



MEMO

To: Board of Directors
From: Company Secretary
Subject: **SHARE BUY-BACKS: PTY LTD COMPANY**

The Corporations Act (and sometimes the company's Constitution) governs the buying back of shares by a company. In my opinion, this is effectively the easiest way a company can reduce its share capital.

The Act applies to all company types, including Proprietary Limited companies. And, for our company, we principally must look to the Act because the Constitution says only (in Rule 16.2) that: "*Subject to the Law, the company may, by special resolution, reduce its share capital*". The company also enjoys the simplicity of only one share type, which makes the process easier, regardless of the amount that might have been actually paid up (if any) on any particular shareholdings.

There are different types of buy-backs, but only the general ones apply here: either 'equal' (ie, the same for all shareholders) or 'selective' (ie, to only some shareholders based on certain criteria). The other types that can be used by Pty Ltd companies are 'minimum holding' and 'employee share scheme'.

Under an **equal access buy-back** all shareholders must be given the same offer as to the number/percentage of shares bought back and the payment amount. An Extraordinary General Meeting* is required to approve the arrangement, passed by a simple majority (ie, more than 50%).

A **selective buy-back** is one where different (terms/percentage/payment/etc) offers can be made to different (some/all) shareholders. For example, you could make a 'selective buy-back' offer to all shareholders excluding the directors and their related party shareholders. However, whatever offer is made it must be 'fair and reasonable to shareholders as a whole'.

An EGM* is also required to approve such arrangement(s), BUT

- the resolution must be passed unanimously by ALL shareholders (ie, they must all be present personally or represented by proxy, attorney or corporate representative) OR
- a special resolution is required passed by 75% of shareholders present (or proxy) EXCLUDING those (and their associates) participating in the buy-back (who are in fact excluded from voting).

Short notice (less than 21 days) of the meeting is possible (subject to 95% of share voting power prior written consent for an EGM) – but still with a minimum of 14 days as that much notice must be given by documents lodged with ASIC (required to give creditors notice and right of objection), provided shareholders have 'reasonable' time to consider the offer within such shorter time period.



There are 2 approaches to conducting a selective buy-back. One approach, which our lawyers seem to favour on this occasion, is to first send out the offer documents (cover letter plus Buy-back Agreement, incorporating the material information mentioned below that would otherwise be incorporated into the Explanatory Memorandum – ref CA Sec. 257G & ASIC Regulatory Guide 110) – *conditional on later shareholder approval* – to all shareholders to whom the ‘selective buy-back’ offer is to be made and then ascertain how many acceptances are received so that (provided there is sufficient interest to warrant it) the EGM can then be called. The other approach is to send out the Notice of Meeting and Explanatory Memo at the same time as the Buy-back Agreement, so that the level of acceptances is probably not known until after the EGM.

The Explanatory Memo (and Buy-back Agreement, if not already sent) must accompany the Notice of Meeting (and also be lodged with ASIC) setting out all material relevant information necessary for shareholders to make a decision (on voting and/or acceptance of the proposal) and to adequately inform creditors. Importantly, no shareholder or creditor can be prejudiced as a result of a buy-back. Certain minimum criteria and matters to be covered are prescribed for inclusion in the Explanatory Memo, including the reasons (underlying principle 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 they may become personally liable.

All documentation must be lodged with ASIC the day before it is sent/given to shareholders, using Form 280. In fact, if the first approach above is taken, the offer documents may have to be lodged with ASIC before they are posted to relevant shareholders (CA Sec. 257E) and then when the EGM documents are to be sent out they too must be lodged with ASIC (CA Sec. 257D(3)). However, where the Buy-back agreement is conditional on shareholder approval – as our lawyers propose – then all documents can be lodged together – providing it is at least 14 days before the EGM.

Once EGM approval is given the buy-back can be effected, payment sent to accepting shareholders and the shares are [deemed] cancelled, using Form 484.

Note: stamp duty is no longer payable on buy-backs (ie deemed share transfers) effected in Queensland, although I am not sure that this applies in all other states (it does in some, at least).

* or, for a Pty Ltd company, a Circulating Resolution signed by all shareholders – including each member if joint holding

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.