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LAWYERS

DOING BUSINESS IN AUSTRALIA – OPPORTUNITIES & PITFALLS



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DOING BUSINESS IN AUSTRALIA – OPPORTUNITIES AND PITFALLS

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Australia has an exceptional track record as a place to do business successfully. It is regarded as a resilient economy and has a well-developed infrastructure, stable laws in a democratic environment. It is also well positioned to provide a gateway into the fast-growing areas of South East Asia and China. It also provides excellent opportunities for individuals, companies and other entities to do business in Australia. It therefore attracts many overseas investors from all over the world and in particular in recent times from South East Asia and China.

Government

Australia is an independent Federal Democracy that is stable and well regarded internationally as it has a good track record, stability and growth. Australia is a Federation by a written Constitution and comprises a Federal Government based in Canberra and six (6) States and two (2) Territories. Accordingly, there are Federal Laws and State and Territory Laws that may affect individuals, Companies and other entities doing business in Australia. The Federal Government and State and Territory Governments also enact laws that affect doing business in Australia and therefore it is extremely important to comply with the laws as usually penalties and other consequences flow in the breach of such laws and regulations. All parties doing business in Australia must be mindful to conduct all their activities within the laws and regulations of the legal system of the Australian Federal Parliament, State and Territories.

Legal System

The Australian Legal system is based on the British Legal system.

There are two (2) sources of law the first being Statute Law which is created by Legislation elected in the Parliaments. The Federal laws apply throughout Australia and the State and Territory Laws apply within the State or Territory in each case.

The second source of law is the common law which is the law developed by the Courts through the decisions of Judges over many years on various cases that are recorded and usually referred to as precedents that lower Courts usually follow. The High Court is the highest Court in the Australian Court system and the respective Supreme Court in the States are the highest Courts in each State in Australia.

As well as the various Courts referred to above there are also Tribunals that have been set up to hear Appeals against Government decisions, administer particular areas of business such as Industrial Relations or administer particular laws such as Planning Laws, Retail Tenancy Laws and in the case of Victoria, Planning Laws, Retail Tenancy Laws are dealt with at Victorian Civil Administrative Tribunal (VCAT). It is important when doing business in Australia to be mindful of the various Courts and Tribunals and obtain sound and timely legal advice prior to commencing business or establishing a legal entity, business entity or business structure in Australia.

Business Structures

There are various business structures that can be set up to do business in Australia such as the following –

1. Companies

A Company is an association of a number of persons with a common object or objects. Companies are regulated by the Commonwealth Legislation, the Corporations Act of 2001.

Broadly speaking there are two (2) types of Companies: -

(1) Proprietary Companies

(2) Public Companies

The most commonly used form of Proprietary Company is a company limited by shares which are private companies with a maximum of 50 non-employee shareholders meaning shareholders that are also Company employees do not count towards the 50-shareholder limit. The benefit of forming a Company limited by shares is that it limits the liability of its members to their respective shareholding. This is usually referred to as “limited liability”. The Proprietary Companies limited by shares are limited in how they can deal with their shares and a proprietary company cannot issue invitations or offers to the public to subscribe to its shares or debt instruments.

If such a Company contravenes the Corporations Act provisions regarding the number of non-employees shareholders it has or issue shares of debt instruments to the Company the Corporate Regulator Australian Securities

and Investment Commission (ASIC) might require the Company to convert to a Public Company. In recent times Proprietary Companies through reform have a number of advantages over Public Companies in respect to the set up formalities such as: –

- (a) No requirement to have more than one (1) Director who resides in Australia;
- (b) No obligation to hold an Annual General Meeting;
- (c) No obligation to appoint a Company Secretary

With respect to Public Companies these are usually larger business structures and require at least three (3) directors, two (2) of whom must ordinarily reside in Australia and at least one (1) Company Secretary ordinarily resident in Australia. There is no limit as to the number of shareholders or members of a Public Company and subject to compliance with disclosure and other requirements set out in the Corporations Act including the preparation of an Offer document might issue shares or debt instruments to the public.

2. Joint Ventures

Two (2) or more individuals or Companies might carry on business as a Joint Venture commonly known as “JV’s”. JV’s are governed by common law and the law of Contract. They may be incorporated or unincorporated and operate generally similar to a Partnership and are governed by a Joint Venture Agreement which set out the Joint Venture parties rights and obligations and protect their respective interests. JV’s are common in the Property, Mining and Petroleum industries as well as Not For Profit Associations and they are commonly formed for a single project rather than an ongoing business.

3. Partnership

A Partnership is an association of persons who carry on business together or in common with a view to profit. A Partnership is not a separate legal entity and are regulated by State Legislation in each State of Australia. The number of Partners permitted to form a Partnership is generally limited to a maximum of 20 except for certain professional partnerships such as Legal and Accounting Partnerships where List limit does not apply.

The important element of a Partnership is the existence of “a business” which includes a trade, occupation or profession. The business also must be carried on in common which requires that the Partners actually carrying on the business have authority to transact on behalf of the Partnership acting as Agents for all the other Partners and the business must be carried on with a view to profit.

A general disadvantage with Partnerships is that the Partners are personally liable for the debts of the Partnership jointly and severally. Unlike as in the case of Companies there is limited liability which is seen as an advantage in that the Creditors might only have recourse and limits the liabilities of its shareholders or members to their respective shareholding.

The major pitfall is that there is no "limited liability" for each partner in a partnership.

4. Trusts

A business might be carried on through a Trust by appointing a Trustee who holds legal title to the assets of the business and carries on the trading activities with those assets on behalf of the beneficiaries of the Trust or pursuant of a lawful aim such as a Charity. The Trustee might be an individual or corporation including foreign companies. A Trust is not a separate legal entity but liability of the Trustee and the Beneficiaries might be limited. Usually the Trustee of a Trust is a separate legal entity such as a company set up specifically to carry on this role.

5. Registered Foreign Companies

A Foreign Company is an incorporated body formed outside Australia. A Foreign Company must register with ASIC to carry on business in Australia if amongst other things it has a place of business in Australia such as a branch office, establishes or uses a share transfer or share registration office in Australia, or administers, manages or deals with property in Australia as an agent, legal person representative or otherwise.

An overseas Company wishing to carry on business in Australia might be able to register as a subsidiary or establish a branch office by registering itself as a foreign company. If a branch office is to be established the foreign company must be registered with ASIC and an Australian resident local Agent must be appointed. Whether a foreign body is carrying on business in Australia is dealt with on a case to case basis and will depend upon the Application of the relevant legal principles to the circumstances of each case and therefore sound legal timely advice should be obtained prior to commencing to carry on business in Australia directly or by forming a branch of the Company within Australia.

Setting Up in Australia

Setting up an Australian Company is relatively straight forward by instructing a Lawyer or an Accountant to incorporate the Company in a name that is available and capable of being registered with ASIC.

However, registering a foreign company outside Australia or incorporated bodies that do not have their Principal place of business in Australia might carry on business through an Australian Branch and register it through ASIC or setting up a subsidiary and again registering the Company through ASIC.

The procedure of registering a foreign company is slightly more onerous than establishing a new company in Australia as the subsidiary as a foreign company must lodge an Application form with ASIC together with other documents. Also, a foreign company establishing a branch must have a registered office in Australia and appoint a local Agent who may be a natural person or a Company in Australia to represent the Company. The Agent is responsible for the Company's compliance with the Corporations Act and is personally liable for any contravention of the Corporations Act.

After registration of a foreign company it must lodge copies of its financial statements at least once every calendar year and at intervals of not more than fifteen months. It must comply with various notification obligations, is given the power to hold land under the Corporations Act and is able to sue and be sued under the Australian Law.

Business Name

A person might reserve a business name that is not identical to the one already reserved or registered to trade under. It is also prudent to conduct an IP, Australia Trade Mark check to confirm if a proposed business name is the same or similar to an unregistered Trade Mark and should register under the National Business Name Register to conduct business unless it is using the identical name already registered as a Company.

Australian Company Numbers

On Registration all Companies are given an Australian Company Number and an Australian Business Number and these numbers are registered with ASIC and must be used at all times when doing business.

The Australian Business Number is maintained by the Australian Taxation Office for Taxation purposes. The consequences for not having an Australian Business number can be serious. This is a serious pitfall as for example when a supplier fails to quote an ABN Number on the Tax Invoice the Purchaser is required to withhold 49% being the top marginal rate of income tax plus a National Health Care Medicare Levy and three (3) years temporary budget repair levy on the amount payable to the supplier and remit that amount to the Australian Taxation Office. This amount will then only be credited back to the supplier on lodgement of the Tax Return presuming that supplier is not to be subject to a 49% rate of tax. This means that there are serious consequences and penalties for not complying with the Australian Taxation Office laws and regulations. Significant penalties will apply for non-compliance and

potentially legal charges might be issued against the individuals, directors and companies.

Workplace Relations

In Australia both at Federal and State levels nearly all aspects of employment relationships are regulated including the standard terms and conditions of employment, long service leave, holiday pay, tax and superannuation, discrimination and workplace health and safety. In general, the Federal system of employment laws apply to foreign companies who have a subsidiary which is registered in or employs people in Australia.

Employment matters are governed by the Fair Work Act of 2009 and covers all private sector employees in Australia with a limited exception in Western Australia which sets the minimum safety net of conditions and national employment standards including maximum weekly hours, request for flexible working arrangements, parental leave, annual leave, long service leave, public holidays and other matters of employment.

Therefore, individuals or companies wishing to set up business in Australia must be aware of potential pitfalls and should comply with the relevant laws including Fair Work, the awards, enterprise agreements and be mindful in relation to unfair dismissal, discrimination and other possible claims including workplace health and safety, discrimination and superannuation provisions.

Foreign Investment

The Australian Government foreign investment policy is implemented through the Commonwealth Legislation, Foreign Acquisitions and Takeover Act of 1975.

Under this Act the Foreign Investment Review Board assesses proposals and provides advice to the Federal Treasurer who is responsible for the administering of regulations and approving foreign investment that fall within the Jurisdiction of Foreign Acquisition and Takeover Act and that usually applies to large companies and investments. The Australian Taxation Office administers the compliance and enforcement of Foreign Investment Rules with regard to residential land, agricultural land on the Agricultural Land Register and a variety of fees are payable depending on the circumstances in each case.

Tax

Australia imposes on the worldwide income of individuals and entities residents in Australia for tax purposes and the income of non-resident sources in Australia subject to any relevant double Taxation Agreement. Different forms of direct and indirect taxes are levied by both Federal and State Governments such as –

- (a) Income Tax and Capital Gains tax by the Federal Government;
- (b) Fringe Benefits Tax by the Federal Government
- (c) Goods and Services Tax by the Federal Government
- (d) Superannuation Tax by the Federal Government
- (e) Withholding Tax by the Federal Government

State Governments also have a variety of taxes in each State such as Payroll Tax, Gambling Taxes, Motor Vehicle Taxes, Land Tax and Stamp Duty. It is therefore important for persons wishing to set up a business in Australia to be mindful of the Tax structure at Federal level as well as State or Territory level. Potential pitfalls and tax issues should be given serious consideration during the formation of their specific business plan. They should obtain sound and timely Legal advice from experienced qualified Lawyers and Accounting advice to enable the individual or company to conduct business successfully in Australia.

Protection of Technology and Intellectual Property

In Australia the principal form of intellectual property is Copyright, Patents, Designs and Trademarks.

- (a) Copyright protects all original literary, dramatic, musical and artistic works as well as sound recordings, films and broadcasts and is protected by the Copyright Act 1968.
- (b) Patents. Registered Patents in Australia are protected under the Patents Act 1990, Commonwealth.

A Patent is a temporary monopoly granted to a Patentee over a device, substance, method or process which is deemed new and inventive.

- (c) Designs. Designs are regulated by the Designs Act 2003 and relate to the shape, configuration, patent or ornamentation which when applied to a product gives the product a unique and distinctive appearance. A Registered Owner has the exclusive right to use the design. The exclusive right to authorise others to use the Design.

The exclusive right to prevent others from using the Design.

- (d) Trade Marks. A Trade Mark can be a word, phrase, letter, number, sound, smell, shape, logo, picture, aspect of packaging or combination and use to distinguish goods and services registration of a Trade Mark and is governed and protected by the Trade Marks Act 1995.
- (e) Domain Names. In Australia the Domain Name mainly used is the .com.au second level Domain. The .com.au Domain is for commercial purposes and the Registrants must be –

- (i) An Australian Registered Company
- (ii) Trading under a Registered Business Name in any Australian State or Territory, an Australian Partnership or Sole Trader
- (iii) A Foreign Company licensed to trade in Australia
- (iv) An owner of an Australian Registered Trade Mark
- (v) An Applicant for an Australian Registered Trade Mark
- (vi) An Australian Commercial Statutory Body

Contract Law in Australia

While conducting business in Australia it is important to understand Contract Law. A Contract is a legally enforceable Agreement which will be enforceable where it satisfies the relevant requirements including Offer, acceptance, consideration, intention to create legal relations and certainty.

Contract Law is generally regulated by Common Law however there is also Legislation to remedy unfair and unconscionable conduct. A Contract will not be enforceable where it contravenes legislation of public policy. Generally, only the parties to a Contract are bound by the Contract and are entitled to enforce it.

It is therefore extremely important to obtain sound and timely advice from a well-qualified Lawyer who is able to advise in the preparation, execution and enforcement of Contracts.

Real Property

When buying or selling land in Australia there are a number of important matters to be taken into account. It is important for the buyer to carry out a thorough investigation of issues such as Title of the land, the condition of any structures on the land, the use to which the land can be put in accordance with local Planning Laws. The Purchaser is to carry out full due diligence in relation to planning and other requirements both at the Federal, State or Territory level. As a Seller, there are usually Statutory obligations which must be met such as providing potential buyers with a Statutory Disclosure document that the Purchaser checks and investigates prior to signing a Contract of Sale of Land. In Victoria this is commonly known as a Section 32 Vendor Statement.

A Contract is usually prepared by the Seller's Solicitors and is provided to the Purchaser or the Purchaser's Solicitors to check and if in order execute and pay a deposit normally 10%. The Contract and 10% deposit is returned to the Seller and the Seller's Solicitors and if in order the Contract is then signed and the Contracts are exchanged which then means that the Contract is then binding between the parties. Usually there is a date for settlement set in the Contract and the Purchaser must pay the balance of the monies and any adjustments and in exchange at the point of Settlement and registration the Purchaser obtains a clear Certificate of Title. If there

is a Lender that the Purchaser is using for a loan to purchase usually the Lender obtains a First Mortgage and holds on to the Certificate of Title until the Loan is paid in full in which case the Lender returns a clear Title back to the Purchaser.

There are many pitfalls in the event that a Purchaser purchases a property without carrying out all due diligence and finds out that the Purchaser cannot conduct its business such as it has no Planning or Building permission to erect or conduct a business at the premises. Furthermore, there could be other complications that the premises have been leased for a considerable period of time and the Purchaser is not able to take possession of the property and conduct its business from the premises.

There are other issues as well in relation to mining, farming and other industries that special licences or permits are required to enable the person or Company to conduct its respective business and all such Applications and Permits must be obtained prior to commencing to conduct the business otherwise prosecution might be brought such as environmental breaches of laws by Authorities of Federal, State or Territories.

BUSINESS LAW – BUYING AND SELLING

Velos & Velos Lawyers have acted for numerous clients be it individuals, partnerships, companies or other commercial entities in the buying and selling businesses in Australia.

When selling a business, it is important to engage experienced Lawyers, Accountants and Business Agents to prepare the relevant disclosure documents, financial documents and the Contract of Sale of Business to ensure that the appropriate terms and conditions are put in place for each business being sold.

Similarly, when purchasing a business, it is important to engage experienced Lawyers, Accountants and other specialist consultants to ensure that due diligence is carried out and to ensure that the business is worth purchasing prior to executing the Contract of Sale of Business.

In selling and buying businesses, there are many potential pitfalls that require careful consideration and analysis with sound and timely advice from experienced expert Lawyers such as Velos & Velos Lawyers.

Velos & Velos Lawyers have an extensive track record of sound expert and practical experience for over 37 years in Commercial Law, Property Law, Business Law and other areas. We set up Companies, Partnerships, Trusts as well as Sole Trader businesses and advise on how to achieve and secure successful outcomes in legal disputes as well as settling disputes.

We have extensive experience in dealing with numerous legal business problems and pitfalls and issues of Insolvencies and Bankruptcies when businesses or individuals run into financial trouble and require re-structure or to declare insolvency or bankruptcy.

Velos & Velos Lawyers have also extensive expert experience in relation to acting for Sellers and Purchasers in the sale and purchase of Australian businesses as well as conducting Litigation when commercial or property disputes arise between the Sellers, Purchasers and other parties including banks or other lenders.

VELOS & VELOS EXTENSIVE EXPERT LEGAL EXPERIENCE

Velos & Velos Lawyers have extensive expert legal experience in many areas of Law including debt collecting and commercial international matters. We work closely with other experts such as Accountants and Business Advisors in Australia and overseas to ensure that individuals and companies carry on business according to the various strict legal regime and complex laws at Federal, State and Territory level or often at local level in relation to planning and building issues

We are ready and able to advise individuals, directors and companies in all aspects of Commercial Law, Property Law, Business Law, Family Law and other commercial matters, as well as in setting up to do business in Australia, including company structures and helping in establishing and creating a thriving and successful business in Australia.

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