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Disclaimer: The contents of this document are intended as an analysis only and do not contain legal advice or specific migration advice. The precise legal meaning and scope of application of the information contained herein will require specific advice independently obtained in order to ascertain if specific exemptions apply to your operations.

Current migration instruments for offshore resources activities

On 3 December 2015, Minister for Immigration & Border Protection, Peter Dutton, registered two instruments impacting on migration / visa requirements for foreign nationals undertaking activities in the offshore resources industry. The Department of Immigration & Border Protection has also published updated material on its website reflecting the requirements that took effect on 14 December 2015.

For foreign nationals (ie. skilled non-citizens) undertaking activities on offshore "resources installations" (eg. installations attached to the Australian seabed), this will not change their current migration / visa requirements. However, for foreign nationals undertaking activities on non-resources installations offshore, it will have important implications.

The introduction of the two new instruments also revoked two existing instruments with effect from 14 December 2015.

What changed on 14 December 2015?

From 14 December 2015, foreign nationals undertaking activities on "resources installations" (see later in this paper for definitions) still require either a 400, a 457 or a permanent residence visa to perform work within Australia's exclusive economic zone (EEZ). Nothing will change for those skilled foreign workers. Their current migration / visa requirements continue from 14 December 2015.

However, non-resources installations operating offshore (eg. some manoeuvring vessels, etc) will be deemed to no longer be within Australia's migration zone. This means foreign nationals undertaking activities on exempt non-resources installations will no longer need to notify the Department of Immigration & Border Protection to enable a special purpose visa (SPV) to be conferred on a foreign national to enter a project's licenced area (ie. the permit zone). This means those particular foreign nationals would not require any other visa that provides work rights if the vessel / structure falls within the prescribed exclusion.

In short, from 14 December 2015, foreign nationals on non-resources installations are deemed to be exempt from Australia's migration zone and therefore do not need a visa that provides work rights to undertake their intended activities.

Those foreign nationals will only require the appropriate visa that would have been necessary for them to enter or exit Australia, eg. a transit visa, an e-visitor visa, a business travel authority or a maritime crew visa (MCV), depending on what passport they hold and how they enter and leave Australia.

Key takeout: From 14 December 2015, foreign nationals working on "resources installations" within Australia's EEZ continue to require a 400, 457 or permanent

residence visa to perform work. Foreign nationals undertaking activities on non-resources installations are deemed to be outside Australia's migration zone and do not require a visa such as an SPV, 457, 400, or a permanent residence visa.

What is a "resources installation"?

A "resources installation" within Australia's EEZ, which continues to be deemed to be inside Australia's migration zone from 14 December 2015, means one of the following:

- **A resources industry fixed structure** – a structure that is not able to move or be moved as an entity from one place to another and is for offshore use in exploring for or exploiting natural resources.
- **A resources industry mobile unit** – a vessel equipped to (or a moveable floating structure for use offshore in order to):
    - Explore or exploit natural resources by drilling the seabed or its subsoil; or
    - Obtain substantial quantities of material from the seabed or its subsoil.

    Note: Vessels used in manoeuvring a resources installation, or in operations relating to the attachment of a resources installation to the Australian seabed, are excluded from the definition of "resources industry mobile unit" above. They are therefore not a resources installation and, as such, are deemed to be outside Australia's migration zone from 14 December 2015.

Unless a vessel or structure fits into one of the two categories above, it is not a resources installation and, from 14 December 2015, is deemed not to be in Australia's migration zone. Consequently, foreign nationals undertaking activities on those non-resources installations would not require a visa that provides work rights in order to undertake activities on those vessels provided they fall within the exemption.

The two new instruments

The two new instruments, the Migration Amendment (Offshore Resources Activity) Regulation 2015 and a separate determination (IMMI 15/140), took effect on 14 December 2015.

The new Regulation simply specifies the visa types that can provide work rights for foreign nationals working in offshore resources activities within the migration zone. For activities that fall within the migration zone, the Regulation specifies that a Temporary Work (Skilled) Visa (Subclass 457), a Temporary Work (Short Stay Activity) Visa (Subclass 400) or a permanent residence visa is required for foreign nationals performing work.

The new Determination (IMMI 15/140) specifies an exclusion from the migration zone for vessels and structures that are not resources installations and also revokes an earlier determination.

According to the explanatory statement to the new determination, the instrument operates so that a non-citizen who is on a vessel or structure that is used for

operations or activities identified in s9A(5)(a) and s9A(5)(b) of the Migration Act 1958, but is not an Australian resources installation, is not taken to be in the migration zone.

This is a return to the long-standing delineation of the migration zone that was in place in Australia between 1982 and 2014.

The two instruments being replaced

Two previous instruments, a determination and a declaration, which were revoked with effect from 14 December 2015, had the combined effect of enabling foreign nationals on non-resources installations to use an SPV to undertake activities within a project's licensed area in the migration zone. Those vessels / structures were exempt from having to use a 457, 400 or permanent residence visa (the visa types prescribed for resources installations) but still required an SPV at a minimum to undertake activities in the licenced area because they were deemed to be in the migration zone.

The following diagrams illustrate in very simple terms the key migration requirements for offshore resources activities before and after 14 December 2015.

Inside Australia's exclusive economic zone

within 200 nautical miles offshore / above the continental shelf

FROM 14 DECEMBER 2015

INSIDE THE MIGRATION ZONE

- **Resources installations** (defined under s8 and s9 of the Migration Act 1958):
  - Resources industry fixed structures (not able to move or be moved)
  - Resources industry mobile units (excludes vessels that "manoeuvre" resources installations into place)

Foreign nationals working on those installations **MUST HAVE** a 457, a 400 or a permanent residence visa that provides work rights

OUTSIDE THE MIGRATION ZONE

- **Non-resources installations**:
  - Vessels not sufficiently attached to the seabed / vessels that "manoeuvre" resources installations into place
  - Resources installations once detached from the Australian seabed and taken outside Australian waters

Foreign nationals undertaking activities on those vessels **DO NOT NEED** a 457, a 400, a permanent residence visa or a special purpose visa to undertake activities because they are no longer deemed to be in the migration zone

Inside Australia's exclusive economic zone

within 200 nautical miles offshore / above the continental shelf

BEFORE 14 DECEMBER 2015

INSIDE THE MIGRATION ZONE

- **Resources installations** (defined under s8 and s9 of the Migration Act 1958):
  - Resources industry fixed structures (not able to move or be moved)
  - Resources industry mobile units (excludes vessels that "manoeuvre" resources installations into place)

Foreign nationals working on those installations **MUST HAVE** a 457, a 400 or a permanent residence visa that provides work rights

- **Non-resources installations**:
  - Vessels not sufficiently attached to the seabed / vessels that "manoeuvre" resources installations into place
  - Resources installations once detached from the Australian seabed and taken outside Australian waters

Foreign nationals on those vessels **MUST HAVE** a special purpose visa at a minimum to undertake activities in the licenced area

What could happen next?

The effect of the latest instruments, in revoking the two pre-existing instruments, means the current High Court challenge by the Maritime Union of Australia (MUA) and the Australian Maritime Officers Union (AMOU) has been reframed against the current framework and will proceed as scheduled.

The High Court case, which was last scheduled for hearing in Sydney on 19 February 2016, initially involved a challenge of the two instruments that have since been revoked. It is understood that the next proceedings in the case will be in August 2016.

Additionally, one of the two latest instruments – the Regulation – can be disallowed in the Senate. On 19 April 2016, Labor Senator Kim Carr gave notice that he would move a motion to disallow the Regulation on the next sitting day (2 May 2016). That motion was deferred until 4 May 2016 and again until 9 May 2016, by which time a federal election was called on 8 May 2016. With the calling of the federal election, the disallowance motion has now lapsed. If it is again moved following the federal election, this will not happen until August 2016 at the earliest.

It is important to note that the current Regulation, whilst disallowable, merely specifies the visa types required for offshore resources activities within the migration zone, ie:

- A Temporary Work (Skilled) Visa (subclass 457);
- A Temporary Work (Short Stay Activity) Visa (subclass 400); or

- A permanent visa.

It is the separate determination that excludes non-resources installations from Australia's migration zone. However, the determination is not disallowable.

AMMA will keep members informed of the outcome of any future disallowance motion moved and other developments in this area. However, no further significant developments are expected until August 2016 at the earliest.

For further information

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