

## **ORGANISATION: MINORITY SHAREHOLDER WATCHDOG GROUP**

### **COMMENTS ON THE CONSULTATIVE DOCUMENT ON MEMBERS' RIGHTS AND REMEDIES**

#### **Response to Consultation Questions:-**

##### **Question 1:**

**Do you agree that apart from the persons currently given standing under section 181 i.e., members and debenture holders, the following persons should also be allowed to bring an action under section 181:**

- (i) a person who is a former member but only if the oppression relates to the circumstances in which he ceased to be a member?**
- (ii) A transferee of shares or a person entitled to them by operation of law whose membership has yet to be perfected?**
- (iii) A former member?**

Yes. We agree for all the three above-named persons to be allowed to bring an action under section 181.

There should also be a clear definition of "former member". The term "former member" and "former shareholder" is supposed to refer to the same person within the company's context. A former member should include ex-member or ex-shareholder.

The definition of shareholder is wide and can include ex-member forced out of the company.

**Question 3:**

**Do you agree that a petitioner should not be allowed to file a petition under section 218 and section 181 simultaneously?**

Yes. Simultaneous petition under section 218 and section 181 should not be allowed to avoid multiplicity of proceedings. Nevertheless, it should be made clear whether minority shareholders can seek redress under section 181 if an application under section 218 has been heard.

It should be clear that section 218 is likely to be sought by a petitioner only as a last resort. Other shareholders would not want to wind up the company due to the fact that the company is profitable and successful. A petition under section 181 would provide an aggrieved shareholder a far wider range of remedies. The powers of minority shareholders to file a petition under section 181 should be made wider and flexible.

**Question 4:**

**Do you agree that the statutory derivative action should be available to all types of companies?**

Yes. Statutory derivative action should be available to members of both private and public companies. While at present common law remedy is available, the existing provisions provide practical difficulties for minority shareholders. For example, in practice, common law derivative action is constrained by the common law principle of *locus standi* and by cost.

We support the introduction of a statutory derivative action as a means of strengthening minority shareholders' protection. This provision will make it easier for minority shareholders to institute an action against directors for breach of their fiduciary duties and also promote effective enforcement of good corporate governance mechanism through shareholder activism. The basis of the derivative action should be set out clearly in the Companies Act. The procedure for minority shareholders to pursue a derivative action should also be made simpler, with the details set out clearly in the rules of Court.

Nevertheless, there should also be sufficient safeguards in the legislation or procedure to justify a statutory derivative action.

**Question 5:**

**Do you agree that persons other than members for example, former members, beneficial owners, directors, former directors and/or the regulatory authorities should be given the standing to bring a statutory derivative action?**

Yes. Statutory derivative action should be available to members, former members or persons entitled to be registered as members to bring proceedings on behalf of the company. We are also of the view that the regulatory authorities should be given standing under the Companies Act to bring a statutory derivative action on behalf of the company. As it is, the Securities Industry Act 1983 already allows the regulator to commence a civil action on behalf of aggrieved parties.

**Question 6:**

**Do you agree that the statutory derivative action should be extended to the cause of action in a related company?**

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

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

**Question 7:**

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

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

**Question 8:**

**Do you agree that the company may be ordered to pay reasonable fees incurred by the complainant in connection with bringing the derivative action at any stage of the proceedings? Do you agree that the applicant may be held liable to reimburse the company if he fails in the proceeding?**

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

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

**Question 9:**

**Do you agree that costs should include an order for indemnity and any reasonable legal fees of the proceedings?**

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

**Question 10:**

**Do you agree that the orders that the Court may make should include an order giving access of information to the applicant?**

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

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

**Question 11:**

**Do you agree that ratification should not be a bar to the application for leave?**

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

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

**Question 12:**

**Do you agree that the variation of class rights can be done:-**

- **if written consent is obtained from at least 75 per cent of the holders of shares whose rights are to be varied; or**
- **a special resolution is passed at a separate class meeting of shareholders whose rights are to be varied?**

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

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

**Question 13:**

**Do you agree that the new procedure need not rely on whether there is or is not a modification of rights clause in the company's Memorandum and Articles?**

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

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

**Question 14:**

**Do you agree that the proposed statutory procedure as stated above be extended to all companies, including companies without share capital? If yes, should it be applicable irrespective of whether or not the company has issued more than one type of shares?**

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

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

**Question 15:**

**Do you agree that the variation of class rights should be retained?**

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

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

**Question 16:**

**Do you agree that the company legislation should expressly provide that the redemption of preference shares (except for redeemable preference shares) is a variation of the rights of existing preference shareholders?**

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

**Question 17:**

**Do you agree that the company legislation should expressly provide that the issue of all new shares (and not just preference shares) is a variation of the rights of existing shareholders of the same class?**

Yes. This will protect the existing shareholders from arbitrary changes or a variation of their rights. This proposed provision will be an added safeguard to minority shareholders, as they will be made aware of the rights attached to the new shares and at the same time their class rights cannot be varied without obtaining the necessary members' consent.

The issue of all new shares includes rights issue, bonus issue, acquisition issue to satisfy consideration for acquisition of assets or interests, direct issue to members of the public and private placement with rights in the same class ranked pari passu.

**Question 18:**

**What are your views on the introduction of a statutory minority buy-out right?**

One of the reliefs that the Courts may grant in cases of "oppression" under Section 181 of the Companies Act 1965 is that the Court order may provide for the purchase of the minority shareholder's shares by the other members or by the company itself. This is essentially a buy-out remedy for minority shareholders.

Therefore, we are of the view that the introduction of a statutory minority buy-out right may not be effective as it may be a duplication of an existing provision.

**Question 19:**

**What are your views on the use of the Articles by providing for an exit right clause to reduce the reliance on the Court process to resolve disagreements between the shareholders of a company?**

The issue of what constitutes a fair price to the shareholders for the company to buy out his shares will be a challenge, and may lead to litigation if both parties cannot come to an agreement. The intention to include an exit right clause in the Articles to reduce reliance on Court process is commendable, but however, the issue of fair valuation can be a complex procedure.

**Question 20:**

**Do you agree on the inclusion of a statutory provision in the company legislation to allow class/ representative action by shareholders?**

We are of the view that inclusion of a specific provision for class action under the Companies Act may not be necessary in view of the proposed introduction of a statutory derivative action available to minority shareholders.

Civil procedure rules should be further clarified and simplified to facilitate the aggrieved minority shareholders to bring a representative action to the High Court.

**Question 21:**

**What are your views on the inclusion of a statutory provision in the company legislation to allow the shareholders or the relevant regulatory body to make an application to Court to seek an injunction to halt or prevent breaches of the law?**

We welcome the inclusion of a statutory provision in the company legislation that allows shareholders or the relevant regulatory authorities to make an application to Court to seek an injunction to halt or prevent breaches of the law. This will speed up and give greater protection to minority shareholders to safeguard their interests as well as save costs of minority shareholders if the relevant regulatory body acts on their behalf.