



MEMO

To: Board of Directors
From: Company Secretary
Subject: **SHARE BUY-BACK – 10 PERCENT LIMIT**

The Corporations Act allows a company to buy-back its own shares using one [or more] of several methods. The main reason for buying back shares is to distribute surplus capital, then cancel the shares.

The relevant statutory/regulatory provisions are covered under Part 2J.1 Division 2 (ss257A ~ 257J) of the Corporations Act and, for a listed company, compliance with the stock exchange listing rules.

Principal Methods

The most practical method of conducting a share buy-back is either '**equal access**' (ie, the same for all shareholders - s257B(2)) or '**selective**' (eg, to only some shareholders based on certain criteria - s257D).

For a stock exchange listed company it can also buy back its shares '**on-market**'.

Shareholders' Approval

In some circumstances shareholders' approval is required:

- equal access - only if the amount to be bought back exceeds the '**10/12 limit**' - by ordinary resolution (s257C)
- selective - in all cases - by special resolution of those shareholders not participating (s257D)
- on-market - again, only if over the 10/12 limit - by ordinary resolution.

10 / 12 Limit

The following share buy-backs are allowed **without shareholder approval**:

- those involving buying back 10% or less of the [smallest] total shares on issue within a twelve-month period

as detailed in ss257B(4) & 257B(5). The requirements for share buy-backs within the 10/12 limit are less onerous than those over that limit.



Equal Access Buy-back

So, as I understand it, what we are going to offer our shareholders is an equal access share buy-back within the 10/12 limit so that it can be implemented quickly and without need for prior shareholder approval.

Under an equal access buy-back all shareholders must be given the same offer as to the percentage of shares bought back and the payment amount (per share).

Documentation

An Offer Document must be prepared setting out prescribed information (similar to what must be provided in an Explanatory Memorandum for a shareholders' meeting), sent to shareholders and, as required by s257E, lodged with ASIC at least 14 days before the offer can be accepted (s257F) - required to give shareholders 'reasonable' time to consider the offer, and provide creditors with notice and right of objection.

Form 280 *Notification of Share Buy-back Details* is used to lodge documents with ASIC.

The buy-back Offer Document must set out all material relevant information necessary for shareholders to make a decision (on acceptance of - or voting for - the proposal) and to adequately inform creditors - s257G. Importantly, no shareholder or creditor can be prejudiced as a result of a buy-back. Certain minimum criteria and matters to be covered must be addressed in the Offer Document, including the reasons (underlying principles and facts), effect on ownership/control of the company, resultant financial impact/position and assurance from directors that the company will not become insolvent as a result of the buy-back - otherwise directors may become personally liable.

Share Buy Back Disclosures

Under paragraph 45 of ASIC Regulatory Guide 110, at a minimum the following information should be provided to shareholders:

- (a) the number of shares on issue;
- (b) the number and percentage of shares to be bought back;
- (c) particulars of the terms of the buy-back;
- (d) the offer price or a simple formula to calculate the price;
- (e) the reasons for the buy-back;
- (f) the interests of any director who may participate in the buy-back agreement;
- (g) the financial effect of the buy-back on the company;
- (h) the source of the funds for the buy-back;
- (i) for a buy-back scheme, the date the offer will commence and close;
- (j) if the company is required under the Corporations Act to lodge audited financial statements, its latest set of audited financial statements (unless they have been recently given to the shareholders); and



(k) if the company is listed, information regarding the current share market price and any additional information that ASX Listing Rules require to be disclosed.

This information will also assist creditors assess any implications the buy-back may have for them - that it will not materially prejudice the company's ability to pay its creditors - as required by s257A(a).

Acceptance of Offer

Shareholders must be given a 'reasonable' opportunity to accept the offer - but there is no obligation for any shareholder to accept.

It is usual for an offer period to be set - say 1 month (the minimum time that ASIC considers reasonable) - and only after it has closed can the buy-back agreements (Offer Document) be finalised (ie, the company cannot accept any offers until this period has elapsed).

Shareholders can also be given the opportunity for the company to offer to buy back more than 10% of their holdings, on condition that overall acceptances are capped at 10%. This allows for the fact that some shareholders may not accept the offer, so any excess (over a total 10%) can be prorated amongst all accepting shareholders. Whilst this approach is not detailed in the Act, legal advice is that ASIC views this as acceptable - on the basis that the 10/12 limit is not breached.

Taxation Issues

Shareholders may have capital gains and/or revenue tax implications on the proceeds of a share buy-back, depending on the capital/dividend split components of the amount paid to them - to be calculated and advised by the company when making payments - and their own tax position. It would be usual to include words in the Offer Document suggesting that shareholders take their own advice in relation to tax.

Cancellation of Shares

Effectively, when shares are bought back, ownership is transferred back to the company and after the buy-back is completed the relevant shares bought back are cancelled - s257H(3).

s254Y then requires notification of the cancellation to ASIC by lodging Form 484 (Part C) *Change to Company Details* within 1 month of the cancellation date (although according to the form itself the time limit is only 28 days).

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.