Ashurst

Remote working in Australia

A guide for international employers

2024

Outpacing change

In our increasingly connected world, a company's workforce can stretch across international borders. Since the COVID-19 pandemic, it is becoming more common for workers to work for a company remotely from across an international border.

In this guide, we highlight important obligations under Australian law that international organisations need to keep in mind if parts of their workforce work remotely from Australia.

Contents

Employment law considerations

Do Australian minimum employment standards apply?

Australia has:

- National Employment Standards (**NES**) which make up the minimum entitlements for employees who work in Australia; and
- Other protections available to employees (such as protections against unfair dismissal and adverse action),

which are governed by the *Fair Work Act 2009* (Cth) (**FW Act**).

The FW Act applies to 'national system employers', which includes 'constitutional corporations'. For the FW Act to apply, there are two requirements:

1. The employer is a national system employer; and
2. The employment relationship has sufficient connection with Australia.

National system employers

The FW Act applies to national system employers, which includes constitutional corporations within the meaning of paragraph 51(xx) of the Australian Constitution. A constitutional corporation includes 'foreign corporations'.

Nevertheless, the foreign corporation must have an appropriate and sufficient connection with Australia in order to be considered a 'national system employer' (and trigger the application of the FW Act).

Applicability of the FW Act and NES to remote workers in Australia

In order for the FW Act (and the NES) to apply, it must be shown that there is an appropriate connection aligning the employment relationship (i.e. not just the work performed) sufficiently with Australia. It must also be shown that the employment relationship is sufficiently linked with Australia.

The below factors indicate that the employment relationship does not have a sufficient connection with Australia (and so the FW Act and NES do not apply):

- the employee is not an Australian resident;
- the contract of employment was made outside of Australia and is regulated by the laws of an external jurisdiction;
- wages, and liabilities including tax and social security, were paid outside Australia;
- wages were paid in foreign currency;
- the employment address listed by the employee is an address outside of Australia; and
- the employer is a foreign corporation.

Do Australian work health and safety laws apply?

Australia has comprehensive work health and safety laws under the *Work Health and Safety Act 2011* (Cth) (**WHS Act**), as well as associated regulations and State and Territory laws. The WHS Act applies broadly to a 'person conducting a business or undertaking' (**PCBU**). There is no requirement that the PCBU (the employer) be based in Australia.

A PCBU has an obligation to ensure, so far as is reasonably practicable, the health and safety of its workers while they are at work. A worker will still be considered to be at 'work' if they are working remotely. The WHS Act will therefore apply to international employers while their employees are working remotely in Australia.

Key obligations

International employers have a duty to eliminate or minimise risk to workers' health and safety so far as is reasonably practicable, including risks to the workers' physical and mental health. What is 'reasonably practicable' in terms of providing a safe working environment will be impacted by the ability of the employer to control or influence safety outcomes in the circumstances (i.e. the fact that the employer does not have operations based in Australia will be taken into account in considering what is reasonably practicable).

If an international employer fails to comply with its obligations under the WHS Act, the international employer may be subject to a range of consequences, including being subjected to directions, penalties and/or prosecution for breach of the WHS Act.

An example of the key obligations of international employers under the WHS Act where an employee is working remotely in Australia, and our recommended approach to eliminate or minimise these risks, is included in the table below.

International employers may also wish to use as a guide the checklist published by SafeWork Australia for PCBU's implementing working from home arrangements.

WHS Obligation	Recommendation(s)
Take all reasonable steps to ensure that the employee's remote workstation(s) and work environment is set up correctly to minimise health and safety risks.	Consider: 1. Consulting with the worker around their remote working arrangements; 2. Completing a virtual risk assessment of the remote workspace; and 3. Ensuring compliance with any applicable existing WHS policy (including policies on workstation set up and ergonomics which may be extended to the worker while they are working remotely).
Take all reasonable steps to minimise psychosocial hazards. A psychosocial hazard is anything that could cause harm to the worker's mental health.	Applicable psychosocial hazards to a remote worker could include remote or isolated work, poor physical environment, job demands, low job control, poor support, and/or lack of role clarity. Consider taking steps to identify reasonably foreseeable psychosocial hazards and steps to eliminate risk, so far as reasonably practicable. Steps to eliminate risk may include, for example, team check ins and/or providing the employee access to Employee Assistance Program services whilst they are working remotely in Australia.

Tax law considerations

Tax laws (and their interpretation by courts), and administrative practices change over time and this may impact upon the below. We recommend that you contact our Tax team for advice regarding your specific situation.

Permanent establishment and income tax implications for an international employer

From an income tax perspective, an international employer may already have a taxable presence in Australia via a local subsidiary or branch (permanent establishment) or may have no taxable presence prior to their worker visiting Australia. If the employee is effectively under the control and direction of an offshore entity of the international employer whilst in Australia, in certain circumstances, a taxable presence of the offshore entity can arise.

Where the international employer is resident in a country that has a double tax treaty with Australia, then an Australian income tax liability should generally only arise where the presence of an employee in Australia gives rise to a permanent establishment as defined for the purposes of the treaty. Where a treaty is not available, then the international employer may be subject to tax on any Australian sourced income related to the activities of an Australian located worker.

Income tax implications for a remote employee

A fundamental concept under Australian income tax is residence and Australia's individual tax residence rules are complex. If an employee becomes an Australian tax resident, then their income or gains from all sources worldwide will be subject to Australian taxation. If they qualify as a 'temporary resident', however, certain categories of foreign source income will not be taxed in Australia (one exception being salary or wages derived from duties outside of Australia).

Assuming the employee does not become an Australian resident as a result of their posting to Australia (or is considered to be a 'temporary resident' whilst in Australia), then their income or gains from sources outside of Australia should not generally be subject to Australian income tax (other than, as mentioned above, in the case of a 'temporary resident' employee who may be subject to Australian tax on salary or wages earned whilst working outside Australia during their posting).

However, any salary or wages earned by an employee whilst in Australia will *prima facie* be subject to Australian income tax irrespective of whether or not they are an Australian tax resident under Australia's tax law, on the basis that such income will have an Australian source.

Irrespective of the above, Australia's right to tax an employee's salary or wages is subject to the operation of a relevant double tax treaty if the employee is a tax resident of a country that is a treaty partner with Australia.

In summary, under the 'dependent personal services' article under Australia's treaties, Australia is permitted to tax any salary or wages that an employee derives during their Australian posting unless:

a) the employee is present in Australia for no more than 183 days;

b) their salary or wages are paid by a non-resident employer; and

c) their salary or wages are not borne by a permanent establishment of the non-resident employer.

Pay as you go (PAYG)/Fringe benefits tax (FBT)

Where the 'dependent personal services' article of a treaty applies and prevents Australia from levying income tax on an employee's salary or wages, then:

a) the non-resident employer should not be required to deduct PAYG withholding tax amounts from the salary or wage payments; and

b) FBT should not apply in respect of any fringe benefits provided to the employee in connection with their Australian posting.

If the treaty exemption does not apply, then the non-resident employer may be subject to PAYG and FBT obligations in connection with the employee throughout their Australian posting.

Superannuation

Employers are generally required to make a minimum level of superannuation contributions in respect of employees in order to avoid being required to pay the superannuation guarantee charge (**SGC**). The key piece of legislation governing an employer's obligations to make superannuation contributions is the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGAA**).

To avoid imposition of the SGC, the employer must make contributions to a complying superannuation fund in respect of each employee at the rate of 11% (for 2023-24, gradually increasing to 12% by 2025-26) of the employee's "ordinary time earnings" (**OTE**). OTE is a subset of salary and wages.

Amounts that are excluded from salary or wages are generally also excluded from OTE. There is no general exclusion for salary or wages paid by a non-resident employer to a non-resident employee for work performed in Australia. However, where Australia has entered into a bilateral social security agreement with the relevant foreign country, the salary or wages may be excluded for superannuation guarantee purposes.

Payroll tax

Payroll tax is charged by each Australian state/territory on employers in respect of wages and certain other amounts paid to employees and certain contractors. Tax is levied at rates of up to 6.85% on taxable wages.

Wages for these purposes is broadly defined to include commissions, bonuses, allowances, fringe benefits, and certain shares and options.

There are two issues which international employers need to consider to ascertain whether there is a registration or payment liability (which depends on the actual circumstances):

- **Nexus:** whether the wages paid to the particular employee have a nexus to a particular Australian state/territory in a particular month; and
- **Threshold:** if there is such nexus to a particular state/territory, whether the relevant threshold has been exceeded. The threshold is generally calculated on a group basis so a foreign employer with no permanent employees in Australia may already be over the threshold if there are Australian operations elsewhere in the group.

Immigration law considerations

Australia does not have a specific visa for people working remotely whilst visiting Australia. However, depending on the circumstances of the employee's visit, the employee may legitimately work remotely from Australia via certain relevant visas.

Australia has various work visas that will be applicable in different situations.

We recommend that you contact Ashurst for advice regarding your specific situation.

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