

Companies (Minority Buy-out Rights) Amendment Bill

Government Bill

Explanatory note

General policy statement

This Bill amends the Companies Act 1993 (the **Act**) to clarify the minority buy-out provisions for dissenting shareholders in times of a special resolution. The key objective of the Bill is to improve the practical operations of the minority buy-out regime to ensure that it functions efficiently, cost effectively, and appropriately.

The intention of the minority buy-out provisions is to provide an exit regime for dissenting shareholders of a company who have unsuccessfully opposed a fundamental change to the structure or operation of the company. The shareholders are entitled to have the shares that they acquired before the change was decided on purchased by the company at a fair price.

In 2001 the Law Commission, in response to the July 2000 decision of Doogue J in *Natural Gas Corporation Holdings Ltd v Infratil 1998 Ltd* [2000] 3 NZLR 727, commenced a review designed to assess the effectiveness of the minority buy-out provisions. Its subsequent report number 74 *Minority Buy-outs* (released in August 2001) highlighted problems with the existing legislation and concluded that the Companies Act 1993 was defective in its failure to set out a workable method of valuing a minority shareholding when the minority shareholders had elected to have their shares purchased by the company under section 111(2) of the Act.

The current minority buy-out provisions are set out in sections 110 to 115 of the Act. These provisions provide for the company, if it

agrees to the purchase of the shares, to nominate a fair and reasonable price for the shares to be acquired. This current test does not give sufficient guidance or certainty to companies as to how the price should be ascertained. Nor do the current provisions give any indication as to the date on which the price is to be ascertained.

To simplify and clarify the regime, the minority buy-out provisions should have the following key features:

- an obligation on the company of a minority buy-out to send to each shareholder of the company a statement setting out the rights of shareholders when a special resolution triggers the minority buy-out provisions in the Act:
- that the share offer for a minority buy-out be accompanied by a statement outlining for the shareholder how a fair value for the shares was determined:
- the valuation of the shares in a minority buy-out should be calculated as at the value on the date the company gives notice to the shareholder agreeing to buy the shares:
- the valuation should be adjusted to leave out of account any change in the valuation attributable to the event that was decided by special resolution (also known as the triggering event):
- in determining the valuation of shares, a calculation of the class of shares in which the shares in question form a part should be done, followed by an allocation on a pro rated basis among all shareholders:
- in determining the valuation of the shares, the adjustment of the valuation to leave out of account the effect of the triggering event should not apply when the dissenting shareholder is being eliminated as a shareholder against the shareholder's will:
- if the shareholder and company cannot come to an agreement on the value of the shares, the price may be determined by arbitration:
- the legal title of the shares and voting rights attaching to them should remain with the shareholder until the price is ascertained and paid in full, but from the time of the provisional payment any purported disposition of the shares of the shareholder, except in favour of the company, will be of no effect.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 provides that the Act comes into force on the day after the date on which it receives the Royal assent.

Part 1 Amendments to Companies Act 1993

Clause 3 provides that *Part 1* amends the Companies Act 1993.

Clauses 4, 5, and 6 make minor consequential amendments to sections 58, 66(1), and 67A respectively.

Clause 7 repeals section 112 and replaces it with *new sections 112 to 112C*.

New section 112 sets out how shares that are to be purchased by a company in a minority buy-out situation must be valued. It also specifies that a shareholder may object to the price offered for the shareholder's shares, and when the company must purchase the shares if no objection is received.

New section 112A provides that if a company receives an objection to the price offered for shares under *new section 112*, the company must refer 2 issues to arbitration for determination and pay a provisional price for the shares in the meantime.

New section 112A also specifies the orders an arbitral tribunal must make once it has valued the shares, and provides it with discretion in relation to the award of damages for loss.

New section 112B provides that interest is payable on any sum that must be paid under *new section 112 or 112A* and that is outstanding, and specifies how that interest is to be calculated.

New section 112C specifies when the legal title to, and the beneficial ownership of, shares purchased by a company in accordance with section 111(2)(a) pass to the company.

Clause 8 makes a minor consequential amendment to section 113(1).

Clause 9 adds a *new paragraph (c)* to clause 2(2) of Schedule 1 that requires shareholders to be given notice of their minority buy-out rights under section 110 when they are asked to exercise their powers under section 106(1)(a) or (b) in order to amend the company's constitution or approve a major transaction.

Part 2
**Transitional provision and consequential
amendments to other enactments**

Clause 10 specifies that the amendments in *Part 1* do not apply to any special resolution passed before this Act comes into force.

Clause 11 makes a minor consequential amendment to section 29(f) of the Co-operative Companies Act 1996.

Clause 12 makes a minor consequential amendment to regulation 33(1)(b)(ii) of the Overseas Investment Regulations 2005.

Hon Lianne Dalziel

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Companies (Minority Buy-out Rights) Amendment Act **2007**.
- 2 Commencement**
This Act comes into force on the day after the date on which it receives the Royal assent. 5
- Part 1**
Amendments to Companies Act 1993
- 3 Principal Act amended**
This Part amends the Companies Act 1993. 10
- 4 Company may acquire its own shares**
Section 58 is amended by omitting “to 112 of this Act” in each place where it appears and substituting in each case “to **112C**”.
- 5 Cancellation of shares repurchased** 15
Section 66(1) is amended by omitting “section 112 of this Act” and substituting “**sections 112 to 112C**”.
- 6 Company may hold its own shares**
Section 67A is amended by omitting “section 112 of this Act” in each place where it appears and substituting in each case “**sections 112 to 112C**”. 20
- 7 New sections 112 to 112C substituted**
Section 112 is repealed and the following sections are substituted:
- “112 Valuation of shares to be purchased by company** 25
“(1) Within 5 working days of giving notice under section 111(2)(e) that the board agrees to the purchase of shares by the company, the board must give to the holder of those shares written notice of—
- “(a) the price it offers to pay for those shares; and 30
 “(b) how the matters in **subsection (2)(a) and (b)** were calculated.

- “(2) That price must be an honest estimate of the value (on the date that the board gave notice under section 111(2)(e)) of the shares held by the shareholder, calculated as follows:
- “(a) first, the value of the total shares in each class to which the shares belong must be calculated (the **class value**): 5
 - “(b) secondly, each class value must be adjusted to exclude any fluctuation (whether positive or negative) in the class value that has occurred (whether before or after the resolution was passed) that the board reasonably considers was due to, or in expectation of, the event proposed or authorised by the resolution (*see* **subsection (7)**): 10
 - “(c) thirdly, a portion of each adjusted class value must be allocated to the shareholder in proportion to the number of shares he, she, or it holds in the relevant class. 15
- “(3) However, if the resolution approved an amalgamation of the company under section 221, no adjustment of value may be made under **subsection (2)(b)** in respect of any shares (whether comprising part, or the whole, of a class of shares) that—
- “(a) will not be converted into shares of the amalgamated company; and 20
 - “(b) the board reasonably considers increased in value due to, or in expectation of, the amalgamation proposed or authorised by the resolution.
- “(4) The shareholder may object to the price offered by the board for the shares by giving written notice to the company no later than 10 working days after the date on which the board gave written notice to the shareholder under **subsection (1)**. 25
- “(5) If the company does not receive an objection to the price in accordance with **subsection (4)**, the company must purchase all the shares at the nominated price no later than 10 working days after—
- “(a) the date on which the board’s offer under **subsection (1)** is accepted; or 30
 - “(b) if the board has not received an acceptance, the date that is 10 working days after the date on which the board gave written notice to the shareholder under **subsection (1)**. 35

- “(6) The time periods in **subsection (5)** do not apply if there is a written agreement between the board and the shareholder that specifically sets a different date for purchase of the shares.
- “(7) In this section, **resolution** means the resolution referred to in section 110 or 118 that, due to it having been passed, entitles the shareholder to require the company to purchase the shareholder’s shares in accordance with section 111. 5
- “112A Share valuation referred to arbitration if shareholder objects to price**
- “(1) If a company receives an objection to the price offered for shares in accordance with **section 112(4)**, the company must— 10
- “(a) refer the following issues to arbitration for determination:
- “(i) the value of the shares, on the basis set out in **section 112(2) and (3)**; and 15
- “(ii) the remedies available to the holder of the shares or the company in respect of any share valuation that differs from that determined by the board under **section 112**; and
- “(b) within 5 working days of receiving the objection, pay to the shareholder a provisional price in respect of each share equal to the price offered by the board under **section 112(1)**. 20
- “(2) If the price determined for the shares—
- “(a) exceeds the provisional price paid, the arbitral tribunal must order the company to pay the balance owing to the shareholder: 25
- “(b) is less than the provisional price paid, the arbitral tribunal must order the shareholder to pay the excess to the company. 30
- “(3) Except in exceptional circumstances, an arbitral tribunal must award interest on any balance owing or excess to be paid under **subsection (2)**.
- “(4) If a balance is owing to the shareholder, an arbitral tribunal may award to the shareholder, in addition to or instead of an award of interest, damages for loss (whether foreseeable or not) attributable to the shortfall in the initial payment. 35
- “(5) Any sum that must be paid in accordance with this section must be paid no later than 10 days after the date of the arbitral

tribunal’s determination, unless the arbitral tribunal specifically orders otherwise.

- “(6) A reference to arbitration under this section is an arbitration agreement for the purposes of the Arbitration Act 1996.
- “(7) Clause 6 of Schedule 2 of the Arbitration Act 1996 may not be excluded from the arbitration agreement, and the term ‘costs and expenses of an arbitration’ in that clause includes, where a balance is owing to the shareholder,—
 - “(a) the reasonable legal costs of the shareholder on a solicitor-and-client basis; and
 - “(b) the reasonable costs of expert witnesses.

“112B Interest payable on outstanding payments

- “(1) Interest is payable on any sum that must be paid under **section 112 or 112A** that is outstanding after the date on which it falls due—
 - “(a) on a daily basis until the date of full payment; and
 - “(b) at the prescribed rate (within the meaning of section 87(3) of the Judicature Act 1908) on the date the outstanding payment is made.
- “(2) The sum on which interest is payable under **subsection (1)** includes any interest or damages for loss awarded under **section 112A**.

“112C Restrictions on, and timing of, transfer of shares

- “(1) The legal title to, and the beneficial ownership of, shares purchased by a company in accordance with section 111(2)(a) pass to the company,—
 - “(a) if the company does not receive an objection to the price offered for the shares in accordance with **section 112(4)**, when that price has been paid in full; or
 - “(b) if the company receives an objection to the price offered for the shares in accordance with **section 112(4)**,—
 - “(i) when the balance owing to the shareholder in accordance with **section 112A(2)(a)** has been paid in full; or
 - “(ii) if an arbitral tribunal agrees with the board’s valuation of the shares, on the date of the tribunal’s determination; or

- “(iii) if an order is made under **section 112A(2)(b)**, upon the making of that order.
- “(2) After a shareholder has given notice under section 111(1) requiring a company to purchase the shareholder’s shares, purported dispositions of the legal title to, or the beneficial ownership of, those shares (other than dispositions in favour of the company) have no effect.” 5
- 8 Purchase of shares by third party** 10
Section 113(1) is amended by omitting “Section 112 of this Act applies” and substituting “**Sections 112 to 112C** apply”.
- 9 Schedule 1 amended**
Clause 2(2) of Schedule 1 is amended by adding “; and” and also by adding the following paragraph:
“(c) in the case of special resolutions required by section 106(1)(a) or (b), the right of a shareholder under section 110.” 15

Part 2

Transitional provision and consequential amendments to other enactments 20

- 10 Application of amendments in Part 1**
The amendments in **Part 1** do not apply to any special resolution passed under section 106(1) of the Companies Act 1993 before this Act comes into force.
- 11 Amendment to Co-operative Companies Act 1996** 25
(1) This section amends the Co-operative Companies Act 1996.
(2) Section 29(f) is amended by omitting “112 and” and substituting “**112 to**”.
- 12 Amendment to Overseas Investment Regulations 2005** 30
(1) This section amends the Overseas Investment Regulations 2005.
(2) Regulation 33(1)(b)(ii) is amended by omitting “section 112” and substituting “**sections 112 to 112C**”.

