

Corporate Law Reform Committee

**Responses and Comments Received on
Consultative Document
“Members’ Rights and Remedies”**

Respondents:

A total of () responses were received from the following:

1. Joint MIA-MICPA Working Group on Law Reform
2. The Malaysian Institute of Chartered Secretaries and Administrators (MAICSA)
3. Minority Shareholder Watchdog Group (MSWG)
4. Tay & Partners
5. Maybank
6. CPA Australia
7. Sunway Management Sdn Bhd
8. The Association of Banks in Malaysia (ABM)
9. Kadir, Andri & partners
10. Lee Hishammuddin Allen & Gledhill

Summary of responses and comments:

Respondents	Comments
<p>Joint MIA- MICPA Working Group on Law Reform</p>	<p>Reply to Question 1: Yes, the Institutes agree to the recommendation but only for categories (i) and (ii). A former member should not be allowed to bring an action under section 181.</p> <p>Reply to Question 3: Yes, the Institutes agree a petitioner should not be allowed to file a petition under section 218 and section 181 simultaneously.</p> <p>Reply to Question 4: Yes, the Institutes agree that the statutory derivative action should be available to all types of Companies.</p> <p>Reply to Question 5: Yes, the Institutes agree that persons other than members for example, former members, beneficial owners, directors and former directors should be given the standing to bring a statutory derivative action. However, regulatory authorities should be excluded from being given the standing to bring a statutory derivative action.</p> <p>Reply to Question 6: Yes, the Institutes agree that the statutory derivative action should be extended to the cause of action in a related company.</p> <p>Reply to Question 7: Yes, the Institutes agree that unless the Court otherwise orders, the applicant should give notice of the intention to bring a statutory derivative action to the company at least 28 days before commencement of the proceedings.</p> <p>Reply to Question 8: Yes, the Institutes agree that the company may be ordered to pay reasonable fees incurred by the complainant in connection with bringing the derivative action at any stage of the proceedings and that the applicant may be held liable to reimburse the company if he fails in the proceeding.</p> <p>Reply to Question 9: Yes, the Institutes agree that costs should include an order for indemnity and any reasonable legal fees of the proceedings.</p> <p>Reply to Question 10: Yes, the Institutes agree that the orders that the Court may make should include an order giving access of information to the applicant.</p> <p>Reply to Question 11: Yes, the Institutes agree that ratification should not be a bar to the application for leave.</p> <p>Reply to Question 12: Yes, the Institutes agree that the variation of class rights can be done (i) if written consent is obtained from at least 75 per cent of the holder of shares whose rights are to be varied; or (ii) a special resolution is passed at a separate class meeting of shareholders whose rights are to be varied.</p>

	<p>Reply to Question 13: Yes, the Institutes agree that the new procedure as stated above need not rely on whether there is or is not a modification of rights clause in the company's Memorandum and Articles.</p> <p>Reply to Question 14: Yes, the Institutes agree that the proposed statutory procedure as stated above be extended to all companies. However, this procedure should not be applicable for companies without share capital.</p> <p>Reply to Question 15: Yes, the Institutes agree that section 65(6) should be retained.</p> <p>Reply to Question 16: Yes, the Institutes agree that the company legislation should expressly provide that the redemption of preference shares (except for redeemable preference shares) is a variation of the rights of existing preference shareholders.</p> <p>Reply to Question 17: Yes, the Institutes agree that the company legislation should expressly provide that the issue of all new shares (and not just preference shares) is a variation of the rights of existing shareholders of the same class.</p> <p>Reply to Question 18: The Institutes are of the view that the introduction of a statutory minority buy-out right is not necessary.</p> <p>Reply to Question 19: The Institutes are of the view that the Articles providing for an exit right clause can be used to reduce the reliance on the Court process to resolve disagreements between the shareholders of a company.</p> <p>Reply to Question 20: No, the Institutes do not agree on the inclusion of a statutory provision in the company legislation to allow class/representative action by shareholders.</p> <p>Reply to Question 21: The Institutes are of the view that the recommendation has far reaching consequences as a company would be made completely "defunct" by such injunctions being ordered against a company. The Institutes are of the view that a more comprehensive review is needed particularly in regards to the appropriate remedies and safeguards that will be in place (e.g. provisions to uplift injunctions ordered pursuant to this recommendation).</p>
MAICSA	<p>Reply to Question 1: We agree with CLRC that the <i>locus standi</i> to bring an action under the provision for oppression should be extended to beneficial owners i.e. a transferee of shares or person entitled to them by the operation of law whose membership has not been perfected and to members who have ceased to be members because of the oppressive conduct. Widening the section might provide avenue for former members and beneficial owners. However, we would like to suggest that debenture holders should also be included when determining when a person ceases to become shareholder of a company.</p> <p>In respect of the recommendation to include former members as those persons having a <i>locus standi</i> to bring an action, we feel that there should be limit on the</p>

duration by which a former member could bring up an action i.e. to limit to no later than twelve months following his sale of shares in the company.

Reply to Question 5:

While we agree that persons other than members e.g. former members, beneficial owners. Directors, former directors should be given the standing to bring statutory derivative action; we have reservations in agreeing to regulatory authorities being given the same standing. The neutrality of the regulatory body could then be questioned. The regulatory body should have the resources to undertake such responsibilities on their own accord as per the laws that govern them.

Reply to Question 10:

We agree with CLRC's recommendation that a Court may make an order giving the complainant access to the company's records to allow him to gather evidence for the action to be brought but caution that there should be restriction on type of document. We recommend that CLRC adopts section 24(1)(d) of the Australian Corporations Act 2001 whereby the Court is given the power to appoint independent persons to investigate and report to the Courts. The independent investigator is entitled to inspect the books of the company for any purpose connected with their appointment and limited to the task they have been entrusted with.

Reply to Question 13:

We recommend that the modification clause be maintained in the Memorandum of Association or Articles of Association for clarity or consistency and to assure interested parties of such rights.

Reply to Question 14:

We are unable to comment and clarification from CLRC for the basis of this question

Reply to Question 16:

We are unable to comment and seek clarification from CLRC for the basis of this question.

Reply to Question 17:

We disagree with the above statement that the company legislation should expressly provide that the issue of all new shares is a variation of the rights of the existing shareholders of the same class. This will give rise to procedural problem for example whenever ordinary shares are issued a special resolution needs to be passed. We wish to highlight that there is no variation of class right whenever ordinary shares are issued.

Reply to Question 18:

We believe that shareholder should be given an option, as it is not quite appropriate to place this matter under section 181 of the Companies Act 1965. The introduction of statutory minority buy out right will give shareholders another option when faced with minority issues. We therefore recommend that both new statutory remedies for minority buy out and section 181 should remain as avenues for shareholders.

Reply to Question 19:

We feel that there may be drawback to the recommendations to provide an exit clause in the Articles. It may encourage premature withdrawal of capital by the major shareholders whenever there is a disagreement. As an alternative, we recommend mediation clauses be introduced to soften any tension situation so that normal business of the company can continue and will also help to avoid abuse of such exit clause.

	<p>We are in agreement with other questions raised in the CD6 and have no further comments on those questions.</p>
MSWG	<p>Reply to Question 1: Yes. We agree for all the three above-named persons to be allowed to bring an action under section 181.</p> <p>There should also be a clear definition of “former member”. The term “former member” and “former shareholder” is supposed to refer to the same person within the company’s context. A former member should include ex-member or ex-shareholder.</p> <p>The definition of shareholder is wide and can include ex-member forced out of the company.</p> <p>Reply to Question 3: Yes. Simultaneous petition under section 218 and section 181 should not be allowed to avoid multiplicity of proceedings. Nevertheless, it should be made clear whether minority shareholders can seek redress under section 181 if an application under section 218 has been heard.</p> <p>It should be clear that section 218 is likely to be sought by a petitioner only as a last resort. Other shareholders would not want to wind up the company due to the fact that the company is profitable and successful. A petition under section 181 would provide an aggrieved shareholder a far wider range of remedies. The powers of minority shareholders to file a petition under section 181 should be made wider and flexible.</p> <p>Reply to Question 4: Yes. Statutory derivative action should be available to members of both private and public companies. While at present common law remedy is available, the existing provisions provide practical difficulties for minority shareholders. For example, in practice, common law derivative action is constrained by the common law principle of <i>locus standi</i> and by cost.</p> <p>We support the introduction of a statutory derivative action as a means of strengthening minority shareholders’ protection. This provision will make it easier for minority shareholders to institute an action against directors for breach of their fiduciary duties and also promote effective enforcement of good corporate governance mechanism through shareholder activism. The basis of the derivative action should be set out clearly in the Companies Act. The procedure for minority shareholders to pursue a derivative action should also be made simpler, with the details set out clearly in the rules of Court.</p> <p>Nevertheless, there should also be sufficient safeguards in the legislation or procedure to justify a statutory derivative action.</p> <p>Reply to Question 5: Yes. Statutory derivative action should be available to members, former members or persons entitled to be registered as members to bring proceedings on behalf of the company. We are also of the view that the regulatory authorities should be given standing under the Companies Act to bring a statutory derivative action on behalf of the company. As it is, the Securities Industry Act 1983 already allows the regulator to commence a civil action on behalf of aggrieved parties.</p> <p>Reply to Question 6: Ideally the holding company should bring the action on behalf of the related</p>

corporation. Members of the holding company can make a written demand to the Board of the holding company, requesting the Board to commence an action or take appropriate measures to resolve the problems.

The Board of the holding company should respond to the request within a certain time period and, in the case where the Board rejects the demand, the members of the holding company should themselves be allowed to bring a derivative action on behalf of the related company.

Reply to Question 7:

Yes. The notice should also specify the grounds of the proposed action.

Reply to Question 8:

Yes. The Court should be granted power to order the company to pay for reasonable fees incurred by the complainant in connection with bringing the derivative action at any stage of the proceedings provided he acted reasonably.

We agree that applicant may be held liable to reimburse the company if he fails in the proceeding. The Court should also be allowed to order costs against the applicant if the suit was brought about in bad faith or without reasonable cause. Nevertheless, the minority shareholder should a certain extent be compensated if he had reasonable grounds for bringing the derivative action which is in the interests of the company.

Reply to Question 9:

Yes. This includes the situation where the Court may order the company to indemnify the claimant against any liability in respect of reasonable legal costs incurred in the proceedings.

Reply to Question 10:

Yes. Otherwise shareholders would have difficulties in obtaining information which is not accessible to the public for purposes of gathering evidence. Often, a company may be controlled by those in breach of their fiduciary duties and it may be impossible for an aggrieved shareholder to bring a claim against errant directors except in limited situations. Furthermore, fiduciary duties do not impose on directors to disclose information except where directors' duties are owed to the company if they are responsible for a potential breach of their duties or where their personal interest conflicts with their duties to the company.

Statutory provisions need to be enacted which require directors to disclose information and specific details concerning the company's affairs. This will enable shareholders to monitor the management and control of the company. This is of vital value to shareholders who are not involved in the management of the company. These shareholders may otherwise have no means of access to information regarding the management of the company.

Reply to Question 11:

Yes. Minority shareholders should be permitted to enforce their rights via derivative action against majority shareholders for irregularities in the company especially when such irregularities can be ratified by a majority of shareholders present and voting at a general meeting. Therefore, ratification on the action by the necessary majority in a general meeting should not preclude a member from pursuing a derivative action. The shareholders who are most likely to be prejudiced in such a situation would be the minority shareholders.

The law at present would appear to allow the wrongdoers to exercise their voting

rights as shareholders to ratify their wrong. Where errant directors are able to exercise or influence the exercise of sufficient votes at a general meeting to obtain a ratification of the breach, minority shareholders would be left in a disadvantaged position.

Reply to Question 12:

Yes. In addition, the current provision under section 65(1) of the Companies Act 1965 where the variation of class rights may be challenged by the holders of not less than 10 per cent of the issued shares of that class should also be retained. This will allow the dissenting holders (being persons who did not consent to or vote in favour of the resolution to vary the rights) to apply to the Court to have the variation cancelled.

In the interest of maintaining a proper balance of power between members, a decision to vary class rights must be taken in the best interests of the class as a whole. The general rule is that rights of one class of shareholders should not be altered by another class.

Reply to Question 13:

Yes. The new procedure should apply regardless of whether or not there is a modification of rights clause in the company's Memorandum and Articles. This will prevent companies from denying holders from their statutory right to challenge the variation.

Provisions dealing with the internal allocation of powers between the board and shareholders are to be set out exclusively in the Articles of Association. Particulars of class rights not contained in the memorandum or articles should be registered so that this will only apply to a variation of class rights.

Reply to Question 14:

The Companies Act 1965 does not define what constitute class rights and what would amount to a variation of class rights. As between shareholders in a company, there is a presumption of equality so that they will enjoy equal rights in respect of voting and dividends when the company is a going concern and a right to participate in any surplus assets in the event of it being wound up. This presumption is rebutted if the company issues shares carrying different class rights.

Yes, the statutory procedure should be applicable irrespective of whether or not the company has issued more than one type of shares. In the case of companies without share capital, it should be applicable to different classes of membership in the company.

Reply to Question 15:

Yes. The variation of class rights should be retained as it will facilitate companies in the event they wish to undertake a capital structure reorganization.

The proposed procedures on variation of class rights should be adequate to protect the interest of the holders of all classes concerned and ensure that the class rights cannot be varied without their consent. By this way, the rights of shareholders are given wide ranging protection.

Reply to Question 16:

Yes. This is also consistent with Rule 7.15 of the Listing Requirements of Bursa Malaysia Securities Berhad where such provision is required to be included in the listed issuer's Articles of Association. Such shares may not be redeemed unless they are fully paid and the terms of redemption must provide for payment on redemption.

	<p>Reply to Question 17: Yes. This will protect the existing shareholders from arbitrary changes or a variation of their rights. This proposed provision will be an added safeguard to minority shareholders, as they will be made aware of the rights attached to the new shares and at the same time their class rights cannot be varied without obtaining the necessary members' consent.</p> <p>The issue of all new shares includes rights issue, bonus issue, acquisition issue to satisfy consideration for acquisition of assets or interests, direct issue to members of the public and private placement with rights in the same class ranked pari passu.</p> <p>Reply to Question 18: One of the reliefs that the Courts may grant in cases of "oppression" under Section 181 of the Companies Act 1965 is that the Court order may provide for the purchase of the minority shareholder's shares by the other members or by the company itself. This is essentially a buy-out remedy for minority shareholders.</p> <p>Therefore, we are of the view that the introduction of a statutory minority buy-out right may not be effective as it may be a duplication of an existing provision.</p> <p>Reply to Question 19: The issue of what constitutes a fair price to the shareholders for the company to buy out his shares will be a challenge, and may lead to litigation if both parties cannot come to an agreement. The intention to include an exit right clause in the Articles to reduce reliance on Court process is commendable, but however, the issue of fair valuation can be a complex procedure.</p> <p>Reply to Question 20: We are of the view that inclusion of a specific provision for class action under the Companies Act may not be necessary in view of the proposed introduction of a statutory derivative action available to minority shareholders. Civil procedure rules should be further clarified and simplified to facilitate the aggrieved minority shareholders to bring a representative action to the High Court.</p> <p>Reply to Question 21: We welcome the inclusion of a statutory provision in the company legislation that allows shareholders or the relevant regulatory authorities to make an application to Court to seek an injunction to halt or prevent breaches of the law. This will speed up and give greater protection to minority shareholders to safeguard their interests as well as save costs of minority shareholders if the relevant regulatory body acts on their behalf.</p>
Tay & Partners	<p>Reply to Question 1: (I) – FORMER MEMBER AS A CONSEQUENCE OF OPPRESSION</p> <p>a) Presumably the question is meant to refer to an alleged oppression as the fact of oppression remains to be determined at the point locus standi is challenged. That is to say, it is sufficient to establish that a causal nexus exists between the act complained of (whether oppressive or not) to the ceasing of membership. Otherwise a prima facie determination of oppression at that stage would have to be done.</p> <p>b) Is it relevant under what conditions the member ceases to be a member? Generally, one cannot force the member to dispose of his shareholding against his will. (Exceptions may include perhaps by a "selective" capital reduction and / or scheme or arrangement but these would normally be the subject of approval by the Court.) He might have done so under some misconception or he may have</p>

done so at a price which he is now not satisfied with – that is to say, he makes a bad bargain. Should he have recourse? One could argue that he has elected to cease to be a member by disposing his shares and should not.

- c) A related question is how long ago must he have been a member? If 5 years after the act, he complains that it is unfairly prejudicial and caused him loss (and the effect of the oppression if proved is continuing as the CLRC proposes), is it actionable? Should the locus standi be determined by general laws in relation to limitation? This would be 6 years or longer under certain conditions. If he has ceased to be a member for 5 years, should the Company not be allowed to proceed with business?
- d) Is the position different if he discovers a fact not previously known to him which then enables him to recognize that the act was unfairly prejudicial to him in effect (as opposed to merely prejudicial)? Should his failure to recognize an act which has an unfairly prejudicial effect upon him affect the Company. The Company would have laid plans and made investments which could now be jeopardized.
- e) One possible answer may lie in asking the question whose fault was it for not recognizing the unfairly prejudicial effect? Could he have discovered it with due diligence? If he could have, perhaps no action is available. If he could not have, perhaps action may be brought.
- f) That may be well and good in cases where the fact causing the prejudice to be unfair could be discovered with due diligence. What about the scenario where, after having transferred his shares and ceasing to be a member, subsequent corporate exercises are undertaken by the Company which leads him to understand that the act now complained of which seemed innocuous previously was part of an greater exercise over time to cause him to transfer his shares.
- g) In these circumstances when (as in how long ago) he ceased to be a shareholder may be relevant. Especially, if the effect of the unfairly prejudicial act is continuing? Should it be governed by general limitation laws (6 years or more) or a special cut off period is to be provided for?
- h) A balance has to be struck between enabling a Company to do its business by majority rule versus protecting individual shareholders who may have transferred his shares. It ought to be recognized that some of these shareholders may be disgruntled as a consequence of being defeated by a majority and may seek to sue to be obstructive and / or to seek vengeance.
- i) It may be that to extend this right as proposed may have the effect that uncertainty is introduced unless clear and adequate safeguards to deal with the matters raised above are provided for.

(II) – BENEFICIAL SHAREHOLDER

- a) The traditional restriction of the action being available only to a member is because, very generally speaking, a company can only know its shareholders through its register of shareholders.
- b) Some exceptions exist in very limited scenarios and it normally hinges upon the Company's special knowledge of circumstances where a person not registered on its register of shareholders is entitled to be registered in short order – particularly where the person entitled is known to the Company.
- c) Is it envisaged that an beneficial shareholder unknown to the Company be allowed to bring an action under 181?
- d) A beneficial shareholder may hold those shares under varying conditions and purposes.
- e) Does he hold his beneficial shareholding merely as a consequence of shortness of time preventing him from registering as a member? Is it merely a procedural step which could not be completed in time?
- f) Or does he hold his beneficial shareholding over a long time as a means of hiding control of the Company behind the scenes through several proxy members and avoiding scrutiny only to surface when he deems necessary? This may especially

	<p>relevant to public companies which are not listed. Especially, in cases where a small shareholding can control a Company because the remainder shareholding is greatly dissipated amongst numerous members.</p> <p>g) It can be argued that in the former case a beneficial shareholder ought to be able to bring a 181 action but not in the latter case.</p> <p>h) It is recognized that the shadow shareholder may not need to resort to a 181 action and he may well be the oppressor upon either directing behind the scenes or surfacing and assuming control. But should he have legislative sanction to claim such right? Even if there is oppressive conduct by the controlling members, can the shadow shareholder really complain when he has previously engaged in what could be said to be unfair conduct?</p> <p>i) It is suggested that the right to bring a 181 action be extended only to the beneficial shareholder who could not register his shares due to shortness of time.</p> <p>(III) – FORMER MEMBER SIMPLICITER No. Please refer to the views expressed in relation to Question (i) above.</p> <p>Reply to Question 3:</p> <p>a) If it is meant by the question that 2 separate petitions – one under section 181 and another under section 218 – should not be filed and subsist at the same time, this is agreed insofar as it sets in motion 2 different sets of proceedings which may duplicate costs and make inefficient use of judicial time. However, it is submitted that there is no harm in allowing 1 set of proceedings to deal with the grounds under both sections. Whether this is achieved by filing 2 separate petitions or via what has been called up a rolled up petition is a separate point but generally a procedural rule should not obstruct the substantive grounds. Objections to rolled up Petition is an anachronism of English procedural rules. There is no reason why a Court should not be seized of both matters at once to save judicial time and costs provided it is able to deal with the 2 grounds conceptually separately.</p> <p>b) The fact that a similar remedy is available to both grounds of complaint should not confuse the issue. The rule that once an action under 218 is brought then no action under 181 is permissible is difficult to understand other than as a punishment for electing to bring the action under the “wrong” section and not allowing a second bite at the cherry when it may be that 181 provides a solution to the dispute. The function of 181 is to remedy oppressive actions. Function of section 218 just and equitable is to wind up the company and is normally understood in the context of its relationship to Partnership law. How do the 2 differ? If the matter is not oppressive, it may still be just and equitable to wind up for other reasons. E.g. The company cannot function without the contending shareholders getting along. But if it is not just and equitable to wind up, can it still be oppressive? It can but it does not mean that the Company must be wound up as the Company may still be able to function. In those circumstances other remedies under section 181 may be administered to enable the Company to function but at the same time to compensate the aggrieved member via other remedies available under 181. (Some commentators suggest that historically the practice in England had been that the Company should be wound up if oppression is found, but other remedies should applied if the oppressed petitioners themselves would suffer adversely from its winding up.)</p>
Maybank	<p>Reply to Question 1: Agree to (a) and (b) but not (c).</p> <p>Reply to Question 3: Agree as to avoid multiplicity of proceedings.</p>

Reply to Question 4:

Yes since incidents of breaches of duties and abuse of directors' powers potentially exist in private as well as public companies.

Reply to Question 5:

Yes but not extended to former members since there is no justification for former members to bring a derivative action (except in cases of oppression). This is because in the event the wrong has not been ratified, the current member can bring the action. As for regulatory authority, it is noted that Security Industry Act 1983 allows a regulator to commence a civil action on behalf of parties who have been aggrieved by conduct amounting to insider trading. The possibility to extend such right to CCM as well may want to be explored.

Reply to Question 6:

No. We are of the view that the holding company and not the members of the holding company should bring such action, particularly in the event of an action against the holding company's own subsidiary.

Reply to Question 7:

Yes, it would reduce delay since the company is given a specific period to respond.

Reply to Question 8:

Yes. However, the applicant is required to reimburse in the event he fails in the proceeding.

Reply to Question 9:

Yes.

Reply to Question 10:

Yes since it will allow the applicant to gather information for bringing an action under the statutory derivative action.

Reply to Question 11:

Yes. However it will depend on the validity of the decision made by members to ratify a wrong on the company.

Reply to Question 12:

Yes.

Reply to Question 13:

Yes.

Reply to Question 14:

It should be noted that the statutory procedure applies only where the company has issued more than one type of shares. We are of the view that the issue of whether this would be applicable to a company without share capital where it is a non profit/charitable company should reconsidered.

Reply to Question 15:

Yes.

Reply to Question 16:

Yes.

Reply to Question 17:

	<p>The variation of rights would be in respect of a dilution of the rights of existing shareholders. However, it should be noted that Paragraph 6.10 of the Listing Requirements of Bursa Malaysia Securities Berhad state that issuance of shares must not exceed 10% of the value of the listed issuer's paid-up capital.</p> <p>Reply to Question 18: Since Section 181 of the CA already provides for a minority buy-out remedy and is widely worded, we are of the view that there is no necessity to have a statutory minority buy-out right. It is also uncertain whether this would be workable in public listed companies.</p> <p>Reply to Question 19: The exit right clause in the Articles is intended to enable the minority shareholders to require the company to buy out their shares at a fair price upon certain events occurring. Thus, notwithstanding there is an exit right clause in the Articles, it is up to the company on whether to adopt the same or not and may still rely on the court to resolve the dispute. In any event, the law should state clearly that the company can buy out its own shares.</p> <p>It should be noted that Section 180(3) of Companies Act, 1965 provides for mandatory acquisition similar to the provisions in the Securities Commission Act and Malaysian Code on Takeovers & Merger.</p> <p>Reply to Question 20: We are of the view there is no necessity to introduce a provision in the companies act due to the introduction of statutory derivative action that addresses the issue of cost as well.</p> <p>Reply to Question 21: In principle, we agree but to specify major offences to avoid technical breaches in view of Section 369 of the Companies Act and to consider regulatory body and not shareholders to invoke the injunction to prevent abuse of the process.</p>
CPA Australia	<p>Reply to Question 1: In principle, we agree but to specify major offences to avoid technical breaches in view of Section 369 of the Companies Act and to consider regulatory body and not shareholders to invoke the injunction to prevent abuse of the process.</p> <p>Reply to Question 18 - 19: In principle, we agree but to specify major offences to avoid technical breaches in view of Section 369 of the Companies Act and to consider regulatory body and not shareholders to invoke the injunction to prevent abuse of the process.</p> <p>Reply to Question 21: In principle, we agree but to specify major offences to avoid technical breaches in view of Section 369 of the Companies Act and to consider regulatory body and not shareholders to invoke the injunction to prevent abuse of the process.</p>
Sunway Management Sdn Bhd	<p>Reply to Question 1:</p> <ol style="list-style-type: none"> 1. Yes. Agree that a person who is a former member but only if the oppression relates to the circumstances in which he ceased to be a member is allowed to bring an action under Section 181, so that his interest as a member can be protected.

2. Yes. Agree that a transferee of share whose membership has yet to be perfected is also be allowed to bring an action under S181 prior to his/her ownership be effected under the Act.

3. No. Former member shall not interfere with the management of the Company in order to avoid former member taking legal action for personal interest.

Reply to Question 3:

Yes, it would be confusing to file petition under both sections simultaneously and affect court proceedings.

Reply to Question 4:

Yes. Abusing of powers, misappropriation of funds, breaching of directors' fiduciary duty by the Directors/Shareholders exist in private as well as the public companies.

Reply to Question 5:

Agree.

Reply to Question 6:

Generally yes.

Rationale:-

- 1) To ensure that the Board/shareholders of the related company is on toe in managing the other related company as the financial results would ultimately affect the Group.
- 2) To deter the Board/Shareholders of a related company to make personal gain from a decision which is favorable only to the company and not to the related company.

Reply to Question 7:

Agreeable to the above.

Rationale:-

- 1) Company is allowed to decide whether to take the action by itself
- 2) Minimise the potential of being used as a delaying tactic however, shorter timeframe should be allowed for urgent cases.
- 3) Provide time for the Company to address the issue in hand and Board to remedy the situation, if necessary.

Reply to Question 8:

Yes to both.

Rationale:-

- 1) Since cost is an important consideration for minority shareholders to decide whether to initiate a cause of action, it should be made available at any stage of the proceedings.
- 2) Applicant would be required to reimburse the Company in the event that the decision was held not in favour of him. This is to prevent applicant to use statutory derivative action to manipulate share price for personal gain or in bad faith or without reasonable cause.

Reply to Question 9:

Yes.

Reply to Question 10:

Yes, this is to ensure that there is a valid case in hand.

Reply to Question 11:

Agree. Ratification should not be used as an excuse for cases already brought up to the court. The applicant can still proceed for his application.

Even though effective ratification of shareholders/Board has been obtained,

	<p>application for leave should still be permitted.</p> <p>Reply to Question 12:</p> <ul style="list-style-type: none"> • Agree • Agree. A special resolution with 75% consent for the shareholders whose rights are to be varied should be adopted. <p>Reply to Question 13: Agree.</p> <p>Reply to Question 14: Agree – should apply to all companies including company limited by guarantee without share capital. Agree – different membership may have differing rights and variation of such rights should go back to that class of membership.</p> <p>Reply to Question 15: Agree. To protect minority interest.</p> <p>Reply to Question 16: Agree.</p> <p>Reply to Question 17: Agreed. It should extended to all classes of share so that the rights of different classes of shareholders is well defined and protected.</p> <p>Reply to Question 18: The introduction of a statutory remedy for minority buy out is not necessary as such remedy is already provided in S181. Any constructive suggestion: A formula for calculation of share price at market value may be introduced.</p> <p>Reply to Question 19: Exit right clause should be made available but should state down the avenues that forms part of the exit right clause.</p> <p>Reply to Question 20: Disagree – it's no necessary to introduce a provision for class action suits within the Companies Act in view of the introduction of the statutory derivative action and the specific provision in the proposed statutory derivation action that will resolve the problem as to costs.</p> <p>Reply to Question 21: Agreed with CLRC's recommendation. Any constructive suggestion: To consider other parties for eg. Independent directors, audit committee, internal auditors, former members.</p>
ABM	<p>Reply to Question 1: Agree to (i) and (ii) <u>but not (iii) i.e. former members</u> as a former member who has ceased to be a member for reasons other than oppression, does not have any interest in the company.</p> <p>Reply to Question 3: Yes, we agreed.</p>

Reply to Question 4:

Yes.

Reply to Question 5:

Agreed that only the existing director and beneficial owners who are entitled to be registered as members and their registration are pending be given the standing to bring a statutory derivation action.

Former members, former directors and regulatory authorities do not have any interest in the company and therefore should not be given such standing.

Reply to Question 6:

The statutory derivation action should not be extended to the cause of action in a related company. We are of the view that the holding company should bring the action and not the members of the holding company as this will be against the very fundamentals of separate legal entity and may also increase the potential for legal suits.

Reply to Question 7:

Yes. This is a reasonable time frame for the company to address the issues raised by the applicant.

Reply to Question 8:

Yes to both questions.

Reply to Question 9:

Yes.

Reply to Question 10:

Agreed in principle subject to compliance with all other existing legislations and contractual to maintain confidentiality of information.

Reply to Question 11:

Yes.

Reply to Question 12:

Yes to both bullet points.

Reply to Question 13:

Yes.

Reply to Question 14:

Yes, to both because one type of shares can be divided into different classes.

Reply to Question 15:

Yes.

Reply to Question 16:

Yes, it will provide clarity to the parties.

Reply to Question 17:

No, we disagreed.

Reply to Question 18:

We agreed with the recommendation made by CLRC that there is no necessity to introduce a statutory remedy for minority buy-out.

	<p>Reply to Question 19: We are of the view that the Articles could be used as and when deemed fit by the shareholders.</p> <p>Reply to Question 20: Agreed with the CLRC's recommendation that there is no necessity to introduce a provision for class action under the Companies Act.</p> <p>Reply to Question 21: We are of the view that it would not be necessary to include a statutory injunction in the company legislation as without the said provision, shareholders or the relevant regulatory body could still make an application to Court to seek an injunction.</p>
Kadir, Andri & partners	<p>Reply to Question 1:</p> <p>i. We agree. As lucidly explained by Gopal Sri Ram JCA (in delivering the decision of the Federal Court) in the case of <i>Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor</i>¹, it would not be right for a company which by its own action had deprived the petitioner of membership to then assert his lack of standing to move a petition under section 181 of the Companies Act 1965 (the "Act") for it does not lie in the mouth of the alleged wrongdoers to say that the appellant has no ground to stand on after having cut the very ground from under his feet". The court further added that a person who is guilty of unconscionable or inequitable conduct will not be permitted to raise or rely upon the requirement of membership in order to defeat a petitioner's standing as this would amount to him using statute as an engine of fraud. In view of such findings by the Federal Court, we are in agreement with the recommendation that a person who is a former member should also be allowed to bring an action under section 181 if the oppression relates to the circumstances in which he ceased to be a member.</p> <p>This must however be approached carefully. Frequently, we deal with schemes whereby all shareholders except one will lose their shares, but will be adequately compensated. There is enough time between the "act" to expropriate, e.g. in <i>Gambotto</i>, and taking proceedings to injunct such an "act". If the "act" is fraudulent, e.g. forging the "transferor's" signature on transfer forms, this may come within s. 181. We should not have a situation where it is too easy for any shareholder to take pot shots at a scheme or a capital reduction.</p> <p>ii. Yes, we agree that as a general principle, a transferee of shares or a person entitled to them by operation of law whose membership has yet to be perfected should not be precluded from bringing an action under section 181. notwithstanding, we are of the view that the provision if amended should not be worded as a "general permission" but that the CLRC should consider confining the circumstances in which this may apply to specific circumstances where membership has not yet been perfected due to circumstances beyond the control of the transferee. In our considered opinion, if the non-perfection of the membership is deliberately brought upon, or caused by, or otherwise contributed to, by such person entitled by operation of law to be a member, we do not see why that person should then be allowed to bring an action under section 181 (against the company) when the fact that the person in question is not yet a member could very well be a result of a conscious and deliberate act of that person.</p> <p>iii. We agree that a former member should also be allowed to bring an action under section 181 but only in limited circumstances, that is, if the oppression relates to the circumstances in which he ceased to be a member.</p>

¹ [1996] 1 MLJ 113

Reply to Question 3:

We agree that the views expressed by the CLRC in paragraph 1.29 of the Consultative Document in that the current practice of filing a winding up petition under section 218 and section 181 concurrently should not be encouraged in order to avoid multiplicity of proceedings which might be used to pressure respondents into a settlement and which consequently, is in our view an abuse of the Court's process.

The current rules of procedure should be robust enough to deal with the situation of a multiplicity of proceedings and abuse of process.

Reply to Question 4:

We concur with this recommendation. As per the views expressed by the various law reform committees in other jurisdictions, codification of the derivative action would in our view be advantageous as it would go some way towards removing the present uncertainty in common law derivative actions as well as providing a more effective avenue for actions to be brought against recalcitrant directors and in relation to other wrongdoings committed in relation to the company. This, we feel, would be beneficial to all companies (public and private) and we see no reason for confining this remedy to particular types of companies.

We also agree with the CLRC on its recommendation that the criteria for allowing the application of a statutory derivative action should comprise of the following:

- The company does not intend to bring an action;
- The applicant acts in good faith;
- It is in the best interest of the company that the applicant be granted leave; and
- There is a serious question to be tried.

Reply to Question 5:

Because of the diverse circumstances in which a statutory derivative action may be brought about, it is difficult to list exhaustively which party should be given the standing to bring such an action. For this reason, we do not agree that the scope of persons to be given the right to bring a statutory derivative action should be restrictively confined. In this regard, we agree with the Australian's Companies and Securities Law Review Committee's view that the status of the person in respect of the company should not be the main consideration when determining this question, but rather, whether or not it is appropriate in those circumstances for the applicant to be given the *locus standi* to sue. This question, we feel, would best be determined by the courts and in this respect, we recommend that the scope of persons to be given the standing to bring a statutory derivative action (in addition to the existing members of the company) be expended to include "any other person who at the discretion of the court is deemed a 'proper person' (reference can be made to the wordings of the present Canadian legislation – Section 239 as set out in paragraph 2.26 of the Consultative Document) in order to afford more flexibility and to avoid laying down too exhaustive a list which would in our view be counter productive.

Notwithstanding the aforesaid, we do note the concerns expressed by ALI on expending the *locus standi* to other persons other than existing members of the company. We agree with incorporating the safeguards as recommended by ALI as highlighted in paragraph 2.22 of the Consultative Document. We also agree that former members should not be permitted to bring derivative actions for the reasons pointed out in paragraph 2.23 of the Consultative Document.

In relation to beneficial owners, our views are that the mere fact of one's beneficial interest should not be the sole determinant in relation to *locus standi*. As discussed

² [1897] AC 22

³ *Ibid*, at p 391

in our response to Question 1(ii) above, we do not see why a beneficial owner should be accorded the automatic right to bring a statutory derivative action (i.e. an action brought on behalf of the company) when the beneficial owner may have by choice chosen to remain only that at his own volition.

As for directors and/or former directors, we do not have any cogent reasons against the accordance of *locus standi* for their benefit.

Reply to Question 6:

In our opinion, the principle expounded in *Salomon v Salomon & Co Ltd*² applies without distinction in such situation. An individual company should be viewed as a legal entity by itself. We also subscribe to the view that in cases involving the acts of holding and subsidiary companies, the acts of the holding company should not automatically be viewed as synonymous with the subsidiary company even if the latter is wholly owned. Consequently, the acts of persons who are common directors of the holding and subsidiary companies are not in law the acts of both the holding and subsidiary companies and it follows that there should not be an “automatic” right accorded to a member in a holding company to bring an action on behalf of a related company where the cause of action arose in the related company given that both the holding and the related company are in fact two separate distinct legal entities. Notwithstanding this general principle, if on the other hand it can be demonstrated that there is sufficient nexus between those two companies which relate to the cause of action in question this would in our view shift the balance in favour of the grant of this right. As such, the determination of such a matter should in our view rest squarely as part of the exercise of judicial discretion and not an “automatic” right.

Reply to Question 7:

We agree with the recommendation of the CLRC on this matter. First, we hold the view that having a specified time frame for the applicant to give a notice of the intention to bring a statutory derivative action to the company would be better than not stating any precise time period as this removes any uncertainty in relation to the time frame.

In addition, we also agree that the 28-day time frame would appear to be adequate to allow a company to respond to the notice. Moreover, the words “unless the Court otherwise orders” as recommended by the CLRC to be inserted along in the provision would accord a degree of flexibility needed in circumstances where the stipulated time frame may be insufficient. A company not being able to respond in the time specified and having just cause can always apply to the Court for an extension of time.

Conversely, an applicant who is able to demonstrate to the Court that a particular matter is of great urgency and hence should not be subject to the usual procedures can seek an order from the Court to waive the requirement to give notice. This of course should not in our view be done by way of *ex parte* applications. The company should also be given an equal opportunity to be heard before the Court makes its final decision on whether or not to waive the requirement.

Reply to Question 8:

As pointed out in paragraph 2.50 of the Consultative Document, not only should the order for costs be made available at any stage of the proceedings, it should also include an order for indemnity for reasonable legal costs incurred by the complainant in connection with bringing the derivative action given that the costs of proceedings is one of the predicaments faced by minority shareholders. In view of the fact that the benefit of the action will accrue to the company if the action succeeds, it is only fair in our view that, in the absence of any other factors, the complainant should be indemnified against reasonable costs he incurs on its behalf.³ As such, we agree that the company may be ordered to pay reasonable fees incurred by the complainant in connection with bringing the derivative action at any stage of the proceedings.

We also agree with the proposal to hold the applicant liable to reimburse the company should he fail in the proceedings in view of the concerns raised on the possible abuse of this process by unscrupulous shareholders and concur with the CLRC's recommendation to incorporate safeguards, such as allowing the Court to order costs against the applicant if the suit was brought in bad faith or without reasonable cause and to refuse to make an order as to costs where the Court considers it unjust or inequitable for the company to bear those costs.

Reply to Question 9:

We agree. Please refer to our answer in Question 8 above.

Reply to Question 10:

We agree whole-heartedly with this recommendation. Limited access to information has often been highlighted from past experience as one of the setbacks faced by minority shareholders when bringing a derivative action. Such limited access inevitably curtails the applicant's chances of obtaining sufficient evidence to substantiate his case and for this reason, we agree with the CLRC's view that the orders that the Court may make should include an order giving access of information to the applicant.

There should be a balance that is struck between disclosure of information to shareholders (who traditionally have no right of access) and the need to keep directors in line.

Reply to Question 11:

We agree that ratification should not be a bar to the application for leave and in this respect a provision similar to that of Section 239 of the Australian Corporation Act 2001 (see paragraph 2.61 of the Consultative Document) may be incorporated if the provision or mechanism in relation to derivative actions is to be codified.

Reply to Question 12:

We would not suggest that variation be achieved by agreement in writing. The purpose of a meeting is to discuss and then vote. The purpose of a notice of meeting is to allow the shareholder to decide whether he should come to the meeting to voice his views about the pros and cons of the variation which other shareholders may not be aware of. If it is done purely by a notice in writing, the views of dissenting shareholders would not be heard, which may influence the decision whether to pass the resolution to vary rights.

Unless there is a good reason to suppose that the benefits of allowing a variation by procuring in writing the agreement of 75% is not outweighed by the benefits of insisting on a meeting, the procedure for variation by the agreement of 75% of shareholders in writing should not be allowed.

Reply to Question 13:

We agree that in order to simplify and rationalize the current framework for the variation of class rights, reliance should no longer be placed on the existence of a 'modification of rights' provision in the Memorandum and Articles in order for a company to vary the class rights. This will also help to solve some of the problems as raised by the CLRC in paragraphs 3.09 and 3.10 of the Consultative Document.

Reply to Question 14:

In our considered opinion, we do not subscribe to the view that the said statutory procedure should be extended to all companies in particular companies without share capital. It would in our view be wrong to extend this provision to companies without share capital (e.g. companies limited by guarantee) as ordinarily the 'modification of rights' clause should not come into play as this could potentially alter the whole substratum of the company in question if at all this is to be considered it should be

nothing less than unanimity.

As far companies with a single class of share capital, we are of the view that any modification of rights can be effected under the proposed statutory procedure on the basis that the modification of the said right will affect the class as a whole and not be used as a means to create “new” or “preferential” rights which would only apply to or benefit certain shareholders (e.g. majority shareholders).

Reply to Question 15:

We agree that section 65(6) should be retained.

Reply to Question 16:

Preference Shares not stated to be redeemable on the terms of its issue cannot be redeemed. Their “redemption” will be an unauthorized reduction of capital and therefore, should automatically be a variation of rights of existing preference shareholders.

Reply to Question 17:

It is not necessary to have a sledgehammer approach to deem all new issue of shares a variation of class rights. The traditional understanding of whether a right is varied is whether the terms constituting the contract between the shareholders inter-se and with the company has been varied. A straight issue of shares has always been viewed not to vary rights but it may affect the enjoyment by the shareholder of his rights – e.g. lesser dividends. This may be an oppressive act which can be made the subject of s. 181 petitions where the purpose is to dilute the voting power of other shareholders.

Reply to Question 18:

We agree that the existence of the provisions in section 181 do adequately address this issue and there is no necessity for the introduction of a statutory minority buy-out right.

Not all people who come together to form companies may wish a buyout as an automatic remedy. Some may prefer winding up. Some may want a capital reduction to cancel the shares of the other party. There should be an economic and strategic rationale to all of these decisions which the law should not intervene so quickly and assume that a buyout is preferred.

Reply to Question 19:

This should be encouraged as it would provide a reasonable degree of certainty in respect of the manner in which a minority shareholder may exit the company.

Typically, more sophisticated business ventures would provide an exit-right clause. The buyout price can typically be by a cost plus formula, some other formula, by valuation conducted by an agreed valuer.

Reply to Question 20:

We agree that there is no necessity to introduce statutory provisions for class actions.

Reply to Question 21:

In principle, this is something that ought to be introduced but we are of the view that care needs to be taken in the formulation of the ambit and scope of the statutory provision.

<p>Lee Hishammuddin Allen & Gledhill</p>	<p>Reply to Question 1:</p> <p>1.1 The word “member” is defined in section 16(6)⁴ to include the subscribers to the memorandum, and “every other person who agrees to become a member of a company and whose name is entered in its register of members”. A company’s register of members is <i>prima facie</i> evidence of any matters inserted therein as required or authorized by the Act.⁵</p> <p>1.2 As section 181 stands now, it is possible for persons under sub-paragraphs (i) and (ii) to maintain an action under the section. In respect of sub-paragraph (i), the law is illustrated in <i>Owen Sim Liang Khui v Piasau Jaya Sdn Bhd</i>.⁶ In that case, the Federal Court held that the word “member” for the purpose of section 181, was not confined to those persons mentioned in section 16(6). For sub-paragraph (ii), the High Court in <i>Dr. Leela Ratos v Anthony Ratos Domingos Ratos</i>⁷ held that a beneficial shareholder of a company has <i>locus standi</i> to present a petition under section 181, provided that the legal owner was also made a party to the proceedings.</p> <p>1.3 For sub-paragraph (iii), the CLRC has cited an example from the UK Law Commission, where, a former member is induced to sell his shares at an under-value to directors, who are majority shareholders because of their wrongdoings. We share the view of the UK Law Commission that section 181 should not be extended to former members, because they have alternate remedies, such as actionable misrepresentation in a normal suit. Disputes of this nature will also normally involve a substantial dispute of facts. Section 181 may not be suitable because hearing under the section is intended to be by way of affidavit evidence.</p> <p>Reply to Question 3:</p> <p>3.1 After the Supreme Court’s decision in <i>Lai Kim Loi v Dato Lai Kim</i>⁸, it is not possible now to “roll up” a section 181 petition with a section 218 petition because the sections are governed by different court procedures.</p> <p>3.2 The practice adopted post <i>Lai Kim Loi</i>, <i>supra</i>, is to file two petitions, one under section 181 and another under section 218 separately and most of the time, simultaneously.</p> <p>3.3 The CLRC is concerned that the filing of two petitions simultaneously might be used to pressure respondents into a settlement. We feel that respondents should not feel pressured if there are no merits in the petitions. It is open to the respondents to apply to strike out the petitions under Order 18 r. 19 of the Rules of the High Court 1980 or under the inherent jurisdiction of the Court.</p> <p>3.4 There may be circumstances where a petitioner has bona fide reasons for needing to present two petitions under the different sections, as was observed in <i>Eddie Lee Kim Tak v JK Development Sdn Bhd</i>.⁹ It is further demonstrated in <i>Lyn Country Sdn Bhd v EIC Clothing Sdn Bhd</i>¹⁰ where the learned High Court judge held:</p> <p style="padding-left: 40px;">“It may well be that I might find that the petitioner had failed to make out a case of oppression in section 181 petition but that I could proceed to hold that if the second respondent had failed to honour the terms of the joint venture agreement, then the substratum of the joint venture agreement was at an end and thus consequently it would be just and equitable to wind up the first respondent under</p>
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⁴ In our Comments, references to the “Act” refer to the Companies Act 1965, and unless noted otherwise, all sectional references are to the Act.

⁵ Section 158(4)

⁶ [1996] 2 AMR 2477

⁷ [1996] 4 CLJ 33

⁸ [1989] 2 MLJ 290

⁹ [1997] 3 CLJ 894, 901

¹⁰ [1997] 4 MLJ 198

section 218(1)(i) of the Act.”

3.5 To conclude, there should not be a statutory restriction on the filing of two petitions simultaneously. As noted above, it is open to a respondent to apply to strike out the petitions if he feels that filing of the two petitions amounts an abuse of process of the court.

Reply to Question 4-11:

Our views:

4.1 We support the proposed amendments. They will bring the Act in line with legislative developments in other Commonwealth jurisdictions which have codified derivative actions. Our reservations are these:

4.2 **For Question 7**, we feel that a notice period of 28 days as proposed by CLRC is not unreasonable. However, there may be in some cases a need to file an action urgently for the purpose of obtaining, for example, a *mareva* injunction to restrain the wrongdoing directors from dissipating their assets. In such a case, we feel that the notice requirement should be waived.

4.3 **For Question 8**, a derivative action is instituted by a member on behalf of a company and for its benefit. The fruits of the litigation will go to the company if the action succeeds, it is therefore just and equitable that the plaintiff be indemnified against and paid the costs he incurs on its behalf.

4.5 We feel that the second part of Question 8 should not arise at all. In making an order to pay fees, the Court would have to be satisfied that the plaintiff has proved that requisite requirements in the way CLRC has ultimately proposed. Since a derivative action is brought for the benefit of a company, the maxim *Qui sentit commodum sentire debet et onus* applies. He who would take benefit of a venture if it succeeds ought also to bear the burden if it fails.¹¹

4.6 In respect of **Question 10**, we feel that there must be sufficient safeguards so that an application for access to information is not used as a “fishing expedition” or to embarrass the company.

4.7 For **Question 11**, we feel ratification should not be a bar to a statutory derivative action. However it may be a relevant factor for the Court to take into account when deciding the nature of order to be made.

Reply to Question 12-17:

5.1 We agree that the procedures for, and the definition of variation of class rights be provided for in the Act in line with legislative developments in other Commonwealth jurisdictions.

5.2 We note that the proposals in Question 12 are also found in articles 4 of Table A. However, if class rights are entrenched in the memorandum of association, the rights can be varied but only with the unanimous consent of that class of shareholders whose rights are to be varied. As noted by CLRC, an appropriate amendment to section 21 (1B) is needed for this purpose.

Reply to Question 18-21:

Our views

6.1 We agree with the CLRC that there is no present need to introduce a statutory buy out.

6.2 The same remedy can be obtained under section 181(2)(c). The section allows the Court to have greater flexibility in selecting the appropriate date for the

¹¹ For judicial reasoning, see *Wallersteiner v Moir* (No. 2) [1975] 1 All ER 849, 859.

¹² See, inter alia, *Guan Seng Co Sdn Bhd v Tan Hock Chan* [1990] 2 CLJ 761; *Re London School of Electronics Ltd* [1985] 3 WLR 474, 484; *Dickson Investment (Singapore) Pte Ltd* [1999] 2 SLR 129.

¹³ *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227, 229, PC.

¹⁴ *Re Saul D Harrison & Sons Plc* [1995] BCLC 14, 31, CA

valuation of the shares by taking into consideration the merits of each particular case.¹²

6.3 Whilst we agree that there must be sufficient and meaningful statutory provisions for the protection of minority interest, the law should not be over regulated so as to undermine the legitimate rights of the majority. It is an accepted rule that those who take interests in a company limited by shares have to accept majority rule.¹³ It may be necessary for the majority to take steps which may be prejudicial to some of the minority members in order to secure the further prosperity of the company or even its survival.¹⁴

Reply to Question 1:

Yes, the Institutes agree to the recommendation but only for categories (i) and (ii). A former member should not be allowed to bring an action under section 181.

Reply to Question 3:

Yes, the Institutes agree a petitioner should not be allowed to file a petition under section 218 and section 181 simultaneously.

Reply to Question 4:

Yes, the Institutes agree that the statutory derivative action should be available to all types of Companies.

Reply to Question 5:

Yes, the Institutes agree that persons other than members for example, former members, beneficial owners, directors and former directors should be given the standing to bring a statutory derivative action. However, regulatory authorities should be excluded from being given the standing to bring a statutory derivative action.

Reply to Question 6:

Yes, the Institutes agree that the statutory derivative action should be extended to the cause of action in a related company.

Reply to Question 7:

Yes, the Institutes agree that unless the Court otherwise orders, the applicant should give notice of the intention to bring a statutory derivative action to the company at least 28 days before commencement of the proceedings.

Reply to Question 8:

Yes, the Institutes agree that the company may be ordered to pay reasonable fees incurred by the complainant in connection with bringing the derivative action at any stage of the proceedings and that the applicant may be held liable to reimburse the company if he fails in the proceeding.

Reply to Question 9:

Yes, the Institutes agree that costs should include an order for indemnity and any reasonable legal fees of the proceedings.

Reply to Question 10:

Yes, the Institutes agree that the orders that the Court may make should include an order giving access of information to the applicant.

Reply to Question 11:

Yes, the Institutes agree that ratification should not be a bar to the application for leave.

Reply to Question 12:

Yes, the Institutes agree that the variation of class rights can be done (i) if written consent is obtained from at least 75 per cent of the holder of shares whose rights are to be varied; or (ii) a special resolution is passed at a separate class meeting of shareholders whose rights are to be varied.

Reply to Question 13:

Yes, the Institutes agree that the new procedure as stated above need not rely on whether there is or is not a modification of rights clause in the company's Memorandum and Articles.

Reply to Question 14:

Yes, the Institutes agree that the proposed statutory procedure as stated above be extended to all companies. However, this procedure should not be applicable for companies without share capital.

Reply to Question 15:

Yes, the Institutes agree that section 65(6) should be retained.

Reply to Question 16:

Yes, the Institutes agree that the company legislation should expressly provide that the redemption of preference shares (except for redeemable preference shares) is a variation of the rights of existing preference shareholders.

Reply to Question 17:

Yes, the Institutes agree that the company legislation should expressly provide that the issue of all new shares (and not just preference shares) is a variation of the rights of existing shareholders of the same class.

Reply to Question 18:

The Institutes are of the view that the introduction of a statutory minority buy-out right is not necessary.

Reply to Question 19:

The Institutes are of the view that the Articles providing for an exit right clause can be used to reduce the reliance on the Court process to resolve disagreements between the shareholders of a company.

Reply to Question 20:

No, the Institutes do not agree on the inclusion of a statutory provision in the company legislation to allow class/representative action by shareholders.

Reply to Question 21:

The Institutes are of the view that the recommendation has far reaching consequences as a company would be made completely "defunct" by such injunctions being ordered against a company. The Institutes are of the view that a more comprehensive review is needed particularly in regards to the appropriate remedies and safeguards that will be in place (e.g. provisions to uplift injunctions ordered pursuant to this recommendation).

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