Australian Government
Department of Immigration and Citizenship

DIAC Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Offshore Resources Activity) Bill 2013

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The Department of Immigration and Citizenship welcomes the opportunity to provide comment to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Offshore Resources Activity) Bill 2013, following the introduction of this Bill into the House of Representatives on 30 May 2013. The Bill passed the House of Representatives on 17 June 2013.

1. CONTEXT AND BASIS OF THE BILL

The Migration Amendment (Offshore Resources Activity) Bill 2013 (the Bill) amends the *Migration Act 1958* (the Act) to clarify the situation around foreign workers in Australia's offshore maritime zones to address the Federal Court decision of *Allseas Construction SA v Minister for Immigration and Citizenship* [2012] FCA 529 which was handed down in May 2012.

The Court found that by operation of subsection 5(13) of the Act, two pipe-laying vessels, the *Lorelay* and *Solitaire* were not Australian resources installations within the meaning of the Act while they were wholly or principally engaged in operations relating to the installation of offshore pipelines. As such, the Court found that the *Lorelay* and *Solitaire* and the non-citizens working on these vessels were not within or working within the migration zone as defined by subsection 5(1) of the Act. This means that the workers on board those vessels did not require a visa.

On 15 October 2012, the former Minister for Immigration and Citizenship, the Hon Chris Bowen MP, announced that the government would legislate to amend the Act and clarify the situation around foreign workers in Australia's offshore maritime zones to address the decision of *Allseas*. Following this announcement, the Department of Immigration and Citizenship (the Department) commenced a review on how best to apply the Act to workers in offshore maritime zones.

The Migration Maritime Taskforce (the Taskforce) was developed to conduct this review and explore options to determine the most appropriate way to ensure foreign workers in Australia's offshore maritime zones come within the ambit of the Act. The Taskforce found that any question as to whether a person was in the migration zone or not should not be solely dependent on where that person was physically located (for example, whether that person was physically on an Australian resources installation) but also dependent on the sorts of activities that person was conducting.

The Taskforce recommended that the existing legislative framework that essentially provides that persons are in the migration zone based on where they are physically located be supplemented with a new legislative concept. This new concept would provide that all offshore resource workers, including support staff, are taken to be in the migration zone when they are engaged to conduct or support activities regulated by Commonwealth, State and Territory legislation relating to the exploration and exploitation of Australia's offshore natural resources.

2. PURPOSE OF THE BILL

The Migration Amendment (Offshore Resources Activity) Bill 2013 (the Bill) amends the *Migration Act 1958* (the Act) to provide that persons who participate in, or support, an offshore resources activity are taken to be in the migration zone.

The purpose of the Bill is to regulate foreign workers participating in offshore resources activities by bringing these persons into the migration zone and thereby requiring them to hold a visa under the Act.

The Government is committed to maintaining the security of Australia's borders. Under the current legislative framework, the Government has an incomplete picture of the number of foreign workers in the offshore maritime zone. This is in part due to the absence of a regulated visa regime to capture those engaged in Australia's offshore maritime zones and the corresponding requirement to submit migration information. There are security ramifications as a result of the inability to regulate foreign workers engaged in offshore resources activities in an immigration context. The June 2012 Report of the Offshore Oil and Gas Resources Sector Security Inquiry recognised that visa security checks are one of the only ways Australia is able to examine non-citizen workers in this security-sensitive industry.

The exploration and exploitation of the natural resources in Australia's offshore maritime zones contributes significantly to the Australian economy and employs thousands of Australian workers. The inability of the Government to regulate foreign workers in Australia's offshore resources industry undermines the integrity of Australia's migration program and visa regime regulating work entitlements. As a result, there is a risk that foreign workers undertaking activities involved in the exploration and exploitation of Australia's natural resources and who therefore form part of the Australian employment sector may be working under conditions and receiving wages that do not adhere to Australian standards. This reduces work opportunities for Australian citizens and non-citizens who hold relevant visas permitting work and also puts businesses that only engage workers who hold valid visas to work at a competitive disadvantage.

The amendments in this Bill will regulate foreign workers participating in offshore resources activities by bringing these persons into the migration zone and thereby requiring them to hold a visa under the Act. In terms of selecting offshore resources activities, the Taskforce recommended referencing a legislative solution that comprehensively administer the activities of the offshore resources industry comprising the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Offshore Petroleum Act) and the *Offshore Minerals Act 1994* (the Offshore Minerals Act). In addition to these two Acts, the Bill will create a power for the Minister to make a determination in writing for the purposes of defining offshore resources activity. This will provide the Minister with flexibility to declare certain activities administered by other regulatory schemes as offshore resource activities for the purposes of the new deemed migration zone. This would include projects that take place in areas that are within the coastal waters of the States and the Northern Territory which are regulated under State and Territory laws rather than their Commonwealth equivalents.

The legislative measures will supplement the current framework under the Act which defines, as part of the migration zone, Australian resources installations and Australian sea installations. Together with the existing provisions in the Act, this new comprehensive framework will ensure that workers in Australia's offshore resources industry are regulated

under the Act and required to hold specific visas. Individuals who engage in offshore resources activities in Australia's offshore maritime zones will be subject to existing compliance measures in the Act which address breaches of work and visa conditions.

A specifically tailored visa pathway for offshore resource workers will be developed in consultation with stakeholders to provide industry with the flexibility and certainty it requires while meeting the policy objectives of ensuring Australian working conditions are protected.

3. CONTENT OF THE BILL

The Bill amends the Act to:

- insert a deeming provision which provides that a person is taken to be in 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;
- put beyond doubt that a person may be taken to be in the migration zone because of the new deeming provision whether or not the person's participation or support of the offshore resources activity, or whether or not the offshore resources activity itself, has started, is continuing or has concluded;
- provide that a person may undertake an offshore resources activity whether the person:
    - is on an Australian resource installation in the area; or
    - is otherwise in the area to participate in, or support the activity;
- provide that a person is taken to be in Australia while he or she is taken to be in the migration zone because of the new deeming provision;
- provide that a person is taken to travel to Australia if the person travels to an area in which the person is taken to be in the migration zone because of the new deeming provision;
- provide that a person is taken to enter Australia when the person enters an area in which the person is taken to be in the migration zone because of the new deeming provision;
- provide that, subject to section 80 of the Act, a person is taken to leave Australia when the person leaves an area in which the person is taken to be in the migration zone because of the new deeming provision;
- define offshore resources activity, in relation to an area, as:
    - a regulated operation (within the meaning of section 7 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*) that is being carried out, or is to be carried out, within the area, except an operation determined by the Minister in writing;
    - an activity performed under a licence or a special purpose consent (both within the meaning of section 4 of the *Offshore Minerals Act 1994*), that is being carried out, or is to be carried out, within the area, except an activity determined by the Minister in writing**;**
    - an activity, operation or undertaking (however described) that is being carried out, or is to be carried out:

  - under a law of the Commonwealth, a State or a Territory determined by the Minister in writing;
  - and within an area, as determined by the Minister in writing;

- create a legislative instrument making power for the Minister to make a determination with respect to the definition of an offshore resources activity;
- provide that a condition of a visa that allows the holder of the visa to work is not taken to allow the holder to participate in, or support, an offshore resources activity in relation to any area unless the visa is:
  - a permanent visa; or
  - a visa prescribed by the regulations for the purpose of allowing the holder of that visa to participate in, or support, an offshore resources activity.
- provide that a person may undertake an offshore resources activity (and therefore be required to hold the above visas) whether the person:
  - is on an Australian resource installation in the area; or
  - is otherwise in the area to participate in, or support the activity under the new framework;
- provide that unless a provision of this Act, or another Act, expressly provides otherwise, the new deeming provisions do not have the effect of extending, for the purposes of another Act, the circumstances in which a person:
  - is in the migration zone or is taken to be in the migration zone; or
  - is in Australia or is taken to be in Australia; or
  - travels to Australia or is taken to travel to Australia; or
  - enters Australia or is taken to enter Australia; or
  - leaves Australia or is taken to leave Australia;
- provide for application provisions that apply on or after the commencement of this Schedule; and
- make necessary consequential amendments.

4. International law

Australia has jurisdiction under the United Nations Convention on the Law of the Sea (UNCLOS) to apply its immigration laws to foreign nationals on foreign-flagged and Australian-flagged vessels which are engaged in the exploration and exploitation of natural resources and which are located in Australia's territorial sea, contiguous zone, exclusive economic zone (EEZ) or in the waters above its extended continental shelf.

Article 56(1) provides Australia with sovereign rights for the purpose of exploring and exploiting the natural resources of the EEZ. The jurisdiction accorded to Australia by Article 56(1) must, by operation of Article 56(2), be exercised with due regard to the rights and duties of other States. The effect of the proviso in Article 56(2) is to ensure that vessels that are not engaged in activities for which the coastal State has jurisdiction under Article 56(1) are not unduly hindered by the activities of the coastal State, and that freedoms such as freedom of

navigation, freedom to lay cables and pipelines (which do not come to Australia) and other high seas freedoms are preserved. Coastal states which permit foreign vessels and structures to engage in exploration and exploitation of natural resources within their EEZ or their continental shelf do so on conditions which include the regulation of a number of matters which would, on the high seas, be the preserve of the flag state.

Relevant provisions in UNCLOS include:

> Article 56
> *Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*
> 1. In the exclusive economic zone, the coastal State has:
>   (a) **sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living**, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
>   […]
>
> 2. 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.
>
> Article 77
> *Rights of the coastal State over the continental shelf*
> 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
>
> Article 58
> *Rights and duties of other States in the exclusive economic zone*
> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
>
> Article 87
> *Freedom of the high seas*
> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:
>   (a) freedom of navigation; […]

Section 36 of the Offshore Petroleum Act ensures that its regulation of pipelines is compatible with Australia's international obligations.

> 36 Certain pipelines provisions to apply subject to international obligations

1. This section applies to the provisions of this Act to the extent to which they relate to a pipeline for the conveyance of petroleum recovered from a place beyond the outer limits of any offshore area.
2. The provisions have effect subject to Australia's obligations under international law, including obligations under any agreement between Australia and any foreign country or countries.

5. Asylum seekers

The Bill does not materially alter the situation regarding asylum seekers.

The existing provisions in the Act regarding resources installations remain unchanged. Australian resources installations are currently, and will continue to be:

- part of the migration zone
- deemed to be part of Australia
- excised offshore places.

This position will continue in parallel to the new arrangements. Asylum seekers without a visa in effect arriving at Australian resources installations by sea would be classified as unauthorised maritime arrivals, and would be subject to a visa application bar, as they are under present arrangements.

Those asylum seekers would not be covered by the new arrangements because they do not fall within the deeming provision in new subsection 9A(1), as they would not be in an area to participate in or support an offshore resources activity. Thus if a vessel whose crew is deemed to be in the migration zone by new subsection 9A(1) were to rescue asylum-seekers, the asylum-seekers would not be deemed to be in the migration zone.

It is planned to prescribe in the Regulations non-citizens who are covered by new subsection 9A(1) as excluded maritime arrivals under paragraph 5AA(3)(c), removing them from the operation of the unauthorised maritime arrivals provisions. This will account for a situation where a crewmember working on a resources activity is deemed to be in the migration zone while not holding a valid visa.

6. Interaction with other legislation

The Bill is drafted to as to exclude unintended consequences for other legislation. New subsection 9A(4) provides that unless a provision of this Act, or another Act, expressly provides otherwise, new section 9A does not have the effect of extending, for the purposes of another Act, the circumstances in which a person:

(a) is in the migration zone or is taken to be in the migration zone; or
(b) is in Australia or is taken to be in Australia; or
(c) travels to Australia or is taken to travel to Australia; or
(d) enters Australia or is taken to enter Australia; or
(e) leaves Australia or is taken to leave Australia.