

MINERALS EXPLORATION & MINING



MERITAS[®]
LAW FIRMS WORLDWIDE

GUIDE TO DOING BUSINESS IN AUSTRALIA





MERITAS[®]
LAW FIRMS WORLDWIDE

GUIDE TO DOING BUSINESS IN AUSTRALIA AND NEW ZEALAND

PREPARED BY MERITAS LAWYERS
IN AUSTRALIA AND NEW ZEALAND



Published by Meritas, Inc. • 800 Hennepin Avenue, Suite 600

Minneapolis, Minnesota 55403 USA

+1.612.339.8680 | +1.612.337.5783 FAX | www.meritas.org

© Copyright 2015, Meritas, Inc. All rights reserved.

Guide to Doing Business in Australia and New Zealand

This publication has been prepared to provide an overview to foreign investors and business people who have an interest in doing business in Australia and New Zealand. The material in this publication is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisors.

Meritas firms offer clients the ability to access high-quality legal services throughout Australia, New Zealand and worldwide. With nearly 7,000 business lawyers in over 200 cities, Meritas gives your company access to local counsel around the world.

Meritas firms:

- Offer high-quality, worldwide legal services through a closely integrated group of full-service law firms
- Are subject to rigorous selection criteria, ongoing service monitoring and periodic recertification reviews
- Provide global reach and access to local knowledge at market rates
- Offer coordinated service across jurisdictions
- Can be found on www.meritas.org which enables direct access to member firms through a searchable database of lawyer skills and experience plus links to contacts at each Meritas firm

There are over 170 lawyers in six firms across Australia and New Zealand providing clients 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.

The following currency notations are used in this book:

AUD Australian Dollar

NZD New Zealand Dollar

Please be aware that the information on legal, tax and other matters contained in this booklet is merely descriptive and therefore not exhaustive. As a result of changes in legislation and regulations as well as new interpretations of those currently existing, the situations as described in this publication are subject to change. Meritas cannot, and does not, guarantee the accuracy or the completeness of information given, nor the application and execution of laws as stated.

This book is intended to provide practical and useful insights into the 10 most common questions facing foreign investors and businesses:

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 labor 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?

Contributing to this book are the law firm members of the Meritas alliance in Australia and New Zealand. Each firm is comprised of local lawyers who possess extensive experience in advising international clients on conducting business in their respective countries. The firms were presented with these 10 questions and asked to provide specifics about their jurisdiction along with timely insights and advice. In a very concise manner, the book should provide readers with a solid overview of the similarities and differences, strengths and weaknesses of the states and territories of Australia and New Zealand.

*Peter Kennedy, Managing Partner
Madgwicks Lawyers
Melbourne, Victoria*

SNEDDEN HALL & GALLOP

DEAKIN - AUSTRALIAN CAPITAL TERRITORY

Tel: +61 (2) 6285 8000 | www.sneddenhall.com.au



Dennis Martin

lawyers@sneddenhall.com.au



With over 55 years' experience Snedden Hall & Gallop is Canberra's most established independent law firm, with the skills and experience necessary to provide a full range of legal services to corporate, government, associated bodies and individuals. Our lawyers are among the most experienced practitioners in the territory, with many having been in practice for several decades. For over 55 years, the firm has utilised its skills and knowledge to provide a full range of legal services to companies, small to medium businesses and individuals across the ACT and surrounding region.

Snedden Hall & Gallop is dedicated to achieving the best results for our clients. Many of Canberra's most prominent businesses choose us as their legal counsel and have done so for several years and often several decades. Our lawyers are there for our clients in the best of times and the worst of times.

Snedden Hall & Gallop offers a range of legal services to both private and corporate clients, and specialises in the areas of:

- Business Law
- Dispute Resolution
- Employment Law
- Superannuation Litigation
- Migration Services
- Wills and Estate Planning
- Property Law
- Compensation Law

Snedden Hall & Gallop is committed to providing an unparalleled quality of service. We pride ourselves on the personal attention we give to every client, including a high level of client-to-lawyer contact. Our lawyers are always available for face-to-face conferences, and we have a policy of promptly responding to phone calls and emails. Additionally, our team is in constant consultation with each other, resulting in the efficient delivery of advice that draws on the vast expertise within our firm.

SWAAB ATTORNEYS

SYDNEY - NEW SOUTH WALES

Tel: +61 (2) 9233 5544 | www.swaab.com.au



Fred Swaab

fxs@swaab.com.au



Mary Digiglio

med@swaab.com.au



Swaab Attorneys is a multi-award winning, mid-sized commercial law firm offering legal services across a number of core practice areas and industry groups. We are based in Sydney; Australia's largest city, with a population in excess of 4.3 million people.

Our firm is shaped by our Swaab Brand of Service: a set of service standards we aspire to meet in all of our dealings, both with colleagues within our business and with our clients. In August 2014, Swaab Attorneys was named a finalist in the ALPMA Thought Leadership Awards for the development of the "USB separation survival kit." Swaab has also been a finalist in the BRW Client Choice Awards for seven consecutive years and have won three times, the most recent win being Best Law Firm (rev under AUD50m) and Best NSW Firm at the 2012 BRW Client Choice Awards. But it's not just our client service that has been awarded, we have also appeared for four consecutive years on the BRW Great Place to Work list.

We have strong capabilities in most areas of commercial and corporate law. We practice in corporate structuring and commercial transactions, intellectual property, franchise law and employment, property, planning and projects, real estate transactions and all areas of commercial litigation. We also have a large private client practice servicing family law, estate planning and other "high net worth" personal services.

We have a number of international clients for whom we act as attorneys and agents to assist them with their introduction to Australia's business landscape and the development of their business in Australia.

Our clients are medium sized, fast growing businesses and publicly listed companies in various retail, property, health, and insurance and not-for-profit industries as well as property trusts, state government departments and local government agencies. By way of example our client base includes; a major commercial property trust (Investa Funds Management), a Canadian mining



group (Red Lion Management), a Chinese commercial glass manufacturer (Austech Group), a subsidiary of a US owned rail freight and logistics company (Freightliner Australia), a global online marketing and research provider (Pureprofile Inc), Australia's largest online auction house (GraysOnline), one of Australia's largest supermarket retailers and one of the world's largest private hospital providers.

BRISBANE, CAIRNS & TOWNSVILLE - QUEENSLAND

Tel: +61 (7) 4030 0600 | www.macdonnells.com.au



Russell Beer

rbeer@macdonnells.com.au



Luckbir Singh

lsingh@macdonnells.com.au



MacDonnells Law is one of Queensland's largest and longest established independent law firms with 100 personnel, including 10 partners and 40 legal staff.

MacDonnells Law is unique in that it is the only independent law firm in Queensland to have full service offices in three of Queensland's major geographical, demographic and commercial centres, namely Cairns, Townsville and Brisbane.

For more than 130 years, the firm has offered state-wide legal services to commercial, insurance, government and individual clients throughout Queensland. Our connected, state-wide network gives us the unique ability to provide personal, local support from our regional offices, respond to client needs no matter where they are in Queensland, and ability to respond promptly regardless of the nature, size, complexity or duration of a matter.

Our firm is structured into five state-wide practice groups, comprised of highly experienced legal practitioners from all areas of law, including:

- **Commercial and Corporate:** contracts, commercial advisory, corporate law, property, intellectual property and conveyancing;
- **Dispute Resolution and Litigation:** insurance, industrial relations and employment, workplace safety, commercial disputes, trade practices law, debt recovery and insolvency;
- **Government:** government advisory, planning and environmental law, development advisory, building and construction, native title and cultural heritage.
- **Personal Law:** family law, collaborative law, asset protection and wills and estates.

At state-level, the firm plays an integral part in both the legal profession and business communities with the firm's senior personnel holding influential positions in key industry advocacy groups including the Australian Institute of



Company Directors, Tax Institute of Australia, Urban Development Institute and Property Council.

The MacDonnells Law team also has a strong understanding of government processes and policy that impact commercial organisations, as we are a platinum partner to the Local Government Managers Association (LGMA), a strong supporter of the Local Government Association of Queensland (LGAQ) and provide legal services to several state government entities.



Peter Kennedy

peter.kennedy@madgwicks.com.au

MADGWICKS

Lawyers

Madgwicks is a progressive Australian business law firm servicing local, national and international clients. Our staff pride themselves on responsive

legal services driven by a passion for client success.

The firm develops close working relationships with clients, providing practical commercial advice, focusing on legal solutions to achieve our clients' goals. Our clients view us as a crucial business partner as we have an intimate knowledge of their business, industry and the specific project. We position ourselves as a key element to the success of a project, and our clients view us as such.

The relationship between client and law firm is of extreme importance. Madgwicks places great emphasis on establishing an open, trusting and strong relationship with our clients. The value the firm places on relationships is reflected in the internal culture of the firm which has many long term professional and support staff employees.

The firm's clients include private and listed corporations, financial institutions, professional firms, business and private individuals. Madgwicks has clients in a diverse range of industries, including manufacturing, retailing, business services, energy, information technology, financial services, superannuation, building and construction, property development, transport, agribusiness, marketing, tourism and hospitality.

Our lawyers are skilled in handling the needs of overseas companies wishing to invest in Australia and are familiar with the rules and procedures relating to foreign investment in Australia.

Establishing operations in Australia

Australia is a great place to do business and a safe place to operate a business. With a strong economy, Australia represents an attractive proposition for offshore companies looking to grow their global operations.

While Australia's stable Government and well established legal system make it a low risk place to invest, companies looking to start operations face a myriad of registration and compliance issues. It is essential to get the right professional advice prior to commencing operations to give your business the best chance to flourish.

Madgwicks expertise for inbound clients

The core advisor for businesses planning to start up operations in Australia is a legal firm. Madgwicks has a team of highly experienced lawyers who:

- Are experienced in establishing businesses from offshore
- Have specific industry experience and knowledge
- Are accessible and eager to establish a long term relationship with an in-bound company looking to start up operations in Australia
- Provide a comprehensive range of services covering every aspect of business start up
- Are well connected in business circles with the ability to source other specialist advisors as well as facilitate alliances, suppliers and relationships with potential clients

Our legal services for business start-ups include:

- Structuring of business
- Employment contracts and workplace relations compliance
- Tax structuring compliance
- Intellectual property
- Commercial advice

We can also assist clients in respect to migration law matters as well as finding and leasing property and identifying other key service providers such as accountants and business advisors.

Services offered to Meritas members and their clients

- Free 30 minute consultation
- Introduction to key contacts
- Use of meeting rooms
- Advice on accommodation
- Immigration and relocation assistance
- Assistance with tickets to Melbourne events

WILLIAMS + HUGHES PTY LTD.

PERTH - WESTERN AUSTRALIA

Tel: +61 (8) 9481 2040 | www.whlaw.com.au



Damian Quail

damian.quail@whlaw.com.au



Tully Carmady

tully.carmady@whlaw.com.au

WILLIAMS + HUGHES

Williams + Hughes is a Western Australian law firm specializing in commercial law and commercial litigation and dispute resolution. We have offices in Perth, the State capital city, and Geraldton, Western Australia's largest regional city.

The firm was established in 1986 as one of Perth's first boutique commercial law firms. The firm grew quickly and attracted a wide range of quality work. We now act for a wide range of clients, including small to large businesses, private companies, public listed companies, multi-national groups and high net worth individuals.

Our primary focus is on commercial work, providing services in the business and corporate law, resources, commercial litigation and dispute resolution fields. We regularly act on complex, large matters against national and international global legal firms, and these firms regularly refer work to us where they are conflicted from acting. We operate in all civil and commercial jurisdictions and are particularly active in the Federal and Supreme Courts

Apart from English, we have staff members that speak Cantonese, Mandarin, German, French, Italian and Indonesian (various levels of competency).

What makes our practice unique is the way we work to deliver a positive outcome for our clients. We are creative and precise in our thinking, pragmatic in our approach, responsive to our client's changing needs and understand the importance of achieving practical commercial solutions.

A key differentiator is that we work hard to understand our client's industries. Often we become trusted business advisers, and are involved in the early stages of developing transactions rather than being brought in later to document agreed deals.

Our philosophy, **working in your favour**, has helped our practice grow over the last 29 years into one of Western Australia's most respected commercial law firms.

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 Board within the Commonwealth Department of Treasury. One of its roles 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 is also responsible for monitoring and ensuring compliance with foreign investment policy.

Different rules apply depending on the nature of the proposed foreign investment, for example, an investment in residential real estate or commercial real estate versus in an Australian business. Whether FIRB approval is required for a proposed foreign investment may also depend on whether the proposed investment exceeds certain set monetary thresholds.

The application process for obtaining FIRB approval is fairly 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 corporate 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 may regulate the foreign investor through FIRB and other laws such as the *Corporations Act* (which regulates companies generally) and taxation laws.

4. WHAT LAWS INFLUENCE THE RELATIONSHIP BETWEEN LOCAL AGENTS OR DISTRIBUTORS AND FOREIGN COMPANIES?

Broadly speaking the relationship between an Australian agent or distributor and an overseas supplier would be a contractual one 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. There are comprehensive and complex tax laws dealing with transfer pricing of goods and services imported to or exported from Australia for the purposes of protecting the 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 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 certain sectors where foreign investment will be prohibited or restricted or otherwise restricted as being against the national interest or as being against Australia’s national security. These include residential real estate, media, telecommunications and military (albeit FIRB approval may be granted in these areas in certain circumstances).

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

6. HOW DO LABOR STATUTES REGULATE THE TREATMENT OF LOCAL EMPLOYEES AND EXPATRIATE WORKERS?

LOCAL EMPLOYEES

Australia's system is strongly regulated by state and federal legislation. Companies that are trading corporations fall within the federal system of industrial relations presently administered pursuant to the *Fair Work Act 2009*.

Most blue-collar and clerical workers have their employment terms and conditions determined by reference to the National Employment Standards, and various awards and collective agreements approved by Fair Work Australia, a third party tribunal.

Senior executives and management more commonly have their terms and conditions of employment determined by reference to common law agreements negotiated directly between the employer and the employee. The terms of such agreements must still exceed the statutory minimum standards.

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

EXPATRIATE WORKERS

The terms and conditions for expatriate workers will greatly depend upon 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, where visas are required, the employees will most commonly be required to be engaged as if they were employees fully covered by the Australian industrial relations regime and legislation referred to above. In any event, key legislation covering such issues as workplace health and safety and worker's compensation will apply to any person working in Australia.

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. As such, they are accustomed to trading in foreign exchange and dealing with letters of credit and other trade-based securities.

There are, however, some reporting requirements in relation to the movement of large sums of money and there may also be financial sanctions imposed in relation to 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 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 and other assets including shares in a company

- In some cases, payroll tax on wages and salaries (a state-based impost)
- 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 and a credit allowed to respective employees on filing their income tax return)
- In some cases, Fringe Benefits Tax on non-cash compensation paid to employees

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 Organisation and TRIPS, as well as the Berne, Paris and Rome Conventions, the Patent Co-Operation 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 regimes (e.g., *Copyright Act*, *Trade Marks Act*, *Patents Act*, *Designs Act*, *Plant Breeders Rights Act* and *Circuit Layouts Act*) and common law regimes (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) and are enforced regardless of the nationality of the parties, subject to a principal of reciprocity in respect of copyright infringement such that Australia courts will only recognise copyrights of foreign nationals to the extent that courts of that national's country recognise an Australian copyright.

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 proceedings in the Federal Court. Increasingly these courts, generally with the support of litigants and their lawyers, are requiring that pro-active case management, mediation and other alternate dispute resolution processes be implemented as early as possible to resolve disputes without the costs and delays involved in full-blown trials.

Further, in September 2010, the Federal Attorney General's Department established a Mediation Standards Board for the accreditation and regulation of Australian mediators. Accredited commercial mediators may be sourced through accrediting organisations such as LEADR and Institute of Arbitrators and Mediators Australia.

Mediation is cross-jurisdictional and therefore increasingly attractive for the resolution of international disputes.

While arbitration is also available, with well-regulated commercial arbitration procedures in most jurisdictions, the growth in alternative dispute resolution processes has meant that in general terms litigants are less attracted to arbitration than they may have been in the past. The fact that arbitration is no longer seen as a significantly less expensive alternative than traditional court-based litigation is a likely contributing factor to this.

MINERALS EXPLORATION AND MINING

Minerals exploration and mining is a very important industry in Australia. Australia has significant reserves of minerals including iron ore, coal, gas, uranium, nickel, gold and rare earths. It is ranked in the world's top five for the availability and output of the following minerals:

Commodity	Resources	World Ranking	Production	World Ranking
Iron ore	44,650 Mt	1	520 Mt	2
Uranium	1,174 kt	1	7,009 kt	3
Coal(black)	61,082 Mt	5	501 Mt	4
Gold	9,909 t	1	251 t	5
Zinc	64.1 Mt	1	1.54 Mt	2
Nickel	17.7 Mt	1	0.244 Mt	4
Copper	91.1 Mt	2	0.91 Mt	5
Bauxite	6,281 Mt	2	76.3 Mt	1

Source: Geoscience Australia, *Australia's Mineral Resource Assessment 2013*.

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 alumina, diamond and tantalum producer; number two iron ore and heavy mineral sands producer; number three LNG exporter; number four nickel producer; and number five gold producer.

These high world rankings for production are a clear indicator that Australia is a very safe destination for mining investment. Australia is consistently ranked first or second in Behre Dolbear's annual *Ranking of Countries for Mining Investment* publication, based on an assessment of the following key factors:

- The country's economic system
- The country's political system
- The degree of social issues affecting mining in the country
- Delays in receiving permits due to bureaucratic and other issues
- The degree of corruption prevalent in the country
- The stability of the country's currency
- The competitiveness of the country's tax policy

Importantly, Australian Commonwealth, 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 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 focuses on mining law in Western Australia, as Western Australia is the largest player in the Australian mining industry. The primary state 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 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* 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 1800s.

In addition, some substances are not classed as “minerals” for the purposes of the *Mining Act*. 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 council rather than the state government is usually used when seeking to mine these substances. Specialist advice is required in this regard.

The *Mining Act* also provides for agreements between the state governments and proponents of major mining projects. State agreements are contracts between the state and a developer that are ratified by passing state legislation. The 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* 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 right 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 the land 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* 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 infeasible 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* 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.

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

- Annual minimum expenditure commitments
- Environmental conditions
- Rent and royalty conditions
- Restrictions on transfer, assignment and mortgage
- Quarterly reporting obligations
- Requirement to lodge security deposits to secure compliance

If a tenement holder does not comply with those 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 resources projects in Australia. The following table summaries the key aspects of the two main forms of joint venture used. 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 <i>Corporations Act 2001</i>	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 <i>Corporations Act 2001</i> . IJVs must comply with mandatory accounting, reporting and audit requirements.	Rights are set out in the JVA. Usually one JV party is appointed Manager of the JV. Accounting, reporting and audit 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.

	Incorporated Joint Venture (IJV)	Unincorporated Joint Venture (UJV)
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 be considered prior to selecting a business structure to undertake a mining project or to acquire an interest in an existing mining project. It 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 the proposed transactions 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 farmin agreement usually includes a right to form a new joint venture or join an existing joint venture on completion of the farmin. Farmin 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 effects transfer of legal title of most 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 and Petroleum, transfer/stamp 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 tenement may need to be prepared and lodged. The value of the tenement may include both the mineral resources identified on the tenement and the value of plant and equipment affixed to the tenement. Once stamp duty has been paid the tenement transfer is registered into the name of the buyer and entered onto a public register of mining tenements.

Farmin Agreements

A farmin 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 farmin 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 farmin agreement usually includes terms by which a new joint venture arises on completion of the farmin obligations or the farmee is entitled to join an existing joint venture on completion of the farmin.

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
 - Etc
- 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 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 where the overseas entity is either government controlled or private. Specialist advice should be sought. Failure to obtain FIRB approval where it is required can result in the transactions being 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 (for example, ownership of the asset in question can be lost).

It is important to appreciate that typical joint venture agreements and shareholders 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 AUD0.62 per tonne for construction uses and AUD1 per tonne for metallurgical uses.

Higher value minerals attract *ad valorem* duty, i.e., a royalty is paid based on the value of the minerals. Royalty rates vary between minerals but the following principles apply:

- Bulk material (subject to limited 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.

An *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 defined under Regulation 85 of 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.

MINING ON PRIVATE LAND

Mining tenements can usually be obtained over private land. However the consent of the private landowner to 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 issues.

MERITAS FIRM CONTACTS

AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY

Deakin

Snedden Hall & Gallop Lawyers

43-49 Geils Court
Locked Bag 3003
Deakin ACT 2600

Dennis Martin
lawyers@sneddenhall.com.au
Tel: +61 (2) 6285 8000
www.sneddenhall.com.au

NEW SOUTH WALES

Sydney

Swaab Attorneys

Level 1, 20 Hunter Street
Sydney NSW 2000

Fred Swaab
fxs@swaab.com.au
Mary E. Digiglio
med@swaab.com.au
Tel: +61 (2) 9233 5544
www.swaab.com.au

VICTORIA

Melbourne

Madgwicks

Level 33, 140 William Street
Melbourne VIC 3000

Peter Kennedy
peter.kennedy@madgwicks.com.au
Tel: +61 (3) 9242 4744
www.madgwicks.com.au

QUEENSLAND

Brisbane / Cairns / Townsville

MacDonnells Law

Cnr Shields & Grafton Streets
PO Box 5046
Cairns QLD 4870

Russell Beer
rbeer@macdonnells.com.au
Luckbir Singh
lsingh@macdonnells.com.au
Tel: +61 (7) 4030 0600
www.macdonnells.com.au

WESTERN AUSTRALIA

Perth

Williams + Hughes Pty Ltd.

25 Richardson Street
Perth WA 6005

Damian Quail
damian.quail@whlaw.com.au
Tully Carmady
tully.carmady@whlaw.com.au
Tel: +61 (8) 9481 2040
www.whlaw.com.au

NEW ZEALAND

Martelli McKegg

Level 20, PWC Tower
188 Quay Street
Auckland 1141

Mike Worsnop
mcw@martellimckegg.co.nz
Craig A. Nelson
can@martellimckegg.co.nz
Tel: +64 (9) 379 7333
www.martellimckegg.co.nz



800 Hennepin Avenue, Suite 600
Minneapolis, Minnesota 55403 USA
+1.612.339.8680 www.meritas.org

Prepared by Meritas Law Firms

Meritas is an established network of 176 full-service law firms serving over 230 markets, all rigorously qualified, independent and collaborative. Connect with a Meritas law firm and benefit from local insight, local rates and world-class client service.

www.meritas.org enables direct access to Meritas law firms through a searchable database of lawyer skills and experience.

