

# Talking Companies

## Consideration for Shares under the Companies Act 2008 (“the Act”)

The board of directors of a company (“the board”) must issue authorised shares of the company only:

- for adequate consideration;
- in terms of conversion rights associated with previously issued securities (e.g. warrants or options);
- as a capitalisation share (i.e. shares issued to existing shareholders pro rata to their existing shareholding, usually as an alternative to distributing a cash dividend to that shareholder).

The board must determine the adequacy of the consideration payable and the terms under which the shares will be issued. The determination of the adequacy of the consideration may not be challenged except on the basis that the directors breached a statutory duty of care established in terms of the Act. The shares need not be issued for cash, as “consideration” means anything of value given and accepted in exchange for any property, service, act, omission or forbearance or any other thing of value, including:

- any money, property, negotiable instrument, securities, investment credit, facility, token or ticket;
- any labour, barter or similar exchange of one thing for another;
- any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly.

When the consideration is in a form other than for cash, payment is only received when the company has negotiated (i.e. realised the cash value for the consideration tendered) or the subscribing party has performed its obligations in terms of the agreement with the company. Prior to either of the above occurring, the share is issued by the company and is then held in trust by a third party, for the subscribing party, until payment is actually received. Except to the extent that the agreement with the trustees provides otherwise, there will be limitations on the voting rights, any pre-emptive rights, the right to receive dividends and the transferability of any shares issued for a non-cash consideration, until the payment is received by the company.



When a company proposes:

- a resolution that alters the rights of a shareholder in a materially adverse manner;
- to dispose of the major part of the assets or business undertaking of the company;
- to merge or amalgamate with another company;
- a scheme of arrangement affecting the shares of that shareholder;

then the shareholder may invoke section 164 of the Act, resulting in the company having to pay the fair value of the shares held by that shareholder, determined as at the date on which, and the time immediately before the company took the action. If the company and the shareholder cannot agree on the fair value, an application may be made to the court to determine such fair value.

### Contact Information

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