



Cross-Border Restructurings in AUSTRALIA

The global surge in commodities prices is over – leading to a slowdown in economic growth in Australia, especially showing in a significant decrease of the GDP growth of about 2.5 % in 2014. Irrespective of this, the fifth continent faces big shifts in the automotive sector. Against this backdrop, Arthur Davis (Addisons, Sydney) and Dr. Ruediger Theiselmann (WELLENSIEK, Frankfurt) talk about what foreign companies doing business in Australia need to know now.

What are the main drivers for the cooling down of the economic boom in Australia?

Theiselmann: Particularly the drop in demand for commodities from China is afflicting the market. Australia is known for its dependence on the export of natural resources, 20 % of overall export is stemming from the iron ore industry. In addition there is coal with a share of 12 percent. In the metals & mining sector we see rising numbers of corporate restructurings.

Is this a unique problem of the commodities industry?

Theiselmann: No, also in the automotive sector Australia experiences first occurrences of crisis and restructurings. Toyota and Holden/GM are two important manufacturers that have already announced to shut down production until 2017. Surely, this will lead to restructurings among the domestic and foreign automotive component suppliers in Australia as well.

What are the most critical aspects in out-of-court restructurings of Australian companies?

Davis: There are two broad issues to consider. Firstly, what will be the effect on operational contracts as a result of the restructure? Will operating contracts need to be novated or transferred to other group companies? Contracts will need to be reviewed to determine whether the consent of

counterparties needs to be obtained as part of the restructure. In the same way, the contracts of employees who may be transferred within the group will as part of the restructure need to be considered. The group may want to go through a process of making employees redundant as part of the restructure. Alternatively, they may want to ensure that they do not incur any liability as a result of an employee being deemed redundant. Secondly, groups will want to consider the balance sheet, tax and stamp duty implications of the restructure. Generally groups that are “consolidated” for tax and accounting purposes can adopt a streamlined process. Groups may consider a group “consolidation” before embarking on a restructure.

How fast can a company and its advisors realize job reductions under Australian labor law and what do foreign holding companies need to know in this regard?

Davis: The speed in which Australia companies can “streamline” their workforce will depend upon the terms of individual contracts and whether the employees are covered by industry “awards” or enterprise arrangements with employees. An award is a statutory imposed minimum standards for employees in particular industries or job descriptions. The workforce of Australian companies can be covered by more than one award. For example, there is one award for employees performing clerical work

and another for those involved in manufacturing. Although there are minimum notice requirements prescribed by Australian Law, industry awards and enterprise arrangements can pose additional requirements. As a general rule, a person's employment cannot be made "redundant" unless that position is genuinely no longer available.

What kind of projects for foreign subsidiaries in Australia have you advised on lately?

Theiselmann: Most recently, we advised a German engineering group in its international restructuring. In Australia we have carried out the transfer of shares of its subsidiary. In close cooperation with the Australian lawyers and accountants we coordinated the necessary local formalities.

At what point an Australian company is to be considered insolvent and are there any obligatory reasons to file for insolvency?

Davis: An Australian company will be deemed to be insolvent if it cannot pay its debts as and when they fall due. If a director does not have reasonable grounds to believe that the company can pay its debts and continues to trade, the director can be personally liable for the debts incurred by the company. Consequently, there is an incentive for directors to have an administrator appointed to the company where the company is not in a position to pay its debts. In addition directors of insolvent companies can be liable for prosecution.

What are liability risks that foreign shareholders in Australian subsidiaries need to be aware of in insolvency/bankruptcy scenarios?

Davis: Under Australian Law the definition of directors is not limited to individuals who have been formally appointed. The definition extends beyond those who have been validly appointed as a director to include those not validly appointed, if the appointed "directors are accustomed to acting in accordance with the person's instructions or wishes". That means that foreign shareholders and their representatives can be deemed to be directors of insolvent companies. It is not uncommon for Australian companies to continue to operate with the financial support of foreign shareholders. However, that commitment should be reviewed and renewed on at least a yearly basis. If an Australian company relies on the support of its foreign shareholders to continue trading it

should appoint an administrator if that support is withdrawn. Generally, the directors of an Australian company (including those appointed by a foreign shareholder) have an obligation to act in the interests of the Australian company, rather than the foreign shareholder. However, under Australian Law, directors of an Australian wholly-owned subsidiary are permitted to act in the interests of the parent company where, amongst other things it is permitted by the subsidiary's constitution.

Many thanks for the interesting discussion, Mr. Davis and Mr. Theiselmann.

Arthur Davis is attorney-at-law and partner at Addisons based in Sydney. He frequently advises foreign based businesses on their investments into Australia. In addition, he has undertaken extensive employee incentive plan work, particularly for Australian subsidiaries of European and North American groups.



Dr. Ruediger Theiselmann is attorney and executive partner at WELLENSIEK in Frankfurt am Main. He heads the cross-border team and has advised in and coordinated international restructuring projects in terms of both legal and financial aspects. Ruediger focuses on advising management, supervisory board members, creditors and investors in corporate and insolvency law related transactions.

