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Structuring Essentials: Why use a Company?

Key Considerations:

- Asset Protection
- Tax
- Succession Planning
- Longevity
- Government Support
- Governance
- Costs



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Structuring Essentials: Why use a Company?

Asset Protection

- Separate legal entity = separation of personal assets from risk
- Limited liability of shareholders
- Directors' duties
- Insurance & indemnities

Tax

- Company tax rate
- No tax-free threshold
- Retain earnings indefinitely
- No CGT concession



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Structuring Essentials: Why use a Company?

Succession Planning

- Directors/Successor Directors
- Shareholders
- Sole director/shareholder companies

Longevity

- Unlimited lifespan
- Retain earnings indefinitely

Government Support

- R&D incentives
- Early-stage innovation companies



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Structuring Essentials: Why use a Company?



- Governance**
 - Corporations Act 2001 (Cth) & case law
 - Governance agreements: Constitution & Shareholders' Agreements
 - Legitimacy & credibility
 - Higher level of understanding
- Costs**
 - Initial & ongoing ASIC fees

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Alternate Directors & Successor Directors



- Alternate Directors**
 - Specified period
 - Approval of other Directors required
 - Ceases when the appointor's directorship ceases (e.g. death or incapacity)
 - S. 201K Corporations Act 2001 (Cth)
- Successor Directors**
 - Mechanism in the constitution
 - Death
 - Legal Disability (liable to have affairs administered by another under law dealing with intellectually disabled, mental health or mentally disabled)

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Corporate Trustees of Trusts & SMSFs



- Asset protection: Trustee's personal liability for trust debts vs entitlement to indemnity
- Succession & trust asset transfers
- Administration confusion
- Trustee for each trust/SMSF
- SMSF Specific Considerations:
 - ATO penalties
 - Admin & cost of changes
 - Signing
 - Single member funds

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Loans to Companies

- Loan, gift or equity?
- Importance of loan agreement
- Secured vs unsecured creditor
- Personal Property Securities Register (PPSR)
- Insolvency, bankruptcy, family breakdown, death




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Shareholder Exit Options

- Redemption
- Forfeiture
- Share Buy Back
- Transfer
- Constitutional mechanism

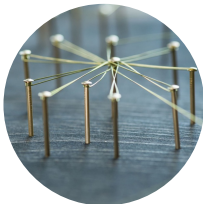


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Shareholder Exit: Redemption



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:

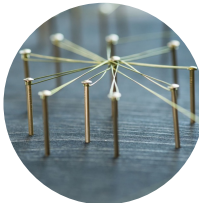
- (a) if the shares are **fully paid-up**; and
- (b) out of **profits or the proceeds of a new issue of shares made for the purpose of the redemption.**

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Shareholder Exit: Forfeiture



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.
- A forfeited share is cancelled immediately on forfeiture.

Section 258D Corporations Act 2001 (Cth)

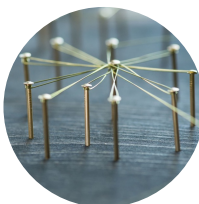
A company may, by resolution passed at a general meeting, cancel shares that have been forfeited under the terms on which the shares are on issue.

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Shareholder Exit: Buy Back



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.

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Shareholder Exit: Sale



- Existing shareholder purchaser (pre-emptive rights)
- Third-party purchaser
- Constitution / Shareholders' Agreement
- Share Sale:
 - Capital gain or loss
 - CGT Concessions: 50% general discount & small business CGT concessions
- Share Buy Back:
 - Capital / Dividend (income) components

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Top Tips: Share Buy Backs

- Procedural requirements – *Corporations Act 2001* (Cth)
- Shareholder approval – “associates”
- Hard copy form lodgement with ASIC
- Deemed dividend - s. 159GZZZP *Income Tax Assessment Act 1936* (Cth)
Difference between purchase price of share buy-back and amount debited against the share capital account in respect of shares being bought back is taken to be a dividend paid by the company.
- Deemed market value - s. 159GZZZQ *Income Tax Assessment Act 1936* (Cth)



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Top Tips: Financial Assistance

- Broad “definition” of Financial Assistance from the Courts:
The financial assistance need not involve a money payment by the company to the person acquiring the shares. Any action by the company can be financial assistance if it eases the financial burden that would be involved in the process of acquisition or if it improves the person’s net balance of financial advantage” in relation to the acquisition.
Connective Services Pty Ltd v Sleat Pty Ltd [2019] HCA 33, [22]
- Financial assistance may be given before or after acquisition of shares – s. 260A *Corporations Act 2001* (Cth)
- Balancing *Corporations Act 2001* (Cth) and bank requirements
- Procedural requirements – *Corporations Act 2001* (Cth)

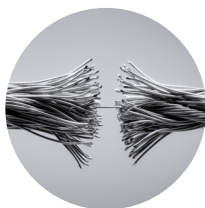


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Special Purpose Companies



- Pharmacy
- Medical
- Accounting
- Architects
- McDonalds
- BCorp

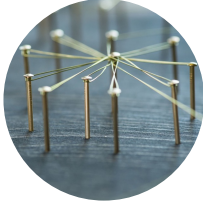


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Director ID Update




- **19 March 2024:** Director formally charged with one count of contravening s. 1272C *Corporations Act 2001* (Cth) by failing to have a Director ID.
- Matter next in court today (30 April 2024)

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Q & A.



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Thank you.



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