

# LegalTalk

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PRICEWATERHOUSECOOPERS LEGAL



The International Tax Review Asia Awards 2006 recognised PricewaterhouseCoopers in the following categories:

Leading Tax Firm of the Year in:

- Australia
- Asia
- China
- Singapore

Leading Transfer Pricing Firm of the Year in:

- Australia
- Asia
- China
- India
- New Zealand
- South Korea

## Multinational business – managing privacy obligations relating to employee information

As businesses expand across country borders and human resource (HR) and payroll functions are globalised, employee information is increasingly transmitted and stored overseas, and privacy obligations relating to employee information become more complex.

### Multinational businesses

Within multinational businesses, employee information is likely to be held at numerous locations (eg national office, HR location, payroll office and head office), and may be transmitted or available in electronic form to various persons within the business (including its related entities). Employees may be unaware that their information has been transmitted outside of their local office or home country, or that such information is available to or held by entities related to their employer.

### Relevant privacy obligations

Multinational employers need to ensure that they comply with privacy laws and their own internal privacy policies which relate to employee information obtained from each location where employees work. While privacy laws differ from country to country, often they are based on the same principles, as outlined below.

In some countries, the cross-border sharing of employee information may be considered a breach

of privacy and of local law. Transmission of employee information may be allowed where consent has been obtained from the employee, or permission has been obtained from the relevant privacy authority. Some countries require the country receiving employee information to have equivalent privacy laws to the country of origin, or if not, for the employer to have privacy protocols in place that reflect the country of origin's privacy laws.

### Australia's privacy law

The *Privacy Act 1998* (the Act) is the primary legislation in Australia relating to privacy, although privacy legislation also exists at state level. The Act specifically excludes coverage for employee records, although it may be amended in future to remove this exception. While (subject to relevant state law) this exemption leaves flexibility for employee information to be used and transmitted across country borders within an employer, experience suggests that many Australian employees will expect to have

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their personal information protected from unnecessary dissemination or disclosure (including transmission overseas). It is recommended to obtain consent from employees to the transmission and storage of their personal information, and to have reasonable safeguards to prevent unnecessary disclosure.

## Moving to a global privacy policy

Having a global privacy policy relating to employee information can ensure greater consistency in treatment of employee information across countries. While privacy laws differ (and some countries do not have privacy laws), a global policy will ensure that ‘best practice’ is adopted.

Employers should consider the following privacy principles when dealing with employees’ personal information as a matter of best practice:

- collection – employee information should be obtained by lawful and fair means and, where appropriate, with the employee’s knowledge or consent
- relevance – employee information gathered should be relevant to the purpose for which it will be used



- accuracy – employee information should be kept accurate, complete and up to date
- purpose – employees should be told the purpose for which information about them is gathered
- use and disclosure – employee information should only be disclosed or made available for the purpose for which it was gathered, except with the consent of the employee or relevant authority
- protection – information should be protected by reasonable safeguards against risk of unauthorised access,

disclosure, loss, destruction or modification, and

- access and correction – employees should be given reasonable access to information held about them and be able to request corrections.

A global privacy policy may need separate sections dealing with country or state-specific obligations to meet any requirements of local laws.

## Ensuring compliance – privacy audit

A global privacy audit is a helpful means of measuring compliance with local law and company policies.

An audit may identify actions that can be taken to reduce the risk of privacy breaches and prosecution.

Risk areas for multinational employers include:

- unnecessary duplication of employee information across multiple sites, resulting in increased costs and inaccurate or incomplete records
- unauthorised disclosure of employee information across country borders, and
- insufficient safeguards to protect employee information from unauthorised disclosure and use, particularly where the information is in electronic form.

## Employee consent

It is helpful to have the consent of each employee to the use and disclosure of their personal information within an employer and its related entities. Subject to local law, this may be incorporated into the employee’s employment agreement or may be signed as a separate document.



## International assignments to Australia – Australian superannuation obligations and avoiding ‘double pension’ payments

Most international assignments to Australia will trigger an obligation to make employer contributions to an Australian superannuation scheme. This can be problematic for offshore employers, as they may already make home country pension contributions on behalf of their assignees (resulting in ‘double pension’ payments), or they may not have factored in this cost when setting assignment remuneration.

Employers of assignees to Australia should have considered their Australian superannuation obligations before setting assignment terms, and have determined whether an exemption is available in respect of each assignee, to remove the requirement to make Australian superannuation contributions.

### The requirement to make Australian superannuation contributions

The *Superannuation Guarantee (Administration) Act 1992* (SGA Act) was enacted to ensure that

most Australian employees receive superannuation contributions from their employer. The prescribed level of contribution is currently 9%, and employers who fail to make contributions may be required to pay a penalty, by way of a Superannuation Guarantee Charge (SGC), to the Australian Tax Office (ATO).

The obligation to make superannuation contributions or pay an SGC applies to all employers of employees working in Australia, including temporary assignees. Upon permanent departure from Australia, assignees may be able to withdraw their Australian superannuation by way of a cash payment (less a 30% withholding tax), which is known as the Departing Australia Superannuation Payment (DASP). Some assignees, including Australian and New Zealand citizens, will not be entitled to the DASP.

### Exemptions for temporary assignees

Employers of temporary assignees to Australia, particularly those with

ongoing home country pension obligations, should consider whether each assignee’s circumstances qualify them for an exemption from having to make Australian superannuation contributions. The following exemptions may be available.

#### Senior executives

Employers of ‘senior foreign executives’ working in Australia on a temporary basis and holding either a subclass 456 or 457 visa (or equivalent Electronic Travel Authority) are exempted from the requirement to make Australian superannuation contributions. Advice should be sought on whether a particular assignee will come within the definition of ‘senior foreign executive’. Factors which are considered in determining whether the person fits the definition include:

- seniority of role (eg a national or deputy managing executive may qualify)
- level of responsibility, and
- qualifications held appropriate to the position.



the Netherlands, Portugal and the United States. New agreements have been signed with Germany, Japan, Korea and Switzerland, but are yet to come into force.

### Options to avoid double pension payments where Australian superannuation contributions are required

If neither of the exemptions outlined above apply, it may be possible (subject to the terms of employment and the assignment, and the rules of the home country pension scheme) to avoid making double pension payments by suspending or reducing contributions to the home country pension scheme during the term of the assignment to reflect contributions made to the Australian superannuation scheme. If those options are unavailable (eg prevented by the scheme rules), it may be possible to make both payments and recover the DASP by agreement with each assignee. Legal advice should be obtained about any arrangement to recover the DASP, as there is a risk that such an arrangement may be viewed by the ATO as an attempt to avoid payment of the SGC (which is prohibited) and expose the employer to liability for payment of a penalty.

#### International agreements on superannuation contributions

Australia has bilateral agreements with a number of countries to prevent employers of overseas assignees being forced to make mandatory superannuation/pension contributions both in the home country and in Australia. Where such an agreement exists, a Certificate of Coverage may be obtained from the relevant authority in the assignee's home country, which removes the employer's obligation to make Australian superannuation contributions. Eligibility for a Certificate of Coverage will depend on each assignee's circumstances, and should be considered on an individual basis.

Australia has implemented bilateral agreements on double superannuation with Belgium, Chile, Croatia, Ireland,

## Conclusion

Employers of assignees to Australia should ensure that they understand their superannuation obligations and determine how they will deal with these, before each assignment commences. Each employer's approach should be consistent with, and reflected in:

- the assignment agreement
- the employment agreement (as varied by the assignment terms), and
- relevant assignment policies.

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