

25 September 2018

Primary Production Committee
Parliament Buildings
Wellington

By email: pp@parliament.govt.nz

Clarification of dividend rules in companies

The Institute of Directors (IoD) appreciates the opportunity to comment on the [Companies \(Clarification of Dividend Rules in Companies\) Amendment Bill](#). The Bill introduces a minor and technical amendment to the Companies Act 1993 to clarify that profits can be distributed differently across the same class of share if this is set out in a company's constitution. There is currently uncertainty around whether this is permissible under the Companies Act.

About the Institute of Directors

The IoD is a non-partisan voluntary membership organisation committed to driving excellence in governance. We represent a diverse membership of over 8,900 members drawn from listed issuers, large private organisations, small and medium enterprises, state sector organisations, not-for-profits and charities.

Our Chartered Membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development to support good corporate governance.

Overview of the issue and proposed solution

The Explanatory Note to the Bill states that there "is currently doubt about the ability of a company constitution to provide for "dry shares" (shares which do not carry dividend rights in prescribed circumstances)". It notes that the classic example is shares in a co-operative where the holder ceases supplying the co-operative, but the issue is broader than this. The uncertainty arises because of the interplay between sections 36 and 53 of the Companies Act.

Section 36 sets out the rights and powers attaching to shares. It also states that the rights 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, subject to section 53.

Section 53 sets out the meaning of dividend and subsection 53(2) states that the board of a company must not authorise a dividend:

- in respect of some but not all the shares in a class or
- that is of a greater value per share in respect of some shares of a class than it is in respect of other shares of that class
(except in limited circumstances).

Proposed solution

The Bill sets out a new subsection to section 53 to remove doubt about "dry share" provisions. It states "To avoid doubt, nothing in subsection (2) prevents the constitution of a company providing that shares in a class do not confer a right to receive dividends in the circumstances specified in the constitution".

IoD comment

The proposed solution would mean that the constitution of a company could provide for shares in the same class to carry different entitlements to dividends in different circumstances (eg this would address the co-operative example above). We support this for the following reasons:

- it should provide greater certainty for boards in decision making
- it should prevent disputes
- it is consistent with provisions of the Co-operative Companies Act 1996
- companies and shareholders should be able to tailor their mutual rights and obligations to give effect to their commercial objectives, subject to some limits
- we understand that the potential for unfair treatment of shareholders is addressed by the interest group and minority buy-out provisions in the Companies Act.

We appreciate the opportunity to comment on behalf of our members.

Yours sincerely



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