

FAQS ON THE COMPANIES ACT 2016 (ACT 777)

BACKGROUND TO THE REVIEW PROCESS AND NEW MALAYSIAN COMPANIES ACT

1. When was the review process of the Companies Act initiated?

The structured review process of the Companies Act actively began in December 2003 when SSM established the Corporate Law Reform Committee (CLRC).

The CLRC was part of SSM's Strategic Direction initiatives formulated in 2003 to develop a dynamic and conducive regulatory environment for businesses in Malaysia.

2. What were the objectives for the establishment of CLRC?

SSM established the CLRC to spearhead the review of the Companies Act 1965 with the following main objectives:

- To create a legal and regulatory structure that will facilitate business; and
- To promote accountability and protection of corporate directors and members taking into account the interest of other stakeholders, in line with international standards.

3. Are there any other factors that were taken into account by CLRC in recommending the changes to be made to the Companies Act besides the objectives stated above?

When reviewing and recommending changes to the Companies Act, the CLRC considered the following factors:

- Modernising the law by taking into account the advances made in information and communication technology (ICT);
- Reducing the costs of compliance;
- Reducing duplications and conflicts that exists between the various corporate regulatory bodies;
- Simplifying the existing operational processes of a company; and

- Simplifying the current legislative language as used in the Act.
4. **Was the public consulted during the process of formulating recommendations of changes to the Companies Act by CLRC?**
- Yes, public consultation was extensively conducted during the review process.
- The CLRC had, throughout the Law Reform Programme, issued a total of 12 consultative documents for public consultation. Such consultation process is vital to ensure that the views and feedback of the industry and stakeholders are taken into consideration when formulating the recommendations.
- This is especially important since the proposed recommendations will have a direct impact on the business community. The views and feedback play a significant part in ensuring that the proposed recommendations will facilitate and promote business growth.

5. **What were the outcomes of the reform process conducted by CLRC?**
- The outcome was encapsulated in CLRC Final Report which contained 188 Recommendations to SSM.
- The Final Report proposed changes that should be implemented to the Companies Act.
- After due consideration, SSM's Board formally accepted 183 out of the 188 recommendations, which were then consolidated into 19 Policy Statements which formed the basis for the Companies Act 2016.

6. **What were the scope and issues covered in the 188 Recommendations by CLRC?**
- The CLRC's recommendations covered all aspects of the legal framework relating to the administration of companies ranging from inception of a company (preliminaries & incorporation process), life span (management, capital, shares, charges, corporate governance up to its demise (winding-up, striking-off & dissolution).

Issues related to good governance, shareholders' protection, enforcement and sanctions were also carefully considered and included.

7. **What were the 19 Policy Statements formulated based on the CLRC's Recommendations?**

- ❖ Modernizing the Companies Act;
- ❖ Facilitating & Modernizing Entrance into the Corporate Sector;
- ❖ Migration to No Par Value Regime;
- ❖ Facilitating the Management & Restructuring of the Company's Share Composition;
- ❖ Simplifying & Facilitating Internal Decision Making Process;
- ❖ Strengthening the Corporate Governance Structure in Relation to the Affairs of the Directorship of a Company;
- ❖ Reinforcing The Roles, Functions & Obligations of the Company Secretaries;

- ❖ Establishment of a Registration Regime for Practicing Company Secretaries;
- ❖ Integrating the Contents of the New Companies Act with the Notions & Elements of Corporate Responsibility;
- ❖ Enhancement of Shareholders' Rights & Protection;
- ❖ Strengthening the Corporate Governance Structure Through Refinement of Auditors' Role & Responsibilities;
- ❖ Reaffirming the Importance of Audited Financial Statements & the Timely Disclosure of such Information;
- ❖ Strengthening Good Corporate Governance Practices Through Enhancement & Refinement of Rules Pertaining to Transactions Involving Directors & Substantial Shareholders;

- ❖ Simplifying, Refining & Expediting the Winding Up Process;
- ❖ Modernizing Insolvency Law by Introducing Corporate Rescue Mechanisms to Revive Financially Troubled Companies;
- ❖ Restructuring the Concept of Scheme of Arrangements Between a Company and its Creditors;
- ❖ Refining The Role of Receivers/Receiver & Managers;
- ❖ Refining the Current System of Registration of Charges by Improving the Procedures and Processes Involved; and
- ❖ Modernizing the Enforcement Regime.

8. What are the basic philosophies adopted in modernizing the Malaysian Companies Act?

- The introduction of a new legal framework applicable to all companies;
- Simplifying laws and procedures for companies based on private/public distinction and facilitating the growth of private companies; and
- Removing obstacles and facilitating the growth of private companies.

9. Are there any provisions that will be introduced to facilitate and modernize the entrance into the corporate sector?

Yes. In order to facilitate and modernize the entrance into the corporate sector, the following provisions will be introduced:

- Conferment of companies with full capacity of a natural person. However, companies may elect or decide to have their object clauses should they wish to limit their capacity. Notwithstanding, non-profit making companies would still be required to specify their objects.
- Introduction of the concept of a single member company where a company can be incorporated by only one member and that member can also be the director; and

- Fees to incorporate a company will be based on the type of companies.
10. **What are the new provisions introduced under the Companies Act 2016 to remove the obstacles in incorporating a company?**
- The process of incorporating a company currently consists of several procedures thus making the incorporation process becomes unduly complicated and may be seen as unnecessary obstacles. By examining the whole process, some of the procedures could be simplified or removed to provide simple and easy incorporation process.
 - Under the current regulatory structure, the current company's name reservation process will be made optional by introducing the "guaranteed name approval" concept. Through the guaranteed name approval process, persons intending to incorporate a company will have the option to use the name they have proposed or if such name is not approved, to use the company's registration number (as a temporary measure).
 - Removing the requirement for Memorandum & Articles at the point of incorporation. A company will have the option whether to adopt its own Articles of Association and such adoption could be done after its incorporation. In view of this, some provisions contained in the current Table A are adopted as substantive law.
 - To further simplify the incorporation process, all statutory declaration by Promoters/Directors which previously required to be executed before a Commissioners' of Oath is now replaced with statement of compliance.
 - At the same time, the law also liberalise the qualification of secretaries to include directors. Directors can also act as secretaries for private companies (PROVISO: same person cannot act as both director/secretary relating to actions that require to be done by both a director and secretary). If compliance is not observed, Registrar is empowered to direct a company to appoint a qualified company secretary.

- The law will also introduce a single incorporation template as opposed to the current regime where several documents (name search approval, statement of compliance by company secretary, statutory declaration by directors, and Memorandum and Articles of Association) are required for the purposes of incorporation. The incorporation process can be completed by the promoter /shareholder/director without having to require a company secretary to do so;
- The requirements for certificates of incorporation and company seals are made optional; and
- Most importantly, SSM will also be leveraging on the advent of technology to facilitate the incorporation process and submission of documents to SSM.

11. What are the benefits offered through the introduction of the No Par Value (NPV) regime?

- Companies will no longer be required to state its authorised share capital.
- The NPV regime will bring about simplification of accounts where share premium accounts and reserves will no longer be applicable. (During the transition period, companies are given the opportunity to utilise the amount standing in credit in their share premium accounts for specific purposes, such as to write off preliminary expenses of a company and to use for redemption of shares).
- Companies will no longer subject to lengthy and costly procedures to increase share capital.

12. What are the new provisions which would facilitate the management and restructuring of the company's share composition?

- Under the Companies Act 2016, a new procedure for the reduction of capital is provided, where the directors are required to make a solvency statement to be approved by shareholders of the company. This procedure is in addition to the current procedure where a reduction of capital can only be carried out if a Court order has been obtained.

- Similarly, the rules relating to share buyback and financial assistance provisions are also enhanced by introducing solvency tests before a company is allowed to carry out such corporate exercises.
- To facilitate the disposal of treasury shares as a result of share buyback exercise, the limitation that such disposal be carried out on the stock exchange will be removed by allowing treasury shares to be sold through private treaty in accordance to the Bursa Malaysia Listing Requirements.

13. What are the new features which will simplify and facilitate internal decision making process?

- Annual General Meetings ('AGM'): Removing the mandatory requirement for private companies to hold AGMs. However, public companies are still required to convene their respective AGMs;
- Written Resolutions: Simplification of decision making process for private companies where AGMs are not required under the law. Decisions to be passed at meeting of members or through written resolutions;
- Restructuring the policies pertaining to written resolution procedures for private companies towards abolishing the rule of unanimity in passing written resolutions;
- Simplifying and clarifying the rules relating to meeting procedures;
- Proxies: lifting the prohibition on person(s) who can be appointed as proxies and facilitating the affairs of proxies during general meetings;
- Liberalizing the modes of voting during general meetings through the recognition of best practices; and
- Reducing the required threshold for the purpose of convening/requisitioning of general meetings.

14. What other new features under the new Companies Act 2016?

The decoupling of annual return and submission of financial statements will be introduced. Annual Returns are to be submitted on the anniversary of incorporation.

Meanwhile, financial statements are to be circulated to members within 6 months of the company's financial year end and a copy of which will be lodged to the Registrar.

15. What are the new provisions under the Companies Act 2016 which strengthens corporate governance structure in relation to company directors?

- clarifying the relationship between the board of directors and shadow directors;
- clarifying the minimum age for directorship i.e. 18 years old and abolishing the maximum age for directorship. Appointment or re-appointment of directors will be based on their qualifications and merits
- revising the residency requirement for directorship;
- restructuring the rules pertaining to the appointment, resignation and removal of directors;
- codifying the requirement for remuneration of directors of public companies to be sanctioned;
- Stricter rules relating to directors' remuneration
 - Members' agreement will be required for remuneration of directors' of public companies.
 - Members will have the right to inspect the contract of service for directors' of public companies.
 - Only disinterested members can approve payment for loss of office for directors' of public companies
- providing members the right to inspect directors' contract of service with public companies;
- requiring any payment for loss of office of directors of public companies to be approved by disinterested members;
- clarifying the rules relating to exemption and indemnification of directors' and officers'/auditors' liability; and
- enhancing the rules relating to disqualification of director.

16. What are the new provisions under the Companies Act 2016 which reinforce the roles, functions and obligations of company secretaries?

- Retaining the appointment of qualified company secretaries as well as allowing company director/s who are responsible for fiduciary duties to act in the best interest of the company to act as company secretary of private companies (subject to the provision that the same person cannot act as both director/secretary relating to actions which require to be done by both a director and secretary);
- For public companies, appointment of qualified company secretary is mandatory;
- In ensuring compliance and public confidence in the accuracy of corporate register, the Registrar is empowered to direct a company to appoint a qualified company secretary if compliance with the provisions of the Companies Act is not observed.

17. What is the purpose of the mandatory registration regime for practicing company secretaries under section 241 of the Companies Act 2016?

- The registration regime is established for the following reasons;
 - to obtain the accurate information on named company secretaries, as not all members of prescribed bodies render company secretarial services;
 - to ensure that the standards of professionalism and competency amongst company secretaries remain high;
- As we move towards a developed nation in 2020, the profession of company secretaries must be able to discharge their responsibilities to the expected level of professionalism and competency irrespective of their background qualification. The issuance of practicing certificate to any person intending to act as company secretary will address issues of incompetency and "habitual offender". Any secretary who display lack of professionalism and

competency will risk their practicing certificate being revoked; and

- The role of prescribed bodies will remain intact in that they will continue to supervise and monitor their members who will be qualified to act as secretary.

18. In line with integrating the content of the new Companies Act 2016 with the notions and elements of Corporate Responsibility (CR), what are the changes moving forward?

Currently, there are various laws and guidelines relating to CR, for example:

- ✓ Environmental Law, Employment Relations Law, Consumer Protection and Labour Laws;
- ✓ Ratified United Nations ('UN') Conventions relating to CR (UN Convention No. 8 (Elimination of Discrimination against Women);
- ✓ UN Convention No. 11 (Children's Rights);
- ✓ International Labour Organization Convention no. 138 (Minimum Age);
- ✓ Bursa Malaysia Listing Requirements – Public Listed Companies to statement on CR activities in their Annual Reports – Rule 9.25 to be read together with Item 29 of Appendix 9C; and
- ✓ Khazanah Nasional Berhad – Government Linked Companies (Silver Book: Achieving Value through Corporate Responsibility).

In future, the directors' report will cover additional matters including policies on internal control and corporate responsibility which would be covered under the business review report.

Under the business review element, directors are encouraged to report on matters relating to risks faced by the company, future projections and Key Performance Indicator (KPI) as well as matters policies on environmental matters affecting their business, policies on their employees and social and community issues.

19. What are the enhancements made under the new Companies Act 2016 in relation to shareholders' rights and protection?

The enhancements of shareholders' rights and protection are as follows:

- clarifying the application of rules relating to oppression of members' rights;
- refining the application of statutory derivative actions; and
- reforming the rules relating to variations of class rights and preference shareholders.

20. How is the corporate governance structure further solidified from the perspective of Auditors'?

Under the Companies Act 2016, the corporate governance structure is strengthened through refinement of auditors' role and responsibilities by:

- retaining the mandatory requirement for the appointment of auditor(s) for all types of companies. However, the Registrar will be empowered to determine certain criteria to exempt the application of audit requirement;
- introducing a new regime for the appointment of auditors for private companies in view of the proposal to lift the requirement for holding annual general meetings;
- enhancing the rules relating to the resignation of auditors;
- relying on industry practice for mandatory audit rotation of audit firms; and
- granting access to auditors on all communications relating to any resolutions which the company proposes to pass by way of the written resolution procedure.

21. What are the amendments with regard to reporting and audited financial statements?

The Companies Act 2016 reaffirms the importance of audited financial statements and the timely disclosure of such information.

This is achieved by the following modes:

- (i) realignment of accounting provisions with the approved accounting standards

- (a) removal of Ninth Schedule;
 - (b) reliance on approved accounting standards;
 - (c) enhancement of Directors' Report where necessary.
- (ii) clarification of dividend rules:
- (a) dividend distribution can be made if after the distribution is made the company satisfies the following solvency test:
 - (b) the company is able to pay its debts as they become due in the normal course of business when the dividend is declared or paid; and
 - (c) the value of the company's assets is greater than the value of its liabilities.

22. How is good governance practiced through rules pertaining to transactions involving directors and substantial shareholders?

The Companies Act 2016 provides for good governance practices by enhancing and refining the relevant provisions pertaining to transactions involving directors and substantial shareholders by way of:

- rules relating to substantial property transactions and persons connected with directors or substantial shareholders; and
- disclosure principles to avoid conflict of interests.

23. What are the new provisions introduced to enhance the winding up process?

Under Part IV of the Companies Act 2016, new provisions provided are as follows:

- (a) Shortening the time taken to wind up a company;
- (b) Introducing and defining the parameters for exempt dispositions;

- (c) Refining the concept of undue preference transactions;
- (d) Preserving the assets of the company;
- (e) Increasing the threshold for statutory amount of debts to prevent abuse by creditors;
- (f) Empowering the Court to terminate winding up proceedings to ascertain the status of a company;
- (g) Enhancing the roles of liquidators to facilitate the smooth process of liquidation;
- (h) Enhancing the rights of creditors;
- (i) Reaffirming the rules relating to preferential debts; and
- (j) Providing adequate protection to employees as unsecured creditors.

24. What are the new provisions to cater for insolvent companies?

Division 8 Part III of the Companies Act 2016 provides for a totally new Corporate Rescue Mechanism. These new provisions are new horizons for the Malaysian insolvency laws landscape.

The new rescue mechanisms intended to assist and hopefully revive financially troubled companies are as follows:

- (a) Judicial Management (JM); and
- (b) Corporate Voluntary Arrangement (CVA).

SSM had organised its inaugural National Insolvency Conference in 2016, which was well attended. This Conference focussed on the new rescue mechanism. We hope to see a greater participation in this year's National Insolvency Conference.

25. Is there anything done to provisions related to Scheme of Arrangements?

The concept of Scheme of Arrangements between a company and its creditors are retained with some modifications under sections 365 – 371 of the Companies Act 2016.

26. What are the changes made on provisions related to Receivers or Receivers and Managers?

Amongst others, under sections 372 – 393 of the Companies Act 2016, the changes are as follows:

- (a) Clarifying the status and power of receivers; and
- (b) Introducing new provisions relating to liability, indemnity and priority over receiver's costs.

27. What efforts have been taken in terms of provisions related to Charges?

Efforts were taken to refine the current system of registration of charges by improving the procedures and process involved.

28. What are the changes in terms of enforcement regime?

The following are changes in terms of enforcement regime which are contained in the Companies Commission of Malaysia (Amendment) Act 2015 (Act A1478) and Companies Act 2016:

- (a) Expanded the scope of powers relating to investigation, surrender of travel documents, enhancing the level of penalties and introducing the concept of civil and administrative proceedings for selected types of breaches of the Companies Act 2016 alongside criminal sanctions;
- (b) Criminal sanctions to be imposed against the officers responsible instead of the company; and
- (c) Refining the rules pertaining to disqualification of directors.

29. Overall, what are the benefits and expected outcome with the introduction of the new Malaysian Companies Act?

The Companies Act 1965 had been in existence for more than 5 decades. Undeniably, methods of conducting business and dynamisms of corporate exercises have significantly evolved during those years.

The new Companies Act 2016 encapsulates the dynamic business environment in today's global corporate scenario, as well as the consistent growth of the Malaysian economy.

The Companies Act 2016 is *at par* with global standards. It ensures that the route for starting a business in Malaysia is more competitive, which in turn will attract more investments and promote the growth of Small & Medium Enterprises ('SME') in Malaysia.