



MEMO

To: Board of Directors
From: Company Secretary
Subject: **FOREIGN OWNED / CONTROLLED COMPANIES**

Below is my response to your comments / questions.

An Australian company ("Newco Pty Ltd") may have a single shareholder. If that single shareholder is another company ("Parentco Pty Ltd"), then Newco is a wholly-owned subsidiary of Parentco [Corporations Act secs.46~47] and Parentco is the 'Ultimate Holding Company' [sec.9 definition] – which must be recorded on the Form 201 when incorporating a new company (and, if subsequent to company formation, then via Form 484) – sec.349A.

Parentco can be a foreign company, which can own 100% of the shares in an Australian company. There is no requirement to have [at least] one Australian shareholder. I do not know what you have planned for Newco, but some foreign investments (eg real estate of any value and most other businesses/industries of \$10m+) must first be approved by the Foreign Investment Review Board. Also, for public companies, there are some limits on foreign ownership*.

Financial Reporting Requirements

Also – and I guess this is getting into operational/regulatory matters (ie, beyond merely establishing a new company), which I am not necessarily qualified to advise on, and you may have to seek appropriate professional advice at some future time because there could be a myriad of issues to be considered as a foreign owned/controlled company (legal, accounting, tax, etc) – but my general understanding of the Corporations Act requirements for a foreign-owned 'small proprietary company' (ie, one where at least 2 of the following criteria are satisfied: annual revenue less than \$25m, assets of less than \$12.5m, less than 50 employees – sec.45A) which I presume you will be, at least initially, is that audited financial statements must be prepared and filed annually with ASIC under secs.292/301 unless Newco qualifies for relief from these obligations.

This relief does not extend to Newco if it becomes a large proprietary company (the corollary of above for 'small') or a public company – in which cases it must prepare and lodge audited financial statements annually.

Also, if Parentco is itself registered with ASIC as a foreign company and lodges consolidated financial reports that include its activities in Australia and its Australian



subsidiaries, then Newco does not have to separately prepare and lodge accounts – sec.292(2).

Accounts / Audit Relief

Relief from the financial reporting requirements (ie, preparing and lodging accounts, and from having them audited) is available under CO 98/98 and RG 58 if the company is not part of a large group (ie, if Newco is not part of a group of Australian registered companies which together fit the definition of large proprietary company – sec.45A – being the corollary of ‘small’ above) and such relief is sought within the designated time frames by directors’ resolution and lodging a Form 384 within 3 months of incorporation (or within 3 months of becoming foreign controlled) and, for all subsequent years, during the period 3 months before the end of the company’s financial year.

If at any time for whatever reason the company subsequently ceases to rely on the CO98/98 relief then the directors must so resolve and Form 394 must then be lodged with ASIC within 4 months of the end of the relevant financial year.

Relief from just having accounts audited may also be available, in need, under CO 98/1417 and RG 115 and lodging Form 382, provided both directors and shareholders so resolve. However, it appears that if relief is granted from preparing/lodging accounts, then this separate relief from audit is not needed. There may be other situations when even though accounts are, or have to be, prepared (and no relief is available) that separate relief from requiring an audit may be sought for relevant reasons.

Financial Year

The company’s financial year-end can effectively be any date the directors resolve within the first 18 months after Newco was formed (sec 323D), but thereafter generally cannot be altered without ASIC consent. Most Australian companies choose 30 June as that is also the tax year-end. So, as Newco was only formed in March 2009, the first financial year [for preparing accounts/audit if required] under the Corporations Act can be June 2009 or June 2010, or it can be any other date up to September 2010, for example to coincide with Parentco.

Also, under the Tax Act, Newco will probably still need to lodge a 2009 tax return, as I see it, which would be easiest if the first financial year-end is June 2009. There is also scope to change the tax year, by application to the Australian Tax Office, and one accepted criteria for that is a foreign parent company with a different tax year.

*** Limitations on Foreign Ownership**

The Foreign Acquisitions and Takeovers Act (‘FATA’) places limitations on the rights of non-Australian residents to hold or vote the shares of an Australian public company. The FATA regulates acquisitions giving rise to ownership of substantial amounts of a company’s shares. The FATA prohibits:



- (a) any natural person not ordinarily resident in Australia; or
- (b) any corporation in which either a natural person not ordinarily resident in Australia or a foreign corporation (as defined in FATA) holds a substantial interest (defined below); or
- (c) 2 or more such persons or corporations which hold an aggregate substantial interest (defined below),

from entering into an agreement to acquire shares if after the acquisition such person or corporation would hold a substantial interest in a corporation, without first applying in the prescribed form for approval thereof by the Australian Treasurer and receiving such approval or receiving no response in the 40 days after such application was made.

A holder will be deemed to hold a substantial interest in a corporation if the holder alone or together with any associates (as defined in FATA) is in a position to control not less than 15% of the voting power in the corporation or holds interests in not less than 15% of the issued shares in that corporation. Two or more holders hold an aggregate substantial interest in a corporation if they, together with any associates (as so defined), are in a position to control not less than 40% of the voting power in that corporation or hold not less than 40% of the issued shares in that corporation.

DISCLAIMER

The comments in this memo reflect some commercial aspects and observations on the matter experienced or observed by the writer in practice as he understands them. The information is given as a guide only and does not represent a definitive or legal view of any of the issues raised, covered or referred to and the reader is urged to seek his own professional advice on all aspects of, or pertaining to, this and any related matter.