

“The Modern Legalities of e-Commerce”

Presented by:

Tom Meagher

Director – Balfour Meagher

Legal & Business Advisors



Tom Meagher | Director

Tom has over 25 years' legal and business experience including:

- Being an owner and director of his former firm, Murfett Legal;
- Previously working for local law and major national firms;
- Being the national operations manager for a financial advisory IT platform provider;
- Previously being the WA Legal Technology Group Manager for a National Law Firm
- Owning and managing an IT consultancy business; and
- Being a director and in-house counsel for a public company.



He is also a regular publisher of articles and is one of Australia's leading presenters of legal seminars to and for various professional bodies, associations and government authorities on a wide range of business law and professional development-training topics including:

WA Department of Commerce • Chartered Accountants Australia and New Zealand • Law Society of WA • Innovation Centre of WA • LegalWise CLE • The Tax Institute • Institute of Public Accountants • Governance Institute of Australia • National Electrical & Communications Association (WA) • Australian Hotels Association (WA) • Small Business Development Corporation • Australian Institute of Conveyancers (WA) • CPA Australia • Mortgage & Finance Association of Australia • City Insolvency Discussion Group • Forum for Directors of Indigenous Organisations (FDIO) • Stirling Business Centre • Institute of Certified Bookkeepers • Western Suburbs Business Association • Business Foundations Inc. • WA Business Assist • WA Reckon Partners • WA Indian Docs Inc.



Disclaimer

- *This seminar is not legal advice and must not be relied on as such.*
- *The information presented in this seminar is intended only as a guide, as to the topic and the matters discussed.*
- *If you have a matter which relates to this seminar or you require legal advice, careful review and analysis of your matter's particular facts, information, documents and law are required before proper legal advice can be given or applied to your matter.*



Overview

1. What is eCommerce?
2. Checklist for Business-to-Consumer E-Commerce in Australia
3. “The Cloud!”
4. What is “Blockchain Technology”
5. *The Electronic Transactions Act*
6. *The Privacy Act*
7. Australian Privacy Principles and “the Notifiable Data Breaches scheme”.
8. Internationals Sales of Goods
9. What are INCOTERMS?





What is eCommerce?

Source: Attorney- General's Department

A term referring to a wide variety of Internet-based or delivered business models.

Typically, an e-commerce strategy incorporates various elements of the marketing mix to drive 'users' (whether businesses – B2B or consumers - B2C) through an “App” and/or to a Web site for the purpose of purchasing a product or service.

Includes:

- Online business to business transactions.
- Online business to consumer transactions.
- Digital delivery of products and services.
- Online banking & merchandising.
- Automated telephone transactions e.g. phone banking.
- EFTPOS and other automated transfer systems.



Checklist for Business-to-Consumer E-Commerce in Australia

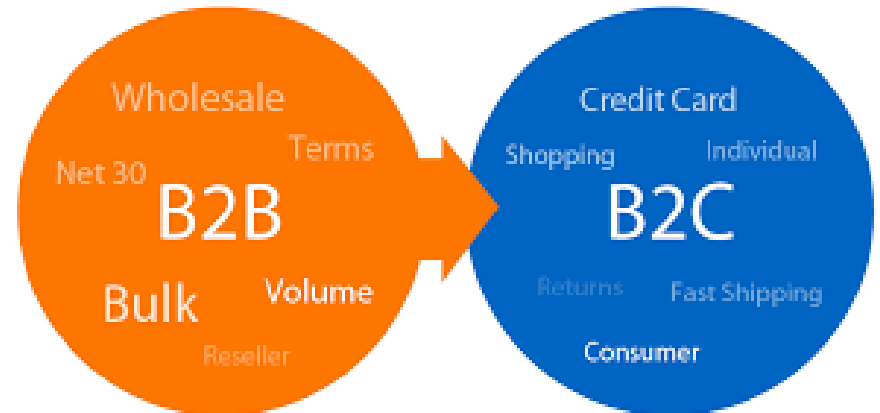
When engaging in business-to-consumer (B2C) e-commerce, make sure you consider the following issues:

- Does your business follow 'fair business practices'?
- Do consumers need specialised software or hardware to trade with you?
- Have you taken reasonable steps to ensure the goods and services you supply are accessible to people with a disability?
- Is all advertising material clearly identifiable, so it cannot be confused with other content?
- Are procedures in place to ensure that any marketing messages you send do not constitute spam?
- Have you taken reasonable steps to avoid entering into transactions with minors?

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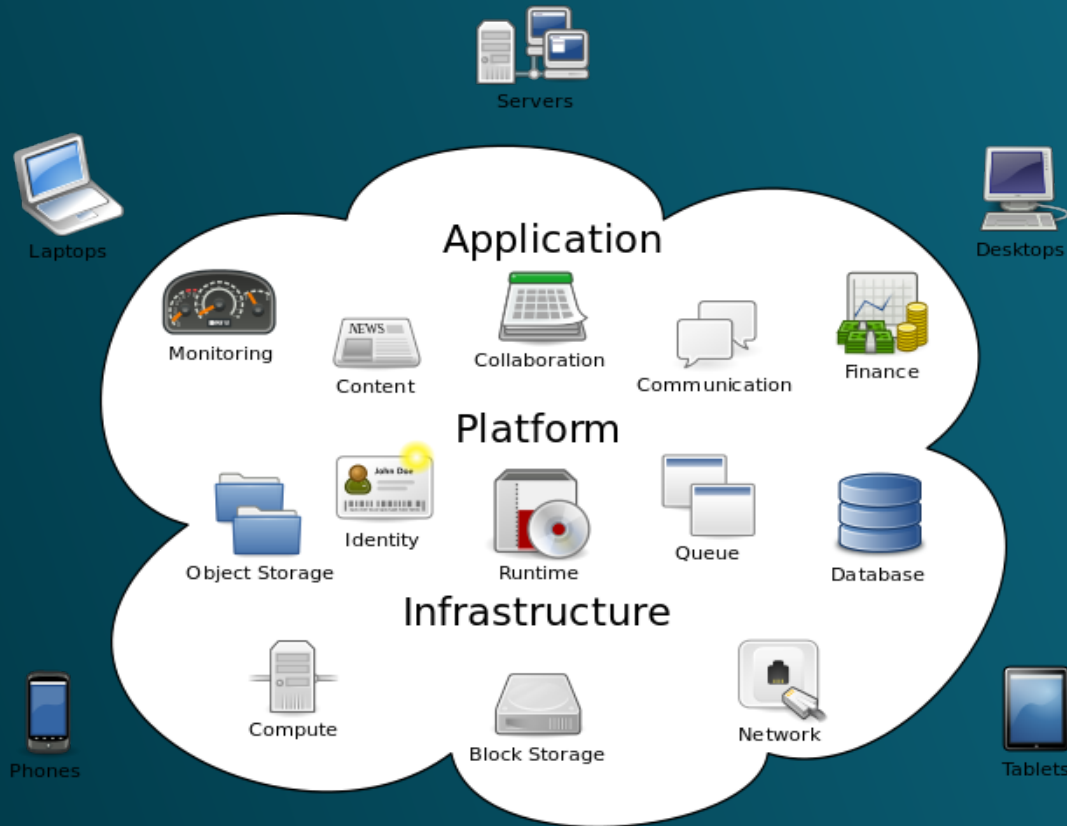


Checklist for Business-to-Consumer E-Commerce in Australia (cont'd)



- Can consumers easily find all key information about your business, including contact details?
- Are contract terms for purchases clear, accurate and easily accessible by consumers?
- Have you taken appropriate steps to protect consumers' privacy?
- Have you provided consumers with payment mechanisms that are easy to use and offer appropriate security?
- Have you clearly explained to consumers the security and authentication methods you use so they can assess any risks?
- Do consumers have easy access to, and clear information about, dispute resolution procedures?
- Are consumers informed about any specific laws or jurisdiction applicable to transactions with your business.

What is the “Cloud”?



Cloud Computing



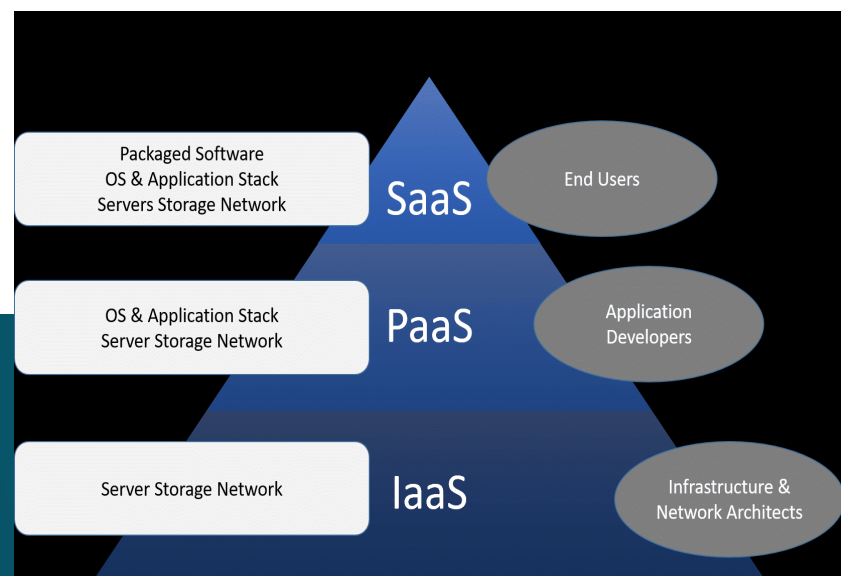


What is the “Cloud”? (cont’d)

- Cloud computing is the delivery of on-demand computing services -- from applications to storage and processing power -- typically over the internet and on a pay-as-you-go basis.
- Rather than owning their own computing infrastructure or data centres, companies can rent access to anything from applications to storage from a cloud service provider.
- One benefit of using cloud computing services is that firms can avoid the upfront cost and complexity of owning and maintaining their own IT infrastructure, and instead simply pay for what they use, when they use it.
- In turn, providers of cloud computing services can benefit from significant economies of scale by delivering the same services to a wide range of customers.

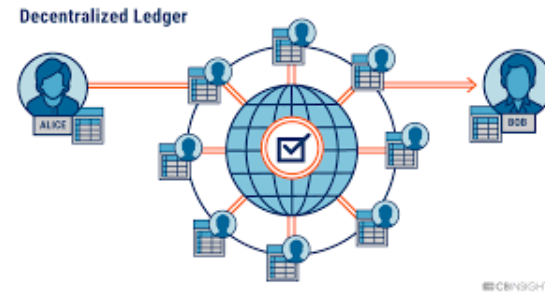
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What is the “Cloud”? (cont’d)



Cloud computing is becoming the default option for many apps: software vendors are increasingly offering their applications as services over the internet rather than standalone products as they try to switch to a subscription model.

- **Infrastructure-as-a-Service (IaaS)** refers to the fundamental building blocks of computing that can be rented: physical or virtual servers, storage and networking.
- **Platform-as-a-Service (PaaS)** is the next layer up -- as well as the underlying storage, networking, and virtual servers this will also include the tools and software that developers need to build applications on top of: that could include middleware, database management, operating systems, and development tools.
- **Software-as-a-Service (SaaS)** is the delivery of applications-as-a-service, probably the version of cloud computing that most people are used to. The underlying hardware and operating system is irrelevant to the end user, who will access the service via a web browser or app; it is often bought on a per-seat or per-user basis.



What is “Blockchain” technology?

- A blockchain is a continuously growing list of records, called blocks, which are linked and secured using cryptography.
- Each block typically contains a cryptographic hash of the previous block, a timestamp and transaction data.
- By design, a blockchain is inherently resistant to modification of the data. It is "an open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way".
- For use as a distributed ledger, a blockchain is typically managed by a peer-to-peer network collectively adhering to a protocol for validating new blocks. Once recorded, the data in any given block cannot be altered retroactively without the alteration of all subsequent blocks, which requires collusion of the network majority.
- Blockchains are secure by design and exemplify a distributed computing system with high ‘Byzantine fault tolerance’. ‘Decentralized consensus’ has therefore been achieved with a blockchain.
- In addition to the ‘Bitcoin experiment’, this makes blockchains potentially suitable for the recording of events, medical records, and other records management activities, such as identity management, transaction processing, documenting provenance, food traceability or voting. **However** cf [Hashgraph!!](#)



(Web)Site-Based ‘Goodwill’

What are the differences between *Trademarks, Business Names, Company Names* and *Domain Names*?

- Common misconception that the registration of a website domain name (via the [Australian Domain Name Authority \(auDA\)](#)), or business or company name (with [ASIC](#)), gives the registrant some form of ‘ownership’ or exclusive rights to the use of that name in Australia (or worldwide).
- ***Only if the name is registered as a trade mark does it confer such rights.*** Having a registered trade mark (via [IP Australia](#)) can provide legal protection for a business, its website, brand(s) and goodwill .
- It also gives the registered owner statutory rights to prevent another person/entity from using the same or similar trade mark. A registered trade mark can also be a valuable marketing tool, as well as quite often an appreciating IP asset on a business’ balance sheet.
- Registering a website domain and/or business name that infringes (inadvertently or otherwise) an existing trade mark can be a costly exercise. It could mean serious and expensive legal action & costs and possibly the offending party being legally-ordered to cease using your domain/business name (amongst other matters).
- Watch-out for “cyber-squatting” too!



The Electronic Transactions Act

Source: Attorney- General's Department

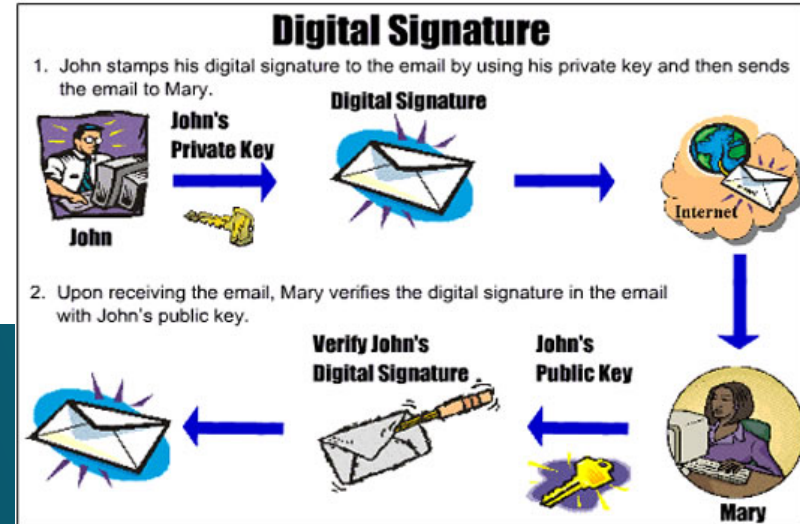
- The *Electronic Transactions Act 1999 (Cth)* ensures that a transaction under a Commonwealth law will not be invalid simply because it was conducted through electronic communication (i.e. email, text message, digitally-signed PDFs etc).
- If a Commonwealth law requires you to:
 - *give information in writing*
 - *provide a handwritten signature*
 - *produce a document in material form*
 - *record or retain information*



the Electronic Transactions Act means you can do these things electronically.

The Electronic Transactions Act (cont'd)

Source: Attorney- General's Department



- The Act applies to all laws of the Commonwealth unless they are specifically exempted by the *Electronic Transactions Regulations 2000*.
- If a law is exempt you may still have to use paper forms or retain paper-based information. Most exemptions can be found in Schedule 1 of the Regulations
http://www.austlii.edu.au/au/legis/cth/consol_reg/etr2000365/sch1.html
- Australia is currently considering acceding to the United Nations Convention on the Use of Electronic Communications in International Contracts.

The Privacy Act

- *The Privacy Act 1988 (Cth)* regulates the handling of personal information about individuals. This includes the collection, use, storage and disclosure of personal information, and access to and correction of that information.
- The Privacy Act also:
 - ✓ Regulates the collection, storage, use disclosure, security and disposal of individuals' tax file number.
 - ✓ permits the handling of health information for health and medical research purposes in certain circumstances, where researchers are unable to seek individuals' consent.
 - ✓ allows the Information Commissioner to approve and register enforceable APP codes that have been developed by an APP code developer, or developed by the Information Commissioner directly.
 - ✓ permits a small business operator, who would otherwise not be subject to the Australian Privacy Principles (APPs) and any relevant privacy code, to opt-in to being covered by the APPs and any relevant APP code.
 - ✓ allows for privacy regulations to be made.



Responsibilities under The Privacy Act (cont'd)

- Australian and Norfolk Island Government agencies and all businesses and not-for-profit organisations with an annual turnover greater than \$3 million have responsibilities under the Privacy Act subject to some exceptions.
- As well some small business operators (organisations with a turnover of \$3 million or less) are covered by the Privacy Act including:
 - ✓ private sector health service providers, including child care centres, private schools and private tertiary educational institutions
 - ✓ businesses that sell or purchase personal information.
 - ✓ credit reporting bodies.
 - ✓ contracted service providers for a Commonwealth contract.
 - ✓ employee associations registered or recognised under the Fair Work (Registered Organisations) Act 2009.
 - ✓ businesses that have opted-in to the Privacy Act.
 - ✓ businesses prescribed by the Regulations.

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Responsibilities under The Privacy Act (cont'd)

- Others
 - activities of reporting entities or authorised agents relating to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and its Regulations and Rules.
 - acts and practices to do with the operation of a residential tenancy database.
 - activities related to the conduct of a protection action ballot.
- Specified persons
 - credit reporting information — including credit reporting bodies, credit providers (which includes energy and water utilities and telecommunication providers) and certain other third parties.
 - tax file numbers under the Tax File Number Guidelines.
 - personal information contained on the Personal Property Securities Register.
 - old conviction information under the Commonwealth Spent Convictions Scheme.
 - ehealth record information under the *Personally Controlled Electronic Health Records Act 2012* and Individual Healthcare Identifiers under the *Healthcare Identifiers Act 2010*.



Notifiable Data Breaches under The Privacy Act

- The passage of the *Privacy Amendment (Notifiable Data Breaches) Act 2017* established the Notifiable Data Breaches (NDB) scheme in Australia. The NDB scheme applies to all agencies and organisations with existing personal information security obligations under the Australian Privacy Act from **22 February 2018**.
- The NDB scheme introduced an obligation to notify individuals whose personal information is involved in a data breach that is likely to result in serious harm. This notification must include recommendations about the steps individuals should take in response to the breach. The Australian Information Commissioner (Commissioner) must also be notified of eligible data breaches.
- Agencies and organisations can lodge their statement about an eligible data breach to the Commissioner through the Notifiable Data Breach statement.
- Agencies and organisations must be prepared to conduct a quick assessment of a suspected data breach to determine whether it is likely to result in serious harm, and as a result require notification.
- The NDB scheme applies to agencies and organisations that the Privacy Act requires to take steps to secure certain categories of personal information. This includes Australian Government agencies, businesses and not-for-profit organisations with an annual turnover of \$3 million or more, credit reporting bodies, health service providers, and TFN recipients, among others.



International Sales of Goods

What happens if you sell goods internationally?

- Consider : Incoterms[®] and [The United Nations Convention on Contracts for the International Sale of Goods \(“CISG”\)](#).
- The CISG (or the ‘Vienna Convention’) is a treaty that is a uniform international sales law.
- It has been ratified by 89 countries that account for a significant proportion of world trade, making it one of the most successful international uniform laws!
- Depending on the country, the CISG can represent a small or significant departure from local legislation relating to the sale of goods, and in this can provide important benefits to businesses from one contracting country that import goods into other country that have ratified the CISG.



What are INCOTERMS?

- Incoterms 2010 stands for ‘International commercial terms’ and are International rules for the interpretation of trade terms. Incoterms make international trade easier and help traders in different countries to understand one another.
- Incoterms’ definitions that are most commonly used in international contracts are protected by the [International Chamber of Commerce’s](#) copyright.
- To assist traders to understand the areas that the 11 Incoterms cover and how each one works, the official ICC website now publishes the “preambles” to each term in read-only format, together with basic information and background.
 - The preambles do not spell out the obligations of buyer and seller, which are essential for correct use of Incoterms. This information may be obtained by consulting the full published texts of the 11 Incoterms, available online from ICC Publishing.

What are INCOTERMS? (cont'd)

Ex Works (EXW) – The seller makes the goods available at its location, so the buyer can take over all the transportation costs and also bears the risks of bringing the goods to their final destination.

Free Carrier (FCA) – The seller hands over the goods into the disposal of the first carrier. After the buyer takes over all the costs, the risk passes when the goods are handed over to the first carrier.

Free Alongside Ship (FAS) – The seller must place the goods alongside the ship at the named port, the risk of loss or damage to the goods passes when the goods are alongside the ship, and the buyer bears all the costs from that moment on.

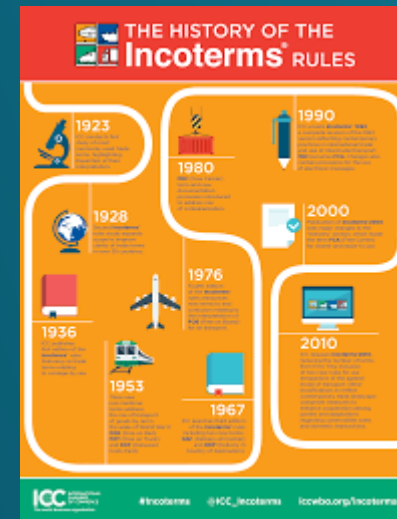
Free on Board (FOB) –The seller must load the goods on board of the ship, nominated by the buyer. Cost and risk are divided when the goods are actually on board.

Cost and Freight (CFR) –Seller must pay the costs and freight to bring the goods to the port of destination. Although the risk is transferred to the buyer when the goods are loaded on the ship.

Cost, Insurance and Freight (CIF) –It's exactly like CFR except that the seller must in addition procure and pay for the insurance.

Carrier and Insurance Paid to (CIP) –The seller pays for the carriage and insurance to the named destination point, but risk passes when the goods are handed over to the first carrier.

Delivered Duty Paid (DDP) –The seller is responsible for delivering the goods to the named place in the country of the buyer, and pays all costs in bringing the goods to the destination.



What are INCOTERMS? (cont'd)

Allocations of costs to buyer/seller according to Incoterms 2010

Incoterm 2010	Export customs declaration	Carriage to port of export	Unloading of truck in port of export	Loading on vessel/airplane in port of export	Carriage (sea/air) to port of import	Insurance	Unloading in port of import	Loading on truck in port of import	Carriage to place of destination	Import customs clearance	Import duties and taxes
EXW	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer
FCA	Seller	Seller	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer
FAS	Seller	Seller	Seller	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer
FOB	Seller	Seller	Seller	Seller	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer
CPT	Seller	Seller	Seller	Seller	Seller	Buyer	Buyer/Seller	Buyer/Seller	Seller	Buyer	Buyer
CFR	Seller	Seller	Seller	Seller	Seller	Buyer	Buyer/Seller	Buyer	Buyer	Buyer	Buyer
CIF	Seller	Seller	Seller	Seller	Seller	Seller	Buyer/Seller	Buyer	Buyer	Buyer	Buyer
CIP	Seller	Seller	Seller	Seller	Seller	Seller	Buyer/Seller	Buyer/Seller	Seller	Buyer	Buyer
DAT	Seller	Seller	Seller	Seller	Seller	Seller/Buyer	Seller	Buyer	Buyer	Buyer	Buyer
DAP	Seller	Seller	Seller	Seller	Seller	Seller/Buyer	Seller	Seller	Seller	Buyer	Buyer
DDP	Seller	Seller	Seller	Seller	Seller	Seller/Buyer	Seller	Seller	Seller	Seller	Seller



“Why your Business' IT Systems' Security is like Home Security”

For the purposes of trying to simplify the world of IT and how it analogously relates to your business, I've put together some basic domestic->technology metaphors to try to explain how your IT systems and security is similar to protecting your home.



Thank You!

Top-tier quality legal work and business advice delivered directly by highly experienced, personable senior lawyers. Balfour Meagher's services include:

- ✓ Software licensing and distribution agreements (including Software-as-a-Service (SaaS) and Software-as-a-Platform)
- ✓ Cloud-based businesses
- ✓ international eCommerce matters
- ✓ Web and App development
- ✓ Platform-provider advices (including modular)
- ✓ Outsourcing agreements
- ✓ Sale/acquisition of business agreements
- ✓ Hardware vendor arrangements
- ✓ Internet service provider issues (including all broadband applications)
- ✓ Telecommunications law (including laws governing Voice Over IP – VoIP)
- ✓ Website marketing agreements (Terms of Use and Privacy Policies)
- ✓ IT Distribution and Reseller matters
- ✓ Product liability matters
- ✓ IP Commercialisation and Brand protection
- ✓ Privacy, Data & Security
- ✓ Privacy, Encryption and data security policies.
- ✓ Notifiable Data Breach Policies.
- ✓ Obtaining Data with and without consent/Opt-in & Opt-out advices; including Freedom of Information issues.
- ✓ 'Reverse-engineering' and Software piracy protection.
- ✓ Spam Act and Electronic Transactions Act advices.
- ✓ Privacy and Cyber security audits (in conjunction with IT and digital forensics advisers).
- ✓ Cyber-hijacking & attacks' mitigation strategies (in conjunction with specialist IT and insurance advisors).





BALFOUR MEAGHER

Legal & Business Advisors

EXPERTISE • SERVICE • RESULTS

Tom Meagher

Director

E: tom@bmlegaladvisors.com.au

W: www.bmlegaladvisors.com.au

P: +61 8 9322 3842

A: Level 2, 11 Ventnor Ave, West Perth, WA 6005

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