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AUSTRALIA BRAZIL CHAMBER OF COMMERCE

BOLETIM BRAZIL

HOW TO DO BUSINESS IN
AUSTRALIA

AICD EVENT

BRAZIL MUST URGENTLY LEARN
HOW TO OPERATE IN A MORE
CHINA-CENTRIC WORLD

LAWS OF BRAZIL UPDATE

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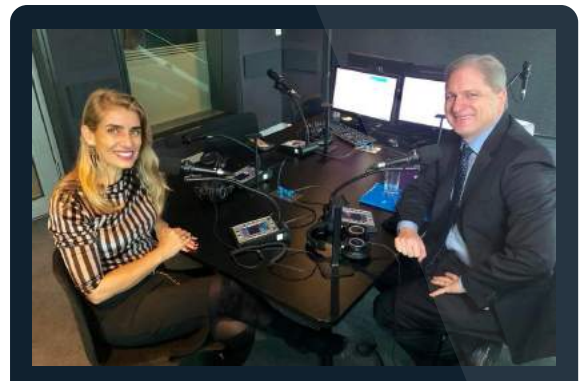
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MESSAGE FROM THE ABCC

It's been a busy and exciting few months for the ABCC across the country. We kicked-off 2018's Mix@6 events schedule with the launch of our networking drinks on the west coast in Perth. Our Mix@6 events then continued across to the east coast with our New South Wales chapter hosting networking drinks with representatives of the Consulates, Chambers of Commerce and business community members from Brazil, Peru, Australia, Germany, Chile, Italy and the Arab countries in February. In April, the ABCC in Melbourne organised a Brazil Business Briefing where Senior Trade Commissioner and Consul General Greg Wallis spoke to Victorian businesses about current and emerging opportunities in Brazil. The Briefing covered updates across education, health and medtech, agribusiness, and infrastructure, and included an overview of the Victorian Government's activities in Brazil and across Latin America. The ABCC was delighted to combine forces with the German-Australian Chamber of Commerce and Football Federation Australia in May to host a FIFA World Cup Football panel discussion with Kyle Patterson, Eric Abrams and Brazilian and German mediators who discussed the current status of football in Australia and the massive growth in this sporting sector in Australia. We were thrilled to be joined at this event by the Indigenous Football Association of Australia and over 70 guests. In Brisbane, the ABCC was pleased to support the 10th World Meeting of Brazilians Overseas at networking drinks in May.

And in June, our Vice-President Cristina Talacko was interviewed by Tim Harcourt – The Airport Economist – for an edition of his Airport Economist podcast series for Qantas covering aspects of doing business with Brazil including challenges, opportunities and business culture.



Cristina Talacko Vice President ABCC &
Tim Harcourt, The Airport Economist

In June, we were very excited to form an invaluable partnership with new corporate member, the Australian Institute of Company Directors, the leading provider of corporate governance education for company managers and directors and board advisory services. This collaboration has resulted in the development of an upcoming workshop session specially designed to benefit ABCC members and guests who are recently appointed Australian company directors, or those already in office but who have not undertaken professional development in this area and for directors and executives that wish to refresh or improve their knowledge of directors' responsibilities and sound board practices in Australia. The workshop is schedule for September 2018 and further details are included in the flyer in this edition of Boletim Brazil. The ABCC would like to welcome all the new members who have joined the chamber over recent months including:

- The Australian Institute of Company Directors
- Western Union
- OzForex Limited (OFX)
- Bahman Marzbani of Prima International Pty Ltd
- Fabio Bastian.

We look forward to connecting with our members and friends at our upcoming ABCC events. Please subscribe to our website or follow the ABCC on LinkedIn or Facebook to be notified of our future events.



AUSTRALIAN
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DIRECTORS



LAWS OF AUSTRALIA: A LEGAL FRAMEWORK GUIDE FOR NEW VENTURES

By Flavia C Ribeiro De Souza, Principal – Legal Practice Director, Teddington Legal



GET YOUR LEGAL FRAMEWORK RIGHT FROM THE START WITHOUT EATING INTO YOUR START-UP CAPITAL OR CURBING YOUR MOMENTUM

Many entrepreneurs start their businesses with a vision of exactly what success looks like for them. They will work harder than they ever have before in order to reach that dream and it will feel like the 'to do' list only ever grows.

In these early days, there are protections that they should put in place to make sure that, on the day when they reach success, it isn't taken away from them.

Hence, my first piece of advice to all entrepreneurs setting up business in Australia: do not rush past the legal structuring set up.

Most entrepreneurs are surprised to find that the protections they need are affordable even for solo entrepreneurs and small businesses, and don't take long to put in place.



Trust me, you will remember me and be glad you did it.

I am seeing a boom of 'business consultancies' around Australia and probably around the world following this magnificent entrepreneurial movement that we business ambassadors and professionals are all part of. It is truly wonderful that entrepreneurs have access to valuable information such as marketing, strategy, financial, accounts, holistic advice, early in the process

But I am also seeing a somewhat (fearsome) accidental 'neglect' or 'procrastination' with seeking legal advice when firstly starting a business, or the thought that, legal documentation and/or compliance can be left for 'later' or left to an accountant to decide/advise later on.

First of all, legal and financial/accountancy advice are two different things and go side-to-side, not alternating.

In Australia, many commercial lawyers are also business advisors, they can brainstorm, advice on the 'bigger picture', structures, explain concepts, connect, plus they see what many people don't, trips and traps and mistakes made by clients along the way, hence, that way, they can work efficiently and closely alongside the business since its inception, preventing mistakes (95% of start-ups fail, hence mistakes can be expensive and sometimes fatal to a new enterprise).

The second good reason legal advice should be sought from the start is that legal compliance in Australia is not an option. ASIC (Australian Securities and Investments Commission), ACCC (Australian Competition and Consumer Commission), Fair Work Australia, to cite some, are strong, very active and powerful framework regulators, real 'watch dogs'. Institutions like those exist to help businesses understand their rights and obligations and to ensure compliance with the Australian regulatory framework.

For example, the Fair Work Ombudsman can issue fines from \$50,000 per offence each time an employer (non-accidentally) pays an actual employee as a 'contractor', that is, preventing the employee from receiving their entitlements under the law. This type of knowledge or to know how to prevent it, is something a start-up would not want to miss out on, or only learn about it, later.

The ACCC can prosecute and issue fines of \$50,000 and greater, against franchisors that do not comply with the Australian Franchising Code of Conduct. Therefore, it is imperative and not an option, to get it right from the start. It is really a matter of survival for any start-up and all businesses in Australia. This article will take you through a summary of key 7 legal documents needed in Australia and the important legal decisions that, in my opinion and experience, business owners should make now.



1. Shareholders Agreement

Shareholders Agreements are the most important contract business owners will ever sign. As soon as the start-up has more than one owner, they need one of these, and this may turn out to be the most important contract they ever enter into. A proper Shareholders' Agreement will govern how important business decisions are made, how a shareholder may sell their equity to others (can they sell to any third party without offering it to their partners first?), how the company will raise further capital in the future, invite others to join in, and how the investors will ultimately exit – all crucial matters about which there should be clear agreement in advance.

Of particular importance will be pre-emption rights on new issues of securities (shares), which help to prevent the investors from being diluted by future capital raisings, as well as pre-emption rights on transfers of securities to give the investors certainty about the particular individuals with whom they are going into business. Tag-along and drag-along rights can also prove to be crucial when one or more of the owners are seeking to exit the business.

Creating a shareholders' agreement will force co-investors to sit down together and address these vital points upfront.

2. Legal housekeeping: Governance & Company Secretarial

Nobody likes paperwork, but certain legal record-keeping requirements are compulsory for all companies by the Australian Corporations Act 2001 (Cth). Failure to comply with these requirements can lead to ASIC (Australian Securities and Investments Commission) fines, as well as potential disputes amongst shareholders.

All too often, start-up founders are not aware of these legal obligations and the company's fundamental documents are thrown together with little thought, if any. This may cause serious issues down the track.

Important company secretarial documents include:

1. register of members (ie, shareholders) and option holders;
2. share certificates evidencing the shareholdings;
3. application forms when investors subscribe for shares;
4. transfer forms when shares are bought and sold;
5. board resolutions approving all issues and transfer of shares and other key decisions of the company (eg, entering into major contracts, paying dividends, etc);
6. consents to act as directors;
7. company constitution; and
8. power of attorney authorising key executives to sign documents on behalf of the company.

3. Employee Option Plan

An Employee Option Plan (otherwise referred to as an Employee Share Option Plan, ESOP, Employee Share Scheme or ESS) is an equity (shares) incentive arrangement that allows employees and consultants of a company to acquire shares in the company in the future at preferential prices.

Why adopt an Employee Option Plan?

An Employee Option Plan enables the company to remunerate key staff members with equity. You may have heard the term "sweat equity", which means paying employees for their work (ie, sweat) with equity incentives.

There are 2 main reasons to do this:

1. The company can hire key staff members and grow the team without needing to raise cash to pay their salaries.
2. Giving key employees a stake in the ownership of the business aligns their incentives with those of the shareholders and helps to motivate them to work hard towards increasing the value of the business.

4. Employee Handbook

Every business needs a comprehensive set of employee policies and procedures. These work hand-in-hand with employment contracts to define the company culture, set expectations and clarify the rules for all employees.

Adopting a proper Employee Handbook will help business owners to meet your legal obligations, enable managers to make reliable decisions and promote a culture of fairness. This can avoid disputes and grievances caused by confusion and inconsistencies and raises the level of professionalism of your business.

An Employee Handbook needs to be customised to suit the particular environments in which the staff will be working and the tasks they will be performing (eg, food safety, manual handling, working outside, dress code, code of conduct, etc).



5. Employment contract, Non-Competition and Confidentiality Agreements

Surely hiring the first employees will be one of the most exciting and significant steps for a start-up.

Choosing the right individuals to employ is, of course, most important, but all too often new companies bring in employees without putting a proper employment contract in place. That can lead to big problems for the business down the track.

In particular, it is absolutely vital that employees within the business are not able to lay claim personally to any of the company's valuable intellectual property. Confidentiality provisions will also be extremely important, as businesses will be exposing their inner workings to employees.

Also, putting in place reasonable non-solicitation and non-compete provisions for staff who will have access to the company's proprietary know-how and key suppliers/customers should be considered.

Navigating through the minefield that is Australian employment law is a daunting task for any entrepreneur. A proper employment contract should be viewed as essential for every employee.

Business owners may be able to pique the interest of potential investors, joint venture partners and customers without giving away too much of their start-up's confidential information, but their questions will inevitably become more probing and, sooner or later, they will need to delve into details that may be sensitive to their business.

As the saying goes, "I'd rather shake hands with an honest person than sign a contract with a crook".

Trust is important in every relationship, including business relationships, but prudent business practice means putting in place the customary legal protections of a properly drafted confidentiality agreement (otherwise referred to as a "non-disclosure agreement" or "NDA") before disclosing their valuable confidential information.

Requiring a confidentiality agreement before engaging in confidential discussions will not only help to protect you legally but will also help you to present as a prudent and professional businessperson to potential investors, joint venture partners and customers.

6. Website terms of use

Nowadays, every business needs a website, which means that every business needs a set of Website Terms of Use. Website usage terms lay down the rules for people using the website, including what conduct is prohibited. Importantly, they also include disclaimers and limitations of liability to protect the business in case things go wrong.

The website usage terms need to be customised to suit the business and the particular ways in which the website will be used. For example, if you sell products through your website, you will need provisions regarding pricing, payments, delivery and returns (if you are selling physical goods), refunds, etc. It is advisable to include a separate returns policy if you are selling physical goods.

7. Privacy Policy

Although small businesses (ie, with turnover less than \$3 million) are not obliged to include a Privacy Policy under the Privacy Act 1988 (Cth), it is customary for all websites to include a Privacy Policy where personal information (eg, name, address, date of birth, credit card details, etc) may be provided by website users. Customers expect to see this when transacting online, so I suggest including a formal Privacy Policy alongside the Website Terms of Use.

Should you require legal advice on any of the above topics, feel free to contact **Flavia C. Ribeiro De Souza, Lawyer of the Supreme of New South Wales, Australia.**



Flavia C. Ribeiro De Souza Principal – Legal Practice Director – Teddington Legal
"For a free initial legal consultation book here: <https://calendly.com/flaviadesouza>



In the Boardroom: Responsibilities and Practice

UNDERSTAND AND IMPLEMENT TRANSPARENT AND ROBUST GOVERNANCE PRACTICES

AUSTRALIAN INSTITUTE
of COMPANY DIRECTORS

The Australian Institute of Company Directors (AICD) is delighted to partner with the Australia-Brazil Chamber of Commerce (ABCC) to invite you to a unique half-day interactive session hosted by OFX: **In the Boardroom: Responsibilities and Practice in Australia.**

This half-day course examines the separate roles of the board, directors and management, as well as the composition and structure of the board. Participants revise why the separation of management and control contributes to good corporate governance and therefore the long-term viability of organisations.

Who should attend?

- Executives and Managers reporting to Directors;
- Directors of companies based either on-shore or off-shore (in Brazil or Asia) with accountability in Australia;
- Board members and executives of Australian companies; or
- Business Owners and Partners of Australian businesses.

How can we help you, your board and your business?

You will be able to connect with your colleagues and share ideas and will:

- Gain key insights into your roles and responsibilities as company directors and company owners in Australia;
- Develop better objectivity in assessing organisational performance;
- Apply learnings to real-world situations;
- Understand the regulatory environment surrounding your organisation and identify your duties within it; and
- Detailed understanding of the challenges, complexities and personal liabilities that are involved directing a company in Australia.

Structure of the course

In 3.5 hours of in-depth focused learning, you will develop your Director' skills and knowledge by exploring real world case studies, illustrated in PowerPoint slides and brought to life by a facilitator (who is also an experienced company director selected by AICD) on an interactive small group (from 12 to 25 attendees) table session and participating on the issues and challenges that Directors face.

Extras

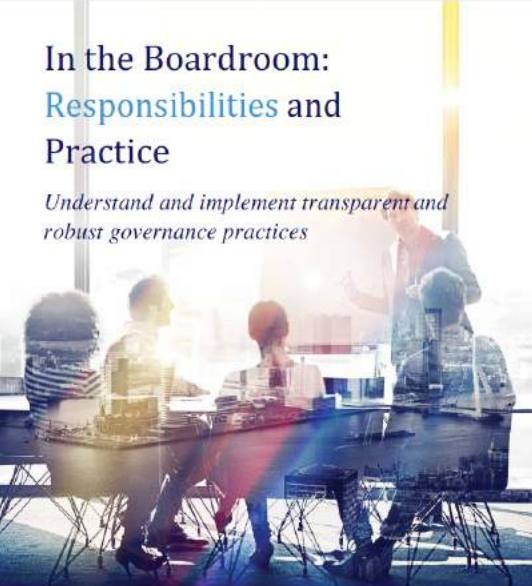
- AICD will waive the \$200 joining fee for each participant. Annual membership fees still apply.
- Each business with more than 20 employees will be granted a free ABCC annual Corporate Membership (valued at \$550) for every 2 participants enrolled in the course.
- Light breakfast and refreshments will be provided on the day of the course.





AUSTRALIAN INSTITUTE
of COMPANY DIRECTORS

In the Boardroom: Responsibilities and Practice

*Understand and implement transparent and
robust governance practices*



HOSTED BY  PARTNERED WITH 

Course outline

The course will cover:

- The responsibilities of a company director under Corporations Act 2001 (Cth);
- The importance of the local business context and laws;
- Different governance structures;
- Potential conflicts for directors holding multiple roles;
- Corporate governance integrity;
- Appropriate reporting and communication lines.

Course details

Dates:

Wednesday 26 September 2018

Time:

8.00am to 12.00pm

Venue:

Arrowhead Room - OFX Level 19, 60 Margaret Street Sydney NSW 2000

Cost:

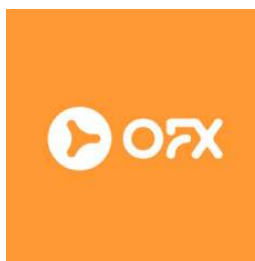
\$750 (incl. GST) per person Limited spots

Contact: Ropeti Huntley

t: 02 9431 8623

e: abcc@theassociationspecialists.com.au

GREAT NETWORKING OPPORTUNITY



AUSTRALIAN INSTITUTE
of COMPANY DIRECTORS



BRAZIL MUST URGENTLY LEARN HOW TO OPERATE IN A MORE CHINA-CENTRIC WORLD

BY OLIVER STUENKE, ASSOCIATE
PROFESSOR OF INTERNATIONAL RELATIONS
AT THE GETULIO VARGAS FOUNDATION IN
SÃO PAULO

As Brazil's economic dependence on China grows and tensions between the West and China grow, Brasília will have to navigate an increasingly complex geopolitical scenario

The mood in Western capitals about China is undergoing an unprecedented change. Those optimistic about the consequences of China's rise are being pushed aside to those who worry the West needs to adopt a far tougher strategy to defend itself against growing Chinese influence. Two recent publications symbolize this change. In Germany, the report "Authoritarian Advance: Responding to China's Growing Political Influence in Europe", published by MERICS and GPPi, two important think tanks based in Berlin, argues that China's rapidly increasing political influencing efforts in Europe and the self-confident promotion of its authoritarian ideals "pose a significant challenge to liberal democracy as well as Europe's values and interests." In the United States, Kurt Campbell and Ely Ratner, two former high-ranking US diplomats, published "The China Reckoning: How Beijing Defied American Expectations" in the magazine Foreign Affairs, and argue that US policy towards China since World War II has been hopelessly naïve, and that Beijing has continuously outfoxed the West.



In Australia, the government changed foreign investment rules in response to reports about campaign donations ahead of the 2016 elections coming from businesses with ties to China's Communist Party. In a dramatic gesture, the Australian prime minister has hit back at China (Australia's greatest trading partner and major investor in the country) over the issue of foreign interference, speaking Mandarin on television and invoking a famous Chinese slogan to declare Australia will "stand up" against meddling in its national affairs. The consequences of growing tensions between China and the West for global order cannot be overestimated and will affect everyone

China's growing economic role is also an undeniable reality in Brazil. We increasingly depend on Chinese demand for commodities, and China will soon turn into the largest investor in Brazil, lending it an unprecedented degree of economic and political influence. The same is true across our neighborhood. While China is pouring investment into Latin American economies, the US government is planning to cut aid projects and speaks of erect walls. China's growing role across Latin America is accentuated by Washington's stunning retreat from the region, allowing Beijing to fill the resulting vacuum almost unopposed. Brazil has little choice other than operating within these structural constraints. The question is not whether to embrace this reality of growing dependence, but how to manage it so that it benefits Brazil's strategic interests.

Growing tensions between the West and China offer a world of opportunities for Brazil if it can learn how to navigate in this new geopolitical environment. Yet at a recent gathering of China watchers in Brasília, participants from government, academia and the private sector openly agreed that Brazil lacked a clear strategy vis-à-vis China. That is partly because domestic challenges currently reduce Brazil's room for maneuver in the foreign policy realm. Yet a more worrying reason is that the fundamental nature of Brazil-China ties today is one of profound knowledge asymmetry: China knows a lot about Brazil, while Brazil knows very little about China. The consequence? China heavily invests in training an elite of analyst with a sophisticated understanding of Brazil -- including precise goals about how many Chinese should learn Portuguese. Brazil, by comparison, lacks a comparable grand strategy. How many sinologists do we need by 2030? How many Brazilian students do we want to have spent time at Chinese universities by 2030? How many Chinese tourists should come to Brazil per year in 2020?

This already has real-life consequences: In Brasília, it is now common for Brazilian government officials – for example, at the Ministry of Development Industry (MDIC) to find out that a Chinese investor interested in a big project has already been in touch with Itamaraty, Planalto, FIESP and several state governors to make his case. That allows Chinese investors to operate in Brazil and strike deals in a way a Brazilian investor in China could only dream of. Any debate about articulating a coherent China strategy must start with investing heavily in closing this knowledge asymmetry.

That involves large-scale exchange programs to create a Brazilian elite that is knowledgeable and aware of China, public funds for independent China-related research, and possibly a separate career track for Brazilian diplomats who focus on China to assure that a larger group of Brazilian diplomats fluent in Chinese are based at the Embassy in Beijing at any time, as well as our Consulates across China.

If managed right, the bilateral relationship can be richly rewarding. China's rise provides opportunities to tap into its immense financial reserves for its own investment priorities and loans when needed – to modernize Brazil's infrastructure, a key obstacle to increasing Brazil's competitiveness in the global marketplace. It is thus in Brazil's interest not only to be an active member of the AIIB, the NDB, but also of China's Belt-and-Road infrastructure program – determining, at the same time, clear limits to Chinese political influence in Brazil's domestic affairs. No other country in Latin America stands more to benefit from Brazil from a more connected region – provided that investments are allocated broadly in Brazil's economic interests.

Managing the relationship to China requires investment in knowledge of historic proportions. Only if we gain a profound understanding of Chinese society, economy and strategic culture – not only in the Foreign Ministry, but also in universities, companies, state governments and NGOs – can we learn how to make the best of a more China-centric world. Our economic well-being in the next decades depends on it.

Source: This article was originally published in Portuguese in EL PAÍS and can be accessed at <http://www.postwesternworld.com/2018/06/02/urgently-operate-centric/>.

AGRIBUSINESS ADVICE WITH MCNAMARA AGRIBUSINESS MANAGEMENT AND FINANCE

By Barry McNamara

www.mcnamaraagribusiness.com.au

McNamara Agribusiness Management and Finance is a family owned and operated consultancy offering services to those interested in the agribusiness sector.

With a background of living off the land for nearly 40 years and facing the various challenges of the agricultural sector, McNamara's experts have been working on the "other side of the desk" for the past 20 years as specialist financial advisors.

McNamara's have a lifetime of experience in the farming and finance sectors involving grain, cattle, sheep, irrigated crops and the development of rural properties.

McNamara's are recognised experts in the field of agribusiness finance offering services across Australia to local and international family and corporate clients. Unrestricted by commodity and geographic areas, McNamara's services include:

- Finding the right financing for clients.
McNamara's are keenly aware that agribusinesses are often offered unsuitable financing options and they work closely with clients to ensure the best financing option is secured.
- Developing business plans for clients and those wishing to invest in the agribusiness sector, including those moving to a new area and locality.

- Identifying properties for clients, including those who wish to remain nameless in the market place.

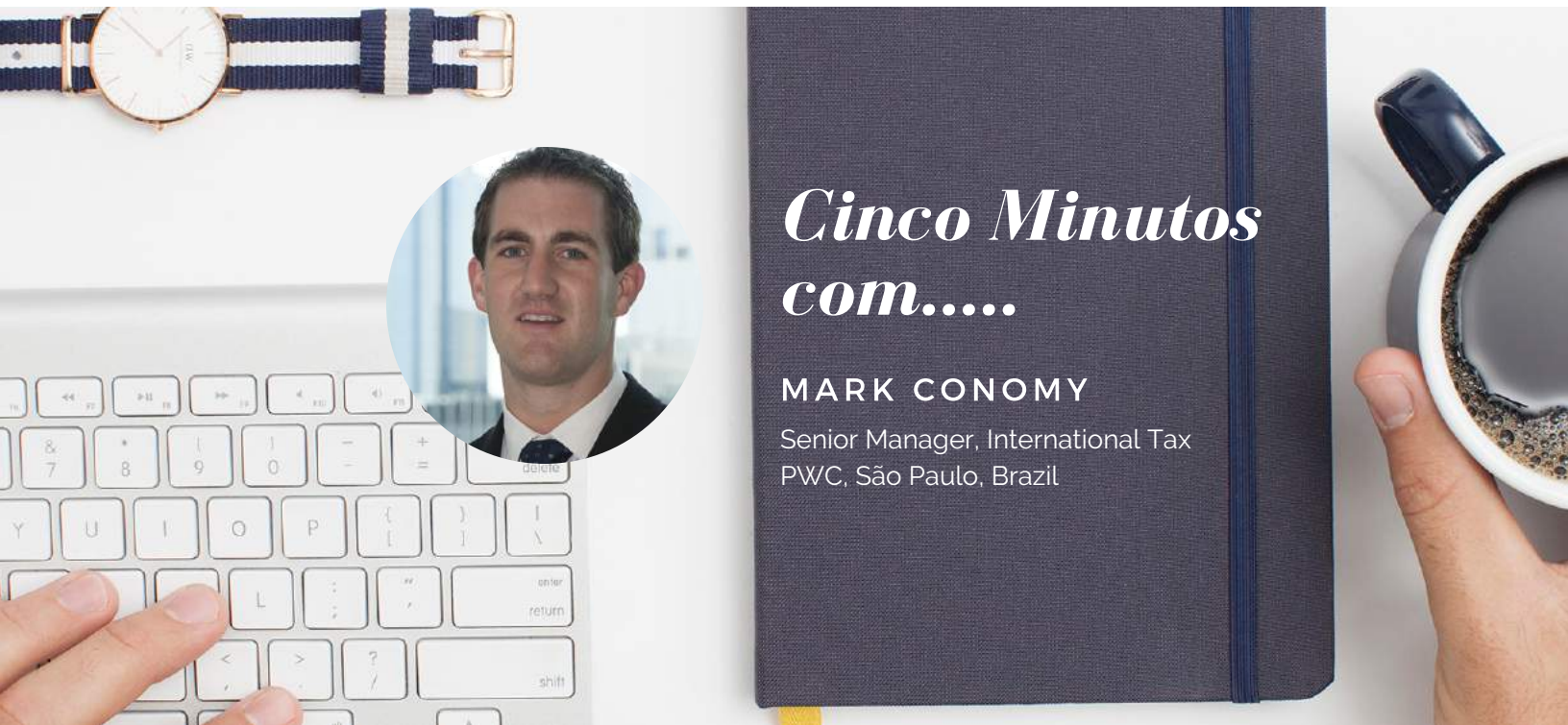
- Transacting property deals as McNamara's have a licensed real estate agent on staff.

- Advising on mergers and acquisitions of properties. • Arranging business partners for existing farmers with investors. • Advising on agricultural operation and investment options.

If you require any assistance in the agribusiness sector, please get in touch with **Barry McNamara** 0427659808, barry@mcnamaraagri.com.au or **Neil McNamara** 0409595 076, neil@mcnamaraagri.com.au



McNamara Agribusiness
Management & Finance



When and why did you move to Brazil?

I am originally from Melbourne, having moved to São Paulo in December 2013 with my Brazilian wife, Fabiana. We were both looking for the next challenge both professionally and personally, and thought that we would give it a go. Fabiana is also from PwC and the firm (both in Australia and in Brazil) was very supportive in making the transfer happen.

What's your favourite thing about living in Brazil?

It would have to be a three-way tie between the people, the weather and Brazilian BBQ.

What do you miss about Australia when you're in Brazil?

Other than my family and friends, without a doubt, it would have to be going to AFL games. As a lifelong Essendon fan, I do try to make it back once a year during footy season so I can get a game in and watch my beloved Bombers. Unfortunately, the WatchAFL app hasn't been able to build in the atmosphere of the MCG with a Four'n Twenty just yet!

What do you see as the biggest similarity and the biggest difference between Australia and Brazil?

In my view, there are quite a lot of cultural similarities between Brazilians and Australians. Other than the language barrier, I have found that the everyday interactions between people are quite similar in Brazil to Australia - which made the adaptation process actually feel quite natural. Probably the biggest difference that comes to mind is the beach experience. In my view, Australia and Brazil have some of the most beautiful beaches in the world. However, a day at the beach is completely different - in Australia, you generally need to pack for a day at the beach as if you were going on a one-month survivalist camp whereas in Brazil you just sit down on the beach and the rest will come to you (lunch, drinks, umbrella, chairs...) and generally at pretty reasonable prices.

What bilateral business opportunities are you most excited about between Australia and Brazil?

Given the environmental and cultural overlaps, I think there are a number of established industries where substantial bilateral business opportunities are possible, including agriculture, mining, oil & gas and technology to name a few. Instead of viewing the two countries as competitors for investment, I can see best practice techniques in one country successfully being leveraged into the other. While understanding the difference in business environments will have its challenges (both ways), I definitely see a wealth of untapped opportunities between these two countries.



If you have any questions please email abcc@theassociationsspecialists.com.au



ABCC Melbourne

Laws of Brazil Update



By Fabiano Deffenti
fdeffenti@deqlaw.com.br

Improvements to Brazilian Central Bank Rules on International Capital Flows

On 9 March 2017 the Central Bank of Brazil ("BACEN") published Circular DC/BACEN 3,883/2018. This regulation amends two key BACEN regulations: Circular 3,689/2013 (which regulates foreign investments in Brazil and Brazilian investments abroad) and Circular 3,690/2013, (which regulates the classification of international forex transactions

These changes are in line with a series of BACEN's system updates aimed to modernise and simplify registrations. BACEN's system for the registration of foreign capital in Brazil (Registro Declaratório Eletrônico, "RDE") comprises four modules:

- (i) direct foreign investment (RDE-IED);
- (ii) portfolio (RDE-Portfolio);
- (iii) financial operations (RDE-ROF); and
- (iv) company registration (CADEMP).

In 2017 a new system for RDE-IED was implemented together with new rules regarding the registration of foreign direct investment.

BACEN now is doing the same with RDE-ROF and the main changes brought about by the amending regulation are as follows:

- Novations of international loan contracts that do not amount to changes to the due dates for payments of the loans or the incurring of additional liability no longer need to be registered;
- Upon the Brazilian borrower filing for registration and receiving confirmation that the RDE-ROF application has been deemed as "prepared", the party may commence receiving funds and making payments and service fees relating to the loan;
- The regulations expressly state that foreign loans will be registered automatically in the currency of the funds received by the borrower in Brazil (or in Brazilian reals, if the funds are received in Brazilian currency), and the currency of the loan will need to be registered on the system;
- For transactions other than the loans, the regulations now provide that they must be registered in the currency and with the terms set out in the contract, but separate registrations being made for deals with different currencies or on different terms, and these must be linked on the BACEN system;
- The fees charged by lenders are no longer required to be registered with the Central Bank (the Federal Revenue Department considers these to be services which must be registered in the SISCOSERV system and taxes on services will apply to them);

- The provisions of Circular 3,689/2013 with previously only applied to loans obtained directly, or via the issuing of debt securities, abroad by Brazilian residents (chapter III, section II, subsection I) now extend to debentures privately distributed within Brazil;
- Payments made towards the amortisation of the loan and for the fees charged by the lender may be made prior to the full registration on the Central Bank database;
- The registration status will be changed to "effected" once the funds are received from abroad. After that, changes to the registration will only be allowed in relation to the payment schedule, changes to the debtor by succession, corporate restructure or pursuant to a court order, changes to the creditor through the negotiation of credits between non-resident parties, contact details and "complimentary information";
- New codes have also being introduced for the purposes of effecting the registrations. These are set out in the new Annex IX to Circular 3,690/2013.

It is positive to see BACEN modernising its systems. After many years of little regard being paid to BACEN's systems, it appears that resources are finally being allocated to make the lives of those looking to do business in Brazil a little easier

Disclosure of Ultimate Beneficiary Information to the Brazilian Federal Revenue Department

In May 2016 the Brazilian Federal Revenue Department ("RFB", from its original in Portuguese) issued Normative Instruction 1,634/2016 ("NI"), the new rules governing the National Register of Legal Entities (known as the "CNPJ").

Among other changes, the new rules require that foreign companies disclosure to the tax authorities their full chain of ownership all the way to individuals who are the beneficial owners of the legal entities as defined in articles 8 and 9 of NI.

The modernisation of the regulations reflect Brazil's continued commitment to fighting corruption and avoiding money laundering and tax evasion, including Brazil's bid to join the OECD.

What entities must disclose?

The obligation to disclose falls on those entities domiciled abroad which hold rights over Brazilian:

- real estate, vehicles, ships, aircrafts and other types of vessels;
- cheque accounts, stock holdings or investments in the financial and capital markets;
- shares or other types of corporate holdings in entities outside the capital markets.

Further, foreign entities that carry out activities related to leasing, chartering of vessels, equipment and simple leases, or that import goods without foreign exchange coverage for the purpose of payment up capital of Brazilian companies, are also bound to disclose.

Exempt from the disclosure requirement are those companies publicly listed in Brazil or in countries where it is mandatory to disclose all relevant shareholders; not-for-profit entities that do not act as fiduciary managers and are not registered in countries with beneficial or privileged taxes systems (i.e. "tax havens"); multilateral institutions; central banks; government entities or those entities linked to sovereign funds; private pension funds or similar institutions when they are regulated by the authorities in the country of origin; and investment funds regulated by Brazil's Securities and Exchange Commission (CVM).

Who is a "beneficial owner"?

The NI defines "beneficial owner" as the "individual who ultimately, directly or indirectly, owns, controls or influences the entity" or "the individual on whose behalf a transaction is made". NI provides that "significant influence" is found when an individual who, directly or indirectly:

- holds more than 25% of the capital of the legal entity;
- holds or exercises dominance in corporate resolutions; or
- has the power to elect the majority of the legal entity's directors, even without having ultimate control over the entity.

LAWS OF BRAZIL UPDATE By Fabiano Deffenti

What documents must be provided? Article 20 of NI provides that each foreign entity that holds shares in a Brazilian company must file with the Federal Revenue Department the following documents for the purposes of maintaining its CNPJ registration:

- a copy of the articles of association, bylaws, constitution or equivalent (as applicable) or current company extract;
- a copy of the company director's legal ID or passport;
- a copy of the minutes of shareholders' meeting appointing the directors or similar document showing the powers held by the directors (if this is not available in the company's registration documents in the foreign country);
- a copy of the power of attorney appointing a Brazilian individual who is a permanent resident with the powers to "manage the assets and rights of the legal entity" in Brazil, represent the company before the tax authorities, and be served on behalf of the company.
- a certified copy of the ID of the person holding the power of attorney; and
- a list of the company's shareholders and directors.

All documents from outside Brazil need to be apostilled (or legalised at the Brazilian consulate or embassy, if the country where the documents are issued is not a member of the Hague Apostille Convention) and translated by a sworn translator registered in Brazil.

By when do the companies must provide the documents to the tax authorities?

For legal entities that are already registered in Brazil with their CNPJ, the information and additional documents relating to the beneficial owner must be provided to the RFB when the company requires any changes that affects the company's tax information or **until 31 December 2018**, whichever occurs first.

What are the consequences of non-compliance?

The legal entities that do not comply with the new requirements will have their CNPJ registration suspended. Having the suspension of the CNPJ means that the legal entity will be prevented from participating in public procurement processes and, in practice, its Brazilian subsidiary will have issues obtaining credit with suppliers and financial institutions.

Low tax on importing goods into Brazil: the Temporary Admission Regime

- The temporary admission regime (regime de admissão temporária) allows certain goods to enter Brazil without the payment of import-related taxes.
- The regime is subdivided into three: temporary admission for economic use (for most goods and uses), temporary admission with total suspension of payment of taxes (for certain specific goods and uses) and temporary admission for active improvement (for goods that will undergo servicing or improvements in Brazil).
- Where the economic use regime applies, taxes will be paid in proportion to the time the goods stay in Brazil (1% of the total taxes payable for each month that the goods remain in Brazil). Imports under the other two regimes are free of import-related taxes.
- In addition to the tax advantages, the temporary admission regime allows used goods to be brought into Brazil, which is frequently not allowed for normal imports.
- The amount of time the goods can remain in Brazil under each type of temporary admission regime will depend on the good being imported and how it will be used. Under the temporary admission regime for economic use the goods cannot stay in Brazil for longer than 100 months.

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- For goods imported under the temporary admission regime for economic use the importer must provide security for the full taxes that would apply if the good was imported outright (there are exceptions to this requirement). The other two types of the temporary admission regime do not require any security to be provided.
- Replacement parts required to replace those in the goods previously imported enter the country free of import-related taxes.
- The goods must leave Brazil before the end of the time granted by customs authorities or else all import-related taxes will be payable, together with interest at 12% per annum plus the Central Bank's benchmark rate calculated from the time the goods first entered Brazil (taxes paid while the goods were under the regime are offset).
- It is advisable that importers obtain insurance coverage against theft or destruction for the value of the goods, plus the full amount of taxes that would have been payable if the goods were being imported to remain permanently in Brazil. This is important because if the goods are not re-exported, destroyed in accordance with customs rules or gifted to customs, the importer will be liable for the full amount of taxes, regardless of fault.
- A well-drafted agreement will go a long way in ensuring that the exporter receives the goods back from the importer at the agreed time or full compensation if the goods are damaged, lost or stolen.

Background

Brazil has very high import-related taxes. However, it is possible to reduce this burden by importing goods temporarily if the requirements of the temporary admission regime are met. On **2 January 2018** and on **15 February 2018** two separate amendments to the **main regulation** relating to the temporary admission regime were published. The amendments clarified some issues relating to the regime.

What is the temporary admission regime? To what goods does each type of regime apply?

The temporary admission regime is considered a "special customs regime", which means that specific rules apply to it. It is subdivided into three types:

- temporary admission for economic use, which applies to most goods and uses, and provides for taxes to apply in proportion to the time the goods stay in Brazil; •
- temporary admission with total suspension of payment of taxes, which applies to specific goods and uses, and are free of import-related taxes; and
- temporary admission for active improvement, which applies to those goods imported for the purposes of being improved, assembled, renovated, reconditioned, refurbished, repaired or maintained, and are also free of import-related taxes.

One of the key advantages of the temporary admission regime is that it allows for second hand goods to be temporarily imported. This is especially useful, as second-hand goods generally may only be imported if the importer proves that the type of good is not manufactured in Brazil and that it cannot be replaced by other goods manufactured in Brazil. A special licence is required for importing second-hand goods.

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Temporary admission for economic use

The temporary admission regime for economic use applies to most goods that are imported into Brazil temporarily. It includes the importing of goods used for the provision of services to any third parties as well as for the manufacturing of other goods destined for sale. Under this regime, for each month that the good stays in Brazil only 1% of the total taxes that would have been payable if the good had been imported outright will be payable. Importantly, any replacement parts that are required for the goods imported under the regime will enter Brazil free of import-related taxes.

Only the importer can seek the application of the temporary admission for economic use regime and the maximum period of time that the good can remain in Brazil is 100 months. The early 2018 amendments now make it clear that the tax officer responsible for assessing the application for the regime may refuse it if the length of time requested by the party for the goods to remain in Brazil is not compatible with its declared use. If the officer refuses the application the importer may file an administrative appeal or seek a writ of mandamus (mandado de segurança) from the courts.

Temporary admission with total suspension of payment of taxes

The temporary admission regime with total suspension of payment of taxes applies to a limited number of import transactions. Where the regime conditions are met, **import duty, tax on industrialised products (IPI), PIS-Import and COFINS-Import, Cide** (but only as it applies to fuels) and the AFRMM – all Federal taxes – are not payable. Similar exemptions generally apply at State level for State taxes, depending on the destination of the goods as well as other criteria.

The regime applies to:

- goods imported for cultural, scientific, technical, political, educational, sporting, religious, commercial or industrial events (such as trade fairs and the like);
- goods to be used for scientific and technological development approved by Brazil's CNPq (and CNPq-registered entities) and by Finep;
- goods imported for the assembly, maintenance or repair of foreign goods currently in Brazil; • goods imported for the testing and registration purposes during the development of products;
- goods imported for the replacement of goods previously imported but still under warranty;
- goods imported to be used as moulds for the manufacturing of phonograms and audiovisual works;
- goods imported for audiovisual productions and equipment to be used by radio, television and the press generally;
- goods imported for marketing purposes, including commercial samples not to be sold in the country;
- goods used for humanitarian clinical and surgical services provided free of charge; animals for exhibitions;
- goods used for assistance in situations causing damage or threatening to cause damage to the population generally or to the environment;
- goods to be used for military events or operations, for carrying out maintenance or repair in Brazil's CNAEA nuclear power plant and for satellite launches;
- goods to be used for benchmarking of measuring equipment approved by Inmetro;
- foreign aircraft where the trip is not part of a regular service and no fees are paid for the use of the aircraft;
- vehicles (including boats) used by travellers temporarily staying in the country;
- goods used in exploration and extraction of petroleum and natural gas (only until 31 December 2020 and specific rules apply);
- machinery, equipment, appliances, instruments and tools, including spare parts, for the transportation, warehousing and re-gasification of liquefied natural gas (only until 31 December 2020);
- goods to be used in the Manaus Free-Trade
- goods to be used in the Manaus Free-Trade Zone (only until 4 October 2023);
- stamps for inspection controls issued by foreign countries to be used on products to be exported to those countries.

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The addition of stamps for inspection controls to the regime is helpful as until the passing of the most recent amending regulation Brazilian exporters would need to go through the standard import process and subsequently seek drawback credits, which had a negative impact on manufacturers' cash flows.

In addition to the advantage of the exemption of those taxes mentioned above, the temporary admission regime with total suspension of payment of taxes allows the entity organising the event where the goods are going to be sent, and the entity responsible for the logistics and customs clearance, to act as importers. This is unique under Brazilian law, where the importer of record invariably needs to be the party purchasing or leasing the goods for its own benefit.

Temporary admission for active improvement

The temporary admission regime for active improvement regime only applies to the goods that are imported into Brazil to undergo improvement, assembly, renovation, reconditioning, refurbishing, repair or maintenance. Note that unlike the other two types of temporary admission, here it is the actual good being imported that will undergo improvements or repairs (that is, the good will not be used). Also, under this type no security is required to be provided to the tax authorities. However, in the import declaration the applicant must provide a description of the industrial process to be carried out in Brazil as well as details about the outcome of the industrialisation process to be granted the benefits of the regime.

While the temporary admission for active improvement regime remains in force, the goods may be sent abroad temporarily. Prior to the 2018 changes, the goods could only be sent abroad for tests and demonstrations for subsequent return to Brazil. However, now they may also be sent abroad for maintenance and repairs to be returned after without losing the benefits of the regime.

What about State taxes?

States are allowed to provide tax exemptions for goods imported under the temporary admission regime. For instance, the State of São Paulo's ICMS Regulations provide that State tax over the movement of goods (ICMS) will apply to those goods under the economic use regime in proportion to the time that they stay in Brazil. However, this will only apply if the goods are imported and re-exported through the State of São Paulo.

The other two types of temporary admission regimes are also contemplated, so where they apply and the State's requirements are met, no ICMS is payable in the State of São Paulo.

What about taxes on services?

Any services that may be supplied by the foreign company as part of a package to the Brazilian importer will be taxed as a service. Depending on the type of service and the Brazilian importer, the taxes over the services component can be hefty.

Termination and risks

The temporary admission regime will be terminated when the goods are re-exported, destroyed strictly in accordance with the rules, gifted over to customs (if customs accepts it; this is done at custom's sole discretion) or imported for consumption (that is, imported permanently). If any one of the first three occurs, no additional taxes are payable. However, if the importer decides to purchase the goods imported under the temporary admission regime, the importer will have to pay all taxes that would have been payable at the time when the goods were first imported, in addition to interest set at 12% per annum plus interest set at the Brazilian Central Bank's benchmark rate. The taxes paid while the good stayed in Brazil under the auspices of the regime will be discounted from the final tax bill.

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There are two risks which commonly affect deals involving goods subject to the temporary admission regime:

- when the goods are stolen or accidentally destroyed; and
- when the goods are not returned by the importer.

Insurance is often available for theft and accidental destruction of the goods. It is important that the insurance coverage includes cover for both the customs value of the goods as well as the taxes that will apply if they are stolen or accidentally destroyed. Unfortunately, this is often neglected by parties making a deal involving the temporary import of goods into Brazil.

Finally, a professionally drafted contract is key for foreign exporters to receive goods back from the Brazilian importer at the agreed time and to receive full compensation if the goods are damaged, lost or stolen.



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