MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Andrew Bayly	**Portfolio**	Commerce and Consumer Affairs
Title of Cabinet paper	Modernising the Companies Act 1993 and Making Other Improvements for Business	**Date to be published**	15 August 2024

List of documents that have been proactively released		
Date	**Title**	**Author**
31 July 2024	Modernising the Companies Act 1993 and Making Other Improvements for Business	Office of the Minister for Commerce and Consumer Affairs
31 July 2024	Modernising the Companies Act 1993 and Making Other Improvements for Business ECO-24-MIN-0149 Minute	Cabinet Office
31 July 2024	Appendix 1: Proposals in the Companies Act, Limited Partnerships Act, and Insolvency Act with a Regulatory Impact Analysis Exemption	MBIE
31 July 2024	Appendix 2: Amendments to RSB 3 proposals	MBIE
31 July 2024	Appendix 3: Regulatory Impact Statement: Companies Act 1993 Modernisation and Simplification Changes	MBIE
31 July 2024	Appendix 4: Regulatory Impact Statement: Making it easier for government agencies to require an NZBN	MBIE
31 July 2024	Appendix 5: Better Visibility of Individuals Who Control Companies and Limited Partnerships CAB-21-MIN-0539.01 Minute	Cabinet Office
31 July 2024	Appendix 6: NZBN legislative proposals – additional detail	MBIE
31 July 2024	Appendix 7: Business registers and associated legislation in scope for NZBN changes	MBIE

Information redacted **YES** / **NO** *(please select)*

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Some information has been withheld for the reasons of Confidential advice to Government.

Regulatory Impact Statement: Companies Act 1993 Modernisation and Simplification Changes

Coversheet

Purpose of Document	
Decision sought:	*Analysis produced to inform Cabinet decisions on policy proposals to modernise and simplify aspects of the Companies Act 1993*
Advising agencies:	*Ministry of Business, Innovation and Employment (**MBIE**)*
Proposing Ministers:	*Minister of Commerce and Consumer Affairs*
Date finalised:	*24 July 2024*

Problem Definition

The main policy problem we are seeking to address with the proposals covered in this Regulatory Impact Statement (**RIS**) is that some provisions in the Companies Act 1993 (**the Act**) set out inefficient and/or overlapping procedures. These are creating uncertainty as to the proper procedures to be followed, unnecessary compliance costs and/or complexity in the administration of a company's affairs for their directors and shareholders.

Executive Summary

The proposals considered in this RIS will be part of the Corporate Governance Amendment Bill, an omnibus bill implementing various related policies, most relating primarily to companies. Many of the proposed changes for this Bill have already had a regulatory impact analysis completed or are exempt from the requirement.

This RIS is limited to the following issues summarised below. The options for addressing them have been considered against the policy objectives of certainty, efficiency, and protections for shareholders, creditors and other stakeholders.

Issue 1: High compliance costs for a company to reduce its share capital

Unless otherwise provided in the Act, a company may only reduce its share capital with the approval of the court. This is a costly and time-consuming process. This RIS considers and recommends providing a non-court procedure for permitting certain reductions in share capital that can sufficiently safeguard shareholders' interests in the company.

Issue 2: Situations where unanimous assent of shareholders for certain actions may be permitted under section 107

Section 107 provides for a simplified procedure for various corporate actions where all shareholders agree. However, there are three actions not covered by section 107 that we have assessed in this RIS as appropriate to include, and these are:

- issue of options of convertible securities, otherwise than under section 49
- crediting unpaid shares, otherwise than under section 47(3)

- acquisition of shares to be held as treasury stock, otherwise than under section 67A.

Issue 3: Major transactions – excluding certain transactions

Section 129 provides that any acquisition or disposition of assets or incurring of obligations or liabilities that amount to over 50% of the value of the company's assets (a **major transaction**) must be approved by a special resolution of shareholders. However, it is unclear whether matters relating solely to the capital structure of the company fall within the ambit of section 129. This RIS recommends excluding from section 129 share issues, buybacks, dividends and redemptions.

Issue 4: Major transactions – closing loopholes

The protections under section 129 for shareholders can potentially be avoided by structuring major transactions either:

- as a series of smaller transactions, none of which individually meet the required threshold, or
- through a subsidiary.

This RIS recommends amending section 129 to ensure that the protections provided are not able to be subverted or avoided by structuring transactions in either of these ways.

Issue 5: Unclaimed dividends

It is not always possible for dividends to be paid to all shareholders. Some shareholders fail to update their contact details and/or bank account details for receiving dividends. This can result in unclaimed dividends remaining on a company's balance sheet as a permanent liability. This RIS recommends an option that permits the company to mingle unclaimed dividends with its own money after a period of two years. The shareholder's claim to their dividend would be retained, but this would instead become a contingent liability.

Consultation

We have undertaken targeted consultation with a small group of company law and insolvency law experts and other stakeholders, including the Institute of Directors, New Zealand Shareholders' Association, NZX, and Chartered Accountants Australia New Zealand, on the issues and specific amendments for addressing them.

Limitations and Constraints on Analysis

We have had limited time to consider the proposals and have not publicly consulted on them. As a result, we have limited information on the scale and magnitude of the issues we are seeking to address (ie, we do not have data on how often the issues are arising for companies or the costs they are incurring because of them), may not have identified all possible options to address them, and have not tested our analysis widely.

None of the proposals put forward represent any significant shifts of policy within the overall scheme of the Act. They are each addressing quite specific issues in the Act and are designed to make things easier for businesses, either by saving time and money, or through clarifying provisions. Although we don't have concrete data on the scale and magnitude of each issue, it is reasonable to conclude that the relevant situations are unlikely to arise frequently for most companies. In addition, our group of stakeholders

represented a reasonably diverse range of views and so their broad support provides a level of comfort with the limited analysis that has taken place.

We therefore consider our analysis is sufficient to support our recommendations, despite the limitations and constraints on the analysis.

Responsible Manager(s) (completed by relevant manager)
Gillian Sharp (Manager) **Corporate Governance and Intellectual Property Policy** Ministry of Business, Innovation and Employment Small Business, Commerce and Consumer Policy  *24 July 2024*

Quality Assurance (completed by QA panel)	
Reviewing Agency:	Ministry of Business, Innovation and Employment
Panel Assessment & Comment:	MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. The panel considers that the information and analysis in the Regulatory Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Section 1: Diagnosing the policy problem

Modernising and simplifying the Companies Act

What is the context behind the policy problem and how is the status quo expected to develop? What is the policy problem or opportunity?

1. The Companies Act 1993 sets out the rules and procedures for how companies are incorporated, managed, and liquidated. The purpose of the Act, as set out in the long title, is:
    a. to reaffirm the value of the company as a means of achieving economic and social benefits through the aggregation of capital for productive purposes, the spreading of economic risk, and the taking of business risks;
    b. to provide basic and adaptable requirements for the incorporation, organisation, and operation of companies;
    c. to define the relationships between companies and their directors, shareholders, and creditors;
    d. to encourage efficient and responsible management of companies by allowing directors a wide discretion in matters of business judgment while at the same time providing protection for shareholders and creditors against the abuse of management power; and
    e. to provide straightforward and fair procedures for realising and distributing the assets of insolvent companies.

2. The company is the most common corporate structure in New Zealand and, therefore, a key underpinning of economic activity. As of 30 June 2024, there were more than 731,000 registered companies. Accordingly, it is important the legislative settings in the Act are efficient, effective and clear, and provide appropriate safeguards against misuse of the corporate form by company directors or undue risk for shareholders and creditors.

3. The Act is now more than 30 years old and, while it has been amended since then, it is evident that there are aspects that could be improved. Some of those changes are relatively simple and straightforward. For example, some elements of the Act do not adequately reflect how the modern business environment has changed in the last 30 years. Some provisions which, at the time the Act was introduced, were quite novel (such as share buybacks) are now considered to be uncontroversial and are commonplace. Nor has the Act been fully updated to make optimal use of digital technology. Other more complex issues with the Act have been identified, including by the courts.

4. In early 2024, the Minister of Commerce and Consumer Affairs asked officials to work towards implementing some of the more straightforward changes, as recommended by a company law expert, alongside other changes to the Act and related corporate governance legislation. The aims are reducing compliance costs, addressing uncertainties and facilitating the greater use digital technologies in the administration of companies' affairs. We have considered the proposals and undertaken targeted consultation on them with company law experts and other key stakeholders.

5. The following specific issues from those proposals have been identified for analysis in this RIS.

Subject	What is the issue?
Reduction in share capital	Currently (unless otherwise provided for elsewhere in the Act, eg, under share buyback provisions), the only way for a company to reduce its share capital[1] is through the provisions of Part 15 of the Act, which require court approval. This is costly and time-consuming (it can cost at least $100,000 and add at least 2-3 months to the process). With appropriate safeguards, this is not necessary in most cases and a simpler, more cost-effective process could be adopted.
Unanimous assent	Section 107 of the Act provides simplified processes for various corporate actions where all shareholders agree to them. Examples include share issues, authorising dividends and approving financial assistance for the purchase of shares. There are three actions not covered by section 107, which are of a similar nature as those that are, such that it would be consistent for them to be included in the section. These are: • issue of options of convertible securities, otherwise than under section 49 • crediting unpaid share capital, otherwise than under section 47(3) • acquisition of shares to be held as treasury stock, otherwise than under section 67A.
Major transactions – excluding certain transactions	Section 129 requires approval by a special resolution of any acquisition, disposition or other transaction that amounts to more than half the value of the company's assets (a **major transaction**). The purpose of these provisions is to avoid the situation where shareholders are unaware of a transformation of the company that is so significant that it transforms the nature of the enterprise in which they originally invested. This might, for example, be the purchase of another business whose activities differ significantly from that of the original company. It is not clear whether transactions that are solely about the capital structure of the company – share issues, buybacks, dividends and redemptions – fall within the ambit by section 129 and, therefore, whether the company must bear the time and costs associated with directors needing to seek the approval of shareholders by special resolution for these transactions to proceed.
Major transactions – closing loopholes	The protections for shareholders under section 129 can potentially be avoided by structuring major transactions either: • as a series of smaller transactions, none of which individually meet the required threshold, or • through a subsidiary.
Unclaimed dividends	It is not always possible for dividends to be paid to all shareholders. Some shareholders fail to update their contact details and/or bank account details

[1] Share capital is the money raised by shareholders through the sale of ordinary shares.

	for receiving dividends. This can result in unclaimed dividends remaining on a company's balance sheet as a permanent liability.

What objectives are sought in relation to the policy problem?

6. The main objective for proposals to modernise and simplify the Act is to reduce compliance costs and complexity for companies through more efficient regulation, while retaining appropriate safeguards.

7. The secondary objectives that will assist in meeting the main objective are:

    a. addressing unnecessary duplication of processes or protections

    b. addressing ambiguities in the legislation that can lead to confusion for regulated parties.

Section 2: Deciding upon an option to address the policy problem

Modernising and simplifying the Companies Act

What criteria will be used to compare options to the status quo?

8. The following criteria were used in our assessment:

    a. Certainty – is it clear what the law is and how to comply?

    b. Efficiency – will there be a reduction in compliance costs and/or burden for the companies?

    c. Protections – what is the impact on legislative protections for companies, stakeholders or the general public?

9. There is also a need to appropriately balance the level of protections to be provided against efficiency of processes and procedures for providing such protection. Higher levels of protection inevitably reduce efficiency by increasing compliance costs and/or burden for companies, their directors and shareholders, and others, including creditors.

What scope will options be considered within?

10. As we are looking specifically at changes to modernise and simplify the Act, our analysis is limited to considering legislative changes to address the policy problems.

Consultation

11. The options to amend the Act have not been consulted on publicly, but targeted consultation has taken place with a small group of companies law experts and stakeholder organisations including Bell Gully, Russell McVeagh, Minter Ellison Rudd Watts, Price Waterhouse Coopers, Chartered Accountants Australia and New Zealand, New Zealand Law Society, NZX, Institute of Directors, New Zealand Shareholders Association.

Issue 1: Reduction in share capital

Problem

12. Share capital is the portion of a company's capital that has been derived from the issue of shares. There are several reasons a company may wish to reduce its shareholder capital (eg, to create a more efficient capital structure). The principal ways this may happen are:

    a. through share buybacks (either on or off market), or

    b. a court approved arrangement under Part 15 of the Act, which allows for aggrieved shareholders to challenge the reduction in their shareholder equity.

13. As with all matters relating to capital restructuring, it is important that appropriate shareholder protections are provided for before any reduction in share capital occurs. Such reductions could have the effect of changing the shareholders' rights (e.g., voting rights or dividends received) and adversely impact creditors (eg, by the company becoming insolvent through the restructuring).

14. The procedures for protecting shareholders can be time consuming and expensive, and this protection could be provided in other ways. For example, a reduction in share capital not requiring an offer to each individual shareholder would currently have to proceed under Part 15 of the Act and require the approval of the court. This can cost at least $100,000 and take at least 2-3 months to complete. While we have been unable to ascertain the original rationale for requiring court approval, it is likely that it will have been to ensure protections for shareholders and creditors. Our view is that there are other ways these protections can be provided.

Identification and analysis of options

15. Three options were considered:

    Option 1 (*Status quo*): There are currently two main ways that a company can reduce its share capital:

    a. it can offer to buy back shares (either on or off market) which requires offers to be made to, and accepted by, each individual shareholder. The board must first resolve that:
        i. the offer is in the best interests of the company,
        ii. the offer is fair and reasonable to the company, and
        iii. it is not aware of any information not disclosed to shareholder that might affect their consideration of the offer;
    b. a reduction in share capital not requiring an offer to each individual shareholder must proceed under Part 15 of the Act and requires the approval of the court.

    Option 2(a) (Modelled on the equivalent provision in the Australian Corporations Act 2001 under section 256B-D[2] and consulted upon): set out a procedure that requires:

[2] A full discussion of the Australian provisions can be found in the Explanatory Memoranda to the Company Law review Bill 1997 COMPANY LAW REVIEW BILL 1997 Explanatory Memorandum (austlii.edu.au)

a. the board to resolve that the reduction must:
    i. be fair and reasonable to the company's shareholders as a whole, and
    ii. does not materially prejudice the company's ability to pay its creditors;
b. the reduction must also be approved by shareholders;
c. if it is an 'equal reduction' (ie, applies equally and proportionally to all shareholders), it must be approved by an ordinary resolution of shareholders;
d. if it is an 'unequal reduction', it must be approved by a special resolution of disinterested shareholders and, in the case of cancellation of shares, a special resolution of shareholders whose shares are to be cancelled.

Option 2(b) (preferred option following targeted consultation): as per Option 2(a), but with the additional requirement that directors who vote in favour of the resolution under (a) must also sign a certificate as to the matters set out under (i-ii).

16. All options provide certainty to shareholders and creditors as the processes are clear in each case, whether they involve seeking the agreement of the court or seeking shareholder approval following a resolution of the board. We consider that the distinction between equal and unequal reductions in Options 2(a) and (b) is also sufficiently clear.

17. We also consider that each option would provide broadly similar protections. An equal reduction will not affect the relative voting and distribution rights of shareholders and so an ordinary resolution is appropriate. Unequal distributions require greater protections, and the threshold of a special resolution is appropriate in these instances.

18. However, we note that it is a standard process in the Act to require directors who vote in favour of a resolution to subsequently certify that the matters specified in the resolution have been met. This is a unique feature of New Zealand companies' law and was a recommendation of the Law Commission in its original report on companies' law reform.[3] The intent of these certificates is to provide extra evidence to pursue cases of director wrongdoing, which can be hard to prove. As Option 2(a) does not contain this extra provision, we consider it slightly lower in protection to the other two options.

19. The most marked difference is against the criterion of efficiency. As already noted, the process of having to go to court for what, in many instances is an uncontroversial proposal, can cost at least $100,000 and take at least 2-3 months to complete. Providing an alternative process is therefore a significant gain in efficiency, saving the company both time and money.

20. When all these matters are taken into consideration, Option 2(b) is our preferred option.

What we heard in targeted consultation

21. Although there was general support for Option 2(a), some submitters were more cautious than others over its proposed adoption. Comments included:

[3] Law Commission Report No 9 'Company Law Reform and Restatement' NZLC-R9.pdf (lawcom.govt.nz)

a. this is consistent with other jurisdictions and enables a return of capital more rapidly and with lower transaction costs
b. shareholder approval should be a prerequisite in all situations
c. shareholder approval should not be needed for an equal reduction as long as the business is solvent
d. the key protections are in the resolution by the board and certificates signed by the directors
e. the scheme should have separate approval from a 'reasonable person of business' and be able to reflect differences in shareholder interest in addition to shareholder class.

22. Following feedback from stakeholders, Option 2(a) was subsequently amended to include the step of requiring those directors who vote in favour of the resolution to certify the three matters set out under (i) (ie, Option 2(b) was developed). Certification following a resolution is generally consistent with the key protections found elsewhere in the Act, where directors are required to certify certain matters were considered before a board resolution was adopted.

23. We do not agree with the removal of shareholder approval for an equal reduction. We also do not consider that a separate appraisal of some form is necessary. This would add compliance costs to the process, and we consider the protections already in place are sufficient. We also do not agree with reflecting shareholder interest groups in the decision-making process. This is quite a significant change to the Act and would require more detailed consideration.

Table 1: Options analysis for Issue 1

	Option 1 – *Status quo*	**Option 2(a) – Reduction without court approval**	**Option 2(b) (preferred) – Reduction without court approval with an additional safeguard added**
Certainty	0 Process is clear in the legislation.	0 Process to follow is clearly set out in the legislation. No significant difference to the status quo of the court process.	0 Process to follow is clearly set out in the legislation. No significant difference to the status quo of the court process.
Efficiency	0 The court process is costly and time consuming. Court process is estimated at $100k and 2-3 months.	+ + Significantly more efficient than the status quo in terms of both time and costs.	+ + Significantly more efficient than the status quo in terms of both time and costs.
Protections	0 The court process provides sufficient protections.	- Minor loss of protection provided by the general scheme of the Act	0 No effective loss of protections compared to the status quo.

		requiring directors to certify certain matters were considered before board adopts a particular resolution.	
Overall assessment	0	+	++

Preferred option

24. Option 2(b) is our preferred option. It is no less certain than the status quo, and we consider there is no effective loss of protection for shareholders. There is, however, a significant gain in efficiency due to not needing court approval.

Issue 2: Unanimous assent

Problem

25. Section 107 of the Act provides for simplified processes for various corporate actions, predominantly matters relating to the capital structure of the company, where all shareholders agree. Under this section, certain actions such as share issues, authorising dividends and approving financial assistance for the purchase of shares may be undertaken in a manner otherwise than in accordance with the usual provisions set out in the Act where the action to be taken has unanimous shareholder consent.

26. Section 108 provides that if using the simplified procedures under section 107 (except for shares issues), the board is required to be satisfied that the company will satisfy the solvency test after the action is undertaken, and directors who vote in favour must sign a certificate to that effect.

27. However, there are three actions not covered by section 107, but are of a nature such that it would be consistent for them to be included in that section. These are:

    a. issue of options of convertible securities, otherwise than under section 49;

    b. crediting unpaid share capital, otherwise than under section 47(3); and

    c. acquisition of shares to be held as treasury, stock otherwise than under section 67A.

28. As with the actions covered by section 107, the usual process for these actions is a resolution of the board followed (with the exception of section 67A) by the directors who voted in favour of signing a certificate stating that they have considered certain matters.

29. The problem is primarily one of consistency, as there appears to be no clear rationale for these three actions to be excluded from the simplified procedures of section 107. Under current provisions:

    a. Shares issued directly under sections 42, 44 or 45 (for a consideration decided by the board) can also be issued by unanimous assent under section 107(2). However, options of convertible securities (which are things such as bonds or preferred shares which can be converted into ordinary shares by the shareholder) are usually issued under section 49 cannot also be issued by unanimous assent.

    b. The board does not need to determine the consideration for an issue of shares, other than for cash under section 47(1), when issued under section 107(2). However, for shares issued other than cash, there is a subsequent step under section 47(3) which provides that, once the shares are issued, the board must determine the cash value of the consideration before the shares can be credited as paid up. It is inconsistent to still require this determination when the shares are issued under section 107, when the determination for the original issue is no longer necessary.

c. Shares acquired under section 59 can be held as treasury stock (under section 67A). This means that the shares aren't cancelled (as is usually the case when a company acquires its own shares) and the company holds shares in itself. However, shares usually acquired under that section, but instead acquired under section 107(1)(c), cannot be. Again, we consider that this is an inconsistency that needs to be addressed.

Identification and analysis of options

30. Only two options were considered for targeted consultation, as we were only asked to consider the one alternative to the *status quo*.

Option 1 (*Status quo*): Simplified procedures under section 107 may be used in relation to:

a. a dividend authorised otherwise than in accordance with section 53;
b. a discount scheme approved otherwise than in accordance with section 55;
c. shares in a company acquired otherwise than in accordance with sections 59 to 65;
d. shares in a company redeemed otherwise than in accordance with sections 69 to 72;
e. financial assistance given for the purpose of, or in connection with, the purchase of shares otherwise than in accordance with sections 76 to 80; and
f. any of the matters referred to in section 161(1) authorised otherwise than in accordance with that section.

Option 2 (additional actions consulted upon and preferred option): Amend section 107 to include the following actions:

a. issue of options of convertible securities authorised otherwise than under section 49;
b. crediting unpaid share capital authorised otherwise than under section 47(3); and
c. acquisition of shares to be held as treasury stock authorised otherwise than under section 67A.

31. In general, there is not a significant difference between these two options. It is unclear if there are any efficiency gains from the process in Option 2 compared to the status quo. Perhaps there are some marginal efficiency gains of achieving unanimous shareholder assent compared to the process of a board resolution, but we have not assessed these as significantly different enough.

32. If an action is to be included in section 107, we consider the two requirements of:

a. unanimous assent, combined with
b. the board having to affirm that the company will still meet the solvency test after the action in the case of an acquisition of shares to be held as treasury stock,

would provide sufficient protection when compared to the protections provided in the usual processes for those actions elsewhere in the Act.

33. It is in relation to certainty that we prefer Option 2. As discussed above there is no clear reason why the three additional actions proposed for inclusion in section 107 are not

currently included as they are consistent with other, similar actions already included. We consider this will provide more certainty and clarity to shareholders.

What we heard in targeted consultation

34. Feedback from the targeted stakeholder consultations unanimously supported Option 2. The only notable comments were that:

    a. it will still be essential that the decision is informed by a consideration of the solvency test in the case of an acquisition of shares to be held as treasury stock, and

    b. a larger reform promoted by a leading companies law expert, which is not expressly about this issue, is that a solvent company should be bound in all instances by the unanimous assent of its shareholders.

35. In relation to the first comment, the solvency test of section 108 would automatically apply to the share buyback held as treasury stock covered in Option 2, so no additional change needs to be considered to address this comment. The second comment is beyond the current scope of reforms.

Table 2: Options analysis for Issue 2

	Option 1 – *Status quo*	**Option 2 (preferred) – Include actions in section 107**
Certainty	0 There is some inconsistency in the Act about how similar provisions are dealt with.	+ Improves consistency of the Act and provides more clarity to shareholders about their power.
Efficiency	0 A board resolution is a reasonably efficient process.	0 Unclear if there are efficiency gains from replacing a board resolution with shareholder assent.
Protections	0 There are sufficient protections in the differing applicable statutory regimes.	0 Protections provided by section 108. No loss of protections compared to the status quo.
Overall assessment	0	+

Preferred option

36. Option 2 is our preferred option although we acknowledge it is marginal according to the analysis. Although it is not clear that it would provide a more efficient process, it would improve the consistency of the Act, and give shareholders greater certainty about their powers.

Issue 3: Major transactions – excluding certain transactions

Problem

37. Section 129 of the Act provides that any acquisition or disposition of assets or incurring of obligations or liabilities that amount to over 50 percent of the value of the company's assets must be approved by a special resolution of shareholders.

38. As the Law Commission said in its report that preceded the development of the current Act[4]:

> the provision is based on the view that some dealings have such far-reaching effects that they should be referred to shareholders. Shareholders should not find that massive transactions have transformed the company they invested in without warning.

This might, for example, be the purchase of another business whose activities differ significantly from that of the original company.

39. However, it is unclear whether matters relating solely to the capital structure of the company, specifically share issues, buybacks, dividends and redemptions, fall within the ambit of a major transaction to which section 129 applies when the Act already provides specific procedural rules to be followed in relation to these matters.

40. The uncertainty around whether to apply section 129 to these matters creates additional and unnecessary compliance costs for companies to apply section 129. If companies consider the existing procedural rules for the matters are sufficient for protecting the interests of shareholders and they do not apply section 129 to these matters, they risk the transaction being challenged through the courts as illicit transactions.

41. This issue is likely to occur more frequently in the early stages of the life of a company, when it is small and growing quickly in size, rather than later in its life when it has become a larger and more established company.

Identification and analysis of options

42. We considered four options:

Option 1 (*Status quo*): section 129 provides that any acquisition or disposition of assets or incurring of obligations or liabilities that amount to over 50 percent of the value of the company must be approved by a special resolution of shareholders and there are specific procedural rules applying to share issues, buybacks, dividends and redemptions elsewhere in the Act;

Option 2: amend section 129 to be clear that all share issues, buybacks, dividends and redemptions are major transactions to which the section applies to;

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[4] NZLC R9 *Company Law: Reform and Restatement* (1989) at paragraph 499.

Option 3: amend section 129 to be clear that buybacks, dividends and redemptions are not major transactions to which the section applies, whereas share issues are a major transaction if they meet the threshold; or

Option 4 (Proposal for which targeted consultation was undertaken and our preferred option): amend section 129 to be clear that share issues, buybacks, dividends and redemptions are not major transactions to which the section applies.

43. Although we consider that the *status quo* provides sufficient protection, as these actions are covered by processes set out elsewhere in the Act, it remains unclear whether these actions fall under the protections of section 129 as well. This can also lead to inefficiencies for companies as they are unsure whether or not they need to follow the additional processes in section 129 as well. Some may opt to do so out of caution.

44. What is primarily at issue in the analysis is whether the extra protections afforded by section 129 (which effectively layers an additional process over the top of the processes which already exist elsewhere in the Act) is merited in relation to these actions and the increased time and cost that this would entail.

45. Our view is that actions relating solely to the capital structure of the company are not major transactions, as they are not fundamentally changing the nature of the company in the manner originally envisaged by the Law Commission. However, in response to stakeholder feedback, we added Options 2 and 3 to our analysis. Option 4 was the option we originally consulted on.

46. All options fared better than the status quo. All options provided certainty, but Option 2 was worse than the status quo on efficiency as all actions would have been required to go through two processes. And while this does provide increased protection, we do not think this is merited in relation to the actions that we are talking about as the protections elsewhere in the Act are sufficient.

47. The analysis comparing Options 3 and 4 comes down to the relative merits and trade-off between efficiency and protection. As we have already noted, we consider the protections that exist elsewhere in the Act provide sufficient protections for these actions and so we assess that any additional protection gained by requiring share issues to go through two processes is outweighed by the increase in time and cost of having to subject the action to two separate processes.

48. Option 4 is therefore our preferred option.

What we heard in targeted consultation

49. General feedback received from targeted stakeholder consultations was supportive of clarifying whether or not these matters are covered by section 129. However, there were differing views on whether it should be all, some, or none of them. Of the nine stakeholders who commented on the proposal:

    a. Four supported Option 4 without reservation. Their main comment was that these actions are already covered by procedural rules and protections elsewhere in the Act.

b. One supported Option 4, but with some caveats. This submitter raised concerns about the dilution of voting rights, although they noted there are protections elsewhere in the Act. They also referred to the NZX listing rules for major transactions and the *Major Transactions Guidance Note* which (i) clarify that these actions would be included (as 'assets' is defined very broadly), but (ii) carve out transactions that do not significantly change the nature of the company.

c. One supported Option 3. Their rationale was cash is an asset under section 129 and so a share issue that raised more than half the value of a company's assets should be considered a major transaction. On the other hand, they considered that buybacks and dividends are both forms of distributions and are already subject to sufficient protections for shareholders and creditors. They also considered a redemption at the option of the company is similar to a repurchase of shares and a redemption at the option of the holder is a transaction the company has no choice over and so redemptions should also be excluded.

d. Three supported Option 2 on the grounds that shareholders should have a say in relation to any significant change to the nature of the company and its assets and liabilities. One of these considered that a more "holistic review of these provisions that offer greater clarity of thresholds relevant to the specific funding transaction" should instead be undertaken. We consider that a more holistic review is outside of the scope of this review and therefore of this RIS.

Table 3: Options analysis for Issue 3

	Option 1 – *Status quo*	**Option 2 – all included**	**Option 3 – all excluded except share issues**	**Option 4 (preferred option) – all excluded**
Certainty	0 There is a lack of clarity as to whether these transactions are covered by section 129.	+ + Provides clarity in relation to the status of all four transactions.	++ Provides clarity in relation to the status of all four transactions.	+ + Provides clarity in relation to all four of the transactions.
Efficiency	0 The uncertainty creates some inefficiency because risk adverse companies will apply two processes to each of these transactions, adding to the time and cost to complete these transactions.	- - Each transaction would have to undergo two processes, adding to time and cost to complete these transactions.	+ Share issues would have to undergo two processes, adding to time and cost to complete this type of transaction. Other actions would only require one process.	+ + Excluding all these transactions means companies would only have to undergo a single process to be complete these transactions.

Protections	0 There are existing protections for each transaction as well as potentially additional protections under section 129 for risk adverse companies (who are compelled to apply two processes to complete these transactions).	+ + Maximum protection provided because each transaction would need to undergo two processes to be completed.	+ This would only be a marginal increase in protection as share issues would to go through two processes.	0 Excluding all these transactions means they each would only need to undergo a single process to be completed to provide reasonable protection for shareholders.
Overall assessment	0	+ +	+ + ++	+ + + +

Preferred option

50. While Options 3 and 4 have come out equal in the above table (largely because both address the primary issue of uncertainty with the status quo), Option 4 is our preferred option. This is because we do not consider that the additional process (and increased time and cost associated with this) that Option 3 requires in relation to share issues is merited by the marginal additional protection provided.

Issue 4: Major transactions – strengthening provisions

Problem

51. Protections afforded by section 129 can potentially be subverted or avoided if the transaction is structured in a certain way. For example, a transaction might be executed through a subsidiary depriving the shareholders of the parent company of a say in the transaction (a structure that has been the subject of High Court litigation which determined transactions undertaken through a subsidiary are not a major transaction of the parent company). Another way is to split a transaction into a series of smaller transactions, none of which individually meet the threshold for section 129.

52. Stakeholders were all supportive of addressing this issue and several referred us to the approach taken to major transactions in the current NZX listing rules. Notably, rule 5.1.1 refers to a 'transaction, *or a related series of transactions*'[5] with guidance provided in the NZX Guidance Note 'Major and Related Party Transactions'.[6] This is a broader definition of 'transaction' than that in section 129.

53. An example is the purchase of Rip Curl by Kathmandu. The purchase was executed through a wholly owned subsidiary of Kathmandu, so there was no requirement of a special resolution under section 129. However, the purchase was put to an ordinary resolution of shareholders under NZX listing rule 5.1.1(b).

Identification of options

54. We considered two options:

    Option 1 (*Status quo*): Under the status quo, section 129 can potentially still be avoided (or its intent subverted) by structuring major transactions in certain ways. This has the effect of denying the shareholders in the company their right to have a say on the transaction through a special resolution. A special resolution requires at least 75% of shareholders to vote in favour of the transaction. We note that the NZX listing rules, which do capture at least some of the behaviour we are seeking to target only require an ordinary resolution (50% vote), meaning that some transactions of listed issuers might still be caught by these, if not by section 129.[7]

    Option 2: Expand the definition of a transaction under section 129 – perhaps along the lines of that found in the NZX listing rules – to avoid the situation in which transactions can be structured in such a way so as to circumvent the protections under section 129 (or at least its intent).

55. We understand that case law does address this issue to some extent in that transactions that are split up into a series of transactions have been found to be caught by section 129. However, this is not the case for transactions executed through subsidiaries. Either way, we consider that the law should be clearer so that the protections of section 129 are not circumvented.

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[5] Available here NZX Listing Rules 5.1

[6] Available here Major and Related Party Transactions

56. We consider that Option 2 would provide greater certainty as to what constitutes a major transaction and so ensure that the appropriate protections – as originally envisaged by the Law Commission – are in place. We recognise that Option 2 requires additional time and cost of seeking a special resolution but consider this is worthwhile trade off to ensure shareholders a say.

57. Given the discussion in Issue 3 (on excluding transactions that relate solely to the capital structure of the company), we note that the kinds of transactions we are now discussing are the kinds of transactions that might significantly change the nature of the company a shareholder originally invested in. This might, for example, be the purchase of another company whose business activities are significantly different from those of the original company.

58. The *status quo* is uncertain about whether certain transactions are covered or not, and this itself creates some inefficiencies. As it allows section 129 to be avoided in certain situations, it is also not providing shareholders sufficient protections in those situations.

59. Our preferred option is Option 2. However, based on what were received from targeted consultation (discussed below), we recognise that the details of this option would likely need to be further developed during the drafting process.

What we heard in targeted consultation

60. As already noted, all stakeholders that responded to this issue supported addressing it in some way (Option 2). Comments included:

    a. supportive of clarifying that a transaction extends to a related series of transactions, perhaps along the lines of the NZX listing rules;
    b. application to subsidiaries could be challenging; and
    c. this should only proceed if the proposal as set out as Option 4 in Issue 3 above proceeds.

Table 4: Options analysis for Issue 4

	Option 1 – *Status quo*	**Option 2 – expand definition of a transaction under section 129**
Certainty	0 There is a lack of clarity as to when a related series of transactions falls under section 129.	+ Provides clarity in relation to when a related series of transactions is a major transaction for the purpose of section 129.
Efficiency	0 The uncertainty creates some inefficiency, though avoiding section 129 also avoids time and costs.	- There would be increased time and costs for companies that have to put a transaction to a special resolution.

Protections	0 There is potential for avoidance of the protections of section 129 if transactions are structured in certain ways.	+ + Maximum protection provided as section 129 cannot be avoided by structuring the transactions in certain ways.
Overall assessment	0	+ +

Preferred option

61. As discussed above, our preferred option is Option 2.

Issue 5: Unclaimed dividends

Problem

62. There are times when it is not possible to contact a shareholder, usually because they have not updated their contact details, and/or pay them their dividend because their bank details are no longer current. This raises the question of what happens to dividends which cannot be paid to those shareholders. Unclaimed dividends remain as a permanent liability on the company's books.

63. Companies with constitutions will often address this issue in their constitutions. Examples of such provisions include:

    a. Subject to law, all unclaimed dividends may be invested or otherwise used by the board for the benefit of the company until claimed or otherwise disposed of according to law.

    b. All dividends and other distributions, and other moneys payable to any shareholder or former shareholder in respect of entitlement to receive a dividend or other distribution, that remain unclaimed for one year after the due date for payment may be invested or otherwise made use of by the board for the benefit of the Company until claimed. The Company shall be entitled to mingle the distribution with other money of the Company and shall not be required to hold it or to regard it as being impressed with any trust but, subject to compliance with the solvency test, shall pay the distribution to the person producing evidence of entitlement.

64. However, only around 2 in 7 companies have constitutions. This leaves the question undetermined for the remaining companies.

Identification of options

65. Two options were considered:

    Option 1 (*Status quo*): Under the status quo, unless a company provides for it in their constitution, there is no process for dealing with unclaimed dividends and they remain a permanent liability on the company's balance sheet.

    Option 2 (preferred): Provide that after a period of two years, and after making reasonable efforts to contact the shareholder, the company may mingle any unclaimed distributions with the company's money. However, the shareholder would retain a claim to the money should they subsequently come forward.

66. We discussed with Inland Revenue whether this issue could be addressed by a change to the *Unclaimed Money Act 1971* (which provides a regime administered by the Commissioner for Inland Revenue for paying out unclaimed money[8]), but they informed us that unclaimed dividends are materially different to the type of unclaimed money that

[8] Unclaimed money is money (ie, cash) held by a person or organisation, such as a solicitor or a Bank, where the owner of that money (or someone with authority to act on behalf of the owner) cannot be found. Unclaimed money can be transferred to the IRD for distribution under the Unclaimed Money Act.

the Unclaimed Money Act encompasses. For example, a company dividend may not be a cash amount and dividends are often treated as taxable income for the shareholders.

67. We elected a period of two years for Option 2 consistent with the recommendations of the Takeovers Panel following a 2021 consultation on what to do with money in relation to compulsory share acquisitions when the shareholder could not be contacted.

68. This is not a significant issue in relation to either efficiency or protection. The shareholder does not lose their right to the claim under either option. Option 2 would, however, provide certainty to a company, especially those without a constitution addressing this issue, as to how they may deal with unclaimed dividends.

What we heard in targeted consultation

69. General feedback received from targeted stakeholder consultations was supportive of addressing this issue.

Table 5: Options analysis for Issue 5

	Option 1 – *Status quo*	**Option 2 – unclaimed dividends can be used after 2 years**
Certainty	0 There is a lack of clarity as to what happens with unclaimed dividends.	+ + Provides clarity as to how a company may deal with unclaimed dividends.
Efficiency	0 There are no significant efficiency issues with either option.	0 There are no significant efficiency issues with either option.
Protections	0 The shareholder does not lose their right to the claim under either option.	0 The shareholder does not lose their right to the claim under either option.
Overall assessment	0	+ +

Preferred option

70. Option 2 is our preferred option.

What are the marginal costs and benefits of the options for each issue?

71. Due to the limited analysis available of the extent of the issues covered in this RIS it has not been possible to undertake a meaningful cost/benefit analysis of our recommended options. We can, however, make one or two qualitative observations:

    a. Reducing the need for companies to apply to the court for a share capital reduction (Issue 1) will result in lower costs for those companies in relation to that process.

    b. Clarifying that matters relating to capital structure are not subject to the major transactions provisions (Issue 3) will have some cost savings for companies as it clarifies that a company does not need a special resolution in addition to the processes provided for elsewhere in the Act. There may be some minor costs for the NZX if they need to revisit listing rules as a result of any regulatory changes in response to Issue 3.

Section 3: Delivering the options

How will the new arrangements be implemented?

72. We will need to inform stakeholders about the changes so that they can make the appropriate adjustments to their processes. This will be through information on the MBIE and Companies Office websites.

How will the new arrangements be monitored, evaluated, and reviewed?

73. Once the amendments have been acted and entered into force, the changes will be monitored, evaluated, and reviewed in line with good regulatory stewardship principles. However, there are a range of constraints, including:

    a. *Monitoring:* There are limitations on the availability of data to assess the effectiveness of the changes. This is primarily due to the nature of private actions undertaken by companies and their directors, including with their shareholders and creditors, and a lack of available data in the public domain related to private parties using the procedures under the Act. However, regular engagement with key stakeholders will help to monitor the implementation and impacts of changes.

    b. *Evaluation:* The quality of the evidence on the performance of the proposed amendments will likewise mean it is difficult to evaluate the effectiveness of the changes, as it will be based on partial data.

    c. *Review:* There are no plans currently for a review of these provisions, but this will be considered in due course.