



**To** Assistant Minister for Immigration and Border Protection

**Subject** Offshore resources activity – Special Purpose Visa (SPV)

**Timing** Please action by 31 March 2015 to enable the SPV instrument to take effect.

**Recommendations**

That you:

- 1. sign the instrument at **Attachment B** giving effect to a declaration granting Special Purpose visas (SPVs) to non-citizens engaged in an offshore resources activity; and agreed / not agreed
- 2. sign the statement at **Attachment C** to be laid before both Houses of Parliament by 16 September 2015 setting out the contents of the SPV instrument and the reasons for making it. agreed / not agreed

**Assistant Minister for Immigration and Border Protection**

**Signature**.....

**Date**:...../...../2015

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Assistant Minister's Comments				
Rejected Yes/No	Timely Yes/No	<b>Relevance</b> <input type="checkbox"/> Highly relevant <input type="checkbox"/> Significantly relevant <input type="checkbox"/> Not relevant	<b>Length</b> <input type="checkbox"/> Too long <input type="checkbox"/> Right length <input type="checkbox"/> Too brief	<b>Quality</b> Poor 1.....2.....3.....4.....5 Excellent <b>Comments:</b>

### Key Issues

1. As foreshadowed in submission MS15-001332 (**Attachment A**), the department has prepared an instrument for your signature giving effect to a declaration granting Special Purpose visas (SPVs) to non-citizens engaged in an offshore resources activity (**Attachment B**).
  
2. This instrument engages your power under section 33(2)(b)(ii) of the *Migration Act 1958* ('the Act') and declares that all non-citizens who are in an area to participate in, or to support, an offshore resources activity are taken to have been granted SPVs by operation of law. Such SPV holders will be able to lawfully engage in an offshore resources activity when they are in the permit or licence area. If you sign it, a statement setting out the contents of the declaration and reasons for it must be laid before both Houses of Parliament by 16 September 2015. A statement to this effect for your signature is at **Attachment C**.
  
3. Section 41(2B) of the Act provides that "a condition of a visa that allows the holder of the visa to work is not taken to allow the hold to participate in, or support, an offshore resources activity" unless that visa is a permanent visa or prescribed in the regulations. The SPV provides a means for persons to engage in offshore resources activities without holding either a permanent or prescribed temporary visa as the SPV does not have a work condition that would be breached, and can be used without being prescribed in the regulations (regulations prescribing temporary visas were disallowed by the Senate in July 2014). The risks associated with this approach and longer-term solutions are outlined in submission MS15-001143 (**Attachment D**).

### Background

4. On 26 March 2015, the Full Federal Court declared that a determination made by you on 17 July 2014 under the Act was not authorised by section 9A(6) of the Act or otherwise and is invalid. The Court stated that the power to make a determination is for the purpose of making an exception, not for the purpose of denuding the definition of offshore resource activity of any content. The immediate effect of this decision was that temporary visa holders could not lawfully participate in or support an offshore resources activity, including on an Australian resources installation.

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5. On 27 March 2015, you signed instrument IMMI15/073 giving effect to a determination which excluded activities involving resources installations from the definition of 'offshore resources activity'. This enabled temporary visa holders to lawfully work on an Australian resources installation. However, this determination did not cover offshore activities not involving resource installations, such as pipe laying activities. The instrument at **Attachment B** deals with these activities, by deeming individuals engaged in such activities to be SPV holders.

6. The power under s 33(2)(b)(ii) of the Act to grant SPVs to individuals or a class of persons has been used in a range of circumstances, including the following recent examples:

- a declaration granting SPVs to members of foreign naval vessels while they are on approved shore leave in Australia;
- a declaration granting SPVs to facilitate the entry to Australia of emergency personnel to assist in the Victorian bushfire emergency of 2009; and
- a declaration to allow foreign search and rescue teams involved in the search and recovery of missing Malaysian flight MH370 to come to Australia.

s. 47C(1)

8. Section 33(9) allows you or a delegated officer to declare that it is undesirable that a person, or any persons in a class of persons, travel to and enter Australia or remain in Australia. This power is available to you or a delegated officer should a situation arise in which you or a delegated officer consider that an SPV holder should not travel to or remain in Australia.

### Consultation – internal/external

9. Special Counsel, Legal Division, and Visa and Citizenship Management Division were consulted on the drafting of the SPV instrument.

### Consultation – Secretary/CEO

10. The Secretary and CEO were not consulted on the approach in the submission.

### Client service implications

11. Under the SPV instrument, relevant non-citizens will be deemed to hold an SPV through operation of law. They will not need to pay a visa application charge or lodge an application.

12. Persons transiting through Australia will need a visa other than the SPV to be immigration cleared. Visas that are commonly held for transit purposes and may be used in conjunction with the SPV include the Subclass 600 (Visitor), Subclass 601 (Electronic Travel Authority) and Subclass 651 (eVisitor).

13. The department notes that where an individual holds a substantive visa that has a work condition attached (i.e. not a visitor, electronic travel authority or eVisitor visa), they will continue to hold that visa while holding the SPV, and will be working in contravention of the offshore resource activities provisions in relation to their substantive visa (see *Sensitivities* for further context). It is unclear how many individuals would be impacted, but we expect it to be small numbers.

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Sensitivities

14. Individuals who will be covered by the SPV instrument will be undertaking activities including those which were sought to be captured by the 'extended' migration zone brought about by the Migration Amendment (Offshore Resources Activity) Act 2013, which came into effect from 29 June 2014. s. 47C(1)

[Redacted]

s. 42(1)

[Redacted]

Financial/systems/legislation/deregulation implications

16. The instrument giving effect to the SPV is an administrative instrument. It will commence upon signature. Subsection 33(6) of the Act requires you to cause to be laid before each House of Parliament a statement setting out the contents of the declaration and the reasons for it. Under s33(8) of the Act, this must be done within 15 sitting days of the relevant House after 1 July 2015 – by 16 September 2015 for both Houses under this year's sitting calendar.

Attachments

Attachment A MS15-001332: Offshore resources activity – SPV and Determination

Attachment B Instrument: SPV granted under section 33(2) of the Migration Act 1958

Attachment C Statements to the House of Representatives and the Senate on the SPV instrument

Attachment D MS15-001143: Offshore resources activity – Next steps

<b>Authorising Officer</b>	
Cleared by:	
Ben Meagher Acting Assistant Secretary Economic Mobility Branch	
Date: March 2015	
Ph. s. 22(1)(a)(ii)	

Contact Officer s. 22(1)(a)(ii) Director, Business and Entrepreneur Policy Section, Ph. s. 22(1)(a)(ii)

Through David Wilden, a/g FAS Immigration and Citizenship Policy Division  
Rachel Noble PSM, Deputy Secretary, Policy Group

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CC  
Minister for Immigration and Border Protection  
Secretary  
Deputy Secretaries  
Special Counsel  
General Counsel, Legal Division  
First Assistant Secretary, Visa and Citizenship Management Division  
Acting Assistant Secretary, Litigation Branch  
Assistant Secretary, Legislation and Framework Branch  
Assistant Secretary, Temporary Visa Programme Branch

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**To** Assistant Minister for Immigration and Border Protection  
**Subject** Offshore resources activity – Special Purpose Visa and Determination  
**Timing** Please action by 27 March 2015 to enable legislative instrument to be registered and take immediate effect.

**Recommendations**

That you:

- 1. note the implications of the Full Federal Court’s judgment of 26 March 2015 in relation to the determination made on 17 July 2014; noted / please discuss
- 2. note that an instrument giving effect to a declaration granting the Special Purpose Visa (SPV) to non-citizens engaged in an offshore resources activity is being drafted for your signature and will be provided shortly; noted / please discuss
- 3. as an immediate measure, sign the instrument at **Attachment B** giving effect to a determination excluding activities involving resources installations from the definition of ‘offshore resources activity’; signed / not signed

s. 47C(1)



agreed / not agreed

agreed / not agreed

Assistant Minister for Immigration and Border Protection

Signature.....

Date:...../...../2015

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Assistant Minister's Comments				
Rejected Yes/No	Timely Yes/No	<b>Relevance</b> <input type="checkbox"/> Highly relevant <input type="checkbox"/> Significantly relevant <input type="checkbox"/> Not relevant	<b>Length</b> <input type="checkbox"/> Too long <input type="checkbox"/> Right length <input type="checkbox"/> Too brief	<b>Quality</b> Poor 1.....2.....3.....4.....5 Excellent <b>Comments:</b>

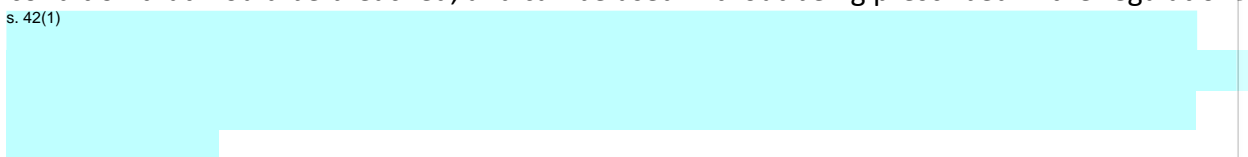
**Key Issues**

1. On 26 March 2015, the Full Federal Court declared that a determination made by you on 17 July 2014 under the *Migration Act 1958* ('the Act') is not authorised by section 9A(6) of the Act or otherwise and is invalid. The Court stated that the power to make a determination is for the purpose of making an exception, not for the purpose of denuding the definition of offshore resource activity (ORA) of any content.
2. As a result of this decision, all non-citizens engaging in an offshore resources activity (ORA) – including persons on resources installations – are taken to be in the migration zone by virtue of section 9A of the Act. Further, in order to work, they are required to hold a permanent visa (as there are no prescribed visas for ORA following the disallowance of the regulations in July 2014) by virtue of section 41(2B) of the Act.
  - The effect of the judgment is that non-citizens who are taken to be in the migration zone by virtue of section 9A of the Act but do not hold a visa are unlawful non-citizens under the Act. Those persons on resources installations who do hold a temporary visa ((normally the Subclass 457 (Temporary Work (Skilled) or Subclass 400 (Temporary Work (Short Stay Activity))) are in breach of the work condition of their visa.

**Immediate measures**

3. The ORA provisions have been constructed so as to require non-citizens to hold either a permanent visa, or a visa prescribed in the regulations for that purpose, to lawfully engage in these activities. The requirement to hold either of these visas applies equally to persons working on resources installations.
4. The Special Purpose visa (SPV) provides a means for persons to engage in offshore resources activities without holding either a permanent or prescribed visa, in that it does not have a work condition that would be breached, and can be used without being prescribed in the regulations.

s. 42(1)



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s. 42(1)

Special Purpose Visa for offshore resources activities

7. The department is drafting a declaration under section 33(2)(b)(ii) of the Act for your signature granting SPVs to all non-citizens who are in an area to participate in, or to support, an offshore resources activity in relation to that area. This will allow the holder to lawfully engage in an offshore resources activity when they are in the permit or licence area.

- Persons transiting through Australia will need a visa other than the SPV to be immigration cleared. Visas that are commonly held for transit purposes and may be used in conjunction with the SPV include the Subclass 600 (Visitor), Subclass 601 (Electronic Travel Authority) and Subclass 651 (eVisitor).

8. The instrument giving effect to the SPV is not legislative, it does not need to be registered on the Federal Register of Legislative Instruments (FRLI) and can commence upon being signed. The instrument will be provided to you shortly with a further submission.

s. 42(1)

Determination excluding activities involving Australian resources installations

10. The department has drafted a written determination under section 9A(6) of the Act for your signature revoking the legislative the previous determination and instead exempting activities involving Australian resources installations from the ORA provisions (see **Attachment B** and **Attachment C**). The instrument can be registered on FRLI on the day of signature (if that is a week day) and will commence upon registration.

11. The determination will allow non-citizens engaging in these activities to hold a visa other than a permanent visa, or a visa prescribed in the regulations for that purpose, so as not to be in breach of the ORA provisions. The practical effect of this is that they continue working on their existing temporary visa.

12. The new determination specifically excludes from the ORA provisions activities involving a resource installation that is part of Australia by virtue of section 8 of the Act – that is, by being attached to the Australian seabed. For clarity, the determination also specifies that vessels that transport cargo and/or persons to or from a resources installation are subject to the exclusion as it seems likely that there are vessels on which the crew already hold visas because, for example, they operate from an Australian port.

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s. 42(1)

s. 47C(1)

s. 42(1)

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**Background**

24. Section 9A(6) of the Act allows the Minister to make a determination, in writing, with respect to the definition of ‘offshore resources activity’ as provided by section 9A(5) of the Act. The determination is made by way of a non-disallowable legislative instrument.

25. On 15 September 2014 the Federal Court dismissed two separate legal challenges to the determination made on 17 July 2014 filed by the Maritime Union of Australia and the Australian Maritime Officers’ Union. Appeals to the Full Federal Court were filed by both unions on 3 October 2014.

26. This determination excluded all regulated operations (within the meaning of section 7 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*), and all activities performed under a licence or a special purpose consent (both within the meaning of section 4 of the *Offshore Minerals Act 1994*). This effectively restored the situation that existed under the Act prior to 29 June 2014 when the ORA provisions came into effect.

**Consultation – internal/external**

27. Special Counsel and the Legal Division were consulted on the implications of the judgment, and on the drafting of both instruments. The Visa and Citizenship Management Division was also consulted on the drafting of the instrument granting the SPV.

**Consultation – Secretary/CEO**

28. The Secretary and CEO were not consulted on the approach in the submission.

**Client service implications**

N/A

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**Sensitivities**

N/A

**Financial/systems/legislation/deregulation implications**

N/A

**Attachments**

**Attachment A** MS15-001143 Offshore resources activity – Next steps

**Attachment B** Determination made under section 9A(6) of the *Migration Act 1958*

**Attachment C** Explanatory Statement

s. 42(1)

Authorising Officer
Cleared by:  David Wilden Acting First Assistant Secretary Immigration and Citizenship Policy Division  Date: March 2015 Ph: s. 22(1)(a)(ii)

**Contact Officer** s. 22(1)(a)(ii), Director, Business and Entrepreneur Policy Section, Ph: s. 22(1)(a)(ii)

**Through** Rachel Noble PSM, Deputy Secretary, Policy Group

**CC** Minister for Immigration and Border Protection  
Secretary  
Deputy Secretaries  
Special Counsel  
General Counsel, Legal Division  
First Assistant Secretary, Visa and Citizenship Management Division  
Acting Assistant Secretary, Litigation Branch  
Assistant Secretary, Legislation and Framework Branch  
Assistant Secretary, Temporary Visa Programme Branch  
Acting Assistant Secretary, Economic Mobility Branch

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**Commonwealth of Australia**

*Migration Act 1958*

**SPECIAL PURPOSE VISA 2015**

*(subsection 33(2) of the Migration Act 1958)*

I, *MICHAELIA CASH*, Assistant Minister for Immigration and Border Protection, acting under subparagraph 33(2)(b)(ii) of the *Migration Act 1958* (the Act) hereby:

1. DECLARE that persons in the following class of persons are taken to have been granted a Special Purpose Visa:

All non-citizens who are on a vessel in an area to participate in, or to support, an offshore resources activity in relation to that area provided the vessel has been reported to the Department of Immigration and Border Protection.

2. A Special Purpose Visa granted to a non-citizen under this Instrument ceases when the non-citizen disembarks from the vessel referred to in paragraph 1 of this Instrument.

This Instrument, IMMI 15/074 commences upon signature.

Dated

2015

**Assistant Minister for Immigration and Border Protection**

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**SECTION 33 OF THE *MIGRATION ACT 1958***

**- STATEMENT TO PARLIAMENT -**

Exercising my power under subparagraph 33(2)(b)(ii) of the *Migration Act 1958* (the Act), I declared on 30 March 2015 that persons in the following class of persons are taken to have been granted a special purpose visa:

All non-citizens who are on a vessel in an area to participate in, or to support, an offshore resources activity in relation to that area provided the vessel has been reported to the Department of Immigration and Border Protection.

The purpose of the declaration is to ensure that non-citizens who are on a vessel in an area to participate in, or to support, an offshore resources activity in relation to that area, are able to do so lawfully.

Dated 2015

**Assistant Minister for Immigration and Border Protection**



**To** Assistant Minister for Immigration and Border Protection  
**Subject** Offshore resources activity – Next steps  
**Timing** Please action by 27 March 2015, given the expected handing down of the judgment by the Full Federal Court on 26 March 2015.

**Recommendations**

That you:

s. 42(1)

noted / please discuss

noted / please discuss

noted / please discuss

agreed / not agreed / please discuss

noted / please discuss

Assistant Minister for Immigration and Border Protection

Signature.....

Date:...../...../2015

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Assistant Minister's Comments

<b>Rejected</b> Yes/No	<b>Timely</b> Yes/No	<b>Relevance</b> <input type="checkbox"/> Highly relevant <input type="checkbox"/> Significantly relevant <input type="checkbox"/> Not relevant	<b>Length</b> <input type="checkbox"/> Too long <input type="checkbox"/> Right length <input type="checkbox"/> Too brief	<b>Quality</b> Poor 1.....2.....3.....4.....5 Excellent <b>Comments:</b>

**Key Issues**

s. 42(1)



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s. 42(1), s. 47C(1)



**Granting Special Purpose Visas**

s. 42(1)



- Under section 41(2B), a non-citizen who engages in an offshore resources activity without holding either a permanent visa, or a visa prescribed in the regulations for that purpose, is in breach of the work condition of their visa.

s. 42(1)



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## Background

17. On 15 September 2014, the Federal Court of Australia dismissed two separate legal challenges to the determination made by you on 17 July 2014 filed by the Maritime Union of Australia and Australian Maritime Officers' Union. Buchanan J found that while the unions had a powerful argument, there was no limitation on the Minister's power to make the determination, and that it did not offend section 48 of the *Legislative Instruments Act 2003*. Appeals to the Full Federal Court were filed by both unions on 3 October 2014.

18. The appeal was heard by the Full Federal Court (Justices Gordon, Katzmann and Griffiths) on 27 February 2015. At the conclusion of the hearing, the Court requested that further submissions be provided by both parties on relief that may be provided if it allows the appeal. Submissions were filed on your behalf on 12 March 2015, with the unions' response filed on 20 March 2015. The Court will hand down its judgment on 26 March 2015.

**Consultation – internal/external**

19. The Legal Division was consulted in the preparation of this submission. The Temporary Visa Programme Branch has been consulted on the use of the SPV. The Character Assessment and Cancellation Branch has previously been consulted on the Act’s general visa cancellation powers.

**Consultation – Secretary/CEO**

The Secretary and CEO were not consulted on the approach in the submission.

**Client service implications**

N/A

**Sensitivities**

N/A

**Financial/systems/legislation/deregulation implications**

20. If you agree to pursue further amendments to the regulations, the earliest by which out-of-cycle regulation changes could be made is in early May.

**Attachments**

**Attachment A**

s. 42(1) [Redacted]

**Attachment B**

MS14-000129 Visa options for offshore resources activity

**Attachment C**

MC2014/02345 Visa options for offshore resources activities

**Authorising Officer**

Cleared by:

s. 22(1)(a)(ii) [Redacted]

Ben Meagher  
Acting Assistant Secretary  
Economic Mobility Branch

Date: 24 March 2015

Ph: 02 [Redacted]

**Contact Officer**

(s. 22(1)(a)(ii) [Redacted]) Director, Business and Entrepreneur Policy Section, Ph: (s. 22(1)(a)(ii) [Redacted])

**Through**

Rachel Noble PSM, Deputy Secretary, Policy Group  
David Wilden, Acting First Assistant Secretary, Immigration and Citizenship Policy Division

**CC**

Minister for Immigration and Border Protection  
Secretary  
Deputy Secretaries  
Special Counsel  
General Counsel, Legal Division  
Acting Assistant Secretary, Litigation Branch  
Assistant Secretary, Legislation and Framework Branch

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