CHAPTER 2

KEY PROVISIONS OF THE BILL AND ISSUES RAISED

2.1 The Bill contains one schedule comprised of two Parts. Part 1 of Schedule 1 sets out the operative provisions, and Part 2 deals with the application of the amendments.

Key provisions of the Bill

2.2 Proposed new section 9A (item 6 of Schedule 1) will create a new framework to provide that persons in an area who participate in, or support, an 'offshore resources activity' are taken to be in the migration zone. Proposed new subsections 9A(1) and 9A(3) operate as the deeming provisions and proposed new subsection 9A(5) further defines what is an 'offshore resources activity'. Proposed new subsection 9A(6) will enable the Minister to make a determination, by legislative instrument, that further defines what is an 'offshore resources activity' for the purposes of proposed new subsection 9A(5).[1]

2.3 The intended effect of proposed new section 9A is to bring persons participating in, or supporting, an 'offshore resources activity' within the ambit of the Migration Act, thereby requiring these persons to hold visas.[2] Proposed new subsections 41(2B) and 41(2C) (item 8 of Schedule 1) will then operate to ensure that all non-citizens engaged in an 'offshore resources activity' hold a specific visa or a permanent visa to participate in, or support, the relevant activity.[3]

2.4 The Explanatory Memorandum (EM) explains that the policy intent of proposed new subsections 41(2B) and 41(2C) is to enable the Department of Immigration and Citizenship (DIAC) to identify the number of non-citizens working in the offshore resources sector and obtain information about the work they are doing. The EM advises that 'without a specific visa for this work, this will not be possible'.[4]

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1 EM, pp 9, 11. Proposed new section 9A will also clarify how the new framework will operate by deeming when persons are taken to be in Australia, taken to travel to Australia, taken to enter Australia and/or taken to leave Australia.

2 EM, p. 9.

3 EM, p. 10. The EM explains that this specific visa will be prescribed in the Migration Regulations 1994. See: EM, p. 22.

4 EM, p. 22.

Issues raised during the inquiry

2.5 The committee received evidence in respect of proposed new section 9A (item 6 of Schedule 1). Issues raised by stakeholders related to the proposed new definition of 'an area' (proposed new subsections 9A(1) and 9A(5)) and the proposed power to enable the Minister to make determinations with respect to the definition of 'offshore resources activity' (proposed new subsection 9A(5)).

Concern about the definition of 'an area'

2.6 Proposed new section 9A (item 6 of Schedule 1) will have the effect of bringing persons participating in, or supporting, an 'offshore resources activity' within the operation of the Migration Act by ensuring that persons participating in, or supporting, an 'offshore resources activity' in a relevant area are required to hold a visa to work.

2.7 The meaning of 'an area' is not defined in proposed new subsection 9A(1). The EM states that the term has been left 'deliberately broad' and proposed new subsection 9A(1) relies on the definition set out in proposed new subsection 9A(5) to determine whether an 'offshore resources activity' is in 'an area':[5]

> New paragraphs 9A(5)(a) and 9A(5)(b) do not attempt to exhaustively define the areas in which Australia has the jurisdiction to govern offshore resources activity. Instead new paragraphs 9A(5)(a) and 9A(5)(b) rely on the existing processes applied in the Offshore Petroleum Act and the Offshore Minerals Act, which authorise activities to be carried out in Australia's offshore maritime zones, to suppose that these activities are carried out within Australia's jurisdiction. In other words, the limits of the ―area are intended to be determined with reference to a regulated operation or activity performed under a licence or a special purpose consent issued under these two Acts. These areas would include areas within Australia's [Exclusive Economic Zone (EEZ)] (beyond the limits of the territorial sea) and above Australia's extended continental shelf.[6]

2.8 While supportive of the Bill, the Australian Institute of Marine and Power Engineers (AIMPE), criticised the lack of a definition of 'an area' in proposed new subsection 9A(1) and suggested that rather than the words 'an area', the proposed section refer to the EEZ:

> [The Bill]…should be improved to ensure that Australia's migration laws are effective in their application to persons working on offshore resources vessels throughout Australia's EEZ.[7]

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5 EM, p. 11, 17.

6 EM, p. 17. Also see: p. 11.

7 *Submission 3*, [p. 1].

2.9 The Maritime Union of Australia (MUA) disagreed with this suggestion however, stating that in its view the Bill '[d]oes not seek to over-reach Commonwealth regulation in relation to vessels navigating through the Australian EEZ to get to the area in which those vessels need to operate'.[8]

2.10 The MUA informed the committee that the Bill would provide certainty and should be passed 'immediately without amendment':

> It provides the certainty that the workforce, resource owners, operators and contractors have been seeking for a long time, and will ensure that tendering for offshore construction work will be undertaken on the basis of certainty as to what Australian labour relations arrangements apply, thus creating a basis for tenderers to have a known labour cost structure which cannot be undercut by competitors.[9]

2.11 Not all submitters however were supportive of the Bill. Shipping Australia Limited (SAL) informed the committee that in its opinion the amendments 'set out in the Bill are unnecessary as the current Act is consistent with international standards of practice in the offshore resource sector'.[10] SAL called on the committee to retain the status quo, stating that, in its opinion, the Migration Act 'sufficiently [covers] visa requirements for special skilled workers when operating within Australia's territorial seas and on Australian vessels'.[11]

2.12 Similarly, the Australian Mines and Metals Association (AMMA) contended that the Migration Act does not require amendment in respect of offshore resource workers as the relevant provisions:

> …already clearly require a non-Australian person working on a vessel to 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.[12]

Government response

2.13 Mr David Wilden, Acting First Assistant Secretary, Migration and Visa Policy Division, from the Department of Immigration and Citizenship (DIAC), advised the committee that if a person enters the migration zone they require a visa:

> The reason for this bill is that there was a presumption, I guess because it had never been tested, that international crew on these certain vessels were already holding visas…and the anomaly was when it became apparent that they were not. …The purpose of this [Bill] is purely and simply to regulate those people who, by the Allseas decision, are deemed not to be in the

8 *Submission 4*, p. 2.

9 *Submission 4*, p. 1.

10 *Submission 1*, p. 1.

11 *Submission 1*, p. 2.

12 *Submission 5*, p. 3.

> migration zone; to amend the migration zone, which has not been an irregular occurrence over the years, to include them.[13]

2.14 DIAC further explained that the changes proposed by the Bill 'clarify the situation around foreign workers in Australia's offshore maritime zones'.[14]

Ministerial determination

2.15 Submitters also commented on proposed new subsection 9A(6), which provides the Minister with the authority to make a determination with respect to the definition of 'offshore resources activity'.

2.16 The EM states that the inclusion of proposed new subsection 9A(6):

> Provide[s] the Minister with the flexibility and ability to exempt certain activities administered by the Offshore Petroleum Act and the Offshore Minerals Act from the definition of offshore resources activity…[and provides] the Minister with the ability to capture certain other activities not administered by these two Acts but administered by a law of the Commonwealth, a State or a Territory…[and]…will also provide the Minister with an additional tool to ensure that any future emergency can be effectively dealt with and to exclude any unintended consequences which may breach Australia's international obligations.[15]

2.17 The AMMA considered proposed new subsection 9A(6) to be an inappropriate delegation of legislative power. The AMMA were of the view that as the determination made by the Minister (pursuant to proposed new subsection 9A(6)) will be a legislative instrument exempt from disallowance,[16] it does not provide sufficient parliamentary scrutiny of the legislative power delegated to the Minister.[17]

Government response

2.18 Representatives from DIAC explained that proposed subsection 9A(6) provides for the Minister to respond to the unknown and to do so promptly:

> [A] power for the Minister to make a determination in writing for the purposes of defining offshore resources activity…will provide the Minister with flexibility to declare certain activities administered by other regulatory

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13 *Committee Hansard*, 21 June 2013, p. 14.

14 *Submission 7*, p. 3.

15 EM, pp 18-19.

16 Proposed new subsection 9A(7) provides that determinations made under proposed new subsection 9A(6) are legislative instruments but are not subject to section 42 (disallowance) of the *Legislative Instruments Act 2003* pursuant to section 44 of that Act.

17 *Submission 5*, pp 11-12. The Australian Shipowners Association (ASA) also raised concerns in relation to proposed new subsection 9A(6) stating that it is 'not clear how a Ministerial determination of what constitutes an 'offshore resources activity' would work with respect to these vessels'. See: *Submission 2*, p. 2.

> schemes as offshore resource activities for the purposes of the new deemed migration zone.[18]

Committee view

2.19 The committee notes the value of the liquefied natural gas (LNG) industry to Australia.[19] As the growth of the offshore petroleum industry is accompanied by a skills shortage,[20] the committee takes the view that Australia's migration and visa regime must facilitate the flexibility required to attract the appropriate skills to the sector and provide certainty and clarity for the industry. The committee considers that the Bill will provide the necessary certainty and flexibility.

2.20 The committee considers that the Bill will also ensure that the employment conditions of foreign workers undertaking activities involved in the exploration and exploitation of Australia's natural resources are being properly regulated.

2.21 The committee notes the concerns raised by stakeholders in relation to the government's consultation process however is satisfied that the Taskforce did consult with a wide range of stakeholders including:

> …the Australian Maritime Officers Union, the Maritime Union of Australia, the AMWU…the AIMPE, the AWU, the Australian Petroleum Production and Exploration Association, Allseas, McDermott, Saipem, Woodside, Chevron, the Chamber of Commerce and Industry of Western Australia, and a long list of departments as well, at both state and Commonwealth level.[21]

2.22 The committee further notes that DIAC confirmed that a future consultation process will occur on the 'mechanics' of the visa:

> …the next consultation period [will go] to the mechanics…the way [the visa] would probably work…that goes to the specific issues of e-lodgement, a suitable visa charge and…the mechanism[s] behind it.[22]

2.23 The committee takes the view that the concerns of stakeholders in relation to uncertainty will be addressed through this next round of consultation. Further, the committee is satisfied that the introduction of the new specified visa (the details of

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18 *Submission 7*, p. 4.

19 The Department of Resources, Energy and Tourism noted that in 2011-12 Australia exported 19.3 million tonnes of LNG valued at around $12 billion. Forecasts indicate that in 2012-13 the value of LNG exports will increase to $16.3 billion. Australia is the fourth largest LNG exporter. Export capacity is expected to grow from the current 24 million tonnes per annum to exceed 80 million tonnes per annum by 2016-17. See: *Submission 6*, [p. 1].

20 *Submission 6*, [p. 1].

21 *Committee Hansard*, 21 June 2013, p. 16.

22 *Committee Hansard*, 21 June 2013, p. 15.

which will be set out in Regulations after industry consultation) will not result in a significant burden for the offshore resources industry nor will it affect investment.

2.24 The committee notes that the commencement provisions set out in the Bill allow adequate time for DIAC to consult with key stakeholders and States and Territories for the purposes of developing the special visa, defining 'offshore resources activity' and exempting certain activities. The committee takes the view that this should enable the concerns raised by stakeholders to be resolved prior to the commencement of the provisions.

2.25 The committee also notes Australia's sovereign rights under the United Nations Convention on the Law of the Sea Australia (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, EEZ or in the waters above its extended continental shelf.[23]

Recommendation 1

2.26 The committee recommends that the Bill be passed.

Senator Trish Crossin

Chair

23 *Submission 7*, p. 6. Article 56(1) of UNCLOS 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. See: *Submission 7*, pp 6-7.