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AUSTRALIA

A Legal Guide for Business Investment & Expansion

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INTRODUCTION

Welcome to the 2022 edition of the Meritas Legal Guide for Business Investment and Expansion in Australia. Australia (officially the Commonwealth of Australia) is a federation comprised of six states, two mainland territories and seven external territories. The federal government is based in the capital city of Canberra (within the Australian Capital Territory). Australia has a population of approximately 25 million people coming from a diverse range of ethnic backgrounds. Over 70% of Australians live in the major cities located on its coastline.

Australia is a land of opportunity for foreign investors and those wanting to conduct business in the country. Globally successful in a number of key industries, such as resources, agribusiness, financial services, education and tourism, the nation's diverse economy is expanding and producing globally significant research, innovation and development. With strong economic and cultural ties and a strategic location in the growing Asia-Pacific region, Australia's low-risk business environment hosts a diverse, multicultural and highly skilled workforce.

To assist foreign investors and businesses operate to their full potential in Australia, the Australian firms in the global legal network Meritas are proud to present this guide. Designed to provide practical and useful insights into the 10 most common questions facing foreign investors and businesses wanting to operate in Australia, this guide will consider:

1. What role does the government play in approving and regulating foreign direct investment?
2. Can foreign investors conduct business without a local partner? If so, what corporate structure is most commonly used?
3. How does the government regulate commercial joint ventures between foreign investors and local firms?
4. What laws influence the relationship between local agents or distributors and foreign companies?
5. What steps does the government take to control mergers and acquisitions with foreign investors of its national companies or over its natural resources and key sectors (e.g. energy and telecommunications)?
6. How do labour statutes regulate the treatment of local employees and expatriate workers?

7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?
8. What types of taxes, duties and levies should a foreign investor expect to encounter?
9. How comprehensive are the intellectual property laws? Do local courts and tribunals enforce them objectively, regardless of the nationality of the parties?
10. If a commercial dispute arises, will local courts or arbitration offer a more beneficial forum for dispute resolution to foreign investors?

The network of Meritas firms offers clients the ability to access high-quality legal services throughout Australia, New Zealand and worldwide. With over 7,600 business lawyers in over 240 cities, Meritas gives your company access to local counsel around the world.

There are over 170 lawyers in six firms across Australia and New Zealand providing clients with a local legal partner with deep international resources. Our lawyers are supported by knowledgeable and conscientious patent agents, trade mark agents, notaries, administrative legal assistants, real estate law clerks, corporate clerks and litigation support specialists. We are closely integrated and strategically placed to deliver coordinated, efficient legal services.

We hope this Guide to Doing Business in Australia is a valuable resource that will assist your business in reaching its full potential in Australia.

Please note that all currency notations ($) used in this guide refer to the Australian dollar.

Top 10 Questions

1. What role does the government play in approving and regulating foreign direct investment?

The government regulates foreign investment through the Foreign Investment Review Board (FIRB), which is a non- statutory advisory body. Its major role is to examine proposals by foreign interests to undertake direct investment in Australia and to make recommendations to the government whether the proposals are suitable for approval under the Australian government's policy. The ultimate decision whether a proposal is approved lies with the Treasurer.

FIRB functions are advisory but include monitoring and ensuring compliance with foreign investment policy.

Different rules apply depending on the type of the proposed foreign investment. An investment in land (residential, commercial or agricultural) has different applicable rules to an investment in an Australian business. Whether FIRB approval is required for a proposed foreign investment may also depend on whether it exceeds certain set monetary thresholds.

The application process for obtaining FIRB approval is rigorous but is generally determined within 30 days of lodgement of the application, although this period may be extended.

2. Can foreign investors conduct business without a local partner? If so, what corporate structure is most commonly used?

Yes, there is no general legal requirement for a foreign investor to conduct a business with a local partner.

The most common structure used in conducting business in Australia is a company, although other structures, such as joint ventures, partnerships and trusts, may also be used.

Even with a local partner, FIRB approval may be required.

3. How does the government regulate commercial joint ventures between foreign investors and local firms?

Generally, the government does not regulate commercial joint ventures between foreign investors and local firms; however, the government does regulate the foreign investor through FIRB and other laws including the Corporations Act (which regulates companies generally) and taxation laws.

4. What laws influence the relationship between local agents or distributors and foreign companies?

Generally, the relationship between an Australian agent or distributor and an overseas supplier is contractual and governed by the same principles of contract law as the UK and other English-speaking jurisdictions.

Under Australian tax law, the pricing of goods and services supplied under contract between an Australian agent or distributor and an overseas supplier is expected to be set on an "arms-length" basis. Comprehensive and complex tax laws apply to the transfer pricing of goods and services imported to or exported from Australia for the purposes of protecting revenue.

Where the Commissioner of Taxation forms the opinion that cross-border transactions have not been priced on an arms- length basis, the Commissioner has power to make compensating price adjustments and impose penalties.

5. What steps does the government take to control mergers and acquisitions with foreign investors of its national companies or over its natural resources and key sectors (e.g. energy and telecommunications)?

FIRB controls whether a foreign investor may invest in certain sectors. There are sensitive sectors where foreign investment will be prohibited or restricted as being against Australia's national interest or security. These include land (agricultural, residential, commercial and mining), media, telecommunications, transport and military (albeit FIRB approval may be granted in these sectors in certain circumstances).

Even if a proposed foreign investment is not within a sensitive sector, FIRB has an overriding policy to decline approval where the proposed investment is against the national interest or is against Australia's national security.

6. How do labour statutes regulate the treatment of local employees and expatriate workers?

For Local Employees
Australia's industrial relations system is strongly regulated by state and federal legislation. Companies that are trading corporations need to comply with the Fair Work Act 2009.

Most blue-collar and clerical workers have their employment terms and conditions set by the National Employment Standards (NES) and various awards and approved collective agreements. The NES sets 10 minimum standards for all employees.

Senior executives and management typically have their terms and conditions of employment set by contractual agreements negotiated directly between the employer and the employee. These contracts must still exceed the NES.

Workplace health and safety, discrimination, and workers' compensation for workplace injury are regulated by state or territory and federal legislation.

Expatriate Workers
Expatriate workers' terms and conditions depend on the type of visa arrangements approved by the Australian immigration authorities. Business people visiting from overseas can continue to enjoy the benefits of their home-based employment arrangements while undertaking short-term business activities in Australia. However, specific visas are usually required for non-Australian residents who seek employment or are employed in Australia. Any non-Australian residents employed are covered by the Australian industrial relations system including workplace health and safety and workers' compensation referred to above.

7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit and other basic financial transactions?

Generally, Australia does not have any exchange controls. The Australian dollar (AUD) is a floating currency widely and transparently traded, although the Reserve Bank may, from time to time, buy or sell AUD to smooth out unusual market events.

There are no restrictions on repatriation of profits back to overseas parents by way of dividends or loan repayments other than:

- The usual requirement that the Australian entity meet the solvency test of being able to meet its debts as and when they fall due, or
- In some cases, making sure the company does not fail the thin capitalisation test to ensure that its interest expense is fully deductible for tax purposes.

Local banks are generally well-capitalised and sophisticated financial institutions. Our banks are accustomed to trading in foreign exchange and dealing with letters of credit and other trade-based securities.

Reporting requirements apply about the movement of large sums of money and there may also be financial sanctions imposed for transactions involving certain countries, entities or individuals.

8. What types of taxes, duties and levies should a foreign investor expect to encounter?

For most operating companies, the following taxes would be encountered by an Australian operation:

- Company tax at 27.5% to 30% on taxable income
- Withholding tax on any dividends to the extent that these are unfranked (i.e. franked dividends to overseas shareholders are free of withholding tax)
- Withholding tax at 10% on interest payable to an overseas party
- Withholding tax on royalties payable to an overseas party
- State duties on the acquisition of land, businesses and other assets including shares in a land rich company
- Payroll tax on wages and salaries (a state-based impost subject to monetary exemptions)
- Resource Rent Tax (oil and gas only)
- Pay-as-you-Go withholding tax (on the salaries and wages of employees which is remitted directly to the Commissioner of Taxation by the employer and a credit allowed to respective employees on filing their income tax return)
- Fringe Benefits Tax on non-cash compensation paid to employees' subject to monetary limits
- Goods and Services Tax (GST) at 10% to supply of goods and services, and real property

9. How comprehensive are the intellectual property laws? Do local courts and tribunals enforce them objectively, regardless of the nationality of the parties?

Australia is a member of World Trade Organization and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), as well as the Berne, Paris and Rome Conventions; the Patent Cooperation Treaty; the Madrid Protocol (for trade marks); and a member of other international IP treaties administered by the World Intellectual Property Organisation. As a result, Australia has a comprehensive intellectual property regime. It includes legislative (e.g. Copyright Act, Trade Marks Act, Patents Act, Designs Act, Plant Breeders Rights Act and Circuit Layouts Act) and common law (e.g. the protection of confidential information and common law trade marks). Australia's intellectual property statutes create both civil and criminal liability for infringements, but criminal prosecutions are rare. Where applicable, Australian intellectual property laws are enforced objectively (principally in the federal jurisdiction), regardless of the nationality of the parties.

10. If a commercial dispute arises, will local courts or arbitration offer a more beneficial forum for dispute resolution to foreign investors?

All Australian courts – including federal, state and territory courts – offer well-regulated dispute resolution processes. The Civil Dispute Resolution Act 2011 requires parties to litigation to certify that they have taken genuine steps to resolve a dispute prior to commencing action in the Federal Court. Increasingly, courts, generally with the support of litigants and their lawyers, are requiring that pro-active case management, mediation and other alternate dispute resolution (ADR) processes be implemented as early as possible to resolve disputes without the costs and delays involved in trials.

ADR processes (which include mediation) are cross- jurisdictional and therefore increasingly attractive for the resolution of international disputes.

Australia has comprehensive accreditation and regulation standards for mediators and arbitrators.

Arbitration is also an option in Australia although generally it is now the same cost as a court trial. The popularity of ADR processes has generally reduced court trials and arbitrations.

ABOUT MERITAS

Meritas' global alliance of independent, market-leading law firms provides legal services to companies looking to effectively capture opportunities and solve issues anywhere in the world. Companies benefit from local knowledge, collective strength and new efficiencies when they work with Meritas law firms. The personal attention and care they experience is part of Meritas' industry-first commitment to the highest quality of service and putting client priorities above all else.

Founded in 1990, Meritas has member firms in 258 markets worldwide with more than 7,500 dedicated, collaborative lawyers. To locate a Meritas resource for a specific need or in a certain market, visit http://www.meritas.org or call +1 612-339-8680.

Levels of Government

The Australian constitution apportions responsibilities between the Commonwealth government and the states and territories. Australia's system of government is similar in many respects to other federal systems such as the United States of America and Canada.

The Commonwealth, state and territory governments respectively make laws in their areas of responsibility. Federal matters include most areas of taxation, marriage, divorce, foreign policy, defence, international and Australian trade practices, competition law, consumer protections, industrial relations, national employment conditions, currency, fisheries, trade mark, patent and copyright registration, banking and monetary system and immigration. The states and territories regulate matters such as health, education, major road construction, public transport, agriculture, police, prison, community services and utilities within their borders.

In addition to federal and state or territory laws, some 560 local or municipal governments make various regulations and bylaws affecting businesses operating within their jurisdictions. They also deliver a range of services to communities, including environmental, town planning, building approvals, cultural and recreation and local infrastructure facilities.

Accordingly, businesses in Australia must be aware of and comply with federal, state or territory laws in which the business operates and the bylaws of each city, town or shire where the business is located or trades.

Australia adheres to the principles of responsible government.

Some states have ceded certain powers to the Commonwealth.

Court & Legal System

The Australian legal system is modelled on the English common law system of judge-made (or case) law and written (statutory) law made by the various parliaments.

The federal and state courts have separate and shared jurisdictions. The Federal Court generally has jurisdiction over matters arising under Commonwealth legislation, which includes bankruptcy, aspects of consumer and competition law, federal taxation and intellectual property.

Both federal and state courts have jurisdiction over corporations, including insolvency matters.

The state courts generally have jurisdiction over matters arising under state legislation and common law, including commercial law, contract, equity, torts, real property, criminal law and state taxation.

The High Court of Australia is the highest court and the final court of appeal for both state and federal jurisdictions.

The hierarchy of state courts is:

- High Court of Australia
- Court of Appeal
- Supreme Court
- District Court or County Court
- Magistrates' or Local Court (dealing with small disputes and minor offences)

The federal system has a similar hierarchy:

- High Court
- Full Federal Court
- Federal Court
- Federal Circuit and Family Court

Extensive cross-vesting arrangements mean that the Federal Court can hear a matter involving a mixture of state and federal matters. Similarly, a state court can, in most circumstances, hear or determine a matter that involves federal issues.

Major Forms of Business Organisation

A foreign investor proposing to establish a business in Australia may choose from a number of different entities or forms of business organisation. Each of these forms has its advantages and disadvantages. Foreign investors will need to carefully consider them and take advice to determine which is the most appropriate form for their requirements.

The major forms of business organisation are:

Company

- Locally Incorporated Subsidiary of a Foreign Company
- Branch Office of a Foreign Company
- Incorporation Transferred from Country of Origin

Joint Venture

- Unincorporated Joint Venture
- Incorporated Joint Venture

Partnership

- Australian states (not territories) also recognise limited liability partnerships

Trust

- Discretionary Trust
- Unit Trust
- Hybrid Trust

COMPANY

A foreign company seeking to establish a business in Australia may choose among three main forms of corporate organisation.

Locally Incorporated Subsidiary of a Foreign Company

The most common type of company is a proprietary (private) company limited by shares. Australia has a uniform national corporations law; as such there is no geographical restriction upon the territorial operation of an Australian company, nor a requirement to register in each Australian state and territory in which the company seeks to operate.

A local subsidiary (usually a proprietary company) is a separate legal entity from its foreign parent or holding company. It must be incorporated and have a registered office in Australia and is required to comply with all relevant Australian laws. A proprietary company must also have at least one shareholder, and not more than 50 non- employee shareholders.

It must also have at least one director and at least one director must ordinarily reside in Australia.

An Australian company will usually be fully taxed in Australia on all its income and profits, whether that income arises from its business activities conducted in Australia or elsewhere in the world. However, income of an Australian company that is from a non-Australian source that flows through to an Australian non-resident shareholder will, in certain circumstances, be outside the Australian tax net.

An Australian company must file an annual statement with the Australian Securities and Investments Commission (ASIC) and, depending on the size of the company, accounts. Usually a "small proprietary company" is exempt from lodging accounts with ASIC. However, if the company is controlled by a foreign company and its financial results are not consolidated into financial statements that another company or a registered foreign company has lodged with ASIC, it will be required to lodge accounts with ASIC.

As a local subsidiary is a separate legal entity, the liability of the foreign parent company for its subsidiary's indebtedness is, in the absence of guarantees given by the parent company or other contractual arrangements, limited to any unpaid amounts on share capital subscribed for by the parent company. However, the parent may also be liable for insolvent trading by its subsidiary in circumstances where the parent ought to have known that the subsidiary was insolvent.

There is no minimum capital requirement imposed by Australian company laws on an Australian company.

The process for incorporating a new proprietary company is quick and easy, with same day incorporations possible provided all necessary consents and information regarding the officeholders, shareholders and address(es) of the company have been obtained.

Branch Office of a Foreign Company

A branch office is simply a local Australian office of a foreign company and does not have a separate legal identity from its parent company. If the foreign company "carries on business in Australia", it is required to be registered with ASIC and must comply with all relevant Australian laws. Failure to register a foreign company carrying on business in Australia is a strict liability offence and could result in fines.

The branch office will be taxed in Australia on all its income and profits that arise from its business activities conducted in Australia, although the provisions of applicable Double Taxation Agreements between Australia

and the foreign parent's country of incorporation may reduce the tax otherwise payable in Australia.

The foreign company must file with ASIC a copy of its annual accounts. If the accounts are not in English then a translation must be filed.

As a branch office is not a legal entity separate from the foreign company, the foreign company will be liable for the debts and other obligations of the branch office. This is because all transactions will be entered into by the foreign company.

Some advantages of having a local subsidiary or branch office compared with appointing an agent include:

- Direct control over the business in Australia
- Potential cost reductions achieved by operating locally
- Identification with local business partners and customers
- Opportunities to establish or build a local corporate identity
- Access to other markets from a base in Australia.

Australian company law is discussed under the "Company Law" section.

JOINT VENTURE

Forming a joint venture with an Australian organisation is a popular form of business organisation for foreign investors. A joint venture is a business arrangement where two or more individuals or entities become involved in a specific project or jointly participate in the conduct of a business venture.

There are two main forms of joint venture.

Unincorporated Joint Venture

An unincorporated joint venture is not a separate legal entity. Rather, it is a contractual arrangement between two or more people who agree to conduct business for a particular purpose.

Where the participants share profits of the joint venture, the joint venture may, in certain circumstances, be classified as a "partnership". If it is possible to structure the arrangements so that the participants share output rather than profit, then the joint venture may not be a partnership.

Incorporated Joint Venture

Alternatively, a proprietary company can be incorporated to operate the joint venture and each participant becomes a shareholder in the joint venture company. This confers on the participants the protection of the

company's limited liability status. Australian company law regulates this type of joint venture company.

There are many different ways to structure a joint venture, which may require specific arrangements depending on the type of industry or project in which the joint venture will be involved. In addition, the participants must carefully consider foreign investment rules, taxation matters (which can differ depending on the structure), management and control of the joint venture, the respective rights and obligations of the participants, supply and purchase agreements, the division of profits, the sharing of costs and expenses and the termination or sale of the joint venture. These issues are typically addressed in a joint venture (or shareholders) agreement that is entered into between the participants and, if applicable, the joint venture company.

PARTNERSHIP

A partnership is an arrangement between two or more people or entities to carry on a business with a view to profit. It may be formed by an agreement between the partners. In the absence of an agreement, the Partnership Acts in the various Australian states and territories set out many of the partnership rules that apply to the arrangement. The Partnership Acts follow the well-established common law model. If the partnership does not conduct business under the actual names of its partners, the business name under which the partnership operates must be registered with ASIC.

Ordinarily, partnerships are not separate legal entities and the partners have an unlimited personal liability, both jointly and severally, for the debts and obligations of the partnership. In addition, each partner is deemed to be an agent for the others and so may act on behalf of and bind the other partners. This includes, for example, entering contracts and disposing of partnership property.

A partnership is not subject to taxation in its own right, but the partners are liable to pay tax on the amounts they receive from their partnership income and profits which are assessed at the partners' marginal tax rates.

The laws of Australian states and some territories permit limited liability partnerships, which limit the liability of some partners who do not manage the partnership business. A partnership of this type must have at least one partner whose liability is limited and one general partner (whose liability is unlimited). These types of partnerships are generally used for specialist investment activities. A limited liability partnership is taxed as a company.

TRUSTS

A trust is a legal relationship whereby a trustee, being the legal owner of trust property, deals with that property for the benefit of some other person or persons (the beneficiaries) or for some object or purpose permitted by law. A trust is not a separate legal entity to the trustee, and the trustee does not enjoy limited liability, although it is common to use a company as the trustee and thereby limit the potential liability of the trustee. A trustee owes a high standard of care to beneficiaries and is subject to several duties. These include the duty to act in good faith, to make full disclosure to beneficiaries as well as fiduciary duties such as a duty to avoid conflicts of interest and a duty not to take an unauthorised profit or benefit. Trusts are widely used in Australia as a trading vehicle. The two main forms of trust are discretionary trust and unit trust.

Discretionary Trust

In a discretionary trust, the trustee has an absolute discretion in distributing both capital and income among the beneficiaries and it may choose to not allocate any capital or income in a financial year to beneficiaries at all. Discretionary beneficiaries have no proprietary interest in the trust assets. The role and power of the trustee, the purposes of the trust fund and the rules regarding its use are generally contained in a trust deed. Discretionary trusts are typically used in family and family-owned business arrangements.

Unit Trust

A unit trust is a common investment vehicle that allows the pooling of investment funds and the investment of those funds through a trustee, whose powers are clearly defined in the trust deed. Trust beneficiaries are known as unitholders, and they have a fixed share of the profits of the trust based on the number of units held compared with the total number of units issued. The unit holders can transfer their units in a similar fashion to shares in a company. The trustee may be assisted by a separate entity known as a manager, whose job is to select and manage the investments while the trustee acts as a guardian of the interests of the unitholders. It is common for the unitholders to enter into a unitholders agreement, which covers similar issues to those covered in a shareholders agreement.

Hybrid Trust

Less common is a hybrid trust, which is simply a trust that possesses the characteristics of more than one type of the above trust categories. The trustee of a hybrid trust generally has the power to distribute income and capital among the beneficiaries as described in the trust deed, as in a standard discretionary trust. However, a hybrid trust generally also allows

for units in the trust to be issued, entitling the unitholders to receive at least part of the income and/or capital of the trust in proportion to the number of units they hold.

In certain circumstances there may be advantages in selecting a trust as the form of business organisation, particularly from a taxation viewpoint. However, care must be taken to determine that it is appropriate for, among other matters, the type of business, taxation status desired, required return, degree of control required and flexibility needed.

Regulation of Foreign Investment

One of the first matters a foreign investor must consider when planning to invest in Australia is the impact of Australia's foreign investment policy. Foreign investment in Australia is principally governed by the Foreign Acquisitions and Takeovers Act and is administered by the Foreign Investment Review Board (FIRB).

The FIRB is a division of the Federal Treasury. Its function is purely advisory, and its primary role is to review foreign investment proposals and to make recommendations to the Federal Treasurer. The Treasurer will then make a decision, based on these recommendations, which will either permit or prevent the proposed foreign investment in Australia. This decision is commonly referred to as FIRB approval. Any monetary thresholds referred to below are in Australian dollars and are current as at the date of publication. In most cases, thresholds are indexed annually on 1 January.

FOREIGN INTEREST

Foreign investment regulation applies to investment proposals in Australia by a foreign person. The term 'foreign person' is defined to include:

- An individual that is not ordinarily a resident in Australia; or a foreign government or foreign government investor; or
- A corporation, trustee of a trust or general partner of a limited partnership where an individual not ordinarily resident in Australia, foreign corporation or foreign government holds a substantial interest of at least 20%; or
- A corporation, trustee of a trust or general partner of limited partnership in which two or more foreign persons hold an aggregate substantial interest of at least 40%.

If you fall within one of these categories, and are proposing to make any of the types of investment described below, it is likely that you will need to give notice to FIRB under the FATA.

CATEGORIES OF FOREIGN INVESTMENT

The main categories of foreign investment regulated by FIRB are:

Business Investments

- Subject to certain minimum limits, a foreign interest must give notice to FIRB under the FATA prior to entering into a transaction when it is proposing to acquire, increase or alter a "substantial interest" (at least

20%) in an Australian company when that company is valued at over $289 million.

- For Investors from countries that have free trade agreements with Australia (Chile, China, Japan, Korea, Malaysia, New Zealand, Singapore, Thailand and United States (Agreement Country Investors), higher foreign investment thresholds apply. The current notification threshold is $1,250 million, except for investments in certain sectors referred to as 'sensitive businesses' to which the standard $289 million threshold applies.

  Sensitive businesses include media; telecommunications; transport; defence and military related industries and activities; encryption and securities technologies and communications systems; and the extraction of uranium or plutonium; or the operation of nuclear facilities.

- For non-land investments in agribusinesses, foreign persons must get FIRB approval before acquiring a direct interest where the investment is more than $63 million. A higher threshold of $1,250 million applies in relation to land investments for Chilean, New Zealand and United States investors under Australia's FTA commitments.

- Foreign persons must also register certain interests they acquire in water entitlements and water rights on the Register of Foreign Ownership of Water Entitlements.

- In relation to media business, all foreign persons must get FIRB approval before making investment of at least 5%, regardless of the value of the investment.

New Businesses Proposals

Proposals by private investors to establish new businesses generally do not require notification or approval under the Act or the policy. Direct investments by foreign governments and their agencies, including proposals to establish new businesses, require approval. Foreign persons starting a national security business also require approval.

Offshore Takeovers

Takeovers by a non-prescribed investor in an offshore company that holds Australian assets or conducts business in Australia are subject to FIRB approval where the proposal exceeds $289 million. Offshore acquisitions of interests in securities of an Australian land entity will be notifiable and significant where the foreign person holds an interest of 5% or more in an unlisted land entity or 10% or more if the land entity is listed on a stock exchange. There are also rules for foreign persons who are in a position to influence or participate in the central management and control of the land entity. Takeovers must comply with the Corporations Act.

Acquisition of Real Estate
Prior FIRB approval is required for foreign acquisitions of interests in Australian Land as follows:

- Agricultural land – where the cumulative value of agricultural land owned by the foreign person and any associates is more than $15 million. Reduced thresholds apply under FTAs for Chilean, New Zealand and United States investors ($1,250 million) and Thai investors ($50 million).
- Vacant commercial land – all interests regardless of the value.
- Developed commercial land – where the value of the interest is likely to exceed $289 million, with some exceptions applicable for certain types of developments. Agreement Country Investors only need to apply for approval where the value of the interest is more than $1,250 million.
- Residential real estate – all interests, regardless of value. The rules for approval differ depending on whether the person is a temporary resident or non-resident in Australia.

Tenements
Foreign persons must get approval to acquire an interest in a mining or production tenement, regardless of value. Chilean, New Zealand and United States investors only need to apply for approval where the value of the interest is more than $1,250 million.

Foreign Government Investments
All foreign government must get approval before:

- Acquiring a direct interest in Australia, starting a new business or acquiring an interest in Australian land regardless of the value of the investment.
- Acquiring a legal or equitable interest in a tenement or an interest of at least 10% in securities in a mining, production or exploration entity.
- Where the foreign government investor already holds an interest of 10% in a mining, production or exploration entity, generally acquisitions of additional interests will also require approval.

Other Legislation Before Investing in Australia
Foreign investors should take note of relevant legislation that might impact their investment. For example:

- Airports Act 1996 (Cth) relevantly provides that a foreign person must not own more than 49% stake in an airport operator company.

- Financial Sector (Shareholdings) Act 1998 (Cth) relevantly provides that a foreign person must not own more than 15% (or a higher percentage if approved under the legislation) of stake in a financial sector company.

EXEMPTIONS

Foreign persons can be exempt from needing to seek FIRB approval in certain circumstances, including when interests are bequeathed in a will and certain types of acquisitions.

APPLICATION PROCESS

The FIRB's review process of investment proposals is generally prompt. Forwarding an investment proposal to the FIRB and paying the associated fee activates a "time clock" so that if action is not taken within 30 days (or an extended time period as notified by the FIRB), the FIRB cannot withhold its approval.

In most cases a decision is made within the 30 day period and FIRB approval is normally granted unless the proposal is judged to be contrary to the national interest. This judgment may be made in consultation with other government departments, such as the Australian Taxation Office.

Generally, the FIRB is required to satisfy itself that the investment is for a legitimate purpose benefiting Australia.

If an investment proposal is on a large scale, political considerations may become important. In some cases, the FIRB's approval may be subject to the foreign interest meeting certain conditions. If the FIRB's approval is conditional, the foreign interest must comply with the conditions. For example, in real estate investments such conditions may include obtaining feasibility studies and environmental impact reports and providing evidence that the foreign interest has planned for the long-term management of the development.

PENALTIES

There are heavy penalties for failure to comply with the Foreign Acquisitions and Takeovers Act or with conditions imposed by the FIRB, including fines or an order requiring the foreign entity to sell its interest. We strongly recommend that you always seek legal advice before structuring or submitting a proposal to the FIRB to make an investment in Australia to determine which rules apply to your circumstances, and is any exemptions may apply.

Company Law

Some general matters relating to company law in Australia are discussed below.

REGULATORY SCHEME

The Corporations Act 2001 principally regulates companies and their incorporation, the acquisition of shares, securities, and the derivatives industry. The Corporations Act, together with other major pieces of legislation such as the Australian Securities and Investments Commission Act, the Australian Securities and Investments Commission Guidelines and the Listing Rules of the Australian Stock Exchange Limited, form a uniform regulatory scheme for companies which applies in all Australian states and territories.

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC)

A federal body, the Australian Securities and Investments Commission (ASIC), is responsible for administering the Corporations Act. ASIC has broad-ranging powers and functions (alongside the Australian Stock Exchange (ASX) for publicly listed companies) as the regulator and enforcer of company law and is the principal registry and information source for company matters. ASIC has wide investigative powers under the Australian Securities and Investments Commission Act in order to detect misconduct, gather evidence necessary to bring criminal proceedings, restrain unlawful conduct and also to initiate civil proceedings for offences under the Corporations Act.

INCORPORATION (also called "registration")

A company has a separate legal identity from its shareholders and directors. A company can own property, enter into contracts, and commence legal proceedings in its own name. It is the most common form of business organisation in Australia.

Companies are incorporated under the Corporations Act. Incorporation involves appointing directors (one of whom must be resident in Australia), issuing shares, nominating a registered office in Australia (which can be in any state or territory of Australia) and, where applicable, lodging copies of the company's constitution (its governing document, if it elects to adopt one) with ASIC. ASIC is required to make certain company records available for public inspection.

Alternatively, companies that are already incorporated but have never traded may be purchased for immediate use. These companies are known as "shelf companies" and are available from the Meritas member firms in Australia. A shelf company generally costs about $1,000. ASIC is required to make certain company records available for public inspection.

Unless a company is a publicly listed company or a company that is created for a specific reason (e.g. a not-for-profit company), there is no requirement for a company to have a constitution. If a company does not wish to have a constitution, it can use the "replaceable rules" instead. The replaceable rules are in the Corporations Act and are a basic guide for internal management of a company. The "replaceable rules" apply to a company (other than a company where the same person is both the sole director and the sole shareholder) whether or not the company has a constitution, unless they are displaced or modified by the company's constitution. Where a proprietary company elects to adopt a constitution, the constitution is not required to be lodged with ASIC.

Each company, which is properly incorporated, is registered by ASIC and receives a unique nine-digit Australian Company Number (ACN).The ACN must appear on all of the company's public documents. If the company has an Australian Business Number (ABN) that consists of the company's ACN, it may display the ABN in lieu of the ACN. Foreign companies and certain other bodies required to register under the Corporations Act also receive identification numbers known as the Australian Registered Body Number (ARBN).

All companies incorporated under the Corporations Act are able to conduct business in all states and territories of Australia without meeting further registration requirements.

TYPES OF COMPANIES

There are two principal types of companies under the Corporations Act. These are public and proprietary companies limited by shares.

The liability of shareholders of such companies is limited to any unpaid amount in respect of shares held by them.

Both proprietary and public companies must have a registered office in Australia where communications can be sent and where, in respect of a public company, the registered office must be open to the public (usually between 10 am and 12 noon and 2 pm and 4 pm each business day, or at least for three hours between 9 am and 5 pm each business day). All companies must also have a "public officer" who is responsible for discharging obligations required by Australian taxation law. One of the directors of a company, the public officer of a company and the secretary of a public company (and, in the case of a proprietary company, if a secretary is appointed) must be ordinarily resident in Australia. The same person may, but need not, fulfil the roles of director, secretary and public officer.

The distinguishing features of these types of companies are:

Public Company
A public company may offer its shares for sale or subscription to the public. It must have at least three directors, no fewer than two of whom must be ordinarily resident in Australia. In addition, it must have at least one shareholder, but there is no maximum limit on the number of shareholders. It is not necessary for a public company to be listed on the ASX.

Public companies must hold an Annual General Meeting (a general meeting of its shareholders) at least once in each calendar year and within five months of the close of each financial year. The audited financial report of the company, together with reports from the company's directors must be presented at the meeting.

There can be no restriction on the transfer of shares in a public company.

Proprietary Company
A proprietary company is the most commonly used form of company in Australia. It is designed for a relatively small group of shareholders (minimum one shareholder and not exceeding 50 non-employee shareholders). A proprietary company can place restrictions on the sale of its shares.

A proprietary company must have at least one director and one shareholder (who can be the same person). At least one director must ordinarily reside in Australia.

Proprietary companies are further classified as either large or small proprietary companies. To be classified as a small proprietary company, and so qualify for reduced financial reporting requirements, the company must satisfy at least two of the following criteria:

- The company and the entities it controls, if any, must have a consolidated gross operating revenue of less than $25 million for the financial year
- The value of its consolidated gross assets and the assets of any entities it controls, if any, total less than $12.5 million at the end of the financial year
- The company and any entities it controls, if any, have fewer than 50 employees at the end of the financial year

In addition, a proprietary company must not have conducted a CSF (see below).

Crowd-Sourced Funding
A proprietary company is not permitted to raise funds from the public unless the offer is conducted as a crowd-sourced funding (CSF).Where a proprietary company is raising fund from the public through CSF (up to $5 million), the proprietary company must have two directors and where the company has more than two directors, majority of the directors must ordinary reside in Australia.

Other Forms of Companies
Other forms of companies, including companies limited by guarantee, no-liability and unlimited liability companies, are also available, depending on the purposes for which the companies are required. (A no-liability company is one where the holder of partially paid shares can choose to forfeit the partially paid shares without further liability rather than pay a call in respect of those shares. They can only be used where the principal activity of the company is that of mining or oil exploration.)

DIRECTORS AND OFFICERS

Management and control of a company are vested in the board of directors, who are appointed by the members. Directors of companies conducting business in Australia, and others acting as directors, such as managers, owe certain duties to the company itself, its shareholders as a whole and, in certain circumstances, to other people associated with the company such as the creditors of the company. The directors' duties arise under the general law, the Corporations Act and other legislation, such as statutes governing tax, employment, competition, work health and safety, to name but a few. Of particular importance in Australia is that a person will be considered to be a director even if the person is not validly appointed as a director, such as where the person acts as if they were a director (a de facto director) or where the board generally acts in accordance with the instructions or wishes of that person (a shadow director).The duties to which directors (including non-executive directors) and officers are required to comply under the Corporations Act are:

- To act with the care and diligence of a reasonable person
- To act in good faith and for a proper purpose
- To avoid conflicts of interest
- To avoid improper use of position
- To avoid improper use of information

- To avoid insolvent trading; and
- To provide or disclose certain information, including financial information, to its shareholders.

Breaching these duties can have severe consequences, including subjecting directors to criminal or personal financial liability or in some instances to both.

REPORTING REQUIREMENTS AND RECORDS

Companies conducting business in Australia are under various obligations to:

- Keep various records and maintain various registers in respect of their activities
- Maintain their accounts in accordance with generally accepted accounting principles consistently applied in Australia
- Prepare annual financial statements and reports and distribute copies to their shareholders
- Lodge copies of those statements with ASIC and, if applicable, the Australian Stock Exchange (ASX)
- In some cases, prepare consolidated financial statements covering financial aspects of a group of companies
- Procure the preparation of reports by the directors on the company's performance
- For some companies, have their accounts audited regularly by an independent auditor who is a resident in Australia
- Disclose significant matters affecting their performance or prospects to ASIC and, if applicable, the ASX.

The extent of the reporting obligations will depend on the size and activities of the company and whether the company is a reporting entity. The recent introduction of major new accounting standards (Australian Accounting Standard Board 9, 15 and 16) will impact on financial reporting for many companies. .A discussion of these new standards is beyond the scope of this publication.

AUSTRALIAN STOCK EXCHANGE (ASX)

Public companies may seek to raise funds from the public by listing on the ASX. The ASX quotes the shares of public companies and enables trading of those shares to take place. Listing on the ASX is an option that is also available in certain circumstances to companies incorporated overseas.

In order to list on the ASX, companies must meet various stringent financial criteria set out in the ASX Listing Rules and satisfy comprehensive ongoing reporting requirements, in addition to satisfying the requirements of the Corporations Act. Listing can be an expensive process involving the issue of a detailed prospectus to potential investors describing the company's status and prospects. The company must have a minimum of 300 non-affiliated security holders with holdings valued at a minimum of $2,000 each, and a free float of not less than 20%. The Company must also satisfy either the:

- Profit test ($1 million aggregated profit from continuing operations over past three years and $500,000 consolidated profit from continuing operations over the last 12 months or
- The assets test ($4 million net tangible assets or a market capitalisation of $15 million)

A company that does not seek listing on the ASX is not subject to any minimum capital requirements and can be structured in various ways to suit the financing requirements of the shareholders.

Over the last decade, a number of specialist and "second board" exchanges have been set up in Australia, including:

- National Stock Exchange of Australia (NSX)
- Chi-X Australia
- Asia Pacific Stock Exchange (APX).

Whilst the ASX remains the largest exchange in Australia, listings on the other exchanges continue to grow. The emerging exchanges offer listing options that target small-to-medium enterprises. These exchanges also provide opportunities for trading of other tradeable rights, such as water licences.

CROWD-SOURCED FUNDING

Australia has also recently introduced legislation that allows start-up and small businesses to raise equity capital through crowd source funding. In short, the legislation provides a mechanism (an online platform) that will enable eligible companies to raise capital by offering securities (only new ordinary shares) in the company to a large number of investors, including retail investors, without a detailed and extensive disclosure document (generally referred to as a prospectus).

MANAGED INVESTMENT SCHEMES

The Corporations Act regulates managed investment schemes that are defined to include any arrangement where an operator manages an investment made by one or more passive investors, other than through the issue of shares or other securities in a company. These provisions aim to protect the interests of the passive investors who do not have day- to-day control over the operation of the scheme in which they invest.

To register a management investment scheme, the operator or manager must be an Australian public company that has an Australian financial services licence, authorising it, amongst other things, to operate the registered scheme. The operator's or manager's constitution must make adequate provisions for matters prescribed in the Corporations Act and have a compliance plan setting out the measures the operator or manager will need to apply to ensure it complies with the Corporations Act and its constitution.

There is substantial cost involved in setting up, registering and running a licensed managed investment scheme. That cost is generally only warranted where there are substantial funds under management.

There are a number of exemptions from the managed investment scheme rules. These include exemptions for small- scale schemes and schemes that only have sophisticated investors. These exemptions have strict limits to their application.

If a specific exemption does not apply, then the full managed investment scheme provisions apply.

ACQUISITION OF BUSINESSES

A business may be acquired in one of two principal ways:

- Its assets can be acquired (in which case the company itself is not acquired)
- The shares of the company which owns the business can be acquired.

Each of these methods has its own advantages, depending on the outcome that is sought.

Complex rules apply in relation to public companies. For instance, special take-over laws apply once a party has acquired a 20% interest in:

- A listed company; or
- An unlisted company with more than 50 members.

In addition, taxation and stamp duty consequences (discussed under "Taxation") must be carefully considered. Note in some jurisdictions stamp duty, which is a state tax, is simply called duty.

Taxation

It is not possible to give a complete outline of the scope of the taxation system in this guide. A brief outline of the basic taxation principles and some of the major forms of taxation are discussed below.

In all cases, we strongly recommend that you obtain professional tax and legal advice before structuring or implementing your investment or business plans in Australia. Meritas law firms have considerable tax expertise.

All levels of government in Australia levy tax.

FEDERAL TAXES

The most important federal taxes are:

- Income tax (including capital gains tax)
- Company tax
- Goods and services tax
- Customs duties
- Fringe benefits tax.

State or territory governments levy none of these taxes.

STATE AND TERRITORY TAXES

These taxes include:

- Stamp duty
- Land tax
- Payroll tax.

The federal government levies none of these taxes.

LOCAL GOVERNMENT TAXES

Local or municipal governments raise revenue by levying a "rate" on land located within their districts. The rate is proportional to the value of the land. Some municipalities rate on the basis of land value alone while others rate on the basis of land value and improvements.

PROBATE, DEATH DUTIES AND GIFTS

There is no probate or death duties in Australia. Gifts of assets are also not subject to any specific gift tax but may be subject to capital gains tax if not in cash.

INCOME TAX

Australia taxes residents on worldwide income. Non-residents are taxed on the basis of Australian source income only. Temporary resident individuals are taxed as though they are non-residents (i.e. only on Australian source income and gains).

The financial or income reporting year in Australia is generally from 1 July to the following 30 June, though substituted accounting periods can be arranged where there is a good reason (e.g. to align Australian reporting with an overseas parent company).

A company will generally be a resident of Australia for taxation purposes if it is incorporated in Australia or if its central management or control is located in Australia. Double Tax Treaties may treat companies as resident at the place of effective control to avoid treating them as residents of more than one country.

Taxable income in Australia is the difference between assessable income and allowable deductions. The notion of "assessable income" is broader than the accounting notion of "income". For instance, assessable income in Australia includes capital gains.

The notion of "allowable deductions" includes most things that would be allowed as a deduction for accounting purposes. However, it does not include entertainment expenses or outgoings of a private or domestic nature (e.g. interest on a mortgage used to purchase a private property).

Losses may be carried forward from one year to the next but cannot be carried back. (A limited company loss carry back rule was repealed in Australia after one year of operation.) Company losses must meet either a "continuity of ownership" test or a "continuity of business" test to remain deductible in subsequent years. Foreign tax credits are usually recognised.

Individual Tax Rates

Taxable income is treated differently for individuals compared with companies.

Residents

The tax rates for resident individuals for the 2018 – 19 year are set out below:

TAXABLE INCOME ($)	TAX PAYABLE
Nil – 18,200	Nil
18,201 – 37,000	19% of excess over 18,200
37,001 – 90,000	3,572 + 32.5% of excess over 37,000
90,001 – 180,000	20,797 + 37% of excess over 90,000
180,001 +	54,097 + 45% of excess over 180,000

A Medicare Levy of 2% is also charged.

Non-residents

The tax rates for non-resident individuals for the 2018 –19 year are set out below:

TAXABLE INCOME ($)	TAX PAYABLE
Nil – 90,000	Nil
90,001 – 180,000	29,250 + 37% of excess over 90,000
180,001 + – 90,000	62,550 + 45% of excess over 90,000

Whether an individual is a resident for tax purposes is not the same as an individual's citizenship or residency status for immigration purposes. If an individual resides in Australia and satisfies the "resides test", the individual is considered an Australian resident for tax purposes.

If an individual does not satisfy the "resides test", the individual may still be considered an Australian tax resident if one of the following three statutory tests is satisfied:

1) The domicile test

2) The 183-day test

3) The superannuation test.

This is a matter on which your Meritas firm can provide more detailed advice and assistance.

Companies

All companies are currently taxed at a flat rate of 30% on their taxable income, unless they are eligible for the lower company tax rate of 27.5% (from the 2018–2019 to 2023–2024 financial years).The lower company tax rate will then reduce to 25% by the 2026–27 financial year.

Eligibility for the lower company tax rate is dependent on whether the company is a "base rate entity". A base rate entity is a company that has an aggregated turnover less than the aggregated turnover threshold (which is $50m from the 2018–19 and 2023–24 for consistency financial years) and that 80% or less of the company's assessable income is base rate entity passive income.

Some of the examples of a base rate entity's passive income include corporate distributions and franking credits on these distributions; royalties and rent; interest income; gains on qualifying securities; a net capital gain; and an amount included in the assessable income of a partner in a partnership or a beneficiary of a trust, to the extent it is traceable to an amount that is otherwise base rate entity passive income.

If no dividend is declared by a company, no further tax is payable in the hands of the resident shareholder. Australia does not impose either excess profits tax or adopt any alternative minimum tax rules.

If a dividend is declared, and the dividend comes from funds on which the company has paid Australian tax, then a resident shareholder will be taxed on an amount that consists of the cash received or credited plus an amount called a "franking credit", which represents the company tax paid by the company. The resident individual shareholder can use the company tax (that is the franking credit) to offset any liability to pay the individual's personal tax.

If the shareholder is a resident individual with a tax rate of less than 30% (or 27.5% for base rate entity), and has income consisting of only fully franked dividends, the resident individual will be entitled to a tax refund.

No tax will be payable if the resident shareholder is another resident company.

For example: Assume a company who is not a base rate entity has $100 profit and one shareholder. The company pays $30 company tax (being 30% of $100).The board of the company may choose to pay a dividend. Assume it chooses to pay an $100 dividend. In that case, the shareholder receives $70 cash and a tax credit of $30 (franking credit). For income tax

purposes the shareholder has received taxable income of $100.The shareholder must pay income tax on the $100 at his marginal rate but is entitled to an $30 tax credit for the franking credit.

Capital Gains Tax (CGT)
Assessable income may include net capital gains. Net capital gains derived by individuals (Australian residents and non- residents) are taxed at their respective progressive tax rates. Net capital gains derived by companies are taxed at the usual corporate rate of 30% or at the lower company tax rate of 27.5% (from the 2018 –2019 to 2023–2024 financial years) if they are base rate entities.

Australian residents are liable for tax on worldwide capital gains. In many cases these gains may qualify for a 50% discount if the CGT asset is held for 12 months or more (the discount is not available to companies and foreign resident individuals) and in some cases, small businesses are eligible to receive a further 50% discount.

The Australian CGT rules allow a number of indefinite deferrals of tax by allowing rollover relief. This is a matter on which your Meritas firm can provide more detailed advice and assistance.

Overseas resident investors, however, are now largely exempted from Australian CGT except on the limited class of assets known as "taxable Australian property". Broadly, this refers to interests in Australian real estate and related property interests. On disposal of a real property where the contract price is $750,000 and above, there will be a foreign resident capital gains withholding tax at the rate of 12.5%.

Where an overseas entity incorporates an Australian company that conducts an active Australian business that is not "land rich" the capital gain on sale of the Australian company shares would generally be tax free.Again, this is an area where expert advice is strongly recommended from your Meritas firm.

WITHHOLDING TAX

Australia levies a withholding tax on remittances of the following types of income to non-residents at the rates set out:

- Dividend: 30%
- Interest: 10%
- Royalty: 30%.

Where an Australian resident remits income of the type mentioned above to a non-resident, prima facie tax at the rate set out above must be deducted from the payment by the Australian resident remitter.

These rates are reduced for the various Double Tax Treaties to which Australia is a signatory. In the case of the United States, the Australia – U.S. Free Trade Agreement further reduces the rates.

Dividend Withholding Tax (DWT)
Where an Australian resident is a company that pays a dividend out of profits in respect of which company tax has been paid at 30% as outlined above to a non-resident shareholder (i.e. the dividend is fully franked) then no DWT is levied.

To the extent to which distributions to a non-resident are unfranked, these are subject to DWT at 30%, reduced by tax treaties where applicable. Most treaties provide for 15% DWT. Special rules apply for New Zealand under the Triangular Tax Rules to provide an element of mutual recognition of trans- Tasman franking credits.

Certain unfranked dividends may be paid to non-resident shareholders under the "conduit foreign income" rules. Generally, conduit foreign income represents income and gains made by or through an Australian company that are not taxed at the company level (e.g. foreign non-portfolio dividends and gains on the disposal of certain foreign shares). These generous exemptions now make Australia an ideal place to base an intermediary holding company.

Interest Withholding Tax (IWT)
Interest paid to non-residents by Australian residents generally attracts IWT at 10% unless either reduced by a tax treaty or covered by certain limited exemptions.

Royalty Withholding Tax
Royalties are defined very broadly to include fees for the supply of certain property or rights. Royalties paid will generally be deductible to an Australian company, subject to the transfer pricing rules if paid to a related party or on non-arms-length terms.

Royalties are subject to withholding tax at 30% unless reduced by a tax treaty, where the rate is generally 10%.

Double Tax Treaties

Australia is party to a comprehensive range of double tax agreements with a number of countries. One effect of all double tax agreements is that the dividend and royalty withholding tax rates specified above are substantially reduced. Where treaty rates are higher than domestic rates, the lower rate prevails.

Withholding tax rates under Australia's tax treaties are set out in the following table:

COUNTRY	DIVIDENDS	INTEREST	ROYALTIES
Argentina	10% - 15%	12%	10% - 15%
Austria	15%	10%	10%
Belgium	15%	10%	10%
Canada	5%-15%	10%	10%
Chile	5%-15%	5%-15%	5%-10%
China (not HK or Macau)	15%	10%	10%
Czech Republic	5%-15%	10%	10%
Denmark	15%	10%	10%
Fiji	20%	10%	15%
Finland	0%-15%	10%	5%
France	0%-15%	10%	5%
Germany	15%	10%	5%
Hungary	15%	10%	10%
India	15%	15%	10%-15%
Indonesia	15%	10%	10%-15%
Ireland	15%	10%	10%
Italy	15%	10%	10%
Japan	5%-10%	10%	5%
Kiribati	20%	10%	15%
Korea	15%	15%	15%
Malaysia	15%	15%	15%
Malta	15%	15%	10%

COUNTRY	DIVIDENDS	INTEREST	ROYALTIES
Mexico	0%-15%	10%-15%	10%
Netherlands	15%	10%	10%
New Zealand	5%-15%	10%	5%
Norway	5%-15%	10%	10%
Papua New Guinea	15%-20%	10%	10%
Philippines	15%-25%	10%-15%	15%-25%
Poland	15%	10%	10%
Romania	5%-15%	10%	10%
Russian Federation	5%-15%	10%	10%
Singapore	15%	10%	10%
Slovakia	15%	10%	10%
South Africa	5%-15%	0%-10%	5%
Spain	15%	10%	10%
Sri Lanka	15%	10%	10%
Sweden	15%	10%	10%
Switzerland	15%	10%	5%
Taiwan	10%-15%	10%	12.5%
Thailand	15%-20%	10%-25%	15%
Turkey	5%-15%	10%	10%
United Kingdom	0-15%	0-10%	5%
United States	0-15%	0-10%	5%
Vietnam	10%-15%	10%	10%

INTERMEDIARY OR REGIONAL HOLDING COMPANIES

Changes made to both the taxation of foreign income received or earned by Australian resident companies together with both an extensive network of tax treaties and CGT exemptions for overseas gains have made Australia a very competitive place to base intermediary or regional holding companies.

TRANSFER PRICING

Australia has overhauled its transfer pricing rules following a number of unsuccessful court cases. First, interim retrospective rules were introduced. Then, from 23 June 2013, completely new rules commenced. These rules are both complex and comprehensive and allow the Australian Taxation Office to adjust the outcome of transactions where it believes that non-arms-length prices have been charged to the detriment of the revenue.

While all taxpayers are required to keep comprehensive records for tax purposes, there is a special need to document transfer pricing decisions to establish that prices are reasonable and commercially justifiable.

This is a complex area on which specialist tax advice is recommended from your Meritas firm.

THIN CAPITALISATION

Thin capitalisation rules operate to restrict interest deductions allowable against Australian source income for both foreign- controlled Australian investments (inbound investors) and Australian entities investing overseas (outbound investors) where the entity's debt exceeds certain levels.

The following applies from 1 July 2019.

- Generally the maximum permitted gearing for both inbound and outbound investors will be set at a debt-to-equity ratio of 1.5 to 1 or 60% debt to total assets (15 to 1 ratio for financial institutions or 93.75% debt to total assets).
- Taxpayers with annual interest deductions of less than $2 million will be exempt from the thin capitalisation rules.

CONSOLIDATION RULES

These rules allow wholly owned corporate groups to prepare and lodge tax returns on a consolidated basis to reflect the fact that they generally operate as a single economic unit.

Where consolidated returns are prepared, the head company acts as a representative taxpayer for the whole group and all losses can be offset against income derived by other group members. Similarly, the tax law disregards all intra-group transactions and allows the free movement of assets between group members without recognising any taxable gains or losses or needing to meet any formal rollover requirements.

There are also discrete rules relating to certain Australian- resident wholly owned foreign subsidiaries of overseas parent companies known as MEC groups.

While the election to form a consolidated group is optional, once made it cannot be rescinded.

GOODS AND SERVICES TAX

The Goods and Services Tax (GST) regime in Australia operates in a manner which is very similar to the GST regimes in Canada and New Zealand or the VAT regime in the United Kingdom.

GST in Australia is levied at the rate of 10% with exemptions for certain food stuffs, certain educational expenditure, medical expenditure, some religious activities, health and care products, and some telecommunication supplies.

As in the countries mentioned above, the tax is intended to be levied on the final consumption of a good or service with the tax being progressively collected along the manufacturing and distribution chain.

CUSTOMS DUTIES

Customs duty is levied on the importation into Australia of some goods. It is payable by the importer.

FRINGE BENEFITS TAX

In Australia, if an employee receives a non-cash benefit as a consequence of his employment, then that benefit is taxed separately from income tax under a regime known as fringe benefits tax. Basically, the employer is assessed for the fringe benefits tax. The tax is calculated by reference to the value of fringe benefits paid to the employee.

As a consequence, many employees in Australia do not receive fringe benefits as part of their remuneration arrangements. Where an employee receives a taxable fringe benefit, the employer usually takes the amount of fringe benefits tax into consideration when determining the total remuneration package payable to the employee.

OTHER TAXES

Stamp Duty

This is levied by the states and territories. There is no federal stamp duty. Depending on the relevant state or territory, duty may be levied on:

- A transfer of property (including a transfer of land)
- A lease of land
- A mortgage or other security
- A transfer of shares (where the company is "land rich")
- A transfer of a business (in some states).

This is not a comprehensive list. Generally speaking, this is a tax which is payable by the purchaser. Many components of this tax are being phased out.

For instance, in Victoria, only transfers of land will attract stamp duty. However, if a company's assets consist principally of land, a transfer of its shares may attract duty under the "land rich" provisions.

Land Tax

Land tax is an annual tax levied only by the states and territories on the value of a landholder's total holding of land in that state at a particular date, commonly 31 December. The tax is levied at a percentage of the value of all land owned by that landholder in the state. The maximum rate in Victoria is 2.25% for a landholder who holds land exceeding $3 million in value and a maximum rate of 2% applies in New South Wales.

Certain classes of land, for instance farming land and principal place of residence, may be exempt from the tax. Where land is used for income producing, the relevant land tax expense would generally be deductible for income tax purposes.

Payroll Tax

This is a tax levied on employers by the states and territories on the wages and similar benefits paid by employers to their employees. It was generally not levied on payments to contractors but recent amendments now incorporate certain payments under "relevant contracts" in certain states.

Generally, payroll taxes will be deductible to an employer entity for income tax purposes.

Annual Vacancy Fee

Foreign owners of residential property that is vacant or not genuinely available for rent for at least 6 months per year will be charged an Annual Vacancy Fee. The fee will typically be the same amount as the foreign investment application fee.

Intellectual Property

There are a variety of laws dealing with the protection of intellectual property (IP) in Australia. These laws provide for the creation of legal rights to the exclusive use or ownership of copyright works and other subject matter, registered designs, patentable inventions, trade marks and other forms of intellectual property.

There are also various rights under the general law that protect, among other things, goodwill and confidential information.

Some principal laws protecting intellectual property are briefly discussed below.

For all IP rights (other than Moral Rights), if a right is created by an employee during the course of and in performing the duties of employment, those rights are owned by the employer. Care should therefore be taken in clearly establishing duties and responsibilities of employees, and explicitly dealing with ownership of IP in employment agreements. Independent contractors own all rights in anything created under the contract. In both cases, contractual rights may displace the general position.

PATENTS

The law relating to patents is contained in the Patents Act 1990.This law is federal and operates throughout Australia. If a person seeks to obtain the exclusive and enforceable right to make, use or sell their invention in Australia, they must apply under the Act for a patent that gives the rights for a defined period (subject to the payment of maintenance fees). IP Australia administers patents in Australia.

Up until 25 August 2021, the Act provided for granting of two distinct types of patent:

- A Standard Patent confering the exclusive right to make, use or otherwise exploit the invention claimed for a period of 20 years (upon payment of the annual maintenance fees) and extendible for a further 5 years for certain pharmaceutical inventions.
- An Innovation Patent, which replaced the petty patent in Australia on 24 May 2001, as a relatively fast, inexpensive protection option. Protection lasts for up to a maximum of eight years. The innovation patent system has been designed to provide protection for new products and improvements that, although not vastly different from existing technology, have significant commercial value. Applying for an innovation patent must also cover novel subject matter but does not require an inventive step, but rather only an innovative step.

From 26 August 2021, applications for new Innovation Patents will no longer be accepted but divisional applications claiming priority from earlier standard patents will still be possible for a finite period provided that the parent application for the divisional was filed on or before 25 August 2021. Existing innovation patents and innovation patents filed on or before 25 August 2021 will continue in force until their expiry.

Prior to applying for a standard patent, it is possible to make a provisional patent application to establish a priority date for an invention, which provides 12 months to file either:

- An Australian standard patent application
- An application under the Patent Co-Operation Treaty (PCT) designating Australia
- A patent application in one or more foreign countries.

A complete application can also be made based on and claiming priority from an overseas provisional application or a PCT application that designates Australia as a PCT state.

In order to be "patentable" an invention must be a "manner of manufacture" that involves an inventive step (or innovative step in the case of innovation patents) and be commercially useful.

You cannot patent artistic creations, mathematical models, plans, schemes or other purely mental processes; however, Australia does consider some software and certain business methods to be patentable subject matter.

Special care must be taken when filing a specification to ensure that the invention is accurately and completely described, and that nothing is disclosed prior to securing a valid priority date, as this publication will destroy novelty (subject to a limited grace period).

In all circumstances, it is advisable to consult a patent attorney before preparing the patent application. In Australia, only inventors or patent attorneys can file and prosecute patent applications. Only lawyers can prepare patent licences or other commercial documents and take enforcement proceedings in the courts. Registered patent attorneys are not lawyers but specialists in the preparation and ongoing prosecution of patent applications. All Meritas member firms in Australia have excellent contacts with patent attorneys and referrals may be readily obtained.

Infringement proceedings are generally taken in the Federal Court of Australia.

The Intellectual Property Laws Amendment Act 2015 allows for a single trans-Tasman patent attorney scheme, which came into effect on 24 February 2017 and is designed to increase business confidence in the service provided by patent attorneys, to streamline processes, to minimise the cost of regulating patent attorneys in both countries, and to facilitate competition in the market for patent attorney services.

COPYRIGHT

Copyright gives the owner the exclusive right in Australia to reproduce, publish, perform, communicate to the public (which includes broadcasting and electronic transmission), adapt from original literary works (including original computer programs) and original artistic, dramatic and musical works together with other protected subject matter such as films and sound recordings. Rights vary according to the nature of the work or subject matter.

Copyright subsists in:

- Unpublished original works where the author of the work is an Australian citizen or resident, or a citizen or resident of a member state of the Berne Convention
- Published original works where first publication of the work takes place in Australia, or the author of the work is a citizen or resident of a member state of the Berne Convention at the time the work is first published.

The Copyright Act 1968 governs copyright. This law is federal and operates throughout Australia. It does not rely on a system of registration. Protection arises automatically on the creation of an original work or protected subject matter.

"Fair dealing" in copyright works for the purposes of research or study, criticism or review, parody or satire, legal advice and reporting news is permitted by the Copyright Act without the owner's permission.

The Copyright Act was amended in 2000 to provide for protection of electronic copyright material, and to allow digital copying of copyright material without permission in certain circumstances.

Copyright generally lasts for a period of 70 years after the end of the calendar year of the date of the author's death for works (provided the work is published at the date of death), and 70 years from the date of publication for sound recordings and films (provided the work is published at the date of death). Copyright in broadcasts continues for a period of 50 years from the year in which the broadcast is first made.

In 2015, in response to a rise in digital copyright infringement, the Australian Government sought to create a mechanism for copyright owners and exclusive licensees to block access to online locations based overseas that encourage copyright

infringement
The Copyright Amendment (Online Infringement) Act 2015 introduced new laws to give rights holders who discover infringing material online a way of requiring carriage service providers to take reasonable steps to block access to the content, via an injunction from the Federal Court.

Infringement proceedings are generally taken in the Federal Court of Australia.

Australia also grants to authors certain moral rights, which are separate from the economic rights of reproduction, publication and communication.

These rights are retained by authors even if the author never had any interest in the copyright. These rights cannot be assigned. Authors of works (and producers and directors of films) have each of the following moral rights:

- To be attributed as the author of the work or films
- Not to be falsely attributed as the author of the work or the film
- To prevent the work or film from being the subject of "derogatory treatment".

Each of these rights is only infringed if the act that is undertaken is, in all of the circumstances, unreasonable.

While these moral rights cannot be assigned, an author can consent to acts or omissions that would, but for the consent, amount to an infringement of those moral rights.

CIRCUIT LAYOUT RIGHTS (CLR)

CLR automatically protect original layout designs for integrated circuits and computer chips.

Like copyright protection, there is no requirement for registration for the granting of rights to the owner of an eligible circuit layout design.

The owner of an original circuit layout has exclusive right to:

- Copy the layout in a material form
- Make integrated circuits from the layout
- Exploit it commercially in Australia.

The maximum possible protection period is 20 years. The Attorney General's Department administers legislation relating to CLR.

TRADE MARKS

A sign (such as a word, symbol, name, brand, letter, colour, scent, shape, sound or aspect of packaging or a combination of any of them) used as a trade mark in relation to goods or services provided in Australia is registrable under the Trade Marks Act 1995.This law is federal and operates throughout Australia. IP Australia administers trade mark applications and registrations.

In order to be registrable, a trade mark must be distinctive or capable of becoming distinctive, in that it is not directly descriptive of the character or quality of goods or services the trade mark is applied to, and must be dissimilar to any existing registered trade marks or pending applications.

The person who first uses (by use or by applying to register the trade mark in Australia) is entitled to be registered as the owner of the trade mark.

Trade mark clearance or entitlement to use searches can be a valuable part of the registration process, as they will identify marks that may potentially block acceptance or possible opposition or infringement actions.

It is also important to ensure that where an application is being filed following prior use in Australia, that application is made in the name of the entity that has used the mark; or the rights in the mark, including the right to file the application, have been validly assigned by the first user to the applicant entity. Failure to ensure that the application is made in the name of the correct applicant can lead to an invalid registration.

Registration of a trade mark gives exclusive rights for a period of 10 years. If the registration is renewed every 10 years, the owner of the trade mark may obtain exclusive rights in perpetuity.

It is also important to ensure that a registered trade mark is used, so as to prevent another party from seeking to remove the mark. Any person is entitled to bring removal proceedings for any mark that has been on the register for more than five years and has not been used for a continuous period of three years, ending on one month before the date the removal application is made. It is also possible to seek to remove a registered trade mark if it has been registered for less than five years, if it was filed without any intention in good faith to use or authorise the use of the mark in Australia, and it has not been used at any time since filing.

Infringement proceedings are generally taken in the Federal Court of Australia.

In addition to registered trade mark rights, use of a mark, or name, may generate common law rights, which may entitle the user of that common law mark to restrain use, or oppose registration, of a deceptively similar mark.

Australia is a signatory to the Madrid Protocol, which came into effect in 2001. This provides for the registration of trade marks in other countries, allowing a single application to be filed for protection in any or all signatory countries, based on an Australian trade mark application.

DESIGNS

The look or shape of new and distinctive industrial designs applied to mass-produced articles may be protected by registration under the Designs Act 2003. This law is federal and operates throughout Australia. Protection is granted for the appearance of the article and not how it works.

In order to be valid, the design must be new and distinctive when compared with the prior art base of the design as it existed before the priority date of the design. The design must be a visual feature, which includes the shape, configuration, pattern and ornamentation of the product. That feature may, but need not, serve a functional purpose. The feel of, or materials used, in the product are not visual features.

A registered design is unenforceable unless and until it is certified by the Registrar of Designs. Certification does not take place as a matter of course during the application process. Examination for the purposes of certification must be requested. This can be done by the applicant, or by any third party.

Registered designs for which a certificate of examination has been issued give the owner exclusive and legally enforceable rights in respect of the design initially for a period of five years. Registration can then be extended for an additional five-year period providing a total protection period of 10 years.

IP Australia administers designs in Australia.

Enforcement proceedings are generally instituted in the Federal Court of Australia. Infringement occurs if, during the term of the registration, and without the licence of the owner, a person makes, imports, sells, hires or otherwise disposes of, uses or keeps a product in relation to which the design is registered which embodies a design that is identical to or substantially similar in overall impression to the registered design.

7. PLANT BREEDERS' RIGHTS (PBR)

PBR are used to protect new varieties of plants by giving exclusive commercial rights to propagate, market and sell a new variety or its reproductive material. Registered owners of PBR can direct the production, sale and distribution of the new variety, receive royalties from the sale of plants or sell their PBR to a third party. PBR protection lasts for up to 25 years for trees or vines and 20 years for other species.

Plant varieties can only be protected if they are a new variety or have been recently exploited. A new variety is one which has not previously been sold with the breeder's consent.

A recently exploited variety of plant is one which has been sold in Australia for a period no longer than 12 months before the lodgement of the application. These timeframes are extended for sales outside Australia as follows:

- Trees and vines up to six years
- Other varieties up to four years IP Australia administers PBR.

To be eligible for PBR protection in Australia, the applicant must:

- Show that the new variety is distinct, uniform and stable
- Be able to demonstrate, by a comparative trial, that its variety is clearly distinguishable from any other variety, the existence of which is a matter of common knowledge.

If the breeder is an overseas resident, the breeder must either appoint an agent or an Australian address to receive service of notices.

Enforcement proceedings are generally taken in the Federal Court of Australia. The Intellectual Property Laws Amendment Act 2015 extends the jurisdiction of the Federal Circuit Court of Australia to include PBR matters (commencing 25 August 2015).The PBR in a plant variety is infringed by producing or reproducing, conditioning for the purposes of propagation, selling, offering, importing, exporting or stocking the material (or claiming that the person has a right to do each of those things) without the licence of the owner. PBR is also infringed if the person uses the name of the variety that is entered in the Register in relation to any other plant variety of the same plant class or a plant of a variety of the same plant class.

TRADE OR BUSINESS NAMES

Any individual or company conducting business under a name that is different from that person's personal or company name (referred to as a business name) must register the business name with the Australian Securities and Investments Commission (ASIC).

A "trading name" refers to an unregistered name that businesses could use before the introduction of the National Business Names Register on 28 May 2012. A trading name is not a registered business name. A transition period from 28 May 2012 to 31 October 2018 was in place to allow businesses who have unregistered trading names to decide whether to register them. To continue using a trading name after October 2018, businesses had to register them.

Registration does not provide the registrant with any proprietary interest in the trade or business name and is a statutory obligation under the Federal Business Names Registration Act 2011. Prior to 2011, business name registration was controlled separately by each of the states and territories. In order to obtain national coverage, a business had to register separate business names in each state and territory. Under the Federal Business Names Registration Act 2011, there is now a single, national register, administered by ASIC (which also regulates corporations).

Registration does not protect the business name but does ensure that an identical name cannot be registered by another person.

Registration of a business name or a company name is also one of the eligibility requirements for obtaining a .com.au domain name.

DOMAIN NAMES

From 12 April 2021, stricter rules relating to registering the ".com.au" and ".net.au" domain names came into effect meaning that it will no longer be possible to rely on the somewhat vague (and often misused) "close and substantial connection" rule. Unless one of the other criteria applies, domain names will only be registrable if the business has an Australian trade mark application or registration that is a match of the domain name. This means that the domain name must:

- Be identical to one, some or all of the words or numbers used in the trade mark;
- Use the words or numbers in the same order as they appear in the trade mark; and
- Not include any additional words or numbers (other than things like punctuation marks).

As a result of this change, many domain names will be vulnerable to cancellation (and therefore be available to register by other businesses) after 12 April 2021. That is because the new rules will not only apply to any domain names registered after that date, but will also apply to existing domain names which are renewed after that date. Accordingly, businesses should carefully review their trade mark coverage to ensure they can retain the domain names they need.

Similarly, to obtain any ".au" TLD domain name, businesses must satisfy the "Australian presence" requirement. Foreign businesses can do this merely by applying for a relevant Australian trade mark, which can be an easier and cheaper alternative to incorporating a local Australian company. Again, however, the new rules will require that trade mark to be an exact match of a relevant Australian trade mark application or registration. This will be even stricter than the "match" requirement described above. The domain name being applied for must:

- Be identical to all of the words used in the trade mark; and
- Include all the words in the order in which they appear in the trade mark.

As a result, it won't be possible just to file one Australian trade mark application and piggyback off that to register multiple .au domain names.

Competition & Consumer Protection

Australia has extensive competition and consumer laws dealing with, among other things, the promotion of competition and consumer protection. This section provides an introduction to this area of Australian law.

COMPETITION LAW

The Competition and Consumer Act 2010 (CCA) provides the primary source (though not the only source) of competition regulation in Australia. It is supplemented in some respects by state legislation and, in addition, some industries are governed by industry-specific legislation.

The competition law provisions of the CCA include regulatory control over, for example:

- Mergers and acquisitions
- Price-fixing arrangements (e.g. price fixing agreements between competitors or the fixing by a supplier of the minimum price at which goods supplied by it can be resold)
- Misuse of market power by a corporation with a substantial degree of power in a market
- Customer, supplier and territorial arrangements (for example, arrangements which control the suppliers which a party to the arrangement can use and/or which allocate particular customers or exclusive territories to a party)
- Anti-competitive arrangements between competitors (e.g. bid rigging between tenderers in the course of a tender process) or between organisations in general
- Third party access to essential infrastructure.

Some of the regulated conduct is only prohibited if it has the purpose or the effect of substantially lessening competition in a market. However, there are other types of regulated conduct (e.g., most price fixing arrangements between competitors) that are prohibited outright regardless of the effect on competition.

Policing compliance with the CCA is the responsibility of the Australian Competition and Consumer Commission (ACCC). There are provisions in the CCA allowing the ACCC to authorise, in certain circumstances, proposed

conduct that would otherwise, or which might otherwise, breach the competition law provisions of the CCA. Such conduct includes third line forcing, which is prohibited unless authorised by the ACCC.

The CCA also provides for voluntary industry codes of conduct, such as the Food and Grocery Code of Conduct, and mandatory codes, such as the Franchising Code of Conduct. Breaches of industry codes can result in sanctions under the CCA.

CONSUMER PROTECTION

The CCA provides various types of protection for Australian consumers including:

- Control over the manner in which a total price is to be brought to the attention of a consumer where a component part of a price (e.g. a price exclusive of taxes, postage and handling) is referred to
- A prohibition on misleading or deceptive conduct in trade or commerce (e.g. a prohibition on misleading advertising)
- A number of consumer guarantees that every "consumer" has the benefit of, and which cannot be contracted out of by manufacturers or suppliers
- Unsolicited consumer contracts
- The regulation of the provision of credit finance to consumers
- The imposition of product liability on manufacturers and importers in favour of consumers
- Restrictions on the dissemination of certain private information relating to consumers and others.

The consumer guarantees that are granted are available regardless of any warranty that the consumer may purchase or may be given. These statutory guarantees apply to all consumers, which includes any person who acquires goods or services, where the contract price is under $100,000. It also applies where the contract price is more than $100,000 if the goods or services purchased are normally used for personal, domestic or household purposes. A warranty against defects that may be provided by a manufacturer or supplier is in addition to any of the consumer guarantees and does not limit or replace them. All documents (including any material on which there is any writing or printing or on which there are any marks or symbols) evidencing a warranty against defects, including any description of the features or terms of a warranty against defects, must adhere to the requirements of the Australian Consumer Law.

In addition to civil liability for contraventions of the competition and consumer provisions of the CCA, courts can impose significant pecuniary fines and criminal penalties for contraventions. For example, criminal fines and imprisonment for up to 10 years is available for contraventions of the cartel provisions of the CCA. Maximum fines of $10 million, three times the value of the benefit received, or 10% of annual turnover in preceding 12 months, if court cannot determine benefit obtained from the offence, can be imposed on corporations for any misleading and deceptive representations.

Protection also exists under the CCA for consumers signing a consumer contract where a standard form of contract is used (with little opportunity to negotiate) and which contains an "unfair term." A term will generally not be unfair if reasonably necessary to protect the legitimate interests of the business.

PRIVACY AND SPAM

Australia has a number of rules that limit the use and disclosure of personal information. The principle underlining the regime is one of informed consent. Presently, there is no right to privacy. Individuals have the right to be fully informed prior to disclosing information as to how and why an organisation collects personal information, and the uses made of it, so as to be able to make a fully informed decision as to whether to agree to those information-handling practices. The primary statute governing privacy is the Privacy Act 1988 with each State and Territory having similar legislation.

Further details on the Privacy Act 1988 are explored in Section N of this guide.

Following recommendations from the Australian Law Reform Commission, there is now a uniform approach to privacy through a single set of 13 privacy principles applying to the public and private sectors. These are known as the Australian Privacy Principles (APPs) and came into effect on 12 March 2014, with the commencement of the Privacy Amendment (Enhancing Privacy Protection) Act 2012. Further amendments were made to the Privacy Act 1988 in February 2018 concerning the mandatory notification of certain types of data breaches that are likely to cause serious harm to an individual.

Private sector businesses that turn over more than $3 million, provide health services and hold health information, commercially deal in personal information or are contracted service providers under a Commonwealth contract, must comply with the APPs, subject to some exceptions. The APPs:

- Require APP entities to manage personal information in a transparent way, including having an up to date and available privacy policy and to take reasonable steps to ensure the information's security (APPs 1 and 11)
- Allow individuals the option to operate anonymously or pseudonymously (APP 2)
- Apply higher standards for APP entities collecting solicited personal information and outline how unsolicited information must be handled (APPs 3 and 4)
- Outline how personal information may be used or disclosed and place strict conditions on the use of personal information for direct marketing purposes (APPs 6 and 7)
- Require certain steps to be taken to ensure protection of personal information before it is sent overseas (APP 8)
- Place obligations on APP entities to ensure that information collected is up to date, can be corrected and require reasonable steps to be taken to ensure its accuracy (APPs 10 and 13)
- Allow individuals to better access their personal information by including a requirement to provide, unless a specific exception applies (APP 12).

Where an organisation in Australia deals in information, the Act applies to that organisation's handling of information inside and outside Australia. The Act also applies to foreign organisations if the foreign organisation conducts business in Australia and collects information in Australia.

Australia's statutory privacy law provisions do not generally provide for civil actions by affected individuals. However, some causes of action for breach of confidence exist.

There are some parallels between the concepts underlying Australia's notifiable data breach scheme and the personal data breach provisions under GDPR (Articles 33, 34, 58 and 83). However, there are important differences. For example, the mandated "assessment phase", where one is not sure whether serious harm is likely, and the penalties attaching to failure to notify. The penalties are significantly higher in the European Union.

Unlike the European GDPR, Australian privacy principles are not strictly based on statements of individuals' human rights and freedoms.

Australian privacy law does not include an express distinction between controllers and processors and does not mandate any particular terms for written contracts between controllers and processors.

Australia privacy law does not have an express equivalent of those provisions of GDPR that require at least one of six lawful bases for collection.

As to the territorial reach of the Privacy Act 1988 (Cth), it covers:

- Those who have some recognition under Australian law (for example are incorporated in Australia)
- Those who do not have such recognition but who both carry on business in Australia and collect the relevant personal information in Australia.

As to cross-border disclosure of personal information, Australian law does not allow cross-border disclosures in circumstances where adequate protection of individuals' rights is not guaranteed. Instead, Australian law imposes, in effect, vicarious liability on the entity governed by the Privacy Act 1988 for the data breaches of those to whom cross-border disclosures occur and who are not governed by that Act.

The Australian Information Commissioner may seek to impose civil penalty provisions for interferences with privacy. These can include financial penalties in the order of $420,000.

The Australian Information Commissioner has broad supporting powers. These are to investigate and conciliate and to make ancillary orders, for example obtaining documents and carrying out "own motion" assessments.

The Commissioner's authorised actions are also:

- Examining proposed legislation that would allow interference with privacy or may have any adverse effects on people's privacy
- Researching and monitoring developments in data processing and computer technology to ensure that adverse effects on people's privacy are minimised, promoting an understanding and acceptance of the Australian privacy principles and their objects
- Preparing and publicising guidelines for agencies and organisations to follow to avoid breaches of privacy
- Encouraging industries to develop programs to handle personal information consistent with the Australian privacy principles.

In addition to the commonwealth regime, each state and territory has differing requirements for businesses operating within each particular jurisdiction.

SPAM

The Australian Federal Parliament has also legislated to control or prohibit in certain circumstances direct marketing activities, including using telephone numbers listed on the Do Not Call Register, commercial or electronic messages (spam) and unsolicited consumer contracts by telephone.

The Spam Act 2003 covers email, instant messaging, SMS and MMS or any other electronic messaging of a commercial nature. It does not cover faxes, Internet pop ups or voice telemarketing. There are three essential requirements that must be met in order to ensure that a commercial electronic message is not spam, namely:

- The sender is identified
- The message is sent with consent
- The message includes a functional unsubscribe facility.

Spam compliance is an area that is the subject of significant activity by the regulator, the Australian Media and Communications Authority. The maximum penalty for an initial offence is $84,000 per day for an individual and $420,000 per day for a body corporate. For repeat offences, the maximum penalty increases to $420,000 per day for an individual and $2,100,000 for a body corporate.

Under the Do Not Call Register Act 2006, individuals can only place private, fixed-line or mobile phone numbers on the Register. Businesses are prohibited from making telemarketing calls to numbers listed on the Register, subject to some exceptions. In addition to these requirements, the Telemarketing Industry Standard sets out a number of requirements that must be followed by any business that is making a telemarketing call, including those numbers not on the Register.

Again, this regime is administered by the Australian Communications and Media Authority, which is entitled to seek civil penalty orders from the Federal Court of Australia or the Federal Circuit Court of Australia for breaches.

In addition to this regulatory regime, the Australian Direct Marketing Association has adopted a number of principles in its codes of practice that apply to association members making telemarketing calls from fixed-line and mobile phones.

There is also a Fax Marketing Industry Standard, which is similar to the Telemarketing Standard, that applies to all participants in the fax marketing industry regardless of whether or not the numbers are on the Register.

The Australian Consumer Law also contains similar (but not identical) provisions in relation to calling or contacting a person for the purpose of negotiating an unsolicited consumer agreement, or for an incidental or related purpose, either in person or by telephone.

Unsolicited consumer agreements occur as a result of negotiations by phone or at a location other than the seller's place of business; when the seller approaches uninvited; and the total value of the business is more than $100 (or cannot be determined when the agreement is made). The most common form of sales methods that can lead to unsolicited consumer agreements are:

- Door-to-door selling
- Telemarketing
- Being approached by a sales agent in a public space.

Failure to comply with the requirements can lead to significant fines, in addition to any reputational loss or damage.

Entry to Australia

Before reading this information, please be aware the information provided is not intended to be legal advice or to be acted upon without further consultation. Because of the complex maze of legislation, regulations and policy that comprise Australia's immigration system, we strongly recommend that prospective applicants or sponsors seek specific legal advice before making any applications or representations to the Department of Home Affairs (DHA) or any Australian overseas mission.

The Australian government gives permission for people who are not citizens of Australia to enter and remain in Australia by the issue of visas. There are over 100 different types of visas and they are of six broad categories: visitor, studying and training, family and partner, working and skilled and refugee and humanitarian. Depending on the particular visa, visas provide either temporary or permanent residence. There are detailed rules governing entry in each visa category that are clearly laid down in the migration legislation.

VISITOR VISAS

Electronic Travel Authority (ETA)

This is an electronically stored authority for short-term visits to Australia of up to three months. It is available to passport holders from only a specific number of countries and regions. Applications must be made from outside Australia. Applicants need to meet more relaxed criteria specifically designed to streamline entry to Australia. Holders of ETA visas may engage in tourist and some business visitor activities but must not work. A business visitor can make general business enquiries, review, or sign a business contract, take part in a conference but cannot work or sells goods or services to the public.

eVisitor

This visa is created for business visitors or tourists from European countries intending to make a short business visit or holiday/recreational visit to Australia for up to three months. The holder of an eVisitor visa must not work in Australia other than by engaging in a business visitor activity. Applicants must apply from outside Australia and hold an eligible passport for the eVisitor visa.

Working & Skilled Visas

There are a variety of visas for those with skills recognised by the Australian government on the Medium and Long-Term Strategic Skills List (MLTSSL). These visas include permanent, temporary, and provisional visas which offer a pathway to permanent residency. Applicants may be required to obtain a skills assessment depending on the type of visa

subclass and stream that they are applying for. Typically, these visas require potential applicants to submit an expression of interest and wait for an invitation to apply for a visa.

Temporary Work (Short Stay Specialist) Visa
A Temporary Work (Short Stay Specialist) visa is suitable for people who have highly specialised skills, knowledge, or experience not generally available in Australia. This is a temporary visa that allows the holder to stay in Australia for up to six months and work in a highly specialised job. However, the holder of this visa must only do the work or activities for which the visa was granted. Employers will be required to provide a contract or letter of offer. With this visa, the holder may bring family members, however they will not be allowed to work or study in Australia, except to do a language training program.nt.

Employer Nomination Scheme Visa
Australian employers may nominate skilled workers to live and work in Australia permanently. The Employer Nomination Scheme visa includes three streams: Direct Entry stream, Labour Agreement stream and Temporary Residence Transition stream. This visa allows the holder to live, work and study in Australia indefinitely and sponsor eligible family members to come to Australia. The holder may also apply for Australian citizenship if they are eligible. Through the Direct Entry stream, applicants must have an occupation that is on the skilled occupation list, have at least three years of relevant work experience and have a positive skills assessment.

Regional Sponsored Migration Scheme Visa
A variation of the Employer Nomination Scheme visa is the Regional Sponsored Migration Scheme, which applies to employers in regional Australia. This visa consists of the Direct Entry stream and Temporary Residence Transition stream. Under the Direct Entry stream, the holder must agree to remain employed with the nominating employer in regional Australia for a minimum of two years.

OTHER VISAS

Permanent visa options also exist for those who have family in Australia, including partners, children, parents, or last remaining relatives of Australian citizens. Australia also has a Global Talent visa designed to recognise overseas applicants with a distinguished talent in their area including a profession, sport, the arts or academia and research.

REGULATION OF THE MIGRATION ADVICE PROFESSION

The migration advice profession in Australia is regulated by the Office of the Migration Agents Registration Authority (OMARA). Registered migration agents must meet certain knowledge and character requirements and can deal with the DHA. The details of all registered migration agents can be

found on the Register of Migration Agents on the OMARA website. From 22 March 2021, Australian legal practitioners can provide immigration assistance in connection with legal practice without being a registered migration agent. On 1 March 2022, a new Code of Conduct for registered migration agents will replace the existing Code, which was introduced in 1998.

This information is current as of February 2022.

Exchange Control

Generally, there are no exchange controls in Australia. Inward flows are generally not subject to exchange control, although in certain circumstances there may be a requirement to obtain approval for foreign investments from the Foreign Investment Review Board. Outward exchange is generally not restricted. However, taking currency notes (in any currency) in to or out of Australia is subject to cash transaction reporting requirements and amounts of $10,000 or more (or foreign equivalent) must be reported to the Australian Border Force.

Australian anti-money laundering and counter-terrorism laws impose restrictions on certain money transfers and are regulated by the Australian Transaction Reports and Analysis Centre (AUSTRAC). Significant cash transactions and international funds transfers of $10,000 or suspicious transactions are required to be reported to AUSTRAC within 10 days of the transaction, unless the transaction is exempted. Exemptions apply to transactions between authorised deposit-taking institutions, Australian exchange settlement account holders, Australian financial service licensees and transactions provided by an Australian entity's permanent establishment in a foreign country. AUSTRAC imposes requirements on financial institutions and financial dealers to report on the identification of individuals and companies involved in reportable transactions. Money transfer businesses must also be registered with AUSTRAC.

In some cases there may be financial sanctions imposed in relation to transactions involving certain countries, entities or individuals. Unless a permit is obtained through an application to the Department of Foreign Affairs and Trade, these sanctions prohibit international funds transfers and other transactions using foreign currency involving parties associated with certain activities. The Australian Sanctions Office has been established to provide guidance on how to comply with sanction laws.

Furthermore, a person who has a tax debt may be prevented from sending money out of Australia until the tax debt is paid.

Employment & Industrial Laws

TERMS AND CONDITIONS OF EMPLOYMENT

Employment relationships in Australia are regulated at a number of levels and by a range of statutory and quasi-statutory instruments. Which instruments apply may depend upon the state or territory in which the employee works, the work to be undertaken, the occupation of the employee and the category of employer including whether the employer is a "trading or financial corporation." A corporation that derives a significant proportion of its revenue from the sale of goods and/or services will fall within this definition.

Employment within trading and financial corporations is regulated by a combination of federal and state employment and industrial laws (an exception to this is WA, in which a company which is a "trading or financial corporation" will generally be covered by federal employment laws). Other employment is regulated almost entirely by state employment and industrial laws.

LEVELS OF REGULATION

Broadly, at a federal level, the levels of regulation are:

- The employment contract (its terms are often modified or overridden by other levels of regulation)
- Statutory minimum conditions – the National Employment Standards
- Awards (i.e. arbitrated determinations) of industrial relations tribunals
- Federal enterprise or collective agreements.

NATIONAL EMPLOYMENT STANDARDS (NES)

There are 10 minimum workplace entitlements for all Australian employees and these are set out in the NES.

- A maximum standard working week of 38 hours for full time employees, plus "reasonable" additional hours
- The right to request flexible working arrangements to care for a child under school age or a person with a disability, etc.
- Offers and requests to convert from casual to permanent employment
- 12 months unpaid parental or adoption leave, with a right to request a further 12 months

- Four weeks paid annual leave (pro rata)
- Ten days paid personal/carer's leave per year (for personal ill health and to care for members of an employee's household who are ill or injured),two days paid compassionate leave and two days unpaid family and domestic violence leave
- Paid jury service leave or unpaid emergency service leave
- 5 days unpaid family and domestic violence leave each year
- Paid long-service leave of 8.67 weeks after 10 years of continuous service
- Public holidays
- Notice of termination, and redundancy pay
- New employees are to be given a Fair Work Information Statement that summarises the above conditions and casual employees are to be given a Casual Employment Information Statement.

Australia also has a statutory minimum wage. At 1 July 2021 it is $20.33 per hour or $772.60 per week for adults.

There can be substantial variation depending on the terms of the contract and the nature of the work in which the employee is engaged. Contract terms may improve upon the NES but may not reduce them.

LEGISLATION

The current key federal employment legislation is the Fair Work Act 2009 (FW Act) (and Fair Work Regulations 2009). Its main features include:

- Statutory minimum conditions called "National Employment Standards" as described above
- Modern awards (as a supplementary set of minimum standards and conditions relevant to particular industries and occupations)
- An enterprise-level bargaining system with an emphasis on enterprise agreements with industrial organisations (i.e. unions), rather than directly with an employer's employees
- An institution, called Fair Work Commission, that plays a key role in facilitating and supervising industrial relations under the FW Act
- A Fair Work Ombudsman's office with regulatory, monitoring and educational roles

- Enhanced rights for employees aimed at discouraging and remedying unfair dismissals and the taking of adverse action by an employer or principal for a prohibited reason
- Provisions enabling unions to readily access workplaces (including workplaces where the union has no members).
- Provisions enabling employees and employers to take industrial action associated with negotiations for a proposed enterprise agreement.

Some other employment law matters are covered by state or territory laws. Each Australian state and territory has its own unique legislation covering the following areas:

- Occupational health and safety
- Workers' compensation (a form of statutory injury insurance)
- Discrimination
- Long-service leave.

Employers outside the private sector may also be subject to state minimum conditions and industrial relations laws. In WA, additional dedicated state industrial relations laws can apply in the private sector for employers who are not trading and financial corporations.

OCCUPATIONAL HEALTH AND SAFETY

The federal government has taken steps since 2009 to harmonise occupational health and safety legislation across Australia and has developed a model Work Health and Safety Act, to be implemented by all states and territories. As of July 2021 the Commonwealth, New South Wales, South Australia, Queensland, the Australian Capital Territory and the Northern Territory have enacted the provisions of the Model Act. Victoria and Western Australia have yet to do so, although Western Australia is expected to pass legislation consistent with the harmonised laws in the second half of 2021.

The key provisions are:

- An expanded duty of care for a "person conducting a business or undertaking"
- "Worker" now includes employees, volunteers, contractors, sub-contractors, apprentices, work experience students and outworkers
- An expanded definition of "workplace" to include any place where a worker goes or is likely to go while at work

- Positive duties for "officers" to exercise "due diligence" and comply with their duty of care
- Increased monetary penalties for breach and a range of new orders including training and adverse publicity orders.

AWARDS

An award is a binding order made by an industrial tribunal setting the minimum employment terms and conditions of certain employees. Awards regulate a large percentage of the workforce in Australia.

A (common law) employment contract cannot exclude award provisions, but it can confer additional (non-award) benefits on an employee. Awards don't usually apply to senior management positions; however such positions need to be checked for potential award coverage nevertheless.

The Fair Work Commission has modernised and consolidated its awards so that Australia's suite of federally arbitrated settlements can operate comprehensively within a relevant industry.

ENTERPRISE AGREEMENTS

The FW Act provides for an employer and its employees to make enterprise agreements either directly or indirectly, by involving industrial associations. Any bargaining must be undertaken subject to "good faith" obligations on bargaining representatives. It also permits employers to make greenfields agreements for new projects or enterprises as long as it bargains with the relevant union prior to engaging any employees.

The FW Act also provides for the Fair Work Commission to facilitate enterprise bargaining with employees and with industrial associations. However, the enterprise agreement-making regime differs in at least the following respects:

- Employers can be compelled to bargain collectively even if they do not want to do so if the majority of their employees want to bargain
- Any collective bargaining must be undertaken subject to "good faith" obligations on bargaining representatives
- In some circumstances, an industrial association will be able to seek arbitration of outstanding matters in incomplete negotiations

SUPERANNUATION (PENSION PLANS)

Under the Superannuation Guarantee (Administration) Act 1992 (Cth), employers are required to pay superannuation contributions on behalf of their employees, amounting to a prescribed proportion of each employee's earnings. The contribution rate is currently 10% of the employee's earnings (subject to various caps which impact high earners).

The federal government has indicated its intention to gradually increase these compulsory contributions. It is likely that they will increase to around 12% by 2025 –26.

It is strongly recommended that you seek professional advice in the complex and constantly changing area of employment and industrial law.

Personal Property Securities Law

Personal property securities law in Australia is regulated by the Personal Property Securities Act 2009 (Cth) (PPSA).The PPSA applies across all Australian jurisdictions and governs most, but not all, security interests in personal property. Overseas companies doing business in Australia must ensure they understand the PPSA. If a company or person holds the benefit of a security interest (e.g. a mortgage, a charge, a lien, a retention of a title arrangement) over personal property in Australia, then they must register their security interest on a government register, the Personal Property Securities Register (PPSR). If the security interest is not registered, the holder is exposed to being unable to enforce their rights as a security holder.

In some cases, failure to register can lead to very harsh outcomes (for example, a supplier of plant who has parted with possession of the plant before being paid can lose ownership of the plant if their debtor becomes insolvent). The supplier may not be able to take back their plant and a liquidator may be able to seize and sell the plant. The supplier faces joining the queue as an unsecured creditor. This is just one example of why taking advice in relation to registration of security interests over Australian personal property is very important.

The PPSA is a complex piece of legislation with many technical terms and concepts. It covers a range of matters in relation to personal property, including the creation and registration of security interests in personal property, priority between competing security interests and enforcement. This chapter is meant to give only a basic overview of the key issues.

KEY TERMS

To understand the PPSA regime it is important to understand some of the key terms used in the PPSA.

Personal Property

Under the PPSA, personal property includes most property (tangible and intangible) other than land and some statutory rights and licences. Common examples of personal property to which the PPSA applies include:

- Plant and machinery
- Goods and chattels, including perishables
- Boats
- Motor vehicles
- Crops

- Inventory
- Shares
- Accounts
- Intellectual property
- Investment instruments, including shares and financial products.

Personal property that is the subject of a security interest is referred to as collateral.

Some statutory permits and licenses are specifically excluded from personal property. Examples include mining tenements and oil and gas permits.

Security Interest
Security interests can arise in a wide range of commercial transactions, beyond "security" in the traditional sense. A security interest is an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation. This includes:

- Fixed and floating charges
- Chattel mortgages
- Pledges
- Hire purchase agreements
- Conditional sale agreements
- Leases of goods
- Trust receipts
- Consignment
- Assignment
- Transfer of title
- Flawed asset arrangements

Some security interests, including common law and statutory liens in personal property, are specifically excluded from the operation of the PPSA.

Certain security interests, known as "deemed security interests," are security interests for the purposes of the PPSA whether or not they secure payment or performance of an obligation. Deemed security interests include retention of title arrangements; commercial consignment arrangements and leases; and hires and bailments of personal property for specified time periods. These security interests are known as purchase money security interests (PMSIs). PMSIs attract super priority under the provisions of the PPSA.

Secured Party
The party who has the benefit of the security interest is the secured party. This includes the following:

- A lender who has lent money and has taken a fixed floating charge
- A supplier of goods who has supplied the goods on credit terms (retention of title)
- A lessor of equipment who has hired out plant and machinery to a customer
- A consignor of goods who has left their property in an auctioneer showroom for sale.

Grantor
The party who grants the security interest is the grantor (for example the debtor, borrower, supply customer or lessee). The grantor can be a company, an individual or a trust.

Perfection
In order to obtain the protection of the PPSA, a secured party must ensure that its security interest is "perfected". A security interest may be perfected by possession, by control and by registration.

In many situations, in particular leasing or supply arrangements, maintaining possession of the collateral is not possible for commercial reasons. Manufacturers routinely supply their customers on credit terms, with the goods leaving the possession of the manufacturer many weeks or months before the manufacturer is paid. This is why registration on the PPSR is so important, as a security interest can be perfected by registration.

Only certain personal property can be perfected by control. This includes authorised deposit-taking Institution (ADI) accounts in relation to which the ADI is the secured party, shares and financial products, satellites and space objects. A large number of secured parties will be unable to rely on perfection by control.

Given the difficulty in maintaining possession and the limited availability of control, registration is usually the simplest way to perfect a security interest. It also has the distinct advantage that it is relatively easy to do with the right advice.

PERSONAL PROPERTY SECURITIES REGISTER

The Personal Property Securities Register (PPSR) is an electronic noticeboard that provides basic information about actual or prospective security interests in personal property. It is available online and is administered by the Australian federal government. Conducting searches, completing registrations and removing or amending registrations can be done online and at relatively low cost.

The PPSR enables the secured party to register a security interest against the grantor. Registrations can be made for a single transaction or a series of transactions. So, for example, one registration can be made against all goods supplied under a multi-year supply contract. It is not necessary to make a separate registration each time goods are dispatched. Strict time limits apply to registration depending on the nature of the security interest registered. These time limits must be followed to gain the full protection of the PPSA. If a time limit is missed there is usually very little that can be done, short of applying to the Court for an extension – which can be a costly exercise.

Registration on the PPSR is important for a number of reasons.

KEY PRINCIPLES CONCERNING THE PPS

Enforceability Against Third Parties

Third parties may search the PPSR by reference to the grantor, or in some cases, to a specific item of personal property. For example, motor vehicles can be searched by the licence/ registration, VIN number or other serial numbers. The same applies for aircraft and water craft.

Registration allows third parties searching the register to determine the nature and extent of security interests in personal property. If no registrations are found against an item of property or a particular grantor, the third party can assume that the grantor is free to deal with that personal property. If the third party buys that property from the grantor they will take that property free of any unregistered interests. They get clear title.

Conversely, if a search of the register shows a pre-existing registration, the third party takes that property subject to the registered interests. They get encumbered title, not clear title. This is why it is so important for anyone considering buying personal property, lending money to a company, or supplying goods on credit, to do a PPSR search of the other party. If a secured party does not register its security interest on the PPSR and the collateral the subject of the security interest is sold, the secured party will generally have no right to pursue the purchaser. The secured party cannot seize back the property. The purchaser gets good title to the property. The

secured party will retain its contractual rights against the grantor (i.e. they can still sue the grantor); however, it will be unable to enforce its rights in the collateral.

The PPSA contains a number of exceptions to the above rules, and exceptions to those exceptions. Specialist advice is needed. One example is where goods subject to a registered security interest are sold or leased by the grantor in the ordinary course of their business. Although the purchaser will acquire full title to the goods free from any security interest, the secured party will have a security interest in the proceeds of sale that come from the sale of those goods.

Protection in Bankruptcy and Insolvency Situations
If a secured party does not register its security interest in collateral and the grantor goes into bankruptcy or is placed into liquidation, the collateral the subject of the security interest will vest in the trustee in bankruptcy or liquidator. The trustee in bankruptcy or liquidator may sell the collateral and apply the proceeds towards payment of the grantor's debts.

This is the case even though title to the personal property may have remained with the secured party at all times, for example by virtue of a retention of title clause. If the secured party has registered its security interest in the collateral correctly, the secured party will be entitled to take back possession of that collateral. Again, registration is critical, and failure to register can be fatal.

Priority
The PPSA contains rules for determining priority between security interests in the same personal property. Generally, the first secured party to register its security interest in personal property will have the highest priority in the distribution of that property. Some exceptions apply. For example, the holder of a PMSI will have super priority in the collateral the subject of that PMSI as against most other secured parties.

A secured party who has not registered its security interest may find itself demoted to the position of unsecured creditor on distribution of the grantor's assets (e.g. in an insolvency situation). This is the case even if the unregistered interest arose months or years before the registered security interest. Time of registration of a security interest is critical under the PPSA, not time of creation.

TIMING

Generally a security interest must be registered within 20 business days of the date of the agreement giving rise to that security interest. As is the case with most things in the PPSA, exceptions apply. For example, a PMSI must be registered within 14 days of possession of the collateral passing to the grantor, or if the collateral is inventory, prior to possession passing. So, in plant hire situations or for suppliers of inventory, much tighter time frames apply. In particular, sometimes registration must be made before goods leave the secured party's premises. This can mean that a supplier needs to change its business processes to ensure registrations are made before goods are dispatched.

CAUTIONARY TALES FOR OVERSEAS COMPANIES: THE PPSA IN PRACTICE

The decision in Maiden Civil (P&E) Pty Ltd; Richard Albarran and Blair Alexander Pleash as receivers and managers of Maiden Civil (P&E) Pty Ltd & Ors v Queensland Excavation Services Pty Ltd & Ors [2013] NSWSC 852 demonstrates the consequences of failing to register a security interest on the PPSR. Queensland Excavation Services Pty Ltd (QES) purchased items of machinery that were subsequently leased to Maiden Civil (P&E) Pty Ltd (Maiden). QES failed to register its interest in the machinery on the PPSR. At a later date, Maiden entered into a finance agreement with Fast Financial Solutions Pty Ltd (FFS) by which Maiden granted FFS a security interest over all of Maiden's assets, including the machinery. FFS perfected its interest over Maiden's assets by registration on the PPSR. QES had not perfected its security interest. Maiden later went into liquidation. The New South Wales Supreme Court found that, although QES was the "true owner" of the vehicles, FFS's interest took priority over that of QES as QES had failed to register its interest. QES lost its vehicles and could not take them back. Their only remedy was to sue a company in liquidation – a very harsh outcome.

In Carrafa, Goutzos and Lofthouse (as liquidators of Relux Commercial Pty Ltd) v Doka Formwork Pty Ltd [2014] VSC 570, Relux Commercial Pty Ltd (Relux) leased equipment from Doka Formwork Pty Ltd (Doka). Doka registered its security interest in the equipment leased to Relux, but did not comply with the timing requirements in the PPSA. Relux later went into liquidation. The Victorian Supreme Court found that Doka had registered its security interest in some of the equipment out of time. As a result, that equipment vested in Relux by operation of the PPSA. This highlights the need to register security interests within the relevant time frame.

In Forge Group Power Pty Limited v General Electric International Inc [2016] NSWSC 52, General Electric International, Inc (GE) leased four electricity generating turbines worth $50 million to Forge Group Power Pty Limited.

GE subsequently sold part of its business to APR Energy Holdings Limited (APR), and assigned its rights in the turbines and under the rental agreement to two subsidiaries of APR. Neither GE nor APR registered any security interest on the PPSR in respect of the turbines or the rental agreement. Soon after APR became lessor, Forge went into voluntary administration and its secured creditors appointed receivers and managers over the company. The New South Wales Supreme Court found that APR had failed to perfect its interest in the turbines by registration. As a result, APR's interest in the turbines vested in Forge upon the appointment of administrations to Forge. APR appealed the Supreme Court's decision, but the appeal was dismissed unanimously by the New South Wales Court of Appeal. This case highlights the importance of registering a security interest on the PPSR. It also highlights the importance of searching the PPSR as part of the due diligence process for any business acquisition.

IN PRACTICE

If a transaction is likely to give rise to the creation of a security interest, the secured party should register that security interest on the PPSR as soon as possible. It is not necessary to wait for the transaction to be completed before making a registration. However, care must be taken in determining whether a transaction will give rise to a security interest as civil penalties can apply if a person makes a registration on the PPSR without a reasonable belief that the security interest exists.

Seeking advice in relation to PPSR registrations is vital.

Minerals Exploration & Mining

Minerals exploration and mining / extraction is a very important industry in Australia. Australia has significant reserves of minerals and petroleum, including iron ore, coal, gas, uranium, lithium, nickel, lead, tantalum, zinc, zircon, gold and rare earths. It is ranked in the world's top seven for the production of the following minerals:

COMMODITY	SHARE OF WORLD RESOURCES	WORLD RANKING FOR RESOURCES	SHARE OF WORLD PRODUCTION	WORLD RANKING FOR PRODUCTION
Antimony	7%	4	1%	7
Bauxite	18%	2	28%	1
Coal (Black)	10%	4	6%	5
Coal (Brown)	24%	2	6%	7
Cobalt	19%	2	4%	3
Copper	11%	2	5%	6
Diamond	1%	5	23%	2
Gold	21%	1	10%	2
Ilmenite	24%	2	9%	4
Iron Ore	30%	1	36%	1
Lead	41%	1	11%	2
Lithium	29%	2	56%	1
Manganese Ore	14%	4	17%	2
Nickel	24%	1	7%	6
Rare Earths	4%	6	8%	4
Rutile	65%	1	29%	1
Silver	16%	3	5%	7
Tantalum	73%	1	5%	6
Uranium	31%	1	12%	3
Zinc	27%	1	10%	3
Zircon	72%	1	29%	2

Source: Geoscience Australia, Australia's Mineral Resource Assessment 2019.

Western Australia, in particular, is one of the world's great minerals and energy provinces. It has over 1,000 mines across more than 50 different minerals. It is the world's number one bauxite, (alumina), iron ore, lithium and rutile producer; number two in diamonds, gold, lead, manganese ore and zircon; number three in cobalt, number four nickel, ilmenite and rare earths producer; and number six copper producer.

Petroleum is also a very significant natural gas producer. In 2021 Australia was the number 1 ranked LNG exporter by volume, with Western Australia producing the bulk of gas exported.

These high world rankings for production are a clear indicator that Australia is a very safe destination for mining investment. Australia is consistently ranked in the top 5, and typically 1st or 2nd, by both the Fraser Institute and Behre Dolbear in their annual publications ranking countries as destinations for mining investment, based on an assessment of the following key factors:

- Economic system;
- Political system;
- Degree of social issues affecting mining in the country;
- Delays in receiving permits due to bureaucratic and other issues;
- Degree of corruption prevalent in the country;
- Stability of the country's currency; and
- Competitiveness of the country's tax policy.

Importantly, Australian Federal, State and Territory governments are committed to supporting the resources sector, developing a policy and regulatory framework that is designed to facilitate and streamline international investment and participation in minerals and mining projects. All tiers of Government actively encourage foreign investment in the Australia minerals sector. Unlike other countries, foreign investors can acquire direct interests in mining projects and mining tenements in Australia. When it comes to mining, Australia is open for business.

MINING LAWS AND LEGISLATION

A key enabler of the growth in the Australian mining industry has been the development of a comprehensive legal framework designed to protect investment in mining, from early exploration through to development and operational stages.

Mining in Australia is regulated under a State-based regime, with an overlay of Commonwealth (Federal) regulation. This section of this Guide focuses on mining law in Western Australia, as Western Australia is the largest player in the Australian mining industry.

The primary Western Australian legislation is the Mining Act 1978 (WA) and the Mining Regulations 1981 (WA). Similar legislation applies in the other Australian States and Territories. The main role for Commonwealth legislation is in relation to regulating environmental approvals, mining in National Parks or on Commonwealth land, mining uranium, and regulation of some aspects of Aboriginal heritage and native title issues.

The Mining Act 1978 (WA) provides that minerals are generally owned by the State, regardless of whether the minerals are on private land or Crown (public) land. Some exceptions apply in relation to private land grants from the 1800's.

In addition, some substances are not classed as "minerals" for the purposes of the Mining Act 1978 (WA). This includes limestone, sand other than mineral sands, rock, gravel, shale other than oil shale and many forms of clay. An extractive industries licence granted by a local Shire or Council rather than the State government is usually used when seeking to mine or extract these substances.

The Mining Act 1978 (WA) also provides for agreements between the State government and proponents of major mining projects. State Agreements are contracts between the State and a developer that are ratified by passing State legislation. The State Agreement provides for a "whole of government" approach to the project, and facilitates a streamlined approvals process to ensure "government red tape" and delays are minimised.

MINING TENEMENTS

The Mining Act 1978 (WA) provides that the State, as the owner of the minerals, has power to grant licenses to prospect, explore and mine for minerals. These licenses are known as mining tenements. Mining tenements confer on the holder the exclusive right to undertake certain activities associated with mining, in a specified area, subject to conditions.

The key mining tenements available in Western Australia are as follows:

	PROSPECTING LICENCE	EXPLORATION LICENCE	MINING LEASE
Purpose	Prospect for minerals	Explore for minerals	Extract and dispose of discovered minerals
Area of land	Up to 200 hectares	Up to approx. 60,000 hectares, depending on latitude and location	Limited to the size of the orebody plus infrastructure
Term	4 years plus option to renew for one further 4 year period	5 years, extension for further 5 years possible. Further renewal possible.	21 years, renewal possible
Annual expenditure and rent obligations	Minimum annual rent and on-ground expenditure obligations apply.	Moderate annual rent and on-ground expenditure obligations apply, increasing annually.	Significant annual rent and on-ground expenditure obligations apply, increasing annually
Key rights and obligations	Right to prospect for minerals using metal detectors and small scale equipment. Limited rights to disturb ground. Limited rights to extract up to 500 tonnes of material permitted.	Right to enter land and explore, dig pits, trenches, holes, bores and tunnels, conduct surveys etc. Holder has a priority right to apply for a mining lease over the area. Compulsory surrender of large parts of the area of an EL applies during the term. Extraction of up to 1000 tonnes of material permitted.	Exclusive right to extract minerals from th eland for profit. Applicant/holder must prepare a full mining proposal plus a mineralisation report compliant with stock exchange rules. Royalties payable to the state. No transfer or dealing in an ML without government consent.

The Mining Act 1978 (WA) also provides for grant of retention licenses. These allow holders of a mining tenement an ability to "warehouse" the tenement during periods when it is unfeasible to commence mining, provided the holder has previously expended money to discover minerals on the tenement.

Other tenements are available under the Mining Act for infrastructure related to mining projects, including for roads, tailing dams, mine camps, pipelines, airstrips, etc.

Applications for mining tenements must be made strictly in accordance with the Mining Act 1978 (WA) and the Mining Regulations. It is critical that specialist advice is sought to ensure compliance. Failure to comply can lead to forfeiture of the tenements, including following application from third parties interested in securing the relevant land for themselves. Recent development in the law relating to mining leases make it important to seek advice when applying for, buying or selling mining leases.

All mining tenements are granted subject to conditions. The conditions typically imposed on mining tenements are:

- Annual minimum expenditure commitments;
- Environmental compliance conditions;
- Rent and royalty conditions;
- Restrictions on transfer, assignment and mortgage;
- Quarterly reporting obligations; and
- Requirement to pay annual contributions to a State administered mining rehabilitation fund.

If a tenement holder does not comply with applicable conditions the tenement may become liable to forfeiture.

BUSINESS STRUCTURES TO PURSUE MINING PROJECTS

Mining projects can be pursued by a company on a standalone basis, or jointly with other companies. Although a number of business structures may be used to facilitate joint participation, joint ventures are most commonly used in multiparty resources projects in Australia. The following table summarises the key aspects of the two main forms of joint venture used in Australia. For further information on business structures used in Australia please refer to the Major Forms of Business Organization section of this Guide. Investors should obtain specialist legal and commercial advice as regards the suitability of available structures in meeting their objectives.

	INCORPORATED JOINT VENTURE (IJV)	UNINCORPORATED JOINT VENTURE (UJV)
Legal status	Separate legal entity exists, incorporated under the *Corporations Act 2001.*	No separate legal entity
Governing documents	A Constitution and a shareholders agreement (SHA) is entered into by the parties.	A joint venture agreement (JVA) is entered into by the parties.
Ownership interests	Parties own an interest in the IJV as shareholders in proportion to shareholdings. Ownership interests in IJV are publicly disclosed.	Parties own a proportionate interest in UJV assets as tenants in common, in proportion to agreed UJV interests. UJV ownership interests can be kept confidential.
Management and control	Rights are set out in the Constitution, SHA and the Corporations Act 2001. IJVs must comply with mandatory accounting, reporting and $it requirements.	Rights are set out in the JVA. Usually one JV party is appointed Manager of the JV. Accounting, reporting and $it requirements usually specified in JVA.
Liability for debts	Shareholders not liable for IJV debts. Liability is limited to amount unpaid on shares.	JV parties are typically severally liable for debts of UJV in proportion to their interest in the UJV. JV parties indemnify the Manager for debts incurred as Manager.
Entering into Contracts	IJV enters into contracts in its own right as it is a separate legal entity. Typically no direct contracts with shareholders (unless guarantees required).	UJV cannot enter into contracts in its own right. Manager usually enters into small contracts on behalf of the UJV, larger contracts are entered into by all the parties to the UJV directly.
Financing JV activities	IJV obtains finance as a separate entity. Finance may be secured by a charge over all IJV's assets. SHA usually provides for calls for funding from shareholders.	JV parties usually arrange their own finance to meet their obligations. JVA usually provides for calls for funding from JV parties.
Entitlement to profit and production from a mine	IJV owns the minerals produced. Shareholders have a right to dividends only. Different dividend rights may attach to different classes of shares.	JV parties are directly entitled to their share of production from UJV activities and can deal with their share as they please.
Tax	IJV must pay tax and file a tax return in its own right. IJV will be taxed at the company tax rate of 30%. Dividends will be included in a shareholder's assessable income. Tax losses are trapped in the JV and cannot flow through to shareholders.	UJV does not pay tax or lodge returns. Parties will pay tax on any profit they make from selling their share of the UJV product. Tax losses can flow through to parties.
Transfer of ownership interests	A transfer of shares in IJV does not result in transfer of underlying mining tenements. Consent of government to transfer not usually required. Transfer duty may be payable. Pre-emptive rights usually apply as between IJV parties.	The transfer of an interest in UJV involves the transfer of the underlying UJV assets, including any mining tenements. Consent of government to transfer may be required. Transfer duty may be payable. Pre-emptive rights usually apply as between UJV parties.

Competition law should also be considered prior to selecting a business structure to undertake a mining project or to acquire an interest in an existing mining project. Such law will also be relevant to the operation of the mining project. Particular care is required if it is proposed that a joint venture is formed between competitors or potential competitors. The chosen business structure must not contravene the anti-competition provisions in the Competition and Consumer Act 2010 (Cth). Severe penalties can apply for breach of that legislation.

It may be appropriate to consider applying for official authorisation of a proposed transaction, in certain (rare) cases. The process can be time consuming and is public. Specialist advice is required.

Competition law is discussed in the Competition and Consumer Protection section of this Guide.

ACQUIRING AN INTEREST IN A MINING PROJECT

A range of options are available to investors wanting to acquire a direct or indirect interest in an existing mining project. For example, investors may acquire a direct or indirect interest in an existing mining project via the following mechanisms:

- By **acquiring a direct interest** in the assets of a mining project, for example by joining an unincorporated joint venture. This involves either buying an existing joint venture interest from a joint venture participant or by agreeing to join the joint venture and a new joint venture interest being created.
- By **farming-in** to mining tenements. A farm-in agreement/earn-in agreement usually includes a right to form a new joint venture or join an existing joint venture on completion of the farm-in/earn-in. Farm-in/earn-in transactions are explained below.
- By **acquiring an indirect interest** in a mining project by purchasing shares in an incorporated joint venture. This involves either buying existing shares in the joint venture company from an existing shareholder or by agreeing to subscribe for new shares in that company.

Investors should obtain specialist legal and commercial advice on the suitability of each possible approach in meeting their objectives. A key driver of the chosen structure will be tax considerations and transaction costs. Stamp duty/transfer duty in particular can be a significant transaction cost.

Transfer and Registration of Direct Interests in Mining Projects
Interests in mining projects can be transferred (bought and sold). A sale agreement is the legal document that sets out the terms of sale/transfer of legal title of the project assets. To transfer an interest in the mining tenements a prescribed statutory transfer form must also be signed. For some tenements the right of transfer is subject to Government approval. Separate transfer forms must also be used for motor vehicles and any registered mining plant and equipment.

Before tenement transfer forms can be lodged with the Department of Mines, Industry Regulation and Safety, transfer duty must be paid on the transfer. Usually duty is in the order of 5.5% of the consideration/value given for the transfer. A formal valuation of the tenements may need to be prepared and lodged. The value of the tenements may include both the mineral resources identified on the tenement and the value of plant and equipment affixed to the tenement (fixtures). Once transfer duty has been paid the tenement transfers are registered into the name of the buyer and entered onto a public register of mining tenements.

Farm-in Agreements
A farm-in agreement (sometimes called an earn-in agreement) is an agreement between the owner of a mining tenement (farmor) and another person wanting to obtain an interest in the mining tenement (farmee) whereby the farmee agrees to earn an interest in the mining tenement by spending money "on the ground" rather than by paying money directly to the farmor. Under the agreement, the farmee has the right to earn an interest in the mining tenement by funding exploration costs and satisfying statutory expenditure conditions that apply to the tenement.

The main advantage of a farm-in arrangement as compared to a sale agreement is that transfer/stamp duty may not be payable on the earning of an interest in the tenement by the farmee. So, a significant transaction cost is avoided. It is important to note that no consideration must be paid to the farmor by the farmee in order to qualify for the duty concession.

As noted above, a farm-in agreement usually includes terms by which a new joint venture arises on completion of the farm-in obligations or the farmee is entitled to join an existing joint venture on completion of the farm-in.

Transfer and Registration of Indirect Interests in Mining Projects
A share sale agreement or a share subscription agreement is the most commonly used mechanism for achieving transfer of an indirect interest in a mining project which is in the form of an incorporated joint venture. By using either agreement it is agreed that shares in the incorporated joint

venture company will become registered in the name of the incoming party. The name of the shareholder will be entered onto a public register of shareholdings which can be searched by the public.

Transfer duty in the form of landholder duty may also be payable on the above agreements, as the relevant duty legislation captures indirect transfers of interests in mining tenements. Again, formal valuations of the tenement may need to be prepared and lodged.

Due Diligence

Prior to acquiring an interest in an existing mining project it is important to carry out detailed due diligence. Usually legal, accounting, financial and tax due diligence is carried out with the assistance of specialist advisers.

The following are some of the key aspects of due diligence that need to be considered when acquiring an interest in a mining project:

- Nature of the interest to be acquired
  - Ascertain business structure used
  - Confirm shareholdings/joint venture interests
  - Confirm rights and obligations associated with the interests
- Title to the interest (and any property associated with the interest)
  - Confirm who holds title to any land and to minerals
  - Review encumbrances, i.e. existing charges, mortgages, etc
  - Review PPSR registrations.
- Understand what Government approvals are needed
- Accounts and Records: verify all books and records are complete and compliant with accounting standards and applicable agreements, e.g. joint venture agreement
- Mining tenements
  - Confirm rights and compliance with tenement conditions, i.e. confirm in "good standing"
  - Geological assessment of discovered mineral reserves and prospectivity of the tenement
- Assessment of project risks
  - Political
  - Sovereign
  - Environmental
  - Regulatory
  - Safety
  - Other

- Financial analysis
  - Costs and budget
  - Cash flow analysis
  - Market, supply and demand analysis
- Tax review
  - Confirm all returns have been lodged
  - Verify compliance with tax laws
  - Understand future tax liabilities
  - Confirm efficient tax structuring of proposed acquisition

Foreign Investment Board Approval

FIRB approval is dealt with in the "Regulation Of Foreign Investment" section of this Guide. Where a potential acquirer of an interest in an Australian mining project has an overseas entity as a shareholder or controller, FIRB approval must be considered carefully. This includes whether the overseas entity is either Government controlled or private. Specialist advice should be sought. Failure to obtain FIRB approval where it is required is an offence and significant penalties apply. The transaction can also be forcibly unwound.

PERSONAL PROPERTY SECURITY REGISTRATIONS

Overseas companies participating in mining ventures in Australia must ensure they understand the *Personal Property Securities Act 2009 (Cth)* **(PPSA)**. If a mining venture participant holds the benefit of a **security interest** (for example, a mortgage, a charge, a lien, etc.) over **personal property** in Australia (for example, joint venture assets such as motor vehicles, plant and equipment, goods and property), then they must register their security interest on the Personal Property Securities Register **(PPSR)**.

If a security interest is not registered, the holder is exposed to being unable to enforce their rights as a security holder. In some cases, failure to register can lead to very harsh outcomes including loss of ownership of the asset in question.

It is important to appreciate that typical joint venture agreements and shareholder agreements can give rise to security interests that should be registered on the PPSR. Specialist advice should be sought.

For more detailed information, please refer to the "Personal Property Securities Law" section of this Guide.

ROYALTIES PAYABLE ON MINERALS PRODUCED

Each Australian State and Territory imposes royalties on the extraction of minerals. In Western Australia there are two methods of calculating the rate of mineral royalties.

A flat rate per tonne is applied for low value industrial and construction materials. Higher rates apply where the material is used for its metallurgical content rather than for construction uses. The rates are set out in a table to the Mining Act, and depend on the type of mineral in question. Currently the rates are $0.73 per tonne for construction uses and $1.17 per tonne for metallurgical uses.

Higher value minerals attract ad valorem duty. Ad valorem royalty is calculated as a proportion of the 'royalty value' of the mineral. The royalty value and the components used to calculate it are set out in the Mining Regulations 1981 (WA). The system takes into account processing costs incurred after the mine-head point, price fluctuations, the grade of material and the change in the value as mined ore is processed and value is added. Royalty rates vary between minerals but the following principles apply:

- Bulk material (subject to limited processing/treatment) – 7.5% of the royalty value
- Concentrate material (subject to substantial enrichment through a concentration plant) – 5.0% of the royalty value
- Metal – 2.5% of the royalty value

Some exceptions to the above apply for specific minerals.

MINING ON PRIVATE LAND

Mining tenements can usually be obtained over private land. However the consent of the private landowner to access, exploration and mining on the land needs to be obtained. An access and compensation agreement must be entered into. The compensation paid is for damage to the land and loss of use of the land. In most cases, compensation for minerals is not paid, as the minerals are owned by the State not the landowner.

NATIVE TITLE

Native title refers to the rights and interests in relation to land that Aboriginal people hold in accordance with their traditional laws and customs. Native title is protected by the Native Title Act 1993 (NTA) and the common law of Australia. A 'right to negotiate' process applies, and a mining tenement cannot be granted unless it has satisfied the "future act" requirements of the NTA (except in some special circumstances where pre-existing rights apply).

A minerals company and a native title group can enter into an Indigenous Land Use Agreement whereby the native title group agrees to grant a mining lease without the need for compliance with the 'right to negotiate' process.

Specialist advice is needed in relation to native title and Aboriginal heritage issues.

Privacy in Australia

Australia's privacy legislation impacts how organisations handle personal information, conduct surveillance and engage in direct marketing. The Privacy Act 1988 (Cth) (the Privacy Act) and the Australian Privacy Principles (APPs) govern the collection, use, disclosure and transfer of personal and health information. The APPs are scheduled to the Privacy Act.

The APPs apply to private-sector organisations with an annual turnover of more than $3 million and their related companies, as well as some other organisations, including health service providers and organisations that trade in personal information. The APPs also apply to Australian Federal government agencies. Together we will refer to these as APP Entities..

The thirteen APPs regulate the manner in which any regulated organisation can collect, store, use and disclose personal information. Special provision is made with respect to health and other sensitive information.

Definition of Personal Information
'Personal information' is defined in the Privacy Act as:

information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- Whether the information or opinion is true or not; and
- Whether the information or opinion is recorded in a material form or not.

Definition of Sensitive Information
'Sensitive information' refers to what one would normally expect to be singled out for special treatment such as information or an opinion about an individual's racial or ethnic origin; political opinions; sexual orientation; criminal record; or health, genetic or iometric information about the individual.

Sensitive information is subject to stronger protection under the Privacy Act, including a requirement to obtain consent to collect the information unless another exception applies.

What about non-personal information and de-identified information?
Anonymous information about an individual is not personal information.

While it may not always be possible through de-identification to completely remove the risk that personal information may be re-identified, information will generally be considered to be anonymous where the risk of re-identification in the relevant context is low.

De-identified information can still carry certain privacy risks. The OAIC has issued a guide on De-identification of data and information https://www.oaic.gov.au/agencies-and- organisations/guides/de-identification-and-the-privacy-act

Employee records exemption
The Privacy Act contains an important exemption for employers. The "employee records" provisions exempt employers in relation to an act done or practice engaged in that is directly related to a current or former employment relationship between the employer and the individual, and an 'employee record' held by the current or former employer, which relates to the individual.

An "employee record", in relation to an employee, is defined to mean a record of personal information relating to the employment of the employee. The Privacy Act states that examples of personal information relating to the employment of the employee are health information about the employee and personal information about all or any of the following:

- Engagement, training, disciplining or resignation of the employee;
- The termination of the employment of the employee;
- The terms and conditions of employment of the employee; and
- The employee's personal and emergency contact details, performance or conduct, hours of employment, salary or wages;
- Membership of a professional or trade association; leave and taxation, banking or superannuation affairs.

An employer does not have to grant an employee access to their employee records under the Privacy Act. The employee records exemption only applies to current or former employees and, therefore, an employer must comply with the APPs in the case of job applicants, contractors, and employees of related companies.

Extra-territorial Application
The Privacy Act extends to:

- The activities of foreign companies in Australia, and
- The activities of foreign companies outside Australia, where those companies carry on business in Australia, and collect or hold personal information in Australia.

The Office of the Australian Information Commissioner (OAIC) considers the collection of personal information from an individual located in Australia to be a collection "in Australia", even if the company collecting the information is outside Australia at the time.

THE AUSTRALIAN PRIVACY PRINCIPLES

As noted above, the APPs are part of the Privacy Act. Following is an overview of some key APP requirements. The full text of the APPs is available at https://www.oaic.gov.au/privacy/australian-privacyprinciples/read-the-australian-privacy-principles/

APP 1.2 – Implementing Privacy Compliance
This principle requires an APP Entity to take reasonable steps to implement practices, procedures and systems to comply with the APPs and to deal with inquiries and complaints from individuals. The Privacy Commissioner suggests this may include material such as staff training and information bulletins, complaints procedures, privacy impact assessment procedures, procedures to identify and manage privacy risks and compliance issues, mechanisms to ensure compliance by agents and contractors, and periodic reviews.

APP 1.3/1.4 – Privacy Policy
APP Entities are required to have a clearly expressed, up to date and readily available privacy policy about their management of personal information. At a minimum, the policy must contain information as to:

- The kinds of personal information they collect and hold;
- How they collect and hold personal information;
- The purposes for which they collect, hold, use and disclosed personal information;
- How an individual may access and seek correction of personal information about the individual that the entities hold;
- How an individual may complain about a breach of the Australian Privacy Principles, or a registered APP code (if any) that binds them and how they will deal with such a complaint;

- Whether they are likely to disclose personal information to overseas recipients; if so, the countries in which such recipients are likely to be located if it is practicable to specify those countries in the policy.

APP 1.5
APP 1.5 requires an APP Entity to take reasonable steps to make its privacy policy available free of charge and in an appropriate form. It is generally accepted that publishing the policy on its website would comply with this requirement.

APP 2 – Anonymity and pseudonymity
This principle requires an APP Entity to give individuals, who deal with the entity, the option of not identifying themselves, or using a pseudonym when dealing with the APP Entity in relation to a particular manner, where lawful and practical.

APP 3 – Collection
Under **APP 3.2**, an APP Entity must not solicit or collect personal information unless the information is reasonably necessary for one or more of its functions or activities.

Under **APP 3.3,** an APP Entity may only solicit or collect sensitive information with the express or implied consent of the individual, where required by law or in other specified circumstances (e.g. some circumstances relating to legal authority, emergencies, research and legal claims).

APP 3.4 deals with the collection of sensitive information and contains a list of exceptions to the prohibition against collection of sensitive information.

APP 3.5 requires an APP Entity to collect personal information by "lawful and fair means". Accordingly, in collecting personal information, an APP Entity should:

- Comply with laws, e.g. surveillance, trespass and computer hacking laws
- Avoid intimidation, deception and unreasonably intrusive, as well as covert, collection
- Not misrepresent the purpose or effect of collection, or the consequences for the individual if their personal information is not collected.

APP **3.6** requires an APP Entity to collect personal information directly from individuals unless "unreasonable or impracticable". Considerations include whether the individual would reasonably expect the information to be

collected from a third party, and whether the time and cost of collecting directly would be excessive.

APP 4 – Unsolicited Personal Information
This principle requires an APP Entity, where it receives personal information it did not solicit, to assess in a reasonable time whether it could have been collected under APP 3. If so, an APP Entity can retain the information in which case it must comply with the remaining APPs. Otherwise, an APP Entity must destroy the information or ensure the information is de-identified as soon as reasonably practical if lawful and reasonable to do so.

APP 5 – Privacy Notices
APP 5 requires an APP Entity when collecting personal information to take reasonable steps to ensure individuals are aware of the following matters:

- An APP Entity's identity and contact details
- The fact and circumstances of collection
- Whether the collection is required or authorised by law (specifying the law)
- The purposes of collection
- The consequences if personal information is not collected
- The usual disclosures of that kind of personal information
- Certain information about the APP Entity's Privacy Policy
- Whether the APP Entity is likely to disclose personal information to overseas recipients, and if practicable, the countries where they are located.

The reasonable steps generally need to be taken at the time of, or before, collecting personal information. If that is not practicable, then as soon as practicable after.

APP 6 – Use and Disclosure
APP 6 sets out the circumstances in which the use and disclosure of personal information is permitted. However, the terms "use" and "disclosure" are not defined in the Privacy Act.

An APP Entity can use and disclose personal information for the primary purpose for which the information was collected. The primary purpose is the specific function or activity for which an APP Entity collects the personal information. The context in which personal information is collected will often help in identifying the primary purpose of collection.

An APP entity can disclose personal information for a secondary purpose if the individual would reasonably expect the entity to disclose the personal information and the purpose is related to the primary purpose (directly related if it is sensitive information). An individual's reasonable expectation that a particular use or disclosure might occur could be based on what they already know and understand about the circumstances, and/or what they are told by an APP Entity. However, awareness alone does not equate to expectation. Reasonable expectations should be assessed in light of the use and disclosure of the particular information, not in relation to all personal information held by an APP Entity.

Contractors
The sharing of personal information between principals and contractors is a common part of business. Some examples are arrangements with IT systems service providers, media agencies, call centre operations and professional service advisers.

The Privacy Act position is that where a principal discloses personal information from a contractor or collects personal information from the contractor, both the principal and the contractor must, if they are both bound by the Privacy Act, comply with the APPs separately for their own circumstances. For example where the principal gives the contractor access to the personal information of the principal's customers, the principal is disclosing the information and must comply with the APPs disclosure requirements and the contractor is collecting the information must comply with the APPs collection requirements.

APP 7 – Direct Marketing
This principle prohibits an APP Entity from using or disclosing personal information for the purpose of direct marketing unless consent or another exception applies. Where an APP Entity is permitted to use or disclose personal information for the purpose of direct marketing, it must always allow an individual to request not to receive direct marketing communication or not to have their personal information disclosed for direct marketing.

APP 8 – Cross-border disclosure
Under APP 8, if an APP Entity wishes to disclose personal information to a third party (including a related company) outside Australia, it will generally need to take reasonable steps to ensure the offshore recipient complies with the APPs contractually. Importantly, an APP Entity may be accountable under the Privacy Act for any APP breaches by the offshore recipient.

There are some exceptions, including where disclosure is required or authorised by law or related to suspected unlawful activity or serious misconduct.

APP 9 – Government Identifiers
An APP Entity must not adopt a government identifier of an individual as its own identifier of the individual unless authorised by law.

Government identifiers include tax file numbers and passport numbers.

APP 10 – Data Quality
Under APP 10, an APP Entity must take reasonable steps to ensure that the personal information it collects, uses and discloses is, accurate, up to date, complete and relevant.

An example would be if personal information is to be disclosed for a new purpose that is not the primary purpose of collection, an APP Entity should assess the quality of the personal information having regard to that new purpose before the disclosure.

APP 11 – Security
APP 11.1 requires an APP Entity to take reasonable steps to protect personal information from misuse, interference and loss and from unauthorised access, modification and disclosure. When disclosing personal information to third parties, consideration should be given to how to protect that information both in transit and in possession of the recipient.

APP 11.2 requires personal information to be destroyed or permanently de-identified where no longer needed for any permitted purpose. Where another law requires data retention, that would take precedence over APP 11.2. For example, Corporations Regulation 7.5A.270 requires that certain records of directors and other parties be kept for five years.

APP 12 – Access
Individuals must be allowed to have access to personal information about them which is held by an APP Entity. However, there are a number of exceptions to this principle. Some examples are where:

- A serious threat to the life, health or safety of any individual, or to public health or public safety is thought to exist;
- Giving access would have an unreasonable impact on the privacy of other individuals; or
- The information relates to existing or anticipated legal proceedings between the entity and the individual, and would not be accessible by the process of discovery in those proceedings; or
- Giving access would reveal the intentions of the entity in relation to negotiations with the individual in such a way as to prejudice those negotiations; or

- Giving access would reveal evaluative information generated within the in connection with a commercially sensitive decision-making process.

APP 13 – Correction
An APP Entity must take such steps as are reasonable in the circumstances to correct the personal information it holds and ensure the information is accurate, up to date, complete, relevant and not misleading. Individuals are able to request the correction of their personal information, and the communication of corrections to third parties who had received the incorrect information from an APP Entity.

Notifiable Data Breaches
The Privacy Act includes a scheme for notification of "eligible data breaches". These occur if:

- There is unauthorised access to, unauthorised disclosure of, or loss of, personal information held by an entity; and
- The access, disclosure or loss is likely to result in serious harm to any of the individuals to whom the information relates.

An APP entity must give a notification to the Commissioner and (subject to certain exceptions) affected individuals if:

- It has reasonable grounds to believe that an eligible data breach has happened; or
- It is directed to do so by the Commissioner.

"Serious harm" is to be determined having regard to all relevant matters, which the Act includes as:

- The kind or kinds of information;
- The sensitivity of the information;
- Whether the information is protected by one or more security measures;
- If the information is protected by one or more security measures, the likelihood that any of those security measures could be overcome;
- The persons, or the kinds of persons, who have obtained, or who could obtain, the information;
- The likely effects of relevant security technology or methodology and
- The nature of the harm.

Direct Marketing

Email, SMS and the Spam Act

The Spam Act regulates commercial electronic messages such as email, SMS, instant messages and some proprietary messaging systems such as Facebook messenger. An electronic message will be a "commercial" electronic message where it is sent for a commercial purpose – including marketing, offering or selling or advertising goods or services or promoting a supplier of goods or services. A message that directs a recipient to a location (such as a website) where goods or services are sold or advertised is also regarded as a commercial electronic message.

There are three key requirements of the Spam Act:

- Consent: a restriction on sending unsolicited messages.
- Unsubscribe: a requirement to include a functional unsubscribe facility.
- Identify: a requirement to include accurate sender information.

The Spam Act does not only apply to bulk electronic messages. A one-to-one message can breach the Act.

Telemarketing, fax marketing and the Do Not Call Register Act

The Do Not Call Register Act prohibits telemarketing or fax marketing to any number listed in the Do Not Call Register without consent. The Register includes home numbers, personal mobile numbers and fax numbers, but not business telephone numbers. To avoid calling an Australian number listed on the Register, an entity would need to check or "wash" its telephone lists against those numbers listed on the Register via a website known as the Telemarketer Access Portal. Fees apply for using this service.

The related Telemarketing and Research Industry Standard contains rules regarding telemarketing and market research calls generally, including prohibited calling times, information to be provided during calls, call-termination requirements and the use of calling line identification.

Other direct marketing and the Privacy Act

Where the Spam Act and the Do Not Call Register Act do not apply, or an entity's conduct is exempt under those Acts, APP 7 in the Privacy Act applies to direct marketing involving use or disclosure of personal information. This can include mail, door-to-door and some online direct marketing (where personal information is involved but there is no "electronic address" which would make it a Spam Act issue).

Within a reasonable time of an individual's request, an APP Entity must take reasonable steps to identify the source of personal information used or disclosed for direct marketing, unless unreasonable or impracticable.

An APP Entity should ensure that its systems are set up to effectively record this detail so that it can be provided on request.

When is consent required?

- To send commercial electronic messages (Spam Act).
- To call/fax a number on the Do Not Call Register (Do Not Call Register Act).
- To use or disclose sensitive information for direct marketing (APP 7, where applicable).
- To use and disclose personal information for direct marketing if the information was not collected from the individual, and it is impracticable to obtain consent (APP 7, where applicable).
- To use and disclose personal information for direct marketing if the use or disclosure would be outside the individual's reasonable expectations, and it is impracticable to obtain consent (APP 7, where applicable).

What form of consent is required?

- Express consent

  Express consent is effective under all of the direct marketing regimes.

  Note that express consent only overrides the Do Not Call Register Act for three months unless it is expressed to be for a longer period (e.g. "on an ongoing basis").

- Conspicuous publication – Spam Act

  Conspicuous publication of a work-related electronic address can amount to inferred consent where the message is directly relevant to the recipient's work role and there was no indication of non-consent.

- Relationship with recipient – Spam Act and Do Not Call Register Act

  There is inferred consent where the recipient has an existing and continuing relationship with an APP Entity as a customer, account holder, subscriber, member, licensee, registered user, employee or contractor, and would have a reasonable expectation of receiving the message.

Privacy Act Enforcement

The Privacy Commissioner investigates complaints from individuals about interferences with privacy that are contrary to the Privacy Act. The Privacy Commissioner also has the power to initiate own motion investigations about potential breaches of privacy that do not relate to a particular complainant.

Following its investigation, the Privacy Commissioner has the power to decide ordering compensation and reparatory action, among other things, which is enforceable in the Federal Court or Federal Magistrates Court.

Penalties for serious or repeated breaches of the Privacy Act, Spam Act or Do Not Call Register Act can include penalties of up to $1.7 million and enforceable undertakings.

OTHER LAWS RELEVANT TO PERSONAL INFORMATION

There is a range of Commonwealth and State laws, and industry codes, the operation of which impacts on the management of personal information. In relation to direct marketing, there is the Spam Act and the Do Not Call Register Act, summary details of which are above. A number of these other laws require compliance with a number of laws, for example both the Privacy Act as well as their provisions. Some other key areas of Australian law impacting on dealings in personal information are:

- Specific health records legislation
- Surveillance legislation. There are surveillance devices laws as well as specific workplace surveillance laws in a number of States;
- State public sector information privacy statutes regulating State public sector entities;
- Consumer Data Right (CDR) laws, and allowing consumers in certain sectors to require their service providers (such as their bank) to share their data with other accredited service providers to improve the consumers' ability to compare and switch between products and services;
- Some limited state-based human rights legislation;
- Laws limiting the uses and disclosures of residential tenancy databases; and
- Telecommunications-specific laws which regulate the personal information management practices of telecommunications carriers and service providers via a combination of industry codes, industry standards and statutory provisions.

As the chapter "Competition and Consumer Protection" of this guide mentions, importantly, there are also general fair trading/consumer protection laws, of relevance to misleading or deceptive conduct concerning the management of personal information.

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