AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

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New offshore migration requirements established

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Introduction to recent developments

This briefing paper follows on from AMMA's briefing paper issued immediately following last week's Full Court of the Federal Court decision and provides an analysis of government measures taken subsequent to last week's court decision.

The Federal Government has now issued two new instruments which together specify the coverage of the Migration Amendment (Offshore Resources Activity) Act (the ORA Act) and the visas required for non-Australian personnel working on offshore resources activities, depending on the type of vessel concerned.

Last week's Full Court decision ruled that Assistant Minister for Immigration & Border Protection, Michaelia Cash, could not use a ministerial power under s9A(6) of the ORA Act to exclude all offshore resources activities from coverage of that Act. In doing so, the court confirmed that a partial exclusion was likely to be acceptable, depending on the circumstances, which is what the minister has since enacted.

Maritime unions successfully challenged the earlier ministerial determination made by Assistant Minister Cash in July 2014, which had prevented the ORA Act's expansion of Australia's migration zone into offshore resource activities that were previously excluded. That ministerial determination, which has now been revoked, retained the status quo while it was in effect in relation to migration requirements offshore, despite the ORA Act's implementation on 29 June 2014.

With that ministerial determination now set aside, the government was required to issue further instruments specifying the migration arrangements for offshore resources activities going forward, including the types of visas required. To not do so would have seen existing visa holders working in the offshore oil and gas sector (including those on 400 and 457 visas) unable to lawfully exercise work rights.

What measures has the government put in place since last week?

Immediately following last week's Full Court decision, all offshore resources activities as captured under s9A(5) of the Migration Act 1958 were deemed to be in Australia's migration zone. This removed former exemptions from the zone such as for pipelay and other vessels that would otherwise be within waters above Australia's Exclusive

Economic Zone (EEZ) but not within the migration zone because they had no attachment to the seabed in the work they were performing.

Until the Assistant Minister issued new instruments in recent days, resources activities were, as a result of the Full Court decision, defined broadly by reference to all activities covered by licenses under the Offshore Petroleum & Greenhouse Gas Storage Act 2006 and the Offshore Minerals Act 1994 (as specified in s9A(5) of the Migration Act 1958).

However, the government has since issued two instruments that are understood to have the practical effect of restoring the status quo that was in place prior to the Full Court decision and prior to the ORA Act taking effect on 29 June 2014.

In simple terms, if offshore resources activities were previously deemed to be within the migration zone (because they were on a fixed platform or a facility attached to the Australian seabed) then previous migration requirements continue. This means that non-Australians working on those activities continue to require:

- A Temporary Work (Skilled) Visa (subclass 457);
- A Temporary Work (Short Stay Activity) Visa (subclass 400); or
- A permanent visa.

For vessels and activities that were previously exempt from coverage by the Migration Act 1958 (because they were mobile or manoeuvring vessels with no direct connection to the Australian seabed), those vessels are technically now in the migration zone although the new visa arrangements required will have minimal impact on their operations.

The two new instruments

The two instruments issued since last week's Full Court decision, taken together, are intended to preserve the status quo that was previously in place. The government's intention is to minimise the impact of the Full Court decision on offshore resource industry operations.

The first instrument, issued on Friday 27 March 2015, is a ministerial determination made under s9A(6) of the Migration Act 1958.

This determination excludes offshore "resources installations" from coverage of the ORA Act. This means if activities take place on a fixed platform or another vessel that is attached to the Australian seabed, those activities are not covered by the ORA Act but are still covered by the Migration Act 1958 in the same way as previously.

Instead of excluding all offshore resources activities from coverage by the ORA Act, as the previous ministerial determination did, the latest determination excluded a smaller subset of offshore activities (ie fixed resources installations), but is intended to have a very similar practical effect to the previous determination.

As a result of the latest determination, fixed platforms and vessels attached to the Australian seabed continue to require non-citizens working on them to hold a 400, a 457 or a permanent visa, as has been the case for many years. Going forward,

nothing has changed for those operations as a result of the recent Full Court decision.

The second instrument, issued on Monday 30 March 2015, is a ministerial declaration made under s.33(2)(b)(ii) of the Migration Act 1958.

The declaration is understood to have immediate effect upon being made and is now in force. It is understood to have the effect of declaring those vessels still covered by the ORA Act (which due to the above determination is only non-fixed or moveable vessels) to be covered by "special purpose visas" (SPVs) when non-citizens enter Australia's migration zone to work on them.

The effect of the declaration is understood to mean vessels and activities that were not previously deemed to be in the migration zone despite being in waters above Australia's EEZ (such as pipelay vessels) are now technically in the migration zone. However, they will not need to apply for visas with working rights for their non-Australian citizens because they will automatically be deemed to be covered by an SPV as defined under s.33 of the Migration Act 1958.

In simple terms, the difference between the effect of the latest declaration and what was in effect prior to last week is that:

- **Prior to last week**, the above types of mobile or non-fixed vessels were not deemed to be in the migration zone so did not need a visa providing work rights for non-Australian citizens, although a visa was required to join the vessel.
- **As of 30 March 2015**, it is understood that non-citizens on the above types of mobile vessels are deemed to be entering Australia's migration zone if they are in waters above the EEZ but they will not have to apply for a visa with work rights as they will automatically be covered by an SPV upon entry.

The declaration is not a disallowable instrument so cannot be subject to a disallowance motion in the Senate, but may be subject to further legal challenge in the courts. It remains to be seen whether unions will mount such a legal challenge.

What is a special purpose visa?

A Special Purpose Visa (SPV) is a temporary visa that allows people with prescribed status or who are declared by the minister of the day to be able to hold an SPV to lawfully enter and remain in Australia.

SPVs currently typically cover members of the Royal Family, official guests of the Australian government, and airline crew when they enter Australia.

You cannot apply for an SPV - one is automatically issued when a vessel or crew in this case approaches Australia's migration zone. An SPV is automatically issued once Australian Customs or the Department of Immigration & Border Protection are notified of an arrival. There is no cost associated with being covered by an SPV.

An SPV does not, unlike a 457 or a 400 visa, call up the Fair Work Act or require Australian employment terms and conditions to be applied to visa holders.

What type of visas are now required for your activities?

As a result of the latest developments, the below visas are required for your operations unless and until the instruments issued by the Assistant Minister are subject to legal challenge. AMMA will keep members notified of any developments on that front.

The visas required for non-Australians working on offshore resources activities that **are not** covered by the ORA Act but are still in the migration zone (ie resources installations that are attached to the Australian seabed) are:

- A Temporary Work (Skilled) Visa (subclass 457);
- A Temporary Work (Short Stay Activity) Visa (subclass 400); or
- A permanent visa.

The visa required for non-Australians working on offshore resources activities that **are** covered by the ORA Act (ie mobile or moveable vessels that are not attached to the Australian seabed) is:

- A Special Purpose Visa (SPV), which is the deemed visa as set out above.

The government's intention

The definitions of the types of vessels and activities covered by the ORA Act may be subject to some speculation and interpretation in terms of whether they are considered to be a fixed installation with the requisite attachment to the seabed or a mobile one with no attachment.

However, the Assistant Minister's intention is understood to be that migration arrangements are not opened up any further than the previous status quo allowed.

In simple terms, the only group of activities or vessels intended to be able to use an SPV are those that were until last week deemed to be operating in waters above Australia's EEZ but not in the migration zone.

It is not intended that an SPV can be used by vessels that have historically been covered by the Migration Act 1958. As an example, it is not intended that floating platforms tethered to the seabed or permanently moored are able to use SPVs for non-citizens working on them, with the government's intention that platforms attached to the seabed will continue to require a 457, a 400 or a permanent visa for non-Australian citizens.

The government is mindful that if there is exploitation of SPVs contrary to government intentions this will force it to reassess its recent measures and potentially give full effect to the ORA Act. This would mean a full working visa would be required for all offshore resources activities regardless of the vessel's attachment to the seabed.

AMMA urges its members to obtain specific legal and / or migration advice in relation to your activities to ensure you are not in breach of the law going forward.

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. Please direct any 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.