



MEMO

To: Board of Directors
From: Company Secretary
Subject: **COMPULSORY ACQUISITION OF SHARES**

In certain circumstances **a shareholder who holds/controls at least 90% of the shares in a company** – acquired or obtained in any way, not necessarily through any (formal or informal) takeover bid – may move to compulsorily acquire the balance of shares not held by him.

Procedures and requirements governing the compulsory acquisition of shares in a company are detailed in the Corporations Act. The Act contains provisions designed to protect shareholders (in a target company) who are having their shares compulsorily acquired to ensure that they receive adequate information and a fair price for their shares.

Takeover Provisions

'Compulsory acquisition' typically happens when someone ('bidder') makes a takeover offer for a stock exchange listed company ('target') if, having exhausted the takeover procedures, they find themselves with less than 100% but at least 90% of the shares in the target. Having reached 90% the bidder may be entitled to invoke the compulsory acquisition provisions in the Act and 'force' the remaining shareholders in the target to sell their shares to the bidder.

A similar process may also apply with an unlisted target company if the bidder is someone who is required by the circumstances to follow the relevant sections of the Act, even if they are not 'caught' by the takeover provisions.

General Provisions

There are situations where someone, for various reasons, is not covered by, or required to comply with, the takeover provisions in the Act – for example the target may be too small in some way (eg, less than 50 shareholders) – but nevertheless reaches an ownership of 90% of the shares in another company and then seeks to acquire 100% of that company.

Sec.664A(1) states that a "90% holder" is someone who holds, either alone or with a related body corporate, full beneficial interest in at least 90% of the shares [in a company] by number.

Sec.664A(3) states that a 90% holder may compulsorily acquire all the other shares in the company if either:



- after an objection period [of at least 1 month] set out in a Notice [pursuant to Sec.664C(1)] no shareholder objects to the acquisition or, if any shareholders have objected, they together hold less than 10% of the shares being acquired; or
- if shareholders with 10% or greater of those shares object, the 90% holder applies to the Court within 1 month and the acquisition is approved – Sec.664F.

A 90% holder must action compulsory acquisition within 6 months of becoming a 90% holder – Sec.664AA.

Acquisition consideration must be cash only and the same price paid for all shares – Sec.664B.

A Sec.664C(1) notice (Form 6024 “Notice of Compulsory Acquisition”) must contain the requisite information and be sent to all shareholders and the target company, together with a copy of an expert’s report and objection form, and be lodged with ASIC on the prior business day or the same day at the latest – Sec.664C(2) & (3).

Expert’s Report

Requirements for the expert’s report are set out in Sec.667A, and the expert must be approved by ASIC. The report must state whether, in the expert’s opinion, the terms proposed for the compulsory acquisition give a fair value for the shares concerned and set out the reasons for forming that opinion.

There is apparently no scope for ASIC to waive the requirement for an expert’s report in any circumstance, as we recently found out at another company where our lawyers approached ASIC on this as we had just one recalcitrant shareholder with 0.0001% worth only about \$1,500 and they said *“ASIC have advised that unfortunately there is no scope to grant relief from the requirement to obtain an expert’s report with respect to the compulsory acquisition provisions.”*

Summary

Subject to meeting the requisite provisions in the Act, any person can seek to compulsorily acquire the outstanding shares in any company once they hold 90%.

In summary, the [simplified] process is:

- take action within 6 months of reaching the 90% level
- arrange an expert’s report on the fair value of the shares
- lodge Form 6024 Notice (including the expert’s report and an objection form) with ASIC and then send it to all shareholders
- if objections are received from holders of less than 10% of the shares within the objection period (being at least 1 month), proceed with the compulsory acquisition



- BUT, if objections are received from holders of at least 10% of the shares apply, within 1 month (of the end of the objection period), to the Court for approval.

DISCLAIMER

The comments in this memo reflect some commercial aspects and observations on the matter experienced or observed by the writer in practice as he understands them. The information is given as a guide only and does not represent a definitive or legal view of any of the issues raised, covered or referred to and the reader is urged to seek his own professional advice on all aspects of, or pertaining to, this and any related matter.

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