Singapore Journal of Legal Studies
[2023] 439–480

GETTING THERE 'DIRECTLY': CLOSING THE BELLINGHAM LOOP ON S 48O PDPA

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I. Introduction

The Personal Data Protection Act 2012 (Rev Ed 2020) (as, currently in force, the "PDPA") governs the collection, use and disclosure of personal data by organisations in Singapore.[1] The PDPA establishes a statutory right of private action under Section 48O ("s 48O") in the following terms:[2]

> A person who suffers loss or damage *directly* as a result of a contravention —
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> (a) By an organisation of any provision of Part 4, 5, 6, 6A or 6B; or
> (b) By a person of any provision of Division 3 of Part 9 or section 48B(1),
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> has a right of action for relief in civil proceedings in a court.
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> [emphasis added]

At least two broad sets of questions arise from the phrasing of s 48O. First, who can avail themselves of the right of action created by s 48O? Specifically, would a non-human entity be a "person" under s 48O and, even if it were, is such an entity an appropriate beneficiary of s 48O? This cluster of questions will be referred to as the "standing issue". Second, what type of "loss or damage" does s 48O envisage? Specifically, is "loss or damage" limited to heads of damages generally recognised in common law[3] (*eg*, financial *loss* and physical *damage),* or does it extend to other types of harm such as emotional or reputational damage? This cluster of questions will be referred to as the "loss issue".

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[1] Long Title to Personal Data Protection Act 2012 (2020 Rev Ed Sing).

[2] Personal Data Protection Act 2012 (2020 Rev Ed Sing) ("PDPA"), s 48O.

[3] *Alex Bellingham v Michael Reed* [2022] 4 SLR 513 at [43] ("*Bellingham HC*"): The heads of damages recognised in common law include pecuniary loss, damage to property, personal injury and psychiatric illness.

That it is desirable to have clarity on these issues is self-evident. Data subjects and data controllers alike have an interest in understanding the parameters of the legal rights conferred by Parliament under this section. That these issues were open to substantial question might have been slightly less self-evident until the *Bellingham* chain of cases.[4]

In relation to the standing issue, it was decided at the District Court level in *IP Investment Management v Alex Bellingham* ("*Bellingham DC*")[5] that a non-human entity[6] is not a "person" for purposes of s 32(1) of the then-applicable Personal Data Protection Act 2012 (No. 26 of 2012) (the "Pre-2020 PDPA").[7] On the loss issue, it was initially posited at the High Court level in *Alex Bellingham v Michael Reed* ("*Bellingham HC*")[8] that "loss and damage" is indeed limited to the common law heads of damages. The Court of Appeal, in *Michael Reed v Alex Bellingham* ("*Bellingham CA*"),[9] has, however, since reversed the position on the loss issue (and, in our view, rightly so).

However, because the standing issue was not argued on appeal, the opportunity to clarify it did not arise. In this article, we argue that the *Bellingham DC* holding on the standing issue was not fully satisfying and propose how it may, in future, be clarified. We also take the opportunity, in light of the Court of Appeal's recent decision, to offer further comments on the loss issue and explore the likely implications of the judgment.

The background of the *Bellingham* litigation, along with the reasoning of the three courts, will first be set out in Part II of this article.

Next, in Part III, we argue that, even if the *Bellingham DC* analysis on the standing issue could be accepted at the time the decision was made, it is hard to sustain given recent amendments to the PDPA. Along the way, we explain how we think the related words "person", "organisation" and "individual" used in the PDPA should be construed and differentiated.

In Part IV, we show how the scope of s 48O should *not* be limited to natural persons but can nonetheless be sensibly constrained by a directness requirement that coheres with its text and the stated purpose of the PDPA. Such a directness requirement, we believe *not* coincidentally, had also featured in the Court of Appeal's reasoning on the loss issue.

In Part V, we briefly revisit the Court of Appeal's recent decision. We propose that the court's reasoning leads to the logical conclusion that other harms, most notably reputational harm, that flow directly from a breach of a stated PDPA obligation can also be legitimately encompassed within s 48O. Concerns about the potential breadth of this position can be allayed as long as we interpret s 48O in a principled and disciplined way, taking into account the types of actors typically engaged in

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[4] See "Part II: The Bellingham Cases", where the *Bellingham* chain of cases is described in further detail.

[5] [2019] SGDC 207 ("*Bellingham DC*").

[6] For example, companies. We acknowledge that "non-human entity" is a rather ugly term. The more common term for the idea we have in mind is "non-natural persons". However, given that the meaning of "persons" is itself at the heart of the controversy underlying much of this article, we picked a term that could not easily be misunderstood.

[7] Personal Data Protection Act 2012 (No. 26 of 2012, Sing) ("Pre-2020 PDPA"), s 32(1). s 32(1) of the old PDPA was later re-enacted as s 48O.

[8] *Bellingham HC*, *supra* note 3 at [93].

[9] [2022] 2 SLR 1156 ("*Bellingham CA*").

PDPA breaches, the types of actions commonly constituting PDPA breaches and the most obvious and likely categories of consequences flowing from PDPA breaches.

Finally, in Part VI, we sum up our observations on how the winding journey of the *Bellingham* cases could have been circumvented by careful attention to the humble word "directly" in the introductory clause (or *chapeau*) of s 48O. Sometimes, the answer is indeed right in front of us.

II. The Bellingham Cases

A. *Background*

The *Bellingham* chain of cases started in the District Court[10] before going on appeal to the High Court[11] and finally concluded in the Court of Appeal[12]. They concerned events that occurred between 2018 and 2019. The cases were brought under the statutory right of private action conferred by s 32(1) of the then-applicable Pre-2020 PDPA. The Pre-2020 PDPA was amended by the Personal Data Protection (Amendment) Act 2020 (No. 40 of 2021) (the "2020 Amendment Act"), during which s 32(1) was repealed and re-enacted as s 48O, with some revisions that did not substantially address the issues discussed herein but that, as shown later, do shed light on and clarify some of our positions.[13]

The facts of the cases are as follows. There were three plaintiffs. The first Plaintiff, IP Investment Management Pte Ltd, was a Singapore-incorporated company and was a part of the IP Management group of companies ("**IPIM Group**"). The IPIM Group was, in turn, related to another group of companies known as the IP Global group of companies ("**IP Global**"). The second Plaintiff, IP Real Estate Investments Pte Ltd, was a member of IP Global. The Defendant, Alex Bellingham, was employed by the second Plaintiff.

During the Defendant's term of employment with the second Plaintiff, he was placed on secondment to IP Investment Management (HK) Ltd ("**IPIM HK**"), a member of the IPIM Group. There, he was involved in marketing an investment fund known as the "Edinburgh Fund", which had been set up by both the first Plaintiff and IPIM HK. One of the clients of the Edinburgh Fund was the third Plaintiff, Michael Reed. As part of his work, the Defendant had the opportunity to know customers personally and came into contact with some of their personal data.

After the Defendant's departure from IP Global, he sent emails to each of the clients of the Edinburgh Fund (including the third Plaintiff) at their personal email addresses. It was therefore alleged that the Defendant had breached his obligation not to misuse confidential personal data that he had acquired as part of his

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[10] *Bellingham DC*, *supra* note 5.

[11] *Bellingham HC*, *supra* note 3.

[12] *Bellingham CA*, *supra* note 9.

[13] In most material aspects relevant to the discussion in this article, the old and new provisions are similar insofar as they allow for any person who suffers loss or damage directly as a result of contravention of select PDPA provisions to have a right of action for relief in civil proceedings in a court. However, the new provisions, read in context, do add useful clarity or confirmation on some of the issues discussed in this paper.

job responsibilities. The Plaintiffs sought, *inter alia*, an injunction restraining the Defendant from disclosing any personal data of the clients.

The District Court found, uncontroversially, that the names of the clients, their personal email addresses and their personal investing activity in the Edinburgh Fund amounted to personal data.[14] The Defendant's use of such personal data, without the consent of the clients and for purposes other than those which the clients had been previously informed of, amounted to breaches under the PDPA which *could* give rise to the private right of action under s 32(1).[15] On this basis, the District Court held that the third Plaintiff's claim succeeded, but rejected the claims of the first and second Plaintiff on the ground that they did not have the requisite standing to avail themselves of the private right of action.[16]

On appeal to the High Court, the learned High Court judge reversed the decision of the trial judge in allowing the third Plaintiff a successful claim.[17] The High Court judge concluded that the third Plaintiff did not have a right of private action under s 32(1) because he had not suffered any loss or damage within the meaning of the provision.[18] This decision was then ultimately reversed on appeal to the Court of Appeal. The Court of Appeal found that the third Plaintiff had indeed suffered "loss or damage" within the meaning of s 32(1) and had successfully obtained a right of private action.[19]

B. *The District Court's Reasoning on the Standing Issue*

In *Bellingham DC*, in order for the first and second Plaintiffs to successfully invoke the right of private action under s 32(1), they had to prove, *inter alia*, (1) that non-human entities, as opposed to only natural persons, would qualify as "persons" entitled to the benefit of s 32(1); and (2) that a party other than the individual whose personal data had been misused (*ie*, the "data subject") could invoke s 32(1). In rejecting the claims of the first and second Plaintiffs, the learned District Judge Teo Guan Kee reasoned, as follows:

It is not entirely clear that the term "person" always encompasses bodies corporate.[20] Although the term "person" is defined in the Interpretation Act ("IA") to include "any company or association or body of persons, corporate or incorporate", this is subject to the proviso that the definition only applies unless there is something in the subject or context inconsistent with such construction.[21] Further considering that there are references in the PDPA to "person or organisation" which would result in tautology if "person" invariably included "organisations",[22] it was

[14] *Bellingham DC*, *supra* note 5 at [28].
[15] *Ibid* at [122].
[16] *Ibid* at [111].
[17] *Bellingham HC*, *supra* note 3.
[18] *Ibid* at [4].
[19] *Bellingham CA*, *supra* note 9 at [133].
[20] *Bellingham DC*, *supra* note 5 at [67].
[21] Interpretation Act 1965 (2020 Rev Ed Sing) ("IA"), s 2(1).
[22] *Bellingham DC*, *supra* note 5 at [68].

necessary to have regard to the context in which s 32(1) was promulgated in order to establish the scope of "person" under s 32(1).

The PDPA appears to take what could be broadly described as a prophylactic, as opposed to remedial, approach to the obligations imposed on data-collecting organisations.[23] This is seen from sections 11(1) and 12 of the PDPA: section 11(1) states that "in meeting its responsibilities under this Act, an organisation shall consider what a reasonable person would consider appropriate in the circumstances", while section 12 lists out policies and practices that an organisation should develop in order to be able to meet its obligations under the PDPA. In line with the court's observation of the PDPA's preventive nature, the court opined that Parliament could not have intended for s 32(1) to "serve as a kind of crutch for organisations which have not complied with their obligations under the PDPA".[24]

The learned judge remarked that it seemed clear that one of the primary motivating factors behind the PDPA, as gleaned from Parliamentary readings, is to put Singapore "on par with the growing list of countries that have enacted data protection laws and facilitate cross-border transfers of data".[25] As there was no evidence of any other jurisdiction in which an entity other than a data subject is able to enjoy recourse to a right of private action for its own benefit, "an interpretation of section 32 of the PDPA which permits parties other than the data subject (or some other entity acting on his behalf) to bring an action thereafter would not be consistent with the approach generally taken in data protection regimes in other countries".[26]

The third Plaintiff's claim was allowed, however, as the application pertained to his own personal data and the issues highlighted by the District Judge did not bar his claim. The Defendant proceeded to appeal this decision.

C. *The High Court's Reasoning on the Loss Issue*

On appeal, the High Court concluded that the third Plaintiff also did not have a right of private action under s 32(1), because he had not suffered any loss or damage within the meaning of the provision. On the facts, the third Plaintiff had only suffered the loss of control of his personal data. There was no other type of loss on the evidence. The court found that the third Plaintiff had led no evidence of any adverse consequences, emotional impact or other detriment resulting from that loss of control. The court also held that the mere loss of control of personal data could not be considered "loss or damage" within s 32(1). However, in the course of arriving at that decision, the High Court arguably went further and seemed to limit the types of damage that would qualify under s 32(1): s 32(1) "requires 'loss or damage' *in addition* to a contravention of [the relevant] provisions in the PDPA".[27] Therefore,

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[23] *Ibid* at [73]–[74].

[24] *Bellingham DC*, *supra* note 5 at [86].

[25] *Singapore Parliamentary Debates, Official Report* (15 October 2012) vol 89, <https://sprs.parl.gov.sg/search/#/sprs3topic?reportid=bill-28> at p 828 (Assoc Prof Dr Yaacob Ibrahim, Minister for Information, Communications and the Arts); *Bellingham DC*, *supra* note 5 at [91]–[92].

[26] *Bellingham DC*, *supra* note 5 at [110].

[27] *Bellingham HC*, *supra* note 3 at [46].

to confer the right of private action in every case whenever there was a contravention of the PDPA without anything more "would render the term 'loss or damage' otiose".[28] S 32(1) could not have been intended to apply where the alleged loss or damage is simply a loss of personal data.

S 32(1) creates a statutory tort and allows a right of action on that basis, and:

> *interpreting the term "loss or damage" in s 32(1) PDPA narrowly to refer to the heads of loss or damage applicable to torts under common law (eg, pecuniary loss, damage to property, personal injury including psychiatric illness) would further the specific purpose of s 32(1) PDPA as a statutory tort*.[29]
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> [emphasis added]

In so doing, the High Court rejected arguments that Singapore should follow the approach of other common law jurisdictions. These include Canada, New Zealand and Hong Kong whose equivalent statutes[30] expressly refer to emotional harm; and the UK, where courts have interpreted the relevant data protection provisions to include compensation for distress and loss of control over personal data.[31] The High Court distinguished those other jurisdictions because, in its view, they were driven primarily by the need to protect a right to privacy.[32] Singapore law, in contrast, does not recognise any absolute or fundamental right to privacy[33] and the High Court was of the view that the PDPA also did not necessarily enshrine such a right. Rather, the court stated that the PDPA, as primarily gleaned from its purpose provision,[34] takes a balanced approach to govern the collection, use and disclosure of personal data. Parliament's intention, in the court's view, was to exclude emotional harm and loss of control over personal data from s 32(1).[35]

D. *The Court of Appeal's Reasoning on the Loss Issue*

The Court of Appeal accepted the conceptual distinction between mere loss of control over data (which constitutes the data breach) and recognisable damage which is suffered as a consequence of such breach. However, the Court of Appeal went further and held, contrary to the High Court's remarks, that emotional distress is an actionable type of damage under s 32(1). The Court of Appeal also held, contrary

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28 *Ibid.*

29 *Ibid* at [76].

30 Personal Information Protection and Electronic Documents Act, SC 2000, c 5 (Can), s 16(c); Privacy Act 2020 (NZ) s 66(1); Personal Data (Privacy) Ordinance (Cap 486, HK), s 66.

31 *Bellingham HC*, *supra* note 3 at [57]; *Vidal-Hall v Google Inc* [2016] QB 1003 (CA, Eng) ("*Vidal-Hall*"); *Lloyd v Google* [2020] 2 WLR 484 (CA, Eng).

32 *Bellingham HC*, *supra* note 3 at [57].

33 *Ibid at* [57], [72]–[75].

34 PDPA, *supra* note 2, s 3: "The purpose of this Act is to govern the collection, use and disclosure of personal data by organisations in a manner that recognises both the right of individuals to protect their personal data and the need of organisations to collect, use or disclose personal data for purposes that a reasonable person would consider appropriate in the circumstances.".

35 *Bellingham HC*, *supra* note 3 at [56].

to the High Court's finding, that the third Plaintiff had indeed suffered emotional distress and had thus suffered "loss or damage" within the meaning of s 32(1).[36] The Court reasoned that once a purposive interpretation of s 32(1) is taken, it is plain that emotional distress can found a s 32(1) action.[37] Some of the reasons provided by the apex court are set out below.

S 32(1) is a statutory tort and the scope of the right of action is to be determined first and foremost by the principles of statutory construction. The fact that s 32(1) is a statutory tort does not necessarily entail that common law conceptions of actionable loss or damage should be adopted.[38]

While the general principle is that emotional distress or mental distress is not actionable, the heads of actionable "damage" in civil law are not set in stone but are shaped by questions of policy.[39] As *ACB v Thomson Medical*[40] demonstrates, Singapore law can recognise heads of actionable damage beyond those enumerated known to the common law (*ie*, the heads of damage recognised in *Pickering*[41]).[42] If Parliament intended by s 32(1) to provide a head of damage additional to the common law heads, that intention should be given effect.[43]

The court was satisfied that Parliament intended to displace the starting position at common law that emotional distress is not actionable.[44] Firstly, nothing in the plain language of the PDPA expressly excludes emotional distress as a type of damage covered by s 32(1). Secondly, no contextual indicators weigh against the adoption of a wide interpretation of "loss or damage". Nothing in the text nor context justifies a narrow reading of "loss or damage".[45]

A wide interpretation of "loss or damage" which includes emotional distress better promotes the general purpose of s 32(1).[46] Firstly, the relevant Parliamentary debates indicate that there was no intention to fetter the meaning of "loss or damage".[47] Secondly, the general purpose of the PDPA is to provide robust protection for personal data belonging to individuals and a wide interpretation is not antithetical to the economic interest that the PDPA seeks to promote.[48] Thirdly, it will not be uncommon for emotional distress to be the only loss or damage suffered. This observation is consonant with the observations in *Vidal-Hall v Google Inc*[49] which, although dealing with privacy rights, is not any less persuasive in Singapore

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36 *Bellingham CA*, *supra* note 9 at [118]–[133].
37 *Ibid* at [68].
38 *Ibid* at [67].
39 *Ibid* at [74].
40 [2017] 1 SLR 918.
41 *Pickering v Liverpool Daily Post* [1991] 2 AC 370 (HL, Eng) ("*Pickering*"). The case established the recognised heads of actionable damage for tort claims.
42 *Bellingham CA*, *supra* note 9 at [75].
43 *Ibid* at [76], citing *Ng Boo Tan v Collector of Land Revenue* [2002] 2 SLR(R) 633 at [76].
44 *Bellingham CA*, *supra* note 9 at [77].
45 *Ibid* at [78]–[85].
46 *Ibid at* [96].
47 *Ibid* at [97].
48 *Ibid* at [98].
49 *Vidal-Hall*, *supra* note 31. The court held that it is the "distressing invasion of privacy" which must be taken to be the primary form of damage for misuse of personal data (at [77]) and distress is often the "only real damage that is caused by a contravention" (at [92]).

simply because there is no fundamental right to privacy.[50] Finally, the concern that individuals may bring claims which impose excessive costs on business and other organisations is met by the control mechanisms of (1) the word "directly" within the wording of the provision serving as a causal requirement; and (2) the *de minimis* principle keeping the scope of the s 32(1) action within reasonable bounds.[51]

The specific purpose of s 32(1) is similarly furthered by a wide interpretation.[52] S 32(1), forming part of the enforcement regime of the PDPA, must be an effective means by which individuals may enforce the right to protect their personal data. It would be surprising if Parliament intended s 32(1) to be a dead letter in the not insubstantial proportion of cases where no material damage in the *Pickering* sense is suffered.[53]

E. *Where We Are*

At the end of the long and meandering road of the *Bellingham* litigation, the current position stands as such:

(i) In relation to the standing issue, the District Court found that a party who was not the data subject is not entitled to the right of private action under s 32(1), while observing that the term "person" does not invariably encompass corporate bodies. This finding has been left untouched by the subsequent cases and continues to be operative.

(ii) In relation to the loss issue, the Court of Appeal, in reversing the High Court decision, found that emotional distress is a type of actionable "loss or damage" under s 32(1). It also indicated, without having to expressly decide this, that s 32(1) (and hence s 48O) may be wide enough to include other forms of loss or damage.

We think that, with just a few more steps down the road untravelled, to first clarify the meaning of "persons", and then to explore some other types of loss or damage that might be claimable under s 48O, the journey could come to an even more satisfying terminus.

III. Missing Persons

We begin by discussing whether the word "person" as used in s 32(1) and s 48O should include non-human entities. On this point, we respectfully differ from the observations in *Bellingham DC* and argue that the word "person" in s 32(1) of the Pre-2020 PDPA should not be limited to natural persons and *should* include non-human entities. This is also our position in respect of the new s 48O. We do so by:

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[50] *Bellingham CA*, *supra* note 9 at [100].

[51] *Ibid* at [102].

[52] *Ibid* at [96].

[53] *Ibid* at [104], *Pickering*, *supra* note 41.

(i) questioning the textual and purposive bases relied on by *Bellingham DC*;
(ii) showing that the word "person" as used in the PDPA generally *cannot* be limited to natural persons;
(iii) showing that the word "person" as used in s 32(1) was not likely to have been limited to natural persons and that the word "person" as used in s 48O today *cannot* be limited to natural persons; and
(iv) proposing a coherent way to construe the related words "person", "individual" and "organisation".

A. *Critique of Bellingham DC*

As set out above in Part II, *Bellingham DC*'s decision that "person", as used in s 32(1), excluded non-human entities proceeded (correctly) by first considering a textual analysis and then examining the object or purpose of s 32(1). We will also adopt the same approach.

On a textual analysis, the starting point is that "person" is not defined in the PDPA. "Person" *is*, however, defined in the IA to "include any company or association or body of persons, corporate or unincorporate".[54] This usage, while not intuitive to laypersons or common in lay dictionaries, is unexceptional to most lawyers and is the way "person" is used in many statutes.[55] A definition in the IA is, of course, not automatically applicable in all statutes. It can be departed from if there is something in the subject or context of a statute that is inconsistent with the definition.[56] In the case of the PDPA, the court in *Bellingham DC* reasoned that if "person" invariably included non-human entities, this would result in a tautology because the phrase "person or organisation" was used in various provisions of the PDPA. Interestingly, this tension arises because the word "organisation" is defined in the PDPA in a manner that *also* may not be intuitive to laypersons or common in lay dictionaries. For most laypersons, an "organisation" is typically a non-human entity.[57] Contrary to this, section 2(1) of the PDPA defines "organisation" to include natural persons as well as non-human entities.[58] It is thus not surprising that the court viewed the two words as fully overlapping with each other, if "person" was construed to include non-human entities, such that the phrase "person or organisation" would be what linguists call a "coupled synonym".[59] This would ostensibly

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[54] IA, *supra* note 2, s 2(1).
[55] *Eg*, Income Tax Act 1947 (2020 Rev Ed Sing), s 2(1); Companies Act 1967 (2020 Rev Ed Sing).
[56] IA, *supra* note 2, s 2(1).
[57] Oxford English Dictionary: an organised group of people with a particular purpose, such as a business or government department: a research organisation; Merriam Webster's Dictionary: association, society: charitable organisations.
[58] Where Parliament intended to refer only to non-human entities, terms like "company", "corporation" and "unincorporated association" were used.
[59] For a discussion of coupled synonyms, see Richard C Wydick, *Plain English for Lawyers*, 5th ed (Durham, North Carolina: Carolina Academic Press, 2005) at 17–20. As breaches of canonical guidance go, it seems to us that the coupled synonym is primarily a stylistic *faux pas* and one only rather recently so crowned. Lawyers will be very familiar with coupled synonyms such as "alter or change", "force and effect", "full and complete" and even "object or purpose" in s 9A of IA. Certainly, older English contracts and statutes commonly used coupled synonyms, many of which have become reflexively

offend against the canon of construction that Parliament shuns tautology and does not legislate in vain.[60]

Unfortunately, the District Court's solution of entirely excluding non-human entities from "person" (*ie*, to limit the word to natural persons) would create another separate, different clash of words. This is because the PDPA (both before and after the 2020 Amendment Act) also uses the word "individual", and expressly defines that word to mean "natural persons".[61]

On the District Court's interpretation, the two words "person" and "individual" would have exactly the same intended meaning everywhere they are used in the PDPA. It is *possible* that this interchangeable use was deliberate,[62] but the same canon of construction – that Parliament does not legislate in vain – would, at least at first blush, be breached if we too quickly accept this.

Either way, it would appear that we are presented with a linguistic Hobson's Choice.

This tie is not broken by a call to purposive interpretation. The court made two points in this regard, both of which are equivocal in our view.

First, the court reasoned that the PDPA appears to take what could be broadly described as a prophylactic, as opposed to remedial, approach to the obligations imposed on data-collecting organisations. To the court, the prophylactic nature of the PDPA ought to lead one to infer that Parliament could not have intended for s 32(1) to serve as a substitute for contractual or other arrangements that data-collecting organisations are expected to put in place to safeguard personal data in their possession.[63]

With respect, the PDPA's general purpose is set out in section 3 and does not expressly privilege a prophylactic approach. Instead, the purpose of the PDPA is to "govern the collection, use and disclosure of personal data by organisations in a manner that recognises both the right of individuals to protect their personal data and the need of organisations to collect, use or disclose personal data for purposes that a reasonable person would consider appropriate in the circumstances".[64] This envisages an approach that is concerned with "balance", a value that is not conceptually incompatible with affording non-human entities *some* right of private action.

Second, the court also noted that no other jurisdiction has allowed parties other than the data subject (a natural person) the right of private action for its own benefit. The court reasoned, quoting the Ministerial Statement when the bill was introduced, that Singapore should follow suit to "put [it] on par with the growing list

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deployed terms. While wasteful of words, coupled synonyms are arguably innocuous unless they result in confusion or make substantive provisions otiose.

60 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [38]; *JD v Comptroller of Income Tax* [2006] 1 SLR(R) 484 at [43].

61 PDPA, *supra* note 2, s 2(1).

62 When a statute is drafted and revised over a period of time, it is possible that successive generations of Parliamentary draftspersons working on that statute may use different forms of words for the same or similar idea. The new s 9B of IA acknowledges this possibility.

63 *Bellingham DC*, *supra* note 5 at [85].

64 PDPA, *supra* note 2, s 3.

of countries that have enacted data protection laws and [to] facilitate cross-border transfers of data".[65]

Again, with respect, the remark quoted does not refer specifically to s 32(1) or directly support the court's position. As Menon CJ in *AG v Ting Choon Meng* cautioned, the purpose behind a particular provision may be distinct from the general purpose underlying the statute as a whole, and the specific purpose behind a particular provision must therefore be considered separately in appropriate cases.[66] Here, we have a general statement referring to Singapore's entry into a community of countries that *provide protection for personal data*. The reference to putting Singapore "on par" with these countries was a reference to *raising* the bar of protection so as to facilitate cross-border transfers of data in the knowledge that such data would be safely handled in Singapore as a result of such *increased* protection. The statement does not self-evidently support an argument to *restrict* remedies from a certain class of entities, merely because other countries have not yet extended remedies to them.

Accordingly, the textual and purposive bases relied on by the court in *Bellingham DC* merit consideration but do not ultimately necessitate the outcome it arrived at. Similarly, it can be said that the counterpoints raised are not conclusive. The question then is whether there is other evidence from a contextual reading of the PDPA generally and s 48O specifically that can shed light on this issue.

B. *Use of "Person" in the PDPA Generally*

We start by considering the way "person" is used in the PDPA generally. While it is possible that Parliament used the word "person" differently in s 48O than it did in other sections of the PDPA, this is not likely. It is an accepted canon of construction that when the same word is used in a statute, it should presumptively bear the same meaning everywhere within the statute.[67] This is the so-called canon of consistent usage. Therefore, if it can be shown that the word "person" has been used in other parts of the PDPA to include non-human entities, there would be a strong presumption that the same should apply to s 48O.[68]

A comprehensive survey of every instance where the word "person" is used in the PDPA demonstrates that, even prior to the 2020 Amendment Act, there was at

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[65] *Supra* note 25.

[66] [2017] 1 SLR 373 at [61].

[67] *Tan Cheng Bock*, *supra* note 60 at [58(c)(i)]: "Where the identical expression is used in a statute, and all the more so, where it is used in the same sub-clause of a section in a statute, it should presumptively have the same meaning."

[68] The authors acknowledge that the trial judge in *Bellingham DC* did observe that "it is not entirely clear…that the term 'person' always encompasses bodies corporate". The trial judge therefore seemed to accept the possibility that the term "person" was to be interpreted one way in one section (*eg*, s 32(1)) and another way in other sections where limiting "person" to natural persons would not be tenable. The authors recognise that this may be one possible way to resolve the matter, but propose that the better position would be to apply the canon of consistent usage if at all possible. This would mean starting with a strong presumption in favour of interpreting the word "person" consistently throughout the PDPA, acknowledging that "person" *cannot* exclude natural persons in some sections and then searching for an interpretation that can harmonise the usages. This is what we attempt in this article.

least one provision where the word "persons" *had* to include non-human entities, and several other provisions where it is highly likely. The full analysis of the Pre-2020 PDPA usage of "person" is set out in the form of a table in Annex A. We discuss two examples here.

First, under the Pre-2020 PDPA:

> "Commission"[69] means the *person* designated as the Personal Data Protection Commission under section 5 to be responsible for the administration of this Act[.]
>
> [emphasis added]

This definition of Commission contemplates that the person to be designated is an institution rather than a natural person; it is the definition of a *commission*, not a definition of a *commissioner*. To put matters beyond doubt, under section 5 of the Pre-2020 PDPA, the Info-communications Media Development Authority ("IMDA") was, and continues to be, designated as the Personal Data Protection Commission. The IMDA is evidently not a natural person. All of these provisions were drafted at the same time and it is unlikely that there was any failure of attention or slippage in the use of words. It is therefore clear that even prior to the 2020 Amendment Act, the PDPA's drafters have used the word "person" to include non-human entities.

Another example where one can reasonably infer that the Pre-2020 PDPA must have used "person" to include non-human entities is section 47(3). Section 47(3) deals with short message service ("SMS") marketers who are told by the subscriber to stop bothering them. The provision says that such "person" (the texter) must stop or cause "its agent" to stop texting the subscriber. The deliberate use by the drafters of the possessive neuter pronoun "its" (rather than "his") makes it clear that in this section, the drafters actively considered that the "person" in question would be an entity (rather than a natural person) which acts through its agents.

Both of these are examples where the provision would not make sense if the word "person" excluded non-human entities. Applying the canon of consistent usage, there is thus a strong presumption that the word "person" in s 48O (and in the previous s 32(1)) should also not exclude non-human entities. Such a presumption can, of course, be rebutted[70] if it were shown that s 48O (and the previous s 32(1)) must, by its context, exclude non-human entities. We turn to this next.

C. *Use of "Person" in s 32(1)/s 48O Specifically*

It is evident that s 48O (and the previous s 32(1)) does not contain any express language that excludes non-human entities. Otherwise, the standing issue would have been unarguable from the outset by the first and second Plaintiffs. However, the court in *Bellingham DC* certainly thought that *by its context* s 32(1) possibly excluded non-human entities. The court intuited (rightly in our view) a disjunct between (i) the fact that personal data can only "belong" to an individual (the data

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[69] Pre-2020 PDPA, *supra* note 7, s 2(1).

[70] *Tan Cheng Bock*, *supra* note 60 at [58(c)(i)].

subject); and (ii) allowing some non-human entity (presumptively not the individual) to claim for losses/damage relating to breaches of that individual's personal data. This disjunct ought to mean that non-human entities would rarely be the beneficiaries of a right of action flowing from a data breach. We agree. But, we argue, it need not exclude them entirely.

If it could be shown that there are *some* likely instances where s 48O and/or the previous s 32(1) *was intended* to benefit non-human entities, then a general exclusion may not be justifiable. Further, if it can be shown that interpreting "person" to exclude non-human entities would result in logical/drafting absurdities, then a general exclusion would be untenable. This is a necessary corollary of section 9A(b)(ii) of the IA.

Regarding logical or drafting absurdities, we note that in the current s 48O, the word "person" is used twice, once in the introductory language to refer to potential claimants and once in subsection (b) to refer to potential defendants. Subsection (b) goes on to list those provisions the breach of which would give rise to a right of private action. Our detailed analysis of these provisions is summarised in Annex C. It shows that virtually all of them *can* in theory be breached by non-human entities. *If* "person" in the introductory language excludes non-human entities, there are only two ways to interpret section 48O(b), both of which are absurd. In interpretation 1, the word "person" in the *chapeau* excludes non-human plaintiffs while the same word, just a few sentences down, in the same section, includes non-human plaintiffs. Since Parliament would almost never use the same word in different ways *in the same section*, which follows from the strong form of the canon of consistent usage, this would be absurd drafting. In interpretation 2, both uses of the word "person" are limited to natural persons. The result is that only individuals may be sued under section 48O(b) even though non-human entities can also breach the provisions listed therein. This, we argue, is absurd logic. In short, under the current s 48O, to prevent absurdity, the first use of the word "person" in s 48O must include non-human entities.[71]

Further, regarding the intended beneficiaries of s 32(1)/s 48O, since *Bellingham DC* was decided, Parliament has amended the PDPA to create a whole slew of business-to-business obligations[72] indicating that, at least in its current form, s 48O is intended to create rights for companies. During the second reading of the Personal Data Protection (Amendment) Bill (No. 37 of 2020) ("2020 Amendment"), the Minister for Communications and Information, Mr S Iswaran, stated that "[t]he right of private action [under s 48O] will be extended to organisations…that suffer direct loss…arising from contraventions of the new business-to-business obligations in the Bill".[73]

It would border on absurdity for Parliament to create business-to-business obligations and yet exclude companies from remedies under the PDPA by giving "person" a meaning that is limited only to natural persons. The interpretation that better supports Parliament's specific object and purpose for s 48O should be

[71] We acknowledge that this analysis does *not* apply to s 32(1) of the Pre-2020 PDPA.

[72] PDPA, *supra* note 2, Part 6A, covering ss 26A to 26E.

[73] *Singapore Parliamentary Debates, Official Report* (2 November 2020) vol 95 (Mr S Iswaran, Minister for Communications and Information).

adopted (section 9A(2)(b)(i) of the IA). Minister Iswaran's statement confirms that Parliament intended, at least as of 2020, to extend private remedies to organisations, many of which would be non-human entities.

Indeed, even before the 2020 Amendments, there was at least one obligation – in Section 20(2) of the Pre-2020 PDPA ("s 20(2)") – that was owed by one organisation to another (see analysis in Annex B). It is arguable that Parliament did not previously intend for a breach of s 20(2) to give rise to any remedies to an organisation harmed by failure to comply with this obligation. But this is not a satisfying position. We are unable to think of any plausible reason why Parliament would deliberately single out s 20(2) to exclude, simply through the use of the word "person" in s 32(1). The better interpretation is that Parliament did not do so. This strongly suggests that, even under the Pre-2020 PDPA, *Bellingham DC*'s exclusion of non-human entities from s 32(1) was not what Parliament intended.

At this juncture, we detour slightly to address the question whether there is any real value to undertaking the analysis in Parts III and IV of this article given the current form of s 48O and the Minister's statement, which would seem to put the matter to rest going forward. We think there is, for at least four reasons:

(i) The Minister cannot legislate from the Parliamentary floor. Parliament did not take the opportunity in 2020 to clarify *in the PDPA itself* that s 48O remedies extended to organisations or non-human entities. Until such time that Parliament does so or the matter is judicially determined (and the court refers to the Minister's statement to help ascertain what we believe to be the correct interpretation of "person"), the issue is not settled.

(ii) *Bellingham DC* continues to be part of Singapore law and must be considered when the issue next arises. Section 9A of the IA does not authorise the next court to simply interpret s 32(1)/s 48O *de novo* as if *Bellingham DC* does not exist.[74] Admittedly, *Bellingham DC* is not binding on any court because Singapore courts technically do not practise horizontal stare decisis[75] and district courts do not sit atop any other courts in the Singapore system. However, another district court is likely to follow *Bellingham DC* in real life unless parties can raise arguments such as those canvassed here.

(iii) The Minister's statement only covers organisations in favour of which obligations are created under the current PDPA. However, as we will go on to show, properly construed, s 48O can, in limited circumstances, afford a private right of action to "persons" that are non-human entities but not organisations.

(iv) It is possible that there are still parties with deserving claims under s 32(1) of the Pre-2020 PDPA.[76] The Minister's statement, suggesting as it

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[74] *Chen Hsin Hsiong v Guardian Royal Exchange Assurance plc* [1994] 1 SLR(R) 591 at [14].

[75] *Attorney-General v Shadrake Alan* [2011] 2 SLR 445 at [4]; *Wong Hong Toy v Public Prosecutor* [1985-1986] SLR(R) 656 at [11].

[76] Limitation Act 1959 (2020 Rev Ed Sing), s 24A: The statute of limitations for torts claims is typically six years from the date of the breach and (as of the date of this article) the latest possible claim (based on events in 2019) can still be made. It is also possible that a party only later comes into possession of information showing that a tort had been committed prior to 2020 and the limitation period would only start running from the time the party knew (or ought to have known) such information.

does that it was only in 2020 that remedies were "extended" to organisations, does not assist such plaintiffs. The analysis here (which argues that "person" in s 32(1) has all along included non-human entities) can.

D. *Restoring Non-Human Entities to "Person"*

We acknowledge that, in a substantial statute like the PDPA,[77] it is well-nigh impossible to expect that every single use of common words like "person", "organisation" and "individual" will observe definitional purity. However, we believe that the words "person", "organisation" and "individual" *can* be sensibly, coherently and consistently interpreted as follows:

(i) "Person" is the umbrella term that refers to natural persons as well as legal entities.
(ii) "Organisation" *usually* refers to the subset of persons who collect, use and/or safeguard data.
(iii) "Individual" is the subset of persons who are natural persons and *usually,* but not exclusively, refers to data subjects.

First, quite simply, this approach coheres with the express definitions of the words in the IA (for "person") and in the PDPA itself (for "organisation"[78] and "individual"[79]).

Second, this approach coheres with the use of "organisation", "individual" and "person" in the substantive obligation-creating provisions of the PDPA. At the risk of oversimplification, the PDPA is concerned with two quite different scenarios: (i) protecting the <u>data</u> belonging to data subjects (Parts 3 to 6B of the PDPA) ("Protection of Data Scenarios"); and (ii) protecting the <u>data subjects</u> themselves from intrusive marketing practices (Parts 9 and 9A of the PDPA) ("Protection of Data Subject Scenarios").

In Protection of Data Scenarios, the relevant actors are typically the data subject and the data controller. In Parts III to VIA, the PDPA consistently uses "individual" when referring to the data subject and "organisation" when referring to the data controller. These terms thus appear to perform a function not linked to denoting corporeal status but to the roles being played. Notably, the word "person" is not used at all in Parts 3 to 6A of the PDPA to refer to natural persons who are data subjects. Instead, it is used only seven times in Parts 2 to 6A of the PDPA, each time in a generic way as one would expect of an umbrella term:

(i) three times in the legal term of art "reasonable person";[80]

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77 The PDPA has 85 sections and nine Schedules.

78 PDPA, *supra* note 2, s 2(1): "organisation" includes any individual, company, association or body of persons, corporate or unincorporated, whether or not —
(*a*) formed or recognised under the law of Singapore; or
(*b*) resident, or having an office or a place of business, in Singapore;

79 See footnote 58.

80 PDPA, *supra* note 2, ss 11(1), 15(6(a)(ii)), and 18(a).

(ii) once to distinguish between the data subject (an "individual") and a "person" who is authorised to consent to the collection, use or disclosure of the data subject's personal data;[81]
(iii) twice to distinguish between the data-controller (an "organisation") and a "person" who is able to answer customer questions on the data-controller's behalf;[82] and
(iv) once to refer any "person" (including any public agency) that the data-controller might be obligated to notify of data breaches.[83]

In Protection of Data Subject Scenarios, the relevant actors are typically the sender of the intrusive message or maker of the intrusive phone call (the "sender") and, where the sender is a corporation, the human agents through whom the sender operates. In Parts 9 and 9A of the PDPA, the word "person" is used interchangeably to refer sometimes to the sender,[84] and sometimes to the human agents[85]. It is also used to refer to miscellaneous other actors.[86] Again, this is exactly how one would expect an umbrella term to be used. As for "individual" and "organisation", they are barely used in Parts 9 and 9A of the PDPA. Admittedly, the strict role-related usage that we observed in Parts 3 to 6A is not maintained. So, in section 36(1) in the definition of "services" sub-clause (b), the word "organisation" is used in its colloquial or lay sense in the phrase "any club or organisation". And in sections 43A(1)(b) and (c), the word "individual" does not refer to a data subject. However, the interpretations that we propose are still useful as they hold true in the majority of instances and they provide useful starting points for interpreting these words when encountered in the PDPA.

Third, more importantly, the distinction between the two broad scenarios contemplated in the PDPA also explains the usage of "organisation" and "person" in sections 48O(a) and (b).[87] Section 48O(a) pertains to Protection of Data Scenarios. The obligations referred to therein are owed by data-controllers. Hence, s 48O speaks of an action against "any organisation". On the other hand, section 48O(b) pertains to Protection of Data Subject Scenarios. It speaks of an action against "any person" and, in so doing, tracks the language in Parts 9 and 9A of the PDPA. In other words, the distinction between "person" and "organisation" in s 48O has nothing to do with whether a party is a natural person or not (*ie*, its corporeal status). In s 48O(a), the use of "organisation" is tied to the role played by the potential offender; everywhere else in s 48O, the generic umbrella term "person" is used.

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[81] PDPA, *supra* note 2, s 14(4).
[82] PDPA, *supra* note 2, ss (1)(c) and (5)(b).
[83] PDPA, *supra* note 2, s 26D(9). This is also a provision where it is quite clear that "person" must include non-human entities because of the express inclusion of a public agency.
[84] *Eg*, PDPA, *supra* note 2, s 43(1).
[85] *Eg*, PDPA, *supra* note 2, s 48(b)(3).
[86] PDPA, *supra* note 2, s 39(3) – the Commission may authorise another person to maintain any register on its behalf; s 40(2) – any person may inquire whether any Singapore telephone number is listed in the register.
[87] s 32(1) of the Pre-2020 PDPA does not need to be explained in the same way because it never included the Protection of Data Subject Scenarios.

Finally, the distinction between the two broad scenarios in the PDPA also helps to address the apparent redundancy issue which concerned the District Court regarding the phrase "organisation or person".[88] The District Court based much of its textual reasoning on avoiding what it saw as the tautology in the phrase "organisation or person". It interpreted the phrase as denoting the corporeal status of the potential parties and, given the definition of "organisation" in section 2(1) of the PDPA, baulked at an interpretation where *both* "person" and "organisation" would include natural persons as well as non-human entities, thus seeming to fully overlap. However, if one views the phrase as referring to different categories of potential defendants or wrongdoers where "organisation" refers to potential breachers in Protection of Data Scenarios and "persons" refers to potential breachers in Protection of Data Subject Scenarios, then there is no redundancy.[89] It is no accident that the most common occurrences of the phrase are in Part 9C of the PDPA which deals with enforcement and punishment. A quintessential example is section 48K(1) of the PDPA which states that "[b]efore…imposing a financial penalty…, the Commission must give written notice to the organisation or person concerned."

For all the reasons canvassed in Part III, the word "person" in s 32(1) of the Pre-2020 PDPA should have been interpreted to include non-human entities and the word "person" in the *chapeau* of s 48O of the PDPA must be interpreted to include non-human entities.

IV. Which Persons?

Resolving the textual point, however, does not fully answer the normative question. The court in *Bellingham DC* had focused on the textual question because the argument had been canvassed by the Plaintiffs in court. Accepting the Plaintiffs' framing of the argument was no doubt an expeditious manner to resolve the issue. This was, however, not the only, nor the most important point impacting whether the first and second Plaintiffs were entitled to the private right of action under s 32(1). The key issue, it seems to us, is whether and to what extent (regardless of the definition of person) non-data subjects, especially those that are not expressly stated as being owed obligations under the PDPA, *should* be entitled to a right of private action. We now turn to address this question.

In *Bellingham DC*, the court complemented its textual interpretation with the normative point that persons who are not the data subject should not be able to avail themselves of the right of private action under s 32(1). As mentioned earlier, the court intuited a disjunct between: (i) the fact that personal data can only "belong"

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[88] This explanation applies to both the current PDPA and the Pre-2020 PDPA.

[89] Even if one views "person" as an umbrella term (rather than tied to potential breachers in Protection of Data Subject Scenarios), our proposed interpretation reduces the level of overlap. If one views "person" as an umbrella term, then "person or organisation" would not be a tautology or coupled synonym. Rather, "organisation" would be what mathematicians call a proper subset of "person". In linguistics, this relationship is referred to as hyponymy, where "person" is a hypernym of "organisation". It should be noted that lists or phrases containing a hypernym and its hyponyms are not uncommon in legal drafting. The Interpretation Act's definition of "person" itself is one such example. In it, a "body of persons, corporate or incorporate" is arguably the hypernym of both "company" and "association".

to an individual (the data subject); and (ii) allowing some non-human entity (presumptively not the individual) to claim for losses/damage relating to breaches of that individual's personal data. Only individuals can be data subjects; only they should have the right of private action. This analysis has an intuitive appeal and we generally agree with the starting point that non-data subjects should *generally* not have a claim under the old s 32(1) or the new s 48O.

However, we believe that a better way to ring-fence the scope of "person" in s 32(1)/s 48O is to look at the express purpose of the PDPA, which emphasises *balancing* the needs of individuals against those of data-collecting organisations, and the express text of s 32(1)/s 48O, in particular the qualification that only persons who *directly* suffer loss and harm are within Parliament's contemplation.

First, importantly, the approach would still justify limiting claimants *for the most part* to data subjects. Freely allowing non-data subjects who are not owed direct obligations under the PDPA a right of private action would open up data controllers to disproportionate consequences, thus upsetting the "balance" envisaged by the PDPA purpose provision. Data-collecting "organisations" owe direct obligations generally (but not exclusively) to the data subject, and the law must rightly be cautious of exposing such "organisations" to indeterminate liability if s 48O is read too widely. We see support for this too in the fact that the purpose provision recognises the "right of individuals to protect their personal data" but does not go further to expressly recognise the putative rights of all and sundry who may be incidentally adversely affected by data mismanagement.

Second, the approach would clearly allow *some* non-data-subject claimants a right of action provided that doing so does not upend the balance contemplated in section 3 *and* such claimants fall within the section as drafted. We reiterate that s 32(1) of the Pre-2020 PDPA and s 48O of the PDPA both start with the same introductory language: "[a] person who suffers loss or damage *directly* as a result of a contravention…" [emphasis added]. In our view, the express directness requirement in this *chapeau* clause can do the work required to allay the concerns of the court in *Bellingham DC*. A person (whether a natural person or a non-human entity) who is not the data subject is unlikely to have directly suffered from the breach of the obligations owed to someone else. Tangential and incidental losses, using these terms colloquially, would thereby be generally excluded. At the same time, the concept of directness is flexible enough to permit some discretion, in the appropriate case, to *allow* the claims of individuals who are not the data subject, or of non-human entities.

Minimally, such appropriate cases must surely include instances where the PDPA itself has created *direct* obligations owed to the person attempting to sue. There are at least two such categories of persons who need not be data subjects.

First, as discussed more fully in Part III above,[90] in 2020, Parliament enacted a whole slew of organisation-to-organisation obligations. A non-human entity which is an organisation and which is harmed by the breach of any such obligation would be the quintessential example of a non-human "person" who fulfils the directness requirement. Indeed, our review of the PDPA on this point (the results of which are

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[90] See the text accompanying footnote 72.

summarised in Annex B) shows that, even in the Pre-2020 PDPA, there was at least one provision (s 20(2)) which created direct obligations between organisations. It would be anomalous not to provide such persons with a right of private action under the PDPA and we think that, interpreted properly, the old s 32(1) and the new s 48O have always done just that.

Second, also in 2020, Parliament included additional Protection of Data Subject Scenarios and s 48O(b) extended the right of private action to persons harmed by any breach thereof. The obligations under Parts 9 and 9A of the PDPA are owed, in some cases, to persons who are not data subjects and also to non-human entities.

Additionally, such appropriate cases should include instances where the person attempting to sue may not be the data subject or an organisation but has suffered loss or damage that flows *directly* from the contravention. In our view, this would only occur when the person attempting to sue is so closely associated with the relevant data subject or organisation that the causing of harm to such data subject or organisation is tantamount to causing harm to that person. Such cases (*eg*, where the person is the incorporated alter ego of a data-subject) are likely to be few and far between. And, in such cases where the criterion is met, the offending organisation or person can be said to have taken the risk that by harming the data subject or organisation to which its PDPA duties are owed, it must necessarily *also* (or *actually be*) harming the affected person. We would argue that this is a fair balance. We also believe that such a test, which looks at the closeness between the data subject and the plaintiff, is not too difficult for courts to administer. Directness is a common concept in many areas of law and there would be robust and relevant precedents to draw on to develop this concept in the context of s 32(1)/s 48O. The Court of Appeal in *Bellingham CA* has already deployed the concept of direct causal link to flexibly ring-fence the types of loss or damage that can be claimed under s 32(1)/s 48O.[91] The same concept can be used to ring-fence the persons who can claim thereunder.

The foregoing can be concretely illustrated by the scenario fleshed out below.

Assume that a medical entity ("A") (such as a clinic or hospital) outsources the storage of patient data to an external service provider ("B"). Suppose that an imminent terminal diagnosis for a patient ("C") of A is publicly disclosed by B, in contravention of its PDPA duties owed to A. Suppose further that the wrongful disclosure reaches C and C's customers or clients before C can be properly informed of the diagnosis by a proper representative of A in a controlled environment. Finally, suppose that C is engaged in a business that depends on C's ability to perform certain services (*eg*, C is a lawyer, or architect), and that, because of B's uncontrolled disclosure, C is unable to devise an orderly transition for C's business, with the result that customers or clients take their custom elsewhere.

In this scenario, B's obligations are owed expressly to A but its breach also *directly* harms C.

While acknowledging that *some* customers or clients would have left C because of the content of the information disclosed (C's imminent death), we think that it

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[91] *Bellingham CA*, *supra* note 9 at [93] and [102(a)].

can be argued that some portion of C's customer loss was directly caused by the premature way in which the information was disclosed (*ie*, *some* customers or clients would have given C the chance to pass the business on to a successor, thereby preserving some of its value).

Crucially, we think that if C had carried on this business through a non-human entity ("D"), there is no reason to bar that entity from recovering such pecuniary loss. D would be the incorporated alter ego of C.[92]

The directness requirement (as we interpret it) thus limits any extrapolation of "persons" to a very small group of non-human entities that are (or are akin to) corporate alter egos and to a very small set of scenarios where B's actions impinge on those entities without intermediate intervention. Once we move beyond that limited class, we think that the connection would be attenuated and would have to be carefully scrutinised on a case-by-case basis. For example, once we have a business (D) that is not simply a vehicle for C's services, either because there are other service-providers within D or because D's business is multi-faceted, one would have to consider whether any lost business to D was due less to C's bad news *per se* and more to D's over-reliance on C.

Other potentially affected persons, such as shareholders, creditors, suppliers or employees of A, C, D or E, would be even further removed and even less likely to satisfy a rigorous application of the directness requirement.

Applying the foregoing analysis to the facts in *Bellingham*, we believe that the same outcome would have been reached. The first and second Plaintiffs had not suffered any loss or damage *directly* from the Defendant's contravention. They were not owed any direct obligation by the Defendant. The alleged breaches were of sections 13 and 18 of the Pre-2020 PDPA – neither of which set out organisation-to-organisation obligations. It could also not be said that the first or second Plaintiff was so closely connected to the third Plaintiff (such as being the third plaintiff's incorporated alter ego) that any harm done to the third Plaintiff would have necessarily harmed the first or second Plaintiff. Furthermore, even if the "directly" requirement was somehow fulfilled, as *Bellingham CA* correctly decided (see also below), the mere loss of control over data is itself not a recognisable head of damage – it is the breach. Any emotional distress was suffered by the data subject, not the first and second Plaintiffs. No other loss or harm was alleged.

In sum, we think that the purposive and textual reading of s 48O converge on the conclusion that the right of private action is not limited just to data-subjects but also includes persons (who need not be natural persons): (i) to whom obligations are directly owed under the PDPA; and (ii) whose loss or damage can be shown to flow directly from the breach.

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[92] We do acknowledge that there may be evidentiary difficulties in apportioning C's pecuniary loss between the effect of the content of the disclosure versus the effect of the wrongful disclosure itself. However, we think the distinction is conceptually sound, and illustrates at least one situation where a non-human entity such as D, which is neither a data subject nor another organisation under the PDPA, can make a claim under s 48O against a data controller (B).

V. What Loss or Damage?

We turn now to the "loss" issue, which stood at the epicentre of the decision in *Bellingham CA*. At its core, the "loss" issue was concerned with a fairly straightforward question: is the phrase "loss or damage" (as it was used in s 32(1) and as it is used in the current s 48O) limited to heads of damages generally recognised in common law, or can it extend to other types of harm? Specifically, as pleaded by the third Plaintiff in the *Bellingham* cases, can it extend to emotional distress? The High Court held that "loss or damage" corresponds strictly to the common law heads of damages only. The Court of Appeal reversed this decision and held that emotional distress would also be a type of actionable "loss or damage". The Court of Appeal's decision has been summarised above in Part II.D: The Court of Appeal's Reasoning on the Loss Issue.

Key to that reasoning was that s 32(1) is a creature of statute and that the scope of "loss or damage" should, in the absence of a statutory definition,[93] be determined primarily by statutory construction. We agree. The common law position, while likely to be relevant, should not be the primary determinant. Rather, for a claimant to succeed in an action under a statutory tort, it must be shown that the injury or damage suffered by the plaintiff was a kind which the statute was intended to prevent.[94] In this regard, Parliament's intent might be *wider or narrower* than common law; this is to be determined in each case through an examination of the statutory provision itself.[95]

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[93] We note that s 48C of the PDPA does define the words "harm" and "loss". However, it is clear that these definitions cannot be ported wholesale to s 48O for several reasons. First, both these definitions are expressly limited in application to Part 9B of the PDPA (which does not include s 48O). Second, the definition of "harm" is expressly limited to "individuals" and is not, on its face, interchangeable with "damage" (which is the word used in s 48O).

s 48C thus, at best, provides some guidance on how to construe s 48O, nothing more. In this respect, it is interesting that s 48C defines "harm" to include "harassment, alarm or distress caused to the individual", which is not a typical common law head of damage. This might support a similarly expansive approach under s 48O. However, it may equally suggest that by not extending the s 48C definitions to s 48O and by using a different term "damage" in s 48O, Parliament intended a less expansive approach under s 48O. The difficulties of extrapolating too much from s 48C are exacerbated by the fact that the s 48C terms are primarily used in the offence-creating s 48E. The considerations in a criminal context would differ from those contemplated by s 48O.

On balance, we believe that s 48C does not add much to the analysis of s 48O, which needs to proceed as an exercise of statutory construction on its own terms.

[94] *Halsbury's Laws of Singapore* vol 18 (Singapore: Butterworths Asia, 1998) at [240.399] and [240.404]. See also Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore*, 2nd ed (Singapore: Academy Publishing, 2016) at [09.041]: The type of damage must fall within the scope of protection of the statute. This is consistent with the position under English Law: see *Vibixa Ltd v Komori UK Ltd and others* [2006] WLR 2472 (CA, Eng) and *Wentworth v Wiltshire County Council* [1993] QB 654 (CA, Eng).

[95] The PDPA is not the only statute where such an approach is likely to be adopted. Another statutory tort that likely allows for damages outside of the common law heads of damages is the Protection from Harassment Act 2014 (2020 Rev Ed Sing) ("POHA"). s 11 of the POHA creates a private right of action and allows for damages to be awarded when ss 3, 4, 5 or 7 of the POHA are contravened. s 3 (which relates to the intentional causing of harassment, alarm or distress), section 4 (which relates to harassment, alarm or distress generally) and s 7 (which relates to unlawful stalking) all envisage

Accordingly, taking the Court of Appeal's approach in *Bellingham CA* as a starting point, we propose to, in the rest of this section, conduct an examination of the intended protection accorded by s 48O. In so doing, we will canvas the following points for consideration:

(a) Privacy is merely one of several interests that the PDPA seeks to protect. Whether Singapore recognises a general right to privacy should therefore not be a conclusive determinant of the interpretation of "loss or damage".
(b) The word "directly" (contained in the *chapeau* of s 48O), which we have already shown is crucial in delineating the proper meaning of persons, can do double duty as the central mechanism to limit the types of actionable losses under s 48O and to suggest a framework for identifying these types of actionable losses.
(c) Using such a framework, reputational loss is a possible actionable type of loss under s 48O for individuals.

A. *A short detour to privacy*

Before moving further, it is apposite to first address the role of privacy, both in relation to the PDPA broadly and to the interpretation of "loss or damage" under s 48O. We take the view that privacy is simply one of the many interests that the PDPA seeks to protect and that fixation with the general "right to privacy" is a red herring in the discussion of the "loss" issue. The role of privacy, in the core sense of "keeping something private", is surely pertinent to the PDPA. It is inherently related to the idea of personal data *protection;* specifically to protect against unauthorised access (knowledge) or disclosure. It is thus no surprise that many foreign data protection regimes, in jurisdictions where the right already exists, explicitly premise their data protection regimes on the objective of protecting privacy rights. It is also no surprise that all the courts throughout the *Bellingham* litigation alluded to the role of privacy in relation to Singapore's PDPA. Most significantly, the *Bellingham HC* court took the view that foreign jurisdictions which award damages for emotional distress do so because they are underpinned by a fundamental right to privacy. In contrast, because Singapore does not have a fundamental right to privacy, these foreign jurisdictions could, in the High Court's view, be distinguished with the result that no damages for emotional distress ought to be recoverable. The High Court's view, insofar as it related to damages for emotional distress under s 48O, has since, of course, been

situations where the victim is caused harassment, alarm or distress. The right of private action for the contravention of these provisions would only be meaningful if the victim could be compensated for the very harm that the contraventions (in their stated elements) are *expected* to cause. During the Second Reading of the Protection from Harassment Bill, the Minister confirmed that there was no prohibition against awarding damages for emotional distress in an action based on the statutory tort under the POHA (*Singapore Parliamentary Debates, Official Report* (13 March 2014) vol 91 (Mr K Shanmugam, Minister for Law)). The Minister's statement is not conclusive on its own but is, as always, a strong indicator of Parliament's intent. For our purposes, the important takeaway is the express acknowledgment in Parliament that, when Parliament creates a statutory tort, it does not constrain the damages recoverable to common law heads of damage.

overridden by *Bellingham CA*. However, the residual question is whether the High Court's rather all-or-nothing approach towards privacy should inform our analysis of s 48O. That all-or-nothing approach appears to hold that if privacy is not a fundamental right, it is automatically disqualified as an interest or value, the harming of which can give rise to compensation in the context of a statutory tort.

We agree that privacy is not a fundamental right in Singapore[96] and further take the view that Parliament would not have, simply by enacting the PDPA, created such a general right to privacy in Singapore. In fact, the PDPA is likely not founded upon any general notions of privacy.[97]

However, it is our considered view that precisely because the PDPA is *not* founded on privacy, the interpretation of "loss or damage" under s 48O should *not* be dispositively determined by privacy concerns – whether to *include* certain types of "loss or damage" or to *exclude* them. Instead, the authors propose a framework to determine the types of "loss or damage" that should be encompassed within the scope of s 48O. This is a framework that will include privacy concerns where they are relevant, and will not be especially inclined or disinclined towards a type of "loss or damage" simply because it is associated with the right to privacy in other jurisdictions.

B. *A Roadmap for Additional Types of "loss or damage" under s 48O*

Ultimately, the appropriate inquiry (as deployed by the court in *Bellingham CA*) is whether the type of loss is what one would expect to be suffered as a result of misuse of personal data and whether interpreting "loss or damage" to include such loss is consistent with both the general purpose of the PDPA and the specific purpose of s 48O.

As the dust settles, it is clear that after *Bellingham CA*, the recognised types of "loss or damage" under s 48O are not limited to the traditional common law heads of damages. *Bellingham CA* was a good opportunity to consider and eventually recognise emotional distress as one such category of loss that could fall within "loss or damage". Moving forward, one might consider if there are any further categories of loss outside of the traditional common law heads of damages that could similarly fall within "loss or damage" under s 48O. While this may initially appear to open the door to multiple new categories of loss, a systematic analysis will show that such fears are not likely to materialise.

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[96] This is a fairly uncontroversial proposition given the absence of any constitutional provisions suggesting that privacy considerations are seen to be fundamental rights in Singapore.

[97] On the contrary, the general purpose of the PDPA (as set out in s 3 of the PDPA) envisages a balancing approach that takes into account both the right of individuals to protect their personal data and the need of organisations to collect, use or disclose personal data for purposes that a reasonable person would consider appropriate. See Simon Chesterman ed, *From Privacy to Data Protection: Privacy and Sovereignty in an Interconnected World*, 2nd ed (Singapore: Academy Publishing, 2018): It has in fact been observed that such explicit balancing of the rights of individuals and the "needs" of organisations is hard to reconcile with a rights-based approach to privacy; it is better understood as a pragmatic attempt to regulate the flow of information, moderated by the touchstone of reasonableness.

We propose that a useful method for this analysis is to envision the *typical victims* when a PDPA obligation is breached and the *typical harms* such victims are likely to suffer.[98] We further propose that a useful framework from which to derive such typical victims and typical harms is to start with the two main types of scenarios envisaged in the PDPA, which we have earlier dubbed the Protection of Data Scenarios and the Protection of Data-Subject Scenarios.

As previously explained, in Protection of Data Scenarios, there are two main types of potential victims of a contravention: (i) the individuals who are data subjects ("Type A" victims); and (ii) the organisations whose observance of their own obligations under the PDPA are thwarted by the misactions of other organisations ("Type B" victims).

Similarly, as also previously explained, in Protection of Data Subject Scenarios, there are two main types of potential victims of a contravention: (i) the persons who are contacted by a sender of a contravening solicitation ("Type C" victims); and (ii) senders who find themselves in breach of the PDPA because of their reliance on checkers who had not themselves complied with the PDPA ("Type D" victims).

The *typical harms* to Type B and Type D victims are fairly easy to envisage. They will usually comprise economic and financial consequences, such as legal liability to the data-subject, penalties imposed on them by the Data Comptroller, and loss of commerce or value from any public fall-out. Virtually all of these harms would already be encompassed in the non-controversial category of pecuniary loss.[99] It is unlikely that any further major categories of "loss or damage" can be claimed to be directly suffered by Type B and Type D victims.

The *typical harms* to Type C victims are also fairly easy to envisage. They will usually be of two types. First, and most obviously, a Type C victim may suffer harassment, alarm or distress from being contacted by a stranger to whom they had not confided their contact details. To the extent that their reaction falls within the conception of emotional distress that the Court of Appeal endorsed in *Bellingham CA*, such loss of damage would and should be recoverable. Second, a Type C victim may be wrongfully caused to make a purchase or take some other action to their financial detriment. Such loss or harm would be encompassed in the non-controversial category of pecuniary loss and would, in theory, be recoverable subject always to the plaintiff showing that the particular wrongful purchase or financial detriment flowed directly from the breach.[100]

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[98] This is, in our view, yet another aspect of giving effect to the s 48O requirement that the loss or damage flow "directly" from the breach. We acknowledge that this method is open to the criticism that it might conflate correlation with causation. We have attempted to ameliorate these concerns by illustrating our thinking with concrete scenarios where the causal links between breach and harm are spelt out so that the direct flow can be seen.

[99] For our analysis regarding whether Type B or Type D victims that are non-human entities can claim for standalone reputational harm apart from pecuniary loss, see footnote 116. At this juncture, we would merely reiterate that for the typical Type B or Type D victim engaged in the collection, retention and/or use of data for business purposes, the typical harm is the justified ire of the data subject or the recipient of a wrongful marketing solicitation and the resultant loss of business or incurring of legal liability. To the extent that this kind of loss entails reputational harm to the Type B or Type D victim, it nevertheless typically manifests itself as pecuniary loss arising from reputational harm.

[100] In our view, this type of loss or damage by a Type C victim may be easy to envisage as a *typical harm* for the purposes of our inquiry, but could be quite difficult, on a case-by-case basis, to establish as directly

This leaves Type A victims. These are the data subjects and are also the most common class of victims likely to bring suit because they will often have a strong personal interest in the breach of obligations pertaining to information about them. The framework for analysing the *typical harms* that might be suffered by this category of victims is complicated by three factors: (i) the nature of the information involved; (ii) the action(s) which the breaching party took *vis-a-vis* that information; and (iii) the actions and reactions of third parties as a direct result of (ii). Broadly speaking, information about a data subject can be flattering, negative or neutrally informative. The breaching party may wrongfully disclose or use the information. Where the breaching party discloses the information, others may act or react in ways that cause loss or harm to the data subject. The possible combinations of outcomes and the *typical harm*, if any, that may be experienced is discussed below by using some iconic examples.[101]

First, we consider the case of the hapless doctor: a medical professional carelessly discloses the news of a positive pregnancy test before the pregnant party is ready to share the information with her partner. Here, the information would typically be considered positive or flattering, the breach would consist of disclosure and the normal reaction of third parties would be positive or neutral.[102] The *typical harms* suffered by the Type A victim in such cases would include annoyance or unhappiness at the early disclosure and the inability to time the disclosure. The former may be recoverable if it rises to the level of emotional distress. The latter is not recoverable because it is predicated on a mere loss of control of the information, which (as discussed earlier) must rightly be considered as the breach itself and not loss or damage flowing from the breach.[103]

Next, we consider the case of the opportunistic influencer. Here, there again is positive or flattering information, this time about a celebrity or an important person and their lifestyle or behaviour. The breacher uses the information for financial gain or, by their disclosure, allows a third party to use the information for financial gain. They may do this by selling information to a tabloid or using the information to endorse a product that the celebrity uses. At first blush, it may appear that the data subject has a claim to the financial gain arising from the use of PDPA-protected information about them. However, on closer analysis, the data subject has not suffered any recoverable loss or harm arising from the opportunistic use of their information by these other persons. In both cases, the data subject is still free to themselves exploit their own information; any diminution in value would be

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flowing from a PDPA breach. There will be many other factors, such as the persuasiveness of the marketer, the attractiveness of the product and the truth or otherwise of the marketer's representations, that contribute to the plaintiff entering into the impugned transaction. Courts will therefore still have ample room to dismiss a claim based on the "directly" requirement.

[101] The examples/scenarios by no means cover all the possible combinations. However, they are easily recognisable and capture the gist of some tentpole combinations, from which the implications for similar cases can be extrapolated. Together, these iconic examples (and their close analogues) cover, in our view, most of the more common consequences of a PDPA breach.

[102] It is possible that there are circumstances under which the partner may not wish the pregnancy. We would characterise that as a case of negative or unflattering information and analyse it accordingly.

[103] A similar analysis would usually apply to disclosure (without use) of neutrally informative data.

due to mere loss of control over the timing of disclosure or use and would not be recoverable.[104]

From these first two examples, we can generalise that where the data is not negative *vis-a-vis* the data subject and the breach consists of mere disclosure or use that is merely beneficial to the breacher or a third party (and not harmful to the data subject), no new categories of loss (beyond the acknowledged categories of pecuniary loss and emotional distress) need be introduced to deal with these sorts of cases.[105]

Third, we consider the case of the dangerous thug. Here, there is seemingly neutral but informative data about the data subject, from which the victim's address, actions or interests can be deduced. The breacher uses (or by their breach facilitates a third party to use) the information to harm the data subject's person or property. The *typical* harms suffered by such a victim would include bodily injury, property damage and emotional distress.

Finally, we consider the case of the harmful gossip and their first cousin the sly blackmailer. Here, the information casts the data subject in a negative light. The harmful gossip discloses the information with the effect that third parties are negatively disposed towards the data subject. The *typical harms* suffered would be emotional distress and loss of reputation. Where the negative information concerns the data subject's business, there may also be pecuniary loss. The sly blackmailer uses the threat of disclosure to extort financial benefit. The *typical harms* suffered would be emotional distress and the financial payment.

In sum, using our systematic framework, we confirm that the door left open by *Bellingham CA* is highly unlikely to allow in any major new categories of "loss or damage" because the *typical harms* likely to be suffered by *typical victims* in the event of a breach of the PDPA are already covered by the recognised categories. The only significant additional category is loss of reputation. In our view, as a matter of logic, it is quite likely that a Type A victim will suffer loss of reputation should the breach consist of the disclosure of negative information about them. We therefore proceed to consider whether there are any legal impediments to including loss of reputation as a potential head of recovery under s 48O.[106]

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[104] A similar analysis would usually apply to the benign use of neutrally informative data.

[105] In other words, the authors do not believe that the typical harms arising from a PDPA breach will engage the additional category of wrongful gain damages, over and above the category of pecuniary losses.

[106] While much of our analysis in the next section is relevant to reputational harm generally, for reasons explained in footnote 116, the issue of whether a non-human entity can suffer standalone reputational harm apart from pecuniary losses is complex and beyond the scope of this article.

Further, this class of non-human entities that directly suffer reputational harm is not likely to be large. Except for the unusual case of corporate alter egos discussed earlier, non-human entities cannot be Type A victims (the category most likely to suffer reputational harm) because, under the PDPA, data subjects can only be individuals. Non-human Type B and Type D victims might suffer direct reputational harm if it became widely known that their services had been affected by a PDPA breach. We think this will not happen often (even though the few instances when it does happen can be attention-grabbing). Rather, in most cases, the knowledge of the breach and the attendant reputational taint, if any, would be contained within the circle of affected clients and customers, where the better approach, as previously explained, is to view the Type B or Type D victim's harm through the lens of loss of business. Even where the breach became widely known, the facts would have to be carefully scrutinised to determine whether the reputational taint flowed from the breach *per se* or from the victim's poor handling of the breach.

C. *Loss of reputation*

The factual conclusion that loss of reputation is a typical harm that can flow directly from a PDPA breach and should therefore be recoverable under s 48O also has sufficient legal basis, in our view. Specifically:

(a) The governing authority responsible for the administration of the PDPA has already recognised that loss of reputation is a type of harm likely to be suffered by data subjects harmed by contraventions of PDPA obligations;
(b) Foreign precedent has recognised reputational harm as a type of actionable loss for contravention of data protection obligations; and
(c) Potential objections against recognising reputational harm as a standalone actionable loss under s 48O due to overlap with other remedies can be addressed.

First, there is ample evidence that the Personal Data Protection Commission ("PDPC"),[107] which is the governing authority administering the PDPA, regards loss of reputation as a type of harm likely to eventuate from contraventions of obligations under the PDPA. The PDPC has pointed out in its "Guide on Managing and Notifying Data Breaches under the Personal Data Protection Act" (the "Guide") that data breaches may result in harm to physical safety, psychological or emotional harm, discrimination, identity theft or fraud, loss of business or employment opportunities, significant financial loss, and damage to reputation or relationships.[108] In the very same Guide, when defining significant harm (which is a term used for the purposes of several PDPA provisions), the PDPC stated that "significant harm could include physical, psychological, emotional, economic and financial harm, as well as harm to reputation and other forms of harms that a reasonable person would identify as a possible outcome of a data breach."[109]

The PDPC has made similar acknowledgments in its jurisprudence. In *Credit Counselling Singapore*,[110] the Commission examined a Canadian case which fell under the Canadian Personal Information Protection Act regime, where the Information and Privacy Commissioner of Alberta observed that the disclosing of personal data to an unauthorised third-party debt settlement agency had risked significant harm to the data subject. The PDPC opined that "[d]isclosure of an individual's indebtedness to other third parties could lead to harm to the individual because it could result in social stigma, discrimination or tarnish his reputation" and that

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Given the above, our analysis in the next section will thus focus primarily on standalone reputational harm suffered by individuals who are Type C victims.

[107] PDPA, *supra* note 2, s 5(2): The Personal Data Protection Commission is responsible for the administration of the PDPA.

[108] Personal Data Protection Commission, "Guide on Managing and Notifying Data Breaches under the Personal Data Protection Act" <https://www.pdpc.gov.sg/-/media/Files/PDPC/PDF-Files/Other-Guides/Guide-on-Managing-and-Notifying-Data-Breaches-under-the-PDPA-15-Mar-2021.pdf> (15 March 2021) at p 16.

[109] *Ibid* at p 23.

[110] [2017] SGPDPC 18.

"[t]hese are real possibilities that can affect a person's life."[111] It is also noteworthy that before the case went up to the PDPC, the Commissioner had issued directions to the parties in the case, and in doing so considered that information about an individual's adverse financial condition could cause "serious reputational damage".[112]

Second, the UK has already acknowledged that reputational harm is a type of actionable loss for the contravention of personal data protection obligations. In *Aven v Orbis* ("*Aven*"),[113] the court held that as a matter of principle, compensation can be awarded for reputational harm caused by a breach of the UK Data Protection Act ("DPA").[114] The court built on the authority of *Vidal-Hall v Google Inc* where the Court of Appeal held that compensation is recoverable for a contravention of the DPA even if it does not cause material damage or only causes distress.[115] Consequently, Warbey J in *Aven* took the view that if damage is indeed not limited to material loss, it is difficult to exclude reputational harm as an actionable loss as a matter of principle.

Finally, we address several potential objections to recognising loss of reputation as a standalone head of loss actionable under s 48O.

One potential objection might be that the common law action for defamation already exists to protect reputational interests and there is no need to duplicate a remedy under s 48O. We think, however, that there is no duplication because there is no complete overlap between the wrongs covered by defamation and those for which Parliament sought to provide redress under s 48O. Defamation is primarily concerned with false and unjustifiable statements intentionally made that lower the reputation of the subject. The PDPA is primarily concerned with true information which the data subject has a right to keep from the public eye and that typically enters the public domain as a result of carelessness. The elements of the two torts are thus quite different, and a defamation suit is not a substitute for the redress intended under s 48O. The effect on the subject is likely, of course, to be similar, and defamation law may well be instructive in determining the scope and level of compensation but this should be distinguished from the instance where one cause of action makes another redundant.

A second potential objection might be that any loss or damage arising from loss of reputation can be subsumed within damages for pecuniary losses and for emotional distress already recoverable under s 48O. One may argue that if the loss in reputation has led to some sort of financial loss, that can easily be framed in terms of pecuniary loss; and if the loss in reputation has caused severe emotional distress to the plaintiff, damages for emotional distress are, post-*Bellingham CA*, also readily available. We think this objection can be countered, at least in the case of individuals.[116]

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[111] *Ibid* at [19].

[112] *Ibid* at [36(a)].

[113] [2020] EWHC 1812 (QB, Eng).

[114] Data Protection Act 2018 (c 12) (UK).

[115] *Vidal-Hall*, *supra* note 31.

[116] We acknowledge that these objections have greater weight when considering non-human entities which suffer loss or harm directly from a PDPA breach. For such potential claimants, while it is possible to conceive in the abstract of their suffering reputational harm that is separable from pecuniary harm, it may be difficult to demonstrate the existence of such reputational harm without pointing to some

First, an award of damages for injury to reputation is, fundamentally, quantified differently from an award of damages for pecuniary loss. In *Cassell & Co Ltd v Broome* ("*Cassell*"),[117] the House of Lords explained that where the injury to a plaintiff is in the form of mental distress or injury to reputation, it is almost impossible to equate the damage to a sum of money.[118] It cited, with approval, Windeyer J in *Uren v John Fairfax & Sons*:[119]

> It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public, and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.

Pecuniary loss is thus not the appropriate head of damage to address a breach of the PDPA that results in loss of reputation.

Secondly, injury to reputation similarly stands apart from emotional distress as a head of loss. While the authors acknowledge that reputational harm would often be accompanied by some form of emotional distress suffered by the plaintiff, these are fundamentally two different types of harm. Simply put, loss of reputation deals with society's feelings towards the claimant, over and above the claimant's own

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pecuniary or material loss. It may even be argued that, especially for non-human entities engaging in commercial activities, reputational value cannot be extricated from economic value. Economic concepts such as brand equity, brand value and goodwill are useful in helping us to visualise the intangible asset that is harmed when a non-human entity's reputation is damaged. However, when the time comes to concretely identify its value, one usually reverts to quantitative measures (*eg*, "How much is a customer prepared to pay for the same item or service provided by X vs Y?"; "How much, over and above the value of its tangible assets, is an acquirer prepared to pay when acquiring an entity?"). The authors do note that this point has less force when applied to non-profit organisations for which the value of reputation or brand may not be adequately captured in purely economic terms. For this class of litigants, there may be stronger arguments that they can claim for standalone reputational harm.

We further acknowledge the existence of a school of thought that reputational loss is nothing more than emotional distress and that, because non-human entities have no feelings, they cannot ever suffer reputational loss. See Andrew Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs*, 4th ed (Oxford, United Kingdom: Oxford University Press, 2019) at 268, n(1) [Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs*] and Matthew Collins, *Collins on Defamation* (Oxford, United Kingdom: Oxford University Press, 2014) at 2.10.

These might have been some considerations that led to the passage of s 1(2) of the Defamation Act 2013 (c 26) (UK) under which harm to the reputation of an entity that trades for profit is only treated as recoverable for the purpose of the UK's serious harm test when such harm "has caused or is likely to cause that [entity] serious financial loss".

It is beyond the scope of this article to delve into whether such considerations will also inform the application of s 48O to non-human entities that suffer reputational harm. We content ourselves with repeating our earlier observation that pecuniary loss arising from reputational harm ought to be recoverable under s 48O and by focusing, in this section, on claimants that are individuals.

[117] [1972] 1 AC 1027 (HL, Eng) ("*Cassell*").

[118] *Ibid* at 1085.

[119] (1967) 117 CLR 115 at 150 (HC, Aust).

feelings.[120] A good example of this conceptual distinction can be seen in defamation law itself. In assessing general damages to be awarded in an action for defamation, the quantum must address three purposes. It must: (1) console the plaintiff for the injury to his feelings; (2) repair the harm to the plaintiff's reputation; and (3) vindicate the plaintiff's reputation.[121] The second and third of these purposes are not addressed by an award for emotional distress. A phlegmatic claimant whose reputation has been damaged by a PDPA breach but who sustains this harm without succumbing to emotion is nonetheless entitled, we argue, to compensation under s 48O for that loss of reputation, which should be considered separately as a matter of legal analysis.[122] Reputational loss should thus not be subsumed under emotional distress.

To sum up this part, there is legal basis for recognising reputational loss as a distinct type of damage that can be caused by a data breach. Further, some likely potential objections against so recognising reputational loss can be countered. We are therefore of the view that reputational loss is recoverable in a s 48O action and look forward to the courts doing so in an appropriate case.

VI. Summing Up

In conclusion, s 48O has always included the key to unlocking its own meaning in the form of the humble but crucial qualifier "directly". That qualifier allows the court to give "person" its ordinary legal meaning, while still ensuring that not every complainer is a valid complainant. Non-human plaintiffs whose loss and damage flow directly from the flouting of a PDPA obligation should be entitled to seek their remedy. That qualifier also allows the court to recognise non-pecuniary loss and damage without fearing the deluge from floodgates. The relevant control mechanism is not the type of loss or damage but the closeness of that loss or damage to the breach. In practice, the only major category of loss or damage that is not already recognised and that seems quite clearly to be implicated in some easily-imagined breaches of the PDPA appears to be reputational harm. However, as the court in *Bellingham CA* rightly pointed out, one should not close the door to other possibilities and this article has sought to provide some means for evaluating such possibilities should they be raised in the future.

[120] Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs*, *supra* note 116.

[121] *Arul Chandran v Chew Chin Aik Vikto*r [2001] 1 SLR(R) 86.

[122] It should be noted that mental distress *consequent* on loss of reputation is not clearly separated from the award for loss of reputation itself: see Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs*, *supra* note 116. In all other cases, however, damages for loss of reputation and damages for mental distress should be treated separately.

Annex A: All instances where "person" is used within the PDPA (pre-amendment)

Provision	Includes non-natural entities?
2.—(1) In this Act, unless the context otherwise requires — "authorised officer", in relation to the exercise of any power or performance of any function or duty under any provision of this Act, means a person to whom the exercise of that power or performance of that function or duty under that provision has been delegated under section 38 of the Info-communications Media Development Authority Act 2016;	Unclear
2.—(1) In this Act, unless the context otherwise requires — "Commission" means the person designated as the Personal Data Protection Commission under section 5 to be responsible for the administration of this Act; 5.—(1) The Info-communications Media Development Authority is designated as the Personal Data Protection Commission.	Yes; The Info-communications Media Development Authority, which is a non-natural entity, is the person designated as the Personal Data Protection Commission
2.—(1) In this Act, unless the context otherwise requires — "education institution" means an organisation that provides education, including instruction, training or teaching, whether by itself or in association or collaboration with, or by affiliation with, any other person;	Unclear but likely
8.—(3) In exercising any of the powers of enforcement under this Act, an authorised officer shall on demand produce to the person against whom he is acting the authority issued to him by the Commission.	Unclear but likely
20.—(1) For the purposes of sections 14(1)(*a*) and 18(*b*), an organisation shall inform the individual of — (*c*) on request by the individual, the business contact information of a person who is able to answer on behalf of the organisation the individual's questions about the collection, use or disclosure of the personal data.	Unclear

Provision	Includes non-natural entities?
30.—(3) A District Court shall have jurisdiction to enforce any direction in accordance with subsection (2) regardless of the monetary amount involved and may, for the purpose of enforcing such direction, make any order — (*b*) to require any person to do anything to remedy, mitigate or eliminate any effects arising from — (i) anything done which ought not, under the direction, to have been done; or (ii) anything not done which ought, under the direction, to have been done, which would not have occurred had the direction been complied with.	Unclear but likely
32.—(1) Any person who suffers loss or damage directly as a result of a contravention of any provision in Part IV, V or VI by an organisation shall have a right of action for relief in civil proceedings in a court.	Unclear
36.—(1) In this Part, unless the context otherwise requires — "sender", in relation to a message, means a person — (*a*) who sends the message, causes the message to be sent, or authorises the sending of the message; or (*b*) who makes a voice call containing the message, causes a voice call containing the message to be made, or authorises the making of a voice call containing the message;	Unclear but likely for sub-clause (a)
36.—(1) In this Part, unless the context otherwise requires — "time share accommodation" means any living accommodation, in Singapore or elsewhere, used or intended to be used (wholly or partly) for leisure purposes by a class of persons all of whom have rights to use, or participate in arrangements under which they may use, that accommodation or accommodation within a pool of accommodation to which that accommodation belongs;	Unclear

Provision	**Includes non-natural entities?**
37.—(3) Subject to subsection (4), a person who authorises another person to offer, advertise or promote the first person's goods, services, land, interest or opportunity shall be deemed to have authorised the sending of any message sent by the second person that offers, advertises or promotes that first person's goods, services, land, interest or opportunity. —(4) For the purposes of subsection (3), a person who takes reasonable steps to stop the sending of any message referred to in that subsection shall be deemed not to have authorised the sending of the message.	Likely yes for the first "person"; Unclear for the other "person"
39.—(3) The Commission may authorise another person to maintain any register, on its behalf, subject to such conditions or restrictions as the Commission may think fit.	Unclear but likely
40.—(2) Any person may apply to the Commission, in the form and manner required by the Commission, to confirm whether any Singapore telephone number is listed in a register.	Unclear
43.—(1) No person shall, on or after the prescribed date, send a specified message addressed to a Singapore telephone number unless the person had within the prescribed duration (which may include a duration before the prescribed date) before sending the specified message [complied with certain obligations].	Unclear
44.—(1) No person shall, on or after the prescribed date, send a specified message addressed to a Singapore telephone number unless — (*a*) the specified message includes clear and accurate information identifying the individual or organisation who sent or authorised the sending of the specified message; (*b*) the specified message includes clear and accurate information about how the recipient can readily contact that individual or organisation; (*c*) the specified message includes such information and complies with such conditions as is or are specified in the regulations, if any; and (*d*) the information included in the specified message in compliance with this subsection is reasonably likely to be valid for at least 30 days after the message is sent. (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000.	Likely. Sender of the message is described first as a "person" and then subsequently referred to as "individual or organisation"; "organisation" would be redundant if only natural persons can be senders.

Provision	Includes non-natural entities?
45.—(1) A person who, on or after the prescribed date, makes a voice call containing a specified message or causes a voice call containing a specified message to be made or authorises the making of a voice call containing a specified message, addressed to a Singapore telephone number from a telephone number or facsimile number, shall not do any of the following:	Unclear
46.—(1) A person shall not, as a condition for supplying goods, services, land, interest or opportunity, require a subscriber or user of a Singapore telephone number to give consent for the sending of a specified message to that Singapore telephone number or any other Singapore telephone number beyond what is reasonable to provide the goods, services, land, interest or opportunity to that subscriber or user, and any consent given in such circumstance is not validly given.	Unclear but likely
46.—(2) If a person obtains or attempts to obtain consent for sending a specified message to a Singapore telephone number — (*a*) by providing false or misleading information with respect to the sending of the specified message; or (*b*) by using deceptive or misleading practices, any consent given in such circumstances is not validly given.	Unclear
47.—(1) On giving notice, a subscriber or user of a Singapore telephone number may at any time withdraw any consent given to a person for the sending of any specified message to that Singapore telephone number. (2) A person shall not prohibit a subscriber or user of a Singapore telephone number from withdrawing his consent to the sending of a specified message to that Singapore telephone number, but this section shall not affect any legal consequences arising from such withdrawal. (3) If a subscriber or user of a Singapore telephone number gives notice withdrawing consent given to a person for the sending of any specified message to that Singapore telephone number, the person shall cease (and cause its agent to cease) sending any specified message to that Singapore telephone number after the expiry of the prescribed period.	Yes; the phrase "cause its agent to cease" tagged to the use of the word "person" requires that "person" includes non-natural entities
51.—(1) A person shall be guilty of an offence if he makes a request under section 21 or 22, as the case may be, to obtain access to or to change the personal data about another individual without the authority of that individual.	Unclear

Provision	Includes non-natural entities?
51.—(4) An organisation or person that commits an offence under subsection (3)(*a*) is liable — (*a*) in the case of an individual, to a fine not exceeding $5,000; and (*b*) in any other case, to a fine not exceeding $50,000. 51.—(5) An organisation or person that commits an offence under subsection (3)(*b*) or (*c*) is liable — (*a*) in the case of an individual, to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 12 months or to both; and (*b*) in any other case, to a fine not exceeding $100,000.	Unclear
52.—(5) In this section — "officer" — (*a*) in relation to a body corporate, means any director, partner, member of the committee of management, chief executive, manager, secretary or other similar officer of the body corporate and includes any person purporting to act in any such capacity; or (*b*) in relation to an unincorporated association (other than a partnership), means the president, the secretary, or any member of the committee of the unincorporated association, or any person holding a position analogous to that of president, secretary or member of such a committee and includes any person purporting to act in any such capacity; "partner" includes a person purporting to act as a partner.	No
53.—(1) Any act done or conduct engaged in by a person in the course of his employment (referred to in this section as the employee) shall be treated for the purposes of this Act as done or engaged in by his employer as well as by him, whether or not it was done or engaged in with the employer's knowledge or approval. (2) In any proceedings for an offence under this Act brought against any person in respect of an act or conduct alleged to have been done or engaged in, as the case may be, by an employee of that person, it is a defence for that person to prove that he took such steps as were practicable to prevent the employee from doing the act or engaging in the conduct, or from doing or engaging in, in the course of his employment, acts or conduct, as the case may be, of that description.	Unclear

Provision	Includes non-natural entities?
55.—(1) The Commission may, in its discretion, compound any offence under this Act (except Part IX) which is prescribed as a compoundable offence by collecting from a person reasonably suspected of having committed the offence a sum not exceeding the lower of the following sums: … (2) The Commission may, in its discretion, compound any offence under Part IX which is prescribed as a compoundable offence by collecting from a person reasonably suspected of having committed the offence a sum not exceeding $1,000.	Unclear
59.—(1) Subject to subsection (5), every specified person shall preserve, and aid in the preservation of, secrecy with regard to — (*a*) any personal data an organisation would be required or authorised to refuse to disclose if it were contained in personal data requested under section 21; (*b*) whether information exists, if an organisation in refusing to provide access under section 21 does not indicate whether the information exists; (*c*) all matters that have been identified as confidential under subsection (3); and (*d*) all matters relating to the identity of persons furnishing information to the Commission, that may come to his knowledge in the performance of his functions and discharge of his duties under this Act and shall not communicate any such matter to any person, except in so far as such communication — … (7) In this section, "specified person" means a person who is or has been — (*a*) a member or an officer of a relevant body; (*aa*) a person authorised or appointed by a relevant body to perform the relevant body's functions or duties, or exercise the relevant body's powers, under this Act or any other written law; (*b*) a member of a committee of a relevant body or any person authorised, appointed or employed to assist the relevant body; or (*c*) an inspector or a person authorised, appointed or employed to assist an inspector.	Unclear. Except for "person" in clause: "shall not communicate...to any person", where it is likely to include non-human entities Unclear but likely since a relevant "body" can presumably appoint another body to exercise its powers

Provision	Includes non-natural entities?
60.—No liability shall be incurred by — (*a*) any member or officer of a relevant body; (*b*) any person authorised, appointed or employed to assist a relevant body; (*c*) any person who is on secondment or attachment to a relevant body; (*d*) any person authorised or appointed by a relevant body to exercise the relevant body's powers, perform the relevant body's functions or discharge the relevant body's duties or to assist the relevant body in the exercise of its powers, the performance of its functions or the discharge of its duties under this Act or any other written law; or (*e*) any inspector or any person authorised, appointed or employed to assist him in connection with any function or duty of the inspector under this Act,	Unclear but likely in section 60(d) for same reasons as immediately above
62.—The Commission may, with the approval of the Minister, by order published in the Gazette, exempt any person or organisation or any class of persons or organisations from all or any of the provisions of this Act, subject to such terms or conditions as may be specified in the order.	Unclear
65.— (2) Without prejudice to the generality of subsection (1), the Commission may, with the approval of the Minister, make regulations for or with respect to all or any of the following matters: (*c*) the classes of persons who may act under this Act for minors, deceased persons or any other individuals who lack capacity to act under this Act and regulating the manner in which, and the extent to which, any rights or powers of individuals under this Act may be exercised on their behalf;	No

Provision	Includes non-natural entities?
Second Schedule 1. An organisation may collect personal data about an individual without the consent of the individual or from a source other than the individual in any of the following circumstances: (*j*) the collection is necessary for the provision of legal services by the organisation to another person or for the organisation to obtain legal services;	Likely yes, as legal services are provided not only to natural persons but also non-natural entities such as companies
Third Schedule 2. Paragraph 1(*i*) shall not apply unless — (*c*) the personal data will not be used to contact persons to ask them to participate in the research; and	Unclear
Seventh Schedule 2A.—(4) The Secretary and any person authorised under sub-paragraph (5) may attend any meeting of an Appeal Committee to carry out their functions under this Act. 2A.—(5) The Secretary may be assisted in carrying out the Secretary's functions under this Act by persons authorised by the Secretary.	Unclear
Ninth Schedule 1.—(4) The power under this paragraph to require an organisation to produce a document includes the power — (*a*) if the document is produced — (i) to take copies of it or extracts from it; and (ii) to require such organisation, or any person who is a present or past officer of the organisation, or is or was at any time employed by the organisation, to provide an explanation of the document; or (*b*) if the document is not produced, to require such organisation or person to state, to the best of his knowledge and belief, where it is.	Unclear

Provision	Includes non-natural entities?
Ninth Schedule 2.—(5) An inspector or a person assisting the inspector entering any premises under this paragraph may — (*a*) take with him such equipment as appears to him to be necessary; (*b*) require any person on the premises — (i) to produce any document which he considers relates to any matter relevant to the investigation; and (ii) if the document is produced, to provide an explanation of it; (*c*) require any person to state, to the best of the person's knowledge and belief, where any such document is to be found;	No
Ninth Schedule 2.—(13) In this paragraph — "named officer" means an inspector named in the warrant; "occupier", in relation to any premises, means a person whom the inspector reasonably believes is the occupier of those premises.	Unclear

Annex B: Legislative History Comparison

Provision creating possible claim/description of possible claim	Obligation is directly owed to individual [X] or legal entity [Y] or both [XY]	Pre-amendment	Post-amendment
Section 13 -- An organisation shall not, on or after the appointed day, collect, use or disclose personal data about an individual unless —	X	Yes	Yes
Section 17(1) -- An organisation may collect personal data about an individual, without consent or from a source other than the individual, only in the circumstances and subject to any condition in the Second Schedule. Section 17(2) -- An organisation may use personal data about an individual, without the consent of the individual, only in the circumstances and subject to any condition in the Third Schedule. Section 17(3) -- An organisation may disclose personal data about an individual, without the consent of the individual, only in the circumstances and subject to any condition in the Fourth Schedule.	X	Yes	Yes
Section 19(b) -- Notwithstanding the other provisions in this Part, an organisation may use personal data about an individual collected before the appointed day for the purposes for which the personal data was collected unless the individual, whether before, on or after the appointed day, has otherwise indicated to the organisation that he does not consent to the use of the personal data.	X	Yes	Yes
Section 20(2) -- an organisation must give another organisation enough information about the purpose of the collection to allow other organisation to decide whether disclosure would be in accordance with act.	Y	Yes	Yes
Section 21 -- Subject to subsections (2), (3) and (4), on request of an individual, an organisation shall, as soon as reasonably possible, provide the individual with personal data about that individual, *etc*.	X	Yes	Yes

<u>Provision creating possible claim/description of possible claim</u>	<u>Obligation is directly owed to individual [X] or legal entity [Y] or both [XY]</u>	**Pre-amendment**	**Post-amendment**
Section 22 -- An individual may request an organisation to correct an error or omission in the personal data about the individual that is in the possession or under the control of the organisation.	X	Yes	Yes
Section 22A -- organisation must preserve data that it refuses to provide to individual.	X	No	Yes
Section 23 -- An organisation shall make a reasonable effort to ensure that personal data collected by or on behalf of the organisation is accurate and complete, if the personal data …	X	Yes	Yes
Sections 24, 25 and 26 -- must protect, must cease to retain, must not transfer outside Singapore.	X	Yes	Yes
Section 26C -- must assess whether data breach is notifiable; a data intermediary must notify of possible data breach to organisation.	Y	No	Yes
Section 26D -- must notify Commission, must notify individual unless corrected the breach.	X	No	Yes
Section 26E -- organisation that is a data intermediary must notify a public agency without undue delay of the occurrence of a data breach.	Y	No	Yes
Division 3 of Part 9 -- contains provisions about unsolicited texts sent to a do not call "subscriber".	XY (on assumption that a DNC subscriber can include a corporate)	No	Yes
Part 9A -- contains provisions about unsolicited spams using address harvesting *etc*.	XY (on assumption that a spam victim can include a corporate)	No	Yes

Annex C: Breaches under s 48O(b) that can be committed by a non-human entity

Section	Description of Obligation	Can it be breached by a non-human entity?
43	Subject to section 48(2), a person must not send a specified message addressed to a Singapore telephone number unless the person has, at the time the person sends the specified message, valid confirmation that the Singapore telephone number is not listed in the relevant register.	Yes
43(A)	Failure of a checker who, for reward, supplies information regarding whether a number is listed in the relevant register.	Yes
44	Conditions that specified messages must comply with.	Yes
45	Requirement that specified voice messages must not conceal the calling line identity. Obligation is not just on the caller but on any person who authorises the call.	Usually No for the actual voice caller; Yes for the authoriser
46	Prohibition on unreasonably making the receipt of specified messages a condition of the supply of goods, services, land *etc*.	Yes
48B	Prohibition on sending message with a Singapore link to a dictionary-hacked or addressed-harvested number.	Yes, from definition of Singapore link in section 48A which expressly contemplates a corporate sender of the message – see sections 48A(2)(b) and (d)