

FINANCIAL ASSISTANCE - WHITEWASH EXEMPTION



resently, there is a general prohibition against a company providing financial assistance in connection with the acquisition of

its own shares or shares in its holding company.ⁱ The rationale for this is premised on economic reasons in that if a company supports the purchase of its own shares, it causes a reduction in the company's value in the hands of other shareholders as well as artificially inflates the share price above its market level.

Of course, this prohibition has been criticised as impeding beneficial commercial transactions. Interpretation of the scope of 'financial assistance' in decided cases have been fraught with difficulty and developed this area of the law convolutedly, leading to uncertainty and a maze.

In dealing with this difficult area, the Companies Act 2016 ("2016 Act") retains the general prohibition,ⁱⁱ but introduced a 'whitewash exemption' thereby liberalising the financial assistance framework.

What is this 'whitewash exemption'?

The "whitewash" procedure aims to be facilitative making commercial transactions less cumbersome. The exemption is not applicable to public companies listed on the Malaysian Stock Exchange. The private company should meet the requirementsⁱⁱⁱ set out below:

- at least 75% of the shareholders of the company approved the financial assistance;
- approved and resolved by the majority of company directors that it is in company's best interests to give financial assistance;
- company to satisfy the *solvency test* where the directors in favour of the resolution will be required to provide a *solvency statement* on the day the board resolution is passed;
- the aggregate amount of the assistance does not exceed 10% of the company's current shareholders funds;
- company must receive fair value for giving such financial assistance; and
- financial assistance must be given not more than 12 months after the date of the solvency statement.

Practical Implications

If a company gives financial assistance in contravention of the provisions under the 2016 Act, the validity of the financial assistance and of any transaction will not be affected. However, contravention of the financial assistance prohibition remains as an offence. The maximum penalty has been increased to an amount up to RM3 million or to imprisonment for a term not exceeding 5 years or to both, if convicted. A company and its responsible officers (including directors) may be held liable for a contravention. This means that directors of companies will need to be more circumspect and exercise more thought, care and planning when proposing to enter into such transactions as the ultimate responsibility lie on them as a fiduciary duty.

The 2016 Act further clarifies that companies with its activities regulated by any written law relating to banking, finance or insurance or are subject to the supervision of the Securities Commission to provide loans, guarantees or other security in the ordinary course of its business, are allowed to provide financial assistance.

What are we waiting for then? Let's get financial assistance!

This is a welcome reform to the Companies Act 1965 as it permits private companies to plan its corporate restructuring exercise.

ⁱ Section 67 of the Companies Act 1965
ⁱⁱ Section 123 of the Companies Act 2016
ⁱⁱⁱ Section 126 of the Companies Act 2016