AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

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Dear valued AMMA member

**Urgent briefing: offshore visa developments**

Federal Court Justice Robert Buchanan has today (15 September 2014) handed down a decision that will have implications for your operations offshore.

The judge today rejected the MUA / AMOU challenge to a ministerial determination made by Assistant Minister for Immigration & Border Protection, Michaelia Cash, under the Migration Amendment (Offshore Resources Activity) Act 2013 (the ORA Act).

The maritime unions' challenge, and the earlier Senate disallowance of government regulations made under the ORA Act, have caused significant uncertainty and concern for the offshore resource industry in recent times.

This uncertainty has arisen due to a sustained union campaign waged across the media, our Parliament and in our courts.

However, as a result of today's decision, it is hoped that much-needed certainty will be restored to the offshore resources industry in terms of its migration arrangements.

At all stages of these developments up until today, AMMA has liaised closely with the Assistant Minister and Minister on these issues and has consistently communicated the industry's need for certainty and workable outcomes for the long term.

The purpose of this briefing paper is to clarify the outcomes of today's Federal Court decision, which is essentially that the status quo will continue in terms of migration requirements for offshore resources projects. We have also provided you with key contact points within AMMA for further information and advice should you need them.

**What today's decision means for your operations**

With today's upholding of the ministerial determination, the regulation of migration arrangements for work in the offshore resources industry has been clarified in important ways.

In particular, the coverage of the Migration Act to offshore resources activities returns to what it has historically been and to what it was prior to 29 June 2014 when the ORA Act commenced operating.

**The key points** AMMA would like you to take from today's decision are:

- If you employ or are planning to employ foreign nationals on temporary work (skilled) 457 visas or temporary work (short stay activity) 400 visas to work in support of an offshore resources activity, those arrangements remain valid, and work under those visas can continue going forward.

- If you employ or are planning to employ foreign nationals without 457 or 400 work visas to work on an offshore resources activity because historically those activities were not captured by the Migration Act, those individuals are deemed to be outside the migration zone and will not need a visa that carries work rights in Australia.

**What this document contains**

AMMA has provided for you in this document:

- A two-page analysis of today's Federal Court decision, clarifying the implications for your operations; and
- A two-page background paper detailing the sequence of events leading up to today's decision in order to put it into context.

We hope this information is of assistance to you in relation to these complex matters although we would like to highlight this document does not constitute specific legal advice.

Please direct any further questions or requests for a more detailed briefing to AMMA Senior Workplace Policy Adviser, Lisa Matthews, on (03) 6270 2256 or at lisa.matthews@amma.org.au. Alternatively, contact AMMA's Manager of Migration Services, Jules Pedrosa, on (02) 9211 3566.

Finally – Assistant Minister Cash is the keynote speaker at AMMA's 2014 Skilled Migration Conference in Perth on 16 September 2014 and will directly engage with our members on these and other important policy issues. Shadow Immigration Minister Richard Marles will also speak at this important event. Further details are available on AMMA's website at www.amma.org.au.

Regards,

Steve Knott
AMMA Chief Executive



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# ANALYSIS OF TODAY'S DEVELOPMENTS

The Federal Court today upheld a ministerial determination that was subject to an unsuccessful maritime union challenge. As a result, a broad definition of "offshore resources activities" is no longer in place for migration purposes, with the Migration Act 1958 having returned to the coverage offshore that it has had historically.

This means there will be few direct impacts on AMMA member companies' long-term operational strategies given they can continue doing what they have done in recent years in terms of migration arrangements.

**Are your activities in the migration zone?**

The key to identifying the implications of today's Federal Court decision for your operations is to determine whether the foreign nationals you employ are in the migration zone.

In simple terms, if your activities were deemed to be covered by the Migration Act prior to the ORA Act taking effect on 29 June 2014, then they will still be covered by the Migration Act.

If your activities were not deemed to be in the migration zone prior to 29 June 2014, such as particular pipelay vessels that were deemed to be outside the zone in the *Allseas* decision, those activities continue to be outside the migration zone despite the ORA Act being in place.

The effect of the ministerial determination, which was today upheld by the Federal Court, is to make the operation of the ORA Act null and void by removing the reference to coverage by two other pieces of legislation – the Offshore Petroleum & Greenhouse Gas Storage Act 2006 and the Offshore Minerals Act 1994.

If the ministerial determination had not been put in place, and upheld today, the ORA Act would have deemed foreign nationals to be in Australia's migration zone if they were "in an area to participate in or support an offshore resources activity". As such, the performance of work in relation to all such activities would have required an appropriate visa with Australian work rights.

Section 9A(5) of the ORA Act defines an "offshore resources activity" very broadly and includes all regulated operations under s7 of the Offshore Petroleum & Greenhouse Gas Storage Act 2006 and all activities performed under a licence or special purpose consent under s4 of the Offshore Minerals Act 1994.

Prior to the ORA Act coming into force on 29 June 2014, the Migration Act's offshore coverage was determined by whether an activity was defined as a "resources installation" under s8 of the Migration Act. This left some deliberate gaps in Migration Act coverage, most notably for some pipelay vessels as confirmed by the *Allseas* decision.

The ministerial determination that was today upheld has re-introduced those previous "gaps" or exclusions from the migration zone, which AMMA has always argued were deliberate. With the ministerial determination now firmly in place, the proposed



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broader scope of coverage of the Migration Act, as per the provisions of the ORA Act, has been wound back.

**What happens to existing arrangements?**

- **If you are currently using 457 or 400 visas** - If you currently employ foreign nationals on 457 or 400 visas to work in support of an "offshore resources activity", those visas and working arrangements remain valid following today's developments. This is because the coverage of the Migration Act as previously defined required one of those two visas, or a permanent visa, to be in place before foreign nationals could work in or around a "resources installation" as defined by s8 of the Migration Act 1958.
- **If you are currently using no working visas** - Those foreign nationals who, due to the ministerial determination and / or historical exclusions, were not captured by the Migration Act and therefore were not previously required to hold visas that provided work rights (despite working on an offshore resources activity), will be able to continue with those arrangements. This applies to foreign nationals who were using a combination of a 651 or 601 entry visa to fly into the country and a 988 maritime crew visa (MCV) to join a sea vessel that was previously deemed to be outside the migration zone (and continues to remain outside it after today).

**What will happen next?**

Because the challenge by the MUA / AMOU failed today, the ministerial determination remains in place for the foreseeable future. However, it should be noted that a separate Federal Court challenge to the determination is on foot and was adjourned until after today's decision. It remains to be seen whether that challenge, brought by the Australian Institute of Marine & Power Engineers (AIMPE), will progress in the wake of today's decision.

Also, the Migration Amendment (Offshore Resources Activity) Repeal Bill 2014 is still before federal parliament and will, if passed, have the same effect as the ministerial determination that was upheld today. While it would be preferableto have the status quo confirmed via legislation, it is unclear at this stage whether the Bill will pass and, as mentioned, it will do the same job as the ministerial determination in any case.

AMMA will keep members updated if any developments do occur and forewarn you of any potential impacts on your operations.

**Key contacts within AMMA**

For specific migration advice in relation to these matters, please contact AMMA's Manager of Migration Services, Jules Pedrosa, on (02) 9211 3566 or at jules.pedrosa@amma.org.au.

To receive further policy updates, contact AMMA's Senior Workplace Policy Adviser, Lisa Matthews, on (03) 6270 2256 or at lisa.matthews@amma.org.au.



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# BACKGROUND LEADING UP TO TODAY'S DECISION

In order to understand today's developments, it is useful to take a look at the series of events leading up to them, particularly over the past two years.

**The *Allseas* decision**

In May 2012, the Federal Court handed down the *Allseas* decision confirming that unless vessels performing work in the offshore resources industry were "resources installations", foreign nationals on those vessels were not in Australia's migration zone and did not require visas containing work rights to perform such work.

"Resources installations" were either "resources industry fixed structures" or "resources industry mobile units", both of which required some attachment to the seabed to have the requisite connection to Australia and its migration zone.

The Federal Court confirmed in *Allseas* that pipelines were "resources installations" but that two Allseas pipelay vessels, the Lorelay and Solitaire, were not themselves resources installations covered by the Migration Act. This was because the vessels were neither "resources industry fixed structures" nor "resources industry mobile units".

The court found the two pipelay vessels:

- Were not "resources industry fixed structures" because they were able to be moved;
- Did not satisfy the first of two alternative criteria for a "resources industry mobile unit" because they did not drill into or obtain substantial quantities of material from the seabed; and
- Did not satisfy the second alternative criteria for a "resources industry mobile unit" because they were primarily involved in manoeuvring a resources installation (ie a pipeline) into place, and there was a specific exemption from the definition of resources industry mobile units for "manoeuvring" vessels.

So the court found the two Allseas vessels did not fit the definition of "resources installation" and were not in Australia's migration zone, despite otherwise being in Australian waters. In passing, the judge said the pipeline itself was a "resource installation" because it was attached to the seabed by virtue of coming into contact with the seabed via pipes laying on it.

**The Migration Amendment (Offshore Resources Activity) Act 2013**

The *Allseas* decision confirmed what had been the case since 1982 when other types of resources installations were deliberately included in coverage of the Migration Act, ie. it confirmed there were certain deliberate exclusions for activities not deemed to be performed by "resources installations".

In the wake of that confirmation, the former Labor government made laws to close the perceived gaps in coverage of the Migration Act.

The former government did that by re-regulating offshore resources activities via the Migration Amendment (Offshore Resources Activity) Act 2013, which took effect on 29 June 2014.



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The ORA Act did several things, most notably including in Australia's migration zone all "offshore resources activities" regulated by two other Commonwealth Acts - the Offshore Petroleum & Greenhouse Gas Storage Act 2006 and the Offshore Minerals Act 1994. This gave the Migration Act broad coverage offshore.

**First Regulations made under the ORA Act**

Because there was a change in government before the ORA Act took effect on 29 June 2014, it was up to the new Coalition government to make regulations specifying the types of working visas that would be required under the ORA Act, which now regulated all "offshore resources activities" from a migration perspective.

On 30 May 2014, the Coalition Government released Regulations specifying three types of visas, in addition to permanent visas, that could be used as working visas for "offshore resources activities" from 29 June 2014. Those three visa types were a 457 visa, a 400 short-stay activity visa and a maritime crew visa (MCV).

This was the first time an MCV could be used as a working visa in the offshore resources industry and the first time its use as a visa bestowing work rights was allowed broadly acress the industry. Other amendments were also made to the MCV for use under the ORA Act, including "de-linking" it from importation by Customs, thus further broadening the scope of the MCV's use.

The Australian Greens moved a successful disallowance motion in the Senate on 16 July 2014 and the Coalition government's Regulations were disallowed. This meant there were no valid working visas for work in and around "offshore resources activities" for nearly 24 hours between 16 July 2014 and 17 July 2014, at which time Assistant Minister Michaelia Cash made a ministerial determination.

**The ministerial determination**

Senator Cash implemented a ministerial determination on 17 July 2014 that had the effect of making null and void the operation of the ORA Act and returning coverage of the Migration Act in the offshore resources industry to that which existed before the ORA Act took effect on 29 June 2014.

The pre-existing system was based on whether something was defined as a "resources installation" rather than covering all offshore resources activities in a blanket way.

The ministerial determination removed from coverage by the ORA Act all activities regulated by the Offshore Petroleum & Greenhouse Gas Storage Act 2006 and the Offshore Minerals Act 1994. However, because the vast majority of offshore resources activities were covered by the Migration Act previously, that continued to be the case for the majority of activities. Those resource activities that had been excluded from the migration zone prior to 29 June 2014, such as the pipelay vessels referred to in the Allseas case, were once again excluded by the ministerial determination.

That ministerial determination was subject to a Federal Court challenge by the Maritime Union of Australia (MUA) and the Australian Maritime Officers Union (AMOU) which was heard on 19 August 2014 and a decision handed down today.

Today's Federal Court outcome related only to the challenge by the MUA and AMOU. The Australian Institute of Marine & Power Engineers (AIMPE) has a separate Federal Court challenge on foot which was adjourned until after today's decision.



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