This submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Migration Amendment (Offshore Resources Activity) Repeal Bill is a joint submission from the Department of Immigration and Border Protection and the Australian Customs and Border Protection Service.

1. Introduction

The repeal of the *Migration Amendment (Offshore Resources Activity) Act 2013* (the ORA Act) is consistent with the government's policy of removing unnecessary regulation which impacts negatively on industry. Consistent with industry consultations undertaken following passage of the ORA Act, repeal would provide certainty regarding the relationship between the migration zone and the offshore resources industry to business and individuals engaged in offshore resources activities.

2. Background

The way the migration zone applies to offshore resources activity has been contentious for many years. The migration zone defines the area of Australia where a non-citizen must hold a valid visa to legally travel to, 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. (The exception to this is that an allowed inhabitant of the Protected Zone who is in a protected area in connection with the performance of traditional activities is a lawful non-citizen and therefore does not require a visa. This refers to a citizen of Papua New Guinea who is a traditional inhabitant the Protected Zone, which is established under the Torres Strait Treaty).

Section 5 of the Migration Act provides that the migration zone means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes:

- the land that is part of a State or Territory at mean low water;
- sea within the limits of both a State or a Territory and a port; and
- 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.

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.

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. The operative provisions in the ORA Act will commence on 29 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.

3. Purpose of the ORA Act

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 thus the requirement to hold and comply with a valid visa, to all offshore resources activity, 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.

4. Repeal of the ORA Act

The Department of Immigration and Border Protection (DIBP) notes the complex interrelationship of international and domestic regulatory frameworks which govern employment in the offshore resources sector.

At an operational level, the introduction of the ORA Act will not regulate the employment conditions of the range of occupations held by workers on offshore resources vessels, most of whom will not come onshore.

The Australian Customs and Border Protection Service (ACBPS) notes that the ORA Act does not address the complexity of operations in the offshore environment, especially in regard to obligations requiring notification that visa holders working on offshore resources vessels or installations that are not attached to the seabed.

4.1 Impact on the Offshore Resources Industry

Concerns with the ORA Act have been consistently raised by industry groups, who have emphasised the industry's reliance on a highly mobile workforce and the need to transfer workers with specialist skills from project to project, and from country to country, sometimes at very short notice.
The industry has warned that the ORA Act could jeopardise the viability of current and future oil and gas projects.

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 less 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 would actually be in the migration zone at any given time.

4.2 Impact on employment conditions for offshore resources workers

The offshore resources industry operates in a complex and overlapping regulatory framework, including international conventions and Commonwealth, State and Territory legislation. Repeal of the ORA Act will have no impact on these existing laws.

Terms and conditions of employment will continue to be protected and enforced under domestic laws or 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 domestically or under international law 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 hold valid visas to be immigration cleared when they transit through an Australian port 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.

4.3 Issues concerning Customs and Immigration clearance

The ACBPS notes that repealing the ORA Act prior to or as soon as possible after its commencement would give the most certainty to the offshore oil and gas industry

While the ORA Act addresses visa requirements, it does not cover obligations regarding notification that those visa holders will be in the offshore environment. Because the current pre-arrival requirements are linked to a vessel arriving in a port, there is currently no provision that can be used to require a vessel to report when it arrives into an offshore installation not attached to the seabed. Accordingly, the opportunity exists for enhanced legislative alignment through repeal of the ORA Act.

Administration of the ORA Act would have a significant impact on the ACBPS' border management resources and systems, given the ACBPS administers immigration clearance on behalf of the Department of Immigration and Border Protection. Managing border clearance on vessels that travel to remote offshore infrastructure would be resource intensive and expensive.