Updated 31 August 2016

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Summary of High Court decision on offshore migration

On 31 August 2016, the High Court handed down its decision in response to an application by the Maritime Union of Australia (MUA) and the Australian Maritime Officers Union (AMOU), which will have important implications for Australia's offshore resources industry.

The union application, which argued there was a "special case" to be determined, sought and obtained a declaration from the High Court that paragraph 2 of a ministerial determination (IMMI 15/140) was invalid.

The Determination was made with effect from 14 December 2015 under the ministerial power in s9A(6) of the *Migration Act 1958*. Section 9A(6) confers on the minister of the day the power to make determinations about the definition of "offshore resources activity" for the purposes of coverage by the Migration Act.

Paragraph 2 of the Determination purported to exclude from the definition of "offshore resources activity" any relevantly licensed activity that used a vessel or structure that was not an "Australian resources installation". The effect of that paragraph was that non-citizens working on relevant vessels and floating structures that were not attached to the Australian seabed were no longer subject to Australia's visa regime because they were not deemed to be in the migration zone.

The applicant unions argued that such an exclusion was alternatively "repugnant" to the Migration Act or excluded too substantial a part of the legislative scheme regulating foreign labour in offshore resources activities.

The court's key findings

The High Court unanimously upheld the union application, finding the Determination exceeded the limits of the power conferred on the minister by s9A(6). The court declared the Determination invalid with immediate effect from 31 August 2016.

"The High Court unanimously held that the broad-ranging exception contemplated by the determination exceeded the limited terms of the power conferred on the Minister by s9A(6) of the Act," a High Court summary of the decision states.

"The text and context of s9A(6) imply that its purpose is to provide for limited exceptions for particular activities or operations to which it may be determined from time to time the visa regime should not apply. By entirely negating the extension of the visa regime to non-citizens on vessels and structures that are not Australian resources installations, where those citizens are in an area in order to participate in or support an offshore resources activity, the determination purported in effect to repeal the operation of the amending provisions' extension of the visa regime, and thereby to thwart the legislative purpose."

Detailed High Court findings

In their full decision – Chief Justice French and Justices Bell, Gageler, Keane and Nettle – clarified the ministerial power under s9A(6) was a power to except "an" operation or activity from the migration zone.

"Arguably, that includes power to except more than one operation or activity and perhaps even a class or more than one class of operation or activity," the court said.

While the Determination had been crafted to appear as if it was marking out a particular case of operations or activities that possessed a "special feature", it was actually purporting to exclude any vessel or structure that was not an Australian resources installation. That had the effect of depriving s9A(1) of the Migration Act of all content, the court found.

Given that all other offshore resources activities were previously regulated by the Migration Act prior to the new s9A(1) taking effect on 29 June 2014, in excluding all activities not attached to the Australian seabed, the Determination had in effect entirely negated the extension of coverage.

Given that s9A(1) was enacted to extend the operation of the visa regime to "non-citizens on vessels or unmoored structures who are in an area to participate in or support an offshore resources activity", it should not be supposed that s9A(6) was enacted with the object of enabling the entire negation of that extension, the court said.

While the ministerial power was expressed in "relatively broad terms", it was not "unconstrained", it found.

While the exclusion may have applied to a small proportion of offshore resource sector workers, the court said "whatever proportion of persons" it captured, the legislative purpose was to subject "all" such persons to the visa regime except in relation to specifically exempt operations or activities.

"Whether those persons comprise a small or large proportion of persons working in the offshore resources industry is for present purposes irrelevant."

In summary, because the Determination purported to negate the effect of s9A(1), it was beyond power and invalid, the High Court ruled.

Practical impacts of the decision

In the wake of the High Court decision, the Department of Immigration & Border Protection has issued a fact sheet reflecting the requirements for industry going forward.

"From 31 August 2016, non-citizens working on vessels involved in offshore resources activities will have to meet the same visa requirements as non-citizens working on Australian resources installations," the fact sheet states.

"Non-citizens, other than permanent residents, intending to work on an Australian resources installation or supporting vessel must hold either a Subclass 457 Temporary Work (Skilled) visa or a Subclass 400 Temporary (Short Stay Activity) visa."

The fact sheet clarifies that the definition of "offshore resources activity" is linked to two pieces of legislation – the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Commonwealth) and the Offshore Minerals Act 1994 (Commonwealth).

Any operation or activity performed under either of those Acts is now an "offshore resources activity" covered by the Migration Act unless excluded by any future determination made by the minister of the day, the fact sheet states.

"In practice, this means that all non-citizens undertaking activities or operations on an Australian resources installation or a vessel that is in an offshore permit or licence area to support offshore resources activities are taken to be in the migration zone and must hold a visa."

The most pressing question for employers is what is now required for those overseas workers currently in Australia's offshore resources sector.

Firstly, the Department advises that all work being performed in offshore resources activities by foreign nationals holding a 457, 400 or permanent residence visa can continue under existing arrangements.

Secondly, where foreign nationals are performing work in relation to activities or vessels that were previously outside the migration zone and who as a result are working without a 457 or 400 visa, the Department advises that those workers can remain on vessels but must immediately cease work and obtain a 400 Visa or 457 Visa.

Previous Regulation remains in force

In the wake of the High Court decision which set aside the ministerial Determination, the Migration Amendment (Offshore Resources Activity) Regulation 2015 remains in force.

That Regulation, which took effect on 14 December 2015 along with the now defunct Determination, states that foreign nationals performing work in relation to offshore resources activities that are deemed to be in the migration zone (which is now all activities in Australia's exlusive economic zone), require one of the following visas to perform work:

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

A summary of the High Court decision is available here. Full decision available here.

For further information

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