COMPETITION &
CONSUMER PROTECTION

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GUIDE TO DOING BUSINESS IN AUSTRALIA

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Guide to Doing Business in Australia and New Zealand

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in Australia and New Zealand

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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.

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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.

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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. A review of the Act is currently underway with the Review Panel scheduled to report to the federal government by 31 May 2012

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 counts 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 *Federal 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.

COMPETITION AND 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). Its website is *www.accc.gov.au*. There are provisions in the CCA allowing the ACCC to authorise, in certain circumstances, proposed conduct which would otherwise, or which might otherwise, breach the competition law provisions of 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 AUD40,000. It also applies where the contract price is more than AUD40,000 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 AUD1.1 million can be imposed on corporations for any misleading and deceptive representations.

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*.

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*.

Private sector businesses that turn over more than AUD3 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. 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.

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

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 AUD68,000 per day for an individual and AUD340,000 per day for a body corporate. For repeat offences, the maximum penalty increases to AUD340,000 per day for an individual and AUD1,700,000 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.

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

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