AUSTRALIAN MARITIME OFFICERS UNION ABN 56 181 230 800

Incorporating: Merchant Service Guild of Australia and Australian Stevedoring Supervisors Association

Monday, 28 April 2014

Migration Amendment (Offshore Resources Activity) Repeal Bill 2014.

The Australian Maritime Officers Union strongly urges the Government not to repeal this legislation.

The Australian Maritime Officers Union (AMOU) was formed in 1993 when the Merchant Service Guild and the Australian Stevedoring Supervisors Association amalgamated. With a proud history extending back to the 1880s the AMOU is uniquely placed to represent mariners as well as professional, administrative, supervisory and technical employees in the port and marine authorities, tug boat industry, stevedoring / terminals, pilotage services, port operations, ferry services, charter and tourist vessel, coastal trade, offshore oil and gas industry and floating production vessels.

The AMOU is registered by the Australian Industrial Relations Commission and in accordance with the employment laws of Queensland, New South Wales and Western Australia. This enables the AMOU to represent members in the Federal and State legal jurisdictions. The AMOU is also a federated member of the International Transport workers Federation and a participant of the International Maritime Organisation.

The AMOU consists of 3894 members, a large number of our Members work in the offshore oil and gas industry.

In our submission to the Gillard government in support of a legislative response to the Federal Court decision, a copy is attached below, we stated that the Allseas decision had undermined the employment opportunities for Australian seafarers and deprived the Australian Taxation Office of at least $187,500 for each week the vessel was engaged in Australian waters in income taxation receipts alone.

At a time when Treasurer Joe Hockey has signalled wide-ranging cuts to come in the May federal budget, warning that “the challenge is that everyone in Australia has to help to do the heavy lifting in the budget, because if the burden falls on a few, the weight of that burden will crush them; why would this government allow foreign workers to work in Australia and pay no tax?

According to the Explanatory Memorandum, “The introduction of a visa (ORWV) requirement would only create red tape in order to confirm the status of a foreign national in the migration zone.” The current legislation is not just about confirming an employee’s nationality; it also ensures that foreign workers pay tax which will assist in balancing the budget.

If you require further information, please do not hesitate to contact Jan Thompson.

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Department of Immigration inquiry into the Migration Act / Alseas Decision.

The Australian Maritime Officers Union is pleased to participate in the Department of Immigration inquiry into the Migration Act 1958 as a consequence of the Allseas Decision.

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Department of Immigration and Citizenship Objectives
The AMOU commends the Department of Immigration's objective of reviewing the Migration Act 1958 to ensure that the loophole that allowed foreign waters to work in Australian waters without any visa be closed.

MIGRATION ACT 1958 - SECT 5 –
(10) A reference in this Act to a resources industry fixed structure shall be read as a reference to a structure (including a pipeline) that:

(a) is not able to move or be moved as an entity from one place to another; and

(b) is used or is to be used off-shore in, or in any operations or activities associated with, or incidental to, exploring or exploiting natural resources.

(11) A reference in this Act to a resources industry mobile unit shall be read as a reference to:

(a) a vessel that is used or is to be used wholly or principally in:

(i) exploring or exploiting natural resources by drilling the seabed or its subsoil with equipment on or forming part of the vessel or by obtaining substantial quantities of material from the seabed or its subsoil with equipment of that kind; or

(ii) operations or activities associated with, or incidental to, activities of the kind referred to in subparagraph (i); or

(b) a structure (not being a vessel) that:

(i) is able to float or be floated;

(ii) is able to move or be moved as an entity from one place to another; and

(iii) is used or is to be used off-shore wholly or principally in:

(a) exploring or exploiting natural resources by drilling the seabed or its subsoil with equipment on or forming part of the structure or by obtaining substantial

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quantities of material from the seabed or its subsoil with equipment of that kind; or

(b) operations or activities associated with, or incidental to, activities of the kind referred to in sub-subparagraph (a).

(12) A vessel of a kind referred to in paragraph (11)(a) or a structure of a kind referred to in paragraph (11)(b) shall not be taken not to be a resources industry mobile unit by reason only that the vessel or structure is also used or to be used in, or in any operations or activities associated with, or incidental to, exploring or exploiting resources other than natural resources.

(13) The reference in subparagraph (11)(a)(ii) to a vessel that is used or is to be used wholly or principally in operations or activities associated with, or incidental to, activities of the kind referred to in subparagraph (11)(a)(i) shall be read as not including a reference to a vessel that is used or is to be used wholly or principally in:

(a) transporting persons or goods to or from a resources installation; or

(b) manoeuvring a resources installation, or in operations relating to the attachment of a resources installation to the Australian seabed.

(14) A resources installation shall be taken to be attached to the Australian seabed if:

(a) the installation:

(i) is in physical contact with, or is brought into physical contact with, a part of the Australian seabed; and

(ii) is used or is to be used, at that part of the Australian seabed, wholly or principally in or in any operations or activities associated with, or incidental to, exploring or exploiting natural resources; or

(b) the installation:

(i) is in physical contact with, or is brought into physical contact with, another resources installation that is taken to be attached to the Australian seabed by virtue of the operation of paragraph (a); and

(ii) is used or is to be used, at the place where it is brought into physical contact with the other installation, wholly or principally in or in any operations or activities associated with, or incidental to, exploring or exploiting natural resources.

(15) Subject to subsection (17), for the purposes of this Act, a sea installation shall be taken to be installed in an adjacent area if:

(a) the installation is in, or is brought into, physical contact with a part of the seabed in the adjacent area; or

(b) the installation is in, or is brought into, physical contact with another sea installation that is to be taken to be installed in the adjacent area because of paragraph (a).

(16) For the purposes of this Act, a sea installation shall be taken to be installed in an adjacent area at a particular time if the whole or part of the installation:

(a) is in that adjacent area at that time; and

(b) has been in a particular locality:

(i) that is circular and has a radius of 20 nautical miles; and

(ii) the whole or part of which is in that adjacent area; for:

(iii) a continuous period, of at least 30 days, that immediately precedes that time; or

(iv) one or more periods, during the 60 days that immediately precede that time, that in sum amount to at least 40 days.

(17) Where a sea installation, being a ship or an aircraft:

(a) is brought into physical contact with a part of the seabed in an adjacent area; or

(b) is in, or is brought into, physical contact with another sea installation that is to be taken to be installed in an adjacent area; for less than:

(c) in the case of a ship, or an aircraft, registered under the law of a foreign country--30 days; or

(d) in any other case--5 days;

it shall not be taken to be installed in that adjacent area under subsection (15).

(18) A sea installation shall not be taken to be installed in an adjacent area for the purposes of this Act unless it is to be taken to be so installed under this section.

(19) Subject to subsection (21), for the purposes of this Act, a sea installation shall be taken to be installed in a coastal area if:

(a) the installation is in, or is brought into, physical contact with a part of the seabed in the coastal area; or

(b) the installation is in, or is brought into, physical contact with another sea installation that is to be taken to be installed in the coastal area because of paragraph (a).

(20) For the purposes of this Act, a sea installation (other than an installation installed in an adjacent area) shall be taken to be installed at a particular time in a coastal area if the whole or part of the installation:

(a) is in that coastal area at that time; and

(b) has been in a particular locality:

(i) that is circular and has a radius of 20 nautical miles; and

(ii) the whole or part of which is in that coastal area; for:

(iii) a continuous period, of at least 30 days, that immediately precedes that time; or

(iv) one or more periods, during the 60 days that immediately precede that time, that in sum amount to at least 40 days.

(21) Where a sea installation, being a ship or an aircraft:

(a) is brought into physical contact with a part of the seabed in a coastal area; or

(b) is in, or is brought into, physical contact with another sea installation that is to be taken to be installed in a coastal area; for less than:

(c) in the case of a ship, or an aircraft, registered under the law of a foreign country--30 days; or

(d) in any other case--5 days;

it shall not be taken to be installed in that coastal area under subsection (19).

(22) A sea installation shall not be taken to be installed in a coastal area for the purposes of this Act unless it is to be taken to be so installed under this section.

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Allseas Decision

"By operation of s 5(13) of the Migration Act 1958 (Cth) as in force at the date of this order (the Act), the Solitaire and Lorelay (the Vessels) will not be 'resources installations' within the meaning of the Act while they are wholly or principally engaged in operations relating to the installation of offshore pipelines for the Gorgon and Jansz gas fields pursuant to the applicant's contract with Chevron Australia Pty Ltd executed on 29 October 2009 (the Works).

From the date of this order, and to the extent that the Vessels do not enter the area consisting of the States and Territories within the meaning of the definition of 'migration zone' in s 5(1) of the Act."

AMOU Submission

The Federal Court decision to allow Allseas Construction to employ foreign workers in Australian waters without any visas was very surprising as we believed that Australia had a clear right to regulate the resources in the territorial sea, or in the continental shelf, however the legislation does not support that proposition, hence the reasoning of the Judge in the Allseas Decision.

A closer examination of the s5 of the Migration Act 1958, in relation to a definition of a resource installation is convoluted and allows loop holes not to comply with the legislation. For many years the multinationals that largely explore the Australian waters for our resources have respected the premise that Australia has a clear right to regulate the resources of its waters. There has been a paradigm shift of attitude from the multinationals, we appreciate that there has been a global financial crisis, however multinationals that wish to explore our resources should respect our laws including our labour laws. Although the intent of Allseas was to pay lower wages to the workers on the Lorelay and Solitare, the ramification are potentially far more reaching, we understand the Migration Act definition of a "resource installation" is also included in other legislation.

The Allseas decision also raises the question whether or not the company operating the "resource installation' has to comply with our Occupational Health and Safety Legislation, or actually even pay Australia for our resources, if they can somehow extract our resources without actually attaching themselves to the seabed.

We note that the *Offshore Petroleum and Greenhouse Gas Storage Act 2006,* does not refer to "resource installations", instead making reference to "Infrastructure facilities" which is defined as:

(1) For the purposes of this Act, an infrastructure facility is a facility, structure or installation for engaging in any of the activities to which subsection (2) or (3) applies, so long as:

(a) the facility, structure or installation rests on the seabed; or

(b) the facility, structure or installation is fixed or connected to the seabed (whether or not the facility is floating); or

(c) the facility, structure or installation is attached or tethered to a facility, structure or installation referred to in paragraph (a) or (b).

Obviously, the offshore oil and gas industry is a dangerous working environment and the ramifications for workers and the environment is enormous as confirmed by the Piper Alpha and Exxon Mobil incidents.

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In relation to the labour laws in Australia, the Allseas Decision in effect ruled that the 125 overseas employees working on the natural gas project off the coast of Western Australia aboard these two vessels did not need to obtain 457 visas, consequently there was no obligation to offer the pay and conditions offered to Australian workers and 457 visa holders.

The obvious consequence of this decision is to jeopardise the employment opportunities for Australian seafarers working in the offshore oil and gas industry. For Members of the AMOU, the offshore oil and gas industry is a significant employer of our Members and up until now has provided well paid and continuous employment with good prospect of career development.

Previously when our Members were engaged on the Lorelay or the Solitare, our Members were paid in accordance with the *Offshore Oil and Gas Industry Agreements*, on average our members would have earned approximately $5400 per week and paid approximately $2200 in taxation. Similar taxation receipts would have been paid by the Marine Engineers and lesser rates for the remaining crew. However if we presume the average taxation receipts for the entire crew is a conservative amount of $1500, the Allseas decision has deprived the Australian Taxation Office of at least $187,500 for each week the vessel was engaged in Australian waters in income taxation receipts alone.

It is our submission that the legislation was flawed in its original drafting as it has failed to take into consideration the advances in technology. The, Lorelay for example was the world's first pipelay vessel to operate on full dynamic positioning (DP), this represented a new generation of offshore pipelaying vessels and "in 1996 she extended the limits of S-lay installation, rewriting the industry record books in the process, by laying pipe at a depth of 1,645 m (5,400 ft)".

"Dynamic positioning (DP) is a computer-controlled system to automatically maintain a vessel's position and heading by using its own propellers and thrusters. Position reference sensors, combined with wind sensors, motion sensors and gyro compasses, provide information to the computer pertaining to the vessel's position and the magnitude and direction of environmental forces affecting its position. The computer program contains a mathematical model of the vessel that includes information pertaining to the wind and current drag of the vessel and the location of the thrusters. This knowledge, combined with the sensor information, allows the computer to calculate the required steering angle and thruster output for each thruster. This allows operations at sea where mooring or anchoring is not feasible due to deep water, congestion on the sea bottom (pipelines, templates) or other problems. There are currently more than 1800 DP ships" worldwide.

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At the time of the amending of the original Migration Act 1958, in the early 1970s , the concept of exploring natural resources without being attached to the seabed would not have even been contemplated by industry, let alone the legislators.

As a comparison of the technology, the Seaway Falcon, a vessel familiar with Australians seafarers as they replaced the entire crew on the installation of a 32km, 12 inch diameter pipeline for the Casino Field located in Australia's Bass Strait in February 2005. In 2002 the Seaway Falcon successfully completed a deepwater subsea to subsea installation, including one flowline and one umbilical, for Shell's single well Einset project in 3,463 feet of water on Viosca Knoll Block 872 in the Gulf of Mexico. At the time, this was news worthy, Bjorn Koi, Stolt's project manager said "Subsea to subsea installations are 'rare' in the industry but may become more prevalent as we move into deeper waters. To date, most subsea tie-backs have been supported by host platforms in shallower water. "In the case of Einset, we tied back a new deepwater well to existing subsea infrastructure, also located in deepwater. This achievement demonstrates how the industry is applying proven technology while effectively utilizing deepwater construction vessels, such as Stolt's Seaway Falcon,".

The questions that needs to be answered is why is that previously specialist vessels such as pipelaying vessels like the Lorelay, Solitare, and Seaway Falcon could be fully manned and operated successfully by Australian seafarers and the Australian seafarers could be paid the rates of pay and conditions of employment provided by the relevant *Offshore Oil and Gas Industry Agreements*. We do not believe that Australian seafarers have lost their skills or expertise, the problem is the multinationals want to make more profit than they did before by exploiting foreign workers.

Lorelay

Seaway Falcon

Once again we reiterate that the legislators and the people of Australia would expect that Australia had a clear right to regulate the resources in Australian waters. In a review of the legislation we would urge the Government to ensure that all "facilities" involved in the exploration of our natural resources in our water as defined by the broader maritime zone known as the "Exclusive Economic Zone" rather than the narrower "Territorial Seas" come under the Migration Act 1958.

Ensuring that the workers engaged on these facilities in our "Exclusive Economic Zone" come under our laws is paramount. However we would also like to take this opportunity to raise our concerns about the abuse of the 457 visa, especially in the offshore oil and gas industry.

Australian Worker is Available, but 457 Visa Holder Engaged - Lack of Transparency
The issuing of 457 Visa's seems to occur without any regard to the availability of Australian's seeking work. Currently we have 70 Members with the appropriate Certificates of Competency available for work in Australia. Initially, when the 457 visa program was introduced, vessels may have had one or two foreign seafarers on them, now we are witnessing near on full

manning of foreign seafarers, for example the Hallin Marine, subsea operations vessel the "SOV Carlisle" has just arrived in Australia to undertake a contract on the North West Shelf, it is currently manned by one Australian and 7 foreign Deck Officers. There is no requirement to engage Australians instead of 457 Visa holders. Ironically, a number of our unemployed Members are recent Immigrants under the skills shortage visa program and now they are unable to gain employment because a 457 Visa holder is performing the work that they could be performing and they are now in receipt of unemployment benefits.

The anecdotal evidence would suggest that 457 Visa holders engaged in the offshore oil and gas industry are not being paid the same conditions of employment as Australian seafarers. Our discussions so far with the Department of Immigration and the Fair Work Ombudsman have identified that there is a reluctance to investigate complaints, as both departments expect the beneficiary of the programme to complain about underpayments. If an overseas worker is earning $60,000 in their homeland, we do not believe that they are really going to complain if they are earning $120,000; compared to an Australian who would be paid $180,000!

Despite, the "Temporary Business (Long Stay) (subclass 457) visa booklet stating at page 17, "the department conducts monitoring … by exchanging information with other Australian, state and territory government agencies", it is our experience that both representatives from the Fair Work Ombudsman and the Department of Immigration seem reluctant to contact the Australian Taxation Office to confirm the wages and taxation that are being paid by 457 visa holders.

In order that foreign workers engaged on inferior wages and conditions, are not engaged over Australian workers' we urge the Department to implement Regulations that require more stringent testing that the vacancy cannot be filled by an Australian and confirmation of the applicable industrial instrument and the rates of pay for the position. The wages at least should be automatically monitored by taxation receipts and it should be an open process so that the Unions can also be involved.

$180,000 Exception to Market Salary Rate

A majority of our Masters and a significant number of our Deck Officers employed in the offshore oil and gas industry earn in excess of $180,000 and accrue a leave factor of 1.153 for each day of duty. AMOU seeks that the obligation to ensure equivalent terms and conditions of employment be enforced and the exception not to pay market salary rates, if the sponsored visa holder is paid above $180,000 is not applicable if an industrial instrument applies to the sponsor or to other employers in the equivalent industries.

Training Obligations

The 457 visa program requires the sponsor of overseas workers to demonstrate a contribution to the training of Australian workers. AMOU is unaware of any Australian being trained as a result of the employment of a 457 holder. We are aware that employers have been require to fund occupational health and safety representative training and other associated certificates on maritime projects and we suspect that this sum of money has been used to offset their training benchmarks as required by the Department of Immigration. This expenditure does not assist an Australia to fill the vacancy on the job now or in the future and more importantly the cost would have been incurred regardless of the engagement of a 457 visa holder.

The AMOU seeks that for every 457 holder, the sponsor should pay a formal course of study for their Australia employees and / or employee an Australia trainee. The process should be that transparent that overseas worker named X is engaged on a 457 visa and an Australian named Y is at this course in lieu of foreign worker X.

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Occupational Health & Safety
The Australian maritime industry and in particular the offshore oil and gas industry has developed a safety culture. In the case of the offshore oil and gas industry, the Commonwealth Statutory Agency, the National Offshore Petroleum Safety and Environmental Management Authority [NOPSEMA] regulates the health and safety; structural integrity; and environmental management of all offshore petroleum facilities in Commonwealth waters, and in coastal waters where State powers have been conferred.

Australian Masters who have come up from the IR trainee or Deck cadet training program, have had years of exposure to our health and safety regime, they have an intimate understand of the relevant OH&S regulation, and the importance of taking all reasonable steps to ensure that all work and other activities are carried out in a safe manner and minimise the health risk to any person at all times.

The anecdotal evidence is mounting that foreign workers especially engaged as Masters under the 457 visa immigration program do not have the relevant knowledge and experience of the safe working practices of the Australian offshore oil and gas industry and are therefore putting lives at risk.

In fairness to a foreign Master / Deck Officer, they may hold the appropriate Certificate of Competency, however if their past working environment is from a country that pays scant regard to health and safety, where life is cheap and the death of a worker is regarded as an inconvenience to production as they have to scrap the dead body off the floor and get another worker, then there is a strong argument that the employment of Foreign Masters, based on safety culture alone is a risk factor.

Skilled Occupation List and the Consolidated Sponsor Occupation List
AMOU seeks to have the occupations of Master and Deck Officer removed from the Skilled Occupation List (SOL) and the Consolidated Sponsor Occupation List (CSOL) – we note that four occupations were removed from the SOL list on 1 July 2012. Currently we have 70 members seeking work and our list of unemployed member is growing, yet the number of foreign workers engaged in the Australian maritime industry, especially the dredging and offshore oil and gas is increasing.

More importantly, the use of foreign seafarers on 457 visa's is detrimental to the training opportunities of young Australians, in order to train as a Deck Officer, a cadet needs to undergo course work at the maritime college and gain sea time on-board vessels. We have this insidious situation where the maritime colleges are full of young Australians funding their own studies only to be denied sea time from the industry as there is a preference to engage foreign workers on inferior wages and conditions.

We seek an urgent review of the 457 Visa program and once again thank the Minister of Immigration and Citizenship and his Department for extending us the opportunity to raise our concerns.

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