

(i) Retirement Of Director *(updated on 26 April 2017)*

1. Since there is no AGM for Sdn Bhd, how to deal with the retirement of director at AGM as provided under the existing Articles of Association, i.e. 1/3 of the directors must retire at every AGM?

The previous AGM resolution under section 129(2) of the Companies Act 1965 was worded as “xxx be hereby re-appointed to hold office until the next AGM”. With the abolishment of age limit, shall the public company just re-appoint the said director at 2017 AGM? Or do nothing as he will continue to be a director as per section 619(1) of the Companies Act 2016?

Answer:

In cases where a private company’s Articles of Association (Constitution) deals with the retirement of directors at AGM, then the company must hold AGM to ensure that the provisions of the Articles of Association are met, until the company resolves otherwise.

With the abolition of restriction of maximum age of directors (section 129 of the Companies Act 1965), a public company is required to pass a resolution to enable the director to continue in office at the forthcoming AGM. The application of section 619(1) is limited to recognise the appointment of directors under the new Companies Act 2016 including any limitation or conditions attached with the appointment.

(ii) Boardroom Excellence

1. Directors’ fee in a private company is to be approved by the Board but the director must be notified accordingly. Can shareholders object to the decision of the Board and more so if the Board consists of directors who are also shareholders or persons nominated by shareholders?

Answer:

The provision of the law allows a shareholder holding at least 10% of the total voting rights to object to the decision of the Board in so far as directors’ fees are concerned. This is in line with the general principle that the shareholders are a different body to that of the Board. The objection must also be for the reasons that the payment is not fair for the company.

The position of the law clearly allows a shareholder who is also a director to object to the decision of the Board. This will allow scenarios where that director/shareholder may

not be present at the Board meeting and he now wishes to object, albeit on a different capacity.

2. Why is there a shift in policy in allowing interested parties to vote in related party transactions in a private company?

Answer:

The prohibitive policy is premised on the fact that companies should not be transacting with an interested party unless it has been approved at a general meeting.

The prohibitive policy is lifted for private companies where shareholders who are interested in the transaction could also take part in approving the transaction.

In changing the policy, the Government has taken into considerations that there are many genuine transactions that could not be effected by the current prohibitive policy.

In particular, the private companies could not have access to the available resources because such resources are held by interested parties and could not be utilised due the requirements that the resolution must be passed by uninterested shareholders only.

As such, the Government is of the view that whilst the policy requiring prior shareholders' approval should be maintained, the shareholders should be given the option to proceed with the transactions with full knowledge that the transactions would involve related party, and there should have the full responsibility in approving such transactions.

(iii) Directors Fees and Benefits

1. Does benefit payable to directors under section 230 includes any types of benefits including driver, tele-communication device, medical benefits, training benefits, D&O insurance, discount given for Director to purchase the company's products, e.g. staff discount for house and car, benefits-in-kind ("BIK") given to a salaried Executive Director e.g. leave passage, maid, children's education fees, company car etc. or benefits that are convertible into cash? *(updated on 9 June 2017)*

Answer:

Benefit that requires shareholders' approval are benefits which arises from the appointment to the office of a director.

2. Does the BIK as stated in his employment contract of a executive director falls under the director's benefit and require shareholders approval? *(updated on 9 June 2017)*

Answer:

In the case of salaried Executive Director's entitlement etc, if such entitlement or benefit arises from him being appointed to the office of director, then the entitlement (including BIK) or benefits must be approved by shareholders. But if such entitlement (including BIK) are given due to his office as Executive/Management position then shareholders' approval is not required.

(iv) Directors Power to Allot Shares

1. **Does Dividend Reinvestment Plan fall under the exemption of members' approval for allotment under section 75(2)(a)?** *(updated on 9 June 2017)*

Answer:

No, Dividend Reinvestment Plan does not fall under the exemption list under section 75(2).

(v) Directors' Report

1. **Is cross-reference disclosure (in lieu of repeating the disclosures in the Directors' Report of subsidiaries) sufficient in meeting the disclosure requirement of section 253 of the Companies Act 2016?** *(updated on 23 June 2022)*

Answer:

If a parent company decides to cross-refer to the disclosures in its subsidiaries' Directors' Reports, the parent company must apply to the Registrar in writing for relief from requirements as to form and content of the Directors' Report under section 255 of the Companies Act 2016. The company must also ensure that the subsidiaries' Directors' Reports contain all the information as required as per required under the Companies Act 2016.

2. **It is noted that both section 249 and 5th Schedule of Companies Act 2016 require companies to disclose directors' remuneration and auditors' remuneration in the notes to the financial statements and the directors' report respectively.**

Is cross-reference disclosure sufficient when a company discloses such information in the notes to the financial statements and insert a reference to the notes in the directors' report? *(updated on 23 June 2022)*

Answer:

Directors' remuneration of the holding company its subsidiaries are required to be disclosed in the Directors' Report separate from the notes to the financial statements.

Cross-referencing in this manner would not be acceptable in view of both disclosures serve different purposes under different reports.

Hence, full disclosure should be done at the company in compliance with the Companies Act 2016.

(vi) Application of section 223 – Approval of company required for disposal by directors of company's undertaking or property [formerly Practice Note No.8/2010] *(updated on 31 December 2024)*

Please provide some clarifications on the application of Section 223 of the Companies Act 2016 (Act 777).

Answer:

1. The policy of Section 223 of Act 777 was retained from section 132C of the Companies Act 1965 [Act 125] (Repealed) to provide that notwithstanding anything in the Constitution, the Directors shall not enter or carry into effect any arrangement or transaction for either of the following:

- (i) the acquisition of an undertaking or property of a substantial value; or
- (ii) the disposal of a substantial portion of the company's undertaking or property;

Unless—

- (a) the entering into the arrangement or transaction is subject to the approval of the company by way of resolution; or
- (b) the carrying into effect of the arrangement or transaction has been approved by the company by way of resolution.

2. In determining whether the value of the proposed acquisition or disposal of the company's property amounts to a substantial value or substantial portion and prior approval of shareholders is required before effecting the acquisition or disposal of a property, the following are applicable:

(i) In the case of a company where all or any of its shares are quoted on a stock exchange or its subsidiary (listed company)

The terms substantial value or substantial portion shall mean the same value prescribed by the provisions in the Listing Requirements of Bursa Malaysia where

approval of the shareholders at a general meeting is required.

(ii) In the case of a non-listed company

An undertaking or property shall be considered of substantial value and a portion of the company's undertaking or property shall be considered substantial portion in accordance with section 223(3)(a), (b) and (c) of Act 777 if:

- (a) its value exceeds 25% of the total assets of the company;
- (b) the net profits before tax and extraordinary items attributed to it amounts to more than 25% of the total net profit of the company; or
- (c) its value exceeds 25% the issued share capital of the company, whichever is the highest.

3. For purposes of clarification, the application of the thresholds provided for under 223(3)(a), (b) and (c) of Act 777 is illustrated as follows:

AB Sdn Bhd and CD Sdn Bhd

AB Sdn. Bhd. wishes to acquire a piece of land belonging to CD Sdn. Bhd. for RM2 million. The assets, net profits and issued capital of AB Sdn. Bhd. are as follows:

- Total assets of AB Sdn. Bhd. - RM8 million
- Net profits of AB Sdn. Bhd. - RM2 million
- Issued capital of AB Sdn. Bhd. - RM10 million

The relevant thresholds for AB Sdn. Bhd. under 223(3)(a), (b) and (c) of Act 777 are as follows:

- 25% of total assets (RM8million) - RM2 million
- 25% of net profits (RM2million) - RM500,000
- 25% of issued capital (RM10million) - RM2.5 million (highest)

Since the value of the land (i.e. RM 2million) is less than the highest identified threshold (i.e. RM2.5 million), the directors of AB Sdn. Bhd. are not required to obtain the approval from the shareholders prior to acquiring the land from CD Sdn. Bhd.

4. Although it is good to obtain the financial amounts from the latest audited financial statements of the company, if the amounts have changed significantly since the audited financial statements are issued, the Directors may rely on the company's latest management accounts for the purposes of determining whether the value of the proposed acquisition or disposal of the company's property is of substantial value or substantial portion pursuant to section 223(3)(a), (b) and (c) of Act 777.

5. However, the directors have to use reasonable diligence that will provide a reasonable assurance in ensuring the financial amounts in the management accounts are properly authorised and that the transactions are recorded as necessary to enable the preparation of true and fair view of the management accounts of the company.