Senate Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Offshore Resources Activity) Repeal Bill 2014

Australian Mines & Metals Association (AMMA)

28 April 2014

ABOUT AMMA

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes.

Having actively served resource employers for more than 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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EXECUTIVE SUMMARY

1. AMMA welcomes the opportunity to provide input to the committee on the provisions of the Migration Amendment (Offshore Resources Activity) Repeal Bill 2014.

2. AMMA is extremely supportive of this Bill, which seeks to repeal the Migration Amendment (Offshore Resources Activity) Act 2013 (the ORA Act), which will automatically take effect on 30 June 2014 unless repealed beforehand.

3. AMMA strongly opposed the passing into law of the ORA Act under the former Labor government, taking a lead role in the policy debate around of the legislation leading up to its tabling in parliament and passage through parliament.

4. AMMA's June 2013 submission to the Senate inquiry into the ORA Act was the most comprehensive by far of all the written submissions.

5. AMMA was also the only industry group to appear before the Senate inquiry to give verbal evidence to support its written submission.

6. AMMA's position remains as detailed in those earlier submissions that:

   a. The ORA Act should be repealed with urgency: and

   b. The extension of the Migration Act in the way the ORA Act proposes will have a detrimental impact on resource project viability due to the increased regulatory burden and associated delays this will cause.

Background to this Bill

7. The legislation this Bill seeks to repeal (the ORA Act) was first mooted in the wake of the Federal Court decision in *Allseas*[1] in May 2012.

8. The *Allseas* decision confirmed what AMMA and its members had long maintained, that particular offshore vessels were not part of Australia's migration zone and workers on those vessels were not required to hold skilled migration visas. This was the long-understood international approach and was not remarkable or unexpected.

9. The former Labor government and maritime unions, however, insisted the decision revealed a "loophole" in coverage of the Migration Act 1958 and moved to "close it" by establishing the Maritime Migration Taskforce to review the application of the Migration Act to offshore resources workers.

10. In December 2012, AMMA made a comprehensive written submission to that review, warning of the damaging impacts the extension of the Migration Act as the

[1] *Allseas Construction SA v Minister for Immigration & Citizenship* [2012] FCA 529, 22 May 2012

then-government proposed would have on resource project viability and Australia's international reputation as a place to invest.

11. The previous government chose to pay complete disregard to the views of the industry and to accepted international law and practice. The ORA Act was subsequently tabled and passed through federal parliament, receiving Royal Assent in June 2013.

12. Its provisions will automatically commence on 30 June 2014 unless repealed, amending the Migration Act to ensure that persons who participate in or support an "offshore resources activity" are deemed to be in Australia's migration zone. This means all non-citizens participating in those activities will be required to hold a specific new "offshore resources visa" or permanent visa.

13. To contextualise the scope of the change that will take effect, it will expand Australia's legal territory for the purposes of migration by 10 million square kilometres, more than doubling the reach of Australian laws offshore. It will do this in a way that as yet is not completely clear given the exact form and content of the new visa to accompany the ORA Act is yet to be specified.

14. It has also never been made clear what the imposition of a new visa will achieve, that is, what is to be gained by imposing this new visa requirement?

15. The ORA Act will, unless repealed, extend the Australian migration zone to:

    a. Foreign ships engaged in innocent passage in the territorial sea, the Exclusive Economic Zone (EEZ) or the Extended Continental Shelf (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 resources 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.

    f. Ships or vessels for which custom and practice in 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.

16. This is an extraordinary extension of Australian law to international waters and represents a massive territorial expansion without purpose.

International work on international vessels

17. The objective of the ORA Act, according to the former Labor government and the maritime unions, was to "ensure that Australian jobs are regulated by the Migration Act in an appropriate way".

18. As AMMA pointed out in its verbal submissions to the Senate committee when the ORA Act was before parliament, it is not accurate to say the jobs being affected are Australian jobs:

> *"This is work in international waters by international vessels."*

19. The exclusion of particular vessels from Australia's migration zone is appropriate and a deliberate exclusion made via specific amendments to the Migration Act in 1982.

20. It also reflects global practice. No nation can or should seek to extra-territorialise its migration laws to vessels sailing / operating in international waters.

21. The fact is that local companies and projects often need to engage international contractors or source vessels from within their international fleets for short periods to perform critical work associated with major resource projects. This is internationally unique work requiring vessel-specific skills.

22. An "offshore resources visa" that in any way resembles the current 457 temporary skilled migration visa or equivalent for crew working on those international vessels is neither appropriate nor practical.

23. It is impractical in the extreme to expect a foreign flagged vessel operator that is contracted to perform work where no Australian registered vessels are available, to seek to engage an Australian workforce to temporarily operate their vessel for what is ultimately highly-skilled, short-term temporary work that is not in Australian waters. Not only is there a shortage of Australian seafarers, but the safety and cost implications associated with such a notion would be huge, assuming those skills were even available locally.

24. If this is the intent of the impending legislation, it is misguided. If not, it remains the imposition of a visa requirement and associated bureaucracy without a purpose.

Protections already in place

25. The committee should recall that terms and conditions of employment for foreign nationals are protected internationally through the International Labour Organization's Maritime Labour Convention. Thus, terms, conditions and payments for such work offshore are set consistent with international law and practice.

26. Further, anyone transiting to or from the Australian mainland and working on vessels must hold existing visas in order to transit in and out of the country. Thus, appropriate immigration clearance already exists without the imposition of the ORA Act.

27. The committee should also bear in mind that historically, the demand for maritime skills fluctuates greatly, consistent with both short-term and long-term major project schedules. Specialist vessel operations associated with the offshore resource industry may be described as "itinerant" as they move from project to project across the globe.

28. This status quo situation, which will exist until 30 June 2014 when the ORA Act takes effect, is necessary to ensure that projects of national significance are not delayed through the imposition of unnecessary red tape and a system that fails to take into account the specialised and global nature of the industry.

A welcome reprieve by the Coalition government

29. The Coalition government has made a welcome move in tabling this repeal Bill. The fact remains, however, that the ORA Act, along with its unnecessary and impractical new visa requirement, may come into operation before it can be repealed, particularly as this committee will not report until 6 June 2014.

30. AMMA supports parliament's swift passing of the repeal Bill in light of the operational and administrative imposts the legislation will create, even if it is only in effect for a short time before it is repealed. If not repealed, the Bill's damaging impact on future resource investment will outlast the duration of the legislation.

31. To reiterate, the impending ORA Act is a purposeless, fundamentally redundant but damaging re-regulation for regulation's sake.

32. AMMA notes the Coalition government may have no choice but to enact a visa pathway to implement Labor's "legacy" legislation that will automatically take effect on 30 June 2014. Such a pathway is functionally unnecessary and unjustified.

33. To its credit, the government has consulted with stakeholders over what the industry requires from such a visa, acknowledging that existing visas may not be well-suited to the resource industry's needs once this legislation takes effect.

How the committee should proceed

34. Of the three reform options presented in the Regulatory Impact Statement to the Bill, AMMA overwhelmingly supports Option 3.3, which is to repeal the ORA Act in its entirety.

35. This is what this Bill seeks to do.

36. It would relieve the resource industry from an impending system that would come with excessive red tape, cost implications and practical problems, all of which have the potential to undermine current and future projects of national significance.

THE RIGHT POLICIES TO SUPPORT THE RESOURCE INDUSTRY

37. AMMA welcomes and supports recent comments made by Minister for Industry, the Hon Ian Macfarlane MP[2], that the resources industry has been central to the Australian economy over the past decade, with its contribution more important than ever in the years ahead.

38. The minister quoted the latest figures from the Bureau of Resources and Energy Economics (BREE)[3] showing that Australia will reap an 8% gain in export earnings each year for the next four years, reaching $284 billion by 2018-19, thanks to the resource industry.

39. The value of Australia's mineral and energy commodity exports is forecast to increase from $176 billion in 2012-13 to $199 billion to 2013-14, with Minister Macfarlane commenting that:

> *"The Coalition has always valued the economic contribution of the resources sector and cautioned against taking it for granted, not only because of the clear value it adds to the national economy, but also because it employs tens of thousands of Australians, in both direct and indirect jobs."*

40. According to the minister:

> *"That's why it's so important that the right policies are in place to ensure the mining industry can continue to grow, and that investors have confidence in new and existing projects."*

41. Mr Macfarlane points out that the Coalition government has acted to "end the uncertainty and constant policy changes that the resource sector endured from the previous government".

42. The original legislation this repeal Bill seeks to overturn is one aspect of Labor's legacy that was designed to make doing business more difficult and more uncertain in the resource industry, thereby undermining the economic benefits to Australia flowing from this important sector.

43. AMMA welcomes the Coalition's move to repeal the ORA Act, along with other damaging laws introduced by the former Labor government that will make it harder for the industry to attract investment.

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[2] *"Economic report reinforces value of Australia's resource industry"*, media release, The Hon Ian Macfarlane MP, Minister for Industry, 26 March 2014

[3] *Resources and Energy Quarterly – March Quarter 2014*, published by the Bureau of Resources and Energy Economics

NO LOOPHOLE TO BE CLOSED

44. Contrary to what the former Labor government and the maritime unions would have the committee believe, the *Allseas* decision[4] did not create a "loophole" in the law.

45. The decision merely provided clarity around the operation of the Migration Act in terms of the legal obligations of a resource industry employer under that Act.

46. The *Allseas* decision confirmed that, by reason of s5(13)(b) of the Migration Act, pipelay and other vessels wholly or principally engaged in operations relating to the installation of offshore pipelines:

    a. Are not resources installations and therefore are not "Australian resources installations" within the meaning of the definition of the migration zone; and

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

47. 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. The Migration Act requires those non-citizens to hold a visa if:

    a. The pipelay vessel enters Australia's territorial sea; or

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

48. Thus, appropriate immigration clearance processes are already in place without the imposition of the ORA Act.

49. Claims of a loophole are a fiction, deliberately contrived to impose punitive regulation for regulation's sake with no justification or merit. The parliament should move to quickly correct last year's regulatory error and over-reach.

[4] *Allseas Construction SA v Minister for Immigration & Citizenship* [2012] FCA 529, 22 May 2012

PRACTICAL IMPACTS OF THE IMPENDING LEGISLATION

50. Unless repealed, the ORA Act and the accompanying visa will increase uncertainty, complicate compliance and give rise to pointless and economically damaging litigation.

51. Key issues with the ORA Act that AMMA highlighted in previous submissions remain:

a. The existing (pre-ORA Act) provisions of the Migration Act are the result of past express parliamentary intent to ensure an appropriate application of the Migration Act to offshore resources workers.

b. The ORA Act will significantly increase project costs, including the costs of projects already under way, with a flow-on damaging effect on the Australian economy and jobs.

c. It is inconsistent with international practice and how those vessels operate in international waters subject to management by other countries.

d. It is inconsistent with current industry practice and particularly impractical in the current economic environment when we need to be doing more to attract, not deter, projects coming to Australia.

e. The ORA Act will cause project delays, with operators needing greater lead time to mobilise crew for offshore projects.

f. It will impose a further unnecessary level of regulatory burden on the offshore resources industry, already a highly-regulated industry.

g. It involves an inappropriate delegation of legislative power, particularly the ministerial determination power (*see later in this submission for details*).

h. It will encourage litigation given the lack of clarity around exactly how the new system will apply and the interactions it will have with other regulations and laws, both national and international.

i. It will impose an inappropriate and unnecessary barrier on individual freedom of movement by making travelling in international waters difficult and, in some cases, impossible.

j. It is inconsistent with Australia's obligations under international law by seeking to regulate who may work on, and employment conditions on, foreign ships in all international maritime zones off the Australian coast. Australia should not seek to regulate non-citizens on foreign-flagged vessels in international waters.

k. It is inconsistent with the Offshore Constitutional Settlement which, among other things, settled that 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.

l. It will place untenable cost pressures on the resource industry, both direct and indirect, in terms of compliance and administration and remains a regulatory impost without a purpose.

Impracticality of applying Australian standards in international waters

52. The practical concerns of industry with the ORA Act include that:

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

b. The industry is global in nature, with operations dependent on access to international oil and gas engineering skills due to both the rapid growth of the industry and the fact that for some highly specialised skills there will never be long-term demand for them in Australia.

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

d. 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 sustainable jobs for Australians where practical and appropriate.

53. There would be significant practical difficulties arising from any suggestion via the ORA Act or the associated visa pathway that Australian wages and conditions should be paid where employees work in international waters off the Australian coastline for relatively short periods of time. This would even further delay vessels sailing in and / or performing work, and could result in inconsistent obligations between Australia and the host country and / or ILO obligations.

54. Particular problems would arise from:

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 unless clause 9A(8) of the ORA Act is repealed.

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 types of leave and workers' compensation.

c. **Salary and filing administration** – Concerns arise as to inordinate administrative complexity and cost as a result of the ORA Act.

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 very short periods.

55. The resource industry is committed to training and upskilling local workers but at the same time recognises the small but important niche role these specialist services / facilities provide. This includes global facilities that sail into and back out of international waters off Australia.

56. AMMA members are concerned to ensure the new visa pathway, if and when it takes effect, does not, even in the short term, impede the flexibility and stability necessary for the continued investment in resource projects in this country.

57. The new visa pathway, no matter how transitionally it operates, must be flexible enough to accommodate the unique work in this industry without placing undue restrictions on the ability to use important skills. AMMA will work with government to make this bad idea as benign as possible as parliament hopefully moves to correct last year's regulatory error.

Ministerial determination power a particular concern

58. The ORA Act will in essence insert an extra section – 9A – into the Migration Act that will cover offshore resources workers from 30 June 2014.

59. A particular concern with the ORA Act is s9A(6), which delegates to the minister of the day the power to change the application of the Act.

60. This would give the minister the ability to impose significant obligations on individual non-citizens on board foreign-flagged ships and their employers, creating liabilities for major statutory offences in the event of non-compliance, all without any parliamentary scrutiny.

61. Such a "ministerial determination" would have the potential to affect to a very significant degree not only the Federal Government's relations with states and territories but Australia's relations with other nations, all at the stroke of a pen. It would also be at odds with international maritime practice globally.

62. Those determinations would not be subject to review by parliament as to the appropriateness of the exercise of the delegated power. Nor would they be subject to parliamentary disallowance motions.

63. AMMA's very strong view remains that allowing the minister to determine resource activities deemed to be caught by the Migration Act would represent an inappropriate delegation of legislative power.

64. AMMA welcomes the current Bill's proposal to also repeal that part of the ORA Act by repealing the legislation as a whole.