Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili

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Doing business in Australia

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Introduction

This presentation will give you a brief overview of the following key areas relevant to doing business in Australia.

- Overview of the Australia's governments and the legal system;
- Setting up Australian business operations;
- Overview of Australian contract law; and
- Foreign Investment Review.

Australia's governments and legal system

- **Australia's governments**
  - 3 levels of government:
    - Federal: oversees specific functions, including defence, immigration, finance and trade;
    - State or territory: health, transport and energy;
    - Local government: town planning and development and use of property.
  - Laws in each state/territory may be different – so businesses may need to comply with different arrangements in different jurisdictions.
  - Process of harmonisation of laws between state and territories – corporations law, energy, workplace health and safety.
- **Legal system**
  - Based on the English common law with judicial decisions forming the basis of contract law and interpretation of legislation.
  - Where legislation is inconsistent with common law, the legislation prevails.
  - Cf civil law jurisdictions – <u>practical implication</u> is that commercial contracts tend to be longer and more complex.

Key regulatory bodies

- Australian Securities and Investment Commission (ASIC)
- Australian Taxation Office (ATO)
- Australian Competition and Consumer Commission (ACCC)
- Australian Securities Exchange (ASX)
- Australian Prudential Regulation Authority (APRA)
- Industry specific bodies for highly regulated industries – energy, telecommunications etc

Setting up a business in Australia

Foreign company (ie branch office) or local subsidiary entity?

- Key decision: tax, contractual, employment/visa and operational considerations will inform this decision.
- If you are "carrying on a business" in Australia must register with ASIC.
- Operating a foreign company does not exempt a business from Australian laws or taxation requirements. To operate in Australia, the foreign company must reserve an Australian Business Name (**ABN**).
- Advantages and disadvantages will depend on specific circumstances, however third parties in Australia more likely to deal with Australian company.

Key issues

Separate legal entity: establishing a branch office means there is no separate legal entity and liabilities are those of the foreign company. A local subsidiary is a separate legal entity.

Registration with ASIC: A foreign registered company must be registered with ASIC to operate in Australia and obtain an Australian Registered Body Number. A local subsidiary entity will register with ASIC and be assigned an Australian Company Number.

Financial reporting: both scenarios involve annual financial reporting to ASIC – for a local subsidiary entity financial reporting will be limited to Australian entity's operations.

Tax: Foreign company will be taxed on income sourced from Australia whereas a local subsidiary would pay tax on all income regardless of source. Note: 30% Company tax rate in Australia.

Migration issues: same for both options. If using employees who are not Australian citizens or permanent residents need to comply with relevant migration laws and procedures.

Establishing a subsidiary

Most common types of companies registered with ASIC:

- a **proprietary company** limited by shares; and
- a **public company** limited by shares.

Key features of a 'Pty Limited' company:

- must have at least **one shareholder** (but not more than 50)
- Must have at least **one director**
- One director must ordinarily reside in Australia (other directors can reside overseas)
- Note: Australian Corporations Act and case law impose specific duties on directors and secretary of companies.
- Low share capital requirements – can be established with a share capital of $2
- Cheap and quick to establish – usually one business day to set up

Other structures - trusts and partnerships are alternative options to companies.

Australian contract law

Key features of Australian contract law

- Australian contract law is based on English common law, rather than any codified or statute law
- Basic principle: freedom of contract – courts give effect to the intent of the parties evidenced by the contract.
- Key issues: termination, indemnity and liability for non-performance are governed by the terms of the contract.
- Transaction costs: contracts in Australia are generally more detailed than those in Civil Law jurisdictions
- Australian contracts must respond to judicial decisions which develop the Common Law to ensure that it adequately gives effect to the parties intentions.
- There is important legislation which cannot be contracted out of: Competition and Consumer Act 2010 (Cth)

Australian contract law cont..

Competition Law (Anti-trust)

- Restrictions upon dealings by a party to a contract with third parties may be a breach of anti-trust provisions in the Competition and Consumer Act 2010 (Cth) (**CCA**)

Limitations and exclusions of liability

- Parties generally are free to limit or exclude liability but the CCA and state based fair trading legislation imposes some restrictions.

Enforcement and dispute resolution

- Australia is a party to the New York Convention on the recognition and enforcement of Foreign Arbitral Awards.

International Sale of Goods

- Australia is a signatory to the Vienna Convention on Contracts for the International Sale of Goods.

Foreign Investment Review

Foreign investment review

- Certain types of foreign investment in Australia require notification and approval
- The Foreign Investment Review Board (FIRB) is a body that was established to examine proposal for foreign investment and advise the Treasurer and the Government on those proposals.
- Treasurer reviews proposals against 'national interest' on case by case basis.
- Treasurer may block or impose conditions on proposed foreign investments

Notification requirement depends on:

- type of investor, type of investment, industry sector and the value of the investment
- Most common investments include acquisition of Australian businesses and property
- 'Sensitive areas' include agricultural investments, defence, media, telecommunications, residential real estate or involvement of foreign government investor.
- Monetary thresholds will vary depending on whether country of origin is a party to free trade agreement.

Land

- For residential land that is an existing dwelling, FIRB approval will always be required.
- For commercial land, FIRB approval is required if it is vacant, otherwise threshold generally high

Business

- For an acquisition of a business, FIRB approval is required if the interest if worth more than $1billion (assuming free trade agreement partner and non-sensitive area).