



MEMO

To: Board of Directors
From: Company Secretary
Subject: **DEBT FINANCE: CHARGES**

Rather than raising additional equity (share capital) a company's option may be some form of debt finance.

Advantages/reasons of debt finance/borrowing may be seen as:

- no dilution of existing shareholders
- shareholders may be reluctant to contribute more
- interest is usually a tax deduction
- unencumbered assets may be "utilised" as security.

Typical forms of debt finance/borrowings include:

- bank loan
- debenture
- convertible note

and, in some cases, the latter two may require a prospectus (or other disclosure document).

Borrowings may be:

- secured
- unsecured.

CHARGES

The document creating security over a company's assets is usually referred to as a "charge".

A charge does not pass ownership; it merely creates an interest by the lender in the borrower's property and hence that property is burdened by the rights granted to the lender – particularly the right to be repaid out of the proceeds of sale of the property if the borrower is in default.

REGISTRATION OF CHARGES

Certain charges must be registered with ASIC (Corporations Act section 262) within 45 days of creation to ensure their enforceability. Priority in a winding up is determined by the timing of registration with ASIC.



Lodgement with ASIC requires completion of Form 309 “Notification of Details of a Charge”. This must be signed by the borrower (chargor).

A charge may also be required to be stamped in the relevant jurisdiction (ie: Australian State/Territory) where the assets are located and/or the borrowings are made. This should usually be done before lodgement with ASIC, but if “time is of the essence” then provisional registration can be made.

A Form 350 “Certification of Compliance With Stamp Duties Law” also needs completion, signing by the chargor and lodgement with ASIC – attesting to payment of stamp duty.

REGISTER OF CHARGES

All companies must maintain a Register of Charges (sec. 271) – even if it is blank – detailing all charges, whether or not registered with ASIC.

As a minimum the Register must contain:

- date of creation of charge
- description of property subject to charge
- date of acquisition of property charged
- description of liability secured by charge
- name of chargee (and/or trustee – if debenture)
- name of holder of charge (if applicable).

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.