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## Financial Assistance for the Purchase of the Company's Shares

### Problem Solving Methodology:

1. State **general proposition**
2. Is the Company providing **Financial Assistance**
3. If so are they **permitted to do so s.260A**?
  - a. **Materially Prejudice s260A(1)(a)**
  - b. **SH approval s.260B**
  - c. **Exempt s.260C**
4. **Breach** Consequences

### 1. General Proposition:

A Co may indirectly reduce its capital if it financial assists a person to acquire shares in the Co. As a general rule financial assistance is prohibited (*Trevor v Whitworth*), however **ss.206A-D** permit it where the requirements are strictly complied with.

### 2. Is the Co providing Financial Assistance?

Financial assistance is not defined in the Act, but is to be interpreted broadly (*Burton; Adler*). It may occur before or after the acquisition of shares (**s.260A(2)(a)**) and about be in the form of payment of a dividend (**s.260A(2)(b)**). On the facts ...

Consider the causative element. "but for the assistance would the transaction have taken place?"

It includes

- lending money;
- guaranteeing repayment of a loan;
- providing assets as security for a loan;
- releasing person from a debt or
- other obligation already owed to the company; and
- acquiring assets at an inflated price.

### 3. Acquiring shares in the Company or Holding Company (s.260A):

A Co may provide financial assistance to a person to acquire shares in the Co or a Holding Co (**s.260A**) provided that:

- a. The assistance does not materially prejudice the interest of the Co, its SH or Creditors (**s260A(1)(a)**); OR
- b. The assistance is approved y SH (**s.260B**); OR
- c. The assistance is exempt (**s.260C**)

Notably **s.260A** may be consider poorly drafted as it does not provide creditors with the same level of protection as the capital reduction and share buy-back scheme provision. This is because under **s.260B** the Co may obtain SH approval for actions that are materially averse to creditors and would otherwise contravene **s.260A**.

NB Holding Company: Consider *ASIC v Adler*;

- Where shares are bought in the Holding Company, ensure the relationship is a formal related company under **s.46**
- An informal control relationship under **s.50AA** will not be sufficient

a. Did the FA Materially Prejudice Interest of the SH's, or the Co's Ability to Pay Creditors s.260A(1)(a):

The Co bears the onus of proving that the FA did not materially prejudice the Co, SH or creditors (*Kinarra*). It is the effect/result rather than the intention that is relevant (*Adler*).

Impoverishment Test Adler:

Involves a conversion of the company's assets into one of a lesser value;

- A **Co may be prejudiced** by detrimental changes to their financial position or ability to conduct business
- A **SH may be prejudiced** by changes to dividends or a fall in share price
- A **Creditor may be prejudiced** by transactions that lead to insolvency or transactions that are *unlikely to be re-paid* (eg no guarantee, security, interest etc. and the Co is not able to pay the money back in the ordinary course of business).

b. Has the assistance been Approved by Shareholders s.260B:

SH approval for FA must be given by

- a. Special resolution passed at the GM, not including votes of those who were/will be financially assisted OR
- b. A resolution passed by the ordinary Shareholder unanimously at the GM

\_\_\_ (the person acquiring the shares/an associate) may not vote in favour of the resolution (s.260B(1))

Holding Company:

Where Financial Assistance is given by a Holding Co, to a Subsidiary, it's the Holding Co's SHs who must approve the financial assistance: s.260B(2), (3) by special resolution

Notice:

Notice of a meeting must be given: s.260B(4), and documents (s/h info before sent, notice 14-days before giving assistance and resolution w/in 14 days after it is passed) need to be lodged with ASIC: s.260B(5).

c. Is the assistance exempt under s.260C:

Where Financial Assistance is given in the \_\_\_

- Ordinary course of commercial dealing (i.e. – home loan) – s 260C(1)
- Under an *approved employee share* scheme – s 260C(4)
- See 260C(5) (d)
- Furnishing of something which is needed or wanted in order for that transaction to be carried out (*Burton v Palmer*)
- Entering into an agreement under which a person may make payments to the company for shares by instalments
- Capital reductions or buy backs made in accordance with the provisions of Part 2J.1
- A discharge on ordinary commercial terms of a liability that the company incurred as a result of a transaction entered into on ordinary commercial terms

\_\_\_ The Co may provide financial assistance to a person to acquire shares in the Co or a Holding Co (s.260A)

4. Breach Consequences:

A breach does not invalidate the transaction and the Co does not commit an offence s.260D(1). However any person who is involved in a Co's contravention of s.260A [CPP] contravenes this subsection and is liable to penalty [s.260D(2)]

NB: may also breach D duties under general law and s.180-184

NB: a person commits an offence if involvement is dishonest and faces criminal penalties [s.260D(3)]

Might seek an injunction under s 1324(1A).

## Topic 7: Corporate Contracting

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The Co is a separate legal entity and as such has all of the capacity of a natural person, including the ability to enter into contracts (**s.124**). A Co can enter into a contract in 2 ways, either:

- The Co enters into the contract directly (**s.127(1) and (2)**) requiring 2 Directors OR a Secretary OR
  - The Co enters into a contract indirectly by virtue of an Agent acting on the Co's behalf (**s.126**)
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### Contract Entered into Directly by the Company:

A Co enters a contract directly when the authorised natural persons (Director(s) and/or Secretary) sign the contract as if it were the Co signing.

1. The board approves the Co entering into the contract
2. When contract is ready for signing, the board approves the signing in accordance with **s.127(1)** or **s.127(2)**. **OR** if the constitution has provided for in some other way **s.127(4)**

The Director(s) and/or secretary are the authorised representatives, being natural persons authorised by their office to cause the Co to enter the contract (**s.127**)

#### Entering the Contract:

OTF the contract has purported to have been entered into directly being signed by:

A Co may execute a contract (without common seal) if it is signed by **s.127(1)**:

- a. 2 Directors, or
- b. 1 Director and the Co Secretary, or
- c. For a Pty Co with 1 Director who is also the Secretary – That Director

OTF the contract has purported to have been entered into directly with the common seal being witnessed by:

A Co may execute a contract (with common seal affixed) if it is witnessed by (**s.127(2)**):

- a. 2 Directors, or
- d. 1 Director and the Co Secretary, or
- e. For a Pty Co with 1 Director who is also the Secretary – That Director

**NB:** A sole D Pty Co, with NO secretary, the Co can only ever enter into a contract indirectly through an agency

#### Problems with Authority:

Although purportedly entering the contract directly under **s.127**, there are issues with [X] authority as:

- [X] is not a director or secretary despite holding themselves out/signing as one (**Brick Pipe**)
- [X] is a secretary but signed as director
- [X] had authority to enter the contract but a fetter applied (5 mil limitation, contract is for 10 mil)
- There has been fraud (lied and induced the 3<sup>rd</sup> P to sign)
- There has been a forgery, [X] forged the other D/S signature ()

The contract may however still be binding and enforceable by the [3<sup>rd</sup> P] under either the indoor management rule, or statutory assumptions.

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### Contract Entered into Indirectly through an Agent:

Co enters a contract Indirectly, when a natural person (Agent) results in the contract being signed on behalf of the Co. The Co is bound to the contract by the action of the representative as their Authorised Agent.

A Co's power to make, vary, ratify or discharge a contract may be exercised by a person acting with the Co's express OR implied authority on behalf of the Co. It may be exercised without a common seal (**s.126**). Contracts entered into under **s.126** are binding provided the agent has actual, implied (position or acquiescence) or ostensible authority.

#### Example:

Signed on behalf of Dirty **Harry Plumbing Services Pty Ltd** (ACN 123 456 789)  
by Clinton Eastman, Purchasing Officer: *Clint. Eastman*

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### 1. Actual Authority:

#### a. Express Actual Authority (EAA):

EAA arises when the Co (through a board resolution under **s.198A**) appoint a Co Executive or other EE as its authorised agent to enter contracts. The authority may be limited or qualified (subject matter, maximum value).

- A board resolution authorising [X] to contract on behalf of the Co (**s.198A**)
- Constitutional provision stating the scope of an officer's authority to contract for the company;
- Company's operational policies; or
- The individual's employment contract

#### b. Implied Actual Authority by Position (IAA Position):

IAA can arise by virtue of a person's position in the Co i.e. the Co is taken to have intended the appointee to have authority usually attached to the position.

##### Managing Director

- Has IAA to enter ordinary customary trading transactions,
- But NOT to enter contracts outside of this or to sell the Co's main business (***Hely-Hutchinson***)

##### Individual Directors

- **NO** IAA to bind the Co to contracts, unless appointed as an agent ***Northside Developments***
- Power resides in the collective only unless they have received a specific delegation ***NAB v Sparrow Green***

##### Chairman:

- **NO** IAA to bind the Co to contracts (***Hely-Hutchinson***)

##### Secretary:

- Has IAA to enter contracts related to administrative matters but **NOT** senior management matters (***Panorama Developments***)

### c. Implied Actual Authority by Acquiescence

[X]'s Authority may be implied from previous conduct and circumstances (*Hely-Hutchinson*), however acquiescence to [X] authority must come from someone with actual authority (*Brick & Pipe*).

- Entering into contract multiple times on the Co's behalf, which the Co has treated as binding upon them (*Hely-Hutchinson*)
- Requires acquiescence by **entire board** (not one director), and conduct needs to reflect a pattern, not just a one off (also limited to conduct previously engaged in)(*Brick & Pipe*)

*Brick and Pipe Industries*, a D was held to have IAA because he assumed the role of MD with the acquiescence of other D's and he had entered into transactions without the prior approval of the Board.

*Hely-Hutchinson*, Chairman had no power to enter contracts, but he was held to have IAA, because over many months the Board had given the impression that he could act as a de facto CEO and bind the company to transactions

## 2. Apparent or Ostensible Authority (AOA)

### 2. Apparent or Ostensible Authority

[X] may have authority where the Co is holding or representing to [3<sup>rd</sup> P] that [X] has the authority to contract (*Freeman*) creating an agency by estoppel. The representation must be made by someone with actual authority (*Crabtree; Freeman*), or by the Co via arming conduct (*Paribas*).

Diplock LJ in *Freeman* established the test for Ostensible authority, it focuses upon the legal relationship created by representations of the Co, as such there must be:

1. Holding Out: Representation by words or conduct, that [X] had the authority to enter the contract on the Co behalf,
  - The HC appear to now take a broad approach to 'representations' (*Paribas*)
  - Board knowing/allowing [X] to act as MD and enter contracts and not stopping [X] (*Freeman*)
  - Handing [X] a blank order form, with signing as 'per', arming with with a document which when signed would bear the hallmark of authenticity (*Crabtree*)
  - Allowing [X] access to the facilities, status, title (authoritative materials, blank order forms, letter head, stamps, 'chop') without proper safe guards (*Paribas*)
2. Actual Authority: The representation was made by someone with actual authority either generally or in relation to the matter the contract relates to (see *Crabtree*),
  - Where the representor does not have the request actual authority, arming conduct cannot amount to ostensible authority (*Crabtree*), however note that this was due to the unique management structure and is highly fact dependent
  - Non-ED do not usually have the authority to enter contracts alone (Sparrow Green)
3. Reliance: The [3<sup>rd</sup> P] was induced to enter into the contract relying on the representation.

*Freeman & Lockyer*: Although there was no express communication by the Board to amount to implied actual authority, the Board knew that Mr Kapoor was acting as MD and they did nothing to prevent him);

*Crabtree-Vickers*: Bruce McWilliams Junior could not hold out Peter McWilliams (the agent) as having authority to enter into the transaction, because he himself did not have actual authority to enter into the transaction (he was MD, but needed his father's approval to enter contracts).

*Paribas*: The bank gave a junior employee all of the documents for the 3<sup>rd</sup> party to sign and therefore held out that she had authority