CONSULTATION PAPER
June 2011

Report of the Steering Committee for Review of the Companies Act

MINISTRY OF FINANCE

PREFACE

The last comprehensive review of the Companies Act was conducted in 1999 by the Company Legislation and Regulatory Framework Committee (CLRFC). The review introduced many significant and meaningful changes that took Singapore's corporate regulatory framework forward. Since then, many other countries have undertaken or completed their own reviews of their company law frameworks and redrafted their company legislation.

2. The Ministry of Finance (MOF) had thus set up a Steering Committee in October 2007 to carry out a fundamental review of the Companies Act. The review is aimed at ensuring an efficient and transparent corporate regulatory framework that supports Singapore's growth as an international hub for both businesses and investors.

Approach Taken by Steering Committee

3. In its review, the Steering Committee considered existing legislation in leading jurisdictions such as Australia, New Zealand, the United Kingdom and the United States. The Steering Committee recommended that the Companies Act should contain core company law, while provisions relating to specific types of companies (e.g. foreign companies) should belong in legislation specifically dealing with such entities.

4. The Steering Committee also consulted key stakeholders before finalising its recommendations. Six consultation papers were issued to businesses, professional bodies, individuals who practise or are interested in corporate law and corporate finance, as well as other stakeholders. The Steering Committee received 128 written comments and held 17 focus group meetings to hear oral comments.

Steering Committee's Report

5. The Steering Committee submitted its report to MOF on 29 April 2011. The Steering Committee's Report comprises six chapters and 217 recommendations:

(a) Chapter 1 – Directors;
(b) Chapter 2 – Shareholders' Rights and Meetings;
(c) Chapter 3 – Shares, Debentures, Capital Maintenance, Schemes, Compulsory Acquisitions and Amalgamations;
(d) Chapter 4 – Accounts and Audit;
(e) Chapter 5 – General Company Administration; and
(f) Chapter 6 – Registration of Charges.

Request for Comments

6. MOF, together with the Accounting and Corporate Regulatory Authority (ACRA) which administers the Companies Act, invite the public to give your comments on the Steering Committee's report by 16 September 2011. Comments may be submitted to:

Corporate Regulation and Governance Unit
Economic Programmes Directorate
Ministry of Finance
100 High Street
#10-01, The Treasury
Singapore 179464

Fax: (+65) 6337 4134

Email: mof_pccompaniesact@mof.gov.sg (preferred mode)

7. To ensure that the consultation exercise is effective, respondents are requested to follow these guidelines:

(a) Identify yourself and the organisation you represent (where applicable) so that we may follow up to clarify any issues, if necessary; and

(b) Cite the specific recommendation that you are commenting on, and provide reasons on why you agree or disagree with the recommendation.

8. MOF and ACRA will publish a summary of the comments received together with our responses after the end of the consultation period. The summary will not disclose the identity of respondents, and will not separately address or acknowledge every comment received.

Concurrent Public Consultation on Foreign Entities

9. The Companies Act contains provisions relating to foreign companies. Given the Steering Committee's recommendation that the Companies Act should only contain core company law, ACRA has conducted a separate review on the regulatory framework for foreign entities. The public consultation on the proposals relating to foreign entities is launched concurrently to provide the public with a comprehensive view of the proposed changes to the Companies Act. A copy of the consultation paper on proposals relating to foreign entities is available on the MOF website (www.mof.gov.sg), ACRA website (www.acra.gov.sg) and REACH consultation portal (www.reach.gov.sg).

REPORT
Of THE

STEERING COMMITTEE FOR REVIEW OF THE COMPANIES ACT

APRIL 2011

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SUMMARY OF RECOMMENDATIONS

Recommendation 1.1

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

Recommendation 1.2

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

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.

Recommendation 1.4

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

Recommendation 1.5

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

Recommendation 1.6

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

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.

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.

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.

Recommendation 1.12

It is not necessary for the Companies Act to mandate the 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.

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.

Recommendation 1.16

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

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.

Recommendation 1.18

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

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.

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.

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.

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.

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.

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.

Recommendation 1.25

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

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.

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.

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.

Recommendation 1.29

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

Recommendation 2.1

Sections 178 and 184 should not be amended to require all companies to have all resolutions tabled at general meetings voted by poll.

Recommendation 2.2

Section 178(1)(b)(ii) should be amended to lower the threshold of 10% of total voting rights for eligibility to demand a poll to 5% of total voting rights.

Recommendation 2.3

The requisite majority vote requirements for the passing of written resolutions in private companies should continue to be specified in section 184A.

Recommendation 2.4

The requisite majority vote requirements for the passing of written resolutions in private companies should not be changed.

Recommendation 2.5

The existing restrictions in section 184A(2) on the type of "business" that cannot be conducted using written resolutions should be maintained.

Recommendation 2.6

Section 184A should be amended to provide that a written resolution will be passed once the required majority signs the written resolution, subject to contrary provision in the memorandum or articles of the company.

Recommendation 2.7

The Companies Act should be amended to provide that a proposed written resolution will lapse after 28 days of it being circulated if the required majority vote is not attained by the end of the 28-day period, subject to contrary provision in the memorandum or articles of the company.

Recommendation 2.8

The Companies Act should not specify the categories and manner of appointment of authorised persons who may be appointed to act on behalf of a corporate member in signifying the corporate member's agreement to a written resolution.

Recommendation 2.9

Sections 184A to 184F should be amended to extend the procedures contained therein for passing resolutions by written means to unlisted public companies as well.

Recommendation 2.10

Section 181 should be amended to the effect that, subject to contrary provision in the company's articles, members falling within the following two categories are allowed to appoint more than two proxies, provided that each proxy is appointed to exercise the rights attached to a different share or shares and the number of shares and class of shares shall be specified:

(a) **any banking corporation licensed under the Banking Act or wholly-owned subsidiary of such a banking corporation, whose business includes the provision of nominee services and who holds shares in that capacity; and**

(b) **any person holding a capital markets services licence to provide custodial services for securities under the Securities and Futures Act.**

Recommendation 2.11

The Companies Act should be amended to allow the proposed multiple proxies to each be given the right to vote on a show of hands in a shareholders' meeting.

Recommendation 2.12

The Companies Act should be amended to bring earlier the cut-off timeline for the filing of proxies from 48 hours prior to the shareholders' meeting, to 72 hours prior to the shareholders' meeting.

Recommendation 2.13

The Companies Act should not be amended to adopt sections 145 to 153 of the UK Companies Act 2006 to enable indirect investors to enjoy or exercise membership rights apart from the right to participate in general meetings.

Recommendation 2.14

The Companies Act should be amended to give CPF share investors their shareholders' rights in respect of company shares purchased using CPF funds through the CPF Investment Schemes or the Special Discounted Share scheme.

Recommendation 2.15

The multiple proxies regime recommended at Recommendations 2.10, 2.11 and 2.12 should be adopted to enfranchise CPF share investors.

Recommendation 2.16

Section 179(4) should not be amended to clarify the meaning of the phrase "not otherwise entitled to be present at the meeting".

Recommendation 2.17

The Companies Act should not be amended to deal with the recognition of the appointment of representatives of members that take other business forms such as limited liability partnership, association, co-operative, etc.

Recommendation 2.18

The rules for the use of electronic methods for transmission of notices and documents by companies should be amended to be less restrictive and prescriptive.

Recommendation 2.19

The Companies Act should be amended to provide that companies may use electronic communications to send notices and documents to members with their express consent, implied consent or deemed consent, and where –

(1) A member has given implied consent if –

> **(a) company articles provide for use of electronic communications and specify the mode of electronic communications, and**
>
> **(b) company articles provide that the member shall agree to the use of electronic communications and shall not have a right to elect to receive physical copies of notices or documents; and**

(2) A member is deemed to have consented if –

> **(a) company articles provide for use of electronic communications and specify the mode of electronic communications, and**
>
> **(b) the member was given an opportunity to elect whether to receive electronic or physical notices or documents, and he failed to elect.**

Recommendation 2.20

The following safeguards shall be contained in subsidiary legislation:

(a) For the deemed consent regime, the company must on at least one occasion, directly notify in writing each member that –

(i) the member may elect to receive company notices and documents electronically or in physical copy;
(ii) if the member does not elect, the notices and documents will be transmitted by electronic means;
(iii) the electronic means to be used shall be as specified by the company in its articles, or shall be website publication if the articles do not specify the electronic means;
(iv) the member's election shall be a standing election (subject to the contrary provision in the articles), but the member may change his mind at any time.

(b) If the company chooses to transmit documents by making them available on a website, the company must notify the members directly in writing or electronically (if the member had elected or deemed to have consented or impliedly consented to receive notices electronically) of the presence of the document on the website and how the document may be accessed;

(c) Documents relating to take-over offers and rights issues shall not be transmitted by electronic means.

<u>Recommendation 2.21</u>

As a default, where companies fail to amend their articles to make use of the deemed consent regime, sections 387A and 387B shall continue to apply.

<u>Recommendation 2.22</u>

Section 33 should be amended to allow companies to use electronic methods for transmission of notices of special resolution to alter the objects of a company in its memorandum, in accordance with the proposed amendments in Recommendations 2.19, 2.20 and 2.21.

<u>Recommendation 2.23</u>

The scope of coverage of section 130D(3) should not be expanded to extend the 48-hour rule (effecting notional closure of the membership register) to Singapore-incorporated companies listed on overseas securities exchanges.

Recommendation 2.24

There should be no change to the rule in section 176 that the cost of convening a requisitioned extraordinary general meeting is to be borne by the company, subject to a clawback of the costs from defaulting directors in the event of default by the directors in convening the meeting.

Recommendation 2.25

The Companies Act should not be amended to introduce a minority buy-out right / appraisal right in Singapore where such rights would enable a dissenting minority shareholder who disagreed with certain fundamental changes to an enterprise or certain alterations to shareholders' rights, to require the company to buy him out at a fair value.

Recommendation 2.26

Section 254(1)(i) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.

Recommendation 2.27

Section 254(1)(f) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.

Recommendation 2.28

The scope of the statutory derivative action in section 216A should be expanded to allow a complainant to apply to the court for leave to commence an arbitration in the name and on behalf of the company or intervene in an arbitration to which the company is a party for the purpose of prosecuting, defending or discontinuing the arbitration on behalf of the company.

Recommendation 2.29

Section 216A should be amended to achieve consistency in the availability of the statutory derivative action for Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

Recommendation 2.30

Section 216A should be amended such that the statutory derivative action in section 216A is applicable to Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

Recommendation 2.31

The Companies Act should not be amended to introduce a system of cumulative voting for the election of directors.

Recommendation 2.32

The Companies Act should not be amended to create a mechanism to allow minority shareholders to obtain copies of board resolutions without the need to go through a discovery process.

Recommendation 2.33

The exemption in section 21(6) should be extended to include a transfer of shares in a holding company, in order to align the section 21(6) exemption with the prohibition in section 21(1) and to cater for a transfer of shares in the holding company by way of distribution in specie, amalgamation or scheme of arrangement.

Recommendation 2.34

Section 21(6) should be amended to allow a subsidiary to receive a transfer of shares in its holding company that are transferred by way of distribution in specie, amalgamation or scheme of arrangement:

(a) provided that the subsidiary shall have no right to vote at meetings of the holding company or any class of members thereof, and the subsidiary shall, within the period of 12 months or such longer period as the court may allow after the transfer, dispose of all of its shares in the holding company; and

(b) any such shares in the holding company that remain undisposed after the period of 12 months or such longer period as the court may allow after the transfer –

(i) shall be deemed treasury shares or shall be transferred to the holding company and held as treasury shares, and subject to a maximum aggregate limit of 10% of shares in the holding company being held as treasury shares or deemed treasury shares; and

(ii) provided that the subsidiary / holding company shall within 6 months divest its holding of the shares in the holding company in excess of the aggregate limit of 10%.

Recommendation 3.1

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

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.

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.

Recommendation 3.4

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

Recommendation 3.5

Section 64 should be deleted.

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.

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 subsidiaries.

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.

Recommendation 3.10

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

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.

Recommendation 3.12

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

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.

Recommendation 3.14

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

<u>Recommendation 3.15</u>

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

<u>Recommendation 3.16</u>

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

<u>Recommendation 3.17</u>

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.

<u>Recommendation 3.18</u>

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

<u>Recommendation 3.19</u>

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

<u>Recommendation 3.20</u>

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

<u>Recommendation 3.21</u>

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).

<u>Recommendation 3.22</u>

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".

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".

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.

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.

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

Section 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

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

Recommendation 3.30

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

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.

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.

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.

Recommendation 3.34

The section 403 test for dividend distributions should be retained.

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.

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).

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.

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.

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.

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.

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.

Recommendation 3.43

Sections 210 and 212 should apply to both “companies” and “foreign companies”.

Recommendation 3.44

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

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.

Recommendation 3.46

Section 215 should be amended to extend to units of a company’s shares.

Recommendation 3.47

Section 215 should be extended to cover individual offerors.

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.

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.

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.

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.

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.

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.

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.

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.

Recommendation 3.57

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

<u>Recommendation 3.58</u>

The amalgamation provisions should not be extended to foreign companies.

<u>Recommendation 3.59</u>

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

<u>Recommendation 3.60</u>

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.

<u>Recommendation 4.1</u>

Small company criteria should be introduced to determine whether a company is required to be audited. Small companies would be exempted from the statutory requirement for audit. The following are the criteria for determining a "small company" —

(a) the company is a private company; and

(b) it fulfils two of the following criteria:

Criterion One	Criterion Two	Criterion Three
Total annual revenue of not more than S$10 million.	**Total gross assets of not more than S$10 million.**	**Number of employees not more than 50.**

<u>Recommendation 4.2</u>

Where a parent company prepares consolidated accounts, a parent should qualify as a "small company" if the criteria in Recommendation 4.1 are met on a consolidated basis.

<u>Recommendation 4.3</u>

A subsidiary which is a member of a group of companies may be exempt from audit as a "small company" only if the entire group to which it belongs qualifies on a consolidated basis for audit exemption under the "small company" criteria.

<u>Recommendation 4.4</u>

The current status of “exempt private company” should be abolished.

<u>Recommendation 4.5</u>

Solvent companies which qualify under the proposed “small company” criteria should file basic financial information, but with the following exceptions where such companies are solvent:

(a) private companies wholly-owned by the Government, which the Minister, in the national interest, declares by notification in the Gazette to be exempt;

(b) private companies falling within a specific class prescribed by the Minister as being exempt (e.g. specific industries where confidentiality of information is critical and public interest in the accounts is low); and

(c) private companies exempted by the Registrar upon application on a case-by-case basis and published in the Gazette.

<u>Recommendation 4.6</u>

Dormant non-listed companies (other than subsidiaries of listed companies) should be exempt from financial reporting requirements, subject to certain safeguards.

<u>Recommendation 4.7</u>

To benefit from the dormant company exemption, the following proposed safeguards must be complied with:

- **(a) Annual declaration of dormancy by the directors of a dormant company;**
- **(b) The company must be dormant for the entire financial year in question; and**
- **(c) Shareholders and ACRA will be empowered to direct a dormant company to prepare its accounts, and to lodge them unless exempted under any other exemption.**

<u>Recommendation 4.8</u>

Dormant listed companies should continue to prepare accounts but be exempted from statutory audit requirements (status quo).

Recommendation 4.9

A dormant company which is a subsidiary of a listed company should continue to prepare accounts but be exempt from audit, similar to a dormant listed company.

Recommendation 4.10

The list of disregarded transactions in determining whether a company is dormant should be extended to include statutory fees/fines under any Act and nominal payments/receipts.

Recommendation 4.11

A total assets threshold test of S$500,000 (which may be varied by the Minister for Finance by way of regulations) should be introduced for dormant companies.

Recommendation 4.12

The use of summary financial statements should be extended to all companies.

Recommendation 4.13

Section 201(8) of the Companies Act which requires disclosure of directors' benefits in the directors' report should be repealed.

Recommendation 4.14

There is no need to require all companies to prepare a statement of business review and future developments in the accounts or directors' report under the Companies Act.

Recommendation 4.15

The requirement for a separate directors' report should be abolished.

Recommendation 4.16

Section 201(15) of the Companies Act should be clarified to require that the full list of directors of companies appear in the statement by the directors.

<u>Recommendation 4.17</u>

The UK approach of requiring the directors to ensure that the company auditors are aware of all relevant audit information need not be adopted.

<u>Recommendation 4.18</u>

There is no need to legislatively mandate compliance with auditing standards, but the existing requirements in section 207(3) of the Companies Act, which set out a list of duties of auditors, should be streamlined.

<u>Recommendation 4.19</u>

Section 207(3)(b) of the Companies Act, which requires an auditor to form an opinion on whether proper accounting and other records (excluding registers) have been kept by the company, should be retained, but the drafting of that section should be clarified.

<u>Recommendation 4.20</u>

The requirement for an auditor to form an opinion on the procedures and methods of consolidation in section 207(3)(d) of the Companies Act should be repealed.

<u>Recommendation 4.21</u>

Section 207(9A) should not be extended to include a requirement for an auditor to report on instances of suspected accounting fraud.

<u>Recommendation 4.22</u>

The amount stated in section 207(9D)(b) used as the threshold to define a "serious offence involving fraud or dishonesty", should be raised from $20,000 to $250,000.

Recommendation 4.23

The auditor of a non-public-interest company (other than a subsidiary of a public interest company) should be allowed to resign upon giving notice to the company. The status quo should be retained for the auditor of a non-public-interest company which is a subsidiary of a public interest company, viz, such a company's auditor may only resign if he is not the sole auditor or at a general meeting, and where a replacement auditor is appointed.

Recommendation 4.24

The auditor of a public-interest company should be required to seek the consent of ACRA before he can resign.

Recommendation 4.25

There is no need for an express requirement for an auditor to disclose to the shareholders of the company that appointed it the reasons for his resignation.

Recommendation 4.26

The provisions relating to auditor independence in section 10 of the Companies Act should be consolidated under the Accountants Act.

Recommendation 4.27

There is no need to introduce statutory provisions on the limitation of liability of auditors at this time, but the issue will be monitored by ACRA.

Recommendation 4.28

A company should not be expressly allowed to indemnify auditors for claims brought by third parties.

Recommendation 4.29

The drafting of section 172(2)(b) of the Companies Act should be amended to clarify that a company is allowed to indemnify its auditors against potential liability.

Recommendation 4.30

The provisions relating to audit committees should be moved to the Securities and Futures Act.

Recommendation 4.31

The directors' duty to keep accounting and other records in section 199(1) does not require amendment.

Recommendation 4.32

The requirement under section 199(2A) for a public company to devise and maintain a system of internal controls need not be extended to private companies.

Recommendation 4.33

Any misconception that private companies currently do not require internal controls should be corrected through non-statutory guidance.

Recommendation 4.34

The requirement under section 199(2A) for a public company and its subsidiaries to devise and maintain a system of internal controls need not be extended to the associated companies and related companies of a public company.

Recommendation 4.35

The components of the accounts in the relevant provisions in the Companies Act should be clarified by referring to the definition of "accounts" contained in the Financial Reporting Standards.

Recommendation 4.36

The directors' duties in section 201 to lay the financial statements before the company at every annual general meeting and to ensure that the financial statements are audited do not require amendment.

Recommendation 4.37

The directors' duty in section 203(1) to send to all persons entitled to receive notice of general meetings a copy of the company's profit and loss account and balance-sheet does not require amendment.

Recommendation 4.38

The determination of whether a company should prepare consolidated accounts should be set by only the financial reporting standards and not the Companies Act.

Recommendation 4.39

The requirements for alignment of the financial year-end of a parent company and its subsidiaries should be set in accordance with the financial reporting standards.

Recommendation 4.40

A regulatory framework similar to that in the UK should be adopted for the purposes of requiring the revisions of defective accounts, i.e. the determination of whether an order for revision of defective accounts is made is decided by the courts.

Recommendation 4.41

Provisions for the voluntary revisions of defective accounts should be introduced in Singapore.

Recommendation 5.1

Section 190 (Register and index of members) should no longer apply to private companies as the registers maintained by ACRA in electronic form and accessible by the public can be used as the main and authoritative register of members for private companies in Singapore.

Recommendation 5.2

Any person who is not notified as a member by the company to the Registrar is not a member of that company.

Recommendation 5.3

The status of members in the context of share allotments and transfers for private companies should be determined in the following manner:

(a) a 14-day period should be given for the filing of information regarding the allotment or transfer of shares with ACRA;

(b) the effective date of notice of the allotment or transfer would be based on the date of filing with ACRA; and

(c) such filing shall be prima facie evidence of the change in interest in the shares of the company.

Recommendation 5.4

Companies should continue to maintain the register of directors' shareholdings.

Recommendation 5.5

(a) The definitive register for directors, secretaries and auditors should be kept by ACRA;

(b) it should not be mandatory for companies to keep a register of directors, secretaries, auditors and managers; and

(c) there is no requirement for ACRA to keep a register of managers.

Recommendation 5.6

The memorandum and articles of association should be merged as one document, to be known as the Constitution.

Recommendation 5.7

There should be two models of the Constitution:

(a) for private companies – with variations for companies with only one director, and those with two directors or more;

(b) for companies limited by guarantee.

Recommendation 5.8

There should be no prescribed Model Constitution for public companies (other than companies limited by guarantee) as the provisions in the Constitution for such companies would be determined by the relevant industries concerned.

Recommendation 5.9

Where a company elects to adopt the proposed Model Constitution, there is no need to file a copy of that Model Constitution with ACRA.

Recommendation 5.10

The Model Constitution should be made available on ACRA's webpage, instead of in legislation.

Recommendation 5.11

(a) A natural person who is presently legally required to report his residential address under the Companies Act (e.g. directors, secretaries, managers) may choose to report either his residential address or to report any other address where he can be located ("alternate address"). ACRA will distinguish and indicate whether the reported address appearing on the public records is the residential or an alternate address; and

***(b) Directors who are currently required to disclose their residential address on the register of directors, managers, secretaries and auditors kept at the registered office will similarly be permitted to elect to disclose their alternate address where they can be located.**

***(b) will not be applicable if recommendation 5.5 is accepted.**

Recommendation 5.12

For purposes of non-insolvency matters, the notification periods for the ACRA registers should be standardised to 14 calendar days, with the exception of the following:

(a) Charges, which will still be required to be registered within 30 days; and

(b) Financial assistance and reduction of share capital for which there will be no change to the present timelines.

<u>Recommendation 5.13</u>

There should be different levels of penalties accorded to default and non-compliance, depending on the severity of the default.

<u>Recommendation 5.14</u>

ACRA should take into account the impact of the default on different groups of stakeholders when enforcing such penalties.

<u>Recommendation 5.15</u>

Amend section 395:

(a) **to clarify that any register, index, minute book or book of account may be kept in the form of electronic records (in addition to or as an alternative to physical records);**

(b) **to provide for some definite form of authentication or verification of the electronic records;**

(c) **to provide that directors be responsible for ensuring:**

- **(i)** **the authenticity of such electronic records;**

- **(ii)** **the proper maintenance of such electronic records.**

<u>Recommendation 5.16</u>

Directors should be responsible for the most updated copy of the minutes and to make sure that it is verified to be the correct and definitive copy.

<u>Recommendation 5.17</u>

The process for the verification of electronic records should be left to the company. The Companies Act should be facilitative not prescriptive.

<u>Recommendation 5.18</u>

The current specified time of one month allowed for updating the minute book under section 188 of the Companies Act should be maintained.

<u>Recommendation 5.19</u>

The following should be stated in legislation:

(A) criteria that the company should meet if their directors want to apply for striking off, viz:

(i) the company must not have commenced business or must have ceased trading;

(ii) the company must not be involved in any court proceedings, whether inside or outside Singapore;

(iii) the company must have no assets and liabilities when the application is made, and the company's charge register must also be cleared;

(iv) the company must not have any outstanding penalties or offers of composition owing to the Registry;

(v) the company must not have any outstanding tax liabilities with the Inland Revenue Authority of Singapore (IRAS);

(vi) the company must not be indebted to other government departments;

(B) criteria that ACRA should adopt for identifying and reviewing "defunct" companies for striking off. In this regard, a company is "defunct" if:

(i) the last account lodged by that company with ACRA was more than 6 years ago; or

(ii) the company has not filed any Annual Return for 6 years since its date of incorporation,

and that company has not created any charge for the last 6 years.

<u>Recommendation 5.20</u>

The current 3-month notification period under section 344(2) of the Companies Act, before a company is struck off the register, should be reduced to 2 months.

<u>Recommendation 5.21</u>

Section 344(1) of the Companies Act should be expanded to include the requirement for ACRA to send the striking off notice to other relevant parties, namely, the company's officers (directors, secretary), shareholders (if different from the directors) and IRAS.

Recommendation 5.22

In addition to the requirement for publication of a notice in the Gazette under section 344(2), the list of companies to be struck off and which have been struck off should be made available online (on the ACRA Home Page).

Recommendation 5.23

There should be no requirement for ACRA to send notifications via registered post to the company concerned.

Recommendation 5.24

The current 15-year period before which a struck-off company may be restored to the register should be reduced to 6 years instead.

Recommendation 5.25

Section 344(5) should be amended to allow the Registrar to restore companies which have been struck-off as a result of a review conducted by ACRA.

Recommendation 5.26

For objections to the striking off of a company, it should be specified in legislation:

(a) who may object to the striking-off;

(b) how the objection is to be submitted;

(c) action to be taken by ACRA; and

(d) relevant fee payable to ACRA for processing the objection.

Recommendation 5.27

ACRA should not be required to determine the validity or relevance of documentary evidence used by aggrieved parties to support objections to striking off action, and this should instead be adjudicated by the courts.

Recommendation 5.28

It should be specified in legislation:

- **(a)** **that an applicant may withdraw the striking off application at any time before the company is struck off;**
- **(b)** **that ACRA must update the status of the application and send a notification to the company to inform it that the application for striking off has been withdrawn; and**
- **(c)** **that this information should be updated online (in the ACRA Home Page).**

Recommendation 5.29

The fees for striking off should be placed under subsidiary legislation rather than the parent Act.

Recommendation 5.30

The recommended new provisions on striking off should be in a separate set of subsidiary legislation (the Companies (Striking Off) Rules).

Recommendation 5.31

The status quo of companies limited by guarantee should be preserved.

Recommendation 5.32

Maintain the status quo of the role of the Registrar in approving names.

Recommendation 5.33

Maintain the status quo of the current criterion for refusal of name registration by the Registrar.

Recommendation 5.34

Maintain the status quo of the current regime for similar name registration.

Recommendation 5.35

ACRA should not be responsible for the protection of "famous" names by preventing the registration of "famous" names as one cannot come up with a definitive list of "famous" names. For such cases, the owner of the name can seek recourse under the current section 27(2)(c) via an injunction under the Trade Marks Act (Cap. 332), following which the Registrar can direct a change of name.

Recommendation 5.36

Maintain the status quo of the ambit of section 27 (Names of companies).

Recommendation 5.37

There should be no change to the current time period of 12 months allowed by a complainant to lodge his complaint with the Registrar regarding registration of a similar name by another company under section 27(2A).

Recommendation 5.38

The periods for reuse of names of companies that have ceased should be as follows:

(a) After 2 years for companies which have been dissolved (based on section 343); and

(b) After 6 years for companies which have been struck off (based on section 344).

Recommendation 5.39

There is no need for the formation of a panel of company name adjudicators (unlike the position in the UK).

Recommendation 5.40

Both parties to a name complaint should have the right of appeal to the Minister vis-à-vis a Registrar's decision under section 27(2)(b) or 27(2C).

Recommendation 5.41

Maintain the status quo such that it remains mandatory for private companies to appoint a company secretary.

Recommendation 5.42

Company secretaries of private companies need not be physically present at the company's registered office.

Recommendation 5.43

The current distinction in section 171(1AA) whereby secretaries of public companies are required to possess certain qualifications, whilst secretaries of private companies are not so required, be maintained.

Recommendation 5.44

Prior registration of secretaries before their appointment as secretaries of listed companies is an unnecessary measure to adopt.

Recommendation 6.1

The current framework for registration of charges should be maintained but the list of registrable charges at section 131(3) should be reviewed and updated.

Recommendation 6.2

Section 132 should be broadened to provide for the registration of charges in the name of a business entity, rather than just in an individual's or company's name.

Recommendation 6.3

The current requirements for satisfaction of a charge should be maintained.

Recommendation 6.4

Section 138(1) of the Companies Act should be amended to specify that an instrument should be kept for as long as the charge is in force.

Recommendation 6.5

Upon discharge of the charge, the instrument by which the charge is created should be retained on the basis that it forms part of the accounting and other records required to be kept under and for the purposes of section 199 of the Act.

<u>Recommendation 6.6</u>

There should be a review of ACRA's form for registration of charges in which a confirmation is required by the chargee (if the charge is registered with ACRA by the chargee) that the instrument is kept at the company's registered office.

<u>Recommendation 6.7</u>

A reminder of the chargor's responsibility to keep a copy of the charge at the registered office should be included in the e-notification confirming registration.

<u>Recommendation 6.8</u>

The registration of charges regime should continue to apply only to foreign companies registered under the Companies Act and should not be extended to unregistered foreign entities.

<u>Recommendation 6.9</u>

Maintain ACRA's current practice/position that the mere physical lodgment of charge documents with ACRA does not equate with successful registration of the charge and that the lodgment of the charge documents must be made through BizFile.

THE STEERING COMMITTEE FOR REVIEW OF THE COMPANIES ACT

INTRODUCTION

The Steering Committee for Review of the Companies Act (the Steering Committee) was appointed by the Ministry for Finance in October 2007 to review and rewrite the Companies Act so as to retain an efficient and transparent corporate regulatory framework that supports Singapore's growth as a global hub for both businesses and investors.

2. The Steering Committee is chaired by Professor Walter Woon SC and comprises ten members from varied backgrounds, including accountancy, corporate law, corporate governance, academia and the government. The composition of the Steering Committee and the supporting secretariat is as follows:

Chairman:
Professor Walter Woon

Members:

Mr Lucien Wong	Managing Partner, Allen & Gledhill LLP
Mr Dilhan Pillay Sandrasegara	Managing Partner, WongPartnership LLP (until 31st August 2010) Head, Portfolio Management and Co-Head,Singapore, Temasek Holdings (Private) Limited
Mr Gautam Banerjee	Executive Chairman, PriceWaterhouseCoopers LLP
Mr John Lim	Chairman, Singapore Institute of Directors
Prof Tan Cheng Han SC	Dean, Faculty of Law, National University of Singapore
Mr Charles Lim Aeng Cheng (Secretary)	Parliamentary Counsel, Legislation and Law Reform Division, Attorney-General's Chambers
Mr Ng Heng Fatt	General Counsel, Monetary Authority of Singapore
Ms Juthika Ramanathan	Chief Executive, Accounting and Corporate Regulatory Authority
Mr Chin Chee Kiat	Director (Economic Programmes), Ministry Of Finance (from 1st September 2010)

SECRETARIAT

Wendy Chang	Deputy Senior State Counsel, Legislation and Law Reform Division ("LLRD"), Attorney-General's Chambers ("AGC")
Chong Kah Wei	Deputy Senior State Counsel, LLRD, AGC

Toh Wee San	Legal Officer, Legal Services Division ("LSD"), Accounting and Corporate Regulatory Authority ("ACRA")
Elena Yeo Ju-Lan	Legal Officer, LSD, ACRA
Thomas Koshy	Legal Officer, LSD, ACRA
Andrew Abraham (until 30th September 2009)	Legal Officer, LSD, ACRA

3. In addition, Dr Philip Pillai[1], Mr Laurence Lien (Director (Governance & Investment), Ministry Of Finance) and Mr Derrick Wan (Director (Reserves & Investment), Ministry Of Finance) served as members of the Committee until 30th September 2009, 30th September 2008 and 31st August 2010 respectively.

SCOPE OF THE REVIEW

4. The present Companies Act was enacted in 1967. It was based on the Malaysian Companies Act 1965, which in turn was based on the Companies Act 1961 of the Australian state of Victoria. This latter act can trace its ancestry back to the UK Companies Act 1948. The Singapore Companies Act retains sections that are similar to (and in many cases word for word the same as) sections in the ancestral acts. This has allowed recourse to authorities from Malaysia, Australia and the UK. In the four decades since the introduction of the Companies Act, it has been amended 16[2] times. The amendments took the form of additions and deletions rather than a comprehensive reform. The result is that the present Companies Act is a patchwork quilt of old sections from the ancestral legislation, new sections borrowed from other more modern foreign statutes and locally-drafted sections with no foreign equivalents.

5. The last review of the Companies Act was conducted in 1999 by the Company Legislation and Regulatory Framework Committee (CLRFC). Several changes came out of that review. However, no attempt was made to deal with the structural flaws in the Act caused by piecemeal amendment over the years. In the meantime, a number of Commonwealth jurisdictions have undertaken or completed reviews of their own company law framework. For instance, the Australians re-drafted their Corporations Act in 2001 and the UK completed its company law reform in 2006. The UK Companies Act review was a broad-ranging one. It also had particular emphasis on making the UK Companies Act more user-friendly to the small companies, with what was called a "Think Small First" approach. Hong Kong is currently in the midst of its Companies Ordinance rewrite, which was launched in 2006. The Hong Kong Companies Bill was recently gazetted on 14 January 2011 and aims to achieve four main objectives, namely, enhancing corporate governance, ensuring better regulation, facilitating business and modernising the law[3].

6. The Steering Committee was therefore charged by the Minister for Finance to:

[1] Dr Philip Pillai was a Partner of Shook Lin & Bok LLP until September 2009.

[2] These amendments do not include consequential amendments made to the Companies Act by amendment Acts promulgated under other Acts, for instance, the Residential Property (Amendment) Act 2006 (Act 9 of 2006).

[3] The website of the Hong Kong Companies Registry at http://www.cr.gov.hk/en/publications/press20110114.htm

- provide a conducive, effective and efficient regulatory framework for setting up and doing business in Singapore;

- keep pace with relevant international legal developments and technological advances;

- provide flexibility and clarity to directors and management of enterprises in the operation of corporate entities, but without compromising the interests of stakeholders and the public;

- maintain an appropriate balance in the use of statutory provisions and non-statutory standards in regulating corporate behaviour; and

- promote greater accountability and transparency while keeping the costs of compliance low and manageable.

THE APPROACH OF THE STEERING COMMITTEE

7. The Steering Committee determined at its first meeting that the Companies Act should be re-written and not merely amended again. There was some discussion on whether legislation from the UK or some other jurisdiction should be used as a template. It was decided that foreign legislation could not provide an adequate template for Singapore's needs. In deciding to re-write the Act, the Committee did not suggest that everything should be done from scratch. It is undesirable to abandon wording that is well-understood and with which the market is familiar just for the sake of change. What is required is that the Act should be streamlined and the inconsistencies ironed out. Where sections have proven problematic in practice, they should be clarified. Sections that have outlived their usefulness should be deleted. In reviewing the Companies Act, it is necessary to constantly ask what the policy behind a section is or should be.

8. The guiding principle of the Steering Committee is that we should not change things just for the sake of doing so. The fact that the other jurisdictions may or may not have certain provisions is a factor which was taken into account, but was not in itself determinative. The question to ask is whether changes made in foreign legislation serve a useful purpose in Singapore. The ultimate aim is to make the legislation comprehensible and coherent. Above all, the Act has to be practical. In its review, the Steering Committee has taken into account companies legislation from the United Kingdom, Australia and New Zealand where appropriate. Where additional jurisdictions such as Hong Kong[4], Canada and the United States have been considered, they are included as well.

9. The Steering Committee was also guided by the principle that we should examine the regulatory requirements to see how the regulatory burdens placed on companies can be lessened. Regulatory rules should not be 'hard-coded' in the body of the Act, so as to allow the procedures to be modified as the environment changes. The overarching ideal is to make it easier for companies to comply with the statutory

[4] In its review, the Steering Committee had considered the Hong Kong Government's Consultation Proposals relating to the rewrite of the Companies Ordinance, where relevant.

requirements whilst ensuring transparency and accountability to third parties. It is desired that the new Companies Act will convey the intent of the rules in clear, concise and unambiguous language which can be readily understood by people involved in running or investing in a business enterprise.

10. The Steering Committee's approach is to have the Companies Act contain core company law which applies to all forms of companies. In view of the decision to enact a new Insolvency Act, the provisions on the winding-up of companies will no longer be contained in the Companies Act, but in the Insolvency Act. Specific rules which apply to specific types of companies should, if possible, be migrated to other legislation so as to reduce the complexity of the Act. For example, rules that apply only to listed companies should be moved to the Securities and Futures Act (or some other appropriate legislation) and the Listing Rules. The vast majority of companies do not have to concern themselves with audit committees or with the provisions pertaining to the Central Depository; these rules do not belong in the Companies Act. Similarly, the provisions for registration and winding-up of foreign companies would more appropriately belong in legislation dealing with such entities.

WORKING GROUPS

11. The Steering Committee has conducted a comprehensive review of the Companies Act with the assistance of Working Groups. From November 2007 to July 2010, the Steering Committee held a total of fourteen meetings to discuss various issues raised by the Working Groups.

12. The Working Groups, chaired by the Steering Committee members, were formed to study five distinct areas of the Companies Act, as follows:

Working Group 1 – Corporate Governance covering Directors' Duties
Chairman: Mr John Lim

Working Group 2 – Shareholders' Rights and Meetings
Chairman: Professor Tan Cheng Han

Wording Group 3 – Capital Maintenance and Shares including Takeovers and Amalgamation
Chairman: Mr Lucien Wong

Working Group 4 – Accounts and Audit
Chairman: Mr Gautam Banerjee

Working Group 5 – Company Administration including Registration of Charges
Chairman: Ms Juthika Ramanathan

13. The members of the Steering Committee and co-opted members of the Working Groups had a wide range of expertise and experience, and were drawn from the professions, industry, academia and non-profit organisations. The members and secretaries of the Working Groups and the members of the general secretariat are listed in the **Annex 1**.

CONSULTING THE PROFESSIONS, BUSINESS AND STAKEHOLDERS

14. In the course of its review, the Steering Committee actively sought views from lawyers, accountants, businessmen and other stakeholders in order to ensure that the recommendations made are practical. Hence, in 2009 and 2010, the Steering Committee issued a number of consultation papers seeking feedback from businesses, professional bodies and other stakeholders. Individuals who practise corporate law and corporate finance or are interested in corporate governance issues were also invited to provide their input. Written representations were received from many of the persons and organisations consulted. Focus group meetings were held to hear oral comments. The businesses, professional bodies, individuals and other stakeholders from whom we sought feedback are listed in the **Annex 2**.

15. Specific questions were asked rather than merely inviting the respondents to give general comments. It was felt that this sort of focused feedback was more useful than general feedback from the public at this point. The feedback received was extensively discussed amongst the respective Working Groups and by the Steering Committee. This final report containing the Steering Committee's recommendations incorporates the results of these consultations with professional and business groups.

FINAL POINTS

16. The recommendations of the Steering Committee contained in this Report are only the beginning of the process of review of the Companies Act. Equally important will be the subsequent drafting of the actual legislation. While it is desirable to keep as much of the present wording of the Act as is feasible, the opportunity should be taken to rationalise the various provisions to provide coherence. Some provisions of the Act are in separate sections only for historical reasons. Other provisions need to be consolidated and made internally consistent (eg, the various sections prescribing disqualifications of directors and managers). Finally, it is necessary to consider section by section whether breaches of the Act should be offences or whether it would be more efficient that such breaches should be dealt with by administrative sanctions or even civil proceedings.

17. During the course of the review, the Steering Committee also received feedback on a number of issues that concern listed companies rather than all companies in general. This Report does not discuss such issues as they were or will be referred to SGX for consideration.

ANNEX 1

WORKING GROUP 1 : CORPORATE GOVERNANCE COVERING DIRECTORS' DUTIES

Chairman
Mr John Lim

Members

Professor Tan Cheng Han	Dean, Faculty of Law, National University of Singapore
Mr Adrian Chan	Senior Partner and Head of Corporate Department, Lee & Lee
Dr Lee Tsao Yuan	Executive Coach Practice Leader, Capelle Consulting and former director of Keppel Corporation Ltd and Oversea-Chinese Banking Corporation Ltd.
Mr Yeoh Oon Jin	Partner and Head of Assurance, PricewaterhouseCoopers LLP
Mr Lawrence Wong	Executive Vice President & Head of Listings, Singapore Exchange Limited
Mr Laurence Lien (until 30th September 2008)	Director (Governance & Investment), Ministry Of Finance
Mr Derrick Wan (until 31st August 2010)	Director (Reserves & Investment), Ministry Of Finance

Secretary

Wendy Chang	Deputy Senior State Counsel, Legislation and Law Reform Division ("LLRD"), Attorney-General's Chambers ("AGC")

WORKING GROUP 2 : SHAREHOLDERS' RIGHTS AND MEETINGS

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Professor Tan Cheng Han SC

Members

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Mr Thio Shen Yi SC	Joint Managing Director, TSMP Law Corporation
Ms Annabelle Yip	Partner, WongPartnership LLP
Mr David Gerald J.	President/CEO, Securities Investors Association (Singapore)
Mr Laurence Lien (until 30th September 2008)	Director (Governance & Investment), Ministry Of Finance
Mr Derrick Wan (until 31st August 2010	Director (Reserves & Investment), Ministry Of Finance

Secretary

Chong Kah Wei	Deputy Senior State Counsel, LLRD, AGC

WORKING GROUP 3 : CAPITAL MAINTENANCE AND SHARES INCLUDING TAKEOVERS AND AMALGAMATION

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Mr Lucien Wong

Vice-Chairmen
Mr Dilhan Pillay Sandrasegara
Mr Ng Heng Fatt

Members

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Mr Jeffrey Chua	Managing Director, Investment, Temasek Holdings (Private) Ltd
Mr Olivier Lum	Group CFO, CapitaLand Limited
Mr Ronald Ong	Managing Director, Chairman & CEO, South East Asia, Morgan Stanley Asia (Singapore) Pte
Mr Quek See Tiat	Partner & Deputy Chairman, PricewaterhouseCoopers LLP
Mr Richard Teng	Senior Vice President, Singapore Exchange Limited
Mr Tham Sai Choy	Managing Partner, KPMG LLP
Mr Andrew Lim	Partner & Co-Head of Corporate Mergers and Acquisitions, Allen & Gledhill LLP
Mr Michael Ewing Chow	Associate Professor, Faculty of Law, National University of Singapore

Secretary

Toh Wee San	Legal Officer, Legal Services Division (“LSD”), Accounting and Corporate Regulatory Authority (“ACRA”)

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Chairman
Mr Gautam Banerjee

Members

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Mr Shariq Barmaky	Partner, Deloitte & Touche LLP
Ms Kok Moi Lre	Partner, PricewaterhouseCoopers LLP
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Ms Christine Chan	Partner, Allen & Gledhill LLP

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Chairperson
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Members

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Ms Stefanie Yuen Thio	Joint Managing Director, TSMP Law Corporation
Mr Bobby Tan Cher Chong	Director, Secretariat of the Board of Trustees, National University of Singapore
Mr Cheung Pui Yuen	Partner, Deloitte & Touche LLP
Mr Low Kah Keong	Partner, WongPartnership LLP

Secretary

Andrew Abraham (until 30th September 2009)	Legal Officer, LSD, ACRA
Thomas Koshy	Legal Officer, LSD, ACRA

GENERAL SECRETARIAT

Melinda Moosa	Deputy Senior State Counsel, LLRD, AGC
Jaime Tey	State Counsel, LLRD, AGC
Jenny Tan	Manager, LLRD, AGC
Fanny Chang (until 31st Jan 2011)	Manager, LLRD, AGC
Mariana Othman	Legal Executive, LLRD, AGC
Cheok Yu-Liang	Legal Officer, LSD, ACRA
Tan Keng Yong	Legal Policy Officer, LSD, ACRA
Hannah Goh (until 4th Feb 2010)	Legal Policy Officer, LSD, ACRA
Lim Wei Jan (until 29th May 2010)	Legal Policy Officer, LSD, ACRA
Aaron Lim	Legal Executive, LSD, ACRA

ANNEX 2

PROFESSIONAL BODIES

Allen & Overy LLP
Association of Small & Medium Enterprises
Clifford Chance Pte Ltd
Deloitte & Touche LLP
Ernst & Young LLP
General Insurance Association of Singapore
Herbert Smith LLP
Institute of Certified Public Accountants, Singapore
Investment Management Association of Singapore
KPMG LLP
Latham & Watkins LLP
Life Insurance Association Singapore
Norton Rose (Asia) LLP
PricewaterhouseCoopers
Securities Investors Association of Singapore
Singapore Association of the Institute of Chartered Secretaries and Administrators
Singapore Business Federation
Singapore Corporate Counsel Association
Singapore Institute of Directors
Singapore International Chamber of Commerce
Singapore Reinsurers' Association
The Association of Banks In Singapore
The Law Society of Singapore
White & Case Pte Ltd

CORPORATIONS

CapitaLand Group
Sembcorp Industries Ltd
Singapore Airlines Ltd
Singapore Exchange Limited
SingTel
Temasek Holdings (Private Limited)

ACADEMIA

Assoc Professor Erin Goh-Low Soen Yin
Head
Division of Business Law
Nanyang Business School
Nanyang Technological University

Professor Gillian Yeo Hian Heng
Interim Dean
College of Business (Nanyang Business School)

Nanyang Technological University

Professor Lim Kian Guan
Interim Dean
Lee Kong Chian School of Business
Singapore Management University

Professor Michael P. Furmston
Dean
School of Law
Singapore Management University

Professor Tan Cheng Han, S.C.
Dean
Faculty of Law, National University of Singapore

Professor Yeung Yin Bernard
Dean
Business School
National University of Singapore

SPECIALISTS/OTHER STAKEHOLDERS

Associate Professor Mak Yuen Teen
Associate Professor
Business School, National University of Singapore

Chia Kim Piow
Chairman & Managing Director
Rotary Engineering Ltd

Douglas Foo
Chairman & Chief Executive Officer
Apex-Pal International Ltd

Ho Kwon Ping
Executive Chairman
Banyan Tree Holdings Limited

Nash Benjamin
Group Chief Executive Officer
F J Benjamin Holdings Ltd

Olivia Lum
Group Chief Executive Officer & President
Hyflux Ltd

Philip Ng Chee Tat
Chief Executive Officer
Far East Organization

Sunny Verghese
Group Managing Director & Chief Executive Officer
Olam International Limited

Terry Clontz
President & Chief Executive Officer
Starhub Ltd

GOVERNMENT AGENCIES

Accountant-General's Department
Economic Development Board
Inland Revenue Authority of Singapore
Monetary Authority of Singapore

CHAPTER 1

DIRECTORS

I. INTRODUCTION

1 The Steering Committee for Review of the Companies Act has reviewed the key provisions in the Companies Act relating to directors and directors' duties, with a view to identifying areas which would benefit from reform and refinement. This chapter sets out the Steering Committee's recommendations arising from the review. In particular, it relates to the meaning of shadow director, appointment of directors, qualifications of directors, disqualification of directors on conviction of certain offences, vacation of office and removal of directors, payment of compensation to directors for loss of office, loans to directors and connected companies, the supervisory role of directors, power of directors to bind the company, power of directors to issue shares of company, directors' fiduciary duties, imposition of liability on other officers, disclosure of company information by nominee directors and indemnity for directors.

II. SHADOW DIRECTORS

2 "Director" is defined in section 4(1) and (2) of the Companies Act to include "a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act". Such a person is commonly referred to as a shadow director. The term "shadow director" is not used in the Act.

3 The Steering Committee does not see any necessity to have a separate definition for shadow director. This view was supported by the majority of the respondents during the focus group consultation. However, the Steering Committee considered whether it would be useful for the Companies Act to clarify that a person who controls all the directors or the majority of the directors is a shadow director.

4 The English court in *Ultraframe (UK) Ltd v Fielding and others; Northstar Systems Ltd v Fielding and others*[1] held that a person at whose direction a governing majority of the board was accustomed to act was capable of being a shadow director. The court took the view that there was difficulty as a matter of language in construing the phrase "the directors of the company" in section 741 of the UK Companies Act 1985[2] as meaning "some of the directors of the company" or even "a majority of the directors of the company". However, the policy underlying the definition was stated to be that a person who effectively controlled the activities of a company was to be subject to the same statutory liabilities and disabilities as a person who was a de jure director.

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[1] [2005] EWHC 1638 (Ch); [2005] All ER (D) 397.

[2] Section 741(2) of the UK Companies Act 1985 provided that in relation to a company, "shadow director" means a person in accordance with whose directions or instructions the directors of the company are accustomed to act.

5 This must be read subject to the views of the Court of Appeal of Singapore in *Heap Huat Rubber Company Sdn Bhd v Kong Choot Sian*[3], where it was held that it was a matter of construction of the articles of association whether a "shadow director" had to comply with formal requirements. Since the extended definition of "director" in section 4(1) only applies where the context allows, it would similarly be a matter of construction whether any particular section or regulation applies to shadow directors.

6 A refinement to the meaning of shadow director to refer to control of the majority of the directors would be consistent with the definition of "shadow director" in Hong Kong. Section 2 of the Hong Kong Companies Ordinance defines a "shadow director" in relation to a company as "a person in accordance with whose directions or instructions the directors or a majority of the directors of the company are accustomed to act". The Hong Kong definition by making a reference to the words "a majority of the directors" makes it clear that a person is a shadow director if he controls all the directors or a majority of the directors, but he is not a shadow director if he controls only one director or a minority of the directors. The Steering Committee is of the view that the Hong Kong definition provides greater clarity.

7 The definition of "director" in the Australia Corporations Act 2001 which includes shadow director and the definition of "shadow director" in the UK Companies Act 2006 do not contain any express reference to "the majority of the directors".

8 The Steering Committee considered whether to adopt the English and Australian approach of not having any express reference to "the majority of the directors". One view is that it is not necessary to have such express reference as we could rely on the common law position. However, there is another view that there would be greater clarity if it is expressly provided in the Companies Act that a shadow director includes a person who controls the majority of the directors. In the interests of certainty and clarity, the Steering Committee recommends the latter.

9 During the focus group consultation, the majority of the respondents were in favour of amending the definition of "director" in section 4(1) and (2) of the Companies Act to clarify that a person who controls the majority of the directors is also to be considered to be a director. It was felt that this would be an appropriate definition for shadow director (without necessarily using the term in the Act), and such an amendment would be useful clarification.

10 There were, however, some concerns that the proposed amendment would not be sufficiently robust to address situations where a person is able to exert significant influence over the company even though he does not control the majority of the directors. For example, in the case of a delicately balanced or split board, a person who controls an independent director may be able to exert significant influence on board matters and decisions. There were also concerns that the proposed amendment would not be adequate to address the situation where a person controls one dominant member of the board, who in turns influences the rest of the board. That person should also be regarded as a shadow director.

11 The Steering Committee considered all the feedback received and is of the opinion that a person who controls a single director on the board should not be deemed to be a shadow director. The issue goes beyond influence and control as shadow directors are subject to the obligations and duties of directors as set out in the Companies Act and at common law.

[3] [2004] SGCA 12.

It would be too harsh to subject a person who controls only one director to all the obligations and duties of a director.

12 Further, this would result in corporate shareholders which nominated directors to the boards of companies being regarded as shadow directors. This may in turn result in corporate shareholders owing duties of care to one another in closely held joint venture companies. The Steering Committee considered whether it would be desirable to expressly exclude such corporate shareholders from the meaning of shadow director, but felt that it was not necessary to have such exclusion. The issue whether a corporate shareholder could be regarded as a shadow director in a situation where its nominee director did not exercise independent judgment and only acted in accordance with the instructions of his corporate shareholder should be left to the court if such a case arises.

Recommendation 1.1

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

Recommendation 1.2

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

III. APPOINTMENT OF DIRECTORS

(a) Mode of appointment

13 The Companies Act does not prescribe how directors are appointed; this is left to the companies' articles of association. Typically, directors are elected by the members at the annual general meeting of the company.[4]

14 Table A which contains default articles makes provision for the appointment of directors[5]. Thus, the present position is that the company's articles will provide for the appointment of directors, or the default position in Table A will apply unless Table A is excluded by the company's articles.

15 Having an express provision in the Companies Act will simplify matters as a company will not have to provide for the appointment of directors in its articles or rely on Table A, unless the company wishes to provide for a different mode of appointment. The

[4] *Walter Woon on Company Law*, 3rd Ed, 2005, at paragraph 2.27.
[5] Article 67 provides that the company may from time to time by ordinary resolution passed at a general meeting increase or reduce the number of directors. Article 68 provides that the directors shall have power at any time, and from time to time, to appoint any person to be a director, either to fill a casual vacancy or as an addition to the existing directors, but so that the total number of directors shall not at any time exceed the number fixed in accordance with Table A. Articles 91 and 94 provide for the appointment of managing directors and associate directors respectively.

Steering Committee received industry feedback that in practice, Table A is often excluded by the companies' articles as it is not found to be useful.[6]

16 The current Singapore approach of not prescribing in legislation how directors are appointed is consistent with the position in the UK and Hong Kong. The Steering Committee considered whether the Companies Act should expressly provide for the mode of appointing directors, following the position in Australia and New Zealand.

17 For reasons of simplicity and greater clarity, the Steering Committee recommends that the Companies Act should provide expressly that unless the articles provide otherwise, a company may appoint a director by ordinary resolution passed at a general meeting. The mode of appointment is subject to the company's articles to give flexibility to companies.

18 This approach is consistent with that in Australia where the statutory provisions in the Australia Corporations Act 2001[7] on the mode of appointing directors are replaceable rules.[8] It is also consistent with the approach in the New Zealand Companies Act 1993 where section 153(2) provides for the appointment of subsequent directors by ordinary resolution, unless the constitution of the company otherwise provides.

19 During the focus group consultation, the majority of the respondents expressed support for having such an express provision on the appointment of directors in the Companies Act. It was felt that notwithstanding that there is little dispute in practice on how directors are appointed, it would be good to clearly provide that the general meeting has power to appoint directors, subject to contrary provision in the articles.

<u>Recommendation 1.3</u>

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.

(b) Approval for assignment of office

20 Section 170 of the Companies Act provides that if in the case of a public company, provision is made by the articles or by agreement between any person and the company empowering a director or manager to assign his office to another person, the assignment is of no effect until approved by a special resolution of the company.

[6] It should be noted that the Steering Committee has recommended that the current Table A be replaced by a Model Constitution: see Chapter 5, recommendations 5.7 and 5.8.

[7] Section 201G of the Australia Corporations Act 2001 provides that a company may appoint a director by resolution passed in general meeting. Section 201H(1) provides that the directors of a company may appoint a person as a director and a person can be appointed as a director in order to make up a quorum for a directors' meeting even if the total number of directors of the company is not enough to make up that quorum.

[8] Both sections 201G and 201H of the Australia Corporations Act 2001 are replaceable rules, that is, provisions that can be displaced or modified by the company's constitution (section 135(2)).

21 The Steering Committee recommends that section 170 should be repealed as it is now obsolete. Today, there is no assignment of office as new directors are appointed. In any case, office is personal in nature and should not be transferable or assignable.

22 During the focus group consultation, the majority of the respondents were in favour of repealing section 170 as it no longer fulfils any useful function and is rarely used in practice. It was also noted that the English equivalent provision[9] had been repealed.

<u>Recommendation 1.4</u>

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

IV. QUALIFICATIONS OF DIRECTORS

(a) Corporate directorships

23 Under section 145(2) of the Companies Act, only a natural person who has attained the age of 18 years and who is otherwise of full legal capacity can be a director of a company. The requirement for a natural person has been in the Companies Act since 1967.

24 The Steering Committee considered a proposal to allow corporate directorship in Singapore. It was argued that the availability of corporate directorship in Singapore would encourage the growth of company incorporations in Singapore, especially from foreigners who would otherwise take their business elsewhere where corporate directorship is available[10].

25 Corporate directorship is not allowed in Australia, Canada, New Zealand, Malaysia and the US (under its Model Business Corporations Act). In the UK, corporate directorship is allowed but only in a restricted form, that is, at least one director must be a natural person[11]. The Hong Kong Government has proposed a restriction of its corporate directorship regime, which currently permits corporate directorship in private companies with shares not listed in a recognised stock market, by requiring every private company to have at least one director who is a natural person.[12]

[9] Section 308 of the UK Companies Act 1985.

[10] Corporate directorship is available in some offshore jurisdictions such as the Cayman Islands and the British Virgin Islands.

[11] The UK Companies Act 2006 requires every company to have at least one director who is a natural person so that someone may, if necessary, be held accountable for the company's actions. The UK Government had in its company law review considered the abolition of corporate directorship but was concerned that an outright ban of corporate directors might harm those companies which made use of the flexibilities in corporate directorship for entirely legitimate reasons. For example, a parent company may like to be a corporate director of its subsidiaries to facilitate group cohesion.

[12] Hong Kong Government's Consultation Conclusions on Company Names, Directors' Duties, Corporate Directorship and Registration of Charges dated 10 December 2008, available at http://www.cr.gov.hk/en/publications/consultation.htm.

26 The Steering Committee has found no compelling reason to allow corporate directorship in Singapore, especially in view of the difficulties in determining the person who is actually controlling the company and accountability of corporate directors. Furthermore, a number of major jurisdictions have moved away or are moving away from corporate directorship.

27 Based on the feedback received during the focus group consultation, there was almost a consensus that there is no need for corporate directorships in Singapore.

Recommendation 1.5

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

(b) Training of directors

28 The Companies Act currently does not prescribe the academic or professional qualifications of directors. The Companies Act also does not provide for the training of directors.

29 The Steering Committee does not see any compelling reason for the Companies Act to prescribe the academic and professional qualifications of directors. The current position in Singapore is consistent with that in the UK, Australia, New Zealand and Hong Kong.

30 The Steering Committee is also of the view that the Companies Act should not mandate the training of directors.[13] A mandatory requirement would not necessarily ensure that directors are of good quality and may instead have the effect of deterring potentially good candidates from accepting directorship. The training of directors in Singapore is presently undertaken through non-legislative means, which is working well. For example, the Singapore Institute of Directors conducts extensive and systematic training for directors.

On 2 April 2008, the Hong Kong Government launched a public consultation on whether to abolish corporate directorship altogether or restrict it in the same manner as that in the UK Companies Act 2006, so as to improve the accountability and transparency of company operations and the enforceability of directors' obligations.
It was noted that one feature of corporate directorship was that the delegate might change from time to time, making it very difficult to know who was responsible for the conduct of the business of a company. Further, as the delegate of a corporate director was not personally a director of that company, his duties were not owed to the company and it would be difficult to attach to him liability for acts or omissions prejudicial to the company. Therefore, in the interest of improving corporate governance which stressed a high degree of disclosure and transparency, corporate directorship should be abolished, subject to a grace period. On the other hand, there were concerns that abolition of corporate directorship would drive away many private companies established in Hong Kong and would have adverse implications for businesses, in particular, the ability to incorporate companies quickly and the flexibility provided by corporate directorship in the management of companies set up purely for asset holding purposes. Further, there were legitimate reasons for corporate directorship, for example, a parent company may like to be a corporate director of its subsidiaries to facilitate group cohesion.
In view of the equally strong opinions received during the public consultation exercise on the need to enhance corporate governance and transparency and the legitimate commercial need for flexibility, the Hong Kong Government found that the UK approach of requiring at least one director to be a natural person would strike an appropriate balance between the two.

[13] However, in the case of the listed companies, training of their directors may be provided in the Code of Corporate Governance or the Listing Manual, if the Singapore Exchange Limited (SGX) decides that it would be desirable to do so.

31 During the focus group consultation, all but one respondent agreed with the views of the Steering Committee. The dissenting respondent felt that in the light of increasing sophistication of financial transactions and growing complexities of the globalised marketplace, there should be a requirement for the listed companies to have individuals with formal professional financial and accounting qualifications on Audit Committees. The Steering Committee notes that the listed companies may need special requirements, but this would be an issue for the SGX to consider.

<u>Recommendation 1.6</u>

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

(c) Maximum age for directors

32 Section 153 of the Companies Act prohibits the appointment of a person of or above 70 years of age as a director of a public company or a subsidiary of a public company unless his appointment or re-appointment is by ordinary resolution passed at an annual general meeting.

33 It is noted that the annual re-election process required under section 153 enables companies to appoint younger directors who are able to serve whilst also inducing the boards of public companies and their subsidiaries to plan for succession and renewal.

34 The Steering Committee considered whether it is necessary to impose a maximum age limit for directors and whether section 153 should be repealed. In the Steering Committee's opinion, a person's ability to act as a director of a company is not principally determined by his age. Rather than focusing simplistically and only on age, other factors should be taken into account when considering if a director is contributing or performing well and whether there should be board renewal. This is because today, persons of or above 70 years of age can be capable of doing the job of a director, and are often re-appointed in practice. In any event, the board renewal process is more appropriate and critical for listed companies than unlisted public companies or private companies.

35 During the focus group consultation, the majority of the respondents agreed with the views of the Steering Committee. There were, however, some dissenting views that the imposition of a maximum age limit still serves a useful function. From a practical standpoint, some respondents felt that although the contribution by a director does not depend solely on his age, having a maximum age limit for directors will encourage companies to consciously review and renew board members so as to promote the effectiveness of the board.

36 After considering all the views received, the Steering Committee recommends that the Companies Act should not impose any maximum age limit for directors and section 153

should be repealed.[14] There is no age limit for directors in the companies legislation of the UK, Australia, New Zealand, Hong Kong, British Columbia and Delaware.

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.

V. DISQUALIFICATION OF DIRECTORS ON CONVICTION OF OFFENCES INVOLVING FRAUD OR DISHONESTY

37 Where a person is convicted (whether in Singapore or elsewhere) of an offence involving fraud or dishonesty punishable with imprisonment for 3 months or more, he is disqualified under section 154 of the Companies Act from acting as a director of a company or from taking part in the management of the company. This is an automatic disqualification for 5 years as there is no requirement for a disqualification order to be made by the court.

38 It is noted that section 154 provides for two types of disqualification where a director is convicted of an offence: automatic disqualification and disqualification by court order. A distinction is drawn between a conviction of offences involving fraud or dishonesty on the one hand and a conviction of offences involving the formation or management of a company on the other hand.[15] The former attracts automatic disqualification while the latter is subject to disqualification by court order (disqualification order).[16]

39 It is further noted that section 154(6), which allows a director to apply to the High Court for leave to act as a director or take part in the management of the company, applies only to a director against whom a disqualification order has been made. Thus, a director who is automatically disqualified is not able to apply to the High Court for leave.

40 The Steering Committee considered whether the disqualification regime for conviction of offences involving fraud or dishonesty should be an automatic disqualification regime or a disqualification order regime.

[14] However, for the listed companies, if the SGX decides that an age limit is necessary, an age limit for directors can be imposed in the Listing Manual.

[15] Prior to 1993, section 154 had made no distinction between convictions for offences involving fraud or dishonesty and those involving the formation or management of a company. Both types of conviction had attracted automatic disqualification for a period of 5 years. With the amendments to section 154 in 1993 (Act 22 of 1993), a distinction is now drawn between the two types of conviction.

[16] Australia has a regime similar to Singapore's and provides for automatic disqualification of directors convicted of offences involving dishonesty. However, in the UK and Hong Kong, directors convicted for offences involving dishonesty are not disqualified automatically but by way of a court order. In New Zealand, disqualification can be automatic or by court order.

41 In a disqualification order regime, the court will have to consciously impose disqualification and this will not only be for the offences under the Companies Act, but also for appropriate offences under the Penal Code and other written laws. In contrast, in an automatic disqualification regime, it would be for the director concerned to determine whether or not the offence which he is convicted of is one that involves fraud or dishonesty.

42 A disqualification order regime has the advantage of providing certainty to directors and to companies. However, a difficulty with such a regime is that offences involving fraud or dishonesty are not confined to the offences under the Companies Act, and the onus is on the court to disqualify the offender from acting as a company director. The court may not make the disqualification order as the sentencing judge may not have in mind the relevance of the offence to the role of a company director or may not know that the offender is a company director. If the court did not address its mind to the issue of disqualification or if the issue of disqualification was not raised to the court, resulting in the court not making the disqualification order against the director, it would be too late to raise the issue of disqualification thereafter.

43 Such difficulty would not arise in an automatic disqualification regime as no court order is necessary. A further advantage of an automatic disqualification regime is that offences of fraud or dishonesty committed outside Singapore would also attract automatic disqualification. In such cases, the Singapore court does not need to make a disqualification order.[17]

44 However, there appears to be uncertainty as to what offences would amount to offences involving fraud or dishonesty. The concept of fraud or dishonesty is wide and not connected with the management or formation of a company. There is nothing in the statutory provisions that defines dishonesty in relation to companies. There have been cases where directors are not sure whether the offence which they are convicted of is one involving fraud or dishonesty, and thus are not certain as to whether they become automatically disqualified from acting as a director or from taking part in the management of the company.

45 This uncertainty was highlighted by the District Court in *PP v Foo Jong Kan*[18], where the sentencing judge concluded that as he did not have the appropriate power or jurisdiction to determine whether the automatic disqualification in section 154(1) of the Companies Act applied, he could not determine the meaning of “fraud or dishonesty” in section 154(1). The learned judge stated:

> “42. … As s 154(1) is triggered when the offence is one of fraud or dishonesty, it would seem appropriate that a determination whether such an offence is committed should be made by the sentencing court. Certainly aside from clear cases particularly those in the Penal Code which require dishonesty as an element of the offence, there may be other offences, including possibly the present one[19], in which the situation is less clear, and the matter may call for determination one way or another.

[17] In a disqualification order regime on the other hand, where directors are convicted of offences overseas, the court may have to review overseas findings of fraud or dishonesty. Other jurisdictions may have different criteria on what constitutes fraud or dishonesty.
[18] [2005] SGDC 248.
[19] In *PP v Foo Jong Kan*, Foo Jong Kan, a director, was convicted of a market manipulation offence under section 97(1) of the Securities Industry Act. He caused a misleading appearance as to the price of securities in a

> 43. … [U]pon further consideration of the language of the statute, and the scheme as actually created by the legislature, I concluded that the statute does not in fact contemplate any such determination by the sentencing court.
>
> ……
>
> 46. Though I was initially concerned that this may cause prejudice or uncertainty for accused persons where there is some difference in reasonable views as to whether an offence involved fraud or dishonesty, and therefore merited determination by the sentencing court, I could not in light of the clear express difference in treatment laid out in s 154, read into sub-section (1) words requiring a determination by the Court."

46 The Steering Committee noted that notwithstanding that legislation such as the Companies Act, Securities and Futures Act and Prevention of Corruption Act are silent on what offences amount to offences involving fraud or dishonesty, the director concerned can always apply to the court for a declaration if there is uncertainty as to whether the offence he is convicted of attracts disqualification. Such an application may be made by originating summons. However, until the declaration is made by the court, the director would potentially be in contravention of section 154(1) during the intervening period between his conviction and the court declaration.

47 The Steering Committee had extensive discussions on the issue and was divided on whether to retain the automatic disqualification regime or move to a disqualification order regime. The Steering Committee considered two options in relation to convictions for offences involving fraud or dishonesty:

(a) Retain the automatic disqualification regime, but allow a disqualified director to apply to the High Court under section 154(6) for leave to act as a director or take part in the management of the company; or

(b) Move to a disqualification order regime.

48 In the UK and Hong Kong[20], directors convicted of offences involving dishonesty are not disqualified automatically, but by way of a court order. Australia provides for automatic disqualification of directors convicted of offences involving dishonesty, but the Australian court may grant leave to a disqualified person who is automatically disqualified.[21] In New Zealand, disqualification can be automatic or by court order.[22]

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public listed company by arranging for buy and sell orders in the securities to be placed near the market closing time at a specified price and volume, with the intention of deflating the closing price of the securities.

[20] In the Hong Kong Companies Ordinance, the court may make a disqualification order under section 168E against a person convicted of an indictable offence which necessarily involves a finding that he acted fraudulently or dishonestly. The effect of the disqualification order is that the person shall not be a director of a company or take part in the promotion, formation or management of a company without leave of the court (section 168D). The Hong Kong provisions are based on the UK Company Directors Disqualification Act 1986.

[21] In Australia, conviction of an offence involving dishonesty and punishable with imprisonment for at least 3 months attracts automatic disqualification under section 206B of the Corporations Act 2001. Under section 206G, the court may grant leave to a disqualified person who is automatically disqualified under section 206B.

[22] In the New Zealand Companies Act 1993, if a person has been convicted of any crime involving dishonesty, he can be disqualified automatically for 5 years unless he first obtains the leave of the court (section 382), or be

49 During the focus group consultation, the majority of the respondents expressed support for option (a)[23], but there was a significant minority who felt that automatic disqualification is too drastic[24]. Further, there were calls for clarity and guidance on what offences would constitute offences involving fraud or dishonesty. In this connection, the Steering Committee received suggestions to provide in the Companies Act a non-exhaustive list of offences involving fraud or dishonesty which would attract automatic disqualification, or to provide in the Companies Act an explanatory description of offences involving fraud or dishonesty with a non-exhaustive list of illustrations, or to provide in the Companies Act or subsidiary legislation the guiding principles that the court shall have regard to when deciding on an application for leave under section 154.

50 The Steering Committee considered all the feedback received and recommends retaining the automatic disqualification regime, but to allow disqualified directors to apply to the High Court for leave to act as a director or take part in the management of the company (option (a)). Although the Steering Committee is of the view that it would not be practicable to draw up a list of offences which conviction would attract automatic disqualification, it was noted that provision of further clarification would be useful. However, further discussion would be needed to ascertain how to clarify which offences would attract automatic disqualification. Options for consideration include stipulating a threshold of minimum fine or term of imprisonment.

<u>Recommendation 1.9</u>

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.

VI. VACATION OF OFFICE AND REMOVAL OF DIRECTORS

(a) Resignation of directors

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disqualified by the court for up to 10 years unless he obtains the leave of the court (section 383), to be a director or take part in the management of a company.

[23] The reasons cited by the majority expressing support for retaining the automatic disqualification regime included the following:

(a) A conviction of fraud or dishonesty reflects lack of integrity, thus such directors should be automatically disqualified.
(b) An automatic disqualification regime saves the courts time and is administratively simpler. Allowing disqualified directors to apply to the court for leave will ensure that aggrieved directors are given a fair hearing.
(c) A disqualification order regime is disproportionately burdensome on the courts, especially in the review of overseas findings of fraud or dishonesty. The onus should remain with the individual.
(d) Any person agreeing to serve as a director should be cognisant of potential disqualification when he signs the consent. It is incumbent on him to seek appropriate legal advice.

[24] The minority opined that most directors are not legally trained and may not be aware of automatic disqualification, thus inadvertently commit an offence by continuing to act as director. It was felt that the burden should be on the prosecution who has resources and systems in place to identify directors who should be subject to disqualification and apply to the court accordingly.

51 The Companies Act does not prescribe the formalities for the resignation of directors. The manner in which a director can resign from his office will be provided for in the company's articles. Article 72(f) of Table A provides that the office of director shall become vacant if he resigns his office by notice in writing to the company. At common law, unless the director's contract or the articles of association require it, a director's resignation need not be accepted by the company.[25] Thus, in practice, a director can resign by simply giving notice to the company and the company need not accept the director's resignation.

52 The Steering Committee considered whether for clarity, the Companies Act should expressly provide that unless otherwise provided by the company's articles, a director may resign by giving the company written notice of his resignation. This would be consistent with the position in Australia[26], New Zealand[27] and Hong Kong[28].

53 During the focus group consultation, most of the respondents were in favour of having such an express provision in the Companies Act. There was, however, a view that there was no need for such provision in the Companies Act as it is a given that a director may resign by giving the company written notice.

54 Having considered all the feedback received, the Steering Committee recommends that the Companies Act expressly provides that unless otherwise provided by the company's articles, a director may resign by giving the company written notice of his resignation.

55 The Steering Committee further considered whether the Companies Act should make it clear that a director's resignation should not be conditional upon the company accepting it. Such a provision should, however, still be subject to the rule on "the last man standing" in section 145(5) which provides that a director shall not resign unless there is remaining in the company at least one director who is ordinarily resident in Singapore. Any purported resignation in breach of section 145(5) will be deemed invalid.

56 During the focus group consultation, most respondents were in favour of having an express provision in the Companies Act that subject to the rule on "the last man standing" in section 145(5), the effectiveness of a director's resignation shall not be conditional upon the company's acceptance. The Steering Committee therefore recommends having such express provision.

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[25] *Walter Woon on Company Law*, 3rd Ed, 2005, at paragraph 7.76.

[26] Section 203A of the Australia Corporations Act 2001 provides that a director may resign by giving a written notice of resignation to the company at its registered office. This is a replaceable rule.

[27] Section 157(2) of the New Zealand Companies Act 1993 provides that a director may resign by signing a written notice of resignation and delivering it to the address for service of the company. The notice is effective when it is received at that address or at a later time specified in the notice. Section 157(1)(a) provides that the office of director of a company is vacated if the person holding that office resigns in accordance with section 157(2).

[28] Section 157D of the Hong Kong Companies Ordinance permits a director to resign from the position of director unless the articles of association provide otherwise or unless there is an agreement between the company and the director which provides otherwise. Notification of such resignation must be given to the Registrar in the specified form, unless the person resigning reasonably believes that the company will not give such notice, in which event that person must give the notice. Where the articles or any agreement with the company requires notice to be given by the resigning director, the resignation will not have effect unless notice of the resignation is given in writing in accordance with such requirement or by sending it by post to, or by leaving it at, the registered office of the company.

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.

(b) Retirement of directors

57 The Companies Act does not mandate the retirement of directors. Retirement of directors in rotation is usually provided for in the company's articles.[29]

58 The present position is consistent with that in the UK, Australia, New Zealand and Hong Kong.

59 The Steering Committee considered but does not find it necessary for the Companies Act to mandate the retirement of directors.

60 During the focus group consultation, most of the respondents agreed with the view of the Steering Committee. The Steering Committee recommends that it would not be necessary for the Companies Act to mandate the retirement of directors.

Recommendation 1.12

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

(c) Removal of directors

61 Section 152 of the Companies Act provides for the removal of a director of a public company by ordinary resolution, notwithstanding anything in the company's memorandum or articles or in any agreement between the company and the director.

62 The Companies Act, however, does not provide for the removal of a director of a private company. This is left to the company's articles. Article 69 of Table A provides that the company may by ordinary resolution remove any director before the expiration of his period of office, and may by ordinary resolution appoint any person in his stead.[30]

[29] *Walter Woon on Company Law*, 3rd Ed, 2005, at paragraph 7.80. See for example, Table A articles 63 to 66.
[30] If the company's articles are silent on the issue and Table A is excluded, the directors of a private company will be irremovable unless the articles are suitably amended.

63 The Steering Committee considered whether it would be useful if the Companies Act provides for the removal of directors of both private companies and public companies. However, in the case of private companies, the removal of directors should be subject to the companies' articles which can provide for entrenchment. This would give companies flexibility on the issue of entrenchment. In the case of public companies which include listed companies, there should not be entrenchment of directors, as recognised in section 152[31].

64 The Steering Committee noted that the companies legislation of the UK, Australia and New Zealand makes provision for the removal of directors of all types of companies. However, the position on entrenchment of directors in these jurisdictions varies.

65 In the UK, entrenchment of directors is not allowed. Section 168 of the UK Companies Act 2006 provides that a company may by ordinary resolution at a meeting remove a director before the expiration of his period of office, notwithstanding anything in any agreement between the company and the director. However, a director has a right to protest against removal under section 169.

66 In Australia, it is possible for the directors of a proprietary company to be entrenched, but the directors of a public company cannot be entrenched. Section 203C of the Australia Corporations Act 2001 provides for the removal of a director of a proprietary company by resolution, and this is a replaceable rule. On the other hand, section 203D provides that a public company may by resolution remove a director from office despite anything in the company's constitution, any agreement between the company and the director, or any agreement between any or all the members of the company and the director. Section 203D is not a replaceable rule.

67 In New Zealand, it is possible to entrench the directors of any company. Section 156 of the New Zealand Companies Act 1993 provides that subject to the constitution of a company, a director may be removed from office by ordinary resolution passed at a general meeting. This applies to all companies.

68 During the focus group consultation, there was unanimous agreement that it would be useful to provide in the Companies Act that a private company may by ordinary resolution remove any director, subject to contrary provision in the articles. The Steering Committee recommends that the Companies Act expressly provide so.

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.

[31] Under section 152, special notice must be given of any resolution to remove a director (at least 28 days before the meeting). The director who is to be removed is entitled to make representations in writing to the company and has a right to be heard in his defence. If the director in question was appointed to represent the interests of any particular class of shareholders or debenture holders, the resolution to remove him will not take effect until his successor is appointed.

VII. PAYMENT OF COMPENSATION TO DIRECTORS FOR LOSS OF OFFICE

69 Section 168(1)(a) of the Companies Act requires any payment of compensation to a director for loss of office as an officer of the company, or any payment as consideration for or in connection with his retirement from such office, to have been disclosed to and approved by the shareholders of the company, otherwise the payment would not be lawful.

70 Section 168(1)(a) speaks of compensation for loss of office as an officer, not as a director. On the basis of the definition of "officer" under section 4(1), it would appear that any payment to a director for loss of office or retirement as executive director must have been disclosed to and approved by the shareholders. Thus, if a director resigns as managing director or executive director but remains a director, any payment of compensation to him must be disclosed to and approved by the shareholders.

71 The Steering Committee considered whether to remove the requirement for shareholders' approval in the case of payment of compensation to executive directors for loss of employment.

72 One view is that a distinction should be drawn between loss of office as a director and termination of employment of an executive director. Compensation for loss of office as a director should be for the shareholders to decide because the shareholders appoint the directors. However, if the payment is to an executive director as an employee, then it should be for the board of directors to decide as employees are appointed by the board. Such a distinction is critical especially in the case of a person who wears both the hats of director and employee.[32]

73 On the other hand, it would not be good corporate governance for executive directors to make payment to themselves without the shareholders' approval. However, the Steering Committee noted that the existing law does allow for payments for loss of office to executive directors to be avoided if the payment is approved in breach of the board's fiduciary duties to the company. In *Lim Koei Ing v Pan Asia Shipyard and Engineering Co Pte Ltd* [33], the court disallowed a payment of damages for premature termination of a contract of service to an executive director, even though the payment had been approved by the board. Although the contract between the director and the company allowed for substantial liquidated damages upon loss of office, the payment was disallowed because it was made in breach of the directors' fiduciary duties. The plaintiff's contract of service was voidable at the instance of the company, as it had been obtained in breach of the directors' fiduciary duties.

74 The Steering Committee was divided in its views on the issue. The focus group feedback on this issue was also split.

75 The reasons given for retaining the requirement for shareholders' approval were as follows:

(a) There is a risk that by removing shareholders' approval for such payments, an additional check on the board will be lost.

[32] Where a person is both a director and an employee, the Steering Committee had noted that in most cases, it would be the loss of employment, rather than the loss of the office of director, that would be in issue. Typically, an employee who is also a director does not draw any fees in his capacity as director.
[33] [1995] 1 SLR 499.

(b) Amending the law to obviate the need for shareholders' approval for terminating a director's employment contract would be a step backwards in corporate governance.

(c) An employee who is also a director does not normally draw any fees in his capacity as director. Thus, if he leaves the company, it is unlikely that he will be paid large compensation for loss of office as director. Any significant compensation would more likely be in relation to his termination of employment. From a corporate governance perspective, it would be incongruous to require shareholders' approval for smaller compensation for loss of office as director but not larger compensation for loss of employment.

76 The reasons against retention of the requirement for shareholders' approval were as follows:

(a) Many companies, when entering into employment contracts with their executive directors, would agree with those directors on certain terms of compensation, including compensation on termination of employment. If such terms have to be approved by the shareholders, the companies would be in breach of their obligations under the employment agreements if the shareholders subsequently do not approve of the terms.

(b) Removing the requirement for shareholders' approval would eliminate the difficulties currently faced by having to differentiate when a payment is for "loss of office" and when it is for "past services", and grappling with issues relating to the existing exceptions in section 168(5).

(c) It is burdensome and administratively costly to convene an EGM to remove a non-performing executive director when his contract of employment is terminated.

77 Having considered all the views, the Steering Committee's recommendation is to retain the requirement for shareholders' approval in section 168(1).

78 It is noted that shareholders' approval for payment of compensation to executive directors is not required in New Zealand, where the board may, subject to restrictions contained in the company's constitution, authorise a payment to a director of compensation for loss of office, if the board is satisfied that to do so is fair to the company.[34] However, shareholders' approval for payment of compensation to executive directors is required in the UK and Australia.

79 In the UK, any payment to a director for loss of office, whether as director or any other office or employment in connection with the management of the affairs of the company, would generally require approval by a resolution of the members.[35] The exceptions are for

[34] New Zealand Companies Act 1993, section 161. No distinction is made between payment of compensation for loss of office as director and loss of office in an executive capacity.

[35] UK Companies Act 2006, sections 215 and 217. This replaces section 312 of the UK Companies Act 1985, which provided that it is not lawful for a company to make to a director of the company any payment by way of compensation for loss of office, or as consideration for or in connection with his retirement from office, without particulars of the proposed payment (including its amount) being disclosed to members of the company and the proposal being approved by the company.

payments made in discharge of legal obligations, payments made by way of damages for breach of legal obligations, payments made by way of settlement or compromise of any claim arising in connection with the termination of office or employment, payments made by way of pension in respect of past services and small payments.[36]

80 In Australia, the giving of benefits in connection with a person's retirement from a board or managerial office in a company generally requires members' approval by resolution passed at general meeting, where the benefit is given by way of compensation for or in connection with the loss of office, or the benefit is given in connection with the retirement from the office.[37] The exceptions are retirement benefits made in respect of leave of absence to which the person is entitled to under an industrial instrument, benefits given under a court order, benefits given in prescribed circumstances, genuine payment by way of damages for breach of contract (subject to a payment limit), benefits given under an agreement made before the person became the holder of the office (subject to a payment limit), and benefits for past services (subject to a payment limit).[38]

81 The Steering Committee further considered whether it would be desirable to introduce a new exception to the requirement for shareholders' approval for payment of compensation to an executive director not exceeding a certain limit. It is noted that the UK has an exception for small payments, while the exceptions in Australia are subject to a payment limit which is tied to the annual base salary of the director. In Singapore, there is an existing exception for bona fide payments in respect of past services not exceeding 3 years' total emoluments of the director in section 168(5)(d) of the Companies Act.

82 The Steering Committee agreed in-principle to introduce a new exception to exempt payment of compensation to executive directors for loss of employment where the payment does not exceed a certain payment limit. For such payments, although shareholders' approval will not be required, disclosure to shareholders will still be necessary.

83 However, the Steering Committee had differing views on the appropriate payment limit. The Steering Committee considered whether it would be appropriate for the payment limit to be tied to the total emoluments of the executive director in the 3 years preceding his termination of employment, as in the existing exception for bona fide payments in respect of past services not exceeding 3 years' total emoluments of the director in section 168(5)(d) of the Companies Act. In other words, where the value or amount of compensation to an executive director does not exceed his total emoluments in the 3 years immediately preceding his termination of employment, shareholders' approval need not be obtained.

84 However, it was felt that capping the compensation not requiring shareholders' approval to the total emoluments of the director in the 3 years prior to his loss of office may result in uncertainty as to the actual capped amount and be subject to abuse. Further, the definition of "emoluments" in the Companies Act is significantly broad and not only covers a director's base salary, allowances and perquisites, but also payments made or consideration given to a director whether made to him in his capacity as a director or otherwise, as long as it is in connection with the affairs of the company.

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[36] UK Companies Act 2006, sections 220 and 221.
[37] Australia Corporations Act 2001, sections 200A, 200B and 200E.
[38] Australia Corporations Act 2001, sections 200F and 200G.

85 The Steering Committee also considered stipulating a payment limit which is tied to the base salary of the executive director and would prefer this approach[39]. In this respect, the Steering Committee's view is that it would be appropriate to exempt payment of compensation to an executive director for loss of office where such compensation does not exceed his base salary for the 3 years immediately preceding his termination. The Steering Committee is of the opinion that a cap based on his base salary for the past 3 years would be reasonable, given that section 168(5)(d) provides a cap for bona fide payments in respect of past services based on a director's total emoluments in the 3 years immediately preceding his retirement or death.

86 The Steering Committee considered whether the payment limit in Australia that is tied to the one-year annual base salary would be suitable, but is of the view that it may be too low. The base salary in Australia is much higher than that in Singapore as the tax rate there is higher. Hence, the base salary quoted in Australia takes that factor into consideration.

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.

VIII. LOANS TO DIRECTORS AND CONNECTED COMPANIES

(a) New exceptions to prohibition of loan or giving of guarantee or security

87 Section 162 of the Companies Act prohibits a company from making a loan to its directors or to directors of related corporations, or to the directors' spouse or children, or giving a guarantee or security in connection with such a loan. To avoid the possibility of a company's directors circumventing section 162 by simply making loans to a company which they control, section 163 prohibits a company from making loans or giving of guarantee or security to connected persons. Both sections 162 and 163 contain exceptions.

88 Under section 163, a company (the lending company) may not make a loan or give a guarantee or security for a loan to another company (the borrowing company) if the directors of the lending company have an interest in 20% or more of the shares of the borrowing

[39] It was noted that as a significant portion of an executive director's emoluments is performance-based, his total annual emoluments tend to vary from year to year. Further, there is the difficulty of determining what goes into an executive director's total annual emoluments, given that many companies have share-based incentives that vest over time (more than one year) and which also have claw-back provisions. An executive director's base salary, on the other hand, is more certain.

company. Interest in shares means either ownership or control over the shares. This prohibition also applies where the borrowing company is incorporated outside Singapore. An interest of a member of a director's family is to be treated as the director's interest. For the purposes of the section, the words "a member of a director's family" include his spouse and children.

89 The Steering Committee received industry feedback that section 163 has caused problems in practice for companies incorporated in Singapore, particularly in joint venture situations. For example, where a company (Company A) enters into a joint venture with another company in which one of Company A's directors has a 20% or more share interest, Company A is prohibited under section 163 from giving a loan or corporate guarantee or security in connection with a loan to the joint venture company. The Steering Committee considered whether to adjust the share interest threshold of 20%, but decided to retain this threshold in the light of the feedback received during the focus group consultation.

90 During the focus group consultation, the Steering Committee received a further proposal to achieve parity of treatment between Singapore companies and foreign companies in relation to section 163. There was feedback that companies incorporated in Singapore are subject to the prohibition in section 163, but the prohibition does not apply to foreign companies listed on the Singapore Exchange. Such disparity has caused difficulty in practice.

91 The Steering Committee is agreeable to the proposal by the focus group to introduce two new exceptions to the prohibition in section 163, as follows:

(a) to allow for loans or guarantee/security 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.

Recommendation 1.16

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

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.

(b) Extension to quasi-loans and credit transactions

92 The Steering Committee considered and agreed with a proposal that other than loans, the regulatory regime in sections 162 and 163 should cover quasi-loans, credit transactions and related arrangements. This is because over time, many new types of financial instruments and arrangements have developed. Singapore should update its regulatory regime to keep pace with the changing business environment and to remain on par with leading jurisdictions.

93 In the UK, the regulatory regime for loans is a disclosure and approval regime, rather than a prohibitive regime. Members' approval is required for the making of loans to directors.[40] This requirement extends to quasi-loans[41] and credit transactions[42] in the case of public companies and companies associated with public companies, and also to related arrangements[43].

94 In Australia, members' approval is required for the giving of financial benefits by public companies to their related parties[44]. This is provided in section 208 of the Australia Corporations Act 2001. The "giving of financial benefit" is given a broad interpretation. Section 229 states that the economic and commercial substance of conduct is to prevail over its legal form, and any consideration given for the benefit is to be disregarded. The section cites some examples of giving a financial benefit to a related party, namely, giving or providing the related party finance or property, buying an asset from or selling an asset to the related party, leasing an asset from or to the related party, supplying services to or receiving services from the related party, issuing securities or granting an option to the related party, and taking up or releasing an obligation of the related party.

95 During the focus group consultation, there was unanimous agreement to extend the regulatory regime in the Singapore Companies Act to quasi-loans, credit transactions and related arrangements. There was feedback that there is no limit to creativity in financial

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[40] Section 197 of the UK Companies Act 2006.

[41] A "quasi-loan" (which applies in respect of public companies and associated companies) is defined in section 199 of the UK Companies Act 2006 to mean a transaction under which one party ("the creditor") agrees to pay, or pays otherwise than in pursuance of an agreement, a sum for another ("the borrower") or agrees to reimburse, or reimburses otherwise than in pursuance of an agreement, expenditure incurred by another party for another ("the borrower") —

(a) on terms that the borrower will reimburse the creditor, or
(b) in circumstances giving rise to a liability on the borrower to reimburse the creditor.

[42] A "credit transaction" (which applies in respect of public companies and associated companies) is defined in section 202 of the UK Companies Act 2006 to mean a transaction under which one party ("the creditor") —

(a) supplies any goods or sells any land under a hire-purchase agreement or a conditional sale agreement,
(b) leases or hires any land or goods in return for periodical payments, or
(c) otherwise disposes of land or supplies goods or services on the understanding that payment (whether in a lump sum or instalments or by way of periodical payments or otherwise) is to be deferred.

[43] Pursuant to section 203 of the UK Companies Act 2006, a related arrangement is an arrangement under which another person enters into a transaction that, if it had been entered into by the company, would have required approval under section 197, 198, 200 or 201 and that person, in pursuance of the arrangement, obtains a benefit from the company or a body corporate associated with it. A related arrangement is also one where there is assignment to the company or assumption by the company of any rights, obligations or liabilities under a transaction that, if it had been entered into by the company, would have required approval under section 197, 198, 200 or 201.

[44] The term "related parties" in relation to a public company is defined in section 228 of the Australia Corporations Act 2001. Amongst others, it covers the directors, their spouses, parents and children. It also covers an entity that controls a public company and entities controlled by other related parties.

arrangements and the regime in Singapore should be updated to address the use of devices other than loans.

Recommendation 1.18

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

IX. SUPERVISORY ROLE OF DIRECTORS

96 Section 157A(1) of the Companies Act provides that the business of a company shall be managed by or under the direction of the directors. Section 157A was a new provision introduced in 2003 to give effect to a recommendation of the Company Legislation and Regulatory Framework Committee (CLRFC)[45]. It is based on section 198A of the Australia Corporations Act 2001[46].

97 In practice, there is a distinction between the duties performed by the board of directors as a whole and the duties of the management. The board of directors plays a supervisory role rather than manages or gives direction to the company. It is the management that runs the operations of the company. This is especially the case for the larger companies and listed companies. The Steering Committee considered whether section 157A could be improved to recognise and provide for the supervisory powers of the board of directors. This will better reflect the powers and responsibilities of the board of directors.

98 The Steering Committee finds the equivalent provision in the New Zealand Companies Act 1993 to be clear and comprehensive. Section 128 of the New Zealand Companies Act 1993 states:

Section 128

(1) The business and affairs of a company must be managed by, or under the direction or supervision of, the board of the company. *[emphasis added]*

(2) The board of a company has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.

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[45] According to the Explanatory Statement to the Companies (Amendment) Bill 2003 (Bill No. 3 of 2003), a new section 157A is inserted to give effect (together with the Fourth Schedule as amended) to Recommendation 3.15 of the CLRFC for the enactment of a statutory re-statement of the nature and extent of the powers of directors. As stated in the Final Report of the CLRFC at paragraph 4.7.1, the CLRFC had recommended the adoption of the statutory restatement of the distribution of powers between directors and general meeting following the model used in section 198A of the Australia Corporations Act 2001 to override Article 73 of Table A in the Fourth Schedule which had provided that management powers are also subject to "such regulations, being not inconsistent with the aforesaid Regulations or provisions, as may be prescribed by the company in general meeting."

[46] Section 198A(1) of the Australia Corporations Act 2001 states that "the business of a company is to be managed by or under the direction of the directors".

(3) Subsections (1) and (2) are subject to any modifications, exceptions, or limitations contained in this Act or in the company's constitution.

99 During the focus group consultation, the majority of the respondents agreed with the Steering Committee's view to amend section 157A to provide that the business of a company shall be managed by, or under the direction or supervision of, the 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.

X. POWER OF DIRECTORS TO BIND THE COMPANY

100 Section 23 of the Companies Act was introduced in 2004 to confer statutory powers of a natural person on companies. Section 25 was then amended to retain the *ultra vires* doctrine to preserve contractual rights of internal redress by the members against the officers of the company or against the company, where there is a lack of capacity or power by the company to do a purported act. Section 25A (which originated from section 19 of the New Zealand Companies Act 1993) was also introduced at the same time to provide that notwithstanding anything in the memorandum or articles of a company, a person is not deemed to have constructive knowledge of the contents of the memorandum or articles of, or any other document relating to, the company merely because such documents have been registered with ACRA or are available for inspection at the company's registered office address.

101 It has been proposed that it would be helpful to adopt section 40 of the UK Companies Act 2006. Section 40 provides that in favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution.[47]

102 Section 40 restates sections 35A and 35B[48] of the UK Companies Act 1985. It is similar but not identical to section 35A. Section 35A was enacted in 1989 to give effect to Article 9.2 of the First Company Law Directive of the European Economic Community

47 As explained in *Palmer's Company Law Annotated Guide to the Companies Act 2006* at page 84, the intent of section 40 (as was the intent of section 35A of the 1985 Act) is to protect third parties dealing with the company in good faith from any internal restrictions contained in (usually) the articles of association which limited the power of the board to act on the company's behalf. For example, where the articles contained a provision to the effect that contracts over a certain value required the unanimous consent of the board, and a contract of that nature was entered into without unanimous consent, the counterparty could rely on section 35A to enforce the contract against the company as long as he was dealing with the company in good faith. Equally, where the authorisation of another person to act on behalf of the company required, say, unanimous consent of the board, a third party in good faith could rely on the section to "cure" consent defectively delivered.

48 Section 35B of the UK Companies Act 1985 absolved a person dealing with the company from any duty to enquire as to the existence of limitations on the powers of directors to bind the company or authorise others to do so.

(68/151/EEC)[49]. The effect of section 35A was that a third party dealing with a company in good faith need not concern itself about whether a company is acting within its constitution. It reflected and to some degree extended the "indoor management rule" from *Royal British Bank* v *Turquand* (1856) All E.R. Rep 435. This rule effectively states that a person dealing with a company in good faith is entitled to assume that any internal procedures contained in the company's constitution had been properly complied with.[50]

103 The companies legislation in New Zealand (sections 17 and 19) and Australia (sections 124 and 125) deal with a company's capacity, and do not contain a provision that is identical with section 40 of the UK Companies Act 2006. The closest provision in the New Zealand Companies Act 1993 is section 18, which provides that assertions of lack of authority may not be made for dealings between a company and other persons, unless certain conditions are satisfied.

104 During the focus group consultation, the majority of the respondents were in favour of adopting section 40 of the UK Companies Act 2006. However, there was a view that if a third party has been given express notice that the articles of association of the company limits the board's authority or power to bind the company and the third party then proceeds to enter into a transaction with the company with full knowledge of such limitation, the company should not be held liable for the transaction entered into by the board contrary to such limitation.

105 Having considered all the feedback received, the Steering Committee's recommendation is to provide in the Companies Act that a person dealing with the company in good faith should not be affected by any limitation in the company's articles.

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.

XI. POWER OF DIRECTORS TO ISSUE SHARES OF COMPANY

106 Section 161 of the Companies Act provides that notwithstanding anything in a company's memorandum or articles, the directors cannot exercise any power of the company to issue shares unless it has been approved by the company in general meeting. In practice, the approval under section 161 is usually given by general mandate, which will expire at the next annual general meeting. However, there can be specific shareholders' approval for a particular issue of shares (not in pursuance of an offer, agreement or option made or granted by the directors when the approval is in force, referred to in section 161(4)[51]), which will

[49] Article 9.2 of the Directive provides that the limits on the powers of the organs of the company, arising under the statutes or a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed. The board of directors was treated as one of the "organs" of the company.

[50] *Palmer's Company Law Annotated Guide to the Companies Act 2006*, at page 84.

[51] Section 161(4) allows the directors to issue shares notwithstanding that an approval has ceased to be in force if the shares are issued in pursuance of an offer, agreement or option made or granted by them while the approval was in force and they were authorised by the approval to make or grant an offer, agreement or option which would or might require shares to be issued after the expiration of the approval.

lapse at the next annual general meeting under section 161(3) if the approval is not renewed at the next annual general meeting. In such a situation, an issue has arisen as to whether it would be necessary to obtain approval at the annual general meeting if there is already shareholders' approval.

107 The Steering Committee considered and agreed with a proposal to amend section 161 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 satisfies certain conditions. The conditions are that the specific shareholders' approval must specify a maximum number of shares that can be issued and that the approval will expire at the end of two years.

108 There is a differing view that the proposed amendment is not necessary as it appears to cater to specific mandate for an issue of shares for a proposed transaction. If the company is not able to ascertain the main terms of the proposed transaction, it would be premature to lay it before the shareholders for the purpose of obtaining their approval for that transaction.

109 However, section 161 currently does not only envisage a specific mandate being obtained for a specific transaction. It is wide enough to cover situations outside the scope of section 161(4) including proposed transactions for which the terms cannot be ascertained at the time the specific shareholders' approval was sought.

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.

XII. DIRECTORS' FIDUCIARY DUTIES

(a) Codification of directors' fiduciary duties

110 Section 157(1) of the Companies Act states that a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office. Section 157(2) provides that an officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer[52] or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company. This is the statutory statement of a director's duties under the Singapore Companies Act. It is derived from similar provisions in Australian legislation.[53]

[52] By section 4(1), "officer" includes any director.
[53] *Walter Woon on Company Law*, 3rd Edition, 2005, at paragraph 8.6.

111 Section 157 does not purport to be an exhaustive statement of a director's duties. In fact, section 157(4) specifically provides that the section is in addition to and not in derogation of any other rule of law relating to the duty or liability of directors or officers of a company. The effect of section 157 is to render mandatory the duties that it imposes. However, the fiduciary duties under common law are not excluded and continue to apply.[54]

112 In 2006, the following directors' duties were codified in the UK Companies Act 2006[55]:

(a) Duty to act within powers;
(b) Duty to promote the success of the company;
(c) Duty to exercise independent judgment;
(d) Duty to exercise reasonable care, skill and diligence;
(e) Duty to avoid conflicts of interests;
(f) Duty not to accept benefits from third parties;
(g) Duty to declare interests in proposed transaction or arrangement.

113 The Steering Committee considered whether the Singapore Companies Act should adopt the UK approach of codifying the directors' fiduciary duties[56]. In the UK, the statutory duties replace the corresponding common law rules and equitable principles from which they derive, and are to be interpreted in the same way as the common law rules and equitable principles.[57] By this approach, the UK Government sought to balance precision of the statutory statement against the need for continued flexibility and development of the law.[58] However, it remains to be seen whether this intent would be successfully achieved.[59] The Steering Committee received feedback from British academics and practitioners who are ambivalent about the codification of the directors' fiduciary duties in the UK and have expressed reservation about its usefulness.

114 In codifying the directors' fiduciary duties, the UK Government had accepted the recommendations of the Steering Group which led the Company Law Review (CLR) that

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[54] *Walter Woon on Company Law*, 3rd Edition, 2005, at paragraph 8.7.
[55] UK Companies Act 2006, sections 171 to 177.
[56] The UK Steering Group which led the Company Law Review (CLR) in its report *Developing the Structure* at chapter 3 set out the following general obligations for directors, as gleaned from case law:

- to comply with the constitution and to use powers under it for proper purposes;
- to run the undertaking for the benefit of the company (i.e. generally speaking for the benefit of its members as a whole) and not for any other purpose;
- to maintain their independence of judgment;
- to avoid profiting personally from their position and to avoid conflicts of interest without the consent of the members or the authority of the constitution;
- to act fairly as between members; and
- to apply reasonable care and skill in exercising all their functions.

[57] Section 170(3) and (4) of the UK Companies Act 2006.
[58] See Explanatory Notes to the UK Companies Act 2006, paragraph 305.
[59] It was noted at paragraph 3.11 of the Hong Kong Government's Second Public Consultation Paper on Companies Ordinance Rewrite (2 April 2008) that there were heated debates in the UK during the process of introducing the statutory statement of directors' duties. While some commentators praised the statement for improving clarity and certainty and striking a good balance between precision and flexibility, others were concerned that the statement created new uncertainties and difficulties. For example, the requirement for directors to take into account various new factors in complying with the duty to promote the success of the company may pose new challenges to directors.

there should be a statutory statement of the directors' general duties and that this, subject to two exceptions[60], should be a codification of the current law. CLR's reasons were as follows:

- "to provide greater clarity on what is expected of directors and make the law more accessible. In particular, they sought to address the key question "in whose interests should companies be run?" in a way which reflects modern business needs and wider expectations of responsible business behaviour;

- to make development of the law in this area more predictable (but without hindering development of the law by the courts);

- to correct what the CLR saw as defects in the present duties relating to conflicts of interest." [61]

115 The Steering Committee accepts that the arguments in favour of codification are ones of certainty and accessibility[62]. It should be noted in this context that the UK did not traditionally have a general statutory statement of a director's duties. The Steering Committee also considered the arguments against codification. The strength of the common law lies in the flexibility of the judges to tailor their decisions according to justice. Fiduciary duties cannot be codified without being stated in detailed terms, in which case there will be a loss of flexibility. Further, attempting to restate in statutory form duties which are not yet well-settled or are still developing might restrict the ability of the law to develop further and adapt to changing circumstances. It should be noted that in contrast to the UK, the Singapore Companies Act has a statutory statement of directors' duties, which is based on an Australian model. The Singapore section does not exclude the common law.

116 The Steering Committee notes that the UK may be the only major jurisdiction which has sought to exhaustively codify directors' fiduciary duties. The Australia Corporations Act 2001 has not codified the directors' duties in the same way as the UK Companies Act 2006. There is a statutory statement of the directors' duties in sections 180 to 183 of the Australia Corporations Act 2001[63], but this is not an exhaustive statement as the statutory duties have effect in addition to the existing common law and equitable principles (section 185).

117 The New Zealand Companies Act 1993 has sought to codify some of the directors' fiduciary duties[64], but it does not appear to have codified as extensively as the UK Companies

[60] The two exceptions relate to the regulation of conflicts of interest, where the statutory statement departs from the current law. See the Explanatory Notes to the UK Companies Act 2006, paragraph 302.
[61] Explanatory Notes to the UK Companies Act 2006, paragraphs 300 and 301.
[62] On the issue of accessibility, the Steering Committee has considered the possibility of having guidance notes on directors' duties instead. One suggestion was for SGX to issue such guidance notes.
[63] Sections 180 to 183 of the Australia Corporations Act 2001 provide for the following duties:
(a) Duty to exercise powers and discharge duties with care and diligence (section 180);
(b) Duty to exercise powers and discharge duties in good faith in the best interests of the corporation and for a proper purpose (section 181);
(c) Duty not to improperly use his position to gain an advantage or cause detriment to the corporation (section 182);
(d) Duty not to improperly use information by virtue of his position to gain an advantage or cause detriment to the corporation (section 183).
[64] Sections 131 to 138 of the New Zealand Companies Act 1993 provide for the following directors' duties:
(a) Duty to act in good faith and in the best interests of the company (section 131);
(b) Duty to exercise powers for a proper purpose (section 133);

Act 2006. The directors' duty to promote the success of the company for the members' benefit, duty to exercise independent judgment, duty to avoid conflicts of interest, and duty not to accept benefits from third parties, which are codified in the UK Companies Act 2006, have not been similarly codified in the New Zealand Companies Act 1993. Further, the UK Companies Act 2006 contains an express provision that the statutory duties have effect in place of the common law rules and equitable principles as regards the duties owed to a company by a director. The New Zealand Companies Act 1993 does not contain such a provision.

118 Hong Kong has not codified directors' fiduciary duties. During a recent public consultation[65] by the Hong Kong Government, it was found that the idea of codifying directors' duties remained controversial and responses on this issue were highly divided. The Hong Kong Government concluded that it would be premature to have comprehensive codification at this stage and proposed to just have a statutory statement on the directors' duties to exercise care, skill and diligence.[66]

119 After extensive discussions, the Steering Committee is of the view that it would not be desirable to codify the directors' fiduciary duties in the same manner as the UK as this may not be best for business efficacy. It would be preferable to monitor the developments in the UK to ascertain if the codification of the directors' duties there is useful. This is especially since the UK provisions are still new, having come into operation only on 1 October 2007 (for four duties[67]) and 1 October 2008 (for the remaining three duties[68]). At the same time, we should observe the developments in the other leading jurisdictions. If the experiences of other jurisdictions suggest that codifying directors' duties in a similar manner is a positive development, then it may be useful for Singapore to do so.

120 During the focus group consultation, the majority of the respondents expressed agreement with the Steering Committee's view. One respondent, however, felt that codification would provide better guidance for directors on the standards of behavior

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(c) Duty to comply with the Companies Act and the constitution of the company (section 134);
(d) Duty to exercise care, diligence and skill (section 137);
(e) Duty not to allow the company to engage in reckless trading (section 135);
(f) Duty not to agree to the company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so (section 136).

It is noted that prior to 1993, there was no statutory statement of the directors' duties in New Zealand. The New Zealand Companies Act 1955 did not contain any statutory statement of the directors' duties. Instead, the directors' duties had to be gleaned from a large volume of complex case law. In 1987, the New Zealand Law Commission was of the view that the existing law relating to the duties of directors was inaccessible, unclear and extremely difficult to enforce. It recommended a statutory statement of the directors' duties, recognising at the same time that it would be impossible to encapsulate all the current legal principles and unwise to inhibit development of the standards appropriate in particular cases by attempting codification.

[65] Second Public Consultation on Companies Ordinance Rewrite by the Hong Kong Government, issued on 2 April 2008.

[66] First Phase Consultation of the draft Companies Bill by the Hong Kong Government, issued on 17 December 2009.

[67] These are the duty to act within powers, duty to promote the success of the company, duty to exercise independent judgment and duty to exercise reasonable care, skill and diligence under sections 171 to 174 of the UK Companies Act 2006 respectively.

[68] These are the duty to avoid conflicts of interest, duty not to accept benefits from third parties and duty to declare interest in proposed transaction or arrangement under sections 175 to 177 of the UK Companies Act 2006 respectively.

expected of them. There was also feedback that such guidance could be in the form of non-statutory practice directions or guidance notes instead.

<u>Recommendation 1.22</u>

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

(b) Consequences of breach of duties under section 157

121 Under section 157(3) of the Companies Act, a breach of the provisions in section 157 renders the officer or agent liable both civilly and criminally. He is liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach. Breach of the duties in section 157 is also an offence. If found guilty, the officer or agent is liable to a fine not exceeding $5,000 or to imprisonment for a term not exceeding twelve months.

122 The Steering Committee considered a proposal to decriminalise breach of the duties under section 157. Notwithstanding the position in the other jurisdictions, the Steering Committee found it appropriate to retain the current position in section 157(3) so as not to send the wrong signal. The Steering Committee is concerned that decriminalisation may encourage misconduct.

123 In the UK, breach of the statutory duties of a director under sections 171 to 177 of the UK Companies Act 2006 would not subject the director to criminal liability. The consequences of breach are civil in nature.[69] This is also the position in New Zealand[70].

124 In Australia, a director faces criminal sanction in certain circumstances, namely, for failure to discharge his duty to act in good faith in the best interests of the corporation and for a proper purpose and is reckless or intentionally dishonest, for use of his position dishonestly, and for dishonest use of information obtained because of his position.[71] However, the Australia Corporations Act 2001 provides civil consequences for breach of his duty to exercise care and diligence, duty to exercise good faith in the best interests of the corporation and for a proper purpose, duty not to make improper use of his position and duty not to make improper use of information acquired by virtue of his position.[72]

125 During the focus group consultation, the majority of the respondents were in favour of maintaining the *status quo*. It was opined that the retention of criminal liability serves as a useful deterrent. A few respondents, however, proposed the introduction of a civil penalty regime. In this context, the Steering Committee noted that a civil penalty regime, if

[69] Section 178(1) of the UK Companies Act 2006 provides that the consequences of breach (or threatened breach) of sections 171 to 177 are the same as would apply if the corresponding common law rule or equitable principle applied.
[70] The New Zealand Companies Act 1993 provides a criminal penalty only for breach of the duty to disclose directors' interests under section 140.
[71] Section 184 of the Australia Corporations Act 2001.
[72] These are civil penalty provisions, as stated in a note to sections 180, 181, 182 and 183 of the Australia Corporations Act 2001.

introduced, should apply across the entire Companies Act, and not just in respect of the directors' duties. This issue is currently the subject of a review by ACRA.

<u>Recommendation 1.23</u>

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

(c) Extending section 157(2) to cover improper use of position

126 Section 157(2) of the Companies Act provides that an officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.

127 The equivalent provision in the Australia Corporations Act 2001 is section 183[73]. In addition, section 182 provides that a director, secretary, other officer or employee of a corporation must not improperly use their position to gain an advantage for himself or someone else, or cause detriment to the corporation.

128 The Steering Committee is of the view that it would be useful to adopt the Australian approach by widening the scope of section 157(2) to extend the prohibition to cover improper use of a person's position as an officer or agent of a company, other than the present prohibition covering improper use of any information acquired by virtue of a person's position as an officer or agent, to gain an advantage for himself or any other person or to cause detriment to the company.

129 During the focus group consultation, the majority of the respondents agreed with the Steering Committee's view. It was felt that the ultimate test is that an individual obtained an unfair advantage through an abuse of his position. It is irrelevant whether it concerns merely information or otherwise. It was also opined that such an extension was a logical one.

<u>Recommendation 1.24</u>

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.

[73] Section 183 of the Australia Corporations Act 2001 provides that a person who obtains information because he is or has been a director or other officer or employee of a corporation must not improperly use the information to gain an advantage for themselves or someone else, or cause detriment to the corporation.

XIII. IMPOSITION OF LIABILITY ON OTHER OFFICERS

130 Most of the statutory requirements and duties in the Companies Act are imposed on the directors only. However, some provisions, such as section 157(2) prohibiting the improper use of information acquired by virtue of a person's office, impose the requirements on the officers of a company.

131 "Officer" in relation to a corporation is defined under section 4(1) as including "any director or secretary of the corporation or a person employed in an executive capacity by the corporation".

132 The Steering Committee considered whether it would be appropriate to extend certain statutory requirements and duties to the other officers of a company.

(a) Extension of disclosure requirements

133 The Steering Committee considered whether to impose the following disclosure requirements on the other officers of a company, not just the directors:

(a) duty to disclose conflict of interests in transactions or proposed transactions with the company, or by virtue of holding any office or property (section 156);

(b) duty to disclose shareholdings and interests in shareholdings in the company or related corporation and changes thereof (section 165).

134 A contravention of any of these disclosure requirements would attract a criminal penalty.

135 One view is that such disclosure requirements should be imposed on the key management officers of a company employed in an executive capacity as these persons have control and influence over the decisions of the company. The directors do not necessarily run the company. In modern companies, the key decisions are made by the key management officers who may not be directors. It would be necessary to know their conflicts of interests and other interests. The key management officers generally refer to the Chief Executive Officer and the most senior person responsible for the financial affairs of the company. It also does not seem consistent to impose criminal liability on the directors, some or all of whom may not work full-time for the company, but not the key management officers who are full-time employees and who play a critical role in the decision-making of the company.

136 Another view is that it would be adequate to extend the disclosure requirements to the Chief Executive Officer being the person at the apex of the management of the company. It would be too harsh to subject the other officers to criminal liability as well.

137 It is noted that the companies legislation of the UK, Australia, New Zealand and Hong Kong do not impose the duty to disclose interests in transactions on non-directors.

138 In defining who a key management officer is, the Steering Committee finds the definition of "officer" in relation to a corporation under section 9 of the Australia Corporations Act 2001 to be a useful guide, that is, "a person who makes or participates in making decisions that affect the whole or a substantial part of the business of the corporation,

or who has the capacity to affect significantly the corporation's financial standing, or in accordance with whose instructions or wishes the directors of the corporation are accustomed to act[74]".

139 The Steering Committee consulted the focus group on the following three options:

(a) Extension to the Chief Executive Officer only;

(b) Extension to the key management officers, that is, any person who makes or participates in making decisions that affect the whole or a substantial part of the business of the company, or who has the capacity to affect significantly the company's financial standing, or in accordance with whose instructions or wishes the directors of the company are accustomed to act;

(c) Extension to all the officers (this would include any person employed in an executive capacity by the company, as defined in section 4(1) of the Singapore Companies Act).

140 The majority of the respondents supported extension of the disclosure requirements to non-directors. However, there were mixed views as to which officers should be subject to the disclosure requirements. A number of respondents supported extension to the Chief Executive Officer only, while others were in favour of extension to the key management officers such as the Chief Executive Officer and the Chief Financial Officer. None of the respondents were in favour of extending to all the officers of the company.

141 The minority view which disagreed to an extension of the disclosure requirements felt that it would be sufficient to impose such duties on the directors only as the directors are the ultimate overseers of the company. Extension would put an additional onerous responsibility on non-directors, and this would lead to increased costs of compliance. It was also opined that it would be too harsh to impose criminal penalties on other officers for non-disclosure. Such an extension would not be necessary as the officers of a company are already governed by the company's internal policy on code of conduct and ethics which they have to comply as part of their employment contracts. It was further felt that such an extension may impact on the willingness of individuals to assume key management positions of a company.

142 After considering all the feedback received, the Steering Committee recommends extension of the disclosure requirements to the Chief Executive Officer only as he is the person at the apex of the management of the company. The Steering Committee noted that extension to the Chief Executive Officer would be consistent with the Securities and Futures (Amendment) Act 2009 (introducing a new section 133) where the directors and the Chief Executive Officer of any listed company who is not also a director are required to notify the company of their shareholdings and changes in shareholdings.

[74] This excludes advice given by the person in the proper performance of functions attaching to the person's professional capacity or his business relationship with the directors or the corporation.

Recommendation 1.25

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

(b) Extension of duty to act honestly and exercise reasonable diligence

143 In Australia, the duty to exercise reasonable care and diligence and the duty to act in good faith are imposed on both the directors and other officers[75] of a corporation (sections 180 and 181 of the Corporations Act 2001). The UK Companies Act 2006 and New Zealand Companies Act 1993 impose the duty on the directors only.

144 The Steering Committee considered whether it would be timely to extend the duty to act honestly and exercise reasonable diligence in section 157(1) to the other officers of a company, following the Australian approach, as company officers often wield greater control and influence over the company than non-executive directors. It is noted that the duty not to make improper use of information to gain an advantage under section 157(2) is already imposed on the officers and agents of the company.

145 It is noted that the Chief Executive Officer is usually a director of the company and would be caught by section 157(1) as a director. However, as he is the person at the apex of the management, he should also be subject to the duty even if he is not a director. The Steering Committee therefore recommends that the duty to act honestly and exercise reasonable diligence in section 157(1) be extended to the Chief Executive Officer. However, the Steering Committee considered but finds no compelling reason to extend the duty beyond the Chief Executive Officer.

146 During the focus group consultation, the majority of the respondents were in favour of extending the duty only to the Chief Executive Officer. The minority was against such extension as they were concerned that the criminal sanction for breach of the duty should not be extended beyond the directors.

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.

XIV. DISCLOSURE OF COMPANY INFORMATION BY NOMINEE DIRECTORS

147 Under section 158 of the Companies Act, a director is permitted to disclose information which he has in his capacity as a director or an employee of a company, being information that would not otherwise be available to him, to a person whose interests the director represents (that is, his nominating shareholder) or a person in accordance with whose

[75] As defined in section 9 of the Australia Corporations Act 2001.

directions or instructions the director may be required or is accustomed to act in relation to the director's powers and duties, if certain conditions are satisfied. The conditions are set out in section 158(3), as follows:

(a) the director declares at a meeting of the directors of the company the name and office or position held by the person to whom the information is to be disclosed and the particulars of such information;

(b) the director is first authorised by the board of directors to make the disclosure; and

(c) the disclosure will not be likely to prejudice the company.

148 During the focus group consultation, the Steering Committee received feedback that on a literal reading, specific approval has to be obtained for each piece of information to be disclosed. This is not practicable and cumbersome.

149 Further, section 158 is capable of having three different interpretations: (a) each and every piece of information must be approved by the board before it could be disclosed; (b) general mandate would be sufficient; and (c) disclosure would be possible as long as it is not detrimental to the company, which is the position under the common law. This makes the application of section 158 unclear.

150 The Steering Committee also received feedback that as a result of the conditions stipulated in section 158(3), there are constraints faced by listed holding companies in Singapore in receiving information from its listed subsidiaries. A listed subsidiary will not be prepared to disclose information to its holding company unless it is prepared to disclose the same information to all its shareholders as well. The board members of the listed subsidiary, including nominee directors representing the holding company generally, will not be comfortable to disclose information to its parent company to avoid incurring personal liability unless such information has been approved by the whole board of the listed subsidiary on which he sits on.

151 As the holding company has to ensure that the entire group is properly run, the holding company would need more information than passive shareholders. As such, the holding company's directors have a heavy responsibility to ensure that all the core businesses and operating units including listed subsidiaries are well managed to produce desirable financial results. For the holding company to receive the information only after release of the announcement by its listed subsidiaries would be too late.

152 It was thus proposed that section 158(3) be reviewed to allow nominee directors representing the holding company on the board of its listed subsidiaries to disclose information concerning the subsidiary to their nominating shareholders without having to satisfy the conditions listed in subsection (3). This will facilitate more efficient management of groups with listed subsidiaries. Any concerns relating to improper use of information is mitigated and governed under the Securities and Futures Act. The protection for insider trading has been provided under the Securities and Futures Act which applies to the management and directors of holding company.

153 Another proposal received by the Steering Committee is to amend section 158 to follow the wording of section 145 of the New Zealand Companies Act 1993, which is

consistent with the common law position. Section 145 of the New Zealand Companies Act 1993 allows the director of a company to disclose information to a person whose interests the director represents (that is, his nominating shareholder), unless it is prohibited by the board.

154 The Steering Committee notes that the New Zealand provision deals not only with disclosure but also with making use of or acting on the information. The Steering Committee is of the view that it would not be necessary to address the latter as this would lead to complications with issues such as insider trading.

155 Having considered the feedback received, the Steering Committee's recommendation is to amend section 158 to enable the board of directors to allow the disclosure, whether by general or specific mandate, subject to the overarching consideration that there should not be any prejudice caused to the company. As the requirement stated in section 158(3)(a) seems to rely on a degree of particularity which may be difficult to satisfy, the Steering Committee also recommends deleting section 158(3)(a) and leaving it to the board to require the details if desired.

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.

XV. INDEMNITY FOR DIRECTORS

(a) Indemnity for claims brought by third parties

156 Any provision, whether in the articles or in a contract or otherwise, indemnifying a director against any liability for negligence, default, breach of duty or breach of trust in relation to the company is void. This is provided in section 172(1) of the Companies Act. Section 172 applies to officers[76] and auditors of the company, and not just directors.

157 Section 172(2)(b) provides that section 172 does not prevent a company from indemnifying any director against any liability incurred by him: (i) in defending any proceedings (civil or criminal) in which judgment is given in his favour or in which he is

[76] "Officer", in relation to a corporation, is defined in section 4(1) to include any director, secretary or a person employed in an executive capacity by the corporation.

acquitted; or (ii) in connection with any application under section 76A(13) or section 391[77] or any other provision of the Companies Act, in which relief is granted to him by the court.

158 There appears to be some uncertainty as to whether a company is prohibited under section 172 from providing indemnity for claims brought by third parties. The term "in relation to the company" used in the prohibition in section 172(1) has been interpreted in practice to also cover indemnity for claims brought by third parties since a director's liability in relation to the company may have repercussions on third parties.

159 The leading jurisdictions allow companies to indemnify their directors against claims brought by third parties, subject to certain conditions.

160 In the UK Companies Act 2006, section 232(2) prohibits a company from providing an indemnity for a director against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company. One exception to the prohibition is found in section 234, which allows a company to provide indemnity against liability incurred by the director to a person other than the company or an associated company, provided that the indemnity is not against:

(a) liability to pay a fine imposed in criminal proceedings;

(b) liability to pay a sum payable to a regulatory authority by way of a penalty for non-compliance with a regulatory requirement;

(c) liability incurred in defending criminal proceedings in which he is convicted or civil proceedings in which judgment is brought against him; or

(d) liability in connection with an application for relief in which the court refuses to grant him relief.

161 Section 199A of the Australia Corporations Act 2001 expressly prohibits a company from providing indemnity in respect of a director's liability to a third party except where the liability arises out of conduct in good faith.

162 In the New Zealand Companies Act 1993, section 162 provides that if it is expressly authorised in the constitution of a company, the company may indemnify a director in relation to liabilities he may have to third parties for any act or omission in his capacity as a director.

163 As Singapore companies become more globalised, the risk of them being exposed to liabilities to third parties, for example, arising from the frequent class actions by groups of shareholders in the US, is real and should be addressed. The Steering Committee is of the view that the Companies Act should be amended to expressly allow a company to provide indemnity to its directors for claims brought by third parties.

[77] Section 391 gives the court power to relieve officers of a corporation (which include directors) from the consequences of their negligence, default, breach of duty or breach of trust.

164 During the focus group consultation, the majority of the respondents were in favour of expressly allowing a company to provide indemnity to its directors for claims brought by third parties.

165 The Steering Committee also considered whether it would be desirable to adopt the UK provisions on this issue. There was, however, feedback from the focus group that adoption of the UK provisions may give rise to difficulties. In the circumstances, the Steering Committee recommends that section 172 of the Singapore Companies Act should simply be amended to expressly allow a company to provide indemnity against liability incurred by its directors to third parties, instead of adopting the UK provisions.

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.

(b) Indemnity against potential liability

166 The Steering Committee considered and agreed with a proposal to amend section 172(2)(b) to clarify that a company is allowed to indemnify its directors against potential liability. The proposal is for section 172(2)(b) to cover liability that has been incurred or is to be incurred by the directors. There appears to be some uncertainty as to whether the use of the word "incurred" in section 172(2)(b) is wide enough to cover potential liability. The concern is that the restrictions on a company's power to make loans to its directors have prevented companies from lending money to its directors on a "to be incurred" basis even to pay for his legal expenses.

167 The focus group unanimously agreed with the Steering Committee's view.

Recommendation 1.29

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

CHAPTER 2

SHAREHOLDERS' RIGHTS AND MEETINGS

I. INTRODUCTION

1 This chapter discusses the Steering Committee's review of the provisions of the Companies Act relating to shareholders' rights and meetings and sets out recommendations arising from the review.

2 The Steering Committee has reviewed the various aspects of voting in company meetings (by poll, by show of hands), various aspects of written resolutions (required majority vote, types of business, period for passing resolution, manner of passing resolution), various methods of enfranchising indirect investors (multiple proxies to enfranchise indirect institutional investors, look-through mechanism to enfranchise CPF investors), recognition of corporate representatives, use of electronic communications for corporate notices and documents, various aspects of general meetings (notional closure of membership register, allocation of cost of requisitioned meeting), protection of minority shareholders' rights (minority buy-out right, statutory derivative action, cumulative voting for election of directors) and the prohibition against a subsidiary being a member of its holding company.

II. VOTING

(a) Voting of resolutions by poll

3 Sections 178 and 184(4) of the Companies Act specify the types of matters for which a poll at a general meeting may be demanded and the requirements for demanding a poll. The current practice for Singapore companies is to have resolutions at general meetings voted on a show of hands, unless a poll is demanded. The Accounting and Corporate Regulatory (ACRA), the Monetary Authority of Singapore (MAS) and the Singapore Exchange Limited (SGX) requested a study into whether it is desirable to mandate voting by poll for all resolutions or to require certain types of matters to be determined by poll.

4 The Hong Kong Exchange Listing Rules require listed companies to conduct voting by poll for certain issues.[1] The Asian Corporate Governance Association (ACGA) Asian Proxy Voting Survey 2006 – Initial Report recommended that all resolutions (even routine ones) at general meetings of all listed companies be voted by poll, and that the listing rules be amended to make voting by poll mandatory. The report noted that voting by poll is a more

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[1] Under the Hong Kong Exchange Listing Rules, issuers are required to conduct voting by poll for the following issues:

a. Connected transactions pursuant to Chapter 14A;
b. Transactions that are subject to independent shareholders' approval;
c. Granting of options to a substantial shareholder, an independent non-executive director of the issuer, or any of their respective associates (see rule 17.04(1));
d. Any other transactions in which a shareholder has a material interest, and is therefore required to abstain from voting at the general meeting.

common practice amongst companies comprising the Hang Seng Index in Hong Kong than those comprising the Straits Times Index in Singapore (Hong Kong: 91%; Singapore: 4%).

5 In the review of company law leading up to the UK Companies Act 2006, a committee led by Mr Paul Myners submitted a report entitled "Review of the impediments to voting UK shares"[2] to the Shareholder Voting Working Group in January 2004, which recommended that "best practice should be to call a poll on all resolutions at company meetings". It was noted at paragraph 3.7.1 of the report that the benefits of requiring all resolutions to be voted on a poll are:

(a) voting is more exact and equitable in that one vote per share is counted, as opposed to voting on a show of hands where each shareholder has one vote and it is possible for a group of shareholders owning in aggregate a very small proportion of a company's outstanding capital to influence the outcome;

(b) voting is more transparent;

(c) overseas shareholders would be more inclined to vote UK shares as currently some shareholders are discouraged in the belief that result is in most cases determined by a show of hands at the meeting;

(d) although a show of hands is believed to enfranchise the individual shareholder, the majority of shareholders cannot and do not attend the meeting for reasons of geography or timing, but they do complete proxy cards which they reasonably expect to be counted.

6 On the other hand, voting by poll on all resolutions would be time-consuming and would increase the cost of holding general meetings. The Steering Committee disagrees with the proposal that <u>all companies</u> should be required to have <u>all resolutions</u> tabled at general meetings voted by poll, as it would be unduly restrictive to impose such a requirement on all companies <u>including private companies</u>. Whilst it is recognised that it may be desirable for certain types of important resolutions tabled at general meetings of listed companies to be voted by poll, the Steering Committee is of the view that this is an issue for SGX to consider as it affects listed companies.

7 The respondents to the consultation unanimously agreed with the Steering Committee on this recommendation.

<u>Recommendation 2.1</u>

Sections 178 and 184 should not be amended to require all companies to have all resolutions tabled at general meetings voted by poll.

[2] "Review of the impediments to voting UK shares", Report by Paul Myners to the Shareholder Voting Working Group (January 2004), available at:
http://www.jpmorgan.com/pdfdoc/jpmorgan/investorservices/doc/mynersreport2004.pdf

(b) Lowering of threshold for eligibility to demand a poll (section 178)

8 The Steering Committee considered the issue of whether to amend section 178(1)(b)(ii) of the Companies Act to lower the threshold of 10% of total voting rights for eligibility to demand a poll to 5% of total voting rights. The Steering Committee observed that there is a certain logic to the proposed 5% threshold, as that is the threshold at which a person becomes a substantial shareholder (section 81(1)).

9 The Steering Committee noted that there are two thresholds in section 178(1)(b) – a five-member threshold (sub-paragraph (i)) and a 10% voting rights threshold (sub-paragraph (ii)). The Steering Committee was initially of the view that there is no current necessity to lower the 10% voting rights threshold in view of the availability of an alternative five-member threshold for eligibility to demand a poll, and the lack of market feedback on this issue. However, a significant minority of respondents supported the lowering of the threshold from 10% to 5% of total voting rights for the following reasons:

(a) Lowering the threshold could enhance standards of corporate governance as it could encourage voting by poll which was more representative of shareholders' rights and interests.

(b) 5% is the threshold at which a person becomes a substantial shareholder. Thus, a reduced threshold of 5% would allow a substantial shareholder to demand a poll.

(c) A lower threshold, especially for a private company which had limited number of shareholders, would enable a minority shareholder to better exercise his rights and would be consistent with the threshold in section 184D in respect of the right of a member to require a general meeting to be convened instead of proceeding with written resolution.

(d) If shareholders holding less than 10% voting power could already ask for a poll under the alternative 5-member threshold, there is no compelling reason to maintain the height of the voting rights threshold at 10%.

10 Having considered the consultation feedback, the Steering Committee recommends that the threshold of 10% of total voting rights for eligibility to demand a poll be lowered to 5% of total voting rights.

Recommendation 2.2

Section 178(1)(b)(ii) should be amended to lower the threshold of 10% of total voting rights for eligibility to demand a poll to 5% of total voting rights.

III. WRITTEN RESOLUTIONS

(a) Requisite majority of votes for passing written resolutions

11 Prior to the coming into operation of sections 184A to 184G of the Companies Act on 15 May 2003, members of a private company could make a decision by issuing a written or circular resolution instead of holding a meeting, provided all the members agreed.

12 However, this requirement for unanimous consent resulted in a restricted use of written resolutions. Hence, in 2003, the Companies (Amendment) Act introduced new provisions in order to widen the scope of written resolutions, and to provide for relevant procedures. The amendments were intended to facilitate decision-making by companies.

13 Section 184A(1) lays down the general principle that a private company may pass resolutions by written means. Under section 184A(3) and (4), there is no longer a requirement for unanimous written consent. Instead, it is now provided that:

(a) for special resolutions, a written resolution is passed if agreed upon by one or more members representing at least 75% majority of total voting rights; and

(b) for ordinary resolutions, a written resolution is passed if agreed upon by one or more members representing a simple majority of total voting rights,

or such greater majority as stipulated in the memorandum or articles of the relevant company.

14 This is similar to the position adopted in the UK. However, Hong Kong and Australia do not have these requirements.

15 In order to safeguard minority interests, section 184D provides that holders of 5% of the voting rights may give notice to the directors requiring that a general meeting be convened instead of proceeding with a written resolution. It is mandatory for the directors to convene the general meeting upon receipt of this notice.

16 The Steering Committee considered whether the requisite majority vote requirements for written resolutions for private companies should be specified in section 184A of the Companies Act or be left to be specified by each company in their articles of association.

17 The Steering Committee is of the view that the status quo for the relevant majority vote requirements should be maintained. In other words, the Companies Act should continue to provide for the requisite majority vote (more than 50% for ordinary resolution and 75% for special resolution) for the passing of written resolutions, subject to any requirement for a greater majority in the memorandum or articles. The relevant majority vote requirement should not be left to be determined entirely by a company via its articles of association.

18 Most of the respondents to the consultation agreed that the requisite majority vote requirements for the passing of written resolutions in private companies should be specified in section 184A. The respondents to the consultation unanimously agreed that the requisite majority vote requirements should be unchanged.

Recommendation 2.3

The requisite majority vote requirements for the passing of written resolutions in private companies should continue to be specified in section 184A.

Recommendation 2.4

The requisite majority vote requirements for the passing of written resolutions in private companies should not be changed.

(b) Restrictions on types of "business" that can or cannot be conducted using written resolutions

19 Whilst the Company Legislation and Regulatory Framework Committee (CLRFC) introduced provisions in the Companies Act to allow for most decisions to be made by written resolution, a private company will however still need to hold meetings if the resolution requires a special notice (for example, the removal of a director, a liquidator or an auditor).

20 In the UK, Hong Kong and Australia, there are restrictions on the type of "business" that can or cannot be conducted using written resolutions. In the UK and Hong Kong, directors may not be removed by written resolution.[3] Also, in the UK, Hong Kong and Australia, an auditor may not be removed by written resolution.[4] However, in New Zealand, there are no restrictions in the Companies Act 1993 regarding the types of decisions that may or may not be taken via written resolution.

21 The Steering Committee initially held divided views about whether the Companies Act in Singapore should allow for the removal of a director, liquidator or an auditor by a written resolution. Whilst certain members opined that unanimous agreement for the removal of the above officers of a company may suffice to protect all the interests of the members of a company, others opined that having specific requirements for written resolutions for specific decisions of a company will not be helpful.

22 The written feedback received during the consultation was mixed. However, an overwhelming majority (all except one) of the participants of the subsequent focus group discussion sessions was in favour of maintaining the status quo. The following views in favour of the status quo were expressed – (i) it is desirable for meetings to be held to promote transparency and protection of shareholders' interest, and to prevent undue influence from being exerted on signatories to a written resolution; (ii) a member may listen to others' concerns at a meeting; and (iii) minority shareholders would have a forum to voice their opinion.

23 The Steering Committee is of the view that these matters involve the removal of directors, liquidators and auditors and it would be important to give such directors,

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[3] Section 288(2) of the UK Companies Act 2006 and section 116B(11) of the Hong Kong Companies Ordinance (Cap. 32).
[4] Section 249A(1) of the Australia Corporations Act 2001.

liquidators and auditors an opportunity to be heard, although usually auditors would not give any comments during such meetings. The Steering Committee recommends that the Companies Act should not allow for the removal of a director, a liquidator or an auditor by a written resolution, and that the status quo in section 184A(2) should be maintained.

<u>Recommendation 2.5</u>

The existing restrictions in section 184A(2) on the type of "business" that cannot be conducted using written resolutions should be maintained.

(c) When a written resolution is considered passed

24 Section 184A(3) and (4) of the Companies Act specify that a written resolution is considered as passed when the requisite number of members have formally agreed to the written resolution.

25 In the UK, a written resolution is passed when the majority of members have signified their agreement to the written resolution.[5] Likewise in Hong Kong, a written resolution is passed when all the members have signed the resolution.[6] However, the company legislation in Australia and New Zealand are silent on this issue.

26 The Steering Committee agrees that the Companies Act should provide that unless stated otherwise in the memorandum and articles of the company, a written resolution will be passed once the required majority signs the written resolution.

27 Most of the respondents to the consultation agreed with this recommendation.

<u>Recommendation 2.6</u>

Section 184A should be amended to provide that a written resolution will be passed once the required majority *signs* the written resolution, subject to contrary provision in the memorandum or articles of the company.

(d) When a proposed written resolution will lapse

28 In the interest of clarity, the Steering Committee considered whether the Companies Act should provide that a proposed written resolution will lapse if not passed within a specified period (as in the case of the UK). The UK Companies Act 2006 provides that a proposed written resolution either lapses after a specified period as stated in the company's articles, or 28 days from the date of circulation (if not stated in the articles), if it is not passed

[5] Section 296(4) of the UK Companies Act 2006.
[6] Section 116B(1)(b) of the Hong Kong Companies Ordinance.

within that time frame[7]. Currently, the Companies Act does not specify when a proposed written resolution will lapse if not passed. This is likewise the case in Australia, Hong Kong and New Zealand.

29 The Steering Committee was of the view that the Companies Act should be amended to provide that unless otherwise stated in the memorandum and articles of the company, a proposed written resolution will lapse after 28 days of it being circulated if the required majority vote is not attained by the end of the 28-day period.

30 Most of the respondents to the consultation agreed with this recommendation. A small minority cited that this might pose administrative difficulties for companies with numerous members, and more time and resources would have to be expended to restart the process if the proposed resolution lapses.

31 The Steering Committee considered the following views in favour of introducing such a period:

(a) It is not desirable to have a proposed written resolution, which was not signed or acted upon, left lying around. It is necessary to let such a proposed written resolution lapse. If the 28-day period is too short, the company's articles could provide for a longer period. If there is a need to resurrect the proposal, a new written resolution can be proposed again.

(b) The lapsing of the proposed written resolution is most significant in situations where there is a dispute between the shareholders.

(c) In the event that the signatures were obtained out of time, the shareholders could agree to change the date of the written resolution.

(d) The directors and shareholders of a company might change over time. In view of this, it is logical to stipulate that a written resolution would lapse if the required majority vote is not attained by the end of the 28-day period, as this would address changing circumstances.

32 The Steering Committee also considered the following views against introducing such a period:

(a) There could be litigation arising as to whether certain signatures were obtained within the 28-day period.

(b) It is not efficient for a written resolution to lapse if the delay is only by a day.

33 Having considered the consultation feedback, the Steering Committee recommends that the Companies Act should be amended to provide that unless otherwise stated in the memorandum and articles of the company, a proposed written resolution will lapse after 28 days of it being circulated if the required majority vote is not attained by the end of the 28-day period.

[7] Section 297(1) of the UK Companies Act 2006.

<u>Recommendation 2.7</u>

The Companies Act should be amended to provide that a proposed written resolution will lapse after 28 days of it being circulated if the required majority vote is not attained by the end of the 28-day period, subject to contrary provision in the memorandum or articles of the company.

(e) Where a member is another company: exercising vote by corporate representative

34 Where a member is a corporation, sections 184A to 184F of the Companies Act do not specify the manner of appointment, or the categories, of duly authorised persons who may be appointed to act on behalf of such corporate member in signifying the corporate member's agreement to the resolution in writing.

35 Note 1 to section 249A of the Australia Corporations Act 2001, which generally corresponds to section 184G of the Singapore Companies Act, clarifies that a corporate representative (duly appointed by a corporate member under section 250D of the Australia Corporations Act 2001 which in turn, generally corresponds with section 179(3) of the Singapore Companies Act) may sign a resolution under the Australian equivalent of section 184G.

36 The Steering Committee was initially of the view that the Companies Act should provide that a director or a corporate representative of a company (Company A) that owns shares in another company (Company B), may sign a written resolution on behalf of Company A and be deemed to have adequately represented Company A in agreeing to the resolution in writing.

37 A majority of the respondents to the consultation disagreed with this recommendation.

38 It was pointed out that if the proposed amendment was introduced, the company would only be able to remove the authority conferred legislatively upon the person (i.e. the director) by stripping the person of his title. It would be better to let the company decide on who it would want to authorise to sign the written resolution, instead of hard-coding it in legislation. The proposed amendment would confer authority on directors which authority could not be removed by express notice given by the company to third parties.

39 The Steering Committee noted that the proposed amendment would confer authority on directors to sign written resolutions on a company's behalf even if the company did not have such intention. This would result in difficulties with conflicting authorised representatives, especially when there was a disagreement within the Board. The proposed amendment would enable a dissenting director to countermand a corporate representative appointed by the Board.

40 Having considered the consultation feedback, the Steering Committee recommends that the Companies Act should not be amended to specify the categories and manner of appointment of authorised persons who may be appointed to act on behalf of a corporate member in signifying the corporate member's agreement to a written resolution.

<u>Recommendation 2.8</u>

The Companies Act should not specify the categories and manner of appointment of authorised persons who may be appointed to act on behalf of a corporate member in signifying the corporate member's agreement to a written resolution.

(f) Extending procedures for passing resolutions by written means to unlisted public companies

41 Sections 184A to 184F of the Companies Act set out the procedures for the passing of resolutions by written means, and are only applicable to private companies. It was proposed that these procedures should also be made available to unlisted public companies to enable them to make decisions more expeditiously and conveniently. The proposed extension of the procedures for passing of resolutions by written means to unlisted public companies would help to solve the problem of the difficulty in getting members to attend meetings. The passing of resolutions by written means would allow more members to participate, as members need not come physically to one location in order for a resolution to be passed.

42 The Steering Committee notes that sections 184A to 184F already contain adequate safeguards to ensure proper corporate governance. Section 184C provides that before a written resolution is passed, the directors must send the resolution to all the members. Section 184D provides that members with 5% of voting rights may give notice to the company requiring that a general meeting be convened for that resolution.

43 An overwhelming majority of the respondents to the consultation agreed with this recommendation. The sole dissenting respondent expressed the view that unlisted public companies should be subject to a higher standard of corporate governance since they could raise funds from the public. It was also noted that private companies could waive the holding of annual general meetings (AGMs) (under section 175A), which was consistent with the ability to pass written resolutions. However, unlisted public companies could not waive AGMs and there was no proposal to allow unlisted public companies to waive AGMs, and hence the proposed amendment was not necessary.

44 The Steering Committee noted that many unlisted public companies operated like private companies. The only difference between these companies and private companies was that these companies had more than 50 shareholders. It was also noted that both the amendments introduced in 2003 to allow private companies to pass written resolutions with the usual majority vote thresholds and to waive AGMs arose from the CLRFC report. A check of the CLRFC report revealed that recommendation 1.13 (written resolutions) does not appear to arise from recommendation 3.17 (dispensation of AGM).

45 The Steering Committee recommends that sections 184A to 184F should be amended to extend the procedures contained therein for passing resolutions by written means to unlisted public companies as well.

Recommendation 2.9

Sections 184A to 184F should be amended to extend the procedures contained therein for passing resolutions by written means to unlisted public companies as well.

IV. ENFRANCHISING INDIRECT INVESTORS

(a) Multiple proxies for members providing custodial or nominee services

46 Where shares in a company are held through a nominee company or a custodian bank, the nominee company or custodian bank would be the registered member entitled to attend and vote at a general meeting of the company. Indirect investors such as foreign institutional investors are beneficial shareholders who hold the shares via a nominee company or custodian bank, and can only attend shareholders' meetings as a proxy of the nominee company or custodian bank.[8]

47 Section 181(1)(b) of the Companies Act provides that a member is entitled to appoint a maximum of two proxies to attend and vote at a general meeting, unless the articles of association provide otherwise. Although the Code of Corporate Governance[9] encourages listed companies to amend their articles to remove the limit on the number of proxies that may be appointed by nominee companies, few companies have done so. As a result, fund managers and institutional investors who hold shares via a nominee company or custodian bank are prevented from attending shareholders' meetings due to the limit in the number of proxies. Local custodian banks indicated that their clients who are foreign institutional investors have expressed unhappiness at being disenfranchised due to this limitation.

48 The SGX proposed an amendment to the Companies Act to require companies to allow members who are nominee companies to appoint multiple proxies, provided that each proxy is appointed in respect of a different beneficial owner, and each proxy shall have one vote on a show of hands. ACGA[10] separately proposed a similar amendment to the Companies Act and Listing Manual to allow members who provide custodial or nominee services to appoint multiple proxies so as to enable fund managers and institutional investors to attend shareholders' meetings. ACGA proposed that an amendment to the Companies Act would cover companies incorporated in Singapore while an amendment to the SGX Listing Manual would also apply to companies incorporated in foreign jurisdictions but listed in

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[8] The registered, non-beneficial, owner of shares (the intermediary) has all the powers and privileges attaching to those shares as against the company which issued them (simply by being a member of the company), yet an intermediary has little economic incentive to use those powers and privileges and to engage in the governance of the company, because any advantage from doing so will accrue to the indirect investor who is the ultimate beneficiary of those shares: See RC Nolan, *Indirect Investors: A Greater Say in the Company?* (April 2003) JCLS Vol 3 Part I p 73 at 75.

[9] Principle 15 of the Code of Corporate Governance provides that companies should encourage greater shareholder participation at annual general meetings (AGMs). Commentary 15.4 of the Code encourages companies to amend their articles of association to avoid imposing a limit on the number of proxies for nominee companies so that shareholders who hold shares through nominees can attend AGMs as proxies.

[10] Asian Corporate Governance Association, "Opening Shareholder Meetings to Fund Managers in Singapore" (October 2007).

Singapore. The major local custodian banks and a number of foreign institutional investors expressed support for the “multiple proxies” proposal as the best option to enfranchise institutional investors who hold shares via a nominee company or custodian bank.

49 SGX was of the view that an amendment to the Companies Act is necessary as companies are unable to amend their articles of association to implement a multiple proxies regime in compliance with the Code of Corporate Governance for the following legal reasons:

(a) To allow only nominee companies the right to appoint more proxies without extending the right to other shareholders on the register is contrary to the common law position that shareholders within the same class are to be treated equally. The effect is to unfairly prefer one set of shareholders (the nominee companies) to another set of shareholders although they belong to the same class, namely, ordinary shareholders. This can only be implemented with a statutory amendment to the Companies Act.

(b) Even if nominee companies were empowered to appoint multiple proxies, most of the proxies cannot vote on a show of hands because of the common law position that each registered shareholder is only entitled to <u>one vote</u> on a show of hands. Thus in the case of a vote on a show of hands, companies and nominee companies are put into a difficult position of deciding which proxy, out of the multiple proxies appointed, is entitled to vote on a show of hands to the exclusion of all the other appointed proxies. The proposed amendment to enable each proxy appointed by the nominee company to vote on a show of hands is necessary for the company to recognise their votes and give effect to the true intention behind the multiple proxies regime. It is pointless to allow a nominee company the right to appoint more than 2 proxies if the proxies cannot vote. Giving each proxy the right to vote on a show of hands would also reduce the need for votes to be taken by poll for every resolution, as otherwise the proposed multiple proxies representing institutional investors may demand a poll on every resolution since they would not be able to vote on a show of hands.

50 It is noted that the companies legislation in the UK and Hong Kong permit the appointment of multiple proxies, and provide that proxies shall have the right to vote on a show of hands.

51 Prior to the enactment of section 324 of the UK Companies Act 2006, the UK position was substantially similar to the current Singapore position. The consultation documents leading up to the UK Companies Act 2006 discussed the rationale for the reform of section 372 of the UK Companies Act 1985 to its present form in section 324 of the UK Companies Act 2006, as follows:

> “... We have also noted the growth of such specialist institutions as custodians, depositories and broker nominees, each of which play a key role in the efficient holding, transfer and recording of shares, but whose involvement as intermediaries has led to a growing separation between the legal ownership of shares (the “name on register”) and the “real” or beneficial owner. These intermediaries typically have neither an economic interest in taking an active

part in company governance nor the resources to do so. It is therefore important that the law should provide convenient mechanisms by which the beneficial owners or their representatives can participate in governance, and that any unnecessary obstacle to their participation should be removed."[11]

52 The UK consultation documents also stated that the member (for our purposes – the custodian bank / nominee company) will be allowed to "appoint a proxy for each beneficial holding at a given meeting, thus ensuring that where a nominee or trustee member has beneficial holders who wish to vote in different ways, their wishes can be accommodated".[12]

53 Section 324 of the UK Companies Act 2006 allows a member to appoint multiple proxies, provided that each proxy is appointed to exercise the rights attached to a specific portion of shares.[13] Under the previous UK Companies Act 1985 which was similar to the current Singapore position, a proxy could only vote on a poll and not on a show of hands. Section 284(2) (read with section 324) of the UK Companies Act 2006 now provides that proxies in both public and private companies shall have the right to vote on a show of hands.

54 In Hong Kong, the local custodian banks (or their nominee companies) are not the legal owner of shares, but are rather participants in the Central Clearing and Settlement System (CCASS). CCASS is operated by the Hong Kong Securities Clearing Company Ltd (HKSCC), which also manages a common nominee company, HKSCC Nominees Ltd, in whose name most share certificates are held for credit into the stock accounts of CCASS participants. If an institutional investor wishes to attend a company meeting, its custodian bank will instruct HKSCC / CCASS to appoint one or more representatives. Under section 115(1A) and (3) of the Hong Kong Companies Ordinance, the HKSCC or its nominee company HKSCC Nominees Ltd, is empowered to appoint multiple corporate representatives to attend, vote and act at general meetings as if they were individual members, including the right of speech and the right to vote on a show of hands and on poll. Section 115(1A) provides that if more than one corporate representative is appointed, the authorisation "shall specify the number and class of shares in respect of which each such person is so authorised".[14]

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[11] See Modern Company Law for a Competitive Economy – Final Report (2001), para 7.1.

[12] See Modern Company Law for a Competitive Economy – Final Report (2001), para 7.2 and Company General Meetings and Shareholder Communication (1999), para 50.

[13] Section 324(2) of the UK Companies Act 2006 provides:

> "(2) In the case of a company having a share capital, a member may appoint more than one proxy in relation to a meeting, *provided that each proxy is appointed to exercise the rights attached to a different share or shares held by him* …" [emphasis added]

[14] Section 115(1A) and (3) of the HK Companies Ordinance provide:

> (1A) A recognized clearing house within the meaning of section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571) may, if it or its nominee is a member of a company, authorize such person or persons as it thinks fit to act as its representative or representatives, as the case may be, at any meeting of the company or at any meeting of any class of members of the company provided that, *if more than one person is so authorized, the authorization shall specify the number and class of shares in respect of which each such person is so authorized*. (Added 68 of 1992 s. 20. Amended 62 of 1995 s. 12; 5 of 2002 s. 407) [emphasis added]
>
> ...
>
> (3) A person authorized under subsection (1A) shall be entitled to exercise the same powers on behalf of the recognized clearing house (or its nominee) which he represents as that clearing house (or its nominee) could exercise if it were an individual shareholder of the company. (Added 68 of 1992 s. 20)

55 At the Roundtable Discussion on Multiple Proxies organised by ACGA and the Singapore Association of the Institute of Chartered Secretaries and Administrators (SAICSA) on 10 November 2008, sub-custodian banks presented their case for a multiple proxies solution and addressed the concerns of companies with regard to increased administrative and catering cost. An informal vote taken among the participants at the Roundtable revealed that 67% agreed that the present two-proxy rule (and practice) in Singapore made it difficult for fund managers and institutional investors to participate fully in shareholder meetings. 86% agreed that a multiple proxies solution for nominee companies would improve the standing of the Singapore market in the eyes of institutional investors, and 53% agreed that the multiple proxies solution would fairly resolve the problem. 81% agreed that an amendment to the Companies Act was the best way to achieve uniformity of practice by companies.

56 The reasons given against the multiple proxies proposal mainly relate to a perceived inequality where certain members (the nominee companies and custodian banks) are able to appoint more than 2 proxies, and concerns over administrative cost of administering such a regime and the logistical cost of a higher attendance at general meetings. It was also argued that the proposal would also result in inequality between Singapore investors who hold shares through the Central Depository (Pte) Ltd (CDP), and foreign investors who are likely to hold shares through a nominee company. It was argued that some foreign investors may want the confidentiality that the nominee system affords, but it was also pointed out that foreign investors who wished to remain anonymous could choose not to obtain a proxy appointment, or could choose to have a third party appointed as proxy.

57 The Steering Committee sought the views of the focus group as to whether section 181 should be amended to allow members falling within the following two categories to appoint more than two proxies, subject to contrary provision in the company's articles, in order to enable institutional investors to participate in shareholders' meetings:

(a) any banking corporation licensed under the Banking Act or wholly-owned subsidiary of such a banking corporation, whose businesses includes the provision of nominee services; and

(b) any person holding a capital markets services licence to provide custodial services for securities under the Securities and Futures Act.

The Steering Committee also sought the views of the focus group as to whether only one proxy should be appointed in respect of each beneficial shareholder, and whether such proxies should each be given the right to vote on a show of hands.

58 A large majority of the written feedback from focus group respondents on this issue was in favour of the proposed multiple proxies regime, but the following qualifications were expressed:

(a) The proposed multiple proxies regime should not be limited to enfranchising only institutional indirect investors, but should be extended to individual indirect investors as well.

(b) The multiple proxies regime should require the members appointing multiple proxies to disclose who the beneficial owners are.

(c) The proxies should be appointed in respect of only the first level of beneficiaries. There could be a cap on the number of proxies that a custodian bank or nominee company could appoint.

(d) The 48-hour timeline for submission of the proxy forms should be lengthened in view of the potential increase in the number of proxies attending the general meetings.

(e) Companies should not be able to prohibit this right to appoint multiple proxies by amending their articles.

(f) It is better to allow multiple proxies to be appointed by all members (which is the approach in the UK Companies Act 2006), instead of merely by members who provide custodial or nominee services. The multiple proxies regime should be available to other organisations that provide similar nominee services.

(g) A maximum of 2 proxies should be allowed to be appointed in respect of each beneficial shareholder.

59 The only reason provided by respondents who disagreed with the proposal was that the shareholders of the same class should be treated equally.[15]

60 All the participants of the subsequent focus group discussion sessions were generally in favour of the proposal, but a question was raised as to the sufficiency of the 48-hour cut-off timeline for the filing of proxies.

61 The Steering Committee held a separate discussion session with SGX to discuss the issue in greater detail. SGX expressed the view that it would be impractical to limit the proposed multiple proxies regime to enfranchising only the first level beneficial shareholder, as the first level beneficiary could be an omnibus account with many layers of intermediaries behind that, and in any case, the company would have no way of knowing who the beneficial owners holding the shares through the nominees are. SGX supported a multiple proxies regime provided that each proxy is appointed to exercise the rights attached to a specific portion of shares and that the custodian bank or nominee company be allowed to issue only one proxy for each beneficial holder (but not limited to the first level beneficial holder).

62 Having considered the feedback received during the focus group consultation, the Steering Committee recommends extending the benefit of the proposed multiple proxies regime to individual indirect investors as well as institutional indirect investors. The Steering Committee recommends that there be no limit to the number of proxies that a custodian bank or nominee company can appoint, provided that only one proxy is appointed in respect of each specified block of shares. Each proxy so appointed would be given the right to vote on a show of hands at a shareholders' meeting. The 48-hour cut-off time for the submission of

[15] The Steering Committee noted that it was only in a formal and technical sense that members who provided custodial or nominee services would be conferred greater rights in that they would be allowed to appoint more than 2 proxies, as compared to other members of the same class. In economic reality, members who provide custodial or nominee services are not the actual investors and have no economic interest in the membership rights of participating in a shareholders' meeting. In economic reality, the indirect investors are the actual investors, and the multiple proxies regime would allow indirect investors to participate in the shareholders' meeting without fundamentally changing the rule that the company only recognises the registered member.

proxies would be extended to 72 hours to provide companies more time to process the increased number of proxies.

63 The Steering Committee also recommends that the proposed legislation should be based on section 324(2) UK Companies Act 2006 and section 115(1A) Hong Kong Companies Ordinance, and should merely state that the custodian bank/nominee company that is the registered owner of the shares is entitled to appoint more than 2 proxies, provided that each proxy is appointed to exercise the rights attached to a different share or shares and the number of shares and class of shares shall be specified. The Steering Committee recommends that the proposed legislation should not specify who would be entitled to have a proxy appointed in his behalf.[16]

Recommendation 2.10

Section 181 should be amended to the effect that, subject to contrary provision in the company's articles, members falling within the following two categories are allowed to appoint more than two proxies, provided that each proxy is appointed to exercise the rights attached to a different share or shares and the number of shares and class of shares shall be specified:

(a) any banking corporation licensed under the Banking Act or wholly-owned subsidiary of such a banking corporation, whose business includes the provision of nominee services and who holds shares in that capacity; and

(b) any person holding a capital markets services licence to provide custodial services for securities under the Securities and Futures Act.

Recommendation 2.11

The Companies Act should be amended to allow the proposed multiple proxies to each be given the right to vote on a show of hands in a shareholders' meeting.

Recommendation 2.12

The Companies Act should be amended to bring earlier the cut-off timeline for the filing of proxies from 48 hours prior to the shareholders' meeting, to 72 hours prior to the shareholders' meeting.

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[16] Both the UK and Hong Kong legislation do not specify who would be entitled (i.e. indirect investors) to have a proxy / representative appointed in their behalf, and do not set any maximum number of proxies / representatives that could be appointed by the member authorised to appoint multiple proxies / representatives. Neither legislation attempts to spell out or limit the entitlement of other parties to give instructions to the registered member as to how the registered member should exercise the power to appoint proxies / representatives. This is also the present state of the law in Singapore insofar as registered owners can appoint up to 2 proxies and there are no provisions stipulating the persons who may or may not give instructions to the registered owners as to who may be appointed. This is because the duties of the registered owner - in this case the custodian bank/nominee company who is the registered member – would be governed either by contractual or trust principles which companies legislation should not interfere with.

(b) Nomination of beneficial shareholder to enjoy membership rights

64 The UK Companies Act 2006 introduced two sets of provisions, sections 324 to 331 (allowing multiple proxies to enable indirect investors to participate in meetings) and sections 145 to 153 (enabling indirect investors to exercise members' rights) to enfranchise indirect investors who hold their shares through an intermediary (e.g. broker). The Steering Committee considered whether to adopt sections 145 to 153 of the UK Companies Act 2006, which generally deal with the nomination of indirect investors (beneficial shareholders) by the registered members (intermediaries) to enjoy or exercise membership rights other than the right to participate in shareholder meetings (which is dealt with by the multiple proxies provisions). The explanatory notes to the UK Companies Act 2006 explain that sections 145 to 153 were designed to make it easier for investors to exercise their governance rights fully and responsibly, as it is increasingly likely that the investors will hold their shares through an intermediary or a chain of intermediaries. As it is the intermediary's name that appears on the company's register of members, such indirect investors typically have to rely on contractual arrangements with the intermediaries both to obtain information from the company and also to give instructions on how shares should be voted.

65 The Steering Committee notes that by virtue of section 130D(1) of the Companies Act, most of the investors in listed Singapore companies are deemed to be members, and are able to enjoy and exercise membership rights as *direct investors*. Therefore, the issue of enfranchising indirect investors mainly arises in Singapore in relation to two categories of investors – (a) institutional investors who hold their shares in the name of a nominee; and (b) CPF members who purchased shares using their CPF funds.[17] The Steering Committee has recommended the adoption of a multiple proxies regime to enable indirect investors to attend and vote at shareholders' meetings (see Recommendations 2.10, 2.11 and 2.12). The Steering Committee considered whether to *also* adopt sections 145 to 153 of the UK Companies Act 2006 to enfranchise indirect investors.

66 Section 145 of the UK Companies Act 2006 removes any doubts as to the ability of companies to make provision in their articles to enfranchise indirect investors and provides that such articles are legally effective. The Steering Committee notes that companies are able to amend their articles of association to enable members to nominate other persons to enjoy or exercise membership rights. Many listed UK companies have amended their articles of association for this purpose even prior to the enactment of section 145. As such, the Steering Committee considered that it is not necessary to adopt section 145 which is merely an enabling provision protecting company articles that seek to enfranchise indirect investors. The Steering Committee also considered that it is not necessary to make it mandatory for companies to allow a member to nominate another person to exercise membership rights.

67 Sections 146 to 151 of the UK Companies Act 2006 enable indirect investors to be appointed by the registered member to receive company documents and information that are sent to members by companies traded on a regulated market. Sections 152 and 153 of the UK Companies Act 2006 enable indirect investors, via the registered member, to exercise voting and requisition rights by making it easier for registered members to exercise rights in different ways to reflect underlying holdings and by allowing indirect investors to participate in requisitions. An academic who was involved in the UK companies law reform project expressed reservations on the necessity of sections 146 to 153 of the UK Companies Act

[17] The issue of enfranchising CPF investors is dealt with at paragraphs 70 to 77.

2006. The Steering Committee agrees that it is not necessary to adopt sections 146 to 151 of the UK Companies Act 2006 as indirect investors can easily obtain corporate information of Singapore listed companies through their nominees. The Steering Committee notes that no feedback has been received from market practitioners on the need for such provisions.

68 The Steering Committee is of the view that it would be sufficient to adopt a multiple proxies regime in Singapore for the purposes of enfranchising indirect investors who hold shares through nominees, and that it is not necessary to adopt sections 145 to 153 of the UK Companies Act 2006.

69 Most of the respondents to the consultation agreed with this recommendation.

Recommendation 2.13

The Companies Act should not be amended to adopt sections 145 to 153 of the UK Companies Act 2006 to enable indirect investors to enjoy or exercise membership rights apart from the right to participate in general meetings.

(c) Enfranchising CPF members who purchased shares using CPF funds

70 Central Provident Fund (CPF) members who purchase company shares using their CPF funds through the CPF Investment Schemes ("CPF share investors") do not currently enjoy any membership rights such as the right to attend and vote at shareholders' meetings. The shares purchased under regulation 14 of the CPF (Investment Schemes) Regulations are held in the names of the CPF Agent Banks (referred to as "approved agent bank" in the Regulations). CPF share investors have no rights other than instructing the CPF Agent Bank (the registered member) in advance on how they wish to vote on resolutions, and relying on the CPF Agent Bank to vote according to those instructions. For SingTel shares purchased through the Special Discounted Share scheme (Part IV of the CPF (Investment Schemes) Regulations), these shares are held in the name of the CPF Board, and the CPF members similarly do not enjoy any membership rights.

71 The Steering Committee received representations from the Securities Investors Association Singapore (SIAS) and others that legislative amendment should be introduced to enfranchise CPF share investors. The CPF Board and the CPF Agent Banks have also indicated support for CPF share investors to be given their due rights as shareholders (including rights to attend, speak and vote at shareholders' meetings). The Steering Committee supports giving CPF share investors their due shareholders' rights as they are the real investors and should have the same rights as "cash" investors who are given full membership rights under section 130D(1) of the Companies Act. It is noted that the CPF share investors did not choose to hold their purchased shares in the name of the CPF Agent Banks or CPF Board, instead of in their own names.

72 The Steering Committee considered three possible legislative mechanisms to achieve the goal of enfranchising CPF share investors – (a) a look-through mechanism similar to section 130D(1); (b) multiple proxies; and (c) a nomination mechanism similar to section 145 of the UK Companies Act 2006. Concerns were raised that the multiple proxies option might

result in high administrative cost on the part of the CPF Agent Banks and the companies concerned given the potentially large number of proxies to be issued to the CPF share investors, and might result in administrative difficulty in meeting the proxy filing deadline. Feedback was received from sub-custodian banks (including the CPF Agent Banks) that a nomination mechanism similar to section 145 of the UK Companies Act 2006 would be less efficient than the multiple proxies option. The Steering Committee was initially of the view that the most feasible and efficient solution was a look-through mechanism deeming the CPF share investors (instead of the CPF Agent Bank or CPF Board, as the case may be) as the actual members of the company. The CPF Board had indicated that it is in favour of the look-through option.

73 The Steering Committee sought the views of the focus group on the following questions:

> *(15) Should the Companies Act be amended to give CPF investors their full shareholders' rights in respect of company shares purchased using CPF funds through the CPF Investment Schemes or the Special Discounted Share scheme?*
>
> *(16) If yes, which of the following legislative mechanisms should be adopted to achieve this objective:*
>
> > *(a) look-through mechanism similar to section 130D(1);*
> >
> > *(b) multiple proxies regime similar to that described in Feedback Questions 11 and 12; or*
> >
> > *(c) nomination mechanism similar to section 145 of the UK Companies Act 2006 (see Feedback Question 14)?*
>
> *(17) If a look-through mechanism is to be adopted, should a provision similar to section 130D(1) be enacted such that where shares of a company are purchased using CPF funds under regulation 14 or Part IV of the Central Provident Fund (Investment Schemes) Regulations –*
>
> > *(a) the approved agent banks (for investments under regulation 14 of the CPF (Investment Scheme) Regulations) and the CPF Board (for investments under Part IV of the CPF (Investment Scheme) Regulations) are deemed not to be a member of the company; and*
> >
> > *(b) the CPF member who had purchased the shares using his CPF funds under regulation 14 or Part IV of the Central Provident Fund (Investment Schemes) Regulations shall for such period as the shares are held against his name, be deemed to be a member of the company in respect of the amount of shares entered against his name?*

74 Most of the written feedback from respondents to the consultation on Feedback Question 15 agreed with the recommendation to enfranchise CPF share investors. All the participants of the subsequent focus group discussion sessions were in favour of the

enfranchisement of CPF share investors. The only issues were operational and practical issues surrounding the proposed approaches to enfranchise CPF share investors.

75 Most of the written feedback from respondents to the consultation on Feedback Question 16 were in favour of the look-through mechanism to enfranchise CPF share investors, whilst a small minority was in favour of the multiple proxies regime. At the subsequent focus group discussion sessions, it was noted that a look-through mechanism had 2 main implications that needed to be addressed. Firstly, there would be a need to consolidate the various shareholder registers held by CDP, the CPF Agent Banks, CPF Board and the share registrar. Secondly, there would be a need to study and address the impact on corporate actions, e.g. rights issue entitlement based on total shareholding. It was noted that changes would need to be made to the computer systems of the CPF Agent Banks to facilitate this consolidation of shareholder lists maintained by the share registrar, CDP, CPF Agent Banks and the CPF Board. The notional book closure date of 48 hours before the meeting might also not provide sufficient time to the company to reconcile the different share registers.

76 The Working Group held a discussion session with SGX, CDP, CPF Board and a CPF Agent Bank (OCBC) to explore the issue in greater depth. The following 2 methods were proposed to achieve the enfranchisement of CPF investors:

(a) to adopt the look-through mechanism similar to section 130D(1) to deem the CPF share investor as the member (instead of the CPF Agent Bank or the CPF Board, as the case may be). However, there would be a need to consolidate the various shareholder registers held by the CDP, CPF Board and CPF Agent Banks, which necessitated changes to the computer systems of the CPF Agent Banks; and

(b) to appoint CDP as the sole agent to hold all the shares of CPF investors. This would avoid the need to consolidate the shareholder registers of the CPF Agent Banks with the register held by the CDP, as all the shareholder registers would be held by CDP.

The participants of the discussion session agreed that it was operationally feasible for CDP to be appointed by CPF Board as the sole agent for CPF share investments instead of CPF Agent Banks, which would remove the need for synchronisation of the computer systems of the CPF Agent Banks with the CDP's computer system. It was concluded that both the proposal to adopt a look-through mechanism for CPF Agent Banks (coupled with synchronisation of the various computer systems of the CDP and the CDP Agent Banks), as well as the new proposal to appoint CDP as the agent for CPF share investments instead of CPF Agent Banks, were feasible. The latter mechanism would be more efficient. But further discussions would be needed between CPF Board, CDP and the CPF Agent Banks before a decision could be taken on either proposal. SGX suggested that in the interim, the multiple proxies regime could be used as an interim solution to allow CPF share investors to participate at meetings, though this would not allow CPF share investors to participate in rights issues based on consolidated shareholding.[18]

[18] That is, the multiple proxies regime would not allow CPF share investors to benefit from their entitlement to rights issues based on their total shareholding from all sources (CDP and CPF investments).

77 Having considered the feedback from the consultation, the Steering Committee recommends that the multiple proxies regime (Recommendations 2.10, 2.11 and 2.12) be leveraged upon to enfranchise CPF share investors.

Recommendation 2.14

The Companies Act should be amended to give CPF share investors their shareholders' rights in respect of company shares purchased using CPF funds through the CPF Investment Schemes or the Special Discounted Share scheme.

Recommendation 2.15

The multiple proxies regime recommended at Recommendations 2.10, 2.11 and 2.12 should be adopted to enfranchise CPF share investors.

V. CORPORATE REPRESENTATIVES

(a) Clarification of meaning of "not otherwise entitled to be present at the meeting" in section 179(4)

78 Section 179(4) of the Companies Act provides that a corporation which has given authority to a person to act as its corporate representative at a shareholder or creditor meeting pursuant to section 179(3) is deemed to be personally present at the meeting for the purpose of section 179(1) (i.e. for quorum or vote on show of hands), provided that the person is "not otherwise entitled to be present at the meeting". It was proposed that the phrase "not otherwise entitled to be present at the meeting" be clarified as it was ambiguous in that it may cover either a person who is otherwise entitled to be present as a member, proxy or corporate representative, or a person who is otherwise entitled by law or articles to be present at the meeting (e.g. director or auditor).

79 The Steering Committee disagrees with the proposal to introduce an amendment to clarify the meaning of the phrase "not otherwise entitled to be present at the meeting" in section 179(4), as it felt that the phrase is clear and unambiguous. Given the purpose of section 179(4), which is to provide conditions under which the corporate member shall be deemed to be personally present at the meeting for the purposes of forming a quorum and for determining the members entitled to vote on a show of hands, it is clear that the legislative intent is that the corporate representative will be counted for the purposes of forming a quorum and a vote on a show of hands, provided that the corporate representative is not otherwise also to be counted in another capacity (e.g. as a member) towards the quorum or vote on a show of hands. In other words, a person who is personally present shall only be counted once for the purposes of forming a quorum or a vote on a show of hands.

80 A large majority of the respondents to the consultation agreed with the Steering Committee on this recommendation.

<u>Recommendation 2.16</u>

Section 179(4) should not be amended to clarify the meaning of the phrase "not otherwise entitled to be present at the meeting".

(b) Appointment of representatives of members that take other business forms

81 Section 179(3) of the Companies Act deals with which methods of appointment of a corporate representative of a corporate member will be recognised by the company holding a meeting. Section 179(4) provides the conditions under which the corporate member shall be deemed to be personally present at a meeting attended by its corporate representative. Both sections 179(3) and 179(4) are confined to members that are corporations.

82 Members of a company may take other business forms such as limited partnership, limited liability partnership, association, co-operative and real estate investment trust (REIT). It is noted that following the enactment of the Limited Liability Partnerships Act, article 47 (quorum) and article 59 (execution of proxy form) of Table A in the Fourth Schedule to the Companies Act were amended to cover a member that is a limited liability partnership.

83 The question was raised as to whether section 179(3) and (4) should be amended to deal with the recognition of the appointment of representatives of other business forms. The Steering Committee is of the view that the Companies Act should not deal with the law concerning other business forms. It should be left to the law of agency to determine whether the appointment of a representative of other business forms is valid and should be recognised. It would be onerous if not impossible to cater for all possible forms of existing and future non-corporate business vehicles.

84 A large majority of the respondents to the consultation agreed with the Steering Committee on this recommendation.

<u>Recommendation 2.17</u>

The Companies Act should not be amended to deal with the recognition of the appointment of representatives of members that take other business forms such as limited liability partnership, association, co-operative, etc.

VI. ELECTRONIC TRANSMISSION OF NOTICES AND DOCUMENTS

(a) Electronic transmission of notices and documents

85 Sections 387A and 387B of the Companies Act prescribe conditions and rules for the use of electronic transmission for the giving of notices and sending of documents by a

company or the directors to the members. Feedback was received that the rules in sections 387A and 387B (introduced vide the Companies (Amendment) Act 2004) are too prescriptive and onerous, and have impeded the use of electronic transmission for the giving of notices and sending of documents.

86 Four specific proposals for change were received and considered by the Steering Committee. Firstly, feedback was received that the requirement in sections 387A(2)(a) and 387B(2)(a) that a company obtain a separate "agreement in writing" from each member for the use of website publication for the giving of notices and documents is impracticable for listed companies that have an extensive and dynamic membership base. It was proposed that the Companies Act clarify that the articles of association would satisfy the requirement of an "agreement in writing". It was also proposed that "agreement in writing" should include a members' resolution or agreements made through electronic means with sufficient authentication.

87 Secondly, it was also proposed that the CDP be enlisted to collate email addresses of scripless shareholders (depositors), and that such email addresses satisfy the "current address" requirement in section 387A(7)(a) for the purposes of determining that person's "current address" in sections 387A(1) and 387B(1).

88 Thirdly, it was proposed that the modes of notification ("notified, in a manner for the time being agreed") of website publication in sections 387A(2)(d) and 387B(2)(d) be clarified, and that accepted modes should include notifications by post, email, newspaper advertisement, SGXNET announcement or any other similar means of publication.

89 Fourthly, feedback was received that it is unclear whether a CD-ROM sent by post would fall within the meaning of "by other means but while in an electronic form" in the definition of "electronic communication" so as to fall within sections 387A(1) and 387B(1). It was proposed that a general provision be enacted to allow a company to send notices or documents to its members in whatever medium it thinks fit and by whatever means, unless a member expressly notifies the company otherwise.

90 It was proposed that the Companies Act should not be so restrictive in prescribing the mode of electronic transmission. The Steering Committee recognises that the use of electronic transmission for the giving of notices and sending of documents will enable companies to reduce cost and increase efficiency. The Steering Committee considered the general need to ease the rules in sections 387A and 387B, and studied the relevant legislation in the UK[19], Hong Kong[20], New Zealand[21] and Australia[22]. The Steering Committee is of the view that the rules for the use of electronic transmission should be eased and be less prescriptive, and the interconnected proposals contained in paragraph 95 below were made to achieve that objective.

91 The Steering Committee was of the view that as a starting point, the Companies Act should simply provide that electronic transmission of notices and documents is permissible, and it should be left to the articles of association to provide how the electronic transmission should be effected.

[19] Schedule 5, UK Companies Act 2006 (C.46).
[20] Sections 114A, 141CH and Part I of Table A, First Schedule to Hong Kong Companies Ordinance.
[21] Section 124, 209, 209B and Schedule 1 to New Zealand Companies Act 1993.
[22] Section 249J and 314 Australia Corporations Act 2001.

92 The Steering Committee noted that some shareholders may not have electronic mail access or may not be comfortable with electronic means of transmission in general. In order to ensure that all shareholders are able to receive company notices and documents, it would be necessary to provide for an "opt-out" so that shareholders could choose to receive physical copies of notices and documents instead of electronic transmissions.

93 It was suggested that a listed company might not use electronic transmission for its notices and documents if an "opt-out" for written notices and documents exists, as the company would still incur hefty printing cost for the written notices and documents, and the company would not wish to incur the administrative cost of identifying which members wish to receive electronic notices and documents, and which members wish to receive written notices and documents instead. The Steering Committee considered section 314 of the Australia Corporations Act 2001 which requires a company to notify its members in writing on at least one occasion that the members may elect once whether they wish to receive a copy of the financial report, and whether they wish to receive a hard copy or an electronic copy. For members who do not make an election, section 314(1AB)(b) of the Australia Corporations Act 2001 provides for a default position, namely, that members may access the financial reports on a specified website. This is administratively efficient as the company need not seek the members' indication each and every year.

94 In order to address the issue of companies that do not amend their articles pursuant to the amendment of sections 387A and 387B to choose their preferred modes of electronic transmission, transitional provisions should provide that for companies that have not altered their articles of association, the old rules in the existing sections 387A and 387B would still apply. Therefore, the current sections 387A and 387B provisions will be the default provisions, but companies are at liberty to amend their articles of association to choose their preferred modes of electronic transmission.

95 The Steering Committee sought the views of the focus group as to whether the rules for the use of electronic methods for transmission of notices and documents by companies should be amended to be less restrictive and prescriptive, and if so, whether sections 387A and 387B should be amended to provide that:

(a) In general, companies are permitted to use electronic methods for transmission of notices and documents to its members, and are given more flexibility to do so;

(b) Companies are allowed to specify in their articles of association that electronic methods of transmission would be used, and are given the discretion to determine via their articles of association the specific mode of electronic transmission adopted;

(c) Members are given a right to "opt-out", that is, to demand to receive physical copies of notices and documents instead of electronic transmissions; and

(d) For companies that have not altered their articles of association to establish their preferred modes of electronic transmission pursuant to the proposed amendments, the default rules in the existing sections 387A and 387B would still apply.

96 The focus group feedback was unanimously in favour of amending the rules for electronic transmission of notices and documents to make them less restrictive and prescriptive. In respect of the specific proposals consulted on (paragraphs 95(a) to (d) above), the focus group feedback is summarised as follows:

(a) Paragraph 95(a) - unanimously in favour;
(b) Paragraph 95(b) - a very large majority was in favour;
(c) Paragraph 95(c) - unanimously in favour; and
(d) Paragraph 95(d) - a very large majority was in favour.

97 In particular, MAS and Herbert Smith expressed the need for additional safeguards which will set minimum standards for the companies using electronic transmission for notices and documents. Herbert Smith was sceptical of a regime which allowed Singapore-incorporated companies complete freedom to specify in their articles of association the specific mode of electronic transmission to be adopted. In their view, there was merit in including some basic ground rules in the Companies Act which would apply irrespective of the company's articles. Such basic rules would provide a degree of consistency for Singapore companies in the conduct of electronic communication with its members and also set certain minimum standards. For example, in order for a UK company to communicate with its shareholders by e-mail, the shareholders' specific agreement was required (largely because of the need to obtain their email addresses). Minimum standards should also be set regarding the method of posting documents on the website and the duration for which such documents would be on the website.

98 Both MAS and Herbert Smith suggested that notification of the uploading of any documents on the company's website should be sent to the shareholders.

99 MAS also proposed additional safeguards to ensure that shareholders who are not Internet-savvy are not prejudiced, for example, requiring that physical documents be sent to members above 55 years of age. MAS suggested that the Steering Committee might wish to study the possibility:

(a) of requiring the company to send written notifications of the "opt-out" option to all shareholders on an annual basis;

(b) that the notification could state the methods of electronic communication that the company would be using should a shareholder choose not to "opt-out"; and

(c) that the notification could state that shareholders who had previously not elected to "opt-out" of receiving documents electronically should have the right to subsequently "opt-out" of receiving documents electronically at any time and receive physical documents instead.

100 MAS was also of the view that certain documents such as those relating to take-overs and rights issues contained important procedural instructions and forms or acceptance letters that needed to be completed by the shareholders, and it might be necessary for companies to send physical copies of such documents to the shareholders.

101 Other respondents also provided the following feedback:

(a) It should be left to the company to decide how to give members the opportunity to "opt out" (i.e. to request for hard copies), which could be by means of calling a hotline, sending a letter, email or fax, or by filling in an online form;

(b) The member's election to receive physical copies of documents should only apply to that particular meeting and not be a standing request, as the former was administratively more efficient;

(c) The "standing election" model in section 314 Australia Corporations Act 2001 should not be adopted, as it would not be administratively efficient for listed companies with a dynamic shareholder base to maintain a database of the members' election of physical or electronic transmission. It would be more efficient for listed companies to request members to make an election to receive electronic or physical copies of documents just prior to a shareholders' meeting, and where the election would only be in respect of that shareholders' meeting.

102 Having considered the feedback received during the focus group consultation, the Steering Committee recommends as follows;

(a) In general, companies should be permitted to use electronic methods for transmission of notices and documents to their members, and given more flexibility to do so;

(b) Companies should be allowed to specify in their articles of association that electronic methods of transmission will be used, and be given the discretion to determine in their articles of association the specific mode of electronic transmission to be adopted, subject to safeguards specified in subsidiary legislation;

(c) Certain safeguards are to be included in subsidiary legislation, including the members' right to "opt-out" (that is, to demand to receive physical copies of notices and documents instead of electronic transmissions), the requirement for notification of posting of documents on a website, and the requirement that certain important documents (e.g. take-overs & rights issues) be sent to members in physical copy instead of electronically. Companies should be allowed to specify in their articles of association that members must accept the use of electronic transmission for notices and documents without any right to "opt out"[23];

(d) Unless the company has amended its articles to require the use of electronic transmission without any right to "opt out", a company is required to notify members to elect to receive either electronic or physical copies of documents, and the election will be a standing election (but members may change their election subsequently). In the event of a member's failure to elect the method of transmission, the default position shall be the electronic means as specified by the company in its articles, or shall be website publication if the articles do not specify the electronic means;

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[23] Investors can decide whether they wish to be shareholders of such a company. To smoothen the transition and to give the shareholders time to adjust, the legislation can provide that all amendments to the company articles to such effect shall only come into effect 6 months (or other specified period) after the passing of the resolution.

(e) SGX is at liberty to prescribe additional safeguards as may be appropriate for listed companies; and

(f) For companies that have not altered their articles of association to establish their preferred modes of electronic transmission pursuant to the proposed amendments, the default rules in the existing sections 387A and 387B would still apply.

Recommendation 2.18

The rules for the use of electronic methods for transmission of notices and documents by companies should be amended to be less restrictive and prescriptive.

Recommendation 2.19

The Companies Act should be amended to provide that companies may use electronic communications to send notices and documents to members with their express consent, implied consent or deemed consent[24], and where –

(1) A member has given implied consent if –

- **(a) company articles provide for use of electronic communications and specify the mode of electronic communications, and**
- **(b) company articles provide that the member shall agree to the use of electronic communications and shall not have a right to elect to receive physical copies of notices or documents; and**

(2) A member is deemed to have consented if –

- **(a) company articles provide for use of electronic communications and specify the mode of electronic communications, and**
- **(b) the member was given an opportunity to elect whether to receive electronic or physical notices or documents, and he failed to elect.**

Recommendation 2.20

The following safeguards shall be contained in subsidiary legislation:

(a) For the deemed consent regime, the company must on at least one occasion, directly notify in writing[25] each member that –

[24] In practice, even though the company may be authorised to use electronic means to send notices where the member has impliedly consented or failed to elect, the company may not be able to send notices electronically if it does not possess the electronic addresses to which the notices may be sent. Therefore, the implied consent and deemed consent regimes may be more useful for the transmission of documents such as the annual report via posting on a website, which is accompanied by a notification to the member of the website publication either in writing or electronically.

[25] The notice to members to elect whether to receive notices and documents electronically will need to be in writing as the company would not be in possession of the electronic address at which notices may be sent to each member, until the member elects and provides the electronic address.

(i) the member may elect to receive company notices and documents electronically or in physical copy;

(ii) if the member does not elect, the notices and documents will be transmitted by electronic means;

(iii) the electronic means to be used shall be as specified by the company in its articles, or shall be website publication if the articles do not specify the electronic means;

(iv) the member's election shall be a standing election (subject to the contrary provision in the articles), but the member may change his mind at any time.

(b) If the company chooses to transmit documents by making them available on a website, the company must notify the members directly in writing or electronically (if the member had elected or deemed to have consented or impliedly consented to receive notices electronically) of the presence of the document on the website and how the document may be accessed;

(c) Documents relating to take-over offers and rights issues shall not be transmitted by electronic means.

<u>Recommendation 2.21</u>

As a default, where companies fail to amend their articles to make use of the deemed consent regime, sections 387A and 387B shall continue to apply.

(b) Electronic notice of special resolution

103 Section 33(2) of the Companies Act provides that a company shall give 21 days' written notice of a special resolution to alter its memorandum with respect to the objects of the company. Further to the above recommendations to ease the rules for electronic transmission of notices and documents (see Recommendations 2.18 to 2.21), it was proposed that section 33 be amended to allow a notice of special resolution to alter the objects of a company in its memorandum to be sent by electronic means.

104 An overwhelming majority of the respondents to the consultation agreed with this proposal.

<u>Recommendation 2.22</u>

Section 33 should be amended to allow companies to use electronic methods for transmission of notices of special resolution to alter the objects of a company in its memorandum, in accordance with the proposed amendments in Recommendations 2.19, 2.20 and 2.21.

VII. GENERAL MEETINGS

(a) Extension of 48-hour rule for notional closure of membership register to overseas-listed Singapore incorporated companies (section 130D(3))

105 Section 130D(3) of the Companies Act effects a notional closure of the membership register of a company whose share scrips are deposited with the CDP and are traded in a scripless environment for the purpose of ascertaining who is entitled to vote at a general meeting. Under section 130D(3), a person is regarded as a member of a company entitled to attend, speak and vote at any general meeting of the company if his name appears on the Depository Register 48 hours before the general meeting.

106 The Steering Committee received representations stating that as section 130D(3) applies only to a company incorporated under the Companies Act whose shares are handled as book-entry securities in the CDP, Singapore companies incorporated under the Companies Act but listed on overseas securities exchanges are not able to utilise the 48-hour rule in section 130D(3) as their shares are not held through the CDP. In practice, such companies would therefore have difficulty ascertaining the shareholders who are entitled to attend and vote at general meetings. It was proposed that the scope of coverage of section 130D(3) be extended to cover Singapore-incorporated companies listed on overseas securities exchanges under a scripless regime.

107 A representation was received that a separate foreign depository register is concurrently maintained on behalf of each overseas-listed company outside of Singapore pursuant to the relevant regulations of the overseas securities exchange, but the companies are nonetheless mandated under section 180 of the Companies Act to only recognise members whose names appear in the branch register of members (and not the overseas depository register) as being entitled to attend, speak and vote at general meetings of the company. The companies are unable to resolve this issue by way of amendments to their articles.

108 The Steering Committee ascertained that for shares listed on NASDAQ, the depository (Depository Trust Company) or its nominee (Cede & Co) would be reflected as the registered members on the membership register of the Singapore incorporated company. Therefore, unless section 130D(1) is *also similarly extended* to Singapore-incorporated companies listed on overseas securities exchanges under a scripless regime, the extension of the 48-hour rule in section 130D(3) would not be effective in allowing the company to recognise its beneficial shareholders overseas and to send notices of meetings and documents to them.

109 The Steering Committee observed that it would be difficult to formulate a rule that would apply to all the relevant overseas securities exchanges (or depositories), and that it may not be possible to extend the application of other relevant rules such as sections 130E and 130F of the Companies Act to the overseas securities exchanges (or depositories). It is noted that at paragraph 156 of Chapter 4, the Steering Committee also considered whether the look-through regime in section 130D(1) should be extended to a prescribed list of overseas depositories for the purpose of enfranchising indirect investors for a scheme of arrangement.

110 The Steering Committee notes that this is not a new issue, and therefore Singapore-incorporated companies listed on overseas securities exchanges must have some existing way

of dealing with this problem. Such problems may make it more inconvenient for Singapore-incorporated companies listed on overseas securities exchanges but that is the cost of an overseas listing. There is no compelling reason to amend the Companies Act to make it easier for Singapore-incorporated companies to prefer an overseas listing instead of a listing on the Singapore Exchange.

111 A large majority of the respondents to the consultation agreed with the Steering Committee on this recommendation. A few respondents were of the view that the proposed amendment should be implemented to encourage Singapore businesses to list on stock exchanges even if it is abroad, and to encourage listing aspirants to use and adopt Singapore vehicles to do so.

112 Having considered the feedback from the consultation, the Steering Committee recommends that the scope of coverage of section 130D(3) should not be expanded to extend the 48-hour rule (effecting notional closure of the membership register) to Singapore-incorporated companies listed on overseas securities exchanges.

Recommendation 2.23

The scope of coverage of section 130D(3) should not be expanded to extend the 48-hour rule (effecting notional closure of the membership register) to Singapore-incorporated companies listed on overseas securities exchanges.

(b) Shifting cost of general meeting to requisitioning members

113 Currently, section 176 of the Companies Act requires directors of a company to immediately convene an extraordinary general meeting of the company within two months after receipt of a requisition from members holding not less than 10 percent of the total voting rights. In the event that the directors fail to convene the meeting within 21 days, the requisitionists may themselves convene a meeting. Where the directors have failed to convene a meeting, section 176(4) provides that any reasonable expenses incurred by the requisitionists in convening the meeting shall be paid by the company and shall be clawed back from the defaulting directors. Therefore, the company is required to bear the expenses of requisitioning the extraordinary general meeting in both instances where the directors convene the meeting at the requisition of the shareholder(s), and where they fail to do so (subject to the company's clawback of such sums from the defaulting directors in the latter scenario).

114 The Steering Committee received representations proposing that the cost of convening the extraordinary general meeting should be "re-allocated back to the requisitioning shareholders so that the company is not made to 'subsidise' the costs of a minority shareholder's self-interested agenda. This re-allocation may also have the effect of preventing abuse of the provision by minority shareholders and deter the requisitioning of extraordinary general meetings on spurious grounds".

115 The Steering Committee is of the view that section 176 should not be changed. The Steering Committee notes that the point of cost is most pertinent to listed companies. The

extraordinary general meeting can only be convened with the support of members holding not less than 10 percent of the voting shares (which is not a low threshold, and which entitles the requisitionists to demand a poll at the meeting). The fact that the requisitioning members may have a personal interest in the outcome of the extraordinary general meeting, should not *per se* lead to the conclusion that the meeting is not validly convened for the company's business. Furthermore, the proposal would place an undue fetter on the minority shareholders' right to convene a general meeting to discuss controversial proposals being made by the board (and by extension, the majority shareholders controlling the board). The Steering Committee has not found any evidence that section 176 is being abused by shareholders.

116 Most of the respondents to the consultation agreed with the Steering Committee on this recommendation. Two respondents were in favour of the requisitioning members being made to pay the cost of convening the extraordinary general meeting if the proposed resolution is not passed.

117 Having considered the feedback from the consultation, the Steering Committee recommends that the rule in section 176 should not be changed such that the cost of convening a requisitioned extraordinary general meeting is to be borne by the requisitioning members.

Recommendation 2.24

There should be no change to the rule in section 176 that the cost of convening a requisitioned extraordinary general meeting is to be borne by the company, subject to a clawback of the costs from defaulting directors in the event of default by the directors in convening the meeting.

VIII. MINORITY SHAREHOLDER RIGHTS

(a) Introduction of minority buy-out right or appraisal right

118 Although the will of the majority shareholders will normally prevail in a company, section 216 of the Companies Act (remedy for oppression or injustice) grants relief to minority shareholders to control potential abuse of the majority's voting power. Section 216 allows the court to grant relief where the majority's exercise of power is oppressive or in disregard of the minority's interest as members, or where some corporate act unfairly discriminates against or is otherwise prejudicial to the minority. However, this necessitates costly litigation. As noted in *Walter Woon on Company Law* (3rd Ed, paragraph 5.79), "in most cases, the only practical option is the corporate equivalent of divorce (either the majority buys out the minority (or, more rarely, the minority buys out the majority)) or a winding-up. The reason is simple: if the majority and the minority cannot get along, litigation is not likely to improve matters between them".

119 The Steering Committee considered whether to adopt a minority buy-out right or appraisal right as an alternative remedy for minority shareholders. The objective of such a

right is to allow a minority shareholder who dissented from certain fundamental changes to the enterprise or certain alterations of shareholder rights, to require the company to buy his shares at a fair value. The New Zealand Law Commission stated that the "buy-out procedure recognises not only that there is a level of change to which it is unreasonable to require shareholders to submit but also that in many cases the presence of a disgruntled minority shareholder will be of little benefit to the company itself". The Steering Committee also notes that foreign investors may often be minority shareholders in Singapore joint ventures. As such, providing for stronger minority shareholder rights might be viewed as a positive factor as far as foreign investment flows into Singapore are concerned.

120 The Steering Committee reviewed the following relevant legislation:

(a) New Zealand – sections 110 to 119 of the New Zealand Companies Act 1993;

(b) USA – Chapter 13 of the Model Business Corporations Act 2005 (MBCA); and

(c) Canada – section 190 of Canada Business Corporations Act (CBCA).

121 Whilst the buy-out right or appraisal right in each of these jurisdictions differ in various ways, there are some common threads. Generally, the New Zealand, USA and Canadian legislation provide a dissenting minority shareholder with a right to request a buy-out or an appraisal under some or all of the following circumstances:

<u>Fundamental changes to enterprise</u>
(a) Alteration of the company's structure or activities;[26]
(b) Approval of major transaction;[27]
(c) Approval of amalgamation, merger or share exchange;[28]

<u>Alteration of shareholder rights</u>
(d) Reverse stock splits;[29]

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[26] **USA** – conversion to non-profit status (s.13.02(a)(7) MBCA), an unincorporated entity (s.13.02(a)(8) MBCA), other amendments to articles where appraisal rights were granted (s.13.02(a)(5) MBCA); **New Zealand** – alteration of constitution which imposes or removes restriction on company's activities (s. 110(a)(i) read with s. 106(1)(a) of the New Zealand Companies Act); **Canada** – amendment of articles to add, change or remove any restriction on the business or businesses that the corporation may carry on (s. 190(1)(b) CBCA); continuance where corporation continues as if it had been incorporated under the laws of another jurisdiction, or under other legislation (s. 190(1)(d) CBCA); going private transaction (s. 190(1)(f) CBCA).

[27] **USA** – disposition of assets requiring shareholder approval that would leave the corporation without a significant continuing business activity (s.13.02(a)(3) read with s.12.02(a) MBCA), and any other disposition of assets where appraisal rights were granted (s.13.02(a)(5) MBCA); **New Zealand** – acquisition or disposition of assets or acquiring of rights or incurring of liabilities, the value of which is more than half the value of the company's assets (s. 110(a)(ii) read with s. 106(1)(b) of the New Zealand Companies Act); **Canada** – sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of business (s. 190(1)(e) CBCA).

[28] **USA** – merger if shareholder approval is required (s.13.02(a)(1) MBCA), short form merger where corporation is subsidiary (s.13.02(a)(1) MBCA), share exchange where corporation's shares will be acquired (s.13.02(a)(2) MBCA); **New Zealand** – long form amalgamation (s. 110(a)(ii) read with s. 106(1)(c) of the New Zealand Companies Act); **Canada** – long form amalgamation (s. 190(1)(c) CBCA); carrying out a squeeze-out transaction (s. 190(1)(f) CBCA).

[29] **USA** – amendment to articles that reduces the number of shares owned to a fractional share, if the corporation has an obligation or right to repurchase the fractional share so created (s.13.02(a)(4) MBCA).

(e) Reclassification of shareholder's shares that results in shares with terms less favourable in all material aspects or representing a smaller percentage of total outstanding voting rights;[30]
(f) Alteration or abolition of a preferential right;[31]
(g) Creation, alteration or abolition of a right of redemption;[32]
(h) Alteration or abolition of a pre-emptive right;[33]
(i) Action affecting rights attached to shares.[34]

122 If the minority shareholder disagrees with the valuation of the shares proposed by the company, the company must apply to the court (USA and Canada) or refer to arbitration (New Zealand) for an appraisal or valuation of the fair value of the shares.

123 The US MBCA provides for a market exception, which states that where the shares traded are liquid and the value established by the triggering event is reliable, the appraisal right is not available for holders of shares traded on the US securities exchanges or markets, unless the shareholders are being required to accept for their shares anything other than cash or shares that satisfy the same standard of liquidity and reliability of market value, or the corporate action triggering the appraisal right is an interested transaction involving controlling shareholders or senior executives and directors.

124 One unique feature of the New Zealand model is that the company can apply to the court for relief where the buy-out would be unfair to it.[35] This protects against minority oppression of the majority. The Canadian legislation also provides that the corporation shall not make payment to the dissenting shareholder if there are reasonable grounds for believing that the corporation would become insolvent thereafter.

125 One school of thought favours the introduction of a minority buy-out right or appraisal right, provided that the triggering circumstances are limited and subject to a market exception and safeguards. It was considered that such a remedy would provide a more efficient exit by unhappy minority shareholders in mainly private companies without the need

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[30] **USA** – referred to as a domestication (s.13.02(a)(6) MBCA).

[31] **USA** – contained in 1984 MBCA, but removed from 2005 MBCA on the ground that distinguishing among different types of amendments is necessarily arbitrary and that removing all other triggering circumstances related to amendments to the articles of incorporation would permit a high degree of private-ordering. This removal is not a judgment that an amendment changing the terms of a class or series may not have significant economic effects; **Canada** – a shareholder may dissent if the corporation resolves to amend its articles in various ways which affect the rights of the class, including a preferential right (s. 190(2) CBCA).

[32] **USA** – see footnote 31; **Canada** – a shareholder may dissent if the corporation resolves to amend its articles in various ways which affect the rights of the class, including a right of redemption (s. 190(2) CBCA).

[33] **USA** – see footnote 31; **Canada** – amendment of articles to add, change or remove any provisions restricting or constraining the issue, transfer or ownership of shares of that class (s. 190(1)(a) CBCA); a shareholder may dissent if the corporation resolves to amend its articles in various ways which affect the rights of the class, including a pre-emptive right (s. 190(2) CBCA).

[34] **New Zealand** – Section 117(2): Rights attached to shares include (i) rights, privileges, limitations and conditions attached to shares by the Act or constitution; (ii) statutory pre-emptive rights under section 45; right to require that the procedure prescribed by Act or constitution for amendment or alteration of rights be followed; and right that a procedure prescribed by the constitution for amendment or alteration of rights not be amended or altered; **Canada** – a shareholder may dissent if the corporation resolves to amend its articles in various ways which affect the rights of the class.

[35] Section 114(1) and (2) of the New Zealand Companies Act 1993: Court can order exemption on the ground that (a) the purchase would be disproportionately damaging to the company; (b) the company cannot reasonably be required to finance the purchase; or (c) it is not just and equitable to require the company to purchase the shares.

for costly and protracted oppression actions. It was noted that one of the common strategies in an oppression action is to offer a buy-out and to apply to stay the action. It was also noted that there is existing precedent in the Companies Act which already provides a somewhat similar buy-out remedy in certain narrow circumstances.[36]

126 The Steering Committee is not in favour of introducing such a remedy. It is noted that generally all the triggering circumstances in the New Zealand, US and Canadian legislation involve corporate actions that require approval of the shareholders by special resolution.[37] In contrast, shareholders of Singapore incorporated companies have far more limited rights. A Singapore company is able to enter into major transactions without shareholder approval. It would therefore be illogical for a shareholder to have a buy-out right in circumstances where he does not even have a right to vote to approve the corporate action. As for the alteration of shareholder rights, the Steering Committee took the view that majority rule is part of the bargain that minority shareholders entered into, which includes the fact that their shareholder rights could be altered by special resolution.[38] Therefore the minority shareholders should not be able to require a buy-out on the ground that their rights had been altered or removed by special resolution. There is also concern that the introduction of such a remedy might lower the attractiveness of Singapore as a place for the setting up of businesses, and make it more difficult for entrepreneurs to change the course of their business.

127 Most of the respondents to the consultation agreed with the Steering Committee on this recommendation.

128 A few respondents disagreed and were in favour of introducing a minority buy-out right or appraisal right. A respondent from the Singapore Business Federation supported the introduction of a buy-out right that was limited to the alteration of shareholder rights. Concerning the argument that the appraisal right would be inconsistent with the far more limited rights of shareholders in Singapore compared with the other developed markets which

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[36] Section 33(5) of the Companies Act allows shareholders holding not less than 5% of the issued shares to apply to court for cancellation of an alteration to the objects clauses of the memorandum. On the application, the court may adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase (otherwise than by the company) of the interests of dissentient members.

[37] Examples of fundamental changes requiring approval by special resolution in Singapore include:

(a) section 23 read with 26 (special resolution required to amend memorandum and articles restricting capacity, rights or powers of company)
(b) section 30 (special resolution to change from limited company to unlimited company and vice versa)
(c) section 31 (special resolution to convert public company to private company and vice versa)
(d) section 33 (special resolution to alter objects of company in memorandum – NB. buy-out clause in section 33(7)(b) Companies Act)
(e) section 34 (special resolution required to remove entrenchment of section 10(1) of the Residential Property Act)
(f) section 37 (special resolution required to alter articles of association).

[38] It is noted that certain provisions in the Companies Act protect minority shareholders in the event of certain alterations of their rights. For example, section 39(3) provides that a member is not bound by alterations in the memorandum and articles that he did not agree to which require the member to take or subscribe for additional shares or increase his liability to contribute to share capital. Section 74 provides that where the memorandum or articles provide that consent of a specified proportion of the shareholders of a class is required to authorise the variation or abrogation of class rights, and class rights are varied or abrogated, any such variation or abrogation may be cancelled by the court on application by members holding not less than 5% of the shares of that class. Section 75 provides that preference share rights are to be set out in the memorandum and articles and therefore alteration of rights of preference shareholders would attract the application of section 74.

had appraisal rights, IMAS expressed the view that the opposite argument could also be made, that the absence of a requirement for shareholder approval for major corporate actions makes an even stronger case for the introduction of an appraisal right.

129 SMU Business School pointed out that many studies in finance have empirically shown that giving the minority the right will create higher opportunity costs if a major shareholder treats minority shareholders unfairly, increase the bargaining power of minority shareholders and increase market efficiency. SMU Business School shared that a study of minority investor protection in 27 wealthy countries found higher valuation of firms in countries with better protection of minority shareholders. When law is designed to protect minority shareholders, investors are willing to pay a premium for both equity and debt, because *ex-ante* their cash-flow rights (dividends, interest or principal repayments) are better protected by the law. It motivates entrepreneurs to finance their project externally since the financing cost is lower, and thus expanding the capital market. SMU Business School expressed the view that the introduction of the minority buy-out right could restore the balance of power between the majority and minority shareholders, considering the information advantage of majority shareholders and the non-negligible risk of expropriation through the complex web of pyramidal shareholding that is prevalent in Singapore.

130 Having considered the feedback from the consultation, the Steering Committee recommends that the Companies Act should not be amended to introduce a minority buy-out right or appraisal right. Instead, section 254(1)(*i*) and (*f*) of the Companies Act should be amended to explicitly provide the court with the option, where the company is still viable, to order a buy-out instead of a winding-up where it is just and equitable to do so (see Recommendations 2.26 and 2.27).

Recommendation 2.25

The Companies Act should not be amended to introduce a minority buy-out right / appraisal right in Singapore where such rights would enable a dissenting minority shareholder who disagreed with certain fundamental changes to an enterprise or certain alterations to shareholders' rights, to require the company to buy him out at a fair value.

(b) New buy-out remedy where court finds just and equitable

131 Section 254(1)(*i*) of the Companies Act provides that the court may order a company to be wound up if the court is of the opinion that it is just and equitable to do so. Having taken the view not to adopt the minority buy-out right / appraisal right (see Recommendation 2.25 above), the Steering Committee agrees that it would be useful to amend section 254(1)(*i*) to explicitly provide the court with the power to order a buy-out of the shares in an application for the winding-up of a company on the "just and equitable" ground. This additional remedy would allow a court to order a buy-out instead of a winding-up in cases where the company is still viable and it would be a more efficient solution for the majority to buy out the minority (or vice versa). At present, there have been occasions where the courts

have suspended the winding-up order to allow the parties to consider an amicable solution which could involve a buy-out.[39]

132 Most of the respondents to the consultation agreed with this recommendation. One respondent expressed the view that it was a curious anomaly that the buy-out order is available under the "oppression" regime but not under the "just and equitable" regime, particularly given the drastic effect of granting an order to wind up a company. The participants at the subsequent Focus Group discussion sessions were in favour of this proposed amendment as opposed to the status quo, but a suggestion was also made to combine section 216 and section 254(1)(*i*) into one remedy due to their overlap, or to make the buy-out option available to all the limbs of section 254.

133 Some NUS law academics were not in favour of the proposed amendment as in their view, the benefits of allowing the courts to order a buy-out under section 254(1)(*i*) are outweighed by the following three problems:

(a) It might result in arbitrage between sections 254(1)(*i*) and 216 which would lead to uncertainty in the shareholders' rights regime. Aggrieved shareholders may opt to bring oppression-style cases under the proposed version of section 254(1)(*i*), rather than under section 216, as the former covers a broader range of circumstances and would offer the two remedies most commonly ordered in a section 216 petition (i.e. a buy-out and winding-up);

(b) It might disrupt the careful balance that had been struck in section 254 between *de facto* majority rule and the protection of minority shareholders' rights, and risks opening the floodgates. The current wording of section 254 maintains this balance by allowing courts to protect minority shareholders in an almost unlimited set of circumstances (i.e. whenever the circumstances are unjust or inequitable) but then ensuring that this expansive remedial jurisdiction is limited by restricting the remedy available to winding-up; and

(c) It might result in unintended procedural problems caused by inserting a buy-out remedy into a part of the Companies Act that was primarily intended to deal with winding-up. In many of the claims under the proposed section 254(1)(*i*), particularly where large viable companies are involved, the aggrieved shareholder will be seeking a buy-out remedy and not a winding-up. However, even in such cases, where there will be a small chance of a winding-up being ordered, the section 254(1)(*i*) petition will be considered a winding-up petition and trigger the procedural requirements of such a petition (e.g. advertising of the winding-up). This will result in unfair and costly consequences (e.g. the disruption of credit) for companies that are the subject of 254(1)(*i*) oppression-style claims but are unlikely to be wound up.[40]

[39] See for example, *Chow Kwok Chuen v Chow Kwok Chi* [2008] 4 SLR 362.

[40] The Steering Committee took the view that an application under the amended section 254(1)(i) is not really a question of the applicant seeking a buy-out remedy, because the applicant would still have to apply for a winding-up. Therefore, when an application for a winding-up is made, the usual consequences follow. The court would have to form the view that it is just and equitable to wind up the company. The buy-out is merely an alternative remedy.

134 Having considered the feedback from the consultation, the Steering Committee recommends that section 254(1)(*i*) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.

<u>Recommendation 2.26</u>

Section 254(1)(*i*) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.

(c) New buy-out remedy where directors acted in their own interest or in unfair or unjust manner

135 Section 254(1)(*f*) of the Companies Act provides that the court may order a company to be wound up if the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner that appears to be unfair or unjust to other members. As the grounds for winding-up in section 254(1)(*f*) are somewhat similar to section 254(1)(*i*), and it is common in an oppression action to pray for relief in the alternative under section 216 or section 254(1)(*i*) or (*f*), it was proposed that section 254(1)(*f*) be amended in a similar manner as section 254(1)(*i*) (see Recommendation 2.26), to allow the court hearing a winding-up application under section 254(1)(*f*) the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up. The mirroring of the new buy-out remedy in both sections 254(1)(*i*) and 254(1)(*f*) would prevent the parties from engaging in arbitrage between these two limbs.

136 Most of the respondents to the consultation agreed with this recommendation.

137 The NUS law academics who disagreed with the proposed amendment of section 254(1)(*i*) in Recommendation 2.26, were also not in favour of this proposed amendment to section 254(1)(*f*). The concerns that they had expressed in relation to Recommendation 2.26 generally applied to this related proposal to allow courts to order a buy-out under section 254(1)(*f*). In their view, the combined effect of making a buy-out order available under both sections 254(1)(*i*) and 254(1)(*f*) will likely increase the possibility of undesirable arbitrage occurring generally between sections 216 and 254.

138 Having considered the feedback from the consultation, the Steering Committee recommends that section 254(1)(*f*) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.

<u>Recommendation 2.27</u>

Section 254(1)(*f*) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.

(d) Extension of section 216A (statutory derivative action) to arbitration proceedings

139 Section 216A(2) of the Companies Act (statutory derivative action) provides a complainant (usually a minority shareholder) with the right to apply to the court for leave to: (a) bring an action in the name and on behalf of the company; or (b) intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.

140 In the case of *Kiyue Co Ltd v Aquagen International Pte Ltd* [2003] 3 SLR 130, Kiyue (a minority shareholder of Aquagen) applied under section 216A for leave to intervene in an arbitration between Aquagen and another company. The key issue was whether the word “action” in section 216A(2) included arbitration proceedings. Choo Han Teck J held that section 216A only applies to court proceedings and not arbitration proceedings, but noted that there may be good reasons to legislatively extend section 216A to include arbitration proceedings, especially with the increasing use of arbitration as alternative dispute resolution. Without it, shareholders like Kiyue may be deprived of a reasonable means of asserting their rights.

141 The Steering Committee agrees that section 216A ought to be extended to include arbitration proceedings. Otherwise, all contracts entered into by a company could provide for arbitration and the minority shareholders will have no recourse then.

142 Most of the respondents to the consultation agreed with this recommendation. Two respondents were of the view that the extension of section 216A to include arbitration proceedings would support Singapore’s aspirations to be a leading arbitration centre.

<u>Recommendation 2.28</u>

The scope of the statutory derivative action in section 216A should be expanded to allow a complainant to apply to the court for leave to commence an arbitration in the name and on behalf of the company or intervene in an arbitration to which the company is a party for the purpose of prosecuting, defending or discontinuing the arbitration on behalf of the company.

(e) Application of section 216A (statutory derivative action) to Singapore companies listed in Singapore and overseas

143 The statutory derivative action in section 216A(2) of the Companies Act does not apply to a company that is listed on the securities exchange in Singapore. When section 216A

was introduced in 1993, the remedy was not extended to companies listed in Singapore out of fear that unscrupulous people would make frivolous applications to harass listed companies and thereby attempt to manipulate the share price. Section 216A was introduced at a time when it was very rare for Singapore companies to be listed overseas, and it was therefore made not applicable only to Singapore companies listed in Singapore.

144 It was suggested to the Steering Committee that it is incongruous that this remedy is available to a Singapore-incorporated company listed overseas but is not available to a Singapore-incorporated company listed in Singapore. One of SGX's policies is to promote dual listings by Singapore companies. The Steering Committee agrees that there is a need for consistency in the treatment of Singapore-incorporated listed companies, who would otherwise benefit from this remedy when listed overseas but would not when listed in Singapore.

145 The respondents to the consultation unanimously agreed that section 216A should be amended to achieve consistency in the availability of the statutory derivative action for Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

146 The Steering Committee initially took the view that section 216A should be amended such that the statutory derivative action in section 216A is *not applicable* to Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas. A large majority of the respondents agreed with the Steering Committee's initial view in their written feedback.

147 A significant minority of the respondents (including MAS, SGX and NUS law academics) were in favour of section 216A being made *applicable* to all listed Singapore-incorporated companies. Participants of the subsequent focus group discussion sessions were unanimously in favour of making section 216A applicable to listed Singapore-incorporated companies whether listed overseas or in Singapore. The following reasons were given in support of making section 216A applicable to all listed Singapore-incorporated companies:

(a) SGX highlighted that if section 216A is made not applicable, minority shareholders of Singapore-incorporated listed companies would have no recourse in respect of a wrong done to the company where the wrongdoer is a controlling shareholder or is in a position to prevent an action from being brought against him.[41]

(b) In response to the argument that it was not necessary for section 216A to apply to listed companies as they are monitored by regulatory authorities and disgruntled shareholders can exit by selling their shares in the open market, MAS highlighted that it is more desirable to empower shareholders to take action than to rely solely on regulatory authorities to do so. To deny a disgruntled shareholder the remedy on basis that he can sell his shares in the open market ignores the deterrent effect of the remedy and the fact that the disgruntled shareholder may not wish to exit his investment especially if doing so results in losses.

[41] Strictly speaking, even without section 216A, members of listed companies still have the common law derivative action. Hence, the extension of section 216A simply provides another avenue for minority shareholders to seek redress. However, there are difficulties in bringing a common law derivative action, which was the reason for enacting section 216A in the first place.

(c) In response to the argument that section 216A could result in frivolous litigation as well as the possibility of minorities using the remedy to carry out personal vendettas against directors or to put pressure on majority shareholders in buy-out situations, MAS, SGX and Herbert Smith pointed out that the requirement for leave of court to be obtained before the remedy may be pursued already provides a screening mechanism for such frivolous actions.[42] MAS also opined that the apparent concern about possible price manipulation does not have strong basis, and is not borne out by the practices in other jurisdictions. The NUS law academics shared that evidence from other leading jurisdictions suggests that making the derivative action available to minority shareholders in listed companies will not lead to frivolous litigation.

(d) The NUS law academics also opined that extending s 216A to apply to listed companies would be one of the most effective ways to both promote the efficient enforcement of directors' duties and improve protection of minority shareholders' rights. This would put Singapore on par with most other leading jurisdictions and would potentially attract more foreign investors who increasingly see availability of a derivative action in listed companies as the market standard.

148 Having considered the feedback from the consultation, the Steering Committee recommends that section 216A should be amended such that the statutory derivative action in section 216A *is applicable* to Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

Recommendation 2.29

Section 216A should be amended to achieve consistency in the availability of the statutory derivative action for Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

Recommendation 2.30

Section 216A should be amended such that the statutory derivative action in section 216A *is applicable* to Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

(f) Cumulative voting for election of directors

149 The current system of "straight voting" under which each member may cast one vote per share for a candidate for each vacancy to be filled, enables a bare majority of shares to elect the entire board of directors. In some states of the United States,[43] a system of cumulative voting is available to ensure minority representation on the board of directors. Under that system, the number of shares held by a member is multiplied by the number of vacancies, and the member may cast for a single candidate the total number of votes calculated this way, or may distribute the votes among several candidates as desired.

[42] The court can only grant leave if it is satisfied that the complainant has given 14 days' notice to the directors, is acting in good faith, and that the action is prima facie in the interest of the company.
[43] Ford's Principles of Corporations Law (12th Ed, 2005), pages 227-228.

150 It was proposed that the Companies Act be amended to introduce cumulative voting for the election of directors, whereby members can choose to cast all or part of their cumulative votes (number of shares multiplied by the number of vacancies) in favour of one candidate. This would enable minority shareholders to elect some directors, and this would enhance protection of minority shareholders' interests and strengthen corporate governance.

151 The Steering Committee disagreed with the proposal to introduce cumulative voting, as it considered that cumulative voting is likely to be ineffective because of the ability of management and the controlling shareholder to control the proxy voting process.[44] The Steering Committee noted that other methods of protecting the interests of minority shareholders should be considered instead.

152 A large majority of the respondents to the consultation agreed with the Steering Committee on this recommendation. Some NUS law academics noted that although cumulative voting is available in some of the world's leading corporate law jurisdictions, the effectiveness of cumulative voting in these jurisdictions has been limited by the ability of management and controlling shareholders to use their power to opt out of the system[45] and to control the proxy voting process. They thought that there is little reason to believe that a cumulative voting system would be any more effective in Singapore than it has been in these other leading jurisdictions.

153 A significant minority of the respondents (including MAS, Nanyang Business School, SMU Business School, SIAS and Prof Mak Yuen Teen) disagreed with the Steering Committee and were in favour of introducing a system of cumulative voting for the election of directors.

154 MAS was of the view that a system of cumulative voting could improve minority representation on the board. Although it was not a perfect solution, it could help to alleviate the "majority-takes-all" problem caused by straight voting.

155 Nanyang Business School argued that having board representation is an invaluable *ex ante* tool for effective corporate governance by minority shareholders, rather than relying on *ex post* legal mechanisms for redress under section 216 or 216A. The fact that controlling shareholders can manipulate the proxy mechanism is not sufficient reason to exclude this right.

156 Prof Mak Yuen Teen pointed out that the present law often allows a controlling shareholder to appoint the entire board of directors. There is nothing inherently fair about a system which allows a shareholder often holding substantially less than 100 percent - even less than 50 percent - to control the entire board.

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[44] The Steering Committee had received feedback that the proxy voting process was unsatisfactory as the Chairman had the option of not exercising the vote on behalf of the minority shareholders if those shareholders appointed the Chairman as their proxy. If the proxy voting process is reformed such that the Chairman (as proxy) must vote the proxies as instructed, the weakness of the proxy voting process would be addressed and may no longer be a reason to object to the introduction of the cumulative voting system for election of directors.

[45] An academic commented that the cumulative voting system was not effective in the US jurisdictions that had implemented it as the US companies could opt out from implementing the system and they promptly did so. It was not examined whether the system could be effective if there was no ability for companies to opt out.

157 SMU Business School argued that to the extent that cumulative voting facilitates the election of independent outside directors, it may serve to reduce agency costs between shareholders and managers. A study showed that a cumulative voting system in a firm has a positive effect on firm value. Having cumulative voting for the election of board of directors is one step towards the mitigation of potential abusive action by the majority shareholders.

158 Having considered the feedback from the consultation, the Steering Committee recommends that the Companies Act should not be amended to introduce a system of cumulative voting for the election of directors. It is always open to a company to introduce such provisions if it is thought desirable, rather than mandating it for all companies large and small. In so far as a company is a vehicle for business, the commercial understanding is that a minority shareholder does not have an inherent right to representation on the board. If he has a legitimate expectation of board representation that is defeated by the majority shareholders, he has recourse to a remedy under section 216 or 254.

Recommendation 2.31

The Companies Act should not be amended to introduce a system of cumulative voting for the election of directors.

(g) Enabling minority shareholders to obtain board resolutions

159 Where the minority shareholders are aggrieved by the decisions of a majority-controlled board of directors, the minority shareholders are currently unable to obtain access to the minutes of Board meetings without commencing litigation and applying for discovery of documents. It was proposed that a mechanism be provided to enable minority shareholders to obtain copies of board resolutions without the need to go through a discovery process. The proposed mechanism could require the company to furnish board resolutions upon a written request by at least two members holding not less than 5% in aggregate of the issued share capital of the company. The written request should specify exactly what is being requested, so as not to facilitate a fishing expedition.

160 The Steering Committee disagrees with the proposal as the board will have to pass resolutions dealing with many confidential and sensitive matters, for example, entering into negotiations, commencement or discontinuation of litigation, and authorising the search for candidates for a key appointment. Such a right would hamper the board's duties. The Steering Committee also notes that even majority shareholders do not have such a right to obtain board resolutions.

161 Most of the respondents to the consultation agreed with the Steering Committee on this recommendation.

<u>Recommendation 2.32</u>

The Companies Act should not be amended to create a mechanism to allow minority shareholders to obtain copies of board resolutions without the need to go through a discovery process.

IX. MEMBERSHIP OF HOLDING COMPANY

Extension of section 21(6) exemption to include transfer of shares

162 Section 21(1) of the Companies Act prohibits a corporation from being a member of its holding company and provides that any "allotment or transfer" of shares in a holding company to its subsidiary is void. The Jenkins Report 1962 (Report of the Company Law Committee) (Cmnd 1749) paragraph 151 identified two objects of the original English section: to prevent the capital of the holding company from being indirectly depleted as the result of the purchase of its own shares by its subsidiary, and to prevent the directors of a holding company from maintaining themselves indefinitely in office against the wishes of other shareholders, with the votes of shares held by a subsidiary.[46] Section 21(6) provides for an exemption from this prohibition. It allows the "allotment" of shares in a holding company to a subsidiary which already lawfully holds shares in the holding company if the allotment is made by way of capitalisation of reserves of the holding company and is made to all members of the holding company on a basis that is in direct proportion to the number of shares held by each member in the holding company.

163 The Steering Committee considered a proposal to extend the exemption in section 21(6) to include a "transfer" of shares in a holding company, in order to align the section 21(6) exemption with the prohibition in section 21(1), and to cater for a transfer of shares in the holding company by way of distribution in specie, amalgamation or scheme of arrangement.

164 A representation was received that many companies do undertake distribution of its assets in specie to their shareholders, for example, by way of a dividend in specie. If a company ("Company C") wishes to propose a dividend in specie to be effected by way of a distribution of its assets (say, existing shares in another company, "Company A") to its shareholders, and Company C's shareholders include "Company B", which is a subsidiary of Company A, a transfer of Company A shares to Company B under the distribution would be prohibited under section 21(1). It was proposed that, in the case of a pro rata distribution of shares involving shares in its holding company, a subsidiary should be entitled to have its holding company's shares transferred to it as part of the distribution and to hold such shares so distributed, provided — (a) it must dispose of such shares within 12 months of the transfer or such longer period as the court may allow; and (b) it shall have no right to vote in respect of such shares.

~~165~~ Section 21(4) provides for an exemption to the prohibition in section 21(1), and allows a subsidiary to continue to be a member of its holding company if at the time when it

[46] Woon & Hicks, The Companies Act of Singapore, An Annotation (May 1989 Ed), page 76.

becomes a subsidiary, it already holds shares in that holding company, but subject to the subsidiary having no voting rights at meetings of the holding company, and subject to the subsidiary disposing of all the shares in the holding company within 12 months of becoming a subsidiary. The Steering Committee had earlier indicated its view that section 21(4) should be amended to allow the subsidiary to continue to be a member of its holding company with the shares of the holding company held by the subsidiary being deemed treasury shares, and subject to a maximum aggregate limit of 10% of shares in the holding company being held as treasury shares or deemed treasury shares. The Steering Committee was of the view that section 21(6) should be amended in a similar manner as the proposed section 21(4) as described above.

166 An overwhelming majority of the respondents to the consultation agreed with the recommendation for the exemption in section 21(6) to be extended to include a transfer of shares in a holding company, in order to align the section 21(6) exemption with the prohibition in section 21(1) and to cater for a transfer of shares in the holding company by way of distribution in specie, amalgamation or scheme of arrangement.

167 The respondents to the consultation unanimously agreed with the recommendation for section 21(6) to be amended in a similar manner as the proposed section 21(4) as described in paragraph 165.

168 However in paragraphs 22 to 26 of Chapter 3, the Steering Committee is recommending that section 21(4) should be amended to allow the subsidiary to continue to be a member of its holding company after the period of 12 months referred to in section 21(4)(*b*), with the shares of the holding company held by the subsidiary being deemed treasury shares thereafter, and subject to a maximum aggregate limit of 10% of shares in the holding company being held as treasury shares or deemed treasury shares. The Steering Committee recommends that section 21(6) should be amended in a similar manner as the new proposed section 21(4) as per Recommendations 3.7 and 3.8 of Chapter 3.

<u>Recommendation 2.33</u>

The exemption in section 21(6) should be extended to include a transfer of shares in a holding company, in order to align the section 21(6) exemption with the prohibition in section 21(1) and to cater for a transfer of shares in the holding company by way of distribution in specie, amalgamation or scheme of arrangement.

<u>Recommendation 2.34</u>

Section 21(6) should be amended to allow a subsidiary to receive a transfer of shares in its holding company that are transferred by way of distribution in specie, amalgamation or scheme of arrangement:

(a) **provided that the subsidiary shall have no right to vote at meetings of the holding company or any class of members thereof, and the subsidiary shall, within the period of 12 months or such longer period as the court may allow after the transfer, dispose of all of its shares in the holding company; and**

(b) **any such shares in the holding company that remain undisposed after the period of 12 months or such longer period as the court may allow after the transfer –**

(i) shall be deemed treasury shares or shall be transferred to the holding company and held as treasury shares, and subject to a maximum aggregate limit of 10% of shares in the holding company being held as treasury shares or deemed treasury shares; and

(ii) provided that the subsidiary / holding company shall within 6 months divest its holding of the shares in the holding company in excess of the aggregate limit of 10%.

CHAPTER 3

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

I. INTRODUCTION

1 The provisions reviewed under this section relate to capital maintenance and shares, debentures, schemes, compulsory acquisitions and amalgamations.

2 The Steering Committee has reviewed the relevancy of the legal concepts connected to the above said areas in the present business environment, sought to streamline and update the Companies Act in the light of evolving accounting standards and practices and enable companies to design appropriate capital structures which best suit their needs, while providing adequate safeguards and transparency.

II. PREFERENCE AND EQUITY SHARES

(a) Definition of "preference shares"

3 Section 4 of the Companies Act has a definition of "preference shares". Although in commercial practice preference shares may be voting and/or participating, the Companies Act states that ""preference share", in relation to sections 5, 64 and 180 means a share, by whatever name called, which does not entitle the holder thereof to the right to vote at a general meeting (except in the circumstances specified in section 180(2)(a),(b) and (c)) or to any right to participate beyond a specified amount in any distribution whether by way of dividend, or on redemption, in a winding up, or otherwise."

4 The section 4 definition applies only to sections 5, 64 and 180 of the Companies Act. However there are also references to preference shares in other parts of the Companies Act such as section 74 and 75, to which the commercial understanding of the term would apply. A number of difficulties arise from this inconsistent use of the term "preference share".

5 The Australian, New Zealand and UK legislation do not have a statutory definition of preference shares. Whilst the phrase "preference shares" can be found in the Australian legislation, it is completely absent from the New Zealand Companies Act 1993 and UK Companies Act 2006. The provisions in the Australian, New Zealand and UK legislation which are parallel to sections 5 and 64 of the Singapore Companies Act do not exclude "preference shares". There is no direct equivalent of section 180(2) in Australia, New Zealand and the UK. Instead preference shares would presumably be a class of shares to which the general provisions on classes of shares would apply.

6 In view of the above, the Steering Committee is of the view that the definition of "preference share" should be deleted. Consequential amendments which will be required for sections 5, 64 and 180 (to which the section 4 definition currently applies) are set out in the following paragraphs.

7 When consulted, there were no opposing views received.

<u>Recommendation 3.1</u>

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

(b) Voting rights of holders of preference shares

8 Section 180(2) of the Companies Act states that holders of preference shares shall have the right to at least one vote per share if (i) preferential dividends are in arrears for 12 months or such shorter period as the Articles provide; (ii) upon any resolution to vary the rights attached to those share; or (iii) upon any resolution for winding up.

9 It is the recommendation of the Steering Committee that a company should have the latitude to determine what rights attach to shares issued by the company and there is no cogent reason for the mandatory prescription of the rights of preference shares in the Act. The rights that attach to preference shares can be set out in the Articles. There is no direct equivalent of section 180(2) in Australia, New Zealand or the UK. Section 180(2) should be deleted.

10 When consulted, most respondents agreed with the recommendation. The Steering Committee recommends transitional arrangements to preserve the rights currently attached under section 180(2) to preference shares issued before the proposed amendment.

<u>Recommendation 3.2</u>

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.

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

11 Section 4 of the Companies Act currently defines "equity share" to mean "any share which is not a preference share." There is no such term in the Australian or New Zealand legislation. The term "equity share capital" is used in the UK Companies Act 2006 and is defined at section 548 as "its issued share capital excluding any part of that capital that, neither as respects dividends nor as respects capital, carries any right to participate beyond a specified amount in a distribution".

12 To be consistent with the recommendation that the definition of "preference share" should be deleted, the Steering Committee is of the view that the definition of "equity share" as "any share which is not a preference share" should also be deleted. When consulted, most of the respondents agreed to the recommendation.

<u>Recommendation 3.3</u>

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.

(d) Non-voting/multiple vote shares

13 Section 64(1) of the Companies Act provides that each equity share issued by a public company confers the right at a poll to one vote, and to one vote only. This differs from other major jurisdictions like the UK, New Zealand and Australia. The UK and New Zealand both statutorily confer shareholders a right to vote but this is subject to the Articles. Australia also allows the issue of non-voting shares; although the Australian Securities Exchange (ASX) Listing Rules requires listed shares to carry a vote, changes to this are being considered so that listed companies can issue non-voting shares.

14 The Steering Committee considered if the law should be amended to allow public companies to issue non-voting shares (other than preference shares as currently defined under section 4 of the Companies Act) and shares carrying multiple votes. When consulted, most of the respondents agreed that public companies should be allowed to issue non-voting shares or shares with multiple votes, subject to certain safeguards. This would allow companies greater flexibility in capital management. The Singapore Exchange may determine whether listed companies should be allowed to issue such shares.

15 The proposed safeguards are:

(a) Subject the issue of shares with differential voting rights (particularly super-voting shares) to a higher approval threshold, such as special resolution rather than ordinary resolution. The UK requires super majority for super-voting shares and simple majority for non-voting shares.

(b) Holders of non-voting shares should be accorded equal voting rights for a resolution to wind up the company or a resolution which varies the rights of the non-voting shares.

(c) Where there is more than one class of shares, the notice of a meeting at which a resolution is proposed to be passed should be accompanied by an explanatory statement setting out the voting rights (or the lack thereof) attached to each class of shares.

16 However, a minority of the respondents who did not support the proposal cited the risk of undermining minority rights and compromising standards of corporate governance. It was also commented that the UK, New Zealand and Australian markets are distinct from ours. In markets like ours with companies predominantly controlled by a group of shareholders, non-voting shares and shares with multiple rights can be used to severely undermine minority interests. The Steering Committee notes these views but opines that the necessary safeguards and restrictions should be imposed on the listed companies under the

applicable rules imposed solely on listed companies. Hence section 64 should be removed entirely.

Recommendation 3.4

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

Recommendation 3.5

Section 64 should be deleted.

III. HOLDING AND SUBSIDIARY COMPANIES

(a) Amend the definition of "subsidiary"

17 Section 5 of the Companies Act defines when one corporation is a subsidiary of another. Section 5(1)(a)(iii) deems a corporation to be a subsidiary of another corporation if that other corporation "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)".

18 By comparison, section 46 of the Australia Corporations Act 2001 excludes not preference/treasury shares but "any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital". Similarly section 5(1)(iii) of the New Zealand Companies Act 1993 excludes not preference/treasury shares but "shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital".

19 There is no comparable UK provision. The definition of "subsidiary" in the UK Companies Act 2006 is at section 1159. In short, the UK recognise "control" rather than percentage of shareholding which determines a holding/subsidiary relationship. During consultation, the UK position was examined in greater depth.

20 The Steering Committee recommends that section 5(1)(a)(iii) be deleted. The section 5(a)(iii) definition can be traced back to the requirement for consolidation of accounts, which should be set only by financial reporting standards. The definition of "subsidiary" in the Companies Act should not be the determining factor for consolidation. Instead, section 5(1)(a) should be amended to recognize that a company S is a subsidiary of another company H if company H holds the majority of the voting rights in company S. This would bring the Singapore position in line with the UK to recognize director control, control through voting agreements and voting control to determine whether one company is the subsidiary of another.

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.

(b) Subsidiary holding shares of its holding company

21 Section 21(4) of the Companies Act requires that a subsidiary "shall, within the period of 12 months or such longer period as the Court may allow after becoming the subsidiary of the holding company, dispose of all its shares in the holding company".

22 Treasury shares now being permitted, the Steering Committee initially considered allowing the shares held by a subsidiary in its holding company to be deemed treasury shares. This was supported by majority of the respondents consulted. However, comments were received that this may be unfair. As treasury shares are not entitled to receive dividends, a minority shareholder in the subsidiary that is not wholly-owned would realize a loss in value associated with its shareholding in the subsidiary through no fault of his own. One further query was whether the Act would provide guidance as to the timeline for disposal of any shares in excess of the 10% threshold.

23 The Inland Revenue Authority of Singapore ("IRAS") commented that treasury shares held by a holding company are accounted for differently when held by its subsidiary. Hence there is a possibility that investors may be misled when reading the financials. The Steering Committee took the view that this can be resolved by further disclosures in the financials if necessary.

24 After due consideration, the Steering Committee recommends retaining the current 12-month time-frame for a subsidiary to dispose of shares in its holding company and only convert the shares held to treasury shares thereafter. Once these shares are converted to treasury shares, they would be regulated in accordance with the rules governing treasury shares, which means the maximum holding is 10% of the total number of shares in that class at that time. The subsidiary would have to dispose of shares in excess of the 10% threshold within 6 months under section 76I(3).

25 In addition, section 21(4) should be amended to allow retention of up to an aggregate 10% of such treasury shares. This means if company X acquires another company Y which owns company X's shares, those company X shares owned by company Y should be aggregated with all other company X shares owned by company X (be it through X or X's subsidiaries) in order to determine the 10 % limit. Otherwise, there may be a situation where company X may own a very substantial amount of its own shares (either directly or through subsidiaries). When consulted, most respondents agreed.

26 The position in Australia (section 259D of the Australia Corporations Act 2001) is similar to that in Singapore. In the UK (section 136 of the UK Companies Act 2006) and

New Zealand (section 82(1) of the New Zealand Companies Act 1993) also, the general rule is that a subsidiary may not hold shares in its holding company. However, section 82(4) of the New Zealand Companies Act 1993 provides that "where a company that holds shares in another company becomes a subsidiary of that other company — The company may … continue to hold those shares".

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 subsidiaries.

IV OTHER ISSUES RELATING TO SHARES

(a) Redenomination of shares

27 Currently the Companies Act does not specify a mechanism for redenomination of capital and where such redenomination involves a capital reduction, court sanction would be required. The position is similar in Australia and New Zealand where no statutory mechanism for redenomination is prescribed.

28 In the UK, a comprehensive procedure in respect of redenomination of share capital by shareholder resolution has been introduced with the new Companies Act 2006 (sections 622 to 628) and has taken effect on 1 October 2009. In short, the law provides that a limited company may redenominate its share capital and the conversion must be made at an appropriate spot rate of exchange specified in the resolution. There are prescribed rules on when to ascertain the rate of exchange, calculation of the new nominal value, effect of redenomination, and notification to authorities and the creation of a redenomination reserve. A special resolution is required if the redenomination involves a reduction in capital.

29 The Steering Committee considered if Singapore should introduce a statutory mechanism for denomination of shares similar to the UK model. When consulted, most respondents agreed. Alternate views received however queried if the suggestion was relevant to Singapore as the change in the UK may be prompted by the UK joining the European Union thereby allowing the redenomination of pound to euro. The Steering Committee is of the view that it is common for companies with foreign businesses to re-denominate their share structure and hence the statutory mechanism will be useful and provides greater certainty.

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.

(b) Interest in shares

30 The definition of "interest in shares" at section 7 of the Companies Act differs from the definition of "interest in securities" at section 4 of the Securities and Futures Act (SFA). The section 7 definition does not include similar wording to sections 4(1) and 4(2) which deems a person who has the right to dispose of securities as having an interest in those securities.

31 Under section 146 of the New Zealand Companies Act 1993, the director's right to dispose of shares confers a 'relevant interest' in those shares. Section 608(1) of the Australia Corporations Act 2001 extends relevant interests in securities to any person who has the power to dispose of the securities or control the exercise of the power to dispose of the securities. The UK Companies Act 2006 adopts a similar policy though it uses different wording[1].

32 The Steering Committee is of the opinion that amending the definition in the Companies Act to make it consistent with that in the SFA would not have any unintended consequences on the provisions in the Companies Act which refer to an "interest in shares". Although "interest in shares" is more applicable for listed companies, there is merit to align the definition in both Acts for greater consistency. When consulted, most respondents agreed with the Steering Committee's views. Those in support further commented that the proposed change would more accurately reflect the concept of share ownership as understood by most investment managers, who consider themselves to be shareholders if they have the right to dispose of shares in a company regardless of the existence or absence of any other rights like voting rights. The definition of "interest in shares" should also be reconsidered in light of present day brokerage services and banking activities. However, the law should not require multiple disclosures by companies which are deemed to have an interest in shares beyond certain levels.

Recommendation 3.10

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

[1] See Schedule 1 of the UK Companies Act 2006.

(c) Economic interests in shares

33 In the UK, after a public consultation, on 2 July 2008 the Financial Services Authority (FSA) announced plans to implement a general disclosure regime of long Contracts for Difference (CfD) positions. However, since the FSA reached its decision after extensive research on conditions in the UK market, the conclusions may not be directly applicable to the Singapore environment.

34 In the FSA Consultation Document, the position in other jurisdictions was also considered. In relation to Australia it was stated:

> "Australia requires disclosure of substantial holdings in shares or interests in a listed company. 'Relevant interest' is defined in section 608 of the Corporations Act 2001 and includes the power to exercise, or control the exercise of, a right to vote attached to the securities. It is understood that purely cash settled derivatives generally do not fall within the definition of 'relevant interest', while the disclosure obligation in such a case would lie with the investment bank holding the hedge.
>
> The Australian Takeover Panel recently outlined its plans to prohibit the use of equity derivatives to mask the ownership of takeover targets, in response to several high-profile cases. The Panel said it had developed the draft guidance over two years following numerous instances where controlling interests had used equity derivatives to hide 'substantial holdings'. The central proposition is that for control and substantial holding disclosure purposes long equity derivatives (cash settled or deliverable) should be treated in the same way as physical holdings of the relevant securities. These proposals would apply to all derivative holdings, not just in takeover situations."

35 On 11 April 2008, the Australian Takeovers Panel (Panel) released Guidance Note 20 - Equity Derivatives outlining when, and in what circumstances, the use of equity derivatives may constitute unacceptable circumstances and require disclosure to the market. In short, the Guidance Note indicates that disclosure is required where (i) there is a "long position" in existence or created; (ii) there is a "control transaction"; and (iii) the "long position" relates to 5% or more of an ASX listed company's voting securities.

36 The New Zealand position was described in the FSA Consultation Document as follows:

> "New Zealand requires disclosure of 'relevant interests' in 5% or more of the voting securities of a public issuer. According to article 5 of the Securities and Markets Act, a person has a 'relevant interest', amongst other criteria, if that person: (i) has the power to exercise (or control) any right to vote attached to the security; (ii) has the power to acquire or dispose the security; or (iii) has the power (or may at any time have the power) under an arrangement, to exercise any right to vote attached to the security, to acquire or dispose of the security. The courts have taken a broad approach to what represents a possible future power to acquire shares."

37 The Steering Committee is of the opinion that in Singapore, it would be premature to recognise economic interests as being an "interest in shares". Developments overseas should

be monitored and it may be considered later whether such a step is warranted. When consulted, most respondents agreed with the Steering Committee's views.

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.

(d) Exemption under section 63(1A)

38 Section 63(1)(d) of the Companies Act requires a company to lodge a return of allotment within 14 days of allotment, stating the full name, identification, nationality and address of each member, and the number and class of shares held; or if there are more than 50 members as a result of the allotment, each of the 50 members who, hold the most number of shares in the company (excluding treasury shares). This was introduced in 2003; previously disclosure was not limited to the top 50 members. Section 63(1A) of the Companies Act exempts a company whose shares are listed on a stock exchange in Singapore from section 63(1)(d). This was also introduced in 2003 as shares of such companies are traded daily and compliance with this requirement would be onerous.

39 Representations were received that some countries such as the USA or certain European states have privacy laws which protect their citizens' right to non-disclosure of their personal identification details. As a result, Singapore companies listed in such countries face difficulties in compelling disclosure of such information. However to date, ACRA has not received any conclusive evidence that it is impossible to comply with our laws.

40 Like Singapore, the UK formerly required the shareholders' details to be reported but this was abolished in October 2009[2]. Australia (section 254X of the Corporations Act 2001) and New Zealand (section 43 of the New Zealand Companies Act 1993) only require reporting of details of shares issued.

41 The respondents consulted were in favour of leaving the exemption under section 63(1A) to the Registrar's discretion, as a sweeping exemption might go too far. The respondents are of the opinion that it would be preferable to exempt only foreign exchanges with comparable investor protection laws. Contrary to the comments received, the Steering Committee recommends an extension of the exemption under section 63(1A) to all listed companies, wherever listed. The reasons are (1) the information in section 63(1)(d) is from the Register of Members which is open to public inspection and so there should be no difficulty for anyone who is interested to obtain the information from the company register in any case; and (2) it is in line with the vision of Singapore to be a trusted place for business, hence there should not be a distinction drawn between the information available on Singapore-listed and foreign-listed Singapore companies. As for the concern that a sweeping exemption goes too far and only certain foreign exchanges with credible investor protection laws should be recognised, it would be difficult to draw up such a list.

[2] UK's "The Companies (Shares and Share Capital) Order 2009" has come into effect from 1 October 2009 and there will no longer be any requirement for shareholders' details to be reported.

<u>Recommendation 3.12</u>

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

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

42 Related to the above, another proposal was to amend section 63(1) of the Companies Act 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, subject to the following conditions:

(a) the total number of shares allotted and issued pursuant to the equity-based incentive plans during any financial year does not cumulatively exceed 15% of the total number of issued shares in the capital of the company as disclosed in the last annual return of the company;

(b) the aggregate number of employee-plan shares allotted and issued must be notified to ACRA, on a cumulative bulk basis, within 45 days from the end of each financial quarter; and

(c) the batch report would have to permit reporting the consideration received on a weighted-average basis for the batch, rather than based upon the individual issuances within the batch[3].

43 The argument in favour of this is that companies listed in the USA would have complied with the reporting requirements under US securities laws and these are publicly available and provide sufficiently meaningful information to investors. In any case, members of the public and shareholders also have access to the register of members which will allow them to ascertain the identities of all shareholders and their shareholdings.

44 Australia, the UK and New Zealand do not have a similar concept.

45 Mixed views were received from the respondents during consultation. After consideration, the Steering Committee recommends to maintain status quo for section 63(1) to ensure greater transparency and prompt reporting.

[3] By way of illustration, this translates to reporting the issuance of an aggregate of X shares in the period (ideally aligned with one fiscal quarter) for an aggregate consideration of $Y, or for a weighted average issuance price of $Z per share. The need to identify the individual allottee, personal identifiable information and the issue price per share on an issuance-by-issuance basis, as currently contemplated by section 63(1) of the Companies Act, will require modification.

<u>Recommendation 3.13</u>

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.

(f) Definition of "share"

46 The definition of a "share" in section 4 of the Companies Act is similar to the UK definition except for the recognition of stocks as shares. New Zealand and Australia do not provide a basic definition of shares in their legislative equivalents. Australia relies on the common law to define shares[4]. However, section 2 of the New Zealand Securities Transfer Act 1991 does define shares to include options. Section 121 of the Companies Act goes on to clarify the nature of shares as "movable property", but the UK and New Zealand only refer to shares being "personal property" while Australia included an additional reference to shares as "personal property" which is transferable.

47 The Steering Committee is of the view that the differences in the definition of "share" and the nature of shares in the different jurisdictions do not lead to any difficulties and hence no change is required.

48 When consulted, there were no opposing views received.

<u>Recommendation 3.14</u>

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

(g) Dematerialisation of shares

49 By virtue of section 130(1) of the Companies Act a share certificate must be issued to the holder of shares within two months of an allotment or within one month of a transfer. Although Singapore has not dematerialised shares, immobilisation has been achieved for listed companies but shareholders still have the option of withdrawing listed company share certificates from the Central Depository Pte Ltd (CDP)[5]. This is administratively burdensome without any compensating benefit.

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[4] E.g. "A share is a type of contractual claim against a company. It is an example of intangible property called a 'chose in action' or 'thing in action'." Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW) (1948) 77 CLR 143 at 154.

[5] Regulation 20 of the Companies (Central Depository System) Regulations states that "A depositor may, on application in writing to the Depository, withdraw any documents evidencing title relating to his book-entry securities that are standing to the credit of his account with the Depository."

50 In the UK, since the Uncertificated Securities Regulations came into effect in 2001, most shares have been dematerialised. Notably this was achieved by subsidiary legislation although the default position under the UK Companies Act 2006 is that share certificates should still be issued. In New Zealand, share certificates have been largely dematerialised[6]. In Australia, ASX listed shares have been dematerialised for about 10 years.

51 When consulted, most respondents agreed that Singapore should follow suit. SGX had no objections but commented that the Central Depository System should still be designated as the master register for listed companies. Some however is of the opinion that dematerialization should only be considered for public listed companies. For private companies, the certificates show evidence of ownership and may be needed by the shareholders who should be issued with share certificates. Also, fresh issues and transfers of shares are not likely to be so frequent for private companies, hence it is more cost efficient to retain share certificates. After consideration, the Steering Committee recommends dematerializing shares of public companies, but dematerialization shall not be mandatory at this point in time.

Recommendation 3.15

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

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

52 In line with the aim of retaining only core company law in the Companies Act, the Steering Committee considered whether the provisions in the Companies Act which relate to the CDP should be extracted and inserted into other legislation.

53 When consulted, most respondents agreed that the CDP provisions should be extracted and migrated out of the Companies Act as it is not core company law.

54 The Steering Committee recommends that the CDP provisions be extracted and moved into a separate stand-alone Act.

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.

[6] They are only mandated for public companies whose shares cannot be transferred under an approved scheme which does not require a share certificate for transfer – presumably a small number given that New Zealand Securities Exchange's FASTER system can be so transferred.

V. DEBENTURES

55 Currently section 93 of the Companies Act requires every company which issues debentures (not being debentures transferable by delivery) to keep a register of holders of the debentures. The register is open to inspection by debenture holders and shareholders.

56 In the UK, maintenance of a register of debenture holders is not mandatory. However, if there is such a register then it is open for inspection not only by shareholders and debenture holders but also by any other person. The relevant provisions in the UK Companies Act 2006 are at sections 743 to 747.

57 The New Zealand Companies Act 1993 has only 3 sections (95A to 95C) on debentures – similar to sections 95 and 96 of the Singapore Companies Act. No register of debenture holders is mentioned. However, where debentures are secured, they would fall under the Personal Property Security Act 1999 effective from 1 May 2002. This does have a registration mechanism applicable if the creditor is not in possession of the security. The Australian legislation has no mention of a register of debenture holders.

58 The Steering Committee consulted on whether we should adopt the UK approach. There were mixed views received from the respondents. After review, the Steering Committee recommends no change to section 93 since there was no call to abandon the current regime. However, the current regime can be improved for better transparency. There is no reason that the register of debenture holders and trust deed should stand on a higher level of confidentiality than the register of members which is open to public inspection. In fact it will promote corporate transparency to allow public inspection, in particular for convertible debentures and debt restructuring deals.

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.

VI. SOLVENCY STATEMENTS

59 The Companies (Amendment) Act 2005 reformed the law on capital maintenance substantially. It introduced capital reductions without the necessity for court intervention, further liberalised financial assistance restrictions, permitted share buybacks and redemption of redeemable preference share from capital and introduced treasury shares. One of the safeguards introduced was the satisfaction of the requisite solvency test. The Steering Committee considered but is not persuaded that the capital maintenance regime should be entirely abolished in favour of solvency tests as a means to protect creditors. The Steering Committee acknowledges that this is a possible development in the longer term but is of the opinion that it is not necessary to adopt such a policy at present. Instead, the Steering Committee proposes the following refinements to further improve the capital maintenance regimes.

(a) Uniform solvency statement

60 Under section 7A of the Companies Act (which applies to financial assistance, redemption of preference shares and capital reduction) the test imposed on directors is:

“(a) that they have formed the opinion that, as regards the company’s situation at the date of the statement, there is no ground on which the company could then be found to be unable to pay its debts;

(b) that they have formed the opinion —

(i) if it is intended to commence winding up of the company within the period of 12 months immediately following the date of the statement, that the company will be able to pay its debts in full within the period of 12 months beginning with the commencement of the winding up; or

(ii) if it is not intended so to commence winding up, that the company will be able to pay its debts as they fall due during the period of 12 months immediately following the date of the statement; and

(c) that they have formed the opinion that the value of the company’s assets is not less than the value of its liabilities (including contingent liabilities) and will not, after the proposed redemption, giving of financial assistance or reduction (as the case may be), become less than the value of its liabilities (including contingent liabilities).”

61 Under section 76F(4) of the Companies Act (which applies to share buybacks) the test is that:

“(a) the company is able to pay its debts in full at the time of the payment and will be able to pay its debts as they fall due in the normal course of business during the period of 12 months immediately following the date of the payment; and

(b) the value of the company’s assets is not less than the value of its liabilities (including contingent liabilities) and will not after the proposed purchase, acquisition or release, become less than the value of its liabilities (including contingent liabilities).”

62 The key reasons for a similar but non-identical solvency test, both in content and form, for buyback transactions was to provide a pro-business policy given the continuous nature of such transactions and to retain some consistency with the former test which the market was familiar and comfortable with. After review, the Steering Committee recommends that it is timely to consider an identical solvency test for all transactions. In addition, the requirement in the section 76F(4) test that the company should be “able to pay its debts in full at the time of the payment” is unduly onerous and rather hypothetical since most companies would hold non-cash assets which would have to be liquidated if they were to pay their debts. The amount that may be recovered in the event of such liquidation would be difficult to estimate. As such, the section 7A test is preferable to the section 76F(4) test. When consulted, most respondents agreed with the Steering Committee. One alternative view was the solvency tests in section 7A are in principle more onerous than section 76F(4), though in practice the differences are likely to amount to little.

63 The UK solvency statement under section 643 of the UK Companies Act 2006 is similar to section 7A of the Singapore Companies Act but it does not include an equivalent of section 7A(1)(c). The New Zealand solvency test at section 4 of the New Zealand Companies Act 1993 requires that the company should be able to pay its debts as they become due and should have assets exceeding its liabilities. There is no comparable Australian provision.

Recommendation 3.18

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

(b) Declaration, not statutory declaration

64 Currently section 7A(2) of the Companies Act requires that the solvency statement should be in the form of a statutory declaration. Section 7A(2)(b) provides an alternative to the statutory declaration requirement – it provides that a company which is subject to audit requirements may use a solvency statement which is not in the form of a statutory declaration if accompanied by a report from its auditors that the statement is not unreasonable. Similarly, as part of the amalgamation process, various solvency statements are required to be made by way of a statutory declaration (sections 215I(2) and 215J(1) of the Companies Act).

65 In practice, directors are very reluctant to sign statutory declarations because of the perceived implications under the Oaths and Declarations Act. Auditors are also apparently unwilling to provide a report in accordance with section 7A(2)(b) probably due to the forward-looking nature of the solvency statement.

66 The Steering Committee is of the view that it would not be pro-business to impose statutory declarations. A normal declaration could still be subject to adequate criminal sanctions under section 402 of the Companies Act if it is false. When consulted, most respondents agreed with the Steering Committee.

67 Section 643 of the UK Companies Act 2006 on solvency statements does not require a statutory declaration and neither do the relevant New Zealand provisions like section 52(2) or 70(2) where the directors are only required to sign a certificate. There is no comparable Australian provision. In view of the above, the Singapore requirement for statutory declarations should be done away with. Section 157 of the Companies Act on directors' duties and section 401(2) of the Companies Act on misleading statements should be adequate to police solvency statements.

<u>Recommendation 3.20</u>

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

(c) Solvency statement by the Board of Directors

68 The solvency statement required under sections 70(4)(a), 76(9A)(e), 76(9B)(c), 78B(3)(a) and 78C(3)(a) of the Companies Act require the approval of "all the directors" of the company. However, companies normally operate by majority vote of the Board of Directors. It is therefore anomalous to require the approval of "all the directors" for a transaction. Also, in practice, the requirement can be defeated by some directors resigning and rejoining after the formalities have been executed. The Steering Committee considered if the requirement for all directors to approve the solvency statement can be simplified.

69 In New Zealand, it is the board that must be satisfied that the solvency test is satisfied and only the directors who vote in favour of the corporate action need sign the certificate (see eg sections 52 and 70 of the New Zealand Companies Act 1993). However, the UK solvency statement as defined at section 643 is a statement by "each of the directors". There is no comparable Australian provision.

70 When consulted, majority of the respondents agreed that solvency statements should only require the approval from the board of directors, rather than all directors. However, the minority which disagreed (including MAS) preferred that the status quo be retained. Their reasons were that the making of solvency statements should not be regarded as part of the ordinary business of the company where a majority vote will suffice. The unwillingness of one or more directors to sign the solvency statement calls into question the veracity of the statement. It is unlikely that directors of listed companies will try to circumvent the requirements in the manner highlighted, as their resignation/or re-appointment will have to be disclosed and subject to public scrutiny. Also, having all the directors make the solvency statement provides better protection for the creditors. In view of the fact that 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. After review, the Steering Committee was persuaded that the present position should remain.

<u>Recommendation 3.21</u>

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).

VII. SHARE BUYBACKS AND TREASURY SHARES

(a) Relevant period for share buybacks

71 Whilst a company may now acquire its own shares, section 76B of the Companies Act specifies a cap on such share buybacks. Section 76B(3) states that "The total number of ordinary shares and stocks that may be purchased or acquired by a company during the relevant period shall not exceed 10% … ".

72 The "relevant period" is defined in section 76B(4) as "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 earlier, after the date the resolution in question is passed".

73 The definition of the "relevant period" can lead to different lengths of time permitted, depending on when the buyback mandate was adopted. For example, if the resolution approving the share buyback is passed at an Annual General Meeting (AGM), the relevant period would start from the last AGM, one year before the resolution, to the next AGM, one year after the resolution. The one year before the resolution might also have been the "relevant period" for an earlier share buyback resolution and if the 10% cap on purchases had been reached in that period then the current resolution would effectively be a dead letter.

74 The "relevant period" should not be defined by reference to the resolution date. Instead any period between two consecutive AGMs should be a "relevant period" during which the 10% cap cannot be exceeded.

75 In Australia, a "10/12 limit" is applied, beyond which shareholder approval is required (see section 257C of the Corporations Act 2001) for share buybacks. Section 257B(4) of the Australian Corporations Act 2001 states that "The 10/12 limit for a company proposing to make a buy-back is 10% of the smallest number, at any time during the last 12 months, of votes attaching to voting shares of the company". The position in other jurisdictions is not comparable.

76 In New Zealand, for buyback of shares without prior notice to shareholders under section 65(1)(b) of the New Zealand Companies Act 1993, "the number of shares acquired together with any other shares acquired … in the preceding 12 months does not exceed 5 percent of the shares in the same class as at the date 12 months prior to the acquisition of the shares". If that limit is exceeded[7] then a different procedure under section 63 involving notice to shareholders applies.

77 In the UK, section 725 of the UK Companies Act 2006 provides that "the aggregate nominal value of shares held as treasury shares must not at any time exceed 10% of the nominal value of the issued share capital of the company at that time".

78 The Steering Committee recommends that the definition of the "relevant period" for share buybacks in section 76B(4) be amended to be from "the date an AGM was held, or if

[7] Section 67A(1) sets a 5% limit to the treasury shares that a company may hold; with any excess being deemed cancelled.

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". When consulted, majority of the respondents agreed with the recommendation.

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".

(b) Time periods for measuring threshold of share buybacks

79 The foregoing recommendation amounts to a conceptual change in the definition of the "relevant period" from a defined period for a particular resolution to a general period from one AGM to the next AGM. Accordingly, some consequential amendments to section 76B of the Companies Act will be required.

80 In sections 76B(3)(a) and 76B(3B)(a), the reference to "the last AGM ... held before any resolution passed ..." should be replaced with "the beginning of the relevant period". Also wherever "the relevant period" appears, it should be replaced with "a relevant period". When consulted, majority of the respondents agreed with the Steering Committee.

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".

(c) Repurchase of "odd-lot" shares through a discriminatory offer (an "odd-lot" refers to shareholdings of less than 100 shares)

81 Where a listed company has substantial number of odd-lot shareholders, it will incur administrative costs to secure compliance with the Companies Act. Apart from the cost of dispatching notices of general meetings and annual reports to such shareholders, the odd-lot shareholders would be discouraged from attempting to dispose of their small shareholdings given the relatively high transaction costs.

82 Sections 76B to 76G of the Companies Act preclude a listed company from repurchasing odd-lots from the odd-lot shareholders through a discriminatory repurchase

offer. Section 76(1) also prohibits a company from financing dealings in its shares, unless they fall within the exceptions (including buybacks).

83 Like Singapore, both the UK (section 694 of the UK Companies Act 2006) and New Zealand (sections 60(1)(b) and 107(1)(c) of the New Zealand Companies Act 1993) do not allow buyback of odd-lot shares through a discriminatory repurchase offer[8]. US laws also do not specifically authorise odd-lot programs. However the US Securities and Exchange Commission (SEC) will issue a "no-action" letter to facilitate such odd-lot repurchase programs in USA. A no-action letter serves as a precedent vis-à-vis the SEC in the same way that a prior published case serves as a precedent for the courts.

84 Australia (section 257B(1) of the Corporations Act 2001 read with the Australian Listing Rules) allows repurchase of odd-lots from the odd-lot shareholders through a discriminatory repurchase offer[9].

85 When consulted, all the respondents agreed with the Steering Committee to amend the Companies Act to provide for an additional exception to the share acquisition prohibition for listed companies to enable such companies to make discriminatory repurchase offers to odd-lot shareholders. While this may seem discriminatory against holders of odd-lots of more than 100 shares, the number of such holders is very small. The disparity in prices is also not a valid concern since it is not compulsory for the seller to sell his odd-lot shares.

<u>Recommendation 3.25</u>

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.

(d) Treasury Shares

86 Section 76K(1)(b) of the Companies Act states that treasury shares may be transferred for the purposes of "an employees' share scheme". The Steering Committee is of the opinion that this is unduly restrictive. The Steering Committee recommended that companies should have the latitude to use treasury shares pursuant to schemes meant to benefit persons other than employees as well, for example directors, consultants, spouses and family members of employees and directors. The majority of the respondents consulted agreed, though some commented that the provision should be confined to employees, so as not to be exploited by

[8] The UK (section 694) allows buyback of shares (including odd-lot shares) subject to the terms of the contract authorised by a special resolution of the company. New Zealand allows buyback of odd-lot shares subject to shareholders' consent. Section 60(1)(b) allows a company to make an offer to certain shareholders to buy their shares, provided that certain conditions are fulfilled including consent in writing of all shareholders, or if the offer is expressly permitted by the constitution and is made in accordance with the prescribed procedure. Alternatively, shares in the company may be acquired where all entitled persons agree or concur (section 107(1)(c)). Entitled persons are defined to mean a shareholder or person upon whom the constitution confers the rights and powers of a shareholder.

[9] Section 257B(1) allows the purchase of all of a holder's shares in a listed corporation if the shares are less than a marketable parcel within the meaning of the rules of the relevant financial market. Under the ASX Market Rules Procedure 2.10, a marketable parcel of equity securities is a parcel of not less than $500 based on certain criteria.

directors for their own benefit or used for the benefit of third parties who have not contributed economic value to the company. The Steering Committee disagreed, as there is no apparent reason to disallow directors from benefitting from a share scheme under section 76K(1)(b). The restricted uses of treasury shares were introduced as a measure of prudence when treasury shares were introduced for the first time in Singapore. It is timely to review if such restrictions are necessary. After review, the Steering Committee is of the opinion that if specific safeguards are necessary for listed companies, these should be imposed by rules applicable to only listed companies.

87 In the UK, treasury shares may be transferred by a company "pursuant to an employees' share scheme" (section 727(1)(b) of the UK Companies Act 2006). There is no comparable provision in the New Zealand Companies Act 1993[10]. In Australia there is no provision for treasury shares[11].

88 The Steering Committee also considered but disagreed with increasing the section 76I maximum treasury shareholding from the current 10% to 15%. The UK recently suggested removing the 10% cap on companies holding shares in treasury and extending the period for which authorisation may be given from 18 months to 5 years[12]. This proposal arose from the implementation of a EU Directive and applies to certain types of shares bought from profits. Given that Singapore allows shares to be bought from capital, it is debatable whether we should also similarly remove the maximum treasury shareholding restriction and extend the period of authorisation[13]. Section 67A(1)(c) of the New Zealand Companies Act 1993 imposes a cap of up to 5% of treasury shares in a particular class.

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.

VIII. FINANCIAL ASSISTANCE FOR THE ACQUISITION OF SHARES

89 Under the Companies Act a company is not permitted to give financial assistance for acquisition of its own shares or those of its holding company, unless the company falls within the excepted situations under subsections (8), (9), (9A), (9B) or (10) of section 76. In particular, subsections (9A) and (9B) were introduced to allow financial assistance when a solvency statement is given by the directors, the directors agree that the financial assistance should be given, it is in the best interest of the company to do so and the terms/conditions of

[10] The provisions relevant to treasury stock are at sections 67A to 67C of the New Zealand Companies Act 1993.
[11] Section 257H(3) of the Australia Corporations Act 2001 provides that "Immediately after the registration of the transfer to the company of the shares bought back, the shares are cancelled."
[12] Draft Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009 at www.berr.gov.uk.
[13] Draft Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009 at www.berr.gov.uk

the financial assistance are fair and reasonable. Subsection (9A) applies only in the limited situations where less than 10% of the company's paid up capital and reserves is involved, in which case only a directors' resolution is required. Where larger amounts are involved, subsection (9B) applies, requiring both directors' and shareholders' approval. If the directors elect not to provide the solvency statement, they can also rely on the process under subsection (10).

90 All leading jurisdictions have reformed this area, moving towards eliminating or relaxing restrictions on financial assistance. The UK has abolished financial assistance prohibitions with respect to private companies but had to retain them for public companies as that is required by a EU directive, subject to limited exceptions. Australia reformed this area in 1998 to transform financial assistance prohibitions to qualified authorization. New Zealand abolished financial assistance restrictions and now allows distributions to shareholders subject to a solvency test. The common reasons that prompted the changes included concerns of uncertainty in what amounts to financial assistance and impediments to commercial transactions.

91 The Steering Committee was initially in favour of abolition of financial assistance prohibitions for all companies because:

(a) Financial assistance restrictions exist to protect creditors and shareholders against misuse and depletion of a company's assets. However, abusive transactions can be controlled in other ways, e.g. through provisions on directors' duties or through fraudulent/wrongful trading provisions. If necessary, both directors' duties and section 339 on wrongful trading could be beefed up or suitably clarified to provide greater certainty.

(b) Section 76 (in particular subsections (3) and (4)) is overly complex and has been interpreted differently by judges. This has resulted in uncertainty and difficulty in application. In any case, with the extensive and substantial exceptions introduced by subsections (8) to (9B), financial assistance prohibitions have lost their potency.

(c) Financial assistance provisions cause difficulty in structuring transactions since they tend to cause delay.

92 The respondents consulted had mixed views on this issue. Alternative views expressed were:

(a) While financial assistance prohibitions raise legal uncertainties and might not be beneficial to the business community as a whole, there is still a genuine danger of misuse of the company's capital and assets at the cost of creditors and shareholders. The rationale for financial assistance prohibitions is still valid to a certain extent.

(b) The abuses which the financial assistance provisions sought to remedy would not be sufficiently addressed by relying on directors' fiduciary duties and statutory wrongful trading provisions.

(c) The Australian approach to financial assistance (Corporations Act 2001 Part 2J section 260A to section 260D) should be recommended.

93 In particular, MAS was of the opinion that while the current financial assistance provisions can be abolished for private companies, it would **not** be prudent to abandon the provisions for public companies for the following reasons:

(a) Public companies tend to have a larger shareholder base. There are currently over 1,500 public companies in Singapore of which more than half are unlisted. More importantly, there are quite a number of public companies that have de-listed from SGX over the years but are still held by a large number of public shareholders for various reasons.

(b) Public companies (listed or unlisted) raise capital from the public for the specific purpose of furthering their businesses, and these businesses would not ordinarily include the giving of assistance to acquire their shares. While there may be legitimate reasons why a company needs to undertake such a transaction in furthering its business objectives, at the minimum there should be some conditions that the company has to fulfil.

(c) If left unfettered, financial assistance transactions can be used to circumvent the prohibition on a company acquiring its own shares. Where financial assistance is provided on a non-arm's length basis, minority shareholders and creditors will be prejudiced. Financial assistance restrictions are important in getting boards to apply their mind to the transaction and assess whether the transaction is in the best interest of the company.

(d) Provisions on directors' duties and fraudulent/wrongful trading tend to be either too general or too narrowly circumscribed. Seeking a remedy under these provisions is also likely to be more challenging, with the need to establish the necessary intent (eg for fraudulent trading), and consequently expensive. Abusive transactions may not be effectively curtailed through provisions relating to market manipulation in Part XII of the Securities and Futures Act (eg, creation of false market). Hence, these provisions may not have a strong deterrent effect on controlling shareholders or directors.

(e) Total abolition of financial assistance restrictions for public companies would also put us out of line with other major jurisdictions (eg Australia, New Zealand, Hong Kong and EU countries) which continue to maintain limitations on financial assistance. The UK has abolished financial assistance restrictions for private companies but kept them for public companies.

(f) Under the Singapore regime, for financial assistance to fall under an exception and thus be allowed, resolutions of the board and shareholders' resolutions will generally need to be obtained unless all the directors make a solvency statement and the board resolves, *inter alia*, that financial assistance is in the best interests of the company and the terms and conditions are fair and reasonable (even then, the amount of financial assistance is capped at 10% of the capital of the company). MAS proposed that the Steering Committee consider Australia's qualified authorisation regime. The Australian Corporations Act allows financial assistance if the giving of assistance does not materially prejudice the interests of the company or its shareholders, or the company's ability to pay its creditors. The determination of whether a transaction involves "material prejudice" is made by the board and if a transaction is found not to involve "material prejudice," shareholder approval is not required. In this way, MAS sees the Australian regime as a middle ground between removing financial assistance provisions altogether and retaining the current prohibition on financial assistance. Under the Australian regime, potentially beneficial or innocuous transactions will arguably not be seen as involving "material prejudice" and will be allowed without the need for further shareholder approval. The Australian regime also provides more commercial certainty and comfort for counterparties who have sold shares to parties involved in financial assistance, as such transactions will not be invalid by reason of a contravention of financial assistance provisions (although the directors of the company may be punished). In contrast, under the Singapore regime, such transactions will either be void or voidable.

(g) If financial assistance restrictions prevent or render more expensive a range of potentially beneficial or at least innocuous transactions, the solution is not to abandon the current regime entirely but rather to refine the financial assistance restrictions to more clearly define the conduct which they seek to prohibit. This seems to be the route that some Singapore judges have taken in recent years[14].

94 The Steering Committee acknowledges that the rationale for financial assistance prohibitions is still valid. The prohibitions are to ensure that the capital of a company is preserved intact and not eroded by deliberate acts done otherwise than in the ordinary operations of the company undertaken in the pursuit of its objects for which it was established. Other secondary purposes of financial assistance prohibitions are to prevent market manipulation and to inhibit management of the company interfering with the normal market in the company's shares by providing support from the company's resources to selected purchasers. However, the determining question is whether financial assistance prohibitions are effective as an ex ante rule against the improper dissipation of a company's capital. For an ex ante rule to work well, it should be clear when it is breached and it should not be so broad as to cover necessary and acceptable transactions. Bearing this in mind, the Steering Committee recommends the following refinements.

95 As private companies are closely held, shareholders have greater control over how they can have a say in the company's decision to give financial assistance. Creditors can also rely on breach of directors' duties and provisions on fraudulent and wrongful trading. Also as private companies have fewer resources and the cost of obtaining legal advice is relatively heavier to them, on balance the Steering Committee proposes the abolition of financial assistance prohibitions for private companies (unless they are subsidiaries of public companies). This is consistent with the position in the UK and HK, though in HK, the intended abolition for private companies in the long run is supported in principle, but would not be included in the pending HK Companies Bill.

96 In contrast, public companies have a larger number of shareholders and they have limited control over the company's decision to give financial assistance. It is therefore important to retain financial assistance prohibitions on public companies and their

[14] For instance, in *PP v Lew Syn Pau* [2006] 4 SLR(R) 210, Sundaresh Menon JC (as he then was) sought to limit the prohibition in two ways. Firstly, he inferred a requirement that the FA must result in a depletion of the corporate assets, or at least put them at risk. Secondly, even if the corporate assets are depleted (or put to such risk), the prohibition is not contravened if the transaction is genuinely entered into in the company's own commercial interest, and not merely to financially assist the acquisition of its shares.

subsidiaries, to ensure adequate protection of shareholders and creditors.

97 To address the concern that the present financial assistance restrictions may prevent or render more expensive a range of potentially beneficial or innocuous transactions, the Steering Committee accepts MAS's suggestion to include an additional exception 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. This is adapted from the Australian approach of authorized assistance.

98 As for the question of whether any of the alternative exceptions under section 76(9A), (9B), (9C) and (10) should be removed, the Steering Committee prefers not to do so. There is some uncertainty surrounding the materiality threshold while the solvency test may not be suitable for some situations. The limitations of these two options may impede legitimate financial transactions which directors should be able to consider under the alternative options.

99 Section 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 3.27

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

Section 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

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

IX. REDUCTION OF CAPITAL

(a) Solvency statements for capital reductions without court sanction

100 Under the Companies Act, a company may reduce its share capital without court sanction if approved by special resolution of its shareholders. The relevant provisions are section 78B for private companies and section 78C for public companies. Unless the reduction is solely by way of cancellation of any lost paid-up capital, all directors must

provide a statutory declaration of solvency which conforms with section 7A.[15] Creditors are protected by section 78D which allows any creditor to apply to court for cancellation of the special resolution for capital reduction. Notice of the special resolution must be lodged with ACRA within 8 days in accordance with the publicity requirements as prescribed at regulation 6 of the Companies Regulations.

101 Court-sanctioned capital reduction under section 78G does not require a solvency statement.

102 The Steering Committee has considered whether the solvency statement requirement is unnecessary for capital reductions, particularly since directors are already duty bound to act in the best interests of the company. One alternative considered in lieu of solvency statements is sending a notification to all creditors giving them opportunity to object. However the reality is that creditors may overlook any such notice or may not be able to respond in time.

103 In the UK the position is similar for private companies in that a solvency statement is required for capital reduction without court sanction. In New Zealand, the reduction of shareholders' liability may amount to a distribution, for which a solvency statement is required. In Australia, capital reductions are not governed by a solvency test.

104 On the whole it was felt that the solvency statement is an objective measure which does serve a useful purpose and so should be retained. When consulted, all the respondents agreed with the proposal.

Recommendation 3.30

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

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

105 Although sections 78B(1) and 78C(1) of the Companies Act provide that solvency requirements apply for capital reduction, sections 78B(2) and 78C(2) provide that they do not apply if the reduction of capital is in respect of the cancellation of capital lost or unrepresented by available assets. Reduction of capital in these circumstances does not involve either a reduction of liability in respect of unpaid share capital or the distribution to a shareholder of any assets.

106 In the UK, a solvency statement is required for capital reduction without court sanction, but this avenue is only available to private companies. In Australia, under section 256B of the Corporations Act 2001, capital reduction is allowed if it is fair and reasonable, does not prejudice creditors and is approved by shareholders – no solvency statement is required. The New Zealand Companies Act 1993 has no comparable provisions on capital reduction but relies on a solvency test for distributions in general.

[15] Sections 78B(3) and78C(3).

107 The Steering Committee recommends that the dispensation of solvency requirements should be extended to generally 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. When consulted, majority of the respondents agreed.

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.

(c) Time frames for capital reduction

108 Sections 78B(3) and 78C(3) of the Companies Act prescribe that the solvency statement required for capital reduction should be made before the resolution approving the capital reduction but should precede the resolution by not more than 15 days in the case of private companies or 22 days in the case of public companies.

109 In the UK, the time frame specified at section 642 of the UK Companies Act 2006 for the solvency statement relating to a private company is "not more than 15 days before the date on which the resolution is passed". There is no comparable provision for public companies in the UK. Australia and New Zealand have no comparable provisions whether for public or private companies.

110 Given that notice of 14 and 21 days is required before the meeting to pass the resolution in the case of private and public companies respectively, this leaves an allowance of only a single day for the solvency statement to be made. The Steering Committee is of the view that a little bit more latitude should be allowed instead of having such a tight time frame and this was supported by all the respondents consulted.

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.

(d) Declaration by directors

111 Directors are under a fiduciary duty to act in the best interests of the company. Although requiring a declaration that any capital reduction is in the best interests of the company may serve the purpose of highlighting this duty at a point when it is particularly important to be aware of it, doing so may lead to a misunderstanding that there is some higher standard of duty associated with capital reduction in particular. This might also deter companies from using this procedure. The UK, Australia and New Zealand do not require such a declaration of directors. This was supported by most of the respondents consulted.

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.

X. DIVIDENDS

112 Section 403(1) of the Companies Act provides that "No dividend shall be payable to the share-holders of any company except out of profits". The observations and recommendation in the 2002 report of the Company Legislation and Regulatory Framework Committee (CLRFC) were:

> "3.3 Dividends
>
> 3.3.1 We have considered the prevailing common law rules relating to dividends and developments in the UK and Australia with a view to modernising the Singapore position. Under common law, dividends are payable if there are profits in a particular year, even if the company has accumulated losses on its balance sheet.
>
> 3.3.2 We also considered the meaning and scope of "profits". Pursuant to s. 39 of the UK Companies Act 1980 (now s. 263 and s. 275 of the UK Companies Act 1985), dividends are only distributable out of accumulated realised gains minus accumulated realised losses (so far as not written off in a prior reduction of capital exercise). The UK regulators have proposed to leave it to the accounting profession to prescribe the meaning of 'realised'.
>
> 3.3.3 In Australia, dividends are in theory payable even though there are revenue deficits in previous years. However, the profits must be available at the date of payment, and not the date of declaration. New Zealand has a statutory solvency test that applies to all types of distribution.
>
> 3.3.4 We propose adoption of the UK approach that distributions may only be made out of accumulated realised gains minus accumulated realised losses and to leave it to prescribed accounting standards and rules to determine the meaning of "realised". We note that the Accounting Standards Board in the UK is proposing to move away from the concept of "realised profits" and would recommend that developments be reviewed by the CCDG.
>
> **RECOMMENDATION 2.20**
>
> **The CLRFC recommends that the Council on Corporate Disclosure and Governance review the accounting standards and rules to limit distributions to be made only out of accumulated realised gains minus accumulated realised losses in the light of international developments moving away from the concept of 'realised profits'."**

113 Recommendation 2.20 of the CLRFC has not been implemented to date. The position in New Zealand remains unchanged.

114 Australia amended their legislation in June 2010[16] to repeal the profits test and allow a company to pay dividend if:

(a) the company's assets exceed its liabilities and the excess is sufficient for the payment of the dividend;
(b) it is fair and reasonable to the company's shareholders as a whole; and
(c) it does not materially prejudice the company' ability to pay its creditors.

115 The reforms came about as the Australian Corporations Act does not provide guidance on or a definition of the term "profits". In addition, the legal precedents were outdated, complex and may not be in line with present accounting principles. The nature of the accounting principles for the calculation of profits has changed over time and the requirement for companies to pay dividends only out of profits was inconsistent with the trend to lessen the capital maintenance doctrine in Australia[17].

116 In the UK the use of “realised profits” had not led to certainty in the amounts available for distribution. Towards the end of 2008, the Institute of Chartered Accountants of England and Wales and the Institute of Chartered Accountants of Scotland issued Technical Release 07/08[18] which provides over a hundred pages of draft guidance on the determination of realised profits and losses in the context of distributions under the Companies Act 2006. This shows that the concept of “realised profits” is difficult to define in itself. There has been no concrete development on the UK proposal to move away from the concept of “realised profits” as recorded in the CLRFC report.

117 The Steering Committee first considered the New Zealand approach, i.e. whether a solvency test rather than profits for dividend distribution would be more consistent with the current capital maintenance framework. However any change in dividend distribution rules might have a negative impact on the market, since current rules are well known and have the advantage of being simple and straightforward. Also, there has been no practical difficulty in the application of the current section 403 rule for dividend distribution.

118 The Steering Committee also considered the Australian approach but is of the opinion that other than the observations applicable to the NZ approach, there may be further uncertainties with the Australian approach as an assessment would be needed when determining if a dividend distribution is "fair and reasonable to shareholders" or if it would "materially prejudice the company's ability to pay creditors". Companies are likely to face practical difficulties when making such assessments.

119 The Steering Committee considered the UK approach and also whether section 403 is clear enough in specifying that dividends may be distributed out of “profits”. The issue is whether section 403 should be modified so that dividends are payable only out of

[16] Access http://www.comlaw.gov.au for the Corporations Amendment (Corporate Reporting Reform) Bill 2010
[17] Access http://aph.gov.au for the explanatory memorandum and digest of the Corporations Amendment (Corporate Reporting Reform) Bill 2010
[18] Updating previous guidelines of the ICAEW & ICAS (Institute of Chartered Accountants of England and Wales & Institute of Chartered Accountants of Scotland), to be found at http://www.icaew.com.

accumulated realised gains minus accumulated realised losses rather than simply profits. The question is whether or not prior accumulated losses should be cleared before payment of dividends is allowed. There are reasons why this should not be required, viz, current shareholders should not be burdened with disadvantages arising from accumulated losses. Also, accumulated losses may be caused purely by accounting conventions rather than trading losses. This may be one reason not to require clearance of accumulated losses. In any case, moving to the UK model of allowing only "realised" profits to be distributable would not be an improvement because it would complicate the issue, particularly considering that Singapore would then probably have to adopt something similar to the voluminous guidance on what amounts to "realised" profits issued by the Institute of Chartered Accountants of England and Wales.

120 During consultation, about half of the respondents supported no change in the current position. The opposing school conveyed their objections to the current regime based on two main grounds namely (i) ambiguity on the definition of 'profits' and (ii) changes in accounting rules. One other respondent also cited possible abuses on declaration of interim dividend prior to year end impairment review.

121 On the definition of profits, the opposing school is of the opinion that while current shareholders should not be burdened with disadvantages arising from accumulated losses, all else being equal, the presence of accumulated losses would imply that there are insufficient assets to satisfy the liabilities (disregarding other equity "reserves" items which could represent unrealized gains/losses from revaluation of assets). Hence, allowing distribution when there are accumulated losses may be perceived to be prejudicial to the interests of creditors. While accumulated losses may be caused purely by accounting conventions rather than trading losses, it is the same issue with current year's profits. In other words, the issue of whether accumulated losses should be taken into consideration remains contentious and the respondent commented that the issue should be further studied.

122 On the changes in accounting rules, the current requirement in Section 403 of the Companies Act does not adequately address accounting developments. For example, certain profit/loss items are to be taken to equity/reserve, but there is no guidance as to whether such equity items constitute distributable reserves. There should be further clarification on the types of reserves that would be deemed to be distributable as dividends. The opposing school also commented that the law should recognize that, with the development of the International Financial Reporting Standards (IFRSs), the traditional notion of "profits" may be inadequate at times. For instance, under IFRS 9 Financial Instruments, which is slated to replace International Accounting Standard 39 Financial Instruments: Recognition and Measurement (from which the Singapore Financial Reporting Standard 39 has been adapted), a company will face a situation whereby it will no longer have "profits" or "losses" arising from derecognition of an investment designated under the Fair Value through Other Comprehensive Income category, or "losses" from impairment of investment designated under such category.

123 The opposing school suggested that while adopting the "realised profits" regime in the UK may create more confusion, a middle-of-the-road approach as follows can be considered. No dividend shall be payable to the shareholders of any company except:

(a) where the company has accumulated profits (after taking into account profits/ loss for the period); or

(b) where the company is in an accumulated loss position, it would have to satisfy a solvency test (that can be modelled after the New Zealand's approach).

It was contended that the above-proposed approach promotes more prudent business practice than the current "profit" test. In addition, the solvency test would address a situation where a company does not have "profits" to show but is nonetheless able to make distributions without compromising its capital maintenance position (arising from changes in accounting rules e.g. IFRS 9). Alternatively, some respondents suggested imposing the solvency test on companies with negative equity to safeguard the interests of the creditors.

124 Taking into account all views submitted, the Steering Committee nevertheless proposes no change to the present position. The NZ, Australian and UK models were studied but not recommended for the reasons given above. As for the respondent's proposed middle-of-the-road approach, the Steering Committee acknowledges that there are some merits to this. However as this approach contains some aspects of the UK, NZ and Australian regimes, the Steering Committee recommends that the developments in other leading jurisdictions and the impact of the recent changes in Australia be monitored for the time being, before this issue is reconsidered.

125 Also, after considering the position in various jurisdictions, the Steering Committee has decided that breach of section 403 should not be decriminalised. Although not a crime in the UK or Hong Kong, making an unlawful distribution without satisfying the profits test is a crime in Singapore[19] and Australia[20]. In New Zealand, a similar crime is committed when an unlawful distribution is made without satisfying the solvency test[21]. The Steering Committee has also considered but decided that it is not necessary to amend section 403 to state that even if there is a profit for the purposes of section 403, the directors' duties under section 157 of the Companies Act still apply in respect of the directors' decision to distribute dividends.

126 The Steering Committee also considered the regulation of interim dividends. Presently the common law position is that where interim dividends are paid, there must be a reasonable expectation that there will be profits for the year to cover such interim dividends, failing which the directors may be held personally liable. The Steering Committee considered whether the Companies Act should provide that distribution of interim dividends based on the most recent financial statements (not more than about 3 months old from the date of approval of payment by directors) should be beyond reproach, no matter how the final year financial

[19] In Singapore, under section 403(2) of the Companies Act, making an unlawful distribution is a criminal offence for any director or manager who does so wilfully, punishable with fine up to $5,000 or up to 12 months in prison. In addition, section 339(3) of the Companies Act imposes criminal sanctions for insolvent trading, section 340(1) of the Companies Act imposes civil sanctions for fraudulent trading and section 401 of the Criminal Procedure Code provides for payment of costs of prosecution and compensation.

[20] Section 254T read with section 1311(1A) and Schedule 3 of the Corporations Act 2001. Furthermore, under section 588G(1A) of the Act, if it leads to insolvency then it would amount to insolvent trading which may, if in an aggravated form (i.e. involving dishonesty), be a criminal offence under section 588G(3) punishable with a maximum of $200,000 fine and/or imprisonment of 5 years and 5 years disqualification.

[21] Despite the similarity that distributions made without satisfying the relevant test is criminal in both New Zealand and Singapore, it should be appreciated that the positions are not very easily comparable given the different tests applied. Non-compliance with the New Zealand provisions would occur only if an unlawful distribution leads to insolvency, an understandably serious misdeed likely to cause harm to creditors whereas in the Singapore/Australia context, an unlawful distribution may be made by a perfectly solvent company simply because the company has no profit in its books. If the unlawful distribution is made by an insolvent Singapore company, that could amount to a breach of directors' duties or possibly insolvent trading – both themselves criminal offences in Singapore.

statements may turn out. In addition, the financial statements based on which interim dividends were paid would not have to be audited as long as they are prepared in accordance with the Financial Reporting Standards (FRS) that are applicable to that financial period.

127 The consultation process elicited mixed views from the respondents. Some alternate views were that financial results may be "lumpy" and directors could very well be aware of how the financial statements may turn out. Unlike final dividends, interim dividends are wholly provisional and anticipate the profits to be disclosed in the final accounts. Hence, requiring directors to reasonably believe that there will be profits for the year to cover such interim dividends should be retained as a necessary safeguard. In conclusion, the Steering Committee was persuaded to retain status quo. While one possible consequence was the loss of business from fund companies which aspire to pay a regular quarterly dividend, there was no basis to accord preferential treatment for such businesses.

Recommendation 3.34

The section 403 test for dividend distributions should be retained.

XI. OTHER ISSUES PERTAINING TO CAPITAL MAINTENANCE

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

128 Prior to the commencement of the Companies (Amendment) Act 2005 (hereinafter referred to as "the Amendment Act") on 30 January 2006, a company could use its share premium account to pay commissions as well as other permitted expenses incurred for an issue of shares.[22] The Amendment Act repealed the applicable provisions pursuant to the recommendations of the CLRFC.[23]

129 Whilst the Amendment Act also allowed any amount remaining in the share premium account (which has been added to and now forms part of the company's share capital after 30 January 2006) to be used for payment of expenses connected with an issue of shares incurred before 30 January 2006,[24] it does not however expressly provide that companies can use its share capital to pay for the permitted expenses, if these are incurred after 30 January 2006; neither does the Amendment Act introduce any prohibition on so doing.

[22] Section 67 of the former Companies Act (before it was amended by the Companies (Amendment) Act 2005) provided that a company may pay a commission to any person in consideration of his subscribing or agreeing to subscribe for any shares or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company if the respective conditions were fulfilled. In addition, section 69(2)(e) of the said Act expressly allowed the share premium account to be applied to write off preliminary expenses or the expenses of, the commissions or brokerage paid or discount allowed on, any duty, fee, or tax payable on or in connection with any issue of shares of the company.

[23] The relevant provisions were sections 67 to 69 of the Companies Act. They were repealed as they were no longer applicable as the concept of share premium ceased to apply with the abolition of the concept of par or nominal value. See CLRFC Final Report Para 3.1.8, Chapter 2.

[24] Section 62B (3)(b) of the current Companies Act allows a company to use the amount standing to the credit of its share premium account immediately before 30 January 2006 to write off the preliminary expenses incurred before that day or expenses incurred, or commissions or brokerages paid or discounts allowed, on or before 30 January 2006, for any duty, fee or tax payable on or in connection with any issue of shares of the company.

130 The business community and professionals commented that there is some uncertainty as to whether a company can utilise the proceeds of the issue or its share capital to meet the permitted expenses (by the prescribed accounting standards, with details in the latter part of this paragraph below) incurred after 30 January 2006, since there is no longer a share premium account mandated by law. One view taken is that all monies raised from a share issue is now part of share capital and as a general rule, any amount taken out of the share capital for the company's use amounts to a reduction of share capital. Under the Companies Act, a reduction of share capital can only take place following the procedures under Division 3A, Part IV of the Companies Act. The other (alternative) view is that Division 3A concerns a reduction in the number of shares rather than a mere reduction in share capital amount. In particular, the number of shares reduced in a reduction exercise is required to be reported and it is normal for a company to use the amount raised from its share capital for its business needs. Also, the second interpretation is consistent with the prescribed Accounting Standards which allows expenses directly related to any share issue or buyback to be deducted from the equity[25] portion of the company's balance sheet which can consist of share capital, reserves and retained earnings, ie, equity can comprise more than just the share capital.

131 Australia[26] allows a company to pay brokerage or commissions to a person in respect of that person or another person agreeing to take up shares in the company. The New Zealand Companies Act 1993 is silent on this issue. In the view of the Steering Committee, it is unclear whether share capital may be used to pay for brokerage or commissions incurred for shares bought back by the company. There is no reason why it should not apply to buybacks.

132 When consulted, most of the respondents agreed with the Steering Committee that it should be explicitly provided that a company may use its share capital to pay for expenses, brokerage or commissions incurred in an issue or buyback of shares.

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.

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

133 Prior to the commencement of the Companies (Amendment) Act 2005, companies were required to disclose the nominal value, class of the shares and the extent to which the shares are paid up in their share certificates under the repealed section 123(2)(c) of the Companies Act. Presently, companies are required to disclose the amounts paid, amounts unpaid (if any) on the shares, the class of the shares and the extent to which the shares are paid up. The reason is that with the abolition of par-value, the amount unpaid, if any, represents the outstanding amount due from the shareholders and should therefore be reflected.

[25] Paragraph 37 of FRS 32 allows expenses that are incremental and directly attributable to the share issue or share buyback to be deducted from equity. It is generally accepted that "equity" consists of share capital, reserves and retained earnings.
[26] Section 258C of the Corporations Act 2001.

134 A share certificate must be issued by a company in various circumstances, viz, when shares are allotted, transferred or subdivided, and also when share certificates are spilt, consolidated, lost or destroyed. Fulfilling the requirement to report the amounts paid under the par-value shares regime in the share certificates is not a problem because companies reported the par-value. However, representations were received that after the par-value concept had been abolished, compliance with this requirement has posed a problem in cases where shares have been issued from time to time at a premium and the premium amount has varied. This is especially so for shares of listed companies, as explained below:

(a) Shares of listed companies are deposited with CDP to facilitate scripless trading. At the first instance when the company is listed, certificates are issued to CDP as the registered holder of the then-existing shares (which very often, have been sub-divided prior to the initial public offering) and the new shares offered under the listing exercise. Such shares deposited with CDP would have different issue prices. Most listed companies also have share option schemes. In addition, a listed company may undertake equity-based exercises such as rights issues, the issue of convertible securities, private placement, capital reduction, etc, all of which entail the issue of new share certificates which are deposited with CDP. If and when a depositor decides to withdraw his shares from the CDP system and a share certificate is to be issued in his name, it is administratively impossible to ascertain what should be the amount to be stated on the share certificate in respect of the shares withdrawn from CDP, as such shares become fungible within the CDP system.

(b) Some older listed companies also continue to have shareholders holding physical scrips even after the migration to the CDP system in the mid-1990s. Whenever such shares are transferred or a shareholder's holding is consolidated or sub-divided, new certificates have to be issued. Given that shares of a listed company are publicly traded and would have changed hands many times over the years, it is very difficult to trace the amount originally paid on each share as certificates could have been transferred, split, consolidated, partially transferred, etc.

(c) Similarly, a private company or unlisted public company which has had changes to its capital structure or shareholders, or issued shares at par as well as at a premium, would also encounter similar difficulties.

135 Companies also submitted that there is not much value including "the amount paid on the shares" on a share certificate for fully-paid shares as such information is historical and that has no bearing on the rights or liabilities in respect of the shares. Rather, it is the amount payable on a partly-paid or unpaid share that is relevant to the rights or liabilities in respect of those shares. There is also an issue of confidentiality regarding the amount paid on the share, as a transferor may not like the transferee to know how much he/she has paid.

136 Lastly, companies felt that as the issue price for shares issued after 30 January 2006 is not pegged at the nominal value, the risk of making an error in recording "the amount paid on the shares" in a share certificate is correspondingly higher as shares would be issued at different times and with different issue prices. The benefit of including information relating to "the amount paid on the shares" on a share certificate is outweighed by the adverse consequences (to a company as well as the parties of a share transfer transaction) of having inaccurate information on a share certificate. Instead, section 63(1)(b) of the Companies Act

requires every company, when it makes an allotment of shares, to record in a return to be lodged with the Registrar of Companies, inter alia, "the amount (if any) paid or deemed to be paid on the allotment of each share". The return of allotment lodged pursuant to section 63 is a better source of information for companies and shareholders to confirm the conclusive amounts paid on the shares as this is public information.

137 The UK has not abolished the par-value share concept. Australia requires share certificates to disclose the name of the company, class of shares and amount (if any) unpaid on the shares.[27] However, Australia generally requires both the amounts paid and unpaid on the shares to be disclosed in its register of members[28] while Singapore requires the amounts paid or agreed to be considered as paid on the shares of each member to be disclosed in the register of members.[29] New Zealand requires the name of the company, class of and number of shares to be disclosed on the share certificate.[30]

138 Most of the respondents supported the recommendation to remove the requirement to disclose the "amount paid" on the shares in the share certificate under section 123(2)(c) and to require companies 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).

<u>Recommendation 3.36</u>

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).

(c) Financial Reporting Standards and section 63

139 Under FRS 102 equity-settled options granted by a company to its employees as part of a remuneration package will be recorded as an employee expense in the profit and loss statement, and a corresponding credit will be made to a reserve account (normally called the "share option reserve account"). When such options/warrants were exercised and shares issued, the reserve would be included as part of the share premium account. In a non-par value share regime today, companies are similarly permitted to transfer their reserves to share capital since share capital refers to the amounts received for the shares issued. When options or warrants are not exercised and shares are not issued, the accounting treatment and existing law do not prohibit capitalisation of reserves, which means that the reserves may be added to the share capital. The Steering Committee is of the view that such a policy should be retained as it is in line with the non-par regime now in place.

140 In addition, there are some differences on what amounts to share capital from the accounting perspective when compared with the legal perspective. Depending on the terms

[27] Section 1070B of the Corporations Act 2001.
[28] Section 169 of the Corporations Act 2001.
[29] Section 190 of the Companies Act.
[30] Section 95 of the Companies Act 1993.

they are issued on, redeemable preference shares may be classified in accounts as a liability rather than share capital by virtue of FRS 32. Interest-free loans between a parent and subsidiary could be deemed a capital contribution or distribution by virtue of FRS 39. However, no changes to the law are warranted on account of such changes in accounting treatment.

141 Australia and New Zealand are silent on whether the reserves can be transferred to capital, and whether deemed capital contribution and distributions such as those arising under FRS 39 are permitted in law. New Zealand does not require the consideration paid or agreed to be paid for the shares issued to be reported to the authority. However, New Zealand imposes specific duties on the board before they issue shares, options and convertible securities. These duties relate to the decision on the consideration for which the shares will be issued, the terms of the issue, determination of the reasonable cash value (if the consideration is not cash), a resolution that the consideration is fair and reasonable to the company and existing shareholders and a resolution that the present cash value for the consideration to be provided for the issue (if it is non-cash consideration) is not less than the amount to be credited for the issue of the shares. The Australian legislation is silent on this point.

142 The Steering Committee recommends that the law should be amended to require companies which have increased their capital (from both issue and non-issue of shares) to report such changes to ACRA by lodgment of a return with the Registrar of Companies under section 63(1) of the Companies Act. This will ensure that the amount of capital reflected in the financials will be consistent with the statutory records. The majority of the respondents consulted agreed.

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.

XII. SCHEMES OF ARRANGEMENT

143 Sections 210 to 212 of the Companies Act deal with schemes of compromise or arrangements proposed between a company and its creditors or members which may be made binding on all creditors or members as long as the requisite voting approval is obtained. Section 210 has come to be used as a means for takeover of a target company by an offeror.

(a) Holders of units of shares

144 Section 210 of the Companies Act provides the mechanism for a compromise or arrangement “between a company and its creditors or any class of them or between the

company and its members or any class of them". Based on the wording of section 210, there could be doubts as to whether or not holders of options and convertibles could be parties to a section 210 scheme.

145 In Australia, which has a similar provision, the predominant view is that holders of options and convertibles would be classified as "creditors" and so are within the scope of the scheme of arrangement provisions[31]. The UK and New Zealand also refer to "members or any class of them" for a similar provision. However, the Steering Committee is of the view that the position should be made clear by amending section 210 to state explicitly that it includes holders of units of company shares. When consulted, most of the respondents agreed.

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.

(b) Share-splitting and voting by nominees

146 For section 210(3) of the Companies Act to be binding, a proposal must have the agreement of "a majority in number, representing three-fourths in value" of the creditors or members present and voting.

147 The issue of share-splitting (i.e. persons who transfer their shares to other members who are willing to vote according to their wishes) arose in a section 210-type scheme in the Australian case of *Re MIM Holdings Ltd* [2003] QSC 181. Although in that case share-splitting could not have affected the voting outcome on the scheme, Ambrose J observed that if it was likely or even possible that the majority in number had been achieved by reason of share-splitting, that might be a reason for withholding approval of the scheme. However, as long as the 50 percent test applies, the court cannot approve a scheme where that test is not passed, including where it is not passed by reason of share-splitting.

148 After *Re MIM Holdings Ltd,* Australia amended section 411(4)(ii) of the Corporations Act 2001 (equivalent to section 210(3) of Singapore Companies Act) so that "unless the Court orders otherwise" was added as set out below:

> "(ii) in the case of a compromise or arrangement between a body and its members or a class of members—a resolution in favour of the compromise or arrangement is:
>
> (A) unless the Court orders otherwise—passed by a majority in number of the members, or members in that class, present and voting (either in person or by proxy); and
>
> (B) if the body has a share capital—passed by 75% of the votes cast on the resolution; and…"

[31] Ford's Principles of Corporation Law, Volume 2, Chapter 24, paragraph 24.020.

149 The Explanatory Statement[32] for the Amendment Bill sheds light on the situation the amendment was intended to remedy:

"4.179 A members' scheme could be defeated by parties opposed to the scheme engaging in 'share-splitting', which involves one or more members transferring small parcels of shares to a large number of other persons who are willing to attend the meeting and vote in accordance with the wishes of the transferor. By splitting shares to increase the number of members voting against the scheme, an individual or small group opposed to the scheme may cause the scheme to be defeated. This may occur even though a special majority is achieved in terms of voting rights attaching to share capital, and if the share split had not occurred, the majority of members were in favour of the scheme."

150 For similar reasons as in Australia, a similar amendment should be made to section 210(3). The majority of the respondents agreed, with two respondents cautioning that the change remains subject to a number of limitations and that it would appear that the real problem with the numerical majority test lies in the existence of the test itself. Giving the court discretion to disregard the step may serve as a partial solution to some of the problems caused by the test. The respondent asked if total abolition of the test should be considered. In NZ, there is no longer provision for a statutory scheme of arrangement requiring approval from specified majority shareholders. Reconstructions can be effected by resolutions of the shareholders, amendments to the constitution or by application to the court under section 236 of the New Zealand Companies Act 1993. However, at meetings of creditors held for the purposes of section 230 (for compromises with creditors), a resolution is adopted if a majority in number representing 75% in value of the creditors or class of creditors voting in person or by proxy vote or by postal vote in favour of the resolution.[33]

151 The Steering Committee recommends that the test be retained. In the UK, although the Company Law Review Steering Group proposed a removal of the requirement for a majority in number to approve a scheme, the proposal was not implemented in the final amendments[34]. The UK government retained the measure as an important safeguard for minority shareholders and this was defended by the Attorney-General when the UK Companies Bill was debated in parliament[35].

152 The Steering Committee also recommends that if a majority in number of proxies and a majority in value of proxies representing the nominee member vote in favour of the scheme, it would count as the nominee member having voted in favour of the scheme.

[32] http://www.austlii.edu.au/au/legis/cth/bill_em/cab2007390/memo_0.html
[33] See Schedule 5, clause 5(2) of the New Zealand Companies Act 1993.
[34] See "Modern Company Law: For a Competitive Economy – Final Report", London, Vol. 1, June 2001 at 278 [13.10]. House of Lords Hansard, 28 March 2006, column GC326).
[35] UK Companies Act 2006, House of Lords Hansard, 28 March 2006, column GC326 and 16 May 2006, column 217

<u>Recommendation 3.40</u>

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.

<u>Recommendation 3.41</u>

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 favour of the scheme.

(c) Look-through to beneficial shareholders

153 Where shares are registered in the name of a nominee, the beneficial owners of shares currently do not have the right to vote on section 210 schemes. For example, there might be instances where a Singapore company has shares listed overseas which are held by a foreign depository in the same way that the CDP holds Singapore-listed shares. Section 130D of the Companies Act provides for a look-through to the members behind the CDP so that the actual owners of shares retain their rights as shareholders. But there is no such provision in relation to overseas-listed shares.

154 Technically, the beneficial owners of the shares are not "members" and hence cannot participate in the major decision involved in a section 210 proposal. Such issues may also arise in dual listing situations and so are likely to become more prevalent as the number of dual listings grows.

155 The Steering Committee has considered whether introducing a definition of "members" would be a feasible solution to this problem but decided against it as it would be impractical to formulate an all-encompassing definition which is not too wide.

156 The Steering Committee also considered if there should be a prescribed list of depositories (e.g. the Depository Trust Company (DTC) which is a limited-purpose trust company under New York State banking law and a registered clearing agency with the SEC, USA and CPF Nominee Banks) for which a look-through to the shareholder would apply, but decided against it. There were mixed views received from the consultation. Some agreed with observations regarding the problems faced in extending the 48-hour rule for notional closure of the membership register to overseas-listed Singapore-incorporated companies. Another alternative view was that the appointment of proxies to attend the meetings should suffice. In conclusion, the Steering Committee agrees that a consistent approach should be adopted on this issue and recognition of overseas depositors for all matters under the Companies Act.

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.

(d) Definition of "company"

157 The word "company" is defined differently in sections 210(11) and 212(6) of the Companies Act, leading to different scope for each. The inconsistency should be resolved since section 212 is an extension of section 210 in that a scheme approved under section 210 may have to be carried into effect through section 212.

158 Section 210(11) states that "'company' means "any corporation or society liable to be wound up under this Act". Section 212(6) states that "Notwithstanding section 210 (11), "company" in this section does not include any company other than a company as defined in section 4."

159 The section 212(6) definition is more restrictive since it excludes foreign companies. Foreign companies can be wound up under section 351 of the Companies Act and so fall within the section 210(11) definition.

160 The reason for the narrower section 212 definition appears to be historical. Palmer's Company Law: Annotated Guide to the Companies Act 2006[36] suggests that the more restrictive definition of "company" in the UK equivalent of section 212[37] is derived from section 208 of the 1948 UK Act and best justified on the grounds of practicability. Presumably the reference to "practicability" is the avoidance of problems of cross-border administration of orders for the transfer of the whole or part of the property or liabilities and/or the dissolution (without winding up) of the company or corporation. However, these problems are not insurmountable today. In fact provisions in the Singapore Banking Act and Insurance Act akin to the Companies Act amalgamation provisions already extend to foreign companies. Part VIIA of the Banking Act deals with transfers of business involving *inter alia* Singapore branches of foreign-incorporated banks. In the Insurance Act, section 47 is a similar provision. Just as those extend to foreign entities, section 212 should also be extended to foreign companies to facilitate cross-border transactions.

161 By way of comparison, section 413 of the Australia Corporations Act 2001 (equivalent to section 212 of the Singapore Companies Act) includes foreign companies. There the term "Part 5.1 body" is used, defined at section 9 to include a registrable Australian body or a foreign company that is registered under Division 1 or 2 of Part 5B.2. The comparable New Zealand provisions at Part 15 of the New Zealand Companies Act 1993 also extend to foreign companies.[38]

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[36] London: Sweet & Maxwell, 2007, pages 669 and 673.
[37] New section 900 of the UK Companies Act 2006.
[38] See section 235.

162 In view of the above, the Steering Committee recommends that sections 210 and 212 apply to both companies and foreign companies. All respondents consulted supported this proposal.

Recommendation 3.43

Sections 210 and 212 should apply to both “companies” and “foreign companies”.

(e) Binding the offeror

163 Currently section 210 of the Companies Act and the associated provisions do not have binding force on the offeror. The offeror is not a party to section 210 arrangements and the court’s approval does not render it binding on the offeror (although sometimes the offeror does voluntarily appear for court proceedings or agree to be bound). What binds the offeror is only the antecedent implementation agreement between the offeror and the target company. This can cause difficulties.

164 The Steering Committee has considered whether the law should require the offeror to be party to the scheme. However, this is unnecessary as the court already has the power to require that the offeror be a party to the scheme before granting approval. Shareholders may have recourse against errant offerors through the Securities Industry Council (SIC). Furthermore, the Singapore regime is in line with the other major jurisdictions considered. All respondents agreed with the Steering Committee.

Recommendation 3.44

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

(f) Compliance with the Code of Takeovers and Mergers

165 Section 210 is sometimes used to effect takeovers and mergers but compliance with the Code of Takeovers and Mergers is not specifically mandated or provided for in the provisions.

166 By way of comparison, the Australia Corporations Act 2001 specifically states at section 411(17) that the Court must not approve a compromise or arrangement unless there is produced to the Court a statement in writing by the Australian Securities and Investments Commission (ASIC) stating that ASIC has no objection to the compromise or arrangement. There is no equivalent in the UK or New Zealand.

167 The Steering Committee has considered whether the SIC should be required to approve the transaction before court sanction. Another approach would be to state in the legislation that there must be compliance with the Code of Takeovers and Mergers in relation to companies which are regulated by the Code before court sanction can be obtained. After consideration, the Steering Committee is of the view that it would be more in keeping with

the self-regulatory nature of securities regulations to leave matters as they stand. The obligation to comply with the Code already exists. It remains open to the SIC or any aggrieved shareholder to make an application to the court in an appropriate case. All respondents consulted supported this approach.

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.

XIII. COMPULSORY ACQUISITION

(a) Holders of units of shares

168 Unlike the relevant Australian[39] provision, the UK equivalent of section 215 of the Companies Act covers not only shares but extends to convertibles as well.[40] This makes sense as section 215 is meant to allow the offeror to mop up remaining minority positions to complete the takeover of a company. The Steering Committee is of the view that Section 215 should extend to options and convertibles of all sorts, and this is supported by all respondents consulted.

169 The comparable New Zealand provision is not in the New Zealand Companies Act 1993 but is at Part 7 of the Takeovers Code.[41] Compulsory acquisition extends to equity securities which includes convertibles.[42]

Recommendation 3.46

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

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[39] Section 414 of the Australia Corporations Act 2001

[40] Section 989(1) of the UK Companies Act 2006 states "(1) For the purposes of this Chapter securities of a company are treated as shares in the company if they are convertible into or entitle the holder to subscribe for such shares. References to the holder of shares or a shareholder are to be read accordingly." Section 979 (the UK equivalent of section 215) is within the same chapter as section 989 and so it extends to convertibles.

[41] At http://www.takeovers.govt.nz/code/index.html. This is not universally applicable though – it is generally restricted to listed companies and companies with 50 or more shareholders.

[42] "Equity Security" is defined in rule 3 of the New Zealand Takeovers Code. "Equity security" is defined as follows:
"Equity Interest -
(a) means any interest in or right to a share in, or in the share capital of, a company (whether carrying voting rights or not); and
(b) includes an option or right to acquire any such interest or right unless that option or right is exercisable only with the agreement of the issuer; but
(c) does not include redeemable securities that are redeemable only for cash".

(b) Individual offerors

170 Currently section 215 of the Companies Act applies to transfer of shares in one company to "another company or corporation". As noted in Walter Woon on Company Law at paragraph 15.165, "this section cannot be invoked by a natural person". However there is no good reason why it should not be.

171 The equivalent provision in the Australia Corporations Act 2001 is section 414. Section 414 uses the word "person" instead of "company or corporation" and so covers individuals as well. The position is similar in New Zealand.[43] Section 979 of the UK Companies Act 2006 uses "offeror" which can also encompass individuals.

172 The Steering Committee recommends that Section 215 should be broadened to include transferees who are individuals rather than being restricted to companies and corporations and this was supported by all respondents consulted.

<u>Recommendation 3.47</u>

Section 215 should be extended to cover individual offerors.

(c) Joint offers

173 Section 215 of the Companies Act confers squeeze-out rights to an offeror company in a takeover to acquire shares of the dissenting minority if 90% of the target company shareholders have approved the takeover offer. Subsection (3) provides sell-out rights to shareholders. It should be made clear that where a takeover offer is made jointly by more than one person, all the joint offerors have the same legal obligations. In the UK Companies Act 2006, section 987 deals specifically with joint offers. A similar provision should be added to the Singapore Companies Act. All respondents consulted agreed with the Steering Committee.

174 In the different wording used in Part 7 of the New Zealand Takeovers Code[44], joint offers are also covered. However, the equivalent provision in the Australia Corporations Act 2001, which is section 414(2), uses the word "person" with no specific mention of joint offers.

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[43] Part 7 of the New Zealand Takeovers Code uses the term 'dominant owner'.

[44] The relevant phrase in the New Zealand Takeovers Code is "dominant owner" and it is defined thus: "in relation to a code company, means a person who, after this code comes into force, becomes the holder or controller, or 2 or more persons acting jointly or in concert who, after this code comes into force, become the holders or controllers, of 90% or more of the voting rights in the code company (whether by reason of acceptances of an offer or otherwise)".

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.

(d) Associates

175 In ascertaining whether the offeror has reached the 90% threshold, shares held by the offeror are excluded. Section 215(9) of the Companies Act states that shares held or acquired by the offeror's nominee or related corporation (or its nominee) are to be treated as held by the offeror. Section 6 of the Companies Act then defines a "related corporation". The rationale of the exclusions is that the offer should be accepted by 90% of the shareholders who are unaffiliated with the offeror before section 215 rights are activated. However, the scope of those excluded currently does not adequately cover persons connected to the offeror.

176 The UK approach is to exclude shares acquired by an "associate".[45] The definition of "associates" is very comprehensive and suitable for adoption in Singapore with any required modifications. It may be necessary to specifically provide exemption to very large holding companies with interests in many companies. Most respondents consulted agreed with this proposal.

177 The relevant provision in Australia is section 414(2) of the Corporations Act 2001 which excludes shares held by "the person or a nominee of the person; or if the person is a body corporate – a subsidiary of the body". There appears to be no comparable exclusion under the New Zealand Takeovers Code.

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.

(e) Threshold for squeeze-out rights

178 Section 215 only applies one test: agreement of 90% of unaffiliated shareholders. However, Bermuda allows squeeze-out rights to the holders of not less than 95% of the shares of a company with no restriction to unaffiliated shareholders.

[45] Section 983(8) of the UK Companies Act 2006. The definition of "associates" is in section 988.

179 The Steering Committee considered a suggestion to expand section 215 with an alternative threshold. The following justifications were offered:

(a) If the offeror has 95% shareholding, a listed company could be delisted thereby removing marketability and hence subjecting the shares to potential undervaluation arising from the imposition of a minority discount.

(b) A 5% minority has no meaningful rights in any event and so should not be allowed to block the progress of a transaction which such large majority of voting shares have weighed in favor of. With 95% shareholding, the majority can convene meetings at short notice whereas the minority has no right to convene meetings and no right to request for information except annual reports with no prescribed content. The only remedy for the minority is contractual or by an oppression action, which is a tough proposition likely to result in an order to sell at discount due to the small minority stake.

(c) Minority shareholders may be uncontactable or may include estates of deceased persons, which has its own complexities.

(d) In any event, if any shareholder is aggrieved, the right would remain to apply to court to block the acquisition and the court has a number of remedies including determining whether the price offered was fair. Although appraisal rights, as a concept and remedy to minority shareholders, is not explicitly provided for, it is in effect available as a remedy in an action for minority oppression under section 216 of the Companies Act.

180 The Steering Committee was not unanimous on this issue. When consulted, mixed views were received. The alternative views were :

(a) Other major jurisdictions like the UK, Hong Kong and Australia have not adopted such a policy. Foreign investors may be more comfortable with the existing system, which offers more protection to the minority shareholders but still provides for a sensible squeeze-out system. To maintain Singapore’s reputation as a reputable international financial centre, it is preferable to maintain the present regime.

(b) The ability of the 5% minority to potentially block a transaction (unless approval of 90% of shares of unaffiliated shareholders is obtained) is itself a meaningful right. Further, a 5% shareholder would be regarded as a substantial shareholder, connoting a not-insignificant level of influence over the company. In the absence of countervailing public interest, minority shareholders ought to be given a choice whether to sell out or remain shareholders. Currently, the law provides a route for the majority to buy out the minority by meeting the test of 90% of shares of unaffiliated shareholders. Justification has to be shown as to why this test is inadequate and an alternative test introduced. In relation to the point that the company can be delisted and minorities subjected to a minority discount, this does not mean that the majority should therefore be allowed to squeeze out a minority shareholder who, for some reason, chooses to hold on to his shares.

181 In conclusion, the Steering Committee decided not to pursue the Bermuda model as no other leading jurisdictions have introduced such a policy and there were no strong calls for such a policy.

182 The proviso to section 102 of the Bermuda Companies Act, which is similar to that in section 414(5) of the Australia Corporations Act 2001, was also considered but was rejected as an unnecessary complication which serves no useful purpose. Under those provisions, if the offeror already holds over 10% of the target company shares, added restrictions are put in place before the buyout rights kick in. The added restrictions are that the offer must be extended to all shareholders and must be approved not only by 90% of unaffiliated shareholders' shares but also at least ¾ in number of unaffiliated shareholders. This issue does not arise in the New Zealand context where the Takeover Code focuses on the dominant shareholder having a 90% shareholding rather than acquiring 90% of excluded shares.

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.

(f) Cut-off date

183 Section 215 of the Companies Act currently does not fix a point in time at which to determine whether the 90% threshold has been reached, presumably leading to the default position that shares issued after the takeover offer would have to be factored in to calculate whether the 90% threshold has been reached. This has the drawback of putting the offeror in the position of potentially having to shoot for a moving target of 90% since the number of shares needed to reach that target changes if new shares are issued in the interim.

184 In contrast, section 979(5) of the UK Companies Act 2006 provides that "shares that are allotted after the date of the offer" and "relevant treasury shares … that cease to be held as treasury shares after the date of the offer" should be excluded in calculating the 90% threshold. Neither section 414 of the Australia Corporations Act 2001 nor New Zealand's Takeover Code has a similar provision.

185 To create greater certainty for the offeror, the Steering Committee is of the view that a cut-off at the date of offer should be in place for determining the 90% threshold for the offeror to acquire buyout rights. There were no opposing views received during consultation.

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.

(g) Computation of 90% threshold

186 In computing whether the 90% threshold has been reached, the question arises whether treasury shares should be included or excluded. Different considerations apply when considering this issue from the perspective of the offeror (whether the offeror should have squeeze-out rights) and the perspective of the minority shareholder (whether the minority should have sell-out rights).

187 Dealing with the offeror's perspective of squeeze-out rights, section 215(1) of the Companies Act provides that treasury shares should be excluded. The UK position stated at section 979(5) of the UK Companies Act 2006 is similar. The Steering Committee is of the view that this should not be changed – since the offeror is being allowed to overbear the minority shareholders, the threshold should be high.

188 Dealing with the minority shareholders' perspective of sell-out rights, section 215(3) also provides that treasury shares should be excluded. This is different from the UK position under section 983(5) which provides that "For the purposes of … calculating 90% of the value of any shares, shares held by the company as treasury shares are to be treated as having been acquired by the offeror." Neither section 414 of the Australia Corporations Act 2001 nor the New Zealand Takeover Code mentions treasury shares.

189 The UK position is preferable. Since the minority is in a position of disadvantage, the law should lean in favour of granting sell-out rights when the reality is that the offeror has control over 90% of the shares, including treasury shares. Including treasury shares recognises the reality that the offeror who crosses the 90% threshold when treasury shares are included is in any event already in a position to control the target company (and therefore the treasury shares) by virtue of his majority shareholding. There were no opposing views received during consultation.

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.

(h) Dual consideration

190 Section 215 of the Companies Act currently does not provide any regulation of offers involving a choice of consideration to be paid to the target company shareholders by the offeror. This is similar to the position in New Zealand but contrasts with the position in the UK and Australia.

191 Section 981(3) of the UK Companies Act 2006 gives the shareholder six weeks to elect for his choice of consideration and also states that the offeror must specify a default consideration if no election is done.

192 Section 414(4) of the Australia Corporations Act 2001 provides a shorter time frame of 14 days to a month (depending on when the offer is delivered) for election and allows the offeror to choose in default of election.

193 A period of two weeks should be adequate for shareholders to elect any choice of consideration. Offerors should also be required to state the default position if no election is made. There were no opposing views received during consultation.

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.

(i) Unclaimed consideration

194 When an offeror has acquired minority shareholdings, section 215(4) of the Companies Act provides for payment of the price to the target company and section 215(5) provides that the target company shall hold the consideration received in trust for the share owners.

195 Section 215(6) states: "Where any consideration other than cash is held in trust by a company for any person under this section, it may, after the expiration of two years and shall before the expiration of 10 years from the date on which such consideration was allotted or transferred to it, transfer such consideration to the Official Receiver".

196 Section 215(7) states: "The Official Receiver shall sell or dispose of any consideration so received in such manner as he thinks fit and shall deal with the proceeds of such sale or disposal as if it were moneys paid to him in pursuance of section 322 (Companies Act)".

197 Feedback from industry is that it would be useful for the Official Receiver to similarly handle cash consideration as well. This would also be in line with the law in the UK as stated in section 982 of the UK Companies Act 2006.

198 Given that unclaimed consideration may also arise from sections 210 and 215A to 215J situations, a separate section similar to sections 215(6) and 215(7) should be enacted to allow transfer of consideration to the Official Receiver in all such situations. When consulted, there were no opposing views received.

199 Section 982 of the UK Companies Act 2006, which deals with unclaimed consideration for compulsory acquisitions extends to "money or other consideration"[46], although there is no similar provision for the equivalent of section 210 of Singapore Companies Act. Section 414(15) of the Australia Corporations Act 2001 is equivalent to section 210 of Singapore Companies Act. Section 414(15) of the Australia Corporations Act 2001 deals not only with cash consideration but with "any other consideration" as well. The

[46] See section 981(9).

New Zealand Takeovers Code provides in rule 61 that "must be held in trust for the outstanding security holders until it is claimed."

<u>Recommendation 3.55</u>

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.

(j) Overseas shareholders

200 Section 215 of the Companies Act deals with a scheme "involving the transfer of all of the shares ...". This can lead to an argument that section 215 does not apply if every one of the shareholders has not had the offer delivered to them. Delivering the offer to every single overseas shareholder may however be unduly onerous or impossible where shareholders have no local address.

201 Section 978 of the UK Companies Act 2006 provides that an offer is not prevented from being a takeover offer if not communicated to shareholders with no local address in order not to contravene foreign laws as long as published on a website.

202 The Steering Committee is of the view that a provision similar to section 978 of the UK Companies Act 2006 should be incorporated into the Singapore Companies Act, but with a broader ambit so that exemption applies whenever it is "unduly onerous" to serve the offer on the overseas shareholders or when it would contravene foreign law. It may for example be unduly onerous due to cost. It can be left to the court to decide whether in any case it is unduly onerous or not.

203 By way of comparison, section 414 of the Australia Corporations Act 2001 on compulsory acquisition deals with "a scheme or contract … involving a transfer of shares ..." and so does not require that the scheme involve a transfer of all shares.

<u>Recommendation 3.56</u>

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.

XIV. AMALGAMATIONS

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

204 Pursuant to the recommendation of the CLRFC, the Companies (Amendment) Act 2005 introduced two methods of amalgamation based on the New Zealand model. The provisions at sections 215A to 215J of the Companies Act allow amalgamation of companies with shareholder approval and solvency statements of the directors, without the necessity of court approval. Apart from normal amalgamations, 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.

205 It is currently not clear whether a holding company may amalgamate with its wholly-owned subsidiary by short form if it is the subsidiary which is to be the amalgamated company or whether it is only the holding company which can be the amalgamated company in a short-form amalgamation. There may be reasons why it may be preferred to have the subsidiary company survive – eg, for tax benefits. Accordingly it should be made clear that short-form amalgamations extend to those of a holding company with its subsidiary. When consulted, majority of the respondents agreed. However, IRAS pointed out that in most cases, the subsidiaries are the operating entities with tax losses and not the holding company. Allowing a holding company to amalgamate with its wholly-owned subsidiary by short form may encourage companies to amalgamate not for genuine commercial reasons but solely to derive a tax advantage through the amalgamation process thus defeating the original intention of the policy. However, the Steering Committee takes the view that the tax treatment should not dictate the policies but should instead be reviewed if necessary.

206 The comparable provision in New Zealand[47] is similar in this respect to the current Singapore provision in stating that short-form amalgamation applies where "A company and one or more other companies that is or that are directly or indirectly wholly owned by it may amalgamate and continue as one company (being the company first referred to)". There is no comparable UK or Australian provision as these jurisdictions do not have provisions specifically dealing with amalgamation, except for an equivalent of section 212 of the Singapore Companies Act.

Recommendation 3.57

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

(b) Amalgamation of foreign companies

207 The Steering Committee has considered whether amalgamations involving foreign entities where the foreign entity survives should be allowed but decided against it because none of the other leading jurisdictions allows such amalgamations and it would be best to avoid potential jurisdictional issues that may arise from allowing them. When consulted, majority of the respondents agreed.

[47] Section 222 Companies Act 1993.

<u>Recommendation 3.58</u>

The amalgamation provisions should not be extended to foreign companies.

(c) Amalgamation of companies limited by guarantee

208 Section 215A of the Companies Act contemplates that "two or more companies may amalgamate and continue as one company, which may be one of the amalgamating companies or a new company..". "Company" as defined in the Companies Act includes a company limited by guarantee.

209 However, section 215B(1)(d) indicates that the amalgamation proposal should state, amongst other things, the "share structure of the amalgamated company". There are also other references to "shares" and "share capital" of the amalgamating company, eg at sections 215B(1)(f) and (g), 215B(3), 215B(4), 215D(1)(a) and 215D(2)(a).

210 Paragraph 6.1 of the CLRFC report explained why the committee recommended amalgamations: "In today's business environment of mergers and amalgamations of companies, it is timely for Singapore to introduce a merger process that is clear and efficient and which is tax neutral".

211 It appears therefore that the amalgamation provisions were introduced to facilitate businesses rather than for companies limited by guarantee, which generally do not carry on business activities.

212 The Singapore provisions on amalgamation were based on those found in the New Zealand Companies Act 1993. However, this issue of amalgamation of companies limited by guarantee does not arise under New Zealand law because section 10 of the New Zealand Companies Act 1993 provides that, "A company must have … one or more shares". As such no guidance on this issue is provided by the New Zealand Act.

213 In keeping with the original intention of the CLRFC, amalgamation should not be available to companies limited by guarantee. When consulted, there were alternative views that companies limited by guarantee may also see the need to merge and amalgamate for greater efficiency and economies of scale. There is no good reason why companies limited by guarantee should not be permitted to do so via statutory means. Nevertheless, the Steering Committee was not persuaded.

<u>Recommendation 3.59</u>

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

(d) Solvency statement

214 On the requirement that directors of each amalgamating company should give a solvency statement in relation to the amalgamated company,[48] industry feedback is that the forward-looking solvency statement requirement for the amalgamated company is an onerous requirement. This is so especially for directors of the amalgamating company who would not be serving on the board of the amalgamated company, and where the transaction involves leveraged financing.

215 Sections 215A to 215J are similar to Part XIII of the New Zealand Companies Act 1993.[49] Like the Singapore amalgamation provisions, the New Zealand provisions also require the boards of each amalgamating company to be satisfied that the amalgamated company must pass a solvency test. However, unlike Singapore, New Zealand does not require each amalgamating company to assess its solvency status before the amalgamation.

216 The Steering Committee considered the following two options:

(a) Option One - The boards of the amalgamating companies must 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. It is reasonable and logical that two solvent companies will form a solvent amalgamated company. However, as some companies may not feel comfortable or may not have sufficient knowledge to comment on the solvency status of an amalgamated company, such companies should still be permitted to amalgamate if they can be satisfied that they would nevertheless be solvent at the point in time and in the 12 months ahead, if they have not amalgamated. This is consistent with the solvency test imposed on capital maintenance transactions.

(b) Option Two - 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 as they fall due at the point when the amalgamated company is formed. It may be difficult to expect the amalgamated company to predict its solvency status in the 12 months ahead, considering that the board may consist of members from amalgamating companies and have a different business strategy.

217 When consulted, there were mixed views. Supporters of Option One were of the opinion that it is important to retain the forward-looking component to ensure that the directors involved have duly considered the financial consequences of the amalgamation and are satisfied that it will not result in an amalgamated company that is likely to become insolvent within a 12-month period. Supporters of Option Two were of the opinion that Option One is counter-factual while Option Two is consistent with the New Zealand/Canadian model and there was no evidence of adverse outcomes in these jurisdictions. Some commented that both options are workable and allowing the company to

[48] Found in sections 215C(2)(c) and 215J(1).

[49] Sections 215A to 215J were modelled on sections 188 to 194A recommended by the New Zealand Law Commission Company Law Reform: Transition and Revision No. 16 – see paragraph 6.3 of the Report of the Company Legislation and Regulatory Framework Committee of Singapore, October 2002. The current New Zealand amalgamation provisions are at Part 13, sections 219 to 226 of the New Zealand Companies Act 1993.

elect one option suitable for its circumstances was ideal and would promote the amalgamation regime while another school of thought is of the opinion that allowing an option was not appropriate and it was preferable to impose one uniform requirement for consistency and fairness.

218 Having considered the differing views expressed, the Steering Committee recommends Option One as it is more meaningful and prudent as well as consistent with the solvency test imposed on capital maintenance transactions.

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.

CHAPTER 4

ACCOUNTS AND AUDIT

I. INTRODUCTION

1 The provisions reviewed under this section relate to the preparation of company accounts and the requirement for those accounts to be audited. The Steering Committee recommends the abolition of the status of exempt private company and its replacement with a framework for small companies. Other matters considered include the reporting requirements for dormant companies, the directors' report and the provisions relating to auditors. A table summarising the recommendations in respect of the three main obligations of preparation of accounts, requirement for audit and filing of accounts for various types of companies is set out in Annex A.

II. FINANCIAL REPORTING FOR SMALL COMPANIES

2 Currently, all companies are required to prepare accounts in accordance with the Singapore Financial Reporting Standards (SFRS). All companies must be audited unless the company is an exempt private company[1] (EPC) S$5m revenue or less[2]. Companies, other than solvent EPCs, must file accounts with the Accounting and Corporate Regulatory Authority (ACRA). Solvent EPCs are required to file a confirmation of solvency.

(a) Audit exemption for small companies

3 Feedback was received that the threshold amount of $5 million, which was introduced with effect from 1 June 2004, is too low. Furthermore, it was noted that in other countries such as the UK, Australia and New Zealand, the criteria for determining what constitutes a small company for the purposes of differential statutory financial reporting requirements are generally based on revenue, assets and number of employees. Such criteria would recognise a broader group of stakeholders (e.g. creditors, employees, customers) who may find the financial information relating to a company valuable, other than just shareholders.

4 Small company criteria (based on revenue, assets and number of employees) should be used to determine whether a company is required to be audited. Small companies would be exempted from the statutory requirement for audit. This is in line with reducing the regulatory costs for smaller companies.

5 The proposed approach is that a company would qualify as a "small company" if it is a private company and fulfils two of the following criteria:

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[1] Under section 4 of the Companies Act, "exempt private company" is defined as —
(a) a private company in the shares of which no beneficial interest is held directly or indirectly by any corporation and which has not more than 20 members; or
(b) any private company, being a private company that is wholly owned by the Government, which the Minister, in the national interest, declares by notification in the *Gazette* to be an exempt private company.
[2] Section 205 of the Companies Act read with regulation 89A of the Companies Regulations.

Criterion One	Criterion Two	Criterion Three
Total annual revenue of not more than S$10 million.	Total gross assets of not more than S$10 million.	Number of employees not more than 50.

6 Where a parent company prepares consolidated accounts, the parent may qualify as a "small company" if the criteria in the preceding paragraph are met on a consolidated basis.

7 Based on the present definition of an exempt private company, a company with a corporate shareholder would not currently be able to qualify for an exemption from audit. By contrast, under the Steering Committee's proposed small company criteria, a company with a corporate shareholder can be exempt from audit if it qualifies under the proposed "small company" criteria, even if it is part of a group of companies of which the parent company does not qualify for audit exemption. This would be of concern because if the parent company of the group is required to prepare audited consolidated accounts, it would be difficult for it to do so where its subsidiaries are exempt from audit.

8 The Steering Committee therefore recommends that a subsidiary which is a member of a group of companies may be exempt from audit as a "small company" only if the entire group to which it belongs qualifies on a consolidated basis for audit exemption under the "small company" criteria.

9 There were some concerns that if the criteria are hardwired into the Act, they might not keep pace with changes with the business environment. It is therefore proposed that the threshold quantum for each of the criteria can be prescribed by way of regulations.

(b) Exempt private companies and filing obligations

10 The starting premise is that all companies, by choosing to use the company structure as a business vehicle, should provide disclosure of useful information to members of the public through filing with the Registrar, so as to enable persons who deal with them to make informed decisions. In the Asian context, however, family-run companies would want to keep financial information regarding their companies private. As such, a company which qualifies as an EPC currently has the advantage of being exempt from the requirement to file its accounts (if solvent).

11 An exempt private company is currently defined[3] as follows:

(a) a private company in the shares of which no beneficial interest is held directly or indirectly by any corporation and which has not more than 20 members; or
(b) a private company that is wholly owned by the Government, which the Minister, in the national interest, declares by notification in the *Gazette* to be an exempt private company (a "Government-owned EPC");

12 Solvent EPCs, which are exempt from filing, form more than half of all the companies in Singapore. This lack of transparency for a significant number of companies may prejudice

[3] Section 4(1) of the Companies Act.

persons dealing with solvent EPCs, given that they are not able to verify the financial position of an EPC declared as solvent. In particular, in the case of large EPCs, creditors and other interested persons may not have the bargaining power to ask for financial information from the EPC directly.

13 Furthermore, in recent years, new vehicles such as the limited liability partnership (LLP) and limited partnership (LP) have been introduced, which could be appropriate alternatives to the EPC regime.

14 The Steering Committee therefore proposes to abolish the concept of an EPC. It was observed that no other country studied had a similar concept. To preserve some level of confidentiality for smaller-sized companies, it is proposed that companies which fall within the "small companies" criteria as discussed above be required to file only basic information. The concession that not the full financial information is made available would preserve some level of confidentiality for smaller companies, while making at least some information available to members of the public. Using a "size test" is consistent with consultation feedback received that confidentiality is useful to "attract and grow" SMEs in Singapore.

15 One notable concern, however, is that even basic information may reveal too much in respect of certain types of companies, e.g. Government-owned companies, private investment companies. The "size test" also may not be the appropriate test for the need for confidentiality for some types of companies i.e. due to the nature of the activities, even large companies would be concerned with confidentiality.

16 The Steering Committee therefore proposes certain exemptions from filing of financial information under certain circumstances. A company will be exempt from filing any financial information if it is a private company which is –

(a) wholly-owned by the Government, which the Minister, in the national interest, declares by notification in the Gazette to be exempt; (following the current definition of limb (b) of the definition of an "exempt private company")

(b) part of a class of companies prescribed by the Minister as being a specific class to which the filing requirement does not apply (these would be in relation to specific industries where confidentiality of information is critical and public interest in the accounts is low, e.g. private family investment companies); or

(c) exempted by the Registrar upon application on a case-by-case basis and published in the Gazette.

17 The exemption from filing proposed above in paragraph 16 should still be subject to the condition that the company is solvent. This would mean the company would have to file the full accounts if it is insolvent, unless it is a Government-owned EPC gazetted under section 12(2A) CA.

Recommendation 4.1

Small company criteria should be introduced to determine whether a company is required to be audited. Small companies would be exempted from the statutory requirement for audit. The following are the criteria for determining a "small company" —

(a) the company is a private company; and

(b) it fulfils two of the following criteria:

Criterion One	Criterion Two	Criterion Three
Total annual revenue of not more than S$10 million.	**Total gross assets of not more than S$10 million.**	**Number of employees not more than 50.**

Recommendation 4.2

Where a parent company prepares consolidated accounts, a parent should qualify as a "small company" if the criteria in Recommendation 4.1 are met on a consolidated basis.

Recommendation 4.3

A subsidiary which is a member of a group of companies may be exempt from audit as a "small company" only if the entire group to which it belongs qualifies on a consolidated basis for audit exemption under the "small company" criteria.

Recommendation 4.4

The current status of "exempt private company" should be abolished.

Recommendation 4.5

Companies which qualify under the proposed "small company" criteria should file basic financial information, but with the following exceptions where such companies are solvent:

(a) private companies wholly-owned by the Government, which the Minister, in the national interest, declares by notification in the Gazette to be exempt;

(b) private companies falling within a specific class prescribed by the Minister as being exempt (e.g. specific industries where confidentiality of information is critical and public interest in the accounts is low); and

(c) private companies exempted by the Registrar upon application on a case-by-case basis and published in the Gazette.

III. FINANCIAL REPORTING FOR DORMANT COMPANIES

18 Currently, a dormant company is exempted from the statutory audit requirements but is still required to prepare accounts that are in compliance with the SFRS[4]. A company is taken to be dormant during a period where no "accounting transaction" occurs[5] and a list of transactions which may be disregarded as an accounting transaction are set out under section 205B(3) of the Companies Act.

19 The issues considered by the Steering Committee were whether the regulatory burden for dormant companies should be further lightened and whether the criteria for determining dormancy should be refined.

20 The regulatory regimes for dormant companies in the UK, New Zealand and Hong Kong were reviewed. Australia does not have a separate regulatory regime for dormant companies.

21 A dormant company does not carry out active trading, and therefore it is less likely that anyone will be prejudiced if the company does not prepare accounts, especially if such a company is not listed. Although there was feedback received that the reporting cost would be minimal if a company is dormant, the Steering Committee took the view that the cost of preparing accounts for such a company would outweigh the benefits of the accounts. If the requirement for preparing accounts is removed, there will also be no need for filing requirements. This is similar to the position in New Zealand and Hong Kong.

22 There would, however, be a need for some safeguards to ensure that the company is in fact dormant for the entire financial period in question and that persons are not unduly prejudiced. The following safeguards are proposed:

(a) The directors of a dormant company must lodge an annual declaration to the effect that:

  (i) the company is dormant for the whole duration of the financial year in question; and

  (ii) the shareholders of the company have been duly informed of the company's dormant status and that they will be notified if the company intends to enter into a relevant accounting transaction.

(b) The company must be dormant for the entire financial year in question.

(c) Shareholders and ACRA will be empowered to direct a dormant company to prepare its accounts, and to lodge them unless exempted under any other exemption.

23 In particular, an annual declaration by the directors would require the directors to address their mind to the matter and make a statement accordingly. One of the respondents suggested that this should be by way of statutory declaration. However, the Steering

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[4] Section 205B(1) of the Companies Act.
[5] Section 205B(2) of the Companies Act.

Committee took the view that it is not necessary that the annual declaration be by way of statutory declaration as the penalties in respect of a false or misleading statements in an annual declaration under section 401(2) CA are sufficient.

24 Listed companies usually have a greater number of shareholders and stakeholders, and possibly more creditors, hence the Steering Committee is of the view that it would be prudent to retain financial reporting requirements for dormant listed companies. This is also consistent with the position in New Zealand.

25 Presently dormant companies are not subjected to the statutory audit requirements. The Steering Committee is of the view that this should be retained for dormant listed companies. If the company is dormant for the financial year in question, shareholders and other stakeholders are not likely to be unduly prejudiced if the accounts are not audited, even in the case of a listed company.

26 In light of this, dormant companies which are subsidiaries of listed companies should also continue to prepare accounts, since listed companies would need to incorporate the financial information from their subsidiaries for the purposes of consolidation of accounts.

(a) Disregarded transactions

27 The current list of disregarded transactions includes any fee payable under the Companies Act or composition amounts under section 409(4) of the Companies Act. The Steering Committee is of the view that the list of disregarded transactions be extended to cover statutory fees or fines under any Act. The Steering Committee is also of the view that the payment of costs and receipts of income (such as bank interest) of up to a specified amount should be disregarded for the purpose of determining whether a company can be considered dormant. This is the position in New Zealand. The threshold amount for nominal payments/receipts can be prescribed in regulations.

(b) Substantial assets threshold

28 A concern was noted as to whether a company which has not carried on transactions but which owns substantial assets (e.g. land) should qualify as a dormant company. With the recommendation to allow non-listed dormant companies to be exempt from all financial reporting requirements, it is necessary to provide a total asset threshold as a criterion for determining whether a company may benefit from the reduced financial reporting requirements for non-listed dormant companies. The Steering Committee is of the view that there should be a carve-out from the dormant company financial reporting regime if the company holds more than a threshold amount of total assets (e.g. S$500,000). This threshold figure may be varied by the Minister for Finance by way of regulations. A company with substantial assets should continue to prepare accounts so as to provide accountability in respect of the preservation of those assets. Such a company should be required to prepare accounts, but will be exempt from audit, similar to a listed dormant company.

29 There was feedback received that using an assets threshold is arbitrary and the value of a company's assets as the criteria may result in uncertainty as a company may fall in and out of the exemption on a year-by-year basis, especially with the use of fair value accounting. Another comment was that the benchmark used should not be confined to total assets as there may also be situations where a company may not have substantial assets but have significant

liabilities offset by negative equity, and such a company should have to prepare accounts. However, on balance, the Steering Committee is of the view that a substantial assets threshold is necessary and appropriate for determining a dormant company's exemption from preparation of accounts.

Recommendation 4.6

Dormant non-listed companies (other than subsidiaries of listed companies) should be exempt from financial reporting requirements, subject to certain safeguards.

Recommendation 4.7

To benefit from the dormant company exemption, the following proposed safeguards must be complied with:

(a) Annual declaration of dormancy by the directors of a dormant company.

(b) The company must be dormant for the entire financial year in question.

(c) Shareholders and ACRA will be empowered to direct a dormant company to prepare its accounts, and to lodge them unless exempted under any other exemption.

Recommendation 4.8

Dormant listed companies should continue to prepare accounts but be exempted from statutory audit requirements (status quo).

Recommendation 4.9

A dormant company which is a subsidiary of a listed company should continue to prepare accounts but be exempt from audit, similar to a dormant listed company.

Recommendation 4.10

The list of disregarded transactions in determining whether a company is dormant should be extended to include statutory fees/fines under any Act and nominal payments/receipts.

Recommendation 4.11

A total assets threshold test of S$500,000 (which may be varied by the Minister for Finance by way of regulations) should be introduced for dormant companies.

IV. SUMMARY FINANCIAL STATEMENTS

30 Under section 203A of the Companies Act, only listed companies have the option to provide summary financial statements to shareholders instead of the full set of accounts. Summary financial statements provide a summary of the information in the full set of accounts.

31 The Steering Committee is of the view that the use of summary financial statements should be extended to all companies so as to have a consistent treatment for all companies. This is in line with the practices in the UK, Australia and New Zealand.

32 One respondent pointed out that for small and medium sized companies, preparing of summary financial statements may not be necessary as it is usually not difficult to read through the whole financial statements, especially in light of the possible simplified FRS for SMEs. Preparation of a separate set of summary financial statements may incur additional costs which outweigh its benefits. However, as the preparation of summary financial statements is optional and not mandatory, each company would have a choice whether or not to prepare summary financial statements.

Recommendation 4.12

The use of summary financial statements should be extended to all companies.

V. THE DIRECTORS' REPORT

(a) Disclosure of directors' benefits

33 Section 201(8) of the Companies Act requires the directors' report to state whether a director has received or is entitled to receive a benefit (other than a benefit included in the aggregate amount of emoluments received or due and receivable by the directors shown in the accounts or, if the company is a holding company, the consolidated accounts in accordance with the accounting standards or the fixed salary of a full-time employee of the company) by reason of a contract made by the company or a related corporation with the director or with a firm of which he is a member, or with a company in which he has a substantial financial interest and, if so, the general nature of the benefit. At the same time, key personnel compensation needs to be disclosed under FRS 24. In addition, director's fees are also required to be disclosed to and approved by members of the company under sections 168 and 169 of the Companies Act.

34 In light of these existing disclosure requirements, the Steering Committee is of the view that there is no need to retain a separate requirement in section 201(8) to list directors' benefits in the directors' report.

35 In Australia, the directors' report of a listed company must include discussion of the board policy for determining, or in relation to, the nature and amount (or value, as appropriate) of remuneration of the key management personnel and the prescribed details in

relation to the remuneration of each member of the key management personnel[6]. In the UK, specified information about directors' remuneration must be disclosed in the notes to the company's accounts, and quoted companies are required to disclose details relating to their remuneration in a directors' remuneration report[7]. In New Zealand, the annual report of the company is required to state, in respect of each director or former director of the company, the total of the remuneration and the value of other benefits received by that director or former director from the company during the accounting period[8].

36 While noting that the scope of disclosure under s201(8) CA is conceptually wider than what is required under the SFRS, the Steering Committee took the view that in practical terms, the provision was not necessary.

Recommendation 4.13

Section 201(8) of the Companies Act which requires disclosure of directors' benefits in the directors' report should be repealed.

(b) Inclusion of business review

37 The summary financial statement of a listed public company must include a Chairman's statement covering a business review and future developments (under "Additional Information" in the Second Schedule to the Companies (Summary Financial Statement) Regulations). There is however no equivalent requirement in the accounts or reports accompanying the accounts.

38 The UK has detailed requirements in respect of the statement of business review and future developments. Unless the company is subject to the small companies' regime, the directors' report is required9 to contain a business review. The business review must contain:

(a) a fair review of the company's business; and

(b) a description of the principal risks and uncertainties facing the company10.

However, it is noted that these requirements are linked to the duty to promote the success of the company under section 172 of the UK Companies Act 2006, which is not being adopted in Singapore.

39 In Australia, the directors' report must refer to likely developments in the entity's operations in future financial years and the expected results of those operations.[11] In New Zealand, the board of directors must describe, in its annual report, so far as the board believes is material for the shareholders to have an appreciation of the state of the company's affairs

[6] Section 300A of the Australia Corporations Act 2001.
[7] This is required by regulations made under the UK Companies Act 2006.
[8] Section 211 of the New Zealand Companies Act 1993.
[9] Section 417 of the UK Companies Act 2006.
[10] Section 417(3) of the UK Companies Act 2006.
[11] Section 299(1)(e) of the Australia Corporations Act 2001.

and will not be harmful to the business of the company or of any of its subsidiaries, any change during the accounting period in:

(i) the nature of the business of the company or any of its subsidiaries; or

(ii) the classes of business in which the company has an interest, whether as a shareholder of another company or otherwise[12].

40 The Steering Committee is of the view that while listed companies usually prepare a business review, this is not necessary for all companies.

41 No differing views were received from the consultation feedback.

<u>Recommendation 4.14</u>

There is no need to require all companies to prepare a statement of business review and future developments in the accounts or directors' report under the Companies Act.

(c) Requirement for directors' report

42 The Steering Committee notes that, in Singapore, the directors' report for most companies is based on a standard boilerplate and that there is little value in having the directors' report as a separate document, if the relevant disclosures could be made elsewhere.

43 It was observed that New Zealand does not require a company to have a directors' report. However, the New Zealand Companies Act 1993[13] requires the company to set out, in its annual report, certain information such as particulars of entries in the interests register made during the accounting period and the total of the remuneration and the value of other benefits received by that director or former director from the company during the accounting period, similar to information contained in the directors' report in Singapore.

44 In Australia, a small proprietary company is generally exempted from the requirement to prepare a directors' report (or the financial report) unless:

(a) it is directed to do so by its shareholders or the Australian Securities and Investments Commission (ASIC); or

(b) it was controlled by a foreign company for all or part of the year and it is not consolidated for that period in financial statements for that year lodged with ASIC by:

(i) a registered foreign company; or

(ii) a company, registered scheme or disclosing entity[14].

[12] Section 211(1)(a) of the New Zealand Companies Act 1993.
[13] Section 211(1)(a).
[14] Section 292(2) of the Australia Corporations Act 2001.

45 The UK and Hong Kong require all companies to prepare directors' reports.

46 There was feedback received that directors' report serves a specific purpose, viz for directors to state their opinion on whether the financial statements are drawn up so as to give a true and fair view of the state of affairs of the company as at the end of the financial reporting year in accordance with the Companies Act and SFRS. Thus, the directors' report ought to be clearly delineated from the financial accounts or notes to financial accounts to avoid any confusion and for ease of reference. In particular, where there is a change of directors, a separate directors' report would allow new directors to make specific statements should they not agree with certain information in the financial statements.

47 The Steering Committee, however, took the view that the disclosures in the directors' report can be adequately made elsewhere, e.g. in the accounts, notes to the accounts, or the directors' statement in section 201(15) of the Companies Act. If there is a specific need for a directors' report for listed companies, SGX could include such a requirement in the listing rules.

48 If the recommendation for abolition of the directors' report is accepted, the Steering Committee is of the view that section 201(15) of the Companies Act should be clarified to require that the full list of directors of companies appear in the statement by the directors. This is to replace the current requirement in section 201(6)(a) and (6A)(a) of the Companies Act to state the names of the directors of the company or holding company in office at the date of the report. Most of the respondents agreed to such a clarification.

Recommendation 4.15

The requirement for a separate directors' report should be abolished.

Recommendation 4.16

Section 201(15) of the Companies Act should be clarified to require that the full list of directors of companies appear in the statement by the directors.

VI. OBLIGATIONS RELATING TO AUDIT

(a) Imposition of statutory duty on directors to ensure that auditors are aware of all relevant audit information

49 The Steering Committee considered and rejected a proposal to adopt the UK approach of requiring the directors to ensure that the company auditors are aware of all relevant audit information. Section 418(2) of the UK Companies Act 2006 requires the directors' report to contain a statement to the effect that so far as each director is aware, there is no relevant audit information of which the company's auditor is unaware, and that he has taken all the steps that he ought to have taken as a director in order to make himself aware of any relevant audit information and to establish that the company's auditor is aware of that information.

50 To impose such an obligation on the directors will be unduly onerous and may have the inadvertent consequence of shifting some of the auditors' obligations and duties onto the directors. Furthermore, the UK approach would be too onerous especially if there are changes to the accounti ng standards. It presupposes that a director knows what information the auditors would need to know.

51 On the other hand, supporters of the UK approach highlighted that it is desirable to adopt such an approach as long as there are sufficient safe harbour provisions to protect directors who are acting in good faith and who have discharged their responsibilities to the best of their abilities. It was suggested that such an approach would result in better-informed directors and greater communication in the audit process.

52 The Steering Committee noted that section 207 of the Companies Act already gives the auditors a right of access at all times to the accounting and other records of the company, including registers, and allows the auditors to require from any officer of the company (which is defined in section 4(1) to include a director) such information and explanations as may be desired for the purposes of audit. The Steering Committee is of the view that this provision would achieve adequate information flow and communication between the directors and the auditors. The Singapore position is in line with the position in Australia[15] and New Zealand[16].

Recommendation 4.17

The UK approach of requiring the directors to ensure that the company auditors are aware of all relevant audit information need not be adopted.

(b) Mandating auditing standards

53 Currently, section 207(3) of the Companies Act sets out a list of duties of auditors as to their reports on company accounts. In addition to these duties, as a matter of practice auditors in carrying out an audit usually also follow the Singapore Standards on Auditing (SSA) issued by the Institute of Certified Public Accountants of Singapore (ICPAS). Compliance with the SSA is currently not mandatory under the Companies Act. However, the SSA is one of the standards recognised under the Practice Monitoring Programme under the Accountants Act as a prescribed standard for the Programme.

54 In contrast, in Australia auditing standards are legally enforceable for audits conducted under the provisions of the Australia Corporations Act 2001. Breaches of the auditing standards are a criminal offence under section 307A of the Australia Corporations Act 2001.

[15] Under section 310 of the Australia Corporations Act 2001, an auditor has a statutory right of access at all reasonable times to the books of the entity and may require any officer to give information, explanation or assistance for the purposes of the audit or review, as long as the request is a reasonable one.

[16] Under section 206 of the New Zealand Companies Act 1993, the board of a company must ensure that an auditor of a company has access at all times to the accounting records and other documents of the company, and the auditor is entitled to require from a director or employee such information and explanations as he thinks necessary for the performance of his duties as auditor.

55 The Steering Committee considered whether auditing standards should have the force of law so that auditors are required under the Companies Act to comply with the standards. It has decided not to follow the position in Australia but recommends that the existing requirements in respect of the duties and responsibilities of auditors should be streamlined. Matters pertaining to corporate governance should be retained in the Companies Act, but work procedures should be left to the requirements in the auditing standards. Most of the consultation respondents agreed with the views of the Steering Committee.

Recommendation 4.18

There is no need to legislatively mandate compliance with auditing standards, but the existing requirements in section 207(3) of the Companies Act, which set out a list of duties of auditors, should be streamlined.

(c) Requirement to report on record-keeping

56 One of the duties imposed under section 207(3)(b) of the Companies Act is that the auditor should form an opinion on whether proper accounting and other records (excluding registers) have been kept by the company. The issue is whether this duty is still relevant.

57 All of the countries studied have imposed a duty on the auditor to state an opinion on record-keeping, although the exact wording of the obligation varies between the countries.

58 One of the consultation respondents noted that it is not too burdensome to retain this requirement as part of the job of the auditor would be to do a check of such documents. Another respondent, however, suggested that the Singapore Standards on Auditing would adequately provide for this and that no express obligation in the Companies Act was necessary.

59 The Steering Committee takes the view that section 207(3)(b) of the Companies Act sets out an important obligation that should be retained in the Companies Act. It however noted that the drafting of this section could be clarified, such that the reference to "other accounting records" is in line with section 199 of the Companies Act. This would give greater clarity to the meaning of the phrase "other accounting records".

Recommendation 4.19

Section 207(3)(b) of the Companies Act, which requires an auditor to form an opinion on whether proper accounting and other records (excluding registers) have been kept by the company, should be retained, but the drafting of that section should be clarified.

(d) Requirement to comment on consolidation procedures

60 Section 207(3)(d) of the Companies Act requires an auditor to form an opinion on whether the procedures and methods used by a holding company or a subsidiary in arriving at

the amounts taken into any consolidated accounts are appropriate to the circumstances of the consolidation.

61 None of the countries studied have an equivalent provision. The UK and Australian legislation are silent on the duty to report in respect of any aspect of consolidation of accounts, whilst the obligation in New Zealand just requires the auditor to state an opinion that the group accounts comply with generally accepted accounting practice and give a true and fair view[17]. One respondent opined that the proposal to repeal the section will align Singapore's practice with international best practices. On the other hand, there were comments that the requirement in section 207(3)(d) should be retained since stakeholders, investors and users of financial statements rely on the auditor to give an opinion on this and that it was not unduly onerous for the auditors to do so.

62 The Steering Committee is of the view that, in line with international practice, there is no need for an express requirement in the Companies Act for an auditor to form an opinion on the procedures and methods of consolidation. The auditors' opinion on whether the accounts comply with the accounting standards and are true and fair would give sufficient to assurance in respect of the consolidation procedures. As such, section 207(3)(d) of the Companies Act should be repealed.

Recommendation 4.20

The requirement for an auditor to form an opinion on the procedures and methods of consolidation in section 207(3)(d) of the Companies Act should be repealed.

(e) Requirement to report on fraud

63 Under section 207(9A) of the Companies Act, an auditor of a public company or a subsidiary of a public company who has reason to believe that a serious offence involving fraud or dishonesty[18] is being or has been committed against the company by officers or employees of the company, must immediately report the matter to the Minister for Finance.

64 From the definition of the phrase "a serious offence involving fraud or dishonesty" in section 207(9D) of the Companies Act, it would appear that the nature of the offences contemplated by the section are offences relating to acts where the fraud or dishonesty lead to the misappropriation of the property of the company. It does not appear to cover deliberate mis-statements of accounts (ie, accounting fraud).

65 Auditors are already required to deal with any material mis-statements of accounts in their audits. If the auditor detects a mis-statement (fraudulent or otherwise) during the course of the audit, the auditor would raise this to the company.

[17] Section 16(1) of the New Zealand Financial Reporting Act 1993.

[18] The phrase "a serious offence involving fraud or dishonesty" is defined in section 207(9D) of the Companies Act to mean —
(a) an offence that is punishable by imprisonment for a term that is not less than 2 years; and
(b) the value of the property obtained or likely to be obtained from the commission of such an offence is not less than $20,000.

66 If the mis-statement is not a case of fraud, and adjustments are made, there is no breach of accounting standards or Companies Act requirements. As the adjusted accounts are true and fair, there should also be no concern of the users of the accounts being misled.

67 On the other hand, if the management of the company agrees with the auditor that the transaction is suspicious and no adjustment is made, the financial effect of the suspicious transaction would be disclosed in the accounts (as is required under the SFRS), and users of the accounts would be put on notice. If the management of the company is not co-operative in disclosing the financial effect of the transaction in the accounts, the auditor would qualify his opinion, and if there is a breach of the provision of the Act which cannot be dealt with adequately in the auditors' report, will have to report this immediately to the Registrar of Companies under section 207(9)(a) of the Companies Act. A user of those accounts would therefore be put on notice that there is something irregular (at the very least) in respect of the accounts. The risk that shareholders/investors would be misled by the accounts is therefore reduced.

68 While the Steering Committee noted the views received during the consultation that the consequences of accounting fraud were serious and that auditors can exercise their professional judgment in assessing whether there are instances of accounting fraud, it noted that it may be difficult in practice for an auditor to determine from the circumstances of a mis-statement whether there is case of accounting fraud or if it is just a mistake.

69 Therefore, on balance, the Steering Committee is of the view that section 207(9A) should not be extended to include a requirement for an auditor to report on instances of suspected accounting fraud which he may come across in the course of the performance of his duties as auditor.

70 There was also a suggestion for an increase of the threshold stated in s207(9D), where "the value of the property obtained or likely to be obtained from the commission of such an offence" is used as the threshold to define a "serious offence involving fraud or dishonesty". The threshold amount had been set at $20,000 in 1989. The Steering Committee agreed that this was an area that needed to be addressed and proposed that the threshold level be raised to $250,000 as the appropriate amount to be considered a serious offence in current times.

Recommendation 4.21

Section 207(9A) should not be extended to include a requirement for an auditor to report on instances of suspected accounting fraud.

Recommendation 4.22

The amount stated in section 207(9D)(b) used as the threshold to define a "serious offence involving fraud or dishonesty", should be raised from $20,000 to $250,000.

VII. RESIGNATION OF AUDITORS

71 Section 205(14) and (15) of the Companies Act allow an auditor to resign only if he is not the sole auditor or at a general meeting, and where a replacement auditor is

appointed. This provision makes it difficult for an auditor to resign in a situation where the company which appointed it refuses to hold a general meeting or appoint a new auditor to replace the outgoing one. In contrast, in the UK and Hong Kong, the resignation of the auditor takes effect upon the company being notified or on a date specified in the resignation notice.

72 In line with the position in the UK and Hong Kong, the Steering Committee's view is to allow the auditor of a non-public-interest company (other than a subsidiary of a public company) to resign upon giving notice to the company.

73 The status quo should, however, be retained for the auditor of a non-public-interest company which is a subsidiary of a public-interest company, i.e. such a company's auditor may only resign if he is not the sole auditor or at a general meeting, and where a replacement auditor is appointed. A non-public-interest company which is a subsidiary of a public-interest company should be treated differently from other non-public-interest companies since the auditor of a public interest company is required to seek ACRA's consent before he can resign.

74 It is noted that ACRA would take an interest in the premature resignation of auditors of "public-interest entities". As such, the Steering Committee is of the view that where the company concerned is a public-interest company, the auditor may only resign with the consent of ACRA. This is similar in approach to that in Australia where resignation of auditors of non-proprietary companies[19] requires the consent of the Australian Securities and Investments Commission (ASIC)[20]. ASIC will only consent to the resignation where ASIC is satisfied that there are no disputes with the company management connected with the auditor ceasing to hold office and no concerns such as lack of independence of the audit or opinion shopping, and where the resignation is other than at an annual general meeting, that there are exceptional circumstances[21].

75 There was some feedback received that it would be onerous and unwieldy to wait for ACRA's approval for the resignation of an auditor of a public-interest company and notification of ACRA was suggested as an alternative. Another comment against the requirement for ACRA's consent was that auditors may resign on routine and commercial grounds which are of little interest to ACRA. There were also concerns with ACRA getting involved in disputes between the auditor and the company and doubts as to how ACRA would form a view on whether or not to consent. The Steering Committee noted these responses but took the view that in most instances, an auditor would be appointed from one annual general meeting to the next and that it would only be in unusual situations that the

[19] A proprietary company is a company which:
- is limited by shares or is an unlimited company with a share capital;
- has no more than 50 non-employee shareholders; and
- must not engage in any activity that would require disclosure to investors under Chapter 6D of the Australia Corporations Act 2001 (relating to public fundraising).

A non-proprietary company is a company other than a proprietary company.

[20] Section 329 of the Australia Corporations Act 2001.

[21] ASIC's Policy Statement 26. Examples of exceptional circumstances are:

(a) the failing health of the auditor;
(b) loss of independence of the auditor;
(c) the company is not audited by the auditor of its parent entity; or
(d) a relocation of the company's or auditor's principal place of business resulting in circumstances where it would be impractical for the auditor to perform the audit.

auditor would resign mid-term. In such instances, ACRA would be interested in the reasons for the auditors' resignation and an approval mechanism would allow ACRA to stop the resignation where such resignation is not appropriate. It is likely that ACRA would adopt an approach similar to that in Australia in terms of the circumstances under which ACRA would grant consent.

76 The determination of what constitutes a "public-interest company" would follow a similar concept to that used for the purposes of the Practice Monitoring Programme conducted by ACRA[22]. The details as to what are the exceptional situations under which an auditor of a public-interest company may resign could be stated in a Practice Direction issued by ACRA.

77 A further issue considered was whether the resigning auditor should be required to disclose to the shareholders of the company the reasons for its resignation before the AGM. In the UK and Hong Kong, there is an express provision which requires a resigning auditor to state the circumstances of his resignation or if there are none, a statement of that fact. The statement of circumstances of the auditor's resignation would be given to the company unless a court has determined that the auditor is using the process to secure needless publicity for a defamatory matter[23]. In New Zealand, the resigning auditor must distribute to the shareholders a statement of the reasons for his resignation[24]. No distinctions are made in these countries between public-interest or non-public-interest companies. In Australia, the auditor of a non-proprietary company must state the reasons for his resignation in his application to ASIC for consent to the resignation. While the reasons are not disseminated to the company, ASIC will only grant consent if it is satisfied that there are no issues of concern to the company.

78 The Steering Committee took the view that the Companies Act need not expressly provide for disclosure of reasons by the auditor of a non-public interest company. While there was feedback received that the auditor should provide to the shareholders of the company the reasons for their resignation as a matter of transparency and accountability, the Steering Committee noted that there may be some concerns with defamation, and that the shareholders could request the information from the company where necessary.

79 For a public-interest company, there would also be no need for a requirement in the Companies Act for disclosure to be made to the shareholders where the company is regulated specifically under other rules and requirements, and would have to comply with other disclosure obligations (e.g. the listing manual), as such other disclosure requirements would be sufficient.

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[22] A "public-interest entity" for the purposes of the Practice Monitoring Programme is:-

(a) a company listed on the Singapore Stock Exchange;
(b) a company in regulated industries such as banks and insurance companies; or
(c) any other entity which raise funds from the public, such as charities.

[23] Section 520 of the UK Companies Act 2006; section 140A of the Hong Kong Companies Ordinance.

[24] Section 203(1) of the New Zealand Companies Act 1993.

<u>Recommendation 4.23</u>

The auditor of a non-public-interest company (other than a subsidiary of a public-interest company) should be allowed to resign upon giving notice to the company.

The status quo should be retained for the auditor of a non-public-interest company which is a subsidiary of a public interest company, viz, such a company's auditor may only resign if he is not the sole auditor or at a general meeting, and where a replacement auditor is appointed.

<u>Recommendation 4.24</u>

The auditor of a public-interest company should be required to seek the consent of ACRA before he can resign.

<u>Recommendation 4.25</u>

There is no need for an express requirement for an auditor to disclose to the shareholders of the company that appointed it the reasons for his resignation.

VIII. AUDITOR'S INDEPENDENCE

80 The current Companies Act includes some specific provisions relating to independence of auditors under section 10(1)[25]. This area is also dealt with in the Code of Professional Conduct and Ethics as set out in rules under the Accountants Act[26].

81 In Australia, provisions relating to auditor's independence are included in the Australia Corporations Act 2001. In the UK, auditor's independence requirements are largely prescribed by professional bodies as codes of conduct. In New Zealand, the Companies Act 1993 requires an auditor of a company to ensure, in carrying out the duties of an auditor, that his or her judgment is not impaired by reason of any relationship with or interest in the company or any of its subsidiaries[27].

82 The Code of Professional Conduct and Ethics prescribed under the Accountants (Public Accountants) Rules provides greater detail as to the requirements for independence than what is set out in section 10 of the Companies Act in respect of company auditors. The Steering Committee is of the view that all the provisions relating to independence of auditors could be consolidated in the rules under the Accountants Act, so as to reduce duplication in legislation on this issue. Moreover, the Code of Professional Conduct and Ethics would be of more general application, whereas the provisions in the Companies Act would only relate to company auditors.

[25] Section 10(1) of the Companies Act lists certain restrictions on a person being appointed as an auditor of a company, amongst which there are criteria relating to his independence. Section 206(1A) of the Companies Act requires a public company, under certain circumstances, to undertake a review of auditors' fees to determine whether the independence of the auditor has been compromised.
[26] Fourth Schedule to the Accountants (Public Accountants) Rules.
[27] Section 204 of the New Zealand Companies Act 1993.

83 However, one member of the Steering Committee expressed the view that the requirement for an independent audit of the accounts of a company is a consequence of incorporation and hence the requirement for an auditor's independence from the company should conceptually remain in the Companies Act rather than be moved to the Accountants Act. One of the respondents to the consultation also added that a requirement for independence under the Companies Act is a form of good corporate governance to protect the reliability and integrity of the financial statements of companies.

<u>Recommendation 4.26</u>

The provisions relating to auditor independence in section 10 of the Companies Act should be consolidated under the Accountants Act.

IX. LIMITATION OF AUDITOR'S LIABILITY

84 A review of the practices in the United States (US), the UK, Australia and certain European Union (EU) countries was carried out in respect of the regulatory provisions dealing with the limitation or apportionment of liability of auditors. Notably, reform to the auditor-liability regime has been made in the UK in their Companies Act 2006, which allows auditors to limit their liability through contractual agreements or "liability limitation agreements". In the US, the Private Securities Litigation Reform Act 1995 adopts the principle of proportionate liability (which divides the plaintiff's loss among the defendants according to their share of responsibility), but does not specifically limit the liability of auditors for class action suits.

85 Provisions relating to the limitation or apportionment of auditors' liability seek to address the impact of a major suit against a large audit firm on the market and business community. It is observed that the main reason why auditing firms were brought down (such as Arthur Anderson in the Enron case) was the negative impact on their reputation rather than their involvement in litigation. A further observation is that the US is more litigious and the damages awarded in US are usually higher than in Singapore, and therefore the concerns surrounding auditor liability in the US may not be applicable in Singapore.

86 It is further noted that in the US, audit fees and a cap of liabilities are often used as bargaining terms in audit engagements. In Singapore, however, audit fees are generally lower, and therefore there is less incentive for any agreement for a cap on liability. However, Singapore should keep pace with the developments in other countries in this area and ACRA will continue to monitor this issue.

87 Some respondents to the consultation expressed the view that if limitations to liability are not imposed, this may put Singapore accountants at a disadvantage and would encourage fewer accountants to take up partnership roles in Singapore. Those not in favour of a statutory limitation, on the other hand, felt that auditor liability should be determined by the courts and that the auditors already had the protection of professional indemnity insurance.

88 The Steering Committee considered the feedback received and concluded that on balance, there was no pressing need to statutorily provide for a limitation of auditor's liability

at the moment. However, noting that Singapore should not fall behind other jurisdictions on this issue, ACRA should monitor the developments in this area.

Recommendation 4.27

There is no need to introduce statutory provisions on the limitation of liability of auditors at this time, but the issue will be monitored by ACRA.

X. INDEMNITY FOR AUDITORS UNDER SECTION 172 OF COMPANIES ACT

89 Section 172(1) of the Companies Act states that any provision, whether in the articles or in a contract or otherwise, indemnifying any officer or auditor against any liability for negligence, default, breach of duty or breach of trust in relation to the company is void.

90 Section 172(2)(b) of the Companies Act does not prevent a company from indemnifying any officer or auditor against any liability incurred by him:

(i) in defending any proceedings (civil or criminal) in which judgment is given in his favour or in which he is acquitted; or

(ii) in connection with any application under section 76A(13) or section 391(2) or any other provision of the Companies Act, in which relief is granted to him by the court.

91 The review of these provisions in respect of directors was considered separately. The Steering Committee suggested that section 172 be amended to expressly allow a company to provide indemnity against liability incurred by its directors to third parties.

92 Australia and Hong Kong, like Singapore, have a single provision governing indemnities of both officers/directors and auditors. The UK has separate provisions governing indemnities for directors and auditors, while New Zealand only has provisions in relation to directors.

93 One respondent pointed out that auditors may manage their risks against claims for negligence, error/omission, misrepresentation and any other form of professional negligence by taking out adequate professional liability insurance to cover any third party liabilities arising from auditors' acts, negligence or omissions in their capacity as auditors. Another comment received was that a company should not be allowed to indemnify auditors for claims brought by third parties as the auditor is not an employee of the company nor is he an officer of the company, unlike a director. A further view was that allowing the company to indemnify its auditors may compromise the independence of the auditors.

94 On the other hand, other respondents favoured allowing a company to indemnify its auditors for qualifying claims brought by third parties, as is allowed under the legal frameworks in Australia and New Zealand.

95 The Steering Committee takes the view that an auditor should not be treated in the same way as a director, given that he is not an officer or employee of the company and is appointed to carry out an independent review of the accounts. On that basis, the Steering Committee is unwilling to extend the extension of scope of protection for directors in respect of indemnification for claims brought by third parties to auditors.

96 The Steering Committee also considered and accepted a proposal to amend section 172(2)(b) to clarify that a company is allowed to indemnify its directors against potential liability[28]. On this issue, the Steering Committee agrees that the indemnity in respect of auditors in section 172(2)(b) of the Companies Act can be extended to liabilities which are to be incurred.

Recommendation 4.28

A company should not be expressly allowed to indemnify auditors for claims brought by third parties.

Recommendation 4.29

The drafting of section 172(2)(b) of the Companies Act should be amended to clarify that a company is allowed to indemnify its auditors against potential liability.

XI. AUDIT COMMITTEE PROVISIONS

97 Section 201B of the Companies Act provides a statutory requirement for listed companies to have an audit committee and sets out the composition and duties of such committees. Part of the functions of audit committees and the establishment of other listed company committees are set out in the Code of Corporate Governance.

98 In line with the strategy towards streamlining the Companies Act to contain only core company law, the Steering Committee considered whether to retain this requirement in the Companies Act.

99 The Steering Committee noted that the provisions relating to audit committees only apply to listed companies. There was feedback received from the consultation that there is no compelling reason to move the provisions and that retaining the provisions in the Companies Act will facilitate the possibility in future, if determined necessary, to extend them to non-public companies. However, the Steering Committee took the view that as the bulk of the requirements relating to audit committees are set out in the Code of Corporate Governance, the requirement for an audit committee should be moved out of the Companies Act.

[28] There appears to be some uncertainty as to whether the use of the word "incurred" in section 172(2)(b) is wide enough to cover potential liability. The concern is that the restrictions on a company's power to make loans to its directors have prevented companies from lending money to its directors on a "to be incurred" basis even to pay for his legal expenses.

100 The Steering Committee recognised that there is value in retaining the audit committee as a statutory committee in that failure to comply with the requirements in a statute would attract penalties. The suggestion is therefore that the provisions should be more appropriately located under the Securities and Futures Act or some other Act pertaining only to listed companies.

Recommendation 4.30

The provisions relating to audit committees should be moved to the Securities and Futures Act.

XII. ACCOUNTING RECORDS AND SYSTEMS OF CONTROL

(a) Keeping of accounting records

101 Section 199(1) of the Companies Act requires every company to keep such accounting and other records as are necessary to explain the transactions and financial position of the company and to allow a profit and loss account and a balance-sheet to be prepared. This obligation is cast expressly upon the directors and managers of the company. A similar duty is imposed on directors in the UK, Australia, New Zealand and Hong Kong.

102 This obligation was reviewed by the Directors' Duties Study Team (DDST), led by the Accounting and Corporate Regulatory Authority (ACRA) and comprising industry professionals, representatives of professional bodies and regulators separately. The DDST had separately reviewed the provisions in the Companies Act which set out or affect duties and responsibilities of directors. The DDST opined that this duty of directors is still relevant today and found that section 199(1) is adequate.

103 The DDST also considered that in some overseas jurisdictions, the law provided some details on what accounting records should be kept for the purposes of fulfilling the obligation[29]. The DDST took the view that it would not be possible or desirable to provide a comprehensive list of the type of accounting records that are to be kept. It felt that the existing requirement for accounting and other records to be kept in order to sufficiently explain the transactions and financial position of the company, and to enable the preparation

[29] In the UK, section 386 of the UK Companies Act 2006 states that accounting records must contain: (i) entries from day to day of all sums of moneys received and expended by the company and the matters in respect of which the receipt an expenditure takes places; and (ii) record of assets and liabilities of company. In New Zealand, the accounting records must contain —
(a) Entries of money received and spent each day and the matters to which it relates;
(b) A record of the assets and liabilities of the company;
(c) If the company's business involves dealing in goods —
    (i) a record of goods bought and sold, except goods sold for cash in the ordinary course of carrying on a retail business, that identifies both the goods and buyers and sellers and relevant invoices;
    (ii) a record of stock held at the end of the financial year together with records of any stocktakings during the year;
(d) If the company's business involves providing services, a record of services provided and relevant invoices.
(Section 194(2) of the New Zealand Companies Act 1993).

of true and fair profit and loss accounts and balance-sheet, already provides the scope and principles for such record keeping. The DDST concluded that the test for the adequacy of the accounting and other records to be kept is rightly based on the principle that true and fair financial statements could be prepared from those records.

104 The Steering Committee agreed with the DDST's recommendations and is of the view that the duty of directors to keep accounting and other records as provided in section 199(1) should be retained as currently drafted.

105 The general view from most of the respondents to the consultation was that there was no need to change the provision in section 199(1).

Recommendation 4.31

The directors' duty to keep accounting and other records in section 199(1) does not require amendment.

(b) Devising and maintaining system of internal controls

106 Section 199(2A) of the Companies Act requires every public company and its subsidiaries to devise and maintain a system of internal accounting controls sufficient to provide a reasonable assurance that:

(a) assets are safeguarded against loss from unauthorised use or disposition; and

(b) transactions are properly authorised and that they are recorded as necessary to permit the preparation of true and fair profit and loss accounts and balance-sheets and to maintain accountability of assets.

107 This legal requirement for internal controls for public companies and their subsidiaries was introduced via the Companies (Amendment) Act 1989, in which a number of amendments were aimed at strengthening the statutory means to prevent and detect company fraud. The requirement was reviewed by the DDST and its recommendations have been considered by the Steering Committee.

108 One issue is whether the legal requirement to devise and maintain a system of internal controls should be extended to private companies.

109 On the one hand, since all companies are required to prepare financial statements that are true and fair, all companies should have internal controls in order to ensure the credibility of the financial statements to be prepared. Further, it may be difficult for the auditors to convey to the directors of private companies that they have the responsibility to ensure that the companies have sound internal controls, if the legislation does not expressly provide for such a duty or responsibility. Without internal controls, it would be difficult for the auditors to give an opinion on whether the financial statements are true and fair. In addition, a system of internal controls does not necessarily mean an elaborate system of internal controls. Therefore, private companies should not have difficulty complying with such a legal requirement.

110 Respondents to the consultation also had the following comments in support of the imposition of an express obligation on private companies –

(a) If a sizeable group of private companies is going to be exempted from audit under the proposed small company regime, there would be an even greater need for private companies to have internal controls.

(b) The absence of a provision in the Companies Act for private companies may be misinterpreted as meaning that there is no requirement for internal controls for private companies.

111 On the other hand, there may be no need to impose such a legal obligation on private companies, especially when the users of smaller private companies' financial statements are limited. The number of investors who would be affected by the financial situation of the smaller private companies is also limited. Further, imposing a legal obligation on private companies to have a system of internal controls may lead to an increase in compliance cost. The directors of such companies may perceive the express requirement in law as a "stricter duty" than the present situation. Hence, private companies may think that there is a need to separately engage professionals to advise them whether the internal controls maintained by them are adequate, since non-compliance would be an offence.

112 In the case of larger private companies which have more stakeholders, even if there is no express legal requirement imposed on the companies, the auditors who are not satisfied with the internal accounting controls of private companies and opined that this affects the credibility of the financial statement of the company can qualify the company's financial statements. Market forces would then intervene and cause the company to look into its internal controls. ACRA as the corporate regulator would also step in to investigate, where warranted.

113 It is noted that it would be more desirable to let the market drive corporate behaviour, unless there is a compelling need for the law to provide for regulation to protect public interest which is not the case here. There is also no similar legal requirement in the other major jurisdictions. If Singapore decides to impose the legal requirement on private companies, it may lead to over-regulation and an increase in business costs.

114 Respondents to the consultation also highlighted that duties in a private company cannot practically be segregated in a small family-run company with only a few shareholders/ directors, or single-director companies, making it difficult for such a company to comply with formal internal accounting controls.

115 One of the Steering Committee members highlighted that with the change in the Companies Act which allows even private companies to raise funds from the public, there is now less of a distinction between private companies and public companies. He highlighted that at the time section 199(2A) CA was drafted, the law still permitted only public companies to raise funds from the public. Since the distinction had since been removed, the rationale of balancing the costs and benefits of a mandatory requirement for internal accounting controls should equally apply to both public and private companies of a significant size.

116 Although a private company may be able to solicit a significant amount of funds from the public while not being subjected to the mandatory requirement to maintain internal accounting controls, it is noted that there is still an over-arching directors' duty under section 157 CA to use reasonable diligence to carry out their duties diligently, which would include ensuring sufficient internal accounting controls to facilitate the preparation of proper accounts.

117 Moreover, using the size of the company as the criteria to determine the mandatory requirement would make it difficult for a director to determine at any one point in time what his obligation was, as the size of the company may vary within short periods of time. Having a size test would also present difficulties in enforcement as it would be difficult to determine at what point in time the obligation was mandatory and whether a breach had occurred.

118 On balance, the Steering Committee takes the view that it may to amount over-regulation to impose a mandatory requirement on private companies for which failure to comply would constitute an offence. It, however, recognises that it is important for directors of private companies to be aware of the need for internal accounting controls, so there must be promotion of awareness in this respect. To avoid the public misconception that private companies do not require internal controls, some form of non-statutory guidance should be given.

Recommendation 4.32

The requirement under section 199(2A) for a public company to devise and maintain a system of internal controls need not be extended to private companies.

Recommendation 4.33

Any misconception that private companies currently do not require internal controls should be corrected through non-statutory guidance.

119 Another issue that has been considered is whether it would be necessary to extend the legal requirement under section 199(2A) to the associated companies and related companies of public companies. The Steering Committee notes that as directors of a public company have no control over its associated companies and related parties, the legal requirement to devise and maintain internal controls should not be extended to the associated companies and related parties. This view was generally supported by the consultation feedback.

Recommendation 4.34

The requirement under section 199(2A) for a public company and its subsidiaries to devise and maintain a system of internal controls need not be extended to the associated companies and related companies of a public company.

XIII. COMPONENTS OF STATUTORY ACCOUNTS

120 Currently, the Companies Act requires the preparation of true and fair balance-sheets and profit and loss accounts[30]. It does not provide for the other components of accounts, namely the cash flow statement, statement of changes in equity, accounting policies and explanatory notes. Furthermore, under the current Companies Act provision, there is no requirement for the components of the accounts other than the profit and loss account and the balance-sheet to be "true and fair". There is also no express requirement that these other components be filed with the Registrar of Companies together with the annual return[31].

121 The Steering Committee is of the view that components of the accounts in the relevant provisions in the Companies Act should be clarified by referring to the definition of accounts contained in the Singapore Financial Reporting Standards (SFRS). This is similar to the position in the Australia Corporations Act 2001, which defines "financial statements" as the financial statements in relation to the entity reported on that are required by the accounting standards[32].

122 The SFRS has a clear definition in paragraph 10 of FRS1 as to what comprises a full set of accounts:

(a) a statement of financial position as at the end of the period;

(b) a statement of comprehensive income for the period;

(c) a statement of changes in equity for the period;

(d) a statement of cash flows for the period;

(e) notes, comprising a summary of significant accounting policies and other explanatory information; and

(f) a statement of financial position as at the beginning of the earliest comparative period when an entity applies an accounting policy retrospectively or makes a retrospective restatement of items in its financial statements, or when it reclassifies items in its financial statements.

123 The preference is for a revised definition which refers to the components set out in the SFRS rather than to list the various components expressly in the Companies Act, so that if there are changes to the components in the SFRS, it would not be necessary to make subsequent amendments to the Companies Act. One member of the Steering Committee, however, was of the view that the definition of "accounts" should be retained in the Companies Act.

124 Most of the respondents agreed with the majority view of the Steering Committee.

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[30] See section 201(1A), (3) and (3A) of the Companies Act.
[31] Regulation 38 of the Companies (Filing of Documents) Regulations requires a company to file the profit and loss accounts, the balance-sheet, the directors' report and statement, the auditors' report and the notes to the accounts together with the annual return.
[32] Section 295 of the Australia Corporations Act 2001.

Recommendation 4.35

The components of the accounts in the relevant provisions in the Companies Act should be clarified by referring to the definition of "accounts" contained in the SFRS.

XIV. PRESENTATION OF THE ACCOUNTS

125 The DDST reviewed the current duties on directors in respect of the requirement to lay accounts at the annual general meeting under section 201(1) of the Companies Act, and to send a copy of the accounts to all persons entitled to receive notice of general meetings under section 203(1).

126 The DDST agreed that these existing legal duties of directors were still relevant and recommended that no amendments to the corresponding statutory provisions are necessary. The Steering Committee agrees with these recommendations.

127 Most of the respondents also agreed with these views.

Recommendation 4.36

The directors' duties in section 201 to lay the financial statements before the company at every annual general meeting and to ensure that the financial statements are audited do not require amendment.

Recommendation 4.37

The directors' duty in section 203(1) to send to all persons entitled to receive notice of general meetings a copy of the company's profit and loss account and balance-sheet does not require amendment.

XV. FRAMEWORK FOR CONSOLIDATION OF ACCOUNTS

(a) Determination of which entity needs to prepare consolidated accounts

128 Currently the definitions under section 5 of the Companies Act[33] and FRS 27[34] in respect of the term "holding company" and "parent" respectively are similar but not identical.

[33] Section 5 of the Companies Act defines when a holding company - subsidiary relationship exists. A holding company is defined as a company which:
(a) controls the composition of the board of directors of subsidiary;
(b) controls more than half of the voting power of subsidiary; or
(c) owns more than half of issued share capital of subsidiary (not counting preference shares).

[34] Under FRS 27 of the Singapore Financial Reporting Standards, a "parent" is required to present consolidated accounts in which it consolidates its investments in subsidiaries. A "parent" is defined as an entity that has one

As a result, a company may meet the definition "subsidiary" or "holding company" under the Companies Act but not the accounting definition of "subsidiary" or "parent" under FRS 27. For example, a company may own more than half of the issued share capital of another company but may not control its financial and operating policies. Under section 5 of the Companies Act, such a company is a subsidiary whereas under FRS 27, it is not.

129 In Australia, the obligation to consolidate accounts is located in the accounting standards rather than spelt out in the Corporations Act 2001. The obligation for a company to consolidate accounts is indirectly given the force of law by virtue of section 296 of the Australia Corporations Act 2001, which requires entities to comply with the accounting standards. In the UK, the Companies Act 2006 specifically defines "parent undertaking" and "subsidiary undertaking" for the purposes of the sections relating to the preparation of accounts, which are similar to the definition of the parent-subsidiary relationship in the accounting standards. New Zealand has a specific Financial Reporting Act which defines "subsidiary" consistently with the definition in the accounting standards. The New Zealand Companies Act 1993 has a separate definition of the term "subsidiary".

130 The Steering Committee is of the view that the determination of which companies should prepare consolidated accounts should be aligned and determined by the financial reporting standards. This is similar to the approach in Australia and is consistent with the earlier suggestion to clarify the components of the accounts in the relevant provisions in the Companies Act by referring to the definition of "accounts" contained in the SFRS. Section 5 of the Companies Act can continue to remain for the purposes of other sections in the Companies Act. This approach would minimise future alignment issues if and when the definitions in the accounting standards change, which may be the disadvantage if the UK approach is adopted.

131 No differing views were received from the consultation feedback.

Recommendation 4.38

The determination of whether a company should prepare consolidated accounts should be set by only the financial reporting standards and not the Companies Act.

(b) Alignment of financial year-end of subsidiary and parent

132 In general, the directors of a holding company must take steps to ensure that the financial years of each of its subsidiaries coincides.[35] For foreign subsidiaries, under section 200(2A) of the Companies Act, the financial year of a foreign subsidiary must end on a date not earlier than 2 months before the end of the financial year of the holding company, while the difference between the reporting date of a subsidiary and that of its parent can be up to 3 months under the FRS 27.[36] Where a company has foreign subsidiaries, there appears to be a

or more subsidiaries and a "subsidiary" is an entity, including an unincorporated entity such as a partnership, which is controlled by another entity. "Control" is defined in FRS 27 as the power to govern the financial and operating policies of the other entity so as to obtain benefits from its activities.

[35] Section 200(1) of the Companies Act.

[36] Paragraphs 26 and 27.

mismatch between the requirements in section 200(2A) of the Companies Act and those in the FRS 27.

133 Both the UK and Australia have statutory provisions which require alignment of the financial year-ends of a parent and its subsidiaries. In Australia, there is a general exemption power which allows the Australian Securities and Investments Commission (ASIC) to grant relief from the requirement.[37] In the UK, the financial year-ends of a parent company and a subsidiary undertaking need not be aligned where in the directors' opinion there are good reasons against it.[38] If the financial year of a subsidiary undertaking included in the consolidation does not end with that of the parent company, the group accounts must be made up:

(a) from the accounts of the subsidiary undertaking for its financial year last ending before the end of the parent company's financial year, provided that year ended no more than 3 months before that of the parent company; or

(b) from interim accounts prepared by the subsidiary undertaking as at the end of the parent company's financial year.[39]

134 In New Zealand, the balance date of a subsidiary may precede the balance date of the reporting entity.[40] If so, a subsidiary's balance date must be not more than 3 months earlier than its parent. Otherwise, interim accounts must be prepared in respect of the period that is the same as the accounting period of the parent.[41]

135 The Steering Committee is of the view that the alignment of the financial year-end of a parent company and its subsidiaries should be determined by the SFRS, rather than specified in the Companies Act.

136 Most of the respondents agreed with the views of the Steering Committee.

Recommendation 4.39

The requirements for alignment of the financial year-end of a parent company and its subsidiaries should be set in accordance with the financial reporting standards.

XVI. REVISION OF DEFECTIVE ACCOUNTS

137 ACRA has noted a need for an alternative enforcement action where defective accounts are detected. Currently, the only enforcement action available where there is non-compliance with the accounting standards and the statutory requirements relating to accounts is to prosecute the directors of the company for an offence under section 204 of the

[37] Section 340 of the Australia Corporations Act 2001.
[38] Section 390(5) of the UK Companies Act 2006.
[39] Schedule 6, rule 2(2) of the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008 and the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008.
[40] Section 7(11) of the New Zealand Financial Reporting Act 1993.
[41] Section 14(4) of the New Zealand Financial Reporting Act 1993.

Companies Act. An express procedure which allows ACRA to require a company to revise its defective accounts where such defects had been detected could serve as a complementary enforcement action.

138 The UK, Hong Kong and Australia have regimes in which the regulatory authority which conducts surveillance of compliance with statutory requirements for accounts refers the matter to a separate authority (either a court or an independent panel) for adjudication of non-compliance for the purpose of requiring the company to revise its accounts. In the US, while cease and desist orders (which may include an order to rectify defaults) are issued by the US Securities Exchange Commission (SEC), matters regarding non-compliance are heard and determined by administrative law judges within the US SEC before such an order is issued. There is currently no provision in respect of mandating revision of accounts in New Zealand.

139 There was feedback received that referring non-compliance matters to the courts slows down the revision process considerably and may result in revisions that are not timely. The suggestion was therefore to grant authority such as ACRA the power to require companies to make such revisions. However, it would not be appropriate for ACRA to act both as the regulator and the adjudicator, unless an independent body can be established within ACRA to adjudicate the issue. The Steering Committee considered that referring the case through the court system, which was well established, would be preferred.

140 The Steering Committee therefore is of the view that the most appropriate regulatory framework to adopt in Singapore is that similar to the UK. In Singapore's context, this would entail ACRA bringing proceedings for determining a breach requiring revision of accounts to the court, and the determination of whether an order for revision of the accounts is made is decided by the court.

141 Jurisdictions such as the UK and Hong Kong also have provisions relating to the voluntary revision of accounts in their respective legislation. Currently, there is no express provision in the Companies Act which allows a company to voluntarily revise its accounts. There is value in including a provision relating to voluntarily revision, as it would allow diligent directors of a company to revise the accounts of the company on their own accord before the accounts in respect of the next financial period are prepared.

142 Directors may choose to voluntarily revise the company's accounts if there are errors in their company accounts. This may especially be so if they are concerned with reputation risk or possible civil liability where stakeholders of the company place reliance on an error not corrected by the company, apart from any concern that ACRA may take action against the directors under the Companies Act. A provision for voluntary revision would allow the directors to correct the error at an earlier opportunity than in the next year's accounts if the directors of a company so wish to do so. No differing views were received on this issue from the consultation feedback.

Recommendation 4.40

A regulatory framework similar to that in the UK should be adopted for the purposes of requiring the revisions of defective accounts, i.e. the determination of whether an order for revision of defective accounts is made is decided by the courts.

Recommendation 4.41

Provisions for the voluntary revisions of defective accounts should be introduced in Singapore.

SUMMARY TABLE OF FINANCIAL REPORTING OBLIGATIONS

	(1) Preparation of accounts	(2) Requirement for audit	(3) Filing of accounts
(A) Full requirement	All types of companies other than (1)(C)	All types of companies other than (2)(C)	All types of companies other than (3)(B) and (3)(C)
(B) Reduced requirement	N.A.	N.A.	A small company must file basic financial information (see Recommendation 4.5)
(C) Exempted	A dormant[i] non-listed company (other than a subsidiary of listed company), subject to the substantial asset threshold test (see Recommendations 4.6 & 4.11) The directors of a dormant non-listed company so exempted must lodge an annual declaration of dormancy.	(i) A small company[ii] (see Recommendation 4.1), subject to (ii) below. (ii) A subsidiary which is a member of a group of companies may be exempt from audit as a small company only if the entire group to which it belongs qualifies on a consolidated basis for audit exemption under the small company criteria (see Recommendation 4.3) (iii) A dormant listed company, a dormant non-listed subsidiary of a listed company, a dormant non-listed company which exceeds the substantial asset threshold test. (see Recommendations 4.8 & 4.9) (iv) A company not required to prepare accounts under (1)(C).	(i) A company which is one of the following, and is solvent: (a) a private company wholly-owned by the Government, which the Minister, in the national interest, declares by notification in the Gazette to be exempt; (b) a private company falling within a specific class prescribed by the Minister as being exempt (e.g. specific industries where confidentiality of information is critical and public interest in the accounts is low); (c) a private company exempted by the Registrar upon application on a case-by-case basis and published in the Gazette. (see Recommendation 4.5) (ii) A company not required to prepare accounts under (1)(C).

[i] A company is taken to be dormant during a period where no accounting transaction occurs (Section 205B(2) CA). A list of transactions that are disregarded as accounting transactions are set out under section 205B(3) CA. This list is proposed to be extended to include statutory fees/fines under any Act and nominal payments/receipts (see Recommendation 4.10).

[ii] A company would qualify as a small company is it is a private company and fulfils two of the following criteria:

(a) Total annual revenue of not more than S$10 million;

(b) Total gross assets of not more than S$10 million;

(c) Number of employees not more than 50.

(see Recommendation 4.1)

CHAPTER 5

GENERAL COMPANY ADMINISTRATION

I. INTRODUCTION

1 One of the primary aims of this review of the Companies Act is to streamline the administration of companies in order to reduce the burden of regulatory compliance. To this end, it is proposed that the legal requirement to maintain certain registers be eliminated in view of the availability of electronic records and registers online from the Accounting and Corporate Regulatory Authority (ACRA). Other reforms proposed include simplifying the Memorandum and Articles of Association and simplifying the striking-off process. Proposals were also received regarding the regime governing company names, the necessity for company secretaries and reform of the provisions governing companies limited by guarantee. It was considered that the status quo in these areas is generally satisfactory and should be maintained.

II. REGISTERS

2 Currently, the Companies Act requires all companies to maintain the following registers at their registered office:

(a) Register of members;

(b) Register of directors' shareholdings;

(c) Register of substantial shareholders for listed companies;

(d) Register of directors, managers, secretaries, auditors;

(e) Register of charges; and

(f) Register of debenture holders.

3 However, with the implementation of electronic filing it is possible to make ACRA's registers the definitive and authoritative registers in place of the registers maintained by companies (hereinafter referred to as "company registers"). As company records at ACRA are now easily accessible electronically via ACRA's Bizfile system, the maintenance of a similar set of company records by the company would amount to unnecessary duplication. In contrast to the past when ACRA's records were filed manually and information about companies was difficult to compile or gather, the advent of electronic filing has resulted in a more convenient and efficient manner of accessing such records. The only records that ACRA does not have are the minutes of company meetings.

4 At present, many directors do not seem to be aware of the need to keep, maintain and constantly update a separate set of records regarding changes in appointment of directors, auditors, share allotments, annual returns, changes in

addresses of registered offices, etc. Moreover, many auditors currently rely on ACRA's records as a means to identify any gaps in the records of private companies. In fact, there is an emerging trend, especially amongst banks in Singapore conducting due diligence searches on companies, in preferring to first check the relevant information about such companies, as lodged with ACRA, before verifying such information against the relevant registers and indexes of members maintained by the companies. Thus, third parties tend to rely on ACRA as an independent source of information to confirm information about companies' particulars. In view of this, the Steering Committee is of the view that the registers maintained by ACRA should be the main and authoritative register of members for all companies in Singapore and that the relevant legislation be amended accordingly to reflect this.

5 Making ACRA's database authoritative would mean that people would be able to check with ACRA and not with the company for such information. Furthermore, a small company which does not wish to keep its own register could rely on ACRA's register to record the names and other relevant particulars of its members. Members of the public would be able to buy extracts of information from the register. ACRA's register would help to ensure that there would be a master copy that could be updated.

6 The reliance on ACRA's records as the authoritative source of information would not impede the due diligence checks performed on companies as all records can be found in one form or another (for example, in microfiche for those documents lodged before 2003 and in electronic form after 2003). In order to conduct due diligence checks on companies (when a company is being audited), it would be necessary to ascertain the history of relevant transactional information by such companies.

(a) Register and index of members: authoritative ACRA register of members for private companies

7 The Steering Committee is of the view that the authorised register of members of private companies should be maintained by ACRA. In other words, section 190 (Register and index of members) would no longer apply to private companies as the registers maintained by ACRA in electronic form and accessible by the public can be used as the main and authoritative register of members for private companies in Singapore.

8 The majority of respondents to the consultation agreed with this recommendation. However substantial concerns were expressed relating to how mistakes in the ACRA register would be remedied. These will be addressed when drafting the relevant provisions. Some respondents suggested that in the completion of certain commercial transactions it is often assumed that the company secretary has control over the Register of Members; and since most other jurisdictions do not have online registers, commercial agreements may not contemplate such arrangements. However the Steering Committee is of the view that commercial agreements are not usually so specific that such concerns would arise.

9 The ACRA register should have these characteristics if they are to replace the company registers: (i) fees should not be chargeable for inspection of the ACRA Register of Members by the company; and (ii) the ACRA Register of Members

should be updated in real time. Detailed issues of implementation (e.g. the form of notification, notifying party, dispute resolution) will be addressed at the drafting stage.

(b) Register and index of members: authoritative ACRA register of members for public companies

10 However, the proposed amendment should not apply to listed public companies. Listed public companies tend to have a larger number of members and as such it would still be useful and convenient for the register of such companies to be maintained and kept at the registered office. That register should remain the authoritative register for public companies.

11 For unlisted public companies, it would not be mandatory to report any change in ownership or membership immediately. They will continue to update ACRA registers to reflect changes in ownerships as is the current practice. Changes in ownership are updated when filing the Annual Returns where the company has to provide the final listing of all shareholders (or the top 50 shareholders if there are more than 50 shareholders) or members.

12 Although some respondents to the consultation were in favour of expanding the recommendation to cover unlisted public companies, the Steering Committee does not recommend this. Such companies can have an unlimited number of shareholders and hence ACRA's database would have to cater for this possibility. This would have cost implications. Implementation for public unlisted companies can be considered at a later time.

Recommendation 5.1

Section 190 (Register and index of members) should no longer apply to private companies as the registers maintained by ACRA in electronic form and accessible by the public can be used as the main and authoritative register of members for private companies in Singapore.

(c) Status of members lodged in ACRA register

13 The Steering Committee reviewed the information required to be disclosed in the register of members and index of members for completeness and noted that under the current regime, notification of transfer of shares is not mandatory.

14 The Steering Committee has considered the possibility that doing away completely with the register of members may lead to a problem of authoritative proof regarding who is a member. Nevertheless, the Steering Committee is of the view that the law may be reformed to provide that a person becomes a member only when the Registrar has been duly notified.

15 The initial view of the Steering Committee was that the onus should be on new members to notify the Registrar. However, some of the respondents to the consultation pointed out that the status of a member of a private company should be

made by the company itself to ensure that the control of admission or removal of members remains with the company in accordance its Articles of Association. The Steering Committee therefore recommends that notification of a change in membership should be made by the company.

16 The determination of the status of members in the context of share allotments and transfers for private companies should be in the following manner:

(a) a 14-day period be given for the filing of information regarding the allotment or transfer of shares with ACRA;

(b) the effective date of notice of the allotment or transfer would be based on the date of filing with ACRA; and

(c) that such filing shall be prima facie evidence of the change in interest in the shares of the company.

17 As a consequence of the proposals, it will be mandatory for private and unlisted public companies to report alterations in share capital to ACRA under section 71. Section 71 currently provides that the company may report the alteration without specifying the time frame required.

Recommendation 5.2

Any person who is not notified as a member by the company to the Registrar is not a member of that company.

Recommendation 5.3

The status of members in the context of share allotments and transfers for private companies should be determined in the following manner:

(a) a 14-day period should be given for the filing of information regarding the allotment or transfer of shares with ACRA;

(b) the effective date of notice of the allotment or transfer would be based on the date of filing with ACRA; and

(c) such filing shall be prima facie evidence of the change in interest in the shares of the company.

(d) Register of directors' shareholdings

18 The register of directors' shareholdings under section 164 of the Companies Act is relevant and important for both listed and unlisted companies as disclosure of such information in the register is in accordance with principles of good corporate governance which mandates transparency in the matter of the ownership of shares.

19 The Steering Committee has considered the positions adopted in the UK, Hong Kong, Australia and New Zealand, and noted that these other jurisdictions (with the exception of New Zealand)[1] have done away with the register of directors' shareholdings.

20 Notwithstanding the fact that the UK, Hong Kong and Australia have done away with the register, the Steering Committee recommends that the status quo be maintained in the interest of transparency and disclosure: viz, companies are required to maintain the register of directors' shareholdings (and other interests, etc specified in section 164(1)(a) to (d)). The information about directors' shareholdings would impact a director's position on the board if there was a conflict of interest. Also, a minority investor may wish to have information about such interests. The register enables a private company to be aware of its directors' shareholdings, and enables the parent company of a wholly-owned subsidiary to know similar details about its subsidiary. The register would also be useful for shareholders who may require such information when making decisions about the company.

21 Respondents to the consultation agreed with this recommendation.

Recommendation 5.4

Companies should continue to maintain the register of directors' shareholdings.

(e) Register of directors, secretaries, managers and auditors

22 All companies should still be required to maintain a register of directors and secretaries, but this register should be kept by ACRA. As long as there is a filing obligation on the part of companies, it need not be a statutory requirement for companies to keep the register.

23 The Steering Committee considered that the register of managers is no longer relevant. The term "manager" is vague and not well defined in the Companies Act. Managers could possibly be non-directors. Furthermore, most companies when filing documents with ACRA, leave the relevant slot for managers blank. Thus, the Steering Committee recommends that there is no need for the companies to maintain a register of managers.

24 The Steering Committee considered the need for the register of auditors and decided that such a register does not really serve a purpose. In Australia, the register reflects whether the auditor has had any disciplinary records, and the same approach could indeed be adopted in Singapore. However, even if Singapore were to include this information in the register, this would not affect a company's appointment of its auditor because it is the *auditing firm* (as opposed to individual auditors) that is appointed by the company.

[1] New Zealand has an interests register which is only open to inspection by directors; see New Zealand Companies Act 1993, section 140.

25 Thus, to be consistent with the other proposals, the register of auditors should be done away with as the information is also available from the ACRA's registers.

26 The majority of respondents to the consultation agreed with this recommendation.

Summary of proposals

Current	**Proposed reform**
Mandatory for **all** companies to keep such registers s. 173 CA	Not mandatory for any company to keep registers of directors, secretaries, auditors and managers. ➔ ACRA register will be the definitive register for **all** companies for: (i) Directors (ii) Secretaries (where applicable) (iii) Auditors ➔ No requirement for ACRA to keep register of managers.

Recommendation 5.5

(a) The definitive register for directors, secretaries and auditors should be kept by ACRA;

(b) it should not be mandatory for companies to keep a register of directors, secretaries, auditors and managers; and

(c) there is no requirement for ACRA to keep a register of managers.

III. MEMORANDUM AND ARTICLES OF ASSOCIATION

(a) Merging of Memorandum and Articles of Association

27 In 2002, the Company Legislation and Regulatory Framework Committee (CLRFC) recommended that Singapore adopt a model Constitution for private companies, in accordance with the approach of the UK. The recommendation was accepted by the Singapore Government. However, Singapore chose to wait until the UK had finalised the details of its model Articles before implementing the CLRFC recommendations. The UK's model Articles are found in the Companies (Model Articles) Regulations 2008.[2]

[2] http://www.opsi.gov.uk/si/si2008/uksi_20083229_en_1. In force from 1 October 2009.

28 The UK's approach is to keep the Memorandum and Articles of Association separate, but the CLRFC had recommended that the Memorandum and Articles of Association for Singapore companies be merged as one document to be known as the Constitution.

29 The Steering Committee likewise agrees that there is no need for the Memorandum and Articles of Association to be separate documents.[3] In practice, the Memorandum and Articles of Association usually tend to be bound together, and hence it would be more practical to look at the Memorandum and Articles of Association as a single document. Furthermore, the Memorandum contains very minimal information. Hence, merging and renaming the Memorandum and Articles as the "Constitution" should not pose any practical problems for companies in this regard.

30 The Steering Committee is of the opinion that the Memorandum and Articles of Association should be merged as one document, to be known as the Constitution. Most respondents to the consultation agreed with this recommendation, although there was a suggestion that companies should have the option of retaining their current Memorandum and Articles or converting to a Constitution. However, the Steering Committee is of the view that a standard approach for all companies is preferable.

<u>Recommendation 5.6</u>

The Memorandum and Articles of Association should be merged as one document, to be known as the Constitution.

(b) Model Constitution

31 With regard to having a Model Constitution, the Steering Committee is of the view that there should be two models of the Constitution:

(a) for private companies – with variations for companies with only one director, and those with two directors or more; and

(b) for companies limited by guarantee.

This would be similar to the position adopted by the UK save that the UK also has a regime for private companies limited by guarantee.

[3] In Australia and New Zealand, companies adopt a single document known as the "Constitution". The Australia Corporations Act 2001 contains a set of "replaceable rules" for the governance of a company, which may be modified in a company's Constitution. The company's Constitution, and the replaceable rules as they apply to that company, are then given binding force by section 140, which still adopts a basically contractual approach to achieve that effect.
The New Zealand Companies Act 1993 begins with an essentially statutory structure, but allows "contractual" derogation from it. (The New Zealand approach is different from the Singapore, UK and Australian approaches which begin with a contractual structure and then give that structure statutory force.)

32 Most respondents to the consultation agreed with this recommendation, although some suggested that a Model Constitution for public companies would also be useful. However the Steering Committee is of the view that given the complexity of public companies having a standard Model Constitution for public companies was of limited use.

33 The Steering Committee has considered the possibility that if a Model Constitution were ever to be prescribed for public companies (other than companies limited by guarantee), it would be limited to unlisted public companies. However, the Steering Committee is of the opinion that (unlike the position in the UK[4]), there would be no prescribed Model Constitution for public companies whatsoever, and that instead, the provisions in the Constitution for such companies would be determined by the relevant industries concerned.

Recommendation 5.7

There should be two models of the Constitution:

(a) for private companies – with variations for companies with only one director, and those with two directors or more; and

(b) for companies limited by guarantee.

Recommendation 5.8

There should be no prescribed Model Constitution for public companies (other than companies limited by guarantee) as the provisions in the Constitution for such companies would be determined by the relevant industries concerned.

(c) Necessity of filing Model Constitution

34 When law firms prepare documents for the incorporation of companies for their clients, they tend to include a copy of the Articles of Association even though these Articles are in effect a replica of the current Table A at the Fourth Schedule of the Companies Act. Duplication of this sort is not necessary, in particular for cases where people opt to prepare the incorporation documents without engaging the services of a law firm. In particular, the inclusion of such documents for company incorporation rapidly uses up disc space in ACRA's computerised filing system and database.

35 Where a company elects to adopt the Model Constitution (through incorporation by reference), the Model Constitution need not be filed with ACRA.

[4] The Companies (Model Articles) Regulations 2008, Schedule 3 – Model Articles for Public Companies.

The public would have access to information on the relevant version of the Model Constitution on the ACRA website that the company has adopted.

36 In the event that there are amendments made to the provisions of the Model Constitution after it is posted on ACRA's webpage, the amended version would be archived and made available on ACRA's webpage. Relevant transitional provisions will be worked out in this regard.

37 Respondents to the consultation agreed with this recommendation.

Recommendation 5.9

Where a company elects to adopt the proposed Model Constitution, there is no need to file a copy of that Model Constitution with ACRA.

(d) Model Constitution to be available on ACRA's webpage

38 The Steering Committee considered whether it would be necessary for the Model Constitution to be part of the Companies Act, or whether it would be better to have it placed in subsidiary legislation, or if indeed it need be in any legislation at all. The Steering Committee is of the view that the Model Constitution should be placed on ACRA's webpage instead of being prescribed by the Companies Act.

39 Most respondents to the consultation agreed with this recommendation. However some suggested that the models of the Constitution should be in subsidiary legislation as well to ensure accessibility. The Steering Committee is of the view that putting the models of the Constitution on the ACRA webpage would be adequate but setting the models out in subsidiary legislation can also be considered.

Recommendation 5.10

The models of the Constitution should be made available on ACRA's webpage, instead of in legislation.

IV. ALTERNATE ADDRESS POLICY

40 Currently, a person setting up a company or business in Singapore is required to provide his personal particulars to the Registrar, including his residential address. Such information is available to the public for a fee. Due to the increased security concerns with public disclosure of residential addresses, a policy review was conducted with a view to provide more protection to an individual's privacy. ACRA's view is that its duty is to provide information of business entities and their offices or places of businesses and to ensure that there is adequate disclosure for accessibility and accountability reasons. This objective would be achieved if the business owner, instead of providing his residential address, provides an alternate address where he can be located and for the purpose of effective service of the summonses and notices under legislation administered by ACRA or other legislation.

41 The Steering Committee therefore recommends that a person who is required to provide a residential address may choose instead to provide an alternate address at which he can be located. Singapore will be ahead of other comparable jurisdictions with regard to the disclosure of directors' residential addresses[5]. In a selective consultation, majority support was received for the above proposal.

42 To prevent abuse and fraudulent reporting, safeguards in law will be provided. If the person concerned cannot be located at the alternate address after due enquiry, ACRA shall be empowered to obtain a person's residential address from the National Registration Department for enforcement purposes and may publish the residential address on public records. As for persons who are exempted from registration under the National Registration Act (namely foreigners who hold passes to work in Singapore and persons who do not reside in Singapore), they would also be required to report their residential addresses to ACRA. ACRA will keep these confidential, if such persons want to use an alternate address where they can be located.

43 However, some concern was expressed that this will remove one of the primary sources for obtaining a party's residential address and consequently make it difficult for litigants to locate a defendant in order to effect personal service. This issue has been considered . The courts and Law Society have been kept informed of the proposed policies. They will consider the impact to the laws administered by them.

[5] In countries such as Australia, Hong Kong, New Zealand and the UK, it is compulsory for the persons concerned to disclose their residential address to the regulator. In Australia they allow the owners to seek approval from the regulator to maintain the confidentiality of their residential addresses. Hence Singapore would be more advanced than these jurisdictions as it would not even be mandatory to disclose one's residential address.

Recommendation 5.11

(a) A natural person who is presently legally required to report his residential address under the Companies Act (e.g. directors, secretaries, managers) may choose to report either his residential address or to report any other address where he can be located ("alternate address"). ACRA will distinguish and indicate whether the reported address appearing on the public records is the residential or an alternate address; and

***(b) Directors who are currently required to disclose their residential address on the register of directors, managers, secretaries and auditors kept at the registered office will similarly be permitted to elect to disclose their alternate address where they can be located.**

*(b) will not be applicable if recommendation 5.5 is accepted.

V. STANDARDISED TIMELINES FOR UPDATING OF COMPANY RECORDS

44 Currently, there are different timelines for various types of lodgment with ACRA. The different timelines for lodgment may be confusing for users and it would be more convenient to have a uniform timeline for lodgment instead.

45 However, the determination of the relevant timeline would depend on whether the information would be relied upon by various stakeholders and other third parties. If there is such reliance on the ACRA register, then such information should be better lodged within a shorter time frame (14 days possibly being a suitable period).

46 The standardisation of timelines for notification in the ACRA registers was considered. It was recommended that the reference to "days" will be understood to mean *"calendar"* days (as opposed to "business" days). As it is the intention that ACRA's registers will form the authoritative record of a company, it would be important to standardise the reporting/notification timelines and to shorten (where appropriate) the timelines to ensure prompt notification. Shortening the timelines should not pose a problem as lodgments can be done at any time of the day or night online. In this regard, it was recommended that, for purposes of non-insolvency matters, the notification periods for the ACRA registers be standardised to 14 *calendar* days, with the exception of the following:

(a) Charges will still be required to be registered within 30 days; and

(b) There will be no change to the present timelines for financial assistance and reduction of share capital.

47 The timeline for lodgment of the notice of a reduction of share capital by special resolution as approved by the court under section 78G of the Companies Act may remain as 90 days as there are various proceedings that have to be accomplished

before the lodgment may be done, such as obtaining a court order approving the reduction in share capital, and preparing the notice containing the reduction information. Since no third party interests will be impacted by the long lodgment timeline, the timeline can be maintained to allow companies greater flexibility in this particular lodgment.

48 The lodgments for insolvency matters are out of the Steering Committee's purview and would be handled by the Insolvency & Public Trustee's Office (IPTO) instead, who are working on the omnibus Insolvency Bill.

49 Most of the respondents to the consultation agreed with this recommendation.

Recommendation 5.12

For purposes of non-insolvency matters, the notification periods for the ACRA registers should be standardised to 14 calendar days, with the exception of the following:

(a) Charges, which will still be required to be registered within 30 days; and

(b) Financial assistance and reduction of share capital for which there will be no change to the present timelines.

VI. DIFFERENT LEVELS OF PENALTIES ACCORDED TO DEFAULTS

50 The Steering Committee has considered the penalties for default in compliance with updating of the various registers. The Steering Committee suggests that there should be different levels of penalties accorded to default and non-compliance, depending on the severity of the default and that ACRA should take into account the impact of the default on different groups of stakeholders when enforcing such penalties. (For example, the difference between a penalty for defrauding stakeholders, as opposed to mere lateness in updating particulars with ACRA.)

Recommendation 5.13

There should be different levels of penalties accorded to default and non-compliance, depending on the severity of the default.

Recommendation 5.14

ACRA should take into account the impact of the default on different groups of stakeholders when enforcing such penalties.

VII. COMPANY RECORDS – MINUTES, MINUTE BOOKS, ETC

(a) Electronic records

51 The Electronic Transactions Act clearly provides that electronic records are allowed, although section 395 of the Companies Act (regarding the form of registers) is vague. The language of section 395 provides that any records are allowed as long as they are in any permanent form. By contrast, the relevant provisions in the Companies Ordinance in Hong Kong[6] and the Australia Corporations Act 2001[7] explicitly allow for electronic form of records.

52 Whilst the provisions in Hong Kong and Australia seem to imply that the electronically stored data has to be located within the jurisdiction, the Steering Committee is of the view that the location of the data is not such an important factor. If data were kept on a server it does not matter in which jurisdiction the server is located. What matters is that the records are available and accessible to those who require the information, since the intent of the legislation is to ensure that the records are available.

53 Hence, the Steering Committee is of the view that section 395 be amended:

(a) to clarify that any register, index, minute book or book of account may be kept in the form of *electronic* records (in addition to or as an alternative to physical records);

(b) to provide for some definite form of authentication or verification of the electronic records; and

(c) to provide that directors be responsible for ensuring:

(i) the authenticity of such electronic records; and

(ii) the proper maintenance of such electronic records.

54 The Steering Committee has also discussed the methods a company can use to demarcate the definitive copy of minute books or any other records. The Steering Committee agrees that the *directors* should be responsible for the most updated copy of the minutes and to make sure that it is verified to be the correct and definitive copy.

55 With advances in technology, the Companies Act should allow for the use of electronic signatures to authenticate such records. The Companies Act should provide that electronic records should have some form of director's verification that the copy is the definitive copy.

56 The issue of whether the Companies Act should set out the rules relating to verification of electronic versions of minutes or resolutions was considered. The Steering Committee is of the view that the process for the verification should best be

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[6] Section 95 of the Hong Kong Companies Ordinance.
[7] Section 1301 of the Australia Corporations Act 2001.

left to the company and section 395(2) provides sufficient guidance. The Companies Act should be facilitative rather than prescriptive and should not dictate the form of the verification of the written resolution as the statute cannot be expected to keep pace with all technological changes. Any formal requirements for time-stamps and water-marks as a form of verification will only increase the cost of administration of a company.

57 Most of the respondents to the consultation agreed with these recommendations.

<u>Recommendation 5.15</u>

Amend section 395:

(a) to clarify that any register, index, minute book or book of account may be kept in the form of electronic records (in addition to or as an alternative to physical records);

(b) to provide for some definite form of authentication or verification of the electronic records; and

(c) to provide that directors be responsible for ensuring:

(i) the authenticity of such electronic records; and

(ii) the proper maintenance of such electronic records.

<u>Recommendation 5.16</u>

Directors should be responsible for the most updated copy of the minutes and to make sure that it is verified to be the correct and definitive copy.

<u>Recommendation 5.17</u>

The process for the verification of electronic records should be left to the company. The Companies Act should be facilitative not prescriptive.

(b) Time for updating of minute books

58 The issue of whether there should be a limit on the timeline for the updating of minute books has been considered. Currently, under section 188 of the Companies Act, companies are given up to one month after every meeting to update the minute book. There is however no such timeline for the UK, Hong Kong and New Zealand.

59 The specification of a definite timeline for the updating of the minute book is important, as this ensures that the minute books are indeed kept up-to-date. This would be vital especially for recording information involving shareholder disputes or contractual disputes – as the minutes are a form of evidence of issues, decisions, etc,

that transpired during such company meetings. Hence, the Steering Committee is of the view that the current specified time of one month allowed for updating the minute book under section 188 be maintained. All the respondents to the consultation agreed with this recommendation.

Recommendation 5.18

The current specified time of one month allowed for updating the minute book under section 188 of the Companies Act should be maintained.

VIII. STRIKING OFF OF DEFUNCT LOCAL COMPANIES

(a) Specification of criteria for "defunct" company

60 Currently, the Companies Act only specifies that if the Registrar has reasonable cause to believe that a company is not carrying on business or is not in operation, he may, upon complying with relevant conditions under section 344(1) of the Companies Act, strike off the company. However, in practice, where striking off applications are submitted by the directors of a company, ACRA would require them to declare either the date the company has ceased trading or that the company has not commenced business since the date of incorporation. The company also has to satisfy other criteria when submitting the striking off application, as follows:

(a) the company must have ceased trading;

(b) the company must not be involved in any court proceedings, whether inside or outside Singapore;

(c) the company must have no assets and liabilities when the application is made, and the company's charge register must also be cleared;

(d) the company must not have any outstanding penalties or offers of composition owing to the Registry;

(e) the company must not have any outstanding tax liabilities with the Inland Revenue Authority of Singapore (IRAS); and

(f) the company must not be indebted to other government departments.

61 Where ACRA reviews the relevant transactional details of the company and decides to initiate striking off action, ACRA has had to come up with its own criteria of how a company would be termed as "defunct". Currently, ACRA deems a company "defunct" when the last accounts lodged by that company with ACRA was more than 6 years ago or if the company has not filed any Annual Return for 6 years since its date of incorporation, and that the company has not created any charge for the last 6 years.

62 For the purposes of transparency, the following should be specified in legislation:

(a) criteria (as stated above) that the company should meet if their directors want to apply for striking off; and

(b) criteria (as stated above) that ACRA should adopt when identifying and reviewing companies for striking off.

63 This would ensure that ACRA's decision to accept or reject a striking off application is clear and transparent to applicants as well as all other users of the legislation.

64 A majority of the respondents to the consultation agreed with this recommendation.

Recommendation 5.19

The following should be stated in legislation:

(A) criteria that the company should meet if their directors want to apply for striking off, viz:

(i) the company must not have commenced business or must have ceased trading;

(ii) the company must not be involved in any court proceedings, whether inside or outside Singapore;

(iii) the company must have no assets and liabilities when the application is made, and the company's charge register must also be cleared;

(iv) the company must not have any outstanding penalties or offers of composition owing to the Registry;

(v) the company must not have any outstanding tax liabilities with the Inland Revenue Authority of Singapore (IRAS); and

(vi) the company must not be indebted to other government departments.

(B) criteria that ACRA should adopt for identifying and reviewing "defunct" companies for striking off. In this regard, a company is "defunct" if:

(i) the last accounts lodged by that company with ACRA was more than 6 years ago; or

(ii) the company has not filed any Annual Return for 6 years since its date of incorporation,

and that company has not created any charge for the last 6 years.

(b) Shortening of time for striking off process

65 The current 3-month notification period under section 344(2) of the Companies Act before a company is struck off the register should be reduced to 2 months instead. This is to reduce the overall time involved in the striking off process which can take as long as 5 or 6 months.

66 To confirm this proposal, relevant statistics on objections to striking off received over 8 months in 2008 were considered. A total of 382 companies received objections for their striking off applications during this period. About 95% of the objections were received within a month of the striking off notice. On average, only about 50 companies received their objections after the first gazette notification. Out of that, 34 objections came in within the first month, whilst 8 objections were received in the second and third month respectively.

67 Most of the objections came in the first month after the striking off notice. The most likely reason for objections to be received in the second and third month is simply because currently the Act generously allows for such a prolonged period. In other words, the third month is actually not necessary. (As it is, the objection period for income tax and property tax is only one month.) Thus, if the period for objections to striking off were reduced to 2 months, creditors would take note and lodge their objections according to the new shortened timeline. The shortened timeline would be a reasonable period, and would not unduly prejudice anyone. This would make the striking off process more expeditious (as the current process may take as long as 5 or 6 months).

68 Most of the respondents to the consultation agreed with this recommendation.

Recommendation 5.20

The current 3-month notification period under section 344(2) of the Companies Act, before a company is struck off the register, should be reduced to 2 months.

(c) Extension of the striking off notification to relevant parties

69 Although section 344(1) of the Companies Act only requires that a striking off notification should be sent to the company, in practice ACRA also sends the striking off notice to other relevant parties, namely, the company’s officers (directors, secretary), shareholders (if different from the directors) and IRAS. This is because striking off in essence involves the “closing down” of the company and all relevant parties should be sent the notice so that they will be kept informed about ACRA’s striking off action.

70 In this regard, the Steering Committee is of the view that the administrative action above adopted by ACRA should be codified in the Companies Act. That is, the requirement for ACRA to send notification of striking off under section 344(1) should be extended to include not just the company but also the relevant parties of the company (such as directors, secretaries and shareholders).

71 The striking off regime should be consistent with the insolvency regime. Companies that undergo winding up proceedings have their names published in the Gazette, and that this should also be the case for companies that are to be struck off.

72 Nevertheless, the Steering Committee is of the view that, in addition to the requirement for publication of a notice in the Gazette under section 344(2), the list of companies to be struck off and have been struck off should be made available online (on the ACRA Home Page). This will make it easier for creditors to check on whether ACRA is planning to strike off the company and take immediate steps to lodge their objections online.

73 The respondents to the consultation unanimously agreed with these recommendations.

74 There would be no need for ACRA to send notifications via registered post to the company concerned. However, the removal of the requirement for the sending of the notification of the striking off by registered post should be limited to those who have applied to ACRA for striking off and not to cases where ACRA is striking off the company as part of an exercise. A majority of the respondents to the consultation agreed with this recommendation.

<u>Recommendation 5.21</u>

Section 344(1) of the Companies Act should be expanded to include the requirement for ACRA to send the striking off notice to other relevant parties, namely, the company's officers (directors, secretary), shareholders (if different from the directors) and IRAS.

<u>Recommendation 5.22</u>

In addition to the requirement for publication of a notice in the Gazette under section 344(2), the list of companies to be struck off and which have been struck off should be made available online (on the ACRA Home Page).

<u>Recommendation 5.23</u>

There should be no requirement for ACRA to send notifications via registered post to the company concerned.

(d) Reducing 15-year period for restoration to register

75 Currently, under section 344(5) of the Companies Act, a company may be restored to the register within 15 years if the court is satisfied that the company had been carrying on business at the time of striking off.

76 The Steering Committee is of the view that the 15-year period before which a struck-off company may be restored to the register, should be reduced to 6 years instead. This would shorten the waiting time for any interested person to use an identical name of the struck-off company to register a new entity. The 6-year period would also be consistent with the 6-year limitation period allowed for creditors to recover their debts from the company.

77 A majority of the respondents to the consultation agreed with this recommendation.

<u>Recommendation 5.24</u>

The current 15-year period before which a struck-off company may be restored to the register should be reduced to 6 years instead.

(e) Restoration of struck-off company

78 Currently, section 344(5) of the Companies Act provides that the power to restore a struck off company is vested in the High Court. This means that anyone who wants to restore the company has to engage the services of a lawyer and file an application with the court, which may be costly and time consuming[8].

79 Hence, the Steering Committee is of the view that section 344(5) should be amended to allow the Registrar to restore companies which have been struck-off as a result of a review conducted by ACRA.[9] This would complement the current requirement for restoration by the application to the court. Having to apply to the court for the restoration of a company is a form of deterrence for frivolous applications. Hence, to avoid abuse of the restoration process where restoration is

[8] There are very limited number of companies that have previously applied to be restored to the register. ACRA can only recall about 20 successful cases. 2 of the previously successful cases of restoration of companies to the register concerned companies which had outstanding share interests and outstanding interests in land.
Even for objections to the striking off of a company due to an outstanding interest in land, it would be possible to apply to the court to direct the correct disposal of the assets of a company that is struck off.

[9] In the UK, the Registrar has power to restore a struck off company under section 1024 of the Companies Act 2006 subject to certain conditions under section 1025 of that Act. In Australia, the Australian Securities and Investments Commission (ASIC) has the power to reinstate a company under section 601AH of the Corporations Act. In Hong Kong, the Registrar has the power under section 291AB of the Companies Ordinance (Cap. 32) to reinstate a company that it has deregistered under section 291AA of that Ordinance as a result of a mistake on the part of the Registrar. In New Zealand, the Registrar has power to restore a company under section 328 of the Companies Act 1993 on his or her own motion or upon application by a shareholder, director, or creditor of the company, or a liquidator, or a receiver of the property, of the company.

effected by application to the Registrar, this new process would be limited only to those cases where ACRA has initiated the action of striking off the company.

80 The respondents to the consultation unanimously agreed with this recommendation although the view was expressed that this discretion should be extended to cases where the striking off was not initiated by ACRA as well.

Recommendation 5.25

Section 344(5) should be amended to allow the Registrar to restore companies which have been struck-off as a result of a review conducted by ACRA.

(f) Objections to striking off

81 Currently, the Companies Act does not specify procedural details regarding objections to striking off under section 344. The current procedures are in the form of administrative guidelines.[10] A person may lodge his objection online (for a fee of $10). An ACRA officer generates a letter to inform the directors of the relevant company, and gives them 2 months to clear the objection. If the objection is cleared, the company is struck off. If not, the striking off application lapses. ACRA informs the directors that the application has lapsed.

82 For the purposes of clarity in procedures for objections to striking off, it should be specified in legislation:

(a) who may object to the striking-off;

(b) how the objection is to be submitted;

(c) relevant action to be taken by ACRA; and

(d) relevant fee payable to ACRA for processing the objection.

83 The respondents to the consultation unanimously agreed with this recommendation.

84 Documentary evidence may be required by ACRA in support of the objection to striking off action. However, ACRA is not in a position to decide whether such documentary evidence adduced by the parties is valid or relevant. It should be left to the courts to adjudicate in such matters.

[10] https://www.acra.gov.sg/how-to-guides/closing-a-company/closing-a-local-company.
In New Zealand, the details of objections to removal of a company from the register are found in section 321 (Objection to removal from register) and section 322 (Duties of Registrar if objection received) of the Companies Act 1993. However, there are no similar provisions in the relevant legislation of the UK, Australia and Hong Kong, although in the UK, the details are provided for administratively under the Companies House Guidance Notes (available at http://www.companieshouse.gov.uk/about/gbhtml/gbw2.shtml).

85 The majority of respondents to the consultation agreed with this recommendation. The Economic Development Board suggested that there should be a one-stop-shop solution instead of requiring costly court solutions.

Recommendation 5.26

For objections to the striking off of a company, it should be specified in legislation:

(a) who may object to the striking-off;

(b) how the objection is to be submitted;

(c) action to be taken by ACRA; and

(d) relevant fee payable to ACRA for processing the objection.

Recommendation 5.27

ACRA should not be required to determine the validity or relevance of documentary evidence used by aggrieved parties to support objections to striking off action, and this should instead be adjudicated by the courts.

(g) Withdrawal of striking off application

86 Currently, applications for striking off may be withdrawn any time before the company is struck off. There is a withdrawal fee of $30/-. ACRA will update the status of the application and send a letter to the company to inform it that the application for striking off has been withdrawn. However, these are administrative procedures adopted by ACRA and are not based on provisions of the Companies Act.

87 In this regard, the Steering Committee is of the view that the administrative provisions should be codified in the Companies Act, specifying:

(a) that an applicant may withdraw the striking off application at any time before the company is struck off;

(b) that ACRA must update the status of the application and send a notification to the company to inform it that the application for striking off has been withdrawn; and

(c) that this information should be updated online (in the ACRA Home Page).

88 The respondents to the consultation unanimously agreed with this recommendation.

<u>Recommendation 5.28</u>

It should be specified in legislation:

- **(a)** **that an applicant may withdraw the striking off application at any time before the company is struck off;**
- **(b)** **that ACRA must update the status of the application and send a notification to the company to inform it that the application for striking off has been withdrawn; and**
- **(c)** **that this information should be updated online (in the ACRA Home Page).**

(h) Transfer of relevant provisions to subsidiary legislation

89 The fees for striking off which are currently found in the Second Schedule of the Companies Act should be placed under subsidiary legislation rather than the parent Act. The respondents to the consultation unanimously agreed with this recommendation.

90 The recommended new provisions on striking off could be in a separate set of subsidiary legislation (such as the Companies (Striking Off) Rules), as this would allow greater flexibility for administering the legislation. A majority of the respondents to the consultation agreed with this recommendation.

<u>Recommendation 5.29</u>

The fees for striking off should be placed under subsidiary legislation rather than the parent Act.

<u>Recommendation 5.30</u>

The recommended new provisions on striking off should be in a separate set of subsidiary legislation (the Companies (Striking Off) Rules).

IX. COMPANIES LIMITED BY GUARANTEE

91 Companies limited by guarantee (CLG) are vehicles used for non-profit driven organisations. Although CLGs may make profits, such profits have to be made for a cause. Currently, the CLG structure is used mainly as a vehicle for charities and religious organisations such as churches. Members of CLGs are not allowed to withdraw funds from the CLGs, and such funds may not be returned to the members if they left the CLG.

92 There are no compelling reasons to abolish CLGs. This is because:

(a) Presently Singapore is consistent with most leading jurisdictions in providing for CLGs; and

(b) The CLGs fulfill the needs of those who wish to set up vehicles for non-commercial reasons but wish to benefit from certain advantages of incorporating a company. There is no alternative if the CLGs are abolished.

93 The UK has introduced two new structures in recent years. They are the Charitable Incorporated Organisations ("CIO") and Community Interest Companies ("CICs"). The CIO concept was considered by Singapore sometime back and the decision then was to monitor this area of development, before venturing further. Presently, the Government has set up a separate committee (known as the Social Economy Study Team, led by the Ministry of Community Development, Youth and Sports) to look into the possibility of having a different type of vehicle for organisations carrying out social and community services, which is similar to CICs in the UK. Until a workable alternative or regime is formed, it would be best to retain CLGs for now.

94 A majority of the respondents to the consultation agreed with this recommendation.

Recommendation 5.31

The status quo of companies limited by guarantee should be preserved.

X. REGULATION OF COMPANY NAMES

95 Section 27 of the Companies Act provides for the registration of company names subject to whether they are undesirable, identical to another name on the register or whether the name is a name of a kind that the Minister has directed the Registrar not to accept for registration[11].

96 Currently, the Companies Act allows for two avenues for a complainant to ask the Registrar to direct a change of name, including similar names:

(a) under section 27(2)(b), any business entity can make an application to the Registrar to direct a change in the company name already on the register if it "so nearly resembles the name of another" business entity "as to be likely to be mistaken for it"; or

(b) under section 27(2)(c), when the company's name is one where its use has been restrained by "an injunction granted under the Trade Marks Act (Cap. 332)".

[11] 'Temasek' is the only name left under this category.

(a) No change in role of Registrar in approval of names

97 The Steering Committee is of the view that the Registrar should continue to be responsible for preventing the registration of undesirable, identical or gazetted names of *business* entities registered with ACRA but should not be regarded as a "protector of names" *per se* as this should be handled by applications to the courts under the various other causes of actions such as passing off or trade mark infringement actions. Respondents to the consultation agreed with this recommendation.

Recommendation 5.32

Maintain the status quo of the role of the Registrar in approving names.

(b) No change to current criterion for refusal of name registration by Registrar

98 The Steering Committee is of the view that there should be no change to the current criterion for refusal of name registration by the Registrar. The Steering Committee has noted that registration of a name with ACRA does not afford the applicant property in that name. Respondents to the consultation agreed with this recommendation.

Recommendation 5.33

Maintain the status quo of the current criterion for refusal of name registration by the Registrar.

(c) Registration of similar names

99 The current Bizfile system not only disallows registration of *identical* names (as per the requirements of the Companies Act) but also provides the applicant with a list of similar names, if any, which may not be exhaustive[12]. However, names which are *similar* can still be approved due to the changes in the law in 2003.

100 The reason that the Bizfile system is unable to exhaustively identify a list of similar names is due to the limitation of the programming engine's capability. In this regard, it can never fully replace the human eye and mind in determining what is similar. However, the Steering Committee has also noted that a company that is genuine about its intentions to carry on business will make the effort to select a name that is distinguishable from the name of an existing company.

101 The Steering Committee has considered whether the current system for allowing similar names should be reformed, and decided that the current regime of not checking for similar names need not be changed. The Steering Committee has noted

[12] The alert for similar names is only given to name applicants, and not to existing registered entities (to alert them of the possibility of someone registering a similar name).

that when lawyers act for clients, they already perform the checks to ensure that similar names are not used.

<u>Recommendation 5.34</u>

Maintain the status quo of the current regime for similar name registration.

(d) Protection of "famous" names

102 The Steering Committee has considered the need for protection of "famous" names of companies. It is difficult to determine how "famous" a company name needs to be before it may be afforded complete protection under the Companies Act name "protection" regime. Also, a "famous" name in one country may not be "famous" in another. Hence, it should be up to the courts to decide the extent of protection afforded to a "famous" name.

103 In this regard, the Steering Committee agrees that ACRA should not be responsible for the protection of "famous" names by preventing the registration of "famous" names as it is not possible in the first place to crystallise a definitive list of "famous" names. Thus, for such cases involving the protection of "famous" names, the owner of the name can seek recourse under the current section 27(2)(c) of the Companies Act via an injunction under the Trade Marks Act (Cap. 332), following which the Registrar can direct a change of name.

104 Most respondents to the consultation agreed with this recommendation.

105 It is noted that the avenue of appeal by way of annulment by the Minister under section 27(2) of the Companies Act is particularly useful for small companies (which must have the same right of "protection" for their names as the bigger entities) as such small companies need not apply to the courts against the Registrar's direction for a name change, which will incur expensive legal fees that a small company may ill-afford.

<u>Recommendation 5.35</u>

ACRA should not be responsible for the protection of "famous" names by preventing the registration of "famous" names as one cannot come up with a definitive list of "famous" names. For such cases, the owner of the name can seek recourse under the current section 27(2)(c) via an injunction under the Trade Marks Act (Cap. 332), following which the Registrar can direct a change of name.

(e) Ambit of section 27 to apply to all corporations

106 The Steering Committee is of the view that the ambit of section 27 should remain as it is, that is, it should continue to apply not only to locally-incorporated

companies and foreign companies registered with ACRA, but even to other overseas companies. In other words, an applicant cannot even use a name which is similar to a foreign company not registered here and such company may apply to the Registrar for a direction for change of name against a locally registered entity on grounds of similarity. Respondents to the consultation agreed with this recommendation.

Recommendation 5.36

Maintain the status quo of the ambit of section 27 (Names of companies).

(f) No change in current time period of 12 months within which to lodge name complaint

107 Under section 28(3A) of the Companies Act, a person may make a complaint to the Registrar against registration of a name by a business entity within 12 months of the registration of that name. The complainant would have the option of:

(a) applying to the Registrar to give a direction against the infringing entity under the Act; or

(b) applying to court for other forms of remedy.

108 The Steering Committee has considered the reason as to why appeals to the Registrar are time-barred after 12 months of the registration of the competing business entity. This is meant to provide some certainty and to protect the new company from having to change its company name after having built up 12 month's worth of goodwill to its name. (In any case, if the goodwill of the incumbent company is threatened after the 12-month period, it can always seek redress through the courts.)

109 The Steering Committee is of the view that the 12-month time-bar for name complaint applications should be maintained. Thus, the Steering Committee is of the view that there should be no change to the current time period of 12 months allowed to a complainant to lodge his complaint with the Registrar regarding registration of a similar name by another company under section 27(2A). The Steering Committee agrees that 12 months is appropriate and adequate time allowed for the protection of company names without involving costly recourse to the courts. The 12-month time-bar does not eliminate any other avenues of recourse (for example, applications to court for passing-off).

110 Respondents to the consultation agreed with this recommendation.

<u>Recommendation 5.37</u>

There should be no change to the current time period of 12 months allowed to a complainant to lodge his complaint with the Registrar regarding registration of a similar name by another company under section 27(2A).

(g) Change in current time period for disallowing re-registration of identical names

111 The period for reuse of names of companies which are no longer in existence was considered. The name of a company that has been dissolved or struck off may be reused by another company or proposed company only after the following time periods have lapsed:

(a) After 2 years for companies which have been dissolved (based on section 343 of the Companies Act); and

(b) After 6 years for companies which have been struck off (based on section 344 of the Companies Act).

112 Most respondents to the consultation agreed with this recommendation.

<u>Recommendation 5.38</u>

The periods for reuse of names of companies that have ceased should be as follows:

(a) After 2 years for companies which have been dissolved (based on section 343); and

(b) After 6 years for companies which have been struck off (based on section 344).

(h) No requirement for panel of company name adjudicators

113 The Steering Committee has considered the merits of having a panel of company name adjudicators to deal with disputes involving company names and the goodwill associated with those names (similar to the position in the UK under the Company Names Adjudicator Rules 2008).[13] This was also a suggestion from the Pro-Enterprise Panel (PEP).

[13] The UK has from October 2008 implemented a board to adjudicate on matters relating to the registration of company names. The set of rules for adjudication are similar to the rules of the court used in the laws of passing-off, but simplified. Unlike the UK, there is no similar panel of adjudicators in Australia, Hong Kong and New Zealand. Hong Kong, as part of its review of the Companies Ordinance, considered whether to follow the UK system but decided against it.

114 In the UK, prior to 1 October 08, brand owners had two main options in dealing with registration by third parties of company names in the UK incorporating their trademarks: they could either issue court proceedings for trade mark infringement and passing off, or object to the Secretary of State that a registered company name was the same as, or "too like" another registered company name. However, both alternatives had shortcomings.

115 Effective 1 October 2008, the UK Companies Act 2006 introduced a Company Names Tribunal comprising a panel of company names adjudicators to administer a new regime against opportunistic company name registrations[14]; i.e. those where the main purpose in registering the name was to obtain money or prevent the registration of the name by the person who had built up goodwill[15] in the name.

116 Whereas under the old regime, which still remains available, complainants needed to have a registered company name in order to make a complaint that a name was "too like", applicants to the Tribunal need only demonstrate goodwill in the company name.

117 Allowing recourse to persons other than registered companies was a major development in the UK regime. However, the Tribunal cannot deal with cases involving a company name that is too similar to another, but where there is no suspected opportunism behind the registration. Such complaints are still dealt with under the old regime by an order of the Secretary of State.

118 In the Singapore context name complaints deal almost exclusively with complaints under section 27(2)(b); i.e. where a name "so nearly resembles the name of another company or corporation or a business name as to be likely to be mistaken for it". These do not directly require consideration of goodwill issues and are therefore more straightforward than the complaints administered by the Tribunal in the UK. The UK equivalent of the type of company name complaints in Singapore are the complaints to the UK Secretary of State that a registered company name is "too like" another registered company name. Such "too like" complaints are not dealt with by the Tribunal in the UK.

119 The Steering Committee is of the view that the formation of such a panel is not likely to be a cost effective measure for Singapore to adopt. It would require ACRA to look for appropriately qualified people who are able to perform the functions required of such a panel. This would incur unnecessary time and costs and may slow down the appeal process.

120 Although it is apparent that the UK's names adjudicator board provides an additional avenue for name complaints when the goodwill of a company may be threatened, the Steering Committee is of the view that the current system of name adjudication by ACRA is working fine. Thus, the Steering Committee is of the view that the status quo of the current system in Singapore should be preserved.

[14] Opportunistic company name registrations are similar to opportunistic Internet domain name registrations (called cyber squatting).
[15] An example of an opportunistic company name registration is when someone registers variations of the name of a well-known company in order to get the latter company to buy the registration(s).

121 Respondents to the consultation agreed with this recommendation. Some respondents said it would be useful to have an independent panel of name adjudicators, perhaps specifically to hear appeals. However, the Steering Committee is of the view that the low volume of appeals does not warrant the formation of a panel to hear appeals.

122 The Steering Committee also considered an alternative approach; i.e. providing in statute that the Minister will have recourse to the non-binding advice/opinion of a panel of experts in deciding on appeals. However the Steering Committee decided against this alternative approach. Amongst the factors considered was that an advisory panel is unlikely to be of benefit to the Minister as name complaints predominantly do not involve difficult issues where an advisory panel would be able to be of meaningful assistance. In exceptional cases where such advice would be useful, the Minister is not currently precluded from seeking the advice of appropriately qualified persons.

Recommendation 5.39

There is no need for the formation of a panel of company name adjudicators (unlike the position in the UK).

(i) Parties to name complaints should be granted equal rights of appeal to Minister

123 Currently, under section 27(5) of the Companies Act, a company has the right to appeal to the Minister:

(a) where the Registrar directs the company to change its name on the basis that it so nearly resembles the name of another (in accordance with section 27(2)(b)); or

(b) where the Registrar penalises the company for acting in bad faith in adopting a name which is similar to a registered entity (in accordance with section 27(2C)).

124 However, the Act is silent on whether a company or a complainant whose application for direction to change a name has a similar right of appeal to the Minister where the Registrar dismisses his complaint.

125 This is an anomaly in the law which should be reformed to allow both parties in a name complaint matter to have access to an appeal to the Minister vis-à-vis a Registrar's decision under section 27(2)(b) or 27(2C).

126 Respondents to the consultation agreed with this recommendation.

Recommendation 5.40

Both parties to a name complaint should have the right of appeal to the Minister vis-à-vis a Registrar's decision under section 27(2)(b) or 27(2C).

XI. COMPANY SECRETARIES

127 The Steering Committee has considered the role of the company secretary in relation to private companies, with a focus on whether the law needs to mandate that such private companies be required to appoint company secretaries. Currently, section 171 (1AA) of the Companies Act mandates that public companies appoint a company secretary who has the requisite qualifications in accordance with that section. However, the Companies Act does not require this for private companies.

128 This begs the question of whether the Companies Act should even mandate that private companies need to appoint a company secretary. In this regard, the Steering Committee has questioned the relevance of the company secretary's role in the context of private companies.

129 There are concerns that standards in private company administration may decline if the requirement for private companies to appoint company secretaries is removed. However, the Steering Committee has also noted that even with the appointment of company secretaries in such companies, ACRA would not be in a position to monitor or observe their work vis-à-vis the maintenance of minute books, company registers, etc. which remains largely confined within the internal sphere of the private company. Moreover, the law already allows anyone (without a qualification) to be a company secretary for private companies. Therefore, removing the need of a company secretary will not result in a deterioration of present standards.

130 The Steering Committee has also noted that the Singapore Association of the Institute of Chartered Secretaries and Administrators (SAICSA) was intent on increasing the level of professionalism of company secretaries in corporate administration. However, SAICSA preferred to focus on public companies rather than private companies. SAICSA was of the opinion that there would be greater value-add in focusing on public companies as such companies had the potential tendency to develop and grow. And when they do eventually grow, the company secretary's role in such companies would become more evident in regard ensuring compliance with relevant legislation and overall timely and efficient company administration.

131 The Steering Committee received feedback that arose from a forum conducted by the Singapore Association of the Institute of Chartered Secretaries and Administrators (SAICSA), wherein another view arose regarding the criterion that should be imposed for the appointment of the company secretary for private companies. Some SAICSA members had suggested that the criterion for mandating audit be applied similarly for mandating the appointment of a company secretary.

132 However, the Steering Committee was of the view that it should not be mandatory for any private company to appoint a company secretary since the law already does not mandate company secretaries of private companies to be professionally qualified.

133 Most respondents to the consultation did not agree with the recommendation. It was noted that the requirement in law for a company secretary impresses on directors importance of company administration, provides a contact point and ensures that there is a person in charge of company administration matters and helps ensure compliance. Some respondents emphasized that the importance of a company secretary would be greater given the increasing importance of ACRA records.

134 In view of the feedback, the Steering Committee recommends that the status quo be maintained so that the appointment of a company secretary is mandatory for all companies, including private companies.

COMPANY SECRETARIES: PRIVATE COMPANIES

	SINGAPORE	**UNITED KINGDOM**	**HONG KONG**	**AUSTRALIA**	**NEW ZEALAND**	**CANADA**
Need for appointment	Mandatory s. 171 CA (Cap. 50)	Optional s. 270 UK CA 2006	Mandatory s. 154 CO (Cap. 32)	Optional s. 204A Corp. Act 2001	Not specified in CA 1993 (however, would have been in CA 1955)	Not specified
Professional qualifications	Optional s. 171 CA (Cap. 50)	Not specified	Not specified	Not specified	Not specified	Not specified

<u>Recommendation 5.41</u>

Maintain the status quo such that it remains mandatory for private companies to appoint a company secretary.

135 The Steering Committee is of the view that company secretaries of private companies need not be physically present at the company's registered office (unlike the current requirement under section 171(3) of the Companies Act).

<u>Recommendation 5.42</u>

Company secretaries of private companies need not be physically present at the company's registered office.

136 The Steering Committee has considered the possibility of requiring that secretaries of listed companies be registered (in addition to being qualified), in order to ensure that only qualified secretaries are appointed as secretaries of listed companies. However, the Steering Committee concludes that this requirement would not be necessary as the existing sanctions should be sufficient to ensure compliance with section 171(1AA) of the Companies Act, and it would be unnecessary to create a new registration regime to achieve compliance.

137 The Steering Committee agrees to maintain the current distinction in section 171(1AA) whereby secretaries of public companies are required to possess certain qualifications, whilst secretaries of private companies are not so required.

138 Most of the respondents to the consultation agreed with this recommendation.

Recommendation 5.43

The current distinction in section 171(1AA) whereby secretaries of public companies are required to possess certain qualifications, whilst secretaries of private companies are not so required, be maintained.

Recommendation 5.44

Prior registration of secretaries before their appointment as secretaries of listed companies is an unnecessary measure to adopt.

CHAPTER 6

REGISTRATION OF CHARGES

I. INTRODUCTION

1 The provisions reviewed under this section relate to registration of charges. The current law on the registration of charges is set out in sections 131 to 141 of Division 8 to Part IV of the Companies Act. A company is obliged to lodge with the Registrar for registration particulars of every charge created by it that falls within the list of registrable charges set out in section 131(3).

(a) Survey of reform initiatives

2 There have been law reform initiatives on the registration of charges in the UK, as encapsulated in the following reports and consultation documents:

(a) *The Crowther report 1971;*[1]

(b) *The Halliday report 1986;*[2]

(c) *The Diamond report 1989;*[3]

(d) *The Companies Act 1989;*[4]

(e) In November 1994, the then Department of Trade and Industry (DTI)[5] published a consultation document, *Company Law Review: Proposals for Reform of Part XII of the Companies Act 1985;*[6]

(f) In October 2000, the Company Law Review Steering Group published its consultation document *Modern Company Law for a Competitive Economy: Registration of Company Charges;*[7]

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[1] In addition to suggesting legislation to increase consumer protection, the report recommended a sweeping change to the law: the introduction of a new legal framework of security over movable property which would include a notice-filing system that would take a functional approach to commercial transactions, including within its scope, quasi-securities.

[2] This report recommended the introduction of a system for creating security over movable property based upon the establishment of a register of security interests with notice-filing.

[3] The report also recommended that the law should be reformed by the introduction of a new law of security and the creation of a notice-filing system.

[4] An attempt was made to change the scheme of registration of company charges by Part IV of the Companies Act 1989: new sections were introduced into the Companies Act 1985, but the relevant provisions have never been brought into force. Under these reforms, changes were made to the list of charges that would be registrable and to the requirement to file the instrument of charge itself.

[5] Currently known as the Department for Business Innovation and Skills.

[6] Consultation document from the Department of Business Enterprise and Regulatory Reform (currently known as the Department for Business Innovation and Skills).

[7] Consultation document from the Department of Business Enterprise and Regulatory Reform (currently known as the Department for Business Innovation and Skills).

(g) The Law Commission Consultation Paper No. 164 (2002) – *Registration of Security Interests: Company Charges and Property Other than Land;*[8]

(h) The Law Commission Consultation Paper No. 176 (2004) – *Company Security Interests;*[9]

(i) The Law Commission Final Report (Law Com. No. 296, 2005) – *Company Security Interests*;[10]

(j) Department for Business Innovation and Skills Consultation Paper (2010) - *Registration of Charges Created by Companies and Limited Liability Partnerships*, Proposals to amend the current scheme and relating to specialist registers.[11]

3 The following common law jurisdictions have also introduced changes to their respective laws on registration of charges:

(a) Canada – Model Personal Property Security Act;

(b) Australian Personal Property Securities Act 2009;[12] and

(c) New Zealand Personal Property Securities Act 1999.

4 In Singapore, law reform of the registration of charges was last mentioned in the Company Legislation and Regulatory Framework Committee (CLRFC) Report.

5 In Hong Kong, the Financial Services and the Treasury Bureau (FSTB) launched a comprehensive rewrite of the Companies Ordinance in mid-2006. Two public consultations covering the accounting and auditing provisions of the Hong Kong Companies Ordinance as well as company names, directors' duties, corporate directorship and registration of charges have already been conducted. A new Companies Bill was introduced into the Legislative Council on 26 January 2011 and is now being considered by a Bills Committee.

6 The regime for registration of charges in Hong Kong is similar to Singapore, and the Hong Kong Consultation Paper is a useful reference and guide for law reform recommendations in the Singapore context.[13]

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8 https://www.lawcom.gov.uk/app/uploads/2015/03/cp164_Company_Security_Interests_Consultation.pdf

9 https://lawcom.gov.uk/app/uploads/2015/03/cp176_Company_Security_Interests_Consultative_Report.pdf

10 https://www.lawcom.gov.uk/app/uploads/2015/03/lc296_Company_Security_Interests.pdf

11 http://www.bis.gov.uk/Consultations and https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/49949/10-1319-government-response-consultation-registration-of-charges.pdf

12 https://www.ag.gov.au/legal-system/personal-property-securities

13 The relevant chapter of the Hong Kong Consultation Paper is available at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/2ndPCCOR_Chapter5_e.pdf.

II. CONCEPTUAL ISSUES IN REGISTRATION OF CHARGES

(a) List of registrable charges under section 131(3)

7 The current list of registrable charges under section 131(3) of the Companies Act is outdated, and should be either expanded or replaced entirely so that the provision will be able to better accommodate new and modern financial instruments. In this regard, the rationale behind the selection of items on the list was explored. However, there does not appear to be any in-depth philosophy or jurisprudence behind the choice of items in section 131(3).

8 The list is based on the UK Companies Act 1948, and can be traced back to 1900. At that time, there were only four items on the list: issues of debentures; charges on the uncalled capital of a company; bills of sale; and floating charges. However, over the years, more items were added to the list. In 1907, a charge on book debts was added. In 1928, a charge on calls made but not paid, ship/ share in ship, and charge of goodwill, patents, trademarks and copyright were added. In 1972, a charge on aircraft was brought within the scope of the Mortgaging of Aircraft Order 1972).[14] The list had since then become “fossilised”.

9 A charge on the shares of a subsidiary company is a registrable charge under section 131(3)(c). This is because of the possibility of the assets of the parent company being siphoned off to the subsidiary, at the creditors’ expense. Whilst this item was part of the Companies Bill 1973 in the UK, it was not included when the Act was eventually passed in Parliament. Some academic writers considered this regrettable on the part of the UK.[15] The item was included in the Singapore Companies Act.

10 The precise rationale for the items on the list in section 131(3) has not been clearly established. The list is a pragmatic reflection of the commercial needs or realities of the period in which the items were included. It is not possible to predict types of security interests that will be created in the future. One leading English textbook noted that it may be a burden to require registration of unforeseen interests and to require registration even with respect to the known types of legal charge, particularly those conferring the right to possession, would produce overkill.[16] To require the registration of all charges could dry up certain types of secured borrowing if the security interest is transient; the need to register it could curtail its effectiveness.[17]

11 The UK[18], Australia[19] and Hong Kong[20] have similar regimes as Singapore for the registration of charges. There have been various law reform attempts in these jurisdictions.

(b) Hong Kong: inclusionary vs negative listing approach

12 The existing legislation on company charges[21] in Hong Kong sets out the list of registrable charges, in a similar manner to Singapore. A recent consultation paper in Hong

[14] See Gerard McCormack, *Registration of Company Charges* (1994).
[15] See Gower LCB , *Principles of Modern Company Law* (Fourth Edition), 1979.
[16] Gower’s Principles of Company Law (5th Edition) at p. 427.
[17] This was a point that was noted in a footnote in Gower’s *Principles of Company Law* - referring to the Jenkins Committee at paragraph 301 and the Diamond Report at paragraph 23.1.6.
[18] Part 25, Chapters 1 and 2 of the UK Companies Act 2006.
[19] Chapter 2K of the Australia Corporations Act 2001.
[20] Sections 80 to 91 of the Hong Kong Companies Ordinance (Cap. 32).

Kong (HKCP)[22], recommended that this approach be retained, rather than adopt a "negative listing" approach which would seek to make all charges registrable except those which would be specifically excluded. The HKCP explained that this would create uncertainties as "it might include a lot of complex financial transactions which are not registrable at the moment."

13 The HKCP also noted that legal practitioners are familiar with the current regime and have not encountered any major problems with it.

14 The Steering Committee notes that the "negative listing approach" does not offer any effective solutions to the problems arising from the current "listing approach". For example, there would be problems with defining what needs to be registered under both approaches. Also, in any event, both approaches would have to be regularly updated – that is, in the case of the "listing approach", there would be the need to update the list of charges registrable, and for the "negative listing approach", there would be the need to update the list of charges excluded.

15 Thus, based on the HKCP, it would appear that Hong Kong's approach is to maintain the status quo of list of registrable charges in the Hong Kong Companies Ordinance, but clarify the meaning of certain ambiguous items on that list (namely, "bill of sale"[23] and "book debts"[24], and delete the item on charges securing issues of debentures[25]), in order to improve the existing regime.

(c) United States and New Zealand: Notice-filing system

16 In contrast to the charge registration system in the UK, Hong Kong, Australia and Singapore, the US adopts a notice-filing system which merely provides that a security interest may exist without definitively establishing its existence. The US approach is based on Article 9 of the US Uniform Commercial Code (UCC), which provides a filing regime for all security interests regardless of whether the provider of the security is a company, some other form of business organisation or indeed an individual. By contrast, the UK, Hong Kong and Singapore registration schemes apply only where the security provider is a company. New Zealand has adopted the US-style notice-filing system.[26]

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[21] Section 80(2) of the Hong Kong Companies Ordinance (Cap. 32).
[22] The HKCP was released in April 2008 and is available at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/2ndPCCOR_Chapter5_e.pdf.
[23] Paragraphs 5.13 and 5.14 of HKCP.
[24] Paragraphs 5.15 to 5.18 of HKCP.
[25] Paragraphs 5.9 to 5.12 of HKCP.
[26] New Zealand Personal Property Securities Act 1999 (No. 126).

(d) Reform attempt in Australia and UK: adopting the notice-filing system

17 Australia is also considering a similar approach to New Zealand, although the outcome of the Australian review has not yet been confirmed. The UK Law Commission also proposed a form of notice-filing system that would apply to traditional security interests as well as to sales of receivables.[27] However, the Law Commission's proposal met with a considerable amount of resistance from practitioners and has not been adopted. The current UK approach is similar to Singapore's. However, following the recent consultation by the Department for Business Innovation and Skills, the Government has stated its intention[28] that the requirement to register should apply to every charge or mortgage granted by a company registered in the United Kingdom over any of its property (wherever situated) unless expressly excluded by Regulations under the Companies Act or any other statute.

18 The HKCP concluded that fully adopting the notice-filing system in the Hong Kong context would require reform beyond the realm of company law and that it would not be within the scope of the Hong Kong's current company law reform exercise.

19 It has been agreed likewise that the notice-filing system for registration of personal properties would not be suitable for the Singapore context. If the New Zealand system were to be adopted in Singapore, it would involve a complete overhaul of the current system as it is premised on the US-style registration system, which is completely different from the current charge-registration regime in Singapore. Any attempt to overhaul the current system would involve not only ACRA but also other relevant government agencies, and would be beyond the scope of the Companies Act review.

(e) Current "inclusionary" regime under section 131(3)

20 Currently, in Singapore most banks and law firms attempt to register charges on behalf of their clients under section 131(3) of the Companies Act, even if the charges do not really fit into any of the registrable categories or items listed in section 131(3). In so doing, law firms and banks have attempted to "squeeze" the relevant charges they wish to register into one of the categories in the list. An example would be where law firms and banks have attempted to register charges on bank accounts as "book debts" under section 131(3)(f). It is possible to argue that a bank account is not a book debt and that the charge has been incorrectly registered.

21 The current list in section 131(3) is practically redundant as the list is being "stretched" to take account of charges that may not fit into the "normal" definition of a charge. This has made the list rather artificial. Moreover, there are now new types of securities and assets that may not fit into section 131(3) as it stands. It would be more flexible to leave it to the chargor and chargee to decide whether such securities and assets should be registrable as a charge. (A written instrument will provide some form of evidence to back up the claim of a charge.) The Steering Committee considered two alternatives approaches. The first was based on a reform of the definition of charge and making all charges registrable. The second was to update the section 131(3) list of registrable charges.

[27] See the Law Commission Final Report (2005, Law Com No 296, Cm 6654).
[28]/ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/49949/10-1319-government-response-consultation-registration-of-charges.pdf

(f) Reform of definition of charge

22 The first alternative considered by the Steering Committee was:

(a) to define a charge as being:

(i) a written instrument that is not created or does not arise as a result of an operation of law (for example, liens and pledges); and

(ii) one that requires an overt act of creation and evidenced by some form of documentation; and

(b) the law should require all such charges to be registrable.

23 There was substantial disagreement expressed with this approach by some of the respondents to the consultation including practising lawyers and academics. MAS suggested retaining the current list of registrable charges and adding a catch-all as per the proposed definition. Some views expressed were as follows:

(a) While the current system is not perfect, it largely works.

(b) The proposed changes will broaden the category of registrable charges which endorses the current excessive registrations rather than rectifying the situation. Making more charges registrable can result in increased registration and due diligence checking costs and may inhibit financial innovation.

(c) The proposed changes may impact the relative competitiveness of Singapore as a regional financial hub since it deviates from familiar common law principles and systems.

(d) The 'negative listing' approach does not solve the problem because it will just mean moving from an inclusionary list to an exclusionary one and there will be problems defining the exclusionary list.

(e) There are problems with the proposed definition. It may be necessary to specify that any statutory definition is not meant to affect the common law on what amounts to a charge.

24 The second alternative is to improve on and clarify the list of registrable charges in section 131(3). This alternative is recommended by the Steering Committee. The danger of the first alternative is that what emerges will be different but not necessarily better than the current situation.

<u>Recommendation 6.1</u>

The current framework for registration of charges should be maintained but the list of registrable charges at section 131(3) should be reviewed and updated.

III. OPERATIONAL ISSUES IN REGISTRATION OF CHARGES

(a) Registration of charges in a name other than an individual or company

25 Currently, section 132 of the Companies Act allows for companies and persons to register charges with ACRA, but does not cater for registration of charges by other types of business entities, such as partnerships. ACRA had recently rejected a charge application in which the chargee was a business entity, because the name under which a person carries on business is not allowed to be registered as a chargee.

26 To resolve this, the Steering Committee is of the view that section 132 should be broadened to provide for the registration of charges in the name of a business entity, rather than just in an individual's or company's name. This would facilitate the registration of charges for partnerships, limited partnerships, and other types of business entities other than companies. The intention for the filing of charges under section 131 is to alert anyone of the charges existing on a company. Limiting the ability to register a charge to only companies and individuals needlessly impedes this function of the register of charges.

27 On a related note, the Steering Committee is of the view that broadening section 132 to provide for the registration of charges in a name of a business entity rather than just in an individual's or company's name would however pose some potential challenges concerning the clarity of the charges, for example, where the entity in question is a business trust or real estate investment trust (REIT). To illustrate, if a REIT takes out a secured loan, the charge is registered against the trustee. However, if a third party were to undertake an inspection of the register of charges of the trustee, it would come across a number of charges which would have no real relevance in relation to the obligations in respect of that specific REIT (given the other trusts for which the trustee has responsibility over). The tracing of REITs registered under section 131 may involve the inconvenient process of finding out who the trustee is, and then doing a search of the charges registered under that trustee's name.

28 The majority of respondents to the consultation agreed with this recommendation.

Recommendation 6.2

Section 132 should be broadened to provide for the registration of charges in the name of a business entity, rather than just in an individual's or company's name.

(b) Satisfaction of charge under section 136

29 Currently, for the satisfaction of charges under section 136(2) of the Companies Act, the chargee has to endorse a statement of payment to indicate that the charge has been satisfied. The Companies Act however does not cater for situations where the chargee is either missing, dead or refuses to endorse the statement. The Act also does not cover situations where a company has been merged with another company. In the case of a merger, where Company A (the chargee) is merged with Company B, Company B is not likely to have the relevant documents to endorse the satisfaction of the charge since it is not the chargee.

30 Whilst a majority of the respondents to the consultation agreed with maintaining the status quo, there was also a suggestion that there should be an alternative to going to court provided to address situations where the chargee is uncooperative.

31 The Steering Committee has decided against recommending the amendment of the Act to allow the chargor to sign a statutory declaration that the charge has been satisfied, as this could be abused by the chargor. The Steering Committee is of the view that in a scenario where the chargee is not able to endorse the statement of satisfaction, the statement should only be verified by the court. The Steering Committee further notes that charges are not the same as ordinary debts. Charges are secured debts with priority rights of creditors attached to them. Hence, it would not be appropriate to rely on the chargor to initiate removal of the charge from the register.

32 The Steering Committee is of the view that the current requirements for satisfaction of a charge should be maintained.

Recommendation 6.3

The current requirements for satisfaction of a charge should be maintained.

(c) Retention period for instrument of charge

33 Currently, section 138(1) of the Companies Act provides that a company must cause instruments creating the charge to be kept at the registered office of the company. However, it seems that the books and papers must be kept for so long as the company is in existence, and for a period of 2 years after dissolution.[29]

34 In this regard, the Steering Committee is of the view that section 138(1) of the Companies Act should be amended to specify that an instrument should be kept for as long as the charge is in force, and upon discharge, should be retained on the basis that it forms part of the accounting and other records required to be kept under and for the purposes of section 199 of the Act. (On that basis, the record retention would thus be 5 years from the end of the financial year in which the charge was fully discharged).

35 The current ACRA registration forms require a confirmation by the chargee (if the charge is registered with ACRA by the chargee) that the instrument is kept at the registered office. This may not be appropriate as the chargee has no control over this. In this regard, the Steering Committee is of the view that ACRA should review its form and also consider the possibility of including in the e-notification confirming registration, a reminder of the chargor's responsibility to keep a copy of the charge at the registered office.

36 The respondents to the consultation unanimously agreed with these recommendations.

[29] Section 320(2).

Recommendation 6.4

Section 138(1) of the Companies Act should be amended to specify that an instrument should be kept for as long as the charge is in force.

Recommendation 6.5

Upon discharge of the charge, the instrument by which the charge is created should be retained on the basis that it forms part of the accounting and other records required to be kept under and for the purposes of section 199 of the Act.

Recommendation 6.6

There should be a review of ACRA's form for registration of charges in which a confirmation is required by the chargee (if the charge is registered with ACRA by the chargee) that the instrument is kept at the company's registered office.

Recommendation 6.7

A reminder of the chargor's responsibility to keep a copy of the charge at the registered office should be included in the e-notification confirming registration.

(d) Charges created by unregistered foreign entities

37 Some law firms have attempted to register with ACRA charges created by companies which are not registered under the Companies Act. However, sections 131 to 141 of the Companies Act clearly apply to only locally-incorporated companies and registered foreign companies, and not other unregistered foreign entities. The ambit of section 141 clearly does not extend to unregistered foreign entities.

38 Section 141 further clarifies that the word "company" in the Division dealing with charges will include foreign companies that have been registered under Division 2 of Part XI. Whilst the law firms concerned have attempted to interpret the ambit of section 141 to be an inclusive provision, ACRA's position is that section 141 of the Companies Act only covers foreign companies registered with ACRA (and its coverage should not be "stretched" beyond this ambit). The interpretation accorded by ACRA is that the provision is exhaustive in that the word "company" within the Division refers only to companies incorporated under the Companies Act and registered foreign companies. The Steering Committee agrees with ACRA's stance and thus confirms that unregistered foreign companies cannot register a charge with ACRA. The drafting of section 141 should be improved to make this absolutely clear, and to stop attempted registration of such charges with ACRA. Hence, for avoidance of doubt, the Companies Act should clarify that the reference in section 141 does not include a reference to unregistered foreign companies.[30]

[30] In Hong Kong, the "*Slavenburg* registration" issue has been laid to rest as the current legislation confines charge registration requirements to charges of Hong Kong incorporated companies and non-Hong Kong companies registered under the Companies Ordinance.

39 The Steering Committee went further to consider whether it would be beneficial to amend the current law in Singapore so as to allow for the registration of charges of unregistered foreign companies; in other words, whether the Registrar should accept lodgments of charges by unregistered foreign companies.

40 In order to decide if the law should allow for unregistered foreign companies to register charges with ACRA, it would be necessary to consider whether the interests of members of the public in Singapore are prejudiced in any way. In this context, the Steering Committee is of the view that there is no local public interest to protect.

41 It is further noted that in the context of immovable property in Singapore, the provision for registration will be covered by the Land Titles Act. However, for all other types of movable property, there is no public register to reflect that the property has a charge over it. Thus, it would be up to that chargee to take the necessary measures to protect its own interest if the chargee were to grant a facility to an unregistered foreign company. The chargee would most likely have to take the risk of being an unsecured creditor. (This argument would apply even if the chargee were a Singapore entity because it would have no ability to register a charge against an entity that is not registered in Singapore.)

42 There could be a downside to allowing unregistered foreign companies to register their charges – it may be onerous on foreign creditors of an unregistered foreign company to be required to check the ACRA register for charges which will be deemed to be good notice once the charge is registered with ACRA.

43 Since local companies cannot register a charge over a foreign company in a foreign register, the same position should also apply to an unregistered foreign company.

44 Thus, foreign unregistered companies cannot register a charge in Singapore and chargees involved will have to proactively protect their interests under the current laws of the relevant jurisdictions.

45 The respondents to the consultation unanimously agreed with this recommendation.

<u>Recommendation 6.8</u>

The registration of charges regime should continue to apply only to foreign companies registered under the Companies Act and should not be extended to unregistered foreign entities.

(e) Whether submissions of physical charge documents (by unregistered foreign companies) are to be accepted

46 The word "lodged" is defined under section 4(1) of the Companies Act to mean lodged under the Companies Act or any corresponding previous written law. The lodgment must therefore be in accordance with the Companies (Filing of Documents) Regulations. The Regulations require that "any form and any relevant accompanying document" be lodged using the electronic filing system with exceptions given only "as the Registrar thinks fit".

47 If the Registrar has not agreed to accept such documents in the form of physical delivery of the documents, then arguably, the documents have not been duly lodged by the mere delivery of the documents to the Registrar.

48 Some law firms have attempted to register charges of unregistered foreign companies by lodging physical copies of the relevant charge documents with ACRA, relying on the procedures which were allowed under the UK case of *NV Slavenburg's Bank v. Intercontinental Natural Resources Ltd* [1980] All ER 995 ("*Slavenburg*").

49 Whilst *Slavenburg* may be relevant in the UK, it is not relevant in the Singapore context. In the UK, it was possible under section 106 of the Companies Act 1948 for overseas companies which established a place of business in England and Wales (but which may not have been registered with Companies House) to register charges in the UK. However, this provision has since been repealed through the UK Companies Act 1989. In Singapore, the mere physical lodgment of charge documents with ACRA does not equate with successful registration of the charge (even though the *Slavenburg* case says so). Lodgment of charge documents must be through BizFile – which can only be done for local companies and registered foreign companies. Thus, the "*Slavenburg* Principle" for the registration of charges by unregistered foreign companies will not apply in Singapore.

50 The respondents to the consultation unanimously agreed with this recommendation.

Recommendation 6.9

Maintain ACRA's current practice/position that the mere physical lodgment of charge documents with ACRA does not equate with successful registration of the charge and that the lodgment of the charge documents must be made through BizFile.