

## INTERPRETATION STATEMENT: IS 13/02

### INCOME TAX – WHETHER CERTAIN RIGHTS CONFERRED BY THE COMPANIES ACT 1993 COULD GIVE RISE TO A “SHAREHOLDER DECISION-MAKING RIGHT”

Legislative references are to the Income Tax Act 2007 (ITA 2007) and the Companies Act 1993 (CA 1993). Relevant legislative provisions are reproduced in the Appendix to this Interpretation Statement.

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#### Summary

1. This Interpretation Statement considers whether certain protective rights conferred by the CA 1993 could give rise to a “shareholder decision-making right” under s YA 1 of the ITA 2007.
2. Under s YC 2 of the ITA 2007, a person's “voting interest” in a company equals the percentage of shareholder decision-making rights carried by shares or options over shares held by the person. A “shareholder decision-making right” is a right carried by a share issued by a company (or an option over a share issued by a company) to vote or participate in any decision-making concerning:
  - dividends or distributions to be paid;
  - the constitution;
  - variations in capital; and
  - the appointment of directors.
3. The Commissioner considers that s 36(1) of the CA 1993 is the only provision in that Act that gives rise to any shareholder decision-making rights. Section 36(1) of the CA 1993 sets out the rights attached to shares. These are the rights to:
  - a vote in any resolution;
  - an equal share in dividends; and
  - an equal share in the surplus assets of the company.

4. Section 36(2) provides that these rights may be negated, altered or added to by the constitution or the terms of issue of the shares. The CA 1993 anticipates that some classes of shares may carry no voting rights. This Interpretation Statement is of particular relevance to those non-voting classes of shares. This is because provisions in the CA 1993 confer certain protective rights to all shareholders, irrespective of their voting rights or the company's constitution. The question is whether those types of rights could be a shareholder decision-making right.
5. Two provisions in the CA 1993 were identified as potentially giving rise to a shareholder decision-making right for tax purposes. Section 107 allows a company to undertake various actions without adhering to procedural requirements of the CA 1993 if all shareholders agree. Section 117 provides shareholders with the right to vote on an action taken by a company that affects the rights attached to their shares.
6. The Commissioner considers that ss 107 and 117 of the CA 1993 do not give rise to a shareholder decision-making right under s YA 1 of the ITA 2007. Any rights conferred by those sections are not included in the calculation of a person's "voting interest" in a company under s YC 2 of the ITA 2007.
7. This Interpretation Statement focuses on rights conferred by the CA 1993. However, protective rights of a similar nature to those in s 117 may also be provided in a company constitution, the terms of issue of a share, options over shares or in the NZX listing rules. The conclusions reached in this Interpretation Statement would apply equally to those similar rights.

#### ***Why is this issue relevant?***

8. Several private binding ruling applications identified this issue as being potentially relevant for shareholder continuity purposes. This Interpretation Statement is issued to provide certainty for all taxpayers.
9. The calculation of a person's voting interest in a company is relevant for applying the continuity provisions in the ITA 2007 (unless a market value circumstance exists). The continuity provisions generally require that a group of persons' combined voting interests in a company or companies exceeds certain minimum levels over a period. The continuity provisions govern a company's ability to carry forward losses, memorandum account credits or excess tax credits and to offset losses with other companies. If rights arising under ss 107 and 117 of the CA 1993 were voting interests, this might impact on a company's ability to satisfy shareholder continuity requirements. Problems could similarly arise for the rules concerning consolidation, controlled foreign companies and associated persons.

#### ***Summary of reasoning***

10. The definition of a "shareholder decision-making right" requires that the right is carried by a share or an option over a share issued by a company. The Commissioner considers that rights arising under ss 107 and 117 of the CA 1993 are carried by all shares issued by a company.
11. The definition further requires that the right is to "vote or participate in any decision-making" concerning four types of decisions. It is certainly arguable that rights arising under ss 107 and 117 of the CA 1993 could provide a shareholder with an ability to "participate" in any decision-making. However, the rights conferred by ss 107 and 117 are not substantive voting rights. They are rights of a contingent nature, and arise temporarily on certain actions being proposed by a company. The issue is whether the definition is to be interpreted in a broad way that includes these contingent "protective" rights or whether the definition should be limited to substantive rights.

12. The definitions of “voting interest” and “shareholder decision-making right” were enacted as a means of measuring a shareholder’s level of control over the company’s decisions and resources. A definition of “market value interest” applies in some situations where voting interests may not accurately reflect a person’s interests in a company.
13. The Commissioner considers that protective rights of a contingent and temporary nature were not intended to be included in the calculation of a person’s voting interest in a company. A broad interpretation including these types of rights in calculating a person’s voting interest in a company could lead to absurdity by making the calculations unworkable.
14. Therefore, the Commissioner considers that the preferred interpretation is that ss 107 and 117 of the CA 1993 do not give rise to a shareholder decision-making right. This conclusion equally applies to protective rights of a similar nature to those in s 117 that are in a company constitution, the terms of issue of shares, options over shares or the NZX listing rules.

## **Analysis**

15. This Interpretation Statement considers whether certain protective rights could affect the percentage of voting interests held by a shareholder of a company for the purposes of the ITA 2007. The issue is particularly relevant for a shareholder who holds non-voting shares or options over shares issued by a company. It might seem counter-intuitive that a shareholder holding non-voting shares or options could somehow be said to have a voting interest in the company. However, the question arises due to the broad definitions of “voting interest” and “shareholder decision-making right” in the ITA 2007. The issue is important because it could affect rules relating to shareholder continuity, associated persons, controlled foreign companies and consolidated groups.
16. This Interpretation Statement first sets out the definitions of “voting interest” and “shareholder decision-making right” in the ITA 2007. It then explains why rights arising under ss 107 and 117 of the CA 1993 could fall within those definitions for tax purposes. The statement then considers the purpose of the definitions and whether an interpretation can be reached that is consistent with this purpose.

## **What are “voting interests” and “shareholder decision-making rights”?**

17. A person’s voting interest in a company is referred to in various provisions in the ITA 2007. These provisions include rules relating to associated persons, shareholder continuity, controlled foreign companies and consolidation.
18. Section YA 1 of the ITA 2007 defines a voting interest as follows:
 

**voting interest –**

  - (a) means, for a person and a company and a time, the percentage voting interest that the person is treated as holding in the company at the time under sections YC 2 to YC 20 (which relate to the measurement of company ownership):

19. Section YC 2 of the ITA 2007 provides:

### **YC 2 Voting interests**

#### *Percentage of shareholder decision-making rights*

- (1) A person’s voting interest in a company equals the percentage of the total shareholder decision-making rights for the company carried by shares or options held by the person.

#### *When decision-making rights vary*

- (2) Despite subsection (1), if the percentage of shareholder decision-making rights for a company carried by shares or options held by any person differs as between the types of decision-making listed in the definition of shareholder decision-making right, the person’s voting interest in the company equals the average of those differing percentages.

20. A person's voting interest in a company equals the percentage of the total shareholder decision-making rights for the company that are carried by the shares or options the person holds. The scope of this Interpretation Statement is limited to considering the types of rights that might be a shareholder decision-making right.
21. Section YA 1 of the ITA 2007 defines a shareholder decision-making right as follows:
- shareholder decision-making right** means a right, carried by a share issued by a company or an option over a share issued by a company, to vote or participate in any decision-making concerning—
- (a) a dividend or other distribution to be paid or made by the company, whether on a liquidation of the company or otherwise, excluding decision-making undertaken by directors acting only in their capacity as directors; or
  - (b) the constitution of the company; or
  - (c) a variation in the capital of the company; or
  - (d) the appointment of a director of the company
22. The definition contains three requirements. The relevant right must:
- be "carried by" a share or an option over a share;
  - be a right to "vote or participate in any decision-making"; and
  - relate to one of the four listed types of decision-making (ie, a dividend or distribution to be paid, the company's constitution, a variation in capital, or the appointment of a director).

**What rights in the Companies Act 1993 could be a shareholder decision-making right?**

***Section 36(1) – rights and powers attaching to shares***

23. Section 36 of the CA 1993 provides:
- 36 Rights and powers attaching to shares**
- (1) Subject to subsection (2), a share in a company confers on the holder—
    - (a) the right to 1 vote on a poll at a meeting of the company on any resolution, including any resolution to—
      - (i) appoint or remove a director or auditor;
      - (ii) adopt a constitution;
      - (iii) alter the company's constitution, if it has one;
      - (iv) approve a major transaction;
      - (v) approve an amalgamation of the company under section 221;
      - (vi) put the company into liquidation;
    - (b) the right to an equal share in dividends authorised by the board;
    - (c) the right to an equal share in the distribution of the surplus assets of the company.
  - (2) Subject to section 53, the rights specified in subsection (1) may be negated, altered, or added to by the constitution of the company or in accordance with the terms on which the share is issued under section 41(b) or section 42 or section 44 or section 107(2), as the case may be.
24. Section 36(1) provides that the rights conferred by a share are the right to one vote at a meeting on any resolution, the right to an equal share in dividends and the right to an equal share in the distribution of surplus assets. Some of these rights would give rise to a shareholder decision-making right to the extent they fall within the four listed types of decision contained in the definition.

25. Section 36(2) provides that the rights specified in s 36(1) may be negated, altered or added to by the company's constitution or the terms of issue of a share. Consistent with this, s 37 anticipates that a company may issue shares that confer no voting rights. Certain classes of shares (eg, preference shares) may offer the holder a preferential claim to a dividend but confer no, or limited, voting rights. Therefore, it would seem that such shares would not confer any shareholder decision-making rights on the holder. However, some provisions in the CA 1993 confer a right to participate in certain matters on all classes of shares, regardless of voting rights. The company constitution or the terms of issue of the share cannot negate these rights.
26. These identified rights include the right to:
- participate as an "entitled person" under any s 107 agreement;
  - comment on the management of the company at an annual shareholders' meeting under s 109(1);
  - vote as part of an interest group under s 117 on any issue affecting the rights attached to that shareholder's shares;
  - exercise buy-out rights under s 118, where that shareholder has voted against an action approved by that shareholder's interest group under s 117; and
  - receive notice of and attend an annual shareholders' meeting under s 120(1).
27. The above rights are present in all classes of shares, irrespective of voting rights or the company constitution.
28. Although the holder of a class of share that confers no voting rights may have a right to attend (s 120(1)) and comment (s 109(1)) at a shareholders' meeting, those provisions do not give the holder of such a share any ability to vote or otherwise participate in any decisions made at that meeting. Therefore, these sections would not give rise to a shareholder decision-making right. The constitution cannot negate several other provisions in the CA 1993. These provisions include the requirement for a special resolution of shareholders for particular actions to be undertaken regarding alterations to the constitution, major transactions, amalgamations or liquidation. However, while there must always be a special resolution on such actions, the constitution or the terms of issue of a share can limit the classes of shareholder entitled to vote on those resolutions, as provided in s 36(2).
29. Taking this all into account, only two provisions were identified that could potentially give rise to shareholder decision-making rights – ss 107 and 117 of the CA 1993. Both of these provisions permit shareholders, including holders of non-voting shares, to participate in particular company decisions.

***Section 107 – unanimous assent to certain types of action***

30. Section 107 of the CA 1993 provides that, if all entitled persons have agreed or concur, certain actions can take place otherwise than in accordance with the CA 1993. The section relevantly states:
- 107 Unanimous assent to certain types of action**
- (1) Notwithstanding section 52 but subject to section 108, if all entitled persons have agreed or concur,—
- (a) a dividend may be authorised otherwise than in accordance with section 53:
  - (b) a discount scheme may be approved otherwise than in accordance with section 55:
  - (c) shares in a company may be acquired otherwise than in accordance with sections 59 to 65:

- (d) shares in a company may be redeemed otherwise than in accordance with sections 69 to 72:
  - (e) financial assistance may be given for the purpose of, or in connection with, the purchase of shares otherwise than in accordance with sections 76 to 80:
  - (f) any of the matters referred to in section 161(1) may be authorised otherwise than in accordance with that section.
- (2) If all entitled persons have agreed or concur, shares may be issued otherwise than in accordance with section 42 or section 44 or section 45.
  - (3) If all entitled persons have agreed to or concur in a company entering into a transaction in which a director is interested, nothing in sections 140 and 141 shall apply in relation to that transaction.

...

31. Section 2 of the CA 1993 defines an “entitled person” as:

**entitled person**, in relation to a company, means—

- (a) a shareholder; and
- (b) a person upon whom the constitution confers any of the rights and powers of a shareholder:

32. Section 107 allows some of the formal requirements of the CA 1993 to be bypassed for the listed actions if all entitled persons agree or concur. The definition of entitled person does not distinguish between shareholders who are entitled to vote on a particular action, and those who are not. Therefore, the use of the term “entitled person” shows that all shareholders of the company (not just voting shareholders) must agree or concur to the action being taken. The agreement or concurrence must be in writing.

33. Section 107 was enacted following submissions about the costs and formalities small companies would face in complying with the draft Companies Act 1990. In *Company Law Reform: Transition and Revision* (NZLC R16, Law Commission, Wellington, 1990), the Law Commission stated at [45]:

**Unanimous assent to company action**

Section 78A [now s 107] is a very important new provision. The Law Commission accepts the submissions made by a number of bodies and individuals that the 1990 [draft Companies] Act imposed excessive formalities on the day-to-day operation of small (and, in particular, one-shareholder) companies. **This section permits the formalities which were considered to be a problem to be disregarded completely, if all entitled persons agree, or if they concur in the informal action taken.** In a normal company, in which all the section 6 [Essential rights and powers] rights and powers are attached to shares, a company will be able to issue shares, or repurchase shares, for example, without any formalities at all, where the shareholders agree to or concur in the issue or repurchase. [Emphasis added]

34. Andrew Beck and others in *Morison’s Company and Securities Law* (looseleaf ed, LexisNexis) state at [16.10]:

**The Act provides for suspension of some of the formalities and procedures required by the Act where all those affected agree to the relevant action, or concur in it being taken.** All entitled persons must agree to or concur in the action, and the agreement or concurrence must be in writing. The entitled persons will normally be all the shareholders, but will also include any person other than a shareholder upon whom the constitution of the company confers rights which would otherwise be enjoyed by shareholders. The agreement may either be a separate “one off” agreement to a particular exercise of a power, or a standing agreement to the exercise of the power generally or from time to time. An entitled person can at any time by notice in writing to the company withdraw from a general or standing unanimous shareholder agreement, and in the absence of continuing unanimity s 107 will no longer apply. ... [Emphasis added]

35. Section 107 enables companies to suspend some of the formalities and procedures in the CA 1993, if all entitled persons have agreed to the action in writing. If unanimous assent is not obtained, the company must adhere to all the formalities and procedures in the CA 1993.

## ***Section 117 – alteration of shareholder rights***

36. Section 117 of the CA 1993 provides:
- 117 Alteration of shareholder rights**
- (1) A company must not take action that affects the rights attached to shares unless that action has been approved by a special resolution of each interest group.
  - (2) For the purposes of subsection (1), the rights attached to a share include—
    - (a) the rights, privileges, limitations, and conditions attached to the share by this Act or the constitution, including voting rights and rights to distributions:
    - (b) pre-emptive rights arising under section 45:
    - (c) the right to have the procedure set out in this section, and any further procedure required by the constitution for the amendment or alteration of rights, observed by the company:
    - (d) the right that a procedure required by the constitution for the amendment or alteration of rights not be amended or altered.
  - (3) For the purposes of subsection (1), the issue of further shares ranking equally with, or in priority to, existing shares, whether as to voting rights or distributions, is deemed to be action affecting the rights attached to the existing shares, unless—
    - (a) the constitution of the company expressly permits the issue of further shares ranking equally with, or in priority to, those shares; or
    - (b) the issue is made in accordance with the pre-emptive rights of shareholders under section 45 or under the constitution of the company.
37. A company must not take action that affects the rights attached to shares, unless that action has been approved by a special resolution of each interest group. An “interest group” is defined in the CA 1993 as a group of shareholders with identical rights who will be affected by the company’s action or proposal.
38. Section 117 provides the members of an interest group (whether or not their shares confer voting rights) with the ability to approve or not approve a particular action that would affect the rights attached to their shares. The rights “attached to a share” are defined non-exhaustively to include the rights, privileges, limitations and conditions attached to the share by the CA 1993 or the constitution. This specifically includes voting rights, the right to distributions and pre-emptive rights. The section also clarifies that the issue of further shares that rank in priority to, or equal with, the class of share is an action affecting that class of share.
39. Section 117 requires that the approval is made by special resolution (requiring the assent of 75 percent of affected shareholders in that interest group). If a special resolution is passed and a particular shareholder voted against approving the action or did not sign the resolution, s 118 provides that the shareholder may require the company to purchase their shares under s 111.
40. Section 119 provides that when a company takes action that affects the rights attached to shares, that action is not invalidated by reason only that the action was not approved in accordance with s 117. However, in such circumstances, the affected interest group could take action against the company for unfair prejudicial conduct under s 174 of the CA 1993.
41. The rights conferred on shareholders under s 117 are of a protective nature, and are contingent on the company’s actions. They arise when the company calls for a special resolution of the affected interest group (or otherwise decides to undertake the action). Once this happens, s 117 allows an affected shareholder to vote in a special resolution to approve or not approve the action.

### **Could ss 107 and 117 give rise to a “shareholder decision-making right”?**

42. Two questions arise about the relationship between ss 107 and 117 of the CA 1993 and the definition of a shareholder decision-making right:
- Is the existence of ss 107 and 117 in the CA 1993 a shareholder decision-making right at all times?
  - Could ss 107 and 117 give rise to a shareholder decision-making right when triggered (ie, when unanimous assent is sought or a special resolution of an affected interest group is called by a company)?
43. The Commissioner considers that the mere existence of ss 107 and 117 cannot give rise to shareholder decision-making rights. The existence of those provisions does not ordinarily provide shareholders with any rights to vote or participate in any decision-making regarding the four listed types of decision. The company must first trigger the rights by:
- requesting the unanimous written assent of all shareholders so an action can be undertaken otherwise than in accordance with certain procedures (s 107); or
  - calling for a resolution to approve a proposed action that will affect the rights attached to a particular class of share (s 117).
44. Also, the definition of a shareholder decision-making right is limited to the four listed types of decision. These are any decision concerning dividends or distributions to be paid, the constitution, the appointment of a director, and a variation of capital. Sections 107 and 117 concern a broader variety of actions. The actions could concern the four listed types of decision, but they could also concern other things that are not relevant to the definition of a shareholder decision-making right. It is also possible that a company might never propose to obtain unanimous assent to an action under s 107 or take an action that affects rights attached to shares under s 117.
45. Further, the company constitution cannot negate the protective right under s 117 and the ability to use the s 107 procedure. If an interpretation were taken that the existence of these rights in the CA 1993 could be a shareholder decision-making right for tax purposes, every share a company issued would confer voting interests. The Commissioner considers that the mere existence of those provisions in the CA 1993 does not confer a shareholder decision-making right on all shareholders.
46. The more relevant question is whether ss 107 and 117 could give rise to a shareholder decision-making right when invoked. The provisions require shareholders to provide their assent or to vote in a special resolution. The question is whether the right to assent or vote on that particular decision could at that time be a right carried by a share (or an option over a share) to vote or participate in any decision-making concerning the four listed types of decision.
47. As noted at [22] above, the definition of a shareholder decision-making right requires that the rights are carried by a share or an option over a share. The rights must also be a right to vote or participate in any decision-making concerning the four listed types of decision. These criteria will now be discussed in the context of ss 107 and 117 of the CA 1993.

### ***Are rights arising under ss 107 and 117 “carried by” a share?***

48. The first question is whether the rights arising under ss 107 and 117 could be said to be “carried by” a share issued by a company. Although the company constitution or share issue terms may include similar rights, the constitution or



share issue terms cannot negate or alter rights arising under ss 107 and 117 of the CA 1993.

49. The *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011) relevantly defines the word "carry" as "have as a feature or consequence".
50. Case law discussing the nature of shares assists in determining what rights might be "carried by" a share. For instance, in *IRC v Crossman* [1937] AC 26 (HL) at 66, Lord Russell described a share as:

A share in a limited company is a property the nature of which has been accurately expounded by Farwell J. in *Borland's Trustee v Steel*. It is the interest of a person in the Company, that interest being composed of rights and obligations which are defined by the Companies Act and by the memorandum and articles of association of the company.

51. A share consists of a "bundle of rights and obligations" (see *Borland's Trustee v Steel Brothers & Co Ltd* [1901] 1 Ch 279). The CA 1993 and the company constitution define these rights and obligations.
52. It is considered that rights in the company constitution or the terms of issue of a share will be carried by the shares. Similarly, any rights contained in an option will be carried by that option.
53. In terms of rights and obligations defined by the CA 1993, s 36 of that Act sets out the rights that can make up a share. Although rights arising under s 117 are conferred by statute, similar rights are also sometimes referred to in the company constitution. However, unlike other rights arising under s 36(1) of the CA 1993, the constitution or the terms of issue of shares cannot negate s 117. Therefore, even if the constitution or terms of issue of a share do not explicitly refer to s 117, those rights would be an attribute or a feature of all shares a company issues.
54. Also, s 117(2)(c) specifically provides that the procedure set out in that section is a right "attached to a share". The reference to rights "attached to" shares is similar to the reference to rights that are "carried by" shares. The UK case *Cumbrian Newspapers Group Ltd v Cumberland and Westmorland Herald Newspaper and Printing Co Ltd* [1987] Ch 1 used the words "carried by" interchangeably with "attached to". That case concerned a UK provision similar in nature to s 117. The court stated at 15:

I turn to the critical question: are the plaintiff's rights under articles 5,7,9 and 12, rights attached to a class of shares?

... If articles provide that particular shares carry particular rights not enjoyed by the holders of other shares, it is easy to conclude that the rights are attached to a class of shares, for the purpose both of section 125 of the Act of 1985 and of article 4 of Table A. It is common ground that rights falling into this category are rights attached to a class of shares for those purposes.

55. Therefore, a right that is "attached to" a share could also be regarded as being "carried by" that share.
56. The Commissioner considers that s 117 rights are a feature or consequence of every share a company issues, and so all shares carry such rights.
57. Section 107 permits a company to obtain the unanimous assent of all entitled persons before undertaking certain actions. This group may include persons who are not shareholders. For such persons, the ability to assent to an action cannot be carried by shares (in terms of the definition of a shareholder decision-making right). However, for shareholders, it is certainly arguable that the ability to assent to an action under s 107 is carried by a share.

58. Therefore, the ability to assent to an action under s 107 and the rights arising under s 117 of the CA 1993 would be “carried by” shares held by a person. Similar rights in the company constitution or terms of issue of a share would also be carried by that share. Similarly, any rights in an option over a share would be carried by that option.

***Do ss 107 and 117 confer a right to vote or participate in any decision-making?***

59. The next question is whether ss 107 and 117 give rise to rights to participate or vote in any decision-making. The ordinary meanings of “participate” and “vote” (*Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011)) are:

**participate** v. 1 (often participate in) be involved; take part . 2 (participate of) archaic partake of (a quality).

**vote** n. a formal indication of a choice between two or more candidates or courses of action, expressed typically through a ballot or a show of hands. An act of voting. (the vote) the right to indicate a choice in an election....

60. A shareholder decision-making right is a right (carried by a share or an option over a share) for a shareholder to choose between two or more courses of action or to be involved or take part in any of the listed types of decisions. This type of right seems broad. It is arguable from this ordinary meaning that the rights in ss 107 and 107 could give rise to an ability to “vote or participate in any decision-making”.

*Section 107*

61. Some of the actions in s 107 relate to the types of decision referred to in the definition of a shareholder decision-making right. Section 107 lists actions such as authorising dividends and acquiring the company’s own shares.
62. For example, an argument could be made that s 107(1)(a) provides an opportunity for shareholders to participate in a decision concerning dividends to be paid. Section 107(1)(a) provides that, if unanimous assent were obtained, a dividend may be authorised otherwise than in accordance with s 53 of the CA 1993. Decisions concerning the payment of dividends are not conferred on shareholders under any other provisions of the CA 1993.
63. However, s 107(1)(a) refers only to the authorising of a dividend otherwise than in accordance with s 53 of the CA 1993. Section 53 requires the directors of a company to pay equal dividends to all of the shareholders in a particular class. Therefore, s 107(1)(a) allows the company’s directors to authorise the payment of unequal dividends if all entitled persons have agreed. The decision about the dividend to be paid remains with the directors. Section 107 does not provide shareholders with a right to participate in that decision. It simply allows the company to bypass the procedural requirements in the CA 1993.
64. Also, if unanimous assent is not achieved, the company would be required to follow the procedural requirements of the CA 1993. Any non-voting shareholders would not be involved in that decision (unless their rights were also affected under s 117). As noted above, s 107 operates to allow companies to bypass certain procedural requirements in the CA 1993 if all shareholders agree. The section does not confer any rights on the shareholders, but allows the company to undertake certain actions in a way that might otherwise not be allowed under the CA 1993.
65. Therefore, the Commissioner considers that s 107 does not give rise to a shareholder decision-making right. The section simply allows a company to undertake certain actions or procedures otherwise than in accordance with particular provisions in the CA 1993, if the company’s shareholders agree.

66. Despite this conclusion, the possible inclusion of s 107 as a shareholder decision-making right will be discussed later with s 117 to determine whether including it would be consistent with the purpose of the definition.

#### *Section 117*

67. In respect of s 117, once the relevant resolution is called for by a company proposing to take action affecting the rights attached to shares, the affected shareholders can vote in a special resolution on that particular action. This could be seen to be a right to “vote or participate” in that action (if it relates to the relevant decision-making).
68. However, it could be argued that the affected shareholders are not involved or taking part in the decision-making. The phrase “vote or participate” could be read in a limited way, as relating to substantive voting or participation rights, rather than to contingent rights that only arise temporarily when a company proposes to take a certain action.
69. The Commissioner considers that the definition of a “shareholder decision-making right” is capable of being given a broad or a narrow meaning. The broader interpretation which would include any rights (ie, including protective rights) is arguably the more natural meaning. However, a narrower meaning which restricts the definition to substantive rights is also available. The question is which of these interpretations best accords with Parliament’s purpose.

#### ***How should the definition of “shareholder decision-making right” be interpreted?***

70. Section 5 of the Interpretation Act 1999 provides that the meaning of an enactment must be determined from its text and in the light of its purpose. The Supreme Court supported a purposive approach to statutory interpretation in *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] to [24]. Tipping J noted at [22] that even if the meaning of text appears plain, it should always be cross-checked against purpose. This includes cross-checking against the immediate and general legislative context and any social, commercial or other objective of the Act. See also *CIR v Alcan NZ Ltd* [1994] 3 NZLR 439 (CA) at 444 and *CIR v Auckland Harbour Board* (2001) 20 NZTC 17,008 (PC) at [14] and [15].
71. However, any purposive interpretation must be available on the words used in the provision. This is supported by comments made by Blanchard J in *Stiassny v CIR* [2012] NZSC 106, [2013] 1 NZLR 453. Blanchard J noted at [23] that the purpose of a provision may be a guide to its meaning and intended application. But, in most cases, the only evidence of that purpose is in the detailed wording of the provision. His Honour considered that the safest method is to read the words in their “most natural sense”.
72. The courts will seek to interpret legislation in a way that avoids absurdity or unworkability where possible (see *Alcan* at 446; *Fruco Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 (CA) and *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182). And in *Contract Pacific Ltd v CIR* [2010] NZSC 136, [2011] 1 NZLR 302 the Supreme Court undertook a “commonsense and practical approach” to the interpretation of legislation at [24] to [29]. J F Burrows and R I Carter, *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) state at 329:
- Moreover, if the most natural grammatical interpretation of the text leads to a result that is thoroughly impractical, the court may strive to find an interpretation, even if not the most natural, which is practical and sensible. Words may thus be strained to this end ... .
73. Burrows and Carter state further at 332:

... there is only so far words will stretch. If the words of the Act are plain and can have only one meaning, the accepted doctrine is that a court must simply apply them even if the result is inconvenient or unjust. However, the more undesirable the result, the more the interpreter will question whether that "plain" meaning is the only possible one, and whether an acceptable alternative construction may be found. It is all a question of degree: there may indeed be extreme cases where the natural meaning of the text leads to a result so absurd that a court is prepared to do actual violence to the words to avoid it.

74. In *Frucor Beverages* Thomas J held at [29] that a literal interpretation of the legislation in that case would have led to "anomalous, illogical and futile" results and "unworkable or inconvenient consequences". He stated at [29] that, where the legislative purpose of the statute is clear, the provision should not be reduced to a nullity by a literal adherence to the language, unless the language is "intractable". The subsequent Supreme Court decisions referred to above support this approach.
75. The concept of "absurdity" has a wide meaning. The concept includes results which are "unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief" (per Thomas J in *Frucor*). However, there are other requirements before the courts will strive to interpret legislation to avoid absurdity. The legislative purpose must be clear. The court must be satisfied that the absurdity would frustrate that purpose. And, before the court could seek to avoid absurdity, it must be satisfied that the statutory language is not "intractable". The legislative words used must be capable of including the preferred meaning.
76. It was earlier concluded that both a broader and narrower meaning is available on the words used in the definition of a shareholder decision-making right. Given the above approach to statutory interpretation taken by the courts, the following analysis considers:
- the legislative purpose of the definition of a shareholder decision-making right;
  - whether an absurdity arises if the rights under ss 107 and 117 of the CA 1993 are included in the definition; and
  - which interpretation best accords with Parliament's purpose.

*What is the purpose of the definition of a shareholder decision-making right?*

77. Section YA 1 of the ITA 2007 provides that a person's "voting interest" in a company is determined under ss YC 2 to YC 20. Section YC 2 defines "voting interests" as follows:
- YC 2 Voting interests**
- Percentage of shareholder decision-making rights*
- (1) A person's voting interest in a company equals the percentage of the total shareholder decision-making rights for the company carried by shares or options held by the person.
- When decision-making rights vary*
- (2) Despite subsection (1), if the percentage of shareholder decision-making rights for a company carried by shares or options held by any person differs as between the types of decision-making listed in the definition of shareholder decision-making right, the person's voting interest in the company equals the average of those differing percentages.
78. Section YC 3 defines "market value interests" as follows:
- YC 3 Market value interests**
- Percentage of market value*
- (1) A person's market value interest in a company equals the percentage of the total market value of shares and options over shares in the company that the market value of shares and options over shares in the company held by the person represents.

*Adjustments for options*

- (2) For the purposes of subsection (1), the market value of any share in a company that is subject to an option is calculated having regard to the terms of the option.
79. At first glance it seems that the calculation of a person's voting interest in a company relates to their substantive voting rights in the company. A different calculation, concerning the percentage of the total market value of shares and options over shares in the company that the person holds, is made under the "market value interest" definition.
80. The calculation of market value interests generally arises where a person's interest in a company is not accurately reflected by measuring voting interests. For present purposes, it is sufficient to note that this alternate test, which applies in certain situations, focuses on the percentage of the market value of the shares and options in the company that the person holds. The difference between these two tests is that one relates to what is essentially voting power and the other relates to the proportion of the total market value of the company's shares and options a person holds.
81. The meaning of a "shareholder decision-making right" is important for determining how a person's "voting interest" in a company (rather than their market value interest) is determined.
82. There is no pre-legislative or other commentary on the definition of a "shareholder decision-making right", either from when the definition was first enacted or when any subsequent minor wording alterations were made. However, the purpose of the definition can be determined by considering the Act in a wider sense, in terms of the relevant provisions in the ITA 2007 that refer to shareholder decision-making rights.
83. The origin of the definition of "shareholder decision-making right" was the direct control interest test in the controlled foreign company (CFC) rules (originally s 245C of the Income Tax Act 1976). The definition of "shareholder decision-making rights" was then contained in s 8B of that Act. Sections 8A to 8F were inserted by s 7 of the Income Tax Amendment Act (No 2) 1992, which was before the enactment of the CA 1993.
84. Under s 245C(1), a foreign company was a CFC if (relevantly) a group of five or fewer persons resident in New Zealand had:
- a control interest in the company that was greater than 50%; or
  - the power to control the exercise of the company's shareholder decision-making rights *"and thereby to ensure that the affairs of the company are conducted in accordance with the wishes of that group"*.
85. Determining a person's direct control interest was initially provided for in s 245C(4). A person's direct control interest in a foreign company was the highest percentage held in terms of several factors (including shares held and rights to vote or participate in decision-making).
86. As noted above, s 245C(1) of the Income Tax Act 1976 referred to persons who had the power to control the exercise of the company's shareholder decision-making rights *"and thereby to ensure that the affairs of the company are conducted in accordance with the wishes of that group"*. Similarly, in the 2004 and 2007 Income Tax Acts the equivalent wording was amended in s EX 1(1)(c) to refer to those who can control the exercise of the shareholder decision-making rights for the company and, as a result, *"control the company's affairs"*.
87. *International Tax Reform Full Imputation Part 2* (Report of the Consultative Committee on Full Imputation and International Tax Reform, July 1988) states:

3.2.1 The attributes of a company which are critical for the purposes of calculating control and income interests are the **rights or powers which give the holders the ability to receive or control the disposition of the company's income or capital**. In general, these rights or powers attach to shares and are held by the shareholders of the company. **Different classes of shares may, however, have a wide variety of rights attached to them so that it is not sufficient to focus on the percentage of the shares held by a person.** ... [Emphasis added]

88. The references to "shareholder decision-making rights" and other control interests reflected the desire for a control test to refer to the rights and powers conferred on shareholders to receive or control the disposition of the company's income or capital. As set out above, the relevant provisions referred to shareholders who had the power to control the exercise of the company's shareholder decision-making rights "*and thereby to ensure that the affairs of the company are conducted in accordance with the wishes of that group*".
89. These references to controlling the company's income and capital and ensuring that the company's affairs are conducted in accordance with the wishes of that group indicate that shareholder decision-making rights were intended to be substantive rights to vote. This would not include protective rights that are contingent on particular events and only temporarily give rise to rights when a company proposes a particular action.
90. In *Taxation Policy – Business Tax Policy* (A statement on Government Tax Policy, Policy Advice Division of Inland Revenue and The Treasury, July 1991) the (then) proposed changes to the rules for measuring an interest in a company are explained. That paper stated:

**Measuring an interest in a company under the new rules**

To the extent practicable, a common measure of a shareholder's economic interest in a company would apply for the purposes of:

- the loss carry-forward rules in section 188 of the Act
- the credit continuity rules under the imputation and associated regimes. These rules govern eligibility to carry-forward imputation, brand equivalent tax and dividend withholding payment credits and are discussed in Chapter 9
- rules that govern eligibility for two or more companies to be treated as one taxpayer under the consolidation option outlined in Chapter 5
- the loss-offset rules in section 191 of the Act (this and the rules in relation to consolidation are hereafter referred to jointly in this Chapter as "commonality" rules).

In the light of the problems associated with existing rules to measure a shareholder's interest in a company, from the 1992/93 income year a shareholder's interest in a company's tax losses or credits will be measured primarily **by reference to the percentage of voting power held by that person in relation to decision making by the company. Apart from measuring an interest by reference to market value, voting power is seen as the best proxy for a measure of a shareholder's beneficial interest in the losses or credits of a company and it will often be relatively simple to apply. By exercising voting power, a shareholder can protect its position relative to other shareholders and can ensure appropriate access to the earnings of the company when they are distributed.**

[Emphasis added]

91. The paper referred to situations where both voting interests and market value interests might be taken into account:

Where voting rights in relation to a shareholder's interest differ as between the different types of decision-making described in the previous paragraph, the interest would be determined as the percentage it represents of the market value of all interests in the company, as well as percentage of voting power. Because the percentage of voting power differs between different types of decisions, each measure of voting power would be applied independently and the continuity threshold would have to be satisfied in relation to each measure. Resort is made to a measure based on market value because the differing voting rights may result in voting power giving an unreliable indication of a shareholder's economic interest in a company's losses or credits.

There will be other circumstances where voting power is unlikely to give an accurate measure of shareholders' interests. In these circumstances a shareholder's interest in a company would be computed by reference to both the market value of that interest and its voting power for the purposes of applying the loss and credit carry-forward provisions and the commonality rules. If the minimum continuity or commonality of ownership threshold under either measure is not satisfied, eligibility for loss carry-forward and/or offset would be forfeited.

Broadly, a shareholder's interest would be measured by reference to its market value and its voting power where:

- a shareholder has an entitlement to a certain proportion of company profits which it can be ascertained is different from its voting power and can veto any alteration in that entitlement
- the company or its shareholders, have issued options, other than certain options over listed company shares, options to acquire shares at their market value, or options issued by shareholders without the company's knowledge
- the company has issued shares (other than fixed rate dividend shares) the returns on which are guaranteed by a third party
- the shares have been subject to an arrangement with the purpose or effect of defeating the intent and application of the credit and loss carry-forward rules or the loss offset and consolidation provisions.

Where any of the above tests is triggered, the interests described (such as options) would be taken into account in determining the percentage of the market value of a company held by any share or option holder.

92. The above comments all indicate that determining a shareholder's interest in a company was intended to focus on the voting power held by that shareholder. If a market value circumstance arose, reference was then made to the percentage of the market value of shares in the company that are held by the person – regardless of voting power.
93. Further support for a conclusion that protective contingent rights are not included in the measurement of a person's "voting interest" is found in comments in a government discussion document relating to the introduction of the financial arrangements rules. Although that document does not concern the meaning of "voting interests", it provides some helpful comments on measuring a person's ownership of a company in terms of the debt/equity boundary. The *Consultative Document on Accrual Treatment of Income and Expenditure* (Consultative Committee on Accrual Tax Treatment of Income and Expenditure, October 1986) states at [4.2]:

An equity instrument carries with it elements of ownership whereas a debt instrument is more limited in the sense that it constitutes evidence of a loan, advance or credit facility. The debt/equity distinction thus rests on the presence or absence of ownership of the underlying assets. **Ownership has two key features:**

**a management control - owners exercise power over the way resources of a business are employed; and**

**b share in the risk of the enterprise - the claim of owners to the return from the resources of a business is limited to the residual return after all payments to creditors have been met. This risk manifests itself in two ways:**

- i the return to owners varies with the profits derived from employing resources; and
- ii if the resources are sold and the business or investment is wound up, owners receive the residual after all payments to creditors have been met.

These criteria can be used to draw a distinction between debt and equity. Thus, in general, holders of equity instruments have some control over the affairs of the business concerned; a return which varies with the business's profitability; and a residual claim on the assets of the business after the claims of all other creditors have been met. **Holders of debt instruments, on the other hand, generally have no formal rights to participate in the business's decision-making; a return which does not vary with the business's profitability; and a prior claim over equity holders on its assets.**

While these distinguishing characteristics serve as a general guide, in practice, debt and equity instruments can be virtually interchangeable. Each can have some of the characteristics of the other. **Some debt instruments have an element of management control (eg secured debentures with an associated trust deed) and the return on debt instruments can vary. Similarly, some equity instruments carry negligible management control and/or provide a constant return (eg preference shares).** [Emphasis added]

94. Some equity instruments (for example, preference shares) may exhibit characteristics that are more in the nature of debt than equity. Such shares are likely to have a preferential fixed return but have no interest in the losses or profits of a company. The holders of such shares do not obtain returns that vary with the profits of the company or exercise any power over the way in which resources are employed. Section 117 of the CA 1993 would still apply to these types of shares. Section 117 provides those shareholders with protection against certain actions that a company may take. However, this does not give those shareholders any control over the company, in terms of substantive voting rights.
95. Consistent with this view, s YC 6 specifically excludes an “excluded fixed rate security” and an “excluded option” from the voting interest calculations in s YC 2 (other than in circumstances involving the calculation of market value interests for the purposes of the credit continuity provisions). Essentially, these are instruments that confer no substantive voting rights. An excluded fixed rate security is a security that provides a fixed rate return and confers no shareholder decision-making rights on the holder, other than protective rights. An excluded option includes an option issued on arm’s length terms that carries no shareholder decision-making rights, other than protective rights.

#### Summary

96. The Commissioner considers that the definitions of “shareholder decision-making right” and “voting interest” were intended to relate to substantive voting rights held by the owners of a company. Shareholders who hold substantive voting rights for the relevant types of decision-making can share in the control over the company’s decisions regarding its capital and resources. Non-voting shares may be included in a calculation of ownership and control in circumstances where market value interests are calculated, rather than voting interests (which are specifically provided for in the ITA 2007).

#### ***Does the inclusion of rights under ss 107 and 117 lead to absurdity?***

97. If an interpretation were taken that s 107 or s 117 rights could be a “shareholder decision-making right”, this would occur at particular points in time. Under s 107, this would be the request for shareholder approval for a company to take an action otherwise than in accordance with the CA 1993. Under s 117, this would be the calling of the resolution to vote on the company’s proposed action.
98. Any rights to vote or participate under s 107 and s 117 of the CA 1993 are contingent on the company taking particular actions (or proposing to take such actions), and only temporarily arise for the duration of the vote on that particular proposed action.
99. In such uncertain circumstances, difficulties arise in calculating the percentage of voting interests held by the shareholders of that company at a point in time.
100. Questions could arise if contingent and temporary protective rights were a “shareholder decision-making right” when invoked, including:
  - When the relevant resolution or unanimous assent is requested, do the affected shareholders have 100 percent of the rights to vote on or participate in that particular decision? If so, this could temporarily give those shareholders all the voting interests on that decision.



- At that time, would the affected shareholders' temporary rights then be included in calculating the percentage of the total rights held by all voting shareholders? If so, this could alter the calculation of voting interests in the company for all shareholders.
101. The questions raised could mean that non-voting shareholders may, at times, hold between them decision-making rights in the company that are included in calculating the percentage of voting interests held by all shareholders. Taken to an extreme, it might affect the following parts of the ITA 2007:
- Associated persons provisions – s YB 5 associates a company and a person if the person has a voting interest in the company of 25 percent or more.
  - Shareholder continuity provisions – s OA 8(7) requires a group of persons to continue to hold aggregate minimum voting interests of at least 66 percent.
  - Consolidation provisions – a group of companies can consolidate for tax purposes if a group of persons holds all of the common voting interests.
  - CFC rules – the CFC regime is invoked if five or fewer New Zealand residents hold 50 percent of the control interests of a foreign company.
102. The rights in ss 107 and 117 are provided to all shareholders of a company and cannot be negated by a company constitution. Similar rights to s 117 might also be included in an option, the company constitution or share issue terms. The Commissioner considers that including these types of protective rights in the definition of a shareholder decision-making right could lead to unworkable consequences. That is, every share issued by a company could carry a voting interest at some point in time, potentially affecting the calculations in the above regimes in the ITA 2007.

***Which interpretation best accords with the legislative intent?***

103. The definition of a “shareholder decision-making right” does not use words such as “substantive” when referring to shareholders’ rights to vote or participate in certain decisions. The issue was whether a limitation can be read into the definition.
104. As concluded at [96] above, the Commissioner considers that the definitions of “voting interest” and “shareholder decision-making right” were intended to reflect shareholders’ substantive voting rights in a company, in terms of the level of control they have over the company’s decisions and resources. A person’s voting interest in a company was not intended to include protective rights that are contingent and temporary in nature, and which might never arise. The Commissioner considers that the unworkability and absurdity that arises if these types of rights are included as a shareholder decision-making right means that the narrower interpretation should be preferred. The Commissioner considers that this interpretation is available on the words used in the definition.
105. Therefore, the Commissioner considers that the definition of a “shareholder decision-making right” does not include contingent rights of a protective nature, such as those arising when a company proposes to undertake a certain action under ss 107 or 117 of the CA 1993. The Commissioner considers that a shareholder decision-making right is a substantive voting or participation right. The same conclusion also applies to rights of a similar nature to s 117 that are contained in a company constitution, the terms of issue of a share, option over a share or the NZX rules.

**Conclusion**

106. The Commissioner considers that ss 107 and 117 of the CA 1993 do not give rise to a shareholder decision-making right.

107. Although rights arising under those provisions could be interpreted as being a right to vote or participate in some decisions, such an interpretation does not accord with Parliament's purpose in enacting the definition. An interpretation including these contingent and temporary rights could lead to unworkable outcomes when calculating a person's voting interests in some situations. The conclusion that the relevant rights to vote or participate should be substantive voting rights is considered to be consistent with Parliament's purpose that the persons holding the voting interests in a company are those that have a degree of control over the company's decisions, and not those who may obtain protective rights temporarily.

## References

### Subject references

Income Tax  
Shareholder decision-making right  
Voting interest

### Legislative references

Income Tax Act 2007 – ss YA 1, YC 2, YC 3  
Income Tax Act 1976 – s 245C  
Companies Act 1993 – ss 36, 107, 117

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## Appendix – Legislation

### Income Tax Act 2007

1. “Voting interest” is defined in s YA 1 as follows:

**voting interest –**

- (a) means, for a person and a company and a time, the percentage voting interest that the person is treated as holding in the company at the time under sections YC 2 to YC 20 (which relate to the measurement of company ownership):

2. Section YC 2 provides:

**YC 2 Voting interests**

*Percentage of shareholder decision-making rights*

- (1) A person's voting interest in a company equals the percentage of the total shareholder decision-making rights for the company carried by shares or options held by the person.

*When decision-making rights vary*

- (2) Despite subsection (1), if the percentage of shareholder decision-making rights for a company carried by shares or options held by any person differs as between the types of decision-making listed in the definition of shareholder decision-making right, the person's voting interest in the company equals the average of those differing percentages.

3. Section YC 3 provides:

**YC 3 Market value interests**

*Percentage of market value*

- (1) A person's market value interest in a company equals the percentage of the total market value of shares and options over shares in the company that the market value of shares and options over shares in the company held by the person represents.

*Adjustments for options*

- (2) For the purposes of subsection (1), the market value of any share in a company that is subject to an option is calculated having regard to the terms of the option.

4. A “shareholder decision-making right” is defined in s YA 1 as follows:

**shareholder decision-making right** - means a right, carried by a share issued by a company or an option over a share issued by a company, to vote or participate in any decision-making concerning—

- (a) a dividend or other distribution to be paid or made by the company, whether on a liquidation of the company or otherwise, excluding decision-making undertaken by directors acting only in their capacity as directors; or
- (b) the constitution of the company; or
- (c) a variation in the capital of the company; or
- (d) the appointment of a director of the company

### Companies Act 1993

5. Section 2 sets out the definition of “entitled persons” as follows:

**entitled person**, in relation to a company, means—

- (a) a shareholder; and
- (b) a person upon whom the constitution confers any of the rights and powers of a shareholder:

6. Section 36 provides:

**36 Rights and powers attaching to shares**

- (1) Subject to subsection (2), a share in a company confers on the holder—

- (a) the right to 1 vote on a poll at a meeting of the company on any resolution, including any resolution to—
    - (i) appoint or remove a director or auditor:
    - (ii) adopt a constitution:
    - (iii) alter the company's constitution, if it has one:
    - (iv) approve a major transaction:
    - (v) approve an amalgamation of the company under section 221:
    - (vi) put the company into liquidation:
  - (b) the right to an equal share in dividends authorised by the board:
  - (c) the right to an equal share in the distribution of the surplus assets of the company.
- (2) Subject to section 53, the rights specified in subsection (1) may be negated, altered, or added to by the constitution of the company or in accordance with the terms on which the share is issued under section 41(b) or section 42 or section 44 or section 107(2), as the case may be.

7. Section 107 provides:

**107 Unanimous assent to certain types of action**

- (1) Notwithstanding section 52 but subject to section 108, if all entitled persons have agreed or concur,—
  - (a) a dividend may be authorised otherwise than in accordance with section 53:
  - (b) a discount scheme may be approved otherwise than in accordance with section 55:
  - (c) shares in a company may be acquired otherwise than in accordance with sections 59 to 65:
  - (d) shares in a company may be redeemed otherwise than in accordance with sections 69 to 72:
  - (e) financial assistance may be given for the purpose of, or in connection with, the purchase of shares otherwise than in accordance with sections 76 to 80:
  - (f) any of the matters referred to in section 161(1) may be authorised otherwise than in accordance with that section.
- (2) If all entitled persons have agreed or concur, shares may be issued otherwise than in accordance with section 42 or section 44 or section 45.
- (3) If all entitled persons have agreed to or concur in a company entering into a transaction in which a director is interested, nothing in sections 140 and 141 shall apply in relation to that transaction.
- (4) For the purposes of this section, no agreement or concurrence of the entitled persons is valid or enforceable unless the agreement or concurrence is in writing.
- (5) An agreement or concurrence may be—
  - (a) a separate agreement to, or concurrence in, the particular exercise of the power referred to; or
  - (b) an agreement to, or concurrence in, the exercise of the power generally or from time to time.
- (6) An entitled person may at any time, by notice in writing to the company, withdraw from any agreement or concurrence referred to in subsection (5)(b) and any such notice shall have effect accordingly.
- (7) Where a power is exercised pursuant to an agreement or concurrence referred to in subsection (5)(b), the board of the company must, within 10 working days of the exercise of the power, send to every entitled person a notice in writing containing details of the exercise of the power.
- (8) If the board of a company fails to comply with subsection (7), every director of the company commits an offence and is liable on conviction to the penalty set out in section 374(1).

8. Section 117 provides:

**117 Alteration of shareholder rights**

- (1) A company must not take action that affects the rights attached to shares unless that action has been approved by a special resolution of each interest group.
- (2) For the purposes of subsection (1), the rights attached to a share include—
  - (a) the rights, privileges, limitations, and conditions attached to the share by this Act or the constitution, including voting rights and rights to distributions;
  - (b) pre-emptive rights arising under section 45;
  - (c) the right to have the procedure set out in this section, and any further procedure required by the constitution for the amendment or alteration of rights, observed by the company;
  - (d) the right that a procedure required by the constitution for the amendment or alteration of rights not be amended or altered.
- (3) For the purposes of subsection (1), the issue of further shares ranking equally with, or in priority to, existing shares, whether as to voting rights or distributions, is deemed to be action affecting the rights attached to the existing shares, unless—
  - (a) the constitution of the company expressly permits the issue of further shares ranking equally with, or in priority to, those shares; or
  - (b) the issue is made in accordance with the pre-emptive rights of shareholders under section 45 or under the constitution of the company.