



**SURUHANJAYA SYARIKAT MALAYSIA
COMPANIES COMMISSION OF MALAYSIA**

FREQUENTLY ASKED QUESTIONS (FAQs) ON THE RECENT AMENDMENTS TO THE COMPANIES ACT 1965

Subsection 131(7A)

Q1: Who are required to disclose an interest in a contract or a proposed contract with a company and to whom should the disclosure be made?

A1: Every director of a company who is interested in a contract or proposed contract (whether directly or indirectly) with the company is required to disclose the nature of his interest at a board meeting. In the event the director's spouse or child holds any interest in such contract or proposed contract, the director is deemed to have interest and is required to disclose (as soon as practicable after the relevant facts have come to his knowledge). The scope of child of a director includes adopted child and stepchild.

Q2: What is the duty of the company secretary with regard to the disclosure made under subsection 131(7A)?

A2: The company secretary is required to inform the board members on the requirements of subsection 131(7A). In addition, the company secretary is also required to record the declaration, if made by the director, in the minutes of the board meeting.

Q3: What is the effect on the contract or proposed contract if it is entered by a company without such disclosure being made by a director of the company in accordance with subsection 131(7B)?

A3: If there is a failure to disclose an interest in a contract or proposed contract, the company has a right to declare the contract or proposed contract voidable except if the contract entered is in favour of a *bona fide* purchaser for value and without actual notice of the non-compliance of section 131(7A).

Q4: Is there any safeguard to protect the interest of a third party contracting with the company?

A4: The company cannot declare the contract in contravention of subsection 131(7A) voidable if a third party's right is affected. The third party must fulfill the following requirements:

- (a) that the contract was entered with a valuable consideration; and
- (b) the third party has no knowledge of the contravention.

Section 131A

Q5: What are the prohibitions of a director who is interested in a contract or proposed contract with a company?

A5: A director who is interested in a contract or a proposed contract is prohibited from taking part in the discussion or voting of the said contract or proposed contract at the board meeting. However, the director's attendance is counted for the purpose of meeting the quorum of the board meeting. The parameter of the director's interest is regulated by section 131 **[refer Q1, A1 earlier]**.

Q6: Are the prohibitions stated under subsection 131A(1) applicable to all transactions by all companies?

A6: No. Subsection 131A(1) is not applicable to-

- (i) a private company unless it is a subsidiary of a public company.
- (ii) a private company wholly owned by a public company for contracts entered between them.

- (iii) a private company wholly owned by a public company for contracts entered into with another wholly owned subsidiary of the same holding company.
- (iv) a contract of indemnity against potential loss suffered by a director pursuant to him becoming a surety for the company.
- (v) a contract or proposed contract between a public company/private company which is a subsidiary of a public company with another company where the interest of the director is confined to:
 - (a) him being a director of the company and holding shares not more than the value required to qualify him for directorship; or
 - (b) him holding an interest of not more than 5% of the company's paid up capital.

Notwithstanding the exceptions above, if a company adopts Article 81 of Table A of the Fourth Schedule, which states that "a director shall not vote in respect of any contract or a proposed contract...", then the director is required to abstain from voting pursuant to the company's Articles of Association because it has adopted a more stringent requirements than section 131A.

Section 132C

Q7: How has the new amendment to subsection 132C(1) address the ambiguity in relation to disposal by directors' of company's undertaking or property?

A7: The amendment removes the subjective test required by a company to determine on whether or not the transactions would '*materially or adversely affect its financial position*' should they be carried out. Instead, a company can now rely on the requisite thresholds to determine whether or not a transaction is of '*substantial value*' or '*substantial portion*'. For public listed companies, the definitions of '*substantial value*' or '*substantial portion*' should refer to Bursa Malaysia's listing requirements. For non-public listed companies, '*substantial portion*' or '*substantial value*' is triggered upon the occurrence of the highest of the following:

- (a) the value of the undertaking or property is more than 25% of the company's

- total asset;
- (b) the net profit pursuant to the transaction is more than 25% of the total net profit of the company; or
 - (c) the value of the undertaking or property is more than 25% of the company's issued share capital.

Section 132E

Q8: What are the fundamental differences between the old section 132E and the new section 132E?

A8: The fundamental differences are:

- Apart from directors, the new section 132E also applies to substantial shareholders of a company or its holding company or persons connected with them.
- In the event a transaction envisaged by subsection 132E(1) is to be carried out, the new provision requires prior approval from the shareholders before the transactions could be carried out. Mere ratification from the shareholders is not sufficient to regularize such transaction entered.
- The new provision also requires the directors or substantial shareholders or persons connected with them to abstain from voting on the proposed arrangement or transactions.

Section 132G

Q9: With the deletion of section 132G, what is the protection accorded to companies against asset shuffling by unscrupulous directors or shareholders?

A9: Companies are still protected against asset shuffling by unscrupulous directors or shareholders through the amendments of sections 132C and 132E. These sections provide safeguards with regard to any transactions or arrangements to be entered into between a company and its directors or shareholders through the mechanism of disclosure and approval by the general meeting.

Section 131B

Q10: What is the rationale for the introduction of section 131B?

A10: The new section 131B accords a statutory recognition on the functions of the board of directors on the management of the affairs of a company. The new provision clarifies the functions and powers of the board of directors in which the board of directors is empowered to manage, direct and supervise the management of the business and the affairs of the company. The statutory empowerment is in line with the recommendation of the High Level Finance Committee on Corporate Governance. Although the board of directors is bestowed with all the powers necessary to manage the business and affairs of the company, such powers are still subject to other provisions of the Companies Act 1965 and the company's memorandum and articles of association.

Subsection 132(1)

Q11: What are the major differences between the old provision and the new subsection 132(1)?

A11: The original provision does not require that a director owes a duty to act in the best interest of the company although it does require a director to act honestly and use reasonable diligence in the performance of his duties. The new section provides that a director of a company must exercise his powers for a proper purpose and in good faith in the best interest of the company. In the discharge of his duties, a director may face a situation whereby he has acted honestly, but such an act may not be in the best interest of the company. The amendment serves to clarify situations where a director may claim to have acted honestly though such an act was not in the best interest of the company. The new provision has clarified that acting in the best interest of the company is the paramount duty of a director when discharging its duties to the company.

Subsection 132(1A)

Q12: What is the standard of care, skill and diligence that a director must exercise in

discharging their duties under the new subsection 132(1A)?

A12: The new subsection 132(1A) introduces an objective standard of duty of care, skill and diligence expected of directors in discharging their duties. Subsection 132(1A) comprises two limbs:

- (a) The first limb sets out the minimum standard care, skill and diligence as would reasonably be exercised and expected by all directors; and
- (b) The second limb sets out a higher standard duty of care skill and diligence where a director possesses additional knowledge, skill and experience.

While the first limb applies to all directors, the application of the second limb depends on whether a particular director possesses any additional or special knowledge, skill and experience. Consequently, a director possessing special knowledge or is an expert on a given subject matter carries more responsibility in discharging his duty of care, skill and diligence.

Subsection 132(1B)

Q13: What is the rationale for the introduction of the '*business judgement*' rule?

A13: The business judgement rule (BJR) was introduced to address concerns arising from the making of business decision which often involved risk-taking. In commercial transactions, directors are often faced with situations where they have to exercise their powers by making decisions which sometimes are detrimental to the company. The inclusion of the BJR strikes a balance between legitimate risk-taking which should be protected by this rule and negligent decisions taken without proper and informed assessments of potential risks. This rule may operate as a defense to directors in making any decision involving the company provided that such a decision fulfills all the requirements under the BJR.

Q14: What decisions or judgments qualifies as due exercise of business judgements under subsection 132(1B) pursuant to the director carrying out his functions under subsection 132(1A)?

A14: Due exercise of business judgments by a director is achieved through fulfilling the following prerequisites:

- (a) the business judgement must be made in good faith for a proper purpose;
- (b) the director does not have a material personal interest in the subject matter of the business judgment;
- (c) the director is well informed about the subject matter of the business judgement to the extent that he believes to be appropriate under the circumstances; and
- (d) the director reasonably believes that the business judgement is made in the best interest of the company.

Subsection 132(1C)

Q15: Who are the persons that a director may rely on for information, advice, opinion, report, financial statements or data in exercising his duties as a director?

A15: The following are the persons on whom a director may rely for information, advice, opinion, report etc. in exercising his duties as a director:

- (a) an officer of the company whom he reasonably believes to be reliable and competent in the subject matter;
- (b) professionals or experts retained by the company due to their skills and expertise in the subject matter;
- (c) another director in relation to matters within that director's authority; and
- (d) any committee of directors on which he did not serve in relation to matters within the committee's authority.

Subsection 132(1D)

Q16: Can a director who made a business decision by relying on the information provided by professionals or expert under subsection 132(1C) be exonerated from any

liability if the company suffers loss resulting from such a decision?

A16: Although subsection 132(1C) allows a director to rely on the advice or information provided by any professional or expert in the exercise of his duties, he still has a duty to make an independent assessment of the information or advice given to him in the light of his knowledge and understanding of the structure and operation of the company. Reliance on the information or advice made in good faith alone is not sufficient to exonerate a director from liability.

Subsection 132(1E)

Q17: What is the rationale for the introduction of subsection 132(1E)?

A17: The introduction of subsection 132(1E) is intended to lay at rest the dilemma of a nominee director in the event of a situation where he may have to choose between acting in the best interests of the company where he serves as a director and the interest of his nominator. Subsection 132(1E) clarifies that in the case of a conflict between the exercise of the nominee director's duty to the company and following the instructions of his nominator, his duty to act in the best interest of the company prevails.

Q18: What will be the position of a nominee director who has signed a contract of service with his nominator before 15 August 2007 whereby he is required to act in the best interest of his nominator?

A18: With the operation of the new amendment which came into force on the 15 August 2007, the nominee director is mandated to act in the best interest of the company.

Subsection 132 (1F)

Q19: Can directors delegate any of their power to others? If they can, to whom shall the powers be delegated?

A19: The new subsection 132(1F) allows directors to delegate any of their power to any

committee of the board, director, officer, employer, experts or other persons. In addition, it is also expressly stated in the subsection that directors who have delegated their powers are still responsible for the actions of the delegatee as if such powers had been exercised by the directors themselves.

Subsection 132(1G)

Q20: Could there a situation where the directors who have delegated their powers may not be held responsible for the actions of their delegatee?

A20: Directors may not be held liable for the actions of their delegatee if they believe on reasonable ground that:

- (a) the delegatee would exercise the power delegated in conformity with the duties imposed onto the director and provisions of the memorandum and articles of association; and
- (b) the delegatee was reliable and competent in relation to the power delegated.

In a nutshell, in order for a director to invoke subsection 132(1G) to exonerate himself from any liability, it is not sufficient for directors to prove that they have delegated their powers in good faith. Such director must also conduct proper inquiry as to the reliability and competency of the delegatee with regards to the powers delegated.

Subsection 132(2)

Q21: What are general prohibitions imposed against a director or officer of a company?

A21: Subsection 132(2) identifies five (5) general prohibitions imposed against a director or officer of a company namely:

- (a) use of company's property;
- (b) use of information acquired by virtue of his position as a director or officer of the company;

- (c) use of position as director or officer;
- (d) use of corporate opportunity; or
- (e) engaging in a competing business with the company.

Such director or officer is prohibited from gaining directly or indirectly, either for himself or any other person, or cause detriment to the company in furtherance to the said prohibitions. Nevertheless, a company may pass a resolution to allow a director to accord certain benefits such as the use of a company's car or house.

As a matter of prudence, a director should always disclose and seek approval from the shareholders in the event of any potential breach of section 132(2).

Section 167A

Q22: Section 167A requires the directors to put in place a system of internal control in a company. Does this requirement apply to all companies?

A22: Section 167A imposes a duty on a public company or a subsidiary of a public company to establish a system of internal control within the company for the purpose of providing a reasonable assurance that assets of the company are properly safeguarded against loss or any unauthorized disposition. It is also meant to enable transactions of a company's assets are properly accounted for.

Section 172A

Q23: Is a retiring auditor required to comply with section 172A?

A23: Section 172A requires an auditor to notify the Registrar in the event he ceases to hold office in a company in the following circumstances:

- (i) when he is removed by the company under section 172(4); or
- (ii) when he intends to resign and gives notice to the directors of the company pursuant to section 172(15).

In both circumstances, the auditor must send a copy of his written representation or the explanation of the notice of his resignation to the Registrar within seven days of the submission of his written representation or notice of resignation, whichever is applicable.

Section 172A does not apply in the case of an auditor who does not seek reappointment at an annual general meeting of a company, or where he is not reelected at the annual general meeting.

Section 174

Q24: Are auditors expected to know all serious offences involving fraud and dishonesty in discharging their duties pursuant to section 174(8A)?

A24: A serious offence involving fraud or dishonesty (serious offence) is defined under section 174(8C)(b) as *any offence that is punishable by imprisonment for a term that is not less than two years*; or the value of the assets derived or likely to be derived or any loss suffered by the company, member or debenture holder from the commission of such offence exceeds RM250,000.00 and include offences under sections 364, 364A, 366 and 368 of the Companies Act 1965.

As section 174(8C)(b) already provides a general guide on the definition of "serious offence involving fraud or dishonesty" and covers a wide parameter of serious offences as provided by other written laws, SSM does not intend to prescribe an exhaustive list of such offences.

Further, as the laws regulating companies differ according to their specific industry, auditors of a company should be aware of the specific laws that the company is subject to. It follows that if an auditor is of the opinion that a serious offence has been committed against the company by its officers; he has a duty to report the commission of the offence to the Registrar.