ESTABLISHING A CORPORATE PRESENCE IN AUSTRALIA

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Recently, we have seen an increase in overseas clients establishing operations in Australia, to focus on a range of Australian markets and also as a base for operations in our region. In establishing a presence in Australia, those companies typically seek our guidance on suitable Australian corporate structures and technical and regulatory matters.

Most industries have their own regulatory compliance requirements but the following points summarise our answers to frequently asked questions about corporate structures.

- A privately owned (proprietary) company limited by shares is the most commonly adopted corporate structure for trading businesses. A proprietary limited company will frequently be identified by the abbreviated designation ‘Pty Ltd’. A proprietary limited company is somewhat similar to the US limited liability company.

- Other business structures, including trading trusts, are possible and may be preferred in particular circumstances but a trading company is often the most suitable entity.

- The Australian Securities and Investments Commission (“ASIC”) is the Australian regulatory authority that oversees company incorporation and regulation.

- While not strictly necessary, almost all companies will be incorporated with a constitution that sets out key governance provisions.

- The company will need to have a registered office in Australia. This is the official company address for services of notices and some other compliance requirements. The registered office may be but need not be at the company’s principal place of business.

- The company may be incorporated with minimal issued capital and it need not have any Australian resident shareholders. A Pty Ltd company must have at least 1 shareholder and cannot have more than 50 non-employee shareholders plus additional employee shareholders.

- The Pty Ltd company must have at least one director who is ordinarily resident in Australia. The company may have other directors who are not Australian residents. Directors must be natural persons at least 18 years of age.

- A proprietary limited company is not permitted to raise funds generally from the public. If a company wants to do that and/or intends to have more than 50 shareholders, it will need to be a public company limited by shares. A public company limited by shares is similar to a proprietary company but has a range of increased reporting and other statutory obligations. A public company need not be listed on a securities exchange but for a company to be listed, it must be public. A public company will frequently be identified by the abbreviated designation ‘Ltd’ (without the ‘Pty’).
• Directors of Australian companies have a range of statutory and general law duties. Key duties include the duty to act in the best interests of the company and to exercise reasonable skill and judgement in the conduct of the company’s affairs. In certain circumstances, directors may become personally liable for the debts of the company. For example, personal liability may attach to a director where the director permits a company to incur debts it doesn’t repay when the company is insolvent or in cases of unmet liabilities of the company to the Australian Taxation Office ("ATO") and a range of other legislated liabilities. There has been a great deal written and a great many cases decided in relation to directors’ duties.

• Australian companies are able to trade in jurisdictions throughout the region, subject to compliance with certain regulatory requirements in those jurisdictions.

• Australia has a foreign investment review process, operated by the Foreign Investment Review Board ("FIRB"). Generally, FIRB approval will be required for certain investments in Australia by foreign governments or related entities or investments in certain industries or sensitive or national security type areas and in some real estate transactions. As a result of the Coronavirus pandemic, the previous monetary thresholds below which FIRB approval was not required, have now been reduced to $0. Presently, we recommend that any foreign party looking to make investments in Australian companies, interests in land or other assets, should seek advice regarding the potential requirement for FIRB notification.

• Overseas owners should be aware that the Australian taxation regime includes thin capitalisation provisions and transfer pricing provisions similar to many other jurisdictions. The Australian tax system also has a “dividend imputation” system that is designed to minimise shareholder tax liability on dividends when the dividend paying company has paid income tax on its taxable revenue. Dividend imputation credits are not generally available to foreign shareholders.

• The standard company tax rate in Australia is 30% of corporate taxable profit. However, a “small company” is subject to a tax rate of 27.5% and that rate is presently due to reduce to 25% over the next 2 years. New Australian trading companies have obligations to register with the ATO to obtain a tax file number ("TFN"), an Australian business number ("ABN") and in most cases, goods and services tax ("GST") registration. The ATO has some “know your client” and anti-money laundering type information requirements when a company applying for those registrations has non-Australian directors or shareholders.

• Australian companies that are foreign owned will normally be required to prepare and file annual audited accounts with ASIC. We assist clients with a process whereby foreign owned Australian companies may be able to obtain ASIC exemptions from the need to prepare and file audited financial reports.

• We recommend that Australian companies enter into written employment or contractor agreements with their personnel. The distinction between employment and contractor relationships is important. Australian employees get the benefit of a compulsory employer-paid superannuation contribution regime currently at the rate of 9.5% of annual remuneration. A number of Australian companies also establish employee share schemes and other equity participation arrangements.

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