



Background screening is becoming increasingly commonplace throughout Australia. However, there are diverse legal and cultural considerations that companies should be aware of before implementing a background screening program in this particular country. This whitepaper will highlight the legal landscape and outline checks available.

## **Legal Landscape**

Employers need to understand the different laws that may impact background screening. In particular, data privacy laws and legislation focused on criminal records (particularly when convictions become “spent”) serve as a great starting place.

Australia is composed of six states: New South Wales, South Australia, Tasmania, Queensland, Victoria and Western Australia, which each have its own constitution. The states are allowed to enact legislation regarding any matters not controlled by the Federal Commonwealth.

In addition to the states, there are ten territories. Two of the mainland territories – the Australian Capital Territory and the Northern Territory – and one of the offshore territories – Norfolk Island – have the capacity to self-govern to a limited extent. Indeed, due to their size, the Australian Capital Territory and the Northern Territory are treated more similarly to states. The other territories: Ashmore and Cartier Islands, Australian Antarctic Territory, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands, Jervis Bay Territory and Territory of Heard Island and McDonald Islands are controlled by Federal Commonwealth law. In the event that any laws conflict, the Federal Commonwealth law will control.

Capital	Sydney
Currency	Australian dollar
Population	24,261,100
Area	7,692,024 km <sup>2</sup>
Language	English
Time Zone	UTC +8 to +10.5
Calling Code	+61

## **Data Privacy**

The Commonwealth Privacy Act 1988 used to cover federal agencies and private organizations in Australia and the Australian Capital Territory. However, in 2012 expansive reforms were passed via the Privacy Amendment (Enhancing Privacy Protection) Act 2012. These reforms have been in effect since March 12, 2014.

One of the most significant changes with the Amendment came in the form of the Australian Privacy Principles. These principles replaced the previous framework which was divided into two sets – the Information Privacy Principles (which applied to federal government agencies) and the National Privacy Principles (which applied to private companies). The 13 Australian Privacy Principles (APPs) are:

1. Open and transparent management of personal information
2. Anonymity and pseudonymity



3. Collection of solicited personal information
4. Dealing with unsolicited personal information
5. Notification of the collection of personal information
6. Use or disclosure of personal information
7. Direct marketing
8. Cross-border disclosure of personal information
9. Adoption, use or disclosure of government related identifiers
10. Quality of personal information
11. Security of personal information
12. Access to personal information
13. Correction of personal information

As outlined in APP 1, covered entities must have a Privacy Policy that addresses information such as: the kind of personal information the entity collects and holds, how and why the entity collects and holds personal information, how an individual may access personal information or complain about a breach of the APPs and whether the entity may disclose personal information overseas.

APP 3 addresses collection of personal information, and notes that sensitive information should not be collected without consent from the data subject (unless an exception applies). Additionally, the entity should ensure the information is “reasonably necessary” for the entity’s functions or activities. Sensitive personal data includes many items such as racial or ethnic origin, membership of a trade union, health information about an individual and criminal records. Entities should also obtain consent from the data subject for collection and processing of personal information.

APP 8 is important as it addresses cross-border disclosures of personal information. As outlined in APP 8, before an entity may disclose information to another organization that is not in Australia or a territory and is not the organization itself or the data subject, the entity must take reasonable steps to ensure the receiving organization does not breach the APPs (except APP 1) in relation to the information. This provision does not apply if the entity reasonably believes that the recipient of the information is subject to a law or binding scheme that protects the information in a substantially similar way to the APPs and there are mechanisms available to the individual to enforce the protection of the particular law or scheme. Alternative, this provision will not apply if the entity expressly informs the individual that if he/she consents to the disclosure subclause 8.1 will not apply and the individual then consents to the disclosure. There are additional exemptions but those are unlikely to apply to the background screening context.

The Office of the Australian Information Commissioner (OAIC) is currently tasked with receiving complaints and enforcing the data privacy law. In 2014 a bill was proposed that would disband the OAIC, but the OAIC remains intact and funded.

Except for Western Australia, South Australia and the smaller territories, each state and territory have their own data protection legislation that primarily applies to government agencies.



## **Australian Human Rights Commission Act 1986**

The Australian Human Rights Commission Act 1986 (formerly referred to as the Human Rights and Equal Opportunity Commission Act 1986) established the Australian Human Rights Commission (AHRC). The AHRC has defined indirect discrimination to include situations where a neutral condition that applies to everyone has a disproportionate impact on individuals with a particular attribute such as a criminal record. The term criminal record is not defined under the Act but the AHRC notes that it has been interpreted broadly to include the information on the police record and the circumstances behind the conviction. According to the Act, employers in all states and territories are covered including temporary, full-time and part-time employment relationships. Based on this Act, employers should review criminal records on an individualized basis to analyze whether the record means the individual would be unable to perform the inherent requirements of the particular position being filled. The AHRC has noted it will likely not conduct investigations into alleged discrimination if an employer denies employment to an individual with a criminal record based on a legal requirement.

Employers should also exercise caution in questions asked on job applications and interviews as it pertains to criminal records. According to the AHRC's publication, "On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record" employers should avoid inquiring into spent convictions (unless an exemption applies) and should tailor any questions to those criminal convictions or offenses that are relevant to the inherent requirements of the position.

Other important laws include (but are not limited to): Criminal Records Act (New South Wales), Spent Convictions Act (South Australia), Annulled Convictions Act 2003 (Tasmania), Spent Convictions Act 1988 (Western Australia), Spent Convictions Act 2000 (Australian Capital Territory), Criminal Law (Rehabilitation of Offenders) Act 1986 (Queensland), Fair Work Act 2009 (Commonwealth) and Disability Discrimination Act 1992 (Commonwealth).

## **Background Screening – Available Checks**

**Banned & Disqualified Directors**

**Bankruptcy Records**

**Civil Records**

**Credit Check**

**Criminal (National Police Check)**

**Criminal (National Database)**

**Directorship**

**Education**

**Employment**

**Global Search**

**Motor Vehicle Records**



## Passport Check

### Professional License Verification

### References

In general, the most commonly conducted checks in Australia include reviewing an individual's past education and employment history, checking professional references and conducting a criminal records check. Other checks, such as reviewing an individual's credit history and motor vehicle records, are available; however, they tend to be used only when directly relevant to the position being filled and may not be suitable for every position in every industry. Additionally, there are numerous background check requirements for regulated financial positions that should be taken into consideration as necessary.

### Education

In Australia it is common to verify only the highest degree obtained by a candidate. Educational institutions will be contacted to verify dates of attendance, graduation date and degree information.

### Employment

It is common to verify the last seven years of employment for candidates in Australia. Employers will be contacted to verify the individual's title, dates of employment and if the candidate is eligible for rehire.

### Criminal

There are two types of criminal checks available in Australia: the Police Certificate (recommended) and Nationwide Database search.

### ***National Police Check***

The Australian Federal Police (AFP) provides the National Police Certificate which contains items such as unspent convictions (unless an exclusion applies – see below) and other criminal history information held by police services. This certificate is considered to be the most reliable source of criminal information which is why it is highly recommended. The National Police Certificate provided by the AFP is available for overseas employment, residents of the Australian Capital Territory, Jervis Bay Territory and other external Commonwealth territories, or individuals requiring a check under Commonwealth legislation, such as the Australian Securities and Investments Commission.

For individuals who do not meet those requirements, the particular state or territory police service should be contacted. For example, in Western Australia there is a National Police Certificate available that will list an individual's disclosable court outcomes and pending charges sourced from the databases of all Australian police jurisdictions. The form for the NPC in Western Australia may



be completed by the applicant online, and results are returned rather quickly if no further investigation is needed.

### ***Nationwide Database Search***

The Nationwide Database Search is a proprietary database product that consists of publicly available case law, and state, territory and criminal court information. This should not be considered an official criminal search akin to the National Police Check, but can provide insight into an individual's background if a faster search is desired.

As noted in the discussion regarding the Australian Human Rights Commission Act 1986, employers should ensure that an individual with a criminal record would be unable to perform the inherent requirements of the particular position being filled before taking an adverse employment action.

Additionally, several laws exist on the state and territory level that address spent criminal records. Generally when a conviction becomes spent an employer will not have access to the information and the employer should not inquire as to whether an individual has a spent conviction. However, there are instances where employers may have reason to receive spent convictions under a partial or complete exclusion. These instances include positions that involve supervising children/minors, caring for disabled individuals or working within law enforcement. Whether a particular conviction may become spent will vary by jurisdiction as will the length of time as to when a conviction may become spent.

### **Motor Vehicle Records**

The motor vehicle records search is performed on a jurisdiction-specific level, and search results may vary. Some states offer a full driving history while others may return more limited information. Currently the MVR search is not available in New South Wales.

### **Miscellaneous**

Other searches in Australia include: Banned & Disqualified Directors (registry maintained by the Australian Securities and Investment Commission), Bankruptcy Records, Credit Check, Civil Records, Directorship Search, Passport Check, Global Search (sanctions and watch lists), Professional License Verification and Professional References.

### **Drug Testing**

Drug testing is not commonly performed outside of the United States. While drug testing is not prohibited under Federal Commonwealth law, employees cannot be compelled to submit to a test. However, employers may still be able to decline an employment offer in that scenario. Employers that rely on drug test results should proceed with caution taking into account any applicable unfair dismissal and discrimination laws. Australian courts have found that a drug or alcohol addiction may be considered a disability which would then require an employer to prove that the individual's incapacity prevents him/her from meeting the inherent requirements of the position. Other



important considerations include the employer's drug testing policy, how it is applied to all employees and how it was communicated to staff. Given the potential privacy and discrimination implications, clients should consult with qualified legal counsel before implementing a drug testing program.

*It is important to note that the following is offered as general educational information and is not intended to constitute legal advice. Given the intricacies of the pertinent laws and regulations, consultation with qualified legal counsel is recommended.*