

INDEPENDENCE OF RELATED SHAREHOLDERS

1 This paper sets out various considerations that the Board may have regard to in deciding whether to grant an exemption under clause 7.6(a) of GIC's constitution.

GIC's constitution

2 Clauses 7.1 and 7.8(a) of GIC's constitution provide that every shareholder has only one share and one vote.

3 Clauses 7.4 to 7.7 provide -

7.4 A shareholder may not vote on any resolution at any time when –

- (a) subject to *clause 7.6*, the shareholder is a subsidiary of another shareholder; or
- (b) the shareholder is prohibited from voting by *clause 7.5*; or
- (c) to (e) -----

and any vote cast by a shareholder in contravention of this clause shall be disregarded.

7.5 Subject to *clause 7.6*, if two or more shareholders are subsidiaries of the same person who is not a shareholder, then-

- (a) only one of those shareholders may vote on any resolution; and
- (b) all those shareholders must give unanimous written notice to the Board which specifies the shareholder who is to have the right to vote; and
- (c) until such a notice is given, none of those shareholders may vote on any resolution; and
- (d) after such a notice is given, only the shareholder who is specified in the notice may vote on any resolution.

7.6 The Board may, by written notice to the shareholder,-

- (a) exempt a shareholder from *clause 7.4(a)* or *7.5* if it considers that the management of the business and affairs of the shareholder is conducted independently from that of any other shareholder;
- (b) impose in respect of any such exemption such terms and conditions as it thinks fit; and
- (c) revoke any such exemption if it considers that the management of the business and affairs of the shareholder has ceased to be conducted independently from that of any other shareholder.

7.7 For the purposes of *clause 7.6(a)*, neither a right nor the exercise of a right of a shareholder or other person to control the appointment of a majority of directors of a shareholder means of itself that the management of the business and affairs of the last mentioned shareholder is not conducted independently from that of any other shareholder.

4 The term “subsidiary” is defined in clause 1.1 of the constitution as having “the same meaning as in sections 5 to 8 of the [Companies Act 1993], except that, despite section 5(3) of the Act, Her Majesty the Queen in right of New Zealand is not to be regarded as a company for the purposes of those sections”. In essence, under sections 5 to 8 of the Companies Act a company (“A”) is a subsidiary of another company (“B”) if -

- 4.1 B controls the board of A; or
- 4.2 B holds more than 50% of the shares, or more than 50% of the shareholders’ voting rights, in A; or
- 4.3 B is entitled to receive more than 50% of the dividends paid by A; or
- 4.4 A is a subsidiary of a company that is a subsidiary of B.

Other examples where independence addressed

5 It is worth noting that the question of independence is addressed, for other purposes, in the Companies Act and NZX Listing Rules:

5.1 s126 of the Companies Act includes as a director of a company (for the purposes of various provisions of that Act) “a person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act”;

5.2 the NZX Listing Rules exclude from the definition of “independent director” any person who has a “disqualifying relationship” which is defined as “any direct or indirect interest or relationship that could reasonably influence, in a material way, the Director’s decisions ---”.

Directors’ duties

6 S131(1) of the Companies Act requires every director of a company to act “in good faith and in what the director believes to be the best interests of the company”. However s131(2) and (3) modify this requirement by providing that in certain circumstances a director of a subsidiary may act in the best interests of the subsidiary’s holding company even though to do so may not be in the best interests of the subsidiary.

Matters to consider when granting exemptions

7 The purpose of the voting restrictions in clauses 7.4 and 7.5 is to prevent a company or other person controlling more than one vote by means of a group of related shareholders.

8 The test for the grant of an exemption under clause 7.6 is whether, in the opinion of the Board, the management of the business and affairs of the shareholder is conducted independently from that of any other shareholder. Clause 7.7 makes it clear that a right, or exercise of a right, to control the appointment of a majority of directors of a shareholder does not of itself mean that the management of the business and affairs of the shareholder is not conducted independently from that of any other

shareholder. In other words, the test is how is the business managed in practice rather than what legal rights exist.

9 In deciding whether to grant an exemption applied for by a shareholder, the Board must therefore identify who manages the business and affairs of the shareholder,

look at the relationships and conduct of those persons, and decide whether they are independent in their decision making from the managers of every other shareholder. Each application must be considered on its own merits.

10 The matters that the Board should consider when making a decision on an exemption application include-

- 10.1 whether the businesses and affairs of the shareholder seeking exemption and another shareholder are significantly co-mingled or conducted separately. If the former, the exemption should not be granted;
- 10.2 if the business of the shareholder seeking exemption is not significantly co-mingled with that of another shareholder, who in practice manages the business and affairs of the shareholder seeking exemption? If the shareholder is a New Zealand company, the primary responsibility for management is that of the directors (see s128(1) Companies Act 1993). However –
 - the directors may have delegated much of this role to a committee, chief executive, or other person; or
 - the directors (or the delegate) may in practice act in accordance with the directions or instructions of another person (for example, the board or management of a holding company); or
 - the directors (or the delegate) may, in making decisions, be influenced in a material way by a direct or indirect interest or relationship (for example, there may be an active substantial shareholder, or the directors or delegate may be employed by or otherwise receive remuneration from a third person, or the directors may act in the best interests of the shareholder's holding company even though to do so may not be in the best interests of the shareholder (see paragraph 6 above));
- 10.3 once it is decided who in practice manages the business and affairs of the shareholder seeking exemption, it is necessary to determine whether these persons also directly (by being directors or delegates) or indirectly (by giving directions or instructions to or influencing the directors or delegates) manage the business and affairs of another shareholder. If so, the exemption should not be granted;
- 10.4 there may be cases where some but not all of the persons who manage the business and affairs of a shareholder are also involved in managing the business and affairs of another shareholder. In any such case, the question should be whether these persons control (by being a majority or otherwise) the management of the business and affairs of both shareholders. If so, the exemption should not be granted;

- 10.5 there may also be cases where, in practice, certain persons manage some of the business and affairs of a shareholder and other persons manage the rest. In any such case, the question should be who manages the majority of the business and affairs of the shareholder.
- 11 Clause 7.6(b) of GIC's constitution authorises the Board to impose terms and conditions in respect of any exemption it grants. Such terms and conditions could, for example, include any or all of the following –
- 11.1 an expiry date for the exemption;
 - 11.2 a requirement for the shareholder seeking exemption to immediately advise any changes in those who directly or indirectly manage its business and affairs (including any ability of any person to direct, instruct, or influence any director of the shareholder or delegate not previously advised to the Board) and/or that the shareholder or another specified person give periodic certificates in relation to such matters;
 - 11.3 a prohibition on certain persons being involved in any discussion or voting on any issue relating to GIC.
- 12 Applicants for an exemption under clause 7.6(a) should be asked to provide all information relevant to the matters referred to in paragraphs 7 to 10 above. The Board should, to the extent practicable, check the accuracy of the information provided. For example, the Board could ask that the information provided by the applicant be certified correct by a specified independent person. If the information provided is open to question or is not clear and comprehensive, the Board should defer making a decision on the application until satisfactory verified information is provided.
- 13 The Board should, on a regular basis, monitor any exemption it has granted to ensure that the exemption continues to be justified. If there is doubt as to the continuing justification for an exemption, the Board should review it as soon as possible and, if appropriate, revoke it under clause 7.6(c) of the constitution.