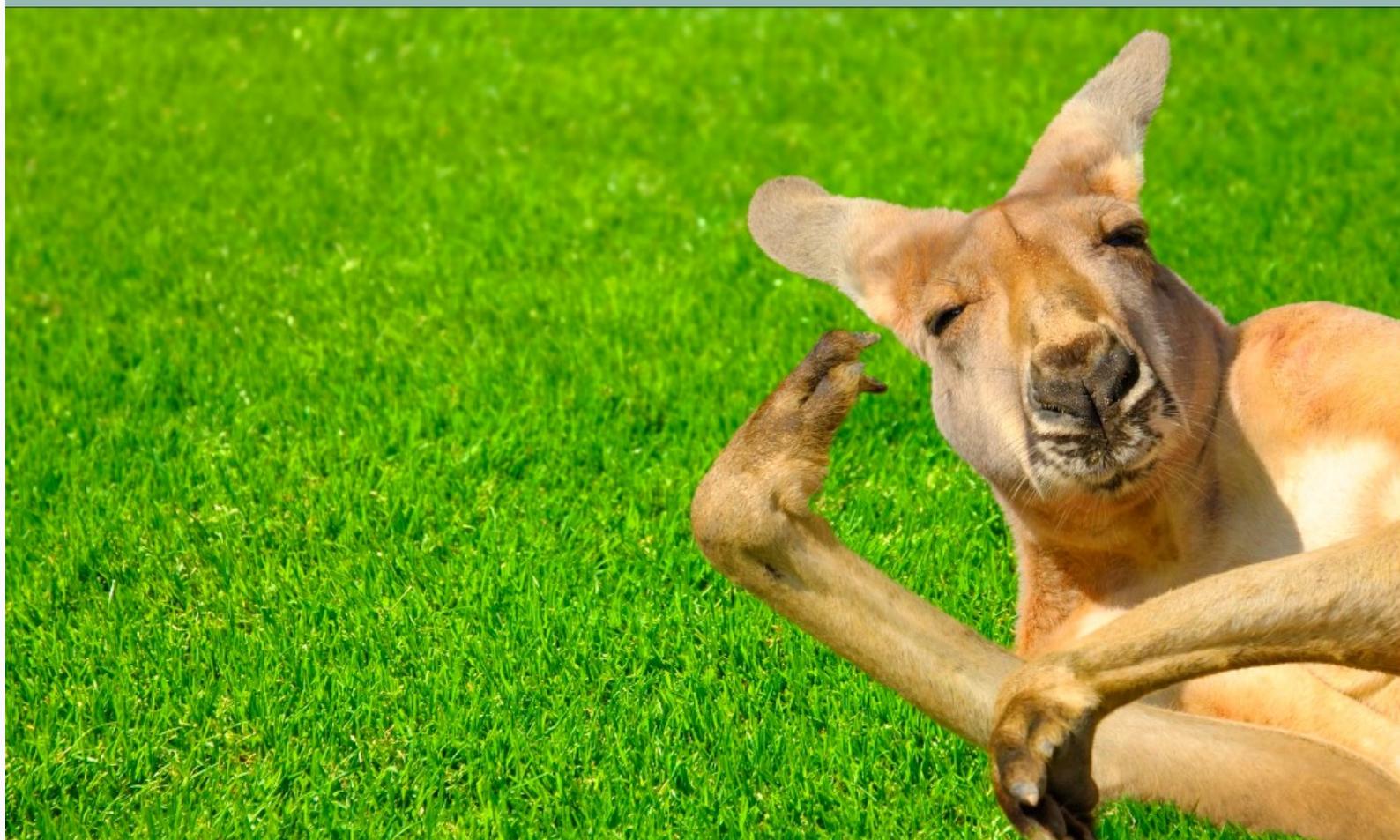


# E-alert



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## Only director Down Under? Tips for minimising your liability

[Nick Miller](#), Partner | [nmiller@hunthunt.com.au](mailto:nmiller@hunthunt.com.au) | +61 3 8602 9269

[Danielle Larkin](#), Senior Associate | [dlarkin@hunthunt.com.au](mailto:dlarkin@hunthunt.com.au) | +61 3 8602 9219



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**Over the last five-plus years, we've noticed an increasing trend towards international companies doing business in Australia via an Australian company which is primarily or wholly managed (as well as owned)**

**offshore. It may well be the case that the Australian-resident director is not the CEO, CFO or COO of the Australian business – instead, they may be at the GM level (either by title or function).**

We recently saw a transaction where this approach was adopted by a large US-based private equity investor, but we've also seen this trend extend beyond the private equity space. Often, the Australian company will have only one Australian-resident director (the minimum required by law), with the rest of the board and all of the senior management team located overseas (for example, Asia or the US).

Of course, the bottom line is that all directors of an Australian-incorporated company must comply with directors' duties under Australian law (Corporations Act and common law). This can be more difficult for an Australian-resident director of a foreign-controlled and managed company – particularly if you are not fully involved in the board-level decision-making, because it takes place offshore.

If you are an Australian director in these circumstances, you may have a limited role in the management of the company. Your appointment may have been based on sales experience or some other specific expertise. However, you may be expected/inclined to undertake activities outside your expertise, simply because you are the only (or the most senior) person 'on the ground' in Australia. For example, Australian-resident directors would typically be involved in banking arrangements and may also be involved in tax (likely being the public officer) and accounting matters, perhaps without significant tax/accounting expertise.

You should be should be wary of this type of role 'scope creep' – being the sole director in Australia should not mean taking on obligations without appropriate experience or expertise.

## Eight tips for directors in this situation

- **Personal liability protections are available – get them:** Generally, we recommend you require the company to obtain D&O Insurance (this covers you for some director conduct), provide you with an indemnity (so the company pays if you suffer certain losses in your director role) and grant ongoing access to documents (you may need this access after your directorship ends). That said, offshore owners/directors may be unfamiliar with these protections and/or be unwilling to implement them – so be prepared to do some advocacy and negotiation to achieve a level of protection you are comfortable with.

- **Don't get shut-out:** Make sure you attend and participate in board meetings and are actively involved in board decision-making.
- **Know who's who:** Inform yourself about your fellow board members, as well as the executives and senior management of the company (regardless of their location).
- **Be informed and meet your directors' duties:** Ensure you have access to review and scrutinise all company information available to the overseas board members. You should be across the company's governance, compliance, management and operational systems. You should understand your directors' duties and be vigilant in meeting those duties. As the only director 'on the ground' in Australia, you are likely to be the first person the corporate regulator looks to if there are any issues (insolvent trading etc.).
- **Remember your duty of care and diligence:** Resist any temptation (or pressure) to simply 'sit back' and let everything be taken care of offshore. You should be proactive – remember, you have a duty to act with care and diligence in your director role.
- **High leverage = higher risks:** All directors have a duty not to allow the company to trade while insolvent or to trade in a way that will make it insolvent. If a company is highly leveraged, this can increase the risk profile in terms of the insolvent trading directors' duty. In this scenario, it is even more crucial for you to ensure you are fully informed and vigilant in meeting your directors' duties.
- **Australian regulatory exposure:** It's easy to imagine you would be 'first in line' if a regulator brings a directors' liability action under an Australian regulatory regime (e.g. taxation, OH&S, Australian Consumer Law or environmental regulatory regimes). You should ensure the company takes appropriate legal advice regarding the key Australian regulatory regimes relevant to the company's activities. You should also ensure that appropriate, Australian-specific compliance systems exist (e.g. policies/procedures in place and compliance is monitored and enforced). While the Australian company may utilise global systems, it will be crucial for you to ensure that Australian-specific regulatory issues are considered and specifically addressed where necessary.
- **Beware of 'blending':** There can be a tendency for decision-making and information regarding the Australian company to be 'blended' in some way with the broader, offshore corporate group. Usually, it's vastly preferable from a governance and risk management perspective for decisions to be made using company-specific information and on a per-company basis (rather than on some looser, group basis).



## ABOUT THE AUTHOR

Nick Miller specialises in corporate and commercial transactions, with a particular emphasis on acquisitions and disposals of businesses and companies. His expertise includes joint ventures, commercial contracts, governance, corporate law, due diligence and foreign investment.



## ABOUT THE AUTHOR

Danielle Larkin is a member of our corporate and commercial group specialising in mergers and acquisitions, corporate advisory and general commercial law. She has been admitted as a solicitor for over 8 years and is highly regarded for her ability to provide clear, concise and commercially-focused advice.

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