

Malaysia

Kadir Andri & Partners

Liberalised capital maintenance regime

In 2013, the Companies Commission of Malaysia published a draft of the new Companies Bill (Bill) for public consultation. Following this process, we understand that the Bill will soon become law. The Bill endeavours to align Malaysia's corporate legal framework with that of jurisdictions such as the UK, Hong Kong and Singapore. We will highlight some

amendments that appear to provide more flexibility in structuring corporate transactions.

Amongst others, the Bill seeks to liberalise Malaysia's capital maintenance regime. It introduces an alternative procedure for capital reduction and a

mechanism to cure financial assistance. It also reforms the framework relating to share buy-backs and redemption of redeemable preference shares (RPS).

Liberalisation comes with conditions designed to strike a balance between flexibility and the need to protect shareholders and creditors. The Bill regulates the capital maintenance regime via the use of solvency statements which could be viewed as a self-regulating mechanism for capital maintenance. Directors of companies undertaking exercises involving elements of capital reductions, financial assistance, shares buy-back and redemption of RPS from capital will be required to issue a statement that in their opinion the company, after undertaking the transaction, will still be solvent and able to pay its debts as and when they become due. Further, directors are still bound by their duty to act in good faith and in the best interest of the company.

Liberalisation and flexibility, however, come with a cost; the Bill imposes personal liability on directors who made the solvency statement. If it is found that such statements were made without reasonable grounds, a director could be liable on

conviction to imprisonment, a fine or both. Due to the severe consequences, directors must be more vigilant that when recommending any corporate transaction, they are indeed acting in the best interest of the company. Post implementation, companies should expect higher advisory cost for transactions involving elements of capital maintenance. Directors may wish to appoint external advisors to assist them in coming up with the solvency statement to minimise the risk of incurring personal liability.

We look forward to the enactment of the Bill, which will remove some of the challenges in the existing legal framework related to the structuring of corporate transactions.

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