Migration Amendment (Offshore Resources Activity) Repeal Bill 2014

Regulation Impact Statement

(OBPR ID: 2014/16740)

Department of Immigration and Border Protection

March 2014

1. The Policy Problem

1.1 Background to the problem

The way the migration zone applies to offshore resources activity has for many years been highly contentious. The migration zone defines the area of Australia where a non-citizen must hold a valid visa to legally enter and remain in Australia. Under the *Migration Act 1958* (the Migration Act), a non-citizen who is in the migration zone, but does not hold a valid visa, is deemed to be an unlawful non-citizen and is subject to immigration detention.

Section 5 of the Migration Act provides that the migration zone consists of:

- the States and Territories (at the low water mark);
- sea within the limits of both a State or a Territory and a port;
- piers, or similar structures, any part of which is connected to such land or to ground under such sea; and
- Australian resource installations and Australian sea installations.

In May 2012, in the case of *Allseas Construction S.A. v Minister for Immigration and Citizenship* [2012] FCA 529 (*Allseas*), the Federal Court of Australia ruled that two vessels, and non-citizens working on board these vessels, were not within the migration zone, and therefore not required to hold visas for the work they were doing. This was due to the fact that both vessels fell within an exemption to the definition of a resource installation contained in the Migration Act, and were therefore not part of the migration zone.

This decision provoked a strong criticism from maritime unions, who argued that by not being required to hold work visas (such as the 457 visa), the vessel operators were able to circumvent the requirement to pay overseas workers Australian rates, which is a requirement under the 457 visa, which would have adverse labour market consequences for Australians.

1.2 The Legislative Response

In response to the decision in *Allseas*, the previous Parliament passed the *Migration Amendment (Offshore Resources Activity) Act 2013* (the ORA Act), which received Royal Assent on 29 June 2013. A Regulation Impact Statement (RIS) for this legislation was undertaken in March 2013. The operative provisions in the ORA Act will commence on 30 June 2014.

The ORA Act supplements the existing provisions in section 5 of the Migration Act determining the migration zone by providing that a person will be taken to be in the migration zone while he or she is in an area to participate in, or support, an offshore resources activity in relation to that area. It also provides that a person who is in the migration zone to participate in, or support, an offshore resources activity must hold either a permanent visa, or a visa prescribed by the regulations for this purpose.

1.3 Intention of the Legislation

The intention of the ORA Act was to regulate the employment of overseas workers in the offshore resources industry, and to impose Australian terms and conditions of employment (or rates of pay) to all non-citizens working in the industry. It does this by expanding the scope of the migration zone,

and by extension the requirement to hold and comply with a valid visa, to all offshore resources activity, and not just to persons working on a resource installation.

A key aspect of the decision to introduce the amendments was that a dedicated visa pathway would be developed for the offshore resources industry. This would ensure that all persons who are in the migration zone to participate in, or support, an offshore resources activity when the ORA Act commences would be able to apply for and hold an appropriate visa. The visa would also provide the capacity to include labour market or salary criteria, to undertake character and health checks on visa applicants, and to provide greater clarity on the number of non-citizens actually working in Australia's offshore maritime zones.

What this means in practice is that the industry, who recruit internationally, do not differentiate between and Australian citizen worker and a foreign national. The workers on these vessels are not recruited by project and are all remunerated in common packages as per international maritime industrial law and standards. The workers would be a range of low to highly skilled occupations and would reflect broad international nationalities, which may require visas depending on their status as Australian/citizens, already holding a visa (eg 457) or non-visaed.

The visa therefore, is simply a red tape, bureaucratic process to confirm the status of a foreign national in the migration zone.

1.4 Status of Regulatory Impact Statements at key decision points

The Mid-Year Economic and Fiscal Outlook 2013-14 (MYEFO) of December 2013 included a decision to reverse funding for the *Reform of the Migration Zone for Offshore Workers*.

On 12 February 2014, the Assistant Minister for Immigration and Border Protection gave policy approval to repeal the ORA Act. An options stage RIS was not prepared.

2. Why is Government Action Needed?

2.1 Unnecessary and disproportionate regulation

The ORA Act fails to adequately appreciate the complex and overlapping regulatory framework – including international conventions and Commonwealth, State and Territory legislation – in which the offshore resources industry operates, which will be unaffected if the ORA Act is repealed.

For example, terms and conditions of employment will continue to be protected and enforced under domestic laws, and under international convention through the International Labour Organisation's Maritime Labour Convention. As the workplace relations and migration systems are subject to separate legislative frameworks, non-citizens' terms and conditions of employment are subject to regulation regardless of whether they are prescribed in sponsorship obligations or visa criteria.

Non-citizens working on resource installations, or who come to the Australian mainland to work, are already required to hold work visas. Non-citizens must also valid visas hold to be immigration cleared when they transit through an Australian airport on their way to and from resource installations and vessels – hence they are still subject to immigration controls, even if they are not required to hold a visa for the activity they are undertaking on the resource installation or vessel.

While the precise number of non-citizens working in the industry who are not currently required to hold visas is unknown, indications are that it is relatively small. One estimate has put the total at approximately 2000 per year (by comparison 68 000 subclass 457 visas were granted in 2012-13), while others have put the number at considerably fewer than this. The prevalence of fly-in fly-out arrangements mean that overseas workers generally remain in Australia for relatively short periods of time, meaning that only a proportion of the estimated 2000 will actually be in Australia at any given time.

For these reasons, the ORA Act will impose unnecessary and disproportionate regulation on the industry.

2.2 Impact on Industry

The development of Australia's offshore resources contributes significantly to the Australian economy, and employs thousands of Australians. Australia is the world's ninth largest energy producer, and the oil and gas industry account for $2^1/_2$ per cent of GDP, generating $28 billion in revenue, and contributing $9 billion in direct tax payments. It is also critical for Australia's future energy security, accounting for 58 per cent of Australia's primary energy needs.

The offshore resources industry has a strong international focus, and relies on a highly mobile workforce that can be transferred from project to project, and from country to country. For example, the Australian Petroleum Production and Exploration Association have said that many employees working on pipe laying vessels have 'specialised skills which are historically accessed globally, wherever the pipe laying vessel is contracted to operate'.

The workforce is also highly specialised, with the demand for specialist skills likely to increase. For example, the Australian Workforce and Productivity Agency noted in its 2013 report on resource sector skill needs that as it moves from construction into an operations phase, that the oil and gas industry in particular 'will need to develop more people with specialised technical skills and industry experience'.

Employment growth in 'oil and gas operations' is projected to outpace growth in other parts of the sector – with employment levels for maritime crews increasing from 475 000 to 766 000 between 2013 and 2018 – and the subsector is 'likely to experience an acute undersupply of appropriately skilled workers across all occupational groups' with professionals and trade occupations being the worst affected.

Migration arrangements therefore need to be relatively flexible, and not create excessive barriers for overseas labour, if skill shortages in the industry are not to be exacerbated.

Industry groups have consistently opposed the ORA Act, and have predicted serious economic consequences if it is allowed to proceed. For example, the Australian Mines and Metals Association warned that the ORA Act would impose 'a further suffocating regulatory burden' on the industry and would 'place untenable cost pressures on the resource industry' which would be 'both direct and indirect, in terms of compliance and administration costs'. This would 'put at risk the viability of current projects and weigh heavily against the commencement of future projects'. These statements along with others have been drawn from the evidence provided by these bodies to the senate Inquiry into the ORA Act.

Regarding the context for the statement of 'serious economic consequences' if the ORA Act proceeds, it should be noted the evidence provided by relevant industry groups over an extended period of time – including to the Senate's Legal and Constitutional Affairs Legislation Committee to which the legislative amendments were referred – on the likely economic impact of the ORA Act. This information was included in the original RIS, and as the legislation has not actually commenced, it remains the only available evidence of the ORA Act's economic impact.

While the cost impact is difficult to estimate in the absence of a visa, costs associated with an employer-sponsored visa such as the 457 visa can include visa application charges, sponsorship and nomination fees, migration agent fees, financial contributions to training funds, costs linked to sponsorship obligations (such as record keeping and return travel costs), English language tests and medical examinations for visa applicants, paid health insurance for visa applicants, and costs associated with complying with immigration clearance and reporting requirements for maritime crews.

Specifically, the issue of immigration clearance is complex and potentially damaging to the industry. If clearance were to be physically required, this could cause major delays to the timing of entry for the ships and when work can commence. AMMA has cited that if the burden were to be too onerous companies may not take up contract offers and therefore large billion dollar projects may not be able to proceed as planned.

Shipping Australia Limited has said that the ORA Act would 'have unintended consequences, be unwieldy to implement, substantially increase costs (in administration, ship time costs and wage bills for resource development projects) and be difficult to monitor to ensure compliance'. This would result in 'the suspension or cancellation of potential development projects' … and 'negative impact on Australia's future export earnings and taxation revenue'.

3. The Policy Options

3.1 Implement a visa with an obligations framework for the sponsoring employer – the 'status-quo' option

This option would involve the development of regulations to create a temporary work visa specifically for non-citizens employed in the offshore resources industry. This would have a number of features common to the subclass 457 visa, such as a sponsorship framework, nomination of the position to be filled, labour market and/or salary criteria, and sponsorship obligations.

3.2 Implement a 'light-touch' regulatory option

This option would involve the development of Regulations that prescribe a visa option for non - citizens employed in the offshore resources industry. The preference would be to implement a visa option which has the least possible regulatory impact on the industry but which gives effect to the requirements in the ORA Act. This may be possible through the use (with some minor modification) of existing visa products.

3.3. Repeal the ORA Act

Repeal of the legislation prior to its commencement would involve least cost to the offshore resources industry as it would maintain existing arrangements for the industry.

4. Likely Benefits of Each Option

4.1 A visa with an obligations framework for the sponsoring employer

A visa with a sponsorship framework would allow greater scrutiny of employers and provide the capacity for the Department to sanction or bar sponsors found not to have complied with their sponsorship obligations or other legislative requirements, such as by failing to provide visa holders with Australian terms and conditions of employment. The nomination process and labour market criteria would provide the capacity to limit the visa to specific occupations, or to impose a 'labour market testing' requirement. This option would require changes to the *Migration Regulations 1994* and would incur start-up and ongoing costs to industry. Industry would need to be educated on the new regulatory requirements and would need to make changes to existing practices to accommodate them. There is a risk that the changes to the *Regulations* would not be approved for commencement on 30 June 2014.

4.2 A 'light-touch' regulatory option

Offshore resources industry representatives have consistently stressed during consultations that, should workers in the offshore resources industry be required to hold a visa from 30 June 2014, the visa should provide flexibility and stability to ensure continued investment in the Australian resources sector. Additionally, the additional regulatory requirement should not cause project delays or significantly increase project costs. It may be possible, with some amendments, to use existing visa products that are already familiar to industry and which provide work rights for non-citizens in the migration zone without the imposition of an employer sponsorship framework and the attendant obligations which apply to an employer-sponsored work visa. While 'light-touch' in intention, this option would also require changes to the *Migration Regulations 1994* and would incur start-up and ongoing costs to industry, though less than the 'status-quo' option. Industry would need to be educated on the new regulatory requirements and would need to make changes to existing practices to accommodate them. There is a risk that the changes to the *Regulations* would not be approved for commencement on 30 June 2014.

Light-regulation option – a variation of the visa requirements to commence on 30 June 2014

Regulatory Burden and Cost Offset *(RBCO)* Estimate Table

Average Annual Compliance Costs (from Business as usual)				
Costs ($m)	**Business**	**Community Organisations**	**Individuals**	**Total Cost**
Total by Sector	-$0.169	$	-$0.09	-$0.26
Cost offset ($m)	**Business**	**Community Organisations**	**Individuals**	**Total by Source**
Agency	$	$	$	$
Within portfolio	$	$	$	$

Average Annual Compliance Costs (from Business as usual)				
Outside portfolio	$	$	$	$
Total by Sector	$	$	$	$
Proposal is cost neutral?	**yes**			
Proposal is deregulatory	**yes**			
Balance of cost offsets	**$(0.260589)**			

4.3 Repeal of the ORA Act

Repealing the ORA Act prior to its commencement would give the most certainty to the offshore oil and gas industry and to the individuals employed in undertaking offshore resources activities. In effect, nothing would change. Industry and individuals would not need to educate themselves on any new regulatory requirements and there would be no additional compliance and administrative costs that would need to be met by industry and individuals in order to comply with the ORA Act. There is a risk that the legislation to repeal the ORA Act would not be passed.

Full repeal of the Act – repeal of the visa requirements to commence on 30 June 2014

Regulatory Burden and Cost Offset *(RBCO)* Estimate Table

Average Annual Compliance Costs (from Business as usual)				
Costs ($m)	**Business**	**Community Organisations**	**Individuals**	**Total Cost**
Total by Sector	-$0.171130	$	-$0.102600	-$0.273730
Cost offset ($m)	**Business**	**Community Organisations**	**Individuals**	**Total by Source**
Agency	$	$	$	$
Within portfolio	$	$	$	$
Outside portfolio	$	$	$	$
Total by Sector	$	$	$	$
Proposal is cost neutral?	**yes**			
Proposal is deregulatory	**yes**			
Balance of cost offsets	**$(0.273730)**			

5. Consultation

5.1 History of Consultations

Extensive consultations have occurred with all affected stakeholders since the Federal Court decision *Allseas* in May 2012.

5.1.1 Consultation – pre-July 2013

Following the *Allseas* decision, the then Department of Immigration and Citizenship established the Migration Maritime Taskforce (the Taskforce) to assess the implications of the *Allseas* case, and to make recommendations to the government on how it should respond. As part of this process, the Taskforce undertook consultations with a range of organisations, including offshore resource industry groups, maritime unions, the migration advice profession, Commonwealth government agencies, and the Western Australian State government.

Following the introduction of the *Migration Amendment (Offshore Resources Activity) Bill 2013* to the Senate, the Bill was referred to the Legal and Constitutional Affairs Committee (the Committee) for examination in June 2013. As a result, hearings were to enable relevant stakeholders were able to provide testimony to the Committee, and to lodge submissions on the specific provisions of the

Bill. Organisations which appeared before the Committee, or lodged submissions with it, included offshore resource industry groups, maritime unions, the migration advice profession, academics, and Commonwealth government agencies.

5.1.2 Consultation – November-December 2013

In November and December of 2013, the Department of Immigration and Border Protection undertook further consultations on the introduction of the ORA Act, including on the potential implementation of a visa pathway for those persons affected by the commencement of the amendments. The following organisations were consulted:

- Australian Shipowners Association
- Australian Petroleum Production and Exploration Association
- Australian Mines and Metals Association;
- Maritime Union of Australia;
- Australian Maritime Officers' Union;
- Australian Institute of Marine and Power Engineers;
- Migration Institute of Australia; and
- Ernst & Young.

5.2 Stakeholder views

The offshore resources industry has consistently argued that the costs of complying with the ORA Act, and the visa arrangements associated with this, would impose an unnecessary and disproportionate regulatory burden and increased cost pressures on the industry, and threaten the feasibility of current and future offshore resource development projects. They have particularly stressed the undue administrative burden and adverse impact that a highly regulated visa (closely modelled on the subclass 457 visa, for example) comprising a sponsorship framework, labour market and salary criteria, would have on employers.

Unions have continued to support the ORA Act and the offshore resources industry remain opposed to its introduction. Most recent consultations have been on the nature of the visa, not the nature of the Act, but have confirmed no shift in the views of major stakeholders.

6. What is the Best Option

6.1 Best Option

Repeal of the ORA Act would provide the greatest certainty to business and individuals engaged in offshore resources activities as it would involve no change to existing arrangements and provide ongoing certainty regarding the relationship between the migration zone and the offshore resources industry, consistent with the *Allseas* decision.

The introduction of a visa requirement would only create red tape in order to confirm the status of a foreign national in the migration zone.

7. Implementation and Evaluation

Following Parliamentary consideration of the *Migration Amendment (Offshore Resources Activity Act) Repeal Bill 2014*, the Department will prepare an implementation plan focused on communication with relevant industry stakeholders.