

# LEGISLATION UPDATE

8 December 2014

## AMENDMENTS TO THE COMPANIES ACT –AMENDMENTS RELATING TO DIRECTORS

### INTRODUCTION

This article is the fourth and last in a series of legal updates relating to the amendments to the Singapore Companies Act (“**Act**”) to be effected by the Companies (Amendment) Act 2014 (“**Amendment Act**”).

Many of the amendments in the Amendment Act are expected to come into force by the end of 2014 and this Legal Update discusses the amendments and related issues in the following areas which pertain to directors:

- (a) shadow directors;
- (b) appointment of directors;
- (c) qualifications of directors;
- (d) disqualification of directors;
- (e) vacation of office and removal of directors;
- (f) payment of compensation for loss of office;
- (g) supervisory role of directors;
- (h) directors’ fiduciary duties;
- (i) disclosure of company information by nominee directors; and
- (j) indemnity for directors.

### SHADOW DIRECTORS

Sections 4(1) and 4(2) of the Act will be amended to clarify that a person who controls the majority of the directors of a company will be considered a director. The Ministry of Finance (“**MOF**”) also

clarified that a person who only controls a single director would not be deemed a director as it would be unrealistic to subject such a person to all the obligations and duties of a director.

MOF also noted that a separate definition of shadow director would not be necessary as the current definition of “director” in the Act already encompasses shadow directors.

### APPOINTMENT OF DIRECTORS

A new section 149B of the Act will be introduced to provide that a company may appoint a director by an ordinary resolution passed at a general meeting, subject to contrary provision(s) in the company’s constitution.

Section 170 of the Act (on the assignment of the office of director) will also be repealed. MOF noted that this section is obsolete as assignments of the office of director are not done in practice.

### QUALIFICATIONS OF DIRECTORS

Section 153 of the Act which provides for an age limit of 70 years for directors of public companies and subsidiaries of public companies will be repealed. MOF is of the view that it is best left to shareholders of such companies to decide whether to approve the appointment of a director and that it is not necessary to impose a maximum age limit for directors in the Act.

In relation to this, MOF is also of the view that it is not necessary to prescribe academic or professional qualifications for directors and has not made any changes to the Act in this respect.

MOF also considered whether to allow corporate directorships in Singapore and views such directorships as currently unnecessary, especially given the difficulties on how to hold corporate directors responsible and on how to determine who actually controls the company. No changes have been made to the Act in this respect.

### DISQUALIFICATION OF DIRECTORS

MOF indicates that the existing automatic disqualification regime for offences involving fraud or dishonesty will be retained. Under this regime, where a person is convicted (in Singapore or elsewhere) of an offence involving fraud or dishonesty punishable with imprisonment for three months or more, such person is automatically disqualified from acting as a director or taking part in the management of a company for a period of

five years, without any requirement for a disqualification order from the Singapore Courts.

Automatically disqualified directors who intend to act as company directors or take part in the management of a company within the five year period may then apply to the High Court for leave to do so. To provide guidance on the scope of offences involving fraud or dishonesty, a non-exhaustive list of offences will be made publicly available on ACRA's website.

A new section 155A of the Act will also be introduced, which provides for a five-year disqualification if a director was a director in at least three companies which were struck off by the Registrar within a five-year period. The five-year disqualification period starts after the last of the three companies were struck off although such disqualified directors may apply to the Court for leave to act as company directors or take part in the management of a company.

#### **VACATION OF OFFICE AND REMOVAL OF DIRECTORS**

A new section 145(4A) of the Act will be introduced. This sub-section provides that unless the articles of a company state otherwise, a director may resign by giving the company written notice of his resignation.

A new section 145(4B) of the Act will be introduced. This sub-section provides that subject to section 145(5) of the Act (the requirement to have at least one director ordinarily resident in Singapore) the effectiveness of a director's resignation shall not be conditional upon the company's acceptance.

The amended Act will also expressly provide that a private company may by ordinary resolution remove any director, subject to contrary provision(s) in the articles. This is provided for in the new section 152(9). This new sub-section also stipulates that the removal of a private company director by ordinary resolution will not be subject to any agreement between the director and the company.

MOF had consulted on the above issue in its latest round of consultations and agreed with respondents who cited the need for greater transparency, given that a company's constitution unlike private agreements can be inspected by the public. MOF also noted that in the interests of minimising contractual disputes and avoiding self-dealing, the right of shareholders to remove a director should not be taken away by any agreement with a director.

In its latest round of consultations, MOF also consulted on (i) whether private companies should be subject to a similar condition as specified under section 152(1) of the Act, in that the removal of a private company director appointed to represent the interests of a particular class of shareholders or debenture holders would not be effective until a successor had been appointed, and (ii) whether the requirement for special notice and the provisions granting the director the right to make representations under sections 152(2) to 152(4) of the Act should also apply to private companies.

In respect of these issues, MOF concluded that private companies should be afforded greater flexibility than public companies. As such, the section 152(1) restriction would not apply to private companies, but MOF noted that if board representation for a particular class of shareholders or debenture holders is required, the constitution of a private company may provide for it. The requirements under sections 152(2) to 152(4) of the Act will also be amended to clarify that these do not apply to private companies.

#### **PAYMENT OF COMPENSATION FOR LOSS OF OFFICE**

The amended Act will retain the section 168 requirement where shareholders will have to approve payment of compensation to directors for loss of office.

However, a new exception will be introduced where shareholders' approval will not be required in instances where the payment of compensation to an executive director for termination of employment is pursuant to an agreement between the company and the director, the amount of compensation does not exceed the total emoluments paid to such director in the past one year and disclosure is made to shareholders prior to the payment of such compensation. This exception will be introduced as new sections 168(1A) and (1B) of the Act.

The initial threshold proposed for this exception was that the amount of compensation does not exceed the director's base salary for the three years immediately preceding termination of employment. Instead, MOF proposed the use of "total emoluments" based on the following considerations: companies were already moving toward performance based compensation, the practical difficulties of defining base pay and a possible unintended consequence of companies increasing the base pay component. MOF had initially noted that "total emoluments" was already defined under section 169(2) of the Act, but following feedback that this definition did not include salary, will use the definition of

“emoluments” under section 4 of the Act instead. MOF also changed the threshold period from three years to one year in the interest of greater prudence.

In its latest round of consultations, MOF had also consulted on whether the above exception should only apply in instances where there is an agreement between the director and company. Subsequently, MOF decided to retain the position in the Amendment Act where payment of compensation must be pursuant to such an agreement. MOF notes that this is consistent with the position in jurisdictions such as the UK, Australia and Hong Kong.

In terms of disclosure to shareholders, MOF indicated that the mode of disclosure will be left to the company to determine and will not be prescribed in the Act. However, if disclosure is not made to shareholders, the amount received by the director shall be deemed to have been received by him in trust for the company. This is provided for under the new section 168(1B)(b) of the Act.

### **SUPERVISORY ROLE OF DIRECTORS**

Section 157A(1) of the Act will be amended to provide that the business of a company shall be managed by, or under the direction or supervision of the directors. The Act as is currently drafted does not expressly state that the business of the company is under the “supervision of” the directors. MOF is of the view that this amendment better reflects the powers and responsibilities of the board of directors. MOF noted that this amendment is not intended to reduce the duty of care expected of directors.

### **DIRECTORS’ FIDUCIARY DUTIES**

The prohibition under section 157(2) of the Act (which currently prohibits improper use of information acquired by virtue of an officer’s or agent’s position) will be extended to cover improper use by an officer or agent of his position to gain an advantage for himself, for any other person or to cause detriment to the company.

MOF also considered the issue of whether directors’ duties should be exhaustively codified and is of the view that this would not be desirable.

MOF also considered if a breach of the duties in section 157 of the Act should still render an officer or agent criminally liable. MOF concluded that the current position of criminal liability should be retained as a deterrent and to encourage better corporate governance. MOF also noted that the

introduction of a civil penalties regime was still an open issue.

### **DISCLOSURE OF COMPANY INFORMATION BY NOMINEE DIRECTORS**

The position under Section 158 of the Act will be liberalised such that the board of directors may allow the disclosure of company information whether by general or specific mandate, subject to the overarching consideration that there should not be any prejudice caused to the company.

The amended Act will also remove the current condition for disclosure under section 158(3)(a) which stipulates a declaration at a meeting of directors of the name, office or position of the person to whom the information is to be disclosed as well as the particulars of such information.

In respect of this, section 158(1) will be amended to delete any reference to the conditions for disclosure under section 158(3). The new section 158(1) will also stipulate that disclosure may be made “if such disclosure is not likely to prejudice the company and is made with the authorisation of the board of directors”.

The current section 158(3) will be deleted and a new section 158(3) will be introduced to clarify that an authorisation of the board may be in respect of disclosure of all or any class of information or only specific information as specified in the authorisation.

### **INDEMNITY FOR DIRECTORS**

#### **Third party indemnity**

The Act will be amended to allow a company to indemnify its officers against third party liability.

In this respect, the current section 172 of the Act will be repealed and new sections 172, 172A and 172B will be introduced. The new section 172 stipulates that provisions purporting to exempt any officer from liability in connection with any negligence, default, breach of duty or breach of trust in relation to the company will be void. The new section 172 also stipulates that companies may not indemnify officers against any liability except as permitted under the new sections 172A or 172B.

The new section 172B allows a company to indemnify a director against liability incurred by its officers in respect of third parties. The initial position was to allow companies to indemnify

directors only, but this was extended to officers of the company based on feedback received during consultation. MOF also indicated that this provision should come with qualifications and these are provided for under the new sections 172(B)(1)(a) and (b). These qualifications include that the indemnity cannot be provided for: payment of fines in criminal proceedings, payment of penalties in respect of regulatory non-compliance, defending criminal proceedings where the officer is convicted and defending civil proceedings brought by the company or a related company in which judgment is given against the officer.

The new 172A is similar to the current section 172(2)(a) and allows a company to purchase insurance against liability for its officers.

### **Indemnity against potential liability**

With the introduction of the new section 172, the amended Act will also introduce new exceptions to sections 162 and 163 which prohibit loans to directors and related persons. These new exceptions will be introduced as new sections 163A and 163B. The new exceptions allow a company to indemnify its directors against potential liability, subject to certain conditions and qualifications.

The new sections 163A and 163B allow a company to provide a director with a loan to meet expenditure incurred under the following circumstances:

- (a) in defending himself against any criminal or civil proceedings in connection with any alleged negligence, default, breach of duty or breach of trust by him in relation to the company;
- (b) in connection with an application for relief;
- (c) in defending himself against an investigation by a regulatory authority; or
- (d) in defending himself against any action to be taken by a regulatory authority.

MOF indicated that these new exceptions will only apply to loans and not quasi-loans, credit transactions, or related arrangements. This is consistent with the position in the UK. MOF also indicated that board or shareholders' approval will not be required for the provision of such loans as there are sufficient safeguards within the provisions to ensure that such loans are repaid to the company under prescribed circumstances (these include that the loan must be repaid to the company within 14 days under various scenarios where the proceedings become final).

### **CONCLUSION**

On the whole, these director related amendments to the Act can be seen as positive developments.

First, enhanced protections for directors have been introduced. These amendments include the new sections 172, 172A and 172B which allow a company to indemnify its officers against third party liability, the new sections 163A and 163B which allow a company to indemnify its directors against potential liability and the new sections 168(1A) and 168(1B) which allow for compensation to be paid to an executive director without shareholder approval, subject to certain terms and conditions.

Second, there is greater clarity as to the roles and duties of directors as well as to the mechanics for the appointment and removal of directors. This would include amendments such as those made to section 157A(1) in respect of the supervisory role of directors, those made to section 157(2) in respect of directors' fiduciary duties and new sections 145(4A), 145(4B) and 152(9) relating to the mechanics of a director's resignation and the removal of a director of a private company via ordinary resolution.

Third, certain restrictions which are no longer deemed necessary have been removed. This would include the removal of the age restriction of 70 years for directors of public companies and subsidiaries of public companies as well as the liberalised position under section 158 where the board of directors may allow the disclosure of company information by nominee directors provided that there is no prejudice caused to the company.

Finally, certain provisions which promote good corporate governance have been enhanced. For example, the new section 155A provides for a five-year disqualification period from acting as a director or taking part in the management of a company if such a person was a director in at least three companies which were struck off by the Registrar within a five-year period.

## REFERENCES

Please also refer to the other articles below which form part of a series of legal updates relating to the Amendment Act:

**Amendments to the Companies Act – Impact on Corporate Transactions**

**Amendments to the Companies Act – Power of Directors to Bind Companies**

**Amendments to the Companies Act - (1) Multiple-vote Shares and Non-voting Shares; (2) Electronic Register of Members**

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