

## OPINION

### Introduction

AusCann Group Holdings Ltd (ACN 601 953 860) (AusCann) is an unlisted public company, which was incorporated on 22 September 2014. It is presently engaged in a reverse takeover by TW Holdings Limited (ACN 008 095 207) (TWH), an Australian listed public company.

AusCann aims to undertake relevant research and development activities that will enable it to produce high-quality, economical and clinically validated cannabis medicines in Australia for Australian patients and for export to a range of importers who are licensed in accordance with the *Single Convention on Narcotic Drugs 1961*.

Both Auscann and TWH have registered offices in Western Australia. On completion of the proposed acquisition, TWH intends to make an application to the ASX for re-admission and quotation of TWH's securities and change its name to "AusCann Group Holdings Ltd" ("the Merged Group").

On 10 November 2016, AusCann announced to the ASX that it had entered into a heads of agreement to form an incorporated joint-venture company with Chilean-based medical cannabis group, Fundación-Daya to cultivate medical cannabis in Chile and develop and distribute cannabis-based medicinal products. The joint venture will be conducted by the entity DayaCann which will be incorporated in Chile.

According to an opinion provided by Chilean law firm Carey y Cia dated 14 November 2016, Fundación-Daya was granted authorization to sow, plant, cultivate and harvest specific species of cannabis in the city of Colbun under certain conditions. It is proposed that Fundación-Daya will either contract DayaCann to conduct the relevant operations under the permit or transfer the permit to DayaCann.

It is proposed that AusCann will hold a 50% interest in DayaCann.

DayaCann intends to utilise the pharmaceutical manufacturing services of a Chilean-based certified manufacturer for the development of medicinal cannabis products.

#### Opinion Sought

The ASX has requested an Australian legal opinion on the legality of Auscann's proposed business activities in Chile following the reverse takeover. Specifically, an opinion is sought as to:

- What material licenses (if any) are required to be obtained in Australia in order for AusCann to undertake all of the proposed Chilean activities?
- What is the process required to obtain the licences (if any)?
- Would AusCann be guilty of an offence under Australian Law by holding a 50% interest in DayaCann for the conduct of the proposed Chilean activities?
- Are there any legal impediments under Australian law to AusCann holding an interest in a company (DayaCann) which conducts the activities in Chile?

For the purposes of providing this opinion, I have read the following documents provided to me by AusCann’s solicitors:

- A signed copy of the heads of agreement between AusCann and Fundación-Daya (“HoA”)
- TWH’s ASX Announcement dated 10 November 2016
- A draft replacement prospectus for TWH dated 11 November 2016 and, in particular, the information disclosed in paragraphs 2.5 and 8.4 of the replacement prospectus concerning the proposed activities of DayaCann in Chile
- A legal opinion from Chilean law firm, Carey y Cia provided for due diligence purposes dated 24 November 2016.

#### Australian Drug Law

Conduct in relation to the possession, cultivation, manufacture and sale and supply of cannabis may constitute offences under both under State and Federal law.<sup>1</sup>

Cannabis is a prohibited plant within the meaning of section 4 and Schedule II of the *Misuse of Drugs Act 1981* (WA) (the “*Misuse of Drugs Act*”) and is a controlled plant under section 301.2 of the *Criminal Code* (Cth).

Certain forms of cannabis may not strictly be the province of the criminal law but be subject to regulation, such as forms of cannabis listed in the Schedules to the SUSMP.<sup>2</sup>

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<sup>1</sup> Commonwealth statutes which regulate inter alia the production, manufacture, import and export etc of cannabis and cannabis derived products include the *Criminal Code* (Cth) 1995, the *Narcotic Drugs Act* (Cth) 1967, *The Narcotic Drugs Amendment Act* (Cth) 2016, *The Customs Act* (Cth) 1901, *The Therapeutic Goods Act* (Cth) 1989 and *The Quarantine Act* (Cth) 1908. Various State and Territory laws provide penalties for the possession, use etc of cannabis.

### State or Federal Law?

The question of whether State or Federal law would have application to conduct in a given set of circumstances amounting to an offence is a question of jurisdiction.

Generally, the criminal law is the responsibility of the States and Territories, as the Constitution does not contain a specific head of power relating to criminal law.<sup>3</sup>

Given that Auscann is incorporated and conducts its business activities in Western Australia (and not in other States which have similar legislation restricting the cultivation of cannabis), the only potentially relevant State legislation is the *Misuse of Drugs Act*.

### Whether the Proposed Chilean activities would constitute an offence under the Misuse of Drugs Act

Section 7 (1) of the *Misuse of Drugs Act* relevantly provides that a person who cultivates a prohibited plant with intent to sell or supply it to another is guilty of an indictable offence.

The offence under section 7 (1) is subject to a defence in circumstances where a person is authorised by or under the *Misuse of Drugs Act*, the *Poisons Act 1964*<sup>4</sup> or the *Industrial Hemp Act 2004*. These provisions should now be read in conjunction with sections 8 of *Narcotic Drugs Amendment Act 2016* which amends section 7A of the *Narcotic Drugs Act 1967*. These provisions make it

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<sup>2</sup> Schedule 9 includes cannabis “except when separately specified in [the Schedules to the Standard] or “processed hemp fibre containing 0.1 per cent or less of tetrahydrocannabinol and products manufactured from such fibre.”

<sup>3</sup> See the discussion in Weldon, *Criminal Law of Western Australia* on section 12 of the Criminal Code (WA).

<sup>4</sup> See section 41

clear that it is Parliament's intention that State or Territory laws that purport to allow the cultivation of cannabis plants will now be the responsibility of the Commonwealth but that any State or Territory provisions occurring outside the regulatory scheme established by the amendments to the *Narcotic Drugs Amendment Act* will continue to operate to deal with criminal activities associated with the cultivation and trafficking of cannabis.

Thus, any State or Territory law that purports to prevent any activity that is authorised under section 25A of the *Narcotic Drugs Act*, as amended by the *Narcotic Drugs Amendment Act*, would be inconsistent with the Act and consequently ineffective.<sup>5</sup>

In my opinion, the proposed activities, to the extent that they involve the cultivation, manufacture, sale or supply of cannabis, would (if carried out in Australia in the absence of relevant authority under the *Narcotic Drugs Act*) be unlawful.

The activities about which an opinion is sought, however, relate to activities to be conducted in Chile. This requires an examination of the extra-territorial effect of State and Federal criminal law.

Does the Misuse of Drugs Act 1981 (WA) have extra-territorial application?

Section 12 of the *Criminal Code* (WA) purports to extend the jurisdiction of the Western Australian criminal law (which includes the *Misuse of Drugs Act*) beyond Western Australia's borders.

Although section 2(1) of the *Australia Act 1986* (Cth) provides that each State not only has power to enact laws for the "peace, order

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<sup>5</sup> *Narcotic Drugs Amendment Bill 2016*, Explanatory Memorandum at page 43

and good government” of the State, it also has the power to enact legislation with extra-territorial effect where there is some connection to the State in question.<sup>6</sup>

If any relevant entity were to grow, sell or supply cannabis abroad then the relevant conduct would lack sufficient connection with Western Australia to invoke its jurisdiction and the application of the *Misuse of Drugs Act*.<sup>7</sup>

### Commonwealth Jurisdiction over Drug Offences

Prior to the passing of the *Law and Justice Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth),<sup>8</sup> serious drug import and export offences were prosecuted under section 233B of the *Customs Act 1901* (Cth) in conjunction with the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth) (“the TINDAPS Act”), both Acts giving effect to the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, signed at Vienna on 20 December 1988.<sup>9</sup>

Following the passing of the *Law and Justice Amendment Act*, the *Customs Act* provisions were repealed and Part 9.1 of the *Criminal Code* (Cth) came into effect, creating a new set of serious drug offences (such as trafficking, cultivation, selling and commercial

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<sup>6</sup> See eg *Pearce v Florenca* (1976) 135 CLR 507 in which Western Australia was permitted to legislate against the taking of undersized fish in waters off the Western Australian coastline and *Commissioner of Stamp Duties of NSW v Millar* (1932) 48 CLR 618 in which laws taxing the shares of a resident of Victoria in a Victorian company was held to be invalid (even though that company carried on some business in New South Wales).

<sup>7</sup> Cf: eg *State of Western Australia v Marchesi and Maguire* [2005] WASCA 133 in which a conspiracy to import drugs to Western Australia formed in Victoria was held to have insufficient connection with Western Australia to invoke its jurisdiction.

<sup>8</sup> This Act was given Royal Assent on 8 November 2005 and came into effect on 6 December 2005.

<sup>9</sup> Note also that Australia is a signatory to the Single Convention on Narcotic Drugs (1961) and the Convention on Psychotropic Substances (1971).

manufacture and possession).<sup>10</sup> These new offences were not limited to circumstances involving an importation or exportation as they had been in their previous form under the *Customs Act*.

Generally, conduct occurring within Australia is regarded as the province of State law unless there is a federal aspect to it (such as, for example, the importation of a quantity of illicit drugs into Australia). This principle is reflected in sections 313.1 and 313.2 of the Criminal Code (Cth) which provides that the relevant provisions do not apply in relation to conduct if a person engages in the conduct in a State or Territory and the conduct is justified or excused by or under a law of that State or Territory or if the person's conduct is justified or excused by or under another Commonwealth law (see section 10.5)<sup>11</sup> or has a reasonable belief that such conduct is justified or excused by a law of the Commonwealth or of a State or Territory.

#### The Criminal Code and its Extended Geographical Jurisdiction Provisions

As explained above, State law has no application in respect of conduct occurring outside State borders unless there is a clear connection to that jurisdiction. The *Criminal Code* (Cth) on the other hand contains extended geographical provisions expanding the application of the Code provisions beyond Australia's borders.

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<sup>10</sup> Division 302, 303, 305, 308 of *Criminal Code* (Cth).

<sup>11</sup> Such as for, example laws that authorise the importation, possession or use of controlled drugs, controlled plants, controlled precursors, border controlled drugs, border controlled plants or border controlled precursors included the *Customs Act* 1901, the *Narcotic Drugs Act* 1967 and the *Crimes Act* 1914.

There is no question that the external affairs power contained in section 51 (xxix) of the *Constitution* provides the Commonwealth with the power to legislate beyond Australia's borders.<sup>12</sup> The extended geographical provisions of the *Criminal Code* (Cth), which deal with conduct physically external to Australia, are a clear manifestation of that power.<sup>13</sup>

### Serious Drug Offences – Category B Offences

Section 300.3 of the *Criminal Code* (Cth) deems all serious drug offences (being the offences contained in Part 9 of the Code and which include, relevantly, the offence created under section 308.3) to be "Category B" offences for the purpose of the extended geographical provisions of the *Code*.

Section 15.2 of *Criminal Code* (Cth) extends jurisdiction for category B offences outside Australia. It reads as follows:

*"(1) if a law of the Commonwealth provides that this section applies to a particular offence, a person does not commit the offence unless:*

*....(c) the conduct constituting the alleged offence occurs wholly outside Australia and:*

*at the time of the alleged offence, the person is an Australian citizen;*

*or.....*

*at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory"*

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<sup>12</sup> Eg: Section 3A of the *Crimes Act* which states "*This Act applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories*". See *Polyukovich v The Commonwealth* (1991) 172 CLR 501.

<sup>13</sup> Part 2.7 of the Code.



On the face of it, section 15.2 would make a person who is an Australian citizen or a body corporate incorporated in Australia engaging in conduct amounting to the commission of a drug offence criminally responsible, even where that conduct occurred abroad (and indeed even where that conduct is legal in the place where the conduct was being committed).

The extended geographical provisions of the *Criminal Code* (Cth) as they relate to Category B offences link the jurisdiction of Australia to prosecute Australian citizens to their nationality. This is an exception to the principal of “international comity”<sup>14</sup> and means that Australian citizens engaging in conduct abroad which amounts to an offence against the *Criminal Code* (Cth) may still (technically) attract criminal responsibility under that Act.

#### Foreign Law Defence

Section 15.2 (2) of the *Criminal Code* (Cth) provides a defence to conduct, which would otherwise be caught by the Code provisions. It reads:

*“If a law of the Commonwealth provides that this section applies to a particular offence, a person is not guilty of the offence if:*

- aa) the alleged offence is a primary offence; and*
- a) the conduct constituting the alleged offences occurs wholly in a foreign country, but not on board an Australian aircraft or Australian ship; and*

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<sup>14</sup> The principal of “international comity” was expressed in the case of *R v Treacy* [1971] ACA 537 by Lord Diplock at p 561 in this way: “each sovereign state should refrain from punishing persons for their conduct within the territory of another sovereign state where conduct has no harmful consequences within the territory of the state which imposes the punishment”.<sup>14</sup>

*b) the person is neither:*

- i. an Australian citizen; nor*
- ii. a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and*

*c) there is not in force in:*

- i. the foreign country where the conduct constituting the alleged offence occurs.....a law of that foreign country or a law of that part of the foreign country, that creates an offence that corresponds to the first mentioned offence.*

The Foreign Law defence under this section of the Code provides a person (or a corporation) with a defence where the conduct is not illegal in the country in which the conduct is being engaged in, provided that the relevant person is not an Australian citizen or corporation.

In my opinion, given that it is proposed that the activities are to be carried out by DayaCann, a company incorporated in Chile and those activities would not constitute an offence in Chile,<sup>15</sup> the activities of DayaCann would not constitute an offence under the *Criminal Code* (Cth).

#### Principles of Corporate Criminal Responsibility under the Criminal Code – the Liability of Auscann

Auscann is a "corporation" in the common law sense formed by registration under Part 2A.2 of the *Corporations Act 2001* (Cth). The registration of a company creates a legal entity capable of having its own legal rights and obligations separate from those of its members.

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<sup>15</sup> Opinion of Chilean law firm, Carey y Cia dated 24 November 2016.

As legal persons, corporations can be found to be criminally responsible for offences under Australian law for direct or indirect involvement in crimes committed in Australia or overseas.

Part 2.5, Division 12 of the *Criminal Code* (Cth) outlines the circumstances in which corporations can be held criminally responsible.<sup>16</sup>

Corporate criminal responsibility can be established where a corporation “expressly, tacitly or impliedly authorised or permitted the commission of the offence”.<sup>17</sup>

Section 12.2 of the *Criminal Code* (Cth) extends criminal responsibility to include offences committed by an employee, agent or officer of a corporation acting within the actual or apparent scope of his or her employment.

Pursuant to Section 12.3, such authorisation or permission can be established in instances where:

- The corporation's board of directors or high managerial agent intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
- A corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

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<sup>16</sup> In instances where legislation does not specifically state either a corporation is liable for an offence, Section 22 of the *Acts Interpretation Act* 1901 (Cth) defines a “person” to include a body corporate.

<sup>17</sup> Section 12.3(1).

- A corporation failed to create and maintain a corporate culture that required compliance with the relevant provision.

In my opinion, given that the relevant activities are to be carried out by a foreign entity (ie DayaCann) the Foreign Law Defence would apply and that entity would not attract criminal responsibility under the *Criminal Code* (Cth).

In these circumstances, the accessorial provisions of the *Criminal Code* (Cth) would have no application to Auscann as the relevant conduct would not constitute an offence by (the principal) DayaCann.

#### Defences to conduct within Australia

Clearly, the offences contained in Part 9 of the *Criminal Code* (Cth) are designed to target the illicit drug trade.

Section 10.5 of the *Criminal Code* (Cth) provides that a person is not criminally responsible for an offence against Part 9.1 if the person's conduct is justified or excused by or under another Commonwealth law (such as the *Narcotic Drugs Act 1967* (Cth)).

The *Narcotic Drugs Act 1967* (Cth) purports to establish a legislative basis for the licensing of manufacture of narcotic drugs. It sets out the circumstances in which the manufacture of narcotic drugs would be lawful, subject to the States enacting complimentary legislation. Until now, although there was in theory a legislative basis to obtain such a licence, the legislation was not adequate for that purpose and required amendment.

#### Narcotic Drugs Amendment Act 2016 (Cth)

The *Narcotic Drugs Amendment Act 2016* (Cth) (the “NDA Act”) which commenced on 1 May 2016 makes provision for the application for a “medical cannabis licence” which is intended to meet Australia’s strict international obligations for the production, manufacture and distribution for medicinal and scientific purposes.

<sup>18</sup> The NDA Act purports to give the Commonwealth the responsibility for the granting of licences, inter alia, for the authorisation of the cultivation of cannabis plants for the purposes of producing cannabis for medicinal or related scientific purposes.<sup>19</sup>

Relevantly, section 8E(1) of that Act provides that “a person may apply to the Secretary for a licence (a medicinal cannabis licence) that authorises one or more of the following activities:

- a) the cultivation of cannabis plants, in accordance with one or more medicinal cannabis permits, for the purpose of producing cannabis or cannabis resin for medicinal purposes and, if appropriate, the obtaining of cannabis plants for the purpose of such cultivation;
- b) the production of cannabis or cannabis resin for medicinal purposes, in accordance with one or more additional cannabis permits;

The requirements for obtaining the relevant permits are set out at paragraph 4.2 of the Replacement Prospectus.

### Summary of Advice

I would answer the questions posed of me as follows:

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<sup>18</sup> Sections 2A and 3

<sup>19</sup> Section 7A

- a) It is not necessary in my opinion for Auscann to obtain any licences in Australia for the proposed activities of DayaCann.
- b) AusCann would not be guilty of an offence merely by holding a 50% interest in DayaCann if DayaCann engages in the in Chile as described.
- c) In terms of liability under the criminal law of Australia, it is my opinion that there is no legal impediment to AusCann holding an interest in DayaCann.

*B. Lousdale*

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COUNSEL

20 December 2016