AIMPE

Australian Institute of
Marine and Power Engineers

THE SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Inquiry into the Migration Amendment (Offshore Resources Activity) Repeal Bill 2014

Submission of the

Australian Institute of Marine and Power Engineers

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ABOUT THE AUSTRALIAN INSTITUTE OF MARINE AND POWER ENGINEERS

The Australian Institute of Marine and power Engineers ("the Institute") was formed in 1881. The Institute represents the professional and industrial interests of marine engineers, marine electricians and marine surveyors. Today, the Institute has around 3000 members who are employed on merchant ships (both coastal and international), offshore industry vessels, tugboats, dredges, transport safety authorities and many other specialised vessels.

After wide consultation with our members and some operators in the offshore resources industry, this submission was prepared.

EXECUTIVE SUMMARY

How the Senate Should Proceed

The Senate should reject the Migration Amendment (Offshore Resources Activity) Repeal Bill 2014.

The Institute strongly opposes this Bill and we are asking all parliamentarians to reject this Bill because:

All Australian jobs should be regulated by Australian law, including the Migration Act where appropriate.

Non-Australian citizens who intend to work in this country must be regulated by a visa.

The visa system enables the Government to checks for any security risks non-citizens might pose to the Australian community.

Enables the Government to know who is physically present around Australia's resource industry.

Health checks are not carried out where visa coverage is not required.

The Migration Amendment (Offshore Resources Activity, 2013) ("the ORA Act") is not inconsistent with international law.

In this submission the Institute outlines the reasons for its view that the ORA Act needs to be maintained and improved. In fact, we were of the view that the ORA Act does not go far enough. The Institute expressed it concerns in the following terms:

It is submitted that the way to avoid the enforcement nightmare and ensure comprehension application of Australia's migration laws to personnel on vessels engaged in offshore resources activity is the delete the preferences to "in an area" and replace them with the concept of the Exclusive Economic Zone {the Institute submission to the Senate inquiry into the migration Amendment (Offshore Resources Activity) Bill 2013 prepared by Martin Byrne, June 2013}. All OECD countries have laws that enable those countries to enforce their laws in the Exclusive economic zone. The ORA Act need to be given the opportunity to be implemented and enforced before it is revisited.

In the light of these concerns, the Institute recommends that the Bill not be passed.

INTRODUCTION

1. The Institute is grateful for the opportunity to provide the following submission to the Senate Legal and Constitutional Affairs Legislation Committee (“the Committee”) in response to its inquiry into the Migration Amendment (Offshore Resources Activity) Repeal Bill 2014(“the Bill”).

2. This Bill, introduced on 27 March 2014 by the Hon. Scott Morrison MP, Minister for Immigration and Border Security (“the Minister”), seeks to repeal the Migration Amendment (Offshore Resources Activity) 2013 Act (”the ORA Act”).

3. The Institute opposes the repeal Bill, and encourages the Committee to recommend that it not be passed.

4. The Institute have previously supported the ORA Act although its view was that the ORA Act did not go far enough.

5. If the ORA Act is repealed and not replaced with another Act, then Australian laws and wages and conditions will not apply in the resources sector pursuant to the Allseas decision (”the case”).

6. The institute notes that this Committee has previously considered the merits of the Migration Amendment (Offshore Resources Activity) regime in detail when it enquired into a 2013 Bill which introduced the protections to those ultimately enacted in June 2013 with the recommendations of this Committee.

7. The judgment of the Federal court of Australia in Fair Work Ombudsman v Pocomwell Limited and Others (“the Pocomwell case”) give strong grounds for arguing for the validity of section 9A of the ORA Act (and amendment suggested earlier) and why the ORA Act needs to be maintained.

8. The Institute remains of the view that the ORA provisions, which will come into operation in just over two months, can be shown to be necessary to address genuine needs and preferable to a non-statutory approach.

9. The ORA Act provides a solution to the problem created by the Allseas decision and ensures advantages for all stakeholders. It provides business with pliability and unions with belief that the wages and conditions of their members will not be undermined by extra cheap foreign labour. Moreover, it allows Australia to catch up with the rest of the OECD countries by asserting its sovereign rights and bring all of these Australian jobs within the coverage of Australian law.

10. ALL AUSTRALIAN JOBS SHOULD BE REGULATED BY AUSTRALIAN LAW

The institute is of the view that Australian jobs should be subject to Australian laws and including the Migration Act where appropriate. As these jobs take place in Australia’s exclusive economic zone and on natural resources in which Australia has sovereign rights, non-citizens should be regulated in all areas over which Australia has jurisdiction. Institute members have reported many cases of abuse where non-citizens were not being paid Australian wages and conditions. Moreover, some were terminated pursuant to the laws of other countries. By regulating these jobs, it will ensure that companies will look to employ Australians first before looking overseas and more importantly will ensure that companies start training young Australian, something which this particular sector has done very little in the past. Training is crucial to this country and it about time this sector does it fair share.

11. NON-AUSTRALIAN CITIZENS WHO INTEND TO WORK IN THIS COUNTRY MUST BE REGULATED BY A VISA.

Currently, the Australian Government does not know how many non-citizens are working within the offshore resource sector due to the fact there is no visa requirement for all non-citizens working in this industry. And the industry does not reveal those figures, because such numbers are big or because they cannot distinguish between those who are holding 457 visas, 600 visas and non-visas. The western Australian Government has revealed figures showing somewhere between 6000 and 8000 are currently employed in the offshore sector, but it is not easy to see how many of these workers are non-citizens. Those numbers are certainly big numbers which might be of interest to the Taxation Commissioner if they are required to have visas.

12. SECURITY CHECKS

The visa system which will commence on June 30 2014 will enable the Government to conduct checks for any security risks non-citizens might pose to the Australian community. Currently, in Australia, we have a requirement that requires Australian workers working in that sector to obtain a maritime security identification card (MSIC) which looks at a worker's past criminal record. The European countries have no such requirement. It is implausible that workers are working in our exclusive economic zone and we have no idea who they are. They are in a position to cause enormous damage to this country at no notice whatsoever. If we do not know physically who is working in the oceans around our coast and in our resource industry, these non-citizens could cause enormous damage.

13. HEALTH CHECKS

At present, Australians do enjoy some of the best health standards in the world. Under the immigration laws you must meet the health requirements unless a waiver is available. But never an applicant is granted a visa where the applicant is found to have an active tuberculosis (TB). Australian workers will come into contact with those workers and it is likely that they can contract a disease which will become a significant public health threat and ending up costing the community and the country enormously. There is no need to continue to take up that risk.

14. THE ORA ACT IS NOT INCONSISTENT WITH INTERNATIONAL OBLIGATIONS

The ORA Act is needed as it fills the void left open by the Migration Act whose application in the offshore resources industry has become inconsistent and virtually impossible to understand from any view whether legal or policy perspective. Disputes as to whether vessels were in the migration zone or not were constantly occurring. That uncertainty has led to the industry challenging successfully the Government's application of the Migration Act to non-citizens working on pipe – laying vessels in the now famously known case as the "Allseas case".

There is no doubt that in terms of modern international law, the relevant provisions of the Migration Act are now antiquated and has not kept pace with developments in technology which in effect means that attachment to the seabed is far less a significant factor in the offshore resources industry. That reliance on attachment to the seabed appears to come from a time before the establishment and acceptance of the exclusive economic zone dating back to 1958 (Continental Self Convention) and came into effect in 1964.

Under international law, the rights and obligations of coastal states in relation to their territorial sea, exclusive economic zone (EEZ), seas above the extended continental shelf (ECS) and the high seas have been essentially codified. The United Nations Convention on the Law of the Sea (UNCLOS or the Law of the Sea Convention) defines the rights and responsibilities of coastal nations in their use of

the world's oceans. The law of the Sea Convention was ratified by Australia in 1994 and given effect to in Australian law to a certain extent by the Seas and Submerged Lands act 1973 (CTH). Under articles 56 and 57 of UNCLOS, Australia has sovereign rights to legislate to cover the EEZ where Australian jobs are concerned and where Australian natural resources are concerned.

The Pocomwell case has illuminated a number of terms relevant to determining the geographical application of the Fair work Act 2009, (FWA, CTH) in Australia's EEZ. In this case Filipino oil rig workers were paid less than $3.00 per hour. The company was successful in claiming neither they nor their Filipino employees are subject to Australian law. Justice Barker stated that a "fixed platform" needs to be permanently attached to the sea-bed and it does not include mobile drilling units that can be moved around from one well to another. Importantly, the said Judge declared that the application of the FWA extends to foreign flagged ships engaged in the exploration of natural resources in Australia's EEZ is not inconsistent with international law.

In the above-mentioned case, the Federal Court interpreted Australia's sovereign rights as a coastal state under UNCLOS to include power to make laws with respect to labour relations on foreign flagged ships engaged in the exploration of natural resources in Australia's EEZ.

Significantly, the Minister makes no mention of the Pocomwell case in the Regulation impact statement (OBPR ID: 2014/16740). It does not address the concerns raised by this case.

15. THE ORA ACT IS NOT INCONSISTENT WITH OTHER COMMONWEALTH LEGISLATION

The Migration Act's application in the offshore resources industry is inconsistent with the application of the Offshore Petroleum and Green House Storage Act (OPGGSA, 2006, CTH) and Offshore Minerals Act (OMA, 1994, CTH). Whereby, those Acts regulates all activities being conducted in the industry, the Migration Act is only limited to regulating the status of non-citizens workers in the industry who are working on installations of vessels who are attached to the seabed.

The ORA Act operates consistently with the FWA). For example section 33 extends its application to the exclusive economic zone and the waters above the continental shelf. And that includes any ship which supplies services or otherwise operates in connection with a fixed platform in the EEZ or the Continental Shelf. However, the Allseas case highlighted the legal loophole that personnel on vessels in these waters are not covered by the Migration Act.

16. CONCLUSION

The repeal of the ORA Act will result in loss of Australian jobs to foreign workers. Companies in this sector will continue to do minimum training of young Australians. The economy will suffer as a result. Foreign workers with no visas pay no income tax and their monies are not spent in this economy. Members are extremely concerned about loss of their jobs and the impact it will have on their wages and conditions. The security and health risks are not acceptable to many Australians and can put enormous pressures on the economy in case of breach of those risks.

The Bill seeks to remove statutory protections designed to allow Australian laws to apply on Australian territory and the EEZ which is consistent with international law and the laws of all OECD states. The law of another country should be not allowed to apply in Australia and its sovereign rights over the EEZ. In addition to providing protection against the laws of other states applying in Australia and its EEZ, the ORA Act provisions provide clear, transparent and consistent legal framework in determining whether a non-citizen is in the migration zone. Moreover, the ORA ACT is consistent with other Commonwealth laws. Repealing the ORA Act could lead Australia back to an antiquated Migration Act that has failed to keep pace with technological developments and modern international law.

The Repeal of the ORA Act is not in the National Interest. In the words of Chris Christie (Governor of New Jersey, USA) “We pay a price when special interests win out over the collective national interest”.

17. RECOMMENDATION:

The Institute recommends that the Bill not be passed.