Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Migration Amendment (Offshore Resources Activity) Bill 2013

By the Australian Mines & Metals Association (AMMA)

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AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 95 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to these industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

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INTRODUCTION

1. This submission is in two parts.

2. First, it demonstrates that the current provisions of the Migration Act resulted from considered development of legislative policy. They are the result of clear parliamentary intent, and do not need to be altered.

3. Second, it provides clear evidence that the proposed provisions would be bad law: they would be inconsistent with international and domestic obligations and they would have a highly damaging effect on the economy and Australian jobs.

4. Nevertheless, any genuine need for the proposed legislation has not been demonstrated by the Minister. Nor could the Parliament be satisfied on the available information as to the likely validity of the legislation, its consistency with Australia's obligations, or of any impact it would have on the economy. Without this evidence, the legislation should not be passed.

5. The Migration Amendment (Offshore Resources Activity) Bill 2013 is said to be intended to ensure that "the definition of the migration zone in the *Migration Act 1958* (the Migration Act) captures foreign workers working in Australia's offshore resources industry" (Second Reading).

6. However, the bill is extremely broad in its drafting and, therefore, in its proposed application. As it would seek to govern migration and workplace matters in international waters, the proposed legislation appears inconsistent with Australia's international obligations, the Offshore Constitutional Settlement and domestic legislative powers.

7. The bill would increase project costs significantly, including the costs of current projects, and cause project delays.

8. To date, the resource industry has complied with all obligations under the Migration Act and, indeed, when the nature of those obligations has not been clear, clarification from the Department of Immigration and Citizenship, and then from the courts, was sought.

9. The bill is stated to be a response by the Government to the decision in *Allseas Construction S.A. v Minister for Immigration and Citizenship* [2012] FCA 529. However, that application to the Federal Court by Allseas was preceded by numerous attempts by Allseas over some years to gain clarification from the Government about its obligations under the Migration Act as an employer of a small number of foreign workers with highly-specialised skills working on board construction vessels operating in the EEZ. The judgment in that matter acknowledged (at [39]):

   Allseas has endeavoured to pursue in good faith and openly, firstly, the correct interpretation of the Act from the Minister and, secondly, the obtaining of relief of a declaratory nature to clarify its obligations in … serious and imminent circumstances.

10. It is important to note that, currently, one of those Allseas vessels, the *Solitaire*, is working away on the North West Shelf. It has a total crew of 395, of which 322 are Australian, supported by a fleet of Australian manned pipe supply vessels. Under the status quo, without these amendments, operations on this vessel in international waters are currently creating more than four Australian jobs for each international offshore worker.

11. Accordingly, for no appreciable gain and at a likely high economic cost, the bill would impose a further level of suffocating regulatory burden on the offshore resource sector. Importantly, the proposed legislation would put at risk the viability of current projects and weigh heavily against the commencement of future projects.

How the Senate Should Proceed

12. The Senate should reject the Migration Amendment (Offshore Resources Activity) Bill 2013.

THE MIGRATION ACT CURRENTLY APPLIES TO OFFSHORE RESOURCE WORKERS

Introduction

13. In its application to offshore resource workers, the *Migration Act 1948* (Cth) is clear. It is the result of careful past parliamentary deliberation. As such, it is consistent with Australia's international and domestic obligations and industry practices.

14. The Migration Act does not need to be amended in respect of its application to offshore resource workers.

15. Relevant provisions of the Migration Act already clearly require a non-Australian person working on a vessel to hold a visa if the vessel enters Australia's territorial sea or the non-citizen transits through Australia in order to join or depart the vessel.[1]

16. These existing relevant provisions of the Migration Act are the result of past express parliamentary intention to ensure an appropriate application of the Act to offshore resource workers that is consistent with Australia's international obligations, constitutional arrangements, the Offshore Constitutional Settlement and the practices of the global resource industry.

17. The sections below demonstrate that the current application of the Migration Act is appropriate and consistent with international and domestic law, and with practices of the global resource industry.

General provisions

18. The Migration Act has been amended many times since its original passage in 1958. It is, as stated in its long title, "An Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons."

19. Section 4 states that the object of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. To advance its object, the Act provides for visas permitting non-citizens to enter or remain in Australia and the Federal Parliament intends that the Act be the only source of the right of non-citizens to enter or remain in Australia.

20. Accordingly, under section 4, both citizens and non-citizens entering Australia must identify themselves so that the Federal Government is aware of the non-citizens entering the country.

21. Section 5(1) provides the meaning of relevant terms. The phrase "enter Australia", in relation to a person, means enter the migration zone. "Migration zone" has a lengthy meaning, but in essence means:

[1] Sections 4, 5 and 8 are outlined in subsequent sections of this submission.

a. The area consisting of the States, the Territories, … and, to avoid doubt, includes:

   i Land that is part of a State or Territory at mean low water.

   ii. Sea within the limits of both a State or a Territory and a port.

b. But the area does not include sea within the limits of a State or Territory but not in a port.

Provisions relevant to offshore resource activities

22. Under the Migration Act, non-citizens who enter Australia's "migration zone" must hold an appropriate visa. If entry into the migration zone is for work, the visa must allow that work.

23. The "migration zone" includes "Australian resources installations" (section 5(1)).

24. To be an "Australian resource installation" and part of the migration zone, an installation must be both:

    a. A "resource installation" (section 5(1)).

    b. Deemed to be part of Australia (section 8).

25. Under section 5(1), a "resource installation" means one of the following:

    a. A resources industry "fixed structure" – a structure, including a pipeline, that is not able to move or be moved as an entity from one place to another and is for offshore use in exploring or exploiting natural resources (see section 5(10)).

    b. A resources industry "mobile unit" – a vessel equipped to, or a moveable floating structure for use offshore in order to –

       i. Explore or exploit natural resources by drilling the seabed or its subsoil, or

       ii. Obtain substantial quantities of material from the seabed or its subsoil (see section 5(11)).

26. Section 5(10) and (11) extend each definition to include "operations or activities associated with, or incidental to" the activities described.

27. Section 5(13)(b) excludes from the relevant part of the definition of resources industry mobile unit, "a vessel that is used wholly or principally in … manoeuvring a resources installation, or in operations relating to the attachment of a resources installation to the Australian seabed". As the term "resources installation" includes a resources industry fixed structure, which in turn is defined to include a pipeline, the effect of section 5(13)(b) is to exclude from the definition of resources installation any vessel used wholly or principally in manoeuvring a pipeline or in operations relating to the attachment of a pipeline to the Australian seabed.

28. A pipelay vessel therefore cannot be a resources installation or an Australian resources installation (whether it is attached to the seabed or not).

29. Under section 8(1), a resources installation will be part of Australia if it "becomes attached to the Australian seabed". This includes physical contact with or being brought into physical contact with a part of the Australian seabed (section 5(14)).

30. The provisions outlined above were not included in the Migration Act when it was enacted in 1958. They were inserted by the *Offshore Installations (Miscellaneous Amendments) Act 1982* (Cth) (the 1982 Act).

Result of express parliamentary intent

31. The 1982 Act made express provision for resource installations and vessels. The parliamentary intention was to ensure an appropriate balance between facilitating the important resource operation activities for the North West Shelf, consistency with international law and preventing the entry into Australia of prohibited imports, exotic diseases or illegal immigrants.

32. The Second Reading Speech to the 1982 Act indicated that the measures were necessary as a result of developments on the North West Shelf of Western Australia, in order to provide a proper legislative basis for the exercise of customs, excise, immigration and quarantine powers.[2]

33. The Explanatory Memorandum stated that the amendments in the 1982 Act would give officers administering relevant Acts powers "now exercisable in respect of installations, ships, aircraft, persons and goods which arrive at, or depart from, geographical Australia".[3]

34. Although the Explanatory Memorandum did not expressly refer to the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), in relation to clause 34, it stated that "by reason of international law", the definition of "Australian waters" meant the territorial sea of Australia and the waters on the landward side of the territorial seas of Australia.

35. The parliamentary intent in the enactment of these provisions, and in particular in respect of vessels, was examined by McKerracher J in *Allseas Construction S.A. v Minister for Immigration and Citizenship* [2012] FCA 529 at [82]:

> *… there does not appear to have been anything in any of [the extrinsic materials to the 1982 amending bill] to suggest that the provisions in the Act relating to 'resources installations' were intended to apply to pipe lay vessels. The Second Reading Speeches suggest that the provisions in the Act relating to 'resources installations' were intended to apply to drilling platforms and rigs and that Parliament did not contemplate that the provisions would apply to pipe lay vessels. It is arguable that the inclusion in the Bill of the exception*

2 Mr Moore (Minister for Business and Consumer Affairs), *House Hansard*, Thursday, 25 March 1982, 1483.

3 The Parliament of the Commonwealth of Australia, House of Representatives, Off-Shore Installations (Miscellaneous Amendments) Bill 1982, Explanatory Memorandum.

which is now s 5(13) of the Act suggests that Parliament was mindful to ensure that the new provisions would not apply to such vessels.

Consistent with international obligations

36. Sections 5 and 8 of the existing Migration Act are consistent with Australia's international obligations.

37. Under international law, the rights and obligations of coastal States in relation to their territorial sea, exclusive economic zone (EEZ), seas above the extended continental shelf (ECS) and the high seas have been substantially codified.

38. International law, formed by the agreement of nations to take common action in pursuit of a common objective, regulates the capacity for Australia as a nation to assert its jurisdiction offshore. Australia's agreement to a particular international instrument, and its incorporation into domestic law, imposes obligations upon Australia to act in a manner consistent with the agreement.

39. The current provisions of the Migration Act were drafted with an appreciation that:

    a. Ships in the EEZ are entitled to freedom of navigation and the determination and enforcement of manning and labour conditions on foreign ships are matters for the flag State.

    b. UNCLOS makes wide-ranging provision as to the rights and obligations of coastal States in relation to their territorial sea, exclusive economic zone and the high seas. UNCLOS was ratified by Australia in 1994 and given effect to in Australian law to an extent by the *Seas and Submerged Lands Act 1973* (Cth).

    c. Under UNCLOS, Australia has sovereign rights over the exploitation and exploration of natural resources in the EEZ and the ECS. However, in relation to ships, UNCLOS does not provide for Australia to regulate who may work in the EEZ and the continental shelf or the employment conditions on ships in these zones. The intention of UNCLOS is for these matters to be the sole province of the flag State which has the right to control 'administrative, technical and social matters' on ships flying its flag.

    d. Also under UNCLOS, freedoms of navigation, overflight and the laying of submarine cables and pipelines applying on the High Seas are extended to the EEZ (see Article 58(1)).

40. Although the Maritime Labour Convention (MLC) was not created until 2006, the provisions of the 1982 Act are consistent also with these newer International Labour Organisation obligations. The consistency occurs because the role of the flag State in regulating manning and labour conditions on vessels flying its flag has been confirmed in the MLC (that is, it followed and applied a well-accepted principle of the law of the sea).

41. Australia ratified the MLC on 14 December 2011 and it is to come into force internationally on 20 August 2013. It charges the flag State with responsibility to

verify that ships flying its flags comply with the requirements of the MLC as implemented in its national laws and regulations (see, for example, the preamble and Article 5).

Consistent with constitutional arrangements

42. Sections 5 and 8 of the existing Migration Act are consistent with Australia's constitutional arrangements.

43. The Commonwealth Constitution confers the Parliament with power to make laws with respect to certain subject matters. Parliament is able to enact a law if there is a connection, 'which is not insubstantial, tenuous or distant', between the law and a subject matter head of power in the Constitution. Accordingly, provided the intention is clear, and a connection exists between the legislation to be passed and the head of power, the Parliament may legislate for matters physically external to 'the Commonwealth'. See, for example, *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 at [81] to [84] per Gummow J which examines the constitutional underpinnings of some provisions of the Migration Act.

Consistent with Offshore Constitutional Settlement

44. Sections 5 and 8 of the existing Migration Act are consistent with the *Offshore Constitutional Settlement 1979*, which had been reached just three years prior to the enactment of the 1982 Act.

45. The Federal nature of our system of government gives rise to complex arrangements offshore. However, under the Offshore Constitutional Settlement an agreement between the Commonwealth and the States, the Commonwealth undertook to allow the States and the Northern Territory jurisdiction over the sea in the three nautical miles offshore from the low-water mark or the State historic boundaries, and for each to have a say about matters in the 'adjacent area'. One reason for this was that the States and Territory were in a better position to deal with local issues close to their shores.

Consistent with industry practices

46. Sections 5 and 8 of the existing Migration Act are consistent with industry practices. The Second Reading Speech and Explanatory Memorandum state that these provisions were, in fact, inserted into the Migration Act in contemplation of expanded industry practices for construction and operation of oil and gas activities on the North West Shelf:[4]

[4] Mr Moore (Minister for Business and Consumer Affairs), House Hansard, Thursday, 25 March 1982, 1483. The Parliament of the Commonwealth of Australia, House of Representatives, Off-Shore Installations (Miscellaneous Amendments) Bill 1982, Explanatory Memorandum.

The massive scale of the North West Shelf developments requires that a number of giant platforms be brought directly to the places on the shelf at which they are to operate. During the operation of the rigs there will necessarily be a constant flow of service craft, personnel and goods between the installations and the Australian mainland. There may be occasional movement between places overseas and an installation once attached. It is essential that these important activities should not provide an avenue for the entry into Australia of prohibited imports, such as drugs, or of exotic diseases or illegal immigrants.

47. Accordingly, relevant provisions in sections 5 and 8, inserted by the 1982 Act, have the effect of requiring offshore resource workers to hold visas when entering Australia, including to join or to depart from a foreign-flagged vessel operating outside of the territorial sea.

48. These requirements are consistent with the migration requirements imposed by other nations in respect of people on vessels operating near those other coastal States for purposes related to the offshore resources industry.

Consideration by Federal Court

49. Provisions of the Migration Act regarding offshore resource workers were considered in detail in *Allseas Construction S.A. v Minister for Immigration and Citizenship* [2012] FCA 529 (22 May 2012).

50. In that matter, the applicant sought two declarations; namely, that:

    a. Under section 5(13) of the Migration Act two pipelaying vessels were not resources installations within the meaning of the Act while engaged in operations relating to the installation of offshore pipelines for the Gorgon and Jansz gas fields.

    b. To the extent that the vessels would not enter the area consisting of the States and Territories within the meaning of the definition of 'migration zone' in s 5(1) of the Act:

        i. Non-citizens working on or otherwise aboard would not be within or working within the "migration zone".

        ii. The applicant would not commit an offence under section 235(1) or section 245AC of the Act.

51. The Federal Court declared that the Allseas' pipelay vessels were not resources installations while wholly or principally engaged in operations relating to the installation of offshore pipelines and that, provided the vessels did not otherwise enter the migration zone, Allseas would not be acting unlawfully by having non-citizens work on the vessels without 457 visas (which the Department of Immigration and Citizenship would otherwise have required since it was the only relevant visa allowing a visa holder to perform ongoing work in the migration zone).

52. Thus, the Federal Court confirmed that, by reason of section 5(13)(b) of the Migration Act, and on the facts before it, pipelay and other vessels wholly or principally engaged in operations relating to the installation of offshore pipelines:

a. Were not resources installations and therefore not Australian resources installations within the meaning of the definition of migration zone.

b. Did not become so simply by coming into contact with a pipeline attached to the seabed in the course of their operations.

PROPOSED S.9A – MIGRATION ZONE ETC – OFFSHORE RESOURCE ACTIVITIES

Introduction

53. Proposed section 9A would deem an offshore resource worker to be within the migration zone, and within Australia, even if he or she were a non-citizen on a foreign-flagged vessel transiting through the EEZ or the waters above the ECS.

54. Proposed section 9A(6) would allow the Minister to declare an activity in or out of Australia.

55. The proposed extension of the application of the Migration Act in this way would be:

    a. An inappropriate delegation of legislative power.

    b. Incompatible with human rights principles.

    c. Inconsistent with Australia's international obligations.

    d. Inconsistent with Australia's constitutional arrangements.

    e. Inconsistent with the *Offshore Constitutional Settlement 1973*

    f. Inconsistent with industry practices and impractical

    g. Damaging to the Australian economy and Australian jobs

56. Information about these matters has not been provided to the Parliament by the Minister.

57. Unless the Parliament is able to give due consideration to these matters, the legislation should not be passed.

Proposed extension of 'migration zone'

58. Proposed section 9A(1) would deem a person to be within the migration zone "while he or she is in an area to participate in, or to support, an offshore resources activity in relation to that area".

59. Under proposed section 9A(5), an "offshore resources activity" in relation to an area would be:

    a. A regulated operation carried out within the area (where "regulated operation" has the meaning given in s. 7 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)).

    b. An activity in the area performed under license or special purpose consent (where these terms have the meaning given in s. 4 of the *Offshore Minerals Act 1994* (Cth)).

    c. An activity, operation or undertaking carried out –

i. Under a law of the Commonwealth, a State or Territory.

ii. Within the area.

60. The Regulation Impact Statement to the bill (at 6) states that the primary objective of the bill is "to ensure that Australian jobs are regulated by the Migration Act in an appropriate way". This includes, for example, the objective that "the legislative system that governs who can work in Australian jobs should cover the whole offshore resources industry".

Proposed Ministerial determinations

61. Under proposed section 9A(6), the Minister could make a determination, in relation to any of the classes of offshore resources activity identified in proposed section 9A(5). The determination would deem the Act to apply, or not apply, to particular activities operations or undertakings. A determination of this nature would be a legislative instrument but would not be subject to parliamentary disallowance (proposed section 9A(7)).

62. The explanatory memorandum to the bill states (at [92]-[93]):

New paragraphs 9A(5)(a) and 9A(5)(b) make it clear that all regulated operations under the Offshore Petroleum Act and all activities performed under a licence or a special purpose consent under the Offshore Minerals Act are captured by the definition of offshore resources activity unless the Minister has excluded the operation or activity by using his powers under subsection 9A(6). This would allow the Minister to exclude from the Act activities defined under the Offshore Petroleum Act and the Offshore Minerals Act which the Minister considers unsuitable to be captured by the definition of offshore resources activity.

New paragraphs 9A(5)(a) and 9A(5)(b) do not attempt to exhaustively define the areas in which Australia has the jurisdiction to govern offshore resources activity. Instead new paragraphs 9A(5)(a) and 9A(5)(b) rely on the existing processes applied in the Offshore Petroleum Act and the Offshore Minerals Act, which authorise activities to be carried out in Australia's offshore maritime zones, to suppose that these activities are carried out within Australia's jurisdiction. In other words, the limits of the "area" are intended to be determined with reference to a regulated operation or activity performed under a licence or a special purpose consent issued under these two Acts. These areas would include areas within Australia's EEZ (beyond the limits of the territorial sea) and above Australia's extended continental shelf.

Inappropriate delegation of legislative power

63. Proposed section 9A(6), by allowing the Minister to determine activities deemed to be caught by the Migration Act would:

a. Represent an inappropriate delegation of legislative power.

b. Not provide for sufficient parliamentary scrutiny of the legislative power delegated to the Minister.

64. Proposed section 9A(6) would delegate the power to change the application of the Act. It would impose significant obligations on individual non-citizens aboard foreign-flagged ships and on their employers, creating liability to major statutory offences in the event of non-compliance. A Ministerial determination would have the potential to affect to a significant degree the Federal Government's relations with States and Territories and Australia's relations with other nations. However, such Ministerial determinations would not be subject to review by the Parliament as to the appropriateness of the exercise of the delegated power. They would not be subject to disallowance.

Incompatibility with human rights principles

65. Proposed section 9A would impose an inappropriate and unnecessary barrier on individual freedom of movement. It would make travelling in international waters difficult and, in some cases, impossible. As such, it is a measure Members of Parliament should oppose.

66. Laws providing for restrictions under article 12(3) of CCPR should meet the requirements of necessity and proportionality and be consistent with principles of equality and non-discrimination.

67. Under article 12(3) of the Covenant on Civil and Political Rights (CCPR), freedom of movement must not be restricted except where such restrictions are provided for by law and where they are necessary on grounds of national security, public order, public health or morals or the rights and freedoms of others. However, AMMA notes that the legislative purpose stated in the Second Reading Speech and in the Explanatory Memorandum are not of this nature.

68. However, the Statement of Compatibility with Human Rights for the bill does not refer to article 12(3) of the CCPR. The Statement proceeds on the misconception that the proposed amendments address concerns expressed by industry about the interpretation of provisions in the Migration Act. It rightly states that the amendments address union concern about foreign labour conditions employed in the offshore resources industry, however, no evidence is provided to demonstrate a need for such concern. We are not concerned about industry. On the contrary, the offshore resources industry relies upon the highly-developed niche skills of foreign workers. International arrangements are in place for their employment, as required, in the global industry. These arrangements require working conditions equivalent to Australian working conditions.

Inconsistency with international obligations

69. Proposed section 9A would be inconsistent with Australia's obligations under international law. It would seek to regulate who may work on, and employment conditions on, foreign ships in all international maritime zones off the Australian coast. However, Australia should not seek to regulate non-citizens on foreign-flagged vessels in international waters.

70. Rather than being "Australian waters", the EEZ and waters above the ECS are within international waters. As such, they are not "owned" by any nation.

71. UNCLOS permits nations to exercise limited sovereign rights in international waters. One way in which it does so is to confer sovereign rights in relation to the natural resources of the EEZ and ECS (Article 56(1)(a) and Article 60).

72. The reference to "sovereign rights" may appear to suggest unlimited power. However, the other provisions of Article 56 and UNCLOS read as a whole suggest that the coastal State does not have jurisdiction at large.[5] Article 56(2) states:

In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

73. Further, Article 56(3) states that the rights set out in Article 56 with respect to the seabed and subsoil shall be exercised in accordance with Part VI of UNCLOS which deals with the continental shelf.

74. The rights and duties of other States in the EEZ are addressed in Article 58. Its effect is to extend to the EEZ the same freedoms of navigation, overflight and the laying of submarine cables and pipelines as apply on the High Seas.

75. While, in the EEZ and the ECS, the content and limits of the right to freedom of navigation are not entirely clear, it has been said to include a freedom from interference; that is, the right of a vessel flagged by one State to proceed unmolested by officials from another State. This includes inspectors seeking to enforce employment and migration laws.

76. The right to freedom of navigation, which is not defined by UNCLOS, must be construed as more than simply the right to pass through the EEZ.

77. UNCLOS also codifies the doctrine of flag-State primacy. Article 90 provides that every State has the right to sail vessels flying its flag on the High Seas and, by reason of Article 58(2), the EEZ. Article 92 states that, save in exceptional cases expressly provided for in international treaties or in UNCLOS, the vessels shall be subject to that State's exclusive jurisdiction on the High Seas. Similarly, Article 94 makes it clear that UNCLOS intends the flag State to have jurisdiction and control over the manning, labour conditions and training of crews on ships on the High Seas and, by reason of Article 58(2), the EEZ.

78. Article 94(6) makes it clear that the remedy for a State which considers that proper jurisdiction and control with respect to a ship have not been exercised is to report the facts to the flag State.

79. The MLC is consistent with the jurisdictional framework outlined above.

80. Accordingly, UNCLOS and the MLC make it clear that in the EEZ and ECS ships are entitled to freedom of navigation and that the determination and enforcement of manning and labour conditions on foreign ships are matters for the flag State. They are not matters that may be regulated by the coastal State.

5 See, for example in relation to the EEZ, Article 56(1)(b) and Article 56(1)(c).

81. Although the Explanatory Memorandum to the bill (at 1) states that Australia has jurisdiction under international law to enact the proposed legislation, the Explanatory Memorandum does not substantiate this assertion by reference to relevant provisions of UNCLOS. Nor does the Explanatory Memorandum address consistency with the MLC.

82. While the Statement of Compatibility with Human Rights to the bill states that the Office of International Law has confirmed that Australia would have jurisdiction, the advice as to jurisdiction appears to be subject to qualification. The advice should be released for the consideration of the Parliament and the Australian people.

Inconsistency with constitutional arrangements

83. Proposed section 9A should not be enacted unless the Parliament is satisfied that it has the legislative power to enact such a provision.

84. The connection of the proposed provision with a constitutional head of power is insubstantial, tenuous and distant.

85. Proposed section 9A is extremely broad in its terms and, therefore, in its intended application. It seeks to govern migration matters and, as a consequence workplace matters, regarding non-citizens on foreign-flagged vessels in international waters.

86. Proposed section 9A seeks to extend to, for example:

a. Foreign ships engaged in innocent passage in the territorial sea, the EEZ or the ECS.

b. Foreign ships exercising a right to freedom of navigation in the EEZ or above the ECS.

c. Foreign ships in the EEZ or above the continental shelf which have not become resource installations.

d. Foreign vessels transporting persons or goods between a place outside Australia and a ship or installation in the territorial sea, EEZ or above the ECS.

e. Ships used wholly or principally in transporting persons or goods to or from a resources installation – these are currently excluded from the definition of resources installation by s5(13)(a) of the Migration Act.

f. Ships or vessels for which custom and practice of the offshore resource industry is to use foreign crews for a short period of time, generally due to the need for specialised skills which are in short supply.

g. Ships at anchorage in the EEZ and the ECS for short periods of time.

87. The legislative reach of the Federal Parliament in relation to these matters is far from certain. Although the legislation appears to rely upon UNCLOS for legislative power, the legislative power is in turn limited by the terms of UNCLOS.

88. At the very least, the proposed legislation is premature ahead of a pending judgment of the Federal Court of Australia, *Fair Work Ombudsman v Pocomwell Limited and Ors*. The outcome of that litigation may give strong grounds for arguing against the validity of proposed section 9A.

89. Further, neither the proposed legislation nor the Explanatory Memorandum identify a head of constitutional power under which the proposed provisions with such a broad application could be enacted.

90. Nor do they acknowledge that, to date, the Australian Government appears to have accepted that under international law there are limits on its ability to regulate foreign ships in the EEZ and the ECS. They do not explain, therefore, why the Government has changed its position from the earlier position stated in the Explanatory Statement to Regulation 1.15D of the Fair Work Regulations 2009.

91. Regulation 1.15D of the Fair Work Regulations 2009 (inserted in 2009 and amended in 2012), for example, provides that the Fair Work Act 2009 does not apply in relation to waters on the landward side of the outer limits of the territorial sea "to the extent to which its application would be inconsistent with" a right of innocent passage or transit passage being exercised by a ship other than a licensed ship or a majority Australian crewed ship. The Explanatory Statement to regulation 1.15 stated that Coastal States are not able to regulate employment relationships on foreign ships exercising the right of innocent passage.

92. No changes have occurred which would remove or diminish this limitation on the powers of the Commonwealth. There appears to be no basis now to take a different approach from that in the Fair Work Regulations.

93. For the sake of completeness, if it were presumed that the constitutional head of power purported to be relied upon for proposed section 9A is the external affairs power; that is, that the proposed legislation would be a law to implement UNCLOS. However, if this were to be the case, the proposed legislation must be reasonably capable of being considered appropriate and adapted to implementing the treaty. See, for example, Victoria v Commonwealth (1996) 138 ALR 129.

94. Alternatively, if it were presumed that the constitutional head of power purported to be relied upon was the immigration power, UNCLOS would again present a problem. As outlined above, UNCLOS does not provide for a coastal State to have sovereignty over immigration in international waters. If the Federal legislation sought to rely upon UNCLOS's terms regarding immigration, it would at the same time be limited by them.

95. It should be a matter of extreme concern for the Parliament that issues of constitutional validity have not been addressed. There are strong grounds for significant doubt about the validity of the proposed legislation. The proposed legislation should not be passed unless that doubt is addressed.

96. Therefore, if DIAC is in possession of advice about the validity or otherwise of the proposed legislation, the advice should be published.

Inconsistency with Offshore Constitutional Settlement

97. Proposed section 9A is inconsistent with the Offshore Constitutional Settlement.

98. Under the Offshore Constitutional Settlement, matters settled included that:

a. The Commonwealth would give each State the same powers with respect to the territorial sea adjacent to its coasts as it would have if the waters were within the limits of the State.

b. The Commonwealth would pass legislation to vest in each State powers and proprietary rights and title in respect of the seabed of the adjacent territorial sea, with reservations to the Commonwealth for national purposes such as defence.

c. The State powers and rights were limited to three nautical miles' breadth, and would stay at three miles if, as subsequently occurred, the Commonwealth extended the territorial sea out to 12 miles.

d. The Offshore Petroleum Agreement 1967 was confirmed –

i. The States would legislate for and regulate the petroleum industry area out to three miles of the low water mark or historic boundaries.

ii. The Commonwealth would legislate outside that area.

iii. A statutory Joint Authority would operate for each State's adjacent waters.

iv. Special conditions were agreed for Queensland and Western Australia because of some complexities unique to them.

v. The proceeds of royalties would be shared between the Federal and State Governments on an agreed basis.

e. The Northern Territory, which was just entering into self-government, was to be treated as a State for the purposes of offshore jurisdiction.

99. Relevantly, the effect of the Offshore Constitutional Settlement on legislative powers in respect of shipping has been described as follows:[6]

The High Court held in New South Wales v Commonwealth *[1975] HCA 58; (1976) 135 CLR 337 that the Commonwealth had sovereignty over the territorial sea. The Offshore Constitutional Settlement of 29 June 1979 followed this decision. It was described at the time as a milestone in cooperative federalism. The Commonwealth, the States and the Northern Territory agreed to enact legislation implementing arrangements relating to shipping under which the States and Territories would be responsible for:*

6 Justice R French, The Incredible Shrinking Federation – Voyage to a Singular State? University of Queensland and Law Council of Australia European Focus Group, *The Future of Federalism*, Brisbane, July 2008

- *trading vessels except those proceeding on an interstate or an overseas voyage;*
- *all Australian commercial fishing vessels except those going on an overseas voyage;*
- *all vessels whose operations are confined to rivers, lakes and other inland water ways (with New South Wales responsible for all vessels operating on the River Murray upstream from the South Australian boarder); and*
- *pleasure craft, and vessels used for pleasure on a hire and drive basis.*

The Commonwealth on the other hand took responsibility for trading vessels on interstate or overseas voyages, the navigation and marine aspects of offshore industry mobile units and offshore industry vessels other than those confined to one State and Territory.

100. AMMA notes that the Explanatory Memorandum to the bill (at 2) and the Second Reading Speech both indicate that the proposed Ministerial direction power would enable projects that take place in areas within the coastal waters of the States and the Northern Territory, regulated under State and Territory laws, to be declared offshore resource activities for the purposes of proposed section 9A.

101. However, the explanatory notes do not indicate how such a provision could be consistent with the Offshore Constitutional Settlement. Again, it is suggested that the proposed legislation should not be passed unless this fundamental question is addressed.

102. From an industry perspective, it is important Commonwealth legislation operates to create certainty and to minimise the regulatory burden imposed on the resources industry and allied sectors. There will be no certainty if legislation appears inconsistent with the Offshore Constitutional Settlement.

103. In this context, AMMA notes with concern, for example, that there is no certainty either as to the interaction of the proposed legislation with the Acts of Parliament and treaties relating to the Joint Petroleum Development Area (JPDA). It is not clear whether the Migration Act, as amended, would apply to projects in the JPDA. On behalf of an AMMA member, clarification was sought from the Migration Maritime Taskforce, but clarification about the intended operation of the legislation in this respect could not be provided.

Inconsistency with industry practices and impracticality

104. First, AMMA is concerned that proposed section 9A(1) is so broad in its intended application that it would be unworkable. It would deem a person to be within the migration zone "while he or she is in an area to participate in, or to support, an offshore resources activity in relation to that area". Proposed section 9A is very broadly worded it would include, for example, all vessels identified in paragraph [86].

105. Similarly, the proposed exclusion of vessels (clause 9A(6)) by way of a Ministerial determination which would be a legislative instrument but not subject to disallowance (clause 9A(7)), would be unwieldy and unworkable.

106. This mechanism would create extreme uncertainty and delay in the application of the Act.

107. Second, during the consultation phase, practical concerns of industry regarding any change to the application of the Migration Act to offshore resource workers were discussed in detail with the Migration Maritime Taskforce. Concerns included:

a. The major and overriding priority and commitment of industry is to safety.

b. The work of offshore resource workers is highly specialised and highly skilled.

c. The industry is global in nature, with Australian operations dependent upon access to international oil and gas engineering skills due to both the rapid growth in the industry (which has the effect of insufficient Australian people with required skills) and the fact that for some highly specialised skills there will never be the demand in Australia for those skills (and these people operate globally).

d. The offshore oil and gas sector is subject to a very heavy regulatory cost burden in Australia, far greater than in other comparable countries; and

e. The industry recognises the many benefits of sourcing labour within Australia and has in place, and continues to develop, measures to ensure the development of skilled and sustainable jobs for Australians.

108. As the report of the Migration Maritime Taskforce has not been published, industry is not aware of the weight, if any, given to these concerns.

109. Third, the offshore resource industry is subject already to complex, overlapping and inefficient regulatory schemes imposed for a variety of purposes by Federal and State and Territory legislation.

Damaging effects upon Australian economy and Australian

110. Enactment of the bill would place untenable cost pressures on the resource industry. The cost pressures would be both direct and indirect, in terms of compliance and administration costs.

111. Between 2002 and 2012, the resource industry was responsible for the greatest creation and transfer of wealth in Australia's economic history:

a. Over 1,100,000 Australian people are employed in the resource sector, directly or indirectly.[7]

b. The mining industry is the highest paying industry in Australia, with an average per annum salary of over $120,000.[8]

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7 Vanessa Rayner and James Bishop, *Industry Dimensions of the Resource Boom: An Input-Output Analysis*, RDP2013-02), available at: http://www.rba.gov.au/publications/rdp/2013/2013-02.html.

8 Vanessa Rayner and James Bishop, *Industry Dimensions of the Resource Boom: An Input-Output Analysis*, RDP2013-02), available at: http://www.rba.gov.au/publications/rdp/2013/2013-02.html.

c. The resource industry has driven a 40% increase in real wages (ie, living standards) in Australia over the past 10 years.[9]

d. The resource industry will contribute $209 billion of export earnings to the Australian economy in 2012–13.[10]

e. When the flow-on contribution of the resource industry is taken into account, it is estimated that the resource industry accounts for between 15 and 20% of the Australian economy.[11]

f. In 2009, the mining industry paid over $5 billion in corporate tax. This was more than 20% of the total corporate tax raised by the Government in that year.[12]

g. More than 8 million Australians are in a superannuation fund. The strong performance of mining has driven the wealth of these funds and mining stocks are held in the vast majority of portfolios.

112. The successes of the resource industry are being shared by all Australians.

113. Each offshore resource industry worker, citizen and non-citizen, skilled or unskilled, contributes to the labour productivity of the offshore resource industry. Each contributes to the Australian economy.

114. However, AMMA members operate within a global industry. Operations in international waters off the Australian coast are dependent upon access to oil and gas engineering and other skills. These skills are sourced via an international market. The global nature of the skills market is two-fold:

a. Rapid growth in the Australian resource industry and allied sectors means in some cases it is not possible currently to source sufficient Australian people with the specialised skills required.

b. For some highly-specialised skills there will never be sufficient demand in Australia for there to be a market. People with these skills operate globally, working for short periods of time wherever required. Accordingly, they work in international waters off many different countries.

115. The Australian resource industry does not just compete for skilled labour. It competes also for a limited pool of international investment capital. In the experience of AMMA members, investment lost from the Australian resource industry is not directed to other parts of the Australian economy. It is spent overseas. Realisation of the next round of large projects, and extensions to existing and committed projects in Australia, will depend heavily on a stable industry with flexibility to respond to future developments.

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9 See remarks made by Professor Quentin Grafton at the Australian National Conference on Resources and Energy (ANCRE) 2012, available at: http://www.bree.gov.au/media/media_releases/2012/20120918-mining-boom.html.

10 Bureau of Resources and Energy Economics, Resources and energy major projects, October 2012, available at: http://www.bree.gov.au/publications/mimp.html.

11 Vanessa Rayner and James Bishop, *Industry Dimensions of the Resource Boom: An Input-Output Analysis*, RDP2013-02), available at: http://www.rba.gov.au/publications/rdp/2013/2013-02.html.

12 Based on Australian Tax Office data.

116. AMMA members are extremely concerned about the extent to which the bill would impede flexibility and stability for continued investment in this country. In particular, project payments are calculated on the basis of conditions at the time agreement is reached. Its detrimental effects would be in addition to the continual pressure from construction and maritime unions for additional wages and conditions which already affect decision-making about future projects.

117. In short, there are cogent and strong ways in which the proposed legislation would impose an undue burden on the resource industry.

118. However, the Regulation Impact Statement to the bill does not address these matters. It does not address cost disincentives. It fails completely to provide legislators with the information they need to consider properly the effects of the bill. Without adequate information in this regard, the bill should not be passed.

VISA CONDITIONS FOR OFFSHORE RESOURCES ACTIVITY

Introduction

119. Proposed section 41(2B) and (2C) would allow for the imposition of visa conditions. It is intended that the conditions hold work arrangements in the offshore resource industry "to Australian standards" (see Regulation Impact Statement, 6).

120. However, it would be impractical to apply "Australian standards" to work conditions in vessels in international waters. Unduly onerous and difficult problems would result.

Impracticality of "Australian standards" in international waters

121. Where employees are employed within the Australian resource industry, AMMA members have always supported the payment of relevant Australian pay rates and the provision of relevant Australian conditions. Concerns about the proposed legislation centre on workplace safety, the management of risk, skills, licensing, speed of access to skilled employees, flow-on issues within global businesses and compliance costs.

122. In relation to holding the offshore resource industry to "Australian working conditions", it must be noted that within the global shipping industry, the Maritime Labour Convention provides the international minimum safety net. This safety net applies, for example, to seafarers working on board vessels registered in the new Australian International Shipping Register while the seafarers are engaged in international trading.

123. Second, within the global resource and maritime industry, it is difficult to make comparisons as to rates of wages and conditions. A significant range of factors must be taken into account that preclude easy comparability.

124. Third, there would be significant practical difficulties arising out of a legislative requirement to ensure Australian wages and conditions where employees work in international waters off the Australian coastline for relatively short periods of time. Examples include:

a. Contractual obligations – Contractors working on vessels offshore are currently absolved from tax obligations as they pay tax in the country where they ordinarily work. Extreme complexity may arise in respect of contractual arrangements if clause 8 were to be enacted.

b. Range of matters falling within "Australian working conditions" - Problems would arise, for example, complying with superannuation choice of fund obligations for staff engaged on a construction vessel who may be in the country only for a matter of weeks or even days. Similar problems would arise in relation to other employer obligations, such as leave, workers' compensation, etc.

c. Salary and filing administration – Concerns arise as to inordinate administrative complexity and cost as a result of the proposed legislation.

d. Visa restrictions – The potential range of restrictions on visas also gives rise to concerns, such as English language, training, and competency requirements, line by line testing and market testing. These are absolutely inapplicable for vessels entering international waters off Australia for short periods.

125. With more time this could be explored further and the industry submits there would be a range of further difficulties, if not absurdities, raised by the prospect of extending Australian laws as proposed.

ATTACHMENT A

Chronicles of the application of the Migration Act to a vessel operating in support of offshore resource activities

1. In January 2009, *DIAC's Guide to visas for foreign crew* published on its website gave pipelay vessels as examples of vessels operating outside the migration zone.

2. Subsequently, the position of the DIAC became that pipelay vessels laying pipe anywhere on the Australian seabed were in the migration zone.

3. Uncertainty as to statutory obligations necessitated an application by Allseas to the Federal Court for a declaration.

4. In *Allseas Construction S.A. v Minister for Immigration and Citizenship* [2012] FCA 529, the applicant and respondent agreed that, on the facts, the particular vessels were not within the limits of the States or Territories. Accordingly, the relevant element of the 'migration zone' was 'Australian resources installations'. In this context, it was common ground that a connection via a pipe being laid to the Australian seabed was the only way in which the vessels could be regarded as having entered the 'migration zone'.

5. The applicant (Allseas) sought declarations that, on the correct interpretation of the Migration Act, the vessels were not within the 'migration zone'.

6. The respondent (Minister) contended that – as a result of contact between the vessels and the pipeline attached to the seabed, or contact between workers on the vessels and the pipeline – everyone on board the vessels entered into the 'migration zone'.

7. In relation to whether the workers were within the migration zone as a result of their contact with the pipeline, McKerracher J stated that this argument was not persuasive and that 'Parliament cannot have intended such an absurd result'.

8. In relation to whether the vessels were 'Australian resources installations', it was found first that they could not be 'resources industry fixed structures' as the vessels could be moved, and did move, as single entities.

9. Nor were the vessels found to be 'resources industry mobile units' as they:

   a. Did not drill or obtain substantial quantities of material from the seabed.

   b. Fell within one exception in section 5(13)(b) as the pipeline: was itself a 'resources installation' (see section 5(10)); would be 'attached' to the seabed when laid in position (see section 5(14)); and would be laid on the 'Australian seabed' (see section 5(1)).

   c. Also fell within the other exception in section 5(13)(b), being used for the 'manoeuvering' of the pipeline.

10. McKerracher J stated (at [77]-[81] and [85]):

> *The Lorelay and Solitaire are pipelay vessels contracted to install the pipelines. That is the whole purpose of the operation on which they are engaged. They will clearly be used wholly or principally in operations relating to the attachment of a pipeline to the Australian seabed within the meaning of s 5(13)(b). Further the Lorelay and Solitaire will be used 'wholly or principally in … manoeuvring the pipeline, so as for that reason also to come within s 5(13)(b)'....*
>
> *It follows that, by reason of their coming within the exception in s 5(13)(b) of the Act, the Lorelay and Solitaire will not be 'resources industry mobile units' and therefore will not be 'resources installations' or 'Australian resources installations' within the meaning of the Act. Section 5(6) of the Act, which provides that persons on board a 'resources installation' shall be deemed to have entered Australia at the time at which the resource installation becomes attached to the Australian seabed, will not apply, because the Lorelay and Solitaire will not be 'resources installations'....*

11. In September 2012, the then Minister for Immigration and Citizenship established a Migration Maritime Taskforce to conduct a review. The published information regarding the review stated that the Taskforce had been established to explore how best to apply the Migration Act to resource project workers in Australian waters. The key objectives of the review were to:

    a. Ensure that the right to work in the offshore resources industry by people who are not Australian citizens, is, to the maximum extent permitted by Australia's international obligations, regulated consistently in all areas over which Australia has jurisdiction.

    b. Create legislative certainty in order to promote continuing investment in the offshore resources industry.

    c. Promote opportunities for Australians to work on Australian resources.;

    d. Protect the rights of workers in the offshore resources industry.

    e. Maintain the integrity in existing, interrelated border legislation.

12. The published material stated, wrongly in AMMA's view, that the effect of the *Allseas* decision was that the Migration Act does not apply to non-Australian citizens on pipelay vessels or that non-citizens on pipelay vessels do not require any form of visa (suggested in the Review's Terms of Reference and Discussion Paper). Currently, the Migration Act requires a non-citizen to hold a visa if the:

    a. Pipelay vessel enters Australia's territorial sea.

    b. Non-citizens transit through Australia (including its territorial sea) in order to join or depart vessels.

13. Nor was the Allseas decision an unintended consequence of or the result of a loophole in the legislation. On the contrary, it was the result of an express exception inserted into the Migration Act in 1982 when the Act was first extended, by the *Off-Shore Installations (Miscellaneous Amendments) Act 1982* (Cth), to cover resource installations.

14. The report of the Migration Maritime Taskforce has not been released.