



# The 183 day myth when working in Australian waters

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# Matters to be discussed today

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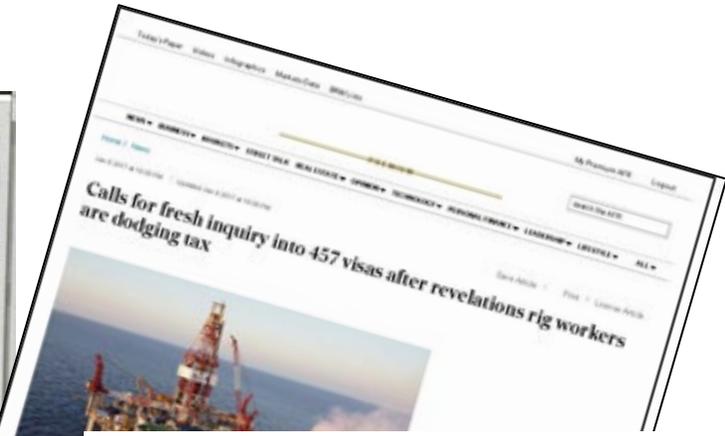
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- 1. Why this is important**
- 2. Corporate permanent establishment matters**
- 3. Employee and employment tax matters**
- 4. Actions required**

# Why this is important



**Temporary visa scandal: Busting the skills shortage 'ruse'**



As Australia's temporary work visa program faces fresh outcry, an economist has criticised the "mostly false" notion of skills shortages that underpins the entire scheme.



**The Maritime Union of Australia is calling for a royal commission into the 457 skilled migrant visa program for temporary overseas workers.**

There are allegations that an American oil and gas drilling company operating off the West Australian coast is using a special roster system to help its fly-in, fly-out employees reduce their tax obligations in Australia.

The allegations concern the United States-based oil and gas drilling company Diamond Offshore, which operates two rigs off the coast of Western Australia.



Temporary visas are back in the news in Australia after *The West Australian* revealed this week that one-third of workers on a US-owned rig off Port Hedland are US citizens, despite widespread unemployment on the west coast.

*The West Australian* reported that the U.S. company, Diamond Offshore, has constructed its roster in such a way that its non-Australian workers infrequently come ashore, thus allowing them to avoid or minimise income tax. There is, however, no suggestion that Diamond Offshore has violated any laws in doing this.

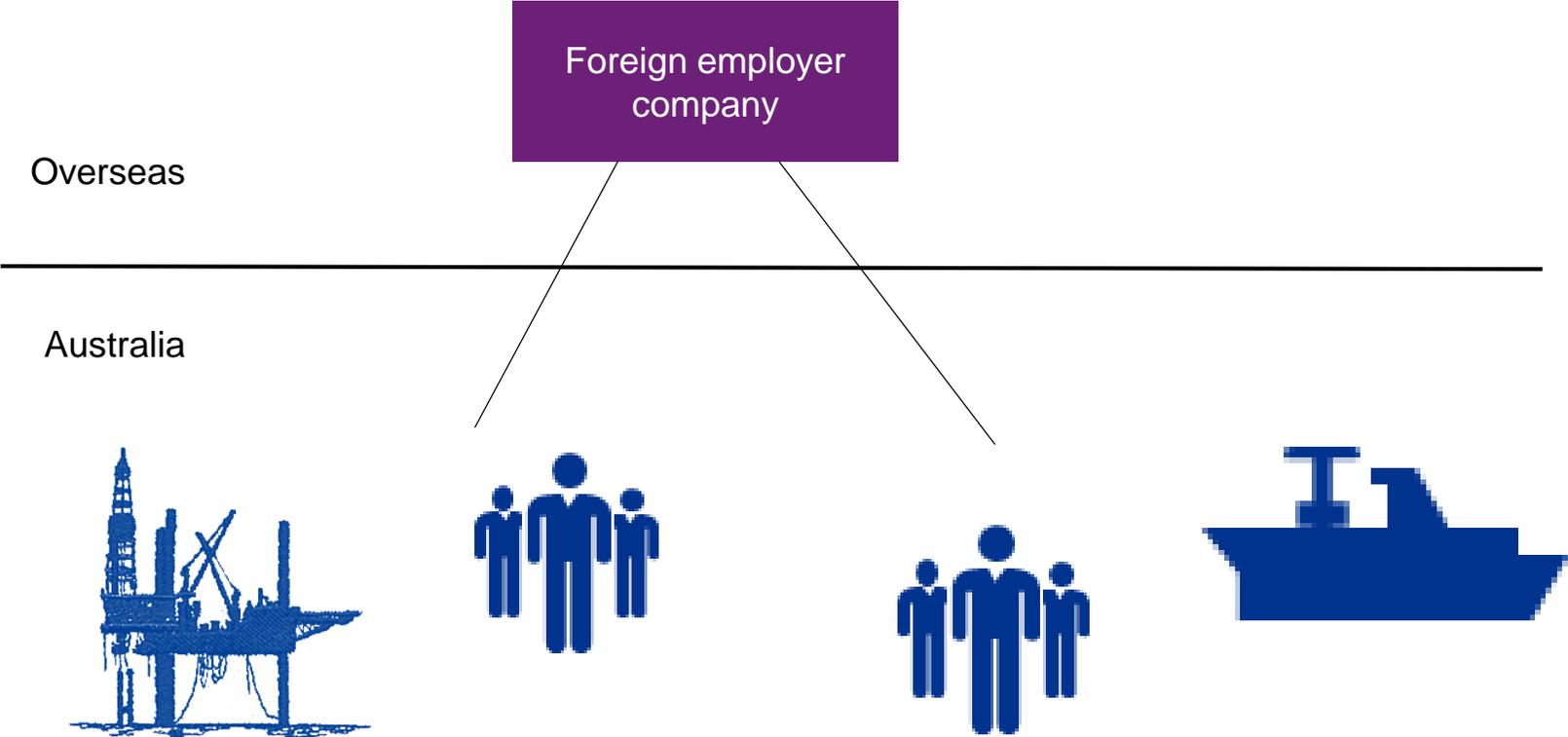
The company has reportedly kept records for favouring overseas employees on in Australia each year so it can roster them in a way that suits the Australian Taxation Office's 183-day-test that determines whether or not foreign workers are considered as residents for income tax purposes.



As Australia's temporary work visa program faces fresh outcry, an economist has criticised the "mostly false" notion of skills shortages that underpins the entire scheme.

KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity.

# Employee services - Australian Permanent Establishment



# Employee services - Australian Permanent Establishment

Foreign employer company will have an Australian PE under general PE definition if:

PE requirements:	Application to offshore activities:
Carries on business in Australia	Foreign employer company: <ul style="list-style-type: none"> <li>• Has employees providing services in Australia</li> <li>• Receiving service fees</li> </ul> Therefore carrying on business in Australia
Temporal permanence	At least one employee in Australia: <ul style="list-style-type: none"> <li>• &gt; 6 months – Australian PE</li> <li>• &lt; 6 months – no-Australian PE</li> </ul>
Geographic permanence	<ul style="list-style-type: none"> <li>• Production platform – Australian PE</li> <li>• Exploration drilling – possible Australian PE</li> <li>• Seismic survey – depends on facts and treaty</li> </ul>

# Employee services - Australian Permanent Establishment

Geographic permanence:

- **General rule** – Ship or rig navigating within Australian waters – mobile and so not fixed
- **However** – A Ship or rig which is restricted to an area of **commercial and geographical coherence** can be considered fixed

Examples:

- Vessel or rig working in **same area for a single customer** – commercial and geographical coherence
- Vessel or rig working in the same area for **multiple customers** – no commercial coherence
- Vessel or rig working in **multiple areas** for a single customer – no geographical coherence

# Employee services - Australian Permanent Establishment

Permanent establishment includes:

- A place relating to the **extraction** of natural resources (OECD model)
- A place relating to the **exploration** for natural resources (UK Treaty)
- A building site or **construction, assembly, or installation project** (for more than 6 months) (Philippines Treaty)
- An installation, **drilling rig** or ship (for at least 6 months in 24 months) used in connection with **exploration or exploitation** of natural resourced (US treaty)
- Carries on **offshore activities** (for more than 30 days in 12 months) in connection with exploration or exploitation of natural resources (Norway treaty)
- **Furnishing services** for more than 183 days in 12 months (Sri Lankan Treaty)

# Employee tax matters

Taxation of foreign nationals working in Australia driven by:

- Residency of employee
- Source of income
- Application of DTA

# Employee tax matters (cont'd)

## Application of the Dependent Personal Services Articles of Australia's treaty network

Exemption from Australian income tax where:

- ü Employee present in Australia for less than 183 days in an income year/12 month rolling period; AND
- ü Remuneration is paid by an employer who is not resident in Australia; AND
- ü Remuneration is not deductible in determining the taxable profits of a PE in Australia.

# Employee tax matters (cont'd)

## Application of the Dependent Personal Services Articles of Australia's treaty network

### *Identifying the employer – the 'economic employer' concept*

OECD model commentary and ATO TR 2013/1

*“the enterprise to which a non-resident individual renders services in what would be considered an employment relationship”.*

Key factors to consider in the analysis include:

- ü control over the worker
- ü the integration of the worker within the business
- ü the terms of engagement
- ü remuneration arrangements
- ü deliverables under the arrangements
- ü tools and equipment
- ü authorisation to delegate

# Employee tax matters (cont'd)

## **Application of the Dependent Personal Services Articles of Australia's treaty network**

### ***What if there is no Australian resident subsidiary?***

If a PE is determined to exist, OECD Commentary again requires a substance over form approach.

Whether or not the deduction for remuneration is actually claimed by the PE, is not necessarily conclusive.

OECD Commentary on the DPS Article outlines that:

*“the proper test is whether any deduction otherwise available with respect to that remuneration should be taken into account in determining the profits attributable to the PE.”*

# Employee tax matters (cont'd)

## **Application of the Dependent Personal Services Articles of Australia's treaty network**

### ***Conclusion***

Even if less than 183 days spent in Australia, treaty exemption unlikely to be available where:

- Australian resident entity is the 'economic employer'; or
- Employee's remuneration is deductible for an Australian PE

### ***Impact for employee***

- Salary and wages attributable to work in Australia subject to Australian income
- Annual Australian income tax return filing obligation (that requires a TFN)

# Employment tax matters

## PAYG withholding

- If employee subject to Australian income tax
- Commissioner's discretion to 'waive' withholding under certain circumstances

## FBT

- If employee subject to Australian income tax

## Superannuation

- Generally applies to all employees working in Australia
- Limited exceptions if covered by Certificate of Coverage, or considered senior foreign executive

## Payroll tax

- Not applicable if:
  - paid outside Australia; and
  - working more than 3 nautical miles from Australian coast

# Actions required

- Review of employees working in Australia
- Review of corporate arrangements under which work is being performed
- Identify employee tax position
- Identify employer tax obligations
- Voluntary disclosure
- Practical considerations of future compliance

# Appendix: Double Tax Agreements



Australia has double tax agreements with

- |  |   |   |
|--|---|---|
| <ul style="list-style-type: none"><li>• Argentina</li><li>• Austria</li><li>• Belgium</li><li>• Canada</li><li>• Chile</li><li>• China</li><li>• Czech Republic</li><li>• Denmark</li><li>• Fiji</li><li>• Finland</li><li>• France</li><li>• Germany</li><li>• Greece</li><li>• Hungary</li><li>• India</li></ul> | <ul style="list-style-type: none"><li>• Indonesia</li><li>• Ireland</li><li>• Italy</li><li>• Japan</li><li>• Kiribati</li><li>• South Korea</li><li>• Malaysia</li><li>• Malta</li><li>• Mexico</li><li>• Netherlands</li><li>• New Zealand</li><li>• Norway</li><li>• Papua New Guinea</li><li>• Philippines</li><li>• Poland</li></ul> | <ul style="list-style-type: none"><li>• Romania</li><li>• Russia</li><li>• Singapore</li><li>• Slovakia</li><li>• South Africa</li><li>• Spain</li><li>• Sri Lanka</li><li>• Sweden</li><li>• Switzerland</li><li>• Taipei</li><li>• Thailand</li><li>• Turkey</li><li>• UK</li><li>• USA</li><li>• Vietnam</li></ul> |
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## Notable exceptions

- Hong Kong
- Mongolia
- Brazil
- Peru





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