Submission to review of application of Migration Act to offshore resource workers

By the Australian Mines & Metals Association (AMMA)

December 2012

AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 94 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.

First published in 2012 by

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Recommendation

The *Migration Act 1958* (Cth) does not require amendment in respect of its application to offshore resource workers. Relevant provisions of the Act are:

- **consistent with Australia's international obligations;**
- **consistent with industry practices in the global shipping and resource and allied industries; and**
- **clear in stating requirements that a non-Australian person working on a vessel must 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.**

The decision in *Allseas Construction SA v Minister for Immigration and Citizenship* [2012] FCA 529 did not create a 'loophole' in the law. It provided clarity about the legal obligations of an industry employer under the Migration Act.

1 The Review

1.1 Objectives

The published information regarding the review states that the Migration Maritime Taskforce has been established to explore how best to apply the Migration Act to resource project workers in Australian waters. The key objectives of the review are to:

- 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;
- create legislative certainty in order to promote continuing investment in the offshore resources industry;
- promote opportunities for Australians to work on Australian resources;
- protect the rights of workers in the offshore resources industry; and
- maintain the integrity in existing, interrelated border legislation.

1.2 Migration Act

Although enacted in 1958, the Migration Act has been amended many times by the Federal Parliament. 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.'

Section 4 states that the object of the Migration 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.

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.

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:

> the area consisting of the States, the Territories, … and, to avoid doubt, includes:
>
> (a) land that is part of a State or Territory at mean low water; and
>
> (b) sea within the limits of both a State or a Territory and a port; …
>
> but does not include sea within the limits of a State or Territory but not in a port.

Relevant provisions of the Migration Act are discussed in section 1.3.

1.3 Allseas

Prior to the judgment of the Federal Court in *Allseas Construction SA v Minister for Immigration and Citizenship* (2012) 203 FCR 200 declaring the operation of the Migration Act in particular circumstances, the position of the Department of Immigration and Citizenship (DIAC) was that pipelay vessels laying pipe anywhere on the Australian seabed were in the migration zone. (However, it must be noted that 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.)

The definition of migration zone in section 5 of the Migration Act includes 'Australian resource installations', defined as a resources installation that is 'attached' to the Australian seabed (section

5(14) defines when a resources installation is taken to be attached to the seabed). The term 'resources installation' is defined to include both a resources industry mobile unit and resources industry fixed structure.

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

In response to Allseas' application seeking clarity regarding its legal obligations, 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 had required since it was the only relevant visa allowing a visa holder to perform ongoing work in the migration zone).

The *Allseas* decision confirmed that, by reason of section 5(13)(b) of the Migration Act, pipelay and other vessels wholly or principally engaged in operations relating to the installation of offshore pipelines:

- are not resources installations and therefore are not Australian resources installations within the meaning of the definition of migration zone; and
- do not become so simply by coming into contact with a pipeline attached to the seabed in the course of their operations.

It is not correct to suggest that the effect of the *Allseas* decision is 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 (as suggested in the Review's Terms of Reference and Discussion Paper). The Migration Act will require the non-citizens to hold visas if the:

- pipelay vessel enters Australia's territorial sea; or
- non-citizens transit through Australia (including its territorial sea) in order to join or depart vessels.

The outcome of the *Allseas* decision was not 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. The current section 5(13) was inserted at that time. In *Allseas*, McKerracher J stated 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 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.*

1.4 Information from AMMA members about industry practice

AMMA members have been actively involved in the review, including via:

- engaging with the review taskforce in a number of forums – matters raised in this context addressed each of the terms of reference; and
- providing information about practical concerns of industry.

Practical concerns of industry, discussed in detail with the review taskforce, included:

- the major and overriding priority and commitment of industry is to safety;
- the work of offshore resource workers is highly specialised and highly skilled;
- 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);
- 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
- 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.

AMMA's responses to the review have been discussed with the Australian Shipowners Association (ASA) and the Australian Petroleum Production and Exploration Association (APPEA).

1.5 AMMA's submission

This submission represents the views of AMMA's members and should be read consistently with the information provided in person by AMMA members.

For the purposes of its responses to the review, AMMA sought legal opinion and advice from both Associate Professor Michael White QC and Mr John Blackburn.

The AMMA submission recommends that the Migration Act not be amended in respect of its application to offshore resource workers. As outlined in the submission, the Act does not require amendment as it is:

- consistent with Australia's international obligations;
- consistent with industry practice; and
- clear in its requirements that a non-Australian person working on a vessel must 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.

It is emphasised that the decision in *Allseas Construction SA v Minister for Immigration and Citizenship* [2012] FCA 529 did not create a 'loophole' in the law - it provided clarity about the legal obligations of an industry employer under the Migration Act.

2 Migration legislation regarding offshore resource workers

2.1 Overview

The Federal Parliament has wide-ranging powers to legislate for matters offshore. However, the published materials regarding the review indicate that the Federal Government is conscious of and wishes to comply with its obligations within the Australian Federation and its international obligations.

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.

Under the Offshore Constitutional Settlement, the Federal Government has agreed with the States as to which Government in the Australian Federal will have jurisdiction as to specified matters offshore.

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

2.2 The Migration Act

The Commonwealth Constitution confers the Federal Parliament with power to legislate with respect to a range of matters. 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'.

In *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 at [81] to [84], Gummow J provided the following overview of the connection between the Migration Act and respective heads of legislative power:

> *The object of the Act is stated in s 4. This (as s 3A) was inserted by s 3 of the* Migration Reform Act *1992 (Cth) and reflects the changes in the Act described in* Re Patterson; Ex parte Taylor *whereby in its terms the Act was based no longer upon the immigration power (s 51(xxvii)) but upon the aliens power (s 51(xix)).*
>
> *Section 4(1) specifies the object of the Act as the regulation, in the national interest, of the coming into and presence in Australia of non-citizens. The national interest thus extends to the regulation of the continuing presence in Australia of non-citizens. To advance the object stated in s 4(1), provision is made in the Act for the removal and deportation from Australia of non-citizens whose presence in the country is not permitted by the Act (s 4(4)).*
>
> *Several points are to be made here, of significance for the issues in this case. The first is that the evident legislative design to base the Act upon the aliens power does not deny the support the legislation may receive in whole or part from other heads of power. A law dealing with the movement of persons between Australia and places physically external to Australia may be supported by the external affairs power (s 51(xxix)); this will be so independently of the implementation by that law of any treaty imposing obligations upon Australia respecting movement of non-citizens, and the power under that law to make delegated legislation, in turn, will take this character. So much follows from the joint reasons in* De L v Director-General, NSW Department of Community Services*. Further, the decision in* Thomas v Mowbray *shows that the defence power (s 51(vi)) extends to that aspect of the national interest which concerns matters relating to national security.*
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> *The upshot is that to conclude that in a particular operation the Act is not supported by one head of legislative power does not foreclose the operation of the Act on the strength supplied by other applicable heads of power. The issue is not one of legislative "intention", here as elsewhere a term apt to mislead, but of the engagement of a supporting head of power.*

2.3 Offshore Constitutional Settlement

The Federal nature of our system of government gives rise to complex arrangements offshore.

Under the Offshore Constitutional Settlement 1979, 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.

From an industry perspective, it is important the Offshore Constitutional Settlement operates to minimise the regulatory burden imposed on the resources industry and allied industries.

2.4 International obligations

International law, formed by the agreement of nations to take common action in pursuit of a common objective, provides the framework 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.

If the Federal Government were to regulate foreign workers on foreign ships in the EEZ, it would be likely to exceed the limits of its jurisdiction under international law. Ships in the EEZ are entitled to freedom of navigation and both the United Nations Convention on the Law of the Sea, 1982, and the Maritime Labour Convention, 2006, make it clear that the determination and enforcement of manning and labour conditions on foreign ships are matters for the flag State.

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. It was ratified by Australia in 1994 and incorporated into Australian law to an extent by the *Seas and Submerged Lands Act 1973* (Cth).

Under UNCLOS, Australia has sovereign rights over the exploitation and exploration in the EEZ and the continental shelf. 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 province of the flag State which has the right to control 'administrative, technical and social matters' on ships flying its flag.

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)).

The role of the flag State in regulating manning and labour conditions on vessels flying its flag has been confirmed in the International Labour Organisation's Maritime Labour Convention, 2006 (Labour Convention). Australia ratified the Labour Convention on 14 December 2011 and it is to come into force internationally on 20 August 2013.

The Labour Convention charges the flag State with responsibility to verify that ships flying its flags comply with the requirements of the Labour Convention as implemented in its national laws and regulations (see, for example, the preamble and Article 5).

3 Conclusion

Provisions of the Migration Act relevant to this review are consistent with Australian obligations and industry practice, which has due regard to the overriding priority of safety in the offshore oil and gas sector. The Migration Act does not require amendment in respect of offshore resource workers who are required to hold visas when entering Australia, including to join or to depart from a foreign-flagged vessel operating outside of the territorial sea. Any such amendment would be inconsistent with Australia's jurisdiction under international law.