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A LONG WAY FROM HOME: THE FAIR WORK ACT IN A GLOBAL SETTING

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The global nature of business means that the employment relationship is no longer confined to the Australian mainland. Employees completing international placements as part of their tenure (either with a host employer, or in the overseas office of their main employer) and insourcing of foreign expertise either temporarily or permanently is also commonplace. The question arises as to whether Australian employment law obligations will follow or attach to these arrangements?

It is particularly relevant when you consider that some Australian employment benefits are fairly unique to our jurisdiction – for example, long service leave and superannuation.

Some areas for employers to consider when negotiating such arrangements are the following:

FAIR WORK ACT

The Fair Work Act ("FW Act") is the principal piece of legislation to consider when assessing the applicability of Australian law. It applies even in circumstances where a worker may be based overseas – provided they are actually employed by an Australian employer.

An exception arises where the employee is "engaged" outside Australia and only ever works outside the country.

In deciding if an employee is "engaged" outside the Country relevant factors include:

- Was the employee recruited initially either from within Australia or from elsewhere?
- Does the employee receive expatriate benefits or do local laws apply?
- Did the employee receive relocation assistance at the commencement of their employment?

LONG SERVICE LEAVE

This area of law is particularly complex as each State and Territory has its own laws on long service leave.

As a general rule, overseas service can count towards an employee's entitlement to long service leave in Australia, if a sufficient "connection" with Australia is demonstrated. Factors include:

- Where was the employee first engaged?
- Are there periods when the employee returned to Australia?
- Did the business fund moving and repatriation costs and were reunion visits paid for regularly?
- Was it intended for the employee to ultimately return to Australia at the end of their posting?

If "connection" can be established, then an entitlement to long service will usually arise, particularly if a determining event (such as a termination of

employment) occurs whilst the employee is fulfilling a period of Australian service.

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SUPERANNUATION

The laws concerning the need to pay superannuation to non residents is particularly complex. The superannuation guarantee legislation contains a range of exceptions to the obligations to make compulsory superannuation payments. Often their applicability will be determined by matters personal to the parties to the employment contract and, in some instances, the nature of the relationship between the two employing entities (if an employer is moving an employee to a different employing body as part of the transfer).

In most of these matters, a carefully drafted contract that takes account of the interests of all parties is a necessary precondition to success in the employment relationship.

It is vitally important to prepare these documents at the same time as matters such as visas and rights to work documentation are being prepared, so that any uncertainty about entitlements can be addressed at the beginning of the engagement.

FOR MORE INFORMATION, PLEASE CONTACT:

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