

## Australia: Working Remotely Overseas - Cross Border Issues

### In brief

In the current pandemic, many employers have been required to rapidly shift to a remote working model. This shift has raised a number of issues which employers have had to consider, including how best to monitor remote workers' hours of work, how to appropriately supervise and mentor them, and how to appropriately address health and safety obligations outside the usual office environment.

With the tightening of Australia's border controls restricting the ability of individuals to travel overseas and back again, employers are now also grappling with situations where employees who have travelled outside Australia are requesting the ability to work remotely whilst overseas.

This may arise where an employee has travelled to provide care and support to a family member overseas, or to attend a funeral, and is unable to return to Australia in the short term due to caps on arrivals and the limited and expensive nature of inbound flights. It may also arise where an employee has simply opted to temporarily relocate to another country to be near family or take advantage of a lower cost of living whilst they are unable to attend the office for work. There may also be situations where an employer wants to recruit an employee who is currently based overseas but who is unable to travel to Australia in the short term to take up the new employment.

In these circumstances, employers must be mindful of additional risks and practicalities which will need to be taken into account when considering whether to approve a request to work remotely.

Set out below is a summary of the key risks and issues which employers should consider, in addition to the usual concerns associated with remote working, before agreeing to allow an employee to work remotely outside of Australia.

### Contents

<a href="#">Right to Work</a>
<a href="#">Compliance with local laws</a>
<a href="#">Continuing employment benefits</a>
<a href="#">Data privacy</a>
<a href="#">Client disclosure and acceptance</a>
<a href="#">Asset management</a>
<a href="#">Professional insurances and licenses</a>
<a href="#">Tax implications</a>
<a href="#">Checklist</a>

### Right to Work

Whether an employee can work remotely in a foreign country will depend on whether the employee is legally able to work in that country. If they are not a citizen or permanent resident of the foreign country, or they do not otherwise hold a visa permitting them to work in that country, then an employer should not require or permit them to carry out work in that location. If an employer were to allow the employee to work in a country where they do not have legal rights to do so, both the employer and the employee may be subject to penalties.

### Compliance with local laws

Where an employee is employed by an Australian company but working in a foreign country, it is likely that the employer will become an employer in the foreign country. This may have implications for the types of employment benefits (including leave) which accrue to the employee whilst working overseas, and other obligations (such as payroll tax or insurance requirements) of the employer.



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## Continuing employment benefits

Certain employment benefits offered by an employer in Australia may not validly be able to be offered to (or maintained for) an employee whilst they are working in a foreign country. For example, any health insurance, salary continuance insurance, or death/TPD insurance offered by an employer may not cover the employee whilst they are working outside of Australia. Where health insurance coverage does not extend to the foreign country, there may also be questions around the employer's obligations to an employee who becomes ill or injured whilst working remotely overseas (subject to any local insurance requirements).

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## Data privacy

As with any remote work arrangement, there is a need to ensure that any data shared with or stored on that employee's remote working device (e.g. laptop, tablet, mobile phone) is protected. However, additional issues are likely to arise where the employee is based overseas. For example:

- It is common for clients to place restrictions on how confidential information which they have shared with the employer can be shared, stored and used. Often, this will include a prohibition on that information being transferred out of the country without the client's consent.
- Insofar as the overseas employee is required to deal with personal information, the employer will need to ensure that it has obtained the appropriate consents to transfer this information overseas if required to facilitate the overseas based employee's performance of their function.

Consideration will therefore need to be given to the work the employee is performing, what information they will require access to in order to perform their role, and what necessary client consents must be obtained.

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## Client disclosure and acceptance

In addition to (and associated with) data privacy concerns, clients are now commonly requiring that their work is not performed outside of Australia, or otherwise not performed in certain countries. This is often because certain countries in the Asia-Pacific region do not have robust laws protecting intellectual property or confidentiality. As a matter of best practice, affected clients should be informed that the employee will be working in the overseas location for the relevant period, and their consent to the employee performing their work during this period should be obtained.

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## Asset management

Where the employee has been provided with company assets (e.g. laptop, tablet, mobile phone), the employee should consider whether any insurances in relation to those devices will apply in the foreign country in which the employee is seeking to work. Further, if the assets are leased by the employer, it should have regard to the terms of any such leases insofar as they address whether or not such assets may be removed from Australia.

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## Professional insurances and licenses

An employer's insurance policies (including workers compensation, professional indemnity etc.), and any necessary licences required for the performance of an employee's function, may not cover an employee whilst they are working outside of Australia. Any such policies should be checked and, if necessary, further insurance and/or licences may need to be obtained in the foreign country in which the employee will be working.

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## Tax implications

There are a number of tax issues which arise when an employee of an Australian entity is working outside Australia, both for the employer and the employee. In particular, by allowing an employee to perform work in a foreign country, there is a risk of creating a



permanent establishment for corporate tax purposes. This may cause the employer to have to register and pay tax in the foreign jurisdictions.

**As with any remote working arrangement, employers should ensure that they clarify that any arrangement is temporary (where intended) and that they have the ability to bring any overseas working arrangement to and end at any time. In this way, employers can avoid triggering any potential termination or other types of claims in the employee's location in circumstances where it looks to return employees to the office or bring any overseas arrangements to an end.**

## Checklist

Issue	Risk	Action
<b>Immigration / Right to Work</b>  Employees seeking to work in a foreign country must be authorised to perform work in that country (e.g. they must be citizen or permanent resident, or hold a working visa or work permit).	If an employer were to allow an employee to work in a foreign country in which they were not authorised to work, both the employee and the employer could be subject to penalties.	Check the employee's work authorisation in the foreign country.  Consider whether the employee is able to gain authorisation to work in the relevant foreign country, including any costs associated with this. This may include considering whether the employee can be employed by a local entity within the employer's corporate group (and seconded back to the Australian employer).
<b>Compliance with local laws</b>  The employer is likely to become an employer in the foreign country in which the employee is working, triggering obligations under local laws.	The employer will need to understand, and ensure that it is complying with, any obligations under local employment and industrial laws.	Employer should seek advice on its legal obligations as an employer in the foreign country.  Consider whether the employee is able to be employed by a local entity within the employer's corporate group (and seconded back to the Australian employer), to avoid the need for the Australian entity to comply with foreign employment laws.
<b>Continuing employment benefits</b>  Certain employment benefits offered by an employer in Australia may not validly be able to be offered to (or maintained for) an employee whilst they are working in a foreign country. For example, any health insurance, salary continuance insurance, or death/TPD insurance offered by an employer may not cover the employee whilst they are working outside of Australia.	Where benefits (such as health insurance coverage) cannot be offered (or maintained), this may result in a change to the terms and conditions of the employee's employment.  Further, where existing health insurance will not extend to the foreign country, there may be questions around the employer's obligations to the employee where they become ill or injured whilst working remotely overseas (subject to any local insurance requirements).	Review employee benefits (including insurances) to determine whether they are able to be offered (or maintained) in the foreign country.  Consider replicating or obtaining suitable alternative benefits locally. If this cannot be achieved, obtain employee acknowledgment and agreement that the benefits will not apply whilst they remain working outside Australia.
<b>Data privacy</b>  Clients may ban their confidential information being transferred out of the country without their consent.  The disclosure and transfer of personal information overseas will be subject to	Employees may be unable to carry out their duties unless they have access to certain information (e.g. client confidential information, personal information such as credit card details).	Consider what work the employee is performing, what information they will require access to in order to perform their role, and what necessary client (or other) consents must be obtained.



the provisions of the <i>Privacy Act 1988</i> (Cth).		
<b>Client disclosure and consent</b> Clients commonly require that their work is not performed outside of Australia, or otherwise not performed in certain countries.	Employees who principally perform work for particular clients may be unable to carry out their duties whilst outside Australia in the absence of client consent.	The employer may need to obtain client consent to their work being performed in a particular country for a particular period.
<b>Asset management</b> Insurance in relation to company assets provided to employees (e.g. laptop, tablet, mobile phone) may not apply in a foreign country.  Leased company assets may not allow for the assets to be removed from Australia.	The employer may need to restrict employees from taking their laptop, tablet or mobile phone overseas, or otherwise may need to obtain alternative insurances or leasing in relation to such devices.	Review insurance and leasing arrangements applying to employee devices.
<b>Professional insurances and licenses</b> An employer's insurance policies (including workers compensation, professional indemnity etc.), and any necessary licences required for the performance of an employee's function, may not cover an employee whilst they are working outside of Australia.	The employer will be at risk if the employee is working without the necessary insurances and licences.	Any such insurances should be reviewed and, if necessary, further insurance and/or licences may need to be obtained in the foreign country in which the employee will be working.
<b>Tax implications</b> There are a number of tax issues which arise when an employee of an Australian entity is working outside Australia, both for the employer and the employee.	By allowing an employee to perform work in a foreign country, there is a significant risk of creating a permanent establishment for corporate tax purposes.	Seek advice on the tax implications of allowing the employee to work in the foreign country.

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