IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S136 of 2015**

BETWEEN: **THE MARITIME UNION OF AUSTRALIA**
First Plaintiff

AUSTRALIAN MARITIME OFFICERS' UNION
Second Plaintiff

HIGH COURT OF AUSTRALIA
FILED
17 JUN 2016
THE REGISTRY SYDNEY

AND: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

DEFENDANTS' ANNOTATED SUBMISSIONS

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Filed on behalf of: Defendants
Australian Government Solicitor
Level 42 MLC Centre
19 Martin Place
Sydney NSW 2000

Contact: Hervee Dejean
File ref: 15129469
Telephone: 02 9581 7504
Facsimile: 02 9581 7650
Email: hervee.dejean@ags.gov.au
DX 444 Sydney

I INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

II ISSUES

2. The three questions for determination appear on page 23 of the Special Case Book (**SCB**). The principal issue is whether paragraph 2 of Determination IMMI 15/140 (the **Determination**), entered on the Federal Register of Legislative Instruments on 3 December 2015, is invalid.

3. The Determination is not invalid. It constitutes a valid exercise of the power conferred on the Minister pursuant to s 9A(6) of the *Migration Act 1958* (Cth) (the **Act**). The plaintiffs' arguments to the contrary should be rejected because:

   3.1. The plaintiffs repeatedly overstate the position in asserting that s 9A enacts a 'functional extension of the "migration zone" beyond, relevantly, "Australian resources installations" to all persons in an area to participate in, or to support, an offshore resources activity'.[1] That statement of the asserted 'rule' enacted by s 9A cannot be correct, for it denies any role for the express power in s 9A(6) to make 'exceptions'.

   3.2. The Determination does not 'consume the rule laid down by Parliament because it negatives so substantial a part of the legislative scheme' that it goes beyond the power to make an 'exception'.[2] On the contrary, even taking the plaintiffs' case at its highest, the Determination leaves untouched approximately half the work undertaken in the offshore resources industry (as the plaintiffs concede: PS [37]).

   3.3. The plaintiffs' case should not be taken at its highest, as the Determination has legal effect only in relation to non-citizens. In the last 5 years, only between 9.4% to 13% of the total hours worked in the offshore resources industry have been undertaken by non-citizens, and an even smaller proportion of that work was undertaken on vessels and structures that are not 'Australian resources installations' (that being the only work that is affected by the Determination).[3] Further, such non-citizens generally have specialist skills or operate specialist equipment on foreign-owned vessels. Those matters indicate that, once the practical operation of the Determination is understood, it is readily characterised as creating an 'exception'.

   3.4. The Determination is not repugnant to the Act. It was open to the Minister to decide that the Determination was in the national interest. Further, the breadth of the Determination is substantially the result of the use in the Determination of defined terms that Parliament itself considered appropriate in delimiting the migration zone.

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[1] Plaintiff's submissions (**PS**) [47] (original emphasis). Also see PS [3] and [28], which likewise state the asserted 'rule' in terms that are too absolute.

[2] PS [5].

[3] See paragraph 61.1 below, demonstrating that between 5.2% and 9.91% of the total work performed in the offshore resources industry in each of the last 5 years would have been affected by the Determination.

III COMPLIANCE WITH S 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. The defendants agree with the plaintiffs that no notice needs to be given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

IV MATERIAL FACTS

5. The facts are set out in the Special Case.[4] The most relevant facts and opinions are those of Mr Thyl Erlend Kint, of Peritus International Pty Ltd[5] (the **Expert report**), which are analysed later in these submissions.

6. While the Special Case sets out a chronology of the regulatory history of steps that have been taken following the enactment of the *Migration Amendment (Offshore Resources Activity) Act 2013* (Cth) (**2013 Amending Act**), those steps are irrelevant to the validity of the Determination (cf PS [10]).

7. The plaintiffs' suggestion to the contrary depends on their implicit characterisation of the Determination as a continuation of the policy reflected in the determination that was held to be invalid by the Federal Court in *Australian Maritime Officers' Union v Assistant Minister for Immigration and Border Protection* (***AMOU Case***) (2015) 230 FCR 523[6] and the determination that replaced it, being Determination IMMI 15/073.

8. In fact, however, the Determination represents a fundamental change from those two previous determinations:

   8.1. The determination that was quashed in the *AMOU Case* purported to except all operations or activities that fell within s 9A(5), thereby depriving the term 'offshore resources activity' of all content. The Determination now in issue has no such operation.

   8.2. In Determination IMMI 15/073, the then Assistant Minister had exercised the power under s 9A(6) to except from s 9A(5) 'an operation or activity involving a resources installation that is part of Australia by virtue of section 8 of the Act'.[7] That is relevantly the same as excepting any operation or activity involving an 'Australian resources installation' (because an 'Australian resources installation' is defined in s 5 to mean 'a resources installation that is deemed to be part of Australia because of the operation of section 8').

   8.3. The plaintiffs challenged Determination IMMI 15/073 in this proceeding, on the ground that it 'negatives so substantial a part of the regime for the regulation of participation in or support for offshore resources activities under the Act' that it either did not constitute an 'exception' or was otherwise repugnant to the Act.[8] In their current submissions, the plaintiffs repeat that Declaration IMMI 15/073 'would have negatived the visa regime in respect of nearly all offshore resources activities' (PS [9]).

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[4] SCB 19-23.
[5] SCB 227-287.
[6] SCB 165.
[7] SCB 192, paragraph 2.
[8] SCB 13.

8.4. The current Determination revoked Determination IMMI 15/073, and then completely reversed the exception. Whereas Determination IMMI 15/073 excepted operations or activities involving Australian resources installations, the Determination excepts operations or activities only to the extent that they use 'any vessel or structure that is not an Australian resources installation'.[9]

8.5. It follows that every operation or activity that fell within Determination IMMI 15/073 now falls outside the exception made by the Determination. The consequence is that the operations and activities which the plaintiffs previously asserted constituted 'so substantial a part of the regime' that they could not validly be excluded, or that constituted 'nearly all offshore resource activities', now remain within s 9A(1) and s 41(2B).

8.6. For the above reasons, the plaintiffs' attempt to paint the Determination as a continuation of the policy reflected in previous determinations is without foundation.

9. One other factual point requires emphasis. The plaintiffs submit that the parts of the Expert report concerning the extent to which offshore resources activities are undertaken by foreign nationals is 'irrelevant to the proceeding'.[10] That cannot be right, because:

9.1. the plaintiffs accept that the evidence in the Expert report is relevant in assessing the 'practical operation of the Determination';[11]

9.2. the Determination has no operation with respect to Australian citizens who work in the offshore resources industry, because such citizens do not require visas, let alone visas of the types specified in s 41(2B);

9.3. accordingly, the only operation of the Determination is with respect to non-citizens who participate in or support offshore resources activities.

10. Once that is recognised, it is apparent that the 'exception' created by the Determination is small. In each of the last five years, somewhere between 5.2% and 9.91% of the total work performed in the offshore resources industry was undertaken by foreign nationals on vessels and structures that are not 'Australian resources installations' (that being the only work that is affected by the Determination).[12] For that reason, the plaintiffs' claims as to the effect of the Determination are significantly overstated (cf PS [37]).

V APPLICABLE PROVISIONS

11. In addition to the provisions in the plaintiffs' annexure, the defendants also rely upon s 4 of the Act.

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[9] SCB 201, emphasis added.
[10] PS [38].
[11] As the plaintiffs accept is appropriate: see PS [8], [29]-[30].
[12] See paragraph 61.1 below.

VI ARGUMENT

Construction of sections 9A and 41(2B) of the Act

12. The first question in the Special Case requires the Court to 'construe the statute under which the [Determination] is made and then interpret it to ascertain whether it is within the ambit of the statute'.[13]

13. In circumstances where the Determination is made pursuant to s 9A(6), which permits the Minister to 'except' activities and operations from the definition of 'offshore resources activity', the first stage of the analysis is to construe s 9A(6), within its statutory context, to determine its proper ambit. At that first stage, it is appropriate to bear in mind the following principles:

    13.1. 'The language which has actually been employed in the text of legislation' is the 'surest guide' to legislative meaning, assisted by consideration of relevant statutory context – including the general purpose and policy of a provision.[14] It is that language, rather than the language of extrinsic material, that is the proper focus of attention.

    13.2. Section 9A, and the other amendments effected by the 2013 Amending Act, must be construed as part of the principal statute.[15]

14. However, before coming to s 9A it is first necessary to understand how the amendments made by the 2013 Amending Act interact with the concept of the 'migration zone' and the various defined components of that concept.

The migration zone

15. The object of the Act is to 'regulate, in the national interest, the coming into, and presence in, Australia of non-citizens' (s 4(1)). To that end, the Act relevantly 'provides for visas permitting non-citizens to enter or remain in Australia' (s 4(2)).

16. For the purposes of the Act, 'Australia' is defined by reference to the concept of the 'migration zone': Thus, s 5(1) provides that:

    16.1. a person 'enters Australia' if he or she 'enters the migration zone';

    16.2. a person 'leaves Australia' if he or she 'leaves the migration zone'; and

    16.3. a person 'remains in Australia' if he or she 'remains in the migration zone'.

17. The 'migration zone' is defined in s 5(1) to mean:

> the area consisting of the States, the Territories, Australian resources installations and Australian sea installations and, to avoid doubt, includes:
>
> (a) land that is part of a State or Territory at mean low water; and
>
> (b) sea within the limits of both a State or a Territory and a port; and
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> (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea;

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[13] *Footscray Corporation v Maize Products Pty Ltd* (1943) 67 CLR 301 at 308 (Rich J).
[14] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [47].
[15] *Acts Interpretation Act 1901* (Cth), s 11B(1).

but does not include sea within the limits of a State or Territory but not in a port.

18. The part of the migration zone consisting of 'Australian resource installations' is defined, in turn, by a number of further provisions:

    18.1. An 'Australian resources installation' is defined in s 5(1) to mean a 'resources installation' that is 'deemed to be part of Australia because of the operation of section 8'.

    18.2. Section 8 deems a 'resources installation' to be part of Australia essentially if that installation is attached to the Australian seabed or physically connected to another resources installation that is so attached (the form of connection being addressed in s 5(14)).

    18.3. A 'resources installation' is defined in s 5(1) to mean a 'resources industry fixed structure' (defined in s 5(10)) or a 'resources industry mobile unit' (defined in s 5(11), which must be read with s 5(12)-(13)).

    18.4. Section 5(13) provides that a vessel is not a 'resources industry mobile unit' (and therefore not a 'resources installation' or 'Australian resources installation'[16]) if it is used wholly or principally in:

        (a) transporting persons or goods to or from a resources installation;

        (b) manoeuvring a resources installation; or

        (c) operations relating to the attachment of a resources installation to the Australian seabed.

19. As the Full Federal Court explained in the *AMOU Case*,[17] the combined effect of the above provisions is that persons who work upon 'Australian resources installations' are within the 'migration zone' and, therefore, require visas to be physically present on those installations (whether they be vessels or structures). By contrast, persons working on vessels that are being used for any of the purposes set out in s 5(13), or on resources installations that are not directly or indirectly physically connected to the Australian seabed, are not in the 'migration zone'.

20. Contrary to the plaintiffs' submission, the position just summarised does not reveal 'significant gaps' in the migration zone.[18] What the plaintiffs call 'gaps' are in fact express statutory exclusions from the 'migration zone'.

Section 9A of the Act

21. Section 9A of the Act was inserted by the 2013 Amending Act, with effect from 29 June 2014. It provides a mechanism that allows the migration zone to encompass persons who are participating in or otherwise supporting certain activities, unless the Minister determines (for reasons not specified in the Act) that the migration zone should not extend to those activities. Section 9A does not 'contain a regime under which non-citizens working in the offshore

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[16] *Allseas Construction SA v Minister for Immigration and Citizenship* (***Allseas Case***) (2012) 203 FCR 200 at 215 [80].

[17] (2015) 230 FCR 523 at 528-9 (SCB 169-170).

[18] PS [54].

resources industries must hold permanent visas or temporary prescribed visas' (cf PS [9]). If it did, there could be no work for the power to make exceptions.

22. Section 9A 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' (s 9A(1)). 'Offshore resources activity' is defined in s 9A(5). It comprises:

22.1. regulated operations within the meaning of s 7 of the *Offshore Petroleum and Greenhouse Storage Act 2006* (Cth) (**Petroleum Act**) (**regulated operations**) (s 9A(5)(a)) – namely, operations to which Chapter 2 (concerning offshore activities relating to petroleum, including petroleum exploration permits) or Chapter 3 (concerning injection and storage of greenhouse gases) apply; and

22.2. activities performed under a licence or special purpose consent within the meaning of s 4 of the *Offshore Minerals Act 1994* (Cth) (**Minerals Act**) (**regulated activities**) (s 9A(5)(b)) – where 'licence' means an exploration licence, retention licence, mining licence or works licence, and a 'special purpose consent' means a consent granted under Pt 2.6, the purpose of which is limited under s 315(4) to scientific investigation, a reconnaissance survey or the collection of small amounts of minerals;

both of which are expressly subject to:

22.3. such exceptions as the Minister may determine under s 9A(6) (s 9A(5)(a) and (b)); and

22.4. any additions as the Minister may determine under s 9A(6) (s 9A(5)(c)).

23. Section 9A does not specify any limits on the Minister's power to make a determination under subsection (6), whether by way of subject matter, relevant considerations or otherwise. While it does not confer an 'unbridled discretion',[19] in enacting s 9A(6) Parliament should nevertheless be taken to understand that where a power is conferred on a Minister in broad terms, that power is limited only by such limitations as appear from the text of the Act, or that arise by implication from the subject matter, scope and purpose of the Act.[20]

Text

24. As to the text of the Act, six points are significant.

25. ***First***, s 9A(1) provides that the migration zone should be 'taken' to encompass the matters set out therein. It does not itself modify the definitions of 'migration zone' or 'Australian resources installation'. As a result, 'offshore resources activities' that take place on an 'Australian resources installation' take place within the migration zone whether or not those activities are covered by a determination under s 9A(6). Non-citizens on an 'Australian resources installation' must hold a visa because otherwise they would be unlawful non-citizens in the migration zone who are subject to detention and removal under ss 189 and 198 of the Act. Accordingly, to the extent that the concept of

[19] See *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-4 (Brennan J).

[20] See *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 400-401 [42]; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J).

'offshore resources activities' is concerned with the reach of the 'migration zone', that concept can operate only to extend the migration zone. It follows that, to the extent that offshore resources activities take place on an 'Australian resources installation', the only effect of a determination under s 9A(6) is on the type of visa that the participants must hold before they can engage in offshore resources activity (for if such a determination applies it will exclude the operation of s 41(2B)).

26. ***Second***, the concept of 'offshore resources activity' as defined in s 9A(5) does not have any fixed or certain content, whether geographical or otherwise. Although geography bears on that definition through the provisions of the Petroleum Act and the Minerals Act, the operation of s 9A does not turn on the location of the persons who participate in offshore resources activity. Accordingly, a person may be captured by s 9A(1) if he or she is working on a vessel that is attached to the Australian seabed, or on a vessel that has no physical connection to Australian territory.[21] Further, while the touchstone for the deeming under s 9A(1) is the 'purpose' for which a person engages in particular activity, even a person who has the relevant purpose may not fall within the definition by reason of s 9A(6). For that reason, it is impossible to identify any particular content that is necessarily within s 9A(1) simply by reading the Act. It is only once it is known whether the Minister has exercised the power under s 9A(6) with respect to the operation or activity in question that the applicability of s 9A(1) can be ascertained.

27. ***Third***, the power that is conferred on the Minister by s 9A(6) is in broad terms. No preconditions to its exercise, or mandatory relevant considerations, are identified.[22] Nor does the text of s 9A provide any foundation for the plaintiffs' assertion that exceptions can be made from ss 9A(5)(a)-(b) only with respect to operations or activities that have 'special features or characteristics' (cf PS [46]). The plaintiffs offer no criteria, grounded in the Act rather than phrases pulled from extrinsic material, that would give any guidance in identifying the 'individual circumstances' (PS [56]) that they contend must exist before the power in s 9A(6) can be lawfully exercised to make exceptions for 'unsuitable' operations or activities or to avoid 'unintended consequences' (PS [58]). Ultimately, their proposed construction of s 9A(6) would leave the validity of any determination dependent on matters of idiosyncratic impression.

28. The breadth of s 9A(6) indicates that the circumstances in which exceptions can be made are substantially left to the judgment of the Minister. As Hayne J pointed out in *Minister for Immigration and Ethnic Affairs v Jia Legeng*, "[c]onferring power on a Minister may well indicate that a particularly wide range of factors and sources of information may be taken into account, given the types of influence to which Ministers are legitimately subject".[23] No doubt it is true that, in making a determination under s 9A(6), the Minister must take account of the objects and purposes of the Act. Here, that relevantly directs attention to

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[21] See s 9A(8).

[22] See *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-758.

[23] (2001) 205 CLR 507 at 565 [187]. See also at 528 [61] and 439 [102] (Gleeson CJ and Gummow J) and 584 [246] (Callinan J).

the 'national interest' (s 4(1)). As this Court has recently recognised, 'what is in the national interest is largely a political question'.[24]

29. Despite the breadth of the power s 9A(6) confers, the Minister is politically accountable for the exercise of that power.[25] That accountability is very real in the circumstances, as offshore resources activity gives rise to numerous politically controversial issues including industrial relations, foreign investment, foreign workers, environmental considerations and national security.[26]

30. ***Fourth***, some limit on the power to make determinations under s 9A(6) arises from the fact that it is a power to 'except' operations and activities from the definition of 'offshore resources activity' in s 9A(5)(a)-(b). It is that limit that was engaged in the *AMOU Case*, because the determination that was held invalid in that case purported to deprive s 9A(5) of all of its content, and for that reason was held not to constitute an 'exception'. As three Justices of this Court observed in *Cockle v Isaksen*,[27] the ordinary meaning of an 'exception' is a matter that:

> ...assumes a general rule or proposition and specifies a particular case or description of case which would be subsumed under the rule or proposition but which, because it possesses special features or characteristics, is to be excluded from the application of the rule or proposition.

Importantly, however, their Honours went on to say that an 'exception' is 'not a conception that can be defined in the abstract with exactness or applied with precision; it must depend very much upon context' (at 165, emphasis added).

31. In the present context, Williams J's more general description of the nature of an 'exception' is the more apt: 'it is a particular thing or things excepted out of the general thing granted'.[28] That follows because the text of ss 9A(5)(a)-(b) and 9A(6) does not purport to limit the scope of the 'particular' that can permissibly be carved out from the 'general' in exercise of the undoubted power to make 'exceptions'.

32. The plaintiffs suggest that the alignment in s 9A(5) of the definition with the 'geographical and temporal scope' of the Petroleum and Minerals Acts, and the provision's use of the singular in describing the contemplated exceptions ('*an* operation' or '*an* activity'), illuminate the character of the permitted exceptions (PS [51]). However, given the potential breadth of the operations and activities regulated by those statutes[29] (which in any event form only one component of the definition in s 9A(5)), and bearing in mind s 23(b) of the *Acts Interpretation Act 1901* (Cth),[30] these arguments do not take the plaintiffs very far.

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[24] *Plaintiff S156 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 46 [40] (the Court).

[25] *Egan v Willis* (1998) 195 CLR 424 at 451-2 [42]-[43] (Gaudron, Gummow and Hayne JJ); *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 314 [103] (Kirby J); *Pollentine v Bleije* (2014) 253 CLR 629 at 654-5 [67] (Gageler J).

[26] See by way of illustration the list of government and industry bodies consulted in relation to the 2013 Amending Act, as set out in the Explanatory Memorandum (SCB 39-40).

[27] (1957) 99 CLR 155 at 165 (Dixon CJ, McTiernan and Kitto JJ).

[28] *Cockle v Isaksen* (1957) 99 CLR 155 at 168.

[29] See [22.1]-[22.2] above.

[30] Which provides that 'words in the singular number include the plural'.

33. ***Fifth***, s 9A(7) provides that a determination made under s 9A(6) is a legislative instrument, although it is not subject to disallowance under s 44 of the *Legislation Act 2003* (Cth). The fact that a determination is not subject to disallowance provides no good reason for construing s 9A(6) restrictively (cf PS [45]). There is no common law or statutory principle to the effect that Parliament's decision to frame a legislative instrument-making power in this way should result in a narrow scope for the power. Indeed, the fact that Parliament has provided that a determination is a legislative instrument, but has excluded the ordinary power to disallow such instruments, tends to emphasise Parliament's intention that it is for the Minister to balance the factors relevant in deciding whether to make an exception to s 9A, and that Parliament should not second guess the Minister's judgment.

34. ***Finally***, s 9A(6) is not accurately characterised as a power to alter the scope of the Act, such that it should be strictly or narrowly construed (cf PS [44]). Even assuming that a strict construction is appropriate for legislative provisions that empower the executive to amend primary legislation (so called Henry VIII[th] clauses),[31] s 9A(6) is not of that kind. Where an Act provides that it operates subject to prescribed exceptions, the prescription of those exceptions does not amend the Act. It simply implements the Act in the very manner that Parliament contemplated.

Context

35. As to context, two points are significant.

36. ***First***, s 5(13) of the Act was not amended or repealed when s 9A was enacted, even though the Explanatory Memorandum to the 2013 Amending Act recognised that s 5(13) was the basis for the decision in *Allseas* that provided the impetus for that Act.[32] The retention in the Act of s 5(13) denies the plaintiffs' assertion that the 2013 Amending Act was intended to extend 'the migration zone to encompass workers in the offshore resources industry whether or not those workers are on an Australian resources installation'.[33] If s 9A had that operation, that would render s 5(13) otiose, because the sole effect of s 5(13) is to prevent vessels that are engaged in particular offshore resources activities from falling within the 'migration zone' as defined in s 5 of the Act.

37. The 'primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute'.[34] A harmonious construction of s 9A(1) and s 5(13) requires the conclusion that the 2013 Amending Act created the capacity for offshore resources activities that are not conducted on 'Australian resources installations' to fall within the migration zone, but that, far from intending that all such activities would be within the migration zone, Parliament left it to the Minister to determine the extent to which that would occur (and therefore the

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[31] Note that Pearce and Argument, *Delegated Legislation in Australia* (4th edn, 2012) [30.12] say 'there appears to be no authority' for the principle that such a strict construction should be adopted.

[32] SCB 36

[33] Cf PS [58].

[34] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], quoted with approval, inter alia, in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389 [24] (French CJ and Hayne J).

extent to which the exclusion that Parliament enacted in s 5(13) should be wound back by s 9A).

38. ***Second***, the broad construction of s 9A(6) that is advanced above is consistent with the general scheme of the Act that the Minister be empowered to determine whether particular persons should be subject to particular requirements of the Act. In addition to the Minister's core functions under the Act involving the grant and cancellation of visas (eg ss 65, 501), the Act confers many wide ranging powers on the Minister to dispense[35] with compliance with various parts of the Act at his or her absolute discretion,[36] including by granting visas for which a person did not apply and where the ordinary criteria for the visa that is granted would not be satisfied.[37]

Purpose

39. As to purpose, a broad construction of the exemption power aligns with the purpose of s 9A to permit, as opposed to mandate, the extension of the migration zone to encompass persons participating in or supporting certain offshore activities. The Explanatory Memorandum to the 2013 Amending Act supports and further elucidates this purpose of developing machinery to regulate foreign workers in the offshore resources industry. For example, the Explanatory Memorandum:

    39.1. summarised the recommendation of the Migration Maritime Taskforce (**Taskforce**) following the *Allseas Case* that questions of whether a worker is in the migration zone 'should not be solely dependent on where that person was physically located', but 'also dependent on the sorts of activities that person was conducting';[38]

    39.2. stated that the existing legislation gave an 'incomplete picture of the number of foreign workers in the offshore maritime zone' due to the 'absence of a regulated visa regime to capture' persons in this area;[39]

    39.3. stated that the 'inability to regulate foreign workers engaged in offshore resources activities' had 'security ramifications';[40]

    39.4. stated that foreign workers participating in offshore resource activities would be brought into the migration zone, and noted that, 'in terms of selecting offshore resources activities':[41]

        (a) the Taskforce had recommended picking up the offshore resource activities regulated by the Petroleum Act and the Minerals Act, and

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[35] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.
[36] See, for example, ss 46A, 48A, 91L, 91Q, 195A, 351, and 417.
[37] *Plaintiff M79 v Minister for Immigration and Citizenship* (2013) 252 CLR 336. See also, for example, ss 33(2)(b) and 195A.
[38] Explanatory Memorandum at 1 (SCB 36).
[39] Explanatory Memorandum at 2 (SCB 37).
[40] Explanatory Memorandum at 2 (SCB 37).
[41] Explanatory Memorandum at 2 (emphasis added) (SCB 37).

(b) 'the Bill will create a power for the Minister to make a determination in writing for the purposes of defining an offshore resources activity';

39.5. described the 'exception' framework in ss 9A(5)(a)-(b) as directed towards 'allow[ing] the Minister to exclude from the Act activities defined under the [Petroleum Act] and the [Minerals Act] which the Minister considers unsuitable to be captured by the definition of offshore resources activity';[42] and

39.6. described the purpose of the determination power in s 9A(6) as 'to provide the Minister with the flexibility and ability to exempt certain activities administered by the [Petroleum] Act and the [Minerals] Act from the definition of offshore resources activity'.[43]

40. The Explanatory Memorandum therefore confirms that s 9A reflects:

40.1. a concern with an inability to regulate certain workers under the Act given the geographical criteria that underpinned the existing provisions establishing the migration zone;

40.2. a desire to facilitate regulation of more workers by supplementing the existing geographical criteria with an 'activities' criterion;

40.3. an acknowledgment that the Minister would play a role in 'defining' the activities that would be caught; and

40.4. a recognition that this role gave the Minister 'flexibility' to exempt activities that he or she considers 'unsuitable' for regulation – terms which connote an expansive, rather than narrow, power (cf PS [50]).

41. The plaintiffs emphasise other aspects of the Explanatory Memorandum, which may suggest a more limited purpose: for example, the statement that the legislation would 'ensure that workers in Australia's offshore resources industry are regulated under the [Migration] Act and required to hold specific visas'.[44] However, statements of this breadth in the extrinsic material do not accurately reflect the terms of s 9A as enacted. Such statements cannot be relied upon to displace the clear meaning of the text.[45] The purpose of s 9A cannot be described, consistently with its terms, as effecting a 'functional extension of the migration zone to include all workers in the offshore resources industries' (PS [47], emphasis in original). Had this been its purpose, Parliament could not rationally have made s 9A(5) subject to exceptions. Further, pursuit of that purpose would have suggested the repeal of s 5(13).

42. The more general reasons proffered by the plaintiff at PS [44]-[45] in favour of a restrictive interpretation of the s 9A(6) power should not be accepted. While it is true that a power should not be construed so broadly as to 'destroy the purpose of the empowering Act',[46] that principle has no relevance here,

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[42] Explanatory Memorandum at 17 [92] (emphasis added) (SCB 52).
[43] Explanatory Memorandum at 18-19 [101] (emphasis added) (SCB 53-54).
[44] Explanatory Memorandum at 2 (SCB 37).
[45] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [47]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].
[46] *Vanstone v Clark* (2005) 147 FCR 299 at 331 [101] (Weinberg J).

because the construction proffered by the Minister is entirely consistent with the purpose of the empowering Act.

43. In light of the analysis above, the plaintiffs' contentions regarding the scope of the Minister's power under s 9A(6) are incorrect (PS [52]). The statute authorises the Minister to determine exceptions to elements of the definition of 'offshore resources activity'. It does not impose a test requiring those exceptions to be 'reasonably related to a discernible need for flexible adjustment of the scheme' (cf PS [52]). In the absence of any textual or contextual basis for a narrow view of the permissible exceptions confined to situations involving 'special features or characteristics', the argument that any exempted activities must not be of 'such a magnitude or ... character that they lack ... the necessary "special features or characteristics" to come within the scope of s 9A(6)' is circular.

Section 41(2B)

44. Section 41(2B) of the Act, which was also inserted by the 2013 Amending Act, created a new restriction on visa conditions for persons connected with 'offshore resources activity' as defined in s 9A(5). The new subsection provides that a condition of a visa that allows the visa-holder 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) a permanent visa; or (b) a visa prescribed by the regulations for the purposes of s 41(2B).

45. By force of Sch 1 item 1 of the 2015 Regulation (SCB 211), two categories of visa are currently prescribed for s 41(2B)(b): a Subclass 400 (Temporary Work (Short Stay Activity)) Visa, and a Subclass 457 (Temporary Work (Skilled)) Visa.

46. The limitation in s 41(2B) attaches to a visa to the extent that the visa-holder seeks to participate in or support an 'offshore resources activity' (as defined in s 9A(5)). That is the position whether or not the visa-holder is working on an 'Australian resources installation' or is in the migration zone independently of the deeming in s 9A(1) of the Act.[47] However, in circumstances where the Minister has made a determination under s 9A(6) excepting certain operations or activities from the definition of 'offshore resources activity', then:

    46.1. if the relevant activity involves an 'Australian resources installation', the non-citizen must still hold a visa, although it need not be of the kind specified in or prescribed under s 41(2B); and

    46.2. by contrast, if the relevant activity does not involve an 'Australian resources installation', then the non-citizen is not required to hold a visa at all provided that the non-citizen remains outside the migration zone (because in that event the Determination will prevent s 9A(1) from deeming the non-citizen to be in the migration zone).

47. That operation of a determination under s 9A(6) is in no way inconsistent with s 41(2B) (cf PS [48]). Like the extension of the migration zone pursuant to s 9A(1), the coverage of s 41(2B) is tied to the definition of 'offshore resources activity' in s 9A(5), and therefore expressly contemplates exceptions to its

[47] See s 41(2C).

coverage. It is therefore not apparent how s 41(2B) 'bespeaks a narrow construction of s 9A(6)' (cf PS [49]).

Effect of ss 9A and 41(2B)

48. It is apparent from the foregoing that the plaintiffs' contention that the effect of ss 9A and 41(2B) is 'to extend the migration zone' to 'offshore resource activities' and to 'create a specific visa regime for workers wishing to participate in or support those activities' (PS [28]) requires qualification.

49. Section 9A clearly facilitates the extension of the migration zone to encompass certain operations under the Petroleum Act (s 9A(5)(a)) and certain activities under the Minerals Act (s 9A(5)(b)). However, the scope of the extension depends upon the statutory definition of 'offshore resource activities', which is expressly framed so as to permit ministerial determination of exceptions or additions. That same is true of the visa condition regime prescribed by s 41(2B).

50. This legislative scheme affords the Minister considerable scope to adjust the content of the phrase 'offshore resources activity' as is appropriate. The only limitation on the Minister's power under s 9A(6) are:

    50.1. consistently with s 4(1) of the Act, the power must be exercised in the national interest; and

    50.2. consistently with general principles of construction and the decision in the *AMOU Case*, the power cannot be used so as to render ss 9A(1) and 41(2B) otiose or denude ss 9A(5)(a)-(b) of any content.[48]

    Otherwise, it is for the Minister to determine the scope of any exception under s 9A(6), and to accept political accountability for any exception that is made.

Validity of the Determination

51. The Determination exempts from the definition in s 9A(5) regulated operations and activities 'to the extent' that those operations and activities 'use ... any vessel or structure that is not an Australian resources installation'.[49] In practice, it operates so that ss 9A(1) and 41(2B) do not apply to offshore activities and operations to the extent that they use:

    51.1. a vessel or structure that is never directly or indirectly physically connected to the Australian seabed (ss 8, 5(14)); and

    51.2. vessels that are being used for the purposes set out in s 5(13).

52. Conversely, the Determination leaves untouched offshore activities and operations to the extent that they use an 'Australian resources installation'. In particular, it leaves all 'offshore resources activities' involving 'Australian resources installations' subject to the visa restrictions imposed by s 41(2B).

53. The Determination's use of the language 'to the extent' is important. A regulated operation or activity may have a number of different components. For example, a drilling operation may involve vessels including a drillship – a mobile unit which touches the Australian seabed, and thus is an 'Australian resources

[48] *AMOU Case* (2015) 230 FCR 523 at 541 [67] (SCB 182).
[49] SCB 201.

installation' – and a supply boat – a vessel to be used in transporting persons or goods, and thus not a 'resources installation' by reason of s 5(13).[50] The Determination does not exempt the whole operation or activity from s 9A(5): it exempts only the part that uses the structure that is not an 'Australian resources installation' (in this example, the supply boat).

The plaintiffs' analysis

54. The Determination does not render ss 9A(1) and 41(2B) otiose or denude ss 9A(5)(a)-(b) of content. On the contrary, even taking the plaintiffs' case at its highest, s 9A(5)(a) and (b) operate – unaffected by the Determination – to define the term 'offshore resources activities' to include a substantial part of the Australian resources industry.

55. The Expert report sets out the estimated man-hours worked in the offshore oil and gas industry for 2011-2015,[51] including on vessels or structures that are Australian resources installations. Taking those figures, and applying the same methodology as the plaintiffs (PS [36]), but using instead the entries from the rows for "Mobile Units Touching Seabed" and "Fixed Structure" (being the relevant components of the definition of 'Australian resources installation') this calculation produces the following results:

	2011		2012		2013		2014		2015	
Exploration	Manhours	% Total	Manhours	% Total	Manhours	% Total	Manhours	% Total	Manhours	% Total
Mobile unit touching seabed	2,348,101	10.9	2,732,488	11.6	3,049,084	15.2	1,833,468	9.0	996,671	4.6
Fixed structure	0	0	0	0	0	0	0	0	0	0
Construction										
Mobile unit touching seabed	1,547,997	7.2	2,369,325	10.0	2,258,514	11.2	3,373,378	16.5	3,161,180	14.6
Fixed structure	0	0	0	0	0	0	34,560	0.2	0	0
Production										
Mobile unit touching seabed	2,540,286	11.8	2,254,671	9.6	2,161,917	10.7	1,914,325	9.4	1,939,686	8.9
Fixed structure	4,655,657	21.7	4,979,914	21.1	3,657,550	18.2	2,893,230	14.2	3,236,733	14.9
Total	11,092,041	**51.6%**	12,336,398	**52.3%**	11,127,065	**55.3%**	10,014,401	**49.1%**	9,334,270	**43%**

56. On the above figures, if the Determination is valid, it nevertheless leaves approximately half of the total work undertaken in the offshore resources industry within the definition of 'offshore resources activity' in s 9A(5), and therefore subject to the operation of both s 9A(1) and s 41(2B). Indeed, taking into account Mr Kint's accuracy range of +/- 20%,[52] the Determination may

[50] See SCB 264-265.

[51] At Attachment 3 to the Expert report: SCB 262.

[52] SCB 237 [4.3]. The plaintiffs probably overstate the limitations on the accuracy of the figures in the table, as immediately after referring to the accuracy within an estimated range of +/- 20%, Mr Kint

leave untouched as much as 63%-75.3% of the total work performed in the offshore resources industry.

57. Further, having regard to the types of vessels that the Expert report identifies in Attachment 4 as engaged in offshore resources activities, it is clear that critical parts of the offshore industry are untouched by the Determination. In particular, and unsurprisingly, the overwhelming majority of the structures and vessels used in production component of the industry are attached to the seabed and are 'Australian resources installations'. Significant activities in relation to the exploration and construction components in the industry are also untouched by the Determination (in particular drilling rigs and geotechnical survey vessels).

58. Accordingly, even on the plaintiffs' approach to the data in the Expert report, the plaintiffs cannot establish that the Determination 'consumed the rule laid down by Parliament' (PS [5]) in s 9A.

The preferable analysis

59. The table in Attachment 3 of the Expert Report contains rows that correspond to each of the two categories of case identified in paragraph 51 above that fall within the exception created by the Determination (the first category being the rows described as 'Mobile Unit – Not touching seabed' and the second being described as 'Not Mobile Unit'). Extracting those rows produces the following:

	2011		2012		2013		2014		2015	
Exploration	% Total	% FN	% Total	% FN	% Total	% FN	% Total	% FN	% Total	% FN
Mobile unit not touching seabed	2.5	1.27	2.2	1.11	2.9	1.47	3	1.52	5.5	2.74
Not Mobile Unit	2.2	0	3.5	0	4.4	0	3.1	0	2	0
Sub-total	4.7	1.27	5.7	1.11	7.3	1.47	6.1	1.52	7.5	2.74
Construction										
Mobile unit not touching seabed	0.7	0.13	0.6	0.12	0.7	0.14	0.5	0.09	0.4	0.09
Not Mobile Unit	33.5	4.86	32.8	4.91	26.2	3.57	33.8	6.01	39	7.06
Sub-total	34.2	4.99	33.4	5.03	26.9	3.71	34.3	6.1	39.4	7.15
Production										
Mobile unit not touching seabed	0.6	0.02	0.6	0.02	0.7	0.02	0.7	0.02	0.7	0.02
Not Mobile Unit	8.9	0	8.1	0	9.8	0	9.8	0	9.4	0
Sub-total	9.5	0.02	8.7	0.02	10.5	0.02	10.5	0.02	10.1	0.02
Total	48.4	**6.28**	47.8	**6.16**	44.7	**5.2**	50.9	**7.64**	57	**9.91**

states 'The numbers which are probably the least accurate in relative terms are the very small numbers'. Nevertheless, even on the plaintiffs' approach no invalidity can be established.

60. Contrary to the plaintiffs' contention that the figures as to foreign nationals are irrelevant (PS [38]), those figures necessarily bear upon the Court's consideration of the practical effect of the Determination because:

60.1. the Determination has no effect on Australian citizens who work in the offshore resources industry, because citizens do not require visas of any kind in order to work in offshore resources activities, whether or not those activities take place in the migration zone;

60.2. while s 9A(5) contemplates that an exception must be framed by reference to operations or activities of the kinds identified therein (being operations or activities in which citizens and non-citizens may engage), any exception has practical operation only with respect to non-citizens who participate in or support the identified offshore resources activities;

60.3. the plaintiffs' argument that the number of foreign nationals affected is irrelevant because 'if the Act requires those foreign nationals, however many there may be, to adhere to a visa regime, then executive action that is repugnant to that requirement is repugnant regardless of how many individuals are affected' (PS [38]) is circular, because the very point in issue is whether the Act does require such adherence in the face of a widely express power to make exceptions.

61. Focusing on the practical effect of the Determination, the above table demonstrates that:

61.1. Based on the experience of the previous 5 years, the practical operation of the Determination is to except somewhere between 5.2% and 9.91% of the total work performed in the offshore resources industry from the reach of ss 9A(1) and 41(2B) (that being the work performed by foreign nationals on vessels or structures that are not 'Australian resources installations').

61.2. Virtually no foreign workers work in the production section of the industry (0.02%) so that, while approximately 9-10% of the operations or activities in that part of the industry fall within the exception created by the Determination, that is without practical effect.

61.3. The vast majority of the offshore resources activities that fall within the exception created by the Determination are activities that are undertaken in the construction section of the industry using vessels that are 'Not mobile units' (being vessels that are not 'Australian resources installations' by reason of s 5(13)). Because the Determination uses the defined term 'Australian resources installation', its reach incorporates the limit on the migration zone that Parliament created when it enacted s 5(13). The Expert report states that that exception covers almost 'all vessels in this construction segment' (SCB 246). The plaintiffs' complaint about the 'magnitude' of the exception overlooks the fact that Parliament, by enacting s 5(13), saw fit to treat the construction section of the offshore industry differently to much of the remainder of the industry. The Determination, by drawing on defined terms used in the Act, reflects that same approach. Far from being repugnant to the Act, it is faithful to it. While s 9A created a capacity to extend the migration zone to the part

of the industry that is covered by s 5(13), it did not mandate that that occur, as could easily have been done by repealing s 5(13) had it been intended to ensure that the migration zone so extend.

61.4. Of the total amount of work that is performed in the construction section of the industry on vessels that are 'Not mobile units', only a small proportion of the work on those vessels is performed by foreign workers (in the order of between 13.6% and 18%). Accordingly, even in the construction section of the industry (which accounts for between 41.4% and 54.06% of the man-hours worked between 2011 and 2015) the practical operation of the Determination is far narrower than is apparent by focusing solely on the percentage of the total number of hours worked on vessels that are not 'Australian resources installations', because the overwhelming majority of that work is performed by Australian citizens who are unaffected by the Determination.

61.5. In relation to the vessels described in the report as 'mobile units', the Expert report states that such vessels constitute 'a very small portion of the overall level of activity (highest number is 5.5% for exploration in 2015 and about 3.0% for exploration in prior years, with much lower numbers for construction and production)'. The percentage of foreign nationals on those vessels as a share of overall activity 'turns out to be an even smaller percentage of the total (the highest number is 2.7% for exploration in 2015 and about 1.5% for exploration in prior years' (SCB 245). Even accepting the limitations on accuracy to which the Expert report refers (SCB 237), any relative error will remain small in absolute terms (SCB 245).

62. The plaintiffs' criticism of the data in the Expert report concerning the work performed by foreign nationals should be disregarded (cf PS [38]):

62.1. The plaintiffs agreed to the Special Case without qualifying their agreement to the facts in the Expert report concerning the work performed by foreign nationals (in contrast with the approach they took to other facts, where agreement was expressly withheld[53]).

62.2. The relevant facts having been agreed, the Court should act on them. It is too late for the plaintiffs to criticise those facts as based 'purely on Mr Kint's experience' or as based on 'hearsay statements', for no question arises as to the admissibility of the Expert report. The plaintiffs are not entitled to dispute agreed facts.

62.3. Nor are the plaintiffs entitled to seek to supplement the Special Case with speculation of an *in terrorem* nature as to what may occur in future if the Determination is held to be valid. In the absence of any foundation in the agreed facts, the plaintiffs' speculation about the impact of the Determination on future levels of foreign labour should be disregarded.

62.4. There is no basis for the submission that throughout the 2011-2015 period there was 'a high degree of uncertainty about the legality of foreign labour' (cf PS [38]). It has always been clear that non-citizens

[53] Special Case at [22] (SCB 22).

working on Australian resources installations required a visa to do so. At its highest, any uncertainty related to the kind of visa that must be held, and perhaps to whether non-citizens who were not working on Australian resources installations required a visa. But there is no foundation in the special case for the proposition that uncertainty of either kind had a material impact on the participation of non-citizens in offshore resources activities, and no basis to infer that there was any such impact.

62.5. Finally, while the Expert report acknowledges that the figures that it contains are subject to some limitations, it also states that:[54]

(a) the results were believed to be 'generally accurate even if not precisely so', with those numbers which were least accurate, being the small numbers, remaining small within the posited margin; and

(b) the percentage of foreign workers on a certain type of vessel remained stable notwithstanding the varying levels of activity, such that 'the most relevant information presented in this report are its ratios and percentages, rather than the absolute levels of activity'.

Further matters relating to the 'exception' made by the Determination

63. The Expert report explains that most of the foreign crew on vessels that are not Australian resources installations 'consists of the specialised technical personnel running the survey equipment',[55] and that 'as is typical of any specialised foreign vessel coming for offshore work in Australian waters, a small number of senior or specialised personnel who are familiar with the vessel or who are irreplaceable specialists stay on board such as the vessel owner's person in charge (PIC), the chief engineer, possibly an electrical/electronic or special on-board equipment expert'.[56] The exception created by the Determination therefore operates to except relatively small numbers of specialised foreign crew from s 9A, in circumstances where most of the work on the relevant vessels is in practice undertaken by Australian crew. For that reason, even if (as the plaintiffs assert) an exception is required to operate with respect to 'special features or characteristics', the Determination does so.

64. The Expert report also explains that:

64.1. Many vessels that are not 'Australian resources installations' by reason of the operation of s 5(13) of the Act, including supply boats (also called Platform Support Vessels or PSV), tugs, crew boats, certain Diving Support Vessels and Offshore Support Vessels, are Australian-based and will both leave from and return to an Australian port. This is especially the case for PSV and crew boats, the purpose of which is to shuttle goods and people between Australian ports and offshore facilities.[57] It follows that such vessels travel in an out of the migration zone, quite independently of s 9A(1), with the result that any foreign nationals on board must hold Australian visas.

64.2. Smaller foreign-based vessels, such as survey vessels, DSVs or small

[54] Expert Report [4.3], SCB 237-238.
[55] SCB 246.
[56] SCB 246, 247.
[57] SCB 243.

construction vessels will generally come in to port before and after performing their work.[58] Such vessels similarly travel in an out of the migration zone, independently of the operation of s 9A(1).

64.3. Larger foreign-based vessels, such as large offshore construction vessels, crane barges or pipelay barges, may not go to an Australian port. However, such vessels are nonetheless ordinarily manned by Australian crew to perform the operations or activities, with the Expert report noting that such units 'have both their personnel cleared by immigration and their goods cleared by customs, even if many such units typically swap over the majority of the crew to Australian personnel in the last foreign port of call and do not come into an Australian port'.[59]

64.4. The entirely foreign crewed vessels which commonly play a role in Australia's offshore resources industry are vessels such as tugs pulling cargo barges or jack-up rigs into Australian waters, bulk carriers bringing large quantities of pipe for pipe-laying, and HLVs bringing elements to be installed offshore, being vessels that engage in international marine shipping. These vessels generally do not enter Australian ports. However, their crews do not do any work with respect to the goods that they ship, instead typically handing over to Australian vessels with Australian crews for the purpose of, for example, unloading cargo.[60]

65. In light of the above, it is apparent that the greater proportion of vessels which fall within s 5(13) will enter at a port in Australia, and therefore enter the migration zone, whether or not they are deemed to do so by s 9A(1). Any non-citizens on such vessels will therefore require an Australian visa. The same is true with respect to vessels that are mobile units. In both cases, it is true that such a visa would not be required to be of a type that falls within s 41(2B). Nevertheless, even when the Determination applies it generally does not operate to take operations or activities wholly outside the scope of the Act.

Conclusion

66. Based on the foregoing analysis, the Determination in supported by the power conferred by s 9A(6) of the Act. In contrast to the instrument the subject of the *AMOU Case*, it cannot be said that the Determination denudes s 9A(5)(a)-(b) of any content[61] or renders ss 9A(1) and 41(2B) otiose.[62] It leaves within the ambit of s 9A a category of activity that represents, on any view, a significant proportion of the operations and activities in the offshore resources industry, and a significant proportion of the economic value of that industry.

67. Further, the Determination leaves s 41(2B) of the Act with important work to do in respect of operations on Australian resources installations. That provision operates to prevent non-citizens who hold visas that are subject to conditions restricting work from participating in offshore resource activities on Australian resources installations unless they hold visas of the specified kinds.[63] By

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[58] SCB 244.
[59] SCB 243-244.
[60] SCB 243-244.
[61] *AMOU Case* at 541 [67].
[62] *AMOU Case* at 541 [68].
[63] See s 41(2C).

combined operation of ss 9A, 41(2B) and the 2015 Regulations, since 14 December 2015 foreign workers involved in activities on Australian resources installations have been required to hold a permanent visa, a Subclass 400 visa or a Subclass 457 visa.

68. Contrary to the plaintiffs' contentions, the text, context and purpose of s 9A provides no support for the contention that the exception created by the Determination is of a 'magnitude' or 'character' that is impermissible (see [31] above; cf PS [55]-[56]). Whilst the 'exceptions' determined by the Minister exclude activities based on their location, s 9A nowhere requires the scope of 'offshore resources activities' within s 9A(1) to have any particular geographical coverage. Further, because s 9A does not effect the 'functional extension' of the migration zone to include all workers in the offshore resources industry (as asserted by the plaintiffs), the exceptions determined under s 9A(6) are not repugnant to any such extension.

69. Nor should the Court accept the plaintiffs' contention that the use of a vessel or structure that is not an 'Australian resources installation' is not an operation or activity that can form the basis of an exception (cf PS [57]). As outlined above (at [53]), the Determination operates directly upon operations and activities, if only to a partial extent (the extent depending on the particular vessels or structures that are involved in the relevant regulated operation or activity).

70. By enacting s 9A(6), Parliament expressly contemplated the making of determinations to create exceptions that would limit the content of the definition of 'offshore resources activity'. The power was entrusted to the Minister, and it was conferred in broad terms. It must be exercised by the Minister having regard to the Minister's view of the national interest, and subject to political accountability that the Minister's position entails. The Determination represents a lawful exercise by the Minister of that power.

71. The questions stated in the Special Case should be answered as follows:

    1. No.

    2. Does not arise.

    3. The plaintiffs.

VIII ESTIMATE OF TIME

72. The defendants estimate that they will require 2 hours for the presentation of oral argument.

Date: 17 June 2016

STEPHEN DONAGHUE
Tel: (03) 9225 7919
E: s.donaghue@vicbar.com.au

A. Mitchelmore

ANNA MITCHELMORE
Tel: (02) 9223 7654
E: amitchelmore@sixthfloor.com.au

Counsel for the Defendants