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Newsletter

Shearn Delamore &Co.

VOL 11 NO 2.0 JUNE 2012

KDN NO. PP 12544/10/2012 (030886)

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CORPORATE LAW

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Takeover Threshold

IN THIS ARTICLE, NICHOLAS TAN AND MAY NG CONSIDER THE SIGNIFICANCE OF VARIOUS SHAREHOLDING THRESHOLDS AND THEIR IMPLICATIONS UNDER THE MALAYSIAN CODE ON TAKE-OVERS AND MERGERS 2010.

Takeovers in Malaysia are primarily regulated under Division 2 of Part VI of the Capital Markets and Services Act 2007 ("CMSA") and the Malaysian Code on Take-overs and Mergers 2010 ("the Code"), the latter which came into force on 15 December 2010 and is to be read together with the Practice Notes on the Code and the Guidelines on Contents of Applications Relating to Take-overs and Mergers.

In addition to the above, there are other rules and regulations that must be complied with and will apply during a takeover process, such as relevant provisions under the Listing Requirements of Bursa Malaysia Securities Berhad ("Bursa Malaysia") and the Companies Act 1965.

The Code applies when the target company is either a public company (whether or not it is listed on Bursa Malaysia), a company that is incorporated outside Malaysia but listed on Bursa Malaysia, or a real estate investment trust that is listed on Bursa Malaysia. Further, a takeover offer which is effected by way of a scheme of arrangement, compromise, amalgamation or selective capital reduction must also be conducted in accordance with the provisions of the Code.

Generally, there are three types of takeover offers, namely mandatory offer ("MO"), voluntary offer ("VO") and partial offer ("PO"). An MO is triggered when an offeror, amongst others, obtains "control" of a target company.

"Control" is defined under the CMSA to mean:

> *"the acquisition or holding of, or entitlement to exercise or control the exercise of, **voting shares or voting rights of more than thirty-three per centum**, or such other amount as may be prescribed in the Code in a company, howsoever effected." (own emphasis added)*

A VO is any takeover offer that is not an MO. A PO, which is relatively rare in Malaysia, is a type of VO where the offeror offers to acquire less than 100% of any class of the voting shares or voting rights of a target company from all offeree shareholders and can only be undertaken with the prior approval of the Securities Commission ("SC").

An offeror who undertakes a take-over is required to comply with various obligations and procedures, such as disclosure requirements under the Code.

- **0% to 33%**
  Generally, no MO obligation is triggered where not more than 33% of the voting shares or voting rights of a company are acquired. An offeror who undertakes a VO of the shares of a target company must nonetheless comply with the relevant provisions under the Code pertaining to the VO.

- **More than 33%**
  An MO obligation will generally be triggered when an offeror has obtained control in a target company.

  A common example of this scenario is when an offeror enters into a sale and pur-

chase agreement to acquire a block of voting shares exceeding 33%, and hence obtaining control, in the target company. The MO obligation would generally be triggered on the date when the sale and purchase agreement becomes unconditional. A recent example of this case was where DRB-Hicom Berhad entered into a share sale and purchase agreement ("SSPA") with Khazanah Nasional Berhad to acquire 42.74% of the issued and paid-up share capital of Proton Holdings Berhad. On 14 March 2012, the last condition precedent of the SSPA was satisfied (that is, upon receipt of shareholders' approval) and the sale and purchase became unconditional. A notice to undertake an MO was served by DRB-Hicom on the same date[1].

An MO will also be required if an offeror triggers the creeping provision by acquiring more than 2% of the voting shares or voting rights of a target company in any period of six months where the offeror's holding was more than 33% but less than 50% of the voting shares or voting rights of the company.

Additionally, the MO obligation also applies to a person who intends to obtain or has obtained control in an upstream entity which holds or is entitled to exercise or control the exercise of more than 33% of the voting shares or voting rights of a downstream company and the upstream entity has a significant degree of influence in the downstream company. This restriction safeguards the interests of shareholders of the downstream entity by preventing any person from sidestepping the requirements of the Code via an indirect acquisition of the downstream entity. Paragraph 4.2 of Practice Note 9 of the Code sets out certain circumstances where the upstream entity would be deemed to have a significant degree of influence in the downstream company, for example, where one of the main purposes of acquiring control of the upstream entity is to obtain control in the downstream company, such as may be evidenced by a majority change in the membership of the board of directors of the downstream company or a change in the business direction of the downstream company.

The proposed acquisition of all the assets and liabilities of Leong Hup Holdings Berhad ("LHHB") by Emerging Glory Sdn Bhd ("EGSB") is an example of an MO obligation being triggered via an acquisition of a company through an upstream entity[2]. One part of LHHB's assets includes approximately 54.26% of equity interest in Teo Seng Capital Berhad ("TSCB"), held by LHHB and its subsidiaries. The SC noted that EGSB would hold a direct interest of 0.6% and an indirect interest of 53.5% in TSCB following the completion of the proposed acquisition[3]. The proposed acquisition would also result in the introduction of new leaders in TSCB via their shareholding in EGSB and there would be changes to the holdings of the voting shares in TSCB. The SC ruled that the proposed acquisition by EGSB is a means to acquire control in TSCB and, consequently, the MO obligation was triggered for the remaining shares in TSCB (the downstream entity).

- **20% to 33%**
  Another point to note is that an MO obligation may be triggered if an offeror acquires a block of voting shares or voting rights in the range of 20% to 33% of a target company. Such MO obligation may be triggered where the acquisition is from a vendor who still retains part of his voting shares or voting rights in the target company and has control over the target company post the completion of the vendor's disposal to the offeror, as the vendor may be viewed as a person acting in concert with the offeror. The SC may consider various surrounding circumstances (including circumstances as set out in Paragraph 6.2 of Practice Note 9) to determine whether an MO obligation is triggered. These circumstances include the ability of the offeror to exercise or control the exercise of the retained voting shares or voting rights.

- **50% + 1 share**
  Condition as to level of acceptances
  In the case of an MO or VO, an offeror would have to include in the offer document a condition that the takeover offer is subject to the offeror having received acceptances which would result in the offeror (and all persons acting in concert with the offeror in the case of an MO) holding in aggregate more than 50% of the voting shares or voting rights of the target company. The voting shares or voting rights already held by the offeror (and all persons acting in concert in the case of an MO with the offeror) will be included in computing the level of acceptances.

The Code expressly states that in the case of a VO the offeror can apply to the SC to request for the VO to be conditional upon a higher acceptance level provided that the offeror has satisfied the SC that he is acting in good faith in imposing such high level of acceptances. There are a number of VOs that have been implemented that were subject to a higher acceptance level (ie more than 50% +1 share).

Other conditions
The Code explicitly provides that an MO document must not be subject to any condition save for that which relates to the minimum acceptance level. However, an offeror in a VO may include any condition in an offer document except a defeating condition that is, one where the fulfilment of which depends on an opinion, belief or other state of mind of the offeror (or any person acting in concert with the offeror) or

an event that is within the control or is a direct result of an action by the offeror (or any person acting in concert with the offeror).

In respect of a VO, the above restriction would mean that an offeror would not be allowed to include a condition, the satisfaction of which is at the discretion of the offeror. For example, a VO that is conditional upon the satisfaction of the offeror in respect of the outcome of a due diligence on the target company would not generally be permitted, as the offeror would be the party ultimately deciding on whether the condition would be satisfied. However, a condition that can be objectively satisfied may be acceptable. As an example, a condition was included in the offer document dated 6 July 2011 for the conditional takeover offer for all voting shares in HPI Resources Berhad ("HPI") by Oji Paper Asia Sdn Bhd, where the offer was conditional upon confirmation from the appointed firm of accountants that the consolidated net asset of HPI as at 28 February 2011 was not less than RM152.25 million[4].

- **More than 50% but less than 75%**
  If upon the completion of a takeover offer, an offeror obtains more than 50% but less than 75%, the offeror will neither be able to invoke the compulsory acquisition procedure nor carry through a special resolution which requires 75% approval.

- **More than 75% but less than 90%**
  In the event an offeror holds more than 75% but less than 90% of shares of the target company, the offeror may request the target company to apply for voluntary delisting under Chapter 16 of the Listing Requirements. Prior to requesting for withdrawal of its listing from the Official List, the listed issuer would have to convene a general meeting to obtain its shareholders' approval and a separate meeting for the approval of holders of any other class of listed securities (if applicable). The resolution for the withdrawal must be approved by a majority in number representing 3/4 in value of the shareholders and holders of any other class of listed securities present and voting either in person or by proxy at the meetings, provided that such shareholders and holders of any other class of listed securities who object to the withdrawal do not exceed 10% of the value of the shareholders and holders of any other class of listed securities present and voting. Further, Bursa Malaysia may at its discretion impose any additional condition for the withdrawal of listing of any listed issuer.

  If the target company does not submit a request for withdrawal of its listing, it will be in breach of the public spread requirement under paragraph 8.02 of the Listing Requirements, which requires at least 25% of the listed company's total listed shares (excluding treasury shares) to remain in the hands of public shareholders. Bursa Malaysia may accept a percentage lower than 25% of the total number of listed shares (excluding treasury shares) if it is satisfied that such lower percentage is sufficient for a liquid market of such shares. Otherwise, the target company may apply to the SC for an extension of time to regularise its position.

- **90% or more**
  Where a takeover offer by an offeror to acquire all the shares in a target company has, within four months after making the takeover offer, been accepted by the shareholders of not less than 9/10 in the nominal value of those shares, excluding shares already held at the date of the takeover offer by the offeror or by a nominee or a related corporation of the offeror, the offeror may, at any time within two months after the takeover offer has been so accepted, invoke a compulsory acquisition under section 222 of the CMSA to acquire the remaining shares in the target company. This requires, amongst others, the offeror to serve a notice on any dissenting shareholder that it desires to acquire his shares.

  It is worth noting that the shares already acquired by the offeror or persons acting in concert with the offeror at the time when the offer is launched will not be counted towards the 9/10 threshold. For example, if at the time when the offer was launched, the offeror already holds 40% of the shares in the target company, the offeror has to acquire 90% of the remaining 60% in order to be able to undertake the compulsory acquisition.

Conclusion

Offerors who intend to acquire a target company are well advised to strategise the acquisition at the outset by, amongst others, taking into account the issues and implications that may arise where different shareholding thresholds under the Code are involved.

The likely level of acceptances of a takeover offer by shareholders of a target company is one of the significant factors that should be considered as an offeror who successfully acquires 9/10 of the nominal value of a target company's shares (excluding shares already held by the offeror or persons acting in concert with the offeror) will be entitled to invoke section 222 of the CMSA to compulsorily acquire all outstanding shares in the target company, thereby gaining full control of the target company.

Serious consideration should also be afforded to the different types of takeover offers as implications of triggering an MO or extending a VO, namely restrictions on the inclusion of conditions of a takeover offer and the application of the creeping provision, are likely to have considerable impact on the offeror's conduct and obligations in the process of a takeover.

The Code expressly states that all consultation with the SC must first be communicated in writing to the SC through an adviser. Therefore, any person who intends or is about to trigger any provisions of the Code must seek relevant advice from advisers who are qualified to act as an adviser in a takeover offer, merger and compulsory acquisition.

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[1] DRB-Hicom Berhad's announcement dated 14 March 2012 via Bursa Malaysia (Reference No: MI-120314-51972)

[2] Leong Hup Holdings Berhad's announcement dated 13 May 2011 via Bursa Malaysia (Reference No: LH-110513-64846)

[3] Letter from RHB Investment Bank Berhad to Leong Hup Holdings Berhad dated 5 May 2011 and letter from the SC to RHB Investment Bank Berhad dated 4 May 2011 (Ref:SC/TOM/1058)

[4] HPI Resources Berhad's announcement dated 15 June 2011 via Bursa Malaysia (Reference No: HR-110615-45178)

FINANCIAL SERVICES

Money Services Business Act 2011

IN THIS ARTICLE, VANESSA CHAM HIGHLIGHTS SOME OF THE KEY FEATURES IN THE MONEY SERVICES BUSINESS ACT 2011.

Prior to the enactment of the Money Services Business Act 2011 ("MSBA"), the money-changing industry in Malaysia was regulated by the Money-Changing Act 1998 and the Exchange Control Act 1953 while the payment remittance industry in Malaysia was regulated by the Payment Systems Act 2003 and the Exchange Control Act 1953. In addition, wholesale currency business was previously regulated by the Exchange Control Act 1953.

Key features of the MSBA[1]

- The MSBA provides a single, uniform and dedicated regulatory framework for licensees carrying on money services business, comprising any or all of the following:
  (a) money-changing business;
  (b) remittance business; and
  (c) wholesale currency business industry,
  (collectively defined under section 2 of the MSBA as "money services business");

- Greater business flexibility and opportunities including the ability to carry on multiple business activities within a single entity for qualified entities, thus promoting greater synergies between these activities and economies of scale;

- Differentiated regulatory requirements according to the nature, scale and complexity of an entity's business;

- Strengthened safeguards to promote the professional and sound management of the industry; and

- Wide range of enforcement actions to ensure compliance with the MSBA.

When the MSBA came into force on 1 December 2011, the Money-Changing Act 1998 was repealed.

Anti-money laundering and terrorism financing

Specific obligations are imposed under section 36 of the MSBA on licensees under the MSBA to institute and maintain internal control mechanisms, which include risk management arrangements, accounting procedures and security measures to ensure the safety and integrity of its money services business to ensure compliance with the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 and other written laws, as Bank Negara Malaysia ("Bank Negara") may prescribe. This is pertinent to the maintenance of the integrity of the Malaysian financial system.

Validity of previous licences

Pursuant to section 95 of the MSBA, with effect from 1 December 2011, all existing licensed money changers, remittance service providers and persons engaged in wholesale currency business are required to apply for a new licence under the MSBA within the stipulated time frame mentioned in (a) to (c) below or such further period as Bank Negara may specify:

(a) for all licences or permission with validity period of less than two years, which means expiring before 1 December 2003, application for re-licensing has to be submitted before 1 March 2012;

(b) for all licences or permission with validity period of two years or more, expiring on or after 1 December 2013, application for re-licensing should be made before 1 June 2012;

(c) application for re-licensing for all other licences or permission with no validity

period has to be submitted prior to 1 June 2012,

using an application form for re-licensing obtained from Bank Negara's website[2].

Upon submitting the application for a licence under the MSBA, all applicants may continue to operate their respective existing businesses until Bank Negara makes a decision on the re-licensing application.

Bank Negara may grant a licence under the MSBA with or without conditions and reserves the right to refuse to grant a licence. This means that Bank Negara has the discretion whether to issue a licence under the MSBA to a person presently conducting any limb of money services business, and that an existing licensee is not assured of obtaining a licence under the MSBA.

The MSBA introduces the concept of a "money services business agent" as a person appointed by a licensee in accordance with section 43 of the MSBA to carry on money services business on behalf of the licensee, and is registered by Bank Negara as a money services business agent under section 44 of the MSBA. A money services business agent must comply with the provisions of the MSBA and any other requirements as Bank Negara may prescribe. The Money Services Business (Money Services Business Agents) Regulations 2012 set out the requirements for a licensee to appoint a money services business agent.

How to apply for a licence under the MSBA

Only a company incorporated in Malaysia may apply for a licence to carry on money services business. Application for a money services business licence under section 5(1) of the MSBA shall be made in writing to Bank Negara by an applicant in such form and manner accompanied by such documents specified by, and such information prescribed by, Bank Negara.

A licence shall be in force for a period of three years unless a shorter period is otherwise specified by Bank Negara in the licence. Upon the expiration of this licence, the licensee will have to apply for a renewal of this licence with Bank Negara.

There are three classes and descriptions of licences as provided under the Money Services Business (Licensing) Regulations 2012, namely:

Class	*Description*
A	Licence to carry on money-changing business and remittance business only
B	Licence to carry on remittance business only
C	Licence to carry on money-changing business only
D	Licence to carry on wholesale currency business only

Minimum capital requirements

Sub-regulation 3(1) and the Schedule to the Money Services Business (Minimum Capital Funds) Regulations 2011 set out the minimum capital requirements for different classes of licences under the MSBA.

- For a Class A licence, the minimum capital funds requirement is two million ringgit.

- For a Class B or C licence, the minimum capital funds requirement varies between RM300,000 and two million ringgit subject to the criteria provided in the Schedule.

In addition to capital requirements, Bank Negara has prescribed the "fit and proper" criteria for shareholders, directors, chief executive officer, and managers of a licensee which have to be satisfied. Section 19 of the MSBA prohibits a licensee from carrying on any business activity other than a money services business activity for which it was licensed under the MSBA except with the prior written approval of Bank Negara.

Conclusion

Bank Negara launched the Financial Sector Blueprint[3] (the "Blueprint") on 21 December 2011 which charts the direction of the financial sector as the country transitions into a high value-added, high-income economy by 2020. One of the focus areas of the Blueprint is strengthening regional and international financial integration through a more open, competitive and diversified financial sector with greater connectivity within the region.

The MSBA provides for a strengthened regulatory and supervisory oversight of money-changing and remittance business in Malaysia[4] and hence is in line with the outcome envisioned under the Blueprint, in addition to safeguarding the integrity of, and confidence in, the money services business industry in Malaysia.

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[1] http://www.bnm.gov.my/microsites/financial/06_01_mcb_about.html
[2] http://www.bnm.gov.my/microsites/financial/06_03_02_application.html
[3] http://www.bnm.gov.my/index.php?ch=109&pg=636&ac=91&yr=2011&eId=box2
[4] See footnote 3 above

INTELLECTUAL PROPERTY

Combating online counterfeiting

IN THIS ARTICLE, JANET TOH LOOKS AT THE COMMUNICATIONS AND MULTIMEDIA ACT 1998, THE COPYRIGHT ACT 1987 AND THE COPYRIGHT (AMENDMENT) ACT 2012 IN RELATION TO ONLINE COUNTERFEITING AND THE LIABILITY OF INTERNET SERVICE PROVIDERS.

Introduction

The decision by the United States District Court which awarded US$164 million in damages to Tory Burch LLC[1], the maker of women's apparel, designer shoes and fashion accessories, against 41 defendants for online counterfeiting on 13 May 2011, marks a victory call for intellectual property ("IP") owners who have been facing an arduous task when contemplating taking action against each and every infringer on the Internet. Online transactions are the new frontier and an ideal platform for the sale of counterfeit goods. It is easily accessible and it is hard to trace the entities behind the sale as counterfeiters generally go through great lengths to conceal their identities by using multiple false identities and addresses associated with their operations and purposely "deceptive" contact information. As a result of this, the service provider becomes an easy target as it is generally a corporate entity with a fixed place of business, unlike its subscribers who are more difficult to track down.

Communications and Multimedia Act 1998

The Communications and Multimedia Act 1998 ("CMA") creates a licensing system and defines the roles and responsibilities of those providing communication and multimedia services. The CMA prohibits a content application service provider from providing content that is indecent, obscene, false, menacing, or offensive in character with the intent to annoy, abuse, threaten or harass any person. As a licensee under the CMA, section 263 of the CMA provides that a service provider has a duty to prevent the network facilities that it owns or provides, or the network service, applications service or content applications service that it provides, from being used in, or in relation to, the commission of any offence under any law of Malaysia.

Pursuant to section 98(2) of the CMA *"compliance with a registered voluntary industry code shall be a defence against any prosecution, action or proceeding of any nature, whether in court or otherwise, taken against a person (who is subject to the voluntary industry code) regarding a matter dealt with in the Code"*. This Content Code is on a voluntary basis although compliance with this Code can be relied upon as a defence against any prosecution, action or proceeding of any nature whether in a court or otherwise. Under the Content Code, the material disseminated must not include anything which offends good taste or decency; is offensive to public feeling, is likely to encourage crime or lead to disorder, or is abusive or threatening in nature. Matters that are likely to be classified as offensive or abusive or threatening will be those pertaining to sex, nudity, explicit sex acts/pornography, child pornography, sexual degradation, violence, menacing content, bad language and false content. Until the amendments to the Copyright Act 1987 were passed, it was still a question whether copyright infringing material or content would be regarded as *"prohibited content or content in contravention of Malaysian law"*.

Copyright Act 1987

Prior to the amendments to the Copyright (Amendment) Act 2012 ("Copyright Amendment Act"), there was no specific provision under the Copyright Act of 1987 ("Copyright Act") regulating the activities of Internet Service Providers ("ISPs") and other digital intermediaries. ISPs and other digital intermediaries were treated like any other user under the Copyright Act, and the general provisions regulating the use of copyright materials directly applied to ISPs and other digital intermediaries. As such, there was also no specific provision for exceptions or permitted uses tailored to cater to ISPs or other digital intermediaries. The Copyright Act was wide enough to impute liability on ISPs for copyright infringement by its subscriber. Notwithstanding this, the Content Code recognises that an "innocent carrier" is not responsible for the content provided.

Copyright (Amendment) Act 2012

Notification by copyright owner and its effect

Pursuant to the Copyright Amendment Act, an ISP can now be put on notice through the copyright owner's written notification of claimed infringement to the ISP's designated agent. It is not specified in the Copyright Amendment Act the manner in which the notification is to be given but the notification must definitely provide an undertaking to compensate the ISP or any other person against any damages, loss or liability arising from the compliance by the ISP of such notification.

If a notice which substantially complies with these requirements is received, the ISP must remove or disable access to the allegedly infringing material or infringing electronic copy on its network not later than 48 hours from the time the notification was received. The ISP must therefore seek clarification from the copyright owner of any unclear aspects within the 48-hour deadline.

Counter-notification

After the notice has been complied with, the person whose electronic copy of the work was removed or to which access has been disabled may issue the ISP a counter-notification requiring the ISP to restore the electronic copy or access to it on the ISP's primary network. If there is a counter-notification from the alleged infringer, the ISP must respond appropriately to it, including promptly providing the copyright owner with a copy of the counter-notification and restoring the removed material or access to it not less than 10 business days following

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receipt of the counter-notification, unless the ISP has received another notification from the copyright owner that he has filed an action seeking a court order to restrain the alleged infringer from engaging in any infringing activity relating to the material on the ISP's network.

Section 43(H)(5) of the Copyright Amendment Act provides that the counter-notification must include the following information:

(i) a physical or electronic signature of the subscriber;

(ii) identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled;

(iii) a statement under penalty of perjury that the issuer has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed;

(iv) the issuer's name, address, telephone number and a statement that the issuer consents to the jurisdiction of the court in which the address is located, or if the issuer's address is outside Malaysia, in which the ISP may be found, and that the subscriber will accept service of process from the copyright owner or an agent of such person.

If the ISP complies with this and the counter-notification procedures, this will mitigate the ISP's risk of legal liability to its own subscriber as a result of taking down the material.

Exemptions

Finally, the Copyright Amendment Act aims to remove legal uncertainty and to limit the liability of ISPs for the transient storage of copyrighted works.

The proposed amendments will provide immunity to ISPs for:

- the transmission or routing of, or the provision of connection to, an electronic copy of a work through the ISP's primary network;
- system caching; and
- storage and information location tools.

Conclusion

In order to protect one's brand, IP owners need to be vigilant in monitoring activity on the Internet and to be prepared to take the appropriate enforcement action against a vendor of the counterfeit products, which may include strategies such as sending demand letters to the appropriate entities and exercising its rights pursuant to the CMA and Copyright Amendment Act. It is also vital to gather intelligence in order to identify the source and supply-chain of the infringing material. It is prudent to work closely with investigators conducting surveillance and test purchases in order to gather and preserve evidence to be used in the ensuing enforcement. SD

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[1] Tory Burch LLC et al v Yong Sheng Int'l Trade Co Ltd et al Case No 1:10-cv-09336

EMPLOYMENT LAW

The cost effectiveness of voluntary separation scheme

IN THIS ARTICLE, PARVATHY DEVI RAJA MOORTHY ANALYSES THE COURT OF APPEAL DECISION IN **PADIBERAS NASIONAL BHD V ZAINON AHMAD & ORS**[1] TO DETERMINE WHETHER AN EMPLOYEE CAN DOUBLE PROFIT FROM A VOLUNTARY SEPARATION SCHEME.

One of the methods of trying to minimise the effects of retrenching a worker that is surplus to a company's needs is to enter into a mutual termination agreement with the relevant employee to terminate that employee's contract of employment. This mutual termination agreement, which is often termed as a voluntary separation scheme ("VSS"), voluntary retirement scheme ("VRS") or mutual separation scheme ("MSS"), is a costly affair as the package offered must always be much more attractive than the termination/retirement benefits provided by the employer in order to be able to induce employees to participate in it.

Therefore, before an employer decides to embark on the introduction of a VSS, VRS or MSS, the employer would have to consider the economic viability and legal liability of the introduction of such a scheme, such as the cost involved in the introduction of the scheme or whether the employer would still be liable to pay an employee retrenchment/retirement benefits that are provided in the employee's contract after incurring a hefty cost through the introduction of the VSS.

This latter concern of an employer has recently been addressed by the Court of Appeal in **Padiberas Nasional Bhd v Zainon Ahmad & Ors**.

The brief background

The employees in this case (691 of them) (the

"Employees") brought an action against Padiberas Nasional Bhd (the "Employer") pertaining to their entitlement to retirement/termination benefits[2] as provided for in their employment handbook two years after receiving the VSS package[3] which they had applied for from the Employer.

The decision of the High Court

The High Court ruled in favour of the Employees on the basis that although the Employees had accepted the VSS, the original employment contracts of the Employees with the Employer were never terminated nor cancelled. The VSS did not terminate the rights of the Employees nor prohibit them from their contractual right.

The Employer was, however, dissatisfied with the judgment and appealed to the Court of Appeal claiming that the High Court had erred in law in deciding in favour of the Employees.

The decision of the Court of Appeal

The Court of Appeal, in hearing the appeal, ruled that the Employees were not entitled to the benefits provided for in their employee handbook although the termination of employment by way of VSS would result in the termination of services for reasons other than compulsory retirement. This is because at the time of applying for the VSS, the Employees were in the position to scrutinise and check the VSS package and as such would have definitely been aware of the purpose of the payment of the benefits in the VSS package.

Further, the Court of Appeal held that if the Employees were given the right to claim the benefits listed in their handbook, the purpose of the VSS would be frustrated because the Employer had given the Employees the option to apply for the VSS package on the condition that they leave their employment with only the benefits stated in the package offered or they could remain within the Employer's employ. As such, it would be wrong to allow the Employees to claim for retirement/termination benefits that were not included in the package as it would essentially lead to the Employees double-profiting.

It was the contention of the Employer that by entering into the VSS, the Employer was relieved from performing its obligations in the employment handbook pursuant to section 63 of the Contracts Act 1950[4]. In response, the Employees contended that this section could not be relied upon because there must be clear words to show that the parties had intended to substitute the rights under the old contract with the new contract, but in this case there was no explicit waiver of the Employees' rights.

The Court of Appeal upon hearing the arguments disagreed with the Employees and ruled that although there was no express term stating that the VSS would discharge the Employer from the rights and obligations that the Employer owed to the Employees, the mutual termination of the employment contract by way of a VSS reveals a clear intention to rescind and terminate the Employees' employment contract. As such, the Employer would not be liable to perform its obligations under the employment contract of the Employees.

In coming to the above conclusion, the Court of Appeal relied on the case of **United Dominions Corporation (Jamaica) Ltd v Michael Mitri Shouciar**[5] where Lord Devlin said that *"if the new agreement reveals an intention to rescind the old, the old goes, and if it does not, the old remains in force and unamended"*[6].

Further, the Employees also argued that they had not given up their rights and obligations under their employment contracts by a voluntary, conscious and affirmative act and should not be deprived of their contractual entitlements. The Court of Appeal found this contention to be without merit, on the view that the acceptance of the VSS would constitute such an act.

Conclusion

In light of the decision in this case, it is clear that the mutual acceptance of a VSS would bring about a complete cessation of an employee's employment contract and an employer would not be liable to pay an employee the retrenchment/retirement benefits that are provided in the employee's contract if he has accepted the VSS offered. There is no room for an employee having applied and accepted a VSS to claim his entitlement to benefits if his employment contract is terminated by any way other than retirement.

However, to reduce legal liability and minimise the effects of retrenchment by introducing the VSS, employers should insert an express waiver clause regarding any contractual entitlement of an employee into the VSS to avoid any future claims for benefits subsequent to the acceptance. SD

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[1] [2011] 8 CLJ 38

[2] A permanent officer of BERNAS who is confirmed in his appointment and who is terminated from service with BERNAS before attaining compulsory retirement age for reasons other than compulsory retirement, optional retirement, death or disability will be paid termination benefits as follows:

F x Last drawn basic monthly salary x Years of service with BERNAS

The F factor is 1.5 for those employees below 10 years of service and 2 for those above 10 years of service

[3] The successful applicant would receive the following package:
(i) A basic compensation package upon termination of employment (ranging from 23 months to 35 months basic salary or the number of months until retirement, whichever is lesser);
(ii) For those who joined Employer from Lembaga Padi dan Beras (LPN), an additional ex gratia compensation ranging from 0.5 months to three months last drawn salary for each year of service;
(iii) Salary in lieu of notice;
(iv) Medical benefits for a period of one year after termination

[4] If parties to a contract agree to substitute a new contract for it, or to rescind, or alter it, the original contract need not be performed

[5] (1969) 1 AC 340

[6] As per Lord Devlin. Approved by the Court of Appeal in *Ramli Shahdan & Anor v Motor Insurer's Bureau of West Malaysia & Anor [2006] 1 CLJ 224*

The law of defamation and the defence of qualified privilege

IN THIS ARTICLE, SOO SIEW MEI DISCUSSES THE STANDARD OF RESPONSIBLE JOURNALISM IN THE CONTEXT OF THE DEFENCE OF QUALIFIED PRIVILEGE.

A person who makes a statement of fact which is defamatory and untrue may incur liability for defamation. The defence of qualified privilege affords protection to the maker of such a statement that may have been made on protected occasions. To establish the defence of qualified privilege, the defendant must show that there is a legal, social or moral duty to make or publish the defamatory statement and the recipient has a corresponding interest to receive the statement.

Historically, in England, the defence of qualified privilege only applies to publication to persons who had proper interest or duty in the matter with which it was concerned. The public as a whole was not regarded as having a relevant interest or duty. It was therefore difficult for the news media to seek protection of the defence of qualified privilege, even if the statements published appeared to be of legitimate public interest.

As a result of the landmark English House of Lords decision in **Reynolds v Times Newspapers Ltd**[1], the protection afforded to the news media in respect of publication of statements to the public at large was extended. The House of Lords in **Reynolds** recognised that the duty on a journalist is to act responsibly and whether the journalist has acted responsibly is necessarily bound with whether the defence of qualified privilege applies. If the news media passes the test of responsible journalism, the defence of qualified privilege applies. On the facts of **Reynolds**, the House of Lords considered the following non-exhaustive factors in deciding whether the news media passed the test of responsible journalism:

- the seriousness of the allegation;
- the nature of the information and the extent to which the subject matter is a matter of public concern;
- the source of the information;
- the steps taken to verify the information;
- the status of the information;
- the urgency of the matter;
- whether comment was sought from the plaintiff;
- whether the article contained the gist of the plaintiff's side of the story;
- the tone of the article;
- the circumstances of the publication, including the timing.

Thus the emphasis is no longer on whether a defendant has a duty to publish the statement to the public who has a reciprocal interest in receiving the communication, but rather the standard of conduct required of the journalist in publishing the statement in public interest. The approach in **Reynolds** was followed by the New Zealand Court of Appeal in **Lange v Atkinson**[2], and the High Court of Australia in **Lange v Australian Broadcasting Corporation**[3].

In **Lange v Atkinson**, the New Zealand Court of Appeal held that the defence of qualified privilege applied to generally published statements made about the actions and qualities of those currently or formerly elected to

Parliament and those with immediate aspirations to be members, so far as those actions and qualities directly affected their capacity (including their personal ability and willingness) to meet their public responsibilities.

In **Lange v Australian Broadcasting Corporation**, the High Court of Australia held that in proceedings for defamation, the categories of qualified privilege in defence of a claim include communication made to the public on a government or political matter, including discussion on government or politics at a state or territory or local government level. The High Court of Australia further held that there exists a privilege which extends to political discussion in the media and opined that, accordingly, a defendant must not only establish that the publication is related to a government or political matter but also that he satisfied the requirements of reasonable conduct.

In Malaysia, the Federal Court in **Datuk Seri Anwar Ibrahim v Dato' Seri Dr Mahathir bin Mohamed**[4] approved the test in **Lange v Australian Broadcasting Corporation** while the Court of Appeal in **Datuk Seri Anwar Ibrahim v Dato' Seri Dr Mahathir bin Mohamed**[5] applied the test in **Lange v Atkinson**.

Recent Malaysian cases relating to the defence of qualified privilege also appear to favour the approach in **Reynolds** in affording greater protection to the news media. For example, the High Court in **Chong Siew Chiang v Ng Kim Ho & Anor**[6] made reference to **Reynolds**, and the High Court in **Dato Annas bin Khatib Jaafar v Datuk Manja Ismail & Ors**[7] followed the approach in **Reynolds**.

Further, the High Court in **Badrul Zaman PS Md Zakariah v Jabatan Penyiaran Radio dan Televisyen Malaysia & Ors And Other Cases**[8] recognised that there is a need to protect newspapers and the press so long as their reports are reasonable and accurate.

The changing judicial trend in the law relating to the defence of qualified privilege, in line with the approach in **Reynolds**, affords better protection to the news media in respect of publication of statements to the public at large, so long as the news media conforms to the standard of responsible journalism. Once the defence of qualified privilege is made out, it could be defeated only by proof of express malice by virtue of O 78 r 3(3) of the Rules of the High Court 1980.

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[1] [2001] 2 AC 127
[2] [1998] 3 NZLR 424
[3] [1997] 189 CLR 520
[4] [2001] 2 MLJ 65
[5] [2001] 1 MLJ 305
[6] [2011] 6 CLJ 62
[7] [2011] 8 MLJ 747
[8] [2009] 7 CLJ 285

CASE NOTE

MN Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

IN THIS ARTICLE, FOONG PUI CHI REVIEWS THE RULING MADE BY THE SPECIAL COMMISSIONERS OF INCOME TAX ("SCIT") ON A PRELIMINARY ISSUE IN MN SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI[1].

Introduction

The main issue in this case was whether a letter of objection was a sufficient substitute for a notice of appeal known as Form Q as prescribed under the Income Tax Act 1967 ("ITA").

Facts

The Director General of Inland Revenue ("DGIR") conducted a field audit on MN Sdn Bhd ("MN") and thereafter raised Notices of Additional Assessment for years of assessment 2002, 2003 and 2004 (collectively "Assessments") against MN on 7 August 2007.

Under section 99(1) of the ITA, if a taxpayer is aggrieved by an assessment raised by the DGIR, he may appeal to the SCIT against the same by filing a notice of appeal in the "prescribed form" to the DGIR within 30 days after the service of the notice of assessment.

On 29 August 2007, MN filed a letter of objection to the DGIR to object to the Assessments. Almost 12 months after the Assessments were raised, MN filed its Forms Q on 5 August 2008 to appeal against the Assessments and the Forms Q were then forwarded to the SCIT on 27 October 2009 (more than 12 months after the DGIR had received them).

During the hearing of the appeal, the SCIT raised the preliminary issue as to whether the appeal ought to be struck out as an invalid appeal as MN had failed to lodge its appeal using the prescribed Form Q within 30 days

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from the date of receipt of the Assessments. Both parties contended that the appeal was valid and compliance with section 99(1) of the ITA was not disputed between the parties. The parties submitted that MN's letter of objection had complied with section 99(1) of the ITA as it was in accordance with Paragraph 3.3.3 of the Public Ruling No 3 of 2001[2] ("PR 3/2001"), which provides that:

> *"An appeal made by way of a letter is also acceptable, and will be dealt with as if Form Q had been received. If it subsequently becomes necessary to forward the case to the SCIT, the Appellant will be requested to complete Form Q accordingly."*

MN contended that the DGIR had prescribed two types of "prescribed form", being the Form Q and the letter of objection, and since it had filed one of them within the stipulated time, it had therefore complied with section 99(1) of the ITA.

Majority decision of the SCIT
Two out of the three SCIT ("Majority SCIT") held that there was no valid appeal before them and consequently struck out the appeal.

- **PR 3/2001 is a delegated or subsidiary legislation**
  The Majority SCIT referred to section 23(1) of the Interpretation Acts 1948 and 1967, case law and various administrative law textbooks and held that as the PR 3/2001 is a delegated or subsidiary legislation[3], which is enacted by the DGIR (an entity other than Parliament) under section 138A(1) of the ITA (under the authority of the parent or enabling Act, the ITA), the PR 3/2001 must conform with, and cannot go beyond, the legislative powers conferred by the ITA, failing which it would be *ultra vires* the ITA and void.

  In particular, the Majority SCIT referred to and relied upon the judgment of the Federal Court in **Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd**[4]:

  > *"…The 1979 Order is in the nature of a subsidiary legislation and cannot enlarge what is circumscribed by the enabling Act.…*
  >
  > *Firstly, in our jurisdiction — unlike England — any subsidiary legislation to be valid must be intra vires the parent statute and the Federal Constitution. …*
  >
  > *There is also no doubt whatsoever that the courts have jurisdiction to declare invalid a delegated legislation if in making it, the person/body to whom power is delegated to make the rules or regulations, acted outside the legislative powers conferred on him/it by the Act of Parliament under which the rules or regulations were purported to have been made. …*
  >
  > *Applying the foregoing principles to the present instances two matters emerge. First, the 1979 Act does not authorize the imposition of the research cess upon palm oil millers. Second, section 14 of the 1979 Act does not impose any liability upon oil palm millers to pay research cess. Based on these matters it is my considered judgment that the 1979 Order is ultra vires the 1979 Act. The 1979 Order is therefore null and void and of no effect."*

- **Section 99(1) of the ITA does not allow any other substitutes for Form Q**
  Upon a close scrutiny of section 99(1) of the ITA, the Majority SCIT found that other than the "prescribed form" (Form Q), the wording of that provision does not allow any other substitute for Form Q. Hence, Paragraph 3.3.3 of PR 3/2001, which provides that a letter of objection can be a substitute for Form Q, was held to be *ultra vires* the ITA, invalid and of no effect.

- **Section 100(1) of the ITA has been bypassed**
  The Majority SCIT held that by relying on Paragraph 3.3.3 of PR 3/2001, the parties had bypassed section 100(1) of the ITA pursuant to which a taxpayer may apply to the DGIR for an extension of time to file Form Q under section 99(1) of the ITA.

- **Section 143(1) of the ITA could not assist MN**
  The Majority SCIT also considered section 143(1) of the ITA which provides that:

  > *"No assessment, notice or other document purporting to be made or issued for the purposes of this Act shall be quashed or deemed to be void or voidable for want of form, or be affected by any mistake, defect or omission therein, if it is in substance and effect in conformity with this Act or in accordance with the intent and meaning of this Act…"*

  The Majority SCIT was of the view that section 143(1) could not assist MN as Paragraph 3.3.3 of PR 3/2001 is not in substance and in effect in conformity with, or in accordance with, the intent and meaning of section 99(1) of the ITA, which expressly stipulates that an appeal can only be made by using Form Q.

- **Section 152(1) of the ITA also could not assist MN**
  Although section 152(1) of the ITA provides that the DGIR *"may authorise the use of a suitable substitute for any form so prescribed"*, the Majority SCIT concluded based on the affidavit and exhibits tendered that there was no proof that MN had used

all reasonable diligence to procure and use the prescribed form as required by section 152(2) of the ITA. It therefore follows that section 152(1) too could not assist MN.

- **No extra time is allowed under section 102 of the ITA**
  The Majority SCIT also pointed out that section 102 of the ITA only allows the DGIR 12 months to review the assessment, with a further six months with the approval of the Minister of Finance, upon application. As such, if the letter of objection is to be treated as equivalent to Form Q, this would mean that the DGIR has arrogated unto himself an extra time frame (beyond the 12 or 18 months provided under section 102) to review the Assessments and this is not sanctioned by section 102 of the ITA.

- **Consent of the parties could not confer jurisdiction upon SCIT**
  Relying upon the decision of **Paramount Malaysia (1963) Sdn Bhd v Pesuruhjaya Khas Cukai Pendapatan & Anor**[5], the Majority SCIT emphasised that where the Court has no jurisdiction to hear the appeal as the Forms Q were not filed within the 30 days stipulated in section 99(1) of the ITA, no amount of consent of the parties can confer jurisdiction upon it.

Dissenting decision of the SCIT
The remaining SCIT ("Dissenting SCIT") disagreed with the Majority SCIT and held that section 99(1) of the ITA must be read together with sections 138A, 143 and 152 of the ITA as all these provisions form part of the same Act and as such must be read as a single, integral and inseparable legislation. Accordingly, the Dissenting SCIT was of the view that the letter of objection and the subsequent Forms Q filed by MN constituted valid notices of appeal under the ITA.

The Dissenting SCIT referred to the facts in the Supreme Court case of **Government of Malaysia v Jasanusa Sdn Bhd**[6] ("**Jasanusa**") and concluded that section 99(1) is only directory in nature and not mandatory. In **Jasanusa**, the notices of assessment were issued in January 1990 and the Forms Q were filed more than two years later in February 1992.

The Dissenting SCIT also said that section 102 of the ITA had been complied with in this case because in the case of **Jasanusa**, although the Form Q was not forwarded to the SCIT within 12 months, the Supreme Court did not rule the assessment to be null and void.

Conclusion
MN has appealed against the decision of the Majority SCIT to the High Court and it remains to be seen whether the High Court would agree with the construction of the applicable provisions of the ITA taken by the Majority SCIT or the Dissenting SCIT on whether a letter of objection is a sufficient substitute for Form Q under the ITA.

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[1] (2011) MSTC 811
[2] This ruling was made by the DGIR under section 138A of the ITA
[3] In the book by D.J. Gifford and K.H. Gifford, How to Understand an Act of Parliament, (1991), (7th Ed), Law Book Company, the term "delegated legislation" is defined as *"law which is made by some person other than Parliament and acting under the authority of an Act of Parliament"*
[4] [2004] 2 CLJ 265
[5] (2002) MSTC 3,908
[6] [1995] 2 CLJ 701

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The Capital Markets and Services (Amendment) Bill 2012

IN THIS ARTICLE, CHAI YEE HOONG HIGHLIGHTS SOME OF THE PRINCIPAL AMENDMENTS PROPOSED BY THE CAPITAL MARKETS AND SERVICES (AMENDMENT) BILL 2012.

The Capital Markets and Services Act 2007 ("the CMSA") came into effect from 28 September 2007 (except for Division 2 Part VI which came into effect on 1 April 2010) to consolidate the Securities Industry Act 1983 and the Futures Industry Act 1993, and to regulate and provide for matters relating to the activities, markets and intermediaries in the capital markets.

The Capital Markets and Services (Amendment) Bill 2012 ("the Bill") was passed by the House of Representatives on 19 April 2012 to amend the CMSA.

We refer to some of the principal amendments proposed by the Bill.

Registration of persons providing capital market services

The Bill seeks to insert a new section 76A into the CMSA, which provides for the registration of persons providing capital market services.

The following new definition of "capital market services" will apply:

> *"capital market services" means any service as specified by the Commission under section 76A, but does not include a regulated activity."*

This section will give the Securities Commission power to specify any service to be a capital market service, to register a person providing any capital market service subject to such terms and conditions as the Securities Commission may impose, to revoke any such term and condition or to impose new terms and conditions, or to withdraw the registration accorded to a person providing any capital market service if it is necessary for the protection of investors or in the public interest.

Business trusts

The Bill will introduce a concept of "business trust" which will be "a unit trust scheme where the operation or management of the scheme and the scheme's property or asset is managed by a trustee-manager". A "trustee-manager" means a person who holds property or asset on trust for unit holders of the business trust, and manages and operates such property or asset.

A person must register a business trust with the Securities Commission, or in the case of a foreign business trust, seek recognition by the Securities Commission, under the new Division 3B of Part VI, if the person intends to:

- establish, operate or assist in establishing or operating the business trust;
- hold himself out as operating the business trust; or
- offer or make available units in the business trust.

The Securities Commission has discretion whether to register or recognise the business trust and/or to impose terms and conditions and/or revisions as the Securities Commission deems fit or necessary.

The other requirements applying to business trusts will be set out in the new Division 3B of Part VI. These include:

- any person intending to offer or make available units in an unlisted business trust shall register with the Securities Commission a disclosure document containing information and particulars as may be specified by the Securities Commission;
- the requirement that a deed is entered into that binds the unit holders and the trustee-manager;
- the role of a trustee-manager, which is to exclusively manage and operate the business trust, and specific duties and responsibilities in sections 256O, 256P, 256R;
- the obligations of officers of a trustee-manager in section 256Q, including director's disclosure of interests in section 256S;
- limitation of liability on unit holders;
- restriction on creditor of a unit holder of a business trust to obtain possession of, or any remedy with respect to, the trust property of the business trust;
- disclosure of policies and practices and reports by the trustee-manager to unit holders;
- calling of annual general meetings and unit holders' rights at general meetings; and
- provisions for winding-up and deregistration of a business trust.

Capital Market Compensation Fund and Capital Market Compensation Fund Corporation

The Bill seeks to substitute Part IV of the CMSA with a new Part IV which provides for the establishment of a fund known as the Capital Market Compensation Fund ("the Fund") and a body corporate known as the Capital Market Compensation Fund Corporation ("the Corporation") which shall

manage and administer the Fund and to process and handle claims for compensation under the Fund.

Currently, Part IV of the CMSA deals with the Compensation Fund (established by a relevant stock exchange) and the Fidelity Fund (established by a relevant derivatives exchange). Both the funds are for compensating persons suffering monetary loss due to defalcation, fraud or insolvency. Payment of compensation from the Compensation Fund and the Fidelity Fund are in such order as the relevant stock exchange or derivatives exchange deems proper.

In the Bill, the proposed Corporation's functions include to:

- establish processes and procedures to determine claims for compensation;
- pay out compensation;
- petition the winding up of a relevant person;
- determine the financial and operational condition of a relevant person and the likelihood of the relevant person triggering an event of default;
- determine, charge, collect and receive contributions, levies, fees and other payments from relevant persons or claimants;
- take any action in respect of its function in managing and administering the Fund.

The rules of the Corporation for governing the proper administration of the Corporation and the Fund have to be approved by the Securities Commission, and the rules cannot be amended without the prior approval of the Securities Commission. Some of the rules of the Corporation include:

- the scope and category of claimants who are eligible to make a claim from the Fund;
- the manner in which claims are to be made, determined and awarded by the Corporation;
- the circumstances in which the Corporation may make a payment to a person other than the claimant; and
- the circumstance in which a claim may be refused by the Corporation.

Further, the Bill seeks to give the court power to make certain orders such as a winding-up order of a relevant person on the petition of the Corporation, an order vesting securities in the Corporation, and an order appointing a receiver in respect of the property of a relevant person.

The approval framework

The Bill seeks to substitute Division 1 of Part VI of the CMSA with new Divisions 1 and 1A of Part VI.

The new Division 1A of Part VI will set out the approval framework for the listing of securities and, like the current Division 1, provides for the grant or refusal of the application subject to the terms and conditions as set out in the Division and as the Securities Commission deems fit or necessary. The amendment will provide for the application of approval, grant and refusal of application in separate sections under the new Division 1A as opposed to all under one section 212 in the current Division 1.

The authorisation and recognition framework for unlisted capital market product

The Bill seeks to introduce a new Division 3A of Part VI into the CMSA which will provide for the authorisation or recognition framework for unlisted capital market products.

This new Division will provide that a person who intends to make available, offer for subscription or purchase, or issue an invitation to subscribe for or purchase unlisted capital market products including unlisted Islamic securities but excluding units in a unit trust scheme, has to seek authorisation of the Securities Commission, or in the case of a foreign securities or capital market product, recognition by the Securities Commission, as well as to register with the Securities Commission a disclosure document containing information and particulars specified by the Securities Commission.

Further, this new Division provides for the application for authorisation, and the grant, refusal and withdrawal of authorisation or recognition subject to the terms and conditions as set out in the new Division, as the Securities Commission deems fit or necessary.

This new Division also provides for the Securities Commission's power to issue directions when the Securities Commission withdraws an authorisation or recognition under this Division, becomes aware that a statement or information provided or submitted to it under this Division is false or misleading or from which there is a material omission, or is satisfied that the interest of investors or public interest is jeopardised or is likely to be jeopardised.

Offences

Further, the Bill also seeks to introduce a new Division 3C of Part VI which will provide for the offences of false or misleading statement or information under the new Divisions 3A and 3B as mentioned above.

Recommendation of private retirement schemes

The Bill seeks to introduce five new sections under Part IIIA Division 4 of the CMSA, namely sections 139ZN, 139ZO, 139ZP, 139ZQ, and 139ZR, which require licenced persons who deal in private retirement schemes to have a reasonable basis for making any recommendation in respect of the private retirement schemes and to provide for offences provisions which include false or misleading declaration or furnishing false documents to a provider or admin-

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istrator, false or misleading statements, etc, and the use of manipulative and deceptive devices. SD

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