MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Scott Simpson	**Portfolio**	Commerce and Consumer Affairs
Title of Cabinet paper	Companies Act 1993 modernisation: further policy decisions	**Date to be published**	29 April 2025

List of documents that have been proactively released		
Date	**Title**	**Author**
March 2025	Companies Act 1993 modernisation: further policy decisions	Office of the Minister of Commerce and Consumer Affairs
March 2025	Appendix 1: Additional minor issues to 'modernise, simplify and digitise' the Act	MBIE
26 March 2025	Companies Act 1993 modernisation: further policy decisions ECO-25-MIN-0032 Minute	Cabinet Office
20 February 2025	Regulatory Impact Statement: Companies Act 1993 modernisation – further policy decisions	MBIE

Information redacted **YES**

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Some information has been withheld for the reason of confidential advice to Government.

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Policy Committee

Companies Act 1993 modernisation: further policy decisions

Proposal

1 I seek five further decisions to modernise, simplify and digitise the Companies Act 1993 (**the Act**) and address harmful business practices. This follows a package of reforms agreed by Cabinet in August 2024 [CAB-24-MIN-0290, ECO-24-MIN-0149].

Relation to government priorities

2 The Companies Act is the foundation of New Zealand's corporate governance regulatory system. For the New Zealand economy to grow, it is important that this system operates effectively and efficiently, addresses poor behaviour and keeps pace with technology.

Executive Summary

3 Following the package of reforms agreed by Cabinet in August 2024, I am seeking Cabinet's agreement to five further policy proposals to update the Companies Act to make it simpler and fairer to do business in New Zealand.

4 These changes are technical and are generally well supported by key stakeholders in the commercial sector, who have been consulted during the policy process. They are part of the package of reforms that support the Government's Going for Growth agenda by:

4.1 reducing unnecessary compliance burdens for businesses and implementation costs for agencies;

4.2 addressing regulatory duplication, gaps, errors, ambiguities and inconsistencies;

4.3 responding to the modern environment, including changing technology.

5 The proposed changes:

5.1 remove the requirement for directors to sign certain certificates following board resolutions;

5.2 enable the threshold for 'large' companies to be adjusted through regulations, rather than primary legislation;

5.3 remove the requirement that a disclosure document is produced for a selective share redemption;

5.4 clarify when an administrator can exercise a casting (ie deciding) vote at a creditors' meeting;

5.5 streamline the process for recovering money when insolvent companies shift assets to a new company.

6 This paper also notes several minor amendments (**Appendix 1**) [CAB-24-MIN-0290, ECO-24-MIN-0149, recommendation 9].

Further proposals to modernise the Companies Act

1) Remove the requirement for directors to sign certain certificates following resolutions

7 I propose to remove the requirement for directors to sign certain certificates following board resolutions. A certificate is a formal declaration directors must sign after a board resolution.

8 This will remove an unnecessary and duplicative process that adds compliance costs for companies. Currently, following a board resolution, directors who vote in favour are required to also certify certain matters that support the decision they have just made. This process is unique to New Zealand's companies law and is not a feature in other countries legislation.

9 Going forward, the proposal is for boards to record a resolution, including the reasons for the directors' conclusions, but there will no longer be a prescriptive requirement to issue a certificate.

10 The requirement for board members to issue certificates of solvency would remain because of their significance for creditor protection.

11 I note that breaching the certificate requirements is currently an offence and that removing the certification requirements in some instances will also remove these offences.

2) Introduce a more efficient process to adjust 'large' company thresholds

12 I propose to enable the thresholds defining a 'large' company to be adjusted through regulations, rather than primary legislation. This will build in flexibility for the future.

13 If a company is defined as 'large' it must meet certain reporting requirements. Currently, the thresholds can only be amended by Order in Council to adjust for inflation. Any more substantive change must be through the primary legislation.

14 This regulation making power will be subject to appropriate statutory criteria and consultation requirements. The statutory criteria will require consideration for balancing the need for transparency of large (and therefore usually more influential) companies, with ensuring companies are not subjected to unnecessary compliance. Consultation with the External Reporting Board and persons affected by the adjustments (or their representatives) will also be required.

3) Make a correction to the selective share redemption provisions

15 I propose to remove the requirement that a disclosure document is produced for a selective share redemption. This is an unnecessary procedural step as the terms of the redemption are agreed at the time of issue.

16 Redeemable shares are shares that a company has the right to buy back. The terms and conditions relating to that buy back ('redemption') are agreed up front at the time the shares are issued. The option to redeem shares can be exercised either in relation to all shareholders of the same class, such that relative voting or distribution rights are unaffected, or in relation to one or more shareholders. This latter option is referred to as 'selective share redemption'.

4) Clarify the conditions for an administrator's casting vote at a creditors' meeting

17 I propose to clarify when an administrator can exercise a casting (or deciding) vote at a creditors' meeting.

18 Voluntary administration is a process under which an administrator is appointed and seeks options to rescue a company that is otherwise facing liquidation. For a plan to proceed, the administrator must seek agreement of the creditors. This is achieved by putting forward a resolution for their agreement. For the resolution to pass, it must be supported by:

18.1 the majority of creditors in number, and

18.2 at least 75 per cent of creditors in value.

19 The proposal will mean that the administrator can exercise the casting vote in a situation where the 75 per cent of creditors in *value* is met, but the majority of creditors in *number* is not met.

20 This proposal clarifies an ambiguity within the existing law. The Act provides for the administrator to exercise a 'casting vote' but does not specify the circumstances in which this power may be used.

21 The proposal is consistent with other jurisdictions such as the UK which only requires a supermajority by value.

5) Improve outcomes for creditors when insolvent companies shift assets to a new company

22 I propose to streamline the process for recovering money when insolvent companies shift assets to a new company.

23 When a company is insolvent, but before a liquidator is appointed, there is an incentive to shift assets to a new company at undervalue to keep these out of the general pool of assets available to creditors when the company is liquidated.

24 This proposal will allow liquidators to initiate recovery of money from undervalue transactions (a sale of asset for less than fair value) through a notice, rather than

commencing proceedings in court. This notice gives the party 20 days to object, otherwise the money becomes automatically recoverable.

25 This will incentivise liquidators to recover money as they will not need to apply to the court which is expensive and time consuming. This new process will align with the process for setting aside a 'voidable transaction' – this is a transaction made when a company is insolvent.

26 Most but not all of the insolvency practitioners I consulted agreed this change would simplify the process. Those that did not support noted that assessments of value were complex and that it could have a chilling effect on directors taking legitimate actions to save a company.

27 Objecting to the notice is a straightforward process and it will then be up to the liquidator to prove undervalue in court (which is the current process). What the proposal will do is prevent some of these matters going to court. I therefore consider that, on balance, this proposal is worthwhile.

Cost-of-living Implications

28 These proposals are not anticipated to have notable cost of living implications.

Financial Implications

29 There are no financial implications relating to the proposals in this paper.

Legislative Implications

Confidential advice to Government

Impact Analysis

Regulatory Impact Statement

32 MBIE has prepared a Regulatory Impact Statement (**RIS**) for the proposals to amend the Companies Act described in paragraphs 7-27 above. MBIE's Regulatory Impact Analysis Review Panel has reviewed the RIS and considers that it meets the quality assurance criteria. The RIS is attached as **Appendix 2**.

Climate Implications of Policy Assessment

33 The Climate Implications of Policy Assessment (**CIPA**) team has been consulted and confirms that the CIPA requirements do not apply to these proposals as the threshold for significance is not met.

Population Implications

34 There are no population implications from the proposals in this paper.

Human Rights

35 No human rights implications arise from the proposals in this paper.

Use of external Resources

36 Roger Wallis, a partner at the law firm Chapman Tripp, has acted as a specialist legal advisor on the proposals in this paper due to his expertise in companies law. He has provided 136 hours of legal advice to date.

Consultation

37 The following departments and entities were consulted on this Cabinet paper: Treasury, Inland Revenue, Financial Markets Authority, and External Reporting Board. The Department of the Prime Minister and Cabinet was informed.

38 The proposals to modernise the Companies Act have not been consulted on publicly, but targeted consultation has taken place with a group of company and insolvency law experts and stakeholder organisations: Peter Watts KC and John Land from Bankside Chambers, Professor Susan Watson (Auckland University), Associate Professor Jonathan Barrett (Victoria University of Wellington), Bell Gully, Russell McVeagh, Minter Ellison Rudd Watts, Price Waterhouse Coopers, Chartered Accountants Australia and New Zealand, New Zealand Law Society, NZX Limited, Institute of Directors, and the New Zealand Shareholders Association.

39 Targeted consultation on the proposals relating to insolvency law has taken place with a group of insolvency practitioners: PKF Corporate Recovery & Insolvency (Auckland), Baker Tilly Staples Rodway, Ecovis KGA, Waterstone Ltd, Restructuring Services, BWA Insolvency, Reynolds and Associates, Calibre Partners, Chapman Tripp.

Communications

40 MBIE's website will be updated to provide details about this package of reforms. I intend to announce its progress in due course.

Proactive Release

41 I will direct officials to release this Cabinet paper with appropriate redactions.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

1 **note** that in August 2024, Cabinet agreed to a package of reforms to New Zealand's corporate governance legislation [CAB-24-MIN-0290, ECO-24-MIN-0149];

2 **note** that work has been progressed towards introduction of the legislation and the Minister of Commerce and Consumer Affairs has had further conversations with stakeholders resulting in five additional proposals to amend the Companies Act 1993 (**the Act**) consistent with the objectives of the original package;

3 **agree** that for matters other than solvency that currently require both a resolution and a subsequent certificate, the matters the Act requires directors to certify are instead included in the original resolution to save time and cost;

4 **agree** that the changes to the thresholds defining a 'large' company or 'large' overseas company (other than to adjust for inflation) can be made through regulations subject to:

4.1 consultation with the External Reporting Board and persons affected by the adjustments (or their representatives); and

4.2 statutory criteria that capture the need to have regard for the objective of balancing the need for transparency when a company is of a certain size with not wanting to impose unnecessary compliance on private companies;

5 **agree** to remove the requirement for a disclosure document for a selective share redemption because the terms and conditions are agreed at the time of issue;

6 **agree** that the administrator can exercise the casting vote when the supermajority by value is met but the majority by number is not;

7 **agree** that the process for commencing actions to recover money related to transactions at undervalue and transactions with related parties for inadequate or excessive consideration is aligned with that for voidable transactions, so that recovery can be commenced by way of a notice;

8 **note** that **Appendix 1** sets out a number of additional minor amendments consistent with Cabinet's previous agreement to make further minor amendments to the Companies Act 1993 [CAB-24-MIN-0290, ECO-24-MIN-0149, recommendation 9];

9 **invite** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the recommendations in this paper;

Confidential advice to Government

Confidential advice to Government

12 **authorise** the Minister of Commerce and Consumer Affairs to further clarify and develop policy matters and make decisions relating to the proposals in this Cabinet paper in a manner not inconsistent with the policy recommendations contained in the paper, including on any matters that might arise during the drafting process.

Authorised for lodgement

Hon Scott Simpson

Minister of Commerce and Consumer Affairs

Appendix 1: Further amendments to the Companies Act 1993 made under previous Cabinet authority [CAB-24-MIN-0290, ECO-24-MIN-0149, recommendation 9]

Attached as separate document

Appendix 2: Regulatory Impact Statement

Attached as separate document

APPENDIX 1: Additional minor issues to 'modernise, simplify and digitise' the Act

Issue	Comment/proposal	Recommendation
Section 120(5) – circumstances under which the Board can determine an annual meeting is not required.	This section arguably gives the board a very broad discretion to determine that an annual meeting is not required. This could be used to subvert the will of shareholders if the board wanted to avoid putting certain matters to shareholders at an annual general meeting. I do not consider that section 120(5) should be dispensed with altogether but instead propose that its application is limited to general meetings where there is only one shareholder (whether a wholly owned subsidiary or a single person). As the general meeting is the primary forum for shareholders to make decisions about the company, the power to determine that a meeting is not required should sit with them, and not with the board.	Restrict the board's power not to call a meeting (under s120(5)) to apply only to wholly owned subsidiaries. Clarify that only shareholders can decide that a meeting is not required under the provisions of section 122(4). They would do this by resolution according to section 122.
Consistent with section 241(3) of the Financial Markets Conduct Act 1993 (FMCA), make it clear that an acquisition or disposal of shares by a director by inheritance or gift does not infringe section 149.	Section 149 currently requires a director to acquire or dispose of shares at fair value. The fair value requirement may preclude a director disposing of shares by inheritance or gift. It is proposed to clarify that section 149 does not apply to either type of transaction.	Clarify that an acquisition or disposal of shares by a director by inheritance or gift does not infringe section 149.
Clarify that the procedural requirements of section 161 do not preclude shareholders' setting the bounds of director remuneration.	Section 161 is expressed in permissive terms, subject to a constitution, to permit the board of a company to approve payment of remuneration and provision of other benefits as long as procedural requirements are satisfied, notably certification as to fairness. It is proposed to clarify that approval of remuneration under section 161 does not, subject to the constitution, prevent shareholders from approving the bounds of remuneration. For example, it is common for shareholders of equity issuers listed by NZX to approve a remuneration cap under listing rule 2.11.	Clarify that approval of remuneration under section 161 does not, subject to the constitution, prevent shareholders from approving the bounds of remuneration.

Issue	Comment/proposal	Recommendation
Add section 49 to list of procedural requirements, the failure of which is deemed to be prejudicial conduct.	Section 175(1) of the Act lists several procedural sections in the Act that, if not followed, are deemed to be prejudicial conduct. Section 49 (under which the board determines the consideration for options and convertible financial products) is left out of this list. This is inconsistent with other provisions that are included in this list.	Add section 49 to section 175(1).
Issues relating to setting auditor's fees when the auditor is reappointed (section 207S).	When an auditor originally appointed at a meeting of the company is reappointed under section 207T, the fees and expenses of the auditor for the reappointment are typically subject to a meaningless resolution authorising the directors to fix their fees even though the appointment has already been made (and in practice the auditor will not perform the role without being paid). These resolutions would no longer be required by an amendment to section 207S to permit the directors, rather than shareholders, to set the auditor remuneration when the auditor is being reappointed. Australian law and practice do not require such resolutions.	Amend section 207S to permit the directors, rather than the shareholders, to set the fees and expenses of the auditor if the auditor is automatically reappointed under s207T of the Act.
Include cross-reference to subpart 4 of Part 4 of the Financial Markets Conduct Act in section 215 (as there is an equivalent cross-reference in section 226 of the FMCA)	Sections 221-225 of the FMCA refer to inspection of registers of regulated products. Section 226 provides that if there is any inconsistency with equivalent provisions in the Companies Act, then the FMCA prevails. Sections 215-218 of the Companies Act refer to inspection of company records. This amendment simplify replicates the cross-reference in section 226 of the FMCA so that readers of the Companies Act are clear that the FMCA prevails if there is any inconsistency between the two.	Include cross-reference to subpart 4 of Part 4 of the Financial Markets Conduct Act in section 215 of the Act.