SHARES, DEBENTURES, CAPITAL MAINTENANCE, SCHEMES, COMPULSORY ACQUISITIONS AND AMALGAMATIONS

PREAMBLE

1. In Chapter 3 of the *Report of the Steering Committee for Review of the Companies Act*, the Steering Committee (SC) had reviewed the following issues relating to shares, debentures, capital maintenance, schemes, compulsory acquisitions and amalgamations:

- preference and equity shares;
- holding and subsidiary companies;
- other issues relating to shares;
- debentures;
- solvency statements;
- share buybacks and treasury shares;
- financial assistance for the acquisition of shares;
- reduction of capital;
- dividends;
- other issues pertaining to capital maintenance;
- schemes of arrangements;
- compulsory acquisition; and
- amalgamations.

SUMMARY OF FEEDBACK RECEIVED AND MOF'S RESPONSES

I. PREFERENCE AND EQUITY SHARES

(a) Definition of "preference shares"

Recommendation 3.1 The definition of "preference share" in section 4 should be deleted.

Summary of Feedback Received

2. All respondents agreed with this recommendation.

MOF's Response

3. **MOF accepts Recommendation 3.1**. The SC had noted that in commercial practice, preference shares may be voting and/or participating. However, the definition of "preference share", in relation to sections 5, 64 and 180 of the Act, means a share that does not entitle the holder to the right to vote at a general meeting (except in specified circumstances) or participate beyond a specified amount in any distribution (e.g. dividend, on redemption or in a winding up). These inconsistencies in the use of "preference share" should be removed. MOF agrees with the SC's views.

(b) Voting rights of holders of preference shares

Recommendation 3.2
Section 180(2) should be deleted. Transitional arrangements should be made to preserve the rights currently attached under section 180(2) to preference shares issued before the proposed amendment.

Summary of Feedback Received

4. Most respondents agreed with this recommendation. However, one respondent suggested that section 180(2)[1] be retained as it serves to protect the basic rights of preference shareholders, and that these shareholders must be able to vote upon a resolution that varies their rights.

MOF's Response

5. **MOF accepts Recommendation 3.2**. The SC had noted that a company should be allowed to determine the rights that would be attached to its shares and there was no persuasive reason for the rights of preference shares to be mandated in the Act. However, SC had recommended certain safeguards to be introduced for the issuance of non-voting shares. Some of these safeguards were similar to those found in section 180(2). Since the definition of "preference share" in section 4 will be deleted, section 180(2), which relates to such shares, can be removed. We will consider if the remaining safeguards in section 180(2) are still relevant during drafting and where they can be better placed within the Act.

[1] Section 180(2) states that "Notwithstanding subsection (1), the articles may provide that holders of preference shares shall not have the right to vote at a general meeting of the company except that any preference shares issued after 15th August 1984 shall carry the right to attend any general meeting and in a poll thereat to at least one vote in respect of each such share held:

(a) during such period as the preferential dividend or any part thereof remains in arrear and unpaid, such period starting from a date not more than 12 months, or such lesser period as the articles may provide, after the due date of the dividend;
(b) upon any resolution which varies the rights attached to such shares; or
(c) upon any resolution for the winding up of the company.

(c) Definition and use of the term "equity share"

Recommendation 3.3
The definition of "equity share" be removed and "equity share" be amended to "share" or some other appropriate term wherever it appears in the Companies Act.

Summary of Feedback Received

6. All respondents agreed with this recommendation.

MOF's Response

7. **MOF accepts Recommendation 3.3**. The SC had noted that for consistency with Recommendation 3.1 (i.e. delete the definition of "preference share"), the definition of "equity share" as "any share which is not a preference share" should be deleted. MOF agrees with SC's views.

(d) Non-voting/multiple vote shares

Recommendation 3.4
Companies should be allowed to issue non-voting shares and shares with multiple votes.

Summary of Feedback Received

8. A majority of respondents agreed with this recommendation. However, a few respondents disagreed because they were of the view that treating all shareholders equally in respect of voting rights was fundamental for good corporate governance. They also felt that in the Asian context where one or two large shareholders might control a company, allowing non-voting or multiple-voting shares would enhance majority control to the detriment of minority shareholders.

MOF's Response

9. **MOF accepts Recommendation 3.4**. Private companies are currently allowed to issue shares with different voting rights. MOF agrees with the SC that this right to issue shares with different voting rights should be extended to public companies, which will give them greater flexibility in capital management. This will align our law with that of the US, UK, New Zealand and Australia, which allow companies to issue classes of shares with different voting rights, subject to companies' Articles. The Australian Stock Exchange imposes prohibitions on listed companies through listing rules.

10. In addition, MOF accepts the safeguards recommended by the SC and the need for the companies' articles to provide clarity on the different classes of shares and their rights. The following safeguards will be introduced: (i) shareholders must approve the issuance of shares with different voting rights via a special resolution; (ii) information on the voting rights for each class of shares must accompany the notice of meeting at which a resolution is proposed to be passed; (iii) companies must specify the rights for different classes of shares in their Articles and clearly demarcate the different classes of shares so that shareholders know the rights attached to any particular class of shares; and (iv) holders of non-voting shares will have equal voting rights on resolutions to wind up the company or on those that vary the rights of non-voting shares.

11. In the case of public listed companies, MOF and MAS recognise that dual class share structure may give rise to issues pertaining to entrenchment of control. SGX should, in consultation with MAS, carefully evaluate whether the listing of companies with dual class share structure should be permitted and whether listed companies should be allowed to issue non-voting shares and shares with multiple votes.

Recommendation 3.5

Section 64 should be deleted.

Summary of Feedback Received

12. Most respondents agreed with this recommendation. One respondent disagreed and indicated that although he agreed with Recommendation 3.4, section 64, which relates to the voting rights of equity shares in certain companies, should not be deleted because the proposed safeguards for listed companies should be incorporated into section 64 instead of the listing rules.

MOF's Response

13. **MOF accepts Recommendation 3.5**. Section 64 should be removed as a consequence of our acceptance of Recommendation 3.4. As with Recommendation 3.4, whether listed companies would be permitted to issue non-voting shares and shares with multiple votes would be dependent on SGX's evaluation on whether the dual class share structure should be permitted.

II. HOLDING AND SUBSIDIARY COMPANIES

(a) Amend the definition of "subsidiary"

Recommendation 3.6

Section 5(1)(a)(iii) should be deleted. Section 5(1)(a) should be amended to recognize

that a company S is a subsidiary of another company H if company H holds a majority of the voting rights in company S.

Summary of Feedback Received

14. Most respondents agreed with this recommendation. One respondent disagreed and indicated that the definition of "subsidiary" should be set by the financial reporting standards so that the Act would not have to be amended whenever the financial reporting standards change. Some comments received were on the distinction between "voting power" (existing concept) and "voting rights" (under the Recommendation).

MOF's Response

15. **MOF accepts Recommendation 3.6.** The SC had noted that section 5(1)(a)(iii)[2] was first introduced for the purpose of prescribing the requirement for consolidation of accounts. Under Recommendation 4.38, the SC had recommended that the determination of whether a company should prepare consolidated accounts should be set only by the financial reporting standards and not the Act. Hence, MOF agrees that section 5(1)(a)(iii) should be deleted since it is no longer necessary. However, section 5 is still relevant and can continue to apply to the other provisions in the Act, we are therefore of the view that the Act should be amended. The SC had noted that **section 5(1)(a) should be amended to recognise the situation where a parent-subsidiary relationship could be determined by whether a company holds a majority of voting rights in another company.** This will align our law with the UK's position to recognise various ways of "control" to determine whether one company is the subsidiary of another. MOF agrees with the SC's views.

(b) Subsidiary holding shares of its holding company

Recommendation 3.7

The current 12-month time-frame for a subsidiary to dispose of shares in its holding company should be retained. Such shares will be converted to treasury shares thereafter. Once these shares are converted to treasury shares, they would be regulated in accordance with the rules governing treasury shares.

Recommendation 3.8

Section 21(4) should be amended to allow retention of up to an aggregate 10% of such treasury shares, taking into account shares held both by the company as well as its

[2] Section 5(1)(a) states that "For the purposes of this Act, a corporation shall, subject to subsection (3), be deemed to be a subsidiary of another corporation, if that other corporation:
(i) controls the composition of the board of directors of the first-mentioned corporation;
(ii) controls more than half of the voting power of the first-mentioned corporation; or
(iii) holds more than half of the issued share capital of the first-mentioned corporation (excluding any part thereof which consists of preference shares and treasury shares)."

subsidiaries.

Summary of Feedback Received

16. All respondents agreed with these recommendations. One respondent sought clarifications on the "conversion" to treasury shares.

MOF's Response

17. **MOF accepts Recommendations 3.7 and 3.8.** The basis of the recommendations was to extend the treasury shares regime to a subsidiary that holds shares of its holding companies. After the 12 month period, the holding company shares held by the subsidiary company will be deemed "holding company treasury shares" held by the subsidiary company. Further details will be available when the draft bill is issued for consultation.

III. OTHER ISSUES RELATING TO SHARES

(a) Redenomination of shares

Recommendation 3.9

A statutory mechanism for redenomination of shares similar to the UK provisions, with appropriate modifications, should be inserted into the Companies Act.

Summary of Feedback Received

18. All respondents agreed with this recommendation. Some respondents queried if the recommendation was necessary as the UK reform was prompted by European Union impact or the recommendation was relevant only in a par value environment.

MOF's Response

19. **MOF accepts Recommendation 3.9.** The SC had noted that it was common for companies with foreign businesses to re-denominate their share structure and hence the statutory mechanism would be useful and provide greater certainty. MOF agrees with SC's views and notes that Hong Kong, which has suggested abolition of par value shares, will also introduce a redenomination regime.

(b) Interest in shares

Recommendation 3.10

Section 7 of the Companies Act should be amended to be consistent with section 4 of the SFA.

Summary of Feedback Received

20. All respondents agreed with this recommendation.

MOF's Response

21. **MOF accepts Recommendation 3.10**. The SC had noted that the definition of "interest in shares" in section 7 should be aligned with the definition of "interest in securities" in section 4 of the Securities and Futures Act (SFA) for consistency. The SC was also of the view that amending section 7 in this manner would not have any unintended consequences on the Act provisions referring to an "interest in shares." MOF agrees with SC's views.

(c) Economic interests in shares

Recommendation 3.11
Section 7 need not be amended to bring economic interests in shares within the definition of "interest in shares" at this point.

Summary of Feedback Received

22. All respondents agreed with this recommendation. One respondent suggested requiring all companies to disclose directors' economic interests in the company's securities.

MOF's Response

23. **MOF accepts Recommendation 3.11**. The SC had noted that it would be premature to recognise economic interests as being an "interest in shares" and suggested monitoring overseas developments in this area. MOF agrees with SC's views. As for the comment on recognition of directors' economic interest, MOF will similarly monitor international developments on this matter.

(d) Exemptions under section 63(1A)

Recommendation 3.12
The exemption afforded under section 63(1A) should be extended to all listed companies, wherever listed.

Summary of Feedback Received

24. All respondents agreed with this recommendation.

MOF's Response

25. **MOF accepts Recommendation 3.12**. Section 63(1A) exempts a company, whose shares are listed on a stock exchange in Singapore, from having to lodge a return of allotment that includes the shares held by the top 50 members of the company, and their personal particulars. MOF agrees with the SC's proposal to extend section 63(1A) to include Singapore incorporated companies that are listed overseas.

(e) Introduction of a carve-out for reporting of share issuances pursuant to shareholder-approved equity-based employee incentive plans

Recommendation 3.13

Section 63(1) should not be amended to replace the 14-day reporting timeline with quarterly reporting (on an aggregate basis) of all shares allotted and issued during each financial quarter where the allotment takes place under equity-based incentive plans pursuant to which shares are issued to employees and other service providers of issuers.

Summary of Feedback Received

26. All respondents agreed with this recommendation.

MOF's Response

27. **MOF accepts Recommendation 3.13**. Currently, section 63(1) imposes a 14-day timeline for companies to file the return of allotment. MOF agrees with the SC not to replace the current timeline with quarterly reporting as this will not promote greater transparency nor prompt reporting. It is also not consistent with the position in jurisdictions like the UK, New Zealand and Australia.

(f) Definition of "share"

Recommendation 3.14

Section 4 definition of "share" and section 121 which defines the nature of shares should not be changed.

Summary of Feedback Received

28. All respondents agreed with this recommendation.

MOF's Response

29. **MOF accepts Recommendation 3.14**. The definition and nature of shares differ across jurisdictions. MOF agrees with the SC that no change is required as we have not received feedback that differences lead to any difficulties.

(g) Dematerialisation of shares

Recommendation 3.15
Shares of public companies should be eventually be dematerialised but the law need not mandate such a requirement at this time.

Summary of Feedback Received

30. Majority of the respondents agreed with this recommendation.

MOF's Response

31. **MOF accepts Recommendation 3.15.** The SC had recommended dematerialisation for public companies. For private companies, the share certificates show evidence of ownership and may be needed by the shareholders. Also, as fresh issues and transfers of shares are not likely to be as frequent for private companies, it is more cost efficient to retain share certificates. MOF agrees with SC's views. There is no compelling reason to mandate dematerialisation for public companies for now.

(h) Central Depository System ("CDP") Provisions

Recommendation 3.16
The provisions in the Companies Act which relate to the CDP should be extracted and inserted into a separate stand-alone Act.

Summary of Feedback Received

32. All respondents except the Monetary Authority of Singapore (MAS) agreed with this recommendation. MAS intends to migrate the CDP provisions to the SFA.

MOF's Response

33. **MOF accepts Recommendation 3.16 but with the modification that the CDP provisions would be migrated to the SFA (i.e. modify Recommendation 3.16).** This is in line with the SC's recommendation to retain core company law in the Act.

IV. DEBENTURES

Recommendation 3.17

Section 93 of the Companies Act on debentures should be retained. However the register of debenture holders and trust deed should be open to public inspection.

Summary of Feedback Received

34. Most respondents agree with this recommendation. However, a few respondents disagreed. They indicated that the register of debenture holders should not be open for public access due to confidentiality reasons. Some commented that even if the register was open to the public, transparency would not be promoted as the registered debenture holder would either be the Central Depository or a nominee of a foreign clearing system for listed debentures. The respondents also pointed out that the trust deeds should not be open for public access as these were confidential documents.

MOF's Response

35. **MOF accepts the recommendation to retain the need to maintain the register of debenture holders, but does not accept the recommendation to give public access to the register of debenture holders or trust deeds (i.e. modify Recommendation 3.17)**. The SC had noted there was no call to remove the current requirements for a company to keep the register of debenture holders. Currently, only debenture holders and shareholders can inspect the register and trust deed. To promote corporate transparency, SC had recommended that the register and the trust deeds be open for public inspection. While MOF agrees that section 93[3] should be retained, MOF is of the view that the register of debenture holders should not be open for public inspection. Opening the register for public inspection may reduce the investment attractiveness of debentures as some investors may be concerned about loss of confidentiality. MOF also agrees that trust deeds, which may contain commercially sensitive information, should not be open to public inspection for confidentiality reasons. This is consistent with the practice in the other jurisdictions like UK and Hong Kong.

V. SOLVENCY STATEMENTS

(a) Uniform solvency statement

Recommendation 3.18

One uniform solvency test should be applied for all transactions (except

[3] Section 93 relates to the register of debenture holders and copies of trust deed.

amalgamations).

Recommendation 3.19

Section 7A solvency test should be adopted as the uniform solvency test and be applied to share buybacks (replacing section 76F(4)).

Summary of Feedback Received

36. All respondents agreed with these recommendations.

MOF's Response

37. **MOF accepts Recommendations 3.18 and 3.19**. The SC had noted that it was timely to consider a uniform solvency test for all transactions. The SC had preferred the section 7A test (i.e. statement by the directors which states that based on the company's current situation, there are no grounds on which it is unable to pay its debts at the point of amalgamation and within a 12-month forward looking period, and that the value of its assets will not become less than the value of its liabilities after the transaction) because it was less onerous and less hypothetical when compared to the section 76F(4) test, which required that the company should be "able to pay its debts in full at the time of the payment". MOF agrees with the SC's views.

(b) Declaration, not statutory declaration

Recommendation 3.20

Solvency statements under sections 7A(2), 215(2) and 215J(1) should be by way of declaration rather than statutory declaration.

Summary of Feedback Received

38. Most respondents agreed with this recommendation. One respondent who disagreed indicated that a statutory declaration would provide more protection to creditors or third parties.

MOF's Response

39. **MOF accepts Recommendation 3.20**. The SC had noted that directors were reluctant to provide a statutory declaration because of the penalties under the Oaths and Declarations Act, and that it was not pro-business to retain the current requirements for a statutory declaration. The SC was also of the view that a declaration was sufficient as false statements were still subject to criminal sanctions in the Act. MOF agrees with the SC's views.

(c) Solvency statement by the Board of Directors

Recommendation 3.21
There should be no change to the requirement for all directors to make the solvency statements under sections 70(4)(a), 76(9A)(e), 76(9B)(c), 78B(3)(a), and 78C(3)(a).

Summary of Feedback Received

40. Most respondents agreed with this recommendation. One dissenting respondent indicated that it would be sufficient for the board of directors to make these solvency statements rather than requiring the approval of "all directors".

MOF's Response

41. **MOF accepts Recommendation 3.21**. The SC had noted that having all the directors make the solvency statements provides better protection for creditors. As our wrongful trading provisions present more obstacles for creditors to seek redress than those found in other jurisdictions, a more stringent approach should be taken in relation to the declaration of solvency. MOF agrees with the SC's views.

VII. SHARE BUYBACKS AND TREASURY SHARES

(a) Relevant period for share buybacks

Recommendation 3.22
The definition of the "relevant period" for share buybacks in section 76B(4) should be amended to be from "the date an AGM was held, or if no such meeting was held as required by law, then the date it should have been held and expiring on the date the next AGM after that is or is required by law to be held, whichever is earlier".

Summary of Feedback Received

42. All respondents agreed with this recommendation.

MOF's Response

43. **MOF accepts Recommendation 3.22**. The SC had noted that the definition of the "relevant period" in section 76B(4)[4] could lead to different lengths of time

[4] Section 76B(4) states that "In subsection (3), "relevant period" means the period commencing from the date the last annual general meeting of the company was held or if no such meeting was held the date it was required by law to be held before the resolution in question is passed, and expiring on the date the next annual general meeting is or is required by law to be held, whichever is the earlier, after the date the resolution in question is passed."

permitted depending on when the buyback mandate was adopted. MOF agrees with the SC that the definition of the "relevant period" should be amended for clarity.

(b) Time periods for measuring threshold of share buybacks

Recommendation 3.23

The reference to "the last AGM ... held before any resolution passed ..." in sections 76B(3)(a) and 76B(3B)(a) should be replaced with "the beginning of the relevant period".

Recommendation 3.24

Also wherever "the relevant period" appears in section 76B, it should be replaced with "a relevant period".

Summary of Feedback Received

44. All respondents agreed with these recommendations.

MOF's Response

45. **MOF accepts Recommendations 3.23 and 3.24**. MOF agrees with the consequential amendments (as a result of Recommendation 3.22) to section 76B.

(c) Repurchase of "odd-lot" shares through a discriminatory offer

Recommendation 3.25

The Companies Act should be amended to provide for an additional exception to the share acquisition prohibition, viz, that listed companies be allowed to make discriminatory repurchase offers to odd-lot shareholders.

Summary of Feedback Received

46. All respondents agreed with this recommendation. One respondent agreed that listed companies might be allowed to make discriminatory repurchase offers to odd lot shareholders subject to the current safeguards in the Act, and that a 105% price cap could apply in the SGX Listing Rules (similar to that for selective on-market purchases). In addition, it should be clarified that a listed company that sponsored an odd-lot program was not taken to have violated the financial assistance prohibition.

MOF's Response

47. **MOF accepts Recommendation 3.25, but with some modifications as elaborated below (i.e. modify Recommendation 3.25).** Currently, the Act prohibits listed companies from buying back shares through discriminatory offers (i.e. selective off-market buybacks). The recommendation will reduce administrative costs for companies with a substantial number of odd-lot shareholders and allow odd-lot shareholders, who are currently discouraged from selling their small holdings due to high transaction costs, to dispose their shares. MOF is of the view that it is more appropriate for prohibitions on listed companies to be specified under the listing rules, as these are not core company law. Therefore, MOF will modify the SC's recommendation. Instead of amending the Act to provide for an additional exception to the share acquisition prohibition, MOF will amend the Act to remove the existing restriction of selective off-market acquisitions for listed companies. Existing safeguards for selective off-market buybacks (e.g. approval by special resolution) will be retained in the Act. Additional rules relating to repurchase offers to odd-lot shareholders by listed companies may be specified in the listing rules. In response to feedback, MOF will clarify in the Act that sponsoring an odd-lot program does not amount to financial assistance.

(d) Treasury shares

Recommendation 3.26
Section 76K(1)(b) should be amended by deleting the word "employees", in order to remove the restriction imposed on the use of treasury shares. If specific safeguards are necessary for listed companies, these should be imposed by rules applicable solely to listed companies.

Summary of Feedback Received

48. All respondents agreed with this recommendation.

MOF's Response

49. **MOF accepts Recommendation 3.26**. The SC had noted treasury shares transfers for the purposes of "an employees' share scheme" was unduly restrictive. SC was also of the view that specific safeguards necessary for listed companies should be imposed by the listing rules. MOF agrees with the SC's views.

VII. FINANCIAL ASSISTANCE FOR THE ACQUISITION OF SHARES

Recommendation 3.27
Section 76(1)(a) and associated provisions relating to financial assistance should be

abolished for private companies, but continue to apply to public companies and their subsidiary companies. A new exception should be introduced to allow a public company or its subsidiary to assist a person to acquire shares (or units of shares) in the company or a holding company of the company if giving the assistance does not materially prejudice the interests of the company or its shareholders or the company's ability to pay its creditors.

Recommendation 3.28

Sections 76(8) and (9) should be reviewed against the list of excepted financial assistance transactions in the UK to determine if they should be updated.

Recommendation 3.29

Sections 76(1)(b), (c) and associated provisions should be integrated with the provisions on share buybacks.

Summary of Feedback Received

50. A majority of respondents agreed with Recommendation 3.27. Dissenting feedback was received that section 76[5] should be abolished for all companies. There were views that section 76 should be reformed to provide greater clarity. One respondent suggested introducing a "predominant reason" test (i.e. financial assistance transactions will not be unlawful where the company's predominant reason for entering into the transaction is not to give financial assistance), which was considered by the UK in 1993, to narrow the scope of the current prohibition. Another alternative was to introduce a "material prejudice" test based on the Australian legislation (i.e. financial transactions will not be unlawful where the transactions do not materially prejudice the company or its shareholders or the company's ability to pay its creditors).

51. Most respondents agreed with Recommendation 3.28. The dissenting respondent stated that the financial assistance prohibition should be abolished entirely. All respondents agreed with Recommendation 3.29.

MOF's Response

52. **MOF accepts Recommendations 3.27, 3.28 and 3.29**. MOF agrees to remove the financial assistance prohibition under section 76 for private companies as they are usually closely held and shareholders have greater control over the decision to give financial assistance. This will reduce cost for private companies and is consistent with the position in the UK. For prudence, MOF agrees with the SC to refine the regime for public companies by introducing a new "material prejudice" exception. MOF has also

[5] Section 76 relates to company financing dealings in its shares.

evaluated the various alternatives to the "material prejudice" exception, but found them to be less suitable.

VIII. REDUCTION OF CAPITAL

(a) Solvency statements for capital reductions without court sanction

Recommendation 3.30 The requirement for a solvency statement in capital reductions without the sanction of the court should be maintained.

Summary of Feedback Received

53. All respondents agreed with this recommendation.

MOF's Response

54. **MOF accepts Recommendation 3.30**. MOF agrees with the SC to retain the solvency statement as it is an objective measure that serves a useful purpose in protecting creditors.

(b) Capital reductions not involving a distribution or release of liability

Recommendation 3.31 Sections 78B(2) and 78C(2) should be amended to dispense with solvency requirements as long as the capital reduction does not involve a reduction/distribution of cash or other assets by the company or a release of any liability owed to the company.

Summary of Feedback Received

55. All respondents agreed with this recommendation.

MOF's Response

56. **MOF accepts Recommendation 3.31**. Sections 78B(2) and 78C(2) provide that the solvency requirements do not apply if the reduction of capital is in respect of the cancellation of capital lost or unrepresented by available assets. The SC had noted that the requirements should cover all situations, which do not involve a reduction/distribution of cash or other assets by the company or a release of any liability owed by the company. MOF agrees with the SC's views as the solvency requirements are not necessary in those circumstances.

(c) Time frames for capital reduction

Recommendation 3.32

The time frame specified in sections 78B(3)(b)(ii) and 78C(3)(b)(ii) should be amended from the current 15 days and 22 days to 20 days and 30 days respectively.

Summary of Feedback Received

57. All respondents agreed with this recommendation.

MOF's Response

58. **MOF accepts Recommendation 3.32**. The SC had noted that a notice period of 14 and 21 days is required to pass the resolution for capital reduction in private and public companies respectively. This leaves only a single day for the solvency statement to be made. MOF agrees with the SC that more time should be given for the making of the solvency statement.

(d) Declaration by directors

Recommendation 3.33

A provision requiring directors to declare that their decision to reduce capital was made in the best interests of the company is not required as the obligation to act in the best interests of the company is already covered by existing directors' duties.

Summary of Feedback Received

59. Most respondents agreed with this recommendation. One respondent disagreed and indicated that directors should make an explicit declaration that the capital reduction would be in the best interest of the company given the significance of such an exercise. The respondent added that to address the possible misconception that there was some higher standard of duty associated with capital reduction, the declaration could be made with reference to section 157 of the Act, which defines directors' duties.

MOF's Response

60. **MOF accepts Recommendation 3.33**. The SC had noted that directors had a fiduciary duty to act in the best interests of the company. The SC opined that expressly requiring the directors to make a declaration (i.e. that any capital reduction was in the best interests of the company when the act took place) might serve as a reminder to the directors. However, there was also a possibility of a misunderstanding that there was some higher standard of duty associated with capital reduction, which might deter directors from issuing a declaration. MOF notes the SC's views and the

dissenting comment that this can be overcome by making reference to the relevant provision that imposes the said duty. However, on balance, MOF accepts the SC's recommendation since there is no evidence of more directors breaching their duties in such transactions. The recommendation is also consistent with the position in the UK, Australia and New Zealand.

IX. DIVIDENDS

Recommendation 3.34

The section 403 test for dividend distributions should be retained.

Summary of Feedback Received

61. Most respondents agreed with this recommendation. Some dissenting views included: (i) the solvency test approach used in New Zealand was more holistic; (ii) "profits" should be defined and that the "middle of the road" approach set out in the report would be more prudent than the current test; (iii) the common law position that dividends were payable when there were profits in a particular year, even if the company had accumulated losses, should be included in the Act for clarity; and (iv) section 403 might be retained but a further requirement that directors should pay due regard to the effects of making a distribution on the company's ability to meet its obligation to achieve long term shareholder value should be introduced.

MOF's Response

62. **MOF accepts Recommendation 3.34**. The SC had considered the tests for dividend payments in jurisdictions like UK, Australia and New Zealand and concluded that we should retain the current position which is sufficiently well understood. While the SC acknowledged that there were some merits to the proposed "middle of the road" approach, it preferred to monitor the developments in other jurisdictions before reconsidering this issue. MOF agrees with the SC's views. MOF is also of the view that codifying the common law position may have unintended consequences and the views expressed in (iv) above introduces uncertainty for directors.

X. OTHER ISSUES PERTAINING TO CAPITAL MAINTENANCE

(a) Permitted uses of capital for share issues and buybacks

Recommendation 3.35

Provisions should be made in law to allow a company to use its share capital to pay for expenses, brokerage or commissions incurred in an issue or buyback of shares.

Summary of Feedback Received

63. All respondents agreed with this recommendation.

MOF's Response

64. **MOF accepts Recommendation 3.35**. The SC had noted the uncertainty on whether a company might use its share capital for payment of brokerage or commission incurred for share buybacks. Thus, the SC had recommended that the Act explicitly provide for this. MOF agrees with the SC's views.

(b) Reporting of amounts paid up on the shares in a share certificate

Recommendation 3.36

The requirement to disclose the "amount paid" on the shares in the share certificate under section 123(2)(c) should be removed. Companies should be required to disclose the class of shares, the extent to which the shares are paid up (i.e. whether fully or partly paid) and the amounts unpaid on the shares, if applicable under section 123(2)(c).

Summary of Feedback Received

65. All respondents agreed with this recommendation.

MOF's Response

66. **MOF accepts Recommendation 3.36**. MOF agrees with the SC that there is not much value in including such historical information in the share certificates of fully paid shares. The return of allotment is a better source of information on the amounts paid for shares.

(c) Financial reporting standards and section 63

Recommendation 3.37

There should be no changes made to the Companies Act on account of the new FRS 32, FRS 39 and FRS 102.

Recommendation 3.38

Section 63 should be amended so that a company is required to lodge with the Registrar a return whenever there is an increase in share capital regardless of whether it is accompanied by an issue of shares.

Summary of Feedback Received

67. Most respondents agreed with Recommendation 3.37. The views on Recommendation 3.38 were split. Respondents who disagreed indicated that companies would face increased costs in having to regularly report changes in accounting share capital. It was also pointed out that: (i) shareholders looked to areas other than share capital in order to determine a company's financial strength; (ii) information about a company's accounting share capital could be found in its financial statements; and (iii) there was no equivalent in other jurisdictions.

MOF's Response

68. **MOF accepts Recommendation 3.37**. MOF agrees with the SC that no changes to the law are warranted on account of changes in the accounting treatments. Accounting treatments in certain areas are complex and change from time to time. There is no compelling reason for the Act to be amended to align with these changes.

69. **MOF does not accept Recommendation 3.38**. The SC had made the recommendation to ensure that the amount of capital reflected in the financial statements would be consistent with the statutory records. However, MOF notes that accounting share capital is currently only reported in the financial statements that are prepared at year-end. As accounting share capital can change frequently without a change in the statutory share capital, companies will be faced with increased business costs without a comparable benefit if they are required to file accounting share capital with ACRA on an ongoing basis. MOF also notes that there is no such precedent in other jurisdictions.

XI. SCHEMES OF ARRANGEMENT

(a) Holders of units of shares

Recommendation 3.39
Section 210 should be amended to state explicitly that it includes a compromise or arrangement between a company and holders of units of company shares.

Summary of Feedback Received

70. All respondents agreed with this recommendation.

MOF's Response

71. **MOF accepts Recommendation 3.39**. The SC had noted that there might be doubts on whether holders of options and convertibles could be parties to a section

210[6] scheme of arrangement. MOF agrees with the SC that the position should be clarified by amending section 210.

(b) Share-splitting and voting by nominees

Recommendation 3.40

The words "unless the Court orders otherwise" should be inserted preceding the numerical majority requirement in section 210(3). This would serve the twin purpose of dealing with cases of "share-splitting" and allowing the court latitude to decide who the members are in a particular case.

Summary of Feedback Received

72. Most respondents agreed with this recommendation. One dissenting respondent was of the view that this amendment would lead to uncertainty as it was not only restricted to a share splitting situation and could suggest that the court might also allow a lesser majority to agree to and bind all relevant parties to any compromise or arrangement. In addition, it was suggested that the court could already exercise its power in section 210(4) [7] of the Act to deal with any risk of share splitting.

MOF's Response

73. **MOF accepts Recommendation 3.40**. The purpose of the amendment is to prevent the defeat of a member's scheme of arrangement by opposing parties engaged in share-splitting, which involves one or more members transferring small parcel of shares to a large number of other persons who are willing to vote in accordance with the transferors' instructions. MOF agrees with SC's views and notes that the amendment has been used in Australia to tackle the share splitting issue. MOF is of the view that section 210(4), when read literally, empowers the court to grant alteration or set conditions for the compromise or arrangement rather than share splitting. Thus, we agree with SC on the need for the amendment.

Recommendation 3.41

For the purposes of section 210, if a majority in number of proxies and a majority in value of proxies representing the nominee member voted in favor of the scheme, it would count as the nominee member having voted in favor of the scheme.

[6] Section 210 relates to the powers to compromise with creditors and members for companies.
[7] Section 210(4) states that "Subject to subsection (4A), the Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just."

Summary of Feedback Received

74. Most respondents agreed with the recommendation. One dissenting respondent commented that the recommendation was not necessary as it reflected the industry practice while another suggested allowing the court to decide in exceptional situations.

MOF's Response

75. **MOF accepts Recommendation 3.41**. Currently, the Act does not specify how a nominee member who is represented by proxies is counted for under the schemes of arrangement. MOF notes the comment that the recommendation reflects the practice and accepts the recommendation to provide greater certainty and clarity. It will be further reviewed during drafting if the court can be permitted some discretion in exceptional instances.

(c) Look-through to beneficial shareholders

Recommendation 3.42
For the purposes of section 210, where shares are registered in the name of a nominee that is a foreign depository, there is no need to provide for a look-through to the actual beneficial shareholders.

Summary of Feedback Received

76. Most respondents agreed with this recommendation. One dissenting respondent commented that the determination of the beneficial shareholders of a nominee should be left to the discretion of the court.

MOF's Response

77. **MOF accepts Recommendation 3.42**. The SC had noted that section 130D of the Act provides for a look-through to the members behind the Central Depository so that the actual owners of shares retain their rights as shareholders. However, there is no such provision in relation to overseas-listed shares when it comes to voting on a scheme of arrangement. After consideration, the SC recommended that a consistent approach be adopted on this issue and recognition of overseas depositors for all matters under the Act. MOF agrees with the SC's views and notes that this is consistent with Recommendation 2.23.

(d) Definition of "company"

Recommendation 3.43
Sections 210 and 212 should apply to both "companies" and "foreign companies".

Summary of Feedback Received

78. Most respondents agreed with the recommendation. One dissenting respondent was of the view that sections 210 and 212[8] should not apply to "foreign companies", as this would result in the Act being given extraterritorial jurisdiction over foreign companies.

MOF's Response

79. **MOF accepts Recommendation 3.43**. The SC had noted the different definition of "companies" and "foreign companies" in sections 210 and 212 of the Act, with the section 212 definition being narrower[9]. The SC also felt that section 212 should be extended to foreign companies in order to facilitate cross-border transactions. MOF agrees with the SC's views.

(e) Binding the offeror

Recommendation 3.44
Section 210 and associated provisions should not be amended to provide for the scheme to be binding on the offeror.

Summary of Feedback Received

80. All respondents agreed with this recommendation.

MOF's Response

81. **MOF accepts Recommendation 3.44**. The SC had noted that section 210 of the Act and the associated provisions did not have binding force on the offeror but recommended that it was not necessary to amend the relevant provisions as the court already had the power to require the offeror be a party to the scheme before granting approval. This was also consistent with practices in other major jurisdictions. MOF agrees with SC's views.

Recommendation 3.45
Section 210 need not be amended to specifically provide that section 210 schemes should comply with the Code of Takeovers and Mergers or be approved by the Securities Industry Council.

[8] Sections 210 and 212 relate to "power to compromise with creditors and members" and "approval of compromise or arrangement by Court" respectively.

[9] Under section 210, "company" means any corporation or society liable to be wound up under this Act. Section 212 states that "company" in this section does not include any company other than a company as defined in section 4.

Summary of Feedback Received

82. Most respondents agreed with this recommendation. One respondent who disagreed suggested requiring schemes of arrangement to comply with the Code of Takeovers and Mergers ("Code") or be approved by the Securities Industry Council. This would provide assurance that the principles expounded by the Code would be applied in appropriate situations.

MOF's Response

83. **MOF accepts Recommendation 3.45**. The SC was of the view that it would be more in keeping with the self-regulatory nature of securities regulation to maintain status quo. Moreover, parties in a take-over or merger transaction are to adhere to the Code and the Securities Industry Council or any aggrieved shareholder can also make an application to the court. Thus, MOF agrees with the SC not to amend section 210.

XII. COMPULSORY ACQUISITION

(a) Holders of units of shares

Recommendation 3.46
Section 215 should be amended to extend to units of a company's shares.

Summary of Feedback Received

84. All respondents agreed with this recommendation.

MOF's Response

85. **MOF accepts Recommendation 3.46**. Section 215[10] is meant to allow an offeror to take up remaining minority positions in order to complete the takeover of a company. MOF agrees with the SC that the provision should be amended to extend to options and convertibles of all sorts.

(b) Individual offeror

Recommendation 3.47
Section 215 should be extended to cover individual offerors.

[10] Section 215 relates to the power to acquire shares of shareholders dissenting from scheme or contract approved by 90% majority.

Summary of Feedback Received

86. All respondents agreed with this recommendation.

MOF's Response

87. **MOF accepts Recommendation 3.47**. Currently, section 215 applies to the transfer of shares in one company to "another company or corporation". MOF agrees with the SC that there is no compelling reason why section 215 cannot be invoked by a natural person.

(c) Joint offers

Recommendation 3.48

A provision similar to section 987 of the UK Companies Act 2006 on joint offers should be added to the Singapore Companies Act.

Summary of Feedback Received

88. All respondents agreed with this recommendation.

MOF's Response

89. **MOF accepts Recommendation 3.48**. The SC had noted that it should be made clear that where a takeover offer is made jointly by more than one person, all the joint offerors would have the same legal obligations. Therefore, section 987 of the UK Companies Act 2006, which deals specifically with joint offers, should be introduced into the Act. MOF agrees with SC's views.

(d) Associates

Recommendation 3.49

The UK definition of "associate" should be adopted for parties whose shares are to be excluded in calculating the 90% acceptances for section 215.

Recommendation 3.50

There should be provision for Ministerial exemptions for very large holding companies with interests in many companies.

Summary of Feedback Received

90. Although a majority of respondents agreed with these recommendations, substantial concerns were expressed by some respondents. Dissenting respondents

were generally concerned that the UK's definition of "associate"[11] was too wide and might lead to uncertainty. For example, it was highlighted that the UK definition included "a body corporate in which the offeror is substantially interested" (i.e. any company over which the offeror is entitled to exercise or control the exercise of one-third or more of the voting power) and this might generate uncertainty as to what amounted to control. Difficulties in determining the appropriate scope and setting clear criteria in the exercise of the exemptions under Recommendation 3.50 were also noted.

MOF's Response

91. **MOF does not accept Recommendations 3.49 and 3.50**. Currently, an offeror company can compulsorily acquire the shares of the dissenting minority shareholders of a target company if 90% of the shareholders of the target company approve the takeover offer. Shares held by the offeror group, which comprises the offeror and its related companies, are excluded from the 90% computation. Although it is conceptually sound to exclude parties not independent of the offeror in calculating the 90% acceptances, the present provisions have not given rise to any particular concerns. Thus, there is no compelling reason to change the position at this time. Moreover, Recommendation 3.49 will make it more difficult for an offeror to obtain full ownership, especially if the offeror already has a substantial shareholding when the offer is made. For a healthy functioning financial market, it is important to ensure that our requirements are not overly stringent or make it difficult for companies to restructure. In case of unfairness, dissenting minority shareholders can apply to court under section 215. MOF also agrees with the feedback that it will be difficult to establish clear and transparent criteria for exemption if Recommendation 3.50 were to be implemented.

(e) Threshold for squeeze-out rights

Recommendation 3.51
A new 95% alternative threshold for squeeze out rights along the lines of section 103(1) of the Bermudan Companies Act was considered but not recommended.

Summary of Feedback Received

92. Most respondents agreed with this recommendation. One respondent was of the view that such a new 95% alternative threshold should be introduced.

[11] Section 988 of the UK Companies Act 2006 states that "associate", in relation to an offeror, means:
(a) a nominee of the offeror,
(b) a holding company, subsidiary or fellow subsidiary of the offeror or a nominee of such a holding company, subsidiary or fellow subsidiary,
(c) a body corporate in which the offeror is substantially interested,
(d) a person who is, or is a nominee of, a party to a share acquisition agreement with the offeror, or
(e) (where the offeror is an individual) his spouse or civil partner and any minor child or step-child of his.

MOF's Response

93. **MOF accepts Recommendation 3.51**. The SC had noted that there were no strong calls for such a policy change. MOF agrees that it is not necessary to introduce such an alternative threshold for squeeze out rights at this time.

(f) Cut-off date

Recommendation 3.52
A cut-off at the date of offer should be imposed for determining the 90% threshold for the offeror to acquire buyout rights so that shares issued after that date are not taken into account.

Summary of Feedback Received

94. All respondents agreed with this recommendation.

MOF's Response

95. **MOF accepts Recommendation 3.52**. The SC had noted that in order to create greater certainty for the offeror, a cut-off at the date of offer should be in place for determining the 90% threshold for the offeror to acquire buyout rights. MOF agrees with the SC's views.

(g) Computation of 90% threshold

Recommendation 3.53
Section 215(3) should be amended by deleting "(excluding treasury shares)" and substituting "(including treasury shares)" so as to grant sell out rights when the offeror has control over 90% of the shares, including treasury shares.

Summary of Feedback Received

96. All respondents agreed with this recommendation.

MOF's Response

97. **MOF accepts Recommendation 3.53**. Currently, section 215(3), which deals with minority shareholders' perspective of sell-out right, provides that treasury shares should be excluded from the 90% threshold. The SC recommended adopting the UK position, which is in favour of sell-out rights of minority shareholders. Amending the law to include treasury shares recognises the reality that the offeror who crosses the 90% threshold when treasury shares are included is already in a position to control the

target company (and therefore the treasury shares) by virtue of his majority shareholding. MOF agrees with SC's views.

(h) Dual consideration

Recommendation 3.54

Where the terms of the offer give the shareholders a choice of consideration, the shareholder should be given 2 weeks to elect his choice of consideration and the offeror should also be required to state the default position if no election is made.

Summary of Feedback Received

98. All respondents agreed with this recommendation.

MOF's Response

99. **MOF accepts Recommendation 3.54**. Currently, the Act is silent on offers involving a choice of consideration to be paid by the offeror to the target company shareholders. For clarity, MOF agrees with the SC that a period of two weeks would be adequate for shareholders to elect any choice of consideration, and that offerors should be required to state the default position if no election is made.

(i) Unclaimed consideration

Recommendation 3.55

The words "other than cash" in section 215(6) should be deleted so that all forms of consideration may be transferred by the target company to the Official Receiver if the rightful owner cannot be located. Such powers should be available in sections 210 and 215A to 215J situations as well.

Summary of Feedback Received

100. All respondents agreed with this recommendation.

MOF's Response

101. **MOF accepts Recommendation 3.55**. Currently, section 215(6) allows consideration other than cash to be transferred by the target company to the Official Receiver if the rightful owner cannot be located. Arising from feedback from the industry, the SC had recommended allowing the Official Receiver to handle unclaimed cash consideration as well. MOF agrees with SC's views.

(j) Overseas shareholders

Recommendation 3.56

An exemption should be added so that if overseas shareholders are not served with a takeover offer, that does not render section 215 inapplicable as long as service would have been unduly onerous or would contravene foreign law.

Summary of Feedback Received

102. All respondents agreed with this recommendation. One respondent suggested that it would be useful to provide illustrations of situations in which it would be deemed unduly onerous to serve the offer on overseas shareholders.

MOF's Response

103. **MOF accepts Recommendation 3.56**. The SC had noted that it might be unduly onerous or impossible to deliver an offer to overseas shareholders who do not have local addresses. To address the problem, a provision similar to section 978 of the UK Companies Act 2006[12] would be incorporated into the Act, but broadened so that the exemption would apply whenever it was "unduly onerous". MOF agrees with the SC's views to incorporate a similar provision to section 978 but with a broader ambit so that the exemption applies whenever it is unduly onerous to serve the offer on the overseas shareholders or when it would contravene foreign law. During the drafting of the provision, we will consider if providing illustrations of such situations is feasible.

XIII. AMALGAMATIONS

(a) Short form amalgamation of holding companies with wholly-owned subsidiary

Recommendation 3.57

It should be specifically stated that a holding company may amalgamate with its wholly-owned subsidiary by short form.

Summary of Feedback Received

104. All respondents agreed with this recommendation.

[12] Section 978 of the UK Companies Act relates to the effect of impossibility etc of communicating or accepting offer.

MOF's Response

105. **MOF accepts Recommendation 3.57**. Short-form amalgamations involve either vertical amalgamation of a holding company and one or more wholly-owned subsidiaries, or horizontal amalgamation of two or more wholly-owned subsidiaries.The SC had noted that it was currently not clear whether a holding company might amalgamate with its wholly-owned subsidiary by short form where the subsidiary was to be the surviving amalgamated company, or whether it was only the holding company which could be the surviving amalgamated company. MOF agrees with the SC's views to clarify that short-form amalgamations extend to those of a holding company with its wholly-owned subsidiary.

(b) Amalgamation of foreign companies

Recommendation 3.58 The amalgamation provisions should not be extended to foreign companies.

Summary of Feedback Received

106. Most respondents agreed with this recommendation. One respondent disagreed as extending amalgamation provisions to foreign companies would be economically beneficial to Singapore to allow cross-border amalgamations.

MOF's Response

107. **MOF accepts Recommendation 3.58**. The SC had noted that none of the jurisdictions allow cross border amalgamations and that it would be preferable to avoid potential jurisdictional issues that might arise from allowing them. MOF agrees with SC's views.

(c) Amalgamation of companies limited by guarantee

Recommendation 3.59 The amalgamation provisions should not be extended to companies limited by guarantee.

Summary of Feedback Received

108. All respondents agreed with this recommendation.

MOF's Response

109. **MOF accepts Recommendation 3.59**. The SC had noted that the amalgamation provisions were introduced to facilitate businesses rather than for

companies limited by guarantee that generally do not carry on business activities. The SC therefore recommended that the amalgamation provisions not be extended to companies limited by guarantee. MOF agrees with SC's views.

(d) Solvency statement

Recommendation 3.60
The boards of amalgamating companies should make a solvency statement regarding the amalgamating company at the point in question and within a 12-month forward-looking period. The components of the solvency test will be assets/liabilities and ability to pay debts.

Summary of Feedback Received

110. Most respondents agreed with the recommendation. One dissenting respondent indicated that the recommendation might compromise the rights of minority shareholders and suggested that the board of the amalgamated company be required to provide a solvency statement for the amalgamated company. This would ensure that the shareholders of the amalgamated company are not prejudiced by the amalgamation.

MOF's Response

111. **MOF accepts Recommendation 3.60 but with modifications.** MOF notes that the SC had originally considered two options. The first option was for the boards of the amalgamating companies to make a solvency statement regarding the amalgamating companies at the point in question and within a 12-month forward-looking period. The second option was to retain the present solvency test for amalgamations, but only require the boards of the amalgamating companies to comment on the amalgamated company's ability to pay its debts when it is formed. The SC had made its recommendation (i.e. the first option) on the basis that it was reasonable to assume that two solvent amalgamating companies would form a solvent amalgamated company.

112. On balance, MOF prefers to accept the second option as MOF recognises the difficulty and reluctance for directors of two amalgamating companies to give a 12-month forward looking solvency statement when the boards of the amalgamated company may adopt a different business strategy. MOF is also of the view that it is not meaningful to have forward looking statements of the amalgamating companies as they will not exist after the merger. Section 215E(1)(e) of the Act currently requires directors or proposed directors of the amalgamated company to issue a declaration of its assets and creditors' status at the point of amalgamation. Thus, MOF will modify the recommendation by requiring the boards of amalgamating companies to issue a solvency statement for the amalgamated company at the time it is formed, together with solvency statements for the amalgamating companies. This modified approach is

consistent with the NZ position, on which our amalgamation regime is largely based on. It is also noted that there is no evidence of adverse outcomes in NZ or Canada, which also shares a similar model.

CONCLUSION

113. The following table summarises MOF's decision on the recommendations in Chapter 3 of the *Report of the Steering Committee for Review of the Companies Act.*

Classification	No. of Recommendations	Recommendation Reference
Accepted by MOF	53	
Modified by MOF	4	Recommendations 3.16, 3.17, 3.25, 3.60
Not adopted by MOF	3	Recommendations 3.38, 3.49, 3.50
Total	60	-