The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Offshore Resources Activity) Bill 2013 [Provisions]

June 2013

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2.26 The committee recommends that the Bill be passed.

CHAPTER 1

INTRODUCTION

1.1 On 30 May 2013, the Minister for Immigration and Citizenship, the Hon Brendan O'Connor MP (Minister), introduced the Migration Amendment (Offshore Resources Activity) Bill 2013 (Bill) into the House of Representatives.[1] On 18 June 2013, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 20 August 2013.[2] In order to assist the parliament's timely consideration of the Bill, the committee decided to present its report for the inquiry on 25 June 2013.

Background to the Bill

1.2 In October 2012, the Australian Government announced that it would amend the *Migration Act 1958* (Migration Act), to clarify the circumstances of persons working in offshore maritime zones.[3] The announcement responded to the decision of the Federal Court of Australia in the case of *Allseas Construction SA v Minister for Immigration and Citizenship* (*Allseas*).[4]

1.3 Following this announcement, the Department of Immigration and Citizenship (DIAC) reviewed how best to apply the Migration Act to workers in offshore maritime zones. The Migration Maritime Taskforce (Taskforce) was established to conduct the review and explore options for legislative amendment. In his second reading speech, the Minister confirmed the government's decision to implement the key recommendations of the Taskforce,[5] the primary effect of which was summarised in the Explanatory Memorandum (EM):

> [T]he existing legislative framework that essentially provides that persons are in the migration zone based on where they are physically located [will] 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

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1 House of Representatives, *Votes and Proceedings*, No. 167—30 May 2013, pp 2317-2318.

2 *Journals of the Senate*, No. 148—18 June 2013, p. 4048.

3 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, 'Government to legislate on visa status of offshore resource workers', Media Release, 15 October 2012.

4 [2012] FCA 529. The Federal Court of Australia held that, by operation of subsection 5(13) of the *Migration Act 1958* (Migration Act), two pipe-laying vessels were not Australian resource installations and, as a result, the non-citizens working on those vessels were not within, or working within, the migration zone and in need of a visa: see Explanatory Memorandum (EM), p. 1.

5 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, Second Reading Speech, *House of Representatives Hansard*, 30 May 2013, p. 9.

> activities regulated by Commonwealth, State and Territory legislation relating to the exploration and exploitation of Australia's natural resources.[6]

Purpose of the Bill

1.4 The Bill seeks to amend the Migration Act, to ensure that persons who participate in, or support, an 'offshore resources activity' are deemed to be in the 'migration zone', thereby requiring all non-citizens engaged in an 'offshore resources activity' to hold either a specific or permanent visa.[7]

1.5 The Minister explained that the proposed amendments address the 'gaps' highlighted by the *Allseas* decision, which 'undermine the integrity of Australia's migration program and the visa regime regulating work entitlements':

> Without regulation there is a risk that foreign workers involved in the exploration and exploitation of Australia's natural resources and who therefore form part of the Australian employment sector are working under conditions and receiving wages that are below Australian standards. This reduces work opportunities for Australian citizens and permanent residents, as well as non-citizens who hold relevant visas permitting work.
>
> It also puts businesses that only engage workers who hold valid visas to work at a competitive disadvantage.[8]

1.6 According to the EM, the proposed amendments will supplement the current legislative framework, which defines Australian resources installations and Australian sea installations as part of the 'migration zone'. Collectively, these provisions will ensure that workers in Australia's offshore resources industry are regulated and are required to hold the appropriate visas.[9]

Conduct of the inquiry

1.7 The committee wrote to 50 organisations, inviting submissions by 20 June 2013. Details of the inquiry, including the Bill and associated documents, were made available on the committee's website at www.aph.gov.au/senate_legalcon.

1.8 The committee received seven submissions, which are listed at Appendix 1. A public hearing was held in Canberra on 21 June 2013, and a list of witnesses who appeared before the committee at the hearing is at Appendix 2. The committee thanks those organisations and individuals who made submissions and gave evidence at its public hearing.

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6 EM, p.1.

7 EM, pp 1, 10. The term 'migration zone' is defined in subsection 5(1) of the Migration Act.

8 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, Second Reading Speech, *House of Representatives Hansard*, 30 May 2013, p. 8.

9 EM, p. 2.

Note on references

1.9 References to the committee *Hansard* and House of Representatives *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

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.

DISSENTING REPORT BY COALITION SENATORS

The Migration Amendment (Offshore Resources Activity) Bill

Introduction

1.1 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 as defined by section 5 of the Act.

1.2 The Bill also proposes to insert a new section 9A of the Act which creates a new framework that provides that persons in an area participating in, or supporting, an offshore resources activity are taken to be in the migration zone (the deeming provision).

1.3 New section 9A further clarifies how this new framework operates 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.

1.4 The Bill was introduced by the Government to override the decision of the Federal Court in *Allseas Construction S.A. v Minister for Immigration and Citizenship [2012] FCA 529* in which McKerracher J *inter alia* held that section 5(13)(b) of the Act excludes vessels that are wholly or principally engaged in operations relating to the installation of offshore pipelines.

1.5 Paragraph 5(13)(b) of the Act excludes a vessel that is used or is to be used wholly or principally in operations or activities associated with, or incidental to, activities of manoeuvring a resources installation, or in operations relating to the attachment of a resources installation to the Australian seabed.

1.6 The Federal Court decision has the effect of excluding foreign workers aboard exempted vessels from the visa requirements applicable to vessels entering the "migration zone" as defined in the Act.

The purpose of the Bill

1.7 The purpose of the Bill is to regulate foreign workers participating in offshore resources activities by bringing those persons into the migration zone and thereby requiring them to hold a visa under the Act.[1]

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1 Department of Immigration and Citizenship, *Submission 7*, p. 4.

1.8 In the Second Reading Speech the Minister claims the Bill will overcome a "loophole" identified in the *Allseas* case which needed to be closed.

1.9 Coalition Senators consider that an objective reading of the *Allseas* case indicates that no loophole was opened by *Allseas*, and that the decision of the Federal Court provided clarity and allowed the industry to proceed consistent with previous Australian and international practice.

1.10 The *Allseas* litigation was initiated to confirm a standing interpretation of Australian law, which was consistent with international law.

1.11 Contrary to the claims of the Minister there was no loophole that needed to be closed.

1.12 Coalition Senators are concerned that the Bill is not being introduced as a measure of considered public policy, but rather it is being introduced for ideological purposes, at the urging of the Maritime Workers Union (MWU) who have been significant donors to the Labor Party over many years, to override the decision of the Federal Court in *Allseas Construction S.A. v Minister for Immigration and Citizenship [2012] FCA 529*.

The value of the offshore oil and gas industry

1.13 Coalition Senators acknowledge the value of the offshore oil and gas industry to the national economy and are concerned that the additional regulatory burden and associated costs the Bill introduces may discourage further investment in this productive sector.

1.14 The Minister in the Explanatory Memorandum (EM) tabled with the Bill acknowledges the economic value of exploration and exploitation of the natural resources in the offshore maritime zones:

> 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.[2]

1.15 The Australian Mines and Metals Association (AMMA) in their oral evidence to the inquiry stated:

> Annually, Australia's oil and gas industry contributes 2½ per cent of our GDP, generates $28 billion in revenue and yields almost $9 billion in direct tax payments. Offshore oil and gas meets 58 per cent of Australia's primary energy needs and is critical to our current and future energy security.
>
> Australian jobs and our overall economic success relies on a confident, growing offshore oil and gas industry able to do business consistent with international laws and practices on, for example, specialist access to

2 EM, p. 2.

> infrastructure and services. With this much at stake, it is vital that sectional interests do not come before the national interest and that parliament delivers sustainable, proportionate and balanced regulation affecting offshore operations.[3]

Uncertainty of the actual offshore area subject to the Bill

1.16 Coalition Senators are concerned that the specific offshore area subject to the Bill is not defined.

1.17 Coalition Senators do not consider the Senate should agree to legislation which is to apply to an "unknown or uncertain" offshore area.

1.18 Coalition Senators note that the uncertainty of the area, the subject of the Bill, was raised in the written submission of the Australian Institute of Marine and Power Engineers (AIMPE).

1.19 The AIMPE expressed its concern in the following terms:

> It is submitted that the way to avoid the enforcement nightmare and ensure comprehensive application of Australia's migration laws to personnel on vessels engaged in offshore resources activity is the delete the references to "in an area" and replace them with the concept of the Exclusive Economic Zone.[4]

1.20 Mr Scott Barklamb, Executive Director, AMMA, in his oral evidence to the inquiry also expressed his concern at the uncertainty of the extent of the area to be subject to the provisions of the Bill in the following terms:

> We say that it is also important to understand the significance of what is being proposed. The exclusive economic zone is larger than our entire landmass. This Bill would expand Australia's legal territory for the purposes of migration by 10 million square kilometres.
>
> The proposal to extend our federal laws, including the Fair Work Act, to this vast area does not amount to a mere tweaking or closing a loophole. It is a radical change that would more than double the reach of our Australian laws, and would do so in a manner unknown and inconsistent with our international legal obligations. Whether this is reach or overreach is a live point, and it is considerably enlivened, we say, by both the legal and regulatory concerns we raised.[5]

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3 Mr Scott Barklamb, Executive Director, Australian Mines and Metals Association, *Committee Hansard*, 21 June 2013, p. 6.

4 *Submission 3*, p. 1.

5 *Committee Hansard*, 21 June 2013, p. 7.

Uncertainty of the number of foreign workers in the offshore maritime zone

1.21 Coalition Senators are concerned that the Government is unable to quantify the number of foreign workers in the offshore maritime zone which appears to be related to the inadequate consultative process with industry and other parties.

1.22 The inability of the Government or the Minister to quantify, or even estimate, the potential number of foreign workers in the offshore maritime zone casts doubt on the veracity of other statements contained in the Second Reading Speech and associated documents tabled in the Senate:

> Under the current legislative framework, the Government has an incomplete picture of the number of foreign workers in the offshore maritime zone.[6]

Uncertainty of the cost to industry

1.23 Should the Bill be passed by the Parliament in its current form it will give greater control of employment of foreign workers on vessels within the migration zone to the MWU.

1.24 Coalition Senators are concerned that the MWU will seek to use the additional power this Bill will bestow on the union to impose outrageous wage demands on employers who are required to rely on union labour.

1.25 The recent demands of the MWU in seeking to have cooks on offshore north-west gas projects paid $230,000.00 annually is evidence of the tactics employed by the MWU.[7]

1.26 Coalition Senators are concerned that the Regulation Impact Statement (RIS), tabled by the Minister with the Bill, is unable to quantify the potential cost impact on employers and the number of people who are likely to be affected by the provisions of the Bill.

1.27 This uncertainty is reflected in the RIS which indicates that:

> …according to Western Australian Government figures, somewhere between 6000 and 8000 workers are currently employed in the offshore resources sector, but it is unclear how many of these workers are non-citizens.[8]

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6 EM, p. 2.

7 'MWU wants gas plant cooks paid $230,000 annually', *Perth Now*, 14 May 2013 http://www.perthnow.com.au/news/western-australia/gas-plant-cooks-want-230000/story-fnhocxo3-1226642040247, (accessed 23 June 2013).

8 RIS, p. 4.

1.28 Whist the Government is unable to quantify the number of foreign workers caught by the provisions of the Bill, the RIS makes it clear that additional fees will be payable by operators for visas required by the foreign workers.

1.29 Whilst the quantum of the relevant fees is not yet settled, Coalition Senators note that 457 visas will increase from $455.00 to $900.00 on July 1st 2013.

1.30 At the committee's public hearing on 21 June 2013, Senator Cash sought further comment from the AMMA on the statement, in their written submission to the inquiry, relating to cost pressures on the resource industry in which they stated:

> Enactment of the Bill would place untenable cost pressures on the resource industry. The cost pressures would be both direct and indirect, in terms of compliance and administration costs.[9]

1.31 Mr Scott Barklamb, AMMA, stated:

> The particular piece of infrastructure work at hand is highly specialised international vessels that sail global waters and assist with the laying of pipes, the moving of infrastructure and the assembly of infrastructure in international waters. If we either delay or complicate or render more costly those inputs to our built offshore infrastructure we complicate, delay and add costs to either the repair and maintenance or the bringing on line of new offshore resource projects. What does that do? That makes them slower to come on line and create jobs in this country and it makes them more costly, and those costs are weighed by international investors.
>
> Australia is not the only place in the world with offshore oil and gas resources. International investors are all too aware of and are in the business of evaluating competing resource destinations.[10]

Constitutional uncertainty of the proposed amendments

1.32 Coalition Senators believe that the scope of the Bill is extremely wide and may breach Australia's obligations in respect to the United Nations Convention on the Law of the Sea 1982 (UNCLOS), which Australia ratified in 1992.

1.33 Coalition Senators acknowledge that Australia has, at international law, a sovereign right to explore and exploit the natural resources occurring in the exclusive economic zone (EEZ) and the extended continental shelf (ECS).

1.34 Australia is limited by the provisions of the UNCLOS convention which does not empower Australia to dictate the employment conditions of maritime personnel in the EEZ or the ECS, as these responsibilities are matters for the flag State of the vessel.

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9 *Submission 5*, p. 19.

10 *Committee Hansard*, p. 8.

1.35 As a signatory to UNCLOS, Australia agreed to be bound by the provisions of the convention agreement and is required to act within the terms of the agreement.

1.36 Coalition Senators are concerned at the inconsistent advice given to the inquiry by the Department of Immigration and Citizenship (DIAC) and various submitters on the constitutional validity of the proposed amendments.

1.37 Coalition Senators are concerned that the Minister has not provided the Senate with compelling evidence that the scope of the Bill and its specific provisions do not breach Australia's international obligations.

1.38 The failure of the Minister to adequately demonstrate that the Government has adequately considered the totality of the complex issues relating to the law of the sea and Australia's international obligations may render the provisions of the Bill invalid.

1.39 Coalition Senators are concerned by the failure of the Minister to distinguish a range of activities that occur as a consequence of vessels at sea. These include where a vessel is transiting through the migration zone, entering an Australian port, or is doing specific work in international waters and not entering the Australian regulatory sphere for employment and migration law.

1.40 Many of the preceding concerns were raised by the AMMA in both their written submission and oral evidence to the inquiry.

1.41 At paragraphs 53-57 of their written submission, AMMA expressed their concerns in the following terms:

> Proposed section 9A would deem an offshore resource worker to be within the migration zone, and within Australia, even if he or she were a non-citizen on a foreign-flagged vessel transiting through the EEZ or the waters above the ECS.
>
> Proposed section 9A(6) would allow the Minister to declare an activity in or out of Australia.
>
> The proposed extension of the application of the Migration Act in this way would be:
>
> a. An inappropriate delegation of legislative power.
>
> b. Incompatible with human rights principles.
>
> c. Inconsistent with Australia's international obligations.
>
> d. Inconsistent with Australia's constitutional arrangements.
>
> e. Inconsistent with the Offshore Constitutional Settlement 1973
>
> f. Inconsistent with industry practices and impractical
>
> g. Damaging to the Australian economy and Australian jobs

> Information about these matters has not been provided to the Parliament by the Minister. Unless the Parliament is able to give due consideration to these matters, the legislation should not be passed.[11]

Submission to the inquiry by the Maritime Union of Australia (MUA)

1.42 Coalition Senators note that the MUA has made representations to the Government for the Act to be amended following the decision of the Federal Court in *Allseas Construction S.A. v Minister for Immigration and Citizenship [2012] FCA 529*.

1.43 The MWU in its submission to the inquiry indicated its support for the Bill and made a number of points in favour of its carriage. The MWU stated that the Bill:

> - Closes an unintended gap in the Migration Act 1958.
>
> - Provides certainty for the workforce, resource owners, operators, and contractors.
>
> - Creates a level playing field so that all workers irrespective of origin can have their migration status and employment standards regulated.
>
> - Ends exploitation of temporary guest workers in the offshore oil and gas industry and will ensure that employment, safety and training and occupational licensing requirements can be bought up to Australian legal and industrial standards.
>
> - Will provide the Government with the capacity to monitor non-nationals working on critical resource projects.[12]

1.44 In response to the specific issues raised by the MWU, Coalition Senators note that:

(a) A close reading of the parliamentary debates relating to the *Migration Act 1958* and subsequent amendments, indicate that there is no unintended gap and that the Parliament intended that certain foreign workers would be excluded in the visa requirements related to the migration zone whilst they were manning a vessel that is used or is to be used wholly or principally in operations or activities associated with, or incidental to, activities of manoeuvring a resources installation, or in operations relating to the attachment of a resources installation to the Australian seabed.

(b) Far from providing certainty for the workforce, resource owners, operators, and contractors, the Bill raises constitutional issues and is likely to be in breach of Australia's international obligations.

(c) Imposing Australian regulations on the employment conditions of foreign workers on vessels excluded by paragraph 5(13)(b) of the Act would be void.

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11 *Submission 5*, p. 11.

12 *Submission 4*, p. 1.

(d) The submission of the MWU provides no evidence of exploitation of temporary guest workers in the offshore oil and gas industry.

(e) Project costs would increase substantially if foreign workers employed on vessels excluded by paragraph 5(13)(b) of the Act, particularly on short term contracts, are subject to Australian employment, safety and training and occupational licensing requirements.

(f) Foreign workers employed on vessels excluded by paragraph 5(13)(b) of the Act are already subject to severe restrictions whilst working offshore in the migration zone and are not entitled to be onshore without an appropriate visa.

Lack of consultation

1.45 The provisions of the original *Migration Act 1958* and subsequent amendments have, in the past, been the subject of lengthy and detailed consultation with interested parties given its international application and its impact on international and domestic obligations.

1.46 Coalition Senators are concerned that the passage of the Bill is being progressed by the Government with indecent haste and without appropriate consultation with affected parties.

1.47 Given the scope of the proposed amendments and the impact of the Bill on Australia's international and domestic obligations, Coalition Senators consider the manner in which the Government is attempting to progress and its inability to clarify with certainty the impact of the Bill on affected parties is both cavalier and arrogant.

1.48 Coalition Senators note that in his Second Reading Speech on the Bill, the Minister for Immigration and Citizenship claimed there had been extensive stakeholder consultation on the Bill with the offshore resources industry, unions and other Commonwealth agencies.

1.49 The Minister's statement on consultation is inconsistent with evidence given to the inquiry by various submitters:

> The more our industry knows about this bill and how the minister intends to proceed, the less certain it becomes. We have absolutely no certainty. We do not believe that we will gain any certainty from the passage of this bill. It will open up myriad areas of uncertainty, as our submission makes clear. Through the committee, we can communicate back to the minister that we believe that the rush and the fundamentally wrong-directed thinking behind this bill will cause some difficulties.
>
> I might also add that, on the consultation arrangements we were talking about earlier—and I am indebted to my colleagues for raising it with me—a

> DIAC task force exercise was undertaken. We have not seen the task force report from DIAC.[13]

1.50 Coalition Senators believe that consultation referred to by the Minister was not on the legislation that is before the Senate, but relates to more amorphous concepts and principles that preceded the drafting of the Bill.

1.51 In his claims about consultation the Minister fails to identify any organisation that was invited to comment on the Bill as drafted.

Conclusion

1.52 Coalition Senators do not support the Bill in its current form for the following reasons:

(a) The Minister has failed to provide documentation to show that the Bill meets Australia's international obligations as they apply to the laws of the sea.

(b) On the evidence available to Coalition Senators, the Bill is not being introduced as a measure of considered public policy, but rather it is being introduced for ideological purposes, at the urging of the MWU who have been significant donors to the Labor Party over many years, to override the decision of the Federal Court in *Allseas Construction S.A. v Minister for Immigration and Citizenship [2012] FCA 529*.

(c) The Minister fails to recognise the value of the offshore oil and gas industry to the national economy and the extent of the negative impact the Bill will have on affected parties.

(d) The Minister fails to understand the impact of the additional regulatory burden and associated costs the Bill will create.

(e) The Minister fails to understand that additional burdensome regulation may discourage further investment in this productive sector.

(f) The Minister has failed to adequately define the extent of the area to be subject to the Bill and seeks to avoid identifying the specific area by indicating that this detail will be fleshed out at a later date.

(g) If the Minister cannot define the extent of the area to be subject to the Bill how can he provide certainty that Australia is not in violation of its international obligations.

(h) The Minister has failed to quantify the potential cost impact on employers and number of people who are likely to be affected by the provisions of the Bill.

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13 *Committee Hansard*, 21 June 2013, p. 11.

(i) The Minister has failed to provide certainty that the MWU will not seek to use the additional power this Bill will bestow on the union to impose outrageous wage demands on employers who are required to rely on union labour.

(j) The scope of the Bill is extremely wide. Given the lack of certainty in the advice provided by the Minister, the Bill may breach Australia's obligations in respect to the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) which Australia ratified in 1992.

(k) The failure of the Minister to adequately demonstrate that the Government has adequately considered the totality of the complex issues relating to the law of the sea and Australia's international obligations may render the provisions of the Bill invalid.

(l) It is clear from the evidence of a number of affected parties that the Minister has failed to adequately consult with industry and that the limited consultation that the Minister claims occurred was limited to amorphous concepts and principles that preceded the drafting of the Bill.

Recommendation 1

1.7 Coalition Senators recommend that the Bill not be passed.

Senator Gary Humphries
Deputy Chair

Senator Sue Boyce

Senator Michaelia Cash

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Shipping Australia Limited
2	Australian Shipowners Association
3	Australian Institute of Marine and Power Engineers
4	Maritime Union of Australia
5	Australian Mines and Metals Association
6	Department of Resources, Energy and Tourism
7	Department of Immigration and Citizenship

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 21 June 2013

BARKLAMB, Mr Scott Cameron, Executive Director, Industry, Australian Mines and Metals Association

BARTLETT, Mr Andrew, Research Fellow, Migration Law Program, College of Law, Australian National University

COPLEY, Mrs Julie Jane, Policy Manager, Australian Mines and Metals Association

DUNCAN, Mr Philip James, Lecturer, Migration Law Program, Legal Workshop, Australian National University

MONTGOMERY, Ms Sophie, Assistant Secretary, Education, Tourism and International Arrangements, Migration and Visa Policy Division, Department of Immigration and Citizenship

WILDEN, Mr David, Acting First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship