



MEMO

To: Board of Directors

From: Company Secretary

Subject: **SHARE BUY-BACK – SINGLE SHAREHOLDER COMPANY**

As we have decided to de-register our wholly-owned subsidiary (because that company no longer has any use) we have to first reduce its assets down to 'nil'; in practice that means say \$1 (equalling 1 share of \$1 – because a company must have at least 1 share).

At present the subsidiary has only cash assets of \$2.7m and 12 million shares on issue.

It seems to me that the easiest way of distributing the cash (up to the parent company) is to undertake a share buy-back, whereby the subsidiary effectively buys back, and cancels, all but 1 of the shares on issue in exchange for paying all but \$1 of the cash at bank out to the parent company. We have tax advice to the effect that, in view of our structure, this proposal will result in no adverse tax consequences for such action.

Share Buy-back

Under the Corporations Act (section 257A) all companies are empowered to purchase (buy-back – from shareholders) their own shares, provided such action does not materially prejudice the company's ability to pay its debts as and when they are due; otherwise, amongst other things, the company may be trading insolvent and directors may become personally liable for the company's debts. Further, if a share buy-back causes the company to become insolvent, the liquidator may be able to recover compensation from the selling shareholders. Anyway, our subsidiary has no debts, creditors or other liabilities.

The Act allows buy-backs in several ways, the most practical being either 'equal access' (ie, the same for all shareholders) or 'selective' (ie, to only some shareholders based on certain criteria) – governed primarily by Division 2 of Chapter 2J (ss.257A~257J) which includes the lodging of buy-back documents with ASIC and the calling of a shareholders' meeting to approve the terms of the buy-back.

ASIC Regulatory Guide 110 also covers buy-backs in more practical detail.

The buy-back procedures are designed to protect the [sometimes conflicting] interests of both shareholders and creditors.

Single Shareholder Company

Where there is only 1 shareholder in a company (a single shareholder) – such as our case – the different types of buy-back are largely irrelevant, as is the procedure for calling meetings covered by Divn.2.



S.249B allows, where there is a parent company single shareholder, that there is no need for the subsidiary to issue a notice of meeting or hold a meeting to pass a resolution. A company that has only 1 shareholder may pass a resolution by that shareholder recording it in writing and signing the record.

Whilst a single shareholder company does not need to have a meeting, RG110.70 requires that the company still must lodge the documents required under ss.257E&G with ASIC, not because the information about the subsidiary and the buy-back is unknown to the parent company (i.e., the shareholder), but so that creditors are on notice.

I can see no provision in the Act or the RG covering when/how this information must be lodged with ASIC for a single shareholder company. I have spoken with ASIC by phone on this and, in their opinion, this must be done by lodging a Form 280 "Notification of Share Buy-back Details" at least 14 days before it is intended to sign the resolution (or hold a meeting, if that is what the subsidiary wants to do).

It is also unclear to me whether, for a company with only 1 shareholder, the buy-back should be regarded as 'equal access' or 'selective' – but I guess in practice it does not matter as the information to be provided to ASIC is effectively the same.

Information for Shareholders

So, based on RG110.70, information that would normally be sent to all shareholders must also be prepared for a single shareholder company.

That information must include whatever is known to the company and is material to the decision how to vote on the resolution. However, the company does not need to disclose information that it would be unreasonable for the company so to do if it is has already been provided to shareholders – ref s.257D(2).

RG110.18 gives guidance to the areas to be addressed in information 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.

In addition, if the buy-back consideration is 'non cash' then the following should also be covered:

- (i) a valuation of the assets offered as consideration; and
- (ii) an assessment of the effect on the company of the assets being offered.

Action After Resolution Passed

Whether by meeting or single shareholder resolution, once it is passed/signed the buy-back can be actioned, unless the company has given less than 14 days' notice using Form 280, in which case it must also lodge a Form 281 "Notice of Intention to Carry Out Share Buy-back" and the buy-back cannot actually be actioned until at least 14 days (the 'relevant date') after that form is lodged with ASIC.

After the buy-back transaction is completed the shares are deemed cancelled under s.257H(3) and the subsidiary is required to lodge a Form 484 "Change to Company Details" (Section C1 Cancellation of Shares) within 28 days to effect cancellation on ASIC's records – s.254Y. Passing of the resolution must be entered in the company's minute books, as required by s.251A(1)(c).

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.