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# DIRECTORS

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## PREAMBLE

1. In Chapter 1 of the *Report of the Steering Committee for Review of the Companies Act*, the Steering Committee (SC) had reviewed the following issues relating to directors:

- definition of shadow director;
- appointment and qualifications of directors;
- disqualification of directors on conviction of certain offences;
- vacation and removal of directors;
- payment of compensation to directors for loss of office;
- loans to directors and connected companies;
- supervisory role of directors;
- powers of directors to bind the company and issue shares of company;
- directors' fiduciary duties;
- imposition of liability on other officers;
- disclosure of company information by nominee directors; and
- indemnity for directors.

## SUMMARY OF FEEDBACK RECEIVED AND MOF'S RESPONSES

### **I. SHADOW DIRECTORS**

#### Recommendation 1.1

It is not necessary to have a separate definition of "shadow director" in the Companies Act.

#### Summary of Feedback Received

2. Most respondents agreed that a separate definition of "shadow director" is not necessary.

#### MOF's Response

3. **MOF accepts Recommendation 1.1.** "Director" is currently defined to include "a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act". The SC had noted that the existing definition of "director" already encompasses shadow directors. MOF agrees with the SC's views.

### Recommendation 1.2

The Companies Act should clarify that a person who controls the majority of the directors is to be considered a director.

#### Summary of Feedback Received

4. Most respondents agreed with this recommendation but some asked whether a person who controls a single director should be deemed a director

#### MOF's Response

5. **MOF accepts Recommendation 1.2.** The SC had noted that it would be unrealistic to subject a person who controls only one director to all the obligations and duties of a director. The SC also cautioned that it would result in corporate shareholders who nominated directors to the boards of companies being regarded as shadow directors. This might result in corporate shareholders owing duties of care to one another in closely held joint venture companies. MOF agrees with the SC's views.

## **II. APPOINTMENT OF DIRECTORS**

### Recommendation 1.3

The Companies Act should provide expressly that a company may appoint a director by ordinary resolution passed at a general meeting, subject to contrary provision in the articles.

#### Summary of Feedback Received

6. All respondents agreed with this recommendation.

#### MOF's Response

7. **MOF accepts Recommendation 1.3.** MOF shares the views of the SC that as the Act is currently silent on this point it will provide greater clarity on the appointment of directors.

### Recommendation 1.4

Section 170 of the Companies Act requiring approval for assignment of office of director or manager should be repealed.

#### Summary of Feedback Received

8. All respondents agreed with this recommendation.

### MOF's Response

9. **MOF accepts Recommendation 1.4.** MOF shares the views of the SC that section 170 is obsolete since assignment of the office of directors is not done in practice.

## **III. QUALIFICATIONS OF DIRECTORS**

### Recommendation 1.5

It would not be necessary to allow corporate directorships in Singapore.

### Summary of Feedback Received

10. Most respondents agreed with this recommendation. A few respondents disagreed and suggested that corporate directorship be allowed as in the United Kingdom (UK) and Hong Kong. The potential benefits cited included fostering of cohesion in a group of companies, cost effectiveness and facilitating the operations of corporate service providers. Safeguards proposed included limiting corporate directorship to entities licensed by the Monetary Authority of Singapore or regulated professionals, or allowing only investment holding companies to appoint corporate directors.

### MOF's Response

11. **MOF accepts Recommendation 1.5.** The SC had considered the position in other jurisdictions, including the UK and Hong Kong, but found no compelling reason to allow corporate directorship in Singapore, especially in view of the difficulties in determining the person who actually controls the company and in holding a corporate director accountable. MOF agrees with the view of the SC. The safeguards proposed do not adequately address concerns about the lack of transparency and the difficulties in enforcement of corporate directors.

### Recommendation 1.6

The Companies Act should not prescribe the academic or professional qualifications of directors or mandate the training of directors generally.

### Summary of Feedback Received

12. All respondents agreed with this recommendation.

## MOF's Response

13. **MOF accepts Recommendation 1.6.** MOF shares the views of the SC that there is no compelling reason to prescribe qualifications or mandate training for directors of all companies.

### Recommendation 1.7

It is not necessary to impose a maximum age limit for directors in the Companies Act.

### Recommendation 1.8

Section 153 of the Companies Act should be repealed.

## Summary of Feedback Received

14. Almost all respondents agreed with these recommendations. A few respondents suggested that the current position of requiring directors above 70 years old to be re-appointed annually should be retained. It was noted that the age limit of 70 years is past the retirement age of 65 years and that shareholders have the option under current provisions of passing an ordinary resolution to appoint a director above the age limit.

## MOF's Response

15. **MOF accepts Recommendation 1.7 and 1.8.** The SC had noted that persons above 70 years of age can be capable of doing the job of a director and are often re-appointed in practice. There is also no age limit for directors in the UK, Australia, New Zealand and Hong Kong. MOF agrees with the SC and is of the view that this is best left to shareholders to decide whether to approve the appointment of a director.

## **IV. DISQUALIFICATION OF DIRECTORS ON CONVICTION OF OFFENCES INVOLVING FRAUD OR DISHONESTY**

### Recommendation 1.9

The automatic disqualification regime for directors convicted of offences involving fraud or dishonesty should be retained in the Companies Act, and directors so disqualified should be allowed to apply to the High Court for leave to act as a director or take part in the management of the company.

## Summary of Feedback Received

16. Most respondents agreed with this recommendation. However, a few respondents suggested variants on the automatic disqualification regime, such as limiting it to a list of specified offences or to offences committed overseas, while

applications for disqualification orders would be required for other offences. One respondent suggested requiring shareholders' approval via a special resolution before disqualified directors can apply to court for leave. A number of respondents also suggested providing clarity and certainty on the offences that constituted offences involving fraud or dishonesty.

### MOF's Response

17. **MOF accepts Recommendation 1.9.** The SC had considered whether a disqualification order regime where an application has to be made to Court specifically to disqualify a director was preferable but decided against it in favour of the existing automatic disqualification regime for conviction of offences involving fraud or dishonesty. Under the present automatic disqualification regime where a person is convicted (whether in Singapore or elsewhere) of an offence involving fraud or dishonesty punishable with imprisonment for three months or more, he is automatically disqualified from acting as a director or from taking part in the management of the company for five years, without any requirement for a disqualification order to be made by the Court. It was noted that a difficulty with putting the onus on the Court is that in sentencing an offender, the Court may not have in mind the relevance of an offence to the role of a company director. It is also too prescriptive to include a requirement in the legislation for shareholders' approval before disqualified directors can apply to court for leave. MOF agrees with the SC to retain the automatic disqualification regime for directors convicted of offences involving fraud or dishonesty, but to allow automatically disqualified directors to apply to the High Court for leave. To provide guidance on the scope of "offences involving fraud or dishonesty", a non-exhaustive list of offences will be made publicly available e.g. on ACRA's website.

## **V. VACATION OF OFFICE AND REMOVAL OF DIRECTORS**

### Recommendation 1.10

The Companies Act should expressly provide that unless the articles state otherwise, a director may resign by giving the company written notice of his resignation.

### Recommendation 1.11

The Companies Act should expressly provide that subject to section 145(5), the effectiveness of a director's resignation shall not be conditional upon the company's acceptance.

### Summary of Feedback Received

18. All respondents agreed with these recommendations.

## MOF's Response

19. **MOF accepts Recommendation 1.10 and 1.11.** MOF shares the views of the SC that specifying these default positions in the Act will provide greater clarity.

### Recommendation 1.12

It is not necessary for the Companies Act to mandate the retirement of directors.

## Summary of Feedback Received

20. While most respondents agreed with this recommendation, one respondent suggested that the Act require retirement by rotation, which would give guidance to companies.

## MOF's Response

21. **MOF accepts Recommendation 1.12.** The current position is consistent with practices in UK, Australia, New Zealand and Hong Kong, which leave this issue to be dealt with in the Articles of Association (“Articles”) of a company. MOF shares the views of the SC that there is no compelling reason to have the Act mandate retirement of directors.

### Recommendation 1.13

The Companies Act should expressly provide that a private company may by ordinary resolution remove any director, subject to contrary provision in the articles.

## Summary of Feedback Received

22. While most respondents agreed with this recommendation, one respondent suggested that the position be the same for both public and private companies such that shareholders have the right to remove a director by ordinary resolution.

## MOF's Response

23. **MOF accepts Recommendation 1.13.** The SC had noted that the issue of removal of directors of private companies is currently left to the Articles. MOF agrees that specifying the default position in the Act will provide greater clarity. MOF also agrees with the views of the SC that private companies may be given flexibility on this issue by allowing the Articles to override the default position. In the case of public companies, which includes listed companies, there should not be entrenchment of directors and so the existing right to remove any director by ordinary resolution should not be subject to the Articles.

## VI. PAYMENT OF COMPENSATION TO DIRECTORS FOR LOSS OF OFFICE

### Recommendation 1.14

The requirement in section 168 for shareholders' approval for payment of compensation to directors for loss of office should be retained.

### Recommendation 1.15

A new exception should be introduced in the Companies Act to obviate the need for shareholders' approval where the payment of compensation to an executive director for termination of employment is of an amount not exceeding his base salary for the 3 years immediately preceding his termination of employment. For such payment, disclosure to shareholders would still be necessary.

### Summary of Feedback Received

24. Most respondents agreed with these recommendations. However, one respondent commented that executive pay should be left to the board to decide whilst another indicated that shareholders should approve compensation payment and the new exception was unnecessary. On the quantum specified in the new exception, some respondents suggested various permutations, including salary of 3 years, base salary of 2 years and base salary of 6 years. Another alternate view was to specify the quantum in terms of emoluments rather than base salary given that the trend is for remuneration to be performance-based.

### MOF's Response

25. **MOF accepts Recommendation 1.14**, as seeking shareholders' approval for payment of compensation to directors for loss of office is a matter of good corporate governance. **MOF also accepts Recommendation 1.15 but will adopt a payment limit of total emoluments for the past one year (i.e. modify Recommendation 1.15)**. MOF notes that payment of compensation to executives is usually determined by the Board. Thus, MOF has no objection to introducing a new exception for payment of compensation to executive directors for loss of employment if the payment does not exceed a certain payment limit. However, MOF prefers to use total emoluments instead of base pay based on the following considerations. First, companies are already moving towards performance-based payments. Using base pay as the payment limit may lead to an unintended consequence of companies increasing the base pay component. Second, it may be difficult to define base pay in practice. The phrase "total emoluments" provides greater clarity and is already defined in section 169(2) of the Act. For prudence, the payment limit will be based on total emoluments for the past one year, instead of three years. MOF also agrees with the SC to retain disclosure to shareholders for transparency and as a check on the Board.

## VII. LOANS TO DIRECTORS AND CONNECTED COMPANIES

### Recommendation 1.16

The share interest threshold of 20% in section 163 should be retained.

### Summary of Feedback Received

26. All respondents agreed with this recommendation.

### MOF's Response

27. **MOF accepts Recommendation 1.16.** MOF shares the view of the SC that there is no need to change the threshold of 20% in section 163.

### Recommendation 1.17

The following two new exceptions to the prohibition in section 163 should be introduced:

- (a) to allow for loans or security/guarantee to be given to the extent of the proportionate equity shareholding held in the borrower by the directors of the lender/security provider;
- (b) where there is prior shareholders' approval (with the interested director abstaining from voting) for the loan, guarantee or security to be given.

### Summary of Feedback Received

28. Most respondents agreed with this recommendation. Some respondents commented that Recommendation 1.17(a) could result in a loan exceeding the proportionate equity shareholding of the investor company, which may not be in the best interests of its shareholders. There was also uncertainty expressed as to how the calculations should be done to comply with Recommendation 1.17(a).

### MOF's Response

29. **MOF accepts Recommendation 1.17 to introduce the new exception (b) but will not introduce the new exception (a) (i.e. modify Recommendation 1.17).** MOF notes the concerns expressed by respondents on Recommendation 1.17(a) and is of the view that it is adequate to introduce the new exception in Recommendation 1.17(b). This approach is consistent with that of UK and Australia



### Recommendation 1.18

The regulatory regime for loans should be extended to quasi-loans, credit transactions and related arrangements.

#### Summary of Feedback Received

30. Most respondents agreed with this recommendation. One respondent expressed concern that this recommendation was too broad and that too many transactions would then fall within the regulatory regime.

#### MOF's Response

31. **MOF accepts Recommendation 1.18.** The SC had noted that the UK regulatory regime already extends to quasi-loans, credit transactions and related arrangements and relevant definitions are in place that properly scopes the provisions. MOF agrees with the views of the SC.

## **VIII. SUPERVISORY ROLE OF DIRECTORS**

### Recommendation 1.19

Section 157A(1) of the Companies Act should be amended to provide that the business of a company shall be managed by, or under the direction or supervision of, the directors.

#### Summary of Feedback Received

32. All respondents agreed with this recommendation. One respondent said that this amendment should not result in a reduction in the duty of care expected of directors.

#### MOF's Response

33. **MOF accepts Recommendation 1.19.** The SC had proposed the modification to section 157A(1) to better reflect the powers and responsibilities of the board of directors. MOF agrees with the SC. The recommendation is not intended to reduce the duty of care expected of directors.

## **IX. POWER OF DIRECTORS TO BIND THE COMPANY**

### Recommendation 1.20

The Companies Act should provide that a person dealing with the company in good

faith should not be affected by any limitation in the company's articles.

### Summary of Feedback Received

34. Most respondents agreed with this recommendation as it is unduly onerous to impose constructive knowledge<sup>1</sup> of the contents of the Memorandum of Association ("Memorandum") and Articles on third parties. One respondent suggested this recommendation was unnecessary since section 25A of the Act provides against constructive knowledge of the Memorandum and Articles merely because it is publicly available. Another respondent suggested that section 25A be deleted and persons be deemed to have constructive knowledge of the Memorandum and Articles of a company as these are public documents. Accordingly, a company should not be bound if transactions are entered into contrary to limitations. Some respondents expressed concern on the scope of the phrase "good faith".

### MOF's Response

35. **MOF accepts Recommendation 1.20.** Currently, section 25A provides that a person is not deemed to have constructive knowledge of a company's Memorandum and Articles merely because it is filed with ACRA or available for inspection at a company's registered address. Section 25A should not be deleted as it will be unduly onerous to impose constructive knowledge of the Memorandum and Articles on third parties. The recommendation is also not made redundant by section 25A since a person may have knowledge of a company's Memorandum and Articles in situations outside of section 25A. Thus, MOF agrees with the views of the SC that it is useful to introduce a provision as recommended. Feedback received on the interpretation of "good faith" will be considered during drafting of the relevant provisions.

## **X. POWER OF DIRECTORS TO ISSUE SHARES OF COMPANY**

### Recommendation 1.21

Section 161 of the Companies Act should be amended to allow specific shareholders' approval for a particular issue of shares to continue in force notwithstanding that the approval is not renewed at the next annual general meeting, provided that the specific shareholders' approval specifies a maximum number of shares that can be issued and expires at the end of two years. This does not apply to the situation referred to in section 161(4) for the issue of shares in pursuance of an offer, agreement or option made or granted by the directors while an approval was in force.

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<sup>1</sup> Constructive knowledge is different from actual knowledge in that it is knowledge which a person is deemed by law to have in certain circumstances even if he did not actually have such knowledge.

### Summary of Feedback Received

36. Although a majority of the respondents agreed with this recommendation, a few respondents disagreed and made significant observations in their responses. The respondents indicated that it is good corporate governance for the company to refresh approval at every Annual General Meeting (AGM) as shareholders' views might change with different company and market conditions. This will not increase the administrative burden or costs, as the company is required to hold an AGM. Some respondents were of the view that there was no reason why companies should need two years to complete a transaction and issue the shares.

### MOF's Response

37. **MOF does not accept Recommendation 1.21.** The observations made by the respondents who disagreed with the recommendation are valid. The economic context for the issue of shares may change. Seeking shareholders' approval will not result in an administrative burden for companies as such approvals are sought at AGMs.

## **XI. DIRECTORS' FIDUCIARY DUTIES**

### Recommendation 1.22

It would not be desirable to exhaustively codify directors' duties. The developments in the UK and other leading jurisdictions should continue to be monitored.

### Summary of Feedback Received

38. Most respondents agreed with this recommendation. Two respondents suggested that further codification of directors' duties even if not exhaustive would be useful.

### MOF's Response

39. **MOF accepts Recommendation 1.22.** The Companies Act already contains a statutory statement on directors' duties. ACRA has also published a guidebook for directors<sup>2</sup>. MOF will monitor the developments in the UK and other jurisdictions.

### Recommendation 1.23

Pending ACRA's review, a breach of the duties in section 157 should still render an officer or agent of a company criminally liable.

<sup>2</sup> ACRA's publication ("ACRA and I: Being an Effective Director") is available at <http://www.acra.gov.sg/Publications/Guidebook+for+Directors.htm>.

### Summary of Feedback Received

40. Most respondents agreed with this recommendation. One respondent commented that civil liability was an adequate deterrent and that there was no need for criminal liability.

### MOF's Response

41. **MOF accepts Recommendation 1.23.** MOF agrees with the views of the SC that the current position should be retained as a deterrent and to improve for better governance. With respect to the possible introduction of a civil penalties regime, MOF notes that this issue (which is within the scope of the ACRA review<sup>3</sup>) was an issue which the SC left open.

### Recommendation 1.24

The prohibition in section 157(2) should be extended to cover improper use by an officer or agent of a company of his position to gain an advantage for himself or for any other person or to cause detriment to the company.

### Summary of Feedback Received

42. Most respondents agreed with this recommendation. However, one respondent commented that the civil liability under the common law was adequate and it was not necessary to extend the scope of section 157(2).

### MOF's Response

43. **MOF accepts Recommendation 1.24.** Section 157(2) already criminalises the improper use of information. MOF agrees with the views of the SC that it is useful to widen the scope of section 157(2) to extend the prohibition to cover the improper use of position.

## **XII. IMPOSITION OF LIABILITY ON OTHER OFFICERS**

### Recommendation 1.25

The disclosure requirements under sections 156 and 165 should be extended to the Chief Executive Officer of a company.

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<sup>3</sup> ACRA is tasked to review the current penalties regime. Amendments pursuant to ACRA's review are targeted to be implemented as part of the second phase involving a rewrite of the Act.

### Summary of Feedback Received

44. Most respondents agreed with this recommendation. Some suggested the disclosure requirements should extend beyond the CEO to other high level executives. On the other hand, one respondent indicated that it was not necessary to extend beyond directors and another commented that this recommendation was not necessary for private companies. A few respondents suggesting introducing a suitable definition as some companies use “Vice-President” or “General Manager” instead of “Chief Executive Officer”.

### MOF’s Response

45. **MOF accepts Recommendation 1.25.** MOF agrees with the views of the SC that the disclosure requirements should be extended to the CEO as the person who is at the apex of management. This is consistent with the SFA which requires the directors and CEO of listed companies to notify the company of their shareholdings. This recommendation is relevant to private companies, just as the disclosure obligations of directors are. Suggestions on the definition of CEOs will be addressed in the draft Bill.

### Recommendation 1.26

The duty to act honestly and use reasonable diligence in section 157(1) should be extended to the Chief Executive Officer of a company.

### Summary of Feedback Received

46. Almost all respondents agreed with this recommendation. The sole dissenting respondent was of the view that the offence of failure to act honestly and with reasonable diligence should not be extended beyond directors as directors owed a fiduciary duty to the company and were the ultimate overseers of the company.

### MOF’s Response

47. **MOF does not accept Recommendation 1.26.** Although MOF agrees with the intent of SC’s recommendation to promote better standards of corporate governance, it would not be timely to extend the statutory duties to CEOs now. Most jurisdictions have not adopted this position despite the precedent in Australia since 1981. For example, UK, New Zealand and Hong Kong impose the duty to act honestly and use reasonable diligence on directors only. Neither UK nor Hong Kong had changed their position in their recent reviews of their companies legislation. Therefore, MOF rejects the recommendation but will monitor developments in other jurisdictions in the mean time. MOF notes that SC had also highlighted that in practice, the CEO is usually a director of the company. Even if not formally appointed, the CEO may be considered a de facto director and be subject to the statutory duty.

### **XIII. DISCLOSURE OF COMPANY INFORMATION BY NOMINEE DIRECTORS**

#### Recommendation 1.27

Section 158 of the Companies Act should be amended:

- (a) to enable the board of directors to allow the disclosure of company information, whether by general or specific mandate, subject to the overarching consideration that there should not be any prejudice caused to the company; and
- (b) to remove the requirement in section 158(3)(a) for declaration at a meeting of the directors of the name and office or position held by the person to whom the information is to be disclosed and the particulars of such information, but to leave it to the board of directors to require such details if desired.

#### Summary of Feedback Received

48. All respondents agreed with this recommendation. One respondent commented that provision of information to a nominating shareholder should not be prohibited as long as it is not detrimental to the company or prohibited by the Board. Another suggestion was that there should be exemption from the requirement for a general or specific mandate for unlisted joint ventures subject to the overarching consideration that there should not be any prejudice caused to the company.

#### MOF's Response

49. **MOF accepts Recommendation 1.27.** MOF agrees with the views of the SC that section 158 should be amended. This will facilitate more efficient management of groups with listed subsidiaries. Concerns relating to improper use of information or insider trading will be mitigated and governed under the SFA. There is no pressing need to further liberalise the position for unlisted joint ventures.

### **XIV. INDEMNITY FOR DIRECTORS**

#### Recommendation 1.28

Section 172 of the Companies Act should be amended to expressly allow a company to provide indemnity against liability incurred by its directors to third parties.

### Summary of Feedback Received

50. Most respondents agreed with this recommendation. However, two respondents indicated that this recommendation was too wide and that the qualifications in the relevant provisions in the UK Companies Act 2006 could be considered.

### MOF's Response

51. **MOF accepts Recommendation 1.28 but will include qualifications (i.e. modify Recommendation 1.28).** MOF agrees with the SC that it should be expressly allowed for a company to provide indemnity to its directors for claims brought by third parties. However, MOF agrees with the feedback that this should be subject to appropriate qualifications. MOF will seek views on the proposed qualifications in the draft Bill.

### Recommendation 1.29

The Companies Act should be amended to clarify that a company is allowed to indemnify its directors against potential liability.

### Summary of Feedback Received

52. All respondents agreed with this recommendation.

### MOF's Response

53. **MOF accepts Recommendation 1.29.** MOF agrees with the views of the SC that it should be clarified that a company is allowed to indemnify its directors against potential liability.

## CONCLUSION

54. The following table summarises MOF's decision on the recommendations in Chapter 1 of the *Report of the Steering Committee for Review of the Companies Act*.

<b>Classification</b>	<b>No. of Recommendations</b>	<b>Recommendation Reference</b>
Accepted by MOF	24	-
Modified by MOF	3	Recommendations 1.15, 1.17 and 1.28
Not adopted by MOF	2	Recommendation 1.21, 1.26
Total	29	-