

# Acis.

## Company Chaos Calmed

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# Today's Speakers



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# Agenda



- Cancelling shares – redemption, forfeiture & buybacks
- Missing directors & shareholders
- Taxation of share buybacks
- Issuing shares for different amounts
- Constitution requirements
- Dividend access shares & small business CGT concessions
- Financial Assistance
- Successor Directors vs Alternate Directors
- Customised constitutions
- Company Document Packs

# What can be done if a Director can't be contacted?

- Company constitution
- The Acis constitution:

*A director is removed if the Director:*

- *does not attend at least 3 consecutive meetings of Directors without the consent of the other Directors – Rule 25.3(f)*
- *is or becomes uncontactable for more than 2 months without the consent of the other Directors – Rule 25.3(g)*

# How can shares be “cancelled”?

- Redemption

## **Section 254J (1) Corporations Act 2001 (Cth)**

*A company may redeem redeemable preference shares only on the terms on which they are on issue. On redemption, the shares are cancelled.*

## **Section 254K Corporations Act 2001 (Cth)**

*A company may only redeem redeemable preference shares:*

- (a) if the shares are fully paid-up; and*
- (b) out of profits or the proceeds of a new issue of shares made for the purpose of the redemption.*

# How can shares be “cancelled”? (cont.)

- Forfeiture

## **The Acis constitution:**

*If a Member does not pay the amount claimed in accordance with a Call Notice, the relevant shares may be forfeited by a Director’s resolution – Rule 16.1*

*A forfeited share is cancelled immediately on forfeiture – Rule 16.5*

## **Section 258D Corporations Act 2001 (Cth)**

*A company may, by resolution passed at a general meeting, cancel shares that have been forfeited under the terms on which the shares are on issue.*

# How can shares be “cancelled”? (cont.)

- Share Buyback

## **Section 257A Corporations Act 2001 (Cth)**

*A company may buy back its own shares if:*

- (a) the buy-back does not materially prejudice the company's ability to pay its creditors; and*
- (b) the company follows the procedures laid down in this Division.*

## **Section 257H(3) Corporations Act 2001 (Cth)**

*Immediately after the registration of the transfer to the company of the shares bought back, the shares are cancelled.*

# What can be done if a shareholder cannot be located?

- Redemption
- Forfeiture
- Form 6010:

I declare that the statements below are correct.

***(a) All members of the company agree to the deregistration; and***

***(b) the company is not carrying on business; and***

***(c) the company's assets are worth less than \$1000; and***

***(d) the company has paid all fees and penalties payable under this Act ;and***

***(e) the company has no outstanding liabilities; and***

***(f) the company is not a party to any legal proceedings***



# What are the tax implication of share buybacks?

*Section 159GZZZP(1) Income Tax Assessment Act 1936 (Cth) – Deemed Dividend*

*(1) For the purposes of this Act, but subject to subsection (1A), where a buy-back of a share or non-share equity interest by a company is an off-market purchase, the difference between:*

*(a) the purchase price; and*

*(b) the part (if any) of the purchase price in respect of the buy-back of the share or non-share equity interest which is debited against amounts standing to the credit of:*

*(i) the company's share capital account if it is a share that is bought back; or*

*(ii) the company's share capital account or non-share capital account if it is a non-share equity interest that is bought back;*

*(iii) is taken to be a dividend paid by the company*

*Section 159GZZZQ Income Tax Assessment Act 1936 (Cth) - Deemed market value*

# Can shares be issued in the same class for different amounts?

- Yes



# How can small business CGT concessions be preserved when Dividend Access Shares are on issue?

*Division 152 Income Tax Assessment Act 1997 (Cth)*

*Devuba Pty Limited and the Commissioner for Taxation*

- Capital gain = ~\$4.3 million.
- Capital gain reduced to nil by virtue of the small business CGT concessions.
- Commissioner claimed that the small business CGT concessions were not available to Devuba, largely because of the existence of a dividend access share.
- Shares in Devuba:
  - One ordinary share held by Mr Van der Vegt;
  - One ordinary share held by the Van der Vegt Family Trust;
  - One dividend access share held by Mrs Van der Vegt.

# How can small business CGT concessions be preserved when Dividend Access Shares are on issue? (cont.)

- In the relevant year (2010) - Devuba had declared a dividend of \$800,000 to the holders of the ordinary shares. No dividend was paid – or could be paid – to the dividend access shareholder.
- The Commissioner argued that the directors of Devuba had a *discretion* to pay a dividend on the dividend access share and could use their powers to pay that dividend to the exclusion of the ordinary shareholders, meaning the ordinary shareholders might obtain a zero distribution.
- 2008:
  - .... the rights attached to dividend access shares are varied so that the holders of the dividend access shares have no right to payment of a dividend until such time as the directors of the Company resolve that the holders of the dividend access shares have a right to a payment of a dividend.

# How can small business CGT concessions be preserved when Dividend Access Shares are on issue? (cont.)

- At that time, the only shares that carried any rights to dividends that may be paid in Devuba were the ordinary shares as the directors had not, at that time, passed a resolution giving the holder of the dividend access share a right to be paid a dividend.
- The Federal Court of Australia dismissed the Commissioner's appeal, finding that Devuba's ability to pay a dividend to the holder of the dividend access share was dependant on a determination to do so being made by the directors – and so was restricted until the directors so declared.

# Small business CGT concessions and the Acis constitution

- I, J & K class shares:
  - No rights until the directors declare that they have rights.
  - A Directors' declaration can only confer a Right to receive dividends.
  - Resolve to pay a dividend to the holders of these shares after dividend Rights have been declared.
  - Redeemable.

# What is Financial Assistance Whitewashing?

*Section 260A Corporations Act 2001 (Cth)*

- No material prejudice to the interests of the company or its shareholders or the company's ability to pay its creditors; or
- Shareholder approval.

Forms 2601, 2602 & 2205

# What is the differences between Alternate Directors and Successor Directors?

- Alternate Director – acts when appointor director unable to
- Successor Director – becomes director when appointer dies or loses capacity



# When do companies require special provisions in their constitutions?

- Pharmacies
- Accountants
- Bcorp
- Share rights
- McDonalds

# What should be done when a company has been registered directly with ASIC?

- Company Document pack – essentially a company register reconstruction

**Questions?**

**Acis.**



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