



Guide for setting up a business in Australia

Introduction

This publication aims to outline some of the more important considerations to take into account when setting up a business in Australia.

For more information on the legal obligations of a director of an Australian company, please refer to our publication titled *Legal obligations of directors of Australian Companies*.

Choosing the right business structure

A key decision has to be made as to whether the business will be run through an offshore entity or whether an Australian entity will be utilised. It should be considered which solution offers the most beneficial outcome from a taxation, employment/visa, contractual and operational perspective. No general rules exist as to which approach is to be preferred as the advantages and disadvantages of using a local entity are numerous and very much depend on the specific circumstances and aims of the business wanting to operate in Australia.

Operating through a non-Australian company

If a decision has been made to expand an overseas business to Australia using a foreign company, the foreign company must register with the Australian Securities Investment Commission (**ASIC**). The foreign company must appoint a local agent for services of notices and maintain a registered office in Australia.

The fact that a foreign company has been chosen as the operating entity, does not mean that the foreign company does not have to comply with Australian legislation and taxation laws. Operating an Australian business through a non-Australian company often involves complex issues and we recommend that you obtain appropriate advice before entering into this kind of arrangement.

Setting up an Australian entity

Often it is beneficial for a foreign company to set up a local subsidiary in Australia to operate the Australian business. If such a decision has been made, one of the following entities may be utilised depending on the needs and objectives of the business:

- ◆ proprietary private company limited by shares (Pty Limited);
- ◆ public company;
- ◆ partnership;
- ◆ discretionary or unit trust; and
- ◆ incorporated or unincorporated joint venture.

The most common entity used by new entrants to the Australian market is a proprietary private company limited by shares.

Establishing a Pty Limited company

Incorporating an Australian Pty Limited company can be done relatively quickly and cheaply. Generally, the process only takes one business day and will cost AUD\$900 in set-up fees plus professional fees for advice on the process and requirements of incorporating the company.

Please contact us if you require assistance.

Company name and Australian Company Number (ACN)

Before deciding on the name for a new company, it should be ensured that the proposed company name does not infringe any intellectual property rights of third parties. Following registration, each company will be allocated with a unique nine digit Australian Company Number (**ACN**). Directors should ensure that the company's name and ACN appears on all of its public documents.

Low minimum share capital requirement

In Australia, there is no minimum share capital requirement for Pty Limited companies so it is acceptable, and not uncommon, to incorporate a Pty Limited company with a share capital of AUD\$2.

Company directors

The company must appoint at least one director, who must reside in Australia. Directors of Australian companies must be natural persons and at least 18 years old. Provided that there is at least once local director, the company may appoint one or several foreign directors.

Company secretaries

The company may appoint a secretary. If a Pty Limited company does not appoint a secretary, each director of the company is liable for a breach of the responsibilities of a secretary.

Public officer

Each company must also appoint a public officer who is responsible for complying with tax obligations and dealing with Australian tax authorities.

Opening local premises

A company may wish to enter into either a lease for premises from which to conduct the business or may choose to acquire real estate as business premises.

Entering into a lease

After having identified potential lease premises, the landlord's solicitor will normally prepare a lease. Legal advice should be obtained in respect of the lease. Any advice obtained should identify whether any State Retail Leases Acts will apply to the lease.

Acquiring Australian real estate

If you choose to acquire real estate that will be used as business premises, you will need to consider whether foreign investment restrictions may apply. In Australia the acquisition of real estate by foreign companies (or Australian companies with a substantial foreign shareholder) may need the approval of the Foreign Investment Review Board (**FIRB**). As a general rule, the acquisition of commercial real estate with a value of less than \$50 million does not, in most circumstances, need the approval of FIRB. However, there are certain exceptions from this general rule so we recommend obtaining professional advice should you consider the acquisition of Australian real estate.

Environmental liabilities

When acquiring real estate, particularly commercial (non - office) and industrial real estate, it is important to investigate the prior use and potential contamination of the property. Most contracts of sale of real estate will attempt to pass any environmental liability on to the new owner and require the purchaser to indemnify the seller against any current or future environmental liability. Again, we recommend obtaining professional advice if you are considering the acquisition of Australian real estate.

Employing Australian employees

When employing Australian employees, companies must be aware of the following issues.

Applicable law

Australian industrial relations law is frequently changing and is a highly politicised area of law.

It is important that companies familiarise themselves with current legislation and obtain appropriate professional advice.

The Australian workplace relations system was completely reformed in 2009 and a new safety net of employee entitlements took effect from 1 January 2010. The new safety net is provided for in the National Employment Standards under the *Fair Work Act 2009* (Cth) together with any applicable modern awards.

Companies employing employees must also comply with a wide range of other legislation including, but not limited to, superannuation and tax legislation and various other State and Territory laws.

Engagement of employees

Although not a legal requirement, it is prudent to engage new employees pursuant to an appropriate agreement. This may be an individual employment contract and/or a properly negotiated enterprise or greenfield agreement.

To minimise exposure to liability, individual employment contracts should include standard conditions of employment, termination of employment provisions, employer protection clauses and provisions dealing with breaks, responsibilities and various leave entitlements.

In the absence of a written employment contract, conditions and entitlements may be determined according to the provisions of relevant legislation, awards and common law and principles of reasonableness. In particular, failing to agree in writing with an employee to a period of notice of termination may impose an obligation on the employer to provide reasonable notice that may be significantly longer, therefore, more costly to an employer than statutory minimum periods.

Occupational health and safety laws

Each Australian State and Territory has occupational health and safety (**OHS**) legislation, which imposes certain obligations on companies employing staff. The main obligation is to meet minimum standards of health and safety in a number of areas. It is typically required that all companies who employ staff ensure the health, safety and welfare at work of their employees, contractors and other persons. Breaches of the relevant OHS Act attract large fines.

Liabilities

Failure to comply with the relevant statutory and award obligations and entitlements will expose employers to liability and may attract significant penalties.

The termination of an employee may in certain circumstances provide grounds on which the employee can seek remedies against the employer. Employers should ensure employees are terminated for lawful and valid reasons and in accordance with principles of fairness, equality and the applicable legislation. Fair and reasonable disciplinary procedures should also be adopted.

Workplace policies

Employers should ensure that they have workplace policies in place including those dealing with anti-discrimination, bullying, sexual harassment, equal opportunity, internet and email use and grievance procedures and that those policies are made available to employees.

Using the services of overseas employees

If a company decides to use the services of employees who are not Australian citizens or permanent residents, the company must ensure that it complies with relevant migration laws and procedures.

This is particularly so for companies that sponsor non-Australian citizen and permanent residents to work in Australia as they will need to meet stringent audit requirements.

It is a criminal offence under the *Migration Act* 1958 to knowingly or recklessly allow someone to work if that person is unlawful or does not have permission to work in the capacity for which they are engaged. Severe penalties (including imprisonment of up to two years) apply to individuals and companies who are convicted of these offences.

It is recommended that employers obtain appropriate migration law advice if they intend to employ overseas employees.

Taxation obligations

Registration and reporting

Every company must obtain a Tax File Number (**TFN**) from the Australian Taxation Office (**ATO**) and ensure they comply with reporting obligations to various regulatory bodies including the ATO, ASIC and various State agencies.

Tax remittance and obligations

Companies must ensure they comply with a broad range of tax obligations including obligations pertaining to:

- ◆ Corporate tax including Pay As You Go (which is a system of paying instalments during the income year towards a company's expected tax liability). The corporate tax rate is 30 per cent for all companies;
- ◆ Capital gains tax;
- ◆ Duties and excise (including stamp duty); and
- ◆ Goods and Services Tax.

Please note that the income tax year in Australia is from 1 July to 30 June and not the calendar year.

When operating a business in an overseas location and in Australia, complex taxation issues may have to be considered such as the payment of withholding tax, the application of double taxation agreement and so called transfer pricing rules. Please contact a taxation expert of Hall & Wilcox to discuss any of these matters.

Obligations under the Competition and Consumer Act

Companies must ensure compliance with the *Competition and Consumer Act* 2010 (Cth) (**CCA**), otherwise, the company may be subject to penalties.

The main provisions of all companies operating in Australia should be aware of are summarised below.

Anti-competitive agreements

Contracts, arrangements or understandings which have the purpose or likely effect of substantially lessening competition are prohibited in Australia, are unenforceable and may result in substantial penalties if made.

Further specific prohibitions include:

- ◆ *Price Fixing* - where parties in competition with each other enter into a contract, arrangement or understanding, which has the purpose or effect of fixing a price for the provision of goods or services.
- ◆ *Exclusive Dealing* - where a company (Supplier) supplies goods or services on the condition that the company that receives those goods or services (Receiver) will not acquire goods or services from a competitor of the Supplier, or that the Receiver must also acquire certain other goods or services directly or indirectly from the Supplier, and this arrangement has the purpose or likely effect of lessening competition in a market.
- ◆ *Third Line Forcing* - a more specific form of exclusive dealing. Occurs when a Supplier supplies goods or services on the condition that the Receiver will acquire different goods or services from a third party. Unlike other jurisdictions, in Australia third line forcing is a 'per se' (or automatic) breach of the CCA, and is punishable regardless of its effect on competition in a market.

- ◆ *Resale Price Maintenance* - occurs when a company dictates to its resellers the minimum prices for the resale of its goods or services. Although a retail price can be recommended, companies will breach this provision if they threaten not to supply goods, if those goods are not sold at the retail price requested or, otherwise, exert pressure on retailers to sell at a specified price.

Consumer protection

Companies are prohibited from engaging in misleading or deceptive conduct in the course of trade or commerce. This prohibition has been interpreted very widely to include activities such as advertising, oral representations and even representations with respect to contractual matters. The consumer protection provisions of the CCA should always be considered when offering goods or services in Australia.

Product liability

Companies that manufacture goods in Australia or import goods into Australia will be liable for defects to those goods. Defects include design, manufacturing and instructional defects, which may or may not have an impact on safety. Whether a defect will be compensable depends on the circumstances and in particular, whether loss or damage has been suffered.

Unconscionable dealing

Companies must not act unconscionably in business transactions. Broadly speaking, conduct is unconscionable if the conduct is clearly unfair or unreasonable or if the company knew, and took advantage of, the special disability of a contracting party.

Intellectual Property Rights

Intellectual property rights are regulated in Australia by Commonwealth legislation (Australia wide legislations).

For example, companies should be aware of the *Trade Marks Act 1995* (Cth), which provides for the registration of trade marks and sets out what rights derive from registration. Companies will be liable if they infringe a registered trade mark.

Other legislation to keep in mind are the *Patents Act 1990* (Cth) and the *Copyright Act 1968* (Cth). Companies should also ensure that they do not benefit from other companies' or individuals' reputation, to avoid being the subject of a common law passing off action.

Please contact us to discuss these matters further.

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