’ income is sourced in Singapore - for example:

- (a) Is Singapore the place where the business profits arose from, or where the business’ operations are?
- (b) Were the key decisions in generating the income made in Singapore?
- (c) Were relevant contracts made and executed in Singapore?

If your organisation takes the form of an online business, you may wish to take note that IRAS has also published guidelines on e-commerce, and on how the above principles may be applied in the case of a business that operates through a website. For example, if a manufacturing company has business operations in Singapore but hosts its website with a hosting service provider in a foreign country, the company’s income derived from its e-commerce business will still be considered as taxable in Singapore if the company carries out its business obligations mainly through its Singapore operations.

‘Received’

Income derived from outside Singapore will be deemed to be ‘received’ in Singapore if it is:

- Remitted, transmitted or brought into Singapore;
- Applied towards the satisfaction of any debt incurred in respect of a trade or business carried on in Singapore; or

- Applied towards the purchase of movable property which is brought into Singapore.

To summarise, you should remember that as a result of the above ‘deemed source’ rule, foreign-sourced income can be taxable in Singapore even if it is not physically remitted or received in Singapore.

Form of Organisation – Registered Charities

Organisations can take many different forms. If your organisation is a registered charity, it will be exempt from income tax and does not need to file income tax returns. As a charity, your organisation may attract “donations” from people who wish to support your social mission. However, if your organisation is not a registered charity, you should be aware that such contributions may be subject to income tax in the hands of your organisation, depending on the circumstances under which the contribution is made.

TAX RESIDENCY

Tax residency is a very specific term and means different things to companies and individuals:

Individuals

Someone is resident in Singapore if he is:

- Ordinarily living in Singapore, except for some temporary and reasonable absence.
- Physically present in Singapore or employed in Singapore (but not as a company director) for at least 183 days in a calendar year.



Companies



A company is considered tax resident in Singapore if its central management and control is in Singapore.

Why is it important to understand the concept of tax residency?

Amongst others, tax residency determines:

- (a) The rate at which tax is imposed, if you are an individual (for example, this is relevant if your business

is run as a sole-proprietorship). Non-residents are generally charged at flat rates of tax, whereas Singapore residents are taxed at progressive tax rates;

- (b) The ability to rely on Singapore's network of tax treaties (commonly referred to as 'Avoidance of Double Taxation Agreements', or DTAs). Non-residents will not be able to rely on Singapore's DTAs, which could be beneficial if your business derives income and pays tax abroad;
- (c) The availability of certain tax exemptions and reliefs (for example, the tax exemption for start-ups mentioned below, and exemptions on certain foreign-sourced income which may be received by companies in Singapore, from outside Singapore);
- (d) Whether withholding tax in Singapore will be applicable to the various transactions carried out by an entity (explained further below); and
- (e) If the entity is a company, whether tax-exempt dividends may be paid (Singapore-resident companies may pay dividends which are exempt from tax in the hands of their shareholders).

BASIS OF TAXATION

The tax treatment of your organisation will depend on the kind of corporate structure that you adopt.

Sole proprietorship

The sole proprietor's business income will be treated as a part of his or her personal income, and will be taxed at the relevant personal income tax rates.

Partnership, Limited Liability Partnership, Limited Partnership

These are 'tax transparent' vehicles, and each partner will be taxed on their own share of the business' income, at their own applicable tax rates. For example, if the partner is an individual, individual rates of tax will apply. If the partner is a company, then the corporate tax rate will apply.

Companies

The current tax rate for companies is 17% with a partial tax exemption

for the first S\$300,000 of profits. If the relevant conditions are met, new start-up companies (including companies limited by guarantee) may be granted enhanced tax exemptions for each of their first three consecutive years of assessment (or “YAs”). For YAs 2016 and 2017, companies will receive a 30% Corporate Income Tax (CIT) rebate that is subject to a cap of S\$20,000 per YA. Details on the computation of the CIT Rebate and the partial and start-up tax exemptions can be found on the IRAS website (www.iras.gov.sg).

ASSESSMENT OF TAX AND COMPLIANCE

Tax is assessed and payable in Singapore, on a preceding year basis, in respect of a YA (defined above). What this means is that the tax payable in any YA generally relates to the income earned in the previous calendar year. If a company’s accounting year happens to end on a date other than 31 December, then the preceding accounting year (and not the calendar year) will form the basis period for a YA. For example, if a company has a financial year end of 31 March, its basis period for taxation in YA 2016, will be 1 April 2014 to 31 March 2015.

For each YA, taxpayers are required to file a tax return with IRAS in a prescribed form (which can be found on the IRAS website) along with supporting documentation, declaring their income. In addition to filing the annual tax return, companies need to file an estimate of their chargeable income (ECI) for each financial year (unless they are exempt from this requirement). These basic procedures are the requirements set out in the ITA. Any failure to comply with these obligations is an offence that may attract penalties and fines.

IRAS will issue a Notice of Assessment (NOA) to the taxpayer after the annual tax return is filed. The NOA contains details of the income tax payable, and the date by which the tax should be paid.



You have a duty to ensure that the information you provide to IRAS is correct. The penalty for submitting incorrect information negligently or without a reasonable excuse is imprisonment of up to three years (with fines and penalties). If you submit fraudulent information with the intention to evade tax or to assist another person to evade tax, you may face imprisonment of up to five years, along with fines and penalties.



DEDUCTIONS

If you are carrying on a trade or business, you may be able to make certain deductions from the income generated by your business (thereby reducing your final tax bill). Some of these basic deductions are as follows:

- (a) Expenses which are wholly and exclusively incurred in the production of income are deductible, unless prohibited under the ITA, such that only net income is included in the amount brought to tax. Common examples of allowable deductions include: costs of staff, including employees' salaries, bonuses, allowances, and irrecoverable (or 'bad') debts incurred in respect of your trade or business;
- (b) Expenditure incurred in the acquisition of certain assets for the purposes of your trade, profession or business (or 'capital expenditure') - for example, plant and machinery, intellectual property rights - may be set off against the income derived from the use of those assets; and
- (c) Under the Productivity and Innovation Credit (PIC) Scheme available until YA 2018, businesses are generally entitled to deduct 400% of the amount of capital expenditure incurred by them per year (subject to a cap of S\$400,000), on each of 6 'qualifying activities'. These 'qualifying activities' are (i) the acquisition of intellectual property rights, (ii) training of employees, (iii) the registration of patents, trademarks, designs and plant varieties, (iv) research and development activities, (v) certain design projects, and (vi) the acquisition or leasing of certain information technology and automation equipment.



The annual expenditure cap of S\$400,000 per qualifying activity may also be combined.

For qualifying small and medium enterprises (SMEs), the available deductions are potentially greater under the PIC+

Scheme, as a higher expenditure cap of S\$600,000 is available, which may be combined as follows:

YEAR OF ASSESSMENT (YA)	EXPENDITURE CAP PER QUALIFYING ACTIVITY	TAX DEDUCTION PER QUALIFYING ACTIVITY
2016 TO 2018 (COMBINED)	S\$1,800,000	S\$7,200,000 (400% x S\$1,800,000)

Note that an entity will only be regarded as an SME for the purposes of the PIC + Scheme if its revenues are not more than S\$100 million; or if it does not have more than 200 employees.

Up to YA 2018, businesses may elect to convert part of their PIC allowances into a cash grant if certain conditions are met. For YAs 2013 to 2015, businesses may also enjoy a ‘PIC Bonus’ (whereby the government will give a business a dollar for every dollar it spends on a qualifying PIC expense, subject to an overall cap of S\$15,000). While the cash payout option continues to be available till YA 2018, the PIC Bonus scheme expired in YA 2015.

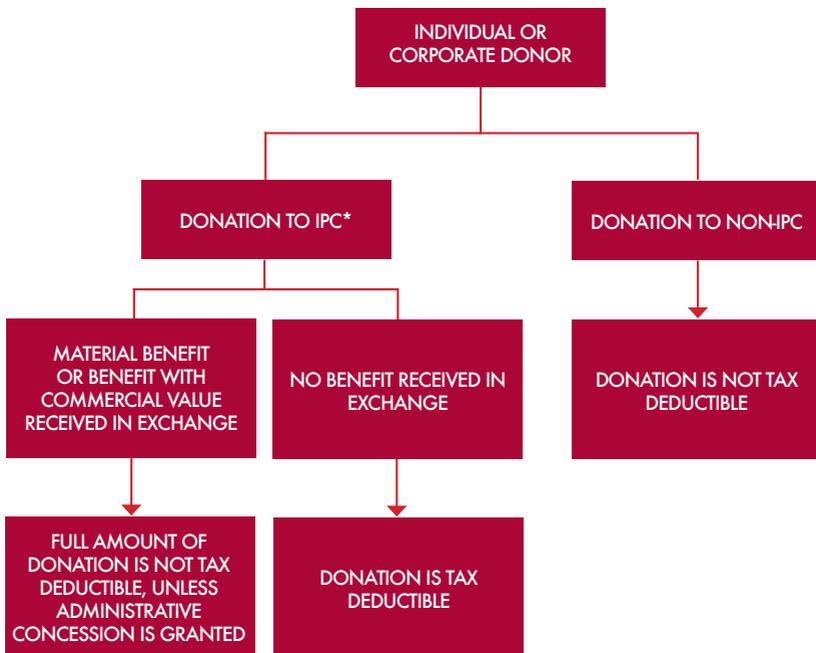
Further details on these additional incentives (as well how they are applied) can be found on the IRAS website.

You should be wary of tax agents or advisers who suggest putting artificial arrangements in place in order to maximise PIC benefits. IRAS has listed on its website some examples of abusive PIC arrangements and you should be wary if your advisers make similar suggestions of how to “game” the system. Remember, regardless of any advice you may receive, the liabilities to taxation remain with you. If in doubt, check on the proposed arrangement with IRAS, or seek independent legal advice.

- (d) Donations made to an Institution of a Public Character (IPC) will entitle the donors to enhanced deductions (300% for donations in 2015, 250% for donations in 2016 to 2018) of the value of the qualifying donations made. Do take note of this if you wish to set up an IPC yourself, or if your organisation makes donations to IPCs.
- Donations need not be in the form of cash to enjoy this tax treatment. Gifts of shares, computers, artefacts, art and land are also eligible. However, if a donation comes with a benefit to the donor (for example, if a souvenir having commercial value is given to the donor), the full amount of the tax deduction may not be claimed.



- IRAS has come up with a list of donations bundled with benefits that in its view do not have any commercial value (for example, the purchase of a charity fundraiser ticket that entitles the donor to attend a charity show, complimentary tickets to the Singapore Zoo, or golf tournaments where the donation includes a golf game for the donor). Thus, if such donations are made, the full amount of enhanced tax deductions may be claimed notwithstanding any benefits to the donor.
- Tax deductions will not be allowed in cases where the donor is essentially advertising at the IPC facility, event, or programme.
- In addition, where donations or gifts are made for a “foreign charitable purpose”, they are not tax deductible even if they are made to an approved IPC (for example, where the donation is made to an overseas relief fund managed by an approved IPC).
- Note that not all registered charities are approved IPCs, and donations made to a charity (or any other entity) without approved IPC status are not tax-deductible from the donor’s perspective. A summary of the tax treatment of donations from the donor’s perspective is summarised in the following chart:



* And not made for a foreign charitable purpose

UNDERSTANDING WITHHOLDING TAX

When certain payments (for example, interest, royalties, director's fees, payments for the use of or the right to use scientific, technical, industrial or commercial knowledge) are made to persons who are not tax-resident in Singapore, and these payments have (or are deemed to have) a Singapore 'source', withholding tax may be applicable.

What this means is that the payer needs to deduct the amount of tax payable to IRAS (at the relevant withholding tax rate) from the payment due, and pay only the remaining amount to the foreign recipient. Although the burden of the tax is borne by the non-resident recipient of the payment, the ITA states that if the payer does not comply with its collection obligations, then the tax which should have been withheld will then be borne by the payer. Similarly, late payment of withholding tax to IRAS will also attract a penalty which will be imposed on the payer.

The concept of withholding tax will be most relevant to your organisation if it makes payments to persons which are not tax-resident in Singapore (for example, a foreign business). If so, you should ask yourself:

- (a) What is the type of payment that is being made?
- (b) Is the payment subject to withholding tax under Singapore's tax laws?;
- (c) If so, is there any waiver or exemption from the tax that has been granted? Are there any DTAs which might reduce the rate of tax imposed?;
- (d) If withholding tax is applicable, does the recipient of the payment know this? Do you need to alter your commercial arrangements to accommodate the payment of this tax?

TAXATION OF COMPANIES LIMITED BY GUARANTEE (CLG)

A CLG (if it is not a registered charity) would be liable to pay tax on its income at the prevailing corporate tax rate.

In the very specific situation where a CLG carries on a trade or professional association with members who pay entrance fees and subscriptions, such a CLG may be treated for tax purposes as a 'mutual concern'. Where such a CLG is treated as a 'mutual concern', the amount of the CLG's income which is subject to tax will depend on the proportion

of its receipts (i.e. entrance fees and subscriptions) from Singapore members. This treatment however is subject to approval being granted by IRAS, and provided that the CLG is able to meet certain conditions. For example, it must not be set up for the purposes of profit or gain, any surpluses must be used to carry out its not-for-profit objectives, and it must exist for the sole purpose of benefiting its members.

OBJECTION PROCESS

If you disagree with a tax assessment that has been raised by IRAS in respect of your organisation, you may object to it by informing IRAS of your grounds for objection within 30 days of receiving the NOA. This is called a 'Notice of Objection' and may be sent to IRAS electronically or in writing. If the Notice of Objection is not sent to IRAS within this 30 day period, the tax assessment is treated as finalised. As of 1 January 2014, by way of an administrative concession, this timeframe will be extended to two months from the date of service of the NOA for corporate tax matters. If you are unable to come to an agreement with IRAS on the tax assessment, you may appeal further to a tribunal called the Income Tax Board of Review (ITBR), and subsequently to the High Court and Court of Appeal. The tax assessed by IRAS will be payable notwithstanding any such appeals (this means that if you subsequently win your appeal, any excess tax will be repaid).

GOODS AND SERVICES TAX (GST)

GST is a tax on domestic consumption. Generally, under the Goods and Services Tax Act (Cap. 117A), GST at a rate of 7% is generally applicable on supplies of goods or services in Singapore by a GST-registered person (explained below) and on the import of goods into Singapore. GST at a rate of 0% is applicable on exports of goods from Singapore and on the supply of certain international services. Certain supplies are also exempt from GST in Singapore, or may fall outside the scope of GST altogether. Before embarking on your organisation, you should consider whether the goods or services that you intend to provide will attract any GST and whether you need to register for GST and if so, how this should be reflected (if at all) in the pricing of your goods or services.



WHEN TO REGISTER FOR GST?

Generally, any person making or intending to make taxable supplies in the course or furtherance of a business may register for GST. A person is required to register for GST if the value of taxable supplies made or expected to be made by him will exceed S\$1 million over a 12-month period. The GST-registered person making the supply will be responsible for collecting and paying the GST to IRAS. Accounting for GST payments and refunds is generally done on a quarterly basis, by the GST-registered person filing GST returns, and should be supported by proper tax invoices.

If your organisation takes the form of a charity, it is required to register for GST if its annual taxable supplies exceed S\$1 million. Once a charity is registered for GST, the charity will be required to charge and account for GST on its taxable supplies (such as grants, donations and sponsorships) where benefits are provided in return.

STAMP DUTY

Stamp duty is generally payable on instruments (i.e. documents) for the transfer of interests in:

- (a) Immovable properties (for example, the sale of houses or apartments, or tenancy arrangements) in Singapore; and
- (b) Unlisted shares registered in Singapore.

The duty is usually payable by the transferee or buyer of the property or shares, but it is generally open to parties to agree otherwise between themselves. Where certain types of industrial and residential property are bought and sold, seller's stamp duty may also apply, depending on the type of property transferred, when the property was acquired, and the period of time for which the property was held before sale.

Stamp duty is also payable on other common instruments, such as mortgages, leases and certain trust documentation. The relevant rates of tax are available on the IRAS website. You should consider whether stamp duty might be payable on any agreements you enter into, when such duty should be paid, and if duty is payable, which party should bear these costs. Stamp duty relief and remissions may also be available in certain circumstances, so do check if they apply to your situation. If you fail to stamp your document in accordance with the law, the document may not be admitted as evidence in the Singapore Courts if you are later involved in any court proceedings that require you to rely on such document.

PROPERTY TAX

Property tax is payable annually on the value of land and immovable property in Singapore by whoever has a legal or beneficial interest in the property (typically the owner of the property). The



“annual value” of such land and immovable property is determined by the Chief Assessor, and further information can be found on the IRAS website. Generally, flat rates of tax are imposed on non-residential buildings and land, whereas progressive rates of tax will be imposed (with effect from 1 January 2014) on residential property. Owner-occupied properties also enjoy special concessionary rates of tax.

The relevant rates of tax are available on the IRAS website, and you should be mindful of the effect property tax might have on your business. For example, if you intend to purchase your business premises, have you factored in property tax as an annual charge that you will need to pay? If you rent your business premises, has your landlord made you contractually liable for any annual property taxes?

Charities that own properties may write in to apply and seek IRAS’ approval for exemption (or partial exemption) from property tax on a building or any part thereof used exclusively as a place for public religious worship, for a public school in receipt of grants-in-aid from the Government, for charitable purposes, or for purposes conducive to social development in Singapore.

8

FUNDING



WHERE AND HOW TO FIND SOME EXTRA CASH

When you've got a great idea but lack the dollars to go with it, it's time to source for funding. There are many ways you can raise funds to further your organisation, but choosing what's best for you requires careful consideration.

Funding is a fundamental issue with all organisations, social enterprise or otherwise. Your organisation can only function if it has sufficient working capital, which is the amount of money readily available for day-to-day business activities and operations. It is the lifeblood of your organisation - you need it to buy your goods, pay your employees and to meet the short-term liabilities of your business.

Generally, there are four ways you can generate money for your organisation:

- Apply for a grant;
- Borrow money (loan);
- Sell part of your business (equity); or
- Seek crowd funding.

If your organisation is a charity, you may also conduct fund-raising activities. Separate grants are also available to non-profit organisations from the National Council of Social Service.

Deciding on the right method will depend on many factors, such as your legal business structure (see Chapter 2), the associated risks, and your obligations to the person or entity giving you the money.

GRANTS

Government

SPRING Singapore is a government agency under the Ministry of Trade and Industry (MTI). It is responsible for promoting the growth of Singapore enterprises. This should be your first destination to find out what grant schemes are available and whether or not you are eligible.



Currently, there are several government grant schemes available to start-up companies and entrepreneurs, however these schemes are often renamed, augmented over time, superseded by new schemes or abolished altogether, so your organisation must check on the continued applicability of any schemes that you may have heard of. Regardless, the grants usually fall into 2 main categories; fixed sum cash grant or a co-contribution scheme:

- A fixed sum cash grant is simply a set amount of money given to a finite number of selected applicants. For example, the grant scheme may have an allotment of \$10,000 with the goal to give out \$1,000 to the first 10 eligible applicants.
- Co-contribution schemes are more common, whereby you will be given \$X for every \$Y that you raise in capital, often limited up to a specified amount. Co-contribution schemes act as less of a one-off

handout and more of an incentive to raise capital yourself. If eligible, you can expect the co-contribution made by the government agency to be contingent upon meeting certain conditions of the scheme, such as performance indicators, timelines and capital targets.

SPRING Singapore's schemes provide support for a wide range of businesses with differing needs, ranging from the development and upgrading of capabilities, and the creation of new market opportunities to the nurturing of innovative start-ups throughout various industries and sectors. Depending on the type of grant scheme, the funds may be given to you as a loan, a monetary donation, or in exchange for a share of your enterprise's ownership (shares) and profits (dividends).

Organisations

Some large multinational organisations also offer grant schemes relevant to their field of business to promote ingenuity in social welfare and not-for-profit organisations, as part of their general corporate social responsibility programmes. A quick search on the internet for these organisations might just prove to be worthwhile.

There are also several other government organisations and schemes that offer grants and funding assistance in Singapore. One example is the Young Changemakers Grant scheme administered by the National Youth Council (NYC), which aims to provide seed funding for youths to implement projects for the community (see: <https://www.nyc.gov.sg/>).

You can also seek grant funding from the Community Foundation of Singapore (CFS) (see: <https://www.cf.org.sg/>), a charitable foundation which aims to direct philanthropists to charities and causes with an impact on the community. Do visit its website^{lxxii} to see if your social enterprise qualifies for any of the grants being offered by the CFS.

If your organisation is a non-profit organisation, you may seek grant funding from the National Council of Social Service. The National Council of Social Service administers a number of grants to enable voluntary welfare organisations, including charities, to achieve their aims in projects and services (see: <https://www.ncss.gov.sg/VWOCorner/funding.asp>). In particular, all exempt, registered charities and Institutions of Public Character (IPCs) can apply for the VWOs-Charities Capability Fund (VCF). The VCF aims to enhance governance and management capabilities of charities and IPCs through the following grants:

- The VCF Training Grant provides co-funding for local training

courses to help charities comply with regulatory requirements and build good governance standards. The grant covers local training courses, seminars or conferences related to governance and management.

- The VCF Consultancy Grant provides co-funding for the engagement of external consultants for governance and management consultancy projects. The grant covers consultancy projects by external consultants to improve key governance and management areas, for example, conducting a review on policies covering regulatory compliance, internal controls and governance best practices.
- The VCF Shared Services Grant provides co-funding for charities that outsource their payroll, finance and accounting functions to a third-party service provider. The grant covers shared services in payroll service as well as finance and accountant services.
- The VCF Info-Communications Technology (ICT) Grant provides co-funding for charities to harness ICT to facilitate the submission of returns and transactions on the Charity Portal. This grant covers basic infrastructure components like computers, printers, broadband and office automation tools. This grant also covers Commercial Off-The-Shelf software, e.g. Microsoft Office, Anti-virus, Adobe Acrobat, and the conversion of accounting systems to adopt the Charities Accounting Standard.

More information on the scope of funding for Charities/IPC's is available on the Charity Portal (<https://www.charities.gov.sg/Grants/VWOs-Charities-Capabilities-Fund/Pages/Overview.aspx>).

Applications for VCF may be submitted via post or through the National Council of Social Service online portal.

LOANS

A loan is a contractual agreement between the lender (usually, a bank) and a borrower, whereby a borrower receives money from the lender and in return promises to repay the borrowed amount plus interest. Like any contractual agreement, a loan agreement is governed by the terms agreed between the contracting parties to the agreement.



A standard loan agreement normally contains the following types of terms:

- **Quantum and any restrictions on use of the loan**

The principal sum must be clearly defined so that you are able to manage your repayment obligations. Some lenders may impose restrictions on the purposes for which the loan may be used. Some lenders may also choose to impose restrictions relating to the change of control in your business or change in your business activities. You will need to think about how these conditions and restrictions will impact your activities, and whether it makes sense for you to accept them in exchange for the loan.

- **Repayment term**

When must the loan be repaid? Can the loan be repaid in stages or by instalments over a period of time? Or must the entire loan be repaid in one lump sum on a specific date?

- **Interest rate**

How much interest is this particular lender charging? Is the interest rate fixed or floating? Are the rates used subject to a base rate (Swap Offer Rate (SOR), Singapore Interbank Offer Rate (SIBOR) or London Interbank Offer Rate (LIBOR) etc.), which may in turn be subject to market rates? Depending on your repayment strategies and business needs, certain modes of interest rates calculation (such as monthly rest or daily rest) may be more cost effective.

- **Acceleration clause (upon event of default)**

This clause provides for the circumstances under which the lender is entitled to immediately demand the repayment of all outstanding loans. Such a clause is typically paired with language providing that a borrower must repay all outstanding loans to the lender immediately upon the occurrence of certain events of default, such as when a borrower misses too many repayments.

- **Security/Collateral**

Banks and financial institutions usually require a borrower to provide security (also known as collateral) to protect itself in the event of the borrower's default (failure to meet repayments).



- **Guarantor clause**

Some lenders may require you to give a personal guarantee over the obligation of your organisation to repay the loan. This means that even if your organisation takes the form of an entity with limited liability (for example, a private limited company – see Chapter 2), you could be called upon to repay the loan in your personal capacity, if your organisation defaults on the loan. Therefore, you need to be wary of such a clause, and consider whether the risks of providing a personal guarantee outweigh any potential benefits.

A Few Things to Note About Loans

Before entering into a loan agreement, you should consider the terms carefully and decide whether your organisation can fulfil them. Once you sign a loan agreement on behalf of your organisation, your organisation will be bound by the terms of the loan agreement. Therefore, it is important that you obtain the appropriate legal advice before your organisation enters into a loan agreement.

As mentioned above, if your organisation is incorporated as a private limited company, it will be an entity separate from yourself. In that case, any loan agreement should be made between the lender and your organisation as the borrower. This, in most cases, absolves you from personal liability if your organisation fails to repay the loan. If, on the other hand, you opt to form a partnership or run your organisation as a sole proprietorship, you could become personally liable for any default on the loan (see Chapter 2 for the pros and cons of each type of entity).

Lastly, exercise caution before you agree to provide a personal guarantee for the loan. Should your organisation default on the loan, the lender may be entitled to rely on the personal guarantee to demand that you repay the loan. In that situation, you will become personally liable for the repayment of the loan even if it was your organisation (private limited company), and not you, that entered into the loan agreement with the lender.

Financial Institutions

Most financial institutions, such as banks and credit/finance companies, will be able to provide your organisation with a loan. Do shop around and look out for a loan with the most attractive terms. Of course, you will also need to convince these lenders that your organisation will

be able to repay the loan at the end of the loan period. Most financial institutions will typically require your organisation to have some sort of track record (e.g., conduct business for more than 2 years), ask to inspect the accounts of your organisation or inspect your personal credit records.

After discussions with a financial institution, the financial institution may make an offer to your organisation by way of a document called a Letter of Offer or Term Sheet setting out the basic terms of the loan. These are typically accompanied by the financial institution's Standard Terms and Conditions, which contain very detailed loan terms. The Standard Terms and Conditions, together with the Letter of Offer or Term Sheet, constitute the loan agreement. As mentioned, once you sign the loan agreement, your organisation is obliged to repay the loan plus interest within certain deadlines. This obligation persists even if your business fails.

Family and Friends

Friendship loans are typically from family and friends who believe in your vision and abilities. Borrowing money from a family member or friend requires a great deal of trust on both sides of the arrangement. These loans are often informal, flexible and rarely require collateral. The terms of the loan are flexible and negotiable, such as the interest rate (if any), repayment deadlines and repayment period.

To avoid any misunderstandings or damaging the relationship, it is best to seek legal advice and expertise in setting out the terms of the agreement and have each party sign a document.

Be sure that the lender is aware that the funds are a loan and not in exchange for a share of the profit or business ownership. Depending on the size of the loan, the lender may expect that he/she shall be entitled to play an active role in the management or operation of your business so as to protect his/her investment. Be sure that both parties clearly understand what they are getting in exchange for the loan.

As the borrower, you should also be aware that should your business fail, your obligations under the agreement will continue to survive, even if the loan is a personal one and has not been granted by a bank or financial institution. This means that unless the lender has agreed to waive repayments, you will have to continue with your repayments and repay the borrowed amount by the agreed deadline.

EQUITY

There is always the risk that your organisation cannot repay the loan within the stipulated timeline.

An alternative to financing your organisation without the risk of the inability to repay the loan is by equity financing, which in its simplest form is the sale of a portion of your organisation to investors. This is applicable to organisations in the form of a private limited company; the company offers its shares to investors in return for the price of the shares. (If your organisation is in the form of a partnership, you as one of the partners could also sell a share of the partnership to a potential investor—do seek legal advice on this.)



One of the biggest advantages of such a method is that the risk of business failure is borne partially by the investors. There is no obligation to repay any money to these investors if your organisation does not do well. There are no additional costs in the form of interest payments in most cases.

The downside to this is that you lose some control over your organisation to the investor. When an investor injects cash into your company in return for shares, the investor gains control over your company in the proportion of his shareholding in the company. In this sense, the investor becomes a co-owner and shareholder of the company, together with you. You may need to share your profits with the investor. You may also need to consult with the investor before any major decision is made on behalf of the organisation.

Shares give voting rights to the shareholder in a general meeting when major decisions are made; the higher the shareholding, the greater the voting ‘power’. These are all considerations before you decide how much of your organisation to be sold to investors in return for cash injections. In order to maintain majority voting “power”, you will need to hold at least 51% of the shares in the company.

You can also consider selling preference shares to an investor. A preference share is a form of hybrid equity that has both the properties of a loan and an ordinary share. A preference shareholder may not have voting rights; in which case you would not cede decision-making control of the company to this investor. You must, however, pay out any dividends of the company to the preference shareholder(s) before the ordinary shareholder(s).

Although it is not common for start-up companies to issue shares of different classes conferring different types of rights, there is certainly flexibility under the current company law for companies to offer different classes of shares bestowing the investor with different types of management rights or varying degrees of entitlement to the companies' profits and capital. You should seek legal advice on this as well.

In the context of a social enterprise, it is very important that a potential investor shares your vision for the social enterprise, because you are no longer the only person making the key decisions in the company. Your control over the social enterprise is limited by your shareholding and generally, you will be unlikely to have any say over how your investor votes in a general meeting. Therefore, you and your potential investor(s) should have a thorough discussion regarding how you would like to develop your social enterprise before you "sell" control over the enterprise, in the form of equity. After that discussion you and the investor(s) will need to enter into a shareholders' agreement which should again be drafted by a lawyer.

SHAREHOLDERS' AGREEMENT

A shareholders' agreement is a legally binding contract entered into between the shareholders of a company. It is usually entered into before the shares in the company are distributed amongst these shareholders but may also be entered into at any time during the company's existence.

This agreement governs the different rights and obligations of each of the shareholders, as well as the relationship amongst these shareholders. These agreements vary substantially depending on the nature of the business, but for organisations, it is essential for the shareholders' agreement to clearly provide for certain rules relating to the management of the business that would not detract from the goals of the organisation. (If your organisation is in the form of a partnership, the agreement setting out the partners' rights in relation to one another (or each other), typically called a partnership agreement, would be broadly similar in purpose to a shareholders' agreement.)

The shareholders' agreement should deal with the following issues:

- Who brings what to the table (stating clearly the monetary contributions of each shareholder);
- What decisions require unanimous consent? You may require some decisions, for example, expansion of business into a certain sector,

to be agreed upon by all of the shareholders instead of by majority vote. These types of decisions ought to be spelt out at the start;

- The roles and responsibilities of each shareholder/director;
- Termination of the shareholders' agreement;
- Obligatory transfers of shares;
- Exit strategies (e.g. "Russian roulette" or "Mexican shoot-out" clauses which could provide for the resolution of a deadlock situation where shareholders own equal numbers of voting shares, but disagree on a particular decision to be made); and
- Right of first refusal. This provides for a situation where before a shareholder wishes to sell some or all of his or her shares to a third party, this shareholder must first offer these shares to existing shareholders on the same terms as those offered to the third party, and also reveal the identity of the third party. As a result, the existing shareholders are afforded an opportunity to buy these shares if they wish, to block the third party from becoming a co-owner and shareholder of the company.

You and your fellow shareholders need to consult with lawyers before drafting and entering into a shareholders' agreement. Such agreements are rather complex and need to be tailored specifically to the needs and nuances of the organisation envisaged by you and your fellow shareholders. If drafted well, you would have laid the groundwork for a smooth working relationship amongst the shareholders of the organisation.

CROWDFUNDING

One common model of crowdfunding sources small contributions from many individuals in order to finance a project or venture. The process is often facilitated through public platforms such as websites.

This is very viable for organisations that have a product or service to offer but require funds to put a prototype into production or raise the initial capital to render the proposed service.

Members of the online community pledge money towards a project because they share your vision, they like the idea of your product, or they want to see



your idea succeed. Backers do not share any ownership in your enterprise or reap any of the profits. In return, backers are usually offered a reward such as access to your product or service before it is publicly available on the open market.

Usually, if your project does not receive enough pledges to meet your goal, you will not get any of the pledged money. It is only when you reach your goal that the pledged money is realised.

You should be conscious of your intellectual property rights before listing a project for crowdfunding. Be sure that you have first secured your intellectual property rights, such as patents or trademarks, before listing your project. Alternatively, accept that your idea is out there and utilise the momentum before someone can copy or recreate your project. For more information on Intellectual Property, please see Chapter 11.

You should also note that some types of crowdfunding companies are regulated by the Monetary Authority of Singapore (MAS) and subject to closer scrutiny by the authorities. The Financial Institutions Directory on the MAS website (www.mas.gov.sg) provides a list of these regulated entities. Do note that “donation-based” crowdfunding models – such as the one described above - are generally not subject to MAS regulation.



FUND-RAISING

There are different requirements on starting a fund-raising campaign, depending on whether the fund-raising appeals are made in the capacity of a charity, an IPC or the general public.

For more information on fund-raising requirements, including your duty to donor, the usage of donations, the documents to be submitted and the 30/70 fund-raising efficiency ratio, please visit the Charity Portal (<https://www.charities.gov.sg/Fund-Raising/Pages/Overview.aspx>).

Applying for Permits

Depending on the type of fund-raising activity you have in mind, you may need to apply for permits or licences from the relevant agencies.

For instance, if your charity’s fund-raising campaign involves the collection of money or property by means of visits from house to house or by soliciting



in streets or other places, or by both such means, a House To House and Street Collections permit is required. However, the following types of collections do not require a licence:

- A private collection that is confined to friends or relatives;
- Making an appeal through the telephone or the media such as the internet and newspapers;
- Sending out appeal letters by post; or
- A collection that is carried out by a full or associate member of the National Council of Social Service (NCSS) or the Community Chest, with a written approval from the Chief Executive Officer of the NCSS.

Information on permits and licences can be found at the Online Business Licensing Service (<https://licences.business.gov.sg/SHINE/sop/WebPageHandler?p=OASIS&pn=SelectLicences&ss=Start>).

Foreign Charitable Purposes

Any person who raises funds for foreign charitable purposes is required to apply for a permit from the Commissioner of Charities.

Whether your event involves public or private fund-raising can have a significant impact on whether funds may be used for foreign charitable purposes, i.e. benefiting those outside of Singapore.

- Where public fund-raising for foreign charitable purposes is concerned, funds raised are subject to the “80/20 rule”, which requires that at least 80% of the net proceeds of the funds raised must be applied within Singapore.
- However, where private fund-raising applies, all funds raised can be directed to the foreign beneficiary.

The Charities Commissioner has introduced some guidelines indicating how he might decide whether fund-raising is public or private. It is more likely that the fund-raising will be regarded as private when the target donors are sufficiently informed about how their money is being used before making the donation, in particular, that their donation will be directed to overseas beneficiaries. In brief, these guidelines consider the following main factors:

- The closer and more direct the relationship between the fund-raiser and the potential donor, the more likely the potential donor will be

able to understand how the money donated will be spent. Family members, friends and business associates are more likely to be considered as donors who are more well-informed about how their money will be used.

- Where the fund-raising is conducted internally within an organisation, such as a business association, alumni network or schools, it is more likely that the donors will be informed about how the money is being used.
- The more sophisticated the donor, the more likely the donor will be informed about how his money will be used. Such donors may include corporate foundations and business corporations.
- The more private the character of any fund-raising event, the more likely the fund-raising will be regarded as private. A more private event is likely to have less participants and lower accessibility to the public. For example, an invitation-only gala dinner is more likely to involve private fund-raising than soliciting donations on the street through a roadshow.



USEFUL LINKS

Governmental grants:

- SPRING at www.spring.gov.sg
- ComCare Enterprise Fund (for social enterprises only) at <http://app.msf.gov.sg/ComCare/Find-The-Assistance-You-Need/ComCare-Enterprise-Fund>
- New Initiative Grant (for social enterprises only) at www.nvpc.org.sg
- National Council for Social Service (VCF Grant) at <https://www.ncss.gov.sg/VWOCorner/funding.asp>
- SCDF at http://www.scdf.gov.sg/content/scdf_internet/en.html

Grants provided by organisations

- ACE Startup Grant administered by Spring Singapore (see: www.ace.sg and <http://www.spring.gov.sg>)

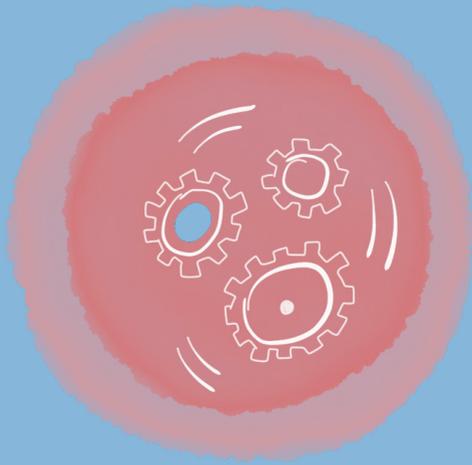
Governmental Loans

- SPRING Micro Loan at www.spring.gov.sg (for businesses with less than 10 employees)

Crowdfunding

- The Monetary Authority of Singapore's MoneySENSE website for regulatory issues: <http://www.mas.gov.sg/moneysense.aspx>
- Kickstarter at www.kickstarter.com
- Indiegogo at www.indiegogo.com

OPERATIONS



9

WRITTEN AGREEMENTS



FORMING CONTRACTS: THE BASICS

Social enterprises and other organisations are unable to function on their own. At some point in time, you will need to hire employees or enter into agreements with other parties for the supply of goods and services. The aim of a contract is to set out the key terms of such arrangements, which you and the contracting parties will adhere to. While verbal contracts can also be effective, a written agreement will assist to serve as a clear record of what has been agreed and what each party's obligations are, which would reduce uncertainty significantly.

WHAT TO CONSIDER WHEN PREPARING A CONTRACT

Contracts should be drafted in an ACCURATE manner. That means that the contract should correctly and clearly set out the arrangements agreed between the parties. For example, when the contract is about goods or services, an accurate description of what has to be delivered, or is expected to be received, together with the price, must be described in as much detail as possible. The standards and quality expected of the goods or services should also



be included. Times and dates, such as when the goods or services are to be delivered, or when payment is to be made, should also be included.

Contracts should also be EXACT. All possible details of the arrangement should be set down in the contract. Assume that you are reading the contract for the first time, without the benefit of discussions with the person whom you will be contracting with. Are you able to appreciate clearly, just from the contract, what it is you have to perform, or what you will receive under the contract?

Contracts should also be COMPLETE. The contract must seek to provide for all possible scenarios that are likely to happen. Plan ahead. Think of the worst-case scenario. Ask ‘what if’ questions such as:

- What if you were faced with a delay preventing you from fulfilling your part of the contract?
- What if there were some quality or other concerns with the goods or services you require, or are providing?
- What if the contract depended on some other event which did not materialise at all, or did not occur exactly as expected?
- What if the relationship between the parties sours and one of the parties tries to back out of the contract? Would he then be able to do so? And if so, how?
- What if you are not paid on time? Or what if you are late with payments that you need to make?

Having prepared the contract, read it afresh. Assume you are the other party to the contract, and think to yourself - “If I really wanted to wiggle out of the contract, or do less than promised, would I be able to do so while still falling within the wording of the contract?” If the answer is yes, then the contract is not ready. Revise the contract to make sure there is no such ‘wiggle room’.

WHAT IF YOU WERE MISTAKEN, OR MISUNDERSTOOD WHAT THE OTHER PARTY MEANT?

For example, A may buy furniture, mistakenly believing it to be of high quality, but not clarifying this with the seller beforehand or stating it clearly in the contract. A only realises that the furniture is of extremely low quality when it arrives. In this case, the contract between A and the seller is valid and A is unlikely to get out of the contract¹ because of his own mistaken belief. Generally, parties are not able

to escape an agreement simply because a mistake has been made.

However, in certain circumstances, and subject to certain legal requirements being made out, a mistake may mean the contract can be rendered void:

- For instance, if one party contracts to buy specific goods without knowing that the goods have perished at the time when the contract is made, the contract is void².
- The contract may also be rendered void if one party knows of the other party's mistake and tries to take advantage of it³. For example, A mistakenly sells an item for \$30 although it should be sold at \$30,000. B knows of the mistake, but grabs the opportunity and immediately buys the item before A realises his mistake. In this scenario, the agreement is void.

It is rare that a contract is made invalid simply because a party had been mistaken about something in the agreement. Where important agreements are involved, it is best to double-check and be sure of what your contractual duties are, or ask for legal advice.

TYPICAL PARTS OF A CONTRACT

Typical contractual terms found in most agreements are often referred to as 'boilerplate clauses'. Examples of such provisions are set out below.

Parties

A contract must identify who the parties to the contract are, that is, those persons that accept to be bound by the contract.

Interpretation

Most contracts have an interpretation clause to define important terms or terms that are used often in that contract. Such defined terms are usually capitalised.

Responsibilities

A contract must set out each party's responsibilities, that is, what each party has to do or what the other party expects to receive out of the contract.

Price

A contract must set out the price, including the relevant exchange rate if the payment is made in foreign currency, and how and when the price will be paid. The price need not always be in cash and can, for instance, take the form of other goods and services (i.e. barter contracts), shares or loan notes.



Duration

The term or duration of the contract has to be specified. If timing is critical, you should state so in the contract by using statements such as ‘time is of the essence’ or a similar phrase. Where time is not made of the essence, parties are generally permitted to perform their obligations within a reasonable time.

Representations & Warranties

Consider if the contract should include representations and warranties. These are statements of fact you require the other party to make to you. Include the statements that have persuaded you to enter into the contract with the other party. For example, if you are entering into the contract because the other party has said he has a certain qualification or background, include such a statement in the contract. This is done by stating in the contract: “Mr A (the other party) warrants / represents to Mr B (you) that...” Representations and warranties are important because they provide you with a definite scope of information which persuaded you to enter into the contract, and when breached, they provide you with compensation in the form of damages. Nevertheless, do note that there are differences between representations and warranties. Representations are normally not a term in the contract, though they may be included in the contract as well. A claim in misrepresentation will arise when a false representation is made. Such a claim in misrepresentation will allow the receiving party to set aside the contract entirely, and any damages awarded will try to put him back in the position he was in before the contract was made.

On the other hand, a warranty is a term of the contract, and a false warranty will result in a breach of contract. Such a breach will result in damages aimed to put the receiving party in a position that he would have been in, had the contract been performed correctly. If the breach is fundamental to the contract, this will even allow for the termination of the contract, with damages assessed at the time of termination.

Thus, do note that the way in which a statement of fact is presented in a contract (i.e. whether as a representation or as a warranty) can affect the types of damages that you may be awarded by a court, if the statements turn out to be false or inaccurate.

Conditions precedent

Consider if certain obligations or actions to be taken under the contract depend on other events first occurring. These are known as ‘conditions precedent’. These may include governmental approvals, third party consents, the grant of

licences, or certain documents being first provided to you or the other party. This is provided for by stating in the contract “Mr. A’s obligation to perform (describe the obligation) under the contract is conditional upon (describe the event)”. This will help to protect you if you are in a situation where you cannot perform your obligations under the contract because of something beyond your control.

Termination provisions

List out the events that can allow either party to terminate, or end, the contract. Also, state the termination process, for example, if termination is by written notice. This is done by stating in the contract “This contract may be terminated (describe method of termination, e.g. in writing) (describe the time period within which the contract may be terminated, e.g. within 30 days of the date of this contract) by (describe which party can terminate the contract) if (describe the event) occurs”.

Indemnities

Certain contracts may include indemnities. These are promises to compensate the other party for losses arising from certain prescribed situations, such as delays or a failure to perform. If the contract provides for a specific amount of compensation for such delays or failures, the amount must be reasonable and intended to compensate for loss and not to punish the other party or to act as a penalty. Like representations and warranties, indemnities are a means of allocating risks between the parties. Unlike a warranty, under an indemnity, the person making the claim for the loss suffered is entitled to recover the full compensatory amount as agreed between parties, and is not required to prove anything further.

Limitation of liability

Contracts may also include clauses limiting liability. These ‘limitation of liability’ clauses exclude liability in certain circumstances, or place a limit on the amount that can be claimed for a breach of contract, regardless of the actual loss suffered by that party. These clauses can be helpful if you are concerned that the loss suffered by the other party due to any failure on your part may be higher than what you expect to receive under the contract. Provisions like this can state “Mr. A’s liability under the contract will in no circumstances exceed (state the amount)”.

Governing law

Contracts usually contain a governing law clause to indicate which country’s law the contract is governed by, and a jurisdiction clause to indicate the country in which court proceedings on disputes arising out of the contract should be initiated in.



Entire agreement

Such clauses stipulate that all the terms agreed between the parties are to be found in the contract, and any promises or assurances made in the course of negotiations will have no contractual force if they are not reduced to writing in the contract.

Tax

When the contract price will involve taxes (for example, in a supply of goods contract), such contracts will usually include a tax clause to determine which party should bear any taxes which may be due.

Notice

This clause identifies the ways in which parties are able to serve notices on each other, as well as the address at which notices are to be served. As there may be discrepancies as to when a notice is considered as 'received' by the other party, contracts generally have a notice clause to standardise when a party is deemed to have received a notice.

Variation

As contract law allows for parties to amend a contract both by oral or written agreement, it is common for parties to include a variation clause in the contract to ensure that only changes made in writing and signed by both parties will be effective.

Assignment

Such clauses provide for the circumstances in which a party may assign its rights and obligations under a contract to a third party. If you wish to ensure that you continue to deal with the same party that you originally entered into the contract with, then you should seek to either restrict assignment under the contract or only allow for assignment with your written consent.

Third party rights

If you want a third party to benefit from the contract, you should expressly state that the third party may enforce a term of the contract. When mentioning third parties in the agreement, the party can be identified by name, as a member of a group, or as fitting a particular description. The party need not be in existence at the point in time when the written agreement is entered into⁴.

Severability

Most contracts will also include a severability clause to ensure that the remainder of the contract is valid, legal and enforceable even if one part of the contract is determined to be invalid, illegal or unenforceable.

Counterparts

This clause allows for contracts to be executed (or signed) in more than one copy, and each copy will be taken as the original. Together, the different signed copies will be taken as a whole. This clause is especially useful when parties are not in the same jurisdiction.

Exhibits

If exhibits or other documents are relevant and important to the contract, attach them to the contract. Exhibits provide specific examples or give more details as to the intention of parties and, where included, should be referred to within the contract.

WHAT IF THE OTHER PARTY HAD LIED OR WAS DISHONEST IN ORDER TO GET YOU TO SIGN THE DOCUMENT?

If you have signed a written document, knowing it to be a contract, the courts will generally take that you have read and understood its terms⁵.

However, if the other party lied or was dishonest in order to get you to sign the document, it is possible for you to seek to get out of the contract. Under the Misrepresentation Act (Cap. 390), the contract can be rescinded, which means to release you from future obligations under the contract, and to restore the parties, as much as possible, to the positions they were in before the contract was entered into. Alternatively, as the victim, you can seek to be financially compensated.

There are several common scenarios that may be relevant:

- If the other party was simply exaggerating or giving their opinion (e.g. “This is the best house ever!”). This is generally not considered to be fraud or a false representation.
- If the other party had made an outright false statement, told a half-truth, or used conduct to imply something false. This can be considered misrepresentation and the victim can try to rescind the contract, or ask for financial compensation.



The statement must have played a real and substantial part in misleading you to enter into the agreement. It must also be directed towards the misled party. If you are told a statement by B who obtained that relevant information from A, who had no intention or knowledge that you would receive that information, it is unlikely that you will be able to sue A under the Misrepresentation Act.

BEWARE OF THE 'STANDARD FORM'!

Often, people or companies entering into negotiations with you will claim that the contracts they are showing you are 'standard form' contracts and may suggest to you that you should accept all terms because they cannot be modified. While it is correct that businesses operating in certain industries, such as banking or insurance, do have 'typical' clauses in their contracts to reflect industry norms, it is certainly not the case that you should blindly accept all contractual terms presented to you, without first checking them. You should do the following:



- Read the contract in its entirety.
- If you do not understand certain clauses, seek help (from a lawyer, ideally).
- Do not be afraid to ask the other side what they mean, if they include terms that you do not understand. If there is no need for a term to be included in a contract, and the other side cannot give you a good explanation for retaining it, do not be afraid to ask for it to be removed.
- Remember, contracts are agreements negotiated between parties. Save for clauses which are included for compliance with laws or government regulations, generally, most clauses may be negotiated between parties.

FORMALITIES: WHAT FORM SHOULD CONTRACTS BE IN?

A contract will only be formed when there is proper offer and acceptance, and both of these can be made expressly by words or by conduct. If you reply an initial offer with a different offer of your own, your counter-offer is not considered an acceptance of the initial offer.

This situation could occur like this:

B offers to sell to A an item for \$5,000 and A counter-offers, asking B to sell it at \$4,500 instead.

If B rejects A's counter-offer and sells the item to another party, A can no longer hold B to the initial offer of \$5,000⁶.

A counter-offer is different from a request for more information. Taking the earlier example, B offers to sell to A an item for \$5,000 and A asks if \$5,000 includes delivery. The original offer (\$5,000) is still valid because A had only asked for more information about B's offer and had not counter offered⁷.

Consideration also forms a necessary part of a contract. As mentioned above, the consideration does not have to be in cash. Also, while the consideration has to be sufficient, it does not mean that the value of the consideration has to be commensurate with the value of the promise.

There is also a requirement of an intention to create legal relations in contract law, and such requirement is used to sift out cases that are not appropriate for court action, such as agreements made in the social and domestic contexts, e.g. an invitation to dinner. Contracts entered into by a social enterprise will usually be contracts made in a commercial context, and should raise a presumption that parties do intend to create legal relations through the contract.

While most people and companies can enter into contracts freely, you should be careful when entering into contracts with minors and persons with mental incapacity, as there is a risk of such contracts being invalid. Minors (persons under the age of 18) are generally not bound by contracts they enter into, except for contracts for necessities (which are the important and basic things that a person needs to live, such as food and clothing), or contracts for training or education. A contract entered into with a person with mental incapacity will also be invalid if it is established that the person did not understand what he was doing when entering into the contract, and you know or ought reasonably to have known of the disability. However, as with minors, persons with mental incapacities will be bound by contracts for necessities.

While contracts can be verbal, they should preferably be in writing.

The general rule is that where there is a written contract, terms that are not included in the written contract will not be recognised, even if both parties



had verbally agreed on something before signing the contract⁸. In that way, the written agreement is assumed to be the final agreement. If you want to argue that the contract was partly an oral agreement, you will likely face many difficulties with evidence and proof. It is thus very important to ensure that you include all the terms, rights and obligations you want in the written contract.

While having written contracts may be more costly than oral agreements, this upfront cost will give you peace of mind knowing that all-important terms are in writing and can be proven, and can potentially save you from having to incur more losses when disputes over the agreement arise. Similarly, in core business relationships such as supply contracts or employment contracts, it is helpful to have everything written down to prevent disputes over agreed terms from ruining long-term business relationships. As you may face bargaining power constraints as a small start-up when negotiating with big players, a written contract is even more important to detail the promises these big players have made to you.

Written contracts are best signed in the presence of a witness, who can be any adult. The witness should also sign on the contract, while indicating that he is signing as a witness.

WHAT ELSE TO CONSIDER WHEN DRAFTING THE CONTRACT?

Make full use of available resources. First of all, if you are able to, do engage a lawyer to assist with drafting the contracts required. For your own knowledge and information, you may want to look at samples of contracts when preparing or reviewing your own contracts. These are available on the internet or in contract guides.

However, use these standard forms only as a guide, to understand terms that are usually included in contracts. Understand in particular the concerns and contingencies that these standard form contracts cover. Do not rely on a single standard form of contract and certainly do not copy indiscriminately. Standard forms may or may not be applicable to a particular situation, and they might have been drafted for the benefit of the other party. Wholesale copying of other people's work is also against the law.

While you may not want to incur significant costs in the early stages of running your organisation, you should be aware that the drafting of contracts requires technical skill and legal expertise, and if you do not engage a lawyer, your interests may not be adequately protected.

Some examples of the more technical aspects of contract drafting are as follows:

1. Penalty Clauses

The rule on penalty clauses is that contractual clauses requiring certain payments on breach of contract have to set the amount payable at a reasonable level, which is enough to fairly compensate the aggrieved party without punishing the defaulting party. If the clause is punitive (in other words, a ‘penalty clause’) then it will not be enforceable. For example, where a clause requires a payment of S\$1 million for a delay in delivery of goods costing only S\$100, it is likely that a court will hold it to be a penalty clause and accordingly unenforceable.

2. Non-competition clauses

In these clauses, one party usually agrees not to carry out certain activities for a period of time. Non-competition clauses are often used in the employment context, especially in the employment contracts of key employees. Such clauses will prevent employees from carrying out certain activities for a period of time after leaving the employment of the company, such as entering into an industry in competition with the company, or soliciting the clients and other employees of the company. These, if too excessive or unreasonable, cannot be enforced.

3. Exclusion clauses or limitation of liability clauses

As noted above, contracts may include such clauses to totally exclude liability, provide a maximum cap to the liability that will be incurred, or to limit the circumstances in which liability can arise. However, such clauses may be subject to the Unfair Contract Terms Act (Cap. 396), and if so will only be upheld by courts if they are considered to be reasonable. Clauses that limit or exclude a party’s liability for negligently caused death or personal injury will be unenforceable.

These are just three examples, but there are many other legal issues surrounding the proper drafting of a contract. Do be aware that if you do not consult a lawyer when drafting your contract, you run the risk of creating a contract that is not able to serve its intended function.

Above all, when reviewing or drafting a contract, always keep the worst-case scenario in mind, and provide rules in the contract that regulate how future disputes can be prevented and if they cannot be prevented, how they may be resolved.

10

EMPLOYMENT CONTRACTS



This chapter aims to provide organisations with a basic understanding of employment laws in Singapore. It also serves as a reference point for organisations when they take on the role of an employer and highlights some of the points that they need to consider when hiring employees (whether Singaporeans or foreigners, whether on a part-time or full-time basis).

WHERE DOES EMPLOYMENT LAW IN SINGAPORE COME FROM?

In Singapore, employment law comes mainly from the following sources:

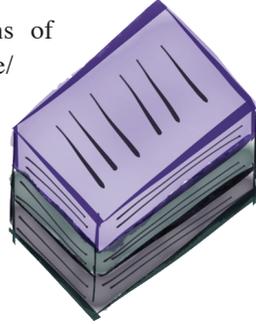
- The 'common law' (i.e. case law and precedents); and
- Legislation, read in light of directives, rules, and policy statements issued by government bodies [e.g. the Ministry of Manpower (MOM)].



WHAT ARE SOME OF THE EMPLOYMENT-RELATED PIECES OF LEGISLATION IN SINGAPORE?

Employment Act (Cap. 91)

This sets out the basic terms and conditions of employment that an employer must provide/comply with. It should be noted that this Act applies only to certain categories of employees.



Employment of Foreign Manpower Act (Cap. 91A)

This sets out the requirements and conditions relating to the employment of foreign employees.

Work Injury Compensation Act (Cap. 354)

This regulates the payment of compensation to employees for injuries suffered in the course of their employment.

Retirement and Re-employment Act (Cap. 274A)

This sets out the provisions relating to the minimum retirement age and matters relating to the re-employment of employees in Singapore.

Workplace Safety and Health Act (Cap. 354A)

This sets out the provisions relating to the safety, health and welfare of persons at workplaces. It imposes obligations on employers to provide a safe workplace for employees.

Industrial Relations Act (Cap. 136)

This regulates the relationship of employers and employees in relation to trade disputes and sets out the provisions for the prevention and settlement of such disputes by collective bargaining.

Other legislation, such as the Central Provident Fund Act (Cap. 36) (CPF Act), the Child Development Co-Savings Act (Cap. 38A) (CDCA), the Holidays Act (Cap. 126), the Income Tax Act (Cap. 134) (ITA) and the Personal Data Protection Act 2012 of Singapore (PDPA) also impose specific obligations and provide assistance to employers and employees.



WHO DOES THE EMPLOYMENT ACT APPLY TO?

The Employment Act (EA) is the primary statute governing employment law in Singapore. The EA applies to all employees in Singapore except seamen, domestic workers, those with managerial or executive positions with monthly basic salary of more than S\$4,500, and persons employed by a statutory board or the government of Singapore.

The MOM takes a broad view of what might be considered a managerial or executive position, indicating that managers and executives are employees with supervisory or executive functions. These functions include the authority to influence or make decisions regarding issues such as recruitment, discipline, termination of employment, assessment of performance and reward, involvement in the formulation of strategies and policies of the enterprise, or the management and running of the business. According to the MOM, managers and executives also include professionals with tertiary education and specialized knowledge or skills, and whose employment terms are comparable to those of managers and executives. In other words, a person may be regarded as a ‘manager’ or ‘executive’ for the purposes of the EA, even if he has not been officially appointed as one.

Although the EA does not apply to persons in managerial or executive positions, employees in those positions who earn S\$4,500 or less per month are nonetheless entitled to certain protections under the EA (specifically relating to the payment of salary).

If an employee who falls within the scope of the EA is hired on a part-time basis, his employment will be recognised and regulated by the Employment (Part-Time Employees) Regulations. A ‘part-time employee’ is someone who works less than 35 hours a week.

You may also need to distinguish between a contract of service between an employer and employee, and a contract for service where an independent contractor (e.g. a vendor or self-employed person) is engaged for a fee to carry out an assignment or project. The MOM website has some helpful pointers on determining whether there is an employer-employee relationship. An employee working under a contract of service may be covered by the EA, but an independent contractor would not be.

WHAT HAPPENS IF THE EMPLOYMENT ACT APPLIES?

The EA provides for the basic terms and conditions at work for employees covered by the EA. If an employee falls within the scope of the EA, the employer must comply with the applicable obligations imposed on employers under the EA and provide terms which are no less favourable than those in the EA. Any clause in the employment contract that is less favourable than that in the EA will be null and void and the relevant provision in the EA will take precedence over the particular contractual term that is less favourable. For example, under the EA, an employee is entitled to paid public holidays in Singapore. Although most employers would provide public holiday leave benefits as a matter of customary practice to all employees (whether or not they fall under the EA), an offence will be committed if the employer does not provide these benefits to an employee who falls within the scope of the EA. Generally, an employer who does not comply with the requirements of the EA may be liable, on conviction, to a fine of up to S\$5,000 or to an imprisonment term of up to 6 months or both.

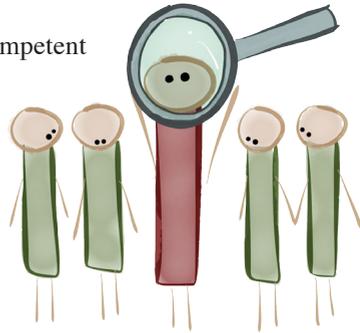
IF THE EMPLOYMENT ACT DOES NOT APPLY, CAN I CHOOSE TO PROVIDE ANY EMPLOYMENT TERM THAT I LIKE IN THE CONTRACT?

If an employee falls outside the scope of the EA, it will be generally up to you and the employee to come to mutual agreement on the terms of the employment. However, there are certain terms that you legally cannot contract out of (e.g. maternity benefits and CPF contributions). You must also bear in mind the common law duties of an employer. For instance, employers owe a basic duty of trust and confidence to the employee. This duty requires the employer not to, without reasonable and proper cause, conduct himself in a manner that may destroy or damage the relationship of confidence and trust between him and the employee. In addition, whether or not employees fall within the EA, employers are encouraged to adopt employment practices that are fair and equitable to all workers. These practices are set out in the Tripartite Guidelines for Fair Employment Practices. The government also encourages businesses to implement work-life strategies such as flexible work arrangements so that employees can enjoy better work-life harmony and employers can benefit from having a more engaged and productive workforce.



HIRING OF EMPLOYEES

As an employer, you should appoint competent and qualified employees. This means that your organisation should ensure that employees are properly qualified and are, if necessary, able to deal with special dangers. This can be performed by:



- Recruitment, Screening and Declaration:

Screening of prospective employees should include checks on candidate's employment and financial background. Candidates should be required to declare relationships (if any) with existing paid staff, volunteers and board members. Board members should be responsible and take part in the recruitment and appraisal of key senior staff.

- Employment Contract and Appraisal:

All staff should be recruited under a proper contract of employment. Annual appraisal should be conducted to assess the staff performance and this should be documented.

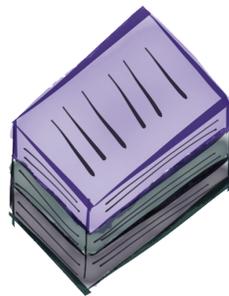
For more information, please refer to "Guide on Internal Controls for Charities in Singapore" published by the National Council of Social Service.

ADMINISTRATIVE ISSUES

Keeping of employee records

Under s 95 of the EA, every employer shall prepare and keep a register showing the:

1. Name;
2. Address;
3. The basic rate of pay and allowances;
4. The amount earned;



5. The amount of deductions made from the earnings of each employee employed by him; and
6. Such other particulars as may be prescribed from time to time.

Keeping of safety records

Under s18 of the Workplace Safety and Health Act, the occupier must keep the following records in the workplace for at least 5 years:

1. Every document issued in respect of the workplace by the Commissioner for Workplace Safety and Health under the provisions of this Act;
2. A copy of every notice furnished to the Commissioner as required under this Act; and
3. All reports and particulars prepared in respect of the workplace under this Act.

Incident reporting

Accidents, dangerous occurrences and occupational diseases may sometimes occur in your organisation's workplace. When this happens, an incident report must be submitted to the Commissioner of Workplace Safety and Health and the MOM. In addition, employers and occupiers are required to keep a record of all incident reports for 3 years.

The most crucial information is:

1. Date and time of the incident;
2. Place of the incident;
3. Name and identification number of the injured or deceased, if any;
4. Name of the employer and occupier;
5. Brief description of the incident; and
6. Name and contact details of the person making the notification.

Further guidelines on what action should be taken after an accident are found on the Workplace Safety and Health Council's website.

For more details on the reporting of work-related accidents, please refer to www.mom.gov.sg/workplace-safety-and-health/work-accident-reporting/what-and-when-to-report.



Failure to make an incident report is an offence under the law.



OBLIGATIONS OWED TO YOUR EMPLOYEE¹

Employee-employee Conduct

As an employer, you are required to ensure that your employee is not a danger towards other employees. Generally, if you are able to anticipate that the relevant employee is likely to engage in misconduct and be dangerous towards other employees, you may be held liable for the consequences of the misbehaving employee's actions.

For example, certain employees may be inclined to play potentially dangerous pranks on other employees, or frequently get into fights with other employees. Other situations could involve sexual harassment or workplace bullying. As an employer, you may be held liable to the victims of such behaviour.

Calling for Medical Assistance

As an employer, you could also have a duty to call for medical assistance if you know your employee is seriously ill or injured at work.

Giving references

As an employer, you are not legally obliged to give references or testimonials for your current or past employees. You do not need to answer any questions posed by your employee's potential employer.

If you decide to give a reference, however, you should not be negligent. This means that you should not give a reference which is untrue, inaccurate or unfair. Even if the facts are correct, the overall impression given off to the potential employer should not be misleading.

If the reference is given while the person is still an employee and the reference is given negligently, the employee may be allowed to resign on the spot without having to give notice or salary in lieu of notice. The basis for this is the breach of a "trust and confidence" term.

Property loss

The employer is generally not liable for property damage suffered by the employee. This is mainly because it would not be fair for the employer to need to use insurance to protect against such losses.

Rest days

These rules only apply to employees as defined in the EA, for example, an accountant.

The employee is allowed one day each week to be a rest day, without pay. The day is generally Sunday, however it can be determined from time to time by the employer. In the case of a shift worker, a rest day would be equivalent to a continuous period of 30 hours.

Payment on a rest day

The employee, who at his own request, works on his rest day is entitled to be paid:

1. The basic rate of pay for half a day's work if the period of work is not longer than half his normal work hours.
2. The basic rate of pay for a whole day's work if the period of work is longer than half but is not longer than his normal hours of work.
3. In addition to the amount in 2), a sum not less than 1.5 times his hourly basic rate of pay for each additional hour if the period of work is longer than his normal hours of work or part thereof.

The employee, who at the request of the employer, works on his rest day is entitled to be paid:

4. The basic rate of pay for a whole day's work if the period of work is not longer than half his normal hours of work.
5. The sum at the basic rate of pay for two days' work if the period of work is longer than half but not longer than his normal hours of work.
6. In addition to the amount in 5), a sum not less than 1.5 times his hourly basic rate of pay for each additional hour or part thereof.

The employer is very unlikely to be able to simply substitute a day off in lieu of the day designated as the rest day. If the employee works from Monday to Friday and is asked to work on Saturday, it is unlikely that he can claim the payment rates of a rest day. The rest day is more likely to be Sunday. Despite this, the employee's work would amount to overtime work and his payment would be according to that (which is not less than 1.5 times his hourly basic rate of pay).

This rest day entitlement applies to part-time employees who work at least 5 days in a week. However, the hourly basic pay only increases to 1.5 times his hourly basic rate of pay to the extent that his working hours are longer than the normal work hours of a full time employee, if not, there is likely to be a situation in which part-time employees are paid more than the full time employees for doing the same job for the same number of hours.



Overtime pay

These rules only apply to employees as defined in the EA.

No employee is required to work for more than 8 hours in a day or for more than 44 hours in one week. However, there are certain exceptions:

1. When the employee works less than 8 hours on any particular day, he may be required to work for more than 8 hours on another day; or
2. When the employee works for not more than 5 days in a week, he may be required to work more than 8 hours a day.

For both 1) and 2) above, the employee cannot be required to work more than 9 hours in a day or for more than 44 hours in a week.

3. When by agreement under the contract of service, the number of hours of work in every alternate week is less than 44, the limit of 44 hours in one week can be exceeded. However, no employee can be required to work for more than 48 hours a week or for more than 88 hours in any continuous period of 2 weeks.
4. For shift workers, the periods of time as mentioned may exceed as long as the average number of hours worked over any continuous period of three weeks is not more than 44 hours per week.

The employee, who at the request of the employer works overtime is entitled to be paid at the rate of not less than 1.5 times of his hourly basic rate of pay.

However, if the employee does not finish his work within the normal hours when he could have, and stays back on his own accord to finish the work, he cannot claim overtime.

If the employer sends the employee for training after office hours or on a Saturday (assuming that it is a non-working day), and the employee does not have the chance to refuse the employer's request, the hours may have to be taken into account.

If the employee is at home but is 'on call', only if he is actually called and is back at work, then do the hours count.

If the employee takes some leave (for example, sick leave, childcare leave or annual leave) during the week, or if there is a public holiday during the week, it is likely that the employee would be considered to have worked during those days when calculating the 44 hours limit.

DO I NEED TO PREPARE A WRITTEN EMPLOYMENT CONTRACT FOR MY EMPLOYEES?

There is no legal requirement that you need to, however, it is customary and good practice to have employment contracts in writing so that disputes (if they do happen), can be more easily resolved (See Chapter 9 on the importance of written agreements). Written contracts can serve to protect both the employee and the employer. Some of the key terms to be included are: the commencement date, the remuneration, probation terms (if any), hours of work, benefits (e.g. medical benefits, bonuses, etc.) and termination procedures (e.g. 1 month's written notice).

There are also certain terms which are implied into an employment contract. Both the employer and employee are deemed to have certain implied rights and duties under the contract, even if these are not expressly stated in the contract (e.g. where the employment contract is very brief). These terms of the contract can be implied based on the parties' presumed intentions and are necessary to give business efficacy to the contract, based on longstanding custom or usage or by the law. Examples include the duty to pay salary, the duty to take reasonable care of the employees' safety and the duty to reimburse the employee for expenses properly incurred when carrying out his/her duties.

Do note that the MOM has also issued guidelines on the issuance of itemised payslips, to prepare businesses when the issuance of payslips becomes a legal requirement under the EA from 1 April 2016. Under these guidelines, employers should issue itemised payslips to all employees at least once a month. Detailed requirements such as what items to include and when and how to give itemised payslips can be found at www.mom.gov.sg/employment-practices/salary/itemised-payslips.

IS THERE ANYTHING ELSE I NEED TO BEAR IN MIND?

Yes. Apart from the above, other legislation may apply and you will need to be aware of your obligations as an employer and comply with the applicable requirements. An example is where you employ female workers. Even if they do not fall within the EA, they will be entitled to certain statutory maternity leave benefits if they meet specified conditions (e.g. where the child is a Singapore citizen). Likewise,



parents will also be entitled to certain leave entitlements e.g. childcare leave. These obligations are imposed pursuant to the CDCA.

CAN I EMPLOY FOREIGNERS?

Yes, however, you must ensure that you apply for and obtain an appropriate work pass for the foreign employee before he commences employment with your organisation. These requirements are imposed pursuant to the Employment of Foreign Manpower Act (Cap. 91A). There are various categories of work passes available, ranging from Employment Passes for professionals who earn a fixed monthly salary of at least S\$3,300 (and have acceptable qualifications), ‘S’ passes for mid-level skilled workers who earn a fixed monthly salary of at least S\$2,200 (with relevant qualifications and work experience), and work permits which are generally issued to foreign unskilled workers.

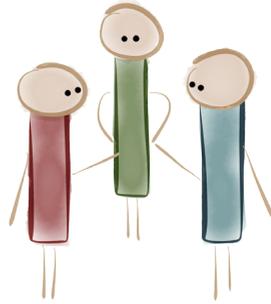
The MOM will take into account a wide range of factors when assessing each work pass application. More information on the qualifying criteria and application process is available on the MOM website.

Also, effective from 1 August 2014, employers are required to consider Singaporeans fairly before hiring foreigners on Employment Passes, pursuant to the Fair Consideration Framework (FCF). Employers must advertise job vacancies on a jobs bank and the advertisement must be open to Singaporeans for at least 14 calendar days. These advertisements should comply with the Tripartite Guidelines on Fair Employment Practices, and avoid stating a preference for nationality, age, race, religion, language, gender, marital status or family responsibilities. Firms with discriminatory hiring practices will be subject to scrutiny and may have their work pass privileges curtailed. These changes are in place to reinforce expectations for employers to consider Singaporeans fairly for job opportunities and to enhance job market transparency.

Do note that in Singapore, quotas are placed on the number of foreign workers that may be hired by an entity. These quotas vary depending on the type of sector (for e.g. under the construction sector only 7 work permit holders may be hired for every full-time local employee). These quotas are subject to change and you should check with the MOM website on the quotas applicable to your business.

RESOLVING DISPUTES

There sometimes will be disagreements and conflicts between people in the workplace. Should these disputes become serious, there are some ways of resolving them. The usual ways are through:



1. Litigation;
2. Arbitration; or
3. Mediation (at the Singapore Mediation Centre or within the court system). For more information, please refer to the Singapore Mediation Centre website.

Other means of resolving employment disputes include:

4. Free of charge mediation or conciliation services at the MOM.
5. For employees covered by the EA, disputes relating to terms in the contract of service or any of the areas in the EA can be taken to the Commissioner of Labour upon payment of a nominal fee². However, note that there is a time limit that differs depending on the situation and not all employees are covered by the EA.
6. For union members with collective bargaining or limited representation rights, they can approach their union for help to resolve the dispute internally.
7. Union members without collective bargaining or limited representation rights (meaning they are general branch members), who are executives and receive a salary not exceeding S\$4,500 a month (excluding overtime payments, bonus payments, annual wage supplements, productivity incentive payments and any allowance however described) can approach the Tripartite Panel for mediation services³.
8. Disputes between the union and the employer can be taken to the MOM for a conciliation process which often successfully resolves the conflict. The dispute can also be brought to Industrial Arbitration Court, though this is less common.



SAFETY FOR YOU AND YOUR EMPLOYEES

Workplace safety is governed by the Workplace Safety and Health Act (WSH). As an organisation and an employer, you are expected to abide by the WSH and ensure the safety and health of your employees at work.

Do note that volunteers, prisoners, and casual or temporary workers could be considered employees of your organisation⁴.

In addition, a workplace can refer to any premises where a person is “at work.” The workplace need not be the primary workplace and can be any workplace⁵. As an organisation, “workplace” could possibly cover any location where events or operations (such as fundraising and carnivals) are held. However, domestic premises are not considered “workplaces”⁶. Similarly, places wholly or partly owned or occupied by the Singapore Armed Forces are exempted from the WSH⁷.

You may refer to the following guidelines to better ensure your employee’s safety⁸.

Providing and maintaining a safe working environment which is without risk to health

1. The employer must ensure that the workplace is safe.
2. Ensuring that the employee has a safe place of work could be done by giving instructions regarding obvious dangers and safety equipment to deal with the danger.
3. This could cover matters such as insufficient lighting, but often this is relevant when an employee is sent to work in a place over which the employer has no control.
4. Employers may also have a duty to do a risk assessment to find out about the potential dangers before sending the employee to that place of work.
5. However, if the danger could not have been expected or foreseeable, despite employers having done a risk assessment, employers may not be liable.



Ensuring adequate safety measures are taken in your employee's use of any machinery, equipment, plant, or process

1. The employer must ensure that the equipment used by employees is safe.
2. The scope of this area is wide. It covers the need to provide adequate or suitable equipment, for example, providing belts, boots, goggles or protective clothing in certain circumstances.
3. Employers need to note that it is not sufficient just to have the safety equipment available in the workplace:
 - The employer may also need to specifically hand the safety equipment over to the employee (this depends on various factors such as the risk of injury, the experience of the employee, and the distance the employee has to go to get the equipment).
 - In addition, the employer may need to educate the employee as to why the equipment is necessary, and even give firm instructions or have proper supervision to make sure that the equipment is being used correctly.
 - Also, the employer may have a duty to maintain and check the equipment regularly, especially if the equipment has caused problems before. However, if the equipment's latent defect caused the injury (and the equipment was purchased from a reputable manufacturer), the employer is generally not liable.
4. Providing adequate facilities and welfare arrangements at the workplace.
5. Ensuring that your employees are not exposed to hazards arising out of arrangement, disposal, manipulation, organisation, processing, storage, transport, working or use of things in their workplace or near their workplace and under the employer's control.
6. Developing and implementing procedures for dealing with emergencies that may arise while your employees are at work.
7. Ensuring that your employees have adequate instruction, information, training, and supervision as is necessary to perform his/her work.



Other Necessary Measures

1. Providing and maintaining first aid boxes and first-aiders in the workplace⁹.
2. Submitting reports to the Commissioner in respect of accidents causing death, dangerous occurrences, occupational diseases and certain types of non-fatal accidents at the workplace within 10 days¹⁰.

Existing Codes of Practice

Existing Codes of Practice approved by the Workplace Safety and Health Council can be referred to as a yardstick to assess whether your organisation has taken reasonable practicable measures to ensure safety and health standards.

The Code of Practices issued by Workplace Safety and Health Council is available in the WSH Council website. The Code of Practices and Singapore Standards published by SPRING Singapore can be purchased at www.singaporestandardseshop.sg.

Penalties

There are the general penalties for offences for which no penalty is prescribed under WSH. For more information, please refer to “A Guide to the Workplace Safety and Health Act” published by the MOM.

DO I HAVE TO MAKE ANY COMPULSORY CONTRIBUTIONS OR PAY LEVIES FOR EMPLOYEES?

You will need to make CPF contributions to employees who are Singapore citizens or Singapore Permanent Residents (SPR). For Singapore citizens, the employer’s rates of contribution are dependent on the employee’s age group, and for SPRs, generally on the length of period that the employee has been an SPR in Singapore. In addition, you must pay a ‘Skills Development Levy’ for all employees (whether full-time, casual, part-time, Singaporean or foreigners) up to the first S\$4,500 of their monthly gross salary at a rate of 0.25%. If your employee is employed on a work permit or ‘S’ pass, a foreign worker levy will also be payable. These rates and fees payable are explained on the CPF and MOM websites.

Besides employee-related CPF liabilities, you should be aware of your own CPF liabilities. If you are a social entrepreneur, you may be deemed

a 'self-employed' person for the purposes of CPF contributions. While, as a self-employed person, you will be exempted from making mandatory CPF contributions, you may wish to build up your retirement savings by making voluntary CPF contributions, up to the approved limit. In addition, as a self-employed person, you must make mandatory contributions to your Medisave account if you earn a yearly net trade income of more than S\$6,000. This is to ensure that you have sufficient Medisave savings for your healthcare needs. If you are employed by your social enterprise, then the same general considerations that would apply to your employees, would also apply to you.

How about volunteers?

As an organisation, you may seek volunteers to assist in your activities (e.g., to provide administrative support or services). As volunteers do not get paid for the services that they perform, employment contracts are customarily not provided to them, and an employment relationship does not normally arise between a volunteer and the organisation with which he volunteers. However, depending on the activities that your organisation is involved in, it may be prudent to set out the main responsibilities (e.g. conduct, behaviour, ethics) expected of your volunteers and, possibly, get them to sign a letter of understanding so that they are aware of their actions and resulting consequences. For example, if you operate an organisation that employs persons from marginalised communities (e.g. people with disabilities), you may want to make clear that the ill-treatment or bullying of your beneficiaries will not be tolerated. If your organisation handles confidential information, you can consider entering into a legally binding agreement with your volunteers to ensure that they keep any information that they come across during the course of volunteering, strictly private and confidential.

Do note that volunteers could be considered employees¹¹. Hence, legislation applicable to employees above may be similarly applicable to volunteers.

Other duties owed to volunteers

Under s 2(5) of the CRTPA, remedies will not be withheld from the third party on the basis that he/she is a volunteer.

Under s 6(2) of the WSH, an employee can be a volunteer who (a) does work for another person, (b) with the knowledge and consent of the other person, (c) and does the work on an ongoing and regular basis for that other person, (d) being work that is in connection with any trade, business, profession or undertaking carried on by that other person.



Duties owed by volunteers

Volunteers owe a duty towards other persons that other regular persons would owe. Beyond this, volunteers may owe other duties. Volunteers who give advice must take particular care. If they give out bad information they may be liable in negligence. These are the conditions:

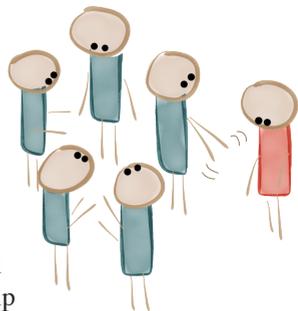
1. The volunteer must be in the business of giving advice;
2. The volunteer must claim to be, or seem to be skilled and able to give advice;
3. It must be foreseeable that the other person would rely on what the volunteer said;
4. The other person must have relied on what the volunteer said; and
5. The other person must have suffered a loss or damage as a result.

Special duties arise where the volunteers are involved in outdoor activities, driving, preparing printed matters, or organizing special events and fundraisers. You should ensure that volunteers are properly trained in the area of work they are involved in.

Although the volunteer's organisation can be held liable for the volunteer's actions, the volunteer himself is not completely shielded from responsibility. The volunteer must always be responsible for his own actions. If his actions are unreasonable and out of the scope of his work duties, he may be liable for his actions.

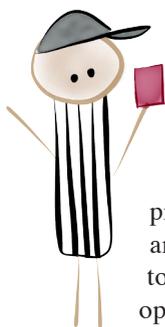
EMPLOYING PEOPLE FROM MARGINALISED COMMUNITIES

People from marginalised communities include persons with disabilities, ex-offenders and ex-drug abusers, youth at-risk, persons recovering from psychiatric illness, and individuals from low-income families who may face multiple problems. As a social entrepreneur, you may be keen to hire and help such people, in order to boast a workforce that reflects the diversity of society, while fulfilling your social mission. The hiring process is often similar to that of employing people from non-marginalised communities. However, there are some additional issues that you should take into consideration.



In respect of persons with disabilities, you can enter into employment agreements with them if you advertise for a job and they apply for it, you are pleased with their credentials, and they have the ability or capacity to enter into a contract. If you need help with hiring persons with disabilities, many voluntary welfare organisations help place persons with disabilities and can help to facilitate the recruitment process.

To encourage employers to offer employment opportunities for persons with disabilities, the government operates an Open Door Programme (ODP) and an enhanced Special Employment Credit scheme (SEC). The ODP helps employers to defray the costs associated with the hiring of persons with disabilities, such as those incurred in job redesign, workplace modification and the provision of support programmes. Employers can also tap on the ODP to receive subsidies in providing apprenticeships for persons with disabilities. The enhanced SEC scheme is an incentive for companies which hire older Singaporean workers and persons with disabilities. Under this scheme, employers may receive a credit of 16% of the monthly income of disabled employees aged 50 and below.



If you are interested in hiring offenders or ex-offenders, you can register your enterprise with the Singapore Cooperation of Rehabilitative Enterprises (SCORE). SCORE is a statutory board established under the Ministry of Home Affairs and it plays an important role in the Singapore correctional system through the provision of rehabilitation and aftercare services to inmates and ex-offenders. SCORE provides employment assistance to offenders under various work release schemes. It also operates a private sector participation scheme whereby social enterprises may set up factories within prisons and provide management, supervision, equipment and technical expertise and raw materials, while SCORE and the Singapore Prisons Department manages the welfare and discipline of the offenders.

Whatever the case, when you employ persons from marginalised communities, you must, as an employer, be respectful of their feelings and vulnerabilities, and for persons with physical disabilities, you must be open to providing the appropriate physical facilities (e.g. building ramps for employees in wheelchairs). Each person (whether or not they are from marginalised communities), should be provided equal respect and access to career development, training and advancement opportunities.



Practical considerations when hiring people from marginalised communities

The following is a short and non-exhaustive list of things that you should consider before hiring anyone from marginalised communities:

- Is the prospective employee capable of entering into a contract? Does he understand the terms you are trying to propose?
- Is it acceptable for you, as a prospective employer, to talk to the employee's caregiver or should you approach the relevant NPO?
- Will you be prepared to deal with consequences of your employee's actions? For example, if your employee with a physical disability inadvertently spills a drink on a customer in your food and beverage business, are you prepared to take responsibility for his actions? How would you then deal with the employee (if at all)?
- Are you willing to design or build additional or special accommodation in your organisation for employees with disabilities?
- Are you willing to accommodate persons with special needs? For example, if you hire a single mother, are you willing to provide flexible working hours?
- Are you willing to train or teach such persons to acquire the skills needed to work in your social enterprise?
- Are you worried about what customers might say if you hire people from marginalised communities? Might this impact your business? If so, how would you then go about correcting these negative perceptions?

IF I AM NOT INTERESTED IN KEEPING AN EMPLOYEE, HOW DO I LET HIM GO?

For employees who are covered by the EA:

1. The EA provides minimum notice periods, ranging from 24 hours to 4 weeks' notice depending on the length of employment. This does not prevent either party from waiving his right to receiving the notice; and
2. If there are grounds of misconduct or wilful breach of the employment contract by the employee, it is possible to terminate

the contract without notice (i.e. summary dismissal). An employer is obliged to conduct due inquiry if he wishes to summarily dismiss an employee for misconduct. Essentially, due inquiry means that the employee must be afforded procedural fairness prior to dismissal. Although there is no prescribed procedure for the conduct of the inquiry, the MOM has issued guidelines on how an inquiry may be conducted. As a general guideline, the person hearing the inquiry should not be in a position which may suggest bias and the employee being investigated for misconduct should have the opportunity to present his case.

If the employee is not covered by the EA:

1. The employer may terminate the contract by providing notice, as stated in the employment contract. If no notice period is fixed in the contract, 'reasonable notice' must be given. What is reasonable will depend on factors such as the nature of the employment and the employee's length of service.
2. It is also possible for the employer to terminate the contract without notice on grounds of the employee's misconduct, or in the event of any wilful breach by the employee of a condition of the contract. When an employee is summarily dismissed, the company must be able to justify its grounds for the summary dismissal. If the grounds seem incorrect or insubstantial, the dismissal can be challenged. Nonetheless, the employee who is not covered by the EA is generally not entitled to an internal inquiry unless the employment contract expressly provided for it.

**FURTHER READING****Open Door Programme**

<https://www.sgenable.sg/pages/content.aspx?path=/employment/open-door-programme-odp>

Employment Act

<http://statutes.agc.gov.sg>

Special Employment Credit

<http://www.sec.gov.sg/>

SCORE

http://www.score.gov.sg/employment_assistance.html

Employment of Foreign Manpower Act

<http://statutes.agc.gov.sg>

MOM

<http://www.mom.gov.sg/>

Central Provident Fund

<http://mycpf.cpf.gov.sg/Employers/home.htm>

Tripartite Alliance for Fair Employment Practices

<http://www.tafep.sg/>

Singapore National Employers Federation

<http://www.sgemployers.com/>

Hey Baby

<http://www.heybaby.sg/summaryofmeasures.html>

Employment Assistance for Persons with Disabilities

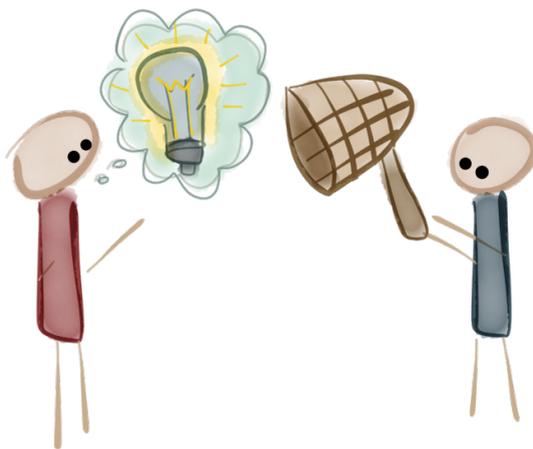
<http://app.msf.gov.sg/>

E-citizen

<http://www.ecitizen.gov.sg/Topics/Pages/Pro-Family-Leave-Schemes-available.aspx>

11

PROTECTING YOUR BUSINESS' INTELLECTUAL PROPERTY



WHAT ARE INTELLECTUAL PROPERTIES?

Intellectual Property Rights (IPs) are a form of personal property, unlike land or your Housing Development Board property, which are considered real property. IPs are intangible in nature, which means that they are not physical things. They are in fact the fruits of intellectual effort and labour. IPs are everywhere and are involved in every aspect of our daily lives. For instance, in the smart phone that you just texted your friend on (patents); in the book you are now holding and reading (copyrights belonging to the Law Society of Singapore); in the chair you are now sitting on (design); and the branded fast food you just had for lunch (trade marks).

As with all forms of property, IPs can be exclusively owned, reproduced and commercially exploited. This would include



being sold, licensed, franchised or even used as security for loans. With ownership or the proper authorization, it is also possible to prevent others from owning, reproducing or commercially exploiting IPs.

For instance, let us consider a book that you might currently be reading. You may have bought the book for money, but the purchase of a book does not give you the authority to make copies of the same book and to sell the copies. While you may have purchased a copy of the book (the physical article), the right to commercially exploit the book other than by selling the physical copy owned by you, belongs to someone else (the writer, and/or the publisher).

The exclusive nature of rights relating to IPs has made it possible for business owners to differentiate themselves from their competitors. Some business owners have in fact managed to raise millions, if not billions of dollars from their IPs. IPs are also very much assets of a business (in the same way that land, or buildings are), and can enhance the intrinsic value of a business.

This exclusivity is restricted to a fixed time frame. For example, patent protection lasts a maximum of 20 years; for registered design, protection lasts a maximum of 15 years; for copyrights, protection covers the life of an author and a further period of 70 years after his death; and for trade marks, registrations are valid only for a term of 10 years although theoretically it is possible to keep renewing these terms indefinitely.

IPs are also territorial in nature, meaning that the rights acquired in Singapore are enforceable only in Singapore and do not allow you the right to enjoy protection on a worldwide basis. For protection in another jurisdiction, you will need to acquire those rights in that jurisdiction either directly or through the auspices of the international offices set up by treaties signed between countries such as the Berne Convention, the Madrid Protocol or the Patent Cooperation Treaty.

More information on IPs can be found at the website of the Intellectual Property Office of Singapore (IPOS).

TYPES OF IP

The following IPs are recognized in Singapore:

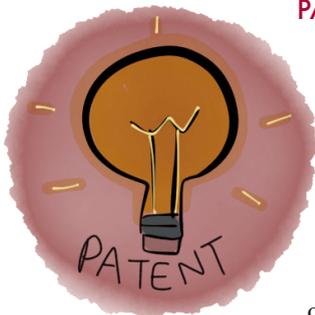
Registrable Rights

- Patents;
- Trade marks;
- Industrial designs; and
- Plant Varieties.



Non-Registrable Rights

- Copyrights;
- Geographical indications;
- Layout-designs of integrated circuits; and
- Protection of Undisclosed Information (Trade Secrets).



PATENTS

In a nutshell, patents are granted for inventions which are novel.

As the owner of a patent, you will have the exclusive right to prevent others from the unauthorised use of the patented invention. Such uses include the making, using, importing or selling of products based on the invention. A patentable invention can be a new product, a new process that is a new technical solution to an existing problem or simply an improvement of an existing product or process.

The right to patent protection generally belongs to the inventor(s). However, s 49 of the Patents Act (Cap. 221) (PA) provides that should the invention be developed in the course of work, then the right to the patent vests with the employer.

Patents do not arise automatically and an application must be filed in order for a patent to be granted.



The PA provides that in order for an invention to be patentable, it must satisfy the following criteria:

Novelty

An invention is considered novel if, prior to the filing date of the application for patent protection, the invention is not anticipated by anything which is publicly known in any way, on a world-wide basis (i.e. all material elements of the invention should not have been found in something that was not kept a secret). Until an application is filed to patent the invention, the owner of the invention should treat the invention as a trade secret or as confidential information (which is explained further below).

If the idea has already been disclosed, commercially exploited, advertised or demonstrated to would-be investors or collaborators, then there is a chance that the novelty of the invention may have already been compromised. For the protection of the invention, a non-disclosure agreement (NDA) should be executed prior to disclosure.

It is a common misconception that concluding an NDA with someone will protect your invention. An NDA merely provides evidence that a specific piece of information has not been made public by handing it over to your contractual partner. It cannot protect the subject matter if the disclosure was made by someone who is not your contractual partner or controlled by your contractual partner.

Inventive step

The invention's improvement over an existing product or process should not be obvious to a person with the relevant technical skills or knowledge in the invention's particular field.

In practice, most inventions that are new are also seen as inventive, unless the invention is a combination of known features that are obvious. For example, adding one more known tool such as special type of pliers to a Swiss pocket knife could be seen as obvious, while providing a new method of making Swiss pocket knives more economically may be likely to be seen as inventive.

Capable of industrial application

The invention must have some form of practical application that allows it to be made or used in some form of industry. For example, an invention of a method of treatment of the human or animal body by surgery,

therapy or diagnosis practised directly on the human or animal body, is deemed to be not capable of industrial application and therefore is not patentable, while surgical instruments and medical devices such as diagnostic apparatus are patentable because they are made using industrial processes.

Once it is granted, a patent grants the owner of the invention 20 years' exclusivity (explained further below) starting from the date of the filing of the invention, and subject to the payment of annual renewal fees.

Although it is not mandatory to apply for patent protection in Singapore prior to seeking patent protection overseas, the PA requires any person residing in Singapore to first obtain National Security Clearance in the form of a written authorisation from the Registrar of Patents before seeking protection overseas. Contravention of this requirement is a criminal offence and any person convicted of such an offence is liable to a fine not exceeding S\$5,000 and/or imprisonment for a term not exceeding 2 years.

Territoriality

Patents are territorial in nature, meaning to say that they can only exist where a patent application has been filed. As the applicant, you can choose to file locally, or overseas by directly filing patent applications in the respective countries or by using an international or regional collective patent application, such as a Patent Cooperation Treaty patent application which is valid for about 150 international countries.

Making claims about patent rights

As the owner of a patent, you will be able to prevent the unauthorised making, disposal of, offering to dispose of, usage or importation or keeping of a product containing or utilising your patent.

However, please note that it is a criminal offence to make unauthorised claims about patent rights or patents applied for. This usually means that you cannot claim an invention to be 'patented' prior to the actual grant of the patent, or that the invention is 'patent pending' when there is no valid application for grant. Threatening someone with a cease and desist letter on the basis that you own a patent or that you have a pending patent when you do not, may result in the other party bringing civil proceedings against you for groundless threats of infringement.

The PA sets out a list of statutory defences to an action for patent

infringement. These include, amongst other things, the ‘private user’ defence: where the infringing act was done privately and not for commercial purposes. For example, re-producing a patented mosquito trap for one’s own home use is not considered to be a patent infringement, while selling the copied mosquito trap is a patent infringement.

TRADE MARKS (TM)

TMs are signs used by a business owner to distinguish the goods or services offered by his business from his competitors. Using a TM, you can ‘educate’ your customers as to the goods and services offered, particularly in the aspect of building goodwill and reputation.



Some examples of famous trade marks include Tiffany’s, Coca Cola, McDonalds, Microsoft, Mercedes-Benz, and Rolls-Royce.

A trade mark may be registered by making an application to the Registry of Trade Marks, either by the organisation itself or more commonly by an agent who acts on its behalf. Such an application may be made at any time, regardless of whether the trade mark has already been used or not.

A trade mark may be registered by making an application to the Registry of Trade Marks, either by the organisation itself or more commonly by an agent who acts on its behalf. Such an application may be made at any time, regardless of whether the trade mark has already been used or not.

A registrable TM must be a sign that is capable of being represented graphically and capable of distinguishing goods or services provided by one trader from another. A TM registration can last indefinitely, provided that you renew the registration every 10 years and the registration is not challenged successfully.

A TM may be refused registration on the following grounds:

Absolute Grounds (reasons) to Refuse Registration

If your TM is indistinct (e.g., a common laudatory word, such as “Best”) or is descriptive of the goods or services claimed (such as “Durians” for a business selling fruits), the application for registration may be rejected so as to ensure that common words or descriptors remain available for use by the public.

A common word with a meaning that has nothing to do with the respective

goods for which protection is sought may however be perfectly registerable as a trademark, e.g. the word ‘apple’ for computers.

Generally speaking, a descriptive or indistinct trademark cannot be registered as a TM, unless it has acquired distinctiveness through use, meaning to say, the TM has through your use become known to be a reference to your goods or services.

Relative Grounds (reasons) to Refuse Registration

If your TM is considered identical or so similar that it is likely to be confused with an earlier registered TM, the application for registration will be rejected.

Passing Off

The law recognises another legal regime governing TMs, in what is also known as the ‘common law action for passing off’. It is complementary to the registration regime under the Trade Marks Act (Cap. 332) (TMA) and the registration of a trade mark does not extinguish the owner’s entitlement to seek this legal recourse.

This is typically used to protect owners of unregistered TMs. For example, passing off may be effective against infringers when the business owner are not ‘first to market’ locally, but whom have in fact gained popularity in other jurisdictions.

To succeed in an action for passing off, you must prove the following:

- There is sufficient goodwill associated with your business/ trade acquired through the TM or get-up used by you on your goods or services. Goodwill is a form of property constituting the market perception of the value and quality of a business and its products. Only this goodwill can be protected against interference or damage by passing off;
- There is a misrepresentation by the other party, leading to confusion or deception; and
- You have suffered or are likely to suffer damage as a result of the other party’s misrepresentation.

Territorial

TMs are territorial in nature. Overseas TM filings can be made either through national filings of trademark applications or by using a collective system, such as the Madrid Protocol (MP) system, again administered by World



Intellectual Property Organization (WIPO). The MP facilitates the filing of TM applications in other Member States concurrently and produces the same effect as if a national TM application has been filed with the national TM office in each country designated by the applicant.

No need for secrecy

Secrecy does not protect TMs. Prior use is effective in proving that the TM has in fact gained distinctive character (through its use) and is therefore registrable.

Some TMs are so ‘famous’ that they are considered to be ‘well-known marks’. These marks are offered greater scope of protection, even though they are not registered in Singapore. The owner of a well-known mark is entitled to take action against the use of a TM or business identifier if:

- Use of the trade mark/business identifier would indicate a connection between those goods or services and the owner of the well-known mark, and is likely to damage the interests of the owner of the well-known mark.
- The TM is already well-known to the public at large in Singapore, where the use of the TM or business identifier would cause ‘dilution’ in an unfair manner, of the distinctive character of the well-known mark; or take unfair advantage of the distinctive character of the well-known mark.

‘Dilution’ happens when there is a lessening of the capacity of the trade mark to identify and distinguish goods or services (regardless of whether there is actually any competition between the owner of the TM and the other party), or where there is any likelihood of confusion on the part of the public.

A number of factors are considered in determining whether a mark is well-known in Singapore:

- The degree of knowledge/recognition by the relevant sector of the public in Singapore;
- The duration, extent and geographical area of the use or promotion of the TM;
- Any registration/application for registration in any country;
- Any successful enforcement of the TM in any country;
- Any value associated with the TM.

Generally, if a TM is well-known to a relevant sector of the public in Singapore, it can be considered as well-known in Singapore. The ‘relevant sector’ includes suppliers, distributors, competitors, customers and other relevant stakeholders in the industry.



INDUSTRIAL DESIGNS

Registered industrial designs (or plainly registered designs) protect an article’s features, which include shapes, configurations, patterns and ornaments. Under the Registered Designs Act (Cap. 226) (RDA), the owner of a registered design has the statutory right to prohibit the unauthorized use of the design for maximum of 15 years subject to the payment of renewal fees every 5 years.

In order for a design to be accepted for registration, it must be new or novel. This means that the design must not have been registered or published anywhere in the world before the date of the first application for registration. In order to preserve the novelty in the design, the owner of a design must avoid disclosing the design, until a design application is filed.

An example of a registered design would be the packaging in which your products are displayed or the shape of your product.

Under the RDA, the following cannot be registered as a design:

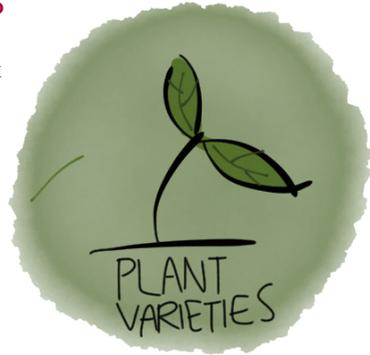
- Designs that are contrary to the public order or morality;
- Computer programs or layout-designs of integrated circuits;
- Designs applied to certain articles which may be protected by other IPs;
- Any method or principle of construction;
- Designs which are purely functional; or
- Designs that are dependent upon the appearance of another article, of which it is intended by the designer to form an integral part; or enable the article to be connected to, or placed in, around or against, another article so that either article may perform its function.



Generally, the RDA provides that the designer is usually the owner of the design. However, this position can be contractually amended. The RDA also recognizes that the party commissioning a design is the owner. Likewise, where a party has created a design in the course of his employment, then his or her employer shall be deemed to be the owner of the design.

PROTECTION OF PLANT VARIETIES

Under the Plant Varieties Protection Act (Cap. 232A) (PVPA), a breeder may apply for and be granted protection for plant varieties cultivated by the breeder. In doing so, the breeder is able to prevent others from doing any of the following acts in respect of the propagating material and/or harvested material of the protected plant variety:



- Production or reproduction;
- Conditioning for the purpose of propagation;
- Offering for sale;
- Selling or other forms of marketing;
- Exporting;
- Importing; and
- Stocking for any of the purposes mentioned above.

It is also possible for the breeder to seek protection under the PA, insofar as the variety or biological processes can satisfy patenting requirements. However, the breeder must choose one or the other.

Protection under the PVPA requires novelty, distinctness, uniformity and stability. IPOS is tasked with carrying out formalities examination while the Agri-Food and Veterinary Authority of Singapore (AVA) is tasked with carrying out the examination of substantive merits of each application under the PVPA.

Like all other registrable IPs, registration grants to the owner exclusivity in the commercialization and exploitation of the registered plant variety.



COPYRIGHTS

Copyrights law protects the original expression of ideas contained in a tangible form. This includes written articles, songs, videos, or photographs which you or your organisation may produce from time to time. However, copyrights law does not protect the idea itself. Therefore, protection under copyrights law does not extend to concepts, discoveries, procedures, methods or techniques, unrecorded speech or writing and information or works that are already in the public domain.

Singapore's Copyright Act (Cap. 63) (CoA) grants protection to a range of works broadly categorized as 'Literary' (novels, poems), 'Dramatic' (plays, dances), 'Musical' (songs) and 'Artistic Works' (paintings, photographs) (collectively, literary, dramatic, musical or artistic, 'LDMA'), as well as neighbouring rights or entrepreneurial rights such as recordings, broadcasts and live performances (also known as derivative or secondary rights). Copyright exists in all 'original' works. Copyright is not found only in high-brow works of art, and can include works with purely functional writing or drawings (such as computer programs or diagrams). 'Originality' simply means that the work must have been created by the author independently.

However, copyrights are not registrable. Anyone claiming infringement must prove (i) ownership and (ii) unauthorized use. Ownership can be proven in various ways. The most expedient manners are to (i) post a copy of the work to yourself in the form of a postcard; or (ii) make a declaration before a Commissioner of Oaths stating the facts of ownership and the date of creation.

Earlier, it was mentioned that Copyrights are protected for the lifetime of the author plus 70 years. However, secondary rights have a shorter protection period of between 25 years (layouts of published editions of LDMA works), 50 years (from the end of the year of making a broadcast or cable programme) and 70 years (from the end of the year of a performance or release of the recording or film).

Generally, the owner of the copyright is the author of the work. There are some exceptions to the rule:

- If the work is created pursuant to terms of employment, then the employer owns the copyright in the work; or



- If the work is commissioned, the commissioning party owns the copyright in the work, unless contractually or statutorily excluded from such ownership.

Consent is usually required for the use of copyright work. However, certain uses of copyright work without consent (also known as ‘fair dealing’), are permissible. In order for ‘fair dealing’ to be established, the following factors must be considered in totality:

- Purpose and character of the dealing: is it commercial or non-profit?
- Nature of the work being copied;
- Portion of the work being copied: is it substantial or material?
- Effect on the potential market or value of the work being copied.
- Would it have been possible to obtain the work at an ordinary commercial price within a reasonable time period?

Other ‘safe harbour’ or exceptions under the CoA include:

- Copying for the purposes of study or research.
- Fair dealing for the purposes of criticism, review, or reporting current events where sufficient acknowledgement of the copied work is given.
- Copying for the purposes of judicial proceedings, or seeking or rendering professional legal advice.
- Performance of LDMA of a religious nature, in the course of services at a place of worship or other religious assembly.
- Parallel importation of an article which is not an infringing copy.

So how would you know if your action amounts to ‘fair dealing’ or an exception permitted by the CoA? It is really a question of fact that can only be answered on a case-by-case basis. However, there are guidelines that may prove to be useful:

- Is the copy an infringing copy (made without permission or consent)?
- If it is an infringing copy, did you manufacture, sell (5 or more copies), possess, import or distribute the infringing copy?
- Did you fail to acknowledge the author or owner?

If the answer to any one question is ‘Yes’, then it is likely that you may have committed copyright infringement.

The forwarding of emails containing copyrighted materials without consent may also constitute infringement. Likewise, downloading of information from the internet without consent can also constitute infringement.

Infringement of copyrights may result in both criminal and civil liability.



GEOGRAPHICAL INDICATIONS

Geographical Indications (GI) are signs that can be used in identifying products originating from a particular location. Traditional and well-known examples of GIs include ‘Bordeaux’ (red wine), ‘Champagne’ (sparkling wine), ‘Darjeeling’ (tea) and ‘Modena’ (balsamic vinegar).

A GI is not the same creature as a TM. A GI informs the public that a particular product originated from a specific place or region and has special qualities due to that specific place or region. The GI is exclusive to all producers or traders whose products originate from that specific place or region and which share those special qualities. A TM, on the other hand, is a sign used by a business to distinguish its goods or services from those of its competitors. A TM gives its owners the right to prevent others from using the mark.

A GI need not be registered in order to have rights conferred under the Geographical Indications Act (Cap. 117B) (GIA). The GIA protects the GIs of World Trade Organization (WTO) member countries or certain countries designated by the Singapore Government without limitation in time, so long as the GI in particular is protected in its country of origin. That said, a GI will not be protected if, amongst other things, it is:

- Immoral or against public order;
- No longer in use or no longer protected in the country of origin;
- The common name in Singapore for the goods or services which it identifies;
- Confusingly similar to a TM for which rights had been acquired, before the GI was protected in its country of origin; or
- The name of a person or a predecessor in a particular business.



LAYOUT-DESIGNS OF INTEGRATED CIRCUITS (ICS)



The Layout-designs of Integrated Circuits Act (Cap. 159A) (LDICA) protects essentially the three-dimensional character of the elements and interconnections of an integrated circuit.

As with the other IPs, the protection pivots on whether an original layout-design exists. An integrated circuit's layout design can be considered 'original' if it is based on the creator's ideas or studies and if there is nothing like it made by others at the time of its creation.

Protection of the layout-design is automatic, provided that its owner qualifies for protection under Singapore law. This means that the owner must be either:

- A qualified person (i.e. a citizen or resident of Singapore or a member country of the WTO, or a country designated by Singapore as "qualifying"); or
- A person who is the owner of the lay-out design which was not commercially exploited anywhere else in the world before it was commercially exploited in Singapore, or in a qualifying country.

The qualified owner must be either the creator of the layout-design, the commissioning party or the employer of the party who created the layout-design.

Any IC created after 15 February 1999 (i.e., the date of enactment of the LDICA) will be protected for a period of 10 years if it is first used commercially within five years of creation. In any other case, it will be protected for 15 years from the date of its creation.

The owner can exercise his rights under the LDICA by taking legal action against the infringing party, including seeking relief in the form of an injunction to stop the infringing action, demanding for the profits gained by the infringing party at his expense and/or seeking damages for the loss suffered.

PROTECTION OF UNDISCLOSED INFORMATION (TRADE SECRETS)



As its name suggests, trade secrets cover information that may be confidential and unknown to the public. It is usually taken to mean information that has commercial value and could include recipes, methods or techniques. Not all pieces of information are considered to be trade secrets. Three elements need to be satisfied in order for the court to find a breach of confidence; in particular the information must have:

- A quality of confidence (meaning that the information must not be freely available in the public domain);
- Been imparted under circumstances importing an obligation of confidence; and
- Been used in an unauthorized fashion generally (although this is not always necessary), to the detriment of the originating party.



Marking a document or a set of information as 'PRIVATE & CONFIDENTIAL', 'RESTRICTED', 'EYES ONLY' or 'TOP SECRET' does not necessarily make that document or information confidential or a trade secret. Such measures are not conclusive. They are at best, indicative of one's intention, and the circumstances must be assessed as a whole.

By their very nature, trade secrets cannot be protected by registration. The only way to protect confidential information or trade secrets is to not disclose such information and ensure it is kept hidden away (if in physical form). Where disclosure is necessary for the advancement of your commercial objectives, then keep a clear record of to whom and when a particular piece of confidential information or trade secret was disclosed. It is critical that you bind the receiving party with non-disclosure obligations, e.g. by way of a formal contract.



If a license agreement is based on a trade secret, the respective confidential information must be provided in written form and it must be relevant for the license agreement, otherwise the license agreement may potentially be void under the prevailing anti-competition legal framework.

As trade secrets become free public knowledge upon publication, even if this is a result of a breach of contract, it is best to protect one's trade secrets by registering them as patents or industrial designs.

WHY DOCUMENT OR REGISTER YOUR IPS?

As discussed above, IPs accord your organisation with protection over your intellectual assets against infringement.

Notwithstanding the fact that your business is an organisation serving a social need or charitable purpose, the registration of IPs can enhance the value of your goods/services to your customers. This helps ensure that your organisation maximizes its earnings and thus reaches its commercial and social goals in a more efficient manner.

Proper documentation and registration reduce the anxiety and stress that come with inadequate protection. It will be too late to start thinking of IPs once they are violated, or once you unwittingly violate those of others. As the old adage goes, a stitch in time saves nine.

As the owner/holder of IPs, you will be able to prevent the continued unauthorized usage, seek an account of profits from the infringer, and/or request for compensation. It is also possible to request for the delivery up of the infringing articles.

Though great steps have been taken in the past years to simplify the registration processes for various IPs in Singapore, it is often the case that business owners may continue to find the registration and/or documentation processes to be daunting, time-consuming or simply a distraction from your pursuit of your passions, concerns and business. IPOS has on its website useful guidelines for use in figuring out the registration process. However, when in doubt, always seek help from your lawyer and where applicable, your patent agent.

So how do you differentiate between the different IPs? Is it even necessary to know the difference? Knowing the difference is half the battle won in gaining control of and exploiting the IPs crucial to your organisation's growth and continued operations.

DETERMINING THE TYPE OF IP PROTECTION NEEDED

One useful, but non-exhaustive rule of thumb in deciding which IPs are crucial to your business is this: what is the originality that you are seeking to protect?

For instance, a social enterprise operating a food and beverage business will have to ensure that its recipes are protected as trade secrets. In the same breath, the same social enterprise may find that it has little or no use for patents in a ‘mature’ industry that thrives on branding or the ‘personality’ attached to the goods or services provided. Thus, patent protection may not be relevant.

A fashion business may find it profitable to register its more popular original T-shirt designs and prints as industrial designs, as this would help to ensure that competitors do not copy its designs and undercut it, in terms of pricing.

In contrast, a social enterprise attempting to create cheap and powerful computers or daily consumables from sustainable and biodegradable sources, will find that patents are more important to it than any other IPs.

All businesses at some point will find it useful to protect their TMs. Invariably, all businesses will need to create brand identity, awareness and loyalty so as to separate themselves or their goods and services from their competitors. Registering one’s TMs is in most cases a vital and necessary step.

VOLUNTEERS AND IPS

Unlike IPs created by contractors who are commissioned or employees in the course of their employment, the line of ownership over IPs created by volunteers working with your organisation may be blurred due to the fact that most volunteers work for free.

This problem can often be resolved by ensuring that the volunteers sign a legally binding release form or at the very least, agree to your terms of engagement that states that they have agreed to assign all IPs to you. For instance, in contributing to this book, each volunteer lawyer was made fully aware of the term that the Law Society of Singapore will own the copyrights in the contributed literary works created by each volunteer lawyer.



PRODUCTIVITY AND INNOVATION

One of the objectives behind the implementation of the Productivity and Innovation credits (“PIC”) is to encourage Singapore businesses to invest in innovation. PIC benefits are given to qualifying expenditures, such as expenses incurred in the filing and registration and acquisition of intellectual property rights (“IPRs”).

Examples of allowable expenses under the PIC Scheme (as of April 2016):¹

1. Official fees payable to the Intellectual Property Office for the registrations of qualifying IPRs;
2. Professional fees to acting agents incurred in relation to the registration of qualifying IPRs;
3. Allowable expenses for acquisition of IPRs; and
4. Allowable expenses for the acquisition of licenses for IPRs (with the exception of the licensing of trade marks).

Companies may benefit for a cash back option of 60% of expenditure capped at S\$100,000 or tax deductions of 400% of the expenditure capped at S\$600,000. Companies should seek the assistance of a tax adviser on how best to maximise their PIC benefits.

Besides the PIC Scheme, organisations can also consider applying for an Innovation and Capability Voucher (“ICV”). The ICV is valued at S\$5,000 and is administered by SPRING Singapore. Small and Medium Enterprises that are Singapore registered entities (meaning to say an enterprise with a minimum of 30% local shareholding, and with an annual turnover of not more than S\$100 million or a group size of no more than 200 employees) can utilise the voucher for consultancy in Intellectual Business and Legal Diagnostics.

12

RESTRAINT OF TRADE



Saying goodbye is part and parcel of running any organisation. For example, some of your employees may decide to leave your business and work somewhere else, while you yourself may decide to sell your business. This section briefly sets out some of the ways you can protect your organisation when your employee, or perhaps even you, decide to move on to work for another business. One of the main ways to do so is to insert a restraint of trade clause in a contract regarding the sale of a business or the terms of employment. However, restraint of trade clauses will be closely scrutinised by the courts and will need to be very carefully drafted in order to have legal effect.

You should also note that the clauses described below typically arise in an employer-employee relationship. You may also request that your volunteers or employees agree to such clauses to protect your business interests, trade secrets and confidential information. In practice, it may be difficult to persuade these volunteers to do so, and it may be helpful to explain to them why these issues are important for your business or to the cause that you are working for.

CAN I PREVENT AN EX-EMPLOYEE FROM BECOMING MY COMPETITOR?

Yes, you can – with a restraint of trade clause, but only within reasonable limits. It is common for a restraint of trade clause to be included in an employment contract. The essence of such a clause in an employment contract is that an employee agrees with his employer to restrict the employee's liberty in the future to do similar work for other persons. For example, the clause might stipulate that an employee cannot work for your direct business competitors for a certain period of time after leaving your employment. Alternatively, the clause may stipulate that the employee may not establish their own business in the same industry if that would bring them into direct competition with you, their previous employer. Such clauses may provide that breach would result in payment of a penalty sum, or forfeiture of a loyalty payment.

While it may seem fair to you that an employee should be prohibited from competing against you after he leaves your business, the reality is that the courts frown upon restraint of trade clauses because such clauses are generally contrary to public policy. Restraint of trade clauses discourage competition and may, in extreme cases, take away the livelihood of the person suffering the restraint. Consequently, the default position is that restraint of trade clauses are not enforceable, unless it can be shown that they are reasonable and genuinely protect a recognised interest (e.g. the goodwill of the company). Some important factors that the courts will look at in considering whether the clause is justified include:

- **The geographical scope of the clause.**

A restraint of trade clause is more likely to be found to be reasonable if it covers a smaller and definitive area of land. For example, in a recent Singapore case, the courts appeared to take the view that a clause prohibiting a dentist from practicing within a 3-kilometre radius from one of his employer's clinics could be valid. In another case, the courts held that a restrictive covenant that extended to Malaysia was not reasonable as the company did not have any ongoing business in Malaysia.



- **The duration of the restriction in the clause.**

A clause unlimited in time is very likely to be struck down as unenforceable by the courts. There are no specific acceptable durations and an acceptable clause depends on the circumstances, including the nature of the ex-employee's involvement in the company, the scope of the services and/or activities, and also the industry in question. Generally, shorter durations such as 6 to 9 months are more likely deemed to be reasonable than longer durations such as 2 years.



- **The scope of activities that the clause captures.**

The wider the scope of the clause is, the less chance there is of the clause being upheld. For example, if your restraint of trade clause restricts your employee from performing tasks that are not sufficiently related to your organisation, it is likely to be deemed unenforceable.

Ultimately, the courts will consider the specific facts of each case in deciding whether a clause is justified. What may be reasonable and justified based on one set of facts may well be held to be unreasonable in a different context, based on the type of industry, nature of work, length of time, and other specific factors. This can be seen from the table on the following page.

More significantly, if the restraint of trade clause in an agreement is found to be unenforceable, there is a possibility that your entire contract may be void if the restraint of trade clause cannot be 'severed' from the contract. Thus, while it is understandable that you may want to restrict your ex-employees from competing against you, you must be very careful to make sure that any restraint trade of clauses in any employment contract will pass muster before the Singapore courts. When starting your business, you should thus:

1. Firstly, consider if all of your employees need to sign a restraint of trade agreement or have a restraint of trade clause in their contract, or whether this can be limited to certain employees who hold key positions in your business.
2. Thereafter, obtain legal advice on how to word your restraint of trade clause or agreement so that the courts are more likely to find this clause / agreement enforceable.

RESTRICTION IMPOSED BY CLAUSE	COURT'S DECISION
Clause restrained a performing artiste's ability to make a living (i.e. by writing or performing music)	Clause was invalid
Clause allowed employer to forfeit employee's deferred bonus if employee were to quit and join competitor during the effective period of a non-compete clause	Clause was valid as the clause did not prohibit employee from competing with ex-employer, but merely financially discouraged him from doing so.
Clause prohibited employee from working with businesses in Singapore and Malaysia in competition with employer for a period of two years.	Clause was valid because the employer operated in the marine winch industry, which is a relatively small and specialised industry with only a select group of potential customers.
Clause prohibited an employee from engaging in competition with the employer for a period of one year after employment in the electronic components market.	Clause was invalid as the shelf-life of electronic components was volatile, and newer and better components were being released into the market all the time

CAN I PREVENT AN EX-EMPLOYEE FROM SOLICITING MY EMPLOYEES?

Companies are also entitled to protect their interest of maintaining a stable, trained workforce via a non-solicitation clause. Such a clause may restrain the employee from soliciting the employment of other employees in the company.

Like restraint of trade clauses, the starting position is that a non-solicitation clause is not enforceable, unless it can be shown that it is justified. A non-solicitation clause is valid if, in the court's opinion, it is reasonable when considering the interests of the involved parties (the company and the employees) as well as the interests of the public. The court must be satisfied that the clause offers adequate protection to the party, and at the same time does not injure the public interest.



In determining whether the clause is reasonable, the court will consider the background in which the clause was made. The questions the court will ask may include the following:

1. What is the category of employees covered by the clause? Does it cover all employees, regardless of seniority? Does it cover employees even though their work involves minimal (or no) expertise? If the answer is yes, it will be more difficult to persuade the court that the clause is reasonable.
2. What is the duration of the non-solicitation clause? Is it for a few weeks, a few months or a few years?
3. Was the non-solicitation clause agreed upon in good faith? Were all parties satisfied with the clause? Or was the employee forced into agreeing to the clause?

Before signing an employment contract containing a non-solicitation clause, both the company and the employee should review the wording of the clause carefully, seek legal advice and carefully consider whether the clause is acceptable to them.

CASE STUDY

In 2010, Albert and Bryan established Company X together. Company X's business involves selling customised chocolates for parties and weddings. Company X hires non-mainstream workers to wrap the chocolates. Their jobs only involve gluing the wrappers together. They are not involved in the design or the production of the wrappers, nor are they involved in marketing or publicity.

In 2011, Albert and Bryan have a fight, following which Bryan decides to leave Company X. Bryan sets up Company Y, which replicates Company X's business model. Bryan approaches Dawn and Evan, who were employed by Company X to wrap chocolate. Bryan asks Dawn and Evan to join Company Y, and he promises to pay them double what Company X had paid. Dawn and Evan agree.

Albert finds out about this and he is furious. It turns out Bryan's employment contract with Company X stated that Bryan was preventing from soliciting the employment of any of Company



X's employees (including employees like Dawn and Evan) for a period of 20 years. If Albert sues Bryan for breach of the non-solicitation clause, it is likely that the court will hold that the non-solicitation clause was unreasonable and invalid. The clause is too wide given that it covers employees whose work involves minimal expertise, such as Dawn and Evan. Moreover, the non-solicitation clause's duration is too long – it lasts for 20 years, even though Bryan only worked in Company X for 1 year.

IF I BUY A BUSINESS, CAN I STOP THE SELLER FROM COMPETING WITH ME?

If you are thinking of buying or selling your business, or any part of it, you may wish to consider including restrictive covenants in the sale and purchase agreement. These provisions may restrict the seller from:

1. Soliciting customers or suppliers of the business for a specified period;
2. Soliciting and employing employees of the business for a specified period; and
3. Competing generally with the business for a specified period within a specified area.

If you are buying a business, you may wish to ensure that the seller agrees to such restrictive covenants. If not, you run the risk that the seller may then set up a competing business, which may in turn entice the customers, suppliers and employees of your newly acquired business.

If you are selling your business, the buyer is likely to insist on such restrictive covenants, to ensure that the business he/she is buying retains its value. Restrictive covenants are often hotly negotiated because they may impact the value of the business that is being sold, and the purchase price.

The starting point is that all restrictive covenants are void and unenforceable, unless the buyer can show that:

1. The clause is reasonable in the interests of the parties and the public; and
2. There is a legitimate interest to be protected, such as the trade connections and goodwill of the business.

The restrictive covenant should go no further than necessary to protect the buyer's legitimate interests in order to be deemed reasonable.

Therefore, it is essential for any buyer to identify the relevant field of business, geographical area and period for restrictions required for the protection of the target business and not to seek restrictions greater than those actually needed.

In general, the Singapore courts are more likely to uphold restrictive covenants in the context of sale or business, than a restraint of trade clause in an employment contract. This is because the buyer is also buying the goodwill of the business, which will suffer if the restrictive covenant is not upheld, as well as the equal power of both the buyer and seller to bargain for a good deal. Nevertheless, it is still important to draft such covenants carefully and precisely, and seek legal advice on this. Depending on the facts of your case, your lawyer may also be able to suggest ways to make the restrictive covenants more likely to be enforceable.

There is also another legal limitation on restrictive covenants in a sale of business. S 34 of the Competition Act (Cap. 50B) prohibits any agreement that has the object or effect of preventing- or restricting competition in any market in Singapore. Any person that infringes the s 34 prohibition may be fined. However, where agreements are directly related and necessary to the implementation of an acquisition or merger, these are exempted from the s 34 prohibition. Therefore, it is important to ensure that any restrictive covenants that you agree to should be directly related and necessary to the implementation of the sale of your business.

CASE STUDY

In 2012, Anne and Melvin set up Company Y, which runs a successful cafe in New Town GRC selling food, drinks, and handicrafts made by underprivileged women. In 2013, Anne and Melvin decide to concentrate on the handicrafts business alone, and sell the food and drinks business to Company Z. Company Z insists that as part of the sale of business, Company Y may neither set up another cafe nor sell handicrafts in New Town GRC for the next six months. The restrictive covenant preventing Company Y from selling handicrafts in New Town GRC is likely to be unenforceable as it is wider than necessary to protect Company Z's legitimate interests in the food and drinks business that it is buying. Company Y may wish to ask for this portion to be removed from the agreement on the sale of business. This would allow Company Y to sell handicrafts in New Town GRC, without the risk that it may breach the agreement.



CAN I PROTECT MY TRADE SECRETS AND CONFIDENTIAL INFORMATION?

It is prudent to incorporate specific confidentiality clauses into your employment contracts to prevent the dissemination and use of your business's confidential information, including trade secrets. Such clauses seek to prevent your employees from divulging your business's confidential information during and after their employment, and are sometimes subsumed or incorporated into the restrictive clause of an employment contract.

When drafting such clauses, try as far as possible to define what you consider to be a trade secret or more generally, confidential information. You should seek to protect only information which is truly relevant to your business, or you may compromise your position should the matter have to be decided in court. If you claim confidentiality over all types of information, the courts are likely to conclude that you do not seriously have any trade secret to protect.

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PRODUCT LIABILITY



WHAT IF SOMETHING IS WRONG WITH YOUR PRODUCT?

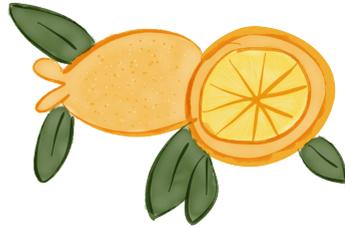
If there is something wrong with my product, will my organisation be exposed to any liability? Will customers be able to make claims against my organisation? What liabilities will my organisation be exposed to? These are some of the things that you may be concerned with if you are running a social enterprise or non-profit organisation.

WHICH LAWS APPLY?

1. “Lemon Laws”, officially known as Part III of the Consumer Protection (Fair Trading) Act (Cap 52A) (CPFTA);
2. Sale of Goods Act (Cap 393) (SOGA); and
3. The common law tort of negligence.



WHAT TYPES OF PRODUCTS ARE COVERED?



The Lemon Laws and SOGA cover all new and second-hand consumer goods purchased in Singapore, except real property (land, buildings) and rental/leased goods.

For example, services and virtual goods are not covered by the Lemon Laws and SOGA. However, physical goods bought online, such as clothing sold online at ‘blogshops’, are covered by the Lemon Laws and SOGA.

WHAT DEFECTS ALLOW A CUSTOMER TO MAKE A CLAIM?

A consumer can sue you under the Lemon Laws if you have provided the consumer with a defective product. The Lemon Laws can be found under Part III of the CPFTA. A defective product is defined as something that does not conform to the agreement at the time of delivery.

Under the Lemon Laws and SOGA, a product is defective where:

1. The product does not correspond with its description in the contract of sale between you and the customer.

For example, you advertise on your website a bottle of red wine but deliver a bottle of white wine.

2. The product is not of satisfactory quality. Factors affecting quality include:
 - Fitness for all the purposes for which goods of that kind are commonly supplied;
 - Appearance and finish;
 - Freedom from minor defects;
 - Safety; and
 - Durability.

For example, a baby chair which has a tendency to topple over or a wooden chair with splinters sticking out of the seat.

3. The product does not correspond to the sample you had shown to the customer on which he based his decision to buy your product.

For example, the customer orders a leather sofa based on the leather sample in the showroom but the leather sofa delivered differs from the sample in that it has many blemishes and is of a different colour.

TIMING OF THE CUSTOMER'S COMPLAINT



Under the Lemon Laws, if a customer reports a defect in your product to you within 6 months of taking delivery, the law presumes that the defect existed at the time of delivery and that you have to rectify the defect. If you want to prove otherwise, the onus is on you to disprove the presumption.

If the customer reports the defect after 6 months of taking delivery, the customer will have to prove that the defect was there at the time of delivery.

WHAT YOU HAVE TO DO TO MAKE IT RIGHT - THE 4 'R'S

Under the Lemon Laws, if you are obliged to rectify the defective product, the consumer can ask you to either:-

1. **Repair** the product; or
2. **Replace** the product.

If repair or replacement is possible, you have to do so. You have to repair or replace the product within a reasonable time, without causing significant inconvenience to the customer, and bear any necessary costs incurred in doing so.

However, if repair or replacement is impossible or disproportionate in cost to the remedies below, you can choose to either:-

3. **Reduce** the price to be paid by an appropriate amount; or
4. **Rescind** the contract of sale (i.e. you refund the consumer in exchange for the return of the product).

Note that rescinding the contract of sale leads to the customer having a right to a cash refund. The customer is not obliged to accept any vouchers or discounts in lieu of this cash refund.



The Lemon Laws apply to both new and second-hand goods. However, the age and the price paid for a second-hand good will be taken into consideration when determining whether a claim should succeed. For example, a person buying a second-hand table set cannot expect the table set to be in excellent condition. However, the buyer can expect the table set to serve its basic function such as being able to stand properly.

OTHER TYPES OF CLAIMS

Under the SOGA and contract law, a customer who has purchased a defective product can, depending on the circumstances, exercise one or more of the following remedies against you:

- Repudiate the contract of sale, i.e., he can reject the defective goods and claim for damages.
- Claim the difference between the market value of the product and the actual value of the defective product.
- Claim the additional or wasted expenses arising out of your supply of the defective product if it was within the reasonable contemplation of, i.e. envisaged by, you and your customer at the time of entering the contract that such additional or wasted expense would be incurred by your customer should your product be defective.

For example, your business customer spent money advertising the launch of a new product you were supposed to supply to him. However the product was defective and was never launched. As a result, he was out of pocket for the advertising cost due to no fault of his. He may then claim or recover this advertising cost from you.

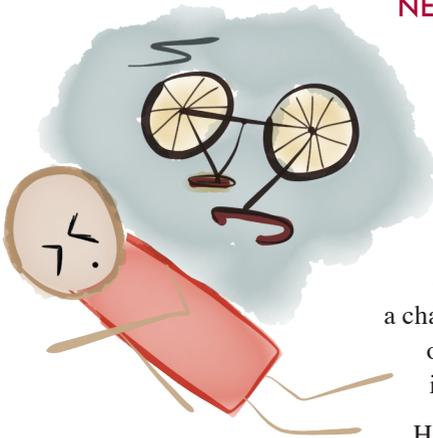
- Claim for any loss of profit caused by the defective product if it was envisaged by you and the customer at the time of entering the contract that your customer was intending to use the product to make a profit.
- Claim for damage caused to other property of your customer if it was envisaged by you and your customer at the time of entering the contract that the product if defective was not unlikely to cause loss of, or damage to, other property belonging to your customer.

For example, you supply gas tanks to coffee shops. The gas tanks are defective. One gas tank explodes and damages a coffee shop. The owner of the coffee shop may claim against you for damage to his property.

- Claim for injury caused to persons if it was envisaged by you and your customer that the product if defective was not unlikely to cause injury. For example, you manufacture and sell tee-shirts. Your customer gets dermatitis and there is a report that proves that the disease was caused by the use of certain chemicals in the manufacture of your tee-shirts. You may be liable for the customer's medical bills.
- Claim for disruption to the buyer's business caused by the defective product.

For example, you supply batteries to a car manufacturer and these are installed in their cars. Your batteries are defective and cannot be used and their production line has to be stopped. The cost incurred in having to shut down the production line and to source for an alternative battery supplier may be claimed against you.

NEGLIGENCE



Lemon laws and the SOGA allow a customer to claim against you for defective products under a contract of sale. Some instances where a contract may arise between an organisation and a consumer are if the organisation runs a charity shop, or sells goods and services online, or by telephone, or away from its premises such as on the streets.

However, even where there is no contract of sale between you and a claimant, the law allows this claimant to sue you under negligence for any injuries or loss suffered if these injuries or loss are caused by your defective product.



CASE STUDY

In the classic case involving ginger beer sold in bottles, the claimant's friend had bought a bottle of ginger beer for the claimant from a cafe, which the claimant drank, only to discover the remnants of a decomposed snail in the bottle. She suffered from shock and severe diarrhoea. She sued the ginger beer manufacturer for failing to provide a system of working his business which would not allow snails to get into the ginger beer bottles and for failure to inspect the bottles before filling them up. The court found that the ginger beer manufacturer was negligent and awarded damages to the claimant. This was in spite of the fact that there had been no direct contract between the manufacturer and the claimant.

This case has been followed and considered good law in Singapore. The Singapore courts have also consistently found that manufacturers of goods are under a duty of care to ensure that their products are not defective.

Therefore, if your product is defective, you may be liable not only to the person who has purchased the product from you, but also to other persons who have not dealt with you directly but have suffered injuries or loss due to the defect in your product. And you may be liable to compensate them for these injuries or loss.

There are 3 steps before a negligence claim will succeed:

1. **You owe the claimant a duty of care. In Singapore, the test for duty of care includes:**
 - i Threshold of factual foreseeability
This refers to whether it was foreseeable that your negligence would result in the damage that the claimant suffered.
 - ii Proximity
This concerns your closeness with the claimant in relation to physical, circumstantial and causal proximity.

iii Policy considerations

This depends on whether the court finds that you should not be found negligent for your actions based on public policy reasons.

For example, the court might not find you negligent in light of the fact that if the court did so there would be a flood of claims of the same type.

2. **You breached that duty of care to the claimant. There are some factors that will determine if you have breached the duty of care:**

- i The likelihood or probability of the risk eventuating;
- ii The seriousness or gravity of the foreseeable risk;
- iii The practicability of avoiding or minimizing the risk;
- iv The justifiability of taking the risk;
- v The time for assessing the risk; and
- vi The relevant characters of the foreseeable plaintiff

3. **The breach caused the claimant recoverable damage. Damages that are recoverable include:**

- i Physical harm to person or property;
- ii Psychiatric harm; and
- iii Pure economic loss (any loss that does not arise from (i) but constitutes monetary loss)

WARNING LABELS ON YOUR PRODUCT

If your product is inherently dangerous, you should place labels or warnings to caution users of the dangers, so as to discharge the duty of care placed on you under the law of negligence. For example, if you manufacture and sell small toys intended for toddlers, you should warn potential buyers that they may be choking hazards. Other examples are hair dye that may cause skin problems or hair spray that may be highly flammable in certain conditions or may cause allergic reactions.

EXCLUSION AND LIMITATION CLAUSES

In a commercial relationship, exclusion and limitation clauses can be effective if reasonable. However, these clauses do not apply in situations where you



supply products to a consumer. Section 7(2) of the Unfair Contract Terms Act (Cap 396) provides that “As against a person dealing as consumer, liability in respect of the goods’ correspondence with description or sample, or their quality or fitness for any particular purpose, cannot be excluded or restricted by reference to any such term.” For example, if you are supplying batteries to a car manufacturer you may be able to contract to exclude or limit your liabilities to the car manufacturer should your product be defective but if you are selling one battery to a car owner (i.e. a consumer), the law does not allow you to exclude or limit your liability in relation to him. For more information on exclusions and limitation of liability clauses, please refer to Chapter 9.

INSURING YOURSELF AGAINST PRODUCT LIABILITY

It may be worthwhile to purchase product liability insurance because claims due to defective products can be fairly large. Such insurance typically provides coverage against claims for personal injury and property damage caused by defective products, and legal costs and expenses in defending against product liability claims. For more information on insurance, please refer to Chapter 14.

LIMITATION PERIOD

The law prevents claimants from making claims against your organisation after a certain period of time.

Generally speaking, the rule is that for claims founded on contract, these cannot be brought against your organisation after the expiration of 6 years from the date on which the cause of action accrued i.e. the date you delivered the defective product to your customer.

For negligence claims, once the damage has occurred, such claims must be brought within 6 years; or should the damage only be discovered later, the claimant has 3 years from the date he knew of and had the right to bring an action, to commence his action, whichever is later.

Specifically for negligence claims where there are personal injuries caused by your defective product, such actions cannot be brought after:

- 3 years from the date on which the cause of action accrued or
- 3 years from the date on which the claimant had the knowledge required for bringing the action, whichever is later.

In all cases claimants can no longer bring an action after 15 years from the date the cause of action accrues.

ILLUSTRATION

Your organisation sells a beauty cream that causes cancer. A customer buys and uses your cream; and is diagnosed with cancer 10 years after she bought and used the cream. According to the law relating to limitation periods for negligence which gives rise to personal injury, she has 3 years from the time she is diagnosed with cancer to sue your organisation. If she brings her claim after the 3-year period (e.g. 13 years and 1 day after she bought the cream), she will be prohibited from suing your organisation as she will be considered to be outside the limitation period.

‘UNFAIR PRACTICES’ IN RESPECT OF YOUR GOODS

You may wish to note that customers can also sue you for ‘unfair practices’ if, for example, you make a false claim about your product (or services). What is ‘unfair practice’ is explained in sections 4, 5 and 6 of the CPFTA. Schedule 2 of the CPFTA sets out some examples:

- Representing that goods or services have sponsorship when they do not
- Representing that goods are new or unused when they are not
- Representing the availability of facilities for repair of goods or of spare parts for goods if that is not the case
- Representing in relation to a voucher that another supplier will provide goods or services at a discounted or reduced price when it is not true; or
- Using small print to conceal a material fact from the customer or to mislead a customer

If you are found guilty of an ‘unfair practice’, you can be ordered by a court to refund the money to the customer or to compensate the customer for any loss or damage suffered. The limitation period for a customer to sue for ‘unfair practice’ differs, depending on what type of ‘unfair practice’ it is. This is set out in Section 12 of the CPFTA. Generally, it has to be commenced no later than 2 years from the date of the occurrence of the last main event on which the action is based or no later than 2 years from the earliest date the customer had knowledge of the ‘unfair practice’.



FURTHER READING

Ministry of Trade and Industry on the Consumer Protection (Fair Trading) Act

<http://www.mti.gov.sg/legislation>

Consumers Association of Singapore

<http://www.case.org.sg>

Limitation Act (Cap 163)

<http://statutes.agc.gov.sg>

14

INSURANCE



Insurance is a pervasive feature of modern life. Most of us have some combination of medical, life and vehicle insurance. The types of insurance available to social enterprises and non-profit organisations taking the form of companies are more diverse in order to cater to the greater scope of activities that are undertaken by these organisations.

When choosing from the many forms of insurance available to your organisation, you should be guided by industry practice, professional advice as well as your own business acumen. Sufficient and comprehensive insurance coverage can vary considerably between different organisations.



SOCIAL ENTERPRISES

A common misperception is that personal insurance policies cover your corporate assets. They do not, if you choose a company, rather than a partnership or sole-proprietorship, as your business vehicle.

This is because the assets you intend to protect with insurance may belong to the company, not you. Even if the company is wholly-owned by you, you are not deemed to have an insurable interest in the asset.

Consider this example: Green Life Pte Ltd (Green Life) is a company which is wholly-owned by a single shareholder, George. George has a personal insurance policy to cover property damage. Green Life owns a retail property, which is damaged in a flood. George's insurance policy will not cover the damage to the shop or its contents as the shop is owned by Green Life, not George.

This is a natural consequence of Green Life enjoying a separate legal identity, which is distinct from George (see Chapter 2). Partnerships and sole-proprietorships, existing only as extensions of their owners, cannot own property and do not face this issue.

The following is a non-exhaustive list of the different types of insurance available to companies:

1. Business Interruption - to protect against temporary interruptions to your business such as Severe Acute Respiratory Syndrome (SARS), haze-related work stoppages, etc.
2. Livestock - to protect the business from financial loss from the death of animals resulting from natural disasters or disease, for example
3. Credit Risk - to cover the risk of non-payment by customers or suppliers
4. Vehicle and Property - to protect against losses resulting from damage to vehicles, inventory, capital assets such as warehouses.

Additionally, do note that companies in certain industries are required by law to purchase insurance. As a business owner, the onus is on you to find out if your company is required to do so. Given the complexity of

legislation, it would be prudent for business owners to verify with their legal advisors whether they are required to obtain insurance.

The above list is not comprehensive, and may not be applicable for every organisation. To determine whether you should insure against a particular type of risk, you should consider factors such as:

1. Likelihood of damage occurring.
2. Effect on your business - would the loss prove to be catastrophic?
3. Extent of coverage - does the insurance policy adequately compensate you for loss? You should examine the exclusions in the policy, otherwise you may find that you have invalidated the policy by engaging in prohibited activities. You should seek clarification relating to any exclusions which are unclear to you.
4. Cost of premiums - this determines whether an insurance policy is cost effective.

NON-PROFIT ORGANISATIONS

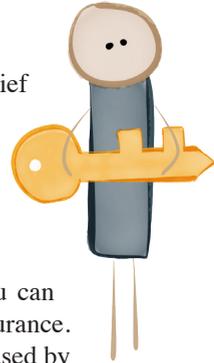
Non-profit organizations may be held legally responsible for a variety of things, such as natural disasters and even criminal activity¹. As the threat of litigation involving non-profit organizations are on the rise in Singapore², it is important for non-profit organizations to have insurance as a form of financial protection for both the organization and its various members.

The most common insurance claims against non-profit organizations are accidents and injuries at non-profit locations and special events. Other less common areas of claim include improper employment practices, professional errors and omissions³.

Even if a non-profit organisation has a risk management department that attempts to avoid activities that could expose the organisation to potential lawsuits, it does not remove the need for insurance. In light of cost considerations, it would be wise to insure against risks that cannot be avoided even with careful risk management. Organisations should look into industry practice as well as consider the unique needs and financial constraints of the organisation⁴.

KEYMAN INSURANCE

A large company like Apple can endure the loss of its Chief Executive Officer and enjoy continued success because of its vast resources, deep talent pool and continuity planning. In contrast, small and medium-sized organisations may depend on one or two key personnel to drive growth and generate revenue.



You may not be able to tap a large talent pool but you can institute continuity planning by taking out keyman insurance. This protects your business against the loss of profits caused by the death of key personnel. The payouts can then be used to hire a replacement and to allow your business the time to regroup.

Keyman insurance is similar in concept to a football team insuring its players. For instance if Cristiano Ronaldo were forced to retire during his contract period, his employer, Real Madrid could use the insurance payout to purchase a replacement player.

Premiums may be tax deductible if the following circumstances are met:

1. The policy does not provide for a cash surrender value
2. The potential payout does not exceed the annual profit of the company
3. The insurance proceeds go to the company, rather than the key personnel or his/her beneficiaries



GENERAL LIABILITY

The most basic of policies is one that covers general liability of the organisation. Policies for general liability will protect the organisation against claims for bodily injury, property damage and other injuries arising from the operation of the organisation's events and products or happening on the organisation's premises. Moreover, if contractors or vendors are hired, one can consider requiring the organisation to be named as an "additional insured" on the vendor's or contractor's general liability policy to avoid being named in a lawsuit for another party's negligence⁵. A general liability policy for non-profit organisations can also be tailored to protect not only the organisation but also a director, officer, employee or volunteer of the organisation⁶.



DIRECTORS & OFFICERS LIABILITY INSURANCE (D&O INSURANCE)

In Chapter 4, we discussed directors' duties and liabilities. Directors and officers are subject to regulation by various government entities such as the Accounting and Corporate Regulatory Authority, the Agri-Food & Veterinary Authority of Singapore, the Ministry of Health, the Competition Commission, the Charities Commissioner, etc. Accordingly, they may be liable to penalties such as fines or jail for their failure to comply with such regulation.

In such situations, directors and officers will naturally want to engage legal counsel to defend themselves. D&O insurance will cover these costs (subject to claim limits), thereby avoiding out-of-pocket expenditure.

Even if a claim is never made, D&O insurance can help in attracting talent to your business, by assuring prospective candidates that their interests will be protected. It is not uncommon for candidates to insist on D&O insurance coverage before joining a company.

D&O insurance is also applicable to charities. As we have seen in cases involving the National Kidney Foundation and City Harvest Church, the directors of charities may also be brought to court for breach of their fiduciary duties. As charities expand their scope of activities into the commercial sphere, their exposure to liability increases commensurately, necessitating greater protection.

Despite the fact that general liability insurance can be tailored to protect a director and officer, employee or volunteer, it is still advised to get a D&O insurance. D&O insurance acts as a third party insurance to protect a director or officer from personal liability arising from participation on the board or management of the charitable organisation, while general liability insurance focuses mainly on liability arising from physical injury and property damage.

For example, if an individual applies for clothes and food from your non-profit organisation and is turned down, the individual may claim that your non-profit organisation negligently denied his or her application. The D&O insurance is designed to cover such claims⁷.

SHAREHOLDER PROTECTION PLAN

In many ways, small businesses are like families. The owners, even if they hold minority stakes, have significant sway in the administration of the business. The relationship between the owners, if not collegial, should at least be workable; otherwise the business runs the risk of paralysis.

Business operations may also be hindered when one owner dies and his next-of-kin inherits his stake in the business. It would be quite natural for the next-of-kin to either want to assume the role previously held by the deceased, or to extract his/her share of capital from the business.

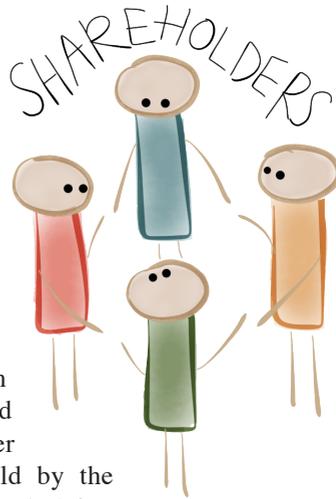
The remaining owners may not want the next-of-kin as a business partner, but may not be financially capable of buying him/her out. It is common for companies to have constitutions which limit the ability of shareholders to transfer their shares, and the next-of-kin may feel aggrieved that he/she is unable to sell his/her shares to a third party. Whatever the case, requiring an unwilling owner to hold on to his/her shares is not a recipe for harmony in the business.

One solution is for the company to purchase a life insurance policy on each shareholder with the proviso that upon receipt of the death benefit, the next-of-kin are legally obligated to transfer the shares belonging to the deceased to the remaining owners.

This arrangement is given effect by a shareholder's agreement with a put and call option. You should be careful to ensure that the shares are transferred to the other owners and not the company, as this will constitute a reduction in capital of the company and require a court order.

Additionally, the shareholder's agreement should be prepared by a legal professional as it can be highly technical and complicated and its terms may need to be tailored according to your particular circumstances.

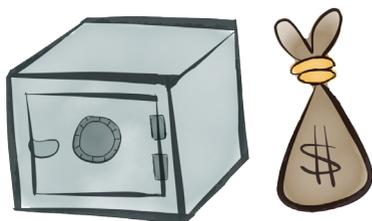
The premiums for the life insurance policy may be tax-deductible as a business expense in providing an employee benefit.



Shareholder protection plans can be a useful tool in persuading prospective investors to take ownership stakes in a company. It demonstrates foresight on the part of the owners by allowing their stakes in the business to be monetised after their death.

On a related note, it would also be advisable to prepare a will as some life insurance policies do not permit the policy holders to nominate their beneficiaries. As such, the insurance money will be directed to the estate of the deceased and distributed according to the will or rules of intestacy. Distribution of assets pursuant to a will is much faster and cheaper than in an intestacy. A will puts money in your family's hands much quicker.

MONEY AND VALUABLES



Money insurance should be purchased for valuables in office and in transit. Furthermore, supplies, inventories and fixed assets should also be safeguarded with insurance coverage.

Insurance for money and valuables usually cover for loss of money whether in the form of travelling to and fro or in secured places such as a locked safe, strong room, drawer, cabinet or cash register⁸. Moreover, it is also an option to insure for loss of physical property which could arise from fraud or dishonest acts done by employees⁹.

WORKERS' COMPENSATION

It is useful to have workers' compensation insurance to protect the organisation against the cost of lawsuits and medical bills that may arise from one of the employees or volunteers getting injured. Accidents are unpredictable and can happen even with precautions taken to avoid its occurrence. Most workers compensation insurance also includes Employment Practices Liability Insurance that provides an employer with protection against claims made by employees on discrimination, wrongful termination of employment, sexual harassment and other related claims.

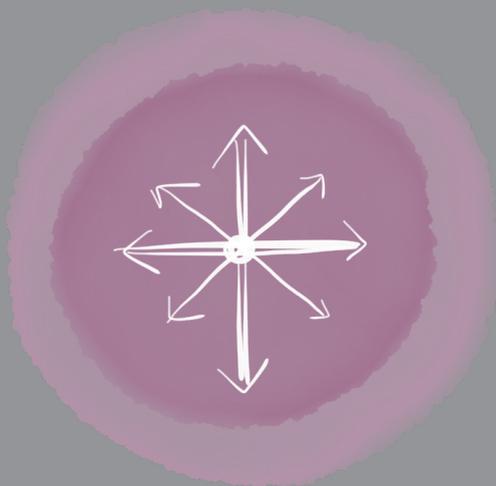


GUIDELINES WHEN PURCHASING INSURANCE

There are several guidelines that one may consider when buying insurance.

1. Take stock of all the possible risks that your organisation faces, taking into consideration the fact that non-profit organisations interact with many different groups of people such as employees, clients, beneficiaries and volunteers, the potential for legal responsibility is great¹⁰.
2. Find an insurance agent or broker who has a strong knowledge of non-profit organisations. This will ensure that the organisation can get insurance that is best tailored to its own needs and the common legal responsibility in the industry¹¹. Furthermore, you can also receive better advice on add-ons or gaps in your coverage.
3. Read the fine print and make sure you know what you are buying. It is important to know what is covered and what is not covered by your insurance such as the exclusions, limits and deductibles, amongst other things. Even though it is in the best interest of non-profit organisations to purchase cheap and cost-effective policies, if there is no adequate coverage in the form of insurance, serious financial harm can be done to the organisation should liability arise¹².
4. Obtain independent advice: If the organisation relies on an insurance agent or broker who has a conflict in interest because he also serves on the board of directors of the organisation, get a new agent or broker.

EXPANSION



15

E-COMMERCE



TAKING YOUR SOCIAL ENTERPRISE ONLINE

Have you ever purchased anything online? If you live in Singapore, chances are that you have. According to the latest statistics and trends about E-commerce industry in Singapore published by GO-Globe, e-commerce user penetration in Singapore was estimated at 57.31% in 2015 and is expected to hit 74.20% in 2020. The estimated e-commerce revenue in 2015 was USD3.5 billion, and projected to be worth up to USD6 billion in 2020¹. The Singapore Government is also actively encouraging smaller local firms to offer online shopping services by introducing various schemes and grants. While there is definitely gold in the online market, it is important to be aware of your legal position when doing business online.



This chapter will cover three main areas of doing business online:

- *The terms and conditions governing the use of a website;*
- *The privacy policy of a website; and*
- *Forming contracts online.*

When reading this chapter, do remember that the same principles that apply in the real world also apply in the virtual world. Do not fall into the trap of believing that because you are in the virtual world, you are somehow exempt from the rules that all businesses face and are subject to or that you cannot be traced or held accountable. The legal obligations that a business faces in the real world are the same as those that a business operating in the virtual world faces.

TERMS AND CONDITIONS

On most established websites, you will see a link at the bottom or top of the page labelled ‘Terms and Conditions’. Clicking on the link will bring the user to a page with many, many words. For buyers / users of the site’s services, it is tempting to ignore these words but this isn’t advisable!



‘Terms and Conditions’ are extremely important because they govern the relationship between you (the owner of the website) and the users of the website (consumers). This is the area where you set out the conditions on which users may use your website and also limit liability to yourself for the misconduct of users. Thus, it is important to have a carefully drafted set of terms and conditions to govern the relationship between you/your organisation and your users/consumers.

Generally, the terms and conditions should set out clearly the legitimate purposes for which your website may be used and other processes such as the registration and maintenance of user accounts, the treatment of personal data, cookie policies, credit card data that is transmitted as well as explain how you intend content ownership and other intellectual properties on your website be treated. Similarly, you should also set out what you define to be illegal or prohibited activities. Finally, you need to protect yourself by expressly stating that you (as the owner of the website) will not be liable for the misconduct of users on your website or for any liability or losses incurred by users through the use of your website.

It is not advisable to try to create your set of terms and conditions on your own, or worse, to try to “copy and paste” the terms and conditions of another site for your own site. Unless you are legally trained, you may not know the precise legal effect of the terms and conditions you have drafted. You may also leave out things that become important when a dispute arises. Other sites may also have crafted their terms and conditions differently, taking into account how their own businesses are organised and what priorities they may have set for their own arrangements. As websites become more varied, the fabled ‘cookie-cutter’ or ‘standard’ terms and conditions, if it existed at all, may no longer fit the precise requirements of your business. For instance, if you plan to offer/sell goods to consumers who are located out of Singapore, you may want to specify some terms and conditions which apply to such cross-border transactions, especially since consumers located out of Singapore may have certain rights given to them under their laws regardless of what governing law you choose to apply or say you apply in your terms and conditions. Other considerations may include the currency that the transaction will use or how the conversion rate of the foreign exchange will be calculated. In addition, you should always seek legal advice prior to offering your goods and services to foreign jurisdictions as you may unintentionally incur legal liability otherwise. For example, the sale and purchase of certain types of items to some countries is prohibited (including Liberia, Iraq, Cote d’Ivoire and Sudan) under international law. Again, these issues are not peculiar to e-commerce facilitated agreements, but they may become magnified due to the cross-border reach of internet-driven sales/services.

Also, it is important to select a governing law to govern the transactions carried out on your website. Depending on the jurisdiction you choose, a set of rules relating to consumer protection or sale of goods may automatically apply and may even override the terms and conditions you have set. For instance, if you choose that Singapore law is to apply to the transactions taking place on your website, the Consumer Protection (Fair Trading) Act (Cap. 52A) (CPFTA) will apply automatically. You have to be aware of what these rules are, in order to avoid unintentionally contravening these rules. The governing law also becomes important if disputes arise over the transaction. Different jurisdictions have different laws relating to consumer transactions, and not all of these laws can be avoided simply by choosing Singapore law as your governing law. One



best practice is to state explicitly the law you wish to apply to contracts formed via the website (eg. Singapore law), in your terms and conditions, and seek legal advice if you expect that a significant portion of your sales will be in/targeted at consumers in a particular country. Do not assume that just because you have a Singapore domain name, Singapore laws will automatically apply!

Once you have selected a governing law to govern the transactions carried out on your website, it would be useful to specify how any potential disputes are to be resolved. For example, as a business located in Singapore, you may wish to choose mediation in Singapore, which is a cost-effective and faster alternative than court action, as a means of settling any disputes. Again, special rules may apply to consumer transactions.

PRIVACY POLICY

Most established websites also have a link entitled ‘Privacy Policy’. This details the website’s approach to privacy issues such as the collection of users’ data, what the website owners will do with users’ data and the cookies operating on the site. It is important to have a properly drafted privacy policy especially in light of the Singapore Personal Data Protection Act (PDPA) 2012 (PDPA). The PDPA regulates the collection, use and disclosure of personal data.

Under the PDPA, you have to obtain the consent of an individual before you may collect, use or disclose his personal data. Before an individual can give consent, he must first be informed of the purposes for the collection, use or disclosure of the personal data and the business contact information of an individual².

This means that before collecting any data about individuals using your website, you have to inform them of the purpose for which their personal data is being collected and obtain their consent for that purpose. For example, if your website uses cookies to automatically collect information about an individual’s location, you need to obtain the consent of the user before collecting his/her information. For example, you would want to inform them that their location data is being collected for the purpose of establishing where your customers are located so as to serve them better with more timely delivery of products.

Informing the individual of the use of cookies and collection of personal data on your site is usually done through a ‘pop-up’ notice which appears automatically upon the individual entering the website. The notice must require the individual to give his/her express consent by clicking ‘Accept’ or ‘Decline’. It should also inform the individual of:

- What information the website will be collecting;
- The purpose of collecting such information; and
- The business contact information such as the email address of a “data protection officer” who can answer individuals’ questions about the collection, use or disclosure of the personal data. A data protection officer can be anyone from your company that will be responsible for attending to queries from individuals on the use of their data.

There are certain circumstances when an individual can be assumed to have consented to the collection, use or disclosure of personal data, for a particular purpose. This is when:

- The individual voluntarily provides the personal data to you for that purpose, and
- It is reasonable that the individual would voluntarily provide the data.
- In addition, if an individual has given (or is deemed to have given) consent to the disclosure of personal data about the individual by one organisation to another organisation for a particular purpose, the individual is deemed to consent to the collection, use or disclosure of the personal data for that purpose by that other organisation. You may utilize these provisions if the requisite conditions stated are met. For example, when an individual voluntarily presents their credit card information for the purpose of making payment, the individual is deemed to have consented to the collection, use or disclosure of their credit card number and other related personal data for the processing of the payment. The individual’s deemed consent would extend to all other parties involved in the payment processing chain. That being said, however, you still have a responsibility to ensure the protection of any credit card data that is transmitted to you.



We would recommend checking the Personal Data Protection Commission's website on a regular basis for updates to the PDPA and e-learning programme's on the PDPA.

You will have to be updated on the law and also have regular audits of your company's practices to ensure that you uphold the privacy policy published on your website. If your company practice does not uphold the privacy policy, customers may not trust you with their personal data and, even worse, you may contravene the PDPA. This is all detrimental to your online business.

Protection and Security of Digital Data

The Computer Misuse and Cybersecurity Act (Cap. 52A) protects computers, computer programs, and data that is stored in computers from unauthorised access, modification, interception and interference.

When a web user accesses a website or makes an online purchase, a record of his preferences and personal data is stored online. Given that you (the e-retailer) might have access to or possess some personal or confidential information about your customers, you must make reasonable security arrangements to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks³.

To take reasonable security arrangements, your organisation should⁴:

1. Design and organise its security arrangements to fit the nature of the personal data held by the organisation and the possible harm that might result from a security breach;
2. Identify reliable and well-trained personnel responsible for ensuring information security;
3. Implement robust policies and procedures for ensuring appropriate levels of security for personal data of varying levels of sensitivity; and
4. Be prepared and able to respond to information security breaches promptly and effectively.

Some examples of security arrangements include⁵:

1. Administrative measures: Requiring employees to be bound by confidentiality obligations in their employment agreements, and implementing robust policies and procedures (with disciplinary consequences for breaches) regarding confidentiality obligations.

2. Technical measures: Adopting appropriate access controls (e.g. considering stronger authentication measures where appropriate), and encrypting personal data to prevent unauthorised access.
3. Physical measures: Storing confidential documents in locked file cabinet systems, and proper disposal of confidential documents that are no longer needed, through shredding or similar means.

Also, do not over-promise your users in your privacy policy as you may not be able to live up to their expectations. For example, do not promise never to disclose users' personal data to third parties without their consent. You may be forced to go back on your promise in certain circumstances such as where the disclosure is necessary for any investigation or proceedings or where the disclosure is necessary due to national interest⁶. It would therefore be wise to have a comprehensive privacy policy that details the instances in which you as the e-retailer may have to disclose user personal data.

Please also bear in mind that Singapore's PDPA is just one of many data protection/privacy laws coming into force all over the world. At the time of print, over 100 countries have enacted some significant broad data protection/privacy legislation in their countries, and the number continues to grow every year. The responsible use of personal data, using the personal data only for the purposes for which you were authorised, is the simplest way to comply with most of these laws, and being transparent about these purposes and giving options to data subjects (i.e. persons whom the data identifies) is key.

If your website can be accessed from outside of Singapore, do note that the privacy requirements differ from jurisdiction to jurisdiction. For instance, in the United States of America, the Children's Online Privacy Protection Act of 1998 (COPPA) governs websites directed at children under 13 years of age. The COPPA spells out what a website operator must include in a privacy policy, when and how to seek verifiable consent from a parent and what responsibilities a website operator has to protect children's privacy and safety online⁷.

In the face of so many different requirements, the best practice is to first seek legal advice to ensure that your privacy policy and practices are tailored to the jurisdiction where you intend to offer your goods and services.



For an overview of the key privacy and data protection laws and regulations across different jurisdictions as well as other information on data protection, you may wish to refer to DLA Piper's Data Protection Laws of the World Handbook at www.dlapiperdataprotection.com/#handbook/about-section.

FORMING CONTRACTS ONLINE

Now that you have your website properly set up, we turn to briefly examine the business aspect of your website - forming contracts. The basics of contract formation are covered in Chapter 9. Here, we shall look at how this applies to online contracts in particular.

The rules that govern the online formation of contracts are the same as those which governing the formation of contracts in real life. In an online transaction, the steps of the formation of a contract are as follows:

1. Invitation to treat

This may take the form of displaying products on your website.

2. Offer

This occurs when the buyer gives notice of his intention to buy the item by submitting an order. Do note that what constitutes an offer can vary depending on the language you use in your website.

3. Acceptance

This occurs when the seller (you) sends a confirmation of the order to the buyer's e-mail address.

4. Intention to create legal relation

The parties must intend for the offer and acceptance to be legally binding, and not 'mere puff'. ('mere puff' - is a statement, which by its nature, and in the context in which it is made, is not intended to form the basis of a binding contract.)

5. Consideration

Consideration is anything of value promised to another when making a contract, such as money, services or performance/non-performance of an act.

The contract is then formed.

Please be aware that when forming contracts of sale online, it is important that the description of the goods on your website matches the goods in real life. This is because, under Singapore law, it is an implied condition of the contract of sale that the goods will correspond with the description. If this implied condition is breached, the buyer may have the right to terminate the contract with you.

How do you incorporate your website's Terms and Conditions into online contracts?

To successfully incorporate the terms and conditions, sufficient steps have to be taken to bring the terms to your buyer's attention. Some suggested methods of incorporation include⁸:

- Display of the terms in a dialogue box, where at the final stage of the order process (for example, after a review of the order), the customer is made to scroll through the terms set out in a dialogue box before clicking on the "submit" button. This method appears to be the most satisfactory from a legal perspective as the customer is forced to review the terms and to agree to the terms via some positive action on his part (the "click"); or
- Display of the terms at the bottom of the webpage. There is greater weight in terms of notice as the terms are displayed on the webpages themselves for the customer's perusal.



In contrast, a mere display of the terms on a separate webpage (for example, on a linked hypertext) without specific notification of the location of the terms to customers may result in the customers not being bound by such terms due to insufficient notice.

Also, do note that even if your website has an "auto-accept" programme such that your website automatically sends out confirmation e-mails without human verification, the contract may still be voided on other grounds such as mistake.

Indeed, "auto-accept" arrangements can create issues if you in fact want to reserve the right to reject an order, or cannot link up / have live updating of your stock management (or ERP) systems with the actual orders coming in. Always take legal advice on how best to manage the ordering system and what messages / information are being sent to the user.

Please note that contracts formed online or through other forms of electronic communication will be binding so long as the elements of contract formation are present. This may take the form of an e-signature or by conduct. It is relatively



common for an electronic ‘signature’ to serve as confirmation of authenticity. All that is required for a signature in the virtual world is:

- A method is used to identify that person and to indicate that person’s intention, and
- The method used is either as reliable as appropriate for the purpose it was used for or is proven in fact to have fulfilled the requirements in (a). This is governed by the Electronic Transactions Act (Cap. 88) and is known as an electronic or digital signature.

Usually, a trusted third party known as a Certification Authority (CA) is needed to issue digital certificates that certify the electronic identities of users and organisations. Digital signatures based on digital certificates issued by the licensed CAs are automatically considered to be trustworthy and recognized by the law. Thus, do check that the person you are “signing” the contract with has a reliable digital signature before proceeding with the contract. Further reading on this can be found at the InfoComm Development Authority of Singapore’s website.

On the other hand, even if you do not “sign” on any document online using a digital signature, you may still be held liable for making promises to perform or for any agreements made through email, SMS, instant messaging or even on social net-working sites. It is very common for lawyers to produce agreements made or concluded between parties over instant chat messages or SMS in Court as evidence that parties had come to an agreement.

Which Consumer Protection Laws must you be aware of?

As an e-retailer, you must also be aware of certain provisions outlined in specific statutes that relate to the protection of consumer rights. These provisions apply to all consumer transactions, including transactions conducted over the internet. Provisions include:

- The Unfair Contract Terms Act (Cap. 396), which regulates exclusion clauses and limited liability clauses in most consumer and standard form contracts;
- The Sale of Goods Act (Cap. 393) (SOGA), which governs contracts for the sale of goods in Singapore. According to the SOGA, any contract entered into for the sale of goods carries with it certain implied terms. For example, goods should be of satisfactory quality or goods that are sold on the basis of a sample or description should in reality correspond with that sample or description. If the goods sold contravene these

implied terms then the SOGA entitles your buyer to reject the goods and terminate the contract or claim damages;

- The Misrepresentation Act (Cap. 390), which holds you accountable if your website contains untrue pre-contractual statements that affect your customer’s decision-making process;
- The Consumer Protection (Fair Trading) Act (Cap. 52A) (CPFTA) sets out a list of specific unfair trade practices and empowers consumers to seek civil remedies. It is the responsibility of the business to prove that it did not commit the unfair practice; and
- “Lemon Laws”, which are provisions under the CPFTA which apply in the event of non-conformity to contract at the time of delivery (for example, in a sale of goods contract). Under lemon laws, if a defect is detected within 6 months, it is presumed that the defect existed at the time of sale or delivery unless the seller can prove otherwise. Beyond 6 months, consumers can still seek remedies but they will need to prove that the defect existed at the time of delivery. Remedies available to the consumer include demanding the seller to:
 - Repair; or
 - Replace the defective product.

If the seller fails to repair or replace the goods within a reasonable time or without significant inconvenience to consumer, the consumer may ask for a reduction in price or return the product for a refund. The seller can offer an alternative remedy from the one demanded by the consumer if the cost of the remedy demanded is disproportionate in comparison.

For more information on product liability, please refer to Chapter 13.

CONCLUSION

It is a common misconception that the internet is the ‘Wild, Wild Web’. This is incorrect. Just like in the real world, the internet is highly regulated and the same rules that apply in real life to protect consumers also apply online. We hope this chapter has gone some way in highlighting the important areas for you to take note of. However, this chapter is but an introduction to the rules that apply. It is always prudent for you to seek legal advice before launching your online business to ensure that you minimise any potential legal liability. Good luck!

16

ADVERTISING



ADVERTISING AND PROMOTING YOUR BUSINESS: WHAT'S LEGAL?

That catchy jingle that you never can seem to get out of your head, that tear-jerking 30-second viral video advertisement that you shared on your Facebook page because it touched on the very heart of giving...we all know that a good advertisement does more than move products off a store shelf. A good advertisement may go a long way in attracting people's attention to your organisation.

Depending on the nature of your organisation, you may invest a lot of time and money in the creation and development of your advertising content. However, before you start on your advertising campaign, you should familiarise yourself with the laws regulating the advertising industry.



ADVERTISING STANDARDS IN SINGAPORE

In Singapore, the key governing body is the Advertising Standards Authority of Singapore (ASAS). The ASAS is an Advisory Council to the Consumers Association of Singapore, set up in 1976 to promote ethical advertising in Singapore. The ASAS is the self-regulatory body of the advertisement industry, and comprises representatives from advertisers, advertising agencies, government agencies, media owners and other supporting organisations. Amongst other things, the ASAS:



- Provides advice and guidance (though it is not the clearing house for approval of advertising);
- Handles complaints on advertising practices;
- Advises on advertisements when such help is required; and
- Issues sanctions that are applied by media owners.

The governing ideals, which set the framework for the ASAS, are set out in the Singapore Code of Advertising Practice 2008 (SCAP). The SCAP applies to all advertisements for any goods, services, and facilities appearing in any form, or any media so anything you use to promote your organisation, regardless whether by way of flyers or posters, traditional placements in magazines or online, newspapers or TV or in any other way that modern technology has rendered possible, would need to comply by these guidelines.

WHAT HAPPENS IF YOU DO NOT COMPLY?

The ASAS mainly relies on voluntary compliance on the part of the organisations involved, rather than punitive measures. For example, the ASAS is empowered to ask you to amend or withdraw your advertisement if the ASAS is of the opinion that your advertisement is contrary to the SCAP. The ASAS may also ask you to withhold any advertisement from publication until it is modified to conform to the SCAP. Furthermore, the ASAS might request its members to impose sanctions on their contracting parties through clauses in the relevant advertisement contracts if the SCAP is violated. Sanctions may consist

of the withholding of advertising space or time from advertisers. The ASAS is empowered to rule on any disputes relating to breaches of the SCAP between members of the various advertising associations in Singapore and such rulings shall be binding on members of the associations.

However, you may trigger legal proceedings if your non-compliance with the SCAP results in a violation of other statutes or breach of contractual terms.

Therefore, whenever you are not sure if an advertisement is suited for public consumption, you should take a closer look into the terms of the SCAP to ensure you are on firm ground to avoid trouble.

WHAT ABOUT ADVERTISING USING SOCIAL MEDIA?

Social media is becoming an increasingly popular platform for advertisements: for example, endorsement or review posts by social media personalities or influencers. As yet, there is no legislation or enforceable guidelines on advertising using social media. The ASAS, together with industry players, is presently working on a set of guidelines for responsible social media marketing practices, and if you intend to embark on such marketing, you should look out for further developments on this matter.



In the meantime, if in doubt, do ensure compliance with the general principles of the SCAP: for example, the traits of honesty and truthfulness. One good example of what this means for endorsements and testimonials (although it is not enforceable in Singapore) can be found on the United States Federal Trade Commission (FTC) website.



Unethical advertising methods can be more easily uncovered in the online space; and if so uncovered, can bring your organisation into disrepute. If you are choosing social media influencers, do note that most credible and savvy personalities tend to disclose how their online presence generates income for themselves (for example, in blog FAQs). This creates an atmosphere of trust between the influencer and his or her audience, and may in turn result in more effective advertising for your organisation.

ARE THERE ANY SPECIFIC RULES FOR CHARITIES?



There is no legislation explicitly discussing advertising guidelines for charities. Although the ASAS website lists s 33 and s 35 of the Charities Act (Cap. 37) as applying to advertisements, these sections were repealed in 2011 and are no longer applicable.

Nonetheless, you should keep in mind broader guidelines found in statutes which specifically govern charities, such as the Charities Act (full list of statutes available at Charity Portal). In particular, the Code of Governance for Charities and IPCs on Public Image lays down the general principle that charities should accurately portray its image to its members and donors (and stakeholders, if any), so as to build up an image consistent with its objectives.

WHAT ARE THE GENERAL PRINCIPLES LISTED BY THE SCAP?

The 14 general principles laid out in s 2 of the SCAP which you should always take into consideration are:

- Legality;
- Decency;
- Honesty;
- Fear, Superstition and Violence;
- Truthfulness;
- Safety;
- Portrayal of Persons;
- Children and Young People;
- Social Values ;
- Family Values;
- Non-denigration;
- Non-exploitation of Goodwill or Intellectual Property;
- Non-Imitation; and
- Use of National Symbols.



Legality

Your advertisements should not contain anything that is illegal or might incite anyone to break the law. This means that the content of your advertisements should not appear to encourage or lighten the gravity of acts of violence or anti-social behaviour, such as vandalism.

It is also important that the audience of your advertisements are made aware that you are promoting your organisation. Under the SCAP you should visibly identify yourself as the advertiser and, where it may be unclear, state that the piece is published for advertising purposes and not, for example, editorial matter.

When you want to promote products or services linked to health, such as medicinal products, you will have to consider the restrictions placed by the relevant regulations, namely, the Guide on Advertisements and Sales Promotion of Medicinal Products, the Guidance on Raw Medicinal Herbs, and the Guidance on Disease Awareness Campaign.

Decency

When creating your advertisement you should pay special attention to the predominant social and family values in Singapore and ensure that no part of your message contradicts or undermines these values. Messages to children should be treated more stringently as children are more easily influenced by their surroundings and (depending on their age) may not have the capacity to properly evaluate the validity or propriety of your content. Special regulations in the SCAP apply to protect minors. Essentially, all advertisements should not contain anything that may offend the sense of decency of its potential audience.

Honesty

Your advertisements should not abuse the trust of the target audience or exploit their lack of experience, expertise or knowledge. For example, if your advertisement is for the purpose of seeking donations for your charity, you should be clear about where the donated funds will go and avoid any hidden costs. For the purposes of fair competition, your advertisements should also avoid making inaccurate comparisons to other companies or charities.

Fear, Superstition, Violence

Advertisements should not play on fear without a justifiable reason. While you may use fear to encourage prudent behaviour, your advertisements

should not cause unwanted anxiety. Your advertisements should not include unproven claims, such as suggesting that viewers may suffer from adverse consequences if they do not donate.

Advertisements, likewise, should not exploit superstitious beliefs and ‘prey’ on the superstitious. Your advertisements should also not promote violence or appear to condone the same.

Truthfulness

Your advertisements should not mislead in any way by inaccuracy, ambiguity, exaggeration, or omission. You should always be truthful in your advertisements. When you use research data or testimonies, these have to be truthfully represented and should not be altered to fit a purpose. Your advertisements may not contain any information to mislead your target audience into believing that any untrue matter is true. Statistics should not be so presented as to imply a greater validity than they really have. You should be prepared to furnish proof for the stated information, which ASAS may request for.

Safety

Unless it serves an educational or social purpose, advertisements should not appear to disregard safety through visual presentations of dangerous practices. Drinking and driving should be discouraged and a higher standard of care should be observed in launching advertisements directed at young, impressionable minds.

When you want to display outdoor advertisements, you will also have to consider the Building Control (Outdoor Advertising) Regulations, which mainly focus on ensuring that outdoor advertisements are properly displayed, well maintained and safe.

Portrayal of persons

Persons must be depicted in a dignified manner. Your advertisements must not disrespect them. For example, your advertisements should not have sexist connotations.

Children and young people

Children’s innocence, inexperience and naiveté should not be exploited. Advertisements should not exploit the susceptibility of children towards charitable appeals and should explain the extent to which their participation will help in any charity-linked promotions.



Social values

Your advertisement should not downplay the importance of or discredit social values, including:

- Patriotism and national unity;
- National issues, including the quality of life in Singapore;
- Singapore's status as a democratic country;
- Having a caring and compassionate attitude for the less fortunate members of the community; and
- Racial harmony.

Be careful when broaching the topic of national problems or national policies. Your advertisement should not adopt or encourage a confrontational approach to resolving these issues.

Family values

Your advertisement should, as much as possible, strengthen the family as the basic unit of society and must not denigrate the love between family members and the sense of comfort and security derived from such ties.

Denigration

When you advertise, you must not put other organisations or professions (such as other charities or another business) in a bad light or ascribe negative things to them, whether directly or indirectly.

Non-exploitation of goodwill or intellectual property

In your advertisements, you must not make unjustified use of the trademarks, logos or take unfair advantage of the goodwill built by others.

Non-imitation

You must strive for originality and creativity in your advertisements and not merely copy the work of others. Furthermore, the International Code Council Code discourages advertisers from using advertising campaigns already run by and associated with other international advertisers, such that the international advertisers would be unfairly prevented from extending their campaigns in the countries showing the copycat advertisement within a reasonable period of time.

National Symbols

There are laws governing the use of Singapore's Coat of Arms, Flag and the National Anthem. For example, the use of the State Crest for advertisements is prohibited by law.

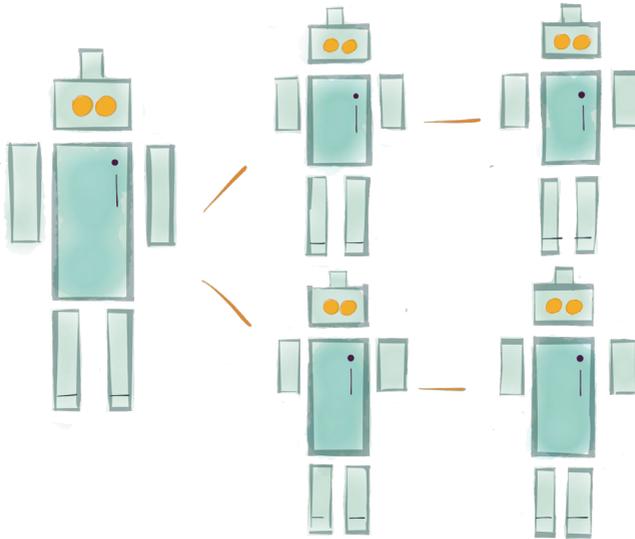
Brief guidelines to the usage of National Symbols are available at the National Heritage Board website. You may also verify the details of these guidelines with the Offices of the Prime Minister or the Ministry of Communications and Information (MCI).

CONCLUSION

To avoid a dent in your organisation's reputation, you should consult SCAP and familiarise yourself with the applicable statutes before green-lighting your advertising campaign. That aside, feel free to use all your creative inspiration and ideas to advertise your organisation!

17

FRANCHISING



FRANCHISING YOUR SOCIAL ENTERPRISE

When we think of franchises, we often think of large-scale commercial examples such as Subway and McDonald's. One way to think about franchises is to first think about what makes a Subway and McDonald's restaurant distinct. Each of these chains have their own particular look and feel (the store's "get-up"), and the same brands are used in each outlet – such as trademarks (e.g., "Big Mac"™). There is a certain way the food is prepared. Each outlet has the same menus, and (usually) the same pricing in each territory. Customers go to any Subway or McDonald's outlet expecting the same standards, the same menu



and the same customer experience. What makes each restaurant distinct is essentially, the intellectual property used in each chain: trademarks, trade secrets, copyrighted works, etc.

Now think about this from the perspective of the owner of the intellectual property in the McDonald's chain (the franchisor). Their trademarks, their recipes, their store get up is immensely valuable because these are all things which would make a customer choose a store that uses their intellectual property over one that doesn't. Rather than set up a restaurant in every location in every country at its own expense, the McDonalds' franchisor instead grants a permission (a "licence") to use the intellectual property to others to set up McDonalds' stores in different locations. In exchange, the franchisee pays a fee for the right use the intellectual property, and for some key promises.

What would some of these key promises be? Consider what's important to McDonalds. As a franchisor, it will want to ensure that every restaurant using its trademark does indeed give the same quality consumer experience to its customers as McDonalds would expect from every store. It would be concerned to not allow the quality and standard of the McDonalds' image and quality standard to deteriorate or be harmed in any way. As such, some of the key promises the franchisor will want from the store owner who uses its intellectual property would be to ensure that he uses the intellectual property correctly (i.e., to meet standards the franchisor would require), or (sometimes) to purchase products from franchisors' approved suppliers).

It's not just F&B outlets either. Franchises can occur in other industries, whether it's selling clothes or computer equipment or providing spa services.

In a nutshell, a franchise is a contractual relationship under which the owner of an existing business (the franchisor) grants rights to another party (the franchisee) to run a business using the franchisor's already established and proven business know-how, business model, methods, and intellectual property. This is done in exchange for franchise fees and royalty fees, which the



franchisee will have to pay to the franchisor to continue enjoying the grant of such rights.

Once entered into, this contractual relationship may allow the franchisor to retain control over various aspects of the franchisee's business, depending on the express terms the franchise agreement. Such control usually includes a franchisee's ability to sub-franchise, geographical boundaries, employment of key-personnel, operational procedures, supply and procurement, promotional and advertising activities, and the use of the franchisor's intellectual property and proprietary information. The autonomy of a franchisee is therefore very much dependent on the terms and conditions of the franchise agreement, and which may vary significantly depending on the franchisor's preferences and the parties' negotiations prior to entering into the franchise agreement.

Franchising is becoming an increasingly popular business model as business risks are apportioned and resources shared amongst the franchisor and franchisees. A franchisee may find a quicker route to business success through affiliating itself with a reputable brand and adopting a proven business format, rather than having to 'reinvent the wheel'. Also, having a larger number of franchise participants, whether franchisees or sub-franchisees (collectively, the 'franchisees', would also result in economies of scale for each of the franchisees. The franchisor, on its part, benefits from the franchisee's local knowledge and the franchisee's sharing of local investment risks. The franchisor is therefore able to scale up rapidly and expand into different countries, while risking less of his capital.

The principles of commercial franchising can be equally applied to a social enterprise. The model of franchising social enterprises is known as social franchising. A social entrepreneur desiring to maximise his impact with limited resources may look to the scalability promised by the franchise model, particularly if the social enterprise is dependent on donor money. This chapter compares social franchising to its commercial counterpart.

KEY ELEMENTS OF A SOCIAL FRANCHISE

A social franchise shares many key elements with its commercial franchise counterpart. Whether you are creating a franchise or evaluating the purchase of rights to operate a franchise, the key elements that you should consider are:

1. Business model and franchise manuals

The business model should be clearly detailed and communicated in a way that allows the franchisee to replicate the processes and systems that the franchisor has used to achieve business success. The business model is usually written out in the franchise manuals with comprehensive guidelines on how to run the business, such as:

- Operations;
- Advertising and promotional guidelines;
- Pricing of the franchise business's products and services;
- Standards of etiquette expected of service staff and;
- Staff training

All these define the parameters of what the franchisor expects of the franchisee, and will help record what the franchisee will do. It is usually shared with the franchisee on a strictly confidential basis. While franchise manuals do not tend to be binding legal documents in themselves, the franchise agreement may refer to or make certain standards and steps described in the franchise manual into binding or establish obligations. Unlike the franchise agreement, franchise manuals may be frequently updated as the business model of the franchise evolves.

2. The franchise agreement

The franchise agreement is the main legal contract between the franchisor and the franchisee that sets out the rights and obligations of each party towards the other. As the relationship between the franchisor and the franchisee involves on-going cooperation between the parties, it is important to ensure that key terms such as the term (i.e. the length of the contractual relationship), geographical boundaries, franchise fees and continuing obligations, are expressed clearly in the



agreement. A discussion of key terms of a franchise agreement is set out further below. The extent to which the franchise agreement can be negotiated will depend significantly on the relative strengths of the franchisor and franchisees.

Stronger franchisors with existing franchise networks may require potential franchisees to sign non-negotiable contracts with standard terms, while franchisees with local networks that the franchisor needs may be in a more dominant position and may therefore be able to negotiate much more customised arrangements for themselves.

3. The brand and intellectual property rights

The attractiveness of a franchise to potential franchisees depends largely on the strength of the franchisor's brand and its market appeal. Reputable and recognisable brands with established customer markets facilitate the franchisee's ability to sell products or services under that brand. It is in the franchisor's interest to protect his intellectual property relating to his brand to the greatest extent possible. If any of the franchisor's intellectual property is used in any way that is not permitted by the franchisor, the brand's reputation and goodwill may be damaged and diminished. A discussion of intellectual property and how it may be protected may be found in Chapter 11.

4. Standardised training and support system

Many franchisors operate training and support systems to train their franchisees or the employees of their franchisees. These training and support systems range from accreditation programmes, periodic seminars and courses to mandatory training regimes (which may involve substantial training fees), but they all share the common goal of strengthening the franchise relationship and ensuring that the franchisee introduces and implements systems that are in line with the franchisor's requirements. The particulars of the training and support system are usually set out in the franchise agreement and the franchise manuals. A strong and well-implemented training programme facilitates knowledge sharing, which is essential to ensure that the business format of the franchise is replicable and that standards are consistent across the franchise. The extent to which such programmes can limit a franchisee's operating flexibility or put burdens on a franchisee can be a source of tension in the relationship between the franchisor and the franchisee.

Understanding the extent to which the franchisor will require the franchisee to implement and comply with such programmes is therefore a crucial part of the process for both the franchisor and the franchisee to work out the terms of their relationship before entering into an agreement.

5. Quality assurance system

Strong franchise brands that have built up significant goodwill do so by providing consistent pricing of goods and/or services, brand experience and corporate culture, and ensuring that their franchisees meet the standards of quality expected by the customers of such brands. Such franchisors have systems in place to inspect and evaluate the performance of their franchisees. The franchisor may pass on some of these costs to the franchisee through the franchise agreement, for example, the personnel and travel costs for facilitating site visits by franchise auditors and inspectors as part of the franchisor's quality assurance checks. The franchise agreement or the franchise manual(s) may set out some of the qualitative and quantitative measures that the franchisor may use to assess his franchisee's performance, and may also provide for the termination or censuring of franchisees who do not meet the franchisor's standards.

KEY DIFFERENCES BETWEEN COMMERCIAL FRANCHISING AND SOCIAL FRANCHISING

Some of the key differences between commercial franchising and social franchising are as follows:

1. Incentivisation/motivation of parties

In commercial franchises, both parties are usually motivated by profit, as commercial franchise fees payable to the franchisor tend to correlate with the franchisee's financial performance. Successful franchisees also improve the brand presence of the franchise and raise the value of the franchise.

A social franchise is established for the purpose of promoting one or several social ends. Although certain types of social franchises do also make money, this is rarely the main objective. With multiple incentives, it is more difficult for parties to align goals and priorities. Social impact is also more difficult to benchmark than



financial performance - while a franchisee's financial performance can be generally ascertained through examining its revenue and profit, the way social impact is measured depends on the objective of the social franchise, and may be subjective and therefore difficult to quantify.

2. Selection of franchisees

Commercial franchisors tend to select franchisees on the basis of their commercial potential. Factors they may consider include the potential franchisee's industry experience and expertise, his financial strength and the commonality of his financial objectives with those of the franchisor.

Social franchisors have to assess a larger range of attributes of their potential franchisees beyond their financial and operational ability to run the franchise. For example, "softer" criteria such as the franchisee's own reputation within the local community, cultural background and shared values, if any, may also be key considerations for selection by the social franchisor.

3. Funding

Banks and other mainstream investors are more comfortable with commercial franchises, as compared to social franchises, as commercial franchises are for-profit enterprises, with less risk of defaulting on loan repayments.

Investors in social franchises tend to be donors such as trusts and foundations, which have their own internal policies, objectives and investment criteria. The social franchise will need to manage the preferences of these non-profit investors in order to ensure their continued investment in the social franchise.

4. Sharing of investment risks

Under commercial franchises, franchisees share and reduce the investment risks of their franchisors. The risk of their own financial loss helps to motivate franchisees towards ensuring the success of the franchise.

With the more limited range of funding options available to social franchisees, franchisors may have to provide significant capital support to the social franchisee and bear much of the associated investment risk. This often leads to the franchisor requiring more

control over the operations of the franchisee, which may in turn result in fewer franchising opportunities.

5. Fee structures

Social franchises, unlike commercial franchises, are not motivated mainly by profit. Social franchisors may have to contend with lower fees or request alternative forms of non-monetary consideration, such as requiring the franchisee to collect and share key data.

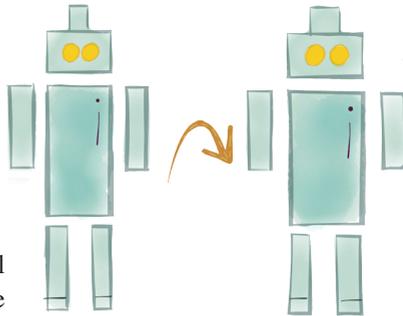
The franchise agreement is usually prepared by the franchisor's lawyers and the tendency is for the franchise agreement to favour the franchisor.

FRANCHISING MODELS

There are a variety of franchising models that can be adopted when franchising an organisation, depending on the nature of the organisation as well as the degree of control that you wish to retain over the organisation.

1. Dissemination

Under this model, the franchisor provides resources to the franchisee and the franchisee is able to replicate the organisation set up, with generally no ongoing legal and financial relationship between the franchisor and franchisee.



This franchising model provides flexibility for both franchisors and franchisee.

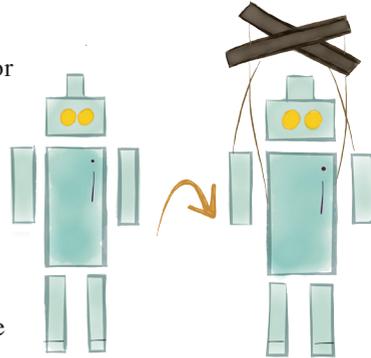
This model suits charities that centre around ideas that can be easily adopted and carried out by a franchisee with little supervision needed.

Examples may be tool kits on how to run clubs in schools, or materials or information to help a franchisee bring a campaign to a new place.



2. Affiliation

Under this model, the franchisor has an ongoing legal and financial relationship with the franchisee such as that of the franchisor charging the franchisee fees.



This franchising model allows a franchisor to retain more control over the franchise of the organisation.

This model suits organisations that require the franchisor's expertise, resources and guidance to closely guide the franchisee to successfully achieve the social goals of the organisation.

KEY ELEMENTS OF A FRANCHISING AGREEMENT

Key terms of the franchise agreement that parties should consider carefully and with independent legal advice are as follows:

1. Exclusivity of rights granted

The franchisor may either grant an exclusive franchise to the franchisee within a specified territory or reserve its rights to grant multiple, non-exclusive franchises. Franchisors that grant exclusive franchises risk becoming overly dependent on a particular franchisee for the expansion and the performance of the franchise in the territory specified. Conversely, franchisees may benefit from exclusive franchises as these rights can limit competition from other franchisees within the territory, and give the franchisee greater leverage with the franchisor once the franchise agreement has been signed. Exclusive franchisees may, however, be subject to greater scrutiny or stricter performance targets by their franchisors given the dependence of their franchisors on their performance.

2. Geographical boundaries and territory

The territory specified for the grant of a franchise affects the value of the franchise, as the business potential of the franchise depends on the economic size and value of the potential customer

base within the specified territory. Where an exclusive franchise is granted, the territory specified also determines the area in which the franchisee is able to operate without competition. Territory is generally specified along geographical lines, and both franchisors and franchisees should consider carefully how this may impact any cross-border business operations that they may have. For example, enterprises with business assets and customers in different countries will have to review the drafting of this clause to ensure that they are able to sell to their expected customers without violating the territorial limitations specified.

3. Duration of the term

It is common for commercial franchises to be entered into for an initial term of up to five years or even ten years, with options for further and subsequent renewals of the term. The option to renew on existing terms is often built into the franchise agreement. Alternatively, the option to renew may be subject to renegotiation of terms on the basis of prevailing market conditions or the performance of the franchisee seeking the renewal at the time of renewal. Conditions may be imposed by the franchisor for the option to renew, such as payment of renewal fees, achievement of pre-agreed performance benchmarks and the absence of material breaches by the franchisee, which would entitle the franchisor to terminate his contractual relationship with the franchisee if such material breaches cannot or are not remedied by the franchisee.

4. Fees

The fee structures of commercial franchises generally include a payment of initial fees as well as on-going royalty fees tied to the financial performance of the franchisee's business. An example of a common fee structure comprises:

- A one-time initial set-up fee;
- A periodic royalty or management fee equivalent to a percentage of the gross monthly turnover of the franchisee;
- A periodic advertising fee equivalent to a percentage of the gross monthly turnover of the franchisee; and
- Ad-hoc training fees for training courses and programmes provided by the franchisor.



Parties should look at the calculation mechanics and payment timing for such fees to ensure that the basis upon which these fees are calculated accords with the franchisee's internal accounting methods, and that the franchisee has the ability to pay on time.

Financial metrics such as gross monthly turnover may be adjusted after the auditing of the franchisee's financials, and the franchise agreement may specify an adjustment mechanism under which audited figures are provided to the parties after the relevant accounting period. The party holding on to the excess amount after reconciliation with the audited amount is then required to refund such amount to the other party, and the withholding party may also be liable to pay additional interest for the withheld sum, which is to be calculated at rates prescribed in the franchise agreement. The franchisor may also require franchisees to disclose their books and records if the franchisor disputes any amounts payable, or require periodic independent inspection and auditing of such books and records, to ensure that fees are properly calculated and paid.

As discussed above, social franchises may have different fee structures given the non-profit nature of the enterprise. Franchisors may also request other forms of consideration such as the provision of data under social franchise agreements. If such alternative forms of consideration are contemplated, the way the consideration is valued and furnished should be carefully negotiated and drafted to avoid ambiguity.

5. Obligations of the franchisor

The franchisor's initial obligations primarily relate to assisting the franchisee in setting up his business. These include advice on the selection of premises and hiring and training of staff, the provision of the franchise manual(s), assistance with setting up human resource and management functions, advertising and management support, and assisting with supply and procurement of equipment and products. The franchisor may also have on-going obligations to supply the franchisor with specified products or provide continued business development.

6. Obligations of the franchisee

The franchisee's obligations may include compliance with the franchise manual(s) and the standards required by the franchisor,

requiring the proper use of the franchisor's intellectual property rights and requiring that the franchisee provides appropriate training and development to his employees, etc. The franchisor uses these legal obligations to ensure it can sue the franchisee if it fails to comply with those requirements, damaging to the image of the franchisee's intellectual property. The general obligation to comply with the franchise manuals (usually pertaining to operations, etiquette and training) also gives flexibility to the franchisor, as the franchisor typically reserves the right to update franchise manuals from time to time and to impose new requirements on the franchisee, without having to amend the executed franchise agreement.

The franchisee may also be subject to obligations to provide the franchisor with its financial statements and management accounts on a periodic basis, to facilitate the franchisor's monitoring and evaluation of the franchisee's financial performance.

There may also be covenants, contractual promises, which will restrict or limit the ability of the franchisee to compete with the franchisor or continue a similar business – though whether this is agreed or is justified will depend on the circumstances in each case.

7. Advertising and marketing

Where the franchisor carries out centralised advertising and marketing activities in exchange for a monthly levy on the franchisee, there may be provisions prescribing the scope and type of advertising and marketing activities to be conducted by the franchisor. The franchisor tends to retain considerable discretion in determining what advertising and marketing activities to conduct, but may provide an undertaking not to use the levy for purposes other than advertising and marketing of the business.

The franchisor has an interest in presenting a consistent brand appearance and preventing damage to its brand reputation. Consequently, the franchisee is usually only permitted to carry out advertising and marketing activities with the prior authorisation of the franchisor and only if such activities are in accordance with the policies and instructions of the franchisor, such as the placement or usage of any of the franchisor's trade name and trade marks on such advertising and marketing materials.



8. Insurance

The franchisor may require the franchisee to take out insurance for third party liability, and insurance for employees, loss of profit and property damage. The franchisor may also require the franchisee to note the franchisor's interest on the policies and demand the provision of copies of insurance policies to the franchisor. Alternatively, the franchisor may also require the franchisee to partake in the franchisor's group insurance schemes, if any.

9. Termination and suspension

The termination provisions of a franchise agreement tend to be crafted to allow the franchisor to withdraw its rights and revoke or suspend the franchise rights granted to the franchisee if the franchisee commits a material breach of the terms of the franchise agreement. The list of breaches deemed material enough to trigger an immediate termination is usually set out in the same provision. Other grounds for termination that parties may consider may include a change of control of a party or the commencement of insolvency proceedings against a party.

10. Dispute resolution

Other than standard court resolutions, franchise agreements usually include alternative dispute resolution provisions that may specify negotiation and 'cooling off' timelines, or provide for the appointment of third party mediators, or for the submission of disputes to arbitration. With the new Singapore International Commercial Court that was officially launched on 5 January 2015, it is anticipated that franchisors may choose to adopt this mechanism instead into the franchise agreements in the near future, given that the reliance on foreign law is generally more welcomed.

LAWS THAT GOVERN TERMS IN FRANCHISE AGREEMENTS

The franchising agreement is a contract between the franchisor and the franchisee and thus it is governed by contract law. It is also regulated by the tort of deceit (a cause of action under common law), the Misrepresentation Act (Cap. 390), and the Competition Act (Cap. 50B).

1. Contract Law

If the franchisor or franchisee breaches a condition in the franchise agreement, the innocent party will be entitled to terminate (i.e. get out of the contract).

2. Contracts (Rights of Third Parties) Act (Cap. 53B)

This Act entitles a third party to enforce contracts directly, when the conditions laid out in the Act are satisfied.

The Act applies to franchise agreements. Thus the franchisor and franchisees should consider if the franchise agreement grants any rights to third parties.

3. Unfair Contract Terms Act (Cap. 396)

This Act requires that certain provisions in a franchise contract must be fair and reasonable, having regard to the circumstances that were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

Where there is an exclusion or restriction of any legal responsibility, the franchise contract must pass the test of reasonableness.

Where legal responsibility is restricted to a specified sum of money, and the question arises whether the franchise contract passes the reasonableness test, the following should be considered:

- The resources that he could expect to be available to him for the purpose of meeting the legal responsibility should it arise; and
- How far it was open to him to cover himself by insurance.

4. Tort of Deceit

This area of law protects the franchisor and the franchisee from false statements made by either party. While this area of law is not enshrined under any legislation per se, this area of law remains to be developed by the Singapore courts through case law over the years.

5. Misrepresentation Act

This Act provides that:

Where a misrepresentation has been made by one contracting party



to another, the party making the misrepresentation is liable to the other in damages (as if it was a fraudulent misrepresentation) unless he can prove that he had reasonable grounds to believe and did believe up to the time that the contract was made that his statement was true.

6. Competition Act

Parties involved in the franchise agreement should be mindful that the franchisee agreement does not entail the franchisor and the franchisee engaging in economic activities in an anti-competitive manner that could go against the Competition Act. Examples of anti-competitive behaviour include price-fixing and market sharing agreements, and predatory behaviour to hinder competitors.

STATUTES AND REGULATIONS THAT GOVERN CHARITIES AND FRANCHISEES

1. Office of the Commissioner of Charities Guidance for Charities Engaging in Business Activities

If your organisation is a charity, and the charity and its franchisees are engaging in business activities for example, to generate additional income or to provide goods or services, your organisation and its franchisees are subject to the guidelines laid out in the Office Of The Commissioner Of Charities Guidance For Charities Engaging In Business Activities.

The Guidance provides that these business activities do not undermine the organisation's focus and distract the organisation from its exclusively charitable purpose. Organisation boards should also be prudent and must not expose their charitable assets to significant risk.

Where business activities may expose charitable assets to significant risk, they must be carried out by a business subsidiary. A business subsidiary means any non-charitable company owned by one or more charities to carry on a trade/ business on their behalf.

The parent organisation and the subsidiary should operate as two parties free and independent of each other, so as to protect the former's assets from business risks and creditors. In addition,

when making decisions related to a business subsidiary, the organisation board must work in the best interests of the parent organisation.

Ultimately, organisation boards are responsible for the proper use of their resources, and are accountable for their investment decisions. However, if necessary, the Commissioner of Charities can direct an organisation to cease funding or terminate its business activities, in order to protect its charitable assets.

2. Competition Act

If your organisation or its franchisee is engaging in economic activities, they are subject to the provisions of the Competition Act, unless exempted.

Your organisation and its franchisee should be mindful not to engage in economic activities in an anti-competitive manner that could go against the Competition Act. Examples of anti-competitive behaviour include price-fixing and market sharing agreements, and predatory behaviour to hinder competitors.

3. Code of Governance

The Code of Governance is applicable to your organisation and its franchisees if your organisation and its franchisees are registered charities in Singapore and receive public donations. Compliance with the Code is not mandatory; however, if charities fail to comply with the Code they are required to explain their non-compliance.

Your organisation and franchisees should consider both the general and specific guidelines in the Code.

The following is a selection of general principles laid out in the Code that are likely to be relevant considerations when creating a franchise for a organisation or evaluating the purchase of rights to operate the franchise.

- Programme Management: The organisation should ensure that its operations and programmes are directed towards achieving its objectives.
- Fundraising: The organisation should be prudent in engaging third party fundraisers.



- **Disclosure of information:** The organisation should be transparent and accountable in its operations. The organisation should provide information about its mission, structure, programmes, activities and finances, as well as be responsive to requests for information.
- **Public Image:** The organisation should be transparent and accountable in its operations. The organisation should provide information about its mission, structure, programmes, activities and finances, as well as be responsive to requests for information.

4. Charities Act (Cap. 37)

If your organisation is a charity, the charity and franchisee have to abide by the Charities Act and regulations which outline the rules on areas such as:

- Registration;
- Deregistration;
- Submission of accounts, reports, and other returns; and
- Fund-raising.

5. Companies Act (Cap. 50)

Your organisation and franchisee are subject to provisions of the Company Act.

A company or foreign company with a charitable purpose which contravenes the Charities Act or regulations made under the Charities Act, may be wound up or struck off the register.

6. Societies Act (Cap. 311)

If your organisation is a Society, your organisation and the franchisee are subject to the provisions of the Societies Act which outlines rules on:

- registration;
- place of business;
- constitution (also known as “rules”);
- officers; and
- annual general meetings.

FRANCHISING AND LICENSING AUTHORITY (SINGAPORE)

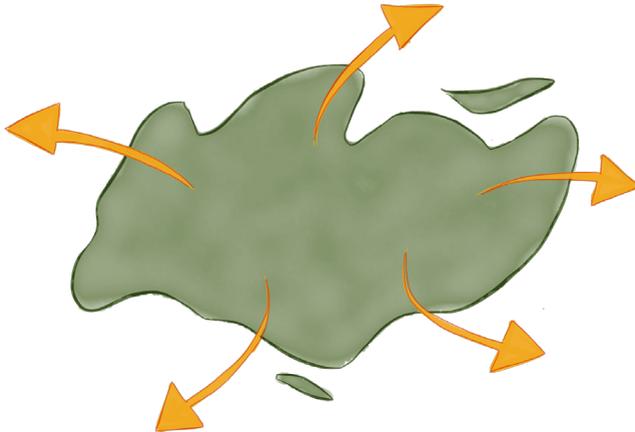
There are currently no government agencies that regulate the sale and formation of franchises in Singapore.

The Franchising and Licensing Authority (Singapore) (FLA) is Singapore's national franchising body, and is self-regulating. Companies can opt to join the FLA as members. Members of the FLA are therefore required to comply with the FLA's Code of Ethics.

The FLA's Code of Ethics contains rules on misleading promotion, full information on investments requirements, disclosure, legal advice, potential franchisees contacting existing franchisees, preventing members from using other's trademarks, proper selection of franchisees, provision of proper training, business guidance, accessibility of franchisor, transferability of franchise, standards of conduct, notice of breach and time for remedy, termination only with good cause and dispute resolution.

18

CROSS-BORDER OPPORTUNITIES



CROSS-BORDER TRADE: WHAT TO LOOK OUT FOR

In helping your organisation grow, you may consider opportunities beyond Singapore's borders.

For the purposes of this toolkit, we will broadly define any such international opportunity as a 'cross-border' opportunity. Cross-border opportunities may present a number of advantages for your organisation, whether through access to cheaper, higher quality or more varied supplies, or by opening new markets in which you can sell your goods or services.

Although there may be great potential for expanding your organisation outside of Singapore, you should satisfy yourself that you are fully informed of the potential and possible operational and legal risks related to your proposed venture and its industry. This chapter briefly outlines some of these business and legal considerations.



CROSS-BORDER OPPORTUNITIES: KEY CONSIDERATIONS

BUSINESS

- Strategy formulation
- Finding the right country
- Finding the right partner
- Foreign currency risk
- Changes to applicable task and duty regimes

LEGAL

- Choosing legal representation
- Choosing an appropriate operating structure
- Conducting due diligence
- Drafting agreements (contracts)
- Local laws and regulations

LEGAL CONSIDERATIONS FOR CROSS-BORDER OPERATIONS

Choosing legal representation

Local legal representation can be crucial to the success of your venture. Local legal counsel are equipped and qualified to advise you on a myriad of issues pertinent to the local legal landscape. Examples include property-related issues (such as rent or purchase of business premises), tax-related issues (such as applicable value added tax, sales tax or corporate income tax) or employment-related issues (such as advising on employment contracts and working conditions for potential employees).

Although high legal fees are a concern for most business persons, most lawyers are happy to meet with potential clients prior to signing any engagement letter or demanding fees of any sort. Such preliminary meetings give potential clients the opportunity to conduct informal interviews and fact-find, as a means of ascertaining if they are comfortable with the lawyer in question, and to gauge the quality of their legal advice. Furthermore you do not need to seek out the biggest or most sophisticated law firm available since a small firm may provide the same quality of service and be the most appropriate advisor for your new business. Foreign law expertise is available locally through Singapore Law Practices (SLP) with foreign desks or offices, as well as



through Qualifying Foreign Law Practice (QFLP) licensed to practise in Singapore. For assistance, please contact the Law Society of Singapore (for SLPs) or the Ministry of Law (for QFLP).

You can also seek out references for legal counsel through word of mouth or through your potential business partners in the relevant foreign jurisdiction. Regardless of the manner by which you select your local counsel, a competent local legal advisor will be invaluable as you expand your business across borders.

Choosing an appropriate operating structure

The structure you choose for your business is dependent on your business plans, local labour and legal requirements, foreign exchange controls and taxation policies, to name a few. Each structure possesses its own distinct advantages and disadvantages and you should discuss this in greater detail with your appointed foreign lawyer.

For example, you may choose to establish a branch office or subsidiary in the country, which would usually mean hiring local employees or sending someone from Singapore to work in that country. Local employees can provide a loyal local presence that represents your enterprise and may provide you with valuable market information in a timely manner. However, establishing a branch office takes up valuable finite resources such as your time and money, may leave you more susceptible to taxes and lawsuits in the foreign country as you now have an established presence in the country, and may increase your compliance costs as you now have to comply with foreign employment laws and regulations as well as local income taxes, to the extent that they apply to your branch office's employees. Alternatively, relying mainly on your foreign business partners is certainly more cost effective but may leave you beholden and give them leverage over you.

Conducting your due diligence

You must ensure that you conduct appropriate due diligence on your business plan and your potential foreign business partners. Due diligence is the process by which you verify or obtain information about material business concerns, such as your business partner and its operations, the legal and political climate of the country or identify other material issues that may affect your cross-border operations.

Due diligence may also be conducted on your behalf by hired professionals, such as accountants, risk management and market consultants or lawyers; you should note that this can be an expensive process.

However you choose to conduct due diligence, it remains a necessary ingredient for successful expansion of your cross-border operations. The findings of your investigations can have a substantial, and even profound, effect on the commercial terms of your cross-border operations, because your investigations allow you to identify and, in turn, potentially quantify the pertinent commercial risks to your cross-border business plan. For example, as a result of your due diligence, you may decide that because a potential foreign supplier lacks the necessary machinery in his operations to consistently provide you with high quality supplies, the risk of receiving shoddy quality supplies from this particular supplier are so great that it is not worth engaging the supplier at all.

Contracts

Any contract that you sign with foreign parties will constitute the legal framework of your operations abroad. Hence, you must give careful attention to the content and form of these agreements. It is very important that you clearly agree, with your counterparty, what the overall purpose of the contract will be.

The purpose of the contract has a direct impact on a contract's scope and terms, and the resulting contract's legal implications.

Some of these legal issues take on particular importance in the context of cross-border transactions:

1. Language

Both parties must agree to the language in which the contract will be drafted. In certain cases, both parties can agree that the contract be drafted in English and another foreign language. The purpose of this is to allow for greater understanding of the terms by both sides, as the terms should be identical across both languages. However, parties must still decide which document will be the operative document in the case of inconsistencies between the English and foreign language versions. Some countries such as Indonesia may also have specific requirements on the language of contracts in order for them to be legally enforceable. Therefore, you may need to make enquiries or consult a lawyer to understand any particular requirements of the foreign country.

2. Payment

From a commercial perspective, the point at which funds change



hands between parties is a very important event that a contract has to clearly account for. The risks associated with payment can generally be divided into either:

- Paying too soon and not receiving the good or service in return; or
- Not receiving payment having already provided the good or service.

Contracts can help to mitigate these payment risks by specifying exactly when and how payment will be made. You can choose to build into your contract specific payment mechanisms, such as letters of credit or escrow accounts, that can help to ensure that the funds are transferred between parties at the appropriate time.

A letter of credit (commonly referred to as an ‘LC’) is a document issued by a bank to another bank that guarantees the payment by a specified person (or entity) upon specific conditions being met.

Escrow accounts are accounts into which funds can be deposited by one party and such funds will not be released to the counter party until the escrow agent, a neutral third party, has determined that certain previously specified conditions have been met.

Essentially, both letters of credit and escrow accounts serve as mechanisms for the parties to manage their risks while still guaranteeing payment so long as the goods or services are provided in a satisfactory manner. Additionally, in the case of international contracts, it is of particular importance that the contract should specify a mutually agreed currency in which payment should be made.

3. Governing law and forum

The governing law of a contract is the law of a particular jurisdiction under which the terms of the contract will be interpreted. The governing law should be specified in the contract to prevent uncertainty should disputes arise. Both parties will typically want their own country’s law to be the governing law of the contract. The governing law can often be the law of the jurisdiction in which performance of the contract takes place. Alternatively, the governing law need not be the law of the jurisdiction of either party, and can be the law of a developed legal system.

For example, English law is often selected as the governing law for commercial contracts, even though neither party is an English corporation. This is because English law provides a more stable basis for interpreting any disputes under the contract. It is also a growing trend to subject the contract to Singapore law, due to Singapore's reputation as a highly regulated financial/business hub with a highly efficient legal system. Insisting on Singapore law is advantageous as it gives you 'home ground' advantage and greater familiarity.

The forum clause of a contract specifies the exact dispute resolution process for any disputes under the contract and the physical location where such a process will take place.

Forum clauses may also state whether any disputes would be interpreted under the exclusive or non-exclusive jurisdiction of the courts of a certain legal system. Claiming 'non-exclusive jurisdiction' means that court proceedings may be brought in any other jurisdiction aside from the jurisdiction specified in the contract, whereas claiming "exclusive jurisdiction" means that any dispute would be heard by the courts of the legal system named in the contract. Exclusive jurisdiction can provide more certainty for you and your business as to where potential legal disputes may arise, while non-exclusive jurisdiction affords you the flexibility to change the forum, if appropriate. Whether you choose exclusive or non-exclusive jurisdiction would primarily depend on your comfort level with the legal system specified in the contract.

The dispute resolution process can either be undertaken through the court system or through arbitration. This choice is discussed in greater detail under, 'Arbitration, litigation and mediation', below. If, for example, a forum clause states that arbitration will be the method of dispute resolution, the forum clause may go on to specify that the arbitration must take place in Singapore. In turn, the governing law clause may specify the arbitration rules and procedures that would be used to govern that arbitration are the rules of the Singapore International Arbitration Centre.

Forum clauses can be very important as you will want to minimise travelling expenses for attending proceedings and the general inconvenience of attending proceedings in a remote location. When one party holds a negotiation advantage over another, the terms of the forum and governing law clauses may be dictated to the weaker



party. Both forum and governing law are very important in maximising the likelihood of achieving a successful resolution to any dispute. Subjecting yourself to the jurisdiction of the courts or governing law of a country with an underdeveloped legal system can profoundly increase the overall risk and uncertainty associated with your cross-border activities in that country. On the other hand, it may allow you to enforce any judgment you might obtain against a foreign counterparty with greater ease. Consequently, the importance of the governing law and forum contractual terms should not be underestimated.

4. Arbitration, litigation and mediation

Parties can choose to have either the courts or an arbitrator adjudicate on any disputes. Arbitration is seen as a customary and popular alternative to the court system, as the arbitration process, while still not cost-free, can avoid the delays and potential unpredictability of foreign courts. It is generally recommended that unless both parties are particularly comfortable with the courts of the relevant legal system, that arbitration should be the preferred method of dispute resolution.

The arbitration clause in the contract must be clear about both the seat and rules of the arbitration (see ‘Governing law and forum’, above) as well as the intention of both parties to seek arbitration as the method of dispute resolution. Details such as how the arbitrator will be chosen, the number of arbitrators and the language of the arbitration proceedings should all be stated within the relevant terms in the contract.

A contract may also specify that parties should seek mediation prior to utilising the courts or an arbitrator. Mediation involves the use of a third-party to assist all parties to resolve their differences prior to commencing court or arbitration proceedings. Accordingly, mediation can be a helpful cost-saving tool in affording you the opportunity to avoid costly litigation or arbitration. The mediation process and its results are typically confidential. Mediation is also a viable option after litigation or arbitration has commenced, but further time and costs would have been expended.

5. Intellectual property

Often, you may find yourself in a situation where you will be sharing your intellectual property with your cross-border business partners. Intellectual property may come in a variety of forms, but commonly

includes trade secrets and trademarks (such as your logo), designs (products' look and feel) and patents (inventions). At the very least, your rights and the rights granted to the other party should be outlined and set out in a contract. Typically, such a contract should specify what is being licensed, the duration and purpose of such license and the remedy in case of any infringement of the licence. You should seek intellectual property protection in the jurisdictions in which you operate. Although it might provide greater security to seek protection in as many jurisdictions as possible, the cost of doing so may become prohibitively expensive. Typically the three largest jurisdictions for patent filing are the USA, the EU and Japan. For further details on intellectual property, please refer to Chapter 11 of this toolkit.

Local laws and regulations

Local laws and regulations may vary widely across countries. The following points are potential local wrinkles that may materially affect your cross-border operations:

1. Tax

Singapore benefits from a relatively simple corporate tax system, but the same cannot be said of many countries in the region. Local tax advice will prove invaluable in determining whether you need to pay tax, and if you do, how much. The advice may even help you make decisions on other aspects of your expansion. For example, tax advice may directly impact the corporate structure you choose to adopt for your expanded operations.

2. Foreign ownership

Many countries have strict and wide ranging rules governing foreign ownership of property, corporations or other types of assets. These rules may have an impact on your ability or interest in investing in a particular jurisdiction. For example, rules may require joint ownership of property with a citizen of that jurisdiction and if you are unable to locate a desirable partner you may wish to invest elsewhere. Another point of consideration is the rights of foreign investors or foreign property owners in that jurisdiction, as a jurisdiction that restricts foreign ownership may also curtail the rights and benefits of foreign investors and property owners. Countries may also institute rules and



regulations to prevent the use of ‘dummy’ organisations or trustees to circumvent such prohibitions.

3. Foreign exchange controls

Although Singapore has a freely convertible currency, many countries, particularly in Asia, have implemented relatively stringent foreign currency conversion controls. This means that your enterprise may encounter difficulty in converting certain foreign currencies into Singapore dollars. This may not be problematic if you intend to continue to utilise the profits generated in the foreign currency in the foreign jurisdiction (for example, to purchase additional supplies), but may be a significant issue should you intend to repatriate the funds back to Singapore, which may require permission from the local authorities. Foreign exchange controls are particularly relevant in a scenario where you are earning income in the foreign currency (For example, from sales of your goods or services in that country) and you wish to repatriate such currency back to Singapore to use as desired.

4. Industry specific regulations

Depending on the industry in which you operate, you may have to deal with specific industry regulations in the foreign jurisdiction that may be entirely unlike what you are exposed to in Singapore. It is vital that you adequately research the applicable local laws and regulations that affect your cross-border operations so that you appreciate the issues raised. For example, your cross-border operations may require that you obtain various licenses to do business in the foreign jurisdiction of your choice. Alternatively, your business may be affected by rules and regulations governing the import and export of certain types of materials or equipment.

5. Employment

Where your cross-border operations envisage the employment of persons in the foreign jurisdiction, you must take special care to ensure compliance with all applicable employment laws and regulations of that jurisdiction. Countries can have widely differing rules that govern any number of employment-related areas such as minimum wage, frequency of pay, working conditions, hours of work, vacation, termination, pensions and benefits. It is important that you or the appropriate person in

charge of employment matters is well versed in these regulations to ensure that your organisation does not fall foul of the law.

6. Intellectual property

As noted above, you may find yourself in a scenario where you are sharing your intellectual property with your foreign business partners. Prior to sharing such information, it is important that you assess the effectiveness of the foreign jurisdiction's judicial system in protecting intellectual property. For example, the 2013 Office of the US Trade Representative Special 301 Report identified India and Indonesia, among others, as states that have judicial inefficiencies for enforcing intellectual property rights. Only after identifying such risks can you decide if the commercial terms of the transaction are acceptable.

BUSINESS CONSIDERATIONS FOR CROSS-BORDER OPERATIONS

Although this chapter focuses on legal considerations, there are a number of basic business considerations which you should consider when you determine the extent of cross-border operations of your organisation. These considerations include, but are not limited to:

1. Formulating a strategy

Before looking abroad, you will want to ensure that you identify the benefits to your organisation of such an expansion. You should be sure that such benefits are worth the additional risk of doing business with partners outside of Singapore. For example, would you consider taking on a supplier based in another country, with no proven track record in Singapore, and no references, if doing so would only lead to a minimal increase in your profit margin?

2. Finding the right foreign market

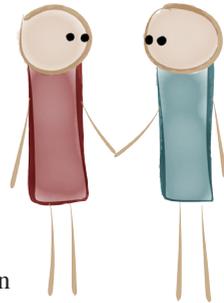
This goes hand-in-hand with formulating your strategy for international expansion. In identifying a country into which to expand your organisation, you will want to take into account not just geographic proximity, but also its political and macroeconomic stability, the fairness and clarity of the legal system, any potential language barriers and its business culture. Not only would you concern yourself with 'macro' reasons such as the economy and



stability of a country, you would also need to conduct research on the particulars of the market in that country for your goods or services. This includes investigating the extent of potential demand for your goods or services as well as the existence of competition or substitute goods and services in that jurisdiction. You may consider hiring a consultant that is particularly knowledgeable about your industry, the potential foreign market, or, preferably, both, to help you form an informed decision.

3. Finding the right partner

After you have identified a strategy and destination for your international operations, you need to undertake the necessary steps to identify your future business partners including business due diligence. Effective business due diligence allows you to confirm that potential business partners can uphold their end of the bargain and to identify any potential issues that may jeopardise your operations. You can conduct due diligence yourself by visiting your partners at their business sites. For example, if you are signing a supply agreement with a foreign supplier, you should strongly consider visiting the factory where they expect to produce the goods that you are buying. Site visits are an effective way to ensure that the quality of the production process and the raw materials meet your requirements. You can also conduct due diligence through interviews with your business partners in order to better understand their business and how they can help your operations. In your search for your future partners, you should consider factors such as cost, track record and cultural fit.



4. Foreign currency risk

Depending on the exact business objective of your cross-border operations, you will want to consider the risk of the relevant foreign currency appreciating or depreciating against the Singapore dollar. Generally speaking, any appreciation of the Singapore dollar against a foreign



currency will make the purchase of goods and services in Singapore from that foreign country cheaper, while the depreciation of the Singapore dollar against a foreign currency will make any goods and services you may sell in the foreign country that are produced in Singapore relatively cheaper. Banks and financial institutions may be able to provide you with hedging instruments that help to limit your foreign exchange risk, but such instruments can be extremely risky if not properly structured, and the accounting and tax treatment of such instruments can be complicated.

5. Applicable tax and duty regulations

You will need to consider if your business operations may incur tax liabilities in a jurisdiction outside of Singapore. If this should happen, this will likely complicate matters for you and it may require you to hire persons in the relevant foreign country to assist you in calculating and paying your liability. Duties for goods being imported into Singapore or for goods being exported to the foreign country of choice may also have a material impact on your bottom line as they can quickly add to your overall costs. You should also be aware that both taxes and duties are subject to changes beyond your control. Such changes can take place for entirely political reasons, and some of these changes may quickly reduce the financial viability of your cross-border operations.

ADDITIONAL GUIDELINES FOR NON-PROFIT ORGANISATIONS

Non-profit organisations may consider conducting fund-raising activities overseas for local charitable purposes or locally for overseas charitable purposes. For more information about fund-raising locally and overseas, please refer to Chapter 8 on Funding.

When expanding your non-profit organisation, you should adhere to the guidelines laid out above. In addition, in order to operate your organisation in the foreign country, you may have to register the charity in the foreign country. The registration process and requirements will depend on the laws of the country the charity is now operating in.

CONCLUSION

The lists above are not intended to be exhaustive. You should conduct your own research through formal means (such as reaching out to the



relevant government agencies in the foreign country of choice) and informal means (such as reaching out to business associates and colleagues with experience either in operating in your industry or in the relevant jurisdiction).

You may also wish to consider approaching International Enterprise Singapore, formerly known as the Singapore Trade Development Board, a government agency which spearheads the overseas growth of Singapore-based companies and promotes international trade.

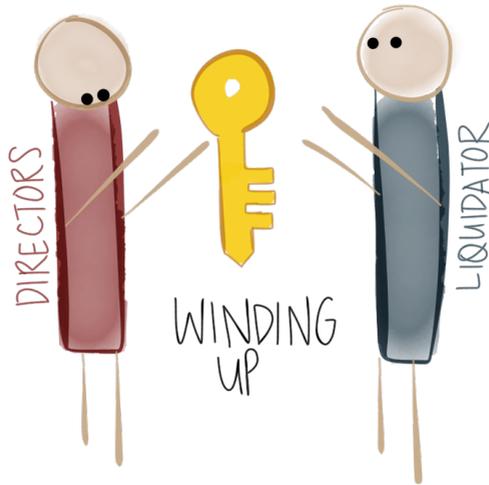
If you have the available funds, you may wish to consider hiring a consultant in Singapore that can advise you on cross-border expansion by providing you with solutions tailor-made to your business strategy and product and/or service.

WINDING UP



19

WINDING UP



CLOSING? YOUR LEGAL OBLIGATIONS DO NOT END THERE

Previous chapters have focused primarily on the formation of your organisation and its operation. Winding up would most probably be the last thought to cross your mind. However, the risk of a business failing, resulting in the entity or its founders becoming insolvent or bankrupt is a real danger which must be addressed.

WHAT DOES 'INSOLVENCY' OR 'BANKRUPTCY' MEAN?

We talk about insolvency where a company is unable to pay its debts. On the other hand, we talk about bankruptcy where an individual is unable to pay his or her debts. It is not uncommon for business entities to face the problem of insolvency at some stage. Some may successfully trade themselves back to solvency (in other words, try to continue with



the business with the aim of making the business profitable again), but if not, they may eventually be made ‘bankrupt’ (in the case of an individual) or be ‘wound up’ (in the case of a company). This chapter focuses on what can be done if you are unable to trade your organisation back into solvency.

As discussed in earlier chapters, there are different legal vehicles (incorporated entities and unincorporated entities) which can undertake business transactions. What can be done in the face of insolvency or bankruptcy depends on which legal vehicle has been selected for your organisation.

UNINCORPORATED ENTITIES

For unincorporated entities, such as sole proprietorships or partnerships (but does not include limited liability partnerships and limited partnerships), when the business becomes insolvent, you, the sole proprietor or partner of the firm, will face bankruptcy. This can be dealt with by:

- Attempting to trade back into solvency (a voluntary arrangement)
- Winding down and applying for bankruptcy.

Voluntary arrangement

In essence, a voluntary arrangement is a court process where you try to get your creditors to agree to a compromise or arrangement to allow you more time to repay your debts.

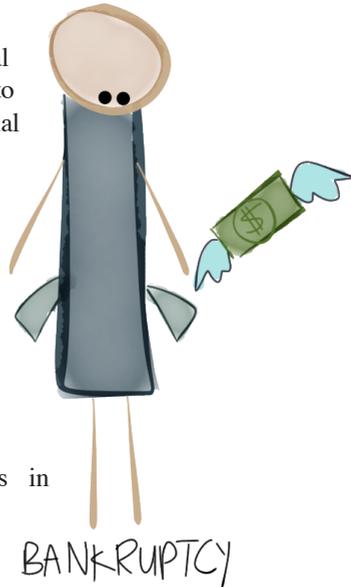
Once the process is commenced, you appoint a nominee (an independent party who is typically a registered accountant or a lawyer) to help you put together a repayment proposal. In the meantime, you may get a reprieve from your creditors in the sense that they cannot commence legal action against you. As part of this process, you then try to convene a creditors’ meeting for the creditors to consider your proposal to repay your debts. If a sufficient majority of your creditors (75%) agree to such a proposal and once the court approves it, it will bind every creditor who had notice of the meeting and was entitled to vote at the creditors’ meeting, including minority creditors who voted against the proposal or who did not vote.

Bankruptcy

To be bankrupt is to have your financial affairs administered and assets distributed to your creditors by a court appointed Official Assignee (OA).

Either you or your creditors can initiate bankruptcy proceedings by presenting the court with a bankruptcy application. For a bankruptcy application to be successful, you (the debtor) must:

- Reside in Singapore;
- Have property in Singapore; or
- Reside in, or carry on business in Singapore, one year before the bankruptcy application.



Although it may be more common for a creditor to initiate bankruptcy proceedings, there are cases where the debtor himself does so. In practice, a debtor may choose to do so where he believes that he is unable to repay his creditors, and decides to apply to court to make himself bankrupt so as to, for example, avoid further pressure for repayment.

The applicant will also have to prove that the debtor is unable to pay his debts. One of the most common ways to do so is to show that the debtor is unable to pay a debt due immediately of at least S\$10,000 within 21 days of receiving a demand in a prescribed form (called a 'statutory demand').

On 14 July 2015, the Bankruptcy (Amendment) Bill 2015 was passed in parliament. It is not yet in force. When the Bill comes into force, the minimum debt that must be owed before a debtor can be made bankrupt will be increased from S\$10,000 to S\$15,000. The Bill also introduces a new expedited bankruptcy application process, under which the applicant need not wait for the 21 days period to be over before he makes the bankruptcy application if he is able to show that the debtor's assets are at risk of being diminished.

If the bankruptcy order is granted, you will be required to submit a statement detailing your financial position within 21 days to the OA. Failure to do so may result in imprisonment or a fine.



The OA will sell off your assets and the proceeds will be used to pay your creditors who have submitted proof of the debts that you owe them. These creditors will be paid in a fixed order of priority (which can be found in s 90 of the Bankruptcy Act (Cap. 20)).

If your debts are not fully repaid due to insufficient proceeds, you will be required to submit your accounts to the OA every six months. Income will also have to be handed over to the OA in order to repay your debts. A reasonable amount, however, may be retained for maintenance of yourself and your family.

Typically, a bankrupt person will need to obtain the approval of the OA before he can travel out of Singapore. Bankrupts are generally not permitted to be appointed as a director of a company. This restriction against being a company director generally lasts so long as the person remains a bankrupt.

It should also be noted that, generally, only the assets or property (except for the bankrupt's HDB flat), which belong to the bankrupt come under the control of the OA. Being a bankrupt usually does not affect the assets or property of his spouse or family members. The exception to this is where the debtor improperly transferred his assets or property to his spouse or family members to avoid claims by his creditors. In such cases, the OA may claim for the return of such assets from the recipients.

Pitfalls of declaring bankruptcy

One common misconception is that as the assets of a bankrupt person's family are generally safe from creditors, the declaration of bankruptcy is an easy way to avoid one's financial obligations, while still managing to enjoy a comfortable lifestyle. Note that as mentioned, the deliberate transfer of your assets to your family in order to protect these assets from creditors, is an action that can be unwound. Additionally, bankruptcy creates a blot on the bankrupt person's credit history, and a declaration of bankruptcy will make it much harder for that person to obtain loans, credit cards and mortgages in future. Thus, voluntary initiations of bankruptcy proceedings should be avoided, unless absolutely necessary.

Discharge from bankruptcy

If the debts have been repaid, you may apply for discharge of your bankruptcy status.

However, that is not the only way a bankruptcy may be discharged. Even if your debts have not been fully repaid, your bankruptcy status can still be discharged through the court, after evaluating your conduct and financial position. Alternatively, it may be obtained from the OA via a certificate of discharge. This is provided that the bankruptcy commenced at least three years ago and the debts proved in bankruptcy did not exceed S\$500,000. A bankruptcy can also be terminated by an annulment order issued by the court. The court has to either be satisfied that the order should not have been made or that you have paid or secured all debts.

When the Bankruptcy (Amendment) Bill 2015 comes into force, the current regime of discharge by a certificate from the OA will be changed to a differentiated discharge framework, allowing those debtors who are still unable to pay the debt amount in full after a number of years to be discharged, provided that the debtor is able to make certain levels of repayments to creditors. These conditions would differ depending on whether the debtor is a first time bankrupt or a repeat bankrupt, and repeat bankrupts would generally be subject to more stringent conditions:

- First time bankrupts may be eligible for discharge as early as three years if they succeed in paying the target contribution which is equivalent to 52 monthly contributions.
- Bankrupts who do not meet the target contribution will only be eligible for discharge after seven years.
- The target contribution of repeat bankrupts will be equivalent to 76 monthly contributions.
- Bankrupts who pay their target contribution in full will have their names and particulars removed from the bankruptcy register five years after discharge.
- Bankrupts who fail to pay their target contribution in full prior to discharge will have their records kept permanently on a publicly available register.

INCORPORATED ENTITIES

When your company is wound up, the business is closed down, its assets are sold off, creditors are paid and the balance of the assets (if any) would be distributed to the members of the company (i.e. shareholders). At the end of the whole process, the company is dissolved and ceases to exist.



This process is also known as liquidation.

For incorporated entities, such as companies, winding up can either be:

- Ordered by the court or
- Occur voluntarily through the members of your company or its creditors.

Winding up by the court

Winding up of your company by the court begins with an application to the court by someone who has the right to make such an application. Who such a person is, can be found in s 253 (1) of the Companies Act (Cap. 50) (CA) (or Schedule 5, Paragraph 2 of the Limited Liability Partnerships Act (Cap. 163A) (LLPA)). The most common applicants are the company itself, any creditor or contributory (a person who is liable to contribute to the assets of the company).

To be considered for a winding up order, one of the grounds for winding up needs to be established. Grounds for winding up which are acceptable to the court are found in s 254 of the CA (or Schedule 5, Paragraph 3 of the LLPA). One of the most common grounds relied upon is (as in the case of individuals facing bankruptcy) the company's inability to pay a debt of more than S\$10,000 within 21 days of receiving a demand in a prescribed form (called a statutory demand).

If the court finds that there is nothing to support the ground on which the application is based, the application will be dismissed. If there are sufficient grounds, a winding up order may be made.

What happens when a winding up order is made?

There are many effects of a winding up order, the most significant being:

- Directors no longer have power to manage the company - the liquidator takes over management of the company;
- All legal proceedings against the company are halted; and
- All contracts of employment may be terminated.

You may have debts owed by your business partners, for example, suppliers or other contracting parties, who are subsequently wound up or made bankrupt. In such a situation, you will not be able to sue, or continue to sue, the party which has been wound up or made a bankrupt to claim for

the debt. You can only file a proof of debt with the liquidator (for a company) or the OA (for an individual), and share equally with the other unsecured creditors against any assets belonging to the party being wound up or made bankrupt.

Voluntary winding up

There are two types of voluntary winding up: (1) members' voluntary winding up, and (2) creditors' voluntary winding up. A members' voluntary winding up must be decided by members of your company (or partners of your limited liability partnership) at a general meeting. For this to occur, however, the company must be solvent to begin with.

1. Members' voluntary winding up

There are many reasons for a company to be wound up despite being solvent. For instance, the purpose for which the company had been incorporated may have been achieved or the company may be merging with another company.

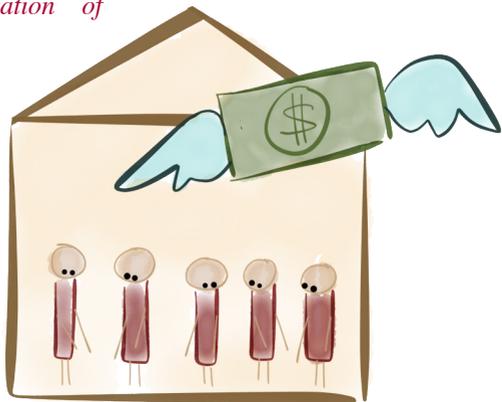
For a members' voluntary winding up to occur, the directors (or if there are more than 2 directors in the company- majority of directors) of the company must make a declaration of solvency.

What is the Declaration of Solvency?

A declaration of solvency is essentially a declaration made by directors. It contains the directors' opinion that the company will be able to pay its debt in full within 12 months after the commencement of the winding up.

For the declaration of solvency to be effective, it must comply with all of the following requirements:

- It must be made at a directors' meeting;





- It must not be made earlier than five weeks before the passing of the resolution for the voluntary winding up of the company; and
- It must be lodged with the registrar before the date on which the notices of the meeting called to pass the resolution for winding up are sent out.

Following an accurate and effective declaration of solvency, the members will appoint one or more liquidators to wind down and deal with the assets and affairs of the company.

If this declaration is made, but is inaccurate, such that the creditors will not be paid within the stated period, the directors who made the statement without reasonable grounds may be guilty of an offence.

2. Creditors' voluntary winding up

If a company is insolvent, it may be wound up by way of a creditors' voluntary winding up. The key differences from a members' voluntary winding up are that

- The company is insolvent and;
- Instead of its members, it is the creditors who decide to place the company into winding up.

Steps for creditors' voluntary liquidation

The main steps for commencing a creditors' voluntary liquidation are as follows:



- If a company cannot carry on its business by reason of its liabilities, the directors may make and lodge a statutory declaration with the Official Receiver and Registrar to that effect and must then appoint a provisional liquidator.
- A notice of the appointment of a provisional liquidator together with a copy of the declaration lodged with the Official Receiver is advertised within 14 days of the appointment of the provisional liquidator in local newspapers.

- Meetings of the company and of its creditors must be held within one month of the making of the declaration. At the meetings, the shareholders and creditors will vote separately to place the company under voluntary winding up and to appoint a liquidator.

Appointment of liquidator

The appointment of a provisional liquidator would cause all the powers of the directors to cease. The responsibility of administering the assets of the company would, accordingly, fall on the provisional liquidator, at least until a liquidator is appointed at the creditors meeting, at which point the liquidator takes over control of the company, its assets and affairs. Generally, the primary duty of the provisional liquidator is to preserve the status quo until the resolution to wind up the company is passed and the liquidator is appointed.

Before commencing any liquidation process, it would be advisable to engage a lawyer to advise on the key steps and implications because any non-compliance may result in you inadvertently committing an offense.

Who are liquidators?

A liquidator is a person who brings the directors' powers to a halt, and becomes responsible for dealing with the assets and affairs of the company.

The liquidator's main task is to sell off the assets of the company so that creditors can be paid and any surplus amount is distributed to the members of the company. He will also investigate if there has been any wrongdoing by the directors of the company, or if there have been any wrongful transfers of the company's assets which may then be 'clawed back' or recovered under law. An example would be where the company improperly transfers assets to another party, without getting anything in return, or in exchange for something substantially less valuable (in legal language, a transaction at an undervalue). In such cases, the liquidator may have a basis to claim against the recipient of the assets for their return.



Order of priority for distribution of company's assets

Once the liquidator has ascertained the debts of the company, the order in which these debts will be paid, will be in accordance with the prescribed priority of claims (found in the CA or the LLPA).

A simplified version of the order of priority is as follows.

Secured creditors (that is, creditors with a security interest such as a charge over the company's assets or a mortgage over the company's real property) are entitled to priority over the unsecured creditors.

Further, there are also certain preferential debts which are given priority over unsecured creditors and debts secured by floating charges (a form of security usually over assets which fluctuates in nature, such as stock-in-trade), namely:

- Costs and expenses of the winding up;
- Wages and salaries of employees up to S\$7,500 per employee;
- Retrenchment benefits and ex-gratia payments of employees, up to S\$7,500 per employee;
- Amounts due in respect of workmen's compensation;
- Amounts due in respect of contributions payable in a stipulated period to employees' superannuation or provident funds;
- Remuneration payable in respect of vacation leave for employees; and
- Tax assessed, including goods and services tax.

Upon the commencement of liquidation, the liquidator is also required to inform the Inland Revenue Authority of Singapore (IRAS) of such liquidation, and to file relevant documentation pertaining to the company's tax matters, for the purpose of ensuring that the company's outstanding tax matters are resolved before completion of the liquidation process.

Dissolution

In a winding up by court, upon the completion of the winding up, the liquidator must apply to the court for an order of dissolution. Once this order has been granted, your company will be dissolved.

In a voluntary winding up, the winding up process ends when the liquidator calls a final meeting of the members of the company, (together with the company's creditors in the case of a creditors' voluntary winding up).

The liquidator presents a final account showing how the winding up has been conducted and how the assets have been disposed. A return will be filed with the Registrar of Companies and the Official Receiver by the liquidator, and the company will be deemed to have been dissolved three months after.

CHARITIES

The process of winding up your charity depends on the type of legal structure. If your organisation is registered as a charity you may continue to be bound by certain legal duties under the Charities Act (Cap. 37) after your organisation ceases to exist.

Trust

A trust may be wound up and its assets distributed according to the provisions set out in the Trust Deed. The trustees may also apply to court for the dissolution of the trust.

Company limited by guarantee

A company limited by guarantee is wound up in accordance with the procedures for winding up a company. Please refer to the section on winding up by the court and voluntary winding up.

Society

If no rules are specified in the objects of the society regarding dissolution, then at least three-fifths of the members residing in Singapore must vote for dissolution delivered in person or by proxy at a general meeting convened for that purpose. If a registered society dissolves itself according to its rules, then it shall inform the Registrar of Societies in



writing and send a certificate of dissolution to the Registrar within one week of dissolution. The certificate should be signed by the president, the secretary and the treasurer or officers of the society holding analogous positions.

A set of supporting documents is also required – the list may be found at the Registry of Societies FAQ page on voluntary dissolution.

The Registrar of Societies will then publish the dissolution of the society in the Gazette.

The assets would be disposed according to the rules of the society applicable. In the event of any dispute the matters shall be referred to the High Court. It may be prudent to specifically provide in the objects of the society for the distribution of assets in the event of dissolution of the society.

LEGAL ASSISTANCE



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SEEKING LEGAL ASSISTANCE



ENGAGING A LAWYER

Lawyers are trained to give legal advice and to represent you in Court. Seeing your lawyer early can save you a lot of time, trouble and money. Lawyers can provide a range of important and useful services in setting up, running, or winding up your organisation, so if you believe you need legal advice or guidance, or feel you wish to seek help with any potential legal aspect arising from your organisation—such as those canvassed in this handbook—you should seek to speak with a lawyer without delay.

THE LAWYER-CLIENT RELATIONSHIP

You must be able to build a relationship of trust and confidence with your lawyer.

Solicitor-client privilege

Your lawyer has the responsibility to keep your information confidential. Ordinarily, even the Court cannot force a lawyer to reveal conversations you may have had with him, without your permission.



Your lawyer's firm

When you hire a lawyer, you are also hiring the law practice the lawyer works for. All members of the law practice and its staff have the same duties of confidentiality toward you and your matter as does your own lawyer.

Conflict of interest

Your lawyer is acting for you alone, and cannot represent or be involved personally with someone who may be against your interests in your matter without your permission.

Your instructions

Your lawyer will try to understand from you what you hope to achieve within the law and the lawyer's professional duties. Your lawyer cannot follow instructions from you that would break any law, or breach the lawyer's duties to the Court or to the legal profession.

CHOOSING A LAWYER

The Ministry of Law has an online directory of the names, addresses and other useful information of all law practices and practising lawyers in Singapore, and may be accessed at: <https://www.mlaw.gov.sg/eservices/lra/lra-home/>. You can also search the list of law practices that have advertised specialist practice areas on the Law Society website at <http://www.lawsociety.org.sg/forPublic/FindaLawFirmLawyer/FindaLawFirm.aspx>, but note that the Law Society is not permitted to recommend lawyers to you.

The recommendations of friends, family and other people who have faced similar legal or potential problems may also be helpful in your selection.

To avoid any misunderstanding later on, it may be useful to reach an early agreement on the legal fees and also have the lawyer give you an estimate of the disbursements likely to be incurred. In addition, you should be independently satisfied that your lawyer has the necessary expertise, knowledge and experience to assist you in your matter. You should also be satisfied that your lawyer is in a position to give you independent legal advice, for example a lawyer acting for an opposing party in a dispute cannot represent you except under particular circumstances with your permission. You may seek a second opinion from another lawyer.

DUTIES YOUR LAWYER OWES YOU

Lawyers are required under their professional conduct rules to:

- Exercise diligence and honesty in their dealings with you;
- Inform you of matters relating to their legal fees;
- Provide statements of accounts in a timely manner upon your request;
- Undertake work in such a manner so as not to unnecessarily or improperly escalate their legal fees;
- Complete any work on your behalf within a reasonable time;
- Provide you competent representation;
- Keep you reasonably informed of the progress of your matter;
- Generally respond to your telephone calls, e-mails and messages promptly and keep appointments made with you;
- Clearly explain proposals of settlements, other offers or positions taken by other parties which affect you;
- Keep your information regarding your matter confidential, even after your lawyer stops representing you;
- Act only in your best interests; and
- Generally evaluate with you if the consequence of your matter justifies the expense or the risk involved.

MEETING YOUR LAWYER

Before you see your lawyer:

- Think about all the information the lawyer will need and gather it in advance;
- List the events as they happened;
- Collate all important papers and supporting documents;
- List the names, addresses, and telephone numbers of everyone involved in your matter; and
- List the questions or issues you wish to discuss with your lawyer during the meeting.



The more organised you are, the less time you will spend during your meeting thus reducing the time-costs chargeable to you by your lawyer.

To avoid future disputes, clarify the likely legal fees involved. Enter into a proper fee agreement (preferably in writing) that sets out these charges clearly. Inform your lawyer in advance of any budgetary constraint. Lawyers usually charge their clients based on the time that they spend working on their matters (i.e. by hourly rates). These rates will generally be fixed within the law firm, with more experienced lawyers charging higher rates than less experienced lawyers. Some lawyers may be willing to assist you on a fixed-fee basis (i.e. they agree to charge you a fixed sum, no matter how much time they actually spend on the work), but this would be subject to negotiation between you and your lawyer. Also note that if you and your business are based entirely in Singapore, a lawyer might charge you GST as well on his or her services rendered, which is a potential cost you should take into account.

When you meet your lawyer:

- Tell the lawyer everything important;
- Answer your lawyer's questions fully, even if you may not understand the purpose of the question at the time; and
- Ask questions to clear all your doubts.

A full and thorough discussion of the issues will help the lawyer give you a realistic expectation of the prospects for success in what you are hoping to achieve, as well as a realistic estimate of the fees you can expect to pay should you proceed. Be mindful that your lawyer may not be able to give you advice at the first meeting. The law changes often, and your lawyer may need to first check on new laws or on decisions made by the Court.

WORKING WITH YOUR LAWYER AFTER THE FIRST MEETING

Arrange to correspond and have follow-up meetings with your lawyer at agreed times. Ask for copies of correspondence and documents filed in Court or regulatory bodies if relevant, and if you do not understand the documents, have your lawyer explain these.

Be honest with your lawyer

It is difficult for your lawyer to give you the best advice if you do not fully disclose details of your matter and documents as early as possible and as soon as new issues arise.

Manage your expectations

Your lawyer is not in a position to guarantee that you will succeed as many factors are beyond your lawyer's control and in litigation, the final decision is with the Court. Always evaluate your case with your lawyer at regular intervals and keep an open mind. Remember, your lawyer is not a judge or government authority.

Control your legal cost

Although you need to keep your lawyer fully informed of your matter, do remember that your lawyer may charge accordingly for his/her time spent on your matter. Focus your communication with your lawyer to the essential facts and information of your matter. Also, you may want to ask for regular fee updates, if the matter is expected to take some time to resolve (For example, ask your lawyer to update you on the costs incurred at the end of each week, or when a certain dollar amount has been exceeded).

LEGAL FEES

Your lawyer is entitled to charge fair and reasonable fees for legal work done on your behalf. As no two matters are completely alike and some matters require more time and expertise to resolve, fees may vary between clients and cases. Legal expenses will generally comprise fees and disbursements. Disbursements are out-of-pocket expenses, and can include costs for filing and serving documents, long-distance calls, meals, photocopying, subpoena fees (i.e., for summoning another person to Court), and medical or other reports.

It is important that you speak to your lawyer about your expectations on the scope of work you require your lawyer to perform, because lawyers have different ways of calculating fees, depending on the types of services required and the lawyer's billing practices. The usual methods are:

1. **Hourly rate**

This is the usual way of billing, especially for a Court case. The amount of time you will require your lawyer's services will not be known at the outset.

2. **Fixed rate**

This method may be used in matters such as transactions where it is reasonably straight forward and predictably measured. The fee is a fixed amount regardless of the amount of time actually spent by the lawyer working on the matter.



It is preferable to enter a written fee agreement at the outset. Note that lawyers are not permitted to enter into contingency/ conditional fee agreements for any matter. Contingency/ conditional fee agreements are agreements in which the lawyer's fees are, for example, payable only in the event of success in the case or are proportionate to the amount which may be recovered by you in the matter, or any profits received from a business transaction or sale of business assets which the lawyer assist in.

For contentious matters, your lawyer will explain to you:

- That you are personally liable for payment of your own legal fees to your lawyer;
- If you lose, you may have to pay part of your opponent's legal fees as well as your own;
- If you win, your opponent may not be ordered to pay the full amount of your legal fees and may not be able to pay what has been ordered; and
- The circumstances under which a lawyer can be discharged.

Your lawyer may ask you to pay a deposit before starting work on your matter. This money is meant to meet expected costs and disbursements. If the deposit is not completely used, the lawyer will refund you the remaining amount.

You should always ask for a receipt from the law practice for monies you have paid. This should indicate if the money is paid into the law practice's client account for your benefit (e.g. monies held on trust for you for the purchase of certain equipment) or is paid into the law practice's office account (e.g. the monies were paid to settle a bill from the law practice).

DISPUTES OVER FEES

The Law Society of Singapore offers a legal costs dispute resolution scheme, known as 'Cost Dispute Resolve', to assist lawyers, their clients and third parties to resolve disputes on legal costs amicably and economically. The scheme provides for mediation as the first step to resolve such disputes. If mediation is unsuccessful, parties can move on to the simple and expedited arbitration process. More information on the Cost Dispute Resolve and the applicable rules can be found here: <http://www.lawsociety.org.sg/forMembers/ResourceCentre/MembershipBenefits/Members%E2%80%99SupportSchemes/CostDisputeResolve.aspx>.

DISCHARGING YOUR LAWYER'S SERVICES

You may change your lawyer at any time. However, you should pay any outstanding costs to your current lawyer before engaging another lawyer unless there are exceptional reasons for not doing so. Where the outstanding fees of the current lawyer are not agreed or paid, that lawyer is entitled to request an undertaking that it retains the property of your case file (a 'lien').

Your lawyer can discharge himself/herself if:

1. His/her discharge does not cause significant harm to your interest and you are fully informed of the consequences and voluntarily assent to it;
2. Your lawyer reasonably believes that continued engagement in the case or matter would likely have a serious adverse effect upon his/her health;
3. You breach an agreement with your lawyer regarding fees or expenses to be paid or regarding your conduct;
4. You make material misrepresentations about the facts of the case or matter to your lawyer;
5. Your lawyer has an interest in the case or matter which is adverse to your interest;
6. Such action is necessary to avoid contravention by your lawyer of the lasting power of attorney or any legislation; or
7. Any other good cause exists.

If your lawyer discharges himself/herself, s/he has to take reasonable care to avoid foreseeable harm to you, including:

1. Giving due notice to you;
2. Allowing reasonable time for substitution of a new lawyer;
3. Co-operating with your new lawyer; and
4. Subject to the satisfaction of any lien your lawyer may have, paying to you any money and handing over all papers and property that you are entitled to.

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PRO BONO LEGAL AID FOR THE COMMUNITY



The legal landscape can be a tricky one to navigate, and while establishing and running a social enterprise or non-profit organisation is a noble cause, it can be emotionally charged and financially challenging. This can cause some stress, and though it is tempting to seek the advice of friends or family you must remember that every business was founded and exists under different circumstances, and it is therefore important to get accurate information from legally trained professionals.

You can consult a lawyer, but if you do not have the finances for this, help is at hand. A number of organisations, including the Law Society of Singapore's Pro Bono Services Office (PBSO), provide legal information and assistance to the community, some of which are listed below.

If yours is a community-serving organisation, help is available.

COMMUNITY ORGANISATION CLINIC

The PBSO runs Community Organisation Clinics (COC) to assist organisations in Singapore with an objective to meet community concerns, providing basic legal advice on operational issues. Applicants must be:



1. A social enterprise or non-profit organisation (e.g. a charity or voluntary welfare organisation) based in Singapore;
2. Geared towards meeting community concerns or needs (i.e. beneficial to the community in Singapore as a whole, and not confined to sectional interests or group of persons based on race, creed, belief or religion);
3. In need of basic legal advice and information on operational issues.

Each session usually lasts for about 45 minutes. Advice given is of a general and preliminary nature. The COCs do not offer legal representation to the applicants, although PBSO may be able to assist with providing you information on how to engage a lawyer formally.

PROJECT LAW HELP

PBSO's Project Law Help programme matches eligible community-serving organisations with law firms that are willing to provide free non-litigation commercial legal services.



These legal services could include:

- **Corporate law**
E.g. advice on contracts with suppliers, indemnity agreements for corporate sponsors, drafting pledges for donors;
- **Employment law**
E.g. drafting or reviewing employment contracts;
- **Intellectual property law**
E.g. advice on copyright, data protection, website use;



- **Property law**
E.g. advice on lease terms; and
- **Other legal matters not involving court litigation advice or representation.**

Applicants must be:

1. A local social enterprise or non-profit organisation (e.g. a charity or voluntary welfare organisation) based in Singapore;
2. Geared towards meeting community concerns or needs (i.e. beneficial to the community in Singapore as a whole, and not confined to sectional interests or group of persons based on race, creed, belief or religion);
3. In need of legal advice or representation for a corporate non-litigation matter, or transaction concerning the organisation;
4. With limited or no financial resources to pay for such legal advice or representation.

Successful applicants work directly with the law firm assigned, with the assurance that all legal matters will be handled in professional confidence by the volunteer law practice. Do note that eligibility for Project Law Help involves the application by PBSO of a ‘means test’ to determine the financial status of applicants. To this end, you would need to forward certain financial information in respect of your social enterprise to PBSO, in order for this determination to be made. Do rest assured that all such information forwarded will be kept confidential.



JOINT INTERNATIONAL PRO BONO COMMITTEE (JIPBC)

The JIPBC aims to match interested Singapore and international law practices with cross-border pro bono opportunities involving economic and social development in emerging markets.

The legal services offered, are broadly similar to those available under Project Law Help (as listed above).

Applicants must be:

1. A local or international social enterprise, or non-profit organisation (e.g. a charity or voluntary welfare organisation) based in Singapore;
2. Geared towards meeting community concerns or needs (i.e. beneficial to the as a whole, and not confined to sectional interests or group of persons based on race, creed, belief or religion);
3. In need of legal advice or representation for a corporate non-litigation matter/transaction concerning the organisation;
4. With limited or no financial resources to pay for such legal advice or representation.

Successful applicants work directly with the law firm assigned, with assurance that all legal matters are handled in professional confidence by the volunteer law practice. The JIPBC would be especially relevant to you, if your organisation has cross-border legal needs (for example, if your suppliers are located outside Singapore, and you need foreign legal advice, such as the review of contracts which may have been executed in accordance with foreign laws, or advice on foreign licensing and regulatory regimes).

TO REGISTER FOR ANY OF THE ABOVE SCHEMES AND FOR MORE INFORMATION:

Telephone: 6536 0650

Email: AssistNPOs@lawsoc.org.sg

Website: <http://probono.lawsociety.org.sg>

THE PRO BONO SERVICES OFFICE (PBSO)

The PBSO is an initiative by the Law Society of Singapore to help bring free legal assistance to those in need in our community. It is part of the Law Society's stated mission to ensure access to justice.

The PBSO's work is supported by volunteers who give generously and selflessly of their time and expertise for the needy in the community, and



by financial contributions from individual lawyers, law practices, private donations, and key stakeholders such as the Ministry of Law, the State Courts, the Singapore Academy of Law and various community partners.

Programmes run by the PBSO aim to:

- Serve the community,
- Support their volunteers, and
- Assist or collaborate on pro bono initiatives with other agencies to deliver on the Law Society's mission to ensure access to justice.

The PBSO also runs on-going programmes aimed at delivering legal information to targeted members of the community including, relevantly, youth and social enterprise and comprise talks, information booklets, legal clinics and workshops and the like.

More information on these services and the PBSO's varied pro bono initiatives can be found online at the following URL: <http://probono.lawsociety.org.sg/Pages/Our-Services.aspx>.

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