

# Tax Events



## Companies Update

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# Today's Speakers



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# Agenda

- Fundamentals of Trusts Update
- Director Identification Numbers
- Cancelling Shares
- Tax Implications of Share Buy Backs
- Temporary Changes to The Corporations Act
- New Look Dividend Access Shares
- Declaring vs Resolving Paying Dividends
- Disappearing Directors



# Fundamentals of Trusts Update

NSW Foreign Beneficiary Exclusions

# Background

## *State Revenue Further Amendment Act 2020 (NSW)*

- NSW foreign person surcharge duty – **8%**
- NSW foreign person surcharge land tax – **2%**



# What the law says...

## Section 104JA *Duties Act 1997 (NSW)* and s. 5D *Land Tax Act 1956 (NSW)*

*A discretionary trust is considered to prevent a foreign person from being a beneficiary of the trust if (and only if) both of the following requirements are satisfied –*

- a) no potential beneficiary of the trust is a foreign person (**the no foreign beneficiary requirement**),*
- b) the terms of the trust are not capable of amendment in a manner that would result in there being a potential beneficiary of the trust who is a foreign person (**the no amendment requirement**).*

# Keep in mind...

**Refunds** available for previously paid surcharge land tax and duty

**Deadline** for the amendment of trust deeds – **31 December 2020**



# Director Identification Numbers



# Background

*Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020 (Cth)*

- Unique and permanent **Director Identification Numbers**
- Part of a Mega Registry
- *“A day or days to be fixed by Proclamation. However, if any of the provisions do not commence within the period of 24 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.”*
- **Eligible Officers** must have a DIN, including Directors and alternate Directors acting in that capacity

# Once the regime is operational...

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## **Existing**

Existing Directors will have a, yet to be specified, set period of time within which they have to apply for a DIN

## **Within 12 months**

Anyone who becomes a director within 12 months of the regime becoming operational has 28 days to apply for a DIN

## **More than 12 months**

Anyone who becomes a director more than 12 months after the regime becomes operational will have to have a DIN prior to being appointed a Director

# Cancelling Shares

# Redemption

## Section 254J 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.*

# Forfeiture

## Section 254M Corporations Act 2001 (Cth)

*If shares in a company are partly-paid, the shareholder is liable to pay calls on the shares in accordance with the terms on which the shares are on issue.*



# Share 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.*



# Tax Implications of Share Buy Backs

# Background

**Deemed Dividend –**  
s. 159GZZZP Income Tax  
Assessment Act 1936 (Cth)

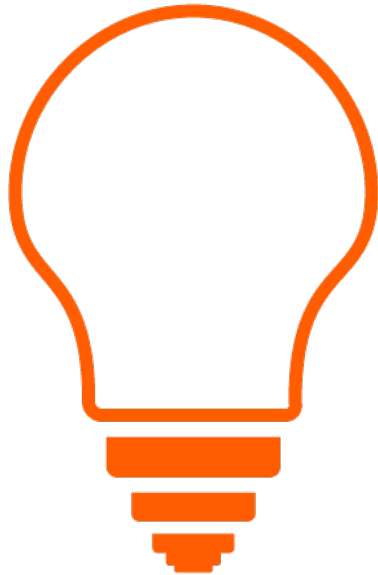
**Market Value –**  
s. 159GZZZQ Income Tax  
Assessment Act 1936 (Cth)

**Capital / Dividend Split**





# Example 1



- ✓ 100 fully paid \$1.00 shares owned by Mick on highest marginal tax rate
- ✓ Company offers to buy back for \$1,000
- ✓ \$100 return of capital
- ✓ \$900 dividend (fully franked)
- ✓ 17.5% tax on that \$900

- ✓ 100 fully paid \$1.00 shares owned by trustee of a SMSF
- ✓ Company offers to buy back for \$1,000
- ✓ \$100 return of capital
- ✓ \$900 dividend (fully franked)
- ✓ Tax refund of 15% of \$900

## Example 2



# Other things to note...

Average Capital per Share

Benchmarking Franking Rule



# Temporary Changes to The Corporations Act

Signing & Electronic Meetings

# Execution by Companies

## Section 127(1) Corporations Act 2001 (*Cth*)

(1) A company may execute a document without using a common seal if the document is signed by:

- a) 2 directors of the company; or
- b) a director and a company secretary of the company; or
- c) for a proprietary company that has a sole director who is also the sole company secretary – that director.



# Execution by Companies

## ***Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 – section 6(3)***

*A company may also execute a document without using a common seal if each person specified in paragraph 127(1)(a), (b) or (c), as the case requires, of the Act either:*

- a) signs a copy or counterpart of the document that is in a physical form; or*
- b) complies with subsection (4) of this section in relation to an electronic communication (within the meaning of the Electronic Transactions Act 1999).*



# Company Meetings

## Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 – section 5

- A meeting may be held using one or more technologies that give all persons entitled to attend a reasonable opportunity to participate without being physically present in the same place
- Email notices, including details on how to participate virtually
- Those participating electronically will be taken for all purposes to be present at the meeting
- A vote at the meeting must be taken by a poll rather than a show of hands

# Company Meetings

## Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 – section 5

- Various forms of technology can be used to allow those attending the meeting a chance to speak
- A proxy may be appointed using one or more technologies specified in the notice of the meeting

**Temporary!**

## The Acis Constitution



# New Look Dividend Access Shares

## Other things to note...

Access to small business CGT concessions where dividend access shares are on issue

Division 152 of the Income Tax Assessment Act 1997 (Cth)

# Devuba case

- Devuba sold shares in another company giving rise to a capital gain and claimed the capital gain could be reduced to nil by virtue of the small business CGT concessions
- The Commissioner claimed that the small business CGT concessions were not available to Devuba, largely because of the existence of a dividend access share
- Shareholding:
  - one ordinary share held by John van der Vegt
  - one ordinary share held by the trustee of the Van der Vegt Family Trust
  - one dividend access share held by Sloane van der Vegt

# Devuba case

- In the relevant year (2010), Devuba declared a dividend to the holders of ordinary shares
- No dividend was paid to the holder of the dividend access share
- Commissioner argued discretion and as such, small business participation percentage/CGT concession stakeholder conditions would not be satisfied and therefore no relief under Division 152
- Memorandum & Articles of Association

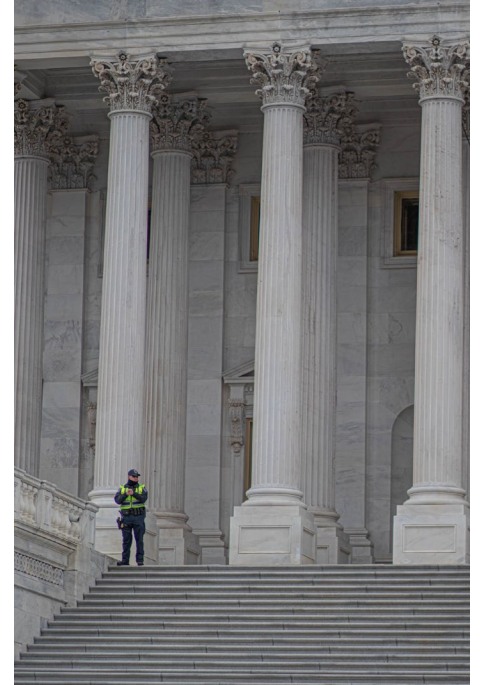
# Administrative Appeals Tribunal

- Just before the CGT event
- Mere existence of the dividend access share at the relevant time did not cause the failure of a key condition for the availability of the small business CGT concessions
- Allowed Devuba's objection to assessment in full



# Federal Court

- Ability to pay a dividend was dependant on a determination to do so being made by the directors – and so was restricted until the directors so declared
- Dismissed the Commissioner's appeal
- Devuba could access the small business CGT concessions, as claimed



# Acis Constitution – I, J & K class shares

- No rights until the Directors declare they have rights
- Only dividend rights can be declared
- Redeemable



# Declaring vs Resolving to Pay Dividends



# Acis Constitution

- Dividend is to be resolved by the Directors, rather than declared
- The Directors may fix:
  - the amount of the dividend;
  - the class or classes of shares to which the dividend will apply;
  - the time for payment; and/or
  - the priority of the payment of any dividend between share classes
- The Directors can withdraw or cancel the payment of a dividend at any time prior to the date for payment

# Disappearing Directors

# Acis Constitution

- A Director is removed if that Director does not attend at least 3 consecutive Directors' meetings without the consent of the other Directors
- A Director is removed if that Director is, or becomes, uncontactable for more than 2 months without the consent of the other Directors



**Acis.**

**Got a question or need more details?**

**Contact us.**

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# Tax Events

**Thank you!**

