



The Observer

As we usher into the year of Dragon, MSWG wishes our readers a prosperous Chinese New Year with abundant returns. As for those who are not celebrating, MSWG wishes you have a joyous holiday ahead.

Do note that "The Observer" will take a break next week. The publication will resume on 23 February 2024.

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❖ Pre-Emptive Right Waivers – A Call for Informed Decision-Making

Following the Court of Appeal's ruling in Concrete Parade Sdn Bhd v. Apex Equity Holdings Berhad & Ors [2021], it becomes imperative to apprise shareholders of the potential risks of granting blanket approval for pre-emptive right waivers through changes to the company constitution.

Section 85(1) of the Companies Act 2016 (CA2016) grants existing shareholders of a company the pre-emptive rights to acquire new shares from any new issuance of shares before the shares are offered to third parties.

The action of seeking blanket approval for pre-emptive rights waivers via amendments to the company constitution may raise concerns from a corporate governance standpoint. Often, companies rationalise the amendments with various potential benefits, i.e., enhance administrative efficiency, enhance fundraising flexibility, and expedite processes.

The purported benefits stated above are a subject of scrutiny. It is important to note that any subsequent issuance of new shares by public listed companies (PLCs) will necessitate approval from shareholders. Thus, the act of presenting a distinct resolution to waive pre-emptive rights can be done concurrently when seeking such mandates from the shareholders. In this regard, we are uncertain how the PLCs will benefit from amending their constitutions.

Our primary concern revolves around the repercussions of this alteration. Notably, two tech-related PLCs under our monitoring portfolio amended their constitutions in a similar manner. Granting blanket approval for waiver of pre-emptive rights by way of amending the company constitution may result in new shareholders facing involuntary dilution of their ownership stake in the event of any future issuance of common stock without their explicit knowledge.

Pre-emptive rights are crucial because they protect the interests of existing shareholders in a company. The statutory rights ensure fairness in issuing new shares, allowing existing shareholders to acquire shares before those shares are offered to third parties. This

means existing shareholders can maintain their proportionate ownership in the company, even if new shares are issued.

Say Mr J owns 10,000 shares, representing 10% of the total number of issued shares of 100,000 in Company XYZ. If XYZ issues another 100,000 new shares without offering J the rights to subscribe to the new shares, it will result in a 5% dilution of J's shareholding in XYZ involuntarily.

In other words, the pre-emptive right is paramount to shareholders because it provides them the right of first refusal to subscribe to newly issued shares and keep their shareholding intact. Shareholders may renounce their rights to acquire the new shares.

For or against?

The significance of Section 85 cannot be overstated; its waiver should not be obscured within the depths of the Constitution. Instead, it must be brought to the forefront of shareholders' attention unequivocally, accompanied by a detailed outline of the implications in resolutions seeking their waiver.

MSWG urges shareholders to retain their rights to decide on waiving their statutory pre-emptive rights under the CA2016 for each and every, as and when there is future issuance of new shares. Pre-emptive rights should be explicitly addressed in resolutions when seeking mandates to issue new shares that may dilute existing shareholders' interests. Transparency is pivotal.

As of today, while awaiting the Federal Court's ruling on an appeal on Concrete Parade v. Apex Equity & Ors [2021], MSWG will vote against any blanket approval to waive shareholders' pre-emptive rights through an amendment to the company's constitution.

Nonetheless, our voting stance regarding this matter is subject to alteration upon the final decision by the Federal Court.

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DISCLOSURE OF INTERESTS

• *With regard to the companies mentioned, MSWG holds a minimum number of shares in all the companies covered in this newsletter.*

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