



MEMO

To: Board of Directors
From: Company Secretary
Subject: **RETURN OF CAPITAL – SINGLE SHAREHOLDER COMPANY**

You have requested my comments on what is involved for EPL to reduce its share capital because it has surplus capital far in excess of its needs (in fact, it no longer needs any share capital as it has no real business).

At present there are 12 million ordinary shares on issue, fully-paid to \$1.00 each (i.e., a total paid-up-capital of \$12m), and your intention is to return the \$12m to the shareholder (MCL), yet retain the company's registration. In this regard, it is quite possible for the company to keep the 12 million shares on issue, if it wants to, rather than cancel them, yet have a paid up amount of nil per share, so the total paid-up-capital would then also be nil.

A company (i.e., its shareholder/s – most probably on the recommendation of the directors/s) – can reduce its paid up share capital if it wants to, generally by the shareholders passing an ordinary resolution (if an equal reduction) or special resolution (if a selective reduction).

The Corporations Act provides for a share capital reduction under sec 256B(1) if it:

- (a) is fair and reasonable to the shareholders as a whole; and
- (b) does not materially prejudice the company's ability to pay its creditors; and
- (c) is approved by shareholders under sec 256C of the Act.

If the reduction also involves the cancellation of shares, a separate special resolution passed by the shareholders whose shares are to be cancelled is required – sec 256C(2). However, capital can be returned to shareholders without need to actually cancel any shares. Conversely, the object or outcome of a share capital reduction might be that shares are cancelled with no return of capital (i.e., for no consideration).

Single Shareholder Process

In our case there is only one shareholder, so the process is somewhat more simplified than where there are several/many shareholders (unless the single shareholders wants, for some reason, to go through the longer/more complicated process required for multiple shareholders).



A single shareholder company does not need to issue a notice of meeting and prepare an explanatory memorandum (i.e., 'meeting documents'), or hold a shareholders' meeting to pass a resolution. A company that has only one shareholder may in fact pass a resolution by the shareholder simply putting it down in writing and signing the document as per sec 249B(1) – so no actual 'meeting' is ever held. Passage of the resolution must be recorded in the company's minute books – sec 251A(1)(c). In this situation, the company is not required to lodge any documents with ASIC relating to the share capital reduction before the resolution is signed/passed – primarily because there was no shareholder's meeting.

The actual share capital reduction and return of capital, if any, can be made immediately following the signing of the shareholder's resolution.

Also, upon reduction of the company's share capital, shareholding details must be adjusted in the Share Register to reflect, for example, new shareholding number/s and/or paid up capital amount/s. Replacement Share Certificate/s or Holding Statement/s may also be required, which should be sent out to the shareholder with a suitable covering letter noting the specific details of the capital reduction/repayment.

Then, within 14 days after the resolution is signed by the single shareholder, the company is required by sec 249B(2) to lodge a Form 2205 "Notification of Resolutions Regarding Shares" with ASIC, irrespective of whether it was an equal or selective reduction (because for a single shareholder company that is, of course, irrelevant), stating that the resolution was passed and accompanied by a copy of the resolution signed by the single shareholder.

On one view this Form should probably also be accompanied by the 'meeting documents', if in fact there are any, to fully satisfy sec 249(2) – but this is unclear in ASIC pronouncements, partially because if a resolution is signed then it could be said there has been no 'meeting', although direct enquiry of ASIC has elicited the informal response that such documents are definitely not necessary for a single shareholder company.

It is equally unclear whether there is also a need to then wait another 14 days (which under sec 256C(3) would usually be the case when lodging a Form 2205 for a selective reduction) before actually making the capital reduction/return of capital, but in my opinion it is probably prudent to do so. However, again, direct enquiry of ASIC has elicited the informal response that this is unnecessary.

Lastly, Form 484 "Change to Company Details" (Section C1 Cancellation of Shares) must be lodged with ASIC within 28 days of the actual share capital reduction date to effect the return of capital in ASIC's records (and effect any share cancellations – which may not necessarily be the case for EPL).



Summary

In summary, the steps to follow will be:

1. Hold an EPL board meeting to formally decide to recommend to the shareholder (MCL) that they approve the return of \$12m paid up share capital to the shareholder, but leave the 12 million issued shares in place with a paid up amount of nil.
2. Hold an MCL board meeting to formally approve the capital reduction proposal and authorise a representative to sign an EPL shareholder's resolution to that effect.
3. Have the MCL shareholder representative sign (and date) the EPL shareholder's resolution.
4. Complete and lodge Form 2205 with ASIC within 14 days of the date of signing the shareholder's resolution.
5. Details of the share capital reduction should then be noted in the Share Register.
6. Lastly, Form 484 must be lodged with ASIC within 28 days of the share capital reduction date so as to effect the capital reduction in their records.

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.
