

**SHAREHOLDER ACTIVISM AND THE  
MANAGEMENT REVIEW MECHANISM:  
ANALYSING SECTION 195 OF MALAYSIA'S  
COMPANIES ACT 2016**

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**Abstract**

This paper evaluates the efficacy of section 195 of the Malaysian Companies Act 2016 as a mechanism for shareholder activism through a management review. It examines section 195 within the Malaysian corporate legal framework governing shareholder rights and corporate governance, analysing how the provision balances between board authority and shareholder influence by enabling shareholders to question, discuss, and make recommendations on management at meetings. The analysis also incorporates a comparative analysis, particularly with New Zealand's management-review framework, to assess the prospects for meaningful dialogue and accountability. The conclusion offers considerations to enhance its practical utility and argues that the practical impact of section 195 depends on reforms that will make it more operable for minority and dissenting shareholders.

**Keywords:** Management review, shareholder voice, shareholder activism, Companies Act 2016 (Malaysia)

## I INTRODUCTION

Shareholder activism refers to shareholders' influence over the company management, involving actions aiming to improve, amongst others, corporate governance. It is difficult to give a single, absolute definition to shareholder activism- but commentators have offered helpful ones which succinctly capture its essence. Gillan and Starks define shareholder activism as “*a process which aims to bring about change within the company without a change in control*”,<sup>1</sup> while Jansson frames it as “*an action of outside shareholders who influence corporate insiders by voicing their opinions in order to affect corporate behaviour*”<sup>2</sup>. In the simplest of terms, it means the intervention of a shareholder in the management of a company, which can include a range of activities from proposing shareholder resolutions to initiating legal action against the company.

This paper aims to evaluate the efficacy of section 195 of the *Companies Act 2016* (Malaysia) as a mechanism for shareholder activism through a management review. The paper will proceed as follows. It first discusses shareholder activism within the Malaysian legal framework and outlines how section 195, which permits shareholders to question, discuss, and make recommendations on company management at meetings, affects the balance between board authority and shareholder influence. The discussion then centres upon section 195, focusing on the section's legislative and comparative context, and discusses how Malaysian case law has construed the section. The

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<sup>1</sup> Stuart L Gillan and Laura T Starks, 'The Evolution of Shareholder Activism in the United States' (2007) 19(1) *Journal of Applied Corporate Finance* 55, 55-73 <<https://doi.org/10.1111/j.1745-6622.2007.00125.x>>.

<sup>2</sup> Andreas Jansson, 'No Exit! The Logic of Defensive Shareholder Activism' (2014) 10(2) *Corporate Board: Role, Duties & Composition* 16.

discussion emphasises its relatively restricted, non-binding nature and the conditions under which recommendations may bear on the board. In the ultimate analysis, the article argues that while section 195 potentially marks a shift toward greater shareholder engagement, its real efficacy is dependent on its being made more accessible, functional, and enforceable.

## II SHAREHOLDER ACTIVISM IN THE CONTEXT OF SECTION 195 OF THE COMPANIES ACT 2016

In Malaysia, shareholders' rights in general and their powers in corporate decision-making are primarily set out in the *Companies Act 2016*. Generally, shareholder activism in Malaysia is understood in the context of ensuring good corporate governance and as an external control mechanism in complementing the board and management to ensure good corporate practices. There has been a rising wave of shareholder activism in Malaysia in the last few years, particularly involving individual shareholders exercising their right to vote—including voting down proposed resolutions, refusing the appointment of directors or requisitioning for general meetings to pass proposed resolutions. This increase appears to have been driven in part by reforms under the *Companies Act 2016*, which replaced the *Companies Act 1965* and introduced new mechanisms to strengthen shareholders' voice. Other shareholder rights can also be found in the Bursa Securities Listing Requirements as well as documents, codes and guidelines relating to corporate governance practices of Malaysian public companies, such as the *Corporate Governance Guide*<sup>3</sup> and *Malaysian Code on Corporate Governance*.<sup>4</sup>

The *Companies Act 2016* confers a range of statutory rights on shareholders to facilitate engagement with company management, including the rights to inspect the register of members,<sup>5</sup> to appoint proxies to attend and vote at meetings,<sup>6</sup> to bring derivative claims with the leave of the court,<sup>7</sup> and to seek remedies for oppression.<sup>8</sup> Shareholders holding the requisite percentage of

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<sup>3</sup> Bursa Malaysia, *Corporate Governance Guide* (4<sup>th</sup> ed, 2021).

<sup>4</sup> Securities Commission Malaysia, *Malaysian Code on Corporate Governance* (2021).

<sup>5</sup> *Companies Act 2016* (Malaysia) s 55.

<sup>6</sup> *Companies Act 2016* (Malaysia) s 334(1).

<sup>7</sup> *Companies Act 2016* (Malaysia) s 347.

<sup>8</sup> *Companies Act 2016* (Malaysia) s 346.

shares may also compel the directors to convene meetings<sup>9</sup> and, in public companies, require the circulation of statements referred to in the proposed resolution to be dealt with at the meeting.<sup>10</sup>

### *A Section 195 of the Companies Act 2016*

Amongst these measures, section 195 is particularly important as it grants members the right to a “management review”. The section states:

*"(1) The chairperson of a meeting of members of a company shall allow a reasonable opportunity for members at the meeting to question, discuss, comment or make recommendation on the management of the company.*

*(2) A meeting of members may pass a resolution under this section which makes recommendations to the Board on matters affecting the management of the company.*

*(3) Any recommendation made under subsection (2) shall not be binding on the Board, unless the recommendation is in the best interest of the company, provided that—*

*(a) the rights to make recommendations is provided for in the constitution; or*

*(b) passed as a special resolution."*

At first glance, section 195 appears to mark a notable shift from the traditionally passive role of shareholders by giving them a greater voice in management. It potentially fosters dialogue between shareholders and directors, without displacing the board’s primary authority under section 211 of the Companies Act 2016.<sup>11</sup> However, a closer look reveals that this is not as straightforward as it seems. The conditions imposed in the section, namely,

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<sup>9</sup> *Companies Act 2016* (Malaysia) s 310.

<sup>10</sup> *Companies Act 2016* (Malaysia) s 323.

<sup>11</sup> *Companies Act 2016* (Malaysia) s 211 states:

(1) The business and affairs of a company shall be managed by, or under the direction of the Board.

(2) The Board has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in this Act or in the constitution of the company.

constitutional support, the passing of a special resolution, and the “best interest” requirement, suggest that the section’s practical importance may be more limited than it initially appears. These matters will be discussed in greater detail in this paper.

### ***B The Legislative Background***

Section 195 of the Companies Act 2016 (Malaysia) was introduced through the *Companies Bill 2015* (Malaysia), which was tabled and passed in the Dewan Rakyat on 4 April 2016.

A key objective for the passing of the *Companies Bill 2015* (later enacted as the Companies Act 2016) was to modernise Malaysia’s corporate legal framework. The *Companies Act 2016* replaced the *Companies Act 1965* (Malaysia), a legislation which was in force for 51 years. As highlighted in the parliamentary debates, the reform aimed to create a legal regime that was modern, dynamic, and responsive to the needs of the business community. The law was intended to foster a more conducive, progressive, and competitive business environment in line with global trends, particularly the increasing use of information and communication technologies.<sup>12</sup>

The *Companies Bill 2015* also aimed to simplify compliance requirements, lower the cost of doing business, and provide greater flexibility in corporate governance. Among the measures introduced were the removal of the mandatory requirement for private companies to hold Annual General Meetings and the option for certain types of companies to dispense with traditional Memorandum and Articles of Association. Significantly, the reforms also introduced section 195 of the *Companies Act 2016*, which expressly grants company members the right to question and make recommendations to the board on matters concerning the management of the company.

In the lower house of Parliament, section 195 was briefly explained by then Minister Dato’ Seri Hamzah bin Zainudin during the clause-by-clause reading, although it did not receive further elaboration or debate. Despite its

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<sup>12</sup> Companies Commission of Malaysia, ‘FAQs on the Companies Act 2016 (Act 777)’ (Web Page) <[https://www.ssm.com.my/Pages/Legal\\_Framework/FAQS-ON-COMPANIES-ACT-2016-AND-TRANSITIONAL-ISSUES/companies\\_act\\_2016\\_-\\_policies.pdf](https://www.ssm.com.my/Pages/Legal_Framework/FAQS-ON-COMPANIES-ACT-2016-AND-TRANSITIONAL-ISSUES/companies_act_2016_-_policies.pdf)> .

short mention, the provision received support. Towards the conclusion of the debate, MPs expressed agreement with the *Companies Bill 2015* as a whole, noting that the legislative model had been adapted from established jurisdictions such as the United Kingdom, Australia, New Zealand, and Singapore.

Discussions in the upper house focused primarily on the broader reforms introduced under the Bill, including enhanced governance standards, stronger internal control mechanisms, and improved corporate responsibility. Minister Dato' Seri Hamzah once again tabled the Bill and emphasised its benefits, particularly its streamlining of outdated procedures and reduction of compliance costs. While no clause-by-clause scrutiny took place, and section 195 was not explicitly discussed, the overarching theme of empowering shareholders, particularly minority shareholders, with mechanisms to voice concerns and participate in company management was evident.

The *Companies Bill 2015* was passed in the upper house on 28 April 2016, received Royal Assent on 31 August 2016 and was subsequently gazetted as the *Companies Act 2016* on 15 September 2016. Its implementation was staged: while certain provisions, such as those relating to corporate rescue, came into force at a later date, the majority of the Act (including section 195) took effect on 31 January 2017.

### ***C Provisions from other jurisdictions in pari materia with section 195 CA 2016***

Malaysia is not alone in legislating the right for shareholders to conduct a "management review." The *Companies Act 2016* shares a similar philosophical foundation with company law in other common law jurisdictions, by balancing the traditional authority of the board of directors with enhanced shareholder oversight. However, it appears that no other Commonwealth jurisdictions have a directly equivalent provision to that of section 195,<sup>13</sup> save for New Zealand's section 109 of the *Companies Act 1993*, which has the closest parallel to section 195 of the *Companies Act 2016* (Malaysia).

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<sup>13</sup> It is not clear why this is the case. Possible explanations include a much stricter separation of powers between the board and shareholders, as well as to protect the board against interference with daily operations.

## 1 *New Zealand*

Commentaries have described section 109 of the *Companies Act 1993* (New Zealand) as one of the more progressive aspects of the *Companies Act 1993* (New Zealand), designed to enhance shareholder engagement and transparency in management decisions.<sup>14</sup>

Section 109 of the *Companies Act 1993* provides:

*Section 109 of Companies Act 1993 – Management review by shareholders*

*(1) Notwithstanding anything in this Act or the constitution of the company, the chairperson of a meeting of shareholders of a company must allow a reasonable opportunity for shareholders at the meeting to question, discuss, or comment on the management of the company.*

*(2) Notwithstanding anything in this Act or the constitution of the company, but subject to subsections (2A) and (3), a meeting of shareholders may pass a resolution under this section relating to the management of a company.*

*(2A) The provisions of Schedule 1 govern proceedings at a meeting of shareholders at which a resolution under this section is passed except to the extent that the constitution of the company provides for matters that are expressed in that schedule to be subject to the constitution of the company.*

*(3) Unless the constitution provides that the resolution is binding, a resolution passed pursuant to subsection (2) is not binding on the board.”*

A plain reading of section 109 of the *Companies Act 1993* (New Zealand), which predates section 195 of the *Companies Act 2016* (Malaysia), shows significant similarities. Both provisions require the chairperson of a shareholders’ meeting to allow a reasonable opportunity for members to question, discuss, or comment on management matters. Section 195 goes further by expressly empowering shareholders to make recommendations to the

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<sup>14</sup> Stephen Bottomley, ‘Rethinking the Law on Shareholder-Initiated Resolutions at Company General Meetings’ (2019) 43(1) *Melbourne University Law Review* 93.

board during meetings. In both cases, however, shareholder influence is carefully circumscribed, recognising that day-to-day management remains the responsibility of directors.

Both provisions also permit members to pass non-binding resolutions, but the conditions differ. Under section 195 of the *Companies Act 2016*, a recommendation may become binding only if it is (i) in the best interest of the company, and (ii) is either allowed in the constitution or is passed by a special resolution. In contrast, resolutions under section 109 of the *Companies Act 1993* are generally advisory and are binding only where the constitution expressly so provides.

In essence, both sections aim to promote transparency and shareholder participation in governance while preserving the board's managerial primacy. Although section 109 of the *Companies Act 1993* appears to have influenced the drafting of Malaysia's section 195 of the *Companies Act 2016*, the New Zealand provision was never expressly cited during Malaysia's legislative debates.<sup>15</sup>

In summary, it can be seen that section 195 represents a notable development in Malaysia's corporate governance framework. Its closest parallel is section 109 of the *Companies Act 1993*, but such provisions are largely absent in other common law countries. Section 195 is a progressive measure intended to foster participatory governance by empowering shareholders to hold management accountable, while still respecting the authority vested in the board. Examining its application and implementation in Malaysia through case law highlights both its potential to reshape shareholder engagement and its inherent practical limits.

### III JUDICIAL INTERPRETATION OF SECTION 195

#### *A Malaysian Cases*

In Malaysia, while shareholder activism is not a novel concept, the application and interpretation of section 195 of the *Companies Act 2016* remains relatively underexplored, both in judicial decisions and in legal discourse. Case law reveals that references to or reliance on section 195 have been limited, with

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<sup>15</sup> Malaysia, *Parliamentary Debates*, Dewan Rakyat, 4 April 2016, 76 (Dato' Seri Hamzah bin Zainudin).

very few instances in which the courts have engaged in substantive analysis or offered a detailed judicial interpretation of the provision. The gap in judicial guidance may result in shareholders being uncertain as to how their rights under section 195 may be effectively exercised, while directors face ambiguity over their obligations in responding to such inquiries. Clearer clarification from the courts would enhance the utility of the provision as a tool for transparency, accountability, and constructive shareholder engagement.

Although limited, several Malaysian cases have referred to section 195 in judicial reasoning, and some of these cases are examined below.

**(i) *Majlis Amanah Rakyat (MARA) v Dato' Abd Rahim bin Abd Halim & Ors*<sup>16</sup>**

Section 195 was not the main subject of this litigation. However, the Court mentioned, *obiter*, that in the context of section 195, if the right to make recommendations is not provided for in the constitution and the resolution passed in respect thereof is not a special resolution, the recommendation of the shareholders will not be binding on the board, but the board must still consider it and act in the best interest of the company.

**(ii) *APFT Bhd v Dato' Faruk bin Othman*<sup>17</sup>**

In this case, APFT sought injunctions to restrain its former executive chairman (the defendant) from dealing in its shares and nominating directors, citing allegations of financial misconduct. The defendant relied on section 195 to justify his attempt to nominate directors at the AGM. The court granted an injunction and effectively rejected this reliance, and held that while section 195 recognises shareholders' participatory rights, those rights are not absolute and may be curtailed where they are being exercised abusively or to obstruct accountability.

**(iii) *Lee Yee Wuen v Seek Keng Mee & Ors*<sup>18</sup>**

The plaintiff, a shareholder in a family company, sought injunctions to restrain

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<sup>16</sup> [2019] 7 MLJ 381.

<sup>17</sup> [2018] MLJU 1471, [2019] MLJU 23.

<sup>18</sup> [2020] CLJU 2119.

her relatives from excluding her from the company's premises and management. In determining whether or not the injunction should be granted, the court took into account the statutory right of shareholders under section 195 to question, discuss, comment or make a recommendation regarding the management of the company in granting the interim injunction.

**(iv) *Lai Chee Leong v TIF Holdings Sdn Bhd & Ors*<sup>19</sup>**

This case revolved around a former director turned shareholder seeking extensive management information and claiming oppression under section 346 of the *Companies Act 2016*. In dismissing the claim, the court mentioned by way of an *obiter* statement that section 195 provides only a procedural right at meetings to ask questions or make recommendations. It does not entitle shareholders to continuous access to documents such as bank statements or board minutes, which remain governed by specific statutory provisions.

**(v) *Satishchandre s/o Pravinchandre Keval Chand Doshi v Rainbow Paradise Beach Resort Bhd*<sup>20</sup>**

This case revolved around a minority shareholder seeking access to extensive internal accounting records. The court stated *obiter* that there is a narrow right for management review which is accorded to shareholders under section 195 of the *Companies Act 2016*, and that even then any such recommendation is not binding on the board unless certain thresholds are met.

**(vi) *Tan Han Kwan & Ors v KSCH Property Sdn Bhd & Ors*<sup>21</sup>**

This case involved minority shareholders seeking leave to commence a derivative action, alleging mismanagement. In granting leave, the Court held that the proposed derivative action was legitimate and arguable. The judge referred to section 195 in affirming the chairperson's duty to allow members a reasonable opportunity to pose questions at meetings.

It can be seen from the discussion above that Malaysian cases have not

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<sup>19</sup> [2024] CLJU 2770.

<sup>20</sup> [2022] MLJU 1264, [2022] 1 LNS 1290.

<sup>21</sup> [2021] MLJU 1232, [2021] 1 LNS 1130.

undertaken an explicit and comprehensive discussion on the operation, application and interpretation of section 195. Although limited, several themes regarding the applicability of section 195 can be deduced from the Malaysian cases discussed above:

1. Non-binding nature but consequential: recommendations under section 195 are non-binding, but directors must genuinely consider them in the company's best interests.
2. The rights under the section are confined to members' meetings and do not extend to ongoing oversight or unrestricted access to records.
3. The courts will restrain the exercise of section 195 where it is exercised abusively or to frustrate accountability.

In essence, section 195 strengthens shareholder participation without displacing the board's managerial primacy. It goes some way to operate as a procedural safeguard that promotes transparency and accountability in corporate governance.<sup>22</sup>

#### IV THE PRACTICAL USEFULNESS OF SECTION 195

In the realm of shareholder activism, section 195 is a potential tool for shareholders who want to be more than just passive investors. It empowers them to become active participants in corporate governance. This is achieved in three primary ways: reducing agency costs, improving corporate decision-making and increasing board accountability.

Section 195 does this by offering shareholders a statutory platform to raise questions, offer comments, and make recommendations on the management of the company during general meetings. This communicative function enhances the flow of information between shareholders and the board, potentially illuminating blind spots in management decisions or highlighting governance concerns that directors may have overlooked.

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<sup>22</sup> Notably, in New Zealand, judicial interpretation of section 109 of the *Companies Act 1993* has been limited, with a few reported cases affirming its procedural, rather than substantive nature. See for example, *Justitiae Trustee Co Ltd v NZF Nominees Ltd* [2021] NZHC 659; *Donnelly v Royal Australasian College of Physicians* [2020] NZHC 242.

### ***A Reduction in Agency Cost***

Directors, as fiduciaries, owe a fundamental duty to act in the best interests of the company. This obligation is codified in section 213(1) of the *Companies Act 2016*, which requires directors to exercise their powers for a proper purpose and in good faith. Common law duties, such as the duty not to profit from a directorship or not to allow a personal interest to conflict with the interest of the company, further reinforce this responsibility. Despite these duties, directors may still prioritise their own interests, creating a divergence from the corporate objective of maximising shareholder value.

This divergence generates agency costs, which are the financial losses and monitoring expenses that arise when directors' interests do not align with those of shareholders. Such costs may result from blatant self-serving conduct, such as exploiting company resources, or from subtler conflicts, such as differing views on short-term versus long-term strategies. A grey area emerges when directors pursue strategies that they believe serve the company's long-term interests, but which clash with shareholders' preference for immediate returns. For instance, a decision to invest heavily in research and development may strengthen innovation and future competitiveness yet reduce short-term liquidity available for immediate profit-making.

Agency costs, therefore, include not only direct losses when managers pursue self-interests but also the monitoring costs shareholders incur to keep the management aligned. By providing shareholders with a statutory platform to engage with management directly at general meetings, section 195 enables them to question directors. This helps to align the interests of directors and shareholders and goes some way in reducing the risk of divergence.

### ***B Improving corporate decision-making***

Shareholders can also provide valuable insights that may be absent from the boardroom. A board, however capable, is limited in size and perspective. Shareholders, particularly institutional investors, bring diverse expertise, market knowledge, and long-term perspectives that can enrich the decision-making process of the board.

Section 195 ensures that members are given an opportunity at a meeting to

question, discuss, or comment on management matters. This opens a channel for the board to hear external data, differing perspectives and alternative viewpoints. Such input helps directors to identify blind spots, challenge entrenched assumptions, and consider issues that they may otherwise overlook. This process encourages more critical and reflective decision-making, resulting in stronger corporate strategies.

Shareholder engagement also serves a corrective function. Questions and recommendations may act as an early warning system, identifying flaws in proposed policies or exposing weaknesses in existing strategies. This external scrutiny prompts the board to reassess, refine, or even reverse policies. This could help steer the company toward more sustainable outcomes.

### *C Increasing accountability of the board*

When a board's decisions face scrutiny, it is essential for the directors to provide clear justifications to shareholders for their actions. This accountability ensures that the board's choices are not only well-considered but can also be explained in a way that aligns with the company's best interests. This process of justifying their decisions strengthens governance and builds trust with shareholders.<sup>23</sup> This form of accountability can also be performed when the Board takes appropriate action to address the concerns of the beneficiaries of that authority.<sup>24</sup>

Section 195 facilitates such accountability by requiring discussions at meetings, where shareholders may directly question and comment on the company's management. In this way, activism does not undermine the board's managerial authority. Rather, it helps sustain and legitimise that authority by subjecting it to transparent scrutiny.

Even if directors retain final decision-making power, section 195 discussions can prompt boards to reassess and refine strategies in anticipation of shareholder feedback. Legal commentators have observed that "greater shareholder engagement would yield greater transparency, corporate democracy and responsibility, which may then improve the performance of the

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<sup>23</sup> Ekram Solak, *Shareholder Activism and the Law* (Routledge, 2021) 48.

<sup>24</sup> Marc Moore, 'The (Neglected) Value of Board Accountability' (2015) 9(1) *Law and Financial Markets Review* 10, 11.

company”.<sup>25</sup>

### ***D Limitations and Practical Challenges of section 195***

Notwithstanding that section 195 of the *Companies Act 2016* provides shareholders with an additional avenue to engage with management, ask questions and to provide feedback, a closer look at the wording in the provision suggests that invoking this right may not be easy. As a starting point, not every shareholder proposal or recommendation binds the board, and there are various requirements that will have to be met before the section 195 mechanism can be successfully invoked.

These requirements are primarily captured in section 195(3) which reads as follows:

*Section 195(3) - Any recommendation made under subsection (2) shall not be binding on the Board, unless the recommendation is in the best interest of the company, provided that-*

*(a) the rights to make recommendations is provided for in the constitution; or*

*(b) passed as a special resolution.*

In essence, the provision’s most substantive element i.e. the ability for members to pass resolutions recommending action, lacks binding force unless such recommendations are (i) in the best interests of the company, and (ii) either authorised by the company’s constitution or passed as a special resolution. These requirements will be scrutinised below.

#### 1 “Best interest of the company”

A significant challenge lies in the ambiguous definition of what constitutes "the best interests of the company." The *Companies Act 2016* does not provide a clear definition of this crucial phrase in section 195, nor does it specify the factors that must be considered when determining it. Most importantly, the *Companies Act 2016* does not designate a test or factors to be taken into

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<sup>25</sup> Ahmad Saiful Azlin Puteh Salin, Zubaidah Ismail and Malcolm Smith, ‘Shareholders’ Engagement and Corporate Performance’ (2025) 3(1) *Business Performance Review* 70.

account, nor does it specify the authority which has the right to make this determination. Specifically, this lack of clarity raises the fundamental question of whether this determination of the “best interest of the company” should be made from the perspective of the shareholders or the directors (who invariably may have different priorities, e.g. short-term vs long-term growth of the company). Furthermore, the question also arises whether the perspectives of other stakeholders of the company, such as creditors, regulators, and employees, should be considered. While Malaysian case law has interpreted the “best interest” concept in the context of other provisions of the *Companies Act 2016*, there is a notable absence of judicial precedent specifically expounding on the “best interests of the company” for the purpose of section 195.

For example, section 213(1) states, “A director of a company shall at all times exercise his powers in accordance with this Act, for a proper purpose and in good faith *in the best interest of the company*” (emphasis added). Generally, this is made up of a subjective and an objective test. The subjective component of the test is whether the director considers that the exercise of discretion is in the best interest of the company, while the test is objective in the sense that the director’s assessment of the company’s best interest is subject to an objective review or examination by the courts. The court will assess whether an honest and intelligent person in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company.

If the same legal test were to be applied to section 195 of the *Companies Act 2016*, it could significantly diminish the provision’s practical value. This is because the power to decide whether the shareholder recommendations are binding would ultimately rest with the directors themselves, thereby limiting the ability of shareholders to effectively influence management. In practice, this means that a board that disagrees can simply rule that a resolution is not in the company’s best interest, thereby nullifying its effect. Therefore, it can be criticised that this provision largely preserves the traditional board primacy.

## 2 *Right to make recommendations must be provided for in the constitution or “passed as a special resolution”*

Even when a shareholder successfully demonstrates that a management decision is in the “best interests of the company”, another significant

procedural barrier remains. Under section 195, a shareholder's recommendation becomes binding on the board only under two specific conditions: either (a) the company's constitution explicitly grants this right, or (b) the recommendation is passed as a special resolution.

In terms of (a), while the *Companies Act 2016* does not mandate a constitution for every company, the reality is that even for those with one, the right for shareholders to make recommendations under section 195 is rarely included, unless this was specifically considered and included at the time of adoption of the constitution. Consequently, shareholders may have to amend the constitution to include such a right into the constitution (which would require a special resolution to be passed) or rely on limb (b) namely, the requirement of a special resolution to make their recommendations effective. Either way, a special resolution would be required.

The requirement of a special resolution, which necessitates a passing majority of not less than 75% of members, is a particularly high threshold in the context of the Malaysian corporate landscape. Many Malaysian companies are characterised by a high degree of concentrated ownership, often dominated by controlling shareholders or family-based structures where ownership and management roles frequently overlap. In this environment, minority or individual shareholders often lack the numerical strength to obtain the 75% support needed to pass a special resolution.

This high threshold effectively renders section 195 a limited tool for minority shareholder activism. Boards that are controlled by insiders can often disregard shareholder recommendations with minimal consequence because they can rely on the high voting threshold to block any dissenting resolutions. As a result, even with a statutory right to a management review, the practical effectiveness of section 195 for influencing corporate decisions is significantly restricted for a substantial portion of the shareholder base.

### 3 *Restricted applicability*

Another significant limitation of section 195 of *the Companies Act 2016* is its restricted applicability in the context of private companies. The provision is designed to be exercised at meetings of members, yet these meetings, particularly Annual General Meetings (AGMs), are not mandatory for private companies in Malaysia.

In many private companies, general meetings may not be held at all. Instead, they frequently rely on written resolutions as a more efficient method of passing corporate decisions. When general meetings are not convened, the statutory right afforded to shareholders under section 195 becomes practically impossible. Consequently, the opportunities for shareholders in private companies to exercise their right to a management review are diminished. This renders the provision largely ineffective in this common corporate structure.

Even where general meetings are held, the efficacy of section 195 is influenced by how a general meeting is conducted. The ability of shareholders to exert influence through questions and comments is contingent on the meeting's atmosphere. Where the spirit of the meeting is to facilitate a genuine and constructive dialogue, discussions under section 195 can be very effective. This environment allows shareholders to engage meaningfully with the board and management, and may lead to a more robust form of accountability. Conversely, if these interactions are treated merely as a procedural formality, shareholder engagement is stifled. In such cases, the statutory right afforded by section 195 becomes ineffective. Ultimately, the true value of this provision as a mechanism for corporate accountability is dependent not only on the informational disparity between management and shareholders but also on the board's willingness to engage in real discourse.

#### 4 *Shareholder apathy*

Apart from the legal and procedural hurdles discussed above, the effectiveness of section 195 is also undermined by shareholder passivity. This phenomenon is especially prevalent in companies with a large and dispersed shareholder base, where two factors, namely, economic disincentives and information asymmetry, discourage active engagement.

When shareholders hold only a small stake in a company, the costs associated with active engagement, such as the time and expense of attending meetings or preparing proposals, often outweigh any potential personal benefit.<sup>26</sup> Since any positive outcomes from activism, like an increase in share value, are distributed proportionally to all shareholders, those with small holdings have little financial incentive to act. This creates a "free-rider"

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<sup>26</sup> Ekram Solak, *Shareholder Activism and the Law* (Routledge 2021) 21.

problem, where these shareholders can benefit from the efforts of others without contributing themselves. For example, if a large institutional investor successfully campaigns for a management change that boosts the company's stock price, smaller shareholders enjoy the same benefit without having to bear any of the costs of the activism. The availability of an option for these shareholders to “freeride” on activism movements spearheaded by other shareholders who hold enough shares in the company to cover any costs of the activism, with the benefits that come along with it, further discourages any shareholder action on their part.<sup>27</sup>

Another contributor to shareholder passivity in the context of section 195 is information asymmetry. While company management and the board possess proprietary and ready information about the firm's operations, strategy, and market conditions, this information may not be readily available to external shareholders. This disadvantage can make it difficult for shareholders to identify genuine areas of concern, formulate proposals, ask questions and make recommendations in general meetings.

## V IS REFORM NECESSARY?

The *Companies Act 2016* of Malaysia contains numerous provisions aimed at empowering shareholders and encouraging greater shareholder activism. Among these, section 195 stands out as a potentially pivotal mechanism to strengthen shareholder oversight of the board and management. By offering shareholders a statutory avenue to pose questions and raise concerns during general meetings, section 195 demonstrates a legislative intent to mitigate agency costs, promote accountability, and enhance overall corporate governance standards. In theory, it signals a progressive shift toward participatory governance by recognising shareholders not merely as investors but as active stakeholders in the decision-making process.

However, despite its seemingly progressive intent, section 195 faces significant limitations in practice. Legal uncertainty surrounding its wording and the high threshold for its invocation may weaken its usefulness as a tool for activism. Consequently, its practical application and judicial interpretation have been limited, both in Malaysia and also in other jurisdictions, such as

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<sup>27</sup> Ibid.

New Zealand, from which the provision appears to have drawn inspiration. While section 195 is perceived as a tool for shareholder involvement in management, its structure and challenges may hinder its ability to fully achieve this objective.

For the mechanism in section 195 to become an effective and meaningful tool of shareholder participation, reform appears necessary. Such reform must begin with a clear understanding of the provision's original intent. Was section 195 ever meant to give shareholders a quasi-decisive role in management, or was it designed as a facilitative tool merely to encourage dialogue while preserving the board's primacy? These questions are fundamental and should be addressed through broad public consultation involving regulators, directors, institutional and retail shareholders, and other stakeholders. Reform, which is not properly informed by such dialogue, runs the risk of either overcorrecting or failing to address the provision's weaknesses.

Any reform, however, must carefully navigate the balance between centralised board management and meaningful shareholder participation. This is a delicate balance that must be struck between a total disassociation between shareholders and management and heavy-handed approaches, which can potentially disrupt the affairs of the company. As Solak observes, the objective is to grant "shareholders a space at the corporate discussion table," transforming them into a vital component of the corporate governance framework without undermining the legitimate authority of the board.<sup>28</sup>

In this regard, it is submitted that practical reforms to section 195 of the Companies Act 2016 (Malaysia) may include the following.

(a) Reforms to the criteria to be met under section 195

As elaborated above, the legal framework of section 195 has high procedural barriers that often render shareholder intervention in management more theoretical than practical. An example of this is that a shareholder recommendation only becomes binding on the board if passed as a special resolution. A pragmatic reform which may be considered would be to reduce this threshold to an ordinary resolution (more than 50%). Arguably, such an approach would align with other fundamental member powers, such as the

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<sup>28</sup> Ibid 44.

removal of directors under section 206, ensuring that the company's strategic direction reflects the will of the majority while still preventing fringe recommendations from disrupting corporate stability.

Furthermore, the practical applicability of section 195 is restricted to being exercised only at meetings of members. However, private companies are no longer mandated to hold an AGM and typically rely on written resolutions, and as such, the section 195 right is not easily exercisable. Potential solutions include requiring a statutory "management review window" in each financial year, whereby during this period, the company can schedule meetings for shareholders for management review sessions and to allow for a reasonable opportunity for shareholders to exercise their rights under section 195. Such a reform could improve section 195 as a proactive tool for accountability, ensuring that shareholders in both public and private entities maintain a consistent "steering wheel" over the management of their investments.

(b) Clarifying the meaning of "best interest of the company"

It was explained above that one of the criteria for the section 195 recommendations to be binding is that they must be made "in the best interest of the company". However, there is no clarity on the meaning of this phrase in the context of section 195. In addition, section 195 does not specify the possible factors that may be considered when determining whether a recommendation made is "in the best interest of the company". Undoubtedly, legislative reform providing clarity on the meaning of this phrase and relevant factors that may be considered would make section 195 more functional, as it would allow shareholders to predict outcomes more accurately and provide directors with guidance for evaluating recommendations.

Ultimately, for the management review mechanism in section 195 to evolve into a meaningful instrument of shareholder engagement, it must be made more accessible, functional, and enforceable. Reform should not be confined to formalistic adjustments but should be guided by a broader vision of inclusive, responsive, and accountable corporate governance.

## VI CONCLUSION

This paper's analysis suggests that section 195 of the *Companies Act 2016* represents a shift towards enhanced shareholder engagement and activism in Malaysia. However, while it appears to signal a potential rebalancing of power by inviting questions, discussion, and non-binding recommendations on management by shareholders, the practical efficacy of the provision is limited by several constraints. In particular, the need for constitutional backing or a special resolution to render recommendations binding and the requirement that recommendations must align with the best interests of the company may hinder the practical utility of the management review mechanism under the section.

This paper's evaluation indicates that section 195 has the potential to encourage dialogue and more accountability in management decisions. However, the impact of the section is contingent on its accessibility (in terms of how easily shareholders can invoke the provision), its functionality (in terms of meaningful discussion and an effective follow-through), and its enforceability (in terms of clear and binding consequences). Thus, for section 195 to deliver on its potential, reforms or clarifications (as discussed in the preceding section) are warranted.

In moving forward, it is submitted that future research might focus on empirical monitoring of section 195 outcomes and the provision of guidance to companies on best practices for conducting effective management reviews. By doing so, Malaysia can more effectively reap the benefits of section 195 to amplify shareholder voice without having to compromise on the stability and authority that promotes sound corporate governance.