

Corporate Governance

Public Sector Governance: What Does it Entail?

Introduction

On 22 September 2017, the Public Service Division, the Ministry of Communications and Information, Ministry of Finance and Smart Nation and Digital Government Office jointly launched a public consultation on the draft Public Sector (Governance) Bill (“**the Bill**”), which sets out a standardised framework for corporate governance across the public sector in Singapore.

Purpose and Content of the Bill

The Bill aims to create a uniform corporate governance framework across the public sector in Singapore, which is defined in the Bill to be made up of the following government bodies:

1. All public bodies – bodies corporate established under public Acts for the purposes of performing a public function, other than a town council (collectively referred to as “**Public Bodies**”); and
2. The public service – comprising the Singapore Armed Forces, the Singapore Civil Defence Force, the Singapore Civil Service, the Singapore Legal Service and the Singapore Police Force.

Although the constituting Acts of many of the aforementioned government bodies contain provisions relating to governance and many of these agencies already have in place their own internal rules and policies, there is no overarching legislation which provides a benchmark for the standard of governance that they need to adhere to.

The Bill addresses this issue by creating standardised corporate governance rules for the public sector in Singapore, including the following, amongst others:

Provisions that Apply to Public Sector Agencies

A Public Sector Agency refers to a Public Body, a Ministry or department of the Government, an Organ of State, a public officer or a person performing a public official function and declared by the Minister to be a Singapore public sector agency for the purposes of the Bill.

- (a) the Minister responsible for the Bill may, on his own or jointly with certain Ministers, issue directions to (a class of) Public Sector Agencies or Public Bodies, for certain specified purposes, requiring them to comply with a policy of the Government relating to any pertinent matter (Sections 4 of the Bill). In this regard, a pertinent matter refers to:
 - (i) employment, management and discipline of employees;
 - (ii) management of official documents;
 - (iii) financial resource management and accountability;

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- (iv) use or development of information technology; or
- (v) data governance (including personal data protection) and sharing of information under the control of a Public Sector Agency with another Public Sector Agency;
- (b) the Ministers responsible for certain Public Bodies may issue directions to such Public Bodies as to the performance of their functions (Section 5 of the Bill). This is a common provision in many constituting Acts of Public Bodies but there are inconsistencies. The introduction of this provision, based on the explanatory notes to the Bill, prevents duplication of laws and ensures consistency and clarity in the relationship between Public Bodies and their responsible Ministers;
- (c) a Public Sector Agency may share information with another Public Sector Agency to the extent permitted under a data sharing direction issued by the Minister responsible for the Bill, notwithstanding any confidentiality obligations under common law (except contractual obligations) (Section 6 of the Bill). This does not affect such sharing of information as permitted under any other law; and
- (d) any member of a Public Sector Agency who causes the disclosure or re-identification of any data which is not authorised under any data sharing direction issued by the Minister responsible for the Bill will be guilty of an offence (Sections 7 and 8 of the Bill). However, it is a defence if such disclosure or re-identification is allowed or required by or under an Act other than the Bill or other law, or is required by an order of court.

Pursuant to Section 9 of the Bill, a direction issued under Sections 4 or 5 may be in the form of a circular or an instruction or order addressed to a Public Sector Agency or its members, chief executive or employees, and may be amended or replaced in the same manner. It further clarifies that such a direction does not have any legislative effect. Section 10 of the Bill requires every Public Sector Agency to which a direction under Sections 4 or 5 is issued to comply with such direction in performing its functions. As the term “comply” has been defined to mean to give effect to or to have regard to the direction, depending on the context, some directions may require strict compliance while others may simply serve as guidance for Public Sector Agencies.

The effect of directions given under Sections 4 or 5 of the Bill is limited by Section 11, which provides that:

- any direction issued cannot be inconsistent with the Bill or any other written law;
- a direction does not bind a Public Sector Agency to the extent to which it would impede or affect its performance of a statutorily independent function, or a quasi-judicial function of the Public Sector Agency or any of its employees in relation to a particular matter; and
- the Minister may not issue any direction to any Public Sector Agency to require the performance or non-performance of a particular act or to bring about a particular result in relation to a particular person, or to make an employment decision relating to a particular person.

Provisions that Apply to Public Bodies

- (a) the appointment, removal, disciplinary control and promotion of chief executives of Public Bodies (Sections 15, 16, 17 and 18 of the Bill);

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- (b) members of Public Bodies are required to disclose any direct or indirect financial or other interest in any relevant matters which such members or their associates may have (Section 24 of the Bill), and to abstain from taking part in decision-making for such matters (Section 26 of the Bill). In this regard, relevant matters include:
 - (i) the performance of the Public Body's functions or exercise of its powers under written law; or
 - (ii) an arrangement, agreement, or a contract made or entered into, or proposed to be made or entered into, by the Public Body.
- (c) Public Bodies are required to submit annual estimates of their revenue and expenditure to their responsible Ministers (Section 34 of the Bill); and
- (d) Public Bodies are required to conduct annual audits of their accounts, and submit auditors' reports, audited financial statements and annual reports to their respective Ministers, who will present these reports to Parliament (Sections 39, 40 and 41 of the Bill).

Comments on the Bill

Corporate governance is by no means a novel concept in the public sector, but the Bill helps to create a formal set of rules and standards which apply uniformly to the public sector in Singapore. Be it in the public sector or the private sector, similar issues arise when it comes to corporate governance. In this regard, parallels may be drawn between the provisions of the Bill and codes of governance which apply to the private sector, as follows:

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Type of Internal Control	Public Sector (the Bill)	Private Sector (the Companies Act and Code of Corporate Governance)
Appointment and Removal of Key Personnel	✓ (chief executives)	✓ (directors)
Procedures for Decision-Making	✓	✓
Executive Remuneration	X	✓
Fiduciary Duties and Consequences for Breach	X	✓
Disclosure of Conflict of Interests	✓	✓
Restrictions on Related Party Transactions	X	✓
Financial Statements and Audit	✓	✓

The Bill is a welcomed initiative to standardise corporate governance rules across the public sector, but there are nevertheless seeming gaps in the Bill which perhaps could be revisited. For instance:

- (a) The fact that many of the provisions of the Bill only apply to Public Bodies rather than all Public Sector Agencies reflects a differing focus given the functions that each category performs. Yet, a greater degree of standardisation of corporate governance rules across the public sector might be preferred.
- (b) Various provisions of the Bill are also found in the constituting Acts of many Public Sector Agencies, such as requirements on information sharing, disclosure of certain interests, delegation of functions, submitting budget estimates, keeping proper financial records, financial audits and preparation of annual reports. It is unclear whether the provisions of the Bill or those of the constituting Acts of these Public Sector Agencies will prevail to the extent there are any inconsistencies. Clarity should be provided on this front to ensure better governance.
- (c) In relation to a data sharing direction under Section 6, the Bill does not prescribe or limit the scope of information that may be shared between Public Sector Agencies, unlike in the case of other directions issued under Sections 4 or 5. While it may be implied that such data sharing directions will be subject to any requirements applicable to the sharing of information under other written law (for example, the Statutory Bodies and Government Companies (Protection of Secrecy) Act), this should be expressly stated in the relevant section in the Bill. In addition, the Bill should also clarify the mechanism for such information sharing, for example, whether directions be given to both the Public Sector Agency providing the information and the one receiving the information and whether there should be protective measures in place when sharing the information.
- (d) Section 27 of the Bill provides that the failure of a member of a Public Body to disclose any conflict of interest in a relevant matter or to abstain from decision-making in such matter does not affect the exercise of any power or performance of any function of that Public Body. This may render such obligations nugatory given that no consequences follow from the failure to meet the said obligations.

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Concluding Remarks

Although the issues raised in the Bill could be addressed by internal controls in each Public Sector Agency, which is the status quo, arguably, this defeats the purpose of passing a new law on public governance, which is to contribute to greater transparency and accountability within the public sector. On the other hand, if the rules under the new law are too rigid, then this may not leave any room for Public Sector Agencies to exercise the (often) wide discretionary powers granted to them by Parliament. This is a difficult balance to strike and will require time.

Public consultation for the Bill will close on 13 October 2017. We are happy to discuss the Bill and issues relating to the Bill with any interested party, or to assist with responses to the public consultation.

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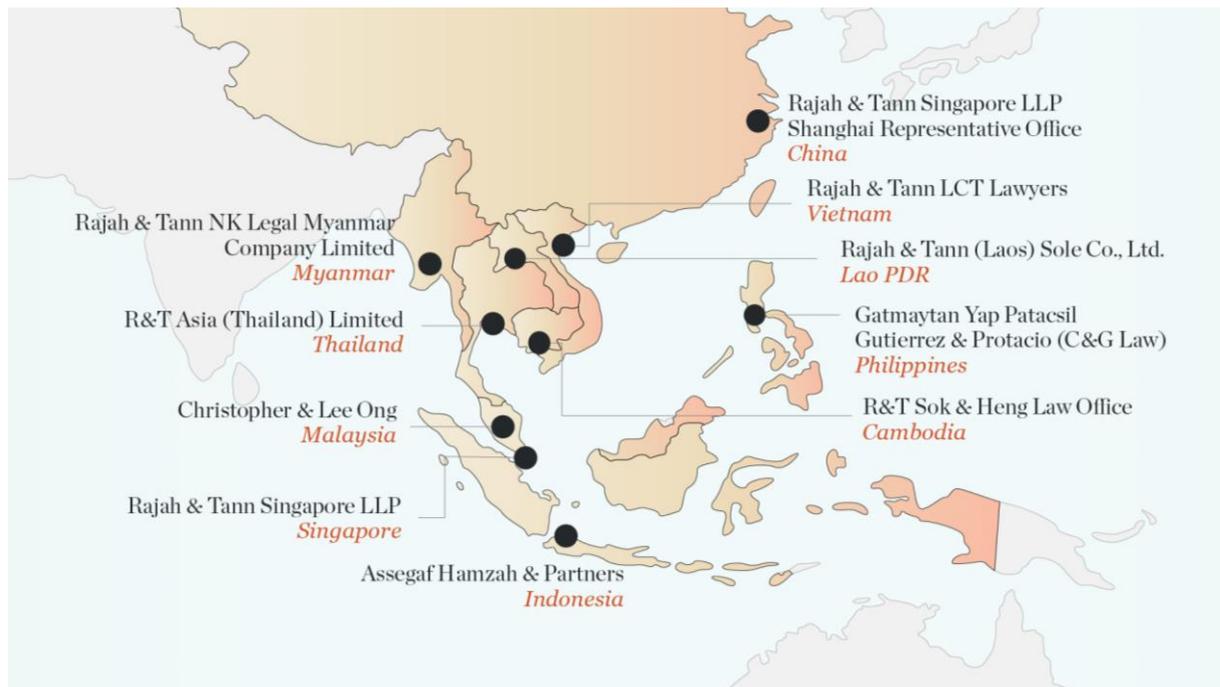
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