# CHAPTER 2

# SHAREHOLDERS' RIGHTS AND MEETINGS

## I. INTRODUCTION

1 This chapter discusses the Steering Committee's review of the provisions of the Companies Act relating to shareholders' rights and meetings and sets out recommendations arising from the review.

2 The Steering Committee has reviewed the various aspects of voting in company meetings (by poll, by show of hands), various aspects of written resolutions (required majority vote, types of business, period for passing resolution, manner of passing resolution), various methods of enfranchising indirect investors (multiple proxies to enfranchise indirect institutional investors, look-through mechanism to enfranchise CPF investors), recognition of corporate representatives, use of electronic communications for corporate notices and documents, various aspects of general meetings (notional closure of membership register, allocation of cost of requisitioned meeting), protection of minority shareholders' rights (minority buy-out right, statutory derivative action, cumulative voting for election of directors) and the prohibition against a subsidiary being a member of its holding company.

## II. VOTING

### *(a) Voting of resolutions by poll*

3 Sections 178 and 184(4) of the Companies Act specify the types of matters for which a poll at a general meeting may be demanded and the requirements for demanding a poll. The current practice for Singapore companies is to have resolutions at general meetings voted on a show of hands, unless a poll is demanded. The Accounting and Corporate Regulatory (ACRA), the Monetary Authority of Singapore (MAS) and the Singapore Exchange Limited (SGX) requested a study into whether it is desirable to mandate voting by poll for all resolutions or to require certain types of matters to be determined by poll.

4 The Hong Kong Exchange Listing Rules require listed companies to conduct voting by poll for certain issues.[1] The Asian Corporate Governance Association (ACGA) Asian Proxy Voting Survey 2006 – Initial Report recommended that all resolutions (even routine ones) at general meetings of all listed companies be voted by poll, and that the listing rules be amended to make voting by poll mandatory. The report noted that voting by poll is a more

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[1] Under the Hong Kong Exchange Listing Rules, issuers are required to conduct voting by poll for the following issues:

a. Connected transactions pursuant to Chapter 14A;
b. Transactions that are subject to independent shareholders' approval;
c. Granting of options to a substantial shareholder, an independent non-executive director of the issuer, or any of their respective associates (see rule 17.04(1));
d. Any other transactions in which a shareholder has a material interest, and is therefore required to abstain from voting at the general meeting.

common practice amongst companies comprising the Hang Seng Index in Hong Kong than those comprising the Straits Times Index in Singapore (Hong Kong: 91%; Singapore: 4%).

5 In the review of company law leading up to the UK Companies Act 2006, a committee led by Mr Paul Myners submitted a report entitled "Review of the impediments to voting UK shares"[2] to the Shareholder Voting Working Group in January 2004, which recommended that "best practice should be to call a poll on all resolutions at company meetings". It was noted at paragraph 3.7.1 of the report that the benefits of requiring all resolutions to be voted on a poll are:

(a) voting is more exact and equitable in that one vote per share is counted, as opposed to voting on a show of hands where each shareholder has one vote and it is possible for a group of shareholders owning in aggregate a very small proportion of a company's outstanding capital to influence the outcome;

(b) voting is more transparent;

(c) overseas shareholders would be more inclined to vote UK shares as currently some shareholders are discouraged in the belief that result is in most cases determined by a show of hands at the meeting;

(d) although a show of hands is believed to enfranchise the individual shareholder, the majority of shareholders cannot and do not attend the meeting for reasons of geography or timing, but they do complete proxy cards which they reasonably expect to be counted.

6 On the other hand, voting by poll on all resolutions would be time-consuming and would increase the cost of holding general meetings. The Steering Committee disagrees with the proposal that <u>all companies</u> should be required to have <u>all resolutions</u> tabled at general meetings voted by poll, as it would be unduly restrictive to impose such a requirement on all companies <u>including private companies</u>. Whilst it is recognised that it may be desirable for certain types of important resolutions tabled at general meetings of listed companies to be voted by poll, the Steering Committee is of the view that this is an issue for SGX to consider as it affects listed companies.

7 The respondents to the consultation unanimously agreed with the Steering Committee on this recommendation.

**<u>Recommendation 2.1</u>**

**Sections 178 and 184 should not be amended to require all companies to have all resolutions tabled at general meetings voted by poll.**

[2] "Review of the impediments to voting UK shares", Report by Paul Myners to the Shareholder Voting Working Group (January 2004), available at: http://www.jpmorgan.com/pdfdoc/jpmorgan/investorservices/doc/mynersreport2004.pdf

*(b) Lowering of threshold for eligibility to demand a poll (section 178)*

8 The Steering Committee considered the issue of whether to amend section 178(1)(b)(ii) of the Companies Act to lower the threshold of 10% of total voting rights for eligibility to demand a poll to 5% of total voting rights. The Steering Committee observed that there is a certain logic to the proposed 5% threshold, as that is the threshold at which a person becomes a substantial shareholder (section 81(1)).

9 The Steering Committee noted that there are two thresholds in section 178(1)(b) – a five-member threshold (sub-paragraph (i)) and a 10% voting rights threshold (sub-paragraph (ii)). The Steering Committee was initially of the view that there is no current necessity to lower the 10% voting rights threshold in view of the availability of an alternative five-member threshold for eligibility to demand a poll, and the lack of market feedback on this issue. However, a significant minority of respondents supported the lowering of the threshold from 10% to 5% of total voting rights for the following reasons:

(a) Lowering the threshold could enhance standards of corporate governance as it could encourage voting by poll which was more representative of shareholders' rights and interests.

(b) 5% is the threshold at which a person becomes a substantial shareholder. Thus, a reduced threshold of 5% would allow a substantial shareholder to demand a poll.

(c) A lower threshold, especially for a private company which had limited number of shareholders, would enable a minority shareholder to better exercise his rights and would be consistent with the threshold in section 184D in respect of the right of a member to require a general meeting to be convened instead of proceeding with written resolution.

(d) If shareholders holding less than 10% voting power could already ask for a poll under the alternative 5-member threshold, there is no compelling reason to maintain the height of the voting rights threshold at 10%.

10 Having considered the consultation feedback, the Steering Committee recommends that the threshold of 10% of total voting rights for eligibility to demand a poll be lowered to 5% of total voting rights.

**<u>Recommendation 2.2</u>**

**Section 178(1)(b)(ii) should be amended to lower the threshold of 10% of total voting rights for eligibility to demand a poll to 5% of total voting rights.**

## III. WRITTEN RESOLUTIONS

### *(a) Requisite majority of votes for passing written resolutions*

11 Prior to the coming into operation of sections 184A to 184G of the Companies Act on 15 May 2003, members of a private company could make a decision by issuing a written or circular resolution instead of holding a meeting, provided all the members agreed.

12 However, this requirement for unanimous consent resulted in a restricted use of written resolutions. Hence, in 2003, the Companies (Amendment) Act introduced new provisions in order to widen the scope of written resolutions, and to provide for relevant procedures. The amendments were intended to facilitate decision-making by companies.

13 Section 184A(1) lays down the general principle that a private company may pass resolutions by written means. Under section 184A(3) and (4), there is no longer a requirement for unanimous written consent. Instead, it is now provided that:

(a) for special resolutions, a written resolution is passed if agreed upon by one or more members representing at least 75% majority of total voting rights; and

(b) for ordinary resolutions, a written resolution is passed if agreed upon by one or more members representing a simple majority of total voting rights,

or such greater majority as stipulated in the memorandum or articles of the relevant company.

14 This is similar to the position adopted in the UK. However, Hong Kong and Australia do not have these requirements.

15 In order to safeguard minority interests, section 184D provides that holders of 5% of the voting rights may give notice to the directors requiring that a general meeting be convened instead of proceeding with a written resolution. It is mandatory for the directors to convene the general meeting upon receipt of this notice.

16 The Steering Committee considered whether the requisite majority vote requirements for written resolutions for private companies should be specified in section 184A of the Companies Act or be left to be specified by each company in their articles of association.

17 The Steering Committee is of the view that the status quo for the relevant majority vote requirements should be maintained. In other words, the Companies Act should continue to provide for the requisite majority vote (more than 50% for ordinary resolution and 75% for special resolution) for the passing of written resolutions, subject to any requirement for a greater majority in the memorandum or articles. The relevant majority vote requirement should not be left to be determined entirely by a company via its articles of association.

18 Most of the respondents to the consultation agreed that the requisite majority vote requirements for the passing of written resolutions in private companies should be specified in section 184A. The respondents to the consultation unanimously agreed that the requisite majority vote requirements should be unchanged.

**Recommendation 2.3**

**The requisite majority vote requirements for the passing of written resolutions in private companies should continue to be specified in section 184A.**

**Recommendation 2.4**

**The requisite majority vote requirements for the passing of written resolutions in private companies should not be changed.**

***(b) Restrictions on types of "business" that can or cannot be conducted using written resolutions***

19 Whilst the Company Legislation and Regulatory Framework Committee (CLRFC) introduced provisions in the Companies Act to allow for most decisions to be made by written resolution, a private company will however still need to hold meetings if the resolution requires a special notice (for example, the removal of a director, a liquidator or an auditor).

20 In the UK, Hong Kong and Australia, there are restrictions on the type of "business" that can or cannot be conducted using written resolutions. In the UK and Hong Kong, directors may not be removed by written resolution.[3] Also, in the UK, Hong Kong and Australia, an auditor may not be removed by written resolution.[4] However, in New Zealand, there are no restrictions in the Companies Act 1993 regarding the types of decisions that may or may not be taken via written resolution.

21 The Steering Committee initially held divided views about whether the Companies Act in Singapore should allow for the removal of a director, liquidator or an auditor by a written resolution. Whilst certain members opined that unanimous agreement for the removal of the above officers of a company may suffice to protect all the interests of the members of a company, others opined that having specific requirements for written resolutions for specific decisions of a company will not be helpful.

22 The written feedback received during the consultation was mixed. However, an overwhelming majority (all except one) of the participants of the subsequent focus group discussion sessions was in favour of maintaining the status quo. The following views in favour of the status quo were expressed – (i) it is desirable for meetings to be held to promote transparency and protection of shareholders' interest, and to prevent undue influence from being exerted on signatories to a written resolution; (ii) a member may listen to others' concerns at a meeting; and (iii) minority shareholders would have a forum to voice their opinion.

23 The Steering Committee is of the view that these matters involve the removal of directors, liquidators and auditors and it would be important to give such directors,

[3] Section 288(2) of the UK Companies Act 2006 and section 116B(11) of the Hong Kong Companies Ordinance (Cap. 32).
[4] Section 249A(1) of the Australia Corporations Act 2001.

liquidators and auditors an opportunity to be heard, although usually auditors would not give any comments during such meetings. The Steering Committee recommends that the Companies Act should not allow for the removal of a director, a liquidator or an auditor by a written resolution, and that the status quo in section 184A(2) should be maintained.

**<u>Recommendation 2.5</u>**

**The existing restrictions in section 184A(2) on the type of "business" that cannot be conducted using written resolutions should be maintained.**

***(c) When a written resolution is considered passed***

24 Section 184A(3) and (4) of the Companies Act specify that a written resolution is considered as passed when the requisite number of members have formally agreed to the written resolution.

25 In the UK, a written resolution is passed when the majority of members have signified their agreement to the written resolution.[5] Likewise in Hong Kong, a written resolution is passed when all the members have signed the resolution.[6] However, the company legislation in Australia and New Zealand are silent on this issue.

26 The Steering Committee agrees that the Companies Act should provide that unless stated otherwise in the memorandum and articles of the company, a written resolution will be passed once the required majority signs the written resolution.

27 Most of the respondents to the consultation agreed with this recommendation.

**<u>Recommendation 2.6</u>**

**Section 184A should be amended to provide that a written resolution will be passed once the required majority *signs* the written resolution, subject to contrary provision in the memorandum or articles of the company.**

***(d) When a proposed written resolution will lapse***

28 In the interest of clarity, the Steering Committee considered whether the Companies Act should provide that a proposed written resolution will lapse if not passed within a specified period (as in the case of the UK). The UK Companies Act 2006 provides that a proposed written resolution either lapses after a specified period as stated in the company's articles, or 28 days from the date of circulation (if not stated in the articles), if it is not passed

[5] Section 296(4) of the UK Companies Act 2006.
[6] Section 116B(1)(b) of the Hong Kong Companies Ordinance.

within that time frame[7]. Currently, the Companies Act does not specify when a proposed written resolution will lapse if not passed. This is likewise the case in Australia, Hong Kong and New Zealand.

29 The Steering Committee was of the view that the Companies Act should be amended to provide that unless otherwise stated in the memorandum and articles of the company, a proposed written resolution will lapse after 28 days of it being circulated if the required majority vote is not attained by the end of the 28-day period.

30 Most of the respondents to the consultation agreed with this recommendation. A small minority cited that this might pose administrative difficulties for companies with numerous members, and more time and resources would have to be expended to restart the process if the proposed resolution lapses.

31 The Steering Committee considered the following views in favour of introducing such a period:

(a) It is not desirable to have a proposed written resolution, which was not signed or acted upon, left lying around. It is necessary to let such a proposed written resolution lapse. If the 28-day period is too short, the company's articles could provide for a longer period. If there is a need to resurrect the proposal, a new written resolution can be proposed again.

(b) The lapsing of the proposed written resolution is most significant in situations where there is a dispute between the shareholders.

(c) In the event that the signatures were obtained out of time, the shareholders could agree to change the date of the written resolution.

(d) The directors and shareholders of a company might change over time. In view of this, it is logical to stipulate that a written resolution would lapse if the required majority vote is not attained by the end of the 28-day period, as this would address changing circumstances.

32 The Steering Committee also considered the following views against introducing such a period:

(a) There could be litigation arising as to whether certain signatures were obtained within the 28-day period.

(b) It is not efficient for a written resolution to lapse if the delay is only by a day.

33 Having considered the consultation feedback, the Steering Committee recommends that the Companies Act should be amended to provide that unless otherwise stated in the memorandum and articles of the company, a proposed written resolution will lapse after 28 days of it being circulated if the required majority vote is not attained by the end of the 28-day period.

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[7] Section 297(1) of the UK Companies Act 2006.

**<u>Recommendation 2.7</u>**

**The Companies Act should be amended to provide that a proposed written resolution will lapse after 28 days of it being circulated if the required majority vote is not attained by the end of the 28-day period, subject to contrary provision in the memorandum or articles of the company.**

***(e) Where a member is another company: exercising vote by corporate representative***

34 Where a member is a corporation, sections 184A to 184F of the Companies Act do not specify the manner of appointment, or the categories, of duly authorised persons who may be appointed to act on behalf of such corporate member in signifying the corporate member's agreement to the resolution in writing.

35 Note 1 to section 249A of the Australia Corporations Act 2001, which generally corresponds to section 184G of the Singapore Companies Act, clarifies that a corporate representative (duly appointed by a corporate member under section 250D of the Australia Corporations Act 2001 which in turn, generally corresponds with section 179(3) of the Singapore Companies Act) may sign a resolution under the Australian equivalent of section 184G.

36 The Steering Committee was initially of the view that the Companies Act should provide that a director or a corporate representative of a company (Company A) that owns shares in another company (Company B), may sign a written resolution on behalf of Company A and be deemed to have adequately represented Company A in agreeing to the resolution in writing.

37 A majority of the respondents to the consultation disagreed with this recommendation.

38 It was pointed out that if the proposed amendment was introduced, the company would only be able to remove the authority conferred legislatively upon the person (i.e. the director) by stripping the person of his title. It would be better to let the company decide on who it would want to authorise to sign the written resolution, instead of hard-coding it in legislation. The proposed amendment would confer authority on directors which authority could not be removed by express notice given by the company to third parties.

39 The Steering Committee noted that the proposed amendment would confer authority on directors to sign written resolutions on a company's behalf even if the company did not have such intention. This would result in difficulties with conflicting authorised representatives, especially when there was a disagreement within the Board. The proposed amendment would enable a dissenting director to countermand a corporate representative appointed by the Board.

40 Having considered the consultation feedback, the Steering Committee recommends that the Companies Act should not be amended to specify the categories and manner of appointment of authorised persons who may be appointed to act on behalf of a corporate member in signifying the corporate member's agreement to a written resolution.

**Recommendation 2.8**

**The Companies Act should not specify the categories and manner of appointment of authorised persons who may be appointed to act on behalf of a corporate member in signifying the corporate member's agreement to a written resolution.**

*(f) Extending procedures for passing resolutions by written means to unlisted public companies*

41 Sections 184A to 184F of the Companies Act set out the procedures for the passing of resolutions by written means, and are only applicable to private companies. It was proposed that these procedures should also be made available to unlisted public companies to enable them to make decisions more expeditiously and conveniently. The proposed extension of the procedures for passing of resolutions by written means to unlisted public companies would help to solve the problem of the difficulty in getting members to attend meetings. The passing of resolutions by written means would allow more members to participate, as members need not come physically to one location in order for a resolution to be passed.

42 The Steering Committee notes that sections 184A to 184F already contain adequate safeguards to ensure proper corporate governance. Section 184C provides that before a written resolution is passed, the directors must send the resolution to all the members. Section 184D provides that members with 5% of voting rights may give notice to the company requiring that a general meeting be convened for that resolution.

43 An overwhelming majority of the respondents to the consultation agreed with this recommendation. The sole dissenting respondent expressed the view that unlisted public companies should be subject to a higher standard of corporate governance since they could raise funds from the public. It was also noted that private companies could waive the holding of annual general meetings (AGMs) (under section 175A), which was consistent with the ability to pass written resolutions. However, unlisted public companies could not waive AGMs and there was no proposal to allow unlisted public companies to waive AGMs, and hence the proposed amendment was not necessary.

44 The Steering Committee noted that many unlisted public companies operated like private companies. The only difference between these companies and private companies was that these companies had more than 50 shareholders. It was also noted that both the amendments introduced in 2003 to allow private companies to pass written resolutions with the usual majority vote thresholds and to waive AGMs arose from the CLRFC report. A check of the CLRFC report revealed that recommendation 1.13 (written resolutions) does not appear to arise from recommendation 3.17 (dispensation of AGM).

45 The Steering Committee recommends that sections 184A to 184F should be amended to extend the procedures contained therein for passing resolutions by written means to unlisted public companies as well.

**<u>Recommendation 2.9</u>**

**Sections 184A to 184F should be amended to extend the procedures contained therein for passing resolutions by written means to unlisted public companies as well.**

## IV. ENFRANCHISING INDIRECT INVESTORS

### *(a) Multiple proxies for members providing custodial or nominee services*

46 Where shares in a company are held through a nominee company or a custodian bank, the nominee company or custodian bank would be the registered member entitled to attend and vote at a general meeting of the company. Indirect investors such as foreign institutional investors are beneficial shareholders who hold the shares via a nominee company or custodian bank, and can only attend shareholders' meetings as a proxy of the nominee company or custodian bank.[8]

47 Section 181(1)(b) of the Companies Act provides that a member is entitled to appoint a maximum of two proxies to attend and vote at a general meeting, unless the articles of association provide otherwise. Although the Code of Corporate Governance[9] encourages listed companies to amend their articles to remove the limit on the number of proxies that may be appointed by nominee companies, few companies have done so. As a result, fund managers and institutional investors who hold shares via a nominee company or custodian bank are prevented from attending shareholders' meetings due to the limit in the number of proxies. Local custodian banks indicated that their clients who are foreign institutional investors have expressed unhappiness at being disenfranchised due to this limitation.

48 The SGX proposed an amendment to the Companies Act to require companies to allow members who are nominee companies to appoint multiple proxies, provided that each proxy is appointed in respect of a different beneficial owner, and each proxy shall have one vote on a show of hands. ACGA[10] separately proposed a similar amendment to the Companies Act and Listing Manual to allow members who provide custodial or nominee services to appoint multiple proxies so as to enable fund managers and institutional investors to attend shareholders' meetings. ACGA proposed that an amendment to the Companies Act would cover companies incorporated in Singapore while an amendment to the SGX Listing Manual would also apply to companies incorporated in foreign jurisdictions but listed in

[8] The registered, non-beneficial, owner of shares (the intermediary) has all the powers and privileges attaching to those shares as against the company which issued them (simply by being a member of the company), yet an intermediary has little economic incentive to use those powers and privileges and to engage in the governance of the company, because any advantage from doing so will accrue to the indirect investor who is the ultimate beneficiary of those shares: See RC Nolan, *Indirect Investors: A Greater Say in the Company?* (April 2003) JCLS Vol 3 Part I p 73 at 75.

[9] Principle 15 of the Code of Corporate Governance provides that companies should encourage greater shareholder participation at annual general meetings (AGMs). Commentary 15.4 of the Code encourages companies to amend their articles of association to avoid imposing a limit on the number of proxies for nominee companies so that shareholders who hold shares through nominees can attend AGMs as proxies.

[10] Asian Corporate Governance Association, "Opening Shareholder Meetings to Fund Managers in Singapore" (October 2007).

Singapore. The major local custodian banks and a number of foreign institutional investors expressed support for the “multiple proxies” proposal as the best option to enfranchise institutional investors who hold shares via a nominee company or custodian bank.

49 SGX was of the view that an amendment to the Companies Act is necessary as companies are unable to amend their articles of association to implement a multiple proxies regime in compliance with the Code of Corporate Governance for the following legal reasons:

(a) To allow only nominee companies the right to appoint more proxies without extending the right to other shareholders on the register is contrary to the common law position that shareholders within the same class are to be treated equally. The effect is to unfairly prefer one set of shareholders (the nominee companies) to another set of shareholders although they belong to the same class, namely, ordinary shareholders. This can only be implemented with a statutory amendment to the Companies Act.

(b) Even if nominee companies were empowered to appoint multiple proxies, most of the proxies cannot vote on a show of hands because of the common law position that each registered shareholder is only entitled to <u>one vote</u> on a show of hands. Thus in the case of a vote on a show of hands, companies and nominee companies are put into a difficult position of deciding which proxy, out of the multiple proxies appointed, is entitled to vote on a show of hands to the exclusion of all the other appointed proxies. The proposed amendment to enable each proxy appointed by the nominee company to vote on a show of hands is necessary for the company to recognise their votes and give effect to the true intention behind the multiple proxies regime. It is pointless to allow a nominee company the right to appoint more than 2 proxies if the proxies cannot vote. Giving each proxy the right to vote on a show of hands would also reduce the need for votes to be taken by poll for every resolution, as otherwise the proposed multiple proxies representing institutional investors may demand a poll on every resolution since they would not be able to vote on a show of hands.

50 It is noted that the companies legislation in the UK and Hong Kong permit the appointment of multiple proxies, and provide that proxies shall have the right to vote on a show of hands.

51 Prior to the enactment of section 324 of the UK Companies Act 2006, the UK position was substantially similar to the current Singapore position. The consultation documents leading up to the UK Companies Act 2006 discussed the rationale for the reform of section 372 of the UK Companies Act 1985 to its present form in section 324 of the UK Companies Act 2006, as follows:

> “... We have also noted the growth of such specialist institutions as custodians, depositories and broker nominees, each of which play a key role in the efficient holding, transfer and recording of shares, but whose involvement as intermediaries has led to a growing separation between the legal ownership of shares (the “name on register”) and the “real” or beneficial owner. These intermediaries typically have neither an economic interest in taking an active

part in company governance nor the resources to do so. It is therefore important that the law should provide convenient mechanisms by which the beneficial owners or their representatives can participate in governance, and that any unnecessary obstacle to their participation should be removed."[11]

52 The UK consultation documents also stated that the member (for our purposes – the custodian bank / nominee company) will be allowed to "appoint a proxy for each beneficial holding at a given meeting, thus ensuring that where a nominee or trustee member has beneficial holders who wish to vote in different ways, their wishes can be accommodated".[12]

53 Section 324 of the UK Companies Act 2006 allows a member to appoint multiple proxies, provided that each proxy is appointed to exercise the rights attached to a specific portion of shares.[13] Under the previous UK Companies Act 1985 which was similar to the current Singapore position, a proxy could only vote on a poll and not on a show of hands. Section 284(2) (read with section 324) of the UK Companies Act 2006 now provides that proxies in both public and private companies shall have the right to vote on a show of hands.

54 In Hong Kong, the local custodian banks (or their nominee companies) are not the legal owner of shares, but are rather participants in the Central Clearing and Settlement System (CCASS). CCASS is operated by the Hong Kong Securities Clearing Company Ltd (HKSCC), which also manages a common nominee company, HKSCC Nominees Ltd, in whose name most share certificates are held for credit into the stock accounts of CCASS participants. If an institutional investor wishes to attend a company meeting, its custodian bank will instruct HKSCC / CCASS to appoint one or more representatives. Under section 115(1A) and (3) of the Hong Kong Companies Ordinance, the HKSCC or its nominee company HKSCC Nominees Ltd, is empowered to appoint multiple corporate representatives to attend, vote and act at general meetings as if they were individual members, including the right of speech and the right to vote on a show of hands and on poll. Section 115(1A) provides that if more than one corporate representative is appointed, the authorisation "shall specify the number and class of shares in respect of which each such person is so authorised".[14]

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11 See Modern Company Law for a Competitive Economy – Final Report (2001), para 7.1.

12 See Modern Company Law for a Competitive Economy – Final Report (2001), para 7.2 and Company General Meetings and Shareholder Communication (1999), para 50.

13 Section 324(2) of the UK Companies Act 2006 provides:

> "(2) In the case of a company having a share capital, a member may appoint more than one proxy in relation to a meeting, *provided that each proxy is appointed to exercise the rights attached to a different share or shares held by him …*" [emphasis added]

14 Section 115(1A) and (3) of the HK Companies Ordinance provide:

> (1A) A recognized clearing house within the meaning of section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571) may, if it or its nominee is a member of a company, authorize such person or persons as it thinks fit to act as its representative or representatives, as the case may be, at any meeting of the company or at any meeting of any class of members of the company provided that, *if more than one person is so authorized, the authorization shall specify the number and class of shares in respect of which each such person is so authorized*. (Added 68 of 1992 s. 20. Amended 62 of 1995 s. 12; 5 of 2002 s. 407) [emphasis added]
>
> ...
>
> (3) A person authorized under subsection (1A) shall be entitled to exercise the same powers on behalf of the recognized clearing house (or its nominee) which he represents as that clearing house (or its nominee) could exercise if it were an individual shareholder of the company. (Added 68 of 1992 s. 20)

55 At the Roundtable Discussion on Multiple Proxies organised by ACGA and the Singapore Association of the Institute of Chartered Secretaries and Administrators (SAICSA) on 10 November 2008, sub-custodian banks presented their case for a multiple proxies solution and addressed the concerns of companies with regard to increased administrative and catering cost. An informal vote taken among the participants at the Roundtable revealed that 67% agreed that the present two-proxy rule (and practice) in Singapore made it difficult for fund managers and institutional investors to participate fully in shareholder meetings. 86% agreed that a multiple proxies solution for nominee companies would improve the standing of the Singapore market in the eyes of institutional investors, and 53% agreed that the multiple proxies solution would fairly resolve the problem. 81% agreed that an amendment to the Companies Act was the best way to achieve uniformity of practice by companies.

56 The reasons given against the multiple proxies proposal mainly relate to a perceived inequality where certain members (the nominee companies and custodian banks) are able to appoint more than 2 proxies, and concerns over administrative cost of administering such a regime and the logistical cost of a higher attendance at general meetings. It was also argued that the proposal would also result in inequality between Singapore investors who hold shares through the Central Depository (Pte) Ltd (CDP), and foreign investors who are likely to hold shares through a nominee company. It was argued that some foreign investors may want the confidentiality that the nominee system affords, but it was also pointed out that foreign investors who wished to remain anonymous could choose not to obtain a proxy appointment, or could choose to have a third party appointed as proxy.

57 The Steering Committee sought the views of the focus group as to whether section 181 should be amended to allow members falling within the following two categories to appoint more than two proxies, subject to contrary provision in the company's articles, in order to enable institutional investors to participate in shareholders' meetings:

(a) any banking corporation licensed under the Banking Act or wholly-owned subsidiary of such a banking corporation, whose businesses includes the provision of nominee services; and

(b) any person holding a capital markets services licence to provide custodial services for securities under the Securities and Futures Act.

The Steering Committee also sought the views of the focus group as to whether only one proxy should be appointed in respect of each beneficial shareholder, and whether such proxies should each be given the right to vote on a show of hands.

58 A large majority of the written feedback from focus group respondents on this issue was in favour of the proposed multiple proxies regime, but the following qualifications were expressed:

(a) The proposed multiple proxies regime should not be limited to enfranchising only institutional indirect investors, but should be extended to individual indirect investors as well.

(b) The multiple proxies regime should require the members appointing multiple proxies to disclose who the beneficial owners are.

(c) The proxies should be appointed in respect of only the first level of beneficiaries. There could be a cap on the number of proxies that a custodian bank or nominee company could appoint.

(d) The 48-hour timeline for submission of the proxy forms should be lengthened in view of the potential increase in the number of proxies attending the general meetings.

(e) Companies should not be able to prohibit this right to appoint multiple proxies by amending their articles.

(f) It is better to allow multiple proxies to be appointed by all members (which is the approach in the UK Companies Act 2006), instead of merely by members who provide custodial or nominee services. The multiple proxies regime should be available to other organisations that provide similar nominee services.

(g) A maximum of 2 proxies should be allowed to be appointed in respect of each beneficial shareholder.

59 The only reason provided by respondents who disagreed with the proposal was that the shareholders of the same class should be treated equally.[15]

60 All the participants of the subsequent focus group discussion sessions were generally in favour of the proposal, but a question was raised as to the sufficiency of the 48-hour cut-off timeline for the filing of proxies.

61 The Steering Committee held a separate discussion session with SGX to discuss the issue in greater detail. SGX expressed the view that it would be impractical to limit the proposed multiple proxies regime to enfranchising only the first level beneficial shareholder, as the first level beneficiary could be an omnibus account with many layers of intermediaries behind that, and in any case, the company would have no way of knowing who the beneficial owners holding the shares through the nominees are. SGX supported a multiple proxies regime provided that each proxy is appointed to exercise the rights attached to a specific portion of shares and that the custodian bank or nominee company be allowed to issue only one proxy for each beneficial holder (but not limited to the first level beneficial holder).

62 Having considered the feedback received during the focus group consultation, the Steering Committee recommends extending the benefit of the proposed multiple proxies regime to individual indirect investors as well as institutional indirect investors. The Steering Committee recommends that there be no limit to the number of proxies that a custodian bank or nominee company can appoint, provided that only one proxy is appointed in respect of each specified block of shares. Each proxy so appointed would be given the right to vote on a show of hands at a shareholders' meeting. The 48-hour cut-off time for the submission of

[15] The Steering Committee noted that it was only in a formal and technical sense that members who provided custodial or nominee services would be conferred greater rights in that they would be allowed to appoint more than 2 proxies, as compared to other members of the same class. In economic reality, members who provide custodial or nominee services are not the actual investors and have no economic interest in the membership rights of participating in a shareholders' meeting. In economic reality, the indirect investors are the actual investors, and the multiple proxies regime would allow indirect investors to participate in the shareholders' meeting without fundamentally changing the rule that the company only recognises the registered member.

proxies would be extended to 72 hours to provide companies more time to process the increased number of proxies.

63 The Steering Committee also recommends that the proposed legislation should be based on section 324(2) UK Companies Act 2006 and section 115(1A) Hong Kong Companies Ordinance, and should merely state that the custodian bank/nominee company that is the registered owner of the shares is entitled to appoint more than 2 proxies, provided that each proxy is appointed to exercise the rights attached to a different share or shares and the number of shares and class of shares shall be specified. The Steering Committee recommends that the proposed legislation should not specify who would be entitled to have a proxy appointed in his behalf.[16]

**Recommendation 2.10**

**Section 181 should be amended to the effect that, subject to contrary provision in the company's articles, members falling within the following two categories are allowed to appoint more than two proxies, provided that each proxy is appointed to exercise the rights attached to a different share or shares and the number of shares and class of shares shall be specified**:

**(a) any banking corporation licensed under the Banking Act or wholly-owned subsidiary of such a banking corporation, whose business includes the provision of nominee services and who holds shares in that capacity; and**

**(b) any person holding a capital markets services licence to provide custodial services for securities under the Securities and Futures Act.**

**Recommendation 2.11**

**The Companies Act should be amended to allow the proposed multiple proxies to each be given the right to vote on a show of hands in a shareholders' meeting.**

**Recommendation 2.12**

**The Companies Act should be amended to bring earlier the cut-off timeline for the filing of proxies from 48 hours prior to the shareholders' meeting, to 72 hours prior to the shareholders' meeting.**

[16] Both the UK and Hong Kong legislation do not specify who would be entitled (i.e. indirect investors) to have a proxy / representative appointed in their behalf, and do not set any maximum number of proxies / representatives that could be appointed by the member authorised to appoint multiple proxies / representatives. Neither legislation attempts to spell out or limit the entitlement of other parties to give instructions to the registered member as to how the registered member should exercise the power to appoint proxies / representatives. This is also the present state of the law in Singapore insofar as registered owners can appoint up to 2 proxies and there are no provisions stipulating the persons who may or may not give instructions to the registered owners as to who may be appointed. This is because the duties of the registered owner - in this case the custodian bank/nominee company who is the registered member – would be governed either by contractual or trust principles which companies legislation should not interfere with.

### *(b) Nomination of beneficial shareholder to enjoy membership rights*

64 The UK Companies Act 2006 introduced two sets of provisions, sections 324 to 331 (allowing multiple proxies to enable indirect investors to participate in meetings) and sections 145 to 153 (enabling indirect investors to exercise members' rights) to enfranchise indirect investors who hold their shares through an intermediary (e.g. broker). The Steering Committee considered whether to adopt sections 145 to 153 of the UK Companies Act 2006, which generally deal with the nomination of indirect investors (beneficial shareholders) by the registered members (intermediaries) to enjoy or exercise membership rights other than the right to participate in shareholder meetings (which is dealt with by the multiple proxies provisions). The explanatory notes to the UK Companies Act 2006 explain that sections 145 to 153 were designed to make it easier for investors to exercise their governance rights fully and responsibly, as it is increasingly likely that the investors will hold their shares through an intermediary or a chain of intermediaries. As it is the intermediary's name that appears on the company's register of members, such indirect investors typically have to rely on contractual arrangements with the intermediaries both to obtain information from the company and also to give instructions on how shares should be voted.

65 The Steering Committee notes that by virtue of section 130D(1) of the Companies Act, most of the investors in listed Singapore companies are deemed to be members, and are able to enjoy and exercise membership rights as *direct investors*. Therefore, the issue of enfranchising indirect investors mainly arises in Singapore in relation to two categories of investors – (a) institutional investors who hold their shares in the name of a nominee; and (b) CPF members who purchased shares using their CPF funds.[17] The Steering Committee has recommended the adoption of a multiple proxies regime to enable indirect investors to attend and vote at shareholders' meetings (see Recommendations 2.10, 2.11 and 2.12). The Steering Committee considered whether to *also* adopt sections 145 to 153 of the UK Companies Act 2006 to enfranchise indirect investors.

66 Section 145 of the UK Companies Act 2006 removes any doubts as to the ability of companies to make provision in their articles to enfranchise indirect investors and provides that such articles are legally effective. The Steering Committee notes that companies are able to amend their articles of association to enable members to nominate other persons to enjoy or exercise membership rights. Many listed UK companies have amended their articles of association for this purpose even prior to the enactment of section 145. As such, the Steering Committee considered that it is not necessary to adopt section 145 which is merely an enabling provision protecting company articles that seek to enfranchise indirect investors. The Steering Committee also considered that it is not necessary to make it mandatory for companies to allow a member to nominate another person to exercise membership rights.

67 Sections 146 to 151 of the UK Companies Act 2006 enable indirect investors to be appointed by the registered member to receive company documents and information that are sent to members by companies traded on a regulated market. Sections 152 and 153 of the UK Companies Act 2006 enable indirect investors, via the registered member, to exercise voting and requisition rights by making it easier for registered members to exercise rights in different ways to reflect underlying holdings and by allowing indirect investors to participate in requisitions. An academic who was involved in the UK companies law reform project expressed reservations on the necessity of sections 146 to 153 of the UK Companies Act

[17] The issue of enfranchising CPF investors is dealt with at paragraphs 70 to 77.

2006. The Steering Committee agrees that it is not necessary to adopt sections 146 to 151 of the UK Companies Act 2006 as indirect investors can easily obtain corporate information of Singapore listed companies through their nominees. The Steering Committee notes that no feedback has been received from market practitioners on the need for such provisions.

68 The Steering Committee is of the view that it would be sufficient to adopt a multiple proxies regime in Singapore for the purposes of enfranchising indirect investors who hold shares through nominees, and that it is not necessary to adopt sections 145 to 153 of the UK Companies Act 2006.

69 Most of the respondents to the consultation agreed with this recommendation.

**Recommendation 2.13**

**The Companies Act should not be amended to adopt sections 145 to 153 of the UK Companies Act 2006 to enable indirect investors to enjoy or exercise membership rights apart from the right to participate in general meetings.**

***(c) Enfranchising CPF members who purchased shares using CPF funds***

70 Central Provident Fund (CPF) members who purchase company shares using their CPF funds through the CPF Investment Schemes ("CPF share investors") do not currently enjoy any membership rights such as the right to attend and vote at shareholders' meetings. The shares purchased under regulation 14 of the CPF (Investment Schemes) Regulations are held in the names of the CPF Agent Banks (referred to as "approved agent bank" in the Regulations). CPF share investors have no rights other than instructing the CPF Agent Bank (the registered member) in advance on how they wish to vote on resolutions, and relying on the CPF Agent Bank to vote according to those instructions. For SingTel shares purchased through the Special Discounted Share scheme (Part IV of the CPF (Investment Schemes) Regulations), these shares are held in the name of the CPF Board, and the CPF members similarly do not enjoy any membership rights.

71 The Steering Committee received representations from the Securities Investors Association Singapore (SIAS) and others that legislative amendment should be introduced to enfranchise CPF share investors. The CPF Board and the CPF Agent Banks have also indicated support for CPF share investors to be given their due rights as shareholders (including rights to attend, speak and vote at shareholders' meetings). The Steering Committee supports giving CPF share investors their due shareholders' rights as they are the real investors and should have the same rights as "cash" investors who are given full membership rights under section 130D(1) of the Companies Act. It is noted that the CPF share investors did not choose to hold their purchased shares in the name of the CPF Agent Banks or CPF Board, instead of in their own names.

72 The Steering Committee considered three possible legislative mechanisms to achieve the goal of enfranchising CPF share investors – (a) a look-through mechanism similar to section 130D(1); (b) multiple proxies; and (c) a nomination mechanism similar to section 145 of the UK Companies Act 2006. Concerns were raised that the multiple proxies option might

result in high administrative cost on the part of the CPF Agent Banks and the companies concerned given the potentially large number of proxies to be issued to the CPF share investors, and might result in administrative difficulty in meeting the proxy filing deadline. Feedback was received from sub-custodian banks (including the CPF Agent Banks) that a nomination mechanism similar to section 145 of the UK Companies Act 2006 would be less efficient than the multiple proxies option. The Steering Committee was initially of the view that the most feasible and efficient solution was a look-through mechanism deeming the CPF share investors (instead of the CPF Agent Bank or CPF Board, as the case may be) as the actual members of the company. The CPF Board had indicated that it is in favour of the look-through option.

73 The Steering Committee sought the views of the focus group on the following questions:

> *(15) Should the Companies Act be amended to give CPF investors their full shareholders' rights in respect of company shares purchased using CPF funds through the CPF Investment Schemes or the Special Discounted Share scheme?*
>
> *(16) If yes, which of the following legislative mechanisms should be adopted to achieve this objective:*
>
> > *(a) look-through mechanism similar to section 130D(1);*
> >
> > *(b) multiple proxies regime similar to that described in Feedback Questions 11 and 12; or*
> >
> > *(c) nomination mechanism similar to section 145 of the UK Companies Act 2006 (see Feedback Question 14)?*
>
> *(17) If a look-through mechanism is to be adopted, should a provision similar to section 130D(1) be enacted such that where shares of a company are purchased using CPF funds under regulation 14 or Part IV of the Central Provident Fund (Investment Schemes) Regulations –*
>
> > *(a) the approved agent banks (for investments under regulation 14 of the CPF (Investment Scheme) Regulations) and the CPF Board (for investments under Part IV of the CPF (Investment Scheme) Regulations) are deemed not to be a member of the company; and*
> >
> > *(b) the CPF member who had purchased the shares using his CPF funds under regulation 14 or Part IV of the Central Provident Fund (Investment Schemes) Regulations shall for such period as the shares are held against his name, be deemed to be a member of the company in respect of the amount of shares entered against his name?*

74 Most of the written feedback from respondents to the consultation on Feedback Question 15 agreed with the recommendation to enfranchise CPF share investors. All the participants of the subsequent focus group discussion sessions were in favour of the

enfranchisement of CPF share investors. The only issues were operational and practical issues surrounding the proposed approaches to enfranchise CPF share investors.

75 Most of the written feedback from respondents to the consultation on Feedback Question 16 were in favour of the look-through mechanism to enfranchise CPF share investors, whilst a small minority was in favour of the multiple proxies regime. At the subsequent focus group discussion sessions, it was noted that a look-through mechanism had 2 main implications that needed to be addressed. Firstly, there would be a need to consolidate the various shareholder registers held by CDP, the CPF Agent Banks, CPF Board and the share registrar. Secondly, there would be a need to study and address the impact on corporate actions, e.g. rights issue entitlement based on total shareholding. It was noted that changes would need to be made to the computer systems of the CPF Agent Banks to facilitate this consolidation of shareholder lists maintained by the share registrar, CDP, CPF Agent Banks and the CPF Board. The notional book closure date of 48 hours before the meeting might also not provide sufficient time to the company to reconcile the different share registers.

76 The Working Group held a discussion session with SGX, CDP, CPF Board and a CPF Agent Bank (OCBC) to explore the issue in greater depth. The following 2 methods were proposed to achieve the enfranchisement of CPF investors:

(a) to adopt the look-through mechanism similar to section 130D(1) to deem the CPF share investor as the member (instead of the CPF Agent Bank or the CPF Board, as the case may be). However, there would be a need to consolidate the various shareholder registers held by the CDP, CPF Board and CPF Agent Banks, which necessitated changes to the computer systems of the CPF Agent Banks; and

(b) to appoint CDP as the sole agent to hold all the shares of CPF investors. This would avoid the need to consolidate the shareholder registers of the CPF Agent Banks with the register held by the CDP, as all the shareholder registers would be held by CDP.

The participants of the discussion session agreed that it was operationally feasible for CDP to be appointed by CPF Board as the sole agent for CPF share investments instead of CPF Agent Banks, which would remove the need for synchronisation of the computer systems of the CPF Agent Banks with the CDP's computer system. It was concluded that <u>both the proposal to adopt a look-through mechanism</u> for CPF Agent Banks (coupled with synchronisation of the various computer systems of the CDP and the CDP Agent Banks), as well as the <u>new proposal to appoint CDP as the agent</u> for CPF share investments instead of CPF Agent Banks, <u>were feasible</u>. The latter mechanism would be more efficient. But <u>further discussions would be needed</u> between CPF Board, CDP and the CPF Agent Banks before a decision could be taken on either proposal. SGX suggested that in the interim, the multiple proxies regime could be used as an interim solution to allow CPF share investors to participate at meetings, though this would not allow CPF share investors to participate in rights issues based on consolidated shareholding.[18]

[18] That is, the multiple proxies regime would not allow CPF share investors to benefit from their entitlement to rights issues based on their total shareholding from all sources (CDP and CPF investments).

77 Having considered the feedback from the consultation, the Steering Committee recommends that the multiple proxies regime (Recommendations 2.10, 2.11 and 2.12) be leveraged upon to enfranchise CPF share investors.

**Recommendation 2.14**

**The Companies Act should be amended to give CPF share investors their shareholders' rights in respect of company shares purchased using CPF funds through the CPF Investment Schemes or the Special Discounted Share scheme.**

**Recommendation 2.15**

**The multiple proxies regime recommended at Recommendations 2.10, 2.11 and 2.12 should be adopted to enfranchise CPF share investors.**

## V. CORPORATE REPRESENTATIVES

### *(a) Clarification of meaning of "not otherwise entitled to be present at the meeting" in section 179(4)*

78 Section 179(4) of the Companies Act provides that a corporation which has given authority to a person to act as its corporate representative at a shareholder or creditor meeting pursuant to section 179(3) is deemed to be personally present at the meeting for the purpose of section 179(1) (i.e. for quorum or vote on show of hands), provided that the person is "not otherwise entitled to be present at the meeting". It was proposed that the phrase "not otherwise entitled to be present at the meeting" be clarified as it was ambiguous in that it may cover either a person who is otherwise entitled to be present as a member, proxy or corporate representative, or a person who is otherwise entitled by law or articles to be present at the meeting (e.g. director or auditor).

79 The Steering Committee disagrees with the proposal to introduce an amendment to clarify the meaning of the phrase "not otherwise entitled to be present at the meeting" in section 179(4), as it felt that the phrase is clear and unambiguous. Given the purpose of section 179(4), which is to provide conditions under which the corporate member shall be deemed to be personally present at the meeting for the purposes of forming a quorum and for determining the members entitled to vote on a show of hands, it is clear that the legislative intent is that the corporate representative will be counted for the purposes of forming a quorum and a vote on a show of hands, provided that the corporate representative is not otherwise also to be counted in another capacity (e.g. as a member) towards the quorum or vote on a show of hands. In other words, a person who is personally present shall only be counted once for the purposes of forming a quorum or a vote on a show of hands.

80 A large majority of the respondents to the consultation agreed with the Steering Committee on this recommendation.

**<u>Recommendation 2.16</u>**

**Section 179(4) should not be amended to clarify the meaning of the phrase "not otherwise entitled to be present at the meeting".**

*(b) Appointment of representatives of members that take other business forms*

81 Section 179(3) of the Companies Act deals with which methods of appointment of a corporate representative of a corporate member will be recognised by the company holding a meeting. Section 179(4) provides the conditions under which the corporate member shall be deemed to be personally present at a meeting attended by its corporate representative. Both sections 179(3) and 179(4) are confined to members that are corporations.

82 Members of a company may take other business forms such as limited partnership, limited liability partnership, association, co-operative and real estate investment trust (REIT). It is noted that following the enactment of the Limited Liability Partnerships Act, article 47 (quorum) and article 59 (execution of proxy form) of Table A in the Fourth Schedule to the Companies Act were amended to cover a member that is a limited liability partnership.

83 The question was raised as to whether section 179(3) and (4) should be amended to deal with the recognition of the appointment of representatives of other business forms. The Steering Committee is of the view that the Companies Act should not deal with the law concerning other business forms. It should be left to the law of agency to determine whether the appointment of a representative of other business forms is valid and should be recognised. It would be onerous if not impossible to cater for all possible forms of existing and future non-corporate business vehicles.

84 A large majority of the respondents to the consultation agreed with the Steering Committee on this recommendation.

**<u>Recommendation 2.17</u>**

**The Companies Act should not be amended to deal with the recognition of the appointment of representatives of members that take other business forms such as limited liability partnership, association, co-operative, etc.**

## VI. ELECTRONIC TRANSMISSION OF NOTICES AND DOCUMENTS

*(a) Electronic transmission of notices and documents*

85 Sections 387A and 387B of the Companies Act prescribe conditions and rules for the use of electronic transmission for the giving of notices and sending of documents by a

company or the directors to the members. Feedback was received that the rules in sections 387A and 387B (introduced vide the Companies (Amendment) Act 2004) are too prescriptive and onerous, and have impeded the use of electronic transmission for the giving of notices and sending of documents.

86 Four specific proposals for change were received and considered by the Steering Committee. Firstly, feedback was received that the requirement in sections 387A(2)(a) and 387B(2)(a) that a company obtain a separate "agreement in writing" from each member for the use of website publication for the giving of notices and documents is impracticable for listed companies that have an extensive and dynamic membership base. It was proposed that the Companies Act clarify that the articles of association would satisfy the requirement of an "agreement in writing". It was also proposed that "agreement in writing" should include a members' resolution or agreements made through electronic means with sufficient authentication.

87 Secondly, it was also proposed that the CDP be enlisted to collate email addresses of scripless shareholders (depositors), and that such email addresses satisfy the "current address" requirement in section 387A(7)(a) for the purposes of determining that person's "current address" in sections 387A(1) and 387B(1).

88 Thirdly, it was proposed that the modes of notification ("notified, in a manner for the time being agreed") of website publication in sections 387A(2)(d) and 387B(2)(d) be clarified, and that accepted modes should include notifications by post, email, newspaper advertisement, SGXNET announcement or any other similar means of publication.

89 Fourthly, feedback was received that it is unclear whether a CD-ROM sent by post would fall within the meaning of "by other means but while in an electronic form" in the definition of "electronic communication" so as to fall within sections 387A(1) and 387B(1). It was proposed that a general provision be enacted to allow a company to send notices or documents to its members in whatever medium it thinks fit and by whatever means, unless a member expressly notifies the company otherwise.

90 It was proposed that the Companies Act should not be so restrictive in prescribing the mode of electronic transmission. The Steering Committee recognises that the use of electronic transmission for the giving of notices and sending of documents will enable companies to reduce cost and increase efficiency. The Steering Committee considered the general need to ease the rules in sections 387A and 387B, and studied the relevant legislation in the UK[19], Hong Kong[20], New Zealand[21] and Australia[22]. The Steering Committee is of the view that the rules for the use of electronic transmission should be eased and be less prescriptive, and the interconnected proposals contained in paragraph 95 below were made to achieve that objective.

91 The Steering Committee was of the view that as a starting point, the Companies Act should simply provide that electronic transmission of notices and documents is permissible, and it should be left to the articles of association to provide how the electronic transmission should be effected.

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[19] Schedule 5, UK Companies Act 2006 (C.46).
[20] Sections 114A, 141CH and Part I of Table A, First Schedule to Hong Kong Companies Ordinance.
[21] Section 124, 209, 209B and Schedule 1 to New Zealand Companies Act 1993.
[22] Section 249J and 314 Australia Corporations Act 2001.

92 The Steering Committee noted that some shareholders may not have electronic mail access or may not be comfortable with electronic means of transmission in general. In order to ensure that all shareholders are able to receive company notices and documents, it would be necessary to provide for an "opt-out" so that shareholders could choose to receive physical copies of notices and documents instead of electronic transmissions.

93 It was suggested that a listed company might not use electronic transmission for its notices and documents if an "opt-out" for written notices and documents exists, as the company would still incur hefty printing cost for the written notices and documents, and the company would not wish to incur the administrative cost of identifying which members wish to receive electronic notices and documents, and which members wish to receive written notices and documents instead. The Steering Committee considered section 314 of the Australia Corporations Act 2001 which requires a company to notify its members in writing on at least one occasion that the members may elect once whether they wish to receive a copy of the financial report, and whether they wish to receive a hard copy or an electronic copy. For members who do not make an election, section 314(1AB)(b) of the Australia Corporations Act 2001 provides for a default position, namely, that members may access the financial reports on a specified website. This is administratively efficient as the company need not seek the members' indication each and every year.

94 In order to address the issue of companies that do not amend their articles pursuant to the amendment of sections 387A and 387B to choose their preferred modes of electronic transmission, transitional provisions should provide that for companies that have not altered their articles of association, the old rules in the existing sections 387A and 387B would still apply. Therefore, the current sections 387A and 387B provisions will be the default provisions, but companies are at liberty to amend their articles of association to choose their preferred modes of electronic transmission.

95 The Steering Committee sought the views of the focus group as to whether the rules for the use of electronic methods for transmission of notices and documents by companies should be amended to be less restrictive and prescriptive, and if so, whether sections 387A and 387B should be amended to provide that:

(a) In general, companies are permitted to use electronic methods for transmission of notices and documents to its members, and are given more flexibility to do so;

(b) Companies are allowed to specify in their articles of association that electronic methods of transmission would be used, and are given the discretion to determine via their articles of association the specific mode of electronic transmission adopted;

(c) Members are given a right to "opt-out", that is, to demand to receive physical copies of notices and documents instead of electronic transmissions; and

(d) For companies that have not altered their articles of association to establish their preferred modes of electronic transmission pursuant to the proposed amendments, the default rules in the existing sections 387A and 387B would still apply.

96 The focus group feedback was unanimously in favour of amending the rules for electronic transmission of notices and documents to make them less restrictive and prescriptive. In respect of the specific proposals consulted on (paragraphs 95(a) to (d) above), the focus group feedback is summarised as follows:

(a) Paragraph 95(a) - unanimously in favour;
(b) Paragraph 95(b) - a very large majority was in favour;
(c) Paragraph 95(c) - unanimously in favour; and
(d) Paragraph 95(d) - a very large majority was in favour.

97 In particular, MAS and Herbert Smith expressed the need for additional safeguards which will set minimum standards for the companies using electronic transmission for notices and documents. Herbert Smith was sceptical of a regime which allowed Singapore-incorporated companies complete freedom to specify in their articles of association the specific mode of electronic transmission to be adopted. In their view, there was merit in including some basic ground rules in the Companies Act which would apply irrespective of the company's articles. Such basic rules would provide a degree of consistency for Singapore companies in the conduct of electronic communication with its members and also set certain minimum standards. For example, in order for a UK company to communicate with its shareholders by e-mail, the shareholders' specific agreement was required (largely because of the need to obtain their email addresses). Minimum standards should also be set regarding the method of posting documents on the website and the duration for which such documents would be on the website.

98 Both MAS and Herbert Smith suggested that notification of the uploading of any documents on the company's website should be sent to the shareholders.

99 MAS also proposed additional safeguards to ensure that shareholders who are not Internet-savvy are not prejudiced, for example, requiring that physical documents be sent to members above 55 years of age. MAS suggested that the Steering Committee might wish to study the possibility:

(a) of requiring the company to send written notifications of the "opt-out" option to all shareholders on an annual basis;

(b) that the notification could state the methods of electronic communication that the company would be using should a shareholder choose not to "opt-out"; and

(c) that the notification could state that shareholders who had previously not elected to "opt-out" of receiving documents electronically should have the right to subsequently "opt-out" of receiving documents electronically at any time and receive physical documents instead.

100 MAS was also of the view that certain documents such as those relating to take-overs and rights issues contained important procedural instructions and forms or acceptance letters that needed to be completed by the shareholders, and it might be necessary for companies to send physical copies of such documents to the shareholders.

101 Other respondents also provided the following feedback:

(a) It should be left to the company to decide how to give members the opportunity to "opt out" (i.e. to request for hard copies), which could be by means of calling a hotline, sending a letter, email or fax, or by filling in an online form;

(b) The member's election to receive physical copies of documents should only apply to that particular meeting and not be a standing request, as the former was administratively more efficient;

(c) The "standing election" model in section 314 Australia Corporations Act 2001 should not be adopted, as it would not be administratively efficient for listed companies with a dynamic shareholder base to maintain a database of the members' election of physical or electronic transmission. It would be more efficient for listed companies to request members to make an election to receive electronic or physical copies of documents just prior to a shareholders' meeting, and where the election would only be in respect of that shareholders' meeting.

102 Having considered the feedback received during the focus group consultation, the Steering Committee recommends as follows;

(a) In general, companies should be permitted to use electronic methods for transmission of notices and documents to their members, and given more flexibility to do so;

(b) Companies should be allowed to specify in their articles of association that electronic methods of transmission will be used, and be given the discretion to determine in their articles of association the specific mode of electronic transmission to be adopted, subject to safeguards specified in subsidiary legislation;

(c) Certain safeguards are to be included in subsidiary legislation, including the members' right to "opt-out" (that is, to demand to receive physical copies of notices and documents instead of electronic transmissions), the requirement for notification of posting of documents on a website, and the requirement that certain important documents (e.g. take-overs & rights issues) be sent to members in physical copy instead of electronically. Companies should be allowed to specify in their articles of association that members must accept the use of electronic transmission for notices and documents without any right to "opt out"[23];

(d) Unless the company has amended its articles to require the use of electronic transmission without any right to "opt out", a company is required to notify members to elect to receive either electronic or physical copies of documents, and the election will be a standing election (but members may change their election subsequently). In the event of a member's failure to elect the method of transmission, the default position shall be the electronic means as specified by the company in its articles, or shall be website publication if the articles do not specify the electronic means;

[23] Investors can decide whether they wish to be shareholders of such a company. To smoothen the transition and to give the shareholders time to adjust, the legislation can provide that all amendments to the company articles to such effect shall only come into effect 6 months (or other specified period) after the passing of the resolution.

(e) SGX is at liberty to prescribe additional safeguards as may be appropriate for listed companies; and

(f) For companies that have not altered their articles of association to establish their preferred modes of electronic transmission pursuant to the proposed amendments, the default rules in the existing sections 387A and 387B would still apply.

**Recommendation 2.18**

**The rules for the use of electronic methods for transmission of notices and documents by companies should be amended to be less restrictive and prescriptive.**

**Recommendation 2.19**

**The Companies Act should be amended to provide that companies may use electronic communications to send notices and documents to members with their express consent, implied consent or deemed consent[24], and where –**

**(1) A member has given implied consent if –**

**(a) company articles provide for use of electronic communications and specify the mode of electronic communications, and**

**(b) company articles provide that the member shall agree to the use of electronic communications and shall not have a right to elect to receive physical copies of notices or documents; and**

**(2) A member is deemed to have consented if –**

**(a) company articles provide for use of electronic communications and specify the mode of electronic communications, and**

**(b) the member was given an opportunity to elect whether to receive electronic or physical notices or documents, and he failed to elect.**

**Recommendation 2.20**

**The following safeguards shall be contained in subsidiary legislation:**

**(a) For the deemed consent regime, the company must on at least one occasion, directly notify in writing[25] each member that –**

[24] In practice, even though the company may be authorised to use electronic means to send notices where the member has impliedly consented or failed to elect, the company may not be able to send notices electronically if it does not possess the electronic addresses to which the notices may be sent. Therefore, the implied consent and deemed consent regimes may be more useful for the transmission of documents such as the annual report via posting on a website, which is accompanied by a notification to the member of the website publication either in writing or electronically.

[25] The notice to members to elect whether to receive notices and documents electronically will need to be in writing as the company would not be in possession of the electronic address at which notices may be sent to each member, until the member elects and provides the electronic address.

**(i) the member may elect to receive company notices and documents electronically or in physical copy;**

**(ii) if the member does not elect, the notices and documents will be transmitted by electronic means;**

**(iii) the electronic means to be used shall be as specified by the company in its articles, or shall be website publication if the articles do not specify the electronic means;**

**(iv) the member's election shall be a standing election (subject to the contrary provision in the articles), but the member may change his mind at any time.**

**(b) If the company chooses to transmit documents by making them available on a website, the company must notify the members directly in writing or electronically (if the member had elected or deemed to have consented or impliedly consented to receive notices electronically) of the presence of the document on the website and how the document may be accessed;**

**(c) Documents relating to take-over offers and rights issues shall not be transmitted by electronic means.**

**<u>Recommendation 2.21</u>**

**As a default, where companies fail to amend their articles to make use of the deemed consent regime, sections 387A and 387B shall continue to apply.**

***(b) Electronic notice of special resolution***

103 Section 33(2) of the Companies Act provides that a company shall give 21 days' written notice of a special resolution to alter its memorandum with respect to the objects of the company. Further to the above recommendations to ease the rules for electronic transmission of notices and documents (see Recommendations 2.18 to 2.21), it was proposed that section 33 be amended to allow a notice of special resolution to alter the objects of a company in its memorandum to be sent by electronic means.

104 An overwhelming majority of the respondents to the consultation agreed with this proposal.

**<u>Recommendation 2.22</u>**

**Section 33 should be amended to allow companies to use electronic methods for transmission of notices of special resolution to alter the objects of a company in its memorandum, in accordance with the proposed amendments in Recommendations 2.19, 2.20 and 2.21.**

## VII. GENERAL MEETINGS

### *(a) Extension of 48-hour rule for notional closure of membership register to overseas-listed Singapore incorporated companies (section 130D(3))*

105 Section 130D(3) of the Companies Act effects a notional closure of the membership register of a company whose share scrips are deposited with the CDP and are traded in a scripless environment for the purpose of ascertaining who is entitled to vote at a general meeting. Under section 130D(3), a person is regarded as a member of a company entitled to attend, speak and vote at any general meeting of the company if his name appears on the Depository Register 48 hours before the general meeting.

106 The Steering Committee received representations stating that as section 130D(3) applies only to a company incorporated under the Companies Act whose shares are handled as book-entry securities in the CDP, Singapore companies incorporated under the Companies Act but listed on overseas securities exchanges are not able to utilise the 48-hour rule in section 130D(3) as their shares are not held through the CDP. In practice, such companies would therefore have difficulty ascertaining the shareholders who are entitled to attend and vote at general meetings. It was proposed that the scope of coverage of section 130D(3) be extended to cover Singapore-incorporated companies listed on overseas securities exchanges under a scripless regime.

107 A representation was received that a separate foreign depository register is concurrently maintained on behalf of each overseas-listed company outside of Singapore pursuant to the relevant regulations of the overseas securities exchange, but the companies are nonetheless mandated under section 180 of the Companies Act to only recognise members whose names appear in the branch register of members (and not the overseas depository register) as being entitled to attend, speak and vote at general meetings of the company. The companies are unable to resolve this issue by way of amendments to their articles.

108 The Steering Committee ascertained that for shares listed on NASDAQ, the depository (Depository Trust Company) or its nominee (Cede & Co) would be reflected as the registered members on the membership register of the Singapore incorporated company. Therefore, unless section 130D(1) is *also similarly extended* to Singapore-incorporated companies listed on overseas securities exchanges under a scripless regime, the extension of the 48-hour rule in section 130D(3) would not be effective in allowing the company to recognise its beneficial shareholders overseas and to send notices of meetings and documents to them.

109 The Steering Committee observed that it would be difficult to formulate a rule that would apply to all the relevant overseas securities exchanges (or depositories), and that it may not be possible to extend the application of other relevant rules such as sections 130E and 130F of the Companies Act to the overseas securities exchanges (or depositories). It is noted that at paragraph 156 of Chapter 4, the Steering Committee also considered whether the look-through regime in section 130D(1) should be extended to a prescribed list of overseas depositories for the purpose of enfranchising indirect investors for a scheme of arrangement.

110 The Steering Committee notes that this is not a new issue, and therefore Singapore-incorporated companies listed on overseas securities exchanges must have some existing way

of dealing with this problem. Such problems may make it more inconvenient for Singapore-incorporated companies listed on overseas securities exchanges but that is the cost of an overseas listing. There is no compelling reason to amend the Companies Act to make it easier for Singapore-incorporated companies to prefer an overseas listing instead of a listing on the Singapore Exchange.

111 A large majority of the respondents to the consultation agreed with the Steering Committee on this recommendation. A few respondents were of the view that the proposed amendment should be implemented to encourage Singapore businesses to list on stock exchanges even if it is abroad, and to encourage listing aspirants to use and adopt Singapore vehicles to do so.

112 Having considered the feedback from the consultation, the Steering Committee recommends that the scope of coverage of section 130D(3) should not be expanded to extend the 48-hour rule (effecting notional closure of the membership register) to Singapore-incorporated companies listed on overseas securities exchanges.

**Recommendation 2.23**

**The scope of coverage of section 130D(3) should not be expanded to extend the 48-hour rule (effecting notional closure of the membership register) to Singapore-incorporated companies listed on overseas securities exchanges.**

***(b) Shifting cost of general meeting to requisitioning members***

113 Currently, section 176 of the Companies Act requires directors of a company to immediately convene an extraordinary general meeting of the company within two months after receipt of a requisition from members holding not less than 10 percent of the total voting rights. In the event that the directors fail to convene the meeting within 21 days, the requisitionists may themselves convene a meeting. Where the directors have failed to convene a meeting, section 176(4) provides that any reasonable expenses incurred by the requisitionists in convening the meeting shall be paid by the company and shall be clawed back from the defaulting directors. Therefore, the company is required to bear the expenses of requisitioning the extraordinary general meeting in both instances where the directors convene the meeting at the requisition of the shareholder(s), and where they fail to do so (subject to the company's clawback of such sums from the defaulting directors in the latter scenario).

114 The Steering Committee received representations proposing that the cost of convening the extraordinary general meeting should be "re-allocated back to the requisitioning shareholders so that the company is not made to 'subsidise' the costs of a minority shareholder's self-interested agenda. This re-allocation may also have the effect of preventing abuse of the provision by minority shareholders and deter the requisitioning of extraordinary general meetings on spurious grounds".

115 The Steering Committee is of the view that section 176 should not be changed. The Steering Committee notes that the point of cost is most pertinent to listed companies. The

extraordinary general meeting can only be convened with the support of members holding not less than 10 percent of the voting shares (which is not a low threshold, and which entitles the requisitionists to demand a poll at the meeting). The fact that the requisitioning members may have a personal interest in the outcome of the extraordinary general meeting, should not *per se* lead to the conclusion that the meeting is not validly convened for the company's business. Furthermore, the proposal would place an undue fetter on the minority shareholders' right to convene a general meeting to discuss controversial proposals being made by the board (and by extension, the majority shareholders controlling the board). The Steering Committee has not found any evidence that section 176 is being abused by shareholders.

116 Most of the respondents to the consultation agreed with the Steering Committee on this recommendation. Two respondents were in favour of the requisitioning members being made to pay the cost of convening the extraordinary general meeting if the proposed resolution is not passed.

117 Having considered the feedback from the consultation, the Steering Committee recommends that the rule in section 176 should not be changed such that the cost of convening a requisitioned extraordinary general meeting is to be borne by the requisitioning members.

**<u>Recommendation 2.24</u>**

**There should be no change to the rule in section 176 that the cost of convening a requisitioned extraordinary general meeting is to be borne by the company, subject to a clawback of the costs from defaulting directors in the event of default by the directors in convening the meeting.**

## VIII. MINORITY SHAREHOLDER RIGHTS

### *(a) Introduction of minority buy-out right or appraisal right*

118 Although the will of the majority shareholders will normally prevail in a company, section 216 of the Companies Act (remedy for oppression or injustice) grants relief to minority shareholders to control potential abuse of the majority's voting power. Section 216 allows the court to grant relief where the majority's exercise of power is oppressive or in disregard of the minority's interest as members, or where some corporate act unfairly discriminates against or is otherwise prejudicial to the minority. However, this necessitates costly litigation. As noted in *Walter Woon on Company Law* (3rd Ed, paragraph 5.79), "in most cases, the only practical option is the corporate equivalent of divorce (either the majority buys out the minority (or, more rarely, the minority buys out the majority)) or a winding-up. The reason is simple: if the majority and the minority cannot get along, litigation is not likely to improve matters between them".

119 The Steering Committee considered whether to adopt a minority buy-out right or appraisal right as an alternative remedy for minority shareholders. The objective of such a

right is to allow a minority shareholder who dissented from certain fundamental changes to the enterprise or certain alterations of shareholder rights, to require the company to buy his shares at a fair value. The New Zealand Law Commission stated that the "buy-out procedure recognises not only that there is a level of change to which it is unreasonable to require shareholders to submit but also that in many cases the presence of a disgruntled minority shareholder will be of little benefit to the company itself". The Steering Committee also notes that foreign investors may often be minority shareholders in Singapore joint ventures. As such, providing for stronger minority shareholder rights might be viewed as a positive factor as far as foreign investment flows into Singapore are concerned.

120 The Steering Committee reviewed the following relevant legislation:

(a) New Zealand – sections 110 to 119 of the New Zealand Companies Act 1993;

(b) USA – Chapter 13 of the Model Business Corporations Act 2005 (MBCA); and

(c) Canada – section 190 of Canada Business Corporations Act (CBCA).

121 Whilst the buy-out right or appraisal right in each of these jurisdictions differ in various ways, there are some common threads. Generally, the New Zealand, USA and Canadian legislation provide a dissenting minority shareholder with a right to request a buy-out or an appraisal under some or all of the following circumstances:

<u>Fundamental changes to enterprise</u>
(a) Alteration of the company's structure or activities;[26]
(b) Approval of major transaction;[27]
(c) Approval of amalgamation, merger or share exchange;[28]

<u>Alteration of shareholder rights</u>
(d) Reverse stock splits;[29]

[26] **USA** – conversion to non-profit status (s.13.02(a)(7) MBCA), an unincorporated entity (s.13.02(a)(8) MBCA), other amendments to articles where appraisal rights were granted (s.13.02(a)(5) MBCA); **New Zealand** – alteration of constitution which imposes or removes restriction on company's activities (s. 110(a)(i) read with s. 106(1)(a) of the New Zealand Companies Act); **Canada** – amendment of articles to add, change or remove any restriction on the business or businesses that the corporation may carry on (s. 190(1)(b) CBCA); continuance where corporation continues as if it had been incorporated under the laws of another jurisdiction, or under other legislation (s. 190(1)(d) CBCA); going private transaction (s. 190(1)(f) CBCA).

[27] **USA** – disposition of assets requiring shareholder approval that would leave the corporation without a significant continuing business activity (s.13.02(a)(3) read with s.12.02(a) MBCA), and any other disposition of assets where appraisal rights were granted (s.13.02(a)(5) MBCA); **New Zealand** – acquisition or disposition of assets or acquiring of rights or incurring of liabilities, the value of which is more than half the value of the company's assets (s. 110(a)(ii) read with s. 106(1)(b) of the New Zealand Companies Act); **Canada** – sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of business (s. 190(1)(e) CBCA).

[28] **USA** – merger if shareholder approval is required (s.13.02(a)(1) MBCA), short form merger where corporation is subsidiary (s.13.02(a)(1) MBCA), share exchange where corporation's shares will be acquired (s.13.02(a)(2) MBCA); **New Zealand** – long form amalgamation (s. 110(a)(ii) read with s. 106(1)(c) of the New Zealand Companies Act); **Canada** – long form amalgamation (s. 190(1)(c) CBCA); carrying out a squeeze-out transaction (s. 190(1)(f) CBCA).

[29] **USA** – amendment to articles that reduces the number of shares owned to a fractional share, if the corporation has an obligation or right to repurchase the fractional share so created (s.13.02(a)(4) MBCA).

(e) Reclassification of shareholder's shares that results in shares with terms less favourable in all material aspects or representing a smaller percentage of total outstanding voting rights;[30]
(f) Alteration or abolition of a preferential right;[31]
(g) Creation, alteration or abolition of a right of redemption;[32]
(h) Alteration or abolition of a pre-emptive right;[33]
(i) Action affecting rights attached to shares.[34]

122 If the minority shareholder disagrees with the valuation of the shares proposed by the company, the company must apply to the court (USA and Canada) or refer to arbitration (New Zealand) for an appraisal or valuation of the fair value of the shares.

123 The US MBCA provides for a market exception, which states that where the shares traded are liquid and the value established by the triggering event is reliable, the appraisal right is not available for holders of shares traded on the US securities exchanges or markets, unless the shareholders are being required to accept for their shares anything other than cash or shares that satisfy the same standard of liquidity and reliability of market value, or the corporate action triggering the appraisal right is an interested transaction involving controlling shareholders or senior executives and directors.

124 One unique feature of the New Zealand model is that the company can apply to the court for relief where the buy-out would be unfair to it.[35] This protects against minority oppression of the majority. The Canadian legislation also provides that the corporation shall not make payment to the dissenting shareholder if there are reasonable grounds for believing that the corporation would become insolvent thereafter.

125 One school of thought favours the introduction of a minority buy-out right or appraisal right, provided that the triggering circumstances are limited and subject to a market exception and safeguards. It was considered that such a remedy would provide a more efficient exit by unhappy minority shareholders in mainly private companies without the need

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[30] **USA** – referred to as a domestication (s.13.02(a)(6) MBCA).
[31] **USA** – contained in 1984 MBCA, but removed from 2005 MBCA on the ground that distinguishing among different types of amendments is necessarily arbitrary and that removing all other triggering circumstances related to amendments to the articles of incorporation would permit a high degree of private-ordering. This removal is not a judgment that an amendment changing the terms of a class or series may not have significant economic effects; **Canada** – a shareholder may dissent if the corporation resolves to amend its articles in various ways which affect the rights of the class, including a preferential right (s. 190(2) CBCA).
[32] **USA** – see footnote 31; **Canada** – a shareholder may dissent if the corporation resolves to amend its articles in various ways which affect the rights of the class, including a right of redemption (s. 190(2) CBCA).
[33] **USA** – see footnote 31; **Canada** – amendment of articles to add, change or remove any provisions restricting or constraining the issue, transfer or ownership of shares of that class (s. 190(1)(a) CBCA); a shareholder may dissent if the corporation resolves to amend its articles in various ways which affect the rights of the class, including a pre-emptive right (s. 190(2) CBCA).
[34] **New Zealand** – Section 117(2): Rights attached to shares include (i) rights, privileges, limitations and conditions attached to shares by the Act or constitution; (ii) statutory pre-emptive rights under section 45; right to require that the procedure prescribed by Act or constitution for amendment or alteration of rights be followed; and right that a procedure prescribed by the constitution for amendment or alteration of rights not be amended or altered; **Canada** – a shareholder may dissent if the corporation resolves to amend its articles in various ways which affect the rights of the class.
[35] Section 114(1) and (2) of the New Zealand Companies Act 1993: Court can order exemption on the ground that (a) the purchase would be disproportionately damaging to the company; (b) the company cannot reasonably be required to finance the purchase; or (c) it is not just and equitable to require the company to purchase the shares.

for costly and protracted oppression actions. It was noted that one of the common strategies in an oppression action is to offer a buy-out and to apply to stay the action. It was also noted that there is existing precedent in the Companies Act which already provides a somewhat similar buy-out remedy in certain narrow circumstances.[36]

126 The Steering Committee is not in favour of introducing such a remedy. It is noted that generally all the triggering circumstances in the New Zealand, US and Canadian legislation involve corporate actions that require approval of the shareholders by special resolution.[37] In contrast, shareholders of Singapore incorporated companies have far more limited rights. A Singapore company is able to enter into major transactions without shareholder approval. It would therefore be illogical for a shareholder to have a buy-out right in circumstances where he does not even have a right to vote to approve the corporate action. As for the alteration of shareholder rights, the Steering Committee took the view that majority rule is part of the bargain that minority shareholders entered into, which includes the fact that their shareholder rights could be altered by special resolution.[38] Therefore the minority shareholders should not be able to require a buy-out on the ground that their rights had been altered or removed by special resolution. There is also concern that the introduction of such a remedy might lower the attractiveness of Singapore as a place for the setting up of businesses, and make it more difficult for entrepreneurs to change the course of their business.

127 Most of the respondents to the consultation agreed with the Steering Committee on this recommendation.

128 A few respondents disagreed and were in favour of introducing a minority buy-out right or appraisal right. A respondent from the Singapore Business Federation supported the introduction of a buy-out right that was limited to the alteration of shareholder rights. Concerning the argument that the appraisal right would be inconsistent with the far more limited rights of shareholders in Singapore compared with the other developed markets which

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[36] Section 33(5) of the Companies Act allows shareholders holding not less than 5% of the issued shares to apply to court for cancellation of an alteration to the objects clauses of the memorandum. On the application, the court may adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase (otherwise than by the company) of the interests of dissentient members.

[37] Examples of fundamental changes requiring approval by special resolution in Singapore include:

(a) section 23 read with 26 (special resolution required to amend memorandum and articles restricting capacity, rights or powers of company)
(b) section 30 (special resolution to change from limited company to unlimited company and vice versa)
(c) section 31 (special resolution to convert public company to private company and vice versa)
(d) section 33 (special resolution to alter objects of company in memorandum – NB. buy-out clause in section 33(7)(b) Companies Act)
(e) section 34 (special resolution required to remove entrenchment of section 10(1) of the Residential Property Act)
(f) section 37 (special resolution required to alter articles of association).

[38] It is noted that certain provisions in the Companies Act protect minority shareholders in the event of certain alterations of their rights. For example, section 39(3) provides that a member is not bound by alterations in the memorandum and articles that he did not agree to which require the member to take or subscribe for additional shares or increase his liability to contribute to share capital. Section 74 provides that where the memorandum or articles provide that consent of a specified proportion of the shareholders of a class is required to authorise the variation or abrogation of class rights, and class rights are varied or abrogated, any such variation or abrogation may be cancelled by the court on application by members holding not less than 5% of the shares of that class. Section 75 provides that preference share rights are to be set out in the memorandum and articles and therefore alteration of rights of preference shareholders would attract the application of section 74.

had appraisal rights, IMAS expressed the view that the opposite argument could also be made, that the absence of a requirement for shareholder approval for major corporate actions makes an even stronger case for the introduction of an appraisal right.

129 SMU Business School pointed out that many studies in finance have empirically shown that giving the minority the right will create higher opportunity costs if a major shareholder treats minority shareholders unfairly, increase the bargaining power of minority shareholders and increase market efficiency. SMU Business School shared that a study of minority investor protection in 27 wealthy countries found higher valuation of firms in countries with better protection of minority shareholders. When law is designed to protect minority shareholders, investors are willing to pay a premium for both equity and debt, because *ex-ante* their cash-flow rights (dividends, interest or principal repayments) are better protected by the law. It motivates entrepreneurs to finance their project externally since the financing cost is lower, and thus expanding the capital market. SMU Business School expressed the view that the introduction of the minority buy-out right could restore the balance of power between the majority and minority shareholders, considering the information advantage of majority shareholders and the non-negligible risk of expropriation through the complex web of pyramidal shareholding that is prevalent in Singapore.

130 Having considered the feedback from the consultation, the Steering Committee recommends that the Companies Act should not be amended to introduce a minority buy-out right or appraisal right. Instead, section 254(1)(*i*) and (*f*) of the Companies Act should be amended to explicitly provide the court with the option, where the company is still viable, to order a buy-out instead of a winding-up where it is just and equitable to do so (see Recommendations 2.26 and 2.27).

**Recommendation 2.25**

**The Companies Act should not be amended to introduce a minority buy-out right / appraisal right in Singapore where such rights would enable a dissenting minority shareholder who disagreed with certain fundamental changes to an enterprise or certain alterations to shareholders' rights, to require the company to buy him out at a fair value.**

***(b) New buy-out remedy where court finds just and equitable***

131 Section 254(1)(*i*) of the Companies Act provides that the court may order a company to be wound up if the court is of the opinion that it is just and equitable to do so. Having taken the view not to adopt the minority buy-out right / appraisal right (see Recommendation 2.25 above), the Steering Committee agrees that it would be useful to amend section 254(1)(*i*) to explicitly provide the court with the power to order a buy-out of the shares in an application for the winding-up of a company on the "just and equitable" ground. This additional remedy would allow a court to order a buy-out instead of a winding-up in cases where the company is still viable and it would be a more efficient solution for the majority to buy out the minority (or vice versa). At present, there have been occasions where the courts

have suspended the winding-up order to allow the parties to consider an amicable solution which could involve a buy-out.[39]

132 Most of the respondents to the consultation agreed with this recommendation. One respondent expressed the view that it was a curious anomaly that the buy-out order is available under the "oppression" regime but not under the "just and equitable" regime, particularly given the drastic effect of granting an order to wind up a company. The participants at the subsequent Focus Group discussion sessions were in favour of this proposed amendment as opposed to the status quo, but a suggestion was also made to combine section 216 and section 254(1)(*i*) into one remedy due to their overlap, or to make the buy-out option available to all the limbs of section 254.

133 Some NUS law academics were not in favour of the proposed amendment as in their view, the benefits of allowing the courts to order a buy-out under section 254(1)(*i*) are outweighed by the following three problems:

(a) It might result in arbitrage between sections 254(1)(*i*) and 216 which would lead to uncertainty in the shareholders' rights regime. Aggrieved shareholders may opt to bring oppression-style cases under the proposed version of section 254(1)(*i*), rather than under section 216, as the former covers a broader range of circumstances and would offer the two remedies most commonly ordered in a section 216 petition (i.e. a buy-out and winding-up);

(b) It might disrupt the careful balance that had been struck in section 254 between *de facto* majority rule and the protection of minority shareholders' rights, and risks opening the floodgates. The current wording of section 254 maintains this balance by allowing courts to protect minority shareholders in an almost unlimited set of circumstances (i.e. whenever the circumstances are unjust or inequitable) but then ensuring that this expansive remedial jurisdiction is limited by restricting the remedy available to winding-up; and

(c) It might result in unintended procedural problems caused by inserting a buy-out remedy into a part of the Companies Act that was primarily intended to deal with winding-up. In many of the claims under the proposed section 254(1)(*i*), particularly where large viable companies are involved, the aggrieved shareholder will be seeking a buy-out remedy and not a winding-up. However, even in such cases, where there will be a small chance of a winding-up being ordered, the section 254(1)(*i*) petition will be considered a winding-up petition and trigger the procedural requirements of such a petition (e.g. advertising of the winding-up). This will result in unfair and costly consequences (e.g. the disruption of credit) for companies that are the subject of 254(1)(*i*) oppression-style claims but are unlikely to be wound up.[40]

[39] See for example, *Chow Kwok Chuen v Chow Kwok Chi* [2008] 4 SLR 362.

[40] The Steering Committee took the view that an application under the amended section 254(1)(i) is not really a question of the applicant seeking a buy-out remedy, because the applicant would still have to apply for a winding-up. Therefore, when an application for a winding-up is made, the usual consequences follow. The court would have to form the view that it is just and equitable to wind up the company. The buy-out is merely an alternative remedy.

134 Having considered the feedback from the consultation, the Steering Committee recommends that section 254(1)(*i*) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.

**<u>Recommendation 2.26</u>**

**Section 254(1)(*i*) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.**

***(c) New buy-out remedy where directors acted in their own interest or in unfair or unjust manner***

135 Section 254(1)(*f*) of the Companies Act provides that the court may order a company to be wound up if the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner that appears to be unfair or unjust to other members. As the grounds for winding-up in section 254(1)(*f*) are somewhat similar to section 254(1)(*i*), and it is common in an oppression action to pray for relief in the alternative under section 216 or section 254(1)(*i*) or (*f*), it was proposed that section 254(1)(*f*) be amended in a similar manner as section 254(1)(*i*) (see Recommendation 2.26), to allow the court hearing a winding-up application under section 254(1)(*f*) the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up. The mirroring of the new buy-out remedy in both sections 254(1)(*i*) and 254(1)(*f*) would prevent the parties from engaging in arbitrage between these two limbs.

136 Most of the respondents to the consultation agreed with this recommendation.

137 The NUS law academics who disagreed with the proposed amendment of section 254(1)(*i*) in Recommendation 2.26, were also not in favour of this proposed amendment to section 254(1)(*f*). The concerns that they had expressed in relation to Recommendation 2.26 generally applied to this related proposal to allow courts to order a buy-out under section 254(1)(*f*). In their view, the combined effect of making a buy-out order available under both sections 254(1)(*i*) and 254(1)(*f*) will likely increase the possibility of undesirable arbitrage occurring generally between sections 216 and 254.

138 Having considered the feedback from the consultation, the Steering Committee recommends that section 254(1)(*f*) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.

**Recommendation 2.27**

**Section 254(1)(*f*) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.**

*(d) Extension of section 216A (statutory derivative action) to arbitration proceedings*

139 Section 216A(2) of the Companies Act (statutory derivative action) provides a complainant (usually a minority shareholder) with the right to apply to the court for leave to: (a) bring an action in the name and on behalf of the company; or (b) intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.

140 In the case of *Kiyue Co Ltd v Aquagen International Pte Ltd* [2003] 3 SLR 130, Kiyue (a minority shareholder of Aquagen) applied under section 216A for leave to intervene in an arbitration between Aquagen and another company. The key issue was whether the word "action" in section 216A(2) included arbitration proceedings. Choo Han Teck J held that section 216A only applies to court proceedings and not arbitration proceedings, but noted that there may be good reasons to legislatively extend section 216A to include arbitration proceedings, especially with the increasing use of arbitration as alternative dispute resolution. Without it, shareholders like Kiyue may be deprived of a reasonable means of asserting their rights.

141 The Steering Committee agrees that section 216A ought to be extended to include arbitration proceedings. Otherwise, all contracts entered into by a company could provide for arbitration and the minority shareholders will have no recourse then.

142 Most of the respondents to the consultation agreed with this recommendation. Two respondents were of the view that the extension of section 216A to include arbitration proceedings would support Singapore's aspirations to be a leading arbitration centre.

**Recommendation 2.28**

**The scope of the statutory derivative action in section 216A should be expanded to allow a complainant to apply to the court for leave to commence an arbitration in the name and on behalf of the company or intervene in an arbitration to which the company is a party for the purpose of prosecuting, defending or discontinuing the arbitration on behalf of the company.**

*(e) Application of section 216A (statutory derivative action) to Singapore companies listed in Singapore and overseas*

143 The statutory derivative action in section 216A(2) of the Companies Act does not apply to a company that is listed on the securities exchange in Singapore. When section 216A

was introduced in 1993, the remedy was not extended to companies listed in Singapore out of fear that unscrupulous people would make frivolous applications to harass listed companies and thereby attempt to manipulate the share price. Section 216A was introduced at a time when it was very rare for Singapore companies to be listed overseas, and it was therefore made not applicable only to Singapore companies listed in Singapore.

144 It was suggested to the Steering Committee that it is incongruous that this remedy is available to a Singapore-incorporated company listed overseas but is not available to a Singapore-incorporated company listed in Singapore. One of SGX's policies is to promote dual listings by Singapore companies. The Steering Committee agrees that there is a need for consistency in the treatment of Singapore-incorporated listed companies, who would otherwise benefit from this remedy when listed overseas but would not when listed in Singapore.

145 The respondents to the consultation unanimously agreed that section 216A should be amended to achieve consistency in the availability of the statutory derivative action for Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

146 The Steering Committee initially took the view that section 216A should be amended such that the statutory derivative action in section 216A is *not applicable* to Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas. A large majority of the respondents agreed with the Steering Committee's initial view in their written feedback.

147 A significant minority of the respondents (including MAS, SGX and NUS law academics) were in favour of section 216A being made *applicable* to all listed Singapore-incorporated companies. Participants of the subsequent focus group discussion sessions were unanimously in favour of making section 216A applicable to listed Singapore-incorporated companies whether listed overseas or in Singapore. The following reasons were given in support of making section 216A applicable to all listed Singapore-incorporated companies:

(a) SGX highlighted that if section 216A is made not applicable, minority shareholders of Singapore-incorporated listed companies would have no recourse in respect of a wrong done to the company where the wrongdoer is a controlling shareholder or is in a position to prevent an action from being brought against him.[41]

(b) In response to the argument that it was not necessary for section 216A to apply to listed companies as they are monitored by regulatory authorities and disgruntled shareholders can exit by selling their shares in the open market, MAS highlighted that it is more desirable to empower shareholders to take action than to rely solely on regulatory authorities to do so. To deny a disgruntled shareholder the remedy on basis that he can sell his shares in the open market ignores the deterrent effect of the remedy and the fact that the disgruntled shareholder may not wish to exit his investment especially if doing so results in losses.

[41] Strictly speaking, even without section 216A, members of listed companies still have the common law derivative action. Hence, the extension of section 216A simply provides another avenue for minority shareholders to seek redress. However, there are difficulties in bringing a common law derivative action, which was the reason for enacting section 216A in the first place.

(c) In response to the argument that section 216A could result in frivolous litigation as well as the possibility of minorities using the remedy to carry out personal vendettas against directors or to put pressure on majority shareholders in buy-out situations, MAS, SGX and Herbert Smith pointed out that the requirement for leave of court to be obtained before the remedy may be pursued already provides a screening mechanism for such frivolous actions.[42] MAS also opined that the apparent concern about possible price manipulation does not have strong basis, and is not borne out by the practices in other jurisdictions. The NUS law academics shared that evidence from other leading jurisdictions suggests that making the derivative action available to minority shareholders in listed companies will not lead to frivolous litigation.

(d) The NUS law academics also opined that extending s 216A to apply to listed companies would be one of the most effective ways to both promote the efficient enforcement of directors' duties and improve protection of minority shareholders' rights. This would put Singapore on par with most other leading jurisdictions and would potentially attract more foreign investors who increasingly see availability of a derivative action in listed companies as the market standard.

148 Having considered the feedback from the consultation, the Steering Committee recommends that section 216A should be amended such that the statutory derivative action in section 216A *is applicable* to Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

**Recommendation 2.29**

**Section 216A should be amended to achieve consistency in the availability of the statutory derivative action for Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.**

**Recommendation 2.30**

**Section 216A should be amended such that the statutory derivative action in section 216A *is applicable* to Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.**

***(f) Cumulative voting for election of directors***

149 The current system of "straight voting" under which each member may cast one vote per share for a candidate for each vacancy to be filled, enables a bare majority of shares to elect the entire board of directors. In some states of the United States,[43] a system of cumulative voting is available to ensure minority representation on the board of directors. Under that system, the number of shares held by a member is multiplied by the number of vacancies, and the member may cast for a single candidate the total number of votes calculated this way, or may distribute the votes among several candidates as desired.

[42] The court can only grant leave if it is satisfied that the complainant has given 14 days' notice to the directors, is acting in good faith, and that the action is prima facie in the interest of the company.
[43] Ford's Principles of Corporations Law (12th Ed, 2005), pages 227-228.

150 It was proposed that the Companies Act be amended to introduce cumulative voting for the election of directors, whereby members can choose to cast all or part of their cumulative votes (number of shares multiplied by the number of vacancies) in favour of one candidate. This would enable minority shareholders to elect some directors, and this would enhance protection of minority shareholders' interests and strengthen corporate governance.

151 The Steering Committee disagreed with the proposal to introduce cumulative voting, as it considered that cumulative voting is likely to be ineffective because of the ability of management and the controlling shareholder to control the proxy voting process.[44] The Steering Committee noted that other methods of protecting the interests of minority shareholders should be considered instead.

152 A large majority of the respondents to the consultation agreed with the Steering Committee on this recommendation. Some NUS law academics noted that although cumulative voting is available in some of the world's leading corporate law jurisdictions, the effectiveness of cumulative voting in these jurisdictions has been limited by the ability of management and controlling shareholders to use their power to opt out of the system[45] and to control the proxy voting process. They thought that there is little reason to believe that a cumulative voting system would be any more effective in Singapore than it has been in these other leading jurisdictions.

153 A significant minority of the respondents (including MAS, Nanyang Business School, SMU Business School, SIAS and Prof Mak Yuen Teen) disagreed with the Steering Committee and were in favour of introducing a system of cumulative voting for the election of directors.

154 MAS was of the view that a system of cumulative voting could improve minority representation on the board. Although it was not a perfect solution, it could help to alleviate the "majority-takes-all" problem caused by straight voting.

155 Nanyang Business School argued that having board representation is an invaluable *ex ante* tool for effective corporate governance by minority shareholders, rather than relying on *ex post* legal mechanisms for redress under section 216 or 216A. The fact that controlling shareholders can manipulate the proxy mechanism is not sufficient reason to exclude this right.

156 Prof Mak Yuen Teen pointed out that the present law often allows a controlling shareholder to appoint the entire board of directors. There is nothing inherently fair about a system which allows a shareholder often holding substantially less than 100 percent - even less than 50 percent - to control the entire board.

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[44] The Steering Committee had received feedback that the proxy voting process was unsatisfactory as the Chairman had the option of not exercising the vote on behalf of the minority shareholders if those shareholders appointed the Chairman as their proxy. If the proxy voting process is reformed such that the Chairman (as proxy) must vote the proxies as instructed, the weakness of the proxy voting process would be addressed and may no longer be a reason to object to the introduction of the cumulative voting system for election of directors.

[45] An academic commented that the cumulative voting system was not effective in the US jurisdictions that had implemented it as the US companies could opt out from implementing the system and they promptly did so. It was not examined whether the system could be effective if there was no ability for companies to opt out.

157 SMU Business School argued that to the extent that cumulative voting facilitates the election of independent outside directors, it may serve to reduce agency costs between shareholders and managers. A study showed that a cumulative voting system in a firm has a positive effect on firm value. Having cumulative voting for the election of board of directors is one step towards the mitigation of potential abusive action by the majority shareholders.

158 Having considered the feedback from the consultation, the Steering Committee recommends that the Companies Act should not be amended to introduce a system of cumulative voting for the election of directors. It is always open to a company to introduce such provisions if it is thought desirable, rather than mandating it for all companies large and small. In so far as a company is a vehicle for business, the commercial understanding is that a minority shareholder does not have an inherent right to representation on the board. If he has a legitimate expectation of board representation that is defeated by the majority shareholders, he has recourse to a remedy under section 216 or 254.

**Recommendation 2.31**

**The Companies Act should not be amended to introduce a system of cumulative voting for the election of directors.**

***(g) Enabling minority shareholders to obtain board resolutions***

159 Where the minority shareholders are aggrieved by the decisions of a majority-controlled board of directors, the minority shareholders are currently unable to obtain access to the minutes of Board meetings without commencing litigation and applying for discovery of documents. It was proposed that a mechanism be provided to enable minority shareholders to obtain copies of board resolutions without the need to go through a discovery process. The proposed mechanism could require the company to furnish board resolutions upon a written request by at least two members holding not less than 5% in aggregate of the issued share capital of the company. The written request should specify exactly what is being requested, so as not to facilitate a fishing expedition.

160 The Steering Committee disagrees with the proposal as the board will have to pass resolutions dealing with many confidential and sensitive matters, for example, entering into negotiations, commencement or discontinuation of litigation, and authorising the search for candidates for a key appointment. Such a right would hamper the board’s duties. The Steering Committee also notes that even majority shareholders do not have such a right to obtain board resolutions.

161 Most of the respondents to the consultation agreed with the Steering Committee on this recommendation.

**<u>Recommendation 2.32</u>**

**The Companies Act should not be amended to create a mechanism to allow minority shareholders to obtain copies of board resolutions without the need to go through a discovery process.**

## IX. MEMBERSHIP OF HOLDING COMPANY

### *Extension of section 21(6) exemption to include transfer of shares*

162 Section 21(1) of the Companies Act prohibits a corporation from being a member of its holding company and provides that any "allotment or transfer" of shares in a holding company to its subsidiary is void. The Jenkins Report 1962 (Report of the Company Law Committee) (Cmnd 1749) paragraph 151 identified two objects of the original English section: to prevent the capital of the holding company from being indirectly depleted as the result of the purchase of its own shares by its subsidiary, and to prevent the directors of a holding company from maintaining themselves indefinitely in office against the wishes of other shareholders, with the votes of shares held by a subsidiary.[46] Section 21(6) provides for an exemption from this prohibition. It allows the "allotment" of shares in a holding company to a subsidiary which already lawfully holds shares in the holding company if the allotment is made by way of capitalisation of reserves of the holding company and is made to all members of the holding company on a basis that is in direct proportion to the number of shares held by each member in the holding company.

163 The Steering Committee considered a proposal to extend the exemption in section 21(6) to include a "transfer" of shares in a holding company, in order to align the section 21(6) exemption with the prohibition in section 21(1), and to cater for a transfer of shares in the holding company by way of distribution in specie, amalgamation or scheme of arrangement.

164 A representation was received that many companies do undertake distribution of its assets in specie to their shareholders, for example, by way of a dividend in specie. If a company ("Company C") wishes to propose a dividend in specie to be effected by way of a distribution of its assets (say, existing shares in another company, "Company A") to its shareholders, and Company C's shareholders include "Company B", which is a subsidiary of Company A, a transfer of Company A shares to Company B under the distribution would be prohibited under section 21(1). It was proposed that, in the case of a pro rata distribution of shares involving shares in its holding company, a subsidiary should be entitled to have its holding company's shares transferred to it as part of the distribution and to hold such shares so distributed, provided — (a) it must dispose of such shares within 12 months of the transfer or such longer period as the court may allow; and (b) it shall have no right to vote in respect of such shares.

~~165~~ Section 21(4) provides for an exemption to the prohibition in section 21(1), and allows a subsidiary to continue to be a member of its holding company if at the time when it

[46] Woon & Hicks, The Companies Act of Singapore, An Annotation (May 1989 Ed), page 76.

becomes a subsidiary, it already holds shares in that holding company, but subject to the subsidiary having no voting rights at meetings of the holding company, and subject to the subsidiary disposing of all the shares in the holding company within 12 months of becoming a subsidiary. The Steering Committee had earlier indicated its view that section 21(4) should be amended to allow the subsidiary to continue to be a member of its holding company with the shares of the holding company held by the subsidiary being deemed treasury shares, and subject to a maximum aggregate limit of 10% of shares in the holding company being held as treasury shares or deemed treasury shares. The Steering Committee was of the view that section 21(6) should be amended in a similar manner as the proposed section 21(4) as described above.

166 An overwhelming majority of the respondents to the consultation agreed with the recommendation for the exemption in section 21(6) to be extended to include a transfer of shares in a holding company, in order to align the section 21(6) exemption with the prohibition in section 21(1) and to cater for a transfer of shares in the holding company by way of distribution in specie, amalgamation or scheme of arrangement.

167 The respondents to the consultation unanimously agreed with the recommendation for section 21(6) to be amended in a similar manner as the proposed section 21(4) as described in paragraph 165.

168 However in paragraphs 22 to 26 of Chapter 3, the Steering Committee is recommending that section 21(4) should be amended to allow the subsidiary to continue to be a member of its holding company after the period of 12 months referred to in section 21(4)(*b*), with the shares of the holding company held by the subsidiary being deemed treasury shares thereafter, and subject to a maximum aggregate limit of 10% of shares in the holding company being held as treasury shares or deemed treasury shares. The Steering Committee recommends that section 21(6) should be amended in a similar manner as the new proposed section 21(4) as per Recommendations 3.7 and 3.8 of Chapter 3.

**Recommendation 2.33**

**The exemption in section 21(6) should be extended to include a transfer of shares in a holding company, in order to align the section 21(6) exemption with the prohibition in section 21(1) and to cater for a transfer of shares in the holding company by way of distribution in specie, amalgamation or scheme of arrangement.**

**Recommendation 2.34**

**Section 21(6) should be amended to allow a subsidiary to receive a transfer of shares in its holding company that are transferred by way of distribution in specie, amalgamation or scheme of arrangement:**

**(a) provided that the subsidiary shall have no right to vote at meetings of the holding company or any class of members thereof, and the subsidiary shall, within the period of 12 months or such longer period as the court may allow after the transfer, dispose of all of its shares in the holding company; and**

**(b) any such shares in the holding company that remain undisposed after the period of 12 months or such longer period as the court may allow after the transfer –**

**(i) shall be deemed treasury shares or shall be transferred to the holding company and held as treasury shares, and subject to a maximum aggregate limit of 10% of shares in the holding company being held as treasury shares or deemed treasury shares; and**

**(ii) provided that the subsidiary / holding company shall within 6 months divest its holding of the shares in the holding company in excess of the aggregate limit of 10%.**