



THE FININCIAL RIGHTS OF SHAREHOLDERS IN
THE COMPANY: COMPARTIVE STUDY BETWEEN
MALAYSIA ANDAUSTRALIA

BY

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ABSTRACT

This study focuses on the rights of shareholders in a company in Malaysia and Australia. The primary concern of this research is the shareholders' financial rights in the company. Therefore, this research hypothesizes that Australian Corporations Act 2001 treats shareholders' financial rights in a manner which is more effective than Malaysian Companies Act 1965. The objective of this study is to ascertain the instances where the financial rights of the shareholders in the company have been prejudiced or discriminated by the directors or majority shareholders and how their financial rights are protected. The conducted research has used a comparative, analysis, and descriptive methods in order to highlight the strong and weak mechanisms that exist in the two jurisdictions, Malaysia and Australia which help to protect the financial rights of the shareholders in the company. Accordingly, the researcher found that Australian Corporations Act 2001 treats the problem mentioned above in more effective way than Malaysian Companies Act 1965. Australian Corporations Act 2001 gives company's shareholders a wide discretion to vary the right attaching to their shares, while Malaysian Companies Act 1965 does not give the company shareholders the same discretion that conferred to company's shareholders in Australia. In addition, Australian Corporations Act 2001 depends on the solvency test in declaring dividend, while the capital maintenance approach is still retained in Malaysia. Moreover, the statutory provision in Australian Corporation Act 2001 relating to the remedies and people who have *locus standi* to sue the wrongdoer is much clearer in comparison to Malaysian Companies Act 1965.

ملخص البحث

تعنى هذه الدراسة بحقوق حاملي الأسهم في الشركة وتركز على الحقوق المالية لحاملي الأسهم في كل من ماليزيا وأستراليا لذلك يفترض الباحث أن قانون الشركات الأسترالي 2001 يعالج الحقوق المالية لحاملي الأسهم في الشركة بأسلوب أكثر فعالية من الأسلوب المعمول به في ظل قانون الشركات الماليزي 1965. الهدف الرئيس من هذه الدراسة هو التحقق من الحالات المتعلقة بحرمان حاملي الأسهم من حقوقهم المالية وفي أي الظروف عادة تحدث. لهذا فقد استخدم الباحث الأسلوب المقارن التحليلي والوصفي لغرض بيان نقاط الضعف والقوة في الوسائل القانونية المتاحة في كلا القانونين. وبعد الدراسة والتمحيص تثبت الباحث من صحة فرضيته القائلة بأن قانون الشركات الأسترالي 2001 أكثر فعالية من قانون الشركات الماليزي 1965 في حماية الحقوق المالية لحاملي الأسهم في الشركة بناءً على النتائج التالية: أن القانون الأسترالي يعطي حرية واسعة لحاملي الأسهم في تعديل وتغيير الحقوق المالية المتعلقة بأسهمهم. إضافة إلى ذلك فإن قانون الشركات الأسترالي 2001 قد جعل من الكفاءة والقدرة المالية المعيار الرئيسي لدفع الأرباح. وأخيراً فإن قانون الشركات الأسترالي 2001 قد وضع سبل العلاج والأشخاص القادرين على رفع الدعوة بأسلوب أكثر دقة ووضوحاً من قانون الشركات الماليزي 1965.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion; it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

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DECLARATION

I here declare that this dissertation is the results of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for my other degree at IIUM or other institutions.

Mohammed L. Salih

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To My Beloved Parents

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LIST OF ABBREVIATIONS

MCA 1965	Malaysian Companies Act 1965
ACA 2001	Australian Corporations Act 2001
ASIC	Australian Securities & Investments Commission
ASX	Australian Stock Exchange
ROC	Registrar of Companies
SSP	Share Purchase Plan
SC	Security Commission

CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

Corporations occupy without any doubt an important aspect of the economic life of most countries today. They play a significant role in providing a majority of the goods and services that people use in their life. Therefore, they are considered as the backbone of the economic sector.

A company consists of two main organs which are the board of directors and members in general meeting. Both of these organs have the ability to make decisions that represent the company itself. However, the ability of either of these organs to act as the company depends on the division of power between the board of directors and members in general meeting and the extent of the authority given to them by the company's constitution, or corporate legislation¹

The role of the board of director is to manage, or to supervise the business of the company. Therefore, the law imposes on the directors certain fiduciaries and duty of care, skill, and diligence.

On the other hand, shareholders are the provider of the capital that is used by the company in its business, and they are entitled to certain rights in the company conferred by corporate legislation.

¹ Lipton & Herzberg, *Understanding company law*, 13th edition, Lawbook Co, 2006, at 252. In Australia the company may have a constitution that constitutes of memorandum and article of association or it may adopt the new system which is called replaceable rules. Replaceable rules are a set of rules that govern the internal administration and the management of the company. These rules are contained in the Australian Corporation Act and applied to companies formed after July 1998.

Shareholders' right may be divided into two broad categories which are financial or distribution right, and control right². Financial rights relate to the right of shareholders to get return for their investment while control right means the right of shareholders to participate in decision making and to monitor the company affairs.

The protection of shareholders rights is considered as a main concern of company law. If the law fails to protect the rights of capital providers, the result will be a decrease in investment in the business sector with adverse effect on economic life. However, the methods of protecting shareholders' right differ between jurisdictions. Thus, the research will focus on comparison of the shareholders financial rights as provided by Malaysian Companies Act 1965 (MCA 1965) and Australian Corporations Act 2001(ACA 2001). Comparison is made because the researcher would like to examine the relevance of Australian experience to the Malaysian experience in terms of protecting shareholders rights.

1.2 SUMMARY OF THE PROPOSED DISSERTATION

This research is divided into five chapters with each part devoted to issues within the purview of the research. Chapter one is about general background to the research, touching specifically on the introduction of the research, literature review, the hypothesis, limitation to the research, research methodology and other foundational issues.

The chapter sets the stage for the reader of what to expect in the main body of the research. Chapter two discusses shareholders' financial rights. It is going to discuss the issues of shareholders financial right in terms of having the share capital structure retained without being altered oppressively. This chapter discusses the right

² Aiman Nariman Mohd Sulaiman, Aishah Bidin, Pamela Hanrahan, Ian Ramsay, and Geof Staphledon, *Commercial application of company law in Malaysia*, 3rd edition, CCH, 2008, at 419

of shareholders in relation to raising share capital, their right to a refund of share capital, and any right to have rights attached to their shares (class share) retained without being varied or altered oppressively. Chapter three discusses the shareholders' distribution right that related to payment of dividends and to refund of capital via share buy- back scheme. Chapter four discusses the oppression remedy and the applicability of this remedy in relation to shareholders' financial rights. Finally, chapter five will contain the suggestion and the conclusion of the research.

1.3 OBJECTIVES

- 1) To compare and contrast between company law in Malaysian and Australia by considering MCA 1965 and ACA 2001 in relation to the legal protection of shareholders' financial right;
- 2) To evaluate whether the current law in Malaysia in relation to shareholders' financial right is effective; and
- 3) To make appropriate suggestions in relation to protection of shareholders' financial right.

1.4 STATEMENT OF PROBLEM

There are so many instances where both the legal principal and statutory provisions have been breached when the directors managed the company's affairs in a manner which is unfairly prejudicial or discriminatory to shareholders in general or to some of its members in particular, in both jurisdictions ,Malaysia and Australia. The shareholders are being discriminated when they are deprived from getting their legal rights for example, when the directors deprived the shareholders to get their financial rights. Thus, the researcher would like to examine the circumstance where this occurs,

and whether there are sufficient protections of the shareholders' financial rights and which jurisdiction is more efficient in dealing with this issue.

1.5 HYPOTHESIS

The primary concern of this research is the shareholders' financial rights in the company. Therefore, this research is going to test the following hypothesis that ACA2001 treats shareholders' financial rights in a manner which is more effective than MCA 1965.

1.6 LITERATURE REVIEW

Many writers have focused on the shareholders rights in their works. Such writers are Walter Woon³, Susan Woodward, Helen Bird, and Sally Sievers⁴, A. N. M. Sulaiman, Aishah Bidin, Pamela Hanrahan, Ian Ramsay, and Geof Staphledon⁵. They mention in their works that all members in the company have certain rights conferred upon them by the Act, the article or the general law. They add that these rights cannot be exercised except by a person who is really a member of the company not just a holder of the shares of the company. They generally mention sets of rights which are:

1. Financial rights;
2. Class rights, where the shares are divided into more than one class;
3. Rights to receive information;
4. Voting rights; and

³ Walter Woon, *Company Law*, 2nd edition, Sweet & Maxwell Asia, 1997, at 141-148

⁴ Susan Woodward, Helen Bird, Sally Sievers, *Corporation law in principle*, 7th edition, Lawbook Co, 2005, at 262.

⁵ Aiman Nariman Mohd Sulaiman, Aishah Bidin, Pamela Hanrahan, Ian Ramsay, and Geof Staphledon, *Commercial application of company law in Malaysia*, 3rd edition, CCH, 2008, at 414-423.

5. Rights of shareholders to have memorandum and article of association observed.

Shareholders financial rights take more than one form. One of these forms is the right of shareholders to get dividends. Therefore, company law imposes on director a duty to determine the time and quantum of dividend payment. Where dividends is concerned, A. N. M. Suliaman⁶ discuss this issue as a part of director's responsibility. She discusses in her work briefly the process of declaring the dividends and the liability of the director for unlawful payment of dividends.

In relation to dividends, James Routledge and Peter Slade⁷ concentrate in their work on the legal view of profits and the effect of omitting the definition of the profit in the statue on determining the dividends which should be declared. Further, they discuss notion of fixed and circulating capital and from which one of them the profit should be paid. However, they do not discuss the ability of shareholders to enforce the company to declare dividends. Kris Arjunan and Chee Keong Low⁸ observe that “in the view of the fact that dividends represent the return on the an investment by shareholders, it is of considerable importance to determine the maximum amount which the law permits to be distributed by way of dividends, or what might be termed the “maximum dividends fund”. They state that it is important to bear in mind that the size of this fund is often not equal to the amount of cash that the company has not it is reflected by meaning which accountant give to the term “profit”. It is therefore an anomaly that, given the importance of the subject matter, the issue of dividends is only

⁶ Aiman Nariman Mohd Sulaiman, *Directors' Duties and Corporate Governance*, Sweet & Maxwell Asia, 2001, at 202

⁷ James Routledge and Peter Slade, “The company dividends restriction: Does it promote good corporate governance”, Vol. 21, No. 7 (2003) C&SLJ 447-456.

⁸ Kris Arjunan and Chee Keong Low, “Dividends: A Comparative Analysis of Provisions in Hong Kong and Australia”, *AJCL*, Vol. 5, No. 40 (1995). Lexis-Nexis, via IIUM library homepage <<http://www.lib.iium.edu.my>>

marginally governed by legislative in a number of jurisdictions with the task of determining the issue being left largely to the courts”. They focus in their work on the definition of dividends at common law and the consequences of applying the meaning of the profit as it is defined at common law in determining the dividends that should be distributed. Further, they try to draw a clear picture on the matter of circulating and fixed capital. However, this article compares the process of declaring dividends between Australia and Hong Kong, and there is no similar literature in relation to Malaysia on this point. Lipton & Herzberg; K Arjunan and Low ck⁹ mention that dividends is only the form of profit that the investors get in return for their investment. They discuss the rights of shareholders to get dividends and the process of declaring dividends in the company. Further, they mention in their work the relation of the dividends and the maintenance of the share capital in declaring dividends. However, they do not discuss other shareholders financial rights such as the process of refunding share capital to shareholders.

Share buy- back is another form of shareholders financial rights. It is in fact a process of repurchasing of the shares by the company from its members. It aims to increase the financial performance of the company because the company sometimes suffers from the problem that it has excess of capital that cannot be used profitably in its business. Thus, the company will seek the balance to increase its profits. On the other hand, there are some studies confirmed that share buy- back scheme may be used as an alternative to dividends. Therefore, Grace V Dharmanan and Jason D Mithchell¹⁰ mention that selective buy- buy back is seen primarily as alternative to

⁹ Lipton & Herzberg's; K Arjunan, Low ck, *Understanding company law in Malaysia*, LBC Information Services, 1995, at 161-172

¹⁰ Grace V Dharmanan and Jason D Mithchell, "Australian buy-back regulation- A cross- country compassion", *AJCL*, Vol. 12, No. 5 (2001). Lexis-Nexis, via IIUM library homepage <http://www.lib.iiu.edu.my>>

dividends. They discuss in their work the developments, types, and legal requirements of share buy-back. Further they explain in their work the ASX¹¹ listing rules and some other stock exchanges rules that regulate this matter. However, this study is a comparative study between Australia, United Kingdom, Hong Kong, and New Zealand. Aishah Bidin¹² observes that a corporation with excess fund and having no investment project with expected return greater than the cost of capital might consider distributing its excess funds to its shareholders by way of share repurchase and cancellation followed by issue of bonus issue, though the same result could be achieved through dividends. She discusses in her work the historical development of share buy-back before the amendment of 1997 and position share buy-back after the amendment of 1998. Furthermore, she concludes her work with some amendments to Malaysian Companies Act such amendment as section 176 of MCA 1965. However, the Malaysian position after the amendment in 1998 is discussed briefly. Nor Azimah Hj Abdul Aziz¹³ discusses in her work the Malaysian position before 1997 at the time where share buy-back scheme was prohibited in Malaysia. She also mentions in the same work also some of the judicial judgments which reflect clearly the prohibition of such scheme from the common law perspective. Furthermore, she concludes her work by comparing the provisions of Malaysian share buy-scheme with United Kingdom share-buy-back scheme.

Having the share capital structure observed without being varied oppressively is another shareholder financial right. Therefore, the alteration of share capital structure must be in accordance with procedures that specified in the company law.

¹¹ It is an abbreviation of Australian Stock Exchange.

¹² Aishah Bidin, "The position of share buybacks in Malaysia and recent amendments to the Malaysian Companies Act", Vol. 20 No 10 (1999) company lawyer at7-9

¹³ Nor Azimah Hj Abdul Aziz, "Share buyback provisions: Malaysia's experience and a comparative study on its application and response in other jurisdiction", *CLJ*, No. 5 (1998). *CLJ*, via IIUM library homepage <http://www.lib.iiu.edu.my>>

Furthermore, it must for the benefit of the company as whole. Accordingly, R P Austin and I M Ramsay¹⁴ say that corporation act empowers a company to alter its constitution by special resolution. However, this power is expressed to be subject to any requirement contained in the constitution. Furthermore, the power is also constrained by the common law, in particular the doctrine of the fraud on the minority. They discuss in their work conditions that must be fulfilled in order to alter the company constitution and in which situations the alteration may amount to oppressive conduct. Further, they discuss the common law requirements for alteration. Stefan Lo¹⁵ observes the concept of fraud on the power was one developed by the courts of equity to restrain actions constituting abuse of power. He discusses in his work the situation where the courts have challenged the decision of the majority shareholders and the test that is used by the courts to determine the validity of altering the company constitution. He also discusses at the end of this article briefly the oppression remedy that available to individuals in relation to alteration of the constitution. However, this article compares three jurisdictions which are Australia, United Kingdom, and Hong Kong. Roger Walton¹⁶ discusses in his work the test that is applied in Australian courts in determining whether the alteration of the company constitution is valid or not. However, he does not examine the Malaysian position. Thus, this research will make comparison with the Malaysian position so as to answer the problem that identified in this research.

¹⁴ R P Austin and I M Ramsay, *Ford's principles of Corporations Law*, 13th edition, Lexis Nexis, 2007, at 640-673

¹⁵ Stefan Lo, "The continuing role of equity in restraining majority shareholders power", *AJCL*, Vol. 16, No. 2 (2004). Lexis-Nexis, via IIUM library homepage <http://www.lib.iiu.edu.my>>

¹⁶ Roger Walton, "Gambotto v WCP Ltd: A justified restriction of minority shareholder right or unwelcome step", *AJCL*, Vol. 12, No. 8 (2000). Lexis-Nexis, via IIUM library homepage <http://www.lib.iiu.edu.my>>

The protection of shareholders' right is a main concern of any company law. The law gives the shareholders specific remedies which are able to secure their rights and protect them from being discriminated. The remedies, which are available to shareholders, take the form of suing the directors or officer who deprived shareholders from enjoying their legal rights. Such a remedy is called oppression remedies. Accordingly, Aiman Nariman Mohd Sulaiman¹⁷ observes that the main reason for giving the shareholders the right to apply to the court is to protect the right of minority shareholder in small private company who are not able to sell their share freely like shareholders in public company. She concentrates in this work on the issue of legitimate expectations of the shareholders in private and public company. Furthermore, she discusses the relevant grounds that can be used by shareholders in order to sue the directors and officer for the oppressive conducts. She concludes her work with the suggestion that shareholders of public company should not be precluded from claiming that their legitimate expectations have not been met. Teng Kam Wah¹⁸ observes that the situation of unfairness is the main fact that must be considered in any application of this section. He adds that essentially the court has to decide whether there is a balance between (1) the corporate objectives and the rights of the members; and (2) the rights of the members inter se in construing sub-s(1). He discusses in his work the remedies that are available to shareholders in the company under section 181&218 of MCA 1965. James McConvill¹⁹ distinguishes between oppression remedies and statutory derivative action in Australia. Further, he observes that the

¹⁷ Aiman Nariman Mohd Sulaiman, "Legitimate exception, the oppression provision and shareholders' agreement in Malaysia", *AJCL*, Vol. 12, No. 4 (2001). Lexis-Nexis, via IIUM library homepage <<http://www.lib.iium.edu.my>>

¹⁸ Teng Kam Wah, "Power to minority shareholders", *MLJA*, Vol. 2, No. 37 (1997). Lexis-Nexis, via IIUM library homepage <http://www.lib.iium.edu.my>>

¹⁹ James McConvill, "current developments and notice: Ensuring balance in corporate governance: parts:2F. 1 and2F. 1A of the corporation law", *AJCL*, Vol. 12, No. 7 (2001). Lexis-Nexis, via IIUM library homepage <<http://www.lib.iium.edu.my>>

common law plays a significant role in determining whether the act is oppressive to or discriminatory against members. The Hon Mr Justice R N Chesterman RFD²⁰ observes that the oppression remedy is flexible enough to encompass and define new obligation and duties in relation to corporations, directors, officers, and their relevant constituencies. He reviews in his article some of the cases that involved the oppression remedy without explaining the legal position.

The majority of the references mentioned above treat the theme of shareholders' rights in a particular jurisdiction, either in Malaysia or in Australia. In addition, these articles have not discussed the application of the oppression remedies to the specific situation of non-compliance with the statutory provision relating to shareholders' financial rights. Therefore, this dissertation seeks to make a comparative study between the rights of shareholders provided by MCA 1965 with shareholders' rights provided by ACA 2001.

1.7 SCOPE AND LIMITATION OF THE STUDY

This study is a comparative study of shareholders' right in Malaysia and Australia. The discussion in this study will concern the experience of both jurisdictions relating to shareholders' financial rights.

Other shareholders' right such as access to information, right to attend general meeting , and right to vote on company resolution will be discussed in the appropriate places within the context of shareholders' financial right.

²⁰ The Hon Mr. Justice R N Chesterman RFD, "Oppression by majority –or of it?", *ABR*, Vol. 25, No. 15 (2004). Lexis-Nexis, via IIUM library homepage <<http://www.lib.iiu.edu.my>>

1.8 METHODOLOGY

Approaches to the study

The research will use a comparative approach in order to compare shareholders' right in both jurisdictions. Such approach is very useful to such study because it helps to discover the advantages and disadvantages of each jurisdiction. Consequently, this will help to suggest appropriate recommendations that may be able to solve the problem identified in this research.

Nevertheless the research will employ also a descriptive approach. This approach will be used in order to describe shareholders rights in both jurisdictions, Malaysia and Australia. Such approach is relevant to draw a real picture about shareholders' rights in both jurisdictions.

The research will adopt doctrinal analysis, and it will not involve any empirical work. The doctrinal analysis will involve an analysis and interpretation of relevant statutes, case law, and academic writing.