



MEMO

To: Board of Directors
From: Company Secretary
Subject: **SHARE BUY-BACKS – UNLISTED COMPANY**

A "buy back" involves a company reclaiming issued shares by purchasing them from existing shareholders (i.e., buying them back).

The buy-back provisions in our Constitution appear to relate to a 'less than marketable parcel' buy-back (or re-sale to other shareholders – which is effectively what we did a couple of years ago). Normally such only applies to listed companies, one of the requirements being that this can't happen more than once every 12 months.

However, the Corporations Act allows buy-backs in several other ways, the most practical for an unlisted company being either ' **equal access** ' (ie, the same for all shareholders) or ' **selective** ' (ie, to only some shareholders based on certain criteria).

Equal Access Buy-back

All shareholders must be given the same offer as to the percentage of shares bought back and the payment amount.

This is the easiest scheme to put in place because *if the offer is limited to buying back no more than 10% of the issued shares over 12 months* then shareholder approval is not required. Otherwise, an EGM is required to approve the arrangement, passed by a simple majority (>50%).

In either case the buy-back Offer documents (and EGM notice/Explanatory Memorandum if applicable) must be lodged with ASIC at least 14 days (but no more than 1 year) before the offer can be accepted (and/or EGM date).

Selective Buy-back

The most common alternative – and probably the one that suits us better – is a selective buy-back.

Here, different (terms/percentage/payment) offers can be made to different (some/all) shareholders. For example, the offer might be to all holders of less than 10,000 shares – about 150 shareholders – or say 50,000 shares – about 200 shareholders. A selective buy-back may even involve only 1 shareholder, if there is some particular reason why that holder's shares should be bought back. However, whatever offer(s) is made it must be 'fair and reasonable to shareholders as a whole'.

An EGM is required to approve such arrangement(s), and



- 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 by proxy, etc) excluding those (and their associates) participating in the buy-back

Again, the buy-back Offer documents and EGM notice/Explanatory Memorandum must be lodged with ASIC at least 14 days before the offer can be accepted and/or the EGM date (required to give creditors notice and right of objection), provided shareholders have 'reasonable' time to consider the offer. In practice these documents would all be lodged at least 21 days in advance because they must be lodged with ASIC at least the day before they are sent/given to shareholders, and 21 days' notice is required for calling an unlisted public company EGM.

The Explanatory Memorandum and buy-back Offer must accompany the Notice of Meeting 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 must be addressed in the EM, 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. Below is a slightly paraphrased extract from ASIC Regulatory Guide 110 setting out the specific disclosure requirements.

Queensland Stamp Duty is no longer payable on the buy-back shares (as if they were a transfer), although it may still be applicable in some states.

After the buy-back is completed the relevant shares are cancelled.

Should the Board resolve to proceed with a share buy-back I believe I have adequate precedents to prepare all necessary documentation if required.

Share Buy Back Disclosures

Under RG 110.45 shareholders voting on a buy-back resolution or receiving offers must be sent all information which is material to their decision whether to vote in favour of the resolution or accept the offer (s257C(2) and 257D(2)). There are no prescribed particulars to be included in the information statement or the offer document. Further, under s257C(2) and 257D(2), the company does not have to set out information previously disclosed to shareholders (however, somewhat confusingly, this exception is not included in the disclosure requirement of s257G). However, 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) for a selective buy-back, the effect the buy-back will have on the control of the company;
- (k) for a selective buy-back, the identity of the selling shareholders;
- (l) for a selective buy-back, the advantages and disadvantages of approving the buy-back;
- (m) 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
- (n) 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 (s257AA(a) and 257A(a)).

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.