Corporate Governance in Malaysia: Directors’ Duties and Whistleblowing

What is Corporate Governance?

There is no universally accepted definition of the term “corporate governance”. In Malaysia however, it is generally accepted that corporate governance refers to all the processes and structures used to direct and manage businesses and affairs of companies to promote business prosperity and corporate accountability with the ultimate objective of realising long-term shareholder value while considering the interests of other stakeholders.¹

Corporate governance plays an important role in a country’s economic development. In the current economic situation and the mega scandals inundating Malaysia, this is even more true, as good corporate governance has usually been advocated to enhance capital movement and to increase efficiency in the capital market. The benefits of good corporate governance have generally been recognised to be the achievement of economic growth through increased stability in the financial market and the resultant growth in investments,² which in turns creates a conducive investment environment for foreign and/or long-term investors.

Sources of law and related guidelines -

The corporate governance framework in Malaysia is built on several pieces of legislations and guidelines which mainly includes, but is not limited to, the following:

- Companies Act 2016 (“CA 2016”)
- Capital Markets and Services Act 2007 (“CMSA 2007”)
- Financial Services Act 2013 (“FSA 2013”)
- Malaysian Code on Corporate Governance 2017 (“MCCG 2017”), by the Securities Commission of Malaysia
- Guidelines on Corporate Governance (“BNM GL”), by the Central Bank of Malaysia (“BNM GL”)
- Main Market, Ace Market and Leap Market Listing Requirements, by Bursa Malaysia Berhad (“Listing Requirements”)
- Code of Ethics for Company Directors/Company Secretaries, by the Companies Commission of Malaysia (“Code of Ethics”)

Besides the sources set out above, corporate governance in Malaysia is supplemented by a few more legislations, to name a few, Employment Act 1955, the Occupational Safety and Health Act 1994, the Environmental Quality Act 1974, the Anti-Money Laundering and Anti-Terrorism Financing Act 2001, the Personal Data Protection Act 2010, and the Whistleblower Protection Act 2010 (“WPA”). These statutes impose direct and indirect responsibility on directors and officers of companies to ensure that no unethical misconduct or illegal activities take place in a company, and that proper procedures are set in place to ensure that companies are properly and transparently governed in accordance to the law.

¹ Corporate governance as defined in the High-Level Finance Committee Report (1999) and as applied in the MCCG.
² Corporate Governance in Malaysia, Rashidah Abdul Rahman and Mohammad Rizal Salim; Sweet 7 Maxwell Asia.
Notwithstanding the numerous legislations which advocate the principles of good corporate governance and compliance, it can be safely said that, in Malaysia, the general principles of corporate governance are statutorily codified in the Companies Act 2016 (CA 2016) which is indeed the primary source on corporate governance.

The CA 2016 came into force on 31st January 2017, superseding the previous Companies Act 1965, and governs, amongst others, the duties, liabilities, responsibilities of the directors of companies and matters of conflicts of interests involving directors of a companies.

**Duties of a Director -**

Under the CA 2016, every director of a company is under a fiduciary duty to, at all times, exercise his/her powers for a proper purpose and in good faith in the best interest of the company.

A director must also exercise reasonable care, skill and diligence with the knowledge, skill and experience which may be reasonably expected of a director having the same responsibilities, together with the additional knowledge, skill and experience which the director in fact has.

The CA 2016 provides that directors of companies are primarily responsible to ensure:

- the financial statements of the company are prepared;
- that the accounts of the company are sufficiently kept and that the transactions and financial position of the company can be adequately explained and disclosed for auditing;
- that the financial statements are circulated to the shareholders of the company;
- for a public company, that its annual general meeting is held; and
- the making of such other disclosures as prescribed in the CA 2016, such as when there is a change in the company’s directors, company secretary or shareholding.

The CA 2016 further describes the manner in which a director is expected to make business judgements. Under Section 214 CA 2016, a director is deemed to meet the statutory duties in CA 2016 and any other equivalent duties under the common law and in equity, if the director:

- makes a business judgement for a proper purpose and in good faith;
- does not have a material personal interest in the subject matter of the business judgment;
- is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and
- reasonably believes that the business judgement is in the best interest of the company.

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1 Section 213(2) CA
2 Section 248 CA
3 Section 245 CA
4 Section 257 CA
5 Section 340 CA
6 Sections 51 & 58 CA
Disclosure of director's interests and conflict of interest

The CA 2016 provides that every director, who is in any way, directly or indirectly, interested in a contract or proposed contract with the company, shall as soon as practicably possible having become aware of such fact, declare the nature of his/her interests at a meeting of the board of directors; and where a director who holds any office or possesses any property where his duties or interests may create a conflict with his/her duties or interests as director, such director shall declare the fact, nature, character and extent of the conflict at a meeting of the board of directors.

The CA further provides that where a director has a direct or indirect interest in a contract entered into or to be entered into by the company, such a director is not allowed to participate or vote in any discussion while the contract or proposed contract is being deliberated at the board meeting unless:

- the director’s interest in the matter is not required to be disclosed under Section 221 of the CA;
- the matter involves a private company, which is not a subsidiary of a public company;
- the matter involves a private company which is a subsidiary of a public company and the contract entered into, or proposed to be entered into is within its own group of companies;
- the contract is for the indemnity against any loss which any director may suffer by reason of being or becoming the surety for the company; or
- the contract entered into, or to be entered into involves a public company or a subsidiary of a public company and in which the interests of the director solely consists of him/her being a director of the company and the shareholder of not more than the number or value as is required to qualify him for the appointment as a director; or in him/her having an interest in not more than five per cent (5%) of the company’s paid up capital.

“...every director, who is in any way, directly or indirectly, interested in a contract or proposed contract with the company he serves, must declare the nature of the interests at a meeting of the board ...”

Malaysian Code on Corporate Governance 2017

Besides the CA 2016, another key document that leads the corporate governance development in Malaysia would be the MCCG which is based on three (3) key principles of good governance:

- Board leadership and effectiveness
- Effective audit and risk management
- Integrity in corporate reporting & meaningful relationships with stakeholders.

Although the MCCG is primarily for listed corporations, non-listed entities such as state-owned enterprises, small and medium enterprises, and licensed intermediaries are encouraged to embrace the MCCG and to consider applying the practices set out in the MCCG to enhance their respective accountability, transparency and sustainability.
The present MCCG was issued in April 2017 and precedes its 2012 predecessor. One of the key features of the MCCG was the introduction of the “Comprehend, Apply and Report (CARE)” approach, which is a shift away from the “comply and explain” to the “apply or explain alternative” approach.

The CARE approach aims at reinforcing mutual trust between companies and their stakeholders and requires that companies clearly identify the processes of practising good corporate governance with a fair and meaningful explanation on how it has applied the practises set out in the MCCG. Where a company has departed from a practice, it shall provide an explanation for the departure together with an alternative practice it plans to implement and how it would achieve the intended outcomes set out in the MCCG.

Whilst it is not mandatory to observe the MCCG, listed companies do have to disclose in their annual reports their compliance status with the practises listed out in the MCCG and to provide meaningful explanations on how they have applied each practise or of any departure from the practises listed out in the MCCG together with their alternative approach adopted to achieve the MCCG’s intended outcomes.

“The latest Malaysian Code on Corporate Governance was issued in April 2017 and it introduced the Comprehend, Apply and Report ‘CARE’ approach, which is a shift away from the common notion of ‘comply and explain’ in most corporate governance codes”

**Capital markets**

In addition to the above, listed corporations are required to comply with the Listing Requirements and other rules issued by Bursa Malaysia. Under the Listing Requirements, to ensure proper corporate governance in listed companies, at least one third of the board of a listed company must comprise of independent directors and that the board must establish a nominating committee and audit committee, and both committees shall function in accordance to the requirements set out in the Listing Requirements.

**Financial institutions**

Besides the legislations and guidelines set out above, financial institutions in Malaysia will have to additionally comply by the corporate governance requirements prescribed in the Financial Services Act 2013 (FSA 2013) Guidelines on Corporate Governance by the Central Bank of Malaysia (BNM GL).

For instance, the FSA, which generally provides for the internal controls of financial institutions, requires a prior written approval of the Central Bank of Malaysia (BNM) before a person can be appointed as a chair, director or chief executive officer of a financial institution.

Whilst the BNM GL enlists important recommendations on the responsibilities of the board and senior management of financial institutions, including the requirements on board meetings, quorums, and the composition of boards in financial institutions, by prescribing amongst other things:

- the majority of the board must at all times consist of independent directors;
- there must be a written policy to address directors’ actual and potential conflicts of interest; and
- the written approval of BNM must be obtained before an independent director is removed or resigns from the financial institution (unless such director is removed as a result of a disqualification under the FSA).
**Code of Ethics**

The objective of the Code of Ethics as issued by the Companies Commission of Malaysia (SSM) is to primarily enhance the standard of corporate governance and corporate behaviour of directors and company secretaries with the view of achieving the following:

- to establish standards of ethical conduct for directors based on acceptable belief and values one upholds;
- to instil professionalism among company secretaries within the tenets of morality, efficiency and administrative effectiveness; and
- to uphold the spirit of social responsibility and accountability in line with legislations, regulations and guidelines governing a company.

Amongst the pertinent items recommended by the Code of Ethics are that a director:

- should immediately disclose all contractual interests, whether directly or indirectly with the company;
- should neither divert to his/her own advantage any business opportunity that the company is pursuing, nor use the confidential information obtained by reason of his/her office for his/her own advantage or that of others;
- should at all times act with utmost good faith towards the company in any transaction and to act honestly and responsibly in the exercise of his/her powers in discharging his/her duties; and
- should be willing to exercise independent judgement and, if necessary, openly oppose if the vital interest of the company is at stake.

**Whistle blowing**

As can be seen from the various statutes and guidelines, the main crux in ensuring a company has good corporate governance practices lies with the directors. It is therefore important for directors to set the appropriate tone in their companies by providing thought leadership and championing good governance and ethical practices.

The board of a company should also encourage employees to report genuine concerns in relation to a breach of any legal obligation within the company, including any negligence, criminal activity, breach of contract, breach of law, miscarriage of justice, danger to health and safety or to the environment and the cover up of any of these in the workplace i.e. whistleblowing.

In recent years, the Malaysian government has been stepping up efforts to reduce corruption and improve corporate governance in companies by introducing the National Anti-Corruption Plan 2019 – 2023 (“NACP”) on 29 January 2019, which identified corporate governance as one of the six (6) priority areas to be scrutinized in ensuring a more transparent and efficient market for investments. The issuance of the inaugural Corporate Governance Monitor 2019 by the Securities Commission in May 2019 and the amendments to the Malaysian Anti-Corruption Act 2009, it has become crucial that directors ensure that there are adequate policies in place and that the companies have the necessary whistleblowing avenues for their employees to voice out legitimate concerns which can be objectively investigated and addressed.

In this context, directors play an important role and should ensure that they understand the law surrounding whistleblowing in order to put in place appropriate and effective whistleblowing policies to ensure an employee in their corporations is able to raise concerns about illegal, unethical or questionable practices in confidence, without the risk of reprisal and that that such individual (hereinafter a “whistle-blower”) would be accorded the following forms of protection:

- protection of confidential information
- immunity from civil and criminal action
- protection against detrimental actions (and such protection to be extended to any person related to or associated with the whistle-blower).  

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11 which presents the overall state of application of the MCCG in Malaysia  
12 which takes effect in June 2020 to include the new offence of corporate liability for corruption  
13 Section 7 WPA
Accordingly, the Whistle-blower Protection Act 2010 ("WPA") defines detrimental action to include:

➢ an action causing injury, loss or damage;

➢ intimidation or harassment;

➢ interference with lawful employment or livelihood of any person, including discrimination, discharge, demotion, suspension, disadvantage, termination or adverse treatment in relation to a person’s employment, career, profession, trade or business or the taking disciplinary action; and

➢ a threat to take any of the actions referred to in the above paragraphs.

In deciding to disclose any unethical and/or illegal activities happening in a company, whistle-blowers are more often than not taking a personal risk which may result in a high price for them to pay. As such, keeping a whistle-blower’s identity confidential should be a company's highest priority.

In this regard, Section 8 of the WPA provides that any person who makes or receives a disclosure of improper conduct or obtain confidential information in the course of investigation of such disclosure shall not disclose the confidential information or any part thereof or risk a fine not exceeding RM50,000 or imprisonment to a term not exceeding ten (10) years or both, if convicted.

Importantly, the WPA defines “confidential information” to include:

➢ the information about the identity, occupation, residential address, work address or whereabouts of a whistle-blower and the person whom against a whistle-blower had made a disclosure of improper conduct;

➢ information disclosed by a whistle blower; and

➢ information that, if disclosed, may cause detriment to any person.

Although the WPA seems to imply that only whistle-blowers who make disclosures to enforcement agencies\(^\text{14}\) would be afforded protection\(^\text{15}\), directors of companies can make their employees feel comfortable and protected by adopting and firmly implementing the WPA as part of their company policies.

In the event a matter is not properly addressed or investigated upon an internal disclosure, companies ought to provide an option to the whistle-blowers to disclose the information to an enforcement agency.

Whilst it would be tempting for most businesses to bury their head in the sand, directors should understand that a failure on their part to have a proper whistleblowing system in place, could in the long run, potentially lead their companies into diminution in value as well as damage in reputation.

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\(^{14}\) The key enforcement agencies in Malaysia are the Royal Malaysian Police Force, Royal Malaysian Customs Department, Road Transport Department, Malaysian Anti-Corruption Commission, and the Immigration Department of Malaysia – A Critical look into the Whistle-blower Protection Act 2010. Christopher Leong

\(^{15}\) Section 6 WPA