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Abstract

Shareholder activism, which refers to action taken by shareholders to bring about change in a company or influence its behaviour without changing its corporate control, has been gradually increasing in Malaysia in recent years. Among other things, this increase can be attributed to the establishment of the Minority Shareholder Watchdog Group ('MSWG') in 2000, amendments to the Companies Act 1965 (Malaysia) in 2007 and the introduction of the Malaysian Code on Corporate Governance 2012, which supersedes its predecessor. Drawing on Hirschman's insights in Exit, Voice and Loyalty, this paper seeks to examine the exit and voice mechanisms available to Malaysian shareholders to monitor or discipline opportunistic management. In this context, the exit option refers to the traditional choice of shareholders in selling their shares, or the 'Wall Street walk' when there is a decline in corporate performance, whereas the voice mechanism refers to expressions of dissatisfaction by shareholders to corporate management, which may be participative, interactive or even combative in nature. Comparisons are made with Australia where relevant.

Keywords

corporate change, Malaysian corporate law, exit, voice and loyalty, Wall Street walk, Malaysian code on corporate governance 2012

SHAREHOLDER ACTIVISM THROUGH EXIT AND VOICE MECHANISMS IN MALAYSIA: A COMPARISON WITH THE AUSTRALIAN EXPERIENCE*

KUEK CHEE YING**

ABSTRACT

Shareholder activism, which refers to action taken by shareholders to bring about change in a company or influence its behaviour without changing its corporate control, has been gradually increasing in Malaysia in recent years. Among other things, this increase can be attributed to the establishment of the Minority Shareholder Watchdog Group ('MSWG') in 2000, amendments to the Companies Act 1965 (Malaysia) in 2007 and the introduction of the Malaysian Code on Corporate Governance 2012, which supersedes its predecessor. Drawing on Hirschman's insights in Exit, Voice and Loyalty, this paper seeks to examine the exit and voice mechanisms available to Malaysian shareholders to monitor or discipline opportunistic management. In this context, the exit option refers to the traditional choice of shareholders in selling their shares, or the 'Wall Street walk' when there is a decline in corporate performance, whereas the voice mechanism refers to expressions of dissatisfaction by shareholders to corporate management, which may be participative, interactive or even combative in nature. Comparisons are made with Australia where relevant.

I INTRODUCTION

Shareholder activism refers to action taken by shareholders who are dissatisfied with a company's management in order to bring about change in the company without a change in control. The term encompasses a continuum of responses to corporate performances.¹ The occurrence of shareholder activism has been gradually increasing in Malaysia in recent years. This increase can be attributed to various developments in the country.

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¹ Stuart L Gillan and Laura T Starks, 'The Evolution of Shareholder Activism in the United States' (2007) 19(1) *Journal of Applied Corporate Finance* 55.

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In March 2000, the *Malaysian Code on Corporate Governance* (the '2000 Code') was first issued.² The 2000 Code recommended, *inter alia*, that companies and institutional shareholders should be ready to enter into dialogue with one another and that the annual general meeting should be used as a mechanism for shareholder communication in which shareholders, regardless of the size of their shareholding, are encouraged to participate. The 2000 Code was subsequently revised in 2007 to strengthen the roles and responsibilities of the board of directors. The *Malaysian Code on Corporate Governance 2007* (the '2007 Code') continued to emphasise the effective communications policy between the board of directors and the shareholders.³ In July 2011, the *Corporate Governance Blueprint 2011* was launched by the Securities Commission of Malaysia.⁴ A five-year action plan was provided for raising corporate governance standards in Malaysia, one product of which was the *Malaysian Code on Corporate Governance 2012* (the '2012 Code'), which superseded the 2007 Code.⁵ The 2012 Code outlines the steps that should be taken by the board of directors in strengthening the relationship between the company and shareholders. These steps include encouraging shareholders to participate at general meetings, poll voting and promoting proactive engagement with shareholders. In addition, the Minority Shareholder Watchdog Group ('MSWG') was established in 2000 to foster awareness of minority shareholders' interests and to enhance corporate governance through shareholder activism and engagement with stakeholders. The MSWG encourages good governance and monitors any non-compliance of corporate governance practices by public listed companies with the objective of achieving long term sustainable shareholder value.⁶ The *Companies Act 1965* (Malaysia) was also significantly reformed in 2007 by the *Companies (Amendment) Act 2007* (Malaysia). This Amendment Act, the object of which would appear to be improving standards in corporate governance in Malaysia, codifies the common law principles of the directors' duties; provides for the business judgment rule;⁷ introduces the statutory

² See Securities Commission Malaysia, *Malaysian Code on Corporate Governance*, March 2000.

³ See Securities Commission Malaysia, *Malaysian Code on Corporate Governance (Revised 2007)*, 1 October 2007.

⁴ See Securities Commission Malaysia, *Corporate Governance Blueprint 2011: Towards Excellence in Corporate Governance*, (July 2011).

⁵ See Securities Commission Malaysia, *Malaysian Code on Corporate Governance 2012*, March 2012.

⁶ See Minority Shareholder Watchdog Group, *Who We Are* <www.mswg.org.my/page.php?pid=36&menu=sub>; see also Minority Shareholder Watchdog Group, 'Annual Report' (Annual Report, 2013) 6 <http://www.mswg.org.my/files/editor_files/file/Annual%20Reports/2013/Final_AR2014.pdf>.

⁷ *Companies Act 1965* (Malaysia) s 132(1B).

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derivative action;⁸ and permits the holding of a meeting at more than one venue using technology.⁹

As Hirschman has observed, shareholders may express their dissatisfaction with a perceived decline in corporate performance in two main ways:¹⁰ shareholders may either vote with their feet by selling their shares, a practice known as 'the Wall Street walk' (the traditional 'exit' mechanism), or they may opt to 'voice' their dissatisfaction to management through participative, interactive or even combative means (the 'voice mechanism'). This paper examines these two mechanisms in a Malaysian context, and draws comparisons with the Australian position where appropriate.

II JUSTIFICATION FOR SHAREHOLDER ACTIVISM

In their seminal work, *The Modern Corporation and Private Property*,¹¹ Berle and Means argue that share ownership is separate from control in the modern corporation. Publicly traded corporations in the United States are generally perceived to have widely dispersed share ownership but with control concentrated in the hands of professionally trained managers who own an insignificant percentage of the shares. The situation is similar in the United Kingdom. However, this perception is challenged by various studies which suggest that the separation of ownership and control is not a global norm but an exception.¹² Some of these studies found that a modest concentration of ownership exists even among the largest American companies,¹³ while separation of ownership and control is rare in East Asian corporations.¹⁴ Likewise, larger numbers of companies in Continental Europe are

⁸ Ibid ss 181A-181E.

⁹ Ibid s 145A.

¹⁰ Albert O Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970).

¹¹ Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Transaction Publishers, 1932).

¹² See Rafael La Porta et al, 'Law and Finance' (1998) 106(6) *Journal of Political Economy* 1113, 1146; see also Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'Corporate Ownership Around the World' (1999) 54(2) *Journal of Finance* 471-2.

¹³ See La Porta, Lopez-de-Silanes and Shleifer, above n 12, 471; see also Stijn Claessens, Simeon Djankov and Larry H P Lang, 'The Separation of Ownership and Control in East Asian Corporations' (2000) 58 *Journal of Financial Economics* 81-2. In Clifford G Holderness, 'The Myth of Diffuse Ownership in the United States' (2009) 22(4) *Review of Financial Studies* 1377, 1379: it was found that 'the ownership concentration in the United States is similar to what it is elsewhere'.

¹⁴ See Claessens, Djankov and Lang, above n 13.

‘controlled companies’ in which managerial powers lie in the hands of a group of shareholders such as founders, families or holding companies.¹⁵

According to the Berle and Means model, shareholders in large, widely held companies are rationally apathetic towards their rights. This is because any return or benefit which they might receive will be outweighed by the costs, time, effort and resources devoted by them to seeking changes in the company, since they only own a relatively small fraction of the company’s stock. This increases the opportunity for the management to act in a self-serving manner or to be unaccountable, resulting in agency costs on shareholders. In an economic sense, an agent acts for or on behalf of a principal and the principal’s welfare is dependent on the agent’s action. Therefore, an agent should act in the interest of the principal instead of his or her own interest. Agency problems arise when there is a non-alignment of the interests and goals of principals and their agents. Principals must engage in costly monitoring of their agents to ensure that they do not act to the principals’ detriment. Thus, agency costs are incurred.

Agency problems can be categorised into three forms. The first category comprises classic conflicts between managers (agents) and shareholders (principals).¹⁶ This type of agency problem normally occurs in developed countries such as the United States and the United Kingdom, where companies have diffuse ownership. The second category comprises conflicts between owners who hold large block of shares or controlling shareholders (agents) and minority or non-controlling shareholders (principals).¹⁷ This type of agency problem is generally perceived to prevail in East Asian and European countries, which have companies with concentrated ownership. The third category comprises conflicts between a company (agent) and other stakeholders such as creditors, employees and customers.¹⁸

A shareholder is conferred control over a company, whether directly or indirectly, when he or she owns a significant percentage of shareholding in that company. Control could be exercised directly through the control of decisions made by the

¹⁵ See Karl Hofstetter, ‘One Size Does Not Fit All: Corporate Governance for “Controlled Companies”’ (2006) 31 *North Carolina Journal of International Law and Commercial Regulation* 597, 600.

¹⁶ This agency conflict is sometimes referred to as ‘Type 1 agency conflict’. See Sumon Kumar Bhaumik, ‘“Family” Ownership, Tunnelling and Earnings Management: A Review of the Literature’ (2010) 24(4) *Journal of Economic Surveys* 705-6; Boon Leong Lim and Siew Hwa Yen, ‘Agency Problem and Expropriation of Minority Shareholders’ (2011) 48(1) *Malaysian Journal of Economic Studies* 37-8.

¹⁷ This agency conflict is sometimes referred to as ‘Type 2 agency conflict’. See Bhaumik, above n 16; Lim and Yen, above n 16.

¹⁸ See generally Henry Hansmann and Reinier Kraakman, ‘Agency Problems and Legal Strategies’ in Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2009).

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general meeting, or indirectly through the exercise of influence over the board of directors, which the controlling shareholders are able to appoint or remove. It is believed that controlling shareholders will have a greater incentive to maximise the value of shareholdings since they have invested a large stake in the company and will receive a greater fraction of any returns derived from profit-enhancing activities. This will help to mitigate the managerial agency problem, as the controlling shareholders' interests are likely to be in alignment with those of non-controlling shareholders.¹⁹

Nevertheless, when the shareholding (including the directors' shareholding) exceeds a certain point, the controlling shareholders or directors may prefer to use the company to generate private benefits of control without the minority shareholders receiving a proportionate share.²⁰ This happens when the controlling shareholders expropriate value from minority shareholdings by exerting their power and influence for their own benefit at the expense of the minority shareholders.²¹ Such expropriation may take the forms of siphoning-off cash and other assets without any justification, transferring assets to controlling shareholders or companies controlled by them, conducting transactions in the interests of the controlling shareholders that may not be beneficial to the company and using inside information to sell or purchase shares in the market.²² This negative force, if it relates to directors' shareholdings, is termed 'managerial entrenchment'.²³

Malaysia is characterised by high levels of family or state concentrated shareholdings.²⁴ Incumbent family members normally dominate the corporate

¹⁹ This convergence of interest hypothesis was proposed by Michael C Jensen and William H Meckling in 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) *Journal of Financial Economics* 305. See also Andrei Shleifer and Robert W Vishny, 'A Survey of Corporate Governance' (1997) 52(2) *Journal of Finance* 737, 754; Randall Morck, Andrei Shleifer and Robert W Vishny, 'Management Ownership and Market Valuation: An Empirical Analysis' (1988) 20 *Journal of Financial Economics* 293, which proposed that according to the convergence of interest hypothesis, market value of shares increases with management ownership.

²⁰ See Shleifer and Vishny, Corporate Governance, above n 19, 759; Bhaumik, above n 16, 707.

²¹ The expropriation of minority shareholders for the benefit of the controlling shareholders or transfer of resources out of a company to its controlling shareholders has been termed as 'tunneling'. See Simon Johnson et al, 'Tunneling' (2000) 90(2) *American Economic Review* 22.

²² See Hofstetter, above n 15, 617-8 fn 108.

²³ See the managerial entrenchment hypothesis proposed in Morck, Shleifer and Vishny, above n 19, 293-4.

²⁴ In Malaysia, 50% of the large publicly traded companies are family owned and 33% are controlled by the state. See Amir Ranjbar, Saeed Pahlevan Sharif and Cyril Hilaris Ponnau, 'Corporate Ownership Patterns in Malaysian Listed Companies' (Paper presented at Terengganu International Business and Economics Conference, 26 November 2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=

management in family-owned companies, and minority shareholders have little incentive to monitor the company.²⁵ On the other hand, companies controlled by the state are perceived to be more sensitive to political concerns, which may be negatively correlated with the company's financial performance. As a result, companies controlled by the state may be low performers.²⁶ However, the dilution of ownership concentration is not recommended; rather, more effective checks and balances against any abuse of power by the controlling shareholders or insiders should be ensured.²⁷ To this end, shareholder activism may alleviate the agency problem between controlling and non-controlling shareholders or minimise any private benefits of control.

Interestingly, the pattern of corporate ownership in Australia is often described as 'dispersed'; in this regard, Australia is often clustered with the United States and United Kingdom as one of the 'Anglo-Saxon' countries,²⁸ which are said to operate outsider/arm-length systems.²⁹ However this classification has been questioned by subsequent studies. A considerable degree of share ownership concentration has

1898642>. See also Claessens, Djankov and Lang, above n 13; see also Stijn Claessens et al, 'Disentangling the Incentive and Entrenchment Effects of Large Shareholdings' (2002) 57(6) *Journal of Finance* 2741; Fazilah Abdul Samad, 'Ownership Structure in the Malaysian Corporate Sector: Its Impact on Corporate Governance, Performance, Financing and Investment Patterns' (Paper no 23, Centre on Regulation and Competition, University of Malaya, October 2002) <<http://ageconsearch.umn.edu/bitstream/30592/1/cr020023.pdf>>; On Kit Tam and Monica Guo-Sze Tan, 'Ownership, Governance and Firm Performance in Malaysia' (2007) 15(2) *Corporate Governance* 208, 210.

²⁵ See Sang-Woo Nam and Il Chong Nam, 'Corporate Governance in Asia: Recent Evidence from Indonesia, Republic of Korea, Malaysia and Thailand' (Asian Development Bank Institute, October 2004) 55 <<http://www.adbi.org/files/2005.01.book.corporate.governance.asia.pdf>>.

²⁶ See Rashidah Abdul Rahman and Mohammad Rizal Salim, *Corporate Governance in Malaysia: Theory, Law and Context* (Sweet & Maxwell Asia, 2010) 66.

²⁷ See Ali Abdul Kadir, 'The Corporate Governance Trends in Malaysia: February 1999 Finance Committee Report on Corporate Governance' (Speech delivered at the Corporate Governance Conference for Nominee Directors of PNB, 20 August 1999) <http://www.sc.com.my/wp-content/uploads/eng/html/resources/speech/sp_990820.html>.

²⁸ See Jeroen Weimer and Joost C Pape, 'A Taxonomy of Systems of Corporate Governance' (1999) 7(2) *Corporate Governance* 152, 153-4, Table 1, in which Australia was classified as one of the Anglo-Saxon countries with low ownership concentration.

²⁹ In countries with an 'outsider/arm's length' system, large business enterprises normally traded on the stock market have a notable size of shareholders but lack a core shareholder who can exercise inside influence. On the contrary, in countries with 'insider/control-oriented' system, stock market listings are less common and companies which have publicly traded shares usually have block holders. See Brian R Cheffins, *Corporate Ownership and Control: British Business Transformed* (Oxford University Press, 2008) 4-5.

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been observed in Australia over the twentieth century;³⁰ as such, it has been argued that Australia is more appropriately classified as having concentrated ownership rather than dispersed shareholding.³¹ If this is correct, then comparisons between shareholder activism in Malaysia and Australia would seem apt.

Generally, shareholders can react to the deteriorating performance of a company by opting for exit or voice mechanisms.³² Exit mechanisms are economic solutions and associated with market governance. Voice mechanisms, on the other hand, are political solutions and a form of non-market force.³³

III EXIT

Exit occurs when a shareholder chooses to 'desert' a company by selling shares or voting with his or her feet (the 'Wall Street Walk') before the decline of the company becomes fully apparent to others.³⁴ This may occur if a manager shirks responsibilities, extracts private benefits or engages in value-destructive activities. If a large number of informed shareholders sell their shares in a company to signal their dissatisfaction with the company's performance, this will depress the share price and the company will be made vulnerable to a takeover, resulting in the possible replacement of the underperforming managers by a new management team. This possibility will alert the existing management, who may in turn undertake to cure the problem. If managerial compensation is linked to share price and the exit of large shareholders will drive the share price down, then the threat of exit by large shareholders may have a disciplining effect on opportunistic managers or influence

³⁰ See La Porta, Lopez-de-Silanes and Shleifer, above n 12, 492-493; Asjeet Lamba and Geof Stapledon, 'The Determinants of Corporate Ownership Structure: Australian Evidence' (Public Law and Legal Theory Working Paper No. 20, Faculty of Law, The University of Melbourne, 2001) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=279015>, which provided empirical evidence that controlling shareholders were common among publicly listed companies in Australia; see also Alan Dignam and Michael Galanis, 'Australia Inside-Out: The Corporate Governance System of the Australian Listed Market' (2004) 28 *Melbourne University Law Review* 623, 627-8.

³¹ See Richard Mitchell et al, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38(1) *Melbourne University Law Review* 68, 104.

³² The exit and voice mechanisms are also called disciplinary trading and intervention. See Alex Edmans and Gustavo Manso, 'Governance Through Trading and Intervention: A Theory of Multiple Blockholders' (2011) 24(7) *Review of Financial Studies* 2395.

³³ See Hirschman, above n 10, 15-6, 19. The concept of exit is said to be connected to a corporate law and economics framework while voice is described as being embedded in a corporate constitutional framework. See Bart Bootsma, 'An Eclectic Approach to Loyalty-Promoting Instruments in Corporate Law: Revisiting Hirschman's Model of Exit, Voice, and Loyalty' (2013) 6(2) *Erasmus Law Review* 111-2.

³⁴ See Patrick Bolton and Frederic Samama, 'L-Shares: Rewarding Long-term Investors' (Finance Working Paper, No 342, European Corporate Governance Institute, 2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188661>.

managerial decisions and strategies to maximise shareholder value. As a corrective mechanism, exit operates indirectly through the market.³⁵

The effectiveness of exit depends on the size of the shareholding and liquidity. Stock liquidity encourages large shareholders to acquire costly information about the fundamental value of the company and to be more aggressive in trading. When stock liquidity is higher and transaction costs are lower, the threat of exit by large shareholders becomes more credible and is more likely to induce managers to take action to maximise shareholder value.³⁶ In short, liquidity increases the threat of exit and enhances the value of the company.

Exit is an easier, cheaper and lower resistance option than voice.³⁷ However, exit is also a non-ameliorative type of solution because the message that it sends is rather generic and does not specify the problem or the cause of the corporate decline.³⁸ It follows that the management may not be able to detect and rectify the problem. Shareholder exit may turn into 'faux exit' and cease to be a threat to underperforming companies when the sale of shares is compensated by acquisition of the same by new shareholders.³⁹ Exit alone may not, therefore, trigger curative measures by management. Moreover, exit as a governance mechanism seems to operate more effectively in respect of companies with widely dispersed share ownership.

IV VOICE

Voice mechanisms involve the articulation of reasons for shareholder dissatisfaction in an attempt to rectify performance lapses. In this context, a shareholder holds on to his or her shares and tries to induce changes within the company rather than escape from the unsatisfactory situation, through various kinds of actions ranging from faint grumbling to violent protest.⁴⁰ Shareholders may express their dissatisfaction through formal channels such as voting, shareholder proposals, and litigation, as

³⁵ In Hirschman, above n 10, 16, exit was described as an indirect device in which any recovery of the declining company is operated by the Invisible Hand in the market place.

³⁶ See Peter Roosenboom, Frederik P Schlingemann and Manuel Vasconcelos, 'Does Stock Liquidity Affect Incentives to Monitor? Evidence from Corporate Takeovers' (2013) *Review of Financial Studies* 1-2; see also Alex Edmans, 'Blockholder Trading, Market Efficiency, and Managerial Myopia' (2009) 64 (6) *Journal of Finance* 2481-2.

³⁷ See Hirschman, above n 10, 15-6. This is because any face-to-face confrontation between the management and the shareholders can be avoided.

³⁸ See Peter C Kostant, 'Exit, Voice and Loyalty in the Course of Corporate Governance and Counsel's Changing Role' (1999) 28 *Journal of Socio-Economics* 203, 205; see also David C Donald, 'Shareholder Voice and Its Opponents' (2005) 5 *Journal of Corporate Law Studies* 305-6.

³⁹ See Kostant, above n 38, 211; see also Hirschman, above n 10, 26.

⁴⁰ See Hirschman, above n 10, 30.

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well as informal ways such as private negotiations. Voice is therefore direct and straightforward in nature. It is also personally costly to activist shareholders because they have to bear the full costs of their intervention or monitoring activities while often realising only a relatively small fraction of the benefits derived from doing so.⁴¹ On the other hand, passive shareholders enjoy the benefits of monitoring conducted by activist shareholders without incurring costs on their part. Despite this so-called 'free-rider' problem, voice is a more effective governance mechanism provided that large shareholders obtain a return that is sufficient to cover their monitoring costs and that profits justify a change.

Voice can be expressed in different forms, which may be participative, interactive or even combative in nature.

A Participative shareholder activism

1 Right to attend, speak and vote at general meetings

A general meeting acts as a forum for accountability in which management must face questions from shareholders regarding the affairs of the company. It also provides an opportunity for deliberation and enables shareholders to express their will through the passing of resolutions.

(a) Malaysia

Malaysian company law provides shareholders with the ability to participate in a company's decision-making process by affording them rights to attend, speak and vote at general meetings.⁴² For this purpose, all shareholders are entitled to receive written notice of a meeting,⁴³ which specifies the place, date and time of the meeting and, in the case of an extraordinary general meeting, the general nature of the business to be transacted.⁴⁴ At common law, the omission to summon a member may invalidate the proceedings of the meeting even though the member had previously indicated that they did not wish to attend.⁴⁵ However, Malaysia has modified the rule by providing that accidental omission to give notice of a meeting or non-receipt of such notice by any member shall not invalidate proceedings at a meeting.⁴⁶ The notice of the meeting must contain sufficient information to enable a prudent

⁴¹ See Anat R. Admati and Paul Pfleiderer, 'The "Wall Street Walk" and Shareholder Activism: Exit as a Form of Voice' (2009) 22(7) *Review of Financial Studies* 2645; see also Bolton and Samama, above n 34.

⁴² *Companies Act 1965* (Malaysia) s 148(1).

⁴³ *Ibid* s 145(4).

⁴⁴ *Ibid* Table A, art 45.

⁴⁵ See *Young v Ladies' Imperial Club Limited* [1920] 2 KB 523.

⁴⁶ *Companies Act 1965* (Malaysia) s 145(5).

shareholder to decide whether or not to attend. If the notice fails to specify the general nature of the business to be transacted at the meeting or omits a material fact, any resolution passed may be invalidated.⁴⁷

The right to vote is a fundamental right of a shareholder as they can have their voice heard through their vote in the meeting. Voting may be by a show of hands or a poll, depending on the company's articles of association. Normally, voting is by a show of hands unless the articles provide otherwise.⁴⁸ Every hand represents one vote irrespective of the number of shares held by the shareholder. On the other hand, in a poll every shareholder is entitled to one vote for each share that they hold.⁴⁹ Shareholders have the right to demand a poll at a general meeting on any question or matter other than the election of the chairman of the meeting or the adjournment of the meeting.⁵⁰ Indeed, companies should encourage and facilitate poll voting as it is fairer and more accurately reflects the wishes of the shareholders.⁵¹

If a shareholder is unable to attend a general meeting, they can appoint a proxy to attend and vote on their behalf. In the absence of a contrary provision in the articles, a proxy cannot be a non-member unless they are an advocate, an approved company auditor or a person approved by the Registrar of Companies.⁵² A proxy has the same right as a member to speak at the meeting but may only vote on a poll (unless the articles provide otherwise).⁵³ A shareholder may appoint two proxies but the appointment shall be invalid unless they specify the proportion of the shareholdings to be represented by each proxy.⁵⁴ Malaysian law is silent on the position of the votes of a proxy cast contrary to the appointing shareholder's instructions. In Singapore, such votes have been held to be spoilt votes.⁵⁵

A corporate shareholder may authorise a corporate representative to attend and vote at a general meeting.⁵⁶ A corporate representative must be distinguished from a

⁴⁷ See *Hup Seng Co Ltd v Chin Yin* [1962] 1 MLJ 371 (High Court of Malaysia).

⁴⁸ Voting by show of hands is common because it is informal and expeditious.

⁴⁹ *Companies Act 1965* (Malaysia) Table A, art 54.

⁵⁰ *Ibid* s 146(1).

⁵¹ Securities Commission Malaysia, *Corporate Governance Blueprint 2011: Towards Excellence in Corporate Governance* (July 2011) recommendation 3; see also Securities Commission Malaysia, *Malaysian Code on Corporate Governance 2012* (March 2012) recommendation 8.2.

⁵² *Companies Act 1965* (Malaysia) s 149(1)(b).

⁵³ *Ibid* s 149(1)(a). Paragraph 7.19 of the Listing Requirements of Bursa Malaysia Securities Berhad makes it mandatory that articles of public listed companies allow a proxy to vote on a show of hands.

⁵⁴ *Ibid* s 149(1)(d).

⁵⁵ See *Tong Keng Mee v Inno-Pacific Holdings Ltd* [2001] 4 SLR 485 (High Court, Singapore).

⁵⁶ *Companies Act 1965* (Malaysia) s 147(3)(a).

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proxy as the former is not subject to any qualitative requirements and can also vote by a show of hands.

(b) Australia

Shareholders in Australia are also entitled to attend, speak and vote at general meetings. The chair of an annual general meeting must allow a reasonable opportunity for shareholders to ask questions about, or make comments on, the management of the company,⁵⁷ or remuneration reports (if it is a listed company).⁵⁸ Shareholders are also given a reasonable opportunity to direct questions to the auditor on matters relating to the audit and auditor's report.⁵⁹ Shareholders who are entitled to vote at the meeting must be given written notice of a forthcoming meeting.⁶⁰ Failure or omission to give notice is a procedural irregularity.⁶¹ However, it will not invalidate a proceeding of the meeting unless the court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the court. In such cases, courts may declare the proceeding invalid.⁶²

A shareholder may appoint a person or body corporate as a proxy to exercise his or her voting right at the meeting even if he or she cannot attend personally.⁶³ A proxy has the same rights as the appointing shareholder to speak, vote and join in a demand for a poll.⁶⁴ A shareholder may direct how the proxy should vote on a particular resolution. If the proxy is the chair, the proxy must vote on a poll and must vote as instructed.⁶⁵ Other non-chair proxies are not obliged to vote. The proxy need not vote on a show of hands but if the proxy does so, he or she must vote as instructed.⁶⁶ Likewise, voting on a poll is optional for a non-chair proxy and if the proxy does so, he or she must vote as instructed.⁶⁷

⁵⁷ *Corporations Act 2001* (Cth) s 250S(1).

⁵⁸ *Ibid* s 250SA.

⁵⁹ *Ibid* s 250T(1).

⁶⁰ *Ibid* s 249J(1).

⁶¹ *Ibid* s 1322(1)(b)(ii).

⁶² *Ibid* s 1322(2).

⁶³ *Ibid* ss 249X(1), 249X(1A). This provision is a mandatory rule for public companies.

⁶⁴ *Ibid* s 249Y(1).

⁶⁵ *Ibid* s 250A(4)(c).

⁶⁶ *Ibid* s 250A(4)(a).

⁶⁷ *Ibid* s 250A(4)(d).

2 Right to requisition the company to convene a general meeting and right to call a meeting

(a) Malaysia

Between two annual general meetings, shareholders may wish to take a course of action with respect to the affairs of the company, which are within their power to decide.⁶⁸ In Malaysia, a shareholder owning 10 per cent or more of the shares has the right to requisition the directors in writing to call an extraordinary meeting with a stated object. The directors are obliged to convene and hold an extraordinary general meeting as soon as practicable within two months after the receipt of the requisition.⁶⁹ If the directors fail to convene the meeting within 21 days of the date of the deposit of the requisition, the requisitionists may do so themselves,⁷⁰ and recover reasonable expenses incurred by them from the company.⁷¹

Two or more shareholders owning not less than 10 per cent of the shares may also call a general meeting themselves if they desire the holding of the meeting to carry out their wishes.⁷² In this situation, the directors are not involved but shareholders who call the meeting must bear the expense incurred.

(b) Australia

In Australia, directors of a company are required to call and arrange to hold a general meeting on the request of members holding at least five per cent of the voting shares or at least 100 members who are entitled to vote at the general meeting.⁷³ The directors must call the meeting within 21 days after the request is given to the company. The meeting must be held within two months after the request.⁷⁴ If the directors fail to do so, members holding more than 50 per cent of the votes of all shareholders who made the request may call and arrange to hold a general meeting and such meeting must be held not later than three months after the request is given to the company.⁷⁵ The company shall bear the reasonable expenses incurred by the members in such a situation.⁷⁶

⁶⁸ Corporate Law Reform Committee for the Companies Commission of Malaysia, 'A Consultative Document on Engagement with Shareholders' (Companies Commission of Malaysia, 2006) 63 [6.1].

⁶⁹ *Companies Act 1965* (Malaysia) s 144(1).

⁷⁰ *Ibid* s 144(3).

⁷¹ *Ibid* s 144(4).

⁷² *Ibid* s 145(1).

⁷³ *Corporations Act 2001* (Cth) s 249D(1).

⁷⁴ *Ibid* s 249D(5).

⁷⁵ *Ibid* ss 249E(1), 249E(2).

⁷⁶ *Ibid* s 249E(4).

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3 *Right to place items on the agenda of the general meeting*

(a) Malaysia

The *Companies Act 1965* (Malaysia) also confers upon shareholders the right to place items on the agenda of a general meeting. A shareholder or shareholders holding at least one-twentieth (or five per cent) of the total voting rights or not less than 100 members holding shares with an average paid-up capital per member of not less than RM500 may, at their own expense, request the company to circulate their proposed resolutions or statements of not more than one thousand words with respect of the matter referred to in any proposed resolution.⁷⁷ A company is not bound to give notice of any resolution or to circulate any statement unless a copy of the requisition is deposited not less than six weeks before the meeting.⁷⁸ This shareholder proposal process enables the shareholders to communicate with the management of the company and with each other.⁷⁹

(b) Australia

Normally, the board of directors of a company sets the agenda for the annual general meetings and other general meetings. However, s 249N of the *Corporations Act 2001* (Cth) enables shareholders to request the company to put forward resolutions to be considered at a general meeting. Shareholders with at least five per cent of the votes or at least 100 members who are entitled to vote at a general meeting may give a company notice of a resolution that they propose to move at a general meeting.⁸⁰ A prescribed number of shareholders may request the company to distribute a statement to all shareholders regarding the proposed resolution to be moved at a general meeting or any other matter that may be properly considered at a general meeting.⁸¹

4 *Using technology for company meetings*

(a) Malaysia

Pursuant to s 145A of the *Companies Act 1965* (Malaysia), a company shall hold all meetings of its members within Malaysia and may hold such a meeting at more than one venue using any technology which enables all members a reasonable opportunity to participate. In other words, a meeting can be held by way of

⁷⁷ *Companies Act 1965* (Malaysia) s 151(1)-(2).

⁷⁸ *Ibid* s 151(4)(a).

⁷⁹ Corporate Law Reform Committee for the Companies Commission of Malaysia, above n 68, 31 [3.1].

⁸⁰ *Corporations Act 2001* (Cth) s 249N(1).

⁸¹ *Corporations Act 2001* (Cth) s 249P(1).

teleconference or videoconference. This provision has, to a certain extent, reduced the geographical constraint to hold a meeting since the traditional shareholder meeting required the physical presence of shareholders at the place where meetings were held. This increase in flexibility should also promote greater shareholder participation since some shareholders may not live in the city where a meeting is held. However, the advantages of this provision are limited by the requirement that meetings are held within Malaysia, which implies that all shareholders must be present within Malaysia.

Section 145A of the *Companies Act 1965* (Malaysia) does not expressly provide for electronic voting.⁸² However, it is submitted that the word 'participate' implies speaking and voting in meetings held with teleconferencing technology and, therefore, electronic voting is not precluded. For this purpose, companies may need to amend their articles of association to implement electronic voting. It seems that virtual shareholder meetings are still rare in Malaysia due to issues of cost and security.⁸³

(b) Australia

In Australia, a shareholder meeting can also be held at two or more venues using technology that gives shareholders a reasonable opportunity to participate.⁸⁴ Obviously, the Australian provision is broader in scope than the Malaysian provision as virtual shareholder meetings are allowed in Australia without restrictions on the locations of the shareholders.

A meeting will only be invalid on the ground that a shareholder did not have a reasonable opportunity to participate in a meeting of shareholders (held at two or more venues) if the court is of the opinion that a substantial injustice has been caused and it cannot be otherwise remedied.⁸⁵

B Interactive shareholder activism

Shareholders may engage in a process of relationship investing, which involves the formation of a long-term relationship between large shareholders or institutional shareholders and companies.⁸⁶ Shareholder engagement in this context may refer to 'the ongoing structured and informal interaction of institutional and retail

⁸² In contrast, s 360A(1) of the *Companies Act 2006* (UK) expressly provides for electronic meetings in which shareholders can attend, speak and vote by electronic means.

⁸³ Securities Commission Malaysia, above n 4, 11.

⁸⁴ *Corporations Act 2001* (Cth) s 249S.

⁸⁵ *Ibid* s 1322(3A).

⁸⁶ See Gillan and Starks, above n 1, 68.

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shareholders with the company throughout the year, as well as the period leading up to, and at the annual general meeting'.⁸⁷ Normally, this is done through purposive dialogue, constructive and private communication, or interaction between large shareholders and the management or the board, especially when the company undertakes a major transaction. Dialogue areas may include matters such as corporate strategies, key business opportunities, corporate governance, and executive remuneration among others. Such direct engagement enables shareholders to obtain more information from the management and assess the affairs of the company. Institutional shareholders who are willing to 'devote resources to gather and analyse information'⁸⁸ will also be able to provide private information, advice and recommendations for change to complement the management's knowledge, plans or corporate strategies so as to enhance the value of shareholdings. Regular engagement between institutional shareholders and companies will help to enhance transparency, develop shareholder trust and build mutual understanding between the parties.

On 27 June 2014, the *Malaysian Code for Institutional Investors* was launched by the Securities Commission of Malaysia and Minority Shareholder Watchdog Group ('MSWG'). This Code serves as a frame of reference for institutional investors to, among other things, monitor and engage with investee companies. Although this newly launched Code is voluntary in its implementation, institutional shareholders are encouraged to become signatories so as to promote good governance and long-term sustainability of companies.⁸⁹

Theoretically, interactive shareholder activism will result in both management and shareholders working together in the interests of the company. Nevertheless, the actual impact of this kind of shareholder activism is difficult to measure, as dialogue may take place behind the scenes and the impact of this kind of shareholder activism may be difficult to attribute to any single recommendation if it involves a number of different shareholders over a few years.⁹⁰ There are also limitations to this approach. For instance, management is not legally obliged to engage with shareholders or

⁸⁷ 'The AGM and Shareholder Engagement' (Discussion Paper, Australian Government: Corporations and Markets Advisory Committee, 2012) 7 [2.2.2] <[http://www.camac.gov.au/camac/camac.nsf/ByHeadline/PDFDiscussion+Papers/\\$file/AGM.pdf](http://www.camac.gov.au/camac/camac.nsf/ByHeadline/PDFDiscussion+Papers/$file/AGM.pdf)>.

⁸⁸ Zohar Goshen and Gideon Parchomovsky, 'The Essential Role of Securities Regulation' [2006] 55(4) *Duke Law Journal* 711, 723. Shareholders who do not have sufficient access to inside information but have the knowledge and ability to collect and evaluate information are categorised as 'information traders'.

⁸⁹ Minority Shareholder Watchdog Group and Securities Commission of Malaysia, 'Malaysian Code For Institutional Investors' (Investment Code, 2014) ii <http://www.sc.com.my/wp-content/uploads/eng/html/cg/mcii_140627.pdf>.

⁹⁰ Gillan and Starks, above n 1, 68-9.

adopt shareholders' recommendations. The board of directors is also protected by the business judgment rule, provided that they act in good faith for a proper purpose, do not have any material personal interest in the subject matter, reasonably believe that the business judgment is appropriate and is in the best interests of the company.⁹¹

C Combative shareholder activism

Shareholders may resort to litigation to remedy a wrong committed against the company by errant management or to enforce their personal rights.

1 *Derivative action*

At common law, a shareholder's right to pursue an action for a wrong done to the company is curtailed by the rule in *Foss v Harbottle*.⁹² This rule laid down two cardinal principles. The first principle is the proper plaintiff rule, which recognises that a company is an independent juristic person separate and distinct from its members or directors. Therefore, when a company suffers a wrong, the company is the proper plaintiff in any associated legal proceedings. The second principle is the internal management rule, which relates to the majority rule. If an alleged misconduct or internal irregularity can be ratified by the majority shareholders passing an ordinary resolution at the general meeting, then no individual shareholder is allowed to maintain an action in respect of that matter.⁹³ However, strict adherence to the rule would greatly limit the capacity of shareholders to seek relief against wrongdoers.

In exceptional cases,⁹⁴ a shareholder is allowed to bring a derivative action in the company's name and for the company's benefit.⁹⁵ This is because management controls litigation decisions and it is unlikely for the company to sue the officers and directors for their wrongdoings against the company. For this purpose, the plaintiff must establish a prima facie case that (i) the company is entitled to the relief claimed; (ii) the action falls within the scope of the exceptions to the rule in *Foss v Harbottle*;

⁹¹ See *Companies Act 1965* (Malaysia) s 132(1B); see also *Corporations Act 2001* (Cth) ss 180(2)–(3).

⁹² (1843) 2 Hare 461.

⁹³ See *Edwards v Halliwell* [1950] 2 All ER 1064, 1066; *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354, 357.

⁹⁴ A number of exceptions to the rule in *Foss v Harbottle* have been developed, namely: (a) the act complained of was illegal or *ultra vires*; (b) the act complained of infringed the personal rights of a member; (c) the act complained of could only be done or sanctioned by the passing of a special resolution; (d) the act complained of constituted a fraud on the minority; (e) where the justice of the case requires.

⁹⁵ It is called a 'derivative action' because the action derives from a right belonging to the company.

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and (iii) the wrongdoers are in control of the company.⁹⁶ One classic example is when the directors breach their duties to the company and the board of directors resolves not to bring legal action against them. In such a case, the wrongdoers will be named as the defendants while the company will be joined as co-defendant so that any judgment entered will be binding on the company. Any relief obtained is for the benefit of the company because, technically, it is the company which is suing, although it is through the shareholder. However, the shareholder bringing the action has to use his or her own funds to proceed and this is a disincentive for a shareholder to seek this remedy.

(a) Statutory derivative action in Malaysia

The statutory derivative action, or proceedings on behalf of a company, was introduced in Malaysia on 15 August 2007 by the *Companies (Amendment) Act 2007* (Malaysia). As the current position stands, a complainant may apply to the court for leave to bring an action on behalf of a company in the company's name.⁹⁷ A complainant may be a member, a former member (if the application relates to circumstances in which the member ceased to be a member), any director of the company or the Registrar (in the case of a declared company).⁹⁸ In deciding whether leave shall be granted, the court shall take into consideration whether the complainant is acting in good faith and whether it appears prima facie to be in the company's best interests that such leave be granted.⁹⁹ Section 181D(a) of the *Companies Act 1965* (Malaysia) overcomes the common law hurdle by providing that a ratification by the members of the company does not prevent any complainant from bringing the proceedings with the leave of court.¹⁰⁰ In granting leave, the court may make appropriate orders including an order requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in relation to the application,¹⁰¹ and an order as to indemnification for costs.¹⁰²

⁹⁶ See *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354, 366.

⁹⁷ *Companies Act 1965* (Malaysia) s 181A(1)–(2).

⁹⁸ *Ibid* s 181A(4).

⁹⁹ *Ibid* s 181B(4).

¹⁰⁰ Under the common law, if the general meeting is able to ratify the misconduct or internal irregularity by ordinary resolution, a shareholder will be barred from suing for such wrong or irregularity. See *Foss v Harbottle* (1843) 2 Hare 461; see also *Edwards v Halliwell* [1950] 2 All ER 1064, 1066; *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354, 357.

¹⁰¹ *Companies Act 1965* (Malaysia) s 181E(1)(d).

¹⁰² *Ibid* s 181E(1)(e).

(b) Statutory Derivative Action in Australia

In Australia, Part 2F1A of the *Corporations Act 2001* (Cth) provides for a statutory derivative action, which enables current and former shareholders and officers to bring legal proceedings on behalf of a company.¹⁰³ This provision was introduced to rectify perceived inadequacies of the common law derivative action. However, leave of court must be obtained in order for a legal action to proceed.¹⁰⁴ This is to ensure that leave is only granted for appropriate actions. Otherwise, disgruntled shareholders may easily bring vexatious or trivial legal actions and cause unnecessary inconvenience to the directors. The court must grant the leave if it is satisfied that each of these requirements are met: (a) it is probable that the company will not itself bring the proceedings; (b) the applicant is acting in good faith; (c) it is in the company's best interest that the applicant be granted leave; (d) there is a serious question to be tried; and (e) the applicant gave written notice of intention to apply for leave to the company at least 14 days before making the application.¹⁰⁵ If the members of a company ratify such conduct, it will not automatically prevent a person from bringing the proceedings with the leave of court;¹⁰⁶ the court has a wide discretion to make any order that it considers appropriate regarding the costs of the applicant, the company or any other party to the proceedings. This includes indemnification for costs.¹⁰⁷

The statutory derivative action has the effect of empowering shareholders with greater remedies and deterring managerial misconduct. Despite the introduction of the statutory derivative action, the common law derivative action has not been abrogated in Malaysia.¹⁰⁸ However, it is believed that the statutory derivative action will be preferred as compared to the common law derivative action as the former provides greater certainty to shareholders who wish to bring an action on behalf of the company.¹⁰⁹ In contrast, with the introduction of the statutory derivative action, Australia has abolished the right of a person at general law to bring proceedings on

¹⁰³ *Corporations Act 2001* (Cth) s 236(1).

¹⁰⁴ *Ibid* s 236(1)(b).

¹⁰⁵ *Ibid* s 237(2).

¹⁰⁶ *Ibid* s 239(1)(a).

¹⁰⁷ *Ibid* s 242.

¹⁰⁸ *Companies Act 1965* (Malaysia) s 181A(3).

¹⁰⁹ The provisions on the statutory derivative action clarify the party who can bring an action in the name of the company; the procedure to bring such action; the factors that will be considered by the court in granting leave; whether ratification by some shareholders of a director's breach would prevent other shareholders from bringing an action; and the powers of court to order a company to pay reasonable legal costs incurred by the complainant in relation to the action.

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behalf of a company.¹¹⁰ However, it seems that the statutory derivative action did not lead to larger number of cases in comparison with the common law derivative action it replaced.¹¹¹

2 *Direct or Personal Action*

The second type of action that a shareholder can bring is a direct or personal claim for statutory remedies where the shareholder has suffered damage personally.

(a) *Malaysia*

In Malaysia, the statutory mechanism that prevents a majority from abusing their power to bind the minority is found in s 181 of the *Companies Act 1965* (Malaysia), or what is popularly known as the 'oppression remedy'. However, the term 'oppression' is not completely accurate because this provision contains two limbs within ss 181(1)(a) and (b). A complainant who brings a case under s 181(1)(a) must establish that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to him or other members or in disregard of his or their interests as members or shareholders. Alternatively, under s 181(1)(b), a complainant must prove that some act has been done or is threatened, or a resolution has been passed or proposed, which unfairly discriminates against or is otherwise prejudicial to him or other members. Therefore, s 181(1) consists of four elements, namely (i) oppression; (ii) disregard of interests; (iii) unfair discrimination and (iv) prejudice.¹¹² These words are not defined by the *Companies Act 1965* (Malaysia) but s 181 is well-developed by case law.

¹¹⁰ *Corporations Act 2001* (Cth) s 236(3).

¹¹¹ Ian M Ramsay and Benjamin B Saunders, 'Litigation By Shareholders and Directors: An Empirical Study of The Statutory Derivative Action' (Research Report, Centre for Corporate Law and Securities Regulation, The University of Melbourne, 2006) 50 <http://www.law.unimelb.edu.au/files/dmfile/Statutory_Derivative_Action_Research_Report_15_03_06_11.pdf>.

¹¹² Section 181 of the *Companies Act 1965* (Malaysia) originated from s 210 of the *Companies Act 1948* (UK) but the latter provided relief only for 'oppression'. This UK provision was later replaced by s 75 of the *Companies Act 1980* (UK) following the recommendation of the Jenkins Committee, and then appeared as ss 459-461 of the *Companies Act 1985* (UK). It is now provided in ss 994-6 of the *Companies Act 2006* (UK). The substitute of s 210 and the subsequent replacements in the UK statutes provided for 'unfair prejudice'. In contrast, s 181 of the *Companies Act 1965* (Malaysia) uses four tests namely 'oppression', 'disregard of interests', 'unfair discrimination' and 'prejudice'. Therefore, s 181 of the *Companies Act 1965* (Malaysia) is couched in wider terms than its UK equivalent. It resembles s 232 of the *Corporations Act 2001* (Cth) that provides remedy to shareholders for acts which were 'contrary to their interest', 'oppressive', 'unfairly prejudicial' and 'unfair discriminatory' against them.

In *Scottish Co-operative Wholesale Society Ltd v Meyer*,¹¹³ the term ‘oppressive conduct’ was defined as ‘burdensome, harsh and wrongful’. According to *Re Kong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung*,¹¹⁴ to make up a case of oppression, there must be ‘a visible departure from the standards of fair dealing and a violation of the conditions of fair play’. As for ‘disregard’, there must be ‘awareness of [the minority shareholders’] interest and an evident decision to override it or brush it aside’.¹¹⁵ The question of ‘unfairness’ under s 181(1)(b) of the *Companies Act 1965* (Malaysia) is one of fact and the court applies an objective test in determining the degree of unfairness.¹¹⁶ Among the common conducts that have been found to have fallen within the ambit of s 181 of the *Companies Act 1965* (Malaysia) are diversion of business,¹¹⁷ misappropriation of corporate assets,¹¹⁸ exclusion of a shareholder from management,¹¹⁹ failure to provide information,¹²⁰ and no dividends or payment of inadequate dividends.¹²¹

Section 181 of the *Companies Act 1965* (Malaysia) embodies a shareholder’s right to be treated fairly. As it involves shareholders’ personal rights, it is not caught by the proper plaintiff rule and it is the shareholder who seeks redress for his grievance.

The *locus standi* given by s 181 is confined to members, debenture holders of the company and the Minister charged with the responsibility for companies.¹²² It follows that a complainant under s 181 must be able to demonstrate that his name appears in the register of members of the company at the time of the filing of action. However, if a person is oppressed in his capacity as a member, for instance by being deprived of membership by the company through the board of directors, then the company or the directors will be estopped from contending that that the complainant has no *locus*

¹¹³ [1959] AC 324.

¹¹⁴ [1978] 2 MLJ 227 (Privy Council).

¹¹⁵ *Ibid* 229. The description of the terms ‘oppression’ and ‘disregard’ in *Re Kong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung* [1978] 2 MLJ 227 (Privy Council) was adopted in *Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd* [1994] 1 MLJ 520 (High Court of Malaysia) and *Dato’ Low Mong Hua v Banting Hock Hin Estate Co Sdn* [2003] MLJU 449 (High Court of Malaysia).

¹¹⁶ See *Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd* [1994] 1 MLJ 520 (High Court of Malaysia).

¹¹⁷ See generally *Thomas v Santhi* (Unreported, Kuala Lumpur High Court, Mohammad Ariff bin Md Yusuf J, 17 September 2010).

¹¹⁸ See *Low Peng Boon v Low Janie* [1999] 1 SLR 761 (Court of Appeal, Singapore).

¹¹⁹ See *Eric Lau Man Hing v Eramara Jaya Sdn Bhd* [1998] 7 MLJ 528 (High Court of Malaysia).

¹²⁰ See *Chiew Sze Sun & Anor v Cast Iron Products Sdn Bhd* [1994] 1 CLJ 157 (High Court of Malaysia).

¹²¹ See *Re Gee Hoe Chan Trading Co Pte Ltd* [1991] 3 MLJ 137 (High Court of Singapore); *Eric Lau Man Hing v Eramara Jaya Sdn Bhd* [1998] 7 MLJ 528 (High Court of Malaysia); *Low Peng Boon v Low Janie* [1999] 1 SLR 761 (Court of Appeal, Singapore).

¹²² *Companies Act 1965* (Malaysia) s 181(1).

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standi under s 181.¹²³ Besides this, the relief afforded by s 181 is not exclusively confined to minority shareholders; it is also available to majority shareholders who are not in control of the management of the company and who are unable to control the board.¹²⁴

Once the conduct under s 181(1) of the *Companies Act 1965* (Malaysia) is established, the court is given wide-ranging powers to make an order it deems fit under s 181(2) to bring an end to the dispute. This includes directing or prohibiting any act or canceling or varying any transaction or resolution,¹²⁵ providing for the purchase of shares of the company by other members of the company or by the company itself,¹²⁶ and ordering the company be wound up.¹²⁷

A shareholder may apply to wind up the company if the directors are acting in their interests instead of the company's interests,¹²⁸ or it is just and equitable to do so.¹²⁹ In fact, winding up a company on just and equitable grounds has been granted in various situations, including a deadlock in the management of the company,¹³⁰ the failure of the substratum of the company,¹³¹ and the deliberate exclusion of the complainant from the management of the company.¹³²

(b) *Australia*

Minority shareholders in Australia are also protected if the conduct of a company, an act committed by or on behalf of a company, or a resolution or proposed resolution of members of a company is either contrary to the members' interests as a whole or oppressive, unfairly prejudicial or unfairly discriminatory.¹³³ There is a wide range of remedies that the court can order in the shareholders' favour under s 233 of the *Corporations Act 2001* (Cth).¹³⁴

¹²³ See *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd* [1996] 1 MLJ 113 (Federal Court of Malaysia).

¹²⁴ See *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd* [1994] 2 MLJ 789 (High Court of Malaysia).

¹²⁵ *Companies Act 1965* (Malaysia) s 181(2)(a).

¹²⁶ *Ibid* s 181(2)(c).

¹²⁷ *Ibid* s 181(2)(e).

¹²⁸ *Ibid* s 218(1)(f).

¹²⁹ *Ibid* s 218(1)(i).

¹³⁰ See *Re Yenidje Tobacco Co Ltd* [1916-17] All ER Rep 1050.

¹³¹ See *Re German Date Coffee Co Ltd* [1881-85] All ER Rep 372.

¹³² See *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492.

¹³³ See *Corporations Act 2001* (Cth) ss 232.

¹³⁴ The remedies include ordering the company be wound up, modifying or repealing the company's existing constitution, regulating the conduct of the company's affairs in the future, providing for the purchase of shares by any member, ordering the company to institute, prosecute, defend or discontinue specified proceedings and others.

Pursuant to s 461(1)(e) of the *Corporations Act 2001* (Cth), the court may order the winding up of a company if the directors have acted in their own interests rather than in the members' interests as a whole. In *Kokotovich Constructions Pty Ltd v Wallington*,¹³⁵ the director breached this duty and allotted shares for the improper purpose of devaluing the respondent's shares in the company. The allotment was subsequently set aside and the company was ordered to be wound up, although it was successful and prosperous, as there was continuing animosity between the two shareholders and a real risk of further oppression. Under s 461(1)(k) of the *Corporations Act 2001* (Cth), the court may also order the winding up of a company if it is of the opinion that it is just and equitable to do so.

The common law derivative action may have restricted the effect of the shareholders' voice in bringing an action on behalf of the company against errant management. However, the statutory oppression remedy and the subsequent introduction of the statutory derivative action in Malaysia will almost certainly strengthen the shareholders' voice mechanism in disciplining opportunistic management, both for the injury suffered by the shareholder personally or for a wrong done against the company. The same applies to Australia, which also has laws providing for a statutory oppression remedy and a statutory derivative action.

V MINORITY SHAREHOLDER WATCHDOG GROUP ('MSWG') IN MALAYSIA

The MSWG plays an important role in shareholder activism in Malaysia. This organisation was established as a public company limited by guarantee in August 2000 with the founding members comprising of the Armed Forces Fund Board, the National Equity Corporation, the Social Security Organisation and the Pilgrims Fund Board, each of which provided funding for its start-up and establishment.¹³⁶ The MSWG is now a professional body licensed under the Capital Markets and Services Act 2007 (Malaysia).¹³⁷ Being a non-profit body, it is currently funded mainly by the Capital Market Development Fund,¹³⁸ along with sales of its own products and services.¹³⁹ MSWG was set up with the noble objectives, among other things, of being a platform to initiate collective shareholder activism on questionable practices by the

¹³⁵ (1995) 17 ACSR 478.

¹³⁶ Minority Shareholder Watchdog Group, *Who We Are*, above n 6.

¹³⁷ See Minority Shareholder Watchdog Group, Annual Report, above n 6.

¹³⁸ The Capital Market Development Fund has been supporting MSWG since 2005, as a recognition to its public mandate to spearhead shareholder activism. See The Capital Market Development Fund, *Minority Shareholder's Watchdog Group* (2014) CMDF <http://cmdf.org.my/364_221_221/Web/WebPage/Minority-Shareholder-s-Watchdog-Group/Minority-Shareholder-s-Watchdog-Group.html>.

¹³⁹ See Minority Shareholder Watchdog Group, *Who We Are*, above n 6.

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management of public listed companies; to be a leader for minority shareholders' rights and interests that influences the decision-making process in public listed companies; and to monitor public listed companies for breaches in corporate governance.¹⁴⁰

MSWG provides various services to their subscribers, such as monitoring services through both before and after annual general meetings and extraordinary general meeting reports of all companies, writing letters to public listed companies to raise certain issues or seek clarification upon the requests of minority shareholders,¹⁴¹ obtaining reply letters from public listed companies to the questions raised by the MSWG, attending companies' general meetings, and running investor education program seminars. In this context, MSWG engages in both participative and interactive shareholder activism. In addition, MSWG provides proxy-voting services to minority shareholders,¹⁴² and an informative website accessible to the public. It holds periodic dialogues with retail and institutional shareholders;¹⁴³ produces research publications such as Malaysian Corporate Governance Reports,¹⁴⁴ Dividend Surveys, and Malaysia-ASEAN Corporate Governance Reports;¹⁴⁵ and publishes a periodic newsletter containing news and information on issues relating to minority shareholders' interests. These initiatives and services of MSWG have, to a certain extent, resolved the problem of information asymmetries on the part of minority shareholders in Malaysia.

Researchers found that MSWG-targeted companies earn significantly greater returns than non-targeted companies.¹⁴⁶ This shows the MSWG's impact in increasing shareholders' wealth and addressing the agency problems in Malaysia.¹⁴⁷

¹⁴⁰ Ibid.

¹⁴¹ For instance, MSWG may ask questions on behalf of the minority shareholders on the performance of the company, financial statements and corporate actions such as mergers and acquisitions.

¹⁴² Rashid Ameer and Rashidah Abdul Rahman, 'The Impact of Minority Shareholder Watchdog Group Activism on the Performance of Targeted Firms in Malaysia' (2009) 5(1) *Asian Academy of Management Journal of Accounting and Finance* 67, 76; see also Siti Sakinah Azizan and Rashid Ameer, 'Shareholder Activism in Family-controlled Firms in Malaysia' (2012) 27(8) *Managerial Auditing Journal* 774, 776.

¹⁴³ See Minority Shareholder Watchdog Group, *Dialogues/Discussion* <<http://www.mswg.org.my/dialogues.php>>.

¹⁴⁴ See eg, Minority Shareholder Watchdog Group, 'Malaysia Corporate Governance Index' (Report, 2011) <http://www.mswg.org.my/files/editor_files/file/publication/MSWG-index-report2011-web.pdf>.

¹⁴⁵ For instance, see Minority Shareholder Watchdog Group, 'Malaysia-ASEAN Corporate Governance Report' (Report, 2013) <http://www.mswg.org.my/files/editor_files/file/publication/MSWG_CG_2013_v4.pdf>; Minority Shareholder Watchdog Group, 'Malaysia-ASEAN Corporate Governance Report' (Report, 2012) <http://www.mswg.org.my/files/editor_files/file/publication/Asena_CG_2012.pdf>.

¹⁴⁶ Ameer and Rahman, above n 142, 89.

¹⁴⁷ Ibid.

VI THE AUSTRALIAN SHAREHOLDERS' ASSOCIATION ('ASA')

Australia also has an organisation that proactively promotes good corporate governance and advances the interests of shareholders - the Australian Shareholders' Association ('ASA'). The ASA was formed in 1960 with the aim of promoting the interests of Australian retail shareholders.¹⁴⁸ It is an independent not-for-profit organisation funded by members' subscription fees.¹⁴⁹ The ASA monitors the performance of the top 200 companies listed on the Australian Securities Exchange ('ASX') by meeting the chairmen and the company executives to discuss crucial matters affecting the respective members. Based on the ASA's independent assessment of the company's annual report and financial statements, the ASA's monitors will prepare the voting intentions and post them on their website. This will occur following the board's engagement and one or two weeks before the annual general meeting. The voting intentions state the ASA's stand on whether to support or oppose the agenda items of the annual general meeting.¹⁵⁰ The members of the ASA are also kept informed about the developments of the companies via the website and the monthly e-newsletters.

VII CHALLENGES TO SHAREHOLDER ACTIVISM IN MALAYSIA

It has been contended that national culture has an impact on shareholder activism in Malaysia and Australia. According to Professor Geert Hofstede,¹⁵¹ culture is the 'collective programming of the mind which distinguishes the members of one group or category of people from others'.¹⁵² He proposed that there are six dimensions of national culture: power distance;¹⁵³ individualism;¹⁵⁴ masculinity;¹⁵⁵ uncertainty avoidance;¹⁵⁶ long-term orientation;¹⁵⁷ and indulgence.¹⁵⁸

¹⁴⁸ See Australian Shareholders' Association, *About the Australian Shareholders' Association* <<https://www.australiashareholders.com.au/about-australian-shareholders-association>>.

¹⁴⁹ *Ibid.*

¹⁵⁰ See Australian Shareholders' Association, *About Company Monitoring* <<https://www.australiashareholders.com.au/about-company-monitoring>>; see also Australian Shareholders' Association, *The AGM season* <<https://www.australiashareholders.com.au/agm-season>>.

¹⁵¹ Professor Geert Hofstede is a Dutch social psychologist who conducted a pioneering study of cultures across modern nations.

¹⁵² See Geert Hofstede, Gert Jan Hofstede and Michael Minkov, *Cultures and Organizations: Software of the Mind* (McGraw Hill, 3rd ed, 2010) 6.

¹⁵³ *Ibid.* 61. Power distance is defined as 'the extent to which the less powerful members of institutions and organisations within a country expect and accept that power is distributed unequally'.

¹⁵⁴ Individualism deals with the degree of interdependence a society maintains among its members. See The Hofstede Centre, *Cultural Dimensions: National Culture* <<http://geert-hofstede.com/national-culture.html>>. In an individualist society, the ties between individuals are loose whereas in collectivist

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Malaysia scored very high (104) on the power distance index.¹⁵⁹ This means that people generally accept a hierarchical order without further justification and that challenges to leadership are generally avoided.¹⁶⁰ With a score of 26 in the individualism index,¹⁶¹ Malaysia is categorised as a collectivistic society, in which loyalty is paramount and strong relationships are fostered. While the preference for masculinity or femininity dimension cannot be ascertained,¹⁶² Malaysia scored 36 on the uncertainty avoidance index, which indicates that Malaysians can easily tolerate deviance from the norm and take risks more readily.¹⁶³ Malaysia is a country with short-term orientation,¹⁶⁴ in which traditions are sacrosanct and the values promoted include preservation of one's face and fulfillment of social obligations. Its score of 57 in the indulgence index demonstrates Malaysia's disposition towards indulgence.¹⁶⁵

With the combination of a high power distance index and low individual value score, shareholders in Malaysia are generally less rights-conscious than shareholders in countries such as Australia. In comparison with shareholders in Western liberal democracies, Malaysian shareholders may be more reluctant to enforce their rights, query management for poor corporate governance practices and to take action

culture, people are integrated into cohesive groups. See Hofstede, Hofstede and Minkov, above n 152, 92.

¹⁵⁵ A masculine society is assertive, tough, competitive and shows preference for achievement, heroism and material success. See Hofstede, Hofstede and Minkov, above n 152, 140; see also The Hofstede Centre, Cultural Dimensions, above n 154.

¹⁵⁶ Uncertainty avoidance refers to the degree to which the members of a society feel uncomfortable with uncertainty and ambiguity. See The Hofstede Centre, Cultural Dimensions, above n 154.

¹⁵⁷ The values that are fostered in a long-term orientated society are perseverance, thrift, ordering relationships by status and having a sense of shame, which attach more importance to the future. On the contrary, in a short-term oriented society, the virtues promoted concern the past and present such as respect for tradition, preservation of one's face and fulfilling social obligations. See Hofstede, Hofstede and Minkov, above n 152, 239.

¹⁵⁸ Indulgence refers to 'a tendency to allow relatively free gratification of basic and natural human desires concerning enjoying life and having fun'. In other words, it is the extent to which people try to control their desires and impulses. Ibid 281; see also The Hofstede Centre, *Country Comparison: What about Malaysia?* <<http://geert-hofstede.com/malaysia.html>>.

¹⁵⁹ See Hofstede, Hofstede and Minkov, above n 152, 57.

¹⁶⁰ See The Hofstede Centre, *Country Comparison, What about Malaysia?* <<http://geert-hofstede.com/malaysia.html>>.

¹⁶¹ See Hofstede, Hofstede and Minkov, above n 152, 97.

¹⁶² Malaysia scored 50 for masculinity index. Ibid 142.

¹⁶³ Ibid 194; see also The Hofstede Centre, *Country Comparison - Malaysia*, above n 160,

¹⁶⁴ Malaysia has a low score of 41 in the long-term orientation index. See Hofstede, Hofstede and Minkov, above n 152, 257.

¹⁶⁵ Ibid 283.

against the 'powerful' directors who are in breach of their duties to the company.¹⁶⁶ Confrontation is not well-received and collective interests prevail over individual interests. This poses a challenge to shareholder activism in Malaysia. However, the performance by the MSWG of its monitoring services, and the fulfilment of its role as a watchdog for minority shareholders, is likely to redress this problem.

Australia, on the other hand, receives a low score on the power distance index (38),¹⁶⁷ which means that there is a preference for consultation.¹⁶⁸ However, with a score of 90 on the individualism index,¹⁶⁹ Australia has a highly individualistic culture in which individuals are expected to take care of themselves and their immediate family only.¹⁷⁰ Australia is considered to be a 'masculine' society,¹⁷¹ which is driven by competition, achievement and success.¹⁷² While Australia has a very intermediate score of 51 in the uncertainty avoidance index,¹⁷³ it has a short-term normative orientation,¹⁷⁴ which indicates a preference for maintaining traditions and norms and a suspicion of societal change.¹⁷⁵ Australia is also an indulgent country (with a score of 71 in the indulgence index)¹⁷⁶ in which people tend to be optimistic and possess a positive attitude.¹⁷⁷

It follows that shareholders in Australia may be more prepared to enforce their rights than Malaysian shareholders. Indeed, seven out of ten new class actions in Australia are shareholder related.¹⁷⁸

¹⁶⁶ The Western countries generally display a low power distance index and high individualism index. See the tables of these indices in Hofstede, Hofstede and Minkov, above n 152, 59, 95.

¹⁶⁷ See Hofstede, Hofstede and Minkov, above n 152, 59.

¹⁶⁸ Ibid 61.

¹⁶⁹ Ibid 95.

¹⁷⁰ See The Hofstede Centre, *Country Comparison: What about Australia?* <hofstede.com/australia.html>.

¹⁷¹ Australia has a score of 61 in the Masculinity index. See Hofstede, Hofstede and Minkov, above n 152, 141.

¹⁷² See The Hofstede Centre, *Country Comparison – Australia*, above n 170.

¹⁷³ See Geert Hofstede, Gert Jan Hofstede and Michael Minkov, above n152, 194.

¹⁷⁴ Australia scores 21 in the long-term orientation index. See Hofstede, Hofstede and Minkov, above n 152, 258.

¹⁷⁵ See The Hofstede Centre, *Cultural Dimensions*, above n 154.

¹⁷⁶ See Hofstede, Hofstede and Minkov, above n 152, 282.

¹⁷⁷ See The Hofstede Centre, *Country Comparison - Australia*, above n 170, 187.

¹⁷⁸ Michael J Legg, 'Shareholder Class Actions in Australia – The Perfect Storm?' (2008) 31(3) *University of New South Wales Law Journal* 669.

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The Australian trade unions have also begun to use their power as shareholders to pursue employee interests.¹⁷⁹

In addition, rational apathy of shareholders may also restrict the impact of shareholder activism in Malaysia. Rational apathy is caused by the division of benefits and free-rider problems. A rational shareholder will only engage in monitoring activities if the benefits obtained equal or exceed the costs associated with such activities. However, the benefits here refer to the small fraction of the total gains accruing to the company, which is proportionate to the shares held by the shareholder. A shareholder may find that it is more viable financially to free-ride on the monitoring activities of others as they can reap the benefits without sharing the costs.

In this respect, institutional shareholders or investors can play a critical role in promoting or sustaining good corporate governance practice, as they hold a substantial stake and they can exert significant influence over their investee companies. Institutional shareholders or investors normally have additional access to company information through their expertise in the markets and close contact with companies. In addition, they have the resources to monitor management. Institutional shareholders or investors should therefore actively monitor and engage with investee companies on matters such as performance of the companies, corporate governance practices, strategies, risks, and signs of problems which will lead to losses of investment value. Constructive engagement between institutional shareholders and investee companies will help to protect shareholders' interests.

VIII CONCLUSION

Generally, ownership structures in the Malaysian public companies are highly concentrated. Agency problems arise due to the non-alignment of interests between the controlling and non-controlling shareholders, as opposed to the conflict of interests between the manager and shareholders, as in the United States and United Kingdom, which have dispersed ownership in companies. The structure of ownership in Australia is less prominent, but it has been argued that Australia is more appropriately categorised as a country characterized by concentrated ownership. Thus, there must be effective mechanisms in both countries that protect

¹⁷⁹ See Kirsten Anderson and Ian Ramsay, 'From the Picketline to the Boardroom: Union Shareholder Activism in Australia' (Research Report, Centre for Corporate Law and Securities Regulation and Centre for Employment and Labour Relations Law, The University of Melbourne, 2005) 6 <http://www.law.unimelb.edu.au/files/dmfile/Union_shareholder_activism_261213.pdf>; see also Michael Rawling, 'Australian Trade Unions as Shareholder Activists: The Rocky Path Towards Corporate Democracy' (2006) 28 *Sydney Law Review* 227.

the interests of minority shareholders against abuse by controlling owners or management.

Indeed, Malaysia and Australia have adopted a shareholder-centred approach to company law. The introduction of a statutory derivative action and virtual meetings using modern technology has enhanced the shareholders' voice mechanism in Malaysia and Australia. Both countries have organisations that advance the interests of shareholders, namely the MSWG in Malaysia and the ASA in Australia. The approach taken by the MSWG and ASA is participative and interactive in nature. However, combative shareholder activism is less pronounced in Malaysia than in Australia (and other Western liberal democratic countries) due to the influence of national culture. Public confrontation with management is relatively rare. On the other hand, shareholders in Australia may be more prepared to exercise and enforce their rights.

While shareholders may also have the traditional choice of selling their shares to express their dissatisfaction against the company's performance, the exit mechanism seems to be a less effective curative measure especially if the size of the shareholding involved is relatively small. In fact, corporate governance in the context of Malaysian and Australian public companies tends to place more emphasis on the voice mechanism than the exit mechanism.

With the launch of the new *Malaysian Code for Institutional Investors* on 27 June 2014, institutional shareholders or investors are encouraged and expected to be more proactive and play a leadership role in monitoring the performance of investee companies and engage actively with the management. On the other hand, researchers have found that Australian institutions may not necessarily act collectively to pursue better corporate governance, and some propose that an explicit fiduciary duty might be needed to prompt institutions to play a more active role in enhancing best practice in corporate management.¹⁸⁰

In any event, shareholder activism, as one strand in a web of governance mechanisms, has been gradually increasing in Malaysia and Australia. It is hoped that shareholder activism will lead to an increase of sustainable shareholder value and raise corporate governance in Malaysia and Australia to a higher level.

¹⁸⁰ Paul Fabris and Andrew Greinke, 'Institutional Activism: Attitudes of Australian Fund Managers' (1999) 7(4) *Corporate Governance* 379, 383.