EMPLOYMENT & INDUSTRIAL LAWS

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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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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.

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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.

EMPLOYMENT AND 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 primarily depends upon 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 in trading and financial corporations is regulated by a combination of federal and state employment and industrial laws. Other employment is regulated almost entirely by state employment and industrial laws.

LEVELS OF REGULATION

Broadly, 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.
- 12 months unpaid parental or adoption leave, with a right to request a further 12 months
- Four weeks paid annual leave
- 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 compassionate leave and two days unpaid carer's leave
- Paid jury service leave or unpaid emergency service leave
- Paid long-service leave of 8⅔ 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. Australia also has a statutory minimum wage. At 1 July 2013 it is AUD16.37 per hour or AUD622.20 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 not reduce them.

LEGISLATION

The current federal employment legislation is the *Fair Work Act* (*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 relevant to particular industries)
- An enterprise-level bargaining system with an emphasis on collective agreements with industrial organisations (i.e., unions), rather than directly with an employer's employees
- A new 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
- Provisions enabling unions to readily access workplaces (including workplaces where the union has no members)

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

Non-corporate employers will also be subject to state minimum conditions and industrial relations laws.

OCCUPATIONAL HEALTH AND SAFETY – NEW FEDERAL MODEL LAW

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 1 January 2014 the Commonwealth, New South Wales, Queensland, the Australian Capital Territory and the Northern Territory have enacted the provisions of the Model Act. Victoria, Western Australia and South Australia have yet to do so.

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.

An employment contract cannot exclude award provisions, but it can confer additional (non-award) benefits on an employee. Awards don't usually apply to management positions.

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

COLLECTIVE AGREEMENTS

The *FW Act* provides for an employer and its employees to make enterprise or collective agreements either directly, or indirectly by involving industrial organisations. 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 collective bargaining with employees and with industrial organisations. However, the collective 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 organisation 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 9.25% of the employee's earnings.

The federal government has indicated its intention (as of January 2012) to gradually increase these compulsory contributions from 9.25% to 12% between the 2013-14 and 2019-20 years.

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

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