REFORMING COMPANY LAW IN SINGAPORE*

The Companies Act of Singapore is a patchwork quilt of provisions drawn from English and Australian legislation, with a sprinkling of sections inspired by other jurisdictions like Canada, New Zealand and Hong Kong, substantially modified by locally-drafted legislation. The Steering Committee for Review of the Companies Act was tasked with considering how the Act may be streamlined and made more coherent. After much consultation and deliberation, the Steering Committee presented its final report to the Minister of Finance in April 2011. This article describes the major reforms recommended by the Steering Committee.

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I. Introduction

1 The primary source of company law in Singapore is the Companies Act.[1] The current Companies Act traces its ancestry through the Malaysian Companies Act 1965 to the Companies Act 1961 of the Australian state of Victoria, which in turn drew extensively upon the UK Companies Act 1948. The present Act is something of a patchwork quilt. Various sections have been based on legislation from the UK,[2] Australia,[3]

* This article is based on the Report of the Steering Committee for Review of the Companies Act, which was presented to the Minister of Finance in April 2011 (available online at <http://app.mof.gov.sg/data/cmsresource/public%20consultation/2011/Review%20of%20Companies%20Act%20and%20Foreign%20Entities%20Act/Anx%20A%20SC%20Report%20Complete.pdf> (accessed 15 September 2011) ("Report of the Steering Committee for Review of the Companies Act (2011)"). The author was Chairman of the Steering Committee. The views expressed are personal and not necessarily those of the Steering Committee, the Accounting and Corporate Regulatory Authority or the Ministry.

1 Cap 50, 2006 Rev Ed. Available online at <http://statutes.agc.gov.sg/>.

2 Sources include the Companies Act 1985 (c 6), the Companies Bill in the White Paper on Modernising Companies Law published in July 2002 and the Companies (Acquisition of Own Shares) (Treasury Shares) Regulations 2003.

3 These include the Company Law Review Act 1998, the Corporations Law, the Corporations Act 2001 and the Corporations Act 2002.

Canada,[4] New Zealand[5] and Hong Kong.[6] In October 2002, the Company Legislation and Regulatory Framework Committee ("CLRFC")[7] recommended extensive amendments to the Companies Act that were progressively implemented. However, the amendments took the form of patching the quilt further rather than streamlining the Act. Indeed, since its introduction in 1967,[8] it has been amended 16 times.

2 The piecemeal nature of the amendment process has led to a situation where several related sections may present inconsistencies. To give one example, there are now six sections which deal with disqualification from acting as a director: ss 148 (bankrupts), 149 (unfit directors of insolvent companies), 149A (directors of companies wound up on grounds of national security or interest), 154 (persons convicted of certain offences), 155 (persons in persistent default of delivery of documents to the Registrar) and 155A (disqualification under the Limited Partnership Acts). Some of these sections prohibit a disqualified person from participating in the management of companies, which are defined in s 4(1) to mean companies incorporated under the Act. Others prohibit management of corporations, which by the s 4(1) definition includes foreign companies. Some of the sections prohibit the disqualified person from being a promoter of a company, others do not. If there is a reason in principle for these nuances, it is not immediately apparent to the user of the legislation. Other instances of such anomalies abound.

3 The CLRFC recommended that Singapore should:[9]

> … adopt the modern UK model as our basic framework, excise elements which are European Union driven, insert revisions that reflect Singapore's particular requirements, introduce refinements from other jurisdictions and render our structure amenable to the adoption of US models in the areas of accounting standards, financial reporting and investor protection in the framework of a disclosure based regulatory environment.

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4 The Canada Business Corporations Act 1985.

5 The Companies Act 1993 and the Report on Company Law Reform: Transition and Revision (Report No 16 of the Law Commission 1990).

6 The Companies Ordinance (Cap 32) and the Securities (Disclosure of Interests) Ordinance (Cap 396).

7 Available online at <http://www.acra.gov.sg/NR/rdonlyres/D4E1E17E-D415-4B69-961F-024EA679B620/9713/FinalReport1.pdf> (accessed 15 September 2011).

8 As Act 42 of 1967, in force from 29 December 1967.

9 Final Report of the Company Legislation and Regulatory Framework Committee (October 2002) <http://www.acra.gov.sg/NR/rdonlyres/D4E1E17E-D415-4B69-961F-024EA679B620/9713/FinalReport1.pdf> (accessed 15 September 2011) at para 1.2.

4 Unfortunately, such an approach cannot be sustained indefinitely. The system of piecemeal patches drawn from a variety of disparate sources will lead eventually to incoherence. The first strategic decision taken by the Steering Committee for Review of the Companies Act ("the Steering Committee") was that the Act should be rewritten and not merely amended again (and again, *ad infinitum*). The second strategic decision was that it is undesirable to use a foreign statute as a template for the revision of the Singapore Companies Act.

5 The reason for this is that the Steering Committee did not have a *tabula rasa* to deal with. To copy the legislation of another country would have meant changing the underlying framework of business. Legislation does not exist in isolation; there is a whole economic ecosystem of regulations, rules and practices that will have grown up to support it. It would be unwise to abandon the old familiar system for something completely new unless there is a compelling case to do so; none was made out. In any case, the UK legislation is so far removed from what we are used to that adapting it would in effect amount to rewriting the Act. The effort involved in considering the legislative rationale for each section of the thousand-plus provisions to determine whether we should adopt it would not be commensurate with the benefit.

6 Rewriting the Companies Act does not mean abandoning the old Act completely. Things should not be changed just for the sake of change. It is undesirable to depart from wording that is well understood and with which the market is familiar just for the sake of change. An example would be the formula that a director shall "at all times act honestly and use reasonable diligence in the discharge of the duties of his office".[10] This may not be perfect, but it is well understood and has been the subject of judicial exposition. There would be little benefit in reformulating the rule along the lines of English legislation. Rewriting means consolidating sections that can be consolidated, eliminating inconsistencies, clarifying provisions which have proven problematic and deleting those that have outlived their usefulness. A certain amount of reorganisation is also necessary. The aim is to have a Companies Act that is comprehensible to the intelligent layman, if that is at all possible for modern legislation.

7 Several general principles guided the Steering Committee's work:

10 Companies Act (Cap 50, 2006 Rev Ed) s 157(1), which represents the statutory formulation of a director's duties in Singapore. It is not exhaustive, and the common law rules continue to apply alongside the statutory rule: see s 157(4).

(a) As far as possible, the regulatory burden on businesses should be reduced. Regulatory rules should not be "hard-coded" into the legislation, but left to subsidiary legislation or even non-statutory guidelines. This will ensure that such rules can be quickly modified if they prove to be an impediment to business efficiency.

(b) The Companies Act should only contain core company law that applies to all companies. Sections that apply only to listed companies should be migrated to the Securities and Futures Act[11] (or some other appropriate legislation) or set out in the SGX's Listing Rules. Examples of such provisions would be those on audit committees[12] and the Central Depository.[13] The provisions on winding up of companies will in future be part of the proposed Insolvency Act. In line with an early suggestion of the Steering Committee, the provisions pertaining to registration of foreign companies will be hived off into separate legislation.[14] This process of de-consolidation should allow a clearer focus for the legislation and for searches; intuitively, a researcher looking for the provisions on the Central Depository would not immediately think of searching the Companies Act.[15]

(c) Provisions which are obsolete should be deleted. In reviewing the Act, the Steering Committee was mindful to always consider the policy rationale behind the provisions. Business practices change, but legislation does not. Like dinosaurs in a lost world, some of these obsolete sections nonetheless remain. Examples are s 170, which provides for the approval of the assignment of office of a director or manager,

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11 Cap 289, 2006 Rev Ed.

12 Companies Act (Cap 50, 2006 Rev Ed) s 201B. The Steering Committee recommended that this provision be migrated to the Securities and Futures Act: Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 4.30.

13 Companies Act (Cap 50, 2006 Rev Ed) Pt IV Div 7A.

14 The reference to a foreign "company" is in fact a misnomer. The definition of "foreign company" in Companies Act (Cap 50, 2006 Rev Ed) s 4(1) includes societies and associations incorporated outside Singapore as well as unincorporated societies and associations which may sue and be sued or hold property in the name of designated officers. Thus it will be seen that a "foreign company" under the Act encompasses a far wider range of business organisations than simply companies properly so called.

15 This author has in fact suggested to the Minister that consideration be given to enacting a Listed Corporations Act, which would apply to both foreign and local companies listed in Singapore. This would allow proper consideration of which rules should apply to foreign corporations seeking a listing in Singapore. At the moment, the Companies Act (Cap 50, 2006 Rev Ed) treats local and foreign companies inconsistently, *eg*, in matters pertaining to the duties of directors.

and s 153, which sets an age limit for directors of public companies.

(d) Provisions which do not in practice create problems may be retained, with necessary modifications and clarifications, despite any academic or theoretical reservations. There are a certain number of sections which may not be perfect, but with which market practitioners are familiar. The prime example of this would be the provisions on registration of charges.[16] The equivalent provisions have been the subject of numerous reports in the UK. Other jurisdictions have made changes to their provisions. The Steering Committee considered whether a thorough overhaul of the provisions was necessary. After consultation with market practitioners, it was concluded that while the current system is not perfect, it works. Practitioners have developed pragmatic "work-arounds" to deal with the system. To overhaul it would risk introducing unnecessary confusion as the market comes to grips with unfamiliar provisions. There is always the risk of inadvertently undermining the basis of prior commercial transactions. It was therefore decided on balance that it would be better to clarify the sections by reviewing and updating the list of registrable charges rather than change the system completely for the sake of theoretical neatness.[17]

(e) The fact that a major foreign jurisdiction has introduced certain changes to its legislation is a factor that is relevant but not determinative. It is unwise to adopt wholesale an innovation from abroad without considering whether it is appropriate in Singapore. Thus, for example, the codification of directors' duties introduced in the UK was considered but ultimately rejected. It was felt after discussion and consultation that such a step is unnecessary given the difference in statutory provisions and historical background.

(f) The Companies Act should facilitate business rather than prescribe rules wherever possible. While it is inevitable that there must be some prescriptive rules backed up by the prospect of criminal sanctions, legislators cannot foresee the way business will develop. The Act should provide a flexible framework for business and not prove to be an impediment to entrepreneurship.

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16 Set out in Companies Act (Cap 50, 2006 Rev Ed) Pt IV Div 8.

17 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 6.1.

8 Finally, it is necessary to consider whether all breaches of the provisions of the Companies Act should be treated as offences. This matter is mentioned in only a single line of the Final Report of the Steering Committee for Review of the Companies Act, but it is a crucial issue that needs to be tackled. There are penalty provisions scattered throughout the Act. Section 407 criminalises contraventions of the Companies Act for which no specific penalties are provided. Realistically, the chances of prosecution are practically nil where there has been no damage to the company or the interests of the public. Even where there has been such damage, the resources of the prosecutors are not infinite; criminal proceedings in many of these cases would entail the deployment of resources out of proportion to the harm inflicted. Some thought should be given to whether particular breaches should carry only civil consequences or be dealt with by regulatory sanctions. It is unwise to have the Sword of Damocles of criminal sanctions hanging over the head of honest directors trying their best to do their jobs when all they have been guilty of is a technical breach of some minor regulatory requirement.

9 Five Working Groups were formed under the Steering Committee dealing with corporate governance, shareholders' rights, capital, accounts and audit, and company administration.[18] These working groups and the Steering Committee held extensive discussions over a two-year period with lawyers, accountants, bankers, businessmen, professional associations and governmental agencies. Specific questions were posed in discussion papers circulated to the various stakeholders. Written and oral representations were received from these stakeholders. The Steering Committee's Report distilled the results of the discussion and feedback into over 200 recommendations. It should be noted that many of the Steering Committee's recommendations involved keeping the *status quo*. The Report explains why this was done. The nature of the consultation process is such that many suggestions were received which did not garner the support of the majority. In undertaking this exercise, the Steering Committee was mindful that the recommendations made should be practical and address real rather than theoretical shortcomings of the legislation.

10 It is not intended in this article to go through every recommendation of the Steering Committee. Rather, three major threads will be discussed: firstly, the reduction of the regulatory burden;

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18 These were chaired respectively by Mr John Lim (Chairman, Singapore Institute of Directors), Professor Tan Cheng Han SC (Dean, Faculty of Law, NUS), Mr Lucien Wong (Managing Partner, Allen & Gledhill LLP), Mr Gautam Banerjee ((Executive Chairman, PriceWaterhouseCoopers LLP) and Ms Juthika Ramanathan (Chief Executive, Accounting and Corporate Regulatory Authority).

secondly, administration and management of companies; and thirdly, issues pertaining to shares and corporate finance.

II. Lessening the regulatory burden

11 Rules, if left unchecked, have a habit of proliferating like weeds. Sometimes the rules remain long after the rationale has been forgotten. The wheels of bureaucracy are lubricated with paper. It is necessary every now and then to relook at statutory provisions and ask whether they still remain relevant and necessary; all the more so where the regulation of businesses is concerned.

A. Dormant companies

12 All companies are currently required to prepare accounts and have them audited. There are audit exemptions for exempt private companies[19] and dormant ones.[20] However, such companies must still prepare accounts in compliance with the Singapore Financial Reporting Standards ("SFRS").

13 The Steering Committee considered that the benefits of having accounts prepared for a dormant company were outweighed by the cost of doing so. A dormant company does not carry on active trading; the benefit of having formal accounts prepared in accordance with the SFRS is minimal. It was therefore recommended that dormant companies should be exempted from financial reporting requirements.[21] However, it was felt that listed companies and their subsidiaries should still be required to comply with the financial reporting requirements even if dormant, given that listed companies will have a far greater number of stakeholders than non-listed ones.[22] Also, it was felt that companies which own substantial assets should still have to prepare accounts even though dormant. It was recommended that the threshold for this be set at $500,000 or such other sum as the Minister may determine.[23] In summary, a dormant company which owns less than $500,000 in

19 Defined in Companies Act (Cap 50, 2006 Rev Ed) s 4(1) as a private company with no more than 20 members, the shares of which are not held beneficially by any corporation. There is a second class of exempt private companies which comprises government-owned companies declared to be exempt by the Minister.

20 Companies Act (Cap 50, 2006 Rev Ed) s 205B.

21 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 4.6.

22 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 4.8 (*status quo*).

23 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 4.11.

property and which is not a listed company (or a subsidiary of a listed company) will not have to prepare accounts.

14 To ensure that this exemption is not abused, the directors of the dormant company would be required to make a declaration to the effect that the company has been dormant for the entire financial period. This will focus their minds on the issue, since there will be penalties for false declarations.[24]

B. Small companies and exempt private companies

15 Accounts must generally be audited. Theoretically, the audit is meant to assure the members of the company that the board of directors is properly exercising its stewardship functions. In practice, audit of small companies is a formality that is gone through merely for the sake of compliance with the Companies Act. To ameliorate this, presently, exempt private companies with a revenue of less than $5m[25] and dormant companies[26] need not fulfil the audit requirements. More than half the companies registered with the Accounting and Corporate Regulatory Authority ("ACRA") are currently exempt from audit requirements.

16 No change is recommended for dormant companies. They will continue to be exempt from audit; indeed, since it has been recommended that such companies be exempt from preparing accounts, there would be nothing to audit.

17 The Steering Committee recommended that the exempt private company regime be replaced with a small company regime instead. The status of exempt private company will be abolished.[27] A private company that fulfils the criteria for a small company will be exempt from audit. To qualify, two of three criteria must be satisfied: (a) not more than $10m annual revenue; (b) not more than $10m in gross assets; (c) not more than 50 employees.[28] The significance of this recommendation is that companies in which corporations hold beneficial interests may qualify as small companies, whereas they would not qualify as exempt private companies. However, a subsidiary company would qualify for audit exemption only if the whole group qualifies on a consolidated

24 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 4.7.
25 Companies Act (Cap 50, 2006 Rev Ed) s 205C read with reg 89A of the Companies Regulations (Cap 50, Rg 1).
26 Companies Act (Cap 50, 2006 Rev Ed) s 205B(1).
27 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 4.4.
28 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 4.1.

basis.[29] Otherwise, it would be difficult for the holding company to prepare consolidated accounts if one or more subsidiaries did not have to have their accounts audited. The criteria for exemption of small companies will not be hard-coded into the Act but should be prescribed by subsidiary legislation so that they can be adapted to meet the evolving needs of the market.

18 Along with exemption from audit requirements, a solvent exempt private company is also not required to file accounts with ACRA. Anomalously, such an exempt private company may own substantial assets. This lack of transparency makes it difficult for creditors and other persons dealing with the company to verify the financial position of the company. As a matter of policy, a balance needs to be struck between the desire for privacy on the part of the owners of a limited liability company and the interests of creditors and the public. That balance has shifted with the introduction of the limited liability partnership[30] and the limited partnership.[31] These provide alternative limited liability vehicles for entrepreneurs who desire confidentiality of financial information. With the abolition of the status of exempt private company, those who choose to do business through the medium of a company will have to file accounts with ACRA. However, if a company qualifies as a small company, it will only have to file basic financial information.[32]

C. The directors' report

19 Section 201(5) mandates that the directors attach a report to the balance sheet specifying the matters set out in s 201(6). This report used to be longer, but in 2002 paras (b) to (e) were deleted. The Steering Committee was of the opinion that there is no need for a separate directors' report, which has to be signed by two directors in accordance with a directors' resolution. This is an example of a needless formality. Accordingly, it was recommended that the requirement for a separate directors' report be abolished.[33] The matters required to be stated in the report can be incorporated directly into the accounts and the notes thereto. In so far it may be felt that a separate directors' report is necessary for listed companies, this can be provided for in the Listing Rules.

29 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 4.3.

30 Limited Liability Partnerships Act (Cap 163A, 2006 Rev Ed), in force 11 April 2005.

31 Limited Partnerships Act (Cap 163B, 2009 Rev Ed), in force 4 May 2009.

32 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 4.5. The Steering Committee did not specify what basic information should be filed; this can be decided when the legislation is drafted.

33 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 4.15.

D. *Registers of members, directors, managers, secretaries and auditors*

20 Presently, companies must maintain certain registers at their registered office, including a register of members and a register of directors, managers, secretaries and auditors. Particulars of the members, directors, managers, secretaries and auditors are filed electronically with ACRA. In practice, it is easier to access the records kept by ACRA than to go to a company's registered office. The reality should be recognised. Thus, the Steering Committee recommended that the information kept by ACRA pertaining to the register of members and the register of directors, secretaries and auditors should be definitive.[34] Companies will therefore be relieved from the necessity to maintain such registers, with certain exceptions.

21 Public companies (whether listed or not) would still have to maintain a register of members. In the case of listed companies, it is necessary for the company itself to keep the register, in order to keep track of who is buying its shares. In the case of non-listed public companies (which include all companies limited by guarantee), the *status quo* will be maintained for the time being. The primary problem is that such companies may theoretically have an unlimited number of members. For example, a guarantee company that is formed for religious purposes might have thousands of members. Expanding ACRA's database to cover these companies would have cost implications. This does not mean that such companies will not eventually be brought within the system; the issue will be considered again later.

22 As for the register of directors, managers, secretaries and auditors, it was recommended that there should no longer be a need to keep particulars of managers. The term "manager" is not properly defined in the Companies Act. It was the view of the Steering Committee that the requirement to maintain a register of managers no longer serves any useful purpose.[35]

23 One further recommendation by the Steering Committee impacts the information required to be reported by directors, secretaries and auditors. Currently, such persons are required to disclose their residential addresses. In today's current security climate, there are concerns about having a person's residential address publicly available for all and sundry to see. In the age of Google Earth, there are also issues of personal privacy. The point of registering an address is to allow the

34 Report of the Steering Committee for Review of the Companies Act (2011) Recommendations 5.1 and 5.5.

35 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 5.5.

person in question to be contacted. This can satisfied equally well if an alternate address is provided where he can be located.[36] There will be penalties if the address proves to be false or if the person cannot in fact be found there.

III. Administration and management of companies

A. Directors

24 In the field of corporate governance, the Steering Committee's Report will probably attract attention more for what it did not recommend rather than for what it did. The Steering Committee did not recommend the codification of directors' duties, despite the fact that the UK has gone ahead to do so.[37]

25 Section 157(1) sets out the general duty of a director to act honestly and with reasonable diligence at all times. This section has been part of the Companies Act since 1965, when it was introduced into Singapore by the Malaysian Companies Act. It is not based on an English model but rather is drawn from the Companies Act of Victoria. This section has been the subject of judicial interpretation both in Singapore as well as Malaysia and Australia, and it is well settled that to act honestly means to act "*bona fide* in the interests of the company".[38] It is thus clear that a director is expected to act in the interests of the company of which he is a director.

26 The problem with going further than this is that it is practically impossible to pin down with exactitude the limits of the company's interests. The Companies Act is drafted on a mistaken premise, *viz*, that the company's business will actually be run by the directors collectively.[39] This may be so in the case of the very smallest closely-held family companies, but it is not invariably the case when one moves up the scale.

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36 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 5.11.

37 Companies Act 2006 (c 46) (UK) ss 171–177. The UK provisions do not in fact form a complete code but continue to exist alongside the common law and equitable rules.

38 See *Marchesi v Barnes & Keogh* [1970] VR 434 at 438; accepted locally, *inter alia*, in *Cheam Tat Pang v PP* [1996] 1 SLR(R) 161; *Lim Weng Kee v PP* [2002] 2 SLR(R) 848; *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 (CA).

39 Companies Act (Cap 50, 2006 Rev Ed) s 157A now recognises that the business of the company shall be managed "under the direction" of the board. The Steering Committee has recommended that this be further clarified to provide that the business may be managed under the supervision of the directors, which would accord better with reality: Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 1.19.

Indeed, when one looks at the largest listed companies, the board of directors does not get involved in the day-to-day management of the business. The reality in Singapore is that the people who run the business (and who are paid to do so) would be employees rather than board members. Operationally, there is a world of difference between the chief executive officer ("CEO")/managing director of a large listed company and the nominee director who sits on his board notionally as a watchdog. The Act, however, does not recognise this, nor is any distinction made between executive and non-executive directors. The position of nominee director is also not explicitly mentioned when dealing with duties of disclosure, fiduciary duties or duties of care, skill and diligence. The market practice regarding executive and non-executive nominee directors is constantly evolving, as are the demands on the skill and experience of such directors. None of this evolution is captured by the current legislation.

27 To prescribe in a statute detailed rules about what is acceptable and what is not carries with it the risks of inexactitude and ossification. It is impossible for the legislative draughtsman to anticipate all the situations in which the different sorts of directors may find themselves. The strength of the common law is the flexibility that exists when judges experienced in commercial matters are called upon to decide particular cases; this is an advantage that should not be given up unless a clear case can be made. In consultation with the various stakeholders on codification of directors' duties, no clear consensus in favour of codification emerged. This was one of those areas where the statute may not be perfect, but people are used to it and it works. The law pertaining to directors' fiduciary duties and the duties of care, skill and diligence develop incrementally over time. Codification would not improve matters. If guidance is required, this can be provided by non-statutory guidelines or codes of best practice.

28 To better appreciate the perils of codification, consider the development of the duties of skill and diligence. A hundred years ago, an English High Court judge could say without blinking:[40]

> [A director] is, I think, not bound to bring any special qualifications to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibilities for the mistakes which may result from such ignorance; while if he is acquainted with the rubber business he must give the company the advantage of his knowledge when transacting the company's business …

40 *Re Brazilian Rubber Plantations and Estates Ltd* [1911] 1 Ch 425 at 437, *per* Neville J.

29 This may have been acceptable in 1911 but can hardly represent the law in 2011. The modern law on directors' duties of skill and diligence is better stated by judges familiar with business than by legislation which cannot anticipate developments. For example, a clear distinction must today be made between executive directors and non-executive directors, a distinction that has only been recognised by judges in the last couple of decades.[41] Judicial recognition follows market developments. Had the law been codified in 1911, it would be completely out of touch with the reality of business in the 21st century.

30 It is in fact a misconception to assume that there is no statutory "code" of directors' duties. Sections 156, 157, 157A, 157B, 157C, 158, 159, 162, 163, 165, 167, 168 and 169 taken together do constitute such a code. There is a strong case for rewriting and harmonising these sections into a coherent body, but at the same time preserving the operation of the common law. The recommendations of the Steering Committee therefore focus on refining rather than codifying the duties of directors. For instance, it is recommended that it be expressly provided that a company may indemnify a director against third-party claims[42] and that the Act be clarified to make it clear that an indemnity may be provided against potential liabilities.[43] Section 158 on disclosure of information by nominee directors will also be clarified to make it clear that the board can authorise such disclosure provided there is no prejudice to the company.[44] Section 157(2) is to be extended to cover not only the improper use of information but also the exploitation of a company officer's position in order to make a secret profit.[45]

31 The Steering Committee appreciated that one cannot concentrate solely on directors. Many companies are not managed by the board of directors in any meaningful way. The CEO of a company often wields more power than most individual directors; yet the CEO is exempt from the statutory rules that apply to directors. It is anomalous that a non-executive nominee director is obliged to disclose conflicts of interest under s 156 while the CEO (who is in a far better position to benefit from such conflicts) is exempt. The Steering Committee therefore recommended that the CEO be subject to the same disclosure

41 See, *eg*, *Lim Weng Kee v PP* [2002] 2 SLR(R) 848.
42 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 1.28.
43 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 1.29.
44 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 1.27.
45 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 1.24.

requirements as directors[46] and the duties contained in s 157 to act honestly and use reasonable diligence in the discharge of his functions.[47] It will also be clarified that a person who controls the majority of the directors is to be considered a director himself, although there will be no separate definition of "shadow" director.[48]

32 The other matter that requires attention is consideration of how far the duties of directors should be enforced by criminal sanctions. In the case of outright dishonesty, prosecution may be appropriate. But where there has been a technical breach of the duty of disclosure, say, should the director be placed in peril of a criminal conviction? ACRA will be looking into this when the time comes for drafting the new act.

B. Streamlining administration

33 The distinction between the memorandum of association and the articles of association has long since ceased to be meaningful. This is another dinosaur surviving from an earlier age. In practice, the two are invariably bound together in a single document. The Steering Committee's recommendation is that the two should be merged into a single document known as the constitution.[49] This would merely be a recognition of the commercial reality. There will be two model constitutions replacing Table A: one for private companies and another for companies limited by guarantee.[50] For public companies other than those limited by guarantee, there will be no model constitution. However, many of these would be listed companies which would have started life as private companies and may adapt the private company model. The model constitutions should be available on ACRA's website.[51] To ease the burden on people who wish to incorporate companies on a do-it-yourself basis, the model constitution may be adopted as the company's constitution by reference, in which case no constitution will need to be registered with ACRA.[52]

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46 Contained in Companies Act (Cap 50, 2006 Rev Ed) ss 156 and 165; see Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 1.25.

47 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 1.26.

48 Report of the Steering Committee for Review of the Companies Act (2011) Recommendations 1.1 and 1.2.

49 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 5.6.

50 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 5.7.

51 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 5.10.

52 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 5.9.

34 The Steering Committee also recommended that certain matters pertaining to the appointment, removal and resignation of directors be expressed in the statute. Currently, the mode of appointment of directors is left to the articles of association. In most cases, directors are appointed by the members through an ordinary resolution. The Act will be amended to make this explicit.[53] The company will retain the power to provide otherwise in its constitution, *eg*, by allowing certain persons to appoint directors. As for resignation, again this is left to the articles of association. Section 152 allows a public company to remove a director by ordinary resolution of which special notice is given. The effect of this is to disallow entrenchment of directors in a public company. It is recommended that private companies should similarly have a right to remove directors by ordinary resolution.[54] This would, however, be subject to contrary provision in the constitution, which means that directors of private companies may be entrenched. Finally, there is the vexed question of resignation of directors. Section 145(5) provides that the last director (or the last one resident in Singapore) may not vacate office. There has been a lot of confusion in practice regarding the conditions under which any other director may resign. It is often mistakenly thought that a director's resignation must be accepted by the company in order to be effective. The Steering Committee decided to clear away the confusion by recommending that the Act expressly provide that a director may resign by giving written notice to the company and that the effectiveness of his resignation does not depend on acceptance by the company.[55] This would still be subject to the "last director" rule in s 145(5) and to any contrary provision in the constitution.

35 The provisions on appointment, resignation and removal of directors will be facilitative, not prescriptive. In the case of private companies, the corporators will retain the power to change the default position by provision in the articles of association. Thus, for instance, the parties to a shareholders' agreement may specify in the articles that each of them may appoint a specified number of directors. In a closely-held family company, it may be specified that the Governing Director may choose other members of the board. It may be provided in the corporate constitution that certain directors shall be irremovable, or removable only with special majorities.

53 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 1.3.

54 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 1.13. This reflects the usual practice, to be found in Companies Act (Cap 50, 2006 Rev Ed) Fourth Schedule, Table A Art 69.

55 Report of the Steering Committee for Review of the Companies Act (2011) Recommendations 1.10 and 1.11.

36 In recognition of the speed of change in the nature of electronic communications, the Steering Committee recommended that the rules for electronic transmission of notices and documents be made more flexible and less prescriptive.[56] The aim of the legislation is to provide a flexible framework, not to put businessmen in a straitjacket. The Act will also be amended to facilitate the greater use of electronic communications, *eg*, e-mail or the corporate website, with the express, implied or deemed consent of members.[57] Members will be deemed to have consented if the constitution provides for such means of communication and the member fails to opt out.

C. Voting and resolutions

37 Although the Steering Committee's general guiding principle was that matters peculiar to listed companies should be dealt with in the Securities and Futures Act or the Listing Rules, there was one area where recommendations were made to deal with a problem that faces listed companies. Section 181(1) provides that a member of a company is entitled to appoint only two proxies to attend and vote at meetings unless the articles otherwise provide. Nominee companies and custodian banks hold shares for clients. These nominees appear in the listed company's register as members. They can only appoint two proxies, which means that only two of their clients can turn up at the listed company's meetings. Fund managers and institutional investors who hold shares through nominee companies or custodian banks expressed dissatisfaction over this limitation, which effectively disenfranchises them.

38 Theoretically, the solution to the problem is to amend the articles of association to allow more than two proxies to be appointed. However, feedback was received that the SGX and the listed companies would prefer to have a legislative solution. There was extensive consultation on this issue with the SGX and other interested institutions. The majority of the respondents to the feedback questions posed were in favour of the introduction of a multiple proxies regime. The recommendation is that only licensed banks and holders of a capital market services licence to provide custodial services for securities should be able to appoint multiple proxies.[58] Indirect investors (whether institutions or individuals) may thereby be allowed to attend and vote at meetings of a listed company after obtaining a proxy from the nominee

56 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 2.11.

57 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 2.19.

58 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 2.10.

company or custodian bank.[59] On a show of hands each proxy will have one vote.[60]

39 A related problem is that of Central Provident Fund ("CPF") members who have purchased shares with their CPF moneys. These shares are held in the names of agent banks. Effectively, the CPF members are disenfranchised as they do not appear in the listed companies' registers as members. There was overwhelming support for the suggestion that CPF members be enfranchised. The problem is how to do it efficiently and with minimal disruption.

40 The neatest solution would be to introduce a "look-through" mechanism, *ie*, ignore the agent banks and treat the individual CPF investors as members of the listed company. This can be done legislatively by the stroke of a pen; implementing it is quite another thing. To implement a look-through mechanism, the various shareholder registers held by the Central Depository ("CDP"), the agent banks, the CPF board and the listed companies' share registrars would have to be consolidated. Alternatively, CDP could be appointed as the sole agent to hold all shares of CPF investors. Both approaches are feasible, but there would have to be extensive discussions among the affected institutions to work out the details of implementation. In the interim, the multiple proxies regime may be used to enfranchise CPF investors.[61]

41 A shareholder can only deploy his full voting power if a poll is called for. Section 178(1) currently provides that a poll can be demanded by any five members, or alternatively by a member or members holding 10% of the voting rights. This means that a single member holding, say, 5% of the voting rights cannot be sure that he can demand a poll and exercise his votes fully (on a show of hands each member has only one vote). The Steering Committee recognised that a person holding 5% is a substantial shareholder and thus recommended that the threshold for demanding a poll be reduced to 5%.[62]

42 For smaller companies, written resolutions can be passed without the necessity of holding a meeting. Formerly, such informal resolutions could only pass if there was unanimous agreement.

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59 The author's personal view is that such a provision would be better enacted in a Listed Corporations Act rather than in the Companies Act itself. Such an Act would allow a proper focus on the legal issues pertaining to listed corporations, whether incorporated in Singapore or abroad.

60 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 2.11.

61 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 2.15.

62 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 2.2.

However, in 2003, ss 184A–184G were enacted to allow written resolutions to be approved by majority. Certain clarifications, however, have been recommended. Firstly, the written resolution will be passed once the holders of the requisite number of votes have signed it.[63] Secondly, the written resolution will lapse if it is not passed within 28 days.[64] This will ensure that written resolutions do not continue to exist in limbo indefinitely. These provisions are facilitative and if it is felt that more time is needed, the company may specify a longer period in its constitution. The written resolution procedure is at present available only to private companies. The Steering Committee considered that unlisted public companies should also be allowed to pass resolutions in this way.[65]

D. Derivative actions

43 The statutory derivative action in s 216A was introduced in 1993.[66] As this was a new provision and unprecedented at the time, it was felt that the procedure should be confined to non-listed companies.[67] The Steering Committee considered the matter and concluded that the statutory derivative action should be available to all Singapore-incorporated companies, whether listed or not.[68] Although there is a risk that there will be an upsurge in corporate litigation, the fact that the party making the application has to pay costs would go a long way in deterring frivolous actions. The possibility that institutional investors may apply to sue directors and managers for breach of their duties should improve corporate governance in listed companies. In the absence of the derivative action, suits against directors and managers tend to occur only when a new management takes over or the company is in liquidation, by which time the investors will have lost out completely.

63 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 2.6.
64 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 2.7.
65 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 2.9.
66 Companies (Amendment) Bill 1993.
67 See the remarks of Dr Richard Hu, the Minister for Finance, on the Companies (Amendment) Bill 1993 as reported from the select committee: *Singapore Parliamentary Debates, Official Report* (28 May 1993) vol 61 at col 293.
68 Report of the Steering Committee for Review of the Companies Act (2011) Recommendations 2.29 and 2.30.

IV. Shares and corporate finance

A. Preference shares

44 One of oddities that has bedevilled the Companies Act for decades is the strange definition of "preference share" in s 4(1). For the purposes of ss 5, 64 and 180, a preference share means a non-voting share with limited rights of participation in distributions of dividends or on a winding up or redemption. This bears no resemblance to what are commonly called preference shares in the market. To align the Act with market practice, the definition of preference share in s 4(1) will be deleted and consequential amendments made to the affected sections.[69] This will primarily be a drafting exercise.

B. Non-voting and multiple-vote shares in public companies

45 In order to give flexibility to companies, it is also recommended that s 64(1) be repealed.[70] This restricted public companies to one vote *per* equity share. Read with s 4(1), this means that public companies cannot issue non-voting shares (these would count as "preference shares" and have to carry restricted rights of participation in dividends, *etc*) or shares with multiple votes. The Steering Committee recommended that public companies should be permitted to issue both non-voting as well as multiple-vote shares.[71] Some respondents expressed reservations to the effect that in listed companies minority interests may be compromised; however, the Steering Committee's view was that this can be dealt with by the Listing Rules if it is thought to be a problem for listed companies.

C. Declarations of solvency

46 A declaration of solvency by the directors is required when a company provides financial assistance for the acquisition of shares,[72] redeems preference shares,[73] reduces its capital[74] or engages in a share buyback.[75] The requirements for the solvency statement in respect of the

69 Report of the Steering Committee for Review of the Companies Act (2011) Recommendations 3.1 and 3.2.
70 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 3.4.
71 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 3.5.
72 Companies Act (Cap 50, 2006 Rev Ed) ss 76(9A) and 76(9B).
73 Companies Act (Cap 50, 2006 Rev Ed) s 70.
74 Companies Act (Cap 50, 2006 Rev Ed) s 78B or 78C.
75 Companies Act (Cap 50, 2006 Rev Ed) s 76F(4).

first three transactions differ from those for share buybacks.[76] The Steering Committee recommended that the declaration of solvency should be uniform.[77] It is also recommended that there is no necessity for a statutory declaration.[78] This will obviate the need to comply with the formalities prescribed by the Oaths and Declarations Act.[79] It will also mean that contravention will not lead to a mandatory jail sentence as provided in that Act.[80]

D. *Financial assistance for the acquisition of shares*

47 One area that has vexed the law continuously is the question of financial assistance for the acquisition of a company's shares. The underlying rationale for the prohibition was to preserve the company's assets for the benefit of the creditors. However, the complexity of the provisions is such that even where the transaction is in the company's interests, there is no prejudice to the creditors and no dissipation of the company's assets, an issue of financial assistance may arise.[81] In most cases, these issues eventually prove to be red herrings. The Steering Committee was initially of the view that the financial assistance provisions do not serve a useful purpose, especially now when companies are free to buy back their shares and reduce capital without the intervention of the court. However, upon consultation and taking into consideration the reservations expressed by some respondents, the Steering Committee decided to recommend the abolition of the restrictions on financial assistance only in respect of private companies.[82] These restrictions remain in place for public companies, but will be reviewed. Thus, transactions that are considered by the directors of a private company to be in the company's interest will not be illegal just because they amount to financial assistance. This removes a potential minefield for directors and other persons who deal *bona fide* with companies, since currently contravention of the prohibition is a criminal offence.

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76 Companies Act (Cap 50, 2006 Rev Ed) s 7A prescribes the requirements for the first three types of transactions.

77 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 3.18.

78 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 3.20.

79 Oaths and Declarations Act (Cap 211, 2001 Rev Ed) s 11 and the First Schedule.

80 Oaths and Declarations Act (Cap 211, 2001 Rev Ed) s 14.

81 See, *eg*, *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064; *Wu Yang Construction Group Ltd v Mao Yong Hui* [2008] 2 SLR(R) 350. Both are decisions of the Court of Appeal.

82 Report of the Steering Committee for Review of the Companies Act (2011) Recommendation 3.27.

V. Conclusion

48 The Report of the Steering Committee is only the beginning of the process of reforming the Companies Act. The recommendations are exactly that: recommendations for the consideration of the Minister. At the time of writing, the Minister has not indicated which of them he will accept.

49 The more important process of drafting the new Act has yet to begin. The recommendations of the Steering Committee merely set out the policy directions that the new Act should take. It is to be hoped that in drafting the new Act, the legislative draughtsmen will not find it necessary to adopt the expansive and convoluted style that has resulted in the enormous expansion of the equivalent English and Australian statutes. We have a local statute that has stood the test of time and which might form a model: the Penal Code.[83] Unlike the usual style of English legislation which is followed here in Singapore, the Penal Code uses illustrations, explanations and exceptions to make matters clear. This is something that might usefully be adopted for the Companies Act, which is meant for businessmen and not for lawyers. Ideally, the legislation should be intelligible to the intelligent layman. That is a consummation devoutly to be wished.

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83 Cap 224, 2008 Rev Ed.