AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

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Dear valued AMMA member

Urgent briefing: offshore visa developments

A Full Court of the Federal Court has today (26 March 2015) handed down a decision that will have implications for your operations offshore.

The Full Court (Justices Gordon, Katzmann and Griffiths) today upheld the MUA / AMOU challenge to a ministerial determination made by Assistant Minister for Immigration & Border Protection, Michaelia Cash in July 2014.

The maritime unions' successful challenge was in the form of an appeal of a 15 September 2014 Federal Court decision that upheld the validity of the ministerial determination in relation to offshore migration arrangements.

The Full Court today set aside the earlier decision, finding the ministerial determination was not authorised under s9A(6) of the Migration Act 1958.

The maritime unions' challenge and the earlier Senate disallowance of government regulations made under the ORA Act have caused significant uncertainty and concern for the offshore resource industry. Unfortunately, today's decision will increase that uncertainty for some.

In the wake of the decision, Assistant Minister Cash is expected to issue a new instrument within the next 24 hours that will ensure the ability for offshore resources operators to continue to have non-citizens work lawfully on their projects.

AMMA will keep you updated on the detail of those measures as soon as they are announced.

At all stages of these developments, AMMA has liaised closely with the Assistant Minister and Minister on these issues and has consistently communicated the industry's need for certainty and workable outcomes for the long term. The government understands the need for urgent measures to be put in place following today's decision.

The purpose of this briefing paper is to clarify the implications of the decision, which will change the visa requirements for some offshore resources activities. We also provide for you key contact points within AMMA for further information and advice should you need them.

What today's decision means for your operations

Today's Full Court decision means the regulation of migration arrangements for work in the offshore resource industry has changed. In particular, the coverage of the Migration Act 1958 to offshore resources activities has expanded from what it has been since the early 1980s.

The key points AMMA would like you to take from today's decision are:

- **All offshore resources activities** as defined under s9A(5) of the Migration Act 1958 are now in the migration zone, with former exceptions such as for pipelay vessels now removed. Resources activities are defined broadly in s9A(5) by reference to all activities covered by licenses under the Offshore Petroleum & Greenhouse Gas Storage Act 2006 and the Offshore Minerals Act 1994.
- **Valid visa types** are yet to be specified by the government that would allow work by foreign nationals across the entire offshore resources industry (which the Migration Act 1958 now covers). This is expected to happen within the next 24 hours as the government obtains legal advice on today's decision.
- **You may wish to obtain** specific legal advice as to whether your current offshore activities using foreign nationals are being conducted appropriately.

What this document contains

AMMA has provided for you in this document:

- An analysis of today's Full Court of the Federal Court decision; and
- A background paper giving a brief history of recent developments to provide you with some context on today's Federal Court decision and how we arrived here.

We hope this information will assist you in these complex matters. However, this document does not constitute specific legal or migration advice in relation to your particular operations.

Please direct any further questions or requests for a more detailed policy briefing to AMMA's Senior Workplace Policy Adviser, Lisa Matthews, on (03) 6270 2256 or at lisa.matthews@amma.org.au.

For specific migration advice, please contact AMMA's Manager of Migration Services, Jules Pedrosa, on 0488 354 040 or at jules.pedrosa@amma.org.au.

Regards

Steve Knott

AMMA Chief Executive

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Analysis of today's Full Court decision

A Full Court of the Federal Court has today upheld an MUA / AMOU appeal of a September 2014 Federal Court decision.

As a result of today's decision, the migration arrangements for some offshore resource activities have changed because the coverage of the Migration Act 1958 has been extended to cover all offshore resources activities, with no exceptions.

The success of the unions' appeal means a ministerial determination made by Assistant Minister Cash in July 2014 was deemed to be invalid and has been set aside. The effect of that determination, while it remained in force, was to retain the historic boundaries of the migration zone despite Labor's Migration Amendment (Offshore Resources Activity) Act 2013 (the ORA Act) seeking to expand the migration zone from 29 June 2014.

While the ministerial determination was in force, historic migration arrangements that had been available since the early 1980s were maintained despite the former Labor government's attempt to expand them at the behest of maritime unions.

While the original Federal Court decision in September 2014 found there were no limits on the power of the minister to alter via a determination the coverage of the Migration Act under a Labor-drafted provision, the Full Court today found that was not the case.

The ministerial determination had used a power under s9A(6) of the Migration Act, as amended by the introduction of the ORA Act on 29 June 2014, which allowed the minister of the day to make exceptions to the ORA Act's extended coverage of offshore resources installations.

The minister used that power on 17 July 2014 to negate the operation of the ORA Act in relation to extending the migration zone. It did that by declaring all offshore resource activities exempt from the ORA Act, which had the effect of removing the expanded migration zone coverage and reverting all formerly covered offshore resources activities back to how they were regulated under the pre-29 June 2014 Migration Act.

In simple terms, the minister used the ministerial power to prevent Labor's ORA Act from extending the migration zone to capture alleged gaps in coverage revealed in the *Allseas* decision, instead retaining the historical status quo.

A September 2014 Federal Court decision found the ministerial determination was validly made, rejecting unions' challenge to the exercise of that power, saying there were no inherent limitations in the way the power was described and therefore no requirement for the minister to leave any activities covered by the ORA Act.

Findings on appeal

Today's decision upholding the unions' appeal found an express purpose of the ORA Act was to regulate foreign workers participating in offshore resources activities by bringing them into the migration zone and requiring them to hold a specific working visa.

The parliamentary intention was therefore for the ORA Act to "supplement and expand" the migration zone in relation to offshore resources activities. However, the ministerial determination had prevented that parliamentary intent from being realised, the court said.

While the minister was certainly empowered to make a determination under s9A(6) about migration zone coverage, this could only be for the purpose of exempting from or capturing within the definition of offshore resources activities some particular activities. The intention of parliament was not to allow the power to be used to negate the new definition of offshore resources activities altogether, the court found.

It found the ministerial determination was not valid and should be set aside.

The government is currently considering the implications of today's decision and is expected to announce supplementary measures within the next 24 hours to minimise the impacts on offshore resource operations.

A recent history of offshore migration developments in Australia

2010

Contradictory advice from Department of Immigration & Citizenship

During 2010, Allseas Construction SA was provided with conflicting advice from different personnel within the then-Department of Immigration & Citizenship (DIAC) about the company's obligations in relation to non-citizens working on some of its vessels in the offshore resource industry.

Allseas had been acting on the understanding (based on previous DIAC advice and its own legal advice) that two of its pipelaying vessels, the Lorelay and Solitaire, were not "resources installations" for the purposes of the Migration Act 1958, and it had been this way since 1982 when other types of offshore resources installations were deliberately included in the Act while certain other vessels remained specifically exempt.

Allseas' understanding was that its two pipelaying vessels were not resources installations while engaged in installing pipelines for the Gorgon and Jansz gas fields at the time and were specifically exempt from coverage by the Migration Act.

Therefore, the company maintained that non-citizens working on those vessels were not performing work in Australia's migration zone and did not require visas providing them with work rights. Those non-citizens did, however, require visas to enter Australia and join the vessels, such as entry visas and a maritime crew visa (MCV).

Due to the conflicting advice Allseas received from DIAC, as well as the ongoing union campaign alleging the company was engaging non-citizens to work unlawfully, Allseas applied to the Federal Court for a declaration to resolve its rights, duties and liabilities in respect of non-citizen employees working aboard the two vessels.

May 2012

The *Allseas* decision is handed down

In May 2012, the Federal Court handed down the *Allseas* decision in response to the Allseas application, declaring that the company's assertions regarding its obligations towards non-citizens were correct.

The Court confirmed that unless vessels performing work in Australia's offshore resources industry were "resources installations", foreign nationals on those vessels were not in Australia's migration zone and did not require visas with work rights to perform such work.

"Resources installations" for the purposes of the Migration Act were either "resources industry fixed structures" or "resources industry mobile units", both of which required some degree of attachment to the Australian seabed to have the requisite connection to Australia and its migration zone.

The Federal Court confirmed that while pipelines themselves were "resources installations", the two Allseas pipelaying vessels were not because:

- They were not "resources industry fixed structures" as they were able to move or be moved.
- They were not "resources industry mobile units" despite being mobile because they were specifically exempt from that definition. This was because they were primarily involved in "manoeuvring" a resources installation (ie a pipeline) into place and there was a specific exemption from the Migration Act for vessels that manoeuvred resources installations into place.
- The vessels also did not fit the definition of "resources industry mobile units" generally because they did not drill into or obtain a substantial quantity of material from the Australian seabed, which was required to fit the definition.

So, the Court found the two Allseas pipelaying vessels did not fit either definition that comprised a "resources installation" and were therefore not covered by the Migration Act when performing that particular work, despite operating in what would otherwise be deemed to be Australian waters.

June 2013

Labor enacts the ORA Act

The *Allseas* decision confirmed what had been the case since 1982 when other types of offshore resources installations were deliberately included in coverage of the Migration Act. The Federal Court's decision simply confirmed there were certain deliberate exclusions for certain specific activities.

In the wake of the Federal Court's confirmation, the then-Labor government, at the behest of trade unions, moved to enact laws to close the perceived gaps in coverage of the Migration Act.

Labor did that by seeking to re-regulate offshore resources activities via the Migration Amendment (Offshore Resources Activity) Act 2013 (the ORA Act), which passed through federal parliament and received Royal Assent in June 2013 but would not take effect until 29 June 2014.

The ORA Act sought to do several things, most notably to bring into Australia's migration zone all "offshore resources activities". Instead of referring to the definition of "resources installation" under the Migration Act at that time, the ORA Act would seek to insert a reference to two other Commonwealth Acts - the Offshore Petroleum & Greenhouse Gas Storage Act 2006 and the Offshore Minerals Act 1994.

All resources activities covered by the licensing frameworks of those two Acts would be brought within the boundaries of the migration zone once the ORA Act took effect. At least that was Labor's plan.

This would give the Migration Act broader coverage offshore than it had had previously, and would effectively remove the deliberate exclusion for vessels such as the Allseas pipelaying vessels and bring them under Australia's migration laws.

September 2013

Change to a Coalition government

Because there was a change from a federal Labor government to a Coalition government in September 2013 before the ORA Act was to take effect on 29 June 2014, it was up to the new Coalition government to make the first regulations specifying the types of working visas required under the ORA Act.

29 June 2014

ORA Act takes effect with Coalition Regulations in place

On 30 May 2014, the Coalition Government released Regulations specifying three types of visas (in addition to permanent visas) that could be used as working visas for offshore resources activities from 29 June 2014 when the ORA Act took effect. Those three visa types were a 457 visa, a 400 short-stay activity visa and a maritime crew visa (MCV).

This was the first time an MCV would have been able to be used as a visa bestowing work rights in the offshore resources industry within the migration zone. It had previously only been able to be used as an entry visa to join a vessel. The Coalition government also made amendments to the standard MCV for use under the ORA Act to "de-link" it from importation by Customs, thus further broadening the application of the MCV.

Because the Coalition's regulations were in place on 29 June 2014 when the ORA Act took effect, Labor's intentions in making the ORA Act were not realised in terms of increasing the level of migration regulation applying offshore. This was a controversial move by the Coalition government that the union movement, Labor and the Greens were set to challenge.

16 July 2014

Coalition Regulations are disallowed

The Australian Greens successfully moved a disallowance motion in the Senate on the evening of 16 July 2014 and the Coalition's Regulations were disallowed from that point on.

This meant an MCV could not be used as a working visa in the offshore resources industry but also, alarmingly, meant no other working visa was valid for work on offshore resources activities. Assistant Minister Cash pointed that out in parliament during the debate on the disallowance motion but the motion succeeded nonetheless.

The disallowance of the Coalition's Regulations meant from the evening of 16 July 2014 there was no valid working visa for non-citizens performing work in and around any "offshore resources activity" in Australia. This meant any non-citizen performing work in relation to those activities was doing so illegally.

Assistant Minister Cash immediately acted to ensure that situation did not continue and implemented an alternative to the disallowed Regulations in the form of a "ministerial determination" on 17 July 2014.

17 July 2014

Assistant Minister Cash makes ministerial determination

Assistant Minister Cash's ministerial determination utilised a section of the ORA Act itself, as drafted and passed into law under the former Labor government, to negate the extended migration boundaries the ORA Act sought to put in place.

Section 9A(6) of the ORA Act gave the minister of the day the power to make a determination changing coverage of the Act. By using the determination to remove the reference to the other two pieces of federal legislation called up under the ORA Act, the minister in effect made null and void the extension of the migration boundaries, ie while the ORA Act was technically in force, it had no work to do.

The migration zone boundaries therefore reverted to what they had been prior to 29 June 2014 and since 1982. This meant the pre-existing exclusions for vessels such as pipelaying vessels were re-instituted with immediate effect.

Not surprisingly, the ministerial determination was subject to a Federal Court challenge by the Maritime Union of Australia (MUA) and the Australian Maritime Officers Union (AMOU) which was heard on 19 August 2014, with an initial decision handed down on 15 September 2014.

15 September 2014

Unions' Federal Court challenge fails

The Federal Court on 15 September 2014 handed down its decision rejecting the MUA / AMOU challenge along with union arguments that the ministerial determination had the same effect as the previously disallowed Regulations and was therefore invalid.

Justice Buchanan in his decision observed:

> *"The Determination, if valid, had the effect of negativing the operation of particular amendments to the Migration Act made by the Migration Amendment (Offshore Resources Activity) Act 2013 [the ORA Act]…"*

He noted the ORA Act sought to broaden the scope of the migration zone so that persons involved in any "offshore resources activity" were deemed to be within that zone and would require a permanent visa or one of a class of visas prescribed:

> *"The amending Act therefore introduced significant restrictions … on the ability of overseas maritime employees to work in the offshore areas adjacent to Australia."*

Justice Buchanan noted the unions' argument was essentially that a ministerial power provided under the ORA Act could not be used for the "extinction or effective removal" of the provisions of that Act to which the ministerial power related. In other

words, unions argued the ministerial power under the ORA Act could not be used, as had been the case, to negate the entire operation of the ORA Act.

While acknowledging the unions' argument was "a powerful one", Justice Buchanan said it should not be accepted. He said the ORA Act did not contain any limits on the power of the minister to make determinations regarding coverage. In fact, according to the judge, the provisions of the ORA Act appeared to give an:

> *"…unfettered discretion to adjust its content or operation, according to the circumstances of the time including Government policy of the day. I do not discern any legislative instruction or intention which would require or mandate that any particular level of operation or activity should be maintained, much less which ones."*

He therefore rejected the unions' challenge, finding the determination was validly made. That determination continued in force up until today's Federal Court decision.

26 March 2015

Full Court upholds unions' appeal

The MUA / AMOU appeal of the September 2014 Federal Court decision was today upheld by a Full Court of the Federal Court, following hearings in Sydney on 27 February 2015.

The ministerial determination was subsequently set aside and it is now up to the government to put in place remedial measures to minimise the impact of the decision on offshore resources operations.

ORA Act repeal Bill still before federal parliament

It should be noted the Coalition has tabled legislation in the federal parliament to repeal the ORA Act in its entirety via the Migration Amendment (Offshore Resources Activity) Repeal Bill 2014. That legislation was tabled in March 2014 and has passed through the Lower House of parliament but is currently held up in the Senate. It has not been debated since 16 June 2014.

It is by no means certain the Repeal Bill will pass through parliament given the current constitution of the Senate. The Bill would, if passed, have the same effect as the ministerial determination that was overturned by a Full Federal Court on 26 March 2015.

AMMA will keep members informed of developments in the coming weeks.