Shareholder Dispute Briefs |

Directors' Refusal to Convene a General Meeting Pursuant to a Members' Requisition: *Do Directors Have Any Discretion?*

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JULY 2026

Article Focus

In Malaysia, a member's right to convene a meeting has been recognised as a valuable right which must remain unfettered, as it is inextricably linked to a member's sacrosanct right to vote[1].

Generally, there are four modes in which a members' meeting may be convened under **the Companies Act 2016 ("CA 2016")**: -

(1) by the board of directors (**S.310(a)**);
(2) by a member (**S.310(b)**);
(3) by the board pursuant to a requisition made by members (**S.311** - **S.313**); and
(4) by an Order of the Court (**S.314**).

This article focuses on the third category (i.e., a members' meeting convened by the board pursuant to a members' requisition under **S.311**) and, more significantly, on whether directors possess any discretion to refuse such a requisition.

The Statutory Right of Members to Requisition a Meeting

S.311(1) and **(3) CA 2016** confers upon members who satisfy the prescribed statutory threshold the right to require the directors to convene a meeting of members.

The requisite threshold is: -

- at least 10% of the issued share capital carrying voting rights; or
- where the company has no share capital, at least 5% of the total voting rights of all members.

At first glance, the use of the plural word "*members*" in S.311 may suggest that a requisition must be made by more than one member.

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[1] ***Golden Plus Holdings Bhd v Teo Kim Hui [2021] 7 MLJ 852. para [28]***

However, it has been held that S.311 is equally capable of applying to a single member[2], provided that the requisite statutory threshold is satisfied.

In addition, **S.311(2) CA 2016** prescribes several formal requirements for a valid requisition. The requisition must: -

- be in hard copy or electronic form;
- state the general nature of the business to be transacted;
- where appropriate, include the text of the proposed resolution; and
- be signed or otherwise authenticated by the requisitioning member(s).

Statutory Timeframe to Call the Meeting

Upon receipt of a requisition, the statutory timeframe is clear. The directors shall: -

- call the meeting within 14 days of receiving the requisition; and
- ensure that the meeting is held within 28 days after the notice convening the meeting is issued.

Where the directors fail or refuse to do so, **S.313 CA 2016** entitles the requisitioning members to convene the meeting themselves, subject to compliance with the remaining statutory requirements.

Significantly, any reasonable expenses incurred by the requisitioning members are reimbursable by the company, which is in turn entitled to retain the corresponding amount from any fees or other remuneration payable to the defaulting director(s)[3].

[2] ***EKA Noodle Bhd v Norhayati bt Tukiman [2021] MLJU 1586, para [28] – [31]***
[3] ***S.313(6) & (7) CA 2016***

Do the Directors Have No Discretion?

The statutory framework naturally raises an important question.

> ***Does it mean that directors are obliged to convene every requisitioned meeting?***

This is not merely a theoretical question. It was, in fact, the central issue in a shareholder dispute in which we previously acted successfully for the directors of a company. In that matter, the directors were required to determine whether they were legally obliged to convene a members' meeting pursuant to requisitions which, amongst others, contained proposed resolutions that were *prima facie* unlawful.

Taken to its logical conclusion, an interpretation that the directors have no discretion howsoever, would effectively require the directors to convene meetings even where the proposed business or resolution is plainly unlawful, contrary to the company's constitution, or incapable of being validly implemented.

Such a result would be difficult to reconcile with the directors' broader duties to act in the best interest of the company and in accordance with its constitution.

This issue must also be considered in light of **S.311(5) CA 2016**, a provision introduced under the **CA 2016**, which provides that: -

> "(5) A resolution may properly be moved at a meeting unless the resolution: -
>
> (a) if passed, would be ineffective whether by reason of inconsistency with any written law or the constitution;
> (b) is defamatory of any person;
> (c) is frivolous or vexatious; or
> (d) if passed, would not be in the best interest of the company."

Presently, to the best of our knowledge, there appears to be no reported Malaysian decision directly considering the scope or application of S.311(5) in the context of directors refusing to convene a meeting pursuant to a members' requisition.

Guidance from Other Commonwealth Jurisdictions

In the absence of direct Malaysian authority, guidance may be drawn from other Commonwealth jurisdictions.

a. Position in the United Kingdom

In this regard, **S.303(5)** of the **UK Companies Act 2006** is substantially similar to **S.311(5)** of our **CA 2016**.

S.303(5) of the **UK Companies Act 2006** provides that:-

> "(5) A resolution may properly be moved at a meeting unless:-
>
> (a) it would, if passed, be ineffective (whether by reason of inconsistency with any enactment or the company's constitution or otherwise);
> (b) it is defamatory of any person; or
> (c) it is frivolous or vexatious."

In **Kaye v Oxford House [2019] EWHC 2181 (Ch)**, the English High Court considered the purpose and operation of **S.303(5)** of the **UK Companies Act 2006** and observed, amongst others, that:-

- ✓ upon receiving a members' requisition, the directors are entitled to consider the proposed business and the text of the proposed resolutions (if applicable) during the statutory period prescribed for convening the meeting;
- ✓ the purpose of that statutory period is to enable the directors to determine whether the proposed resolutions may properly be moved at the meeting;
- ✓ where a proposed resolution falls within one of the statutory exceptions in S.303(5), the directors are not required to convene the meeting;
- ✓ S.303(5) serves as a safeguard against abuse of the requisition process by the "*lunatic fringe*" (i.e. "those individuals whether alone or in concert with others, who wish to abuse the requisition process as a means of causing trouble, or making themselves a nuisance or trying to obtain the oxygen of publicity for causes that are only indirectly associated with the business and affairs of the company");
- ✓ where the requisitioning member disputes the directors' decision, the issue ultimately falls to be determined by the Court.

In fact, this was not a new principle. Even prior to **S.303(5)** of the **UK Companies Act 2006**, the **English Courts** had recognised that directors need not convene meetings solely for the purpose of considering resolutions that were incapable of producing any legal effect[4].

b. <u>Other Commonwealth Jurisdictions</u>

Similarly, the underlying principle stated above has also been recognised in other Commonwealth jurisdictions.

Singapore	**Australia**
In Singapore, the High Court held that directors are entitled to decline to convene a meeting where the object of a requisition is to pass a resolution[5]:- • which cannot legally be carried into effect; or • which is ultra vires the powers of the general meeting.	Likewise, the Australian Courts have consistently recognised that directors are not obliged to convene meetings for purposes which cannot lawfully be achieved by members in a general meeting. ***[See:-*** • ***National Roads & Motorists' Association v Parker [1986] 11 ACLR 1, Australian Supreme Court.*** • ***Windsor v National Mutual Life Association of Australasia Ltd [1992] 7 ACSR 210.]***

[4] ***Rose v McGivern and others [1998] 2 BCLC 593, p.604 – 605***
[5] ***Credit Development Pte Ltd v IMO Pte Ltd [1993] 1 SLR (R) 68. para [14] - [19]***

c. <u>Position in Malaysia Prior to S.311(5) CA 2016</u>

Back in Malaysia, even prior to the enactment of **S.311(5) CA 2016,** the learned authors of **Halsbury's Laws of Malaysia** observed that: -

> "If the object of the meeting is to do that which cannot legally be carried into effect or to pass a resolution which is ultra vires the meeting, then the directors ought not to be required to convene the meeting. If such a meeting is in fact held and a resolution is passed, the directors are not bound to comply with it. The resolution is void and of no effect. There is nothing in the Companies Act 1965 to suggest that the directors must act on requisition for a meeting having as an object that which is not within the powers of the meeting. The directors are well entitled, on such a requisition, to decline to call a meeting…"

Viewed in this context, **S.311(5)** of the **CA 2016** appears to reflect a principle long recognised across Commonwealth jurisdictions, namely that the statutory right to requisition a meeting does not ordinarily require directors to convene meetings for the purpose of considering resolutions which are unlawful, beyond the powers of the general meeting, or otherwise incapable of being validly implemented.

It is also noteworthy that, unlike **S.303(5)** of the **UK Companies Act 2006**, our **S.311(5) CA 2016** contains an additional limb [i.e. limb (d) - a resolution, if passed, would not be in the <u>best interest</u> of the company].

The additional limb suggests a wider basis upon which directors may determine whether a proposed resolution may properly be moved. However, in the absence of judicial consideration of **S.311(5)(d) CA 2016** by the Malaysian Courts, the precise scope and operation of this provision remain open to discussion.

Key Takeaways

	The statutory right to requisition a meeting is an important shareholder right and should not be undermined merely because the directors disagree with the proposed resolutions.
	Members should ensure any proposed business and resolutions contained in a requisition notice are legally competent and capable of being validly implemented.
	Directors should only refuse to convene a requisitioned meeting where there is a genuine and legally sustainable basis for concluding that the proposed business or resolution falls within one of the limited exceptions recognised by the law.

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