



AMENDMENTS TO THE COMPANIES ACT 1965 (ACT 125)

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INTRODUCTION

The Companies (Amendment) Bill 2007 passed by Parliament on the 23rd of May 2007 brings about significant changes to the corporate governance framework in Malaysia. The Bill received its Royal Assent on the 27th of July 2007, was published in the Gazette on the 31st of July 2007 and the Companies (Amendment) Act ("Act 1299") comes into operation effective from the 15th of August 2007.

The purpose of the amendments is to enhance the corporate governance framework in Malaysia and its aim by introducing the amendments is to ensure that corporate governance in Malaysia flourishes and investor confidence in Malaysian companies is enhanced, thus further propelling Malaysia on the global map.

The major amendments to the Act, amongst others, introduce a range of new requirements to enhance corporate governance, the much-awaited deletion of Section 132G as announced by the Honourable Prime Minister in his 2005 Budget speech, as well as other amendments to facilitate the electronic lodgment services for companies documents with Suruhanjaya Syarikat Malaysia.

AMENDMENTS

The 23 separate amendments the Companies (Amendment) Act 2007 seek to amend the Companies Act 1965 ("Act 125") in the following manner:

1. *Clause 2* of the Companies (Amendment) Act 2007 seeks to amend section 11A of Act 125 to allow a statutory declaration to be filed or lodged with the Registrar electronically and to empower the Registrar to serve a notice on persons who do not comply with the requirement of service of documents under that section.
2. *Clause 3* seeks to introduce new sections 11B and "lie" into Act 125. The new section 11B enables the Registrar to utilize electronic means of communication in relation to electronic filing or lodgement of documents to the Registrar whereas the new section lie provides for the evidentiary value of documents supplied and certified by the Registrar electronically.
3. *Clause 4* seeks to amend section 69i of Act 125 by deleting any reference to the Stock Exchange in relation to notification of or changes in substantial shareholding.
4. *Clause 5* seeks to amend section 131 of Act 125 to provide that the interest of a spouse and a child, including adopted child and stepchild is included in the interests that a director must disclose under section 131. Any contract or proposed contract entered into in contravention of section 131 is voidable at the instance of the company except if it was in favour of a person who had no knowledge of the contravention and who had given valuable consideration.
5. *Clause 6* seeks to introduce new sections 131A and 131B into Act 125. The new section 131A prohibits a director of a public company or a subsidiary company of a public company who has an interest in a contract entered into or proposed to be entered into by the company from voting on, or

participating in the discussion on, the contract or proposed contract whilst the contract or proposed contract is being discussed in the board meeting. The new section 131B provides that the directors have the power to manage or supervise the affairs of the company.

6. *Clause 7* seeks to amend section 132 of Act 125 to clarify further on the existing provisions regarding the duties and liabilities of a director of a company.
7. *Clauses 8* and *9* seek to delete sections 132A and 132B of Act 125 as all matters in these sections in relation to the offence of insider trading have been dealt with in the Securities Industries Act 1983.
8. *Clause 10* seeks to amend section 132C of Act 125 to clarify further on the existing provisions regarding the disposal of company's undertaking and property by a director.
9. *Clause 11* seeks to amend section 132E of Act 125 to provide that a company is prohibited from carrying into effect any arrangement or transaction where a director or substantial shareholder of a company or its holding company or persons connected with such director or substantial shareholder acquires from or disposes to the company shares or non-cash assets of a requisite value.
10. *Clause 12* seeks to amend section 132F of Act 125 to expand the statutory exemptions to include another two more arrangements or transactions to which section 132E of Act 125 does not apply.
11. *Clause 13* seeks to delete section 132G of Act 125 as all matters in this section are dealt with in section 132E of Act 125.
12. *Clause 14* seeks to amend section 134 of Act 125 to stipulate that the interest of a spouse and a child, including adopted child and stepchild is included in the interests that a director must disclose.
13. *Clause 15* seeks to amend section 135 of Act 125 to reduce the duplication of notification to the Stock Exchange.
14. *Clause 16* seeks to amend section 145 of Act 125 to provide that the notice to call for an annual general meeting of a public company must be sent not less than twenty-one days before the meeting or any longer period as provided by the articles of the company.
15. *Clause 17* seeks to introduce a new section 145A into Act 125 to provide that a company shall hold a meeting of members within Malaysia and may hold a meeting at more than one venue provided all members are given a reasonable opportunity to participate in the meeting. This enables companies to utilize any technology in conducting shareholders' meetings.
16. *Clause 18* seeks to introduce a new section 167A into Act 125 to provide that the board of directors of a public company or a subsidiary of a public company must set up a system of internal control to ensure that the company does not suffer loss through the unauthorized use of its assets and that proper records are maintained to ensure that the assets are properly accounted for.
17. *Clause 19* seeks to introduce a new section 172A into Act 125. This new section requires that if an auditor serves a written representation to the company in relation to his removal, he must serve, within seven days of the service of the representation, the written representation to the Registrar and in the case of a public company, to the Stock Exchange.
18. *Clause 20* seeks to amend section 174 of Act 125 to provide for an obligation imposed on an auditor of a public company to report to the Registrar of any serious offence involving fraud or dishonesty that he has a reason to believe has been committed by any officer or employee against the company or the Act.
19. *Clause 21* seeks to amend section 174A of Act 125 to provide protection to auditors against any court or disciplinary proceedings for any report submitted in good faith and in the performance of the duties imposed on auditors.

20. *Clause 22* seeks to introduce new sections 181A, 181B, 181C, 181D and 181E into Act 125. The new section 181A provides for proceedings to be brought or intervened in on behalf of a company whereas the new section 181B provides for the procedure for an application for leave of the Court. The new section 181c provides that the Court's approval must be obtained before any proceedings brought, intervened in or defended on behalf of a company may be discontinued, compromised or settled. The new section 181D provides for the effect of ratification. If there is ratification, it will not prevent any person having *locus standi* from taking an action under the new section although the Court may take into account the ratification to determine what order or judgment to make. The new section 181E empowers the Court to make orders in relation to the application for leave made under the section.
21. *Clause 23* seeks to amend section 217 of Act 125 to include the Malaysia Deposit Insurance Corporation as a person who may present a petition for winding up of a member institution under the Malaysia Deposit Insurance Corporation Act 2005 [Act 642].
22. *Clause 24* seeks to introduce new sections 368A and 368B into Act 125. The new section 368A empowers the Court to grant an injunction to stop a person from engaging in any conduct that contravenes Act 125. The new section 368B provides protection to officers of a company for any report made to the Registrar of any contravention of Act 125 or a serious offence involving fraud or dishonesty against the company or Act 125 which has been, is being or is likely to be committed by other officers of the company.

EFFECTS OF AMENDMENTS

Based on the amendments made, the following areas can be summarised as to be directly effected or is a product of the said amendments:

1. The board's functions in overseeing and evaluating the conducts of the company and ensuring that it is properly managed;
2. Directors' duty to act with reasonable care, skill & diligence;
3. Introduction of the 'business judgment' rule;
4. Responsibilities of nominee directors;
5. Clarification of 'substantial value' in relation to disposal of companies' undertaking or property;
6. Introduction of the statutory derivative action to enhance remedies available to minority shareholders;
7. Introduction of the mandatory obligation upon auditors of a public company to report to the Registrar of any fraud and dishonesty committed by any officer;
8. Conduct of shareholders' meeting via electronic mode;
9. Introduction of the mandatory requirement for public companies to set up a system of internal control;
10. Introduction of application for injunctions to enhance the mechanism for shareholders' protection;
11. Prohibition against related party transactions;
12. Deletion of the existing section 132 G; and
13. Electronic filing.

Among the landmark amendments include the introduction of the mandatory obligation upon auditors of a public company to report any fraud and dishonesty committed by any officer of the company. Such obligation is further complemented with the protection accorded for auditors when reporting such incidences. Upon the introduction of this provision in the Companies Act the auditors will not be liable to be sued or subject to any criminal or disciplinary proceedings for reports done in good faith or during the course of doing their business. At the same time, once an auditor ceases to act (i.e. after he has either been removed or has resigned) for a company, he is obligated to serve on the Registrar or in the case of a listed company, the Stock Exchange his written representation in relation to his removal or his written explanation of his resignation.

Equally interesting to note is that officers of a company will be accorded protection for whistleblowing on breaches by the company of provisions under the Act 125 unearthed during the performance of his duties. Under the Companies (Amendment) Act 2007, companies are now under an obligation to ensure that officers of the company are not discriminated against and the lawful employment or livelihood of such officers will not be interfered by reason of the submission of a report regarding such nonobservance.

The law has always required that directors carry out their duties and responsibilities accordingly and reasonably. The amendments to be made in the Act 125 will impose an objective standard in the performance of the directors' duties and responsibilities. One of the major components in the amendments would be apart from the minimum standard of reasonable care, skill and diligence; directors are also expected to perform their functions according to their actual skill and experience. This standard of performance expected from directors will contribute towards the positive growth of the business of companies as well as safeguarding shareholders interests. Coupled with the new requirements of having to disclose their interest in a contract and to abstain from voting in the contract, it is hoped that the level of transparency and accountability amongst directors will be greatly improved. This move is also important to ensure the interests of the investing shareholders and other stakeholders are appropriately protected.

The rights of the minority shareholders will be further augmented by the amendments with the introduction of the codification of the common law derivative action. This codification is a major step in enhancing the protection for the minority shareholders' and other complainants' interests as it will help to ease the setbacks face under the common law derivative actions especially in relation to the costs of proceedings which have to be borne by individual shareholders who had initiated such an action. The codification will promote transparency and accountability on the part of directors and this in turn will improve and enhance the way business is carried out in Malaysia.

The much awaited amendment to repeal section 132G as announced by the Honourable Prime Minister in his Budget speech 2005 is also included. The prohibition under this section was seen as an impediment on genuine business transactions of a company. In preventing unscrupulous individuals from taking undue advantage on the deletion of section 132G, the Companies (Amendment) Act 2007 has inserted a provision requiring prior approval at a general meeting to be obtained where a director or substantial shareholder is involved in the acquisition or disposal of the assets of a company. This amendment will provide enhanced safeguard measures against abuses on related party transactions and at the same time does not impede bona fide transactions.

The initiative to enhance the role and responsibility of directors by the introduction of the business judgement rule should be welcomed and embraced by directors as it finally provides them with the certainty to take their business further. Such reform will further strengthen and promote market freedom and investment protection.

FEEDBACKS AND CONCLUSION

The Minister of Domestic Trade and Consumer Affairs, Y.B. Datuk Hj. Mohd Shafie Bin Hj. Apdal says that the amendments are indeed timely and consistent with the Government's efforts to enhance corporate governance and at the same time, spur the spirit of entrepreneurship and responsible risk taking amongst the business community and will make Malaysia a preferable destination for doing business.

The Chief Executive Officer of SSM, Encik Abdul Karim Abdul Jalil is positive that the amendments will be well received as they provide a balance in facilitating and encouraging companies to prosper on one hand, whilst on the other, provide sufficient mechanisms to discipline businessmen to observe the rules of law.

Commentary on Article by Puan Arni Ariffin, Senior Counsel

1. The abolishment of Section 132G of the Companies Act 1965 is to facilitate and provide greater flexibility to companies to undertake M&As and restructure their business is a welcome announcement. When Section 132G was introduced in 1992, it was aimed at prohibiting asset shuffling whereby shareholders of listed companies could inject newly acquired assets into listed companies at excessively high value, thereby adversely affecting the interests of minority shareholders. It was seen as rather restrictive and impractical, as it hindered genuine listed companies from inter-company transactions. The eventual abolishment of S.132G will enable corporate professionals and advisers from having to grapple with how to find solutions for companies that were caught under this section.

(AA: yes, but for the last 10 years or so we saw a lot of paper shuffling, basically corporate exercises which do not add value to the company but to fatten the pocket of certain individuals. So the question is now, if there's no s.132G are provisions on RPT sufficient?)

What i'm trying to say is the abolishment of Section 132G does not on its own enhance the corporate governance in Malaysia. It's the whole Amendment Act which is aimed to enhance the corporate governance in Malaysia. Having said that, the abolishment of 132G does assist in getting rid of the impracticalities faced previously by companies due to the prohibition of inter-companies transactions.

(AA: I feel abolishment of s.132G has nothing to do with enhancing corporate governance. And if you look at it in isolation of the other amendments, it is now free for all)

I am not to sure whether other amendments have similar clout as the abolishment of Section 132G, but I can't definitely say that it is the most popular amendments of all in term of practicality.

2. The word "lie" is just another way of saying that the new section is incorporated in the Act. I personally do not know whether it's a new lingo or not but I have seen it being used on numerous occasions in other Bills and Acts (the explanation portion).

(AA: Confirmed it is a new lingo!!)

3. As you maybe aware, C(A)A 2007 comes into effect on 15th August 2007, CMSA on the other hand comes into effect on 28th September 2007. Therefore, I would believe that C(A)A 2007 is done with an assumption that SIA 1983 would not be repealed (which is a very bad assumption on part of the legislator if you asked me!!). However, since SIA 1983 is now consolidated into CMSA, without having inspected the CMSA in its entirety, I would believe similar provisions dealing with the offence of insider trading in the SIA 1983 are reintroduced and incorporated in CMSA.

(AA: But for the purposes of A&A's bulletin, since there is an article on CMSA, you might need to relook. Otherwise, clients it may pick up)

4. I believe you are referring to item 15 of my article. The effect of this amendment would be that a company's meeting can now be held at various places SIMULTANEOUSLY (my emphasis) and not restricted to the State where the company is registered. This does not only improve flexibility to hold a company's meeting anywhere, but also would greatly assist in providing avenue for as many members of the company to participate in a company meeting. I believe that this amendment is to cater for the advancement in technology whereby you can hold a tele-conference or video conference easily nowadays.

(AA: so, in addition to having it outside the place where it is registered, the company could also hold meetings at numerous places, as long as there in Malaysia (or no restriction on that too?) This is truly revolutionary. Had many difficulties previously when my directors/shareholders were all over the world. With this definitely won't have problems with the quorum which could be translated to cost savings!)

Having said that, due to its relatively being newly introduced, I have yet to see this being turn into practice.

5. "Business judgement" rule appears under Clause 7 of C(A)A 2007 which means the business judgment rule is inserted as part of the duty and liability of officers of a company as contained in Clause 132 of CA 1965.

(AA: yes, but what does it mean actually? Is there any pointers to it?)

6. The protection of whistle-blower in this C (A) A 2007 deals specifically for corporate and company related whistle blower. It may overlap with other provisions of whistle-blower protection in other legislations. My personal view is it shouldn't be a problem as I believe if you are to be a whistle-blower, you would like to be protected and feeling secured by as many protections as you can get.

(AA: I raised this to point out that this is nothing new. In my experience, it is a double edge sword, often misused by those who bear a grudge against to certain officers of the company. I've not heard any success stories of indictment based on evidence given solely by whistle-blowers)

7. Generally, minimum standard rule would still be applicable. And the standard has certainly been raised with these new amendments. Clause 7 of C(A)A 2007 has greatly improved and raised the standard of responsibility required from the officers (e.g directors) of a company.

For example, where previously under subsection (1) of Section 132 of CA 1965, a director shall act "honestly" and use "reasonable diligence" in discharging the duties of his office, with these new amendments it is now required that the director to exercise his powers for a "proper purpose" and in "good faith" and in the "best interest of the COMPANY". Where previously the duty is more-or-less personal, by these amendments, the director is required to think of what are best in the interest of the company.

(AA: But again very difficult to judge as the terms are very subjective)

If you read through Clause 7 of C(A) A 2007, you will see that the duties, responsibilities and standard of care of the officers of company under Section 132 of CA 1965 have been vastly improved, enhanced and raised.

If i'm not mistaken, the requirement to attend seminar/course by directors is not provided specifically in the CA 1965 but is a requirement imposed by CCm through its directive/guideline. I believe this requirement is still valid until further notice.

I hope that my replies and explanations are of help to you.

It's too early to know and judge whether the new amendments are good or bad to companies. On a lighter note, personally, it's bad, cos now I have to invest in new revised edition of the Companies Act and new company law textbooks which undoubtedly will be revised to cater for these new amendments. Oh, hold on! Maybe I should cease practice and become a publisher now!!!