



# OPENING UP SHOP

HARMERS WORKPLACE LAWYERS is a member of L&E Global, the alliance of employment counsel worldwide

## ABOUT THE NATIONAL CONTEXT FOR OPENING UP SHOP

Australia is home to some of the western world's most complex employment-related legislation. Our unique system combines 'statutory instruments' such as 'Awards', 'Enterprise Agreements', and detailed state and federal employment laws with more-settled common law principles. In addition, each of Australia's six states and two territories has its own workplace health and safety legislation (now largely harmonised), anti-discrimination laws, 'long service leave' benefits and workers' compensation laws.

Far too many Australian-based employers fail to comprehend the

need to obtain expert advice when setting up shop in this jurisdiction. Furthermore, ongoing access to legal advice and support is critical to avoid common employment-related claims such as allegations of 'unfair dismissal', discrimination or 'adverse action'. Many businesses here routinely engage employment lawyers to ensure compliance and reduce their risk profile.

## ABOUT US

**Harmers Workplace Lawyers** was formed in 1996 and is one of Australia's largest employment and industrial law practices with offices in Sydney, Melbourne and Brisbane. The firm focuses on innovative, high quality problem solving and a preventive

approach to law across all areas of employment and industrial law.

We are perhaps unique in Australian employment practices in that, while having an emphasis on corporate Australia and its senior executives, the firm seeks to implement workplace fairness for all, and will represent employers, employees and their representative organisations as needed (subject to there being no conflict of interest). Harmers has represented many of Australia's largest corporations, CEOs and senior executives across a broad range of industries, and has run some of Australia's landmark cases in employment and discrimination.

## I. LABOUR AND EMPLOYMENT LAW REQUIREMENTS

### A) FAIR WORK ACT 2009

Australia has moved towards a national workplace relations system over the past decade. The Fair Work Act 2009 (Cth) ("FW Act") now applies to almost all private sector businesses across the country, with the exception of unincorporated businesses located in the state of Western

Australia (which remain covered by Western Australia's state-based workplace relations system).

Importantly, the FW Act provides employees with ten minimum employment entitlements, known as the National Employment Standards, or "NES". The NES provide employees with a range of guaranteed entitlements,

such as paid annual leave, paid personal/carer's ('sick') leave, and a maximum 38 'ordinary hours' working week (plus reasonable additional hours). The NES are non-negotiable, and cannot be overridden by contract or mutual-agreement between an employer and employee.

This guide is intended as general information only. For legal advice and assistance with your business needs, please contact our Australian firm, Harmers Workplace Lawyers.



## B) AWARDS AND ENTERPRISE AGREEMENTS

Historically, minimum terms and conditions of employment in Australian workplaces were established by the relevant tribunals via the making of 'awards'. This unique award-based system continues to operate, and today there are over 120 different awards (now called 'Modern Awards') which contain additional minimum terms and conditions of employment for employees working in specific industries and occupations. Examples include the General Retail Industry Award and the Professional Employees Award. Businesses setting up shop in Australia should pay careful attention to the following three important points:

1. Modern Awards apply as a matter of law and not choice or preference. Employers are held legally-responsible for identifying – and complying with – any Modern Awards which apply to their employees. A failure to comply with applicable Modern Awards can result in significant penalties.
2. Many 'senior' or 'professional' employees are covered by a Modern Award. It is a pervasive myth that Modern Awards only apply to 'blue-collar' workers, or to those paid an hourly wage as opposed to an annual salary.
3. Modern Awards apply in addition to – not in place of – the NES. It is, accordingly, very important to become familiar with both the NES and any applicable Modern Awards.

In addition to Modern Awards, Australia has also adopted a system of workplace-level enterprise bargaining. This allows an employer to negotiate workplace-wide collective employments with their employees, called 'Enterprise Agreements'. Importantly, Enterprise Agreements replace otherwise-applicable Modern Awards, must be approved by Australia's workplace relations tribunal (the Fair Work Commission) and must not undercut the NES.

An Australian-based employee's minimum wage will depend on whether they are covered by a Modern Award or an Enterprise Agreement or are, instead, 'Award and Agreement-free'. Expert advice is strongly recommended.

## C) EMPLOYMENT POLICIES AND TRAINING

Australian-based employers are not generally obliged to implement workplace policies or provide specific training to their employees. However, comprehensive policies and regular training will significantly reduce the risk of employment-related claims and enhance the employer's ability to take necessary disciplinary and performance-related action. As a minimum, we recommend all workplaces have policies in place covering:

- bullying and harassment (including sexual harassment);
  - discrimination;
  - leave-related entitlements; and
  - workplace health and safety.
- Regular training which reinforces the rights and responsibilities

associated with these topics is strongly-recommended. Australian employers routinely engage third parties to provide training.

## D) EMPLOYMENT AGREEMENTS

While Australian law does not compel employers to issue employees with written employment agreements, this practice is nonetheless strongly recommended. In the absence of a comprehensive written employment agreement, an employee's rights and entitlements will be derived from a combination of the FW Act (where applicable), any relevant Modern Award or Enterprise Agreement, other state and federal statutes, and the common law. The common law may provide an employee with entitlements which are more generous than those which would otherwise apply had an employment agreement been executed.

It is important to note that employment agreements cannot impose terms and conditions which are less generous than those provided by both the NES and any applicable Modern Award or Enterprise Agreement. Given the importance of ensuring agreements are compliant with all applicable laws, it has become increasingly common for Australian-based employers to engage employment lawyers to draft and review their contracts. Indeed, this is one of the most common tasks undertaken here at Harmers Workplace Lawyers.



## II. CORPORATE LAW REQUIREMENTS

(Please note: this Corporate Law Requirements section has been produced by Les Lewis, Director, Lewis King Blumberg)

The Corporations Act 2001 (Cth) (“Corporations Act”) sets out the framework for the incorporation and conduct of companies in Australia, and the Australian Securities and Investment Commission (“ASIC”) is responsible for overseeing the registration and regulation of companies.

Corporations in Australia may be either ‘proprietary companies’ or ‘public companies’, and will fall within four key categories:

- a company limited by shares;
  - a company limited by a guarantee;
  - a company with unlimited liability; and
  - a no-liability company (used only for mining-related purposes).
- The most common company structure for a small to medium-sized business is a proprietary limited (“PTY LTD”) company, which limits the liability of the company’s members to the amount invested and/or the amount due on unpaid shares.

### A) COMPLIANCE FOR INCORPORATION

In order to incorporate, a company must:

- Nominate a unique name (see below for further information).
- Have at least one shareholder who may be a person, another company, a trust, an incorporated

association or a partnership. There can be no more than 50 non-employee shareholders. No minimum share capital is required.

- Have at least one director. Regardless of how many directors are appointed, at least one must ordinarily be resident in Australia.

Directors must:

- be a natural person at least 18 years old;
- provide written consent to act as a company director;
- not be an undischarged bankrupt or subject to a personal insolvency agreement that has not been complied with; and
- not, within the past five years, have been convicted of an offence of dishonesty such as fraud or a company law offence such as insolvent trading (a person who has been imprisoned for such an offence, must not manage a company until five years after his or her release).

- Appoint a public officer.
- Notify the Australian Taxation Office (“ATO”) within three months of conducting business or earning income from property in Australia (the ATO is responsible for administering taxation laws in Australia, and the public officer must ensure the company complies with these laws and liaise with the ATO regarding the company’s tax affairs).

- Appoint a company secretary, who must be a resident of Australia. In PTY LTD companies, a company secretary is responsible for filing documents with ASIC and maintaining the corporate documents of the company. If no

company secretary is appointed, these responsibilities must be discharged by the directors of the company.

- Nominate a physical address in Australia (i.e. not a post office box) as its registered office. This will be the location used for service of legal documents or notices. Often the registered office will be the address of the company’s accountant or law firm, however, a personal residence may also be used. Written consent from the occupant of the registered office must be obtained.

The members of the company may adopt a constitution on incorporation (or any time thereafter) by passing a resolution with the support of 75% of the shareholders of the company. If a constitution is not adopted, the replaceable rules (a set of basic “default” rules) contained in the Corporations Act will generally apply.

Once registered, the company acquires a unique nine-digit Australian Company Number (“ACN”) which is used for identification and reporting purposes. The ACN must be displayed on any formal or public documents, cheques, and at the company’s place of business.

### B) REGISTRATION WITH THE ATO

Companies have various reporting requirements and compliance obligations under Australian income tax legislation. We therefore recommend companies retain a qualified accountant



to advise on these matters and prepare annual financial reports. Companies must apply to the ATO for a Tax File Number (“TFN”), which is used when filing mandatory annual company tax returns. Companies should also register for an Australian Business Number (“ABN”), which is an eleven-digit number comprised of two digits preceding the company’s ACN.

Companies may also need to register for Goods and Services Tax (“GST”), Pay-As-You-Go (“PAYG”) withholding tax, and other types of taxes.

### C) COMPANY NAMES, BUSINESS NAMES, AND TRADE MARKS

A new company’s name cannot be identical to an existing company or business name. Business and company name availability checks can be made using ASIC’s national register.

Companies should also check the website of IP Australia (the federal government agency responsible for administering intellectual property rights) for names or marks which may be identical or similar to the ones the company proposes to adopt. A failure to

take this important step may result in the other company or business taking legal action for infringement.



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### III. PAYROLL AND BENEFITS PROVIDERS

In Australia, the vast majority of smaller employers outsource payroll and benefits to third party companies. The larger employers, however, have their own internal teams processing payroll and are responsible for all related compliance requirements.

Depending on your preference, we would be happy to recommend payroll providers to fit your business requirements.

Harmers Workplace Lawyers | L&E Global Australia is pleased to offer our services to assist your organisation to open in Australia. As a firm specialising in workplace relations, we would also recommend corporate law firm, Lewis King Blumberg, to assist foreign corporations in structuring your entry in Australia. We look forward to working with you.

If you have any questions, please contact either of the following representatives:

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**We look forward to working with you.**

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