

A Consultative Document

On Engagement with Shareholders

by the Corporate Law Reform Committee
for the Companies Commission of Malaysia



SURUHANJAYA SYARIKAT MALAYSIA
COMPANIES COMMISSION OF MALAYSIA

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COMPANY LAW
CORPORATE LAW REFORM COMMITTEE
A CONSULTATIVE DOCUMENT
ENGAGEMENT WITH SHAREHOLDERS

FEBRUARY 2006

The Corporate Law Reform Committee invites comments, by **30 April 2006** on the issues set out in this consultative document.

You are invited to send comments, together with any supporting evidence on any part of this consultation. We would be grateful if you could refer to the recommendation number(s) and/or paragraph number(s) in your feedback, preferably by email, to:

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Section A
FOREWORD

SECTION A - FOREWORD

This paper presents the views of Working Group A ('WGA') and Working Group C ('WGC') of the Corporate Law Reform Committee (CLRC). The task of the Working Groups of the CLRC in this respect involved the review of the relevant legislation, listing requirements and codes of best practice with the objective of improving the shareholder engagement process, focusing particularly on the range of issues arising from general meetings (including pre-meeting and post-meeting processes).

In line with the objectives of the Corporate Law Reform Programme to facilitate business whilst maintaining corporate accountability and responsibility, this Consultation Paper focuses on the simplification measures for companies generally and for private companies specifically in the conduct of the shareholder engagement process. This review essentially seeks to strike a proper balance between the need to:

- **Provide a framework for effective shareholder engagement; and**
- **Ensure that this framework is cost efficient, flexible and facilitative for business.**

In addressing the issues identified throughout this paper, bearing in mind the objectives of this study, four distinct modes of action were canvassed and these are identified as follows:

- **Reforms to company law.**
- **Reforms to the Listing Requirements of Bursa Malaysia Securities Berhad.**
- **Amendments to codes of conduct or industry best practices.**
- **Other relevant institutional arrangements.**

In preparing this document, the CLRC conducted benchmarking studies in relation to selected jurisdictions, namely, the United Kingdom, Australia, Singapore and Hong Kong (collectively 'the benchmarked jurisdictions'). Informal consultation was also conducted with relevant industry groups, such as the Malaysian Institute of Chartered Secretaries and Administrators (MAICSA), the Federation of Public Listed Companies (FPLC) and the Minority Shareholder Watchdog Group (MSWG).

We hope to receive views and comments on the recommendations stated in this Consultation Paper. Please reply to Nor Azimah Abdul Aziz at the Companies Commission of Malaysia (SSM) by **30 April 2006**.

Thank you

Yours truly,

Dato' K.C. Vohrah

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Corporate Law Reform Committee

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Section B
Executive Summary

SECTION B - EXECUTIVE SUMMARY

1. Background

- 1.1 This paper presents the views of Working Group A ('WGA') and Working Group C ('WGC') of the CLRC. This Consultation Paper examines issues relating to the shareholder engagement process, particularly in the area of general meetings and other avenues to facilitate shareholders engagement. Where relevant, recommendations are made for reform with a view to enable shareholders to participate more effectively in company meetings.
- 1.2 The principal issues covered include pre-meeting and post-meeting processes such as the calling of a meeting, settling the agenda, conducting the meeting and issues peculiar to extraordinary general meetings (EGM). Additionally, other avenues to facilitate shareholders engagement such as participation of institutional investors, the provision of voting services and physical infrastructure of electronic voting services are examined. The CLRC also considered the following issues : the need to statutorily prescribe the agenda of the annual general meeting (AGM) and additional information accompanying the notice of meeting, circulation of the AGM's summary minutes, regulating proxy solicitation and other avenues to facilitate shareholder engagement such as institutional investors' accountability to investing clientele, voting services and physical infrastructure of electronic proxy voting services.
- 1.3 In addressing the issues identified, four distinct modes of action were identified to effect the proposals made by the CLRC. These are:
- Reforms to company law.
 - Reforms to the Listing Requirements of Bursa Malaysia Securities Berhad.
 - Amendments to codes of conduct or industry best practices.
 - Other relevant institutional arrangements.

2. Proposals

- 2.1 The following areas of engagement with investors were examined by the CLRC and the recommendations of the CLRC are as follows:
- 2.1.1 *Holding of General Meetings* : The CLRC recommends that private companies should no longer be required to hold AGMs. However, to prevent the minority shareholders from being disadvantaged, there should be minimal or no threshold limitation imposed on the number of members who can request the calling of an AGM. The CLRC is of the view that the right to dispense with the statutory requirement to hold an AGM should not be accorded to public companies.
- 2.1.2 *Location of AGM* : The CLRC recommends the amendment of section 145A of the Companies Act 1965 to accommodate the convening of general meetings at two or more locations. However, the primary venue of the general meeting must still be in Malaysia. The CLRC also recommends that changes be made to the Companies Act 1965 to be facilitative of any technology that will also allow shareholders a reasonable opportunity to participate in the general meeting at two or more locations.
- 2.1.3 *Notice of General Meetings - Notice Period* : The CLRC recommends that the notice period for the calling of an AGM be increased from 14 days to 21 days. The CLRC also recommends that the present provisions in relation to the minimum notice periods for different types of resolutions be retained.
- 2.1.4 *Modes of Service* : The CLRC recommends that the Companies Act 1965 should be amended to allow notices of meetings to be given through electronic means of communication if shareholders agree to this.

2.1.5 *Circulation of Shareholders' Proposed Resolutions and Statements* : Under this issue, the CLRC recommends the retention of a statutory provision allowing shareholders to circulate any resolution provided that the requisitionist meets the threshold requirements and the document for circulation consists of not more than 1000 words. The CLRC also recommends that a company should not be required to give notice of any resolution or circulate any statements unless a copy of the requisition, signed by the requisitionist, is deposited not less than 4 weeks before the meeting. The company is to be responsible for any costs incurred in sending out the notice of the meeting to the members if it receives the notice in time (i.e. if it is deposited not less than 4 weeks before the meeting). However, if any copy of the requisition is lodged less than 4 weeks, it will be circulated at the shareholders' expense.

2.1.6 *The Use of Written Resolutions*:

The unanimity rule - The CLRC recommends that the unanimity rule under the written resolution procedure be replaced with a provision allowing the company to pass a written resolution by the same majority as is required for them at general meetings. Hence, shareholders with at least 5 per cent of the outstanding ordinary shares should be allowed to demand, in writing, that the company convene a general meeting as a safeguard against situations where dissenting shareholders are deprived of an opportunity to be heard.

The use of written resolutions to replace AGMs - The CLRC recommends that section 152A of the Companies Act 1965 be clarified by stating that, for private companies, matters that would ordinarily be resolved at any meeting may be resolved by a written resolution. The written resolution shall not be applied in certain circumstances i.e., dispensing with the need to hold AGMs or resolutions where special notice is required. The CLRC is of the view that the written resolution procedure should be expressly disappplied for public companies.

- 2.1.7 *Appointment of Proxies* : The CLRC is recommending the removal of categorical limitations on the types of persons who can be appointed as a proxy.
- 2.1.8 *Disclosure of Proxy Voting Information* : The CLRC recommends that the disclosure of proxy voting information should not be prescribed by the Companies Act 1965. Given the value it could offer to investors, the CLRC recommends that the issue regarding the disclosure of proxy voting information be addressed as part of a set of best practices.
- 2.1.9 *Voting In Absentia and Electronic Voting* : The CLRC recommends that the Companies Act 1965 be amended to allow for voting in *absentia*. However, this should be facilitative rather than mandatory and there should be rules and guidance for such voting procedures so as to prevent abuses from occurring.
- 2.1.10 *Voting by Show of Hands or Poll* : The CLRC recommends that voting by a show of hands should neither be prohibited by statute, nor should it be made mandatory; and where the proxy is concerned, the proxy should be allowed to vote by a show of hands.
- 2.1.11 *Bundling of Proposed Resolutions* : The CLRC recommends the adoption of the United Kingdom's position where as a matter of best practice, companies should propose separate resolutions at the AGM on substantially separate issues.
- 2.1.12 *Role of the Meeting Chair* : The CLRC recommends that there should not be any statutory formulation of the general functions and duties of the Chairman of the meeting and best practices should be formulated in guiding the conduct of the Chairman of the meeting.

2.1.13 *Extraordinary General Meeting* : The CLRC proposes that the recommendations covered under the sub-topics of *Calling a Meeting*, *Settling the Agenda* and *Conducting the Meeting* in the Consultation Paper should also apply to EGMs with the following variations:

Right of Members to Requisition the Directors to Call an EGM : The CLRC recommends that section 145 of the Companies Act 1965 be amended by dividing the current section into two distinct sections addressing the issues of the right to convene a meeting and the notice of a meeting separately. The CLRC further recommends that section 145(1) be amended to allow a single member, holding more than 10 per cent of the issued capital, to call for a meeting of the company.

3. Other Issues

3.1 In addition, the CLRC has considered and discussed the following issues and believes that the current regulatory and operational framework to be sufficient:

- The need to statutorily prescribe the agenda of the AGM and additional information accompanying the notice of meeting;
- Circulation of the AGM's summary minutes;
- Proxy solicitation; and
- Other avenues to facilitate shareholders' engagement such as institutional investors' accountability to investing clientele, voting services and physical infrastructure of electronic proxy voting services.



Section C
Engagement With Shareholders

SECTION C - ENGAGEMENT WITH SHAREHOLDERS

1. SCOPE

1.1 The principal issues covered in this paper are as follows:

- *Calling a meeting* : The issues discussed are the statutory requirements on holding an Annual General Meeting (AGM), location of the AGM, notice of AGMs, in particular the minimum notice period and modes of service.
- *Settling the agenda* : This covers the right of shareholders to require the company to circulate their proposed resolution or statement.
- *Conducting the meeting* : This section discusses key issues involving the conduct of and voting at shareholders meetings. These include proxy issues such as the appointment of proxies and limits on the statutory right of appointment and disclosure of proxy voting information. This section also examines other issues affecting the meeting process such as permitting voting in *absentia*, voting by show of hands or poll including those of the proxies', bundling of proposed resolutions and role of the Chairman of a meeting.
- *Extraordinary General Meeting (EGM)* : This section discusses key issues pertaining to the EGM, in particular the right for a sufficient body of shareholders to requisition the directors to hold an EGM and related drafting issues.

1.2 In addition to those issues, the CLRC has considered and discussed the following issues and believes that the current regulatory and operational framework in relation to the following issues is sufficient and requires no statutory provisions:

- The need to statutorily prescribe the agenda of the AGM and additional information accompanying the meeting's notice;
- Circulation of the AGM's summary minutes;
- Proxy solicitation; and
- Other avenues to facilitate shareholders' engagement including the institutional investors' accountability to its investing clientele, voting services and physical infrastructure of electronic proxy voting services.

2. CALLING A MEETING

A. Holding of General Meetings

2.1 The Companies Act 1965 recognises two types of general company meetings - the annual general meeting (AGM) and the extraordinary general meeting (EGM). Section 143 of the Companies Act 1965 requires every company to hold an AGM once every calendar year. The responsibility of convening the AGM lies with the directors. However, on application by any member, the Court may direct that an AGM be convened, if there is failure/default in holding one¹. This is an important right accorded to the members of a company in the event that the AGM is not convened according to section 143.

2.2 The Companies Act 1965 provides that certain matters need to be dealt with in an AGM:

- The laying of accounts of the company²; and
- The appointment of auditors³;

In addition, the Articles of Association of companies usually require the following to be dealt with at an AGM:

- The retirement and election of directors⁴ ; and
- The declaration of dividends⁵.

¹ Section 143(4)(b).

² Section 169(1) does not require members to approve the accounts, the laying of accounts is sufficient to satisfy this requirement.

³ Section 172(2) and (16).

⁴ Article 63, Table A.

⁵ Article 106, Table A.

- 2.3 In addition to AGMs, the Companies Act 1965 also recognises EGMs which may be held as and when required⁶. Additionally, section 145(1) of the Companies Act 1965 confers power upon shareholders to convene a general meeting if two or more members holding not less than 10 per cent of the issued share capital desire the holding of a general meeting.
- 2.4 Theoretically, the general meeting provides members of a company with the opportunity to debate amongst themselves, with the benefit of information in the annual report and accounts, and to make decisions on matters which the law, or the company's own constitution, reserve for decision by members; to hear questions put to the directors of the company; and to hold the directors, whose duty is to manage the business in the best interest of the members, to be accountable for their stewardship.
- 2.5 In the case of public companies where shares are held by shareholders who are not actively involved in the management of the company, general meetings are particularly useful for members to meet and put questions to the directors on matters relating to the running of the company. In closely held private companies where the members are also actively involved in the management of the company and where the board of directors comprises the members themselves, the formalities and procedures of general meetings as laid out by the Companies Act 1965 or the Articles of Association are often not observed and may be considered by these shareholders or directors to be unnecessarily burdensome. In these types of companies, the members have access to corporate information by virtue of their active involvement in the company's management and, as such, general meetings serve little purpose.
- 2.6 The CLRC noted that there are different approaches currently being practised in several countries in relation to the deregulation of AGMs for private companies.

⁶ Section 144 of the Companies Act 1965.

These are:

- A regime where private companies are required to hold AGMs but may elect to opt out of this requirement - this is currently the practice in the United Kingdom (UK), Singapore and Hong Kong. It is to be noted that the UK Company Law Review recommends changing the existing opt-out regime to a regime where private companies are not required to hold AGMs unless shareholders elect to do so (opt-in).
- A regime where private companies are not required to hold AGMs unless demanded by the shareholders - this is currently the practice in Australia. There is however no provision allowing public companies to dispense with the holding of AGMs.
- A regime where an AGM is mandatory and cannot be waived – this is currently the regime in Malaysia. New Zealand also makes the holding of an AGM mandatory where deregulation only applies in relation to the period within which the AGM must be held.

2.7 Nonetheless, there are concerns that there may be a need to protect the interests of minority shareholders in private companies since some members of private companies might not be involved in management. Thus, it is necessary to emphasise that any proposal to dispense with the requirement for the holding of an AGM should be coupled with an appropriate mechanism to protect the interests of minority shareholders. Such a mechanism can take the form of ensuring that individual shareholders can insist that an AGM be convened for that particular year. However, the CLRC also noted that conferring such a right to *any individual shareholder* may undermine the core deregulatory purpose of the reform.

2.8 On that basis and towards reducing the procedural cost burden, the CLRC is of the view that the Companies Act 1965 should no longer require private companies to hold an AGM. However, to prevent the minority shareholders from being disadvantaged, there should be minimal or no threshold limitation imposed on the number of members who can request for an AGM. The CLRC believes that the right to dispense with the statutory requirement to hold an AGM should not be accorded to public companies.

RECOMMENDATIONS

2.9 The CLRC recommends that:

- (a) private companies are not required to hold AGMs;
- (b) any member may request that the company convenes an AGM in a particular year.

Questions for Consultation

Question 1:

Do you agree that private companies should no longer be required to hold AGMs?

Question 2:

Do you agree that if private companies are not required to hold an AGM, individual members should be accorded the right to demand that an AGM be held in a particular year? If yes, should there be a minimal threshold either based on shareholding or the number of shareholders to request for an AGM?

B. Location of the AGM

2.10 In Malaysia, by virtue of section 145A of the Companies Act 1965, a company shall only hold a general meeting in the state where its registered office is situated⁷. At common law, a meeting has been defined as 'the coming together of at least two persons for any lawful purpose'⁸. It was held in *Byng v London Life Association Ltd*⁹ that a general meeting could take place in more than one room with adequate audio-visual links to enable everyone attending to see and hear what is going on in all the rooms being used.

⁷ The Offshore Companies Act 1990 ('OCA') provides that subject to limitations in the memorandum and Articles of Association, directors of an offshore company may convene meetings of the members in any part of the world. A member would be deemed to be present at a meeting if he participates by telephone or other electronic means where he can be heard and his voice recognised by all members participating in the meeting.

⁸ *Sharp v Dawes* (1876) 2 QBC 29.

⁹ [1989] 1 All ER 560.



- 2.11 It is anticipated that shareholder participation can be improved by removing the current geographical constraints to hold the AGM *only* in the state where the company is registered. There appears to be no reason why an AGM held at a number of locations, including overseas locations should not be recognized by law provided that there is two-way real time communication between all locations. However, it is important that the primary venue is located in Malaysia. This will ensure there is a reasonable opportunity for members' participation and the applicability of Malaysian laws.
- 2.12 In addition, it is also important to acknowledge and provide for the use of Information and Communication Technology (ICT) in company meetings. Whilst legislation should provide for the use of ICT, the law should ensure that it is technology neutral. There are also certain safeguards to be considered, particularly, in the event of downtime and breakdown in communications. For example, there could be an interactive 'virtual meeting' which may be held in no specific location; the directors' presentations would be posted on an electronic company bulletin board accessible to shareholders, and the shareholders' interventions and the directors' responses would also be posted on the bulletin board. Such a 'meeting' would probably have to remain open for several days. Such a procedure could offer even wider shareholder access, but must be balanced with the directors' accountability to shareholders and awareness of the value of face to face contact with shareholders.
- 2.13 The position in Australia is that a company may hold a meeting of its members at two or more venues using any technology that gives the members as a whole a reasonable opportunity to participate¹⁰.

¹⁰ See section 249S of the Australian Corporations Act 2001.



- 2.14 In the UK, the Company Law Review Steering Group ('CLRSG') recommends that a company should be permitted to hold a general meeting at more than one location, with two way real time communication between the participants, and that the law should if necessary make this clear. The CLRSG further recommends that detailed rules for dispersed meetings (e.g. on the type of communications and the arrangements for verifying attendance) need to be responsive to changing technology and should therefore be best left to non-statutory rules¹¹. The CLRSG proposes to include provisions for dispersed meetings in the new version of Table A for both private and public companies¹².
- 2.15 In Hong Kong, the Standing Committee on Company Law Reform (SCCLR) proposes that Hong Kong companies should be permitted to hold a general meeting at more than one location. The meeting should take place at the venue specified by the notice of the meeting, which would be regarded as the principal venue but subsidiary or satellite venues should be allowed. Additionally, it was recommended that to permit effective communication between venues, both visual and audio real time communications should be permitted by legislation¹³.
- 2.16 The CLRC recommends that changes be made to the Companies Act 1965 to facilitate the use of any technology that will allow shareholders reasonable opportunity to participate in the conduct of general meetings at two or more locations. However, the primary venue of the meeting must still be in Malaysia. Additionally, to safeguard against concerns such as downtime or breakdown in communication, operational application of these technology should be subject to best practices issued by the Companies Commission of Malaysia (CCM) or by other relevant bodies.

¹¹ UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy - Company General Meetings and Shareholders Communication - Consultation Document* URN 99/1144 (Oct 1999) para 62-63; UK Company Law Review Steering Group *Modern Company Law for a Competitive Economy, Completing the Structure-Consultation Document* URN 00/1335 (Nov 2000) Chapter 5 - Corporate Governance: Shares & Shareholders, para 5.21, UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy-Final Report* (2001), para 7.7.

¹² UK Company Law Review Steering Group *Modern Company Law for a Competitive Economy, Completing the Structure - Consultation Document* URN 00/1335 (Nov 2000) Chapter 5 - Corporate Governance: Shares & Shareholders, para 5.21.

¹³ The Corporate Governance Review by the Standing Committee on Company Law Reform, *A Consultation Paper on Recommendations made in Phase II of the Review* (June 2003).

RECOMMENDATIONS

- 2.17 The CLRC recommends that section 145A of the Companies Act 1965 be amended:
- (a) to accommodate the convening of general meetings at two or more locations. However, the primary venue of the meeting must still be in Malaysia.
 - (b) to facilitate the use of any technology that will allow shareholders reasonable opportunity to participate in meetings.

Question for Consultation

Question 3:

Do you agree that a company should be permitted to hold a general meeting at unlimited number of locations, provided that real time, two-way communication is available between participants?

C. Notice Period of General Meetings

- 2.18 Under subsection 145(2) of the Companies Act 1965, all companies are required to give at least 14 days notice (or longer, if stipulated by their Articles of Association) to all its members to convene a general meeting other than a meeting to pass a special resolution (21 days)¹⁴. For listed companies, the listing requirements stipulate that the notices shall be served at least 14 days before the meeting or at least 21 days before the meeting where any special resolution is to be proposed or where the meeting is an annual general meeting. In addition, a meeting can also be called with a shorter notice in the case of an AGM, if agreed by all members who are entitled to attend and vote or in the case of any other general meetings, if agreed to by at least 95 per cent of the shareholders¹⁵.

¹⁴ Section 152(1) of the Companies Act 1965.

¹⁵ Section 145(3) of the Companies Act 1965.



- 2.19 It has been brought to the attention of the CLRC that the current minimum notice period of 14 days for AGMs is not adequate for public companies. The Finance Committee on Corporate Governance¹⁶ recommended that the Companies Act 1965 and the Listing Requirements of Bursa Malaysia Securities Berhad be amended to extend the notice period for AGMs from 14 days to 21 days. The rationale given by the Finance Committee was that the proposed extended time is to enable nominees to obtain and submit proxy votes and assist in greater participation at such meetings. Consequently, in the case of a public listed company, the Listing Requirements of Bursa Malaysia Securities Berhad now require that all listed companies' Articles of Association contain a provision where the notice period is 21 days.
- 2.20 In Hong Kong, the minimum notice requirements under section 114(1) and section 116(1) of the Hong Kong Companies Ordinance (Cap 32) for general meetings of companies are as follows:
- In the case of an AGM, 21 days notice in writing;
 - In the case of a meeting which is neither an AGM nor a meeting for the passing of a special resolution, 14 days in writing in the case of a company other than an unlimited company and 7 days notice in writing in the case of an unlimited company; and
 - In the case of a general meeting for passing of a special resolution, 21 days notice is required.
- 2.21 In the UK, the law relating to the minimum period of notice is the same as that of Hong Kong (section 369(1) and (2) and section 378(2) of the UK Companies Act 1985). Note, however, that the UK CLRSG¹⁷ has recommended that for all general meetings (including AGMs), the minimum notice period should be retained at 14 days, taking into account the effectiveness of the use of electronic communications prior to the meeting.

¹⁶ Malaysia, Report on Corporate Governance, (February 1999), Chapter 6 at paras 2.1.7 to 2.1.11.

¹⁷ UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy - Final Report* (2001) para 7.10.



- 2.22 In Australia, at least 21 days notice must be given for a meeting of a company's members (section 249H(1) of the Australian Corporations Act 2001). In the case of listed companies, a minimum period of 28 days notice is required to be given notwithstanding anything in the company's constitution (section 249HA of the Australian Corporations Act 2001).
- 2.23 In Singapore, not less than 14 days notice is required for all meetings of a company (including AGMs) other than a meeting for the passing of a special resolution (section 177(2) of the Singapore Companies Act (Cap 50)). In the case of a general meeting, for the passing of a special resolution, 21 days' notice is required (section 184(1) of the Singapore Companies Act (Cap 50)).

RECOMMENDATIONS

- 2.24 The CLRC recommends that:
- (a) the period of notice for calling an AGM in the Companies Act 1965 be increased from 14 days to 21 days;
 - (b) the present provisions in relation to the minimum notice periods for different types of resolutions be retained; and
 - (c) section 145 be divided into two: firstly, to provide for specific procedures to the calling of meetings by members in general; and second, to provide for procedures in relation to the calling of meetings on short notice.

Question for Consultation

Question 4:

Do you agree that the minimum notice period for the AGM should be increased to 21 days?

D. Modes of Service

- 2.25 Currently, subsection 145(4) of the Companies Act 1965 states that if the Articles of the company make no provision on the service of notice calling for general meetings, the notice must be served on every member in the manner prescribed by Table A. Article 108 of Table A thereafter prescribes that a notice may be given personally or by post to the registered address or in cases where there is no registered address within Malaysia, supplied by the member to the company. Hence, members may agree to alter the company's Articles to provide other means of service of notice.
- 2.26 The question arises as to the relevance of an express statutory provision, as is currently the case in the UK or Australia that notice can be delivered by fax or by using electronic communications. An alternative is by prescribing it in Table A which will be the model Article. The alternative to revising Table A or prescribing it by statute is for companies to exercise discretion on the mode of service of notice i.e. by incorporating it in the company's constitution. Alternatively, it can also be prescribed as a matter of best practice in the Malaysian Code on Corporate Governance or the Best Practices in MAICSA guide.
- 2.27 In the UK, after the Companies Act 1985 (Electronic Communication) Order 2000 came into operation on 22 December 2000, a company may send a notice using electronic communications to such address as is notified by that person to the company for that purpose (section 369(4A) of the Companies Act 1985) or by publishing the notice on a web site in accordance with section 369(4B) of the Companies Act 1985 notwithstanding any provision to the contrary in its Articles (section 369(4E) of the Companies Act 1985).

- 2.28 In Australia, section 249J(3) of the Australian Corporations Act 2001 expressly provides that a notice of a meeting may be served on a member by sending it to the fax number or electronic address nominated by the member or by any other means that the company's constitution permits.
- 2.29 In Hong Kong, the SCCLR proposes that notices should be given personally or sent by post to shareholders unless the shareholders agree to adopt electronic means of communication. The proposal is for this requirement to be included in the main body of the Hong Kong's Companies Ordinance (Cap 32) and Table A¹⁸.
- 2.30 The CLRC recommends the adoption of the position being proposed in Hong Kong where notices should be given personally or sent by post to shareholders unless the shareholders agree to adopt electronic means of communications. This should include the use of relevant safeguards such as personal identification numbers. This would provide flexibility for companies and at the same time ensure that the right of shareholders to receive notice of an AGM is adequately protected.

RECOMMENDATION

- 2.31 The CLRC recommends that the Companies Act 1965 should state that notices of meetings should be given personally or sent by post to shareholders unless shareholders agree to adopt electronic means of communications.

Question for Consultation

Question 5:

Do you agree with the recommendation for notices to be given personally or sent by post to shareholders unless the shareholders agree to adopt electronic means of communications?

¹⁸ The Corporate Governance Review by the Standing Committee on Company Law Reform, A Consultation Paper on Recommendations made in Phase II of the Review (June 2003).

3. SETTLING THE AGENDA : CIRCULATION OF SHAREHOLDERS' PROPOSED RESOLUTIONS AND STATEMENTS

- 3.1 One of the essential elements of the corporate governance process is for shareholders to be able to communicate both with the management of the company and with each other. One method of achieving this is through the shareholder proposal process. This is reflected in the OECD Principles of Corporate Governance (2004)¹⁹, which states that shareholders should have proper opportunities to place items on the agenda at general meetings, subject to reasonable limitations.
- 3.2 Corporate law has long provided that a certain proportion of shareholders can require the company to circulate their proposed resolutions or statements. This gives them the opportunity to bring any matter to the attention of other shareholders and seek their support before they decide whether to attend the meeting to vote or how to complete their proxies. This is based upon the proposition that shareholders are entitled to have an opportunity to discuss corporate affairs in general meetings, and that this is a right and not a privilege to be accorded at the pleasure of management.
- 3.3 By allowing shareholders to propose resolutions at the expense of the company, the Companies Act 1965 will provide a shareholder with the means to enable him to communicate with the other shareholders on matters of common concern. This is because, at common law, the management of a company is under no obligation to make reference in any of the documents sent out by it to any non-management view or to include in a notice of meeting any proposals other than those of the management.

¹⁹ OECD Principles of Corporate Governance (2004) - Principle C (2), Part II- Right of Shareholders and Key Ownership Functions.



- 3.4 The Companies Act 1965 has provisions allowing a certain proportion of shareholders to require the company to circulate their proposed resolutions or statements to be considered at the company's AGM. By virtue of section 151 of the Companies Act 1965, it is the duty of a company, on the requisition in writing of a member or members representing not less than 5 per cent of the total voting rights, or 100 shareholders holding shares on which there is an average paid-up capital per member of not less than RM500 at the expense of the requisitionists:
- To give to members of the company entitled to receive notice of the next annual general meeting, notice of any proposed resolution which may properly be moved and is intended to be moved at that meeting; and
 - To circulate to members entitled to have notice of any general meeting sent to them any statement of not more than 1000 words with respect to the matter referred to in any proposed resolution or the business to be dealt with at that meeting.
- 3.5 Additionally, section 151(4)(a)(i) of the Companies Act 1965 stipulates that a company is not required to give notice of any resolution or to circulate any statements unless a copy of the requisition signed by the requisitionist is deposited not less than 6 weeks before the meeting in the case of a requisition and section 151(4)(a)(ii) of the Companies Act 1965 states that in the case of any other requisition, it should be deposited not less than one week before the meeting²⁰.
- 3.6 Review of this section raises three questions to be considered by the consultative process namely:
- The right of a sufficient body of shareholders to require directors to circulate a shareholders' proposed resolution to an AGM and to circulate a members' statement relating to any proposed resolution to any general meeting at the company's expense;

²⁰ In the UK, Australia, Singapore and Hong Kong there are provisions similar to section 151. See section 376 of the UK Companies Act 1985, section 249N of the Australian Corporations Act 2001, section 183 of the Singapore Companies Act (Cap 50) and section 115A of the Hong Kong Companies Ordinance (Cap 32).

- The timing requirements for these proposed resolutions or statements; and
 - The cost of circulating the proposal.
- 3.7 It is important to consider that in enabling a sufficient body of shareholders to do so, the approach must strike a balance between the right of shareholders to put forward proposed resolutions and supporting statements and the need to avoid spending time and money circulating, and having shareholders subsequently consider, proposals that may lack any substantial value to the company.
- 3.8 The timing for the proposal to be deposited with the company before the company is required to circulate the proposal is also relevant to ensure that the section achieves its purpose of enabling shareholders to propose any resolution for a meeting as well as to circulate their views about any proposed resolution or business to be dealt with at the meeting.
- 3.9 The cost requirement at the expense of the requisitioner has also been described as a significant barrier to shareholders exercising their rights to put forward proposed resolutions, thereby deterring shareholders from expressing their views and discouraging debate within the company.
- 3.10 In Hong Kong, the UK and Singapore, it is the requisitionists who bear the costs of circulating the notices of shareholders' proposed resolutions or statements²¹. However, in Australia, it is the company, which is responsible for the cost if the company receives the notice in time to send it out to members with the notice of meeting²². Under the Australian Corporations Act 2001, there is no time frame for the proposal to be deposited with the company although there is a requirement for the proposal to be considered at a meeting which is held more than 2 months after the notice is given.

²¹ Section 115A(1) of the Hong Kong Companies Ordinance (Cap 32), section 376(1) of the UK Companies Act 1985 and section 183(1) of the Singapore Companies Act (Cap 50).

²² Sections 249O(3) and (4) of the Australian Corporations Act 2001.



- 3.11 The current proposal in the UK is specific to public listed companies. Such shareholders will have a right within a 15-day holding period after the accounts become available to propose a resolution to be moved at the general meeting where the accounts are laid (usually the AGM). Such resolutions would be circulated at the company's expense²³.
- 3.12 In Hong Kong, the proposal is that shareholders' proposed resolutions and related information should be circulated at the expense of the company if they were received by the company one month after the notification of intention to hold the AGM or two weeks before the anticipated date of dispatch of the AGM notice. However, the requisitioner must meet the threshold requirements and ensure that the document for circulation consists of not more than 1000 words²⁴.
- 3.13 The CLRC is of the view that there should be a statutory provision allowing shareholders to circulate any resolution provided that the requisitioner meets the threshold requirements and the document for circulation consists of not more than 1000 words. However, the time frame of 6 weeks period should be amended to 4 weeks. This means that the company does not have to circulate the proposal if the resolution is deposited with the company less than 4 weeks before the meeting. If however, the time frame is complied with, the company will have to bear the expenses of circulating the shareholders' proposal. Any copy of the requisition lodged less than 4 weeks will have to be circulated at the shareholders' expense. However, given the diverging views on the exact time period, CLRC would like to seek consultative feedback on the appropriate time period.

²³ Company Law Reform White Paper, March 2005, Chapter 3 'Enhancing Shareholder Engagement and a Long-Term Investment Culture', page 17.

²⁴ The Corporate Governance Review by the Standing Committee on Company Law Reform, A Consultation Paper on Recommendations made in Phase II of the Review (June 2003).

RECOMMENDATIONS

3.14 The CLRC recommends:

- (a) The retention of a statutory provision allowing shareholders to circulate any resolution provided that the requisitionist meets the threshold requirements and the document for circulation consists of not more than 1000 words²⁵;
- (b) That a company is not required to give notice of any resolution or to circulate any statements unless a copy of the requisition signed by the requisitionist is deposited not less than 4 weeks before the meeting;
- (c) The company is responsible for any costs in sending out the notice of the meeting to the members if the company receives the notice in time (if it is deposited not less than 4 weeks before the meeting). However, any copy of the requisition lodged less than 4 weeks will have to be circulated at the shareholders' expense.

Questions for Consultation

Question 6:

Do you agree that a company is not required to give notice of any resolution or to circulate any statements unless a copy of the requisition signed by the requisitionist is deposited not less than 4 weeks before the meeting?

Question 7:

Do you agree that the company is responsible for the cost if the company receives the notice in time (if it is deposited not less than 4 weeks before the meeting) to send it out to members with the notice of meeting?

²⁵ Section 151(1) of the Companies Act 1965.



4. THE USE OF WRITTEN RESOLUTIONS

A. The Unanimity Rule

- 4.1 Section 152A of the Companies Act 1965 allows the passing of a resolution in writing signed by all members who are entitled to attend and vote at the meeting to be deemed as duly passed at a general meeting of a company. This procedure can be applied to pass resolutions which would otherwise be required to be passed as ordinary or special resolutions, as the case may be. Decisions can only be taken by this procedure where they are passed unanimously. In addition, section 152A is not limited to private companies. However, because of the requirement for unanimous members' approval, it is often used by private companies.
- 4.2 Written resolutions are a convenient way for companies with a small number of members to make decisions without the need to convene a general meeting. In practice, private companies usually make decisions using the written resolutions procedure as this is more practical and expeditious. However, due to the requirement to obtain unanimous members' approval, any single member can prevent the passing of a resolution. Thus, the efficacy of the written resolution procedure for private companies may be easily undermined due to the unanimity rule. The unanimity rule in the written resolution procedure enables a dissident minority shareholder to inhibit decision making in cases where there is no prospect of blocking the resolution at a general meeting. However, dispensing with unanimity can be taken as trying to make decisions without the opposing or dissenting views being heard.
- 4.3 The ability of members to discuss the proposals requiring decisions to be made is not available when a company utilises the written resolution procedure as compared to the situation if a meeting is formally held. The removal of the unanimous consent rule, arguably, reduces members' protection and democracy. At a meeting, a member can argue his case and try to persuade opinions of other members. Even if not successful, his views were made, heard and recorded.

- 4.4 On this point, the Steering Committee of the UK Company Law Review stated that it is possible to allow companies to use the written resolution procedure to pass any resolutions required to be passed at a meeting and to pass the written resolution by the same majority as required for them at a meeting (i.e. special resolutions could be passed with a 75 per cent majority and an ordinary resolution by a simple majority). The UK Steering Committee also proposed that written resolutions be allowed without unanimity but on a basis of a high percentage - for example, 90 per cent. Further, the UK Steering Committee proposed that all shareholders entitled to vote must be given notice of the proposed written resolution. This would allow dissenting shareholders to try to convince others not to sign the resolution and this would also prevent a resolution being passed by a majority shareholder without the knowledge of other shareholders²⁶.
- 4.5 Where the unanimity rule is concerned, Singapore and New Zealand do not require unanimous consent and in fact allow the company to pass the written resolution by the same majority as required for them at meetings (i.e. special resolutions could be passed with a 75 per cent majority and an ordinary resolution by a simple majority, or if the Articles require a greater majority, by that majority).
- 4.6 The Singapore CLRFC recommended that as a safeguard against situations where dissenting shareholders are deprived of an opportunity to be heard and to put questions to the board and management, shareholders with at least 5 per cent of the outstanding ordinary shares be allowed to demand in writing that the company convene a general meeting²⁷.

²⁶ UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy - Final Report* (2001) para 7.12.

²⁷ Company Legislation and Regulatory Framework Committee Final Report (October 2002), Chapter 1, para 6.4.6.



RECOMMENDATIONS

- 4.7 The CLRC recommends that:
- (a) the unanimity rule under the written resolution procedure be replaced with a provision allowing the company to pass a written resolution by the same majority as required for them at general meetings.
 - (b) shareholders with at least 5 per cent of the outstanding ordinary shares are allowed to demand in writing that the company convene a general meeting as a safeguard against situations where dissenting shareholders are deprived of the opportunity to be heard.

Questions for Consultation

Question 8:

Do you agree that companies may pass a written resolution by a lesser majority than unanimity i.e., by the same majority as required for the resolution at general meetings?

Question 9:

Do you agree that shareholders with at least 5 per cent of the ordinary shares are allowed to demand in writing that the company convene a general meeting as a safeguard against situations where dissenting shareholders are deprived of an opportunity to be heard?

B. The use of written resolution to replace annual general meeting

- 4.9 Apart from the unanimity rule, section 152A of the Companies Act 1965 has caused uncertainty as to whether or not a written resolution may be used by a private company to replace an AGM.
- 4.10 There have been instances where a written resolution under section 152A has been conveniently interpreted by some private companies to allow a company to dispense with the convening of an AGM on the assumption that if a written resolution may replace a formally held meeting, then it is also capable of being used to dispense with the AGM.

- 4.11 The CLRC noted that this is also a similar problem faced by other jurisdictions like the UK, where due to the complexity of the elective regime it is not clear whether a written resolution may be used to replace the holding of the AGM. The Hong Kong²⁸ company legislation on the other hand contains an express provision that an AGM need not be held if resolutions are carried through the written procedure.
- 4.12 The CLRC believes that section 152A of the Companies Act 1965 cannot be used to dispense the AGM since section 143 specifically requires an AGM to be held once every calendar year. Neither section 152A nor section 143 contain the equivalent of the Singapore and Hong Kong provisions that allow companies to dispense with the requirement of holding a physical meeting in lieu of written resolutions. However, because of the tentative recommendation of the CLRC that private companies are not required to hold AGMs, the requirement to hold AGMs should only be limited to public companies. Hence, sections 143 and 152A (with modification) should be clarified to reflect this recommendation. Furthermore, there is no issue as to whether or not the written resolution procedure may replace the AGM for private companies simply because the proposal is that an AGM is not required for private companies. Nonetheless, in such cases, the CLRC is of the view there is merit in clarifying that in the case of private companies, matters that would ordinarily be resolved at any meetings may be resolved by a written resolution. However, since public companies are still required to hold an AGM, the CLRC recommends that the written resolution procedures should be expressly excluded in the case of public companies.

²⁸ Sections 111 and 116B of the Hong Kong Companies Ordinance allow companies not to hold an AGM with the passing of resolutions by unanimous consent of members of a company.

4.13 The CLRC also noted the view in other jurisdictions that the use of a written resolution cannot be applied in certain circumstances. For instance, in Singapore, written resolution shall not apply to resolutions in regard to dispensing with the need to hold annual general meetings or resolutions where special notice is required²⁹.

C. Cross Jurisdictional Study

United Kingdom

4.14 Recognising the fact that most private companies are owner managed and have a less formal internal governance structure, the UK in 1989 introduced the right of private companies to dispense with the holding of AGMs³⁰. At the same time, deregulatory measures in the form of an elective regime were also introduced where private companies were given the right to elect by unanimous resolution to dispense with certain statutory requirements³¹. These include the dispensation of the duration of authority to issue shares³², the laying of accounts and reports before a general meeting³³, the majority needed to consent to short notice of meetings³⁴ and the annual appointment of auditors³⁵.

4.15 Private companies intending to exercise the elective resolutions must do so by convening a general meeting³⁶ to pass each elective resolution. Elective resolutions can be revoked by an ordinary resolution and will cease to have any effect if a private company converts to a public company.

²⁹ Section 184A(1) of the Companies Act (Cap 50).

³⁰ Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication (URN 99/1144) - October 1999 para 18. See section 366A of the Companies Act 1985.

³¹ Section 379A of the Companies Act 1985.

³² Section 80A of the Companies Act 1985.

³³ Section 252 of the Companies Act 1985.

³⁴ Sections 369(4) and 378(3) of the Companies Act 1985.

³⁵ Section 386 of the Companies Act 1985.

³⁶ A general meeting with a 21-day notice period must be given. The notice must specify that an elective resolution is being passed. Each elective resolution must be voted and passed separately.

- 4.16 Although private companies are allowed to dispense with the requirement to hold an AGM, there is still a general provision requiring all companies to hold an AGM in each calendar year as stated in section 366(1) of the Companies Act 1985. At the same time, private companies are also allowed to make decisions through written resolutions³⁷. However, due to the complexity in applying the elective regime, it is not clear whether a written resolution can replace an AGM.
- 4.17 The UK Steering Committee of the Company Law Review recognised the merits of the elective regime but at the same time acknowledged the complexity in its application. The UK Steering Committee recommended that the elective resolution regime be retained with adaptations. Instead of making it an opt-out choice as is found in the existing law, it is proposed that all private companies are not required to hold an AGM (and the other situations for which an elective resolution apply) unless the shareholders by elective resolution opt-in to the regime. The UK Steering Committee also recommended that individual shareholders have the right to insist on the holding of an AGM in any one year, to insist on the laying of accounts and to demand a meeting to propose the removal of the auditors be maintained³⁸. However, in response to this proposal, the UK Government responded that conferring such rights to individual shareholders would have serious disadvantages³⁹. The UK Government was of the view that if a single dissenting member can demand the holding of an AGM, this will undermine the core principle of introducing deregulatory measures and will add a layer of complexity to the provisions. It was also felt that the proposal does not sit well with the proposed default regime where private companies are not required to hold an AGM unless they decide to hold one.

³⁷ Section 381A of the Companies Act 1985 states 'Anything which in the case of a private company may be done -

(a) by resolution of the company in general meeting, or
(b) by resolution of a meeting of a class of members of the company,

may be done, without a meeting and without any previous notice being required, by resolution in writing signed by or on behalf of all the members of the company who at the date of the resolution would be entitled to attend and vote at such meeting.

³⁸ UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy-Final Report* (2001) para 2.19.

³⁹ The UK *White Paper Part II - Modernising Company Law : The Government Policy*, para 2.12.

Australia

- 4.18 The Corporations Act 2001 does not require proprietary companies to hold an AGM and instead provides for shareholders' written resolution in lieu of a meeting⁴⁰. The doctrine of unanimous consent in passing a written resolution is still applicable in Australia. To safeguard the interests of minority shareholders, the directors of a company must call and arrange to hold a general meeting on the request of members with at least 5 per cent of the votes that may be cast at the general meeting; or at least 100 members who are entitled to vote at the general meeting⁴¹. Since a proprietary company does not have to hold an AGM, the issue of whether a written resolution can replace an AGM does not arise.

New Zealand

- 4.19 Section 120 of the New Zealand Companies Act 1993 requires the directors of a company to hold an AGM not later than 15 months after the previous AGM. In addition, exempt companies may, if all shareholders agree, hold an AGM not later than 10 months after the company's balance date⁴².
- 4.20 Section 122(4) of the New Zealand Companies Act 1993 allows shareholders' written resolutions to replace an AGM⁴³ by stating that it is not necessary for a company to hold an annual meeting for shareholders if everything required to be done at that meeting (by resolution or otherwise) is done by resolution. Except for a written resolution to appoint an auditor where all members are required to sign the resolution, all other resolutions requires 75 per cent or more of the shareholders to pass a resolution⁴⁴. To ensure that all members are given notice of the resolutions that have been passed, the company is also required to send a copy of the resolution within five working days of it being passed to shareholders who did not sign the resolution.

⁴⁰ Section 249A(2) of the Corporations Act 2001 states 'A company may pass a resolution without a general meeting being held if all the members entitled to vote on the resolution sign a document containing a statement that they are in favour of the resolution set out in the document. Each member of a joint membership must sign.'

⁴¹ Section 249D(1) of the Corporations Act 2001.

⁴² Section 7(1) of the Financial Reporting Act 1993, New Zealand states that the term 'balance date' in relation to an entity, means the close of the 31st day of March or of such other date as the directors of the entity adopt as the entity's balance date.

⁴³ Section 120(1) of the Companies Act 1993.

⁴⁴ Section 122(2) and (3) of the Companies Act 1993.

Singapore

- 4.21 Despite the general provision requiring all companies to hold an AGM at least once a year or not more than 15 months after the holding of the last preceding AGM⁴⁵, the Singapore Companies Act (Cap 50) allows private companies to dispense with the holding of an AGM⁴⁶. If a resolution dispensing with an AGM is passed, matters which would ordinarily be dealt with at an AGM will be dealt with *via* a resolution passed by written means instead⁴⁷. Notwithstanding the passing of the resolution to dispense with the holding of an AGM, a member may request that the AGM be held in that year by notice to the company not later than 3 months before the end of that year⁴⁸.
- 4.22 Private companies are also allowed to make decisions through written resolutions⁴⁹ and there is no need for unanimous consent⁵⁰. However, written resolutions cannot be used for resolutions to dispense with the holding of an AGM or where a special notice is required⁵¹. The written resolution can only be passed if the directors have sought the agreement of members who have the right to vote on the resolution⁵². Alternatively, a requisition for that resolution must have first been given in accordance with section 183⁵³. The company must inform the members that the resolution has been passed through the written resolutions procedures⁵⁴ and record of it must be made in the company's books in the same way that minutes of proceedings of a company's general meeting is kept⁵⁵.

⁴⁵ Section 175 of the Companies Act (Cap 50).

⁴⁶ Section 175A of the Companies Act (Cap 50) provides that a resolution be passed in a general meeting by all members entitled to vote or by their proxy.

⁴⁷ Section 175A(10) of the Companies Act (Cap 50).

⁴⁸ Section 175A(4) of the Companies Act (Cap 50).

⁴⁹ Section 184(F) provides for the procedures how a written resolution may be passed.

⁵⁰ Section 184A of the Companies Act (Cap 50). In the case of special resolutions, the voting percentage by way of a written resolution is 75 per cent of the shareholders or a greater majority if required by the Articles of the company. In the case of ordinary resolutions, approval of a majority of the shareholders is sufficient to pass a resolution or by a greater majority if required by the Articles.

⁵¹ Section 184A(2) of the Companies Act (Cap 50).

⁵² Sections 184B(1)(a) and 184C of the Companies Act (Cap 50).

⁵³ Sections 184B(1)(b) and 183 of the Companies Act (Cap 50).

⁵⁴ Section 184E of the Companies Act (Cap 50).

⁵⁵ Section 184F of the Companies Act (Cap 50).

RECOMMENDATIONS

4.23 The CLRC recommends that:

- (a) section 152A of the Companies Act 1965 be clarified by stating that for private companies, matters that would ordinarily be resolved at any meetings may be resolved by written resolution;
- (b) the written resolution procedure shall not be applied in certain circumstances i.e., dispensing with the need to hold annual general meetings or resolutions where special notice is required; and
- (c) the written resolution procedure should be expressly excluded for public companies.

Questions for Consultation

Question 10:

Do you agree that section 152A of the Companies Act 1965 be clarified by stating that for private companies, matters that would ordinarily be resolved at any meetings may be resolved by written resolution?

Question 11:

Do you agree that the written resolution procedure shall not be applied in certain circumstances i.e., dispensing with the need to hold annual general meetings or resolutions where special notice is required?

Question 12:

Do you agree that the written resolution procedure should be expressly excluded for public companies?

5. CONDUCTING THE MEETING

A. Appointment of Proxies

- 5.1 Shareholders may wish to exercise their participation rights in circumstances where they do not want to attend a shareholders meeting themselves. The traditional method by which these shareholders may participate is by appointing a proxy to attend the meeting. In general, a proxy has the same right as a shareholder to speak at a meeting but he is not entitled to vote except on poll unless permitted by the Articles (section 149(1)(a) of the Companies Act 1965).
- 5.2 The issue here is that section 149(1)(b) of the Companies Act 1965 imposes a categorical limitation to the types of persons who can be appointed as proxies namely an advocate, an approved company auditor or a person approved by the Registrar. The existence of section 149(1)(b) tends to limit the freedom of choice on the part of the shareholders to appoint persons who are not members as their proxies to only the categories specified.
- 5.3 Frequently, the Articles of Association confer an express right in favour of shareholders to appoint non-members as a proxy holder without any qualification as to the status of the proposed appointee. The question then is whether an appointment of a non-member pursuant to such express right is valid if that non-member is outside the category of persons specified under section 149(1)(b).
- 5.4 It was held in *Tan Guan Eng @ Tan Guan Sooi v BH Low Holdings Bhd & Ors*⁵⁶ that even if the Articles allow for the appointment of non-members as proxies, the appointees must nonetheless belong to the category of person allowed under section 149(1)(b).

⁵⁶ [1991] 3 CLJ 1873.



The effect of this decision is that the parallel powers of appointment of non-members to be proxies, one as prescribed by the Articles and the other under the statute does not exist. However, legislative history⁵⁷ indicates that the statutory provisions were enacted to enable shareholders to appoint proxies in view of the absence of such right under common law, and also to curb undue restrictions (such as a proxy must be a member) in the Articles of Association. As such, the statutory provisions were enacted not to diminish the freedom of contract but only to strike down unfair provisions by laying down minimum standards and conferring rights in the absence of any in the Articles. It is therefore respectfully suggested that if the Articles of Association confer a right upon members to appoint a non-member as a proxy holder and it is more favourable relative to those laid down in the Companies Act 1965 in that it does not specify the appointee's qualification, the limitations of section 149(1)(b) should not be read into the Articles to restrict the operation of an appointment made under the Articles.

- 5.5 The view that parallel powers of appointment co-exist is supported by the decision in *Industrial Equity Ltd v New Redhead Estate & Coal Co Ltd*⁵⁸. Additionally, the two decisions in *Aris bin Mohamed v Thosan Holdings Sdn Bhd*⁵⁹ and *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors*⁶⁰ provide that if the provisions of the of the Articles run contrary to the minimum standards laid down in section 149(1)(b) (for instance if the Articles provide that a proxy must be a member), the Articles would be struck down and the source of power to appoint proxies on the part of shareholders then clearly resides in the statute and the appointee must be a qualified person within the meaning of the provision. Conversely, if lesser standards are imposed under the Articles, the Articles should prevail.

⁵⁷ Cheang, L.S., *Corporate Powers: Controls, Remedies and Decision-making*, Malayan Law Journal Sdn Bhd, 1996.

⁵⁸ (1969) 1 NSW 565.

⁵⁹ (Unreported)(Originating Summons No 31-890 of 1988) Johor Bahru High Court.

⁶⁰ (1992) 2 MLJ 10.

5.6 It can be argued that by removing the categorical limitations on the types of persons who can be appointed as a proxy, it will have the desired effect of encouraging shareholders to vote and hence improve their participation. However, this might affect the calibre of the person appointed as a proxy as they will no longer be required to be professionals such as an advocate or a company auditor. There are views that the categorical limitations serve to ensure that only qualified professionals with a good understanding of the mechanics of a company may be appointed as a proxy. This will ensure that the proxy appointed would be someone who understands his role and would be able to discharge his duties as a proxy professionally, ethically and in accordance with the law. Nevertheless, the CLRC notes that categorical limitations are not generally imposed in Australia⁶¹, Hong Kong⁶², Singapore⁶³ and the United Kingdom⁶⁴. The CLRC is of the view that the current categorical limitations on the types of persons who can be appointed as proxy is too restrictive and should be removed from the Companies Act 1965.

RECOMMENDATION

5.7 The CLRC recommends that the Companies Act 1965 should be amended to allow any person to be appointed as proxy.

Question for Consultation

Question 13:

Do you agree with the proposal for categorical limitations on the types of persons who can be appointed as proxy to be removed from the Companies Act 1965?

⁶¹ Section 249X(1) of the Australian Corporations Act 2001.

⁶² Section 114C of the Hong Kong Companies Ordinance (Cap 32).

⁶³ Section 181 of the Singapore Companies Act (Cap 50).

⁶⁴ Section 372(1) of the UK Companies Act 1985.

B. Disclosure of Proxy Voting Information

- 5.8 Currently, the Companies Act 1965 does not regulate who should have access to the lodged proxies or information about the overall trend of proxy voting before a meeting. However, paragraph 4.79 of the Malaysian Code on Corporate Governance stipulates that companies are to count all proxies lodged with them and to disclose the information prior to the meeting.
- 5.9 One issue for deliberation is whether the Companies Act 1965 should specify that information about lodged proxies should be made available for publication prior to the meeting and if so, whom it should be made available to.
- 5.10 On the question whether information about lodged proxies should be made available for publication prior to the meeting, the first view is to prohibit the disclosure of the proxy figures in advance of the meeting. Prior disclosure of proxy figures may foreclose any debate and may also prevent directors from hearing shareholders' views. Any disclosure may also be misleading, given that shareholders who have appointed a proxy may nevertheless attend and vote in person, even contrary to the instructions originally given to their proxies. Various proxies might decide to abstain from voting on a poll in light of the debate, thereby rendering the figures inaccurate.
- 5.11 The second view is to require disclosure in advance of the meeting. This could expedite the meeting by overcoming unnecessarily prolonged debate where the outcome is clearly settled by the lodged proxies.
- 5.12 One option would be to give any shareholder a right to inspect the lodged proxy documents prior to the meeting. Shareholders might wish to exercise that inspection right, particularly for contested issues, where directors have elected not to disclose the information publicly.

- 5.13 This option might encourage transparency and equal access to proxy information. However, it could also increase administrative costs and permit shareholders to ascertain how individuals, prior to the meeting, have directed their proxies to vote, thereby raising privacy issues, given that some shareholders consider that voting on company issues should be confidential. It may also result in shareholders not lodging their proxies until the last moment. These problems might be reduced if directors and shareholders access were limited to a summary of proxy votes rather than having access to the original lodged proxies, though some observers could still deduce from the timing or size of any summary disclosure how particular large shareholders had instructed their proxies to vote. There will also be issues in determining who should be responsible for receiving and collating proxy votes and the timing of the disclosure.
- 5.14 Another option would be for the Companies Act 1965 to require that a person independent of the board of directors be responsible for receiving and collating proxy votes, solely for the purpose of checking and tallying them prior to the meeting and giving the chair a report for use at the meeting. Otherwise, proxy details should remain confidential prior to the meeting. The independent person could also be required to retain proxy voting forms following the meeting for a period to be stipulated in the legislation.
- 5.15 This option would eliminate the current access that directors, but not shareholders, generally have to information concerning proxy voting by shareholders. One view is that, directors should not have access to this information as the information is not directly related to the function of managing the company, given that it concerns matters within the powers of the shareholders, not the directors. In some instances, the directors could use their current powers to obtain proxy voting information that is not publicly available to solicit votes or otherwise to try to influence the outcome of shareholders' proposed resolutions by publishing a progressive tally of proxy voting directions.

- 5.16 In Australia, at a meeting of any company that is subject to the Replaceable Rules⁶⁵, the chair must disclose before any vote is taken whether any proxy votes have been received and how they are to be cast (section 250J(1A) of the Australian Corporations Act 2001). Further, all the Australian public listed companies must record in their minutes of meeting details of voting on any proposed resolutions decided by a show of hands or on a poll (section 251AA of the Australian Corporations Act 2001).
- 5.17 In the UK, the disclosure of proxy voting information is regulated as a matter of best practice. The Hampel Committee recommended that a resume of discussion at the meeting be prepared indicating the voting figures on any poll or a proxy count where no poll was called and that this resume should be sent to the members only upon request.
- 5.18 In Hong Kong, the SCCLR proposes that there should be a requirement for the Chairman of the meeting to disclose the number of proxies held by the Chairman or any other director and the voting instructions (if any) thereunder to the meeting before the vote. If the proxy was a general proxy with no voting instructions, the way the Chairman intended to use that proxy to vote should also be disclosed⁶⁶.

RECOMMENDATION

- 5.19 The CLRC recommends that the disclosure of proxy voting information should not be prescribed by the Companies Act 1965. However, given the potential value of voting information to the investors, the CLRC recommends that the issue of disclosure of proxy voting information be addressed as part of a set of best practices.

⁶⁵ A table of replaceable rules can be found in section 141, Australian Corporations Act 2001. The table indicates the subject of the rule and the relevant section of the Act that covers each rule. The content of each of those sections in the Act applies as the replaceable rule. Under section 135(1), replaceable rules do not apply to a proprietary company where the same person is both its sole director and sole shareholder.

⁶⁶ The Corporate Governance Review by the Standing Committee on Company Law Reform, A Consultation Paper on Recommendations made in Phase II of the Review, June 2003.

Question for Consultation

Question 14:

Should the disclosure of proxy voting details prior at the general meeting be prescribed?

C. Voting In Absentia and Electronic Voting

- 5.20 The underlying issue is to decide whether the Companies Act 1965 should expressly permit direct absentee voting at a meeting. This basically means incorporating a provision in the Companies Act 1965 to enable a shareholder, if he wishes, to vote by electronic means or through post.
- 5.21 The argument for direct absentee voting is that its directness and simplicity would encourage or assist shareholders' participation in the voting process. From the point of view of retail investors (who dominate the Malaysian investing landscape), who may be dispersed all over the country, direct absentee voting is a cheaper and more efficient method of enabling shareholders to exercise their right to vote. This argument takes on greater force in the context of institutional investors especially foreign institutional investors. Direct absentee voting empowers them to take on a greater role in the company's affairs. It should be noted that, equal effect should be given to both direct absentee voting and voting in person.
- 5.22 However, there are differing views on whether the shareholders should automatically have that right or whether it should be reserved at the company's discretion. There are also arguments which refer to the potential of having unresolved technical difficulties in authenticating the identity of persons using electronic voting and hence the integrity of the voting system as a whole. There is also opposition to direct absentee voting, arguing that it may detract from the significance of a physical meeting as a forum for discussion and debate by the shareholders.

- 5.23 The Finance Committee Report on Corporate Governance in 1999 recommended that the Companies Act 1965 should allow for voting by mail (a form of direct absentee voting). They recommended that the provision be supplemented with provisions mandating reasonable notice periods and sufficient disclosure of information to give shareholders an opportunity to decide how they should vote.
- 5.24 A cross-jurisdictional study showed that in all the jurisdictions, there is no legislation which expressly permits postal voting or electronic voting though the issue is currently under consideration by the law reformers. Those supporting postal or electronic voting submit that the shareholders should be encouraged to participate effectively and vote in shareholders' general meetings through the use of modern technology. It is noted that in New Zealand, legislation expressly recognises postal voting, in that a shareholder may cast a postal vote on all or any of the matters to be voted on at a general meeting by sending a notice at least 48 hours before the meeting.
- 5.25 In the UK, the CLRSG recommends that the new legislation should permit members of the company to vote electronically and that the Standards Committee should develop non-statutory rules or guidance for voting procedures⁶⁷. Additionally, in the UK, electronic voting services are already provided for by CREST and facilitated by the Electronics Communications Act.
- 5.26 In Australia, the Companies and Securities Advisory Committee (CASAC) favours any form of voting that would assist shareholder participation in corporate decision-making. The CASAC recommends that the Corporations Act 2001 should permit directors of a listed public company to provide for direct absentee voting, subject to any restriction in the company's constitution⁶⁸.

⁶⁷ UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy - Final Report* (2001) para 7.11.

⁶⁸ Companies and Securities Advisory Committee - *Shareholder Participation in the Modern Listed Public Company* (Final Report) June 2003, Recommendation 20, page 74.

- 5.27 In Singapore, there is no express prohibition in the Companies Act (Cap 50) on *absentia* voting. Hence, voting by telephonic, electronic or other modes of *absentia* voting would be possible where specifically provided for in the Articles of Associations (see paragraphs 15 and 15.1 of the Code of Corporate Governance).
- 5.28 The proposal in Hong Kong is that absentee voting should be permitted. Absentee voting by post should be done before and not after the meeting, as signatures have to be verified. Postal votes should reach the company during the same period as for lodging of proxy forms. The SCCLR also proposed that electronic voting should be permitted and that there should be rules and guidance for such voting procedures (e.g. authentication, security and the precedence between votes received electronically or by post). It was recommended that the Hong Kong Companies Ordinance (Cap 32) be amended to enable rather than compel electronic voting while the Listing Rules should encourage such voting⁶⁹.
- 5.29 It is generally believed that the Companies Act 1965 should favour any form of voting that would assist shareholder participation in corporate decision-making. Postal or electronic voting may be more attractive to certain shareholders than proxy voting as the shareholders feel their decisions are conveyed directly to the company rather than through a proxy who may vote against his wishes. It should also give directors the choice to provide for direct absentee voting, subject to any restrictions in the company's constitution. This discretion would allow companies to introduce electronic voting if and when the board is satisfied that there is adequate technology for the verification of votes which includes *inter alia* the authentication of shareholders' identity.

⁶⁹ The Corporate Governance Review by the Standing Committee on Company Law Reform, A Consultation Paper on Recommendations made in Phase II of the Review, June 2003.

5.30 There is also the issue of how to deal with attempts by shareholders to change their absentee votes, for instance, by seeking to override a postal vote by a subsequent contrary electronic vote, which is received first by the company. The CLRC's view is that the first absentee vote recorded by the person collating the absentee vote should be the valid vote, with no option for shareholders to change that vote. This pragmatic solution, would overcome the difficulty which companies otherwise having to deal with absentee vote changes that could unduly complicate the direct absentee voting system and discourage its use by companies and shareholders.

RECOMMENDATION

5.31 The CLRC recommends for the Companies Act 1965 to be amended to enable for voting in *absentia*. However, this should be facilitative rather than mandatory and there should be rules and guidance for such voting procedures to prevent abuse.

Question for Consultation

Question 15:

Should the Companies Act 1965 expressly permit direct absentee voting at a meeting?

D. Voting By Show of Hands or Poll

5.32 A show of hands has long been recognized as a method of voting at company meetings. It is informal and expeditious. However, it may not represent the true voting position of the company's shareholders, given that it ignores the number of shares held by each voting shareholder or proxy. The question is whether this form of voting should be limited or abolished.

- 5.33 However, voting can also be conducted by a poll. In Malaysia, Article 51 of Table A states that at any AGM, a proposed resolution put to the vote at a meeting shall be decided on a show of hands unless a poll is demanded by specific categories of persons. In the case of listed companies, the Listing Requirements expressly requires for the Articles to provide that a proxy shall be entitled to vote on a show of hands on any question at any general meeting.
- 5.34 Voting by show of hands has the merit of enabling uncontroversial proposed resolutions to be disposed of quickly, and the right of the Chairman on the one hand and a relatively small number of members on the other hand to demand for a poll is a safeguard against a decision being taken against the wish of holders of the majority of shares.
- 5.35 But given the unrepresentative nature of the attendance at AGMs of large companies, voting by show of hands seems anomalous. The case for retaining voting by show of hands is weakest for public listed companies. It has also been argued that voting by poll only would best ensure full transparency of voting and effective enfranchisement of all shareholders, including those who have lodged proxies.
- 5.36 Additionally, section 149(1)(a) provides that a proxy is not entitled to vote except on a poll. The reason behind the legislative intention to exclude the right of proxies to vote on a show of hands is to facilitate the process of expeditious conduct of meetings, particularly meetings of companies with a large number of shareholders. However, the directory provision in section 149(1)(a) is rarely put to use because the Articles commonly provide for proxies to vote on a show of hands whether the company is a private or public company. In fact, paragraph 7.20 of the Listing Requirements of Bursa Malaysia Securities Berhad makes it mandatory that Articles of public listed companies entitle proxies to vote on a show of hands.

- 5.37 In all the benchmarked jurisdictions, unless otherwise provided in a company's Articles, a proposed resolution put to the vote at any general meeting shall be decided on a show of hands unless a poll is (before or on the declaration of the result of the show of hands) effectively demanded⁷⁰.
- 5.38 In the UK, the CLRSG considered the disadvantages of voting by show of hands. Although voting by a show of hands has the merit of enabling uncontroversial proposed resolutions to be disposed of quickly, given the unrepresentative nature of the attendance at general meetings of large companies, voting by show of hands seems anomalous, particularly so if Table A applies, and proxies have no vote⁷¹. The CLRSG does not propose to rule out voting by show of hands by statute. However, it proposes to consider further the case for a regulatory rule requiring listed companies to proceed directly to a poll on any business likely, on the basis of proxies lodged, to prove contentious, and, perhaps, guidance requiring the Chairman to call a poll where he has reason to believe that it would yield a different result from the show of hands⁷².
- 5.39 The CASAC notes the argument of some respondents that voting by show of hands should be discontinued, particularly on any contentious matter, given that it is uncertain whether it represents the true view of shareholders. The CASAC, however, supports retaining voting by show of hands as a method of dealing with non-contentious matters expeditiously and inexpensively⁷³. The CASAC also notes that a recent UK report has also taken the same view⁷⁴. It has been recommended by the CASAC that there should be no legislative prohibition on voting by show of hands. Furthermore, there should be no codification of the common law duty of the chair to demand a poll where the chair holds proxies, which may overturn the decision on a show of hands⁷⁵. There is, however, no specific proposal in Hong Kong and the SCCLR is seeking feedback in further consultation⁷⁶.

⁷⁰ See Reg. 60 Table A of the Hong Kong Companies Ordinance (Cap 32), Reg. 46 Table A of the UK Companies Act 1985, sections 250J(1) & 250L of the Australian Corporations Act 2001 and Reg. 51 Table A of the Singapore Companies Act (Cap 50).

⁷¹ Modern Company Law for a Competitive Economy: Developing the Framework (URN 00/656) - March 2000, para 4.46, page 99.

⁷² Modern Company Law for a Competitive Economy: Developing the Framework (URN 00/656) - March 2000, para 4.48, page 99.

⁷³ Companies and Securities Advisory Committee - Shareholder Participation in the Modern Listed Public Company (Final Report), para 4.108, page 68.

⁷⁴ Modern Company Law for a Competitive Economy: Developing the Framework (URN 00/656) - (March 2000) para 4.48 page 99.

⁷⁵ Companies and Securities Advisory Committee - Shareholder Participation in the Modern Listed Public Company (Final Report) para 4.109 p.68.

⁷⁶ The Corporate Governance Review by the Standing Committee on Company Law Reform, A Consultation Paper on Recommendations made in Phase II of the Review, June 2003.

RECOMMENDATIONS

5.40 The CLRC recommends that:

- (a) voting by a show of hands should not be prohibited by statute, but neither should it be made mandatory;
- (b) where proxy voting is concerned, the proxy should be allowed to vote by show of hands.

Questions for Consultation

Question 16:

What are your views, on whether the law should require decisions on all business at the AGM of a company to be taken by poll i.e. one share one vote, thus abolishing voting by show of hands?

Question 17:

In the event that the current law on voting by hand is maintained, should voting by show of hands be expressly allowed for proxies? What would be your rationale?

E. Bundling of Proposed Resolutions

5.41 With the exception of section 126 of the Companies Act 1965 on the need for appointments of directors to be voted on individually, there are no express⁷⁷ restrictions under the law on the practice of bundling proposed resolutions.

⁷⁷ Though by implication, the listing requirements prohibit the bundling of resolution approving recurrent related party transaction of a revenue nature.

Additionally, there are no best practices related to the practice highlighted by the Malaysian Code on Corporate Governance or Best Practices in the MAICSA Guide. However, industry experiences indicate that there is a tendency for public companies to bundle related proposed resolutions together. A view often taken is that proposed resolutions that are bundled together may restrict opportunity to debate particular component parts of the proposed resolution. Furthermore, the CLRC believes that bundling could result in the 'hiding' of important details peculiar to contentious proposed resolutions.

- 5.42 Examples of how the practice of bundling can lead to abuses include the bundling of resolution to appoint directors with the approval of remuneration for the directors; amending the Articles to provide for the issuance of preference shares and at the same time propose for the approval of allocation to specified parties; and combining the main business of approving the demerger of a company and the approval of a new long-term incentive scheme for directors of the demerged company⁷⁸.
- 5.43 There are several policy options to be considered pertaining to the bundling of proposed resolutions. The first one is to allow the practice of bundling except for the appointment of directors to be voted separately under section 126 of the Companies Act 1965 (i.e. maintaining the current application of the law). Proponents of this policy would argue that the current set of laws are adequate and that the fiduciary duty owed by directors to the shareholders under common law would be adequate protection and provide recourse in the event of an abuse by bundling of proposed resolutions.

⁷⁸ The demerger of Selfridges Store from Sears in 1997. *Hampel* specifically cites long-term incentive plans as an area where shareholder approval should be sought.

- 5.44 The other option is to expressly prohibit the practice of bundling. The rationale is that this will prevent the practice of proposed resolution bundling to deprive shareholders of their decision making powers in particular their right to vote on each matter of business separately. However, there are questions of practicality as well to be considered such as the efficiency of the meeting in particular the timing length. As such, due consideration should also be given to generic categories of proposed resolutions that can be bundled together (for instance recurrent related party transaction incidental to the business of the company).
- 5.45 The practice of 'bundling' has been criticised in the UK (see the Hampel Report paragraph 5.17). The Best Practices in the UK recommends that companies propose a separate resolution at the AGM on each substantially separate issue. Included in this are separate votes on the report and accounts and the declaration of the dividend.
- 5.46 In Australia, the Australian Stock Exchange (ASX) Corporate Governance Council guidelines states that companies should avoid the bundling of proposed resolutions in the notice of meeting unless proposed resolutions are interdependent and aligned so as to form one significant proposal.

RECOMMENDATION

- 5.47 The CLRC recommends the adoption of the UK's position where at the AGM as a matter of best practice, companies should propose separate resolutions for substantially separate issues.

Question for Consultation

Question 18:

Do you agree with the view that the prohibition of the practice of 'bundling' is to be governed by best practices? Alternatively, do you think that we should allow it within the current regulatory framework? How would you justify your choice?

F. Role of the Meeting Chair

- 5.48 The chair of a shareholder meeting has very wide discretion about how to perform the role. The issue is whether the Companies Act 1965 or, alternatively, codes of best practices such as the Best Practices in the MAICSA Guide should set out a statement of functions and duties of the chair.
- 5.49 The role of the Chairman of a meeting is essential in ensuring the flow of information and transparency. Thus, it is crucial for the consultative feedback process to consider whether the functions and duties of the Chairman would require further clarification.
- 5.50 The role of the Chairman is governed by common law⁷⁹. These include duties such as 'ascertaining the sense of a meeting on any proposed resolution properly coming before the meeting'⁸⁰, including by demanding a poll where necessary for that purpose⁸¹.
- 5.51 The Companies Act 1965 Table A stipulates the role of a Chairman *vis-à-vis* proceedings at general meetings. Additionally, the explanatory note to the Malaysian Code on Corporate Governance also specifically provides guidance on the role and responsibilities of the Chairman of the meeting.
- 5.52 The Chairman of a shareholders' meeting has very wide discretion on how to perform the role. The legislation in all the benchmarked jurisdictions contains similar provisions as to the general powers and obligations of the Chairman, for example:
- (a) to determine objections to a person's right to vote⁸²;
 - (b) to declare the results of a vote on a show of hands⁸³;

⁷⁹ See *National Dwellings Society v Sykes* [1894] 3 Ch 159; *John v Rees* [1969] 2 All ER 274; *Re Indian Zoedone Co.* (1884) 26 ChD 70.

⁸⁰ *Re Bomac Batten Ltd & Pozhke* (1984) 1 DLR (4d) 435.

⁸¹ *Second Consolidated Trust Limited v Ceylon Amalgamated Tea and Rubber Estates Limited* (1943) 2 All ER 567.

⁸² Reg. 68 Table A of the Hong Kong Companies Ordinance (Cap 32), Reg. 58 Table A of the UK Companies Act 1985, section 250G(RR) of the Australian Corporations Act 2001 and Reg. 58 Table A of the Singapore Companies Act (Cap 50).

⁸³ Reg. 60 Table A of the Hong Kong Companies Ordinance (Cap 32), Reg. 47 Table A of the UK Companies Act 1985, Section 250J(2)(RR) of the Australian Corporations Act 2001 and Reg. 51 Table A of the Singapore Companies Act (Cap 50).

- (c) to demand a poll⁸⁴;
- (d) to determine when and how to conduct a poll⁸⁵; and
- (e) to adjourn the meeting⁸⁶.

5.53 An overview of the position in Australia would also indicate that there is no general statutory formulation of the functions and duties of the chair of a meeting of a public company. However, section 250S of the Australian Corporations Act 2001 makes clear that the Chairman of the AGM must allow reasonable opportunity for the members as a whole at the meeting to ask questions about or make comments on the management of the company. The CASAC has also discussed whether there should be a general formulation of the functions and duties of the chair of a meeting⁸⁷. The CASAC believes that its necessarily broad language would make it unsuitable for legislation or could create considerable difficulties or uncertainties in its interpretation⁸⁸ and, therefore, recommends that there should be no statutory formulation of the functions and duties of the chair of a meeting of a listed public company⁸⁹.

5.54 The proposal in Hong Kong is that a clarification of the role of the Chairman would prove beneficial. However, the general formulation of functions and duties of the Chairman is recommended for inclusion in the Listing Rules and not the Companies Ordinance⁹⁰.

⁸⁴ Section 114D(1)(a) of the Hong Kong Companies Ordinance (Cap 32), Reg. 46 Table A of the UK Companies Act 1985, section 250L(1)(c) of the Australian Corporations Act 2001.

⁸⁵ Reg. 63 Table A of the Hong Kong Companies Ordinance (Cap 32), Reg. 51 Table A of the UK Companies Act 1985, section 250M(1)(RR) of the Australian Companies Act 2001 and Reg. 52 Table A of the Singapore Companies Act (Cap 50).

⁸⁶ Reg. 59 Table A of the Hong Kong Companies Ordinance (Cap 32), Reg. 45 Table A of the UK Companies Act 1985, section 249U(4)(RR) of the Australian Corporations Act 2001 and Reg. 50 Table A of the Singapore Companies Act (Cap 50).

⁸⁷ Companies and Securities Advisory Committee - Shareholder Participation in the Modern Listed Public Company (Final Report) Issue 25, page 80.

⁸⁸ Companies and Securities Advisory Committee - Shareholder Participation in the Modern Listed Public Company (Final Report), para 4.159, page 81.

⁸⁹ Companies and Securities Advisory Committee - Shareholder Participation in the Modern Listed Public Company (Final Report) Recommendation 25, page 82.

⁹⁰ The Corporate Governance Review by the Standing Committee on Company Law Reform, A Consultation Paper on Recommendations made in Phase II of the Review, June 2003.

- 5.55 Meanwhile in the UK, it is proposed that codification of the functions and duties of the Chairman of a meeting is not necessary⁹¹. The revised UK Combined Code however, specifically stipulates that the Chairman should arrange for the Chairmen of the audit, remuneration and nomination committees to be available to answer questions at the AGM and for all directors to attend.
- 5.56 One option for ensuring better consistency and providing general guidance is to incorporate a general formulation of the Chairman's duties in the Companies Act 1965. This should *inter alia* cover duties such as facilitating the business of the general meeting and to ensure that an expression of the true will of the shareholders present and represented is obtained on all matters. Additionally, the Chairman of a meeting should administer the meeting fairly to ensure that the persons present have a reasonable opportunity to debate those matters. However, the Chairman must not at any time allow procedures and formalities to prejudice the attainment of the meeting's objectives.
- 5.57 An alternative approach would be to include a general formulation in the Best Practices in the MAICSA Guide or to expand the Malaysian Code on Corporate Governance.
- 5.58 On the contrary, there are counter arguments that oppose any formulation to appear especially in the Companies Act 1965. These include the fact that the current law is operating well in practice. Also, a chair would risk considerable adverse publicity if he or she were to conduct a meeting in a manner which could in any way be said to prejudice the rights of minority shareholders or which is procedurally unfair. Additionally, the way the chair conducts the meeting will often depend on the nature and mood of the meeting and the personality of the Chairman. These are not matters that can be legislated. The necessarily broad language to formulate the functions and duties of the Chairman would make it unsuitable for legislation or could create considerable difficulties or uncertainties in its interpretation.

⁹¹ Modern Company Law for a Competitive Economy: Developing the Framework (URN 00/656) - (March 2000) para 4.62, page103.



5.59 The CLRC believes that the general functions and duties of the Chairman of the meeting should not be prescribed. The law of meetings have dealt with the issue of the conduct of the Chairman. However, this area could be enhanced by way of best practices setting out guidance on the conduct of the Chairman of a meeting.

RECOMMENDATIONS

- 5.60 The CLRC recommends that:
- (a) there should not be any statutory formulation of the general functions and duties of the Chairman of a meeting;
 - (b) best practices should be set out in guiding the conduct of the Chairman of a meeting.

Question for Consultation

Question 19:

Do you agree with the view that there should not be a statutory formulation of the functions and duties of the Chairman of the meeting, but any such formulation be set out in a non-legislative document, such as the Best Practices in the MAICSA Guide or the Malaysian Code on Corporate Governance?

6. RIGHT OF MEMBERS TO REQUISITION THE DIRECTORS TO CALL AN EGM

6.1 Between one AGM to the next, a company through its directors may propose to carry out transactions, which require the approval of shareholders in a general meeting, or the shareholders themselves may desire to take a course of action with respect to the affairs of the company, which are within their power to decide. In the first situation, the Articles of Association invariably confer powers upon directors to call for a general meeting to meet business contingencies, which cannot wait until the next AGM. On the other hand, the Articles rarely give power to shareholders to convene the general meeting. The absence of such power can work unfairly against shareholders, as it has the effect of depriving shareholders of a proper forum to bring forth their views or wishes upon their directors to bear.

- 6.2 At the same time, it would also nonetheless be unfair to management to allow shareholders unfettered rights to convene general meetings as this might have the effect of disrupting orderly management and administration.
- 6.3 Between the two extreme positions, the Companies Act 1965 strikes a balance by conferring powers upon shareholders to requisition directors to convene a general meeting under subsection 144(1) of the Act, and to convene general meetings themselves under section 145 if a sufficiently large number of shareholders desire the holding of a general meeting to carry out their wishes.
- 6.4 An extraordinary general meeting (EGM) is defined as any general meeting, which is not called an AGM (Article 43, Table A). An EGM may be called either:
- By the directors on their own (Article 44, Table A); or
 - By the directors on a requisition by members holding at least 10 per cent of voting rights (section 144, Companies Act 1965).
- 6.5 It is suggested that the proposals covered under the sub-topics of *Calling a Meeting*, *Settling the Agenda* and *Conducting the Meeting* above should also apply to EGMs with the variations as discussed in the paragraphs below.
- 6.6 Under section 144 of the Companies Act 1965, if members holding at least 10 per cent of the voting rights requisition the directors to call an EGM with stated object, the directors must do so. If the directors fail to do so within 21 days, the requisitionists may do so themselves and recover reasonable expenses from the company. There are safeguards to prevent the directors from calling the meeting for a distant date in the future (e.g. directors must convene the meeting no later than 2 months). It is suggested that the substance of these provisions should be retained.

- 6.7 However, the word 'forthwith' in section 144(1) means 'as soon as practicable'⁹², and the word 'convene' means 'summon' or 'call'. Hence, section 144(1) does not mean that the requisitioned meeting must be held within 21 days. Rather, the effect of section 144(1) is that directors must hold the extraordinary general meeting within 2 months calculated from the date of receipt of the requisition. In computing the period of 2 months in section 144(1), the period of 21 days in subsection (3) is to be included.
- 6.8 It ought to be noted that the requirement is to hold the requisitioned meeting 'as soon as practicable', and not on the last day of the second month after the receipt of the requisition. However, in a contest, it can be expected that incumbent directors would fix the requisitioned meeting to be held on the last permissible day, and it can also be reasonably expected that the courts would be slow to interfere at the instance of shareholders who desire that the date for the meeting to be fixed earlier than the last permissible day⁹³. The general reluctance of the courts to interfere may work against the interests of the shareholders in that during the interim period, directors may proceed to carry out acts, which could adversely affect the interest of the requisitioning shareholders.
- 6.9 However, the possibility that directors may be tempted to make use of the gap between the date of the requisition and the date of the meeting to thwart the known wishes of shareholders as disclosed in the requisition notice, does not render the shareholders defenceless. This is because, generally, the power of directors to commit the company to transactions is circumscribed by the equitable principle that powers must be exercised *bona fide* in the interest of the company, and not for other collateral purposes⁹⁴.

⁹² *Re Winward Islands (Enterprises) UK Ltd.*, (1983) BCLC 293, per Nourse J at p 295.

⁹³ For discussions on this, see *Vision Nominees Pty Ltd & Anor v Pangea Resources Ltd & Ors* (1988) 6 ACLC 770.

⁹⁴ See facts of *Paringa Mining & Exploration Co PLC v North Flinders Mines Ltd & Ors* (1989) 7 ACLC 165.



- 6.10 In addition, there are views that the present minimum EGM threshold of 10 per cent under section 144 is too onerous to achieve the necessary balance between the interest of the minority and majority shareholders.
- 6.11 The CLRC recommends that the threshold requirement for calling an EGM under section 144 be lowered to enable members holding not less than 5 per cent of voting rights to requisition a meeting on the basis of the following:
- The inability of requisitionists to satisfy a 5 per cent shareholding threshold would call into serious question the prospects of their proposed resolution succeeding;
 - This threshold requirement achieves the necessary balance between the interests of minority and majority shareholders; and
 - The requirement ensures that the cost of convening meetings is only incurred when there is a legitimate concern by a substantial number of shareholders who have an economic interest in the company. It would be unreasonable for a listed entity and its non-requisitioning shareholders to have to bear these costs unless a reasonable proportion of its shareholders requisitioned the meeting.
- 6.12 Section 145(1) of the Companies Act 1965 confers power upon shareholders to convene general meetings themselves if two or more members holding not less than 10 per cent of the issued share capital (5 per cent in number of the members) desire the holding of general meeting. There are views however that in entirety, section 145 is unclear as section 145(1) deals with the shareholders' right to convene meeting themselves without requisitioning the directors and the other subsections of section 145 deal with notice of meeting⁹⁵.

⁹⁵ In addition to the unclear wording of section 145, the operational hurdle shareholders face in exercising the right to convene a general meeting without going through the board is in relation obtaining the list of shareholders under section 160; though section 160 provides that shareholder and member of the public have the right to inspect the Register of Member and to request a copy. However, the time period for the company to comply with the request to supply a copy is 21 days and the directors can always frustrate the shareholders by only furnishing a copy on the 21st day after the request. This renders the list not up-to-date for the shareholders who wish to convene a general meeting to send out notice or to use it for the purpose of registration of shareholders to attend the general meeting. As such, there are views that the 21 day time period is too long and should be shortened to prevent abuse by directors.

- 6.13 Additionally, there are also views that the wording of section 145(1) that require 'Two or more members...' as being unnecessarily onerous. The wording effectively prohibits a single member, even if he holds more than 10 per cent of the issued share capital, to call a meeting of the company.
- 6.14 In Australia, under section 249D of the Corporations Act 2001 directors of a company must arrange and hold a meeting within 2 months of being requested to do so by:
- members with at least 5 per cent of the votes that may be cast at a general meeting (the share capital test), or
 - at least 100 members who are entitled to vote at a general meeting (the numerical test).

The company bears the cost of calling a requisitioned meeting. Directors have the right to refuse to call a meeting if it is not for a proper purpose. For example, members cannot, by resolution, make decisions on management matters that are exclusively vested in the directors by the company constitution. A meeting may also be refused if its purpose is to harass the company or its directors or to consider matters outside the competence of the company. Under section 249D of the Corporations Act 2001, a relatively small number of shareholders can requisition an EGM to raise questions of corporate responsibility in relation to a broad range of issues including labour practices, executive remuneration and environmental standards. No other country employs a numerical test for calling company meetings. The Government and business groups have argued that the provision is open to abuse by 'vigilante' groups with political agendas. Large companies can be forced to incur considerable costs in notifying members of an EGM. It is also argued that such meetings distract management from its core responsibilities.

- 6.15 In Hong Kong, section 113 of the Companies Ordinance (Cap 32) states that members holding not less than 5 per cent of the voting rights may requisition directors to convene the general meeting with the stated object. If the directors fail to do so within 21 days and to hold the general meeting no longer than 28 days since the notice for meeting was given, the requisitionists may do so themselves and recover reasonable expenses from the company.
- 6.16 In the UK, under section 368 of the Companies Act 1985, if members holding at least 10 per cent of the voting rights requisition the directors to call an EGM with stated objects, the directors must do so. If the directors fail to do so within 21 days, the requisitionists may themselves convene a meeting of which the expenses will be reimbursed by the company.
- 6.17 The CLRC is of the view that section 145 requires clarification in the way it is drafted to state that a single member, holding more than 10 per cent of the issued capital, should be allowed to call for a meeting of the company. The current section should be redrafted into two distinct sections addressing the issues on the right to convene meeting and notice of meeting separately.

RECOMMENDATIONS

- 6.18 The CLRC recommends that:
- (a) section 144 be clarified to enable members holding not less than 5 per cent of voting rights to requisition a meeting.
 - (b) section 145 be amended by dividing the current section into two distinct sections addressing the issues of right to convene meeting and notice of meeting separately.
 - (c) section 145(1) should be amended to begin the section with 'Member or members ...' This is to clarify that a single member, holding more than 10 per cent of the issued capital, should be allowed to call for a meeting of the company.

Questions for Consultation

Question 20:

Do you agree that section 144 be clarified to enable members holding not less than 5 per cent of voting right to requisition a meeting?

Question 21:

Do you agree that section 145 should be clarified to state that a single member, holding more than 10 per cent of the issued capital, should be allowed to call for a meeting of the company?

