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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Regulatory Impact Statement: Companies Act 1993 Modernisation – further policy decisions

Coversheet

Purpose of Document	
Decision sought:	*Analysis produced to inform Cabinet decisions on further policy proposals to modernise and simplify aspects of the Companies Act 1993 and address harmful phoenixing*
Advising agencies:	*Ministry of Business, Innovation and Employment (**MBIE**)*
Proposing Ministers:	*Minister of Commerce and Consumer Affairs*
Date finalised:	*20 February 2025*

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. One proposal addresses harmful phoenixing of companies which can leave creditors of insolvent companies out of pocket when they are liquidated.

Executive Summary

Cabinet previously agreed a package of reforms to the Companies Act 1993 (**the Act**), including measures to modernise, simplify and digitise the Act, and to address harmful phoenixing of companies [CAB-24-MIN-0290 and ECO-24-MIN-0149]. A RIS was prepared in relation to five specific 'modernisation' proposals. Cabinet also agreed (recommendation 9) to make other minor amendments to the Act to:

- clarify Parliament's intent;
- reduce unnecessary compliance burdens for businesses and implementation costs for agencies;
- address regulatory duplication, gaps, errors, ambiguities and inconsistencies;
- respond to the modern environment, including by ensuring that legislation responds to changing technology.

Since then, we have considered several further issues as part of the same piece of work. These were matters the Minister wanted to give further consideration to and/or.were raised either by members of our stakeholder group during the earlier targeted consultation or by our specialist legal advisor on the project (Roger Wallis of Chapman Tripp).

Five issues require regulatory impact analysis and this RIS covers those issues. Four of these sit under the umbrella of modernisation of the Companies Act and the options for addressing these have been considered against the same policy objectives as the original proposals, namely certainty, efficiency, and protections for shareholders, creditors and

2vglsunhpt 2025-04-28 10:14:20

other stakeholders. The other issue (Issue 3 below) relates to the objective of addressing harmful phoenixing of companies and options are addressed against a slightly different set of criteria to reflect the objectives sought. These are: effectiveness, increased recovery for creditors, efficiency and certainty.

Issue 1: Certificates following resolutions

The Act requires directors to certify certain matters following the passing of a resolution. For example, directors may have to certify that a certain action is in the best interests of the company and provide their reasons for it. For certain actions, directors also have to certify that the company will be solvent after the action is undertaken. The original intent of these provisions was to ensure that directors' minds were focussed on these issues when voting. They are unique to New Zealand company law

The question is whether these certificates are an unnecessary double up given that the resolution must also be recorded.

We recommend that, for matters other than solvency, certifications are instead incorporated into the resolutions signed by the directors and require the resolutions to record the reasons for the decision.

Certificates of solvency would remain.

Issue 2: Adjusting 'large' company thresholds

A company is defined as 'large' if it is above either a certain assets or revenue threshold. If a company is large, it has particular financial reporting obligations. Other than adjusting the 'large' company thresholds to reflect inflation, these thresholds can only be adjusted by amendment to the primary legislation. A more efficient process would be for these to be adjusted by regulation. Recognising that this is a delegation of power from Parliament to the Executive, sufficient process and consultation requirements would be needed.

Issue 3: Better outcomes for creditors when smaller companies shift assets to a new company

When a company is insolvent and 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.

The issue of companies shifting assets to a new company and leaving creditors out of pocket is particularly acute at the lower end of the market when the amounts at issue may not be worth pursuing through the courts.

It is possible that the current legislative requirements do not provide sufficient incentive for liquidators to seek to reclaim money when these assets are sold to related parties at undervalue, therefore we recommend allowing liquidators to issue a notice to recover funds from transactions made at undervalue rather than needing to commence proceedings in the Court.

Issue 4: Selective share redemption

Section 69 of the Act treats a redemption of shares that are redeemable by the terms of their issue in a similar manner to a repurchase of shares. However, in contrast to a share buyback (which involves an offer and acceptance process), a redemption of shares is a contractual entitlement that the company and the shareholder agrees to at the time of the issue of a redeemable share.

2vglsunhpt 2025-04-28 10:14:20

Nonetheless, the Act still requires the production of a disclosure document for a selective share redemption which does not make sense in the context. This has been noted as an error by one of the original drafters of the Law Commission report that preceded the Companies Act 1993.

Issue 5: Casting vote at a creditors' meeting

Under the voluntary administration provisions in the Act, creditors will often be called on to vote on a rescue package for the company. Under section 239AK, a resolution of creditors is adopted if it is supported by a majority in number representing at least 75 per cent in value of those voting. The Act provides for the administrator to exercise a 'casting vote' but does not specify the circumstances in which this power may be used.

The Courts have determined that the casting vote is only to break a deadlock in number and the resolution fails if the 75% by value is not reached. This means that a single creditor with over 25% by value can block a resolution. Australia (which only has a 50% by value threshold) takes a different approach defining a deadlock as when the majority by number and majority by value vote differently.

We recommend that an administrator have a casting vote in the 75% by value test is achieved but the by number threshold is not.

Consultation

We undertook targeted consultation with two groups in relation to these proposals. One group was the same as for the earlier proposals and includes 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. We also undertook targeted consultation with a group of insolvency practitioners in relation to the insolvency issues considered (Issues 3 and 5).

Limitations and Constraints on Analysis

As with the previous round of proposals, 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.

However we consider that 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 (with the exception of Issue 3) are designed to make things easier for businesses, either by saving time and money, or through clarifying provisions. Issue 3 sits alongside other measures from the earlier Cabinet paper to address harmful phoenixing of companies. 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.

As the proposals (other than Issue 3) are directly concerned with changes to modernise the Act, only legislative options are considered. In relation to Issue 3, there are both regulatory and non-regulatory measures that could help address harmful phoenixing. These were discussed in the previous Cabinet paper and RIS, and the overall package

2vglsunhpt 2025-04-28 10:14:20

includes both types of measure. Issue 3 in this paper is narrowly focussed on one aspect of the legislation that may be reducing the incentive for liquidators to seek to recover money for creditors in certain situations and so only legislative options are considered.

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
Commerce, Consumer and Business Policy

20 February 2025

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.

2vglsunhpt 2025-04-28 10:14:20

Section 1: Diagnosing the policy problem

Modernising and simplifying the Companies Act and addressing harmful phoenixing

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. This RIS should be read in conjunction with RIS prepared for an earlier package of reforms that were agreed by Cabinet in August 2024 [CAB-24-MIN-0290 and ECO-24-MIN-0149].

2. The previous RIS analyses five specific issues relating to the objective of 'modernising, simplifying and digitising' the Companies Act. The objective of these reforms is to reduce compliance costs for companies. So, for example, a new process was considered for a company to reduce its share capital without the time and expense of going to court, and (to assist smaller companies in particular) the circumstances under which the unanimous assent of shareholders to certain actions could bypass the usual procedural requirements were extended.

3. The issues covered in this RIS are part of the same overall package and (with the exception of Issue 3) underpinned by the same policy intent of 'modernisation, simplification and digitisation' of the Act.

Addressing harmful phoenixing

4. Issue 3 sits alongside the measures in the earlier Cabinet paper to address harmful phoenixing of companies (understood as meaning the transfer of assets out of an insolvent company at undervalue to defeat the interests of creditors).

5. There are already provisions in the Companies Act that refer to phoenixing of companies. However, these focus on the issue of companies being wound up and new ones being incorporated with very similar names. The intent of these provisions is to address the harm that may be caused by misleading consumers or other businesses (including creditors) who may think they are still dealing with the old company.

6. There are provisions in the Act that already capture this activity to some extent:

   a. the duty of directors to act in good faith and in the best interests of the company (s131), and the associated offence for a serious breach of this duty (s138A)

   b. transactions at undervalue (s297) and transactions for inadequate or excessive consideration (s298).

7. However, anecdotally, phoenixing continues to occur and this raises the question of the adequacy of the current provisions.

2vglsunhpt 2025-04-28 10:14:20

What issues are addressed in this RIS?

8. The following specific issues have been identified for analysis in this RIS.

Issue	Subject	What is the issue?
1	*Certificates following resolution* **Rationale:** Simplification	The Act requires directors to certify certain matters following the passing of a resolution. For example, directors may have to certify that a certain action is in the best interests of the company and provide their reasons for it. For some actions, directors also have to certify that the company will be solvent after the action is undertaken. The original intent of these was to ensure that directors' minds were focussed on these issues when voting. They are unique to New Zealand company law. The question is whether they are an unnecessary double up given that the resolution must also be recorded. If so, this is arguably an unnecessary cost on companies.
2	*Adjusting 'large' company thresholds* **Rationale:** Modernisation	A company is defined as 'large' if, over the last two accounting periods, it has either (i) over $66 million in assets, or (ii) over $33 million in revenue. A company that is large must publish audited financial reports. The rationale for this is that some companies are of sufficient size that it is in the public interest for information about their financial situation to be made public, as its failure could have an impact on the economy. These thresholds must be adjusted at least very six years to reflect inflation and this done by Order in Council. Any more substantive adjustment can only happen by amendment to the primary legislation. A more efficient process would be for these to be adjusted by regulation. Recognising that this is a delegation of power from Parliament to the Executive, sufficient process and consultation requirements would be needed.

2vglsunhpt 2025-04-28 10:14:20

<table>
<tr><th>Issue</th><th>Subject</th><th>What is the issue?</th></tr>
<tr><td>3</td><td>Better outcomes for creditors when insolvent companies shift assets to a new company

Rationale: Addressing phoenixing</td><td>Companies sometimes seek to avoid the distribution of assets to creditors when in liquidation by shifting assets to a new company at undervalue. This is often referred to as phoenixing but is a different form of phoenixing than the one currently defined in the Act which relates to companies folding and then starting up again with a similar name.) Anecdotally we understand that this issue is particularly acute at the lower end of the market when the amounts at issue are not worth pursuing through the courts.

Current legislative provisions designed to aid recovery of money for creditors in this situation include:
Section 297: recovery of money relating to transactions with third parties at undervalue
Section 298: recovery of money relating to transactions with related parties for inadequate or excessive consideration
Although we don’t have any reliable data on the extent of this kind of phoenixing, there is anecdotal evidence that the current legislative requirements do not provide sufficient incentive for liquidators to seek to reclaim money when these assets are sold to related parties at undervalue.</td></tr>
<tr><td>4</td><td>Selective share redemption

Rationale: Simplification</td><td>Redeemable shares are shares that a company issues but has the right to buy back at a later date. 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’.

Similar to a share buy-back, the Act requires the production of a disclosure document for a selective share redemption. However, this is an unnecessary procedural step as the terms of the redemption are agreed at the time of issue. This has been noted as an error by one of the original drafters of the Law Commission report.</td></tr>
<tr><td>5</td><td>Casting vote at a creditors’ meeting

Rationale: Simplification</td><td>Voluntary administration is a process under which an administrator seeks options to rescue a company that is otherwise facing liquidation. This is achieved by putting a resolution to creditors. For the resolution to pass, it must be supported by a majority of creditors in number and by creditors representing at least 75 per cent in value of those voting. The Act provides for the administrator to exercise a casting vote but does not specify the circumstances in which this power may be used.

The Courts have determined that the casting vote is only to break a deadlock in number and the resolution fails if the 75% by value threshold is not reached. This means that a single creditor with over 25% by value can block a resolution. Australia - which only has a 50% by value threshold takes a different approach defining a deadlock as when the majority by number and majority by value vote differently.</td></tr>
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2vglsunhpt 2025-04-28 10:14:20

What objectives are sought in relation to the policy problem?

9. 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.

10. 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.

11. The main objective for the proposal to address harmful phoenixing is to reduce the harm caused to creditors by reducing the incidence of harmful phoenixing.

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

    a. deterring directors from engaging in phoenix activity and

    b. making it easier for liquidators to pursue claims.

2vglsunhpt 2025-04-28 10:14:20

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

Modernising and simplifying the Companies Act and addressing harmful phoenixing

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

13. Consistent with the previous analysis of proposals to modernise and simplify the Act, the following criteria will be used in our assessment of options relating to all issues except Issue 3:

    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?

14. 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.

15. The following criteria will be use in the assessment of options relating to the proposal to help address harmful phoenixing:

    a. Effectiveness– are the options effective at meeting the stated objective of reducing the incidence of harmful phoenixing?

    b. Increase recoveries for creditors – to what extent will the options increase recoveries for creditors in liquidations?

    c. Efficiency – how efficient will the changes be and what will their effect on costs in the liquidation process and associated legal proceedings be?

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

What scope will options be considered within?

16. 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.

17. As discussed in the earlier Cabinet paper, addressing harmful phoenixing involves a mix of both regulatory and non-regulatory measures. It was noted that there are already some measures in the Act, but as phoenixing is still occurring these appear to be inadequate. Two specific additional measures that would help achieve the objective were identified at the time: (i) the introduction of unique identifier for directors, and (ii) improved information sharing between agencies (discussed in the paper) are both expected to help achieve this objective.

2vglsunhpt 2025-04-28 10:14:20

18. The proposal considered in this RIS (Issue 3) was considered at the time but needed further consideration and so was not included in that package. As this issue is narrowly focussed on one aspect of the legislation that may be reducing the incentive for liquidators to seek to recover money for creditors in certain situations, only legislative options are considered.

Consultation

19. The options to amend the Act have not been consulted on publicly, but targeted consultation has taken place with two small stakeholder groups in relation to these proposals.

20. The first is the same group that we consulted with on the earlier proposals. This group consists 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.

21. The second group is made up of insolvency practitioners that the Minister has been engaging with on other matters relating to Companies Act reform. We tested the proposals specifically relating to insolvency with this group (proposals 3 and 5 in the table above).

22. Consultation with these groups took the form of preparing two brief consultation documents (one for each group) with questions for stakeholders to provide feedback on,

2vglsunhpt 2025-04-28 10:14:20

Issue 1: Certificates following resolutions

Problem

23. Whenever the board of a company resolves to do something that may impact shareholders, the directors that voted in favour of the resolution have to then sign a certificate setting out their grounds for believing the matters they have resolved on. For example, this may be setting out why they consider the action to be fair and reasonable to shareholders or in the best interests of the company. In some instances, for example when the action involves a distribution to shareholders, they will also have to sign a certificate stating that they believe the company will be solvent after the action is undertaken.

24. The question is whether, given that the directors are already agreeing to the resolution and must record this, this act of certification is an unnecessary double up, thus imposing unnecessary compliance costs on the company.

25. This certification process is a novel feature of companies law in New Zealand, not found in other jurisdictions. The original rationale for certificates, as set out by the Law Commission[1], was to help evidence the reason for director decision making. The certificate requirements explicitly require directors to certify that they have turned their minds to certain matters they have also resolved upon.

26. The approach to this two-step process (resolution then certification) varies in the Act and we have been unable to identify the reason for why this is so. Some provisions of the Act already provide for reasons for a decision to be included in the record of the resolutions – see for example s 60(4), 61(2), 63(2), 78(2), 84(4), 85(1) and (1A). These still require certification afterwards by the directors who voted in favour.

27. Looking at an example in more detail, section 60, which provides for a company to make an offer to buy back shares, requires the board to resolve that the acquisition is in the best interests of the company and that the consideration is fair and reasonable to the company *and* set out the reasons for these conclusions in full in the resolution. The directors who vote in favour must then sign a certificate as to the matters set out in the resolution.

28. In contrast, when determining the consideration for a share issue under section 47, the board only has to resolve that the consideration is fair and reasonable to the company and existing shareholders. The directors who vote in favour must then sign a certificate which sets out further detail than is required in the resolution.

29. Actions undertaken under the unanimous assent provisions of section 107, which allow procedural requirements to be skipped if all shareholders agree, in general do not require certification, though, notably, directors must still sign a solvency certificate if the matter relates to a distribution.

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[1] *Company Law Reform and Restatement* Law Commission Report No 9 [NZLC-R9.pdf]

2vglsunhpt 2025-04-28 10:14:20

30. These considerations raise the question of whether the two processes of resolution and certificate could be combined into one without any loss of shareholder protection If the resolution captured all the matters that a certificate would be required to state it would appear that the certification would then be a duplicate and costly step.

Identification and analysis of options

31. We consulted with our targeted stakeholder group on three options:
    a. **Option 1:** Status quo
    b. **Option 2:** Retain solvency certificates but incorporate all other certificate requirements into the resolutions signed by the directors and require the resolutions to record the reasons for the decision
    c. **Option 3:** Incorporate all certificate requirements into the resolution signed by the directors and require the resolutions to record the reasons for the directors' decision, including as to satisfaction of the solvency test.

32. As noted above, the status quo includes current s107 which reduces formalities for smaller companies through the process of unanimous assent.

33. Options 2 and 3 reflect different degrees of reducing the formalities of certificates and depend on whether solvency certificates are considered to have more privileged status or are equivalent and can be rolled in to the resolutions along with any other requirements.

34. Following internal discussions on this issue with MBIE legal that some companies may prefer to retain the certification process, we added a fourth option, which is variation on Option 2:
    a. **Option 2a:** As for Option 2 above, but for certificates other than solvency certificates, giving companies the choice between incorporating the information in the resolution or providing a separate certificate.

What we heard from stakeholders

35. Most stakeholders agreed with the general idea that, if the resolution were to capture all the matters that would otherwise have to be included in the certificate, then a certificate is not needed. They considered that the resolution, appropriately worded, would be sufficient for directors to 'turn their mind' to the issues. Having an extra step adds little value, and potentially exposes directors to a 'procedural foot fault' - as one submitter put it- if they miss this step. However, stakeholders were evenly split on whether solvency certificates should have special status because of their significance for creditor protection and be retained.

Analysis

36. There is not a significant difference among all the options as even if certificates are removed, the content will still need to be folded into the resolution. Each option for reform will have a marginal efficiency gain as it removes some/all of the need to get directors to sign a separate document after the resolution is passed.

37. We consider that, because of the fundamental importance of solvency, that solvency certificates should be retained. And while there is little to choose between Options 2

2vglsunhpt 2025-04-28 10:14:20

and 2a, we prefer Option 2 on balance as we have some concerns that Option 2a may create some confusion as to what is required.

Table 1: Options analysis for Issue 1

	Option 1 – *Status quo*	Option 2 – retain solvency certificates	Option 2a – retain solvency certificates and give companies choice	Option 3 – remove all certificates
Certainty	0	0 As clear as status quo	- Potential to create legislative confusion for companies	0 As clear as status quo
Efficiency	0 Potential inefficiency from requiring both resolutions and certificates	+ Marginal efficiency gains	++ Marginal efficiency gains (slightly better than Option 2 as companies can choose)	+ Marginal efficiency gains
Protections	0	0 No significant loss of protection	0 No significant loss of protection	- Solvency certificates provide an important protection for creditors
Overall assessment	0	+ This is the preferred option as it reduces compliance and provides clarity	0 Concerns that this option may create confusion	0 Efficiency gains offset by loss of protection of solvency certificates

Preferred option

38. Our preferred option is Option 2: retain solvency certificates but incorporate all other certificate requirements into the resolutions signed by the directors and require the resolutions to record the reasons for the decision

2vglsunhpt 2025-04-28 10:14:20

Issue 2: Adjusting 'large' company thresholds

Problem

39. Section 45 of the Financial Reporting Act 2013 defines thresholds for determining if a company is 'large' for the purposes of other statutes, including the Act. Sections 48 and 49 provides for occasional adjustments to the threshold and other dollar amounts set out in the Act and other statutes to take account of inflation. Currently the "large" thresholds are set at either $66 million in assets or $33 million in total revenue at the balance date of the preceding two accounting periods. The figures are currently set at $22 million and $11 million for "large" overseas companies.

40. If a company it defined as large it must:
    a. complete financial statements within 5 months of their balance date
    b. have financial statements audited unless 95% of shareholders vote to opt out
    c. prepare an annual report.

41. The rationale for imposing these requirements on non-publicly listed companies (listed companies have separate reporting obligations) is that there comes a point where the size of a company is such that it may have an impact on the wider economy or a regional economy if, say, the company is a significant employer in an area. For these companies, it is considered that some degree of transparency of their financial situation is important public information. This is to be balanced by not seeking to impose unnecessary compliance costs on private companies.

42. The rationale for the different thresholds for overseas companies is that there is less information about them available to people in New Zealand because they are likely to have less of a presence here than a domestic company. It is considered that greater transparency is required in relation to these companies, particularly in relation to the amount of tax they are paying.

43. Currently section 48 of the Financial Reporting Act 2013 provides that the "large" thresholds must be reviewed by the Minister of Commerce and Consumer Affairs at least every 6 years and can be adjusted by secondary legislation to take inflation into account. Any more substantive review of the thresholds would require a legislative change.

44. Opportunities for legislative change are rare, and, fitting with the overall rationale of modernising and simplifying the Act, it is proposed that a process for review of the thresholds (other than to adjust for CPI) be placed into regulations.

Identification and analysis of options

45. There are only two options here:
    a. **Option 1:** Status quo
    b. **Option 2:** Provide that the thresholds defining a large company can be adjusted through regulations. The current indexing process would be retained for inflation.

46. The advantages of Option 2 are clear. Amending matters through regulation is a significantly more efficient process than amending primary legislation. It would permit the thresholds to be changed in the absence of an opportunity for change to the primary legislation.

2vglsunhpt 2025-04-28 10:14:20

47. This would put the Act in line with comparative legislation. Section 543(1)(b) of the Financial Markets Conduct Act 2013 (FMC Act) provides a mechanism for certain dollar thresholds in the FMC Act to be increased by regulations. Similarly in Australia the large proprietary company definition in section 45A the Corporations Act 2001 (Cth) can be increased by regulation.

48. However, there are also downsides with this kind of process. It removes the decision-making power from Parliament and delegates it to the Executive. It would provide the government of the day with wide discretion, in a matter which is more subjective exercise than evidence based without any oversight by Parliament.

49. For example, a Minister could seek to raise the thresholds significantly leaving just a handful of private companies in the reporting regime, reducing transparency. Conversely, lowering the thresholds may unnecessarily draw too many companies into the reporting regime imposing unnecessary compliance costs.

What we heard from stakeholders

50. Stakeholders were generally supportive of the proposal, considering that the process would be more efficient. However no concerns were expressed about the current levels. Additional comments included that it would be important that there were clear criteria for the exercise of the power and public consultation would be required. The NZ Shareholders' Association commented that shareholder numbers should be considered in any future reviews of the threshold levels.

51. The External Reporting Board (**XRB**) raised concerns with this proposal. They preferred these thresholds to be adjusted through primary legislation. They also noted there may also be international trade issues as some agreements have provisions relating to the treatment of overseas companies. If it were to proceed, they stressed the need for appropriate statutory criteria to guide a recommendation for regulations. We also consulted the Ministry of Foreign Affairs and Trade (**MFAT**), Inland Revenue (**IRD**) and the Financial Markets Authority (**FMA**) who did not express any concerns with the proposal.

Analysis

52. We agree that appropriate statutory criteria and consultation requirements will need to be put into the primary legislation if Option 2 proceeds, to ensure that the Executive's power to amend the thresholds is not unfettered.

53. We recognise that there is a certain arbitrariness to these threshold settings, so designing statutory criteria that are objective is challenging. However, we consider that they would want to reference to the original policy rationale for the thresholds to make sure that is still met. Having levels that are comparable with other like-minded countries, especially Australia is also likely to be desirable so that the regulatory burden on companies is comparable. Finally, given the XRB's point about our trade agreements we would likely want to reference those commitments too.

54. We note that, on the issue of parliamentary oversight, it is likely that, if Option 2 proceeds, this policy will be considered by the Regulations Review Committee (**RRC**).

2vglsunhpt 2025-04-28 10:14:20

Parliament will have the opportunity to have its say, at least in the design of these provisions.

Table 2: Options analysis for Issue 2

	Option 1 – *Status quo*	Option 2 – provide for process in regulations
Certainty	0 There is no difference in certainty between the two options	0 There is no difference in certainty between the two options
Efficiency	0 Thresholds can only be changed by amending primary legislation	+ + Changing the thresholds through regulation is a more efficient process as it does not take up parliamentary time
Protections	0 Parliamentary process provides great oversight	- Without the oversight of Parliament (other than RRC) there are slightly less protections
Overall assessment	0	+ Option 2 is a marginal improvement over the status quo

Preferred option

55. Our preferred option is Option 2: provide that the regulations can be made adjusting the thresholds that define a 'large' company, subject to the Minister being satisfied that certain statutory criteria are met and appropriate consultation undertaken.

2vglsunhpt 2025-04-28 10:14:20

Issue 3: Better outcomes for creditors when insolvent companies shift assets to a new company

Problem

56. These proposals relate to two specific provisions in the Act:
    a. Section 297 – this provides that a liquidator can seek to recover money in relation to transactions at undervalue (that is transactions for less than the market value of the asset) made with a third party
    b. Section 298 – this provides that a liquidator can seek to recover money in relation to transactions for inadequate or excessive consideration (that is transactions for less or more than the value of the asset) with a related party (either a person or company related to the company making the transaction).

57. In the period leading up to a liquidator being appointed, there is an increasing risk of the company transferring assets to a new/related company at undervalue to keep those assets with the result that less money is available to creditors in the liquidation process.[2]

58. This is potentially more of an issue at the smaller end of the market where it might not be financially worthwhile for creditors to pursue claims again the company due to the costs of taking action (compared to the amount owed).

59. To commence an action to recover money under either of these provisions, the liquidator has to go to court and prove that a transaction is one to which s297 or s298 applies.

60. By contrast, the liquidator can seek to set aside a transaction or charge (ss292/293) more simply. Actions under sections 292 and 293 are commenced by the liquidator filing a notice with the Court under s294. If the person receiving the notice does not object, with reasons and evidence to support the objection, within 20 working days, the transaction or charge is automatically set aside. If the person objects, the liquidator can still apply to the Court to set it aside.

61. Furthermore, in the six months prior to the liquidator being appointed it is presumed that the transaction or charge is voidable and the onus of proof rests on the person to demonstrate otherwise.

62. As the processes for sections 297 and 298 are more costly for liquidators to pursue, compared to sections 292 and 293, they may be, in relative terms, disincentivised to seeking recovery under those sections. aligning those processes with those for sections 292 and 293 could increase the incentive on liquidators to seek to recover money under those sections, leaving more available for creditors.

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[2] Currently this period is set at two years for section 297 and three years for section 298. It is proposed elsewhere in this reform package that this will change to four years for both.

2vglsunhpt 2025-04-28 10:14:20

63. To address the concerns that it is at the lower end of the market that creditors are more likely to be harmed by the company selling off assets at undervalue, there could be a threshold (for example $250k) such that this reversal only applies under that threshold.

Identification and analysis of options

64. There are two elements to the aligning of the processes for these transactions:
    a. Providing that recoveries under sections 297/298 can initiated by way of a section 294 notice
    b. Reversing the onus of proof for transactions under sections 297/298 during a certain period prior to the liquidator being appointed.

65. Adding transactions at undervalue (s297) and transactions for inadequate or excessive consideration (s298) to the s294 notice process could enable a liquidator to initiate recovery by way of a notice rather than having to go to court. The notice requirements would have to set out salient information such as the amount they are seeking to recover, their reasons and evidence for thinking that there is money to recover, and the objection process. If the person objects, the liquidator could still apply to the Court to recover the money in the usual way.

66. Likewise, the onus of proof could be reversed during a specified period prior to the liquidator being appointed (say, 6 months). This would create a presumption that the transaction is one to which section 297 or section 298 applies, and it would sit with the person to prove the transaction was for fair value (as opposed to the liquidator having to prove the opposite). As the issue relates to companies selling on their assets to a new company, this would only apply to transactions with related parties.

67. This suggests three options:
    a. **Option 1:** Status quo
    b. **Option 2:** Add sections 297/298 to the section 294 notice process
    c. **Option 3:** Reverse the onus of proof in sections 297/298 for transactions with related parties in the six months prior to the liquidator being appointed.

68. Options 2 and 3 are not mutually exclusive and could both be implemented.

69. The merits of these proposals are that they:
    a. will align the processes with those for sections 292/293
    b. focus on a period during which companies are more likely to be trying to remove assets from any upcoming liquidation process
    c. may make more money available for creditors

70. However, there are potential complications, including that:
    a. transactions under sections 297/298 are not voidable and instead involve quantitative assessments which can be disputed
    b. the 20-day time period might not be sufficient to challenge a quantitative assessment of value
    c. it might it deter director from taking legitimate actions to try and save the company, potentially making liquidation more likely.

What we heard from stakeholders

71. The stakeholder group were generally cautious about these proposals. They noted that these recoveries involve quantitative assessment of value (which is more subjective),

2vglsunhpt 2025-04-28 10:14:20

whereas the voidable transactions provisions that these proposals are modelled on are more like ‘yes/no’ decisions.

72. In relation to the proposal to reverse the onus of proof, they considered it appropriate that the onus was on the liquidator to demonstrate that an asset had been sold at undervalue. They also noted the potential chilling effect on directors trying to make reasonable decisions to avoid liquidation.

73. In contrast the group of insolvency practitioners were more receptive to these proposals, which were supported by five and out of seven respondees. They noted that it will be helpful for liquidators to have the processes aligned with those for voidable transactions, did not consider that the quantitative nature of the assessment was a barrier, and considered it may help to resolve matters before going to court. Nor did they think the 20-day limit was an issue as this period is just for an objection to be filed, not to provide proof to the contrary. They did not consider a threshold was necessary and noted that all such matters go to the High Court anyway under the Act, with some suggesting that could be changed.

74. One of the submitters who did not support the proposals was concerned that liquidators already use these provisions to recover their own costs rather than increase the pool for creditors and this will just make that easier. Another was not convinced that reversing the onus of proof would be a substantive change as both sides would have to present evidence in court anyway.

Analysis

Option 2

75. Adding sections 297/298 to the notice provisions in section 294 would mean that an action to recover money under either of these sections would be commenced by issuing a notice to the relevant parties. They would then have 20 working days to object to the notice. If they don’t object, the liquidator can then seek to recover that money.

76. This may incentivise liquidators to seek to recover money for creditors and encourage engagement before a matter goes to court. There is some risk that an unscrupulous liquidator may send a multitude of notices covering every conceivable transaction, relying on some businesses not fully understanding the objection process and returning the money even if the transaction was legitimate. However, this risk already exists in relation to voidable transactions, and as liquidators need to maintain a statutory license and are publicly registered, we consider that this risk is fairly low. We agree with stakeholders that a threshold is unnecessary.

Option 3

77. It is not clear that there is anything to be gained from reversing the onus of proof in this instance and, indeed, it may add legal complexity to seeking recoveries under these sections. The comparison with the presumption in sections 292/293 is problematic as in the case of sections 292/293 the presumption is purely that the company is insolvent in that brief period before the liquidator is appointed. It is not about the effect of the transaction itself.

2vglsunhpt 2025-04-28 10:14:20

78. We are also concerned that this is a time when directors may be doing everything possible to avoid liquidation and may take some decisions that are unsuccessful. Reversing the onus of proof may have a chilling effect on directors during this period which could, potentially make liquidation more likely.

79. Finally, even if the presumption were implemented, it is not clear that much would be gained as both sides would need to present their evidence in court anyway.

Table 3: Options analysis for Issue 3

	Option 1 – *Status quo*	**Option 2 – initiate recovery by notice**	**Option 3 – reverse onus of proof**
Effectiveness	0 There are some administrative and financial barriers to pursuing all claims in liquidations	+ This may increase the number of claims taken	- Could have chilling effect on directors undertaking legitimate actions
Increase recoveries for creditors after the fact	0 Anecdotally pursuing claims is slowed or hindered by current settings	+ Could incentivise discussions prior to going to court	0 Not clear that this would lead to increased recoveries
Efficiency	0 There are some administrative and financial barriers to pursuing all claims in liquidations	0 Could incentivise discussions prior to going to court, though, if many objections are filed, may add time and cost	0 Both sides will still have to provide proof in court
Certainty	0 The law is relatively clear	- There is potential for this to add complexity	- There is potential for this to add complexity
Overall assessment	0	+ On balance this option is preferred, though not without its risks	- -

Preferred option

80. Our preferred option is Option 2: providing that recoveries under sections 297/298 can be commenced by issuing a notice under section 294.

2vglsunhpt 2025-04-28 10:14:20

Issue 4: Selective share redemption

Problem

81. Redeemable shares are shares that a company issues but has the right to buy back at a later date. 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’.

82. Section 69 treats a selective share redemption in a similar manner to a company acquiring its own shares through a share buy back. This means that, for a selective share redemption, the board must (under sections 71 and 72) send a disclosure document to every shareholder setting out the nature and terms of the redemption and any further explanation required for those shareholders to understand the nature and implication of the redemption.

83. However, in contrast to a share buyback (which involves an offer and acceptance process), a redemption of shares is a contractual entitlement that the company and the shareholder agrees to at the time of the issue of a redeemable share. In that context, the requirement for disclosure document to be first prepared and distributed for a selective share redemption under sections 71 and 72 of the Act does not make sense.

84. David Goddard KC, who drafted the share redemption provisions in the Law Commission’s draft Bill (which were then carried forward into the Act in a more fulsome form), has described the treatment of redemptions of shares at the option of the company as if they were repurchases by the company as an error in the Commission's work which was not picked up[3].

Identification and analysis of options

85. There were two main options here:
    a. **Option 1:** Status quo
    b. **Option 2:** Remove the requirement for a disclosure document in relation to the selective redemption of shares.

What we heard from stakeholders

86. Stakeholders were generally supportive of this change, although some cautioned that it depended on exactly what was agreed and disclosed at the time the shares were issued.

Analysis

87. Stakeholders concerns about what was agreed at the time the shares were issued are not warranted. In the Act All matters pertaining to the basis for exercise of the option to

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3 *Company Law Reform - Lessons from the New Zealand Experience* (1998) 16 Company and Securities Law Journal 238 at 246.

2vglsunhpt 2025-04-28 10:14:20

redeem shares are agreed in the terms of issue at the time the redeemable shares are issued. There is no need for a disclosure document for a selective share redemption.

88. Our view is that Option 2 is simply correcting a lacuna in the law.

Table 5: Options analysis for Issue 5

	Option 1 – *Status quo*	**Option 2 – remove requirement for disclosure document**
Certainty	0 The law is equally clear under both options	0 The law is equally clear under both options
Efficiency	0 Requirement to produce disclosure document even though terms and conditions of redemption are agreed on issue	+ + Disclosure document not needed as terms and conditions of redemption are agreed on issue
Protections	0 Equal protections under both options	0 Equal protections under both options
Overall assessment	0	+ + This option corrects what was a mistake in the original drafting

Preferred option

89. Our preferred option is Option 2: removing the requirement for a disclosure document for a selective redemption of shares.

2vglsunhpt 2025-04-28 10:14:20

Issue 5: Casting vote at a creditors' meeting

Problem

90. Voluntary administration (**VA**) is a process under which an administrator seeks options to rescue a company that is otherwise facing liquidation. This is usually achieved through preparing a Deed of Company Arrangement (**DOCA** – usually a form of creditor compromise) and presenting this to creditors to vote on.

91. For a DOCA to pass, it must be supported by a majority of creditors in number representing at least 75 per cent in value of those voting (section 239AK). The Act provides for the administrator to exercise a casting vote but does not specify the circumstances in which this power may be used.

92. The Australian regime by contrast:
    a. has a single 50% threshold applying to both number and value, and
    b. provides explicitly that the casting vote can be used to resolve situations where the majority in number reach a different conclusion to the majority in value.

93. The Courts have interpreted the casting vote only to apply when there is an exact deadlock in relation to the *number* of creditors voting. [4] If the second condition, the supermajority relating to *value*, is not achieved, the resolution fails. The Courts rejected an alternative interpretation that a deadlock occurs when the majority in number vote differently to the supermajority in value.

94. That finding effectively makes the casting vote redundant in New Zealand. It also gives a creditor holding more than 25% in value (often IRD) effectively a veto power over a resolution, with no opportunity for the administrator to override that vote in favour of a number of smaller creditors.

95. The prospect of deadlock may also disincentivise creditors and shareholders from investing time in the process.

Identification and analysis of options

96. We originally considered that there were two main options here:
    a. **Option 1:** Status quo
    b. **Option 2:** Permit the administrator to exercise the casting vote when the two voting blocs (by value and by number) are in opposition.

What we heard from stakeholders

97. The group of insolvency practitioners were all supportive of this change. They argued that permitting one creditor to have an effective veto on an arrangement potentially went against the rehabilitative principles of the Act. They noted that this power would not be unchecked as the courts have broad powers in relation to VA, and there is no presumption that the administrator would vote one way and not another. Instead, they would have the flexibility to consider the interests of creditors as a whole and the objectives of the VA process. Some argued that we should fully align with Australia and

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4 *Grant and Khov v Commissioner of Inland Revenue* [2011] NZCA 390

2vglsunhpt 2025-04-28 10:14:20

lower the 'by value' threshold to a simple majority too, though others cautioned against this as the 75 per cent threshold appears in other, related provisions and is appropriate when creditors' property rights are at stake.

We consulted with IRD and they strongly oppose this change. They argue that the Commissioner's decision-making in relation to a resolution is guided by the duty set out in s6A of the Tax Administration Act and this refers to collecting the highest net revenue over time. They say that this does not necessarily mean that they would vote against a rescue package. They also note that the proposal could impact Crown revenue, though they did not provide an estimate of this impact. This is because an administrator's casting vote could be to progress the DOCA even when IRD considers that liquidation will return more money to the Crown.

98. IRD also set the issue in the context of wider issue of tax secrecy and their preferential status as a creditor. These issues were considered by the Insolvency Working Group (IWG). It is acknowledged these can lead to a situation where other creditors continue to trade with a company even while it is accruing tax debt, and then when IRD commences liquidation proceedings those same creditors lose out to IRD because of its preferential status. The Government of the time did not act on the IWG's recommendation to limit IRD's preferential status to six months and instead directed MBIE, IRD (and Customs) to work together on the tax (and duty) secrecy issue.

99. As a result of this feedback, a third option has been considered:
    a. **Option 3:** Only permit the administrator to exercise the casting vote when the supermajority by value is met, but the majority by number is not. We note that in the UK, for example, only a supermajority by value is required. No account is taken of the number of creditors.

Analysis

100. Under the status quo, the main issue is creditors' resolutions ending in deadlock and, as a result, the company ending up in liquidation. This arguably defeats the intent of the VA process. The court's narrow interpretation of the casting vote does nothing to address this.

101. Option 2 would address those issue with the status quo, but we do not think that it can easily be separated out from the wider issues of IRD's role in the liquidation framework.

102. The situation represented by Option 3 will be very uncommon. It represents a situation in which creditors holding 75% of the debt by value vote in favour of a resolution, but over 50% of the creditors by number vote against it. The only recent case of which we are aware in which this occurred was Ruapehu Alpine Lifts when the large number of life pass holders voted against a rescue package supported by its main creditors. As a result the resolution did not pass and the company went into liquidation leading to a worse outcome for all. If Option 3 were in place, the rescue package could have proceeded.

103. Option 3 is therefore only a marginal improvement on the status quo. There will be no impact on Crown revenue in this situation as it does impact IRD's status as a creditor.

2vglsunhpt 2025-04-28 10:14:20

Table 6: Options analysis for Issue 6

	Option 1 – *Status quo*	Option 2 – casting vote when blocks vote differently	Option 3 – casting vote when only 75% threshold met
Certainty	0 The law is equally clear under all options	0 The law is equally clear under all options	0 The law is equally clear under all options
Efficiency	0 Casting vote only when deadlock in majority by number	+ + Could incentivise greater engagement with VA process	+ Marginal increase in incentive to engage, though this situation is likely to be rare
Protections	0 Both supermajority by value and majority by number must be met	- - Significant concerns expressed by IRD, could lead to loss of Crown revenue	0 Situation likely to be rare so no significant difference to status quo
Overall assessment	0	0	+ Marginal increase in efficiency compared to the status quo

Preferred option

104. Our preferred option is Option 3: permit the administrator to exercise the casting vote in the situation that the supermajority by value is met, but the majority by number isn't.

2vglsunhpt 2025-04-28 10:14:20

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

105. 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 requirement for boards to separately certify matters following a resolution (Issue 1) may offer marginal compliance reductions for those companies. As stakeholders noted, it will remove an unnecessary procedural step that adds little value and save time as a result.

    b. Providing that recoveries for money under sections 297/298 can be initiated by way of a s294 notice (Issue 3) may offer marginal cost savings to liquidators and potentially result in increased money being available to creditors. Some of the insolvency experts we spoke to saw merit in aligning the process for recovery with other similar processes in the Act. They noted that in most cases there are limited funds available to liquidators and so anything that makes a process more cost-effective is desirable and may increase the funds available for taking action.

    c. Removing the requirement to produce a disclosure document for a selective share redemption (Issue 4) may offer marginal compliance reductions for those companies. As noted, this simply removes an unnecessary procedural step.

2vglsunhpt 2025-04-28 10:14:20

Section 3: Delivering the options

How will the new arrangements be implemented?

106. We will need to inform stakeholders about the changes so that they can make the appropriate adjustments to their processes. To do this, we will make use of the various channels MBIE has at its disposal including:
    a. putting information on the MBIE and Companies Office websites
    b. direct communication with stakeholders through, eg, Companies Office and Business.govt.nz newsletters (the latter of which specifically targets small businesses), and
    c. direct communication with licensed insolvency practitioners through their regulator, Chartered Accountants Australia and New Zealand (CAANZ).

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

107. 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, we regularly engage with key stakeholders in the corporate governance system for a range of reasons (including through the Small Business and Manufacturing portfolio) and would receive feedback through these channels if any issues with the reforms arose.

    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.

2vglsunhpt 2025-04-28 10:14:20