Companies Act 2016
Shaping the Malaysian corporate regulatory landscape
On 31 January 2017, the Companies Act 2016 (“CA2016” or the “Act”) and Companies Regulations 2017 came into force.\(^1\)

CA2016 is the culmination of more than a decade’s worth of thorough review, debate and collective insights from regulatory, professional and industry bodies to create a set of regulations which can be both practically and effectively applied.

The extensive rigour applied to CA2016’s transformation is reflected by the 188 recommendations proposed by the Corporate Law Reform Committee\(^2\) (“CLRC”) which were then consolidated into 19 policy statements before these policy statements formed the basis of the Act’s 620 sections.

Chart 1: The evolution of Malaysia’s Companies Act 2016

Notes:
\(^1\) As at the time of this publication, Section 241 (registration of a company secretary with the Registrar of Companies) and Division 8 of Part III (corporate rescue mechanisms) have yet to come into force. Companies to take note of other relevant legislative and regulatory requirements, including the Income Tax Act 1967 (“ITA1967”), Finance Act 2017, Companies Regulations 2017, approved accounting standards and guidelines.
\(^2\) Committee formed by Suruhanjaya Syarikat Malaysia (“SSM”) to review Companies Act 1965 in 2003
\(^3\) Companies Commission of Malaysia
Companies Act 2016

What are the new aspirations and areas of focus?

The revamp of CA2016 was driven by the need to further facilitate Malaysia’s status as the place to do business.

A summary of the Act’s key objectives and areas of focus is mapped across the business life cycle as follows:

Chart 2: Snapshot of Malaysia Companies Act 2016
What has changed?

The changes in CA2016 impact across the business cycle spectrum, from simplifying company incorporation, modifying capital restructuring, enhancing corporate governance and financial reporting through to modernising insolvency laws.

1. Simplify company incorporation and decision-making
   - Single-shareholder-and-director for private companies' incorporation
   - For private companies - removal of:
     - Unanimity rule for written resolutions
     - Annual General Meetings ("AGM")
   - Optional Memorandum and Articles of Association ("M&A")
   - Unlimited capacity for companies
   - Introduction of 'superform' - a single, electronic incorporation template

2. Facilitate share capital management and restructuring
   - Introduction of no-par-value regime ("NPVR")
   - Introduction of solvency requirements
   - Share buy-backs and alternative procedures for a reduction of share capital
   - Explicit requirements for dividend distribution
   - Introduction of flexible financial assistance

3. Reaffirm the importance of audit and financial reporting
   - Financial reporting - 9th Schedule and subsidiaries' audit reports
   - Decoupling of annual return and audited financial statements
   - Audit exemptions
   - Mandatory auditor attendance at public company AGMs
   - Auditor resignation - termination date specified

4. Enhance corporate governance and responsibilities
   - Directors' remuneration to be approved at general meetings
   - Removal of maximum age limit for directors
   - Introduction of solvency statements by directors
   - Director indemnification and insurance
   - Increased sanctions for breaches of directors' duties

5. Modernise insolvency laws to manage distressed and insolvent companies
   - Enhancement of receivership provisions
   - Introduction of corporate rescue mechanisms:
     - Judicial Management
     - Corporate Voluntary Arrangement
   - Refinement of winding-up provisions
   - Enhancement of provisions on arrangements and reconstructions
   - Enhancement of creditors' rights

"Companies Act 2016 is about getting governance in check, starting from the tone at the top - the reinforcement of director's accountabilities and higher penalties for breaches. It is time the market rewards well-governed companies with higher premiums."

Philip Rao
Malaysia Risk Advisory, EY

Notes:
1 As at the time of this publication, SSM is in the process of gathering public feedback on the audit exemption clause.
2 Default notice period of 21 days unless otherwise specified
3 As at the time of this publication, the corporate rescue mechanisms have yet to come into force.
### Key points

**1. Simplify company incorporation and decision-making**

Key changes relating to the simplification of company incorporation and internal decision-making include:

<table>
<thead>
<tr>
<th>Single-shareholder-director-cum-secretary for private company incorporation and operation</th>
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<tbody>
<tr>
<td>▶ Reduces incorporation, maintenance and operational costs</td>
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<tr>
<td>▶ The Registrar of Companies (“Registrar”) can appoint an independent secretary should conflict of interest arise.</td>
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<td>▶ Single director liable for unpaid company tax liabilities</td>
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<tr>
<th>Streamlining of internal decision-making processes for private companies</th>
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<tr>
<td>▶ Unanimous written resolutions are no longer necessary as they can now be passed by a majority (greater than 50%) shareholder sign-off.</td>
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<td>▶ Removal of requirement for AGM</td>
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<tr>
<th>Optional Memorandum and Articles of Association (“M&amp;A”) or Constitution</th>
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<tr>
<td>▶ Companies who opt for a Constitution can tailor its provisions within the legal boundaries of CA2016.¹</td>
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<tr>
<td>▶ CA2016 will apply by default to companies who opt not to have a customised Constitution.</td>
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<th>Unlimited capacity for companies</th>
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<tr>
<td>▶ Within the confines of the Act, companies have the rights, powers and privileges to enter into transactions or perform activities without having to rely on the same being specified in the company’s Constitution.</td>
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<tr>
<th>Introduction of Superform - single, electronic incorporation template</th>
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<td>▶ All incorporation and registration procedures will be processed through SSM’s newly-launched online portal, i.e. MyCoID 2016.</td>
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<td>▶ A Notice of Registration will serve as conclusive evidence of incorporation.</td>
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¹ Does not apply to companies limited by guarantee which are required to have a constitution by CA2016
Facilitate share capital management and restructuring

Key changes relating to the management and/or restructuring of share capital are summarised as follows:

**No-Par-Value regime**

- With NPVR, any amount standing to the credit of a company’s **share premium account** and **capital redemption reserve** (“CRR”) shall become part of the company’s share capital.
- A 24-month transition period has been granted for companies to honor any pre-NPVR commitments and/or utilise the outstanding credit from the share premium and CRR accounts.

**Alternative procedures for a reduction of share capital**

- A reduction of share capital requires:
  - A special resolution and **confirmation by the Court**; or
  - A special resolution supported by a **solvency statement**
- **All the directors** of a company must issue and sign this **solvency statement**.

**Did you know?**

**No-par-value regime**

**Rationale**

The previous par value regime did not reflect the true value of a share or the company.

**In practice**

- **Simplify company accounts**
  - Share premium, CRR and authorized capital no longer apply.
- **More flexibility to raise capital**
  - Companies can now issue shares at a discount and capitalise profits without having to issue new shares.

**Impact**

- Share price to be determined by:
  - Current market value of the company
  - Business circumstances: internal and external factors
  - Capital to be raised

**From an accounting perspective, the introduction of the “no-par-value” regime aligns with international standards and will help simplify the accounting treatment of share capital. Directors and management should carefully analyse the effects of the new Act and its impact to their organisations’ regulatory and contractual obligations.**

**Yap Seng Chong**

Malaysia Assurance Leader, EY
When
Corporate exercises which require a solvency test and solvency statement:
► Reduction of share capital
► Preference share redemption\(^1\)
► Financial assistance
► Share buy-backs

Impact
Director(s) who issue a solvency statement without reasonable grounds will be personally liable and may be subject to:
► A maximum fine of RM500,000; and/or
► Imprisonment for a term not exceeding 5 years

Note:
\(^1\) Solvency statements for preference share redemption must be signed by all directors of a company.
Key points

Reaffirm the importance of audit and financial reporting

The requirement to prepare financial statements in accordance with approved accounting standards remains. Failure to comply could subject a company or its management to higher penalties. Some key changes relating to audit matters and financial reporting are summarised as follows:

Impact on financial reporting

- Removal of the 9th schedule (previous Act’s financial statement content guide)
- Companies need only prepare financial statements in compliance with approved accounting standards.
- Removal of requirement for auditors to consider the audit reports of subsidiaries

Audit exemptions

- The Registrar reserves the right to exempt certain private companies from appointing an auditor for the financial year.
- SSM has yet to confirm the eligible private company types which are expected to be dormant and/or small companies.

Decoupling of annual return and audited financial statements

- Private companies are now exempt from holding AGMs.
- Their annual return needs to be lodged with SSM within 30 days from each anniversary of the company’s incorporation date.

Auditor resignation

- Auditor resignation is effective within 21 days of serving notice (unless otherwise specified).
- Auditors may also request a public company client to convene a general meeting and/or circulate a written statement to shareholders on the cause of resignation.

Mandatory auditor attendance at public company AGMs

- These AGMs will facilitate a direct communication platform between shareholders and both directors and auditors on the audit issues in financial statements.
Key points

4 Enhance corporate governance and responsibilities

A key CLRC recommendation is integrating the elements of corporate responsibility by raising director accountability in the following areas:

- **Introduction of mandatory solvency statements by directors**
  
  Directors are directly liable for any offences regarding the issuance of solvency statements (refer pages 5 to 6).

- **Directors’ remuneration approved at general meeting**
  
  - Applicable to public companies or listed companies and their subsidiaries
  - Private company directors’ remuneration may be approved by the Board but requires mandatory record and shareholder notification.
  - Qualifying shareholders have the right to inspect the contract(s) of service of directors.

- **Removal of maximum age for directors**
  
  - The age limit of 70 years for directors of a public company and its subsidiaries removed

- **Stricter requirements for director indemnification and insurance**
  
  - Restrictions on indemnity and insurance for officers
  - No indemnification allowed and no insurance to be effected for directors who have breached their duty

- **Increased sanctions for director non-compliance and/or breaches**
  
  - Maximum fine of RM3m; and/or
  - Maximum imprisonment term not exceeding 10 years

Notes:

1. A company that contravenes this, commits an offence and any payment in contravention constitutes a debt due by the director to the company.
2. The Board shall notify shareholders within 14 days of the approval date. Within 30 days of being notified, shareholders (holding at least 10% of total voting rights and who consider the payment unfair to the company) may require that the company pass a resolution approving the payment by either written resolution or at a general meeting. If no such resolution is passed, the payment shall constitute a debt due by the director to the company.
3. A public company (including its subsidiaries) to keep a copy of every director’s service contract at its registered office. These contracts can be inspected upon request by members holding at least 5% of total paid-up capital (where the public company has share capital); or 10% of members (where the public company has no share capital).
4. A breach of duty occurs when a director does not exercise power for a proper purpose and in good faith; in the best interest of the company; and/or reasonable care, skill and diligence as expected of a director.
Key points

Modernise insolvency laws to manage distressed and insolvent companies

In the event that companies become financially distressed and/or further decline into insolvency, CA2016 has enhanced and/or refined the provisions on arrangements and reconstructions, receivership, winding-up, striking-off and management of assets of dissolved companies.

Key changes include:

- **Enhancement of provisions on arrangements and reconstructions for financially-distressed companies**
  - An approved liquidator may be appointed by the Court to assess the viability of the proposed scheme or arrangement.
  - Extension of the Court-granted restraining order is limited to 12 months to prevent potential abuse.
  - The Court-granted restraining order is not applicable against the Registrar or Securities Commission Malaysia.

- **Enhancement of powers of Receivers or Receivers and Managers**
  - Clear mode of appointment of Receiver or Receiver and Manager via an instrument or Court order
  - Codification of powers of Receivers or Receivers and Managers

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Did you know?

**Introduction of corporate rescue mechanisms**

- **Corporate Voluntary Arrangement** ("CVA")
  - Provides an opportunity for a company to enter into a voluntary arrangement with its creditors provided that the company has sufficient funds to carry on business during the CVA moratorium period

- **Judicial Management** ("JM")
  - Provides temporary breathing space for a financially distressed company from creditor enforcement actions where there is reasonable probability of:
    - Rehabilitation of the company;
    - Full or partial preservation of its business as a going concern; or
    - JM better serving the interests of creditors than a winding-up

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Notes:

1. Division B of Part III of the CA2016 on Corporate Rescue Mechanisms has yet to come into force.

2. Not applicable to public companies; licensed institutions or operators of a designated payment system regulated by Bank Negara Malaysia ("BNM"); a company which is subject to the Capital Markets and Services Act 2007 ("CMSA") or companies with encumbered assets

3. Not applicable to licensed institutions or operators of a designated payment system regulated by BNM or companies subject to the CMSA
The introduction of two corporate rescue mechanisms is among the significant changes in the Companies Act 2016. Distressed companies with viable businesses are now given a lifeline option to turn around.

Stephen Duar
Malaysia Restructuring Leader, EY
Key tax considerations arising from CA2016 include the following:

### No-par-value regime
- Companies which previously qualified as SMEs (and hence were eligible for preferential tax rates on the first RM500,000 of chargeable income) may be affected due to the removal of the need to have a par value on shares.\(^1\)
- **Group relief**, which allows companies to transfer up to 70% of current year tax losses to related companies, may also be affected as the Income Tax Act 1967 (“ITA1967”) requires a minimum share capital threshold for group relief applicants.

### Optional Memorandum and Articles of Association
- Optional M&As may result in tax authorities having to rely on alternative means of determining a company’s business intention(s).
- A company’s business/operating intentions can result in various tax considerations, for example:
  - Determining whether the company is carrying on a single trade or multiple trades
  - Assessing whether gains made by the company from the disposal of property are subject to income tax or whether these are capital gains

### Audit exemptions
- ITA1967 currently provides that tax returns must be based on audited accounts.
- The Inland Revenue Board (“IRB”) may need to consider waiving this requirement for companies exempted from audit obligations by the Registrar.

### Corporate restructuring
- Capital reduction without a Court order provides greater flexibility and speed in carrying out the capital reduction exercise. The tax impact of such exercises should be carefully considered.

### Stamp duty
- The current par-value-based-computation formula imposed on stamp duty for loss-making companies in the transfer of unquoted shares will no longer be applicable post-NPVR.

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"It is important for companies to note that the Companies Act 2016 will raise certain tax considerations and issues which will need to be carefully addressed. The relevant professional bodies should work closely with the IRB to bridge the gap."

Amarjeet Singh
Malaysia Tax Leader, EY

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Note:
1. A SME is defined in the ITA1967 as a resident company incorporated in Malaysia with a paid-up share capital in respect of ordinary shares not exceeding RM2.5m and whose holding company or any of its subsidiaries does not have an ordinary paid-up share capital exceeding RM2.5m.
Actions to consider

1. Update your knowledge of the duties and obligations as an officer of a company
2. Conduct a corporate/organisation readiness assessment on new regulatory requirements
3. Perform a solvency assessment pre-dividend distribution
4. Optimise current and proposed capital and/or debt management strategies
5. Consult your auditors on the timing of the audits of immaterial subsidiaries
In summary, CA2016 has improved Malaysia’s alignment with international standards with the adoption of the pragmatic tenets of simplification, comprehensiveness and flexibility, in creating a conducive and integrated corporate legal framework for businesses and organisations.

Key highlights include:
Today’s challenging economic externalities call for pragmatism and this is reflected in the comprehensive coverage of a wide range of reforms in the Companies Act 2016.

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