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

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# PLAINTIFFS' REPLY

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## I INTERNET PUBLICATION

1. This reply is in a form suitable for publication on the Internet.

## II REPLY

2. The defendants' submissions (**DS**) depend on three central propositions, none of which is correct.

3. **Limits on section 9A(6)**: The defendants' first central proposition is that s 9A(6) is limited only by the "national interest" and by the inability to render ss 9A(1) and 41(2B) "otiose" or to "denude ss 9A(5)(a)-(b) of any content" {DS [50]}. That submission overlooks that s 9A(6) confers power expressly "for the purposes of the definition of offshore resources activity in subsection (5)" such that those "purposes" also limit the power.

4. **Functional extension of migration zone**: The defendants' second central proposition is that s 9A of the Act does not effect a functional extension of the migration zone to encompass all persons participating in or supporting an offshore resources activity. The defendants submit that s 9A merely "allows" {DS [21]} or "facilitates" {DS [49]} such an extension and, relatedly, that "offshore resources activity" "does not have any fixed or certain content" so that the scope of s 9A(1) cannot be "ascertained" until "the Minister has exercised the power under s 9A(6)" {DS [26]}. This proposition embraces the contention correctly rejected in the *AMOU Case* that the existence of a power to make exceptions denies the existence of a fixed rule: the true position is that a power to make exceptions necessarily presupposes a rule.

5. **Characterisation of Determination**: The defendants' third central proposition is that the Determination "has ... effect only in relation to non-citizens", who are said to perform a relatively small percentage of work in the industry (around 10%) {DS [3.3], [59]–[61]}. This proposition is erroneous on two fronts. First, the Determination also affects citizens precisely because, as the defendants submit, "citizens do not require visas of any kind to work in offshore resources activities" {DS [60.1]}. The Determination, by extending to non-citizens the capacity to work without a visa, negatives a privilege otherwise enjoyed only by citizens. Secondly, even if the quantitative effect of the Determination is measured by reference to its effect only on foreign nationals then it excludes approximately two-thirds of the industry measured by foreign national man-hours.

### Limits on section 9A(6)

6. Contrary to DS [28] and [50], there are additional limits on the power conferred by s 9A(6), which is conspicuously *not* a power exercisable only in the national or public interest.[1] The power is expressly conferred "for the purposes of" the definition in s 9A(5) and is limited by *those* purposes: most importantly, the purposes of (1) extending the migration zone to all workers in the offshore resources industry,

[1] Cf ss 46A(2), 46B(2), 48B(1), 72(2)(e), 91F(1), 91L(1), 91Q(1), 133A(1)(e), 133A(3)(b), 133C(1)(e), 133C(3)(b), 137N(1), 195A(2), 197AB(1), 197AD(1), 198AB(2), 198AD(8) and 198AE(1) of the Act.

whether or not physically on an Australian resources installation, and (2) applying to them a specific visa regime. The defendants' resort to the "national interest" object contained in s 4(1) of the Act ignores the significance of the *Parliament's* assessment of the national interest in enacting s 9A.

7. Equally, DS [50.2] is too narrow a statement of the longstanding principle applied in the *AMOU Case*. An exception which denudes a rule of *any* content is, to be sure, invalid. But where the denuding is less than complete, that does not ensure validity but, rather, engages an evaluative judgment as to whether the exception has negatived so substantial a part of the rule as to be invalid.

10 8. The defendants' assertion that the power is amenable to political accountability {DS [29]}, does not confront the circumstance that the Act does *not* attach mechanisms of accountability such as parliamentary disallowance or a requirement to report to Parliament {PS [45]}.

**Functional extension of migration zone**

9. Relatedly, the defendants deny that s 9A discloses a purpose of enacting a functional extension of the migration zone beyond Australian resources installations to all persons in an area to participate in, or to support, an offshore resources activity {DS [3.1], [21], [26], [48], [49]}. They suggest that s 9A merely "allows" or "facilitates" that extension, because the provision for exceptions means that there is
20 no rule with any fixed content. That submission inverts the proper order of the rule and the exceptions, seeking to make the statutory rule bend to the executive power of exception rather than to hold the executive power of exception within the statutory limits of the rule. It is inconsistent with the general principle that a power to make exceptions *presupposes* the existence of a rule.[2] Indeed, the defendants find s 9A(6) lacking in limits only because they do not accept that s 9A(1) has substantive content.

10. Contrary to DS [36]–[37] and [41], there is no significance in the circumstance that the 2013 Amending Act did not repeal s 5(13). It overstates the position to say that the "sole effect" of s 5(13) is to prevent vessels from falling within the migration zone {DS [36]}. Section 5(13) is part of the definition of "Australian resources
30 installation". It mirrors an identical provision in the *Customs Act 1901* (Cth),[3] under which Australian resources installations are subject to customs control.[4] Although the Migration Act definitions do not directly affect the scope of the customs regime, there is an obvious legislative scheme to use the same definitions across the two regimes. Variation of the migration regime as it applies to vessels would therefore *not* be expected to be achieved simply by expanding the definition of a resources installation, nor can it be said that s 5(13) is "otiose" on the plaintiffs' construction of s 9A. On the contrary, s 5(13) serves at least to maintain consistent definitions of "Australian resources installation" across the migration and customs regimes.

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[2] *Cockle v Isaksen* (1957) 99 CLR 155 at 165, 168; PS [41]–[43], [46].
[3] Section 4(8). See also ss 4(1) ("Australian resources installation", "Resources installation"), 4(5)–(9), 5C.
[4] Section 33A.

**Characterisation of Determination**

11. Contrary to DS [60.1], the Determination *does* affect Australian citizens in the offshore resources industry. Contrary to DS [3.3], but consistently with DS [60.2], the Court should examine both the legal and practical operation of the Determination.[5]

12. The legal operation of the Determination is to narrow the meaning of "offshore resources activity" in s 9A(5), thereby narrowing the field of activity in respect of which a person's participation or support will bring the person within the migration zone and the requirement to hold a permanent or prescribed visa. One aspect of the practical operation of the Determination, it is common ground, is that *non-citizens* participating in or supporting activities encompassed by the Determination will not need a visa of any kind. Another aspect of the practical operation is that *citizens* no longer enjoy the exclusive privilege to participate in or to support those activities without a visa. Indeed, the Determination negatives that privilege by putting non-citizens and citizens on an equal footing in respect of their legal rights to work in the offshore resources industries. The defendants' error in overlooking this aspect of the Determination's practical operation infects their attempt to cast the Determination as one of limited or narrow effect.

13. Even if it were appropriate to consider only the effect of the Determination on work performed by foreign nationals, the defendants' so-called "preferable analysis" {DS [59]} is wrong. If the Determination is characterised as affecting only non-citizens who would otherwise need a visa to work, then s 9A ought consistently to be characterised as extending the visa requirement only to the non-citizens who (unlike citizens) are affected by visa requirements. Calculating the quantitative effect of the Determination would then be an exercise not in counting *non-citizens* as a proportion of *all persons* who work in the industry {DS [59]}, but rather in counting *affected* non-citizens as a proportion of *all non-citizens* who work in the industry. That exercise produces the following (the bold values are derived, the other values are taken from Attachment 3):[6]

| | 2011 | | 2012 | | 2013 | | 2014 | | 2015 | |
|---|---|---|---|---|---|---|---|---|---|---|
| **Exploration** | | **%FN** | | **%FN** | | **%FN** | | **%FN** | | **%FN** |
| MU not touching | | 1.27% | | 1.11% | | 1.47% | | 1.52% | | 2.74% |
| Not MU | | 0.00% | | 0.00% | | 0.00% | | 0.00% | | 0.00% |
| **Construction** | | | | | | | | | | |
| MU not touching | | 0.13% | | 0.12% | | 0.14% | | 0.09% | | 0.09% |
| Not MU | | 4.86% | | 4.91% | | 3.57% | | 6.01% | | 7.06% |

[5] *Williams v City of Melbourne* (1933) 49 CLR 142 at 155 (Dixon J); *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at [117]–[119], [123], [139] (Hayne J).
[6] SCB 262.

| Production | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| MU not touching | *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 (0.02% in each year).* | | | | | | | | | |
| Not MU | | 0.00% | | 0.00% | | 0.00% | | 0.00% | | 0.00% |
| | *Total FN* | ***Affected FN*** | *Total FN* | ***Affected FN*** | *Total FN* | ***Affected FN*** | *Total FN* | ***Affected FN*** | *Total FN* | ***Affected FN*** |
| | *9.4%* | ***6.26%*** | *9.7%* | ***6.14%*** | *9.5%* | ***5.18%*** | *11.7%* | ***7.62%*** | *13.0%* | ***9.89%*** |
| *Affected FN as % of Total FN* | | ***66.6%*** | | ***63.3%*** | | ***54.5%*** | | ***65.1%*** | | ***76.0%*** |

14. The quantitative effect of the Determination, if measured by reference only to manhours worked by foreign nationals, is therefore *worse* for the defendants' case than if measured by reference to all manhours worked. It excludes about *two-thirds* of the industry measured by foreign manhours (five-year average of 65.1%) and an increasing percentage in recent years (cf Plaintiffs' Submissions at [36]–[37]).

**Other matters**

15. **Revoked Determination IMMI 15/073**: Contrary to DS [8.4]–[8.5], the Determination did not "completely reverse" the revoked determination such that "every operation or activity that fell within Determination IMMI 15/073 now falls outside the exception made by the Determination". The revoked determination excepted operations and activities "involving" an Australian resources installation;[7] the impugned Determination excepts operations and activities "to the extent [they] use" a vessel or structure that is not an Australian resources installation.[8] There are many operations and activities which "use" a vessel or structure that is not an Australian resources installation which nonetheless "involve" an Australian resources installation. For example, *all* of the s 5(13) vessels are in terms identified by reference to their relationship with a resources installation and may therefore have been engaged in operations or activities "involving" an Australian resources installations within the meaning of the revoked determination.

16. **Future foreign labour**: Contrary to DS [62.3], the plaintiffs are not "supplementing" the Special Case by submitting that the Determination will enable or authorise levels of foreign labour exceeding those reflected in the 2011-2015 data. That future enablement is not a proposition of fact but one of (subordinate) legislative purpose: "*a non-citizen ... is not taken to be in the migration zone*".[9]

17. **Alleged specialised labour**: Contrary to DS [63], when Mr Kint said that "most of the foreign crew on these vessels consist of the specialised technical personnel running the survey equipment",[10] he was expressly referring only to *survey vessels* and not, as the defendants wrongly submit, to the "vessels that are not Australian

[7] SCB 192.
[8] SCB 201.
[9] SCB 203 (Explanatory Statement for Determination IMMI 15/140).
[10] SCB 246.27-28. See also at 247.26-28.

resources installations" *simpliciter*. The "specialised technical personnel" used on *survey* vessels does not explain the use of foreign labour on *non-survey* vessels such as pipelay vessels, supply boats (PSVs), transport barges, and other construction vessels — which was, in fact, the major use of foreign labour in 2011-2015.[11] The "specialised labour" is the *only* "special feature or characteristic" which the defendants raise in defence of the Determination and, as the agreed facts show, that is simply not a special feature or characteristic of the Determination at all.

18. **Australian ports**: Contrary to DS [64], the defendants are not assisted by the proposition that some s 5(13) vessels come into Australian ports and thereby enter the migration zone independently of s 9A(5). First, as the defendants concede, the Determination still operates to relieve personnel on those vessels from the requirement to have a visa of a kind specified in s 41(2B). Secondly, whether a vessel enters a port is entirely contingent and cannot properly inform the validity of the Determination. As Mr Kint explained, whether a given vessel will enter an Australian port "deserves an answer of the '*it depends*' type".[12] In the "overwhelming majority of cases" vessels take on crew in a foreign port.[13] The "primary reason" governing whether to come into an Australian port before or after offshore work is "cost".[14] It therefore cannot be said, as the defendants suggest, that vessels performing work excepted by the Determination will come into port in any event. The agreed facts are that vessels: *do not need* to come into an Australian port; *will not* come into port if it is commercial not to do so; and *already* take on crews in foreign ports in the "overwhelming majority of cases". One practical effect of the Determination, if its validity is confirmed, is that those vessels, in those foreign ports, can take on foreign instead of Australian crews (and will if it is commercial to do so) without immigration consequences when they arrive in the Australian offshore.

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[11] SCB 265–267 (items 3, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 in the "Construction" part of Attachment 4); SCB 262 (the "Not Mobile Unit" line under the "Construction" heading of Table 3).
[12] SCB 243.35.
[13] SCB 243.44–49.
[14] SCB 244.32–34.