

New Companies Act a game changer for corporate governance

The new Companies Act 2016 will demand more accountability from directors

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KUALA LUMPUR: The new Companies Act 2016, which is expected to be implemented in stages from Jan 1, 2017, is set to be a game changer in strengthening corporate governance in Malaysia.

Under the new law, it will be easier to incorporate companies while the mandatory annual general meetings (AGM) for private companies will be abolished, together with the existing par value regime. However, its provisions also demand more responsibility and accountability from directors.

The strengthening of corporate governance and raising of accountability of directors under the new act will benefit investors, according to Zaid Ibrahim & Co partner, Sharon Suyin Tan (*pic bottom right*).

"Directors will be held to higher expectations and will have to shoulder more responsibility to ensure that companies are managed properly. "The new act imposes heavier fines and longer terms of imprisonment on directors for breaches under the act and this serves as a stronger deterrent against improper behaviour and practices by directors," she told *The Edge Financial Daily* via email.

"Investor shareholders will also have the power of management review under the new act.

"Companies are bound to comply with shareholders' instructions if shareholders make a binding recommendation on the board that is in the best interest of the company [providing the right to make recommendations has been provided for in the constitution, or has been passed as a special resolution]," wrote Tan.

Tan, however, cautioned potential investors to be vigilant in protecting their rights, especially if they hold minority interest, or non-controlling stakes.

"For example, there is no more requirement to hold physical shareholder meetings for private companies and shareholder circular resolutions no longer need to be

unanimous and can be passed by the requisite majority.

"Investors would therefore want to look at how they can effectively protect themselves, such as requiring that a company adopt a constitution in which their rights can be expressly provided for, such as veto rights, rights of pre-emption, higher threshold for shareholder approval, and so forth," said Tan.

Setting up a company would also be easier under the new act, as there is no requirement for companies to have a memorandum and articles of association (M&A), while private companies are allowed to have a single director and shareholder.

"Under the new act, the constitutive document of a company is referred to as a constitution and not an M&A, as it is currently referred to under the present Companies Act 1965.

"Under the new act, a constitution is optional, save in limited circumstances such as in relation to companies limited by guarantee or where preference shares or different classes of shares are issued," said Tan.

She added that if a company does not have a constitution, the rights and obligations of the company, its members and directors will be governed by the new act.

"A company may adopt a constitution if it wishes to tailor provisions for itself or its members. Existing M&A will be deemed to be constitutions on the date the new act comes into force," she added.

"The common provisions one can find under existing articles of association have not disappeared. As part of the streamlining efforts under the new regime, these provi-

sions are now incorporated within the new act," said Tan.

As to whether this would affect legal enforcement, Tan said no.

"The absence of a constitution should not really affect legal enforcement as the new act now contains all the processes and provisions usually found in a constitutive document," she said.

Meanwhile, PricewaterhouseCoopers Malaysia Assurance Partner Loh Lay Choon (*pic bottom left*), who also heads the firm's capital markets and accounting advisory services, said investors in both public and private companies will be able to derive comfort from the fact that the new act will keep Malaysian businesses on par with their international counterparts.

"The requirement for directors to perform a solvency test, for instance, will provide investors comfort that the company is solvent when it is engaged in activities [such as] declaration of dividends, capital reduction without a court order; provision of financial assistance to companies outside the group, redemption of preference shares and share buyback," she said in an email response to *The Edge Financial Daily*.

However, Loh, who is a council member of the Malaysian Institute of Certified Public Accountants (Micpa) and also a committee member of Micpa's Accounting and Audit Technical Committee, said the new act will not drastically change the financial reporting landscape in Malaysia.

"The amendments are mainly to provide a more favourable operating environment for businesses, such as easier incorporation of companies and lower operating costs among other improvements.

"We are, however, moving in the right direction towards more transparency and accountability," she said.

Loh went on to say that the solvency tests, and the inclusion of a business review report in the directors' report, although voluntary, will promote more accountability on the part of company directors.

"In addition, to make the di-

SOME KEY PROVISIONS OF THE COMPANIES ACT 2016

1. Easier incorporation of companies

- Companies can now be set up with just one shareholder or director.

2. No par value for shares

- All shares issued before or upon the commencement of the new law shall have no par/nominal value. This means companies need not set any minimum value for the shares they issue.

3. No more AGMs and easier passing of written resolutions for private companies

- A majority of shareholders can sign off on a written resolution to pass it as an ordinary resolution; unanimous written resolutions are no longer necessary.

4. No more M&A

- The new act will cover all necessary provisions for the running of the company. If a company wishes to customise certain provisions, it can adopt a constitution; existing M&As will be deemed as constitutions.
- The M&A not required ruling does not apply to companies limited by guarantee, that issue preference shares or possess a different class of shares, or if it's a Bursa Malaysia-listed company under which its listing requirements deem it mandatory to have an M&A.

5. New safeguards

- Directors will have to attest to the solvency of a company by signing

the equivalent of a statutory declaration before undertaking declaration of dividends, capital reduction without a court order, financial assistance to companies outside the group, redemption of preference shares and share buyback.

- This will require directors to inquire into the company's state of affairs, prospects and financial position. If a solvency statement is made without reasonable grounds, directors can be jailed up to five years, fined RM500,000, or both, upon conviction.

6. Heavier sanctions for directors

- Directors can be fined up to RM3 million, or jailed up to five years, or both — if there is criminal conviction — for breaches under the act.

7. New corporate rescue mechanisms

- Judicial management, under which a company's management will be provided a court-appointed judicial manager who will develop a restructuring plan, which will be subject to the approval of the company's creditors.
- Corporate voluntary arrangement, which entails the company's debt restructuring plan being assessed by an independent insolvency practitioner. The company's creditors will then vote on whether to accept the proposal, and they will be bound by that decision.

rector's service contract available for inspection again improves the accountability of directors and transparency of a company's operations," she said.

On the abolition of the AGM for private companies, Loh said this will not reduce the governance level at these companies as they are still required to lodge financial statements.

"However, with no AGM, this will help ease the administrative process at these private companies, particularly for those which are either wholly-owned or owned by only a small number of shareholders," she said.

Originally the Companies Bill 2015, the new law was passed in parliament on April 4 this year, and was subsequently gazetted on Sept 15 as the Companies Act 2016.

