

Authorisation needed for share buy-backs — lawyers

BY SUPRIYA SURENDRAN

KUALA LUMPUR: The purchase of its own shares by a public listed company is only valid if the company is authorised to do so by its constitution or memorandum and articles of association (M&A), say lawyers.

The “authorisation by constitution” requirement is expressly stated in Section 127 of the Companies Act 2016, said Karen Cheah Yee Lynn, a partner in legal firm Chooi & Company + Cheang & Ariff. (While Section 127 only mentions authorisation by constitution, the 2016 Act — which came into force on Jan 31, 2017 — also permits such authorisation to be

provided for by a company’s M&A for existing companies already registered under the previous law.)

Cheah added that Section 12 of Bursa Malaysia’s Main Market Listing Requirements also states that a listed company may not buy its own shares unless its shareholders give an authorisation to its directors to make such purchases.

Teo Wai Sum, a partner in law firm Tay & Partners, said that without the M&A or constitution of the company authorising the purchase, a share buy-back by a listed firm would be deemed unlawful. “Such transactions conducted would be invalid. Besides, the non-compliance of the Companies Act is punishable by fine and imprisonment,”

she told *The Edge Financial Daily*.

The legality of share buy-backs was raised after the Aug 1 announcement by Apex Equity Holdings Bhd, which owns stockbroking firm JF Apex Securities Bhd. Apex Equity had said that the validity of its share buy-back exercises conducted between years 2005 and 2017 was “questionable” because the company’s M&A does not provide it with the requisite authority to undertake share buy-back exercises.

Apex Equity then said that it is seeking a validation order from the High Court to regularise its previous share buy-back exercises. It said the requirement for express authority to be provided in the constitutional document for a company to un-

dertake share buy-back exercises is stipulated in Section 67A(1) of the old Companies Act and Section 127(1) of the new act.

Besides seeking a relief or order pursuant to a declaration validating the share buy-back transactions, Apex Equity is seeking declarations ascertaining the validity of these shares being held as treasury shares, as well as the validity of these shares being distributed to the company’s shareholders as share dividend.

Minority Shareholders Watch Group general manager Lya Rahman said there appears to be a breach of shareholders trust in the Apex Equity case, as the company’s board is entrusted to car-

ry out its fiduciary duties in the interest of the company and all shareholders without breaching any regulatory requirements. “It is particularly more serious in this case as the share buy-back actions and subsequent distribution of the treasury shares as dividends in specie impact shareholders,” she said when contacted by *The Edge Financial Daily*.

Share buy-backs are when a company repurchases its own shares from the marketplace. The company can either then cancel the shares or hold it as treasury shares. Share buy-back activities help to support the share price and valuation of a company, and increase its earnings per share.