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WHEN THE BARRIERS COME DOWN

The Application of Australian Labour Law Entitlements to Employees in the Asia-Pacific Region

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With COVID-19 vaccines being rolled out in many jurisdictions, and with it the increasing prospect of businesses again deploying employees around the Asia-Pacific region, it is timely to revisit the somewhat complex application of Australian employment laws to inbound and outbound workers.

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I. Introduction

1 Prior to the precipitous drop in international travel brought about by the COVID-19 pandemic, the pace of globalisation brought with it an ever-increasing degree of international employee mobility. Given the significant economic links between countries in the Asia-Pacific region, it is no surprise that employee mobility has been, and continues to be, a priority for businesses in the region. A 2018 survey of companies in the Asia-Pacific region found that 85% of respondents expected

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employee mobility to increase over the next two years, with 64% of companies predicting an increase in short-term assignments.[2]

2 However, despite the increasing prevalence of international working arrangements such as secondments, intra-group transfers and other business travel, Australia's regulatory regimes that apply to employees and employers do not necessarily provide a clear or uniform structure for determining when they will apply to *outbound employees* (being workers initially based in Australia but who perform duties in an overseas jurisdiction), or *inbound employees* (workers who were not initially based in Australia but who perform some work in Australia).

3 The importance of these issues in facilitating labour mobility in the Asia-Pacific region is highlighted by the case law that has developed the principles applicable in determining the extent to which Australia's employment laws will apply to inbound and outbound employees who are mobilised across the region. These decisions regularly involve employees who have travelled to or from other countries in the Asia-Pacific region in the performance of their employment. Further, given that Singapore is Australia's largest trade and investment partner in ASEAN (and Australia's sixth largest trading partner overall),[3] it is no surprise that cases involving employees deployed to or from Singapore feature regularly throughout this article.

4 As at the date of this article, both Australia and Singapore have strict border control measures in place in the light of their respective governments' response to the COVID-19 pandemic. While Singapore has gone some way to easing restrictions on Australian travellers entering Singapore, the Australian government retains strict limitations on Singaporean

2 PwC, "Flexibility in Global Mobility: The Gap between Theory and Practice" (2019) <https://www.pwc.com.au/people/pwc-apac-global-mobility-policy-survey-summary-2019.pdf> (accessed 11 March 2021).

3 Department of Foreign Affairs and Trade, Australian Government, "Singapore Country Brief" <https://www.dfat.gov.au/geo/singapore/Pages/singapore-country-brief> (accessed 11 March 2021).

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travellers entering Australia, as well as Australians seeking to travel overseas.[4]

5 However, media reports indicate that there have been ongoing discussions about opening up quarantine-free travel between Australia and Singapore (and other Asian nations).[5] While the time frame for the full reopening of borders remains uncertain, it is timely to consider the legal issues that will be associated with the increase in employee mobility that will inevitably flow from the reopening of borders. For example, it is necessary to consider whether a Singaporean employee who is assigned to Australia on secondment after Australia's borders open may be entitled to the benefits afforded by Australian employment law.

6 This article considers the key legal principles that are relevant to determining the application of Australian employment laws to inbound and outbound workers. It also considers some of the practical considerations that should be front-of-mind for businesses who are deploying workers into Australia, as well as Australian businesses deploying workers overseas.

A. Fair Work Act 2009 (Cth)

7 The Australian Fair Work Act 2009 (Cth) ("FW Act") is the principle legislative instrument regulating labour law in Australia. The FW Act is a federal Act that establishes a national workplace relations system, though this is not a codified system; the law of Australia's various states and territories is not wholly excluded by the FW Act.[6]

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4 See further Smart Traveller, "Covid-19 and Travel: Singapore" <https://www.smartraveller.gov.au/destinations/asia/singapore>; Singapore Immigration & Checkpoints Authority, "Frequently Asked Questions" <https://safetravel.ica.gov.sg/australia/atp/faq> (accessed 28 April 2021).

5 Stephen Dziedzic, "Federal Government in Talks to Expand Coronavirus Travel Bubble beyond New Zealand to Some Parts of Asia" *ABC News* (10 November 2020); Tiffany Fumiko Tay, "Singapore Continuing to Seek New Travel Bubble Partners Despite HK Setback: Ong Ye Kung" *The Straits Times* (6 December 2020).

6 See, *eg*, s 27 of the Fair Work Act (Cth).

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8 The FW Act was enacted in 2009 and came into effect on 1 January 2010, as the primary legislative instrument governing labour law in Australia's federal system. Australia's labour law regime has had a turbulent political past characterised by significant legislative change.[7]

9 The FW Act established the National Employment Standards ("NES"), a core element of the main terms and conditions of employment under the FW Act.[8] The NES provides, *inter alia*, such conditions as minimum wage, maximum weekly working hours, leave (including parental and annual leave), redundancy pay and notice of termination. In addition to the NES, terms and conditions of employment may also be provided by a "modern award" (a quasi-statutory instrument that governs employee entitlements for employees and employers in a particular industry or on an occupational basis) or an enterprise agreement (*ie*, a collective bargaining agreement).[9]

B. Operation of state and territory legislation

10 While the FW Act prescribes the vast majority of obligations imposed on employers and entitlements of employees in the non-government sector, some state and territory laws govern other aspects of the employment relationship, including anti-discrimination laws, workers' compensation and long service leave.[10]

II. Inbound employees

11 A common question for businesses deploying employees to Australia is "how long can the employee work in Australia before he or she becomes covered by Australian employment law?". In circumstances where there are a variety of legislative regimes that govern the relationship between an employer and employee

7 Mark Bray & Andrew Stewart, 'What Is Distinctive about the Fair Work Regime?' (2013) 26 *Australian Journal of Labour Law* 20.
8 See Division 2 of Part 2-2 of the Fair Work Act 2009 (Cth).
9 See s 41 of the Fair Work Act 2009 (Cth).
10 Fair Work Act 2009 (Cth) s 27.

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in Australia, there is no uniform answer to this question. As set out in more detail below, the approach to be taken will depend on the specific legislative regime that is being considered.

A. The Fair Work Act

12 The majority of the FW Act applies to "national system employers" and "national system employees". These terms are defined in ss 13 and 14 of the FW Act, and generally refer to constitutional corporations, the Commonwealth, those in connection with constitutional trade or commerce, or those incorporated or carrying on an activity in a territory.[11] Sections 30D and 30N further extend the definition of a national system employer in relation to a referring state.

13 The Commonwealth has an explicit power to legislate with regard to constitutional corporations, being those corporations included in s 51(xx) of the Constitution.[12] This section includes "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".[13]

14 Relevantly, for the purpose of considering the application of the FW Act to inbound employees, a foreign corporation is simply a corporation incorporated outside the Commonwealth.[14] However, this does not include all corporations throughout the world; a necessary connection must be made to Australia, in terms of the corporation or its employees.[15]

15 There is no bright dividing line that can be identified to assist in ascertaining when an inbound employee will have a sufficient connection to Australia to be brought within the application of the FW Act. As set out below, the courts have taken the view that it is necessary for the employment, on its whole, to be able to be characterised as being "in and of Australia".

11 Fair Work Act 2009 (Cth) ss 13 and 14.
12 Commonwealth of Australia Constitution Act s 51(xx).
13 Commonwealth of Australia Constitution Act s 51(xx).
14 *New South Wales v Commonwealth* (1990) 169 CLR 481 at 504, *per* Deane J; *Gardner v Milka-Ware International Ltd* [2010] FWA 1589 at [24].
15 *Fair Work Ombudsman v Valuair Ltd (No 2)* (2014) 224 FCR 415 at [72].

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16 The application of the FW Act to inbound employees was considered in *Fair Work Ombudsman v Valuair Ltd (No 2)*[16] ("*Valuair*"), a 2014 decision of a single judge of the Federal Court of Australia. *Valuair* concerned an Australian airline which held contracts with foreign corporations for the supply of cabin crew out of Singapore and Thailand. The cabin crew were engaged to work primarily on international flights (to and from Australia), but would from time to time also be required to work on domestic flights within Australia.

17 The Federal Australian workplace regulator, the Fair Work Ombudsman, contended that – at least for wholly domestic flights – a "modern award" under the FW Act applied. If that was correct, employees engaged overseas by foreign corporations would have been entitled to Australian employment benefits for at least the time they undertook work in Australia.

18 The court in *Valuair* held that the FW Act only applies when an employment relationship is "in and of" Australia, where it bears a sufficient connection to Australia.[17] The court held that the employment relationship as a whole, based on the contract of employment and not just discrete elements of the work performed, must have this sufficient connection to Australia.[18] In a situation where the cabin crew were based in and employed from Singapore or Thailand, were paid and managed from Singapore or Thailand, and performed only a minority of their duties in Australia, the FW Act had no application.

19 The decision in *Valuair* is relevant to determining the application of the FW Act to inbound employees. Though this decision has not been subject to further judicial analysis, its point is relatively simple; for the FW Act or a "modern award" to apply, the employment relationship must be "in and of Australia", having regard to the circumstances as a whole. Where an employment relationship is formed outside Australia and work performed within Australia is a minor part of an

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16 (2014) 224 FCR 415.
17 *Fair Work Ombudsman v Valuair Ltd (No 2)* (2014) 224 FCR 415 at [72].
18 *Fair Work Ombudsman v Valuair Ltd (No 2)* (2014) 224 FCR 415 at [75] and [79].

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employee's duties (for instance, where a person performs a sales role partly in Australia but predominantly in other jurisdictions), that relationship is unlikely to attract the operation of the FW Act. Conversely, the FW Act may apply to a relationship formed outside Australia for the purpose of working substantially within or being based for longer periods of time in Australia.

B. Long service leave

20 Long service leave is an entitlement to an extended period of paid leave that arises after an employee has completed a substantial period of service. Long service leave entitlements are generally governed by state law, and thus vary from state to state. In New South Wales, for example, the primary long service leave entitlement is to two months of paid leave per ten years' service.[19]

21 Given that the entitlement to long service leave arises only after an extended period of service, issues around the application of long service leave to inbound employees commonly arises in the context of employees who, after working for a period of time overseas, are transferred permanently to Australia. The relevant question becomes: should the employee's service outside of Australia be counted when calculating the employee's long service leave entitlements?

22 The Full Court of the Federal Court of Australia recently considered the application of the Long Service Leave Act 1992 (Vic) ("Victorian LSL Act") to an inbound employee in *Cummins South Pacific Pty Ltd v Keenan*.[20] The employee, Keenan, had been employed in the UK by a UK subsidiary of the US-based Cummins Inc. He remained employed in the UK for a period of 13 years, until he was transferred to Victoria, Australia, in 1995. Upon transferring to Victoria, Keenan commenced employment with Cummins Australia Pty Ltd, an Australian entity. Keenan worked in Victoria for a period of seven years, and then was assigned on secondment to Indiana in the US for approximately

19 Long Service Leave Act 1955 (NSW) s 4.
20 *Cummins South Pacific Pty Ltd v Keenan* [2020] FCAFC 204.

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six years (although he remained an employee of the Australian entity). After his secondment was completed, Keenan returned to Victoria to work for a further 20 months before his employment was terminated.

23 The court was required to consider whether Keenan's service in the UK, prior to moving to Australia, ought to be included when calculating his entitlements under the Victorian LSL Act. The court ultimately held that Keenan's UK service *should* be counted when calculating his entitlements to long service leave. In coming to this conclusion, the court rejected the argument of the employer that only service performed within Victoria should count towards calculating the employee's long service leave entitlement.

24 Instead, the court considered whether the service would satisfy the "substantial connection" test that had been established by case law considering the equivalent long service leave legislation in New South Wales.[21] The court described the test arising from the case law as "a characterisation test which essentially asks whether the service provided by the employee may be fairly characterised as 'New South Wales service'".[22] The court also observed that "the primary focus of the characterisation process should be on the years closest to the time at which liability to provide the long service leave entitlements in question arose".[23]

25 In applying this test, the court held that Keenan's "overall service" of 34 years could be characterised as Victorian service. It is notable that while Keenan was employed by the Australian entity for a period that amounted to 60% of his overall service, he only worked within Victoria for a period of 12 years out of the 34 years' total service. The court emphasised the fact that the last 1.75 years of his service was performed in Victoria. Having regard to the court's observations about the importance of the years closest to the time at which the liability to provide the

21 *Australian Timken Pty Ltd v Stone (No 2)* [1971] AR (NSW) 246; *International Computers (Australia) Pty Ltd v Weaving* [1981] 2 NSWLR 64.
22 *Cummins South Pacific Pty Ltd v Keenan* [2020] FCAFC 204 at [194].
23 *Cummins South Pacific Pty Ltd v Keenan* [2020] FCAFC 204 at [194].

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entitlements arose, it appears this was a significant factor in the court's decision.

26 It should be noted that while the "substantial connection" test has now been applied by courts in determining entitlements under the legislation governing long service leave in Victoria and New South Wales, this does not mean it will necessarily be applicable in other states and territories. For example, in *Baker Hughes Australia Pty Ltd v Venier*,[24] the Industrial Relations Commission of Western Australia held that the Western Australian Long Service Leave Act 1958 (WA) did not apply to service with other entities within the corporate group, as the Act referred only to service with "one and the same employer".[25] Accordingly, an employee's service with different entities within a corporate group outside of Australia was to be disregarded for the purposes of calculating service under the regime in Western Australia.

C. Discrimination legislation

27 Anti-discrimination legislation in Australia has been enacted at both the federal level and by individual states and territories. Additionally, the FW Act provides for some protections against discriminatory conduct.[26] Accordingly, it is necessary to consider carefully the specific legislative regimes that may concurrently apply to inbound employees working in Australia.

28 At a federal level, the key pieces of legislation regulating discriminatory conduct are the:

(a) Racial Discrimination Act 1975 (Cth);

(b) Age Discrimination Act 2004 (Cth);

(c) Sex Discrimination Act 1984 (Cth); and

(d) Disability Discrimination Act 1992 (Cth).

29 With the exception of the Racial Discrimination Act 1975 (Cth), each of these Acts explicitly states that it applies to

24 (2016) 263 IR 308.
25 Long Service Leave Act 1958 (WA) s 8(1).
26 For example, s 351 of the Fair Work Act 2009 (Cth).

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discrimination in Australia, even if the discrimination involves persons or things, or matters arising, outside Australia.[27] For example, in *Clarke v Oceania Judo Union Inc*,[28] the Oceania Judo Union Inc, an entity incorporated in New Zealand, made the decision that Clarke, a judo athlete who was blind, could not participate in a judo tournament that would be held in Queensland, Australia, on account of his blindness.

30 The court determined that, notwithstanding that Oceania Judo Inc was not an Australian entity, and that the decision made by the body to exclude the competitor was made outside of Australia, the conduct still enlivened both the Disability Discrimination Act 1992 (Cth) and the jurisdiction of Australian courts to determine the matter.

31 Having regard to the scope of the obligations imposed by discrimination legislation and the associated jurisdiction of Australian courts, businesses located outside of Australia who deploy employees to Australia ought to be aware of their obligations and carefully consider their conduct in relation to Australian-based employees in order to avoid potential claims.

III. Extraterritorial effect of the Fair Work Act 2009 and outbound employees

32 Australian businesses who deploy employees outside of Australia need to carefully consider the applicable legal regimes in the countries in which employees are to be deployed. However, it is also necessary to consider the extent to which Australian legislation may still apply to employees notwithstanding that they are not performing duties within Australia.

A. Fair Work Act

33 The application of the FW Act outside Australian territory is somewhat ambiguous, despite a modicum of judicial scrutiny.

27 Age Discrimination Act 2004 (Cth) s 9(3); Sex Discrimination Act 1984 (Cth) s 9(19); Disability Discrimination Act 1992 (Cth) s 12.
28 [2007] FMCA 292.

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Sections 31 to 36 of the FW Act provide some assistance, under the title "Geographical application of this Act". Section 31 of the FW Act provides that the Act applies generally to Australia and its territories, while s 34(3) allows for regulations to be made to extend this application. Section 34(3) of the FW Act provides:

> Without limiting subsection (1), if the regulations prescribe further extensions of this Act, or specified provisions of this Act, in relation to all or part of the area outside the outer limits of the exclusive economic zone and the continental shelf, then this Act, or the specified provisions, extend accordingly to:
>
> (a) any Australian employer; and
>
> (b) any Australian-based employee.

34 The relevant regulation is reg 1.15F of the Fair Work Regulations 2009 (Cth) ("FW Regulations"), which provides:

> (2) For subsection 34(3) of the Act, the provisions of the Act mentioned in the following table, and the rest of the Act so far as it relates to those provisions, are extended to:
>
> (a) an Australian employer in relation to the employer's Australian-based employees; and
>
> (b) an Australian-based employee in relation to the employee's employer if the same enterprise agreement applies to both of them;
>
> in relation to all of the area outside the outer limits of the exclusive economic zone and the continental shelf.

35 Regulation 1.15F does not grant extraterritorial application to the entire FW Act. The referenced table provides that this regulation extends the application of the NES and other terms and conditions of employment. The regulation also extends the operation of the general protections, unfair dismissal and stand down provisions.[29]

36 These extensions of the FW Act apply to "Australian employers" and "Australian-based employees". An "Australian employer" is defined in s 35(1) of the FW Act as, summarily, one within the ambit of the constitutional limitations above,

29 Fair Work Regulations 2009 (Cth) reg 1.15F.

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particularly trading and financial corporations formed within the limits of the Commonwealth. An Australian-based employee is an employee whose primary place of work is in Australia, or who is employed by an Australian employer (whether the employee is located in Australia or elsewhere).[30] However, this latter category does not apply to an employee engaged outside Australia who is employed by an Australian employer to perform duties outside Australia.[31] This exception is unusually drafted and, as explored below, presents some ambiguity in its application.

37 The application of the FW Act to an outbound employee was considered in *Cohen v iSoft Group Pty Ltd* ("*Cohen*"), a decision of the Federal Court of Australia and a subsequent appeal to the Full Court of the Federal Court of Australia.[32] In *Cohen*, the applicant was an Australian employed by an Australian company, initially in Singapore but with a subsequent secondment to Bangalore, India.

38 In *Cohen*, Flick J at first instance expressed a view in *obiter* on the application of the FW Act. Outlining the relevant provisions of the FW Act and FW Regulations, His Honour noted that the applicant was engaged outside Australia to perform duties outside Australia, and so was not included in the extended application of the FW Act by virtue of s 35(3). This conclusion was justified on the basis the applicant was engaged in Singapore and the substance of his duties was performed outside Australia.[33] This conclusion was affirmed on appeal.[34] The conclusion that might be drawn from *Cohen* is that the test in s 35(3) is a simple consideration of whether the employee performs the substantial part of his duties in Australia or somewhere else, considering also that these cases relate to employees working wholly outside Australia. This conclusion is certainly supportable on the ordinary construction of s 35(3) and its application to simple factual scenarios.

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30 Fair Work Act 2009 (Cth) s 35(2).
31 Fair Work Act 2009 (Cth) s 35(3).
32 *Cohen v iSoft Group Pty Ltd* [2012] FCA 1071; *Cohen v iSoft Group Pty Ltd* [2013] FCAFC 49.
33 *Cohen v iSoft Group Pty Ltd* [2012] FCA 1071 at [165].
34 *Cohen v iSoft Group Pty Ltd* [2013] FCAFC 49 at [54].

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39 A further consideration of s 35 arose in *Tung Fai Choi v ACT Education Solutions (Australia) Pty Ltd*[35] ("*Choi*"), a decision of the Fair Work Commission relating to unfair dismissal. The applicant, Choi, was based in Singapore when he accepted and commenced his employment, and other than a trip to Australia to undertake induction and training, he never otherwise travelled to Australia as part of his employment. The employer named on the offer letter was a company registered in Hong Kong.

40 Choi brought proceedings against, and sought to argue that his true employer was, an Australian company, ACT Education Solutions (Australia) Pty Ltd ("ACT"). Choi contended that:

(a) he took instructions from and liaised daily with employees of ACT;

(b) ACT performed the corporate functions (accounting, *etc*) from Australia for all of the corporate group's operations in Southeast Asia; and

(c) he had never dealt with any employees of the Hong Kong company that was said to be his employer, and he asserted (although there was insufficient evidence for the Fair Work Commission to determine) that he had never dealt with employees of any of the entities comprising the corporate group in Hong Kong because there were no such employees.

41 The Fair Work Commission held that, despite the applicant taking instructions from and liaising with ACT's Sydney office, the applicant was employed by the Hong Kong company. Accordingly, the applicant was not employed by an Australian employer and could not rely on the FW Act. The Fair Work Commission went further, noting that even if the Hong Kong company satisfied the definition of an Australian company (noting that the Hong Kong company did not operate in Australia and so could not satisfy s 35(1)(f)), the applicant performed his duties wholly outside Australia.

35 [2016] FWC 7905.

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42 The result in *Choi* might have been different if the applicant was employed by ACT, as an Australian company that would satisfy s 35(1). Nevertheless, the applicant's duties would still have required a sufficient nexus to Australia, with the performance of not insubstantial duties within Australia, *per Cohen*, to navigate the hurdle in s 35(3).

43 In *Munjoma v Salvation Army (NSW) Property Trust as Trustee for the Social Work*[36] ("*Munjoma*"), the Fair Work Commission held that a fly-in/fly-out employee could rely upon the provisions of the FW Act despite performing work outside Australia. The applicant performed work as a human resources consultant in Nauru for four weeks at a time, before returning to Sydney for two weeks' rest.

44 The applicant entered into the contract of employment in Australia, was paid in Australian dollars, and was managed primarily from Australia. Additionally, the applicant was required to enter into a confidentiality agreement in favour of the Australian government. The contract expressly precluded the operation of the FW Act, though included the NES "as if" the applicant were employed in Australia.

45 The Fair Work Commission held, where the respondent agreed it was an Australian employer for the purpose of s 35, that the applicant could not be excluded from the FW Act by the operation of s 35(3). Thus, the FW Act was applicable to the employee. Referring to *Cohen*, the commission noted the relevance of the jurisdiction in which the contract of employment was *executed* (that is, in *Cohen*, the contract of employment was executed in Singapore). Though *Cohen* focused on the substance of the duties performed within Australia, the commission postulated that the Singapore-executed contract in that case was a factor to be taken into consideration. The key point from the decision in *Munjoma* is that, for the purpose of s 35, "engaged" refers to the jurisdiction in which the contract of employment was executed,

36 [2013] FWC 3337.

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as opposed to the jurisdiction in which the employee performs the employment.[37]

46 Determining the jurisdiction in which the contract of employment was executed is not always a straightforward task. In *Winter v GHD Services Pty Ltd*,[38] an employee was engaged by an Australian company, GHD Services Pty Ltd, to perform work in Papua New Guinea. It was not controversial that the duties to be performed were wholly outside of Australia, so the court was required to determine whether the employee was "engaged outside Australia".

47 The employee was physically located in the US at the time he signed his contract of employment. After signing the contract, the employee e-mailed the document to a representative of the employer who was located in New South Wales, Australia. The court held, by reference to principles of contractual formation, that the contract was formed at the time acceptance was received by the employer. The court found that the Electronic Transactions Act 1999 (Cth) applied to the formation of the contract, and that in accordance with that Act, "when a contract is concluded by an electronic communication, such as an email, it is finalised at the place of business of the recipient of the email".[39] In this case, the place of business of the employer was within Australia, and accordingly the contract was formed in Australia.

48 Accordingly, the court rejected the argument that the employee was "engaged outside Australia", and notwithstanding that the employee was engaged to perform duties wholly outside of Australia, his employment was found to be covered by the FW Act.

49 The application of the FW Act to outbound employees can be ambiguous, and needs to be carefully considered in terms of the substance of the work being performed as well as the circumstances by which the employee was initially engaged.

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37 *Munjoma v Salvation Army (NSW) Property Trust as Trustee for the Social Work* [2013] FWC 3337 at [45].
38 [2019] FCCA 775.
39 *Winter v GHD Services Pty Ltd* [2019] FCCA 775 at [25].

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Practitioners should be cautious in considering the application of the FW Act to outbound employees.

B. Long service leave

50 In Queensland and South Australia, there are statutory tests relevant to determining whether service outside of the relevant state will count when determining the employee's long service leave entitlement. In South Australia, an employee's long service leave entitlement will accrue in respect of:[40]

(a) service in South Australia;

(b) service outside of South Australia where the employee is predominantly employed in South Australia; or

(c) service outside of South Australia under an employment contract that is governed by the laws of South Australia.

51 In Queensland, the relevant definition of service extends to service "whether wholly in the State or partly in and partly outside the State".[41]

52 In other states and territories, the principles applicable in determining the application of long service leave to overseas employees are broadly consistent with those set out above with respect to inbound employees: the key consideration will be determining whether or not the employee's service has a substantial connection with Australia.

53 It is notable that in the case of *Cummins South Pacific Pty Ltd v Keenan* considered above,[42] the employee undertook a six-year secondment in the US whilst being employed by the Australian entity. In all, the employee was employed by the Australian entity for approximately 20 years and worked in Victoria for approximately 14 of those years. It was conceded by the employer, and accepted by the court, that the employee's

40 Long Service Leave Act 1987 (SA) s 4.
41 Industrial Relations Act 2016 (Qld) s 93.
42 See paras 22–25 above.

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secondment ought to be included in considering the employee's period of service for the purposes of calculating his long service leave entitlements.[43]

54 Accordingly, even substantial periods of work performed outside of Australia may have a "sufficient connection" to Australia to count towards an employee's service for the purposes of calculating long service leave entitlements.

C. Anti-discrimination laws

55 In *Brannigan v Commonwealth of Australia*[44] ("*Brannigan*"), the applicant was an Australian citizen employed in the Australian High Commission in the UK. The applicant was dismissed after an extended period of sick leave. The applicant made a complaint to the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) on the basis of racial, sex and disability discrimination, referring to three of the four key Commonwealth anti-discrimination Acts (the exception being the Age Discrimination Act 2004 (Cth)).

56 The court in *Brannigan* held that, absent some Parliamentary intention to legislate extraterritorially, there could be no implied extraterritorial effect in Commonwealth anti-discrimination legislation.[45] These Acts made clear provision for their operation within Australian territory, and thus could not be said to apply to circumstances where the applicant was employed outside Australia.[46] This conclusion was later affirmed in *Vijaykumar v Qantas Airways Ltd*,[47] a 2009 decision of the Federal Court of Australia.

57 While a court has not considered whether or not the Age Discrimination Act 2004 (Cth) has extraterritorial effect, it similarly does not expressly provide for any extraterritorial application, and accordingly it is likely that a court would

43 *Cummins South Pacific Pty Ltd v Keenan* [2020] FCAFC 204 at [167] and [199].
44 (2000) 110 FCR 566.
45 *Brannigan v Commonwealth of Australia* (2000) 110 FCR 566 at 570.
46 *Brannigan v Commonwealth of Australia* (2000) 110 FCR 566 at 571–572.
47 [2009] FCA 1121.

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adopt a consistent approach as taken with each of the other Commonwealth anti-discrimination Acts.

58 The relevant consequence of the construction of these Commonwealth anti-discrimination statutes is that a discriminatory act occurring outside Australia will not be actionable under Australian law.

59 Each state and territory has its own anti-discrimination legislation that operates concurrently with the Commonwealth regime. In *Lindisfarne R & SLA Sub-Branch & Citizen's Club Inc v Buchanan*,[48] the Supreme Court of Tasmania held that the Anti-Discrimination Act 1998 (Tas) did not displace the presumption that legislation does not have extraterritorial effect, and accordingly the Anti-Discrimination Tribunal of Tasmania was not empowered to make orders with respect to discrimination outside of Tasmania. While the legislation of each state and territory needs to be considered on its own terms, the operation of the legislation in each case is subject to this common law presumption[49] which must be overcome before it could be found to have extraterritorial effect.

IV. Conclusion and practical measures

60 The FW Act is the principal piece of Commonwealth labour law legislation, though it does not operate in vacuum; a raft of other Commonwealth and state laws are relevant to determining employee entitlements under Australian law. Importantly, Commonwealth and state legislatures have broad power to make laws with extraterritorial effect.

61 The application of Commonwealth and state labour laws to inbound and outbound employees is piecemeal, ambiguous, and not wholly settled. Inbound employees may be subject to Commonwealth legislation according to a test of whether the employment relationship can be characterised as "in and of

48 [2004] TASSC 73.
49 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363.

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Australia". Care should also be taken in considering the potential application of Commonwealth legislation to outbound employees.

62 Generally, extraterritorial application of state and Commonwealth law requires some sufficient connection to the relevant jurisdiction. Notably, long service leave entitlements vary considerably from state to state. Care should be taken in considering whether long service leave entitlements apply to outbound employees, as this is a particularly ambiguous area of law.

63 When engaging in or altering the terms of an employment relationship with an outbound or inbound employee, there are several practical measures that may negate the effect of Australian labour laws. However, care should be taken in assessing the application of these laws; there is by no means a simple or one-size-fits-all endeavour.

64 In engaging outbound employees, suspending employment with an Australian employer via leave without pay and engaging that employee through a foreign company may suffice in some regards to avoid the application of the FW Act. Alternatively, terminating the employee's employment with the Australian employer (including by way of voluntary employee resignation, where appropriate) and engaging the employee through a foreign company may also assist in clarifying the statutory regime intended to apply to the employment.

65 Additionally, contracts executed (and legally formed) overseas may provide some protection from the application of Australian labour laws, particularly where those contracts expressly stipulate that the law of a non-Australian jurisdiction applies.

66 In all circumstances, it is recommended that the arrangements between the employee and employer are set out in written agreements between the parties. For example, both inbound and outbound employees undertaking secondments should enter into written secondment agreements consistent with their underlying employment agreements that clearly set out the entitlements and benefits during the secondment

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period. Clearly articulating the parties' agreement in respect of entitlements and benefits can, of itself, assist in reducing the likelihood of a dispute arising as it can ensure that the parties have consistent expectations at the commencement of the arrangement. Additionally, it can assist in clarifying the intended legal regime that will apply to the employee during the course of the secondment.

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