

# A Primer on Directors' Fees in Malaysia

by Aaron Gerard Sankar and Christie Wong Yi Shen

The recent allegations against the former Nissan chairman have shone a spotlight on the subject of board and senior management compensation.

In Malaysia, directors are fiduciaries and have statutory duties to act in good faith and to avoid conflict.<sup>1</sup> Akin to the role of a trustee, a director therefore does not, by virtue of his/her office, have a legal right to be remunerated.<sup>2</sup>

## Disclosure requirements

### *Private company*

Under the Companies Act 2016 ("the Act"), a private company may, subject to its constitution,<sup>3</sup> agree to the payment of fees to directors. The board is empowered (again, subject to the constitution) to approve the fees of the directors and benefits payable to them including any loss of employment.<sup>4</sup>

It is a requirement under the Act that such approval be recorded in the minutes of the directors, and shareholders must be notified of the approval within 14 days.

Members holding 10% of the total voting rights and who consider that the payment was not fair to the company may require that the company approve the payment by written resolution or at a general meeting.<sup>5</sup> Unless the shareholders' approval is obtained through such a resolution, the payment of any fee will be a debt due by the director to the company.<sup>6</sup>

### *Public company*

The Act introduces strict requirements for approval by shareholders for payment of fees or provision of benefits to directors in public companies. It is a mandatory requirement now that all fees and benefits payable to directors of public companies and public listed companies and their subsidiaries be approved in a general meeting.<sup>7</sup> These provisions are an adoption of the recommendation of the Corporate Law Reform Committee for ensuring accountability and transparency among directors in a public company.<sup>8</sup>

The Companies Commission of Malaysia has clarified that approval is only needed for fees, benefits and entitlements that arise from the appointment to the office of director, and not from his employment in an executive or management position.<sup>9</sup>

1 See "Directors' Conflict of Interest" in Lee Hishammuddin Allen & Gledhill's *Legal Herald* (June 2018 issue), p 21

2 *Wong See Yaw & Anor v Bright Packaging Industry Bhd* [2016] 6 CLJ 465

3 Adoption of constitution is now not mandatory for a private company. See s 31 of the Act.

4 Section 230(2)

5 Section 230(4)

6 Section 230(5)

7 Section 230(1)

8 A Consultative Document on Clarifying and Reformulating the Directors' Role and Duties by the Corporate Law Reform Committee for the Companies Commission of Malaysia, 14 November 2006 (see paragraph 1.28 – 1.40, pages 30-35 of the Consultative Document)

9 The Companies Commission of Malaysia has clarified in a FAQ that benefits here relate only to benefits that arise from the appointment to the office of a director. The FAQ may be viewed at <[http://www.ssm.com.my/Pages/Legal\\_Framework/FAQS-ON-COMPANIES-ACT-2016-AND-TRANSITIONAL-ISSUES/part\\_f.pdf](http://www.ssm.com.my/Pages/Legal_Framework/FAQS-ON-COMPANIES-ACT-2016-AND-TRANSITIONAL-ISSUES/part_f.pdf)>

### *Subsidiaries of listed companies*

The Act provides that approval by shareholders at the subsidiary level would equally be required for payment of fees or provision of benefits to directors. In practice, members of the listed company approve fees and benefits of directors of the listed company approve fees and benefits of director on the boards of its subsidiary(ies).

If the subsidiary is a private company, its members are entitled to object to the payment of directors' fees,<sup>10</sup> in which event, the payment of fees to directors would constitute a debt to the company until a resolution is passed. Technically, therefore, it would be prudent for public companies to ensure that prior approval of shareholders is obtained.<sup>11</sup>

### *Bursa requirements and MCGG*

In addition to the Act, public listed companies are required to disclose, in their annual report, the remuneration of each director of the listed issuer for the financial year on a named basis, stating the amount received or to be received from the listed issuer and the group.<sup>12</sup> The Malaysian Code of Corporate Governance 2017, or MCGG, further recommends that boards of public companies establish a remuneration committee to implement policies and procedures on the remuneration of individual directors and senior management. It is also recommended that such policies ensure that remuneration packages are determined on the basis of the directors and senior management's merit, qualification and competence, having regard to the company's operating results, individual performance and comparable market statistics.<sup>13</sup>

### **Conclusion**

The requirements under the Act and the Bursa Listing Requirements are in line with the push, domestically and internationally, for a more significant emphasis on corporate governance, and with greater accountability around board and senior executive compensation. **LH-AG**

### **About the authors**



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<sup>10</sup> Section 230(4) and (5)

<sup>11</sup> Where prior approval has not been obtained, it may be useful to consider ratification via subsequent members' resolution

<sup>12</sup> The disclosure must include the amount in each component of the remuneration (e.g. directors' fees, salaries, percentages, bonuses, commission, compensation for loss of office, benefits in kind based on an estimated money value) for each director

<sup>13</sup> The Malaysian Code of Corporate Governance may be viewed at <<https://www.sc.com.my/wp-content/uploads/eng/html/cg/mccg2017.pdf>>