9

CA Amendments: What Did Not Make It

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The 2014 amendments to the Companies Act were seven years in the making. Why did it take so long?

One reason is that this was the most comprehensive set of changes – more than 200 amendments in all – since the Act was first passed in 1967.

When the Steering Committee for the Review of the Companies Act was appointed in end-2007, its goal was to conduct a thorough reform and update of the Act to reflect modern socio-economic conditions. The process was extensive and rigorous. For example, there were five Working Groups under the Steering Committee – I served on the one for Director's Duties. Apart from wide-ranging research, comparing our laws with other jurisdictions, extensive internal debates, and many focus groups, there were no less than nine public consultations at various stages.

The government issued its responses to the Steering Committee's recommendations in October 2012 and the amendments were finally passed by Parliament in October 2014. What is less visible are the many amendments that were debated and then dropped.

Let me share a few that related to directorships.

WHAT MAKES A DIRECTOR?

There was considerable discussion about the definition and qualifications of a director. A proposal to allow a new form of directorship – the corporate director – was dropped. Presently, only an individual over 18 years can be a director.

It was argued that the availability of corporate directorships would encourage the growth of incorporations in Singapore, especially from jurisdictions such as Hong Kong, the UK, the Cayman Islands and the British Virgin Islands where corporate directorships are available.

In the end, the committee concluded that there was "no compelling reason" to allow corporate directorships in Singapore, "especially in view of the difficulties in determining the person who is actually controlling a company and applying sanctions against corporate directors".

Another question was whether the Act should prescribe academic/professional qualifications, or mandatory training for directors. The committee concluded that the Act should do neither as this would not necessarily ensure good quality directors, and it could, instead, deter potentially good candidates. The Committee felt that current non-legislative means still work well, pointing out that the Singapore Institute of Directors (SID) "conducts extensive and systematic training for directors". It should be noted that SID's continuing professional development policy does mandate minimum training hours for its members.

The committee also decided not to mandate the retirement age of directors. In practice, though, retirement is usually provided for in a company's constitution, and for listed companies, there are guidelines (such as the nine-year rule) in the Code of Corporate Governance.

FIDUCIARY DUTIES

The scope of certain director's duties were clarified by the amendments, and these were covered in the previous chapter.

One aspect that was debated but which did not make the cut was the codification of directors' fiduciary duties. The term "fiduciary duties" does not appear specifically in the Act, though section 157 requires a director to act honestly and diligently; with other aspects of fiduciary duties contained in judge-made case law (or common law).

In 2006, the UK Companies Act was amended to codify directors' fiduciary duties in such a way that statutory duties replaced corresponding common law rules. The purpose of the codification was to create certainty and accessibility.

After extensive discussions, the Steering Committee decided that it "would not be desirable" to follow the UK example as "this may not be best for business efficacy". It felt that there would be a loss of flexibility of the law to develop and adapt to changing circumstances, and judges would be less able to tailor their decisions according to justice.

LIABILITY

Under section 157(3) of the Act, a breach of a director's fiduciary duties renders him liable both civilly and criminally. The latter could mean a jail sentence.

A proposal to decriminalise the breach of fiduciary duties was considered but rejected for now. This was notwithstanding the different position taken in jurisdictions such as the UK and New Zealand where criminal liability has been removed and consequences of a breach are civil in nature only. The committee indicated that criminal sanctions should continue to act as a deterrent so as not to send the wrong signal and encourage misconduct. The government had noted that the possible introduction of a civil penalties regime is an issue left open and that the current penalties regime will be reviewed by the Accounting and Corporate Regulatory Authority (ACRA).

In my view, this was a missed opportunity to re-calibrate the scope of a director's fiduciary duties. Of all professionals in Singapore, directors are that rare species that is subject to criminal sanctions when negligent. A fairer position would be to retain the threat of jail and a criminal record for offences involving fraud or dishonesty, but to decriminalise the breach of a duty to exercise reasonable care and diligence. The failure to act diligently can, and should be, subject to a civil penalty regime rather than a criminal one.

This should be made a priority to consider when the Act is next revised. ■