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

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

ANNOTATED

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PLAINTIFFS' SUBMISSIONS

[*Pursuant to Order 7 made by Bell J on 29 April 2016, these submissions replace the submissions filed by the Plaintiffs on 23 November 2015:* ***SCB 17***]

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I INTERNET PUBLICATION

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

II ISSUES

2. The proceeding concerns the validity of "Determination IMMI 15/140" (**Determination**), made with effect from 3 December 2015 by the first defendant (**Minister**) pursuant to s 9A(6) of the *Migration Act 1958* (Cth) (**Migration Act**).

3. The Migration Act (see ss 9A and 41(2B)) applies a visa regime to non-citizens in an area to participate in, or to support, an "offshore resources activity", which is defined in s 9A(5) by reference to operations and activities regulated under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**Petroleum Act**) and the *Offshore Minerals Act 1994* (Cth) (**Minerals Act**). The visa regime has two main aspects. The first aspect is the 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", even if those persons are on structures or vessels that are not "Australian resources installations".[1] The second aspect of the visa regime is the requirement that non-citizens participating in or supporting offshore resources activities (whether or not on an Australian resources installation) hold not simply a visa, but a permanent or prescribed visa.[2]

4. The Determination excepts from the definition of "offshore resources activity" *all* operations and activities "*to the extent that*" the operation or activity "*uses any vessel or structure that is not an Australian resources installation*".[3] The consequence is that the visa regime does not apply "*to [that] extent*". By the Determination, the Minister has: negatived the functional extension of the migration zone to vessels and structures that are not Australian resources installations (the entirety of the first aspect of the visa regime); and also negatived the requirement for permanent or prescribed visas on those vessels and structures (a substantial part of the second aspect of the visa regime, that regime remaining in place only in respect of Australian resources installations and not in respect of the balance of the offshore resources industries).

5. The issue for decision is whether the exception created by the Determination has consumed the rule laid down by Parliament because it negatives so substantial a part of the legislative scheme for the regulation of foreign labour in offshore resources industries that it is: beyond the power to "*except*" an activity or an operation from the definition of "offshore resources activity" (s 9A(6)); or otherwise repugnant to the Migration Act (especially ss 9A and 41(2B)). The repugnancy, the plaintiffs submit,

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[1] Section 9A of the Migration Act.

[2] Section 41(2B) of the Migration Act.

[3] Special Case Book (**SCB**) 201. The Determination is a legislative instrument: s 9A(7) of the Migration Act. Accordingly, the phrase "Australian resources installation" has the same meaning in the Determination as it has in the Migration Act: s 13(1)(b) of the *Legislation Act 2003* (Cth).

manifests in the *magnitude* of the categories of participation in the offshore resources industries that the Determination covers and also in the *character* of those categories.

III NO CONSTITUTIONAL MATTER

6. The Plaintiffs do not consider that any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

IV NO JUDGMENT BELOW

7. The proceeding is in the Court's original jurisdiction conferred by s 75(iii) and s 75(v) of the *Constitution*.

V MATERIAL FACTS

8. The material facts appear in the Special Case.[4] Apart from a chronology of the regulatory history preceding the Determination, the parties have agreed certain facts and opinions, including the limitations and qualifications on those facts and opinions, as stated in an expert report annexed to the Special Case.[5] One aspect of the expert report is expressly not agreed.[6] The agreed facts and opinions inform an appreciation of the practical operation of the Determination and will be explained in detail in the context of the argument dealing with the practical operation of the Determination.

VI ARGUMENT

Introduction

9. The Determination represents the latest manifestation of differences which have existed since 2014 between the Executive and the Parliament over the regulation of foreign labour in Australian offshore resources industries. The Migration Act, since amendments made by the *Migration Amendment (Offshore Resources Activity) Act 2013* (Cth) (**2013 Amending Act**) came into force on 29 June 2014,[7] has contained a regime under which non-citizens working in the offshore resources industries must hold permanent visas or prescribed temporary visas. The Determination would have the effect of allowing non-citizens to work in substantial parts of the offshore resources industries *without* permanent or prescribed visas — or any visa at all.

10. The Determination follows: an unsuccessful attempt to repeal the 2013 Amending Act;[8] the disallowance by the Senate of regulations that would have prescribed permissible temporary visas;[9] the invalidation, by the Full Court of the Federal Court

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[4] **SCB 19–23**.

[5] **SCB 22** [21]–[22]; **SCB 226–287** (Annexure 23: *Peritus International Pty Ltd, "Mobile Units and Fixed Platforms in the Offshore Resource Industry: Expert Opinion Report"*).

[6] **SCB 22** [22].

[7] **SCB 25–33**.

[8] Migration Amendment (Offshore Resources Activity) Repeal Bill 2014 (Cth) (**SCB 66**).

[9] Migration Amendment (Offshore Resources Activity) Regulation 2014 (Cth) (disallowed) (**SCB 93, 120**).

of a legislative instrument which "eviscerate[d] a substantial part of the rule by denuding s 9A(5)(a) and (b) of any content";[10] and an apparently co-ordinated response to the decision of the Full Court by the making of Determination IMMI 15/073 and Declaration IMMI 15/074, which would have negatived the visa regime in respect of nearly all offshore resources activities and, to the extent that it did not negative the visa regime, purported to grant Special Purpose Visas (which were neither permanent nor prescribed visas) to non-citizens working in the offshore resources industries.[11] Those recent administrative decisions were made shortly after the decision of the Full Court; they were promptly challenged in this very proceeding; they were defended for some five months before being revoked after the plaintiffs had filed written submissions and just two months before the scheduled final hearing. The plaintiffs now seek to vindicate the intention of the Parliament, as manifested in the text of the Migration Act, against yet further unauthorised administrative action that is repugnant to the legislative scheme.

11. The argument will:

(a) set out the scheme for the regulation of the offshore resources industries and the scheme requiring individuals participating in or supporting offshore resources industries to hold permanent or prescribed visas;

(b) explain the practical operation of the Determination, by reference to agreed facts; and

(c) address the invalidity of the Determination, which depends on construing s 9A(6) of the Migration Act and assessing whether the Determination is a valid exercise of that statutory power, being one to make an "exception" to the definition of "offshore resources activity".

Legislative schemes

Regulation of offshore resources industries

12. The exploration and recovery of petroleum and the injection and storage of greenhouse gas substances in offshore areas is regulated by the Petroleum Act. The exploration and recovery of minerals (other than petroleum) in certain offshore areas is regulated by the Minerals Act. The Petroleum and Minerals Acts apply to all individuals, whether or not Australian citizens or residents, and to all corporations, whether or not incorporated or carrying on business in Australia.[12] The operations of the Petroleum and Minerals Acts are predicated upon the agreement between the

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[10] Determination IMMI 14/077 (**SCB 125**); *Australian Maritime Officers' Union v Assistant Minister for Immigration and Border Protection* (2015) 230 FCR 523 (***AMOU Case***) at 541 [67] (**SCB 182**).

[11] Determination IMMI 15/073 (**SCB 192**) and Declaration IMMI 15/074 (**SCB 196**).

[12] Section 35 of the Petroleum Act; s 37 of the Minerals Act.

Commonwealth and the States referred to as the "Offshore Constitutional Settlement".[13] That agreement governs the joint responsibility of the Commonwealth and the States for offshore resources.

13. In relevant part, the schemes of the Petroleum and Minerals Acts operate to prohibit individuals and corporations from engaging in certain operations or activities unless they hold a permission granted under the applicable Act to engage in the operation or activity.

14. Section 7 of the Petroleum Act defines a "regulated operation" to mean an activity to which Ch 2 or Ch 3 of the Petroleum Act applies. Ch 2 is about activities relating to petroleum, while Ch 3 is about activities relating to greenhouse gas substances.

15. Ch 2 prohibits: unauthorised exploration for petroleum in an offshore area;[14] unauthorised recovery of petroleum in an offshore area;[15] unauthorised construction or operation of an infrastructure facility in an offshore area;[16] and unauthorised construction or operation of a pipeline in an offshore area.[17] Ch 2 provides for various kinds of permission which authorise these otherwise prohibited acts. A "petroleum exploration permit" or "petroleum retention lease" authorises exploration for petroleum, recovery of petroleum on an appraisal basis, and other related works.[18] A "petroleum production licence" authorises recovery of petroleum, exploration for petroleum and other related works.[19] An "infrastructure licence" authorises the construction and operation of an infrastructure facility.[20] A "pipeline licence" authorises the construction and operation of a pipeline.[21] Several of the permissions have limited duration under the Petroleum Act.[22]

16. Ch 3 is structurally similar to Ch 2, but it deals with the injection and storage of greenhouse gas substances. It prohibits unauthorised exploration for potential greenhouse gas storage formations or injection sites and provides for "greenhouse gas assessment permits" and "greenhouse gas holding leases" to authorise exploration.[23] It prohibits the unauthorised injection or storage of greenhouse gas substances into the

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[13] Section 5 of the Petroleum Act; s 3 of the Minerals Act.

[14] Section 97 of the Petroleum Act.

[15] Section 160 of the Petroleum Act.

[16] Section 193 of the Petroleum Act.

[17] Section 210 of the Petroleum Act.

[18] Sections 98 and 135 of the Petroleum Act.

[19] Section 161 of the Petroleum Act.

[20] Section 194 of the Petroleum Act.

[21] Section 211 of the Petroleum Act.

[22] See s 102 (petroleum exploration permit), s 139 (petroleum retention lease), and s 165 (petroleum production licence) of the Petroleum Act.

[23] Sections 289, 290 and 319 of the Petroleum Act.

seabed or subsoil of an offshore area, and provides for "greenhouse gas injection licences" to authorise injection and storage.[24] Again, several of these permissions are of limited duration.[25]

17. The Minerals Act, likewise, prohibits the exploration for and recovery of minerals in an offshore area unless authorised by a licence or special purpose consent under the Minerals Act.[26] A "licence" means an "exploration licence", "retention licence", "mining licence", or "works licence", which are provided for, respectively, in Pts 2.2, 2.3, 2.4, and 2.5 of the Minerals Act; and "special purpose consent" means a consent granted under Pt 2.6 of the Minerals Act.[27]

10 18. An "exploration licence" authorises exploration for minerals and taking samples of minerals.[28] "Retention licences" and "mining licences" authorise certain exploration for and recovery of minerals.[29] A "works licence" can authorise specified activities that are directly connected with activities being carried out under an exploration, retention or mining licence.[30] Exploration, retention and mining licences are, by force of the Minerals Act, granted for limited periods of time.[31] A "special purpose consent" can authorise the exploration for and taking samples of minerals for scientific investigation, reconnaissance surveys, or collecting small amounts of minerals.[32]

Scheme for visas in offshore resources industries

20 19. The object of the Migration Act is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens".[33] Part 2 of the Migration Act deals with the control of the arrival and presence of non-citizens. A non-citizen in the "migration zone" is a "lawful non-citizen" if, relevantly, he or she holds a visa that is in effect, and is otherwise an "unlawful non-citizen".[34]

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[24] Sections 356 and 357 of the Petroleum Act.

[25] See s 293 (greenhouse gas assessment permit) and s 322 (greenhouse gas holding lease) of the Petroleum Act.

[26] Section 38 of the Minerals Act.

[27] Section 4 of the Minerals Act.

[28] Section 46 of the Minerals Act.

[29] Sections 133 and 193 of the Minerals Act.

[30] Section 267 of the Minerals Act.

[31] See s 88 (exploration licence), ss 146(2) and 154 (retention licence), and ss 209(2), 217(2), 227(2) and 232(2) (mining licence) of the Minerals Act.

[32] Sections 315 and 316 of the Minerals Act.

[33] Section 4(1) of the Migration Act.

[34] Sections 13(1) and 14(1) of the Migration Act.

20. The "migration zone" includes, relevantly, "Australian resource installations".[35] "Australian resources installation" means a "resources installation" that is "deemed to be part of Australia because of the operation of section 8".[36] Taking each of those two components of the definition in turn:

(a) "resources installation" means a "resources industry fixed structure" or a "resources industry mobile unit" within the meaning of ss 5(10) and 5(11) respectively.[37] "Resource industry fixed structures" are structures including pipelines that are not able to move or be moved as an entity from one place to another and which are used or to be used off-shore in operations or activities associated with or incidental to exploring or exploiting natural resources.[38] "Resource industry mobile units" are vessels and certain floatable structures that are used or to be used wholly or principally in drilling the seabed for natural resources or in operations or activities associated with or incidental to such drilling.[39] Importantly, s 5(13) affects the scope of s 5(11) by, in effect, *excluding* from the definition of "resource industry mobile units" vessels used wholly or principally in "transporting persons or goods to or from a resources installation", or "manoeuvring a resources installation, or in operations relating to the attachment of a resources installation to the Australian seabed". The vessels identified in s 5(13) are *not* "resources installations" and are therefore *not* "Australian resources installations";

(b) a resources installation is "deemed to be part of Australia" by operation of s 8 if it becomes "attached to the Australian seabed".[40] It does not cease to be part of Australia until it is detached from the seabed for the purpose of being taken outside the limits of Australian waters or detached and then moved for the purpose of being taken outside those limits (other instances of detachment do not cause the resources installation to cease to be part of Australia).[41] A resources installation is "taken to be attached to the Australian seabed" if it is in "physical contact" with the seabed or with another resources installation that is in physical contact with the seabed.[42]

21. In *Allseas Construction SA v Minister for Immigration and Citizenship* (2012) 203 FCR 200 (***Allseas Case***), the Federal Court of Australia held that certain pipe-laying

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[35] Section 5(1) of the Migration Act ("migration zone").

[36] Section 5(1) of the Migration Act ("Australian resources installation").

[37] Section 5(1) of the Migration Act ("resources installation").

[38] Section 5(10) of the Migration Act.

[39] Section 5(11) of the Migration Act.

[40] Section 8(1) of the Migration Act.

[41] Section 8(2) of the Migration Act.

[42] Section 5(14) of the Migration Act.

vessels were not "Australian resources installations", because they fell within the language of s 5(13)(b) of the Migration Act (as vessels used in manoeuvring a pipeline or in operations relating to the attachment of the pipeline to the seabed).[43] A consequence of the decision was that workers on board those vessels were not within the migration zone and did not require visas. The Department of Immigration and Citizenship, in part responding to that decision, convened the Migration Maritime Taskforce to conduct a "review on how best to apply the [Migration] Act to [foreign] workers in offshore maritime zones".[44] The scope of the Taskforce's review went beyond the particular problem highlighted by the *Allseas Case* and resulted in recommendations for wider reform,[45] which the 2013 Amending Act "broadly implemented".[46]

22. The 2013 Amending Act inserted s 9A into the Migration Act, with effect from 29 June 2014. By force of s 9A(1), 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". "Offshore resources activity" has the meaning given by s 9A(5),[47] which provides:

> In this section:
>
> ***offshore resources activity***, in relation to an area, means:
>
> (a) a regulated operation (within the meaning of section 7 of the [Petroleum Act] that is being carried out, or is to be carried out, within the area, except an operation determined by the Minister under subsection (6); or
>
> (b) an activity performed under a licence or a special purpose consent (both within the meaning of section 4 of the [Minerals Act]) that is being carried out, or is to be carried out, within the area, except an activity determined by the Minister under subsection (6); or
>
> (c) an activity, operation or undertaking (however described) that is being carried out or is to be carried out:
>
> (i) under a law of the Commonwealth, a State or a Territory determined by the Minister under subsection (6); and
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> (ii) within the area, as determined by the Minister under subsection (6).

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[43] (2012) 203 FCR 200 at 214 [70], 214–215 [77], 216 [85].

[44] Explanatory Memorandum to the Migration Amendment (Offshore Resources Activity) Bill 2013 (Cth) (**SCB 36**)

[45] See Regulation Impact Statement attached to the Explanatory Memorandum to the Migration Amendment (Offshore Resources Activity) Bill 2013 (Cth).

[46] *AMOU Case* (2015) 230 FCR 523 at 525 [3] (**SCB 166**).

[47] Section 5(1) of the Migration Act ("offshore resources activity").

23. Subsection (6) provides:

> The Minister may, in writing, make a determination for the purposes of the definition of offshore resources activity in subsection (5).

24. The effect of s 9A is to extend the statutory concept of the migration zone. That statutory concept is extended to include not only particular geographical locations or structures, but participation in or support for certain operations or activities, namely, operations or activities that are regulated or licensed under the Petroleum and Mineral Acts. That extension of the statutory concept is, however, made subject to a power conferred on the Minister by s 9A(6) to make a determination to "except" an operation or an activity, or to include a further activity, operation or undertaking carried out under some Commonwealth, State or Territory law. Such a written determination is not subject to parliamentary disallowance.[48]

25. Subject to the Migration Act, the Minister may grant a person a visa to travel to or enter or remain in Australia.[49] There are classes of visa, and conditions to which classes of visa are subject.[50] Section 41(1) of the Migration Act enables regulations to provide that visas, or visas of a specified class, be subject to conditions. Section 41 also makes general provision for those conditions. Relevantly, s 41(2)(b) provides that the conditions to which visas are made subject by regulations may include a condition "imposing restrictions about the work that may be done in Australia" by the visa-holder.

26. Sections 41(2B) and (2C) were inserted by the 2013 Amending Act and apply in relation to visas granted on or after 29 June 2014.[51] Section 41(2B) provides that, in addition to any restrictions on work imposed consistently with s 41(2)(b), a condition of a visa which 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 permanent visa or a visa prescribed by the regulations for the purposes of s 41(2B).

27. Section 41(2C) (which mirrors s 9A(8)) provides that for the avoidance of doubt a person "may participate in, or support, an offshore resources activity" whether he or she is "on an Australian resources installation" or "is, under s 9A, otherwise in the area to participate in, or support, the activity". The significance of that is this: the extension of the migration zone effected by s 9A overlaps with pre-existing parts of the migration zone, namely, Australian resources installations. The regime requiring workers to hold permanent or prescribed visas applies to all workers participating in or supporting an offshore resources activity, whether they are within the migration

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[48] Section 9A(7) of the Migration Act.

[49] Section 29 of the Migration Act.

[50] Sections 31 and 41 of the Migration Act.

[51] Item 10(2) of Sched 1 of the 2013 Amending Act (**SCB 33**).

zone solely by virtue of s 9A or also by virtue of being on an Australian resources installation.

28. The combined effect of ss 9A(5), 13(1) and 41(2B) is that a non-citizen participating in or supporting an offshore resources activity in an area: must have a visa in order to be lawful non-citizen; and must have a permanent or prescribed visa in order to participate in or support that offshore resources activity (certain temporary visas have been prescribed by regulation since 14 December 2015).[52] The scheme in relation to offshore resources activities thus has two distinct but related aspects: first, it extends the migration zone to those activities (s 9A); secondly, it creates a specific visa regime for workers wishing to participate in or support those activities. That specific visa regime reflects twin policy concerns, articulated in the Explanatory Memorandum, about the "security ramifications" of the "inability ... to regulate foreign workers engaged in offshore resources activities in an immigration context" and the "risk that foreign workers undertaking activities involved in the exploration and exploitation of Australia's natural resources ... may be working under conditions and receiving wages that do not adhere to Australian standards", which "reduces work opportunities for Australian citizens" and puts some businesses "at a competitive disadvantage".[53]

Practical operation of the Determination

29. The practical operation of the Determination, as the Explanatory Statement makes clear, is that "a non-citizen who is on a vessel or structure that is used for operations or activities of the kinds identified in paragraphs 9A(5)(a) and 9A(5)(b) of the Act, but that is not an Australian resources installation, is not taken to be in the migration zone".[54] The practical operation therefore turns on the extent to which operations and activities regulated or licensed under the Petroleum and Minerals Acts "*use[] any vessel or structure that is not an Australian resources installation*".

30. The *Allseas Case*, as explained above, held that certain pipelaying vessels were *not* Australian resources installations. There are very many other vessels and structures used in the offshore resources industries that are also *not* Australian resources installations. The substantially agreed expert report of Mr Thyl Erlend Kint of Peritus International Pty Ltd provides a factual description of the offshore oil and gas industry, which description permits an appreciation of the practical scope of the Determination.[55]

31. In practical terms, "anything material" by way of activity in the Australian offshore resources industries involves the exploration for and exploitation of oil and gas (as

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[52] Migration Amendment (Offshore Resources Activity) Regulation 2015 (Cth) (**SCB 207**).

[53] **SCB 37**.

[54] **SCB 203** [4].

[55] **SCB 226–287** (Annexure 23)

distinct from mining for minerals or injecting greenhouse gas substances).[56] The exploration for and exploitation of oil and gas resources can be subdivided into exploration, construction and production segments.[57] These segments can be seen to correspond to the various permissions available under the Petroleum Act, including: a "petroleum exploration permit" or "petroleum retention lease" (exploration and related works); an "infrastructure licence" or "pipeline licence" (construction and operation of infrastructure facility or pipeline); and a "petroleum production licence" (recovery of petroleum, exploration for petroleum and related works).[58]

32. Attachment 4 to the expert report "provides a detailed table listing and illustrating the types of platforms, vessels and units used for offshore oil and gas operations as well as the category of activities in which they are used".[59] Mr Kint has categorised (in columns headed "Unit Type" and "Definition Category") each kind of platform, vessel or unit as either "Fixed", "Mobile" or "Not Mobile". He has done so by reference to relevant legislative definitions, which he was asked to assume.[60]

33. The vessels categorised as "Not Mobile" correspond to the vessels that are, by reason of s 5(13) of the Migration Act, not "resources installations" and therefore not "Australian resources installations". As Attachment 4 shows, these vessels are used throughout the exploration, construction and production phases and include a variety of kinds of supply vessel, tugs, construction vessels, lift vessels, and accommodation vessels as well as, of course, pipelaying vessels of the kind addressed in the *Allseas Case*.

34. Of the vessels categorised as "Fixed" or "Mobile" (i.e. the "resources installations"), some of them are identified (in a column headed "Touch Seabed?") as being in physical contact with the seabed or another resources installation that is in physical contact with the seabed,[61] and therefore are not "Australian resources installations". These are: seismic survey vessels (exploration) and pre-construction survey vessels (construction).[62] Mr Kint also categorises inspection, maintenance and repair (IMR) vessels (production) as not attaching to the seabed, but the parties do not agree that fact.[63]

35. Mr Kint has also estimated the "percentage of the work in the offshore resources industry that is referable to each of the exploration, construction and production

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[56] **SCB 235** [4.1].

[57] **SCB 239** [5.1.1]–[5.1.3].

[58] See above at [15].

[59] **SCB 240** [5.1.4]; **SCB 263–269**.

[60] **SCB 252**.

[61] **SCB 254**.

[62] **SCB 264, 265**.

[63] **SCB 22** [22], **269**.

segments".[64] He has done so "[b]y reference to the total hours worked offshore per annum"[65] and relying in part on reported offshore man-hour data collected by the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**).[66]

36. Tabulated in Attachment 3 are the estimated man-hours worked in the offshore oil and gas industry for 2011–2015 broken down according to the kind of vessel, structure or unit on which the work was performed.[67] It is possible to derive from this table the man-hours worked for 2011–2015 on vessels or structures that are *not Australian resources installations* (i.e. the man-hours that are within the scope of the Determination). This requires simply summing the man-hours for "Mobile Units" that are "Not Touching Seabed" and the man-hours for "Not Mobile Units". The Court is permitted to undertake that straightforward arithmetical derivation by way of drawing an inference from the facts agreed in Attachment 3.[68] That derivation produces the following results (only the last row in the table is derived):

	2011		2012		2013		2014		2015	
Exploration	**Manhours**	**%Total**	**Manhours**	**%Total**	**Manhours**	**%Total**	**Manhours**	**%Total**	**Manhours**	**%Total**
Mobile Unit not touching seabed	546,000	2.5%	522,168	2.2%	590,160	2.9%	622,872	3.0%	1,189,572	5.5%
Not Mobile Unit	469,932	2.2%	817,920	3.5%	881,880	4.4%	641,136	3.1%	442,944	2.0%
Construction										
Mobile Unit not touching seabed	144,000	0.7%	144,000	0.6%	144,000	0.7%	96,000	0.5%	96,000	0.4%
Not Mobile Unit	7,199,912	33.5%	7,730,524	32.8%	5,271,696	26.2%	6,898,486	33.8%	8,453,048	39%
Production										
Mobile Unit not touching seabed	*These figures are not counted because the parties do not agree that IMR vessels do not attach to the seabed. The figures are relatively small (0.6% or 0.7%).*									
Not Mobile Unit	1,916,250	8.9%	1,900,920	8.1%	1,962,240	9.8%	1,992,900	9.8%	2,038,890	9.4%
Totals	*10,276,094*	***47.8%***	*11,115,532*	***47.2%***	*8,849,976*	***44.0%***	*10,251,394*	***50.2%***	*12,220,454*	***56.3%***

[64] **SCB 241** [5.2.1].

[65] **SCB 241** [5.2.1].

[66] **SCB 241** [5.2.3].

[67] **SCB 262**.

[68] Rule 27.08.5 of the High Court Rules 2004 (Cth).

37. On the quantitative analysis, therefore, the Determination encompasses an extent of operations and activities which represents, over the last five years, around half of the man-hours worked in the industry as a whole (five-year average of 49.1%), and an increasing percentage in recent years. Taking into account Mr Kint's tolerance of ±20%,[69] the figure (using 2015 data) could be as high as 67.56%, or more than two-thirds of the offshore oil and gas industry measured in man-hours worked (and even the smallest figure of 44% in 2013, discounted by 20%, is 35% or more than one-third of the industry).

38. In Attachment 3, Mr Kint has also estimated the percentage of the relevant work performed by foreign nationals. These estimates are irrelevant to the proceeding for the following reasons. First, it does not matter to the validity of the Determination whether there are ten or ten million foreign nationals working in the offshore resources industry: if the Act requires those foreign nationals, however many there 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. Secondly, the data pertains to the years 2011–2015, which predate the Determination. In some of those years (2014–2015), the applicable statutory regime prohibited foreign nationals (in the sense that Mr Kint uses that term to mean non-citizens and non-permanent residents)[70] from working in the industry. At the very least, there was throughout the 2011–2015 period a high degree of uncertainty about the legality of foreign labour, as reflected in the litigation resulting in the *Allseas Case* and the *AMOU Case*. It cannot be assumed that, if the Determination is valid, the percentage of foreign nationals would not increase, and perhaps dramatically so. Thirdly, the foreign national figures are not based on the raw data from NOPSEMA, but are based purely on Mr Kint's experience and unidentified hearsay statements of unidentified industry participants, which Mr Kint recognises as a limitation on the accuracy of his estimates.[71]

Invalidity of the Determination

39. In deciding the validity of the Determination, the "appropriate steps" are 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".[72]

Construction of section 9A(6) of the Migration Act

40. The scope of s 9A(6) must be determined according to ordinary principles of statutory construction: beginning and ending with the text, having regard to context, including legislative history and extrinsic material to the extent that it assists in fixing the

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[69] **SCB 237** [4.3].

[70] **SCB 241** [5.2.2].

[71] **SCB 237–238** [4.3]–[4.4].

[72] *Footscray Corporation v Maize Products Pty Ltd* (1943) 67 CLR 301 at 308 (Rich J).

meaning of the text.[73] Statutory powers of the kind in s 9A(6) are "seldom if ever … conferred in gross, devoid of purposes or criteria, express or implied, by reference to which they are intended to be exercised".[74] Section 9A(6) is, in terms, purposive. It is to be exercised "for the purposes of the definition" of "offshore resources activity" in s 9A(5). That draws attention to the critical word in s 9A(5)(a) and (b): "*except*". The purpose for which the power in s 9A(6) is relevantly to be exercised is to "*except*" an operation or an activity from the definition.

41. The plaintiffs respectfully adopt the construction of s 9A reached by the Full Court of the Federal Court in the *AMOU Case*.[75] The Full Court said that "the term 'except' … does not denote that the Minister's power of determination can be exercised so as completely to extinguish the items within the relevant category or class in s 9A(5)(a) or s 9A(5)(b)".[76] Their Honours applied the "ordinary meaning" of the word "except" as reflected in an authoritative passage from *Cockle v Isaksen*:[77]

> An exception 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. It is not a conception that can be defined in the abstract with exactness or applied with precision; it must depend very much upon context.

42. The generality of the principle in *Cockle v Isaksen* is reflected in other decisions in which the basic principle has been applied. For example, in *Shop Distributive & Allied Employees Association v Minister for Industrial Affairs (SA)*, the High Court construed the word "exempt" as indicating a power to stand a shop "outside the regime with respect to shop trading hours" but not "to lay down an alternative regime in relation to trading hours".[78]

43. The *AMOU Case* concerned a determination which purported to except the *entirety* of the definition in s 9A(5)(a) and (b). The Full Court therefore did not need to grapple with the limits of the power of s 9A(6); it was sufficient to hold that there was *some* limit. The Determination in this case presents the question in a different form, because it does not denude s 9A(5)(a) and (b) of *all* content, by literally mirroring the language of the statutory definition, but makes some attempt to describe a class of

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[73] *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671 [22].

[74] *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 204 (Stephen J).

[75] (2015) 230 FCR 523 (**SCB 164**).

[76] (2015) 230 FCR 523 at 540 [66] (**SCB 181**).

[77] (1957) 99 CLR 155 at 165 (Dixon CJ, McTiernan and Kitto JJ). See also at 168 (Williams J).

[78] (1995) 183 CLR 552 at 559–60. See also *South Australia v Totani* (2010) 242 CLR 1 at [18] (French CJ), [172] (Hayne J).

activity and operation that is to be excepted. It still may not be necessary for the Court to determine the outer limits of s 9A(6), but it is necessary to go beyond saying merely that there is *some* limit to power and to say something more about the nature and extent of the limits. The limits, which are not stated explicitly in s 9A(6), must be "ascertained by reference to the scope and purpose of the statutory enactment".[79] The scope and purpose of the provisions is informed by at least the following seven considerations.

44. ***First***, s 9A(6) effectively empowers the Minister to alter the scope of the Migration Act. Such a power "will be strictly construed".[80] The Court should "not accept that parliament has intended its own enactments to be subject to suspension, amendment or repeal by any kind of subordinate legislation at the hands of the executive unless direct and unambiguous authority has been expressly spelled out to that effect, or is to be found as a matter of necessary intendment, in the parent statute"; an "amending power must be used ... to fulfil the purposes of the Act, not destroy them".[81] The intrinsic vagueness of the power to make a determination under s 9A(6) should, as a matter of constructional choice, be resolved in favour of a *narrower* rather than a *wider* power.

45. ***Secondly***, the narrow character of the power intended to be conferred by s 9A(6) is underscored by the circumstance that Parliament has decided that the power is not to be subject to parliamentary scrutiny by way of disallowance.[82] It would not lightly be supposed that such an unsupervised power was intended to be more expansive than the words used require it to be. Indeed, it may be contrasted with true "dispensing" provisions in the Migration Act, which *are* attended by parliamentary scrutiny.[83]

46. ***Thirdly***, the ordinary meaning of "except", as explained in *Cockle v Isaksen* and endorsed in the *AMOU Case*, provides the first indication of the nature and extent of the limits of s 9A(6). An "exception", in its ordinary meaning, must "specif[y] ... 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". The "special features or

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[79] *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 368 (Mason J).

[80] *Vanstone v Clark* (2005) 147 FCR 299 at 331 [101] (Weinberg J), quoted in the *AMOU Case* (2015) 230 FCR 523 at 547 [74] (**SCB 188**). See also *Public Service Association and Professional Officers' Association Amalgmated Union (NSW) v New South Wales* (2014) 242 IR 338 at [103]–[108] (Basten JA), citing (among other authorities) *R v Secretary of State for Social Security; Ex parte Britnell* [1991] 1 WLR 198 at 204.

[81] *New South Wales v Law* (1992) 45 IR 62 at 75 (Kirby P), 89 (Priestley JA).

[82] Section 9A(7) of the Migration Act; s 44(2) of the *Legislation Act 2003* (Cth).

[83] See, eg, ss 46A, 48B, 91L, 91Q, 195A, 351 and 417; *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336 at 353 [40] (French CJ, Crennan and Bell JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 656 [55], 667 [99(ii)] (Gummow, Hayne, Crennan and Bell JJ).

characteristics" that define the exception must be compatible with the subject-matter, scope and purpose of the statutory enactment.

47. ***Fourthly***, the statutory purposes pursued by s 9A include a functional extension of the migration zone to include all workers in the offshore resources industries, whether or not those workers are physically on an Australian resources installation. Before the enactment of s 9A, Australian resources installations were already within the migration zone, but other vessels and structures were not (*Allseas Case*). Workers on vessels or structures that are *not* Australian resources installations were specifically brought within the migration zone by s 9A.

48. ***Fifthly***, s 9A, when read in conjunction with s 41(2B), also pursues the purpose of creating obligations for non-citizens who wish to participate in or support an activity or operation that is regulated under the Petroleum and Minerals Acts to hold a permanent or prescribed visa. That purpose furthers national security and the protection of work opportunities for Australian citizens, as the extrinsic materials confirm:[84]

> The purpose of [the 2013 Amending Act] is ... to ensure that all Australian jobs are regulated under Australian migration laws ...
>
> Without regulation there is a risk that foreign workers involved in the exploration and exploitation of Australia's natural resources ... 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 ...
>
> The government is committed to maintaining the security of Australia's borders. Under the current legislative framework, the government has an incomplete picture of the number and identity of foreign workers in Australia's offshore maritime zones. This is in part due to the absence of a regulated visa scheme to capture those engaged in Australia's offshore maritime zones and the corresponding migration information
>
> This incomplete information has security ramifications ... [V]isa checks are one of the only ways Australia is able to examine non-citizen workers in this security-sensitive industry.

49. These important purposes would be undermined by large exceptions to the scope of s 9A(5) and so bespeak a narrow construction of s 9A(6).

50. ***Sixthly***, the intended purpose of s 9A(6) itself suggests a narrow power. The narrowness of the power, which appears from its textual relationship with the comprehensive scheme established by ss 9A(5) and 41(2B), is confirmed by the extrinsic material in relation to s 9A(6). The Explanatory Memorandum explained that the power: would "allow the Minister to exclude from the Act activities ... which

[84] Second Reading Speech (**SCB 63–64**). See also Explanatory Memorandum (**SCB 37**).

the Minister considers unsuitable to be captured by the definition";[85] would "provide the Minister with the flexibility and ability to exempt certain activities";[86] and would "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".[87] The notions of "unsuitability", "flexibility", "emergency", and "unintended consequences" all bespeak a narrow power to adjust the reach of what is otherwise intended to be a "new comprehensive framework".[88]

51. ***Seventhly***, the "operations" and "activities" to which s 9A(5) refers are, under the Petroleum and Minerals Acts, themselves generally limited in geographic and temporal scope, because of the way the various permissions under those Acts work. That provides a contextual indication that any corresponding "exceptions" for the purpose of s 9A(5) must also be confined in geographical and temporal scope and not purport to cover entire categories of operation or activity or particular aspects of all operations and activities. Relatedly, it is significant that s 9A(5) anticipates exceptions for "an operation" or "an activity" in the singular, which speaks against the permissibility of excluding entire categories of operation or activity or particular aspects of all operations and activities.

52. These considerations arising from the subject-matter, scope and purpose of s 9A support the following proposition of construction: the "special features or characteristics"[89] of "an activity" or "an operation" that would, in the context of the Migration Act, justify an exception from the definition of "offshore resources activity" must be reasonably related to a discernible need for flexible adjustment of the scheme and not simply a negativing of a substantial part of the scheme. A determination that purported to negative the functional extension of the migration zone achieved by s 9A would be *ultra vires*. Equally, a determination would be invalid if it purported to "except" from the definition of "offshore resources activity" categories of participation in or support for regulated operations or activities that were of such a magnitude *or* of such a character that they lacked the necessary "special features or characteristics" to come within in the scope of s 9A(6) and, instead, were directed to negativing substantial parts of the legislative scheme.

Measuring the Determination against section 9A(6)

53. There are four reasons, each of them sufficient in itself but all of them able to be considered cumulatively, why the Determination, when measured against s 9A(6) properly construed, is *ultra vires*. The first to third reasons correspond to Ground 4,

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[85] Explanatory Memorandum at [92] (**SCB 52**).

[86] Explanatory Memorandum at [101] (**SCB 53**)

[87] Explanatory Memorandum at [102] (**SCB 54**).

[88] Second Reading Speech (**SCB 64**).

[89] *Cockle v Isaksen* (1957) 99 CLR 155 at 165.

and the fourth to Ground 4A, of the Further Amended Application for an Order to Show Cause.[90]

54. ***First***, the Determination wholly negatives the functional extension of the migration zone by s 9A to vessels and structures that are not Australian resources installations. The *Allseas Case* exposed the fact that there were significant gaps in the statutory concept of the "migration zone". While the concept clearly included "Australian resources installations", it did not include pipelaying vessels or, indeed, any of the very many vessels and structures that are, by force of s 5(13) of the Migration Act, also not "resources installations" and therefore not "Australian resources installations". One of the two central purposes of s 9A was to remedy that mischief by extending the migration zone to encompass all participation in or support for offshore resources activities and, in particular, participation and support that occurred on vessels and structures that were *not* Australian resources installations. The Determination, on its face, negatives that purpose completely.

55. ***Secondly***, the categories of participation that the Determination excepts from the definition of offshore resources activity are of such a *magnitude* that the Determination is not an "exception" properly so called and therefore beyond the purposive power conferred by s 9A(6). This ground of invalidity requires the Court to make an evaluative judgment about the whether the Determination, having the practical operation that it has, is authorised by s 9A(6). That evaluative judgment is properly informed by attention to the circumstance that the visa regime created by s 9A and s 41(2B) was manifestly intended to be comprehensive and to apply to the whole of the offshore resources industry (subject to a narrow power to make adjustments by way of exception). The Determination, far from pursuing any adjustment of the scheme consistently with the subject-matter, scope and purpose of the Migration Act, would exempt categories of participation in the industry that amount to up to two-thirds of the industry (measured by man-hours worked).[91] Particularly having regard, on the one hand, to the important purposes of national security and work opportunities for Australians sought to be pursued by the comprehensive visa regime and, on the other hand, the intrinsically narrow power to determine exceptions, the Determination is repugnant to the Migration Act.

56. ***Thirdly***, the categories of participation that the Determination excepts from the definition of offshore resources activity are of such a *character* (even ignoring their magnitude) that the Determination is repugnant to the visa regime. In particular, all transportation of persons or goods to or from a resources installation (s 5(13)(a)) is excluded, as is all manoeuvring and attaching of resources installations (s 5(13)(b)). These categories of participation can be seen especially to engage the legislative concern with national security and work opportunities sought to be addressed by the

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[90] **SCB 13.**

[91] See above at [36]–[37].

visa regime. The exclusion of those categories effected by the Determination is not tailored to any identified circumstances but is wholesale in its nature.

57. ***Fourthly***, the use of a vessel or structure that is not an Australian resources installation is not itself a "regulated operation" within the meaning of the Petroleum Act or an activity performed under a "licence" or "special purpose consent" within the meaning of the Minerals Act. The Determination therefore describes an exception that is referable not to any "operation" or "activity" but rather to the use of vessels and structures that are not Australian resources installations. There is no discernible basis for the exclusion that is consistent with the subject-matter, scope and purpose of s 9A(6), which is a power to make exceptions so that the government can have the "flexibility" to deal with "unsuitable" operations or activities, "emergencies", and "unintended consequences". The Determination is more properly characterised as an exception for s 5(13) vessels or unattached vessels, rather than an exception for any "regulated operation" or "activity performed under a licence or special purpose consent".

58. In summary, the character and extent of the purported "exception" in the Determination is inconsistent with and repugnant to the legislative purpose of extending the migration zone to encompass workers in the offshore resources industries whether or not those workers are on an Australian resources installation. The character and extent of the purported "exception" is inconsistent with and repugnant to the legislative purposes of ensuring that the government can maintain the security of the offshore resources industries through visa checks and can ensure that Australian labour standards are applied in connection with the exploration and exploitation of Australian natural resources. The character and extent of the purported "exception" is inconsistent with and repugnant to the legislative purpose of providing a power to make exceptions so that the government can have the "flexibility" to deal with "unsuitable" operations or activities, "emergencies", and "unintended consequences". The Determination is therefore beyond the power conferred by s 9A(6) and is invalid.

VII APPLICABLE PROVISIONS

59. The applicable statutory provisions as at the date of these submissions are set out in Annexure A.

VIII ORDERS SOUGHT

60. The questions stated for the opinion of the Full Court should be answered as follows:

1. Is paragraph 2 of Determination IMMI 15/140, entered on the Federal Register of Legislative Instruments on 3 December 2015, invalid?

   Answer: Yes.

2. If the answer to Question 1 is "Yes", what relief, if any, should be granted?

Answer: A declaration that paragraph 2 of Determination IMMI 15/140 is invalid and a writ of prohibition or an injunction prohibiting the First Defendant from acting upon or giving effect to the paragraph.

3. Who should pay the costs of the Special Case?

Answer: The defendants.

IX ESTIMATE OF TIME

61. The plaintiffs estimate that they will require a total of 2½ hours for the presentation of oral argument, including reply submissions.

Date: 27 May 2016

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Annexure A

The extracts from the Acts below represent the legislation as it stands on 27 May 2016.

***Migration Act 1958* (Cth)**

Sections 5(1) ("Australian resources installation", "Australian seabed", "migration zone", "resources installation"), 5(10), 5(11), 5(12), 5(13), 5(14), 8, 9A, 41.

***Offshore Minerals Act 1994* (Cth)**

Section 4 ("licence", "special purpose consent").

***Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)**

Section 7 ("regulated operation").

Migration Act 1958

No. 62, 1958

Compilation No. 129

Compilation date:	24 March 2016
Includes amendments up to:	Act No. 34, 2016
Registered:	14 April 2016

This compilation is in 2 volumes

Volume 1:	**sections 1–261K**
Volume 2:	sections 262–507
	Schedule
	Endnotes

Each volume has its own contents

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(ii) whose approval has not been cancelled under section 140M, or otherwise ceased to have effect under section 140G, in relation to that class; or

(b) a person (other than a Minister) who is a party to a work agreement.

Note: A partnership or an unincorporated association may be an approved sponsor: see subsections 140ZB(1) and 140ZE(1) respectively.

area in the vicinity of the Protected Zone means an area in respect of which a notice is in force under subsection (8).

ASIO means the Australian Security Intelligence Organisation.

ASIO Act means the *Australian Security Intelligence Organisation Act 1979*.

assessed score, in relation to an applicant for a visa, means the total number of points given to the applicant in an assessment under section 93.

assessment, in relation to ASIO, has the same meaning as in subsection 35(1) of the ASIO Act.

Australian Border Force Commissioner has the same meaning as in the *Australian Border Force Act 2015*.

Australian passport means a passport issued under the *Australian Passports Act 2005*.

Australian resources installation means a resources installation that is deemed to be part of Australia because of the operation of section 8.

Australian seabed means so much of the seabed adjacent to Australia (other than the seabed within the Joint Petroleum Development Area) as is:

(a) within the area comprising:

(i) the areas described in Schedule 1 to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*; and

(ii) the Coral Sea area; and

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(b) part of:

(i) the continental shelf of Australia;

(ii) the seabed beneath the territorial sea of Australia (including the territorial sea adjacent to any island forming part of Australia); or

(iii) the seabed beneath waters of the sea that are on the landward side of the territorial sea of Australia and are not within the limits of a State or Territory.

Australian sea installation means a sea installation that is deemed to be part of Australia because of the operation of section 9.

Australian waters means:

(a) in relation to a resources installation—waters above the Australian seabed; and

(b) in relation to a sea installation—waters comprising all of the adjacent areas and the coastal area.

authorised officer, when used in a provision of this Act, means an officer authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner for the purposes of that provision.

Note: Section 5D can affect the meaning of this term for the purposes of carrying out identification tests.

authorised system, when used in a provision of this Act, means an automated system authorised in writing by the Minister or the Secretary for the purposes of that provision.

behaviour concern non-citizen means a non-citizen who:

(a) has been convicted of a crime and sentenced to death or to imprisonment, for at least one year; or

(b) has been convicted of 2 or more crimes and sentenced to imprisonment, for periods that add up to at least one year if:

(i) any period concurrent with part of a longer period is disregarded; and

(ii) any periods not disregarded that are concurrent with each other are treated as one period;

maritime officer has the same meaning as in the *Maritime Powers Act 2013*.

master, in relation to a vessel, means the person in charge or command of the vessel.

member of the crew means:

(a) in relation to a vessel other than an aircraft—the master of the vessel, or a person whose name is on the articles of the vessel as a member of the crew; or

(b) in relation to an aircraft—the master of the aircraft, or a person employed by the operator of the aircraft and whose name is included in a list of members of the crew of the aircraft furnished by the master as prescribed.

member of the family unit of a person has the meaning given by the regulations made for the purposes of this definition.

member of the same family unit: one person is a ***member of the same family unit*** as another if either is a member of the family unit of the other or each is a member of the family unit of a third person.

migration decision means:

(a) a privative clause decision; or

(b) a purported privative clause decision; or

(c) a non-privative clause decision; or

(d) an AAT Act migration decision.

migration zone means the area consisting of the States, the Territories, Australian resource 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

(c) piers, or similar structures, any part of which is connected to such land or to ground under such sea;

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

Note: See also section 9A, which concerns offshore resources activities.

minor means a person who is less than 18 years old.

movement records means information stored in a notified data base.

natural resources means the mineral and other non-living resources of the seabed and its subsoil.

non-citizen means a person who is not an Australian citizen.

non-disclosable information means information or matter:

(a) whose disclosure would, in the Minister's opinion, be contrary to the national interest because it would:
  (i) prejudice the security, defence or international relations of Australia; or
  (ii) involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet; or
(b) whose disclosure would, in the Minister's opinion, be contrary to the public interest for a reason which could form the basis of a claim by the Crown in right of the Commonwealth in judicial proceedings; or
(c) whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence;

and includes any document containing, or any record of, such information or matter.

non-political crime:

(a) subject to paragraph (b), means a crime where a person's motives for committing the crime were wholly or mainly non-political in nature; and
(b) includes an offence that, under paragraph (a), (b) or (c) of the definition of ***political offence*** in section 5 of the *Extradition Act 1988*, is not a political offence in relation to a country for the purposes of that Act.

removee means an unlawful non-citizen removed, or to be removed, under Division 8 of Part 2.

residence determination has the meaning given by subsection 197AB(1).

resources installation means:

(a) a resources industry fixed structure within the meaning of subsection (10); or

(b) a resources industry mobile unit within the meaning of subsection (11).

score, in relation to a visa applicant, means the total number of points given to the applicant under section 93 in the most recent assessment or re-assessment under Subdivision B of Division 3 of Part 2.

sea installation has the same meaning as in the Sea Installations Act.

Sea Installations Act means the *Sea Installations Act 1987*.

Secretary means the Secretary of the Department.

serious Australian offence means an offence against a law in force in Australia, where:

(a) the offence:

(i) involves violence against a person; or

(ii) is a serious drug offence; or

(iii) involves serious damage to property; or

(iv) is an offence against section 197A or 197B (offences relating to immigration detention); and

(b) the offence is punishable by:

(i) imprisonment for life; or

(ii) imprisonment for a fixed term of not less than 3 years; or

(iii) imprisonment for a maximum term of not less than 3 years.

(9A) If a review of a decision that has been made in respect of an application under this Act is instituted under Part 5, 7 or 7AA as prescribed, the application is ***finally determined*** when a decision on the review in respect of the application is taken to have been made as provided by any of the following provisions:

(a) subsection 368(2) (written decisions about Part 5-reviewable decisions);

(b) subsection 368D(1) (oral decisions about Part 5-reviewable decisions);

(c) subsection 430(2) (written decisions about Part 7-reviewable decisions);

(d) subsection 430D(1) (oral decisions about Part 7-reviewable decisions).

(e) subsection 473EA(2) (Immigration Assessment Authority decisions).

(9B) However, subsection (9A) does not apply in relation to the following decisions:

(a) a decision of the Tribunal to remit a Part 5-reviewable decision under paragraph 349(2)(c);

(b) a decision of the Tribunal to remit a Part 7-reviewable decision under paragraph 415(2)(c);

(c) a decision of the Immigration Assessment Authority under paragraph 473CC(2)(b).

(10) A reference in this Act to a resources industry fixed structure shall be read as a reference to a structure (including a pipeline) that:

(a) is not able to move or be moved as an entity from one place to another; and

(b) is used or is to be used off-shore in, or in any operations or activities associated with, or incidental to, exploring or exploiting natural resources.

(11) A reference in this Act to a resources industry mobile unit shall be read as a reference to:

(a) a vessel that is used or is to be used wholly or principally in:

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(i) exploring or exploiting natural resources by drilling the seabed or its subsoil with equipment on or forming part of the vessel or by obtaining substantial quantities of material from the seabed or its subsoil with equipment of that kind; or

(ii) operations or activities associated with, or incidental to, activities of the kind referred to in subparagraph (i); or

(b) a structure (not being a vessel) that:

(i) is able to float or be floated;

(ii) is able to move or be moved as an entity from one place to another; and

(iii) is used or is to be used off-shore wholly or principally in:

(A) exploring or exploiting natural resources by drilling the seabed or its subsoil with equipment on or forming part of the structure or by obtaining substantial quantities of material from the seabed or its subsoil with equipment of that kind; or

(B) operations or activities associated with, or incidental to, activities of the kind referred to in sub-subparagraph (A).

(12) A vessel of a kind referred to in paragraph (11)(a) or a structure of a kind referred to in paragraph (11)(b) shall not be taken not to be a resources industry mobile unit by reason only that the vessel or structure is also used or to be used in, or in any operations or activities associated with, or incidental to, exploring or exploiting resources other than natural resources.

(13) The reference in subparagraph (11)(a)(ii) to a vessel that is used or is to be used wholly or principally in operations or activities associated with, or incidental to, activities of the kind referred to in subparagraph (11)(a)(i) shall be read as not including a reference to a vessel that is used or is to be used wholly or principally in:

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

(b) manoeuvring a resources installation, or in operations relating to the attachment of a resources installation to the Australian seabed.

(14) A resources installation shall be taken to be attached to the Australian seabed if:

(a) the installation:

(i) is in physical contact with, or is brought into physical contact with, a part of the Australian seabed; and

(ii) is used or is to be used, at that part of the Australian seabed, wholly or principally in or in any operations or activities associated with, or incidental to, exploring or exploiting natural resources; or

(b) the installation:

(i) is in physical contact with, or is brought into physical contact with, another resources installation that is taken to be attached to the Australian seabed by virtue of the operation of paragraph (a); and

(ii) is used or is to be used, at the place where it is brought into physical contact with the other installation, wholly or principally in or in any operations or activities associated with, or incidental to, exploring or exploiting natural resources.

(15) Subject to subsection (17), for the purposes of this Act, a sea installation shall be taken to be installed in an adjacent area if:

(a) the installation is in, or is brought into, physical contact with a part of the seabed in the adjacent area; or

(b) the installation is in, or is brought into, physical contact with another sea installation that is to be taken to be installed in the adjacent area because of paragraph (a).

(16) For the purposes of this Act, a sea installation shall be taken to be installed in an adjacent area at a particular time if the whole or part of the installation:

(a) is in that adjacent area at that time; and

(b) has been in a particular locality:

8 Certain resources installations to be part of Australia

(1) For the purposes of this Act, a resources installation that:

(a) becomes attached to the Australian seabed after the commencement of this subsection; or

(b) at the commencement of this subsection, is attached to the Australian seabed;

shall, subject to subsection (2), be deemed to be part of Australia and shall be deemed not to be a place outside Australia.

(2) A resources installation that is deemed to be part of Australia by virtue of the operation of this section shall, for the purposes of this Act, cease to be part of Australia if:

(a) the installation is detached from the Australian seabed, or from another resources installation that is attached to the Australian seabed, for the purpose of being taken to a place outside the outer limits of Australian waters (whether or not the installation is to be taken to a place in Australia before being taken outside those outer limits); or

(b) after having been detached from the Australian seabed otherwise than for the purpose referred to in paragraph (a), the installation is moved for the purpose of being taken to a place outside the outer limits of Australian waters (whether or not the installation is to be taken to a place in Australia before being taken outside those outer limits).

9 Certain sea installations to be part of Australia

(1) For the purposes of this Act, a sea installation that:

(a) becomes installed in an adjacent area or in a coastal area after the commencement of this subsection; or

(b) at the commencement of this subsection, is installed in an adjacent area or in a coastal area;

shall, subject to subsection (2), be deemed to be part of Australia and shall be deemed not to be a place outside Australia.

(2) A sea installation that is deemed to be part of Australia because of the operation of this section shall, for the purposes of this Act, cease to be part of Australia if:

(a) the installation is detached from its location for the purpose of being taken to a place outside the outer limits of Australian waters; or

(b) after having been detached from its location otherwise than for the purpose referred to in paragraph (a), the installation is moved for the purpose of being taken to a place outside the outer limits of Australian waters.

9A Migration zone etc.—offshore resources activities

Migration zone etc.

(1) For the purposes of this Act, 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.

Example 1: A person is taken to be in the migration zone under this section if the person is on a vessel in an area to participate in an offshore resources activity under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* in that area by exploring for, or recovering, petroleum.

Example 2: A person who is a member of the crew of the vessel is also taken to be in the migration zone under this section if the person is supporting the offshore resources activity.

Example 3: Neither a stowaway on the vessel, nor a person on the vessel because the person was rescued at sea, is taken to be in the migration zone, because neither is participating in, or supporting, the offshore resources activity.

(2) To avoid doubt, a person may be taken to be in the migration zone under subsection (1):

(a) whether or not the person's participation in, or support of, an offshore resources activity in the area concerned has started, is continuing or has concluded; and

(b) whether or not the offshore resources activity concerned has started, is continuing or has concluded.

(3) For the purposes of this Act:

(a) a person is taken to be in Australia while he or she is taken to be in the migration zone because of subsection (1); and

(b) a person is taken to travel to Australia if the person travels to an area in which the person is taken to be in the migration zone because of subsection (1); and

(c) a person is taken to enter Australia when the person enters an area in which the person is taken to be in the migration zone because of subsection (1); and

(d) subject to section 80—a person is taken to leave Australia when the person leaves an area in which the person is taken to be in the migration zone because of subsection (1).

(4) Unless a provision of this Act, or another Act, expressly provides otherwise, this section does not have the effect of extending, for the purposes of another Act, the circumstances in which a person:

(a) is in the migration zone or is taken to be in the migration zone; or

(b) is in Australia or is taken to be in Australia; or

(c) travels to Australia or is taken to travel to Australia; or

(d) enters Australia or is taken to enter Australia; or

(e) leaves Australia or is taken to leave Australia.

Meaning of offshore resources activity

(5) In this section:

offshore resources activity, in relation to an area, means:

(a) a regulated operation (within the meaning of section 7 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*) that is being carried out, or is to be carried out, within the area, except an operation determined by the Minister under subsection (6); or

(b) an activity performed under a licence or a special purpose consent (both within the meaning of section 4 of the *Offshore Minerals Act 1994*) that is being carried out, or is to be carried out, within the area, except an activity determined by the Minister under subsection (6); or

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(c) an activity, operation or undertaking (however described) that is being carried out, or is to be carried out:

(i) under a law of the Commonwealth, a State or a Territory determined by the Minister under subsection (6); and

(ii) within the area, as determined by the Minister under subsection (6).

(6) The Minister may, in writing, make a determination for the purposes of the definition of ***offshore resources activity*** in subsection (5).

(7) A determination made under subsection (6) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

(8) To avoid doubt, for the purposes of subsection (1), a person may participate in, or support, an offshore resources activity in relation to an area whether the person:

(a) is on an Australian resources installation in the area; or

(b) is otherwise in the area to participate in, or support, the activity.

10 Certain children taken to enter Australia at birth

A child who:

(a) was born in the migration zone; and

(b) was a non-citizen when he or she was born;

shall be taken to have entered Australia when he or she was born.

11 Visa applicable to 2 or more persons

Where:

(a) 2 or more persons who are the holders of the same visa travel to Australia on board the same vessel; and

Refugee and Humanitarian (Class XB) visas means visas classified by regulation as Refugee and Humanitarian (Class XB) visas.

Note: For this class of visas, see clause 1402 of Schedule 1 to the *Migration Regulations 1994*.

40 Circumstances for granting visas

(1) The regulations may provide that visas or visas of a specified class may only be granted in specified circumstances.

(2) Without limiting subsection (1), the circumstances may be, or may include, that, when the person is granted the visa, the person:
- (a) is outside Australia; or
- (b) is in immigration clearance; or
- (c) has been refused immigration clearance and has not subsequently been immigration cleared; or
- (d) is in the migration zone and, on last entering Australia:
  - (i) was immigration cleared; or
  - (ii) bypassed immigration clearance and had not subsequently been immigration cleared.

(3) Without limiting subsection (1), the circumstances may be, or may include, that a person has complied with any requirement to provide one or more personal identifiers made under section 257A.

41 Conditions on visas

(1) The regulations may provide that visas, or visas of a specified class, are subject to specified conditions.

General rules about conditions

(2) Without limiting subsection (1), the regulations may provide that a visa, or visas of a specified class, are subject to:
- (a) a condition that, despite anything else in this Act, the holder of the visa will not, after entering Australia, be entitled to be granted a substantive visa (other than a protection visa, or a

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temporary visa of a specified kind) while he or she remains in Australia; or

(b) a condition imposing restrictions about the work that may be done in Australia by the holder, which, without limiting the generality of this paragraph, may be restrictions on doing:

(i) any work; or

(ii) work other than specified work; or

(iii) work of a specified kind.

(2A) The Minister may, in prescribed circumstances, by writing, waive a condition of a kind described in paragraph (2)(a) to which a particular visa is subject under regulations made for the purposes of that paragraph or under subsection (3).

Conditions about offshore resources activity

(2B) In addition to any restrictions applying because of regulations made for the purposes of paragraph (2)(b), a condition of a visa that allows the holder of the visa to work is not taken to allow the holder to participate in, or support, an offshore resources activity in relation to any area unless the visa is:

(a) a permanent visa; or

(b) a visa prescribed by the regulations for the purposes of this subsection.

Note: For ***offshore resources activity***, see subsection 9A(5).

(2C) To avoid doubt, for the purposes of subsection (2B), a person may participate in, or support, an offshore resources activity in relation to an area whether the person:

(a) is on an Australian resources installation in the area; or

(b) is, under section 9A, otherwise in the area to participate in, or support, the activity.

Additional conditions

(3) In addition to any conditions specified under subsection (1), or in subsection (2B), the Minister may specify that a visa is subject to

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such conditions as are permitted by the regulations for the purposes of this subsection.

42 Visa essential for travel

(1) Subject to subsections (2), (2A) and (3), a non-citizen must not travel to Australia without a visa that is in effect.

Note: A maritime crew visa is generally permission to travel to Australia only by sea (see section 38B).

(2) Subsection (1) does not apply to an allowed inhabitant of the Protected Zone travelling to a protected area in connection with traditional activities.

(2A) Subsection (1) does not apply to a non-citizen in relation to travel to Australia:

(a) if the travel is by a New Zealand citizen who holds and produces a New Zealand passport that is in force; or

(b) if the travel is by a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or

(c) if:

(i) the non-citizen is brought to the migration zone under subsection 245F(9) of this Act or under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*; and

(ii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or

(ca) the non-citizen is brought to Australia under section 198B; or

(d) if:

(i) the non-citizen has been removed under section 198 to another country but has been refused entry by that country; and

(ii) the non-citizen travels to Australia as a direct result of that refusal; and

(iii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or

(e) if:

Offshore Minerals Act 1994

Act No. 28 of 1994 as amended

This compilation was prepared on 30 January 2012
taking into account amendments up to Act No. 113 of 2011

Volume 1 includes:
- Reader's Guide
- Summary of Contents
- Table of Contents
- Sections 1 – 440

The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Volume 2 includes:
- Table of Contents
- Schedule 1
- Note 1
- Table of Acts
- Act Notes
- Table of Amendments
- Table A

Prepared by the Office of Legislative Drafting and Publishing, Attorney-General's Department, Canberra

licence means:

(a) an exploration licence; or

(b) a retention licence; or

(c) a mining licence; or

(d) a works licence.

licence area means the block or blocks covered by a licence.

mineral has the meaning given by section 22.

Mining Licence Fees Act means the *Offshore Minerals (Mining Licence Fees) Act 1981*.

native title and ***native title rights and interests*** have the same meaning as in the *Native Title Act 1993*.

offshore area means a Commonwealth-State offshore area or an external territory offshore area.

offshore exploration or mining activity means:

(a) the exploration for minerals in an offshore area; or

(b) the recovery of minerals from an offshore area; or

(c) activities carried out in an offshore area under a works licence.

offshore mining register means a register kept for the purposes of Part 3.1.

petroleum means:

(a) a hydrocarbon or a mixture of hydrocarbons; or

(b) a mixture of one or more hydrocarbons and one or more of the following:

(i) hydrogen sulphide;

(ii) nitrogen;

(iii) helium;

(iv) carbon dioxide.

primary payment period for the provisional grant or provisional renewal of a licence means the period of 30 days after the day on which the applicant is given a written notice:

(a) in the case of the grant of an exploration licence—under section 66 or 83; and

sample of the seabed or subsoil in an offshore area includes a core or cutting from the seabed or subsoil in that area.

secondary payment period for the provisional grant or provisional renewal of a licence means the period of 30 days after the day on which an extension of the primary payment period for the grant or renewal concerned ends.

share in a licence has the meaning given by subsections 6(1), (2) and (3).

special purpose consent means a consent granted under Part 2.6.

standard block has the meaning given by section 19.

State has a meaning that is affected by the operation of section 5.

State Minister means:

(a) a Minister of State for a State; or

(b) a Minister of State for the Northern Territory.

successor licence to a licence has the meaning given by section 8.

Note: See section 15.

surrender day for an exploration licence means:

(a) the day on which the initial term of the licence ends; or

(b) a day on which the term of a renewal of the licence ends.

tender block has the meaning given by section 20.

the 1981 Act means the *Minerals (Submerged Lands) Act 1981*.

transfer:

(a) when used in relation to a licence—has the meaning given by subsection 7(1); and

(b) when used in relation to a share in a licence—has the meaning given by subsections 7(2) and (3).

vary a licence condition includes revoke or suspend.

Works Licence Fees Act means the *Offshore Minerals (Works Licence Fees) Act 1981*.

Offshore Petroleum and Greenhouse Gas Storage Act 2006

No. 14, 2006

Compilation No. 38

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This compilation is in 3 volumes

Volume 1:	**sections 1–465**
Volume 2:	sections 466–791
Volume 3:	Schedules
	Endnotes

Each volume has its own contents

This compilation includes commenced amendments made by Act No. 126, 2015

Prepared by the Office of Parliamentary Counsel, Canberra

Register:

(a) when used in Chapter 4—has the meaning given by section 467; or

(b) when used in Chapter 5—has the meaning given by section 519.

registered holder, in relation to a title, means the person whose name is shown in the Register kept under section 469 or 521 as the holder of the title. For this purpose, a ***title*** is a petroleum exploration permit, petroleum retention lease, petroleum production licence, infrastructure licence, pipeline licence, petroleum special prospecting authority, petroleum access authority, greenhouse gas assessment permit, greenhouse gas holding lease, greenhouse gas injection licence, greenhouse gas search authority or greenhouse gas special authority.

regulated operation means:

(a) an activity to which Chapter 2 applies; or

(b) an activity to which Chapter 3 applies.

For the purposes of paragraph (b), assume that each reference in subsection 356(1) to a substance were a reference to a greenhouse gas substance.

Regulatory Levies Act means the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003*.

Regulatory Powers Act means the *Regulatory Powers (Standard Provisions) Act 2014*.

renewal:

(a) when used in relation to a petroleum exploration permit, petroleum retention lease or petroleum production licence—has the meaning given by subsection 11(1); or

(b) when used in relation to a greenhouse gas assessment permit or greenhouse gas holding lease—has the meaning given by subsection 11(2).

responsible Commonwealth Minister means: