

10<sup>TH</sup>  
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# CROSS-BORDER REMOTE WORK FAQs

## AUSTRALIA

**1. Assume that a foreign national employee of a foreign company wishes to work remotely for a period of time in your country performing services exclusively for the foreign company and not interacting with the local market in your country.**

IS WORK AUTHORIZATION REQUIRED? IF SO, PLEASE PROVIDE A BRIEF DESCRIPTION OF THE TYPE OF VISA, PROCEDURE, PROCESSING TIME, ETC.

*A visa is required in order to work in Australia, and anyone who is not a permanent resident or citizen needs work authorisation. The most appropriate visa for a remote worker would be a Temporary Skills Shortage visa (subclass 482). This requires sponsorship from an employer (which can be an overseas business), and the employer does not need to have any operations or links to Australia to sponsor an employee to work in Australia. Additionally, a worker must be nominated to work in an approved occupation (for e.g., marketing specialist or web developer). As part of the nomination process, the employer needs to show that they have taken steps to recruit an Australian worker but have been unable to so. Clearly, the more specialised the*

*role, the easier it will be for an employer to argue that their existing employee (the employee that wishes to travel to Australia to work) is the most qualified person for the role.*

*It is advisable that foreign companies seek immigration advice before permitting employees to work remotely overseas.*

IS THERE RISK OF “PERMANENT ESTABLISHMENT” CONSEQUENCES FOR THE FOREIGN COMPANY BY VIRTUE OF THE REMOTE WORKER’S ACTIVITIES? IF SO, WHAT ARE THE MAIN FACTORS DETERMINING THE EXPOSURE.

*A foreign company may be considered as having a permanent establishment in Australia in circumstances where they have an employee working in Australia who becomes a resident for tax purposes. The existence of a permanent establishment in Australia will render a foreign corporation liable to pay Australian company tax on profits generated within Australia.*

*However, the Australian Tax Office has confirmed that foreign companies will not be assessed as having a permanent establishment in Australia if the presence of their employee(s) in Australia is solely as a result of COVID-19 related travel restrictions. Further, where the remote worker is prevented from leaving due to COVID-19 restrictions, they will not become an Australian resident for tax purposes if they usually live overseas permanently and intend to return there as soon as they are able. It is important that a remote worker temporarily working in Australia relocates overseas as soon as practicable following the relaxation of international travel restrictions.*

*It is advisable that foreign companies seek tax advice before permitting employees to work remotely overseas. Employers should also be aware of the existence of a double tax agreement between their home country and Australia. Australia has double tax agreements with China, France, Germany, India, Ireland, Japan, Malaysia, Singapore, the US and UK, among other countries. These agreements may also make provision for social security obligations on home and host countries.*

## AT WHAT POINT AND UNDER WHAT CIRCUMSTANCES WOULD THE REMOTE WORKER BECOME SUBJECT TO LOCAL SOCIAL SECURITY AND OTHER PAYROLL REQUIREMENTS? CAN SUCH REQUIREMENTS BE FULFILLED BY A FOREIGN COMPANY, AND IF SO BY WHAT MECHANISMS?

*Australian residents for tax purposes are liable to pay the Medicare levy, being 2% of taxable income (used to fund some of the costs of Australia's publicly funded system of universal healthcare). Foreign tax residents will need to apply for an exemption from paying the Medicare levy. Generally speaking, when employers withhold PAYG (pay as you go) income tax from employees, the Medicare levy is included as part of the calculation. Australia's social security system is predominantly funded through general government revenue, as opposed to specific levies on employers.*

## AT WHAT POINT AND UNDER WHAT CIRCUMSTANCES DOES THE REMOTE WORKER BECOME SUBJECT TO LOCAL EMPLOYMENT LAW REQUIREMENTS SUCH AS IS WAGE-HOUR, LOCAL HOLIDAYS, ANNUAL LEAVE, MATERNITY LEAVE, DISABILITY LEAVE, PROTECTION AGAINST UNFAIR DISMISSAL, ETC.

*Generally, all people working in Australia, including foreign workers, are entitled to basic rights and protections in the workplace. This includes foreign workers who are not Australian citizens or permanent residents, such as 'backpackers', seasonal workers, or international students.*

*Under the Fair Work Act 2009 (Cth) (FW Act) these protections will apply to employees of a foreign corporation engaged to perform work within Australia, where they are 'national system employers'. However, this does not mean the FW Act encompasses every foreign corporation. As was stressed in *FWO v Valuair* (2014) and *Holmes v Balance Water* (2015), before a company will be considered a 'national system employer', and thereby before the FW Act will apply, there must be:*

- a) an "appropriate connection" aligning the employment relationship with Australia; and*
- b) the employment relationship must be "sufficiently" linked with Australia.*

*Relevant factors include:*

- Proportion of overall working time spent in Australia*
- Domicile of employing entity*
- Currency income is paid in*
- Employment address*
- Jurisdiction where taxation is paid*
- Existence of directions from employer as to location of work*
- Contractual stipulations as to location & choice of law in the employment contract*
- Location where worker employed/contract formed*
- Whether decision to work remotely is that of the employee*
- Whether employee becomes a resident for tax purposes*

## ARE THERE SPECIAL REQUIREMENTS GOVERNING REMOTE WORK IN YOUR COUNTRY WHICH WOULD COVER THE REMOTE FOREIGN WORKER?

*There are no special requirements governing remote workers per se. The above principles apply.*

## WHAT IS THE EMPLOYEE'S EXPOSURE TO LOCAL INCOME TAX, AND UNDER WHAT CIRCUMSTANCES IS THE FOREIGN EMPLOYER REQUIRED TO ARRANGE FOR WITHHOLDING OF INCOME TAX?

*Subject to the exemption for an employee(s) who cannot return to their usual place of work overseas due to COVID travel restrictions, if an individual is present in Australia for more than 183 days (continuously or intermittently), they will be a resident for taxation purposes unless it can be established that their usual place of abode is outside Australia and that they have no intention to take up residence here. If they are a resident, they will be liable to pay Australian income tax, and their employer will be liable to withhold that tax on their behalf (and remit it to the Australian Taxation Office).*

## WOULD THE REMOTE WORKER BE ENTITLED TO BRING A CLAIM FOR WORKPLACE INJURY IN YOUR COUNTRY?

*Work, health and safety laws provide that employers have a primary duty to ensure, as far as reasonably practicable, the health and safety of their employees and all persons in their workplace. This extends to an obligation to, so far as reasonably practicable, provide and maintain a work environment without risks to health and safety.*

*Where a duty is owed to workers travelling or based abroad for work, employers will owe the same primary duty to those workers as to their Australian based workers. However, 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 relevant circumstances.*

## WOULD THE REMOTE WORKER BE COVERED UNDER THE LOCAL NATIONAL HEALTHCARE SYSTEM OR INSURANCE?

*It is unlikely that state payroll tax would apply to the situation where a foreign company has one employee working remotely in Australia, given this tax only applies where the total Australian wages they pay exceeds the threshold of \$1,200,000 in a financial year.*

## IS A FOREIGN EMPLOYER SUBJECT TO DATA PRIVACY AND SECURITY REQUIREMENTS REGARDING PROTECTION OF EMPLOYEE PERSONAL INFORMATION FOR A FOREIGN EMPLOYEE WORKING REMOTELY IN YOUR COUNTRY?

*The Privacy Act 1988 (Cth) ('the Act') provides the Australian Privacy Principles ('APPs') and governs the collection of personal information by certain entities in Australia. The APPs apply to APP entities, which includes private sector organisations with an annual turnover of more than A\$3 million and their related companies, as well as some others including health service providers and organisations that trade in personal information.*

*The Act extends to the activities of foreign companies in Australia, and to the activities of foreign companies outside Australia, where those companies carry on business in Australia, and collect or hold personal information in Australia. The Office of the Australian Information Commissioner ("OAIC") considers the collection of personal information from an individual located in Australia to be a collection 'in Australia', even if the company collecting the information is outside Australia at the time.*

*Importantly, APP 11 provides that if an APP entity holds personal information, the entity must take such steps as are reasonable in the circumstances to protect the information from:*

- (a) misuse, interference and loss; and*
- (b) from unauthorised access, modification or disclosure.*

HAS THERE BEEN ANY LITIGATION  
OR SPECIFIC LAW OR REGULATION  
REGARDING THE FOREIGN REMOTE  
WORKER IN YOUR COUNTRY?

*As previously mentioned, the Australian Taxation Office has clarified that if a remote worker is present in Australia and is prevented from leaving due to COVID-19 restrictions, they will not become an Australian resident for tax purposes if they usually live overseas permanently and intend to return there as soon as they are able. Additionally, the ATO has confirmed that foreign companies will not be assessed as having a permanent establishment in Australia if the presence of their employees in Australia is solely as a result of COVID-19 related travel restrictions. It is important, however, that those employees are temporarily in Australia and that they will relocate overseas as soon as practicable following the relaxation of international travel restrictions.*

**2. Would any of the above answers change if the remote worker (a) is a citizen of your country, or (b) engages in activity interacting with the local market.**

*(a) Citizenship does not determine entitlements to minimum rights and conditions under Australian employment law. However, Australian citizens working remotely in Australia will not need work authorisation.*

*(b) Engaging in activity interacting with the local market may have implications regarding the creation of a permanent establishment in Australia for taxation purposes. Employers should seek specialist taxation advice.*



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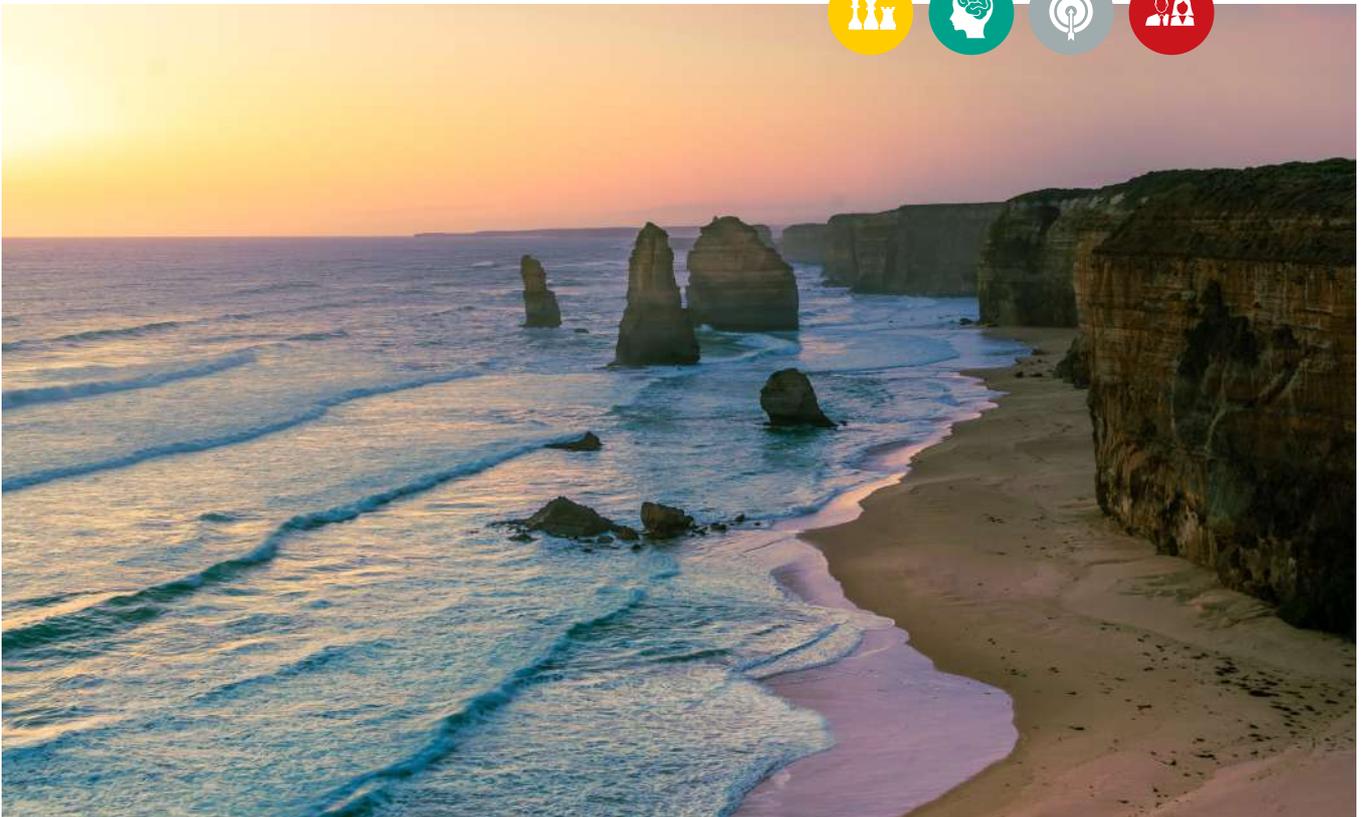
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