



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 110

Share buy-backs

July 2007

About this guide

This is a guide for companies, their advisers and investors involved in or affected by share buy-backs.

This guide explains what a company should do to comply with Div 2 of Pt 2J.1 (the buy-back provisions) of the *Corporations Act 2001* (the Corporations Act), including the procedures that a company needs to follow in conducting a buy-back and the information that must be disclosed to shareholders. It also explains how ASIC may exercise its powers to grant relief from certain requirements to obtain shareholder approval.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This version was issued on 5 July 2007 and is based on legislation and regulations as at 5 July 2007.

This document can also be referred to as Policy Statement 110 (PS 110). Paragraphs in this document can be referred to by their regulatory guide number (e.g. RG 110.1) or their policy statement number (e.g. PS 110.1).

Previous versions:

- Superseded Policy Statement 110C, issued 6 October 1998
- Superseded Policy Statement 110B, issued 4 August 1997
- Superseded Policy Statement 110A, issued 6 May 1996

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview—Complying with the buy-back provisions

Key points

In buying back its own shares a company must:

- get approval from shareholders in certain circumstances (see RG 110.4);
- lodge notices with ASIC (see RG 110.4–RG 110.8); and
- disclose information to shareholders if their approval is required or if offers are being made to them (see Section B, RG 110.18–RG 110.25).

ASIC may take action if it becomes aware of deficient lodged documents, a buy-back proceeding in breach of the buy-back provisions or unacceptable circumstances in a buy-back: see RG 110.10.

- RG 110.1 The buy-back provisions protect the interests of creditors and shareholders by:
- (a) addressing the risk of buy-back activity leading to the company's insolvency;
 - (b) seeking to ensure fairness between the company's shareholders; and
 - (c) requiring the company to disclose all material information.
- RG 110.2 The buy-back provisions do not distinguish between proprietary and public companies. Parliament intends that proprietary companies should be subject to the same requirements as public companies.
- RG 110.3 A company may only buy back its own shares if it follows the procedures in Div 2 of Pt 2J.1. If it does not comply with these procedures it will contravene the prohibition against self-acquisition of shares, which may result in enforcement action against officers involved in the contravention: s257A, 259A and 259F.

Getting shareholder approval and lodging notices

RG 110.4 Table 1 summarises the requirements according to the type of buy-back. See s9 for definitions of the different types of buy-back.

Table 1: Summary of requirements under the buy-back provisions

| Shareholder approval required | What to lodge with ASIC | When to lodge it |
|--|--|---|
| A. Employee share scheme or on-market buy-back (within 10/12 limit) | | |
| None | <p>A notice indicating the company intends to carry out a buy-back (Form 281). The notice must:</p> <ul style="list-style-type: none"> specify a date or period for the proposed buy-back; and may cover buy-backs carried out: <ul style="list-style-type: none"> under a particular scheme; or as part of particular on-market buy-back activity. | At least 14 days before the buy-back agreement is entered into: s257F(1)(b). |
| B. Employee share scheme or on-market buy-back (over 10/12 limit) | | |
| By ordinary resolution: s257C | <p>A notice with details of share buy-back (Form 280). The notice must:</p> <ul style="list-style-type: none"> specify a date or period for the proposed buy-back; and be accompanied by: <ul style="list-style-type: none"> the notice of meeting; and any other documents relating to the buy-back that will accompany it. | Before the notice of meeting is sent to shareholders: s257C(3). You may meet the requirement in s257F(1) to give ASIC 14 days notice by lodging the notice as for 'A' in advance of other documents: s257F(2)(b). |
| C. Equal access scheme (within 10/12 limit) | | |
| None | <p>A notice with details of share buy-back (Form 280) accompanied by:</p> <ul style="list-style-type: none"> the document setting out the terms of the offer; and any other documents that will accompany the offer. | Before the buy-back agreement is entered into: s257E. You may meet the requirement in s257F(1) to give ASIC 14 days notice by lodging the notice as for 'A' in advance of other documents: s257F(2)(b). |
| D. Equal access scheme (over 10/12 limit) | | |
| By ordinary resolution: s257C | As for both 'B' and 'C' (you may use one notice). | As for both 'B' and 'C'. You may meet the requirement in s257F(1) to give ASIC 14 days notice by lodging notice as for 'A' in advance of other documents: s257F(2)(b). |

| Shareholder approval required | What to lodge with ASIC | When to lodge it |
|---|---|--|
| E. Selective buy-back | | |
| By special or unanimous resolution unless exempted: s257D (See Section C for our policy on relief) | As for both 'B' and 'C' (you may use one notice). | As for both 'B' and 'C'. You may meet the requirement in s257F(1) to give ASIC 14 days notice by lodging the notice as for 'A' in advance of other documents: s257F(2)(b). |

How to lodge documents

- RG 110.5 Before the buy-back, lodge all required forms, notices and accompanying documents at an ASIC Business Centre or the IPC at Traralgon: see www.asic.gov.au/asicoffices.
- RG 110.6 There is no fee for lodging forms or accompanying notices or documents.
- RG 110.7 After the buy-back, lodge a notice of change to company details (Form 484).
- RG 110.8 Contact the ASIC Infoline on 1300 300 630 for information and assistance.

Cancelling shares

- RG 110.9 Whenever a company buys back shares, it must cancel them (s257H(3)) and notify ASIC (using Form 484) within one month after cancelling the shares (s254Y). There are no other requirements for a minimum holding buy-back.

ASIC's role

- RG 110.10 If we become aware of deficient lodged documents, a buy-back proceeding in breach of the buy-back provisions or unacceptable circumstances in a buy-back, we may take appropriate action by:
- asking the company to take remedial action;
 - taking civil or criminal action in the courts against officers involved; or
 - applying to the Takeovers Panel.
- RG 110.11 We will not pre-vet notices of meetings or other documents relating to buy-backs. We will post-vet some documents as part of surveillance activities or in response to complaints.
- RG 110.12 If a company proceeds with a buy-back after we have returned incomplete forms or it has lodged deficient documents, the buy-back is not invalidated but the company will contravene the prohibition against self-acquisition of

shares, and any person who is involved in the company's contravention is guilty of an offence.

What you can do now

RG 110.13 Complying with the buy-back provisions involves the following steps:

- 1 Identify type of buy-back
- 2 Determine approval requirement—if selective you may apply for relief
- 3 Determine lodging and notice requirements
- 4 Lodge notices
- 5 Disclose information to shareholders
- 6 Obtain approval if necessary
- 7 Conduct buy-back
- 8 Cancel shares

B Disclosing information to shareholders

Key points

Under the buy-back provisions, a company is required to disclose information to shareholders in certain circumstances: see RG 110.14–RG 110.17. This Section sets out the minimum information ASIC expects companies to give shareholders: see RG 110.18–RG 110.25.

The disclosure requirements for future buy-backs are set out in Section C

The disclosure provisions

- RG 110.14 Under the buy-back provisions, a company must provide certain information to shareholders when:
- (a) obtaining shareholder approval for:
 - (i) an employee share scheme, on-market or equal access scheme buy-back over the 10/12 limit; or
 - (ii) a selective buy-back; and
 - (b) making offers under an equal access scheme or selective buy-back.

See s257C(2), 257D(2) and 257G.

- RG 110.15 The provisions do not specify the information to be sent to shareholders, just that the statement must contain all information known to the company that is material to the decision whether to vote in favour of the resolution or accept the offer.
- RG 110.16 For shareholder approval to be effective, the resolution must approve a transaction whose consequences were known at least to those who voted for it.

Note: See *ANZ Nominees Pty Ltd v Wormald International Ltd* (1988) 13 ACLR 698 at 704-5 and *NSCS v Consolidated Gold Mining Areas NL (No 2)* (1985) 1 NSWLR 622 at 625.

- RG 110.17 If the statement accompanies a notice of meeting, the company does not have to include information previously disclosed to shareholders if it would be unreasonable to do so: s257C(2) and 257D(2). However, this exclusion does not apply to a statement accompanying an offer: s257G.

What to disclose

RG 110.18 Table 2 sets out what we expect a company to provide when disclosing information to shareholders with a notice of meeting (see s257C(2) and s257D(2)) or a buy-back offer (see s257G).

Table 2: What to disclose

| Details of the buy-back | Independent report | |
|---|---|------------------------|
| <p>A company should disclose:</p> <ul style="list-style-type: none"> • the number of shares on issue; • the number and percentage of shares to be bought back; • particulars of the terms of the buy-back; • the offer price or a simple formula to calculate the price; • the reasons for the buy-back (as a matter of best practice, this should include a short description of why other ways of returning excess capital have not been chosen); • the interests of any director who may participate in the buy-back agreement; • the financial effect of the buy-back on the company (including on the level of franking credits to be expended); • the source of the funds for the buy-back; • if shareholder approval is required, the advantages and disadvantages of the buy-back; • for a selective buy-back: <ul style="list-style-type: none"> – the effect the buy-back will have on the control of the company; and – the identity of the selling shareholders; • for an equal access scheme or an on-market buy-back, the date the offer will start and close; • if the company must lodge audited financial statements, its latest set of audited financial statements (unless they have been recently given to the shareholders); and • if the company is listed, information about the current share price and any additional information required by the relevant financial market's listing rules. | <p>If a company proposes to buy back a significant percentage of shares or the holdings of a major shareholder, it should consider providing:</p> <ul style="list-style-type: none"> • a report by its independent directors about whether shareholders should vote in favour of the buy-back, particularly regarding how much the company is paying for the shares; and • an independent expert's report with a valuation of the shares. <p style="text-align: right;"><i>Note: For our policy on experts' reports, see Regulatory Guide 75 <i>Independent expert reports to shareholders</i> (RG 75).</i></p> | |
| | <th style="background-color: #e1f5fe;">Non-cash consideration</th> | Non-cash consideration |
| | <p>To fulfil the disclosure requirements, directors will usually need to provide:</p> <ul style="list-style-type: none"> • a valuation of the assets offered as consideration for the buy-back; and • an assessment of the effect on the company of the assets being transferred. | |

RG 110.19 We consider that the information in Table 2 is material to a shareholder's decision whether to vote in favour of a resolution or accept a buy-back offer. It will also help creditors to assess any implications the buy-back may have for them, consistent with the purpose of the buy-back provisions.

RG 110.20 For buy-backs of a significant proportion of a company's shares, or transactions with a major shareholder, it is usually appropriate for shareholders to have the benefit of independent advice on whether to vote for a buy-back.

- RG 110.21 Directors may expose themselves to the civil and criminal liabilities associated with the buy-back and other relevant provisions if they fail to ensure shareholders and creditors have sufficient information to assess the effects of the buy-back.

When previously disclosed information is overtaken by events

- RG 110.22 If an event occurs in the 12 months after shareholders approve the buy-back that makes any previously disclosed information misleading or deceptive, the company can no longer rely on that approval to carry out a valid buy-back.

Non-cash consideration

- RG 110.23 A company may pay for shares under a buy-back with non-cash consideration. However, valuing non-cash assets and making sufficient disclosure about non-cash assets is more difficult than for cash consideration. Therefore using non-cash consideration may expose directors to significantly greater liability and responsibility to ensure the objectives of the buy-back provisions are met. Non-cash consideration is usually offered in selective buy-backs and frequently to related parties. These are additional reasons for directors to consider their obligations and duties more carefully.

Confidential information

- RG 110.24 There is no confidentiality exemption from the buy-back disclosure requirements. If a company is concerned about disclosing confidential information, the directors or an expert may summarise this information for shareholders. However, the company must ensure it does not breach the disclosure requirements by omitting detailed information that would influence the decision to vote on a buy-back or accept a buy-back offer. We will not exempt a company from the disclosure requirements of the buy-back provisions because information is confidential.

Future buy-backs

- RG 110.25 See Section C for the disclosure requirements where a company proposes to buy back shares in the future or continuously over a period of time.

C Future buy-backs

Key points

A company can rely on a shareholder approval or notice of a share buy-back to continue to buy back shares for up to 12 months. After that period, a further approval or fresh notice will be required if the company intends to continue buying back shares: see RG 110.26–RG 110.30. However, the company must commence buying back shares under a notice within two months or the notice will expire and a fresh notice will be required before the company can buy back shares: see RG 110.31 to RG 110.34.

A continuous buy-back within the 12-month period may also require further disclosures of information to shareholders, particularly where previously disclosed information is overtaken by events: see RG 110.35–RG 110.37.

12-month limit on approval or notice

RG 110.26 Sometimes a company will seek shareholder approval or give notice of a buy-back that may take place in the future on undecided terms and in relation to an unknown number of shares. For example, a continuous buy-back where a company regularly buys back shares (usually on-market) over a period of time, or a non-concrete proposal for an equal access scheme at some time in the future.

Note: A continuous equal access scheme is not possible because the buy-back agreement cannot be entered into until the offer period closes: s257B(2)(d). On-market buy-backs are, almost by definition, continuous. Minimum holding, employee share scheme and selective buy-backs may be structured as continuous buy-backs.

RG 110.27 The Corporations Act does not give a deadline for offers to be made, or specify when offers must close, after a company gives notice of a buy-back (s257F) or receives shareholder approval (s257C or 257D). Therefore a company may rely on one notice or resolution to buy back shares continuously over a period of time, or at some point in the future.

RG 110.28 However, a company cannot use shareholder approval or a single notice to give itself an open-ended ‘blank cheque’ to buy back shares. After 12 months we consider that approval or notice of a buy-back will be ‘stale’ (i.e. the approval or notice will likely no longer provide the intended protection for shareholders and creditors). A 12-month period is also consistent with the operation of the 10/12 limit.

RG 110.29 Where shareholder approval is required, shareholders are approving the terms of the buy-back agreement: see s257C(1) and 257D(1). This means the

terms of the agreement must be sufficiently certain for shareholder approval to be effective.

- RG 110.30 We therefore consider that a company can only rely on approval or notice for up to 12 months. After 12 months, further approval or a fresh notice will be required if the company intends to continue buying back shares.

If a company has not commenced buying back shares after two months the notice will expire

- RG 110.31 If a company has not commenced buying back shares under a notice of a buy-back after two months, we will regard the notice as having expired. We will calculate the two month period from:
- (a) if the notice specifies a date for the proposed buy-back (Form 281)—the date specified; or
 - (b) if the notice does not specify a date (Form 280)—the date we receive the notice.

Note: Notice of a buy-back must be given using Form 280 or Form 281 (see Table 1). Only Form 281 requires a company to specify a date for the proposed buy-back.

- RG 110.32 In both cases, the company must lodge a fresh notice for any subsequent buy-back.
- RG 110.33 After two months shareholders and creditors may reasonably expect that a buy-back not is not proceeding. It is also consistent with s631(1) for announcements about proposed takeovers. If a buy-back starts some time (e.g. more than two months) after a notice intended to provide two weeks notice, it is likely not to be a complying buy-back: It will breach the prohibition against self-acquisition of shares: see s259A.
- RG 110.34 We recognise that in some cases a company may not be able to accurately specify the date on which the buy-back will take place (e.g. if a buy-back is conditional on a circulating resolution, the company may only be able to specify when the resolution is expected to be signed by the last member).

Meeting the disclosure requirements

- RG 110.35 The company must consider how it can comply with the disclosure requirements where shareholder approval is needed if information is given to shareholders up to 12 months in advance of the buy-back, when material terms may not be settled or known to the company. We expect a company to disclose the information in Section B. However, the company does not have to disclose information where it would be impossible (e.g. where all the terms of the future buy-back have not yet been determined). In this situation, we expect a company to ensure that:

- (a) its notice of meeting specifies the terms of the buy-back with enough clarity so shareholders clearly understand what they are approving, including:
 - (i) the maximum proportion of the company's share capital to be bought back;
 - (ii) the maximum price the company will pay and, if possible, a simple formula to calculate the price; and
 - (iii) the effect of the buy-back on the company, assuming the maximum number of shares is bought at the maximum price;
- (b) any information disclosed when the buy-back is approved will apply for the whole of the 12-month period; and
- (c) possible vendors are clearly identified.

RG 110.36 If shareholder approval is required (see s257B(1)), the company must provide to shareholders all information material to deciding how to vote on the resolution: s257C(2) and s257D(2). Shareholders are being asked to approve an acquisition of shares that will or may affect the value of their shares and so must have enough information to make an informed decision.

Disclosure to the market

- RG 110.37 A listed company must also make appropriate ongoing disclosure to the market to:
- (a) comply with continuous disclosure requirements of the Corporations Act and the listing rules of the relevant financial market; and
 - (b) assure the market it is not buying back shares while possessing inside information in breach of the insider trading provisions: s1043A.

D Selective buy-backs—relief from need to obtain shareholder approval

Key points

To undertake a selective buy-back, companies are generally required to obtain shareholder approval at a meeting: see RG 110.42–RG 110.43.

Companies may obtain relief from this requirement in certain circumstances, where the buy-back is consistent with the principles underlying the buy-back provisions: see RG 110.38–RG 110.41.

Companies seeking relief must apply to ASIC before entering into a buy-back agreement: see RG 110.54–RG 110.55.

When we may give relief

- RG 110.38 We may exempt a company from all or some aspects of the requirement for shareholder approval for a selective buy-back at a meeting, with or without conditions.
- RG 110.39 Our relief will allow a company to conduct a buy-back despite it not fully complying with the provisions due to a minor or technical aspect where the buy-back is consistent with the underlying principles in RG 110.1. We will take these underlying principles into account when considering applications for relief.
- RG 110.40 Note that:
- (a) Our policy applies equally to proprietary and public companies, and we will not give an exemption under s257D merely because a company is a proprietary company.
 - (b) A company that is exempted under our policy from the requirement for shareholder approval of a selective buy-back must still:
 - (i) give at least 14 days notice of the buy-back: s257F(1);
 - (ii) lodge offer documents with us: s257E; and
 - (iii) supply relevant information to shareholders who are sent offers: s257G.
 - (c) We do not have the power to exempt a company from compliance with these requirements or the notice required by s257F(2).
- RG 110.41 Table 3 sets out some examples of when we may give exemptions.

Table 3: Examples of possible exemptions

| Minimum holding buy-back by unlisted company: | |
|--|---|
| <p>We may exempt an unlisted company from the requirement to obtain shareholder approval to buy back small parcels of shares if there is an urgent need to make the buy-back and the buy-back cannot wait until the company's next general meeting.</p> <p>Our relief is consistent with the approach to minimum holding buy-backs for a listed company under s257B. We will apply a limit of 1% in a 12-month period because substantive commercial decisions should remain in the hands of shareholders.</p> | <p>We will only give this exemption if:</p> <ul style="list-style-type: none"> • each parcel bought back is the whole of a person's holding; • no parcel is bought back for more than \$500 in total value; • the directors have determined the price is fair to all shareholders; • no more than 1% in aggregate of the company's shares is bought back in a 12 month period, calculated in accordance with s257B(4); and • there is no secondary market in the shares. |
| Shareholder approval without holding a meeting: | |
| <p>We may exempt a public company from holding a meeting to obtain shareholder approval for a buy-back if we are satisfied shareholders can approve the buy-back in another way, for example:</p> <ul style="list-style-type: none"> • by endorsing a circulating memorandum via facsimile or email in accordance with the company's constitution; or • if there are no more than 50 shareholders in the company entitled to vote, all of them indicating in writing that they approve the terms of the buy-back agreement and waive the right to a meeting. | <p>If we give this exemption, the company must:</p> <ul style="list-style-type: none"> • give shareholders the information that would be required to be given under s257D(2) if a meeting had been held; and • lodge with ASIC a copy of the notice of proposed resolution and information documents sent to shareholders. |
| Voting by an associate of the selling shareholder: | |
| <p>We may exempt a company to enable an associate of the selling shareholder to vote on a buy-back when the association is merely technical (e.g. if a company's constitution means that all shareholders are associates because they have pre-emptive voting rights).</p> | <p>There are no standard conditions on this exemption.</p> |

Equal access scheme as a selective buy-back:

(See next section for further detail on this type of buy-back)

We may exempt a company from the requirement for shareholder approval if:

- the buy-back is in essence an equal access scheme; but
- the buy-back does not meet all the requirements for an equal access scheme under s257B(2), so is technically a selective buy-back.

For example, we may give this exemption to enable a company to:

- if the company is a listed company (we give separate relief for unlisted companies to do a minimum holding buy-back—see above), buy back a small parcel of shares from each shareholder (see RG 110.47);
- avoid shareholders being left with small parcels after a buy-back by selectively scaling back shares to be acquired where the buy-back is over-subscribed (see RG 110.47);
- buy back shares by way of a tender offer, usually through a ‘Dutch auction’ (see RG 110.49–RG 110.51);
- allow shareholders to give irrevocable acceptances before the offer period closes if it is impractical or unreasonably costly to comply strictly with the equal access scheme requirements (see RG 110.52–RG 110.53); and
- exclude overseas shareholders from a buy-back where the company cannot make an offer to some shareholders because of the laws of the country in which they reside.

We will only give each exemption if the company:

- complies with the buy-back provisions as though the buy-back were an equal access scheme (including ordinary shareholder approval if over the 10/12 limit); and
- complies as closely as possible with the requirements for an equal access scheme (see RG 110.45–RG 110.46).

How a selective buy-back works

RG 110.42 In a selective buy-back, the number of shares purchased from one shareholder need not relate to the number (if any) purchased from other shareholders. Therefore, shareholders will not be treated equally, and the potential for (and risk of) abuse increases.

RG 110.43 Under s257D(1), an agreement for a selective buy-back must be approved, or be conditional on approval, at a general meeting by:

- (a) a special resolution of shareholders with no votes cast in favour of the resolution by a selling shareholder or their associates; or
- (b) a unanimous resolution by all ordinary shareholders in the company.

RG 110.44 ASIC has the power to give a company a whole or part exemption (with or without conditions) from the requirement to obtain shareholder approval for a selective buy-back at a meeting: s257D(4).

Equal access scheme as a selective buy-back

RG 110.45 In an equal access scheme:

- (a) the offers under the scheme must relate only to ordinary shares;
- (b) the offers must be made to every person who holds ordinary shares to buy back the same percentage of their ordinary shares;
- (c) all of those persons must have a reasonable opportunity to accept the offers made to them;
- (d) buy-back agreements must not be entered into until a specified time for acceptances of offers has closed; and
- (e) the terms of all the offers must be the same: s257B(2).

RG 110.46 In some cases, a company might be prevented from carrying out a buy-back as an equal access scheme because of these requirements, even though the buy-back is in essence an equal access scheme. In such cases, we will use our power to give exemptions from the requirement for shareholder approval for a selective buy-back to treat the buy-back as an equal access scheme.

Small parcels

RG 110.47 For the purposes of our relief, the maximum value of a small parcel is:

- (a) for companies with a market capitalisation of less than \$1 billion:
 - (i) \$2000 for shares to be bought back from each participating shareholder, including the entire holding of participating shareholders whose holding is less than \$2000 (threshold parcel); and
 - (ii) \$500 where a participating shareholder's remaining shares are worth less than \$500 after the threshold parcel is bought back (residual parcel); and
- (b) for companies with a market capitalisation of more than \$1 billion:
 - (i) \$5000 for threshold parcels; and
 - (ii) \$2000 for residual parcels.

RG 110.48 The company's market capitalisation and the size of the parcel of shares to be bought back should be determined using a weighted average five-day trading share price, calculated four weeks before the announcement of the buy-back.

Note: The limits set out above only apply to our relief to enable a company to buy back small parcels or to selectively scale-back a buy-back to avoid holders being left with small parcels. They do not apply to minimum holding buy-backs, either by a listed company under the Act (where the limit is the size of a marketable parcel) or by an unlisted company relying on the relevant relief set out in Table 3 (where the limit is \$500).

Tender offers and 'Dutch auctions'

RG 110.49 In a tender offer buy-back, the company invites each shareholder to tender their shares for sale, rather than offering to buy back shares. If more shares are tendered than the company wants to buy, the company will use a scale-back mechanism (to ensure it does not buy back more shares than it wanted): see RG 110.62. Often the scale-back is selective to avoid shareholders being left with small parcels: see RG 110.47.

RG 110.50 A tender offer buy-back cannot be an equal access scheme because the company does not 'offer' to buy shares but rather invites shareholders to offer to sell shares. This means a tender offer buy-back is a selective buy-back and, without relief, would need special shareholder approval under s257D.

Note: A company can achieve a similar result by conducting a limit-based equal access scheme: see RG 110.62.

RG 110.51 In a 'Dutch auction' tender offer, the company invites each shareholder to tender their shares at a price nominated by the shareholder. Usually shareholders choose from a range of prices set by the company, where each price is a certain discount to the market price at the time of the buy-back. The company then calculates the lowest price (i.e. the biggest discount to the market price) at which it can buy back the desired number of shares, and buys shares at that price (the final price) from each shareholder who nominated a price at or below the final price.

Irrevocable acceptances

RG 110.52 In an equal access scheme, buy-back agreements are not entered into until the offer period has closed: s257B(2)(d). If a company allows shareholders to give irrevocable acceptances during the offer period, the buy-back agreement is entered into when the company receives the acceptance. Accordingly, the buy-back is technically a selective buy-back and would, without our relief, require shareholder approval.

RG 110.53 Because some agreements will be entered into while offers are still open, we will only give an exemption on condition that the company does not change the terms of the offers without our consent.

How to apply for relief

- RG 110.54 If you are applying for an exemption from s257D, you must:
- (a) do so before entering into the buy-back agreement (s257D(4)(b));
 - (b) allow enough time for us to consider the application, bearing in mind that you must give 14 days notice of an intended buy-back (s257F);
 - (c) lodge your application in writing with supporting information at any ASIC office: see www.asic.gov.au/asicoffices; and
 - (d) include the prescribed fee with your application as set out in the Corporations Regulations (see Information Sheet 30 *Fees for commonly lodged documents* (INFO 30)).
- RG 110.55 You can also contact ASIC Infoline on 1300 300 630 for information and assistance.
- RG 110.56 For our general policy on applications for relief and giving no-action letters, see Regulatory Guide 51 *Applications for relief* (RG 51), Regulatory Guide 52 *Enforcement action submissions* (RG 52) and Regulatory Guide 108 *No-action letters* (RG 108).

E Other aspects of share buy-backs

Key points

This section provides further information on:

- 100% buy-backs (see RG 110.57);
- changes in control (see RG 110.58);
- dual-listed companies (see RG 110.59–RG 110.61);
- limit-based equal access schemes (see RG 110.62);
- minimum period for buy-back offers (see RG 110.63–RG 110.69); and
- resolutions without meetings (see RG 110.70).

100% buy-backs

RG 110.57 Because a company must have at least one member (s114), a company may not buy back all of its shares (e.g. as an alternative to winding up).

Changes in control

RG 110.58 A buy-back will not breach the takeovers prohibition in s606 if it is carried out in accordance with the buy-back provisions: s611, item 19. However, we may apply to the Takeovers Panel for a declaration of unacceptable circumstances if we consider the buy-back is unreasonable having regard to:

- (a) its effect on the control of the company or another company;
- (b) whether there was equal opportunity for shareholders to participate in the benefits; and
- (c) whether the disclosure and other procedural aspects of the buy-back would have substantially satisfied the requirements for a takeover in Ch 6 (regardless of whether they satisfy the requirements of the buy-back provisions).

Dual-listed companies

RG 110.59 An Australian incorporated company listed in Australia and overseas may carry out an on-market buy-back in both markets if:

- (a) the buy-back is available in both markets at the same time; and

(b) we have declared in writing that the overseas market is an approved overseas financial market (see Table 4): s257B(7).

RG 110.60 The buy-back on the overseas financial market must be ‘in the ordinary course of trading’: s257B(7). It is the company’s responsibility to ensure, before it starts a buy-back on a foreign exchange, that the ‘ordinary course of trading’ on the overseas financial market meets the criteria implied by this phrase under Australian case law.

RG 110.61 In Australia, this phrase means that the trading is in strict order of price and time priority, with indifference as to the identity of counterparties, and no pre-agreements or selection of counterparties: see *Attorney-General (Vic) v Walsh’s Holdings Ltd* [1973] VR 137.

Table 4: Approved overseas financial markets

| | |
|---|---------------------------|
| • American Stock Exchange | • London Stock Exchange |
| • Borsa Italiana | • NASDAQ Stock Market |
| • Bursa Malaysia Main Board and Bursa Malaysia Second Board | • New York Stock Exchange |
| • Euronext Amsterdam | • New Zealand Exchange |
| • Euronext Paris | • Singapore Exchange |
| • Frankfurt Stock Exchange | • SWX Swiss Exchange |
| • Hong Kong Stock Exchange | • Tokyo Stock Exchange |
| • JSE | • Toronto Stock Exchange |

Note: See Class Order [CO 02/249] Approved overseas financial markets: s257B(7).

Limit-based equal access schemes

RG 110.62 The Corporations Act places very few restrictions on the terms a company may insert into an equal access scheme buy-back. For example, a company may set a maximum number, value or percentage of shares it will buy back and makes it a term of the offer that if (at the close of offers) the company has received acceptances for more shares than the specified limit, the number of each acceptor’s shares will be reduced by the same proportion needed to ensure the company buys back no more than the specified limit (i.e. a scale-back).

Example

A company with 100 shares and 10 equal shareholders invites each shareholder to tender some or all of their shares, up to a total maximum of 30 shares with a proportionate scaling back if there are excessive shares tendered. If up to three shareholders tender all their shares, the company will buy back all 10 shares from each participating shareholder. If six shareholders tender all their shares, the company will buy back only five shares from each participating shareholder, and so on.

Minimum period for buy-back offers

- RG 110.63 There is no specified minimum period of time a buy-back must be open. However, we will presume a buy-back offer is open for a reasonable period if it is open for one month based on:
- (a) the ‘reasonable opportunity’ requirement for equal access schemes under s257B(2)(c); and
 - (b) similar provisions in the takeovers regime and listing rules.
- RG 110.64 The shorter the period under one month for members to consider the buy-back offer, the greater the onus on the company to justify why the circumstances of the company are such that the period is reasonable.

‘Reasonable opportunity’

- RG 110.65 Under an equal access scheme (including one requiring shareholder approval), a company must give all ordinary shareholders ‘a reasonable opportunity to accept the offers made to them’: s257B(2)(c). There is no case law on the term ‘reasonable opportunity’. However, it is clearly relevant to look at:
- (a) the number of shareholders;
 - (b) their closeness to the decision to commence a share buy-back;
 - (c) the amount and complexity of information provided to them; and
 - (d) their knowledge of the company.
- RG 110.66 For very small companies, when shareholders are in close contact with management and the operations of a company, or are themselves the management, the company’s directors may have a reasonable basis for holding the offer open for a shorter period than one month.

Takeovers regime and listing rules

- RG 110.67 Under the takeovers regime, the legislature has determined one month as the minimum period for offerees to consider a takeover offer: s624(1)(b).

RG 110.68 Under ASX Listing Rules Appendix 7A, shareholders must have at least 15 business days after the record date to accept an equal access buy-back offer (the record date must be at least nine business days after the buy-back is announced). However, because unlisted companies do not have the continuous disclosure obligations or the ongoing liquid market listed companies have, the period for an equal access buy-back by a listed company of 15 business days is likely to be insufficient for unlisted companies.

Selective buy-backs

RG 110.69 For selective buy-backs, the legislature appears to consider the time period for a general meeting to be a minimum for notice of the buy-back decision: s257D(1). However, if the members and the offeree(s) agree, it may be acceptable to leave the offers open for a very short period after the resolution is passed.

Resolutions without meetings

RG 110.70 A proprietary or single shareholder company can satisfy the shareholder approval requirement without holding a meeting: s249A and s249B. However, it must still comply with the lodgment and disclosure requirements in s257E and 257G. In the case of a single shareholder company, although the shareholder should be expected to know all the information about the company and the buy-back, lodging this information will help creditors.

Key terms

| Term | Meaning in this document |
|-------------------------------|---|
| 10/12 limit | The 10/12 limit as defined in s257B(4) |
| ASIC | The Australian Securities and Investments Commission |
| associate | An associate as defined in s10–17 |
| buy-back | A share buy-back under Div 2 of Pt 2J.1 of the Corporations Act |
| the buy-back provisions | Div 2 of Pt 2J.1 of the Corporations Act |
| [CO 02/249] (for example) | An ASIC class order (in this example numbered 02/249) |
| Corporations Act | The <i>Corporations Act 2001</i> (Cth) including regulations made for the purposes of the Act |
| disclosure requirements | The requirements in s257C(2), 257D(2) or 257G |
| Div 2 | A division of a part of the Corporations Act (in this example, numbered 2) |
| ordinary shareholder approval | Approval by shareholders for a buy-back under s257C(1) |
| Pt 2J.1 | A part of the Corporations Act (in this example, numbered 2J.1) |
| RG 110 | An ASIC regulatory guide (in this example, numbered 110) |
| s257D(4) (for example) | A section of the Corporations Act (in this example, numbered 257D(4)) |
| special shareholder approval | Approval by shareholders for a selective buy-back under s257D(1) |

Related information

Headnotes

10/12 limit, continuous buy-back, disclosure, Dutch auction, employee share scheme buy-back, equal access scheme, minimum holding buy-back, on-market buy-back, selective buy-back, share buy-back, shareholder approval, small parcel, tender offer

Class orders

[CO 02/249] *Approved overseas financial markets*

Regulatory guides

RG 51 *Applications for relief*

RG 52 *Enforcement action submissions*

RG 75 *Independent expert reports to shareholders*

RG 108 *No-action letters*

Information sheets

INFO 30 *Fees for commonly lodged documents*

ASIC forms

Form 484 *Change to company details*

Form 280 *Notification of share buy-back details*

Form 281 *Notification of intention to carry out a share buy-back*

Legislation

Corporations Act Div 2 of Pt 2J.1, Ch 6, s114, 257B, 257C, 257D, 257E, 257F, 257G, 259A, 259F, 606, 611 item 19, 624(1)(b), 631(1), 1043A

Cases

ANZ Nominees Pty Ltd v Wormald International Ltd (1988) 13 ACLR 698

Attorney-General (Vic) v Walsh's Holdings Ltd [1973] VR 137

NSCS v Consolidated Gold Mining Areas NL (No 2) (1985) 1 NSWLR 622

Consultation papers and reports

Buy-backs: small parcels (December 2004)

Report on the Public Hearing February 1992 on the Promotion and Sale of Foreign Securities in Australia 1992 ASC Digest PH 58

Media and information releases

[MR 05-44] *ASIC's position on off-market share buy-backs incorporating fully franked dividends* 3 March 2005)

[IR 04-64] *ASIC calls for public comment on share buy-back proposal* (13 December 2004)

[IR 05-18] *ASIC announces new limits on share buy-back relief for small parcels* (6 May 2005)