FEDERAL COURT OF AUSTRALIA

Australian Maritime Officers’ Union v Assistant Minister for Immigration and Border Protection [2015] FCAFC 45

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| Citation: | Australian Maritime Officers’ Union v Assistant Minister for Immigration and Border Protection [2015] FCAFC 45 |
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| Appeal from: | Maritime Union of Australia v Assistant Minister for Immigration and Border Protection [2014] FCA 993 |
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| Parties: | **AUSTRALIAN MARITIME OFFICERS’ UNION v ASSISTANT MINISTER FOR IMMIGRATION AND BORDER PROTECTION and THE COMMONWEALTH OF AUSTRALIA** |
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|  | **THE MARITIME UNION OF AUSTRALIA v ASSISTANT MINISTER FOR IMMIGRATION AND BORDER PROTECTION and THE COMMONWEALTH OF AUSTRALIA** |
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| File number(s): | NSD 1004 of 2014NSD 1005 of 2014 |
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| Judge(s): | **GORDON, KATZMANN AND GRIFFITHS JJ** |
|  |  |
| Date of judgment: | 26 March 2015 |
|  |  |
| Corrigendum: | 30 March 2015 |
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| Catchwords: | **ADMINISTRATIVE LAW** – definition of offshore resources activity under s 9A(5) of the *Migration Act 1958* (Cth) informing the meaning of the migration zone – where exceptions and additions to the definition may be made by ministerial determination under s 9A(6) – where Determination excepts the content of the definition – whether Determination is ultra vires the Act**STATUTORY INTERPRETATION** – whether s 9A(6) conferred on the Minister power to extinguish the content of the definition  |
|  |  |
| Legislation: | *Acts Interpretation Act 1901* (Cth)ss 11B, 15AA*Federal Court of Australia Act 1976* (Cth) s 21*Judiciary Act 1903* (Cth) s 39B(1A)(c)*Migration Act 1958* (Cth) ss 4, 5, 8, 9, 9A, 41*Migration Amendment (Offshore Resources Activity) Act 2013* (Cth)*Offshore Minerals Act 1994* (Cth)*Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)*Migration Amendment (Offshore Resources Activity) Regulation 2014* (Cth)Assistant Minister for Immigration and Border Protection (Cth), *Determination, IMMI 14/077*, 17 July 2014  |
|  |  |
| Cases cited: | *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27*Allseas Construction SA v Minister for Immigration and Citizenship* [2012] FCA 529; (2012) 203 FCR 200 *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AAQS* *v Cross* [2012] HCA 56; (2012) 248 CLR 378*CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 *Cockle v Isaksen* (1957) 99 CLR 155 *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* [1995] HCA 44; (1995) 184 CLR 453*CPCF v Minister for Immigration and Border Protection* [2015] HCA 1*Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* [2013] HCA 16; (2013) 87 ALJR 588 *Footscray Corporation v Maize Products Pty Ltd* (1943) 67 CLR 301*Kelly v R* [2004] HCA 12; (2004) 218 CLR 216 *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402*New South Wales v Law* (1992) 45 IR 62*Project Blue Sky* *Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355*R v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170 *Shop Distributive & Allied Employees Association v Minister for Industrial Affairs (SA)* [1995] HCA 11; (1995) 183 CLR 552*South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 *Swan Hill Corporation v Bradbury* [1937] HCA 15; (1937) 56 CLR 746 *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664 *Vanstone v Clark* [2005] FCAFC 189; (2005) 147 FCR 299 *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1 |
|  |  |
| Date of hearing: | 27 February 2015 |
|  |  |
| Place: |  |
|  |  |
| Division: | GENERAL DIVISION |
|  |  |
| Category: | Catchwords  |
|  |  |
| Number of paragraphs: | 81 |
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| Counsel for the Appellant in NSD 1005 of 2014: | Dr AS Bell SC with Mr BK Lim |
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| Solicitor for the Appellants in both matters: | Slater & Gordon Lawyers |
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| Counsel for the Respondents in both matters: | Dr SP Donaghue QC with Ms A Mitchelmore |
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| Solicitor for the Respondents in both matters: | Australian Government Solicitor |
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FEDERAL COURT OF AUSTRALIA

Australian Maritime Officers’ Union v Assistant Minister for Immigration and Border Protection [2015] FCAFC 45

**CORRIGENDUM**

1. Order 3 of the Orders dated 26 March 2015 in proceeding NSD 1004 of 2014 should read:

“The respondents are to pay the appellant’s costs of and incidental to the appeal and of the proceedings below.”

1. Order 3 of the Orders dated 26 March 2015 in proceeding NSD 1005 of 2014 should read:

“The respondents are to pay the appellant’s costs of and incidental to the appeal and of the proceedings below.”

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| I certify that the preceding two (2) numbered paragraphs are a true copy of the Corrigendum to the Reasons for Judgment herein of the Honourable Justices Gordon, Katzmann and Griffiths. |

Associate:

Dated: 30 March 2015

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1004 of 2014 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | AUSTRALIAN MARITIME OFFICERS’ UNIONAppellant |
| AND: | ASSISTANT MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentTHE COMMONWEALTH OF AUSTRALIASecond Respondent |

|  |  |
| --- | --- |
| JUDGES: | GORDON, KATZMANN AND GRIFFITHS JJ |
| DATE OF ORDER: | 26 march 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by the primary judge on 15 September 2014 be set aside.
3. The respondents are to pay the appellant’s costs of and incidental to the appeal.

**THE COURT DECLARES THAT:**

1. Legislative instrument IMMI 14/077, as registered in the Federal Registry of Legislative Instruments on 17 July 2014, is not authorised by s 9A(6) of the *Migration Act 1958* (Cth) or otherwise and is invalid.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1005 of 2014 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | THE MARITIME UNION OF AUSTRALIAAppellant |
| AND: | ASSISTANT MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentTHE COMMONWEALTH OF AUSTRALIASecond Respondent |

|  |  |
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| JUDGES: | GORDON, KATZMANN AND GRIFFITHS JJ |
| DATE OF ORDER: | 26 March 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the primary judge on 15 September 2014 be set aside.

3. The respondents are to pay the appellant’s costs of and incidental to the appeal.

**THE COURT DECLARES THAT:**

4. Legislative instrument IMMI 14/077, as registered in the Federal Registry of Legislative Instruments on 17 July 2014, is not authorised by s 9A(6) of the *Migration Act 1958* (Cth) or otherwise and is invalid.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1004 of 2014 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | australian maritime officers' unionAppellant |
| AND: | ASSISTANT MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentTHE COMMONWEALTH OF AUSTRALIASecond Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1005 of 2014 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | THE maritime union OF AUSTRALIAAppellant |
| AND: | ASSISTANT MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentTHE COMMONWEALTH OF AUSTRALIASecond Respondent |

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| --- | --- |
| JUDGES: | GORDON, KATZMANN AND GRIFFITHS JJ |
| DATE: | 26 march 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

# THE COURT:

1. The central issue in these appeals, which were heard together, is whether the primary judge erred in concluding that a determination made by the first respondent (**the Minister**) on 17 July 2014 (**the Determination**) is valid. The issue turns on the proper construction of the Minister’s power under s 9A(6) of the *Migration Act 1958* (Cth) (**the*Act***) to make a determination for the purposes of the definition of “offshore resources activity” in s 9A(5) of the *Act* and whether the Determination is *ultra vires* the *Act*. The issues raised are of significance to the regulation of work carried out in the Australian offshore resources industry and affects whether foreign workers participating in offshore resources activities are required to have an appropriate visa under the *Act*.

## Background to the appeals

1. In *Allseas Construction SA v Minister for Immigration and Citizenship* [2012] FCA 529; (2012) 203 FCR 200 (***Allseas***), McKerracher J held that two pipelaying vessels, which were laying pipelines in gasfields off the Western Australian coast, were not “Australian resources installations” and, therefore, were not within the “migration zone” for the purposes of the *Act*. This meant that the workers on the vessels, who were mainly non-citizens, did not need visas. The Maritime Union of Australia (**MUA**)and the Australian Maritime Officers’ Union (**AMOU**) were dissatisfied with that outcome. The then government established a Departmental Migration Maritime Taskforce (**the Taskforce**) to investigate and report upon the matter. It recommended that the existing legislative framework, which essentially provided that persons were in the migration zone based on where they were physically located, be supplemented with a new legislative concept. The new concept would provide that all offshore resource workers, including support staff, would be taken to be in the migration zone when they were engaged to conduct or support activities regulated by Commonwealth, State or Territory legislation relating to the exploration and exploitation of Australia’s natural resources.
2. On 29 June 2013, Royal Assent was given to the *Migration Amendment (Offshore Resources Activity) Act 2013* (Cth) (***2013 Amending Act***), which relevantly inserted ss 9A, 41(2B) and 41(2C) into the *Act*, with effect from 29 June 2014. It will be necessary to set out those provisions in full later. The amendments broadly implemented the Taskforce’s recommendations. Under s 9A(1), persons engaged in “offshore resources activity” as defined in s 9A(5) were deemed to be in the “migration zone”. The effect of the amendments was that non-citizens involved in such an activity were not allowed to work without a permanent visa or a visa prescribed for that purpose (s 41(2B) and (2C)). Significantly, the amendments also included a Ministerial power in s 9A(6) to make a determination for the purposes of the definition of “offshore resources activity” in s 9A(5), which would have the effect of excepting an operation or activity the subject of such a determination from that definition. The Minister’s power also enabled certain further activities, operations or undertakings to be added to that definition.
3. There was a change of government after the federal election in September 2013. On 27 March 2014, the new government introduced the *Migration Amendment (Offshore Resources Activity) Repeal Bill 2014* (Cth) (***2014 Repeal Bill***), which was passed by the House of Representatives on 26 May 2014 and then introduced into the Senate on 16 June 2014. That Bill remains before the Parliament. As the primary judge noted, it is not directly relevant to any legal issue in the proceedings.
4. On 29 May 2014, the Governor-General made the *Migration Amendment (Offshore Resources Activity) Regulation 2014* (Cth) (***2014 Amending Regulation***). The effect of the *2014 Amending Regulation* was to prescribe three existing visas for the purposes of s 41(2B)(b) of the *Act*. The primary judge inferred that the intention behind the prescription of the three classes of temporary visas was to avoid the consequence that, otherwise, workers in offshore resource activities would require a permanent visa, a requirement which was likely significantly to restrict non-citizens in the migration zone who could carry out such work.
5. The *2014 Amending Regulation* was disallowed by the Senate on 16 July 2014. The next day, the Minister – purporting to rely upon s 9A(6) of the *Act* – made the Determination. The Determination was registered on the Federal Register of Legislative Instruments on the same day. By that Determination, the Minister relied on the power to “except” an operation or an activity from the classes of regulated operations and activities identified in s 9A(5)(a) and (b) to exclude **all** regulated operations and **all** regulated activities from the whole of the defined content of “offshore resources activity” in those particular paragraphs, with the consequence that non-citizen workers involved in those operations and activities did not require visas. The central issue in the appeal is whether the Determination was within the power contained in s 9A(6) of the enabling *Act*.
6. In late July 2014, each appellant commenced proceedings under s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) seeking declaratory relief that all or parts of the Determination were invalid, including on the ground of lack of authorisation under s 9A(6) of the *Act*.

## The relevant legislative scheme in more detail

1. The stated object of the *Act* is to “regulate, in the national interest, the coming into, and presence in, Australia of non-citizens” (s 4(1)). Section 4(2) states that, to advance that object, the *Act* provides for visas permitting non-citizens to enter or remain in Australia and, further, expressly states that the Parliament intends that the *Act* be “the only source of the right of non-citizens to so enter or remain”.
2. Part 2 of the *Act* deals with the control of the arrival and presence in Australia of non-citizens. A non-citizen in the “migration zone” is a “lawful non-citizen” if, relevantly, he or she holds a current visa; otherwise he or she is an “unlawful non-citizen” (ss 13 and 14). The “migration zone” is defined in s 5(1) of the *Act* and relevantly includes the area consisting of “Australian resource installations” and “Australian sea installations”.
3. It is desirable to now set out in full the definition of “migration zone” in s 5 of the *Act*:

***migration zone*** means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes:

(a) land that is part of a State or Territory at mean low water; and

(b) sea within the limits of both a State or a Territory and a port; and

(c) 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.

Note: See also section 9A, which concerns offshore resources activities.

The note at the foot was inserted by the *2013 Amending Act*.

1. By s 5(1), “Australian resources installation” means a “resources installation” that is deemed to be part of Australia because of the operation of s 8. Section 8 is entitled “Certain resources installations to be part of Australia”. It provides:

(1) For the purposes of this Act, **a resources installation** that:

(a) becomes attached to the Australian seabed after the commencement of this subsection; or

(b) at the commencement of this subsection, is attached to the Australian seabed;

shall, subject to subsection (2), be deemed to be part of Australia and shall be deemed not to be a place outside Australia.

(2) **A resources installation** that is deemed to be part of Australia by virtue of the operation of this section shall, for the purposes of this Act, cease to be part of Australia if:

(a) the installation is detached from the Australian seabed, or from another resources installation that is attached to the Australian seabed, for the purpose of being taken to a place outside the outer limits of Australian waters (whether or not the installation is to be taken to a place in Australia before being taken outside those outer limits); or

(b) after having been detached from the Australian seabed otherwise than for the purpose referred to in paragraph (a), the installation is moved for the purpose of being taken to a place outside the outer limits of Australian waters (whether or not the installation is to be taken to a place in Australia before being taken outside those outer limits).

(Emphasis added.)

1. A **resources installation** is defined in s 5 to mean:

(a) a **resources industry fixed structure** within the meaning of subsection (10); or

(b) a **resources industry mobile unit** within the meaning of subsection (11).

(Emphasis added.)

1. In fact, as will become evident, s 5(10) to (14) are relevant:

(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 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.

(Emphasis added.)

1. “Australian sea installation” is defined in s 5(1) to mean a sea installation that is deemed to be part of Australia under s 9 of the *Act*. Section 9 provides:

**Certain sea installations to be part of Australia**

1. For the purposes of this Act, a sea installation that:
2. becomes installed in an adjacent area or in a coastal area after the commencement of this subsection; or
3. at the commencement of this subsection, is installed in an adjacent area or in a coastal area;

shall, subject to subsection (2), be deemed to be part of Australia and shall be deemed not to be a place outside Australia.

1. A sea installation that is deemed to be part of Australia because of the operation of this section shall, for the purposes of this Act, cease to be part of Australia if:
2. the installation is detached from its location for the purpose of being taken to a place outside the outer limits of Australian waters; or
3. after having been detached from its location otherwise than for the purpose referred to in paragraph (a), the installation is moved for the purpose of being taken to a place outside the outer limits of Australian waters.
4. The effect of these provisions is that a visa was required to work upon (and remain on) structures or vessels which were resources installations or sea installations as defined in ss 8 and 9 respectively of the *Act*. Why? Because those resources and sea installations were part of the migration zone under s 5 of the *Act*.
5. As noted above, following the decision in *Allseas*,s 9A and other related provisions were inserted by the *2013 Amending Act*. By s 9A(1), a person is “taken to be in the migration zone while he or she is in an area to participate in, or to support, an offshore resources activity in relation to that area”. “Offshore resources activity” is defined in s 9A(5). It is notable that, rather than amend the definition of “migration zone” in s 5 of the *Act* so as to include “offshore resources activity”, the newly inserted s 9A(1) provided, in effect, that a person who is involved in an offshore resources activity as defined is **deemed** to be in the migration zone.
6. It is convenient to set out all of s 9A:

**9A Migration zone etc. –offshore resources activities**

*Migration zone etc.*

1. For the purposes of this Act, a person is taken to be in the migration zone while he or she is in an area to participate in, or to support, an offshore resources activity in relation to that area.

Example 1: A person is taken to be in the migration zone under this section if the person is on a vessel in an area to participate in an offshore resources activity under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* in that area by exploring for, or recovering, petroleum.

Example 2: A person who is a member of the crew of the vessel is also taken to be in the migration zone under this section if the person is supporting the offshore resources activity.

Example 3: Neither a stowaway on the vessel, nor a person on the vessel because the person was rescued at sea, is taken to be in the migration zone, because neither is participating in, or supporting, the offshore resources activity.

(2) To avoid doubt, a person may be taken to be in the migration zone under subsection (1):

(a) whether or not the person's participation in, or support of, an offshore resources activity in the area concerned has started, is continuing or has concluded; and

(b) whether or not the offshore resources activity concerned has started, is continuing or has concluded.

(3) For the purposes of this Act:

(a) a person is taken to be in Australia while he or she is taken to be in the migration zone because of subsection (1); and

(b) a person is taken to travel to Australia if the person travels to an area in which the person is taken to be in the migration zone because of subsection (1); and

(c) a person is taken to enter Australia when the person enters an area in which the person is taken to be in the migration zone because of subsection (1); and

(d) subject to section 80—a person is taken to leave Australia when the person leaves an area in which the person is taken to be in the migration zone because of subsection (1).

(4) Unless a provision of this Act, or another Act, expressly provides otherwise, this section does not have the effect of extending, for the purposes of another Act, the circumstances in which a person:

(a) is in the migration zone or is taken to be in the migration zone; or

(b) is in Australia or is taken to be in Australia; or

(c) travels to Australia or is taken to travel to Australia; or

(d) enters Australia or is taken to enter Australia; or

(e) leaves Australia or is taken to leave Australia.

*Meaning of offshore resources activity*

(5) In this section:

***offshore resources activity***, in relation to an area, means:

(a) a regulated operation (within the meaning of section 7 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*) that is being carried out, or is to be carried out, within the area, except an operation determined by the Minister under subsection (6); or

(b) an activity performed under a licence or a special purpose consent (both within the meaning of section 4 of the *Offshore Minerals Act 1994*) that is being carried out, or is to be carried out, within the area, except an activity determined by the Minister under subsection (6); or

(c) an activity, operation or undertaking (however described) that is being carried out, or is to be carried out:

(i) under a law of the Commonwealth, a State or a Territory determined by the Minister under subsection (6); and

(ii) within the area, as determined by the Minister under subsection (6).

(6) The Minister may, in writing, make a determination for the purposes of the definition of ***offshore resources activity*** in subsection (5).

(7) A determination made under subsection (6) is a legislative instrument, but section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to the determination.

(8) To avoid doubt, for the purposes of subsection (1), a person may participate in, or support, an offshore resources activity in relation to an area whether the person:

(a) is on an Australian resources installation in the area; or

(b) is otherwise in the area to participate in, or support, the activity.

(Emphasis in original.)

1. The effect of s 9A is to extend the statutory concept of the “migration zone”. Particular geographical locations or structures remain within that concept but s 9A extends that concept by a deeming provision which captures persons who participate in or support specified operations or activities, including operations or activities that are regulated or licensed under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (***Offshore Petroleum Act***) or the *Offshore Minerals Act 1994* (Cth) (***Offshore Minerals Act***). As noted above, the extension of that statutory concept was accompanied, however, by a power conferred upon the Minister by s 9A(6) to make determinations to “except” an operation or an activity for the purposes of s 9A(5)(a) and (b), or to include a further activity, operation or undertaking for the purposes of s 9A(5)(c).
2. The *2013 Amending Act* also made other important amendments. Sections 41(2B) and (2C) were added to the existing provisions in the *Act* dealing with conditions on visas, such that s 41 then provided:

**Conditions on visas**

1. The regulations may provide that visas, or visas of a specified class, are subject to specified conditions.

*General rules about conditions*

1. Without limiting subsection (1), the regulations may provide that a visa, or visas of a specified class, are subject to:

(a) a condition that, despite anything else in this Act, the holder of the visa will not, after entering Australia, be entitled to be granted a substantive visa (other than a protection visa, or a temporary visa of a specified kind) while he or she remains in Australia; or

(b) a condition imposing restrictions about the work that may be done in Australia by the holder, which, without limiting the generality of this paragraph, may be restrictions on doing:

(i) any work; or

(ii) work other than specified work; or

(iii) work of a specified kind.

(2A) The Minister may, in prescribed circumstances, by writing, waive a condition of a kind described in paragraph (2)(a) to which a particular visa is subject under regulations made for the purposes of that paragraph or under subsection (3).

*Conditions about offshore resources activity*

(2B) In addition to any restrictions applying because of regulations made for the purposes of paragraph (2)(b), a condition of a visa that allows the holder of the visa to work is not taken to allow the holder to participate in, or support, an offshore resources activity in relation to any area unless the visa is:

(a) a permanent visa; or

(b) a visa prescribed by the regulations for the purposes of this subsection.

Note: For ***offshore resources activity***, see subsection 9A(5).

(2C) To avoid doubt, for the purposes of subsection (2B), a person may participate in, or support, an offshore resources activity in relation to an area whether the person:

(a) is on an Australian resources installation in the area; or

(b) is, under section 9A, otherwise in the area to participate in, or support, the activity.

*Additional conditions*

(3) In addition to any conditions specified under subsection (1), or in subsection (2B), the Minister may specify that a visa is subject to such conditions as are permitted by the regulations for the purposes of this subsection.

(Emphasis in original.)

1. The end result of these and other relevant provisions in the *Act* is that, absent a relevant determination under s 9A(6), a non-citizen who participates in or supports an offshore resources activity in an area:
* must have a visa in order to be a lawful non-citizen; and
* must have either a permanent visa, or a visa specifically prescribed by regulations for the purpose, in order to participate in or support the offshore resources activity in that area.
1. The Determination stated:

I, MICHAELIA CASH, Assistant Minister for Immigration and Border Protection, acting under subsection 9A(6) of the Migration Act 1958, DETERMINE:

1. for the purposes of paragraph 9A(5)(a), a regulated operation (within the meaning of section 7 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*); and

2. for the purposes of paragraph 9A(5)(b), an activity performed under a licence or a special purpose consent (both within the meaning of section 4 of the *Offshore Minerals Act 1994*).

This instrument, IMMI 14/077, commences on the day it is registered on the Federal Register of Legislative Instruments.

1. The effect of the Determination was to except the **whole** of the defined content of “offshore resources activity” stated by s 9A(5)(a) and (b): see [17] above.

## Primary judge’s reasons summarised

1. The primary judge described the appellants’ basic argument, namely that a power to provide for exceptions does not permit extinction or effective removal of the provisions to which the exception relates, as “a powerful one”. His Honour added that, at one level, the argument “seems almost instinctively correct”. However, his Honour rejected the argument for several reasons, which may be summarised as follows.
2. The primary judge identified the following three matters of construction as important “in the journey through the thicket of intertwined definitions and when attention is given to the changes which were made by the Amending Act and then undone by the Determination”.
3. First, his Honour described as an important consideration the fact that the relevant provisions were all “definitional”. He added that, although those provisions must be considered as incorporated into the substantive relevant provisions, “they are all provisions directed to the expansion or contraction of the concept of the ‘migration zone’”. His Honour cited McHugh J’s observations in *Kelly v R* [2004] HCA 12; (2004) 218 CLR 216 (***Kelly***) at[103] to the effect that the function of a definition is not to enact substantive law and that error is likely to occur if a definition is given a narrow, literal meaning and then used to negate the evident policy or purpose of a substantive enactment. The primary judge added at [42]:

In light of the possibilities for adjustment of that concept in s 9A there does not seem to be a reason (in the present case at least) to treat the content of s 9A as fixed by Parliamentary intent, or free from particular kinds of Ministerial adjustment, according to the policies and priorities of the Government of the day.

1. Secondly, in accordance with s 11B(1) of the *Acts Interpretation Act 1901* (Cth) (***Acts Interpretation Act***), an Act amending another Act must be construed with the other Act as part of the other Act.
2. Thirdly, delegated legislation, such as the Determination, must conform to the purposes for which it is enabled (citing, *inter alia*, *Swan Hill Corporation v Bradbury* [1937] HCA 15; (1937) 56 CLR 746 (***Swan Hill Corporation***) at 756, 757-8).
3. The primary judge did not accept that a series of cases dealing with statutory powers to “except”, which were relied upon by the appellants, established invalidity of the Determination. It is convenient to defer a discussion and analysis of those cases.
4. His Honour also noted that the appellants placed heavy reliance on various parts of the Explanatory Memorandum to the *Migration Amendment (Offshore Resources Activity) Bill 2013* (***2013 Amending Bill***), not to displace the statutory text but rather to confirm the intention which they contended could be discerned from the statutory text itself. Again, it is convenient to defer discussion and analysis of the Explanatory Memorandum.
5. The primary judge then summarised the parties’ competing submissions. Because there is a considerable overlap between those submissions and the submissions which are now advanced in the appeals, it is desirable to defer summarising those submissions.
6. After citing several High Court authorities on the proper approach to statutory construction (which included *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 (***Alcan***); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 (***Consolidated Media Holdings***) and *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664 (***Thiess***)), his Honour acknowledged the emphasis which the High Court has recently placed on the task of statutory construction beginning and ending with the statutory text, whatever assistance may be provided by context. In the light of these High Court authorities, the primary judge described the relevant approach as a search “for a meaning and parliamentary intent guided by the statutory language”.
7. His Honour rejected the appellants’ argument that the Determination was invalid as beyond power. At [74] and [75] of his reasons for judgment, the primary judge concluded:

74. The search is, therefore, for a meaning and parliamentary intent guided by the statutory language. When that focus is applied in the present case I perceive **no limit** of the kind for which the applicants contend which would prohibit a complete (and perhaps temporary) exception of the kind effected by the Determination. Although the operative extent of the migration zone is thereby limited (but not beyond the extent permitted by s 9A(5) itself) the legislative scheme remains unimpaired.

75. Neither s 9A(5)(a) or (b) states any limitation on the power of the Minister. Each appears to give **an unfettered discretion** to adjust its content or operation, according to the circumstances of the time including Government policy of the day. I do not discern any legislative instruction or intention which would require or mandate that any particular level of operation or activity should be maintained, much less which ones.

(Emphasis added.)

1. For these reasons, the challenges to the validity of the Determination were dismissed.

## The appellants’ submissions summarised

1. The MUA submitted that the primary judge erred in holding that there was “no limit” to the Minister’s power under s 9A(6) and also in concluding that the provision “appears to give an unfettered discretion”. This “unlimited” construction was wrong, the MUA submitted, because the primary judge’s approach:
2. failed to give effect to the natural and ordinary meaning of the word “except”, which contains an inherent limitation in that a power to make an “exception” to a general rule does not extend to negativing that general rule. The primary judge’s view that he could “perceive no limit… which would prohibit a complete (and perhaps temporary) exception” was criticised on the basis that the notion of a “complete exception” was a contradiction in terms and contrary to the ordinary and grammatical sense of the term “except”;
3. failed to observe the “principle of construction” relating to a statutory power to “except”, in cases such as *Cockle v Isaksen* (1957) 99 CLR 155 (***Cockle***);
4. failed to give effect to the clear statutory purpose. It was submitted that a narrower construction of s 9A(6) should be preferred to the primary judge’s “unfettered” construction having regard to the fact that the Parliament decided to immunise the power conferred by s 9A(6) from parliamentary scrutiny by way of disallowance (see s 9A(7) of the *Act*). This suggested that such an “unsupervised power” was not intended to be any more expansive than indicated by the words used. The MUA also relied on parts of the Explanatory Memorandum to the *2013 Amending Bill* (at [99]-[102]), including the fact that references to the power to make exceptions contemplated the exemption of “**certain**” regulated operations or activities and also to the proposed amendment providing the Minister with “an additional tool to ensure that any future emergency can be effectively dealt with” (see further below); and
5. misapplied McHugh J’s observations in *Kelly* concerning the construction of definitional provisions. In particular, it was submitted that the primary judge erred by reasoning in [42] of his reasons for judgment that, because the provisions were definitional provisions, the power of exception was to be construed more readily as being without limitation than if they were substantive provisions.
6. The AMOU submitted that, having regard to the following matters, the primary judge erred in not finding that the text, context and purpose of s 9A(5) and (6) did not permit the field of operation for the statutory concept of “offshore resources activity” to be emptied of operative content by subordinate legislation, with the result that the Determination was not authorised.
7. First, the use of the term “except” was a strong textual limitation in the conferral by s 9A(5) and (6) of a power to except an activity or operation from those otherwise defined to be an offshore resources activity. The fact that a determination made under s 9A(6) must be for the purposes of the definition in s 9A(5) presupposes that that definition, having actual content, must survive the making of any such determination. The ordinary meaning of the word “except” does not denote the wholesale exclusion of all items from a category.
8. Secondly, the proposition that a power to “except” something from a category does not generally authorise a complete extinguishment of the category itself is supported by cases such as *Cockle; South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 and *Shop Distributive & Allied Employees Association v Minister for Industrial Affairs (SA)* [1995] HCA 11; (1995) 183 CLR 552, cases which the primary judge misapplied here.
9. Thirdly, the primary judge’s construction is inconsistent with the scheme of the amendments introduced by the *2013 Amending Act* because some tangible content has to be given to the substantive deeming provision in s 9A(1) for the visa requirement in s 41(2B) of the *Act* to have any work to do. Although the Parliament intended that there be some capacity to contract or expand the definition of “offshore resources activity”, it contemplated that at least some level of activity or operation should be maintained for the definition to work (citing *Vanstone v Clark* [2005] FCAFC 189; (2005) 147 FCR 299 (***Vanstone***)at [101] per Weinberg J and *New South Wales v Law* (1992) 45 IR 62 at 75 per Kirby P).
10. Fourthly, the primary judge’s approach did not give weight to the clear purpose of the relevant amendments, which introduced a visa regime relating to offshore activities in which a person participates in or supports (and not just geographic location or the type of vessel on which the person was located as previously was the case). The primary judge erroneously assumed that the *2013 Amending Act* was intended to introduce a “framework” for altering the deemed migration zone rather than as being directed to having actual consequences for visa regulation. The legislative intention underlying the amendments was to expand the definition of the deemed migration zone, with practical consequences for offshore workers and not merely to provide a facility whereby this could be done, or not done, depending entirely on current government policy.
11. Fifthly, the primary judge misapplied *Kelly* in reasoning that, because the exercise of the discretion in s 9A(5) and (6) related to a definitional provision, the discretion was free from constraint and no minimum content was mandated in relation to the definition of “offshore resources activity”.
12. Sixthly, the AMOU supported the MUA’s submission concerning the significance which should attach to the fact that a determination made under s 9A(6) is not subject to parliamentary scrutiny by way of disallowance, which it contrasted with what it described as the “true dispensing powers” conferred upon the Minister under provisions such as ss 46A, 48B, 91L, 91Q, 195A, 351 and 417 of the *Act*.
13. Finally, it was submitted that the primary judge’s conclusion that s 9A(5) conferred an “unfettered discretion” upon the Minister to adjust the content or operation of the definition of “offshore resources activity” was inconsistent with the majority view expressed in *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1 at [10] that “the notion of ‘unbridled discretion’ has no place in the Australian universe of discourse”.

## The Minister’s submissions summarised

1. The Minister’s submissions may be summarised as follows.
2. First, in contrast with the authorities relied upon by the appellants concerning “exceptions”, such as *Cockle*, the Minister’s exercise of power under s 9A(6) determines the scope of the “rule” in s 9A(1) – thus the rule is inherently susceptible to contraction or expansion by determination under s 9A(6). The Minister accepted that the power under s 9A(6) is not unlimited but contended that the primary judge did not suggest otherwise, “stating [at [74]] only that he perceived ‘*no limit of the kind for which the applicants contend’*”. The Minister acknowledged that, while the Minister’s power was unconfined by reference to the express terms of the *Act*, limitations on its exercise might be found in the subject-matter, scope and purposes of the *Act*.
3. Secondly, read in the context of relevant definitions in the *Act*, including the definition of “migration zone” in s 5(1), s 9A *allows*, but does not *require*, the migration zone to be extended to “offshore resources activities” which are not otherwise covered by the *Act*. In contrast with ss 8 and 9, s 9A:
4. operates by deeming persons who are in an area for a particular purpose to be in the migration zone; and
5. the definition of “offshore resources activity” does not apply if the Minister determines under s 9A(6) that it should not do so.
6. Thirdly, s 9A recognises the need to maintain flexibility as to the scope of the extension of the migration zone under s 9A, having regard to the potential breadth of operations and activities to which s 9A(5)(a) and (b) refer and the range of permits and licences regulated by the *Offshore Petroleum Act* and *Offshore Minerals Act*.
7. Fourthly, the Minister’s power under s 9A(6) is different from the dispensing powers conferred on the Minister elsewhere in the *Act*. Section 9A(6) is not a dispensing power but, instead, creates a power by legislative instrument to determine whether the *Act* extends to particular circumstances at all.
8. Fifthly, the Minister contended that it was erroneous of the appellants to argue that the *2013 Amending Act* operated “to provide that persons who participate in, or support, an offshore resources activity are taken to be in the migration zone”. If that were the true purpose, he submitted, s 9A(5) would not have been made subject to exceptions, because any exercise of the power to make exceptions would necessarily undercut the asserted purpose. Rather, the Minister submitted, the true purpose of s 9A was not to ensure that any offshore resources activity **would** be regulated under the *Act*, but to ensure that it **could** be regulated under the *Act*. Although the Minister relied on some parts of the Explanatory Memorandum as confirming that this was the true purpose of s 9A, he also acknowledged that other statements suggested that the effect of s 9A is to “ensure that workers in Australia’s offshore resource industry are regulated under the Act”. The Minister submitted that such statements did not accurately reflect the terms of s 9A as enacted and primacy had to be given to the clear meaning of the text.
9. Sixthly, the Minister submitted that the authorities concerning “exceptions” relied upon by the appellants were all distinguishable because none dealt with the situation here, where the power to except under s 9A(6) modified the content of the rule itself.
10. Finally, the appellants failed to identify any principled basis in support of their claim that s 9A(5) must have some particular level of operation or activity. The appellants’ claim that s 9A(5) must have some content should not be accepted, submitted the Minister, because it required arbitrary distinctions to be drawn between different activities and operations without advancing any discernible purpose. The Minister submitted that, where the Parliament failed to provide any workable criteria that would limit the power under s 9A(6), the Court should not fill the gap.

## Appellants’ submissions in reply summarised

1. The AMOU’s submissions in reply (which were adopted by the MUA) may be summarised as follows.
2. First, it was emphasised that the Minister’s acknowledgment that his power under s 9A(6) is not unlimited is inconsistent with the primary judge’s express statement that the Minister had an “unfettered discretion” to adjust the content or operation of the definition of “offshore resources activity”. The limits of the Minister’s determination power are to be discerned from the purpose and policy of s 9A. Construed against the background of its legislative history and alongside the other relevant definitional terms relating to the “migration zone”, s 9A was intended to introduce a new, operative, mechanism by which persons **would** be brought within the migration zone for the purpose of the *Act*.
3. Secondly, contrary to the Minister’s contention that there is nothing in the *Act* which reveals a discernible legislative intention that any particular kind of operation or activity must constitute an “offshore resources activity”, the following textual matters indicate that that phrase has a mandatory content:
4. the stipulation by s 9A(1) to (4) and s 41(2C) of detailed deeming machinery for which persons are taken to be in the migration zone by reason of their involvement in an “offshore resources activity” evinces a legislative intention that the migration zone actually be expanded pursuant to s 9A. Contrary to the primary judge’s finding that the amendments were directed to the expansion or contraction of the concept of the migration zone, the amendments only expand that concept and the Minister’s power to make a determination under s 9A(6) must be exercised conformably with the legislative object to have persons participating in such activities (howsoever defined) within the migration zone;
5. the Parliament intended that the expression “offshore resources activity” had actual work to do because it is related to s 41(2B) of the *Act*, which imposes substantive obligations upon persons to hold particular kinds of visas where they are involved in an “offshore resources activity”;
6. the significance of the absence of a Parliamentary power to disallow a determination made under s 9A(6) lies in the fact that it reinforces that some level of operation or activity prescribed by the Parliament as an “offshore resources activity” should be maintained and the Court should hesitate to construe unsupervised Executive power in extremely broad terms; and
7. as to the Minister’s submission that the question whether the migration zone should extend to particular offshore activities is essentially “a policy question” and depends on “politically contentious issues”, the appellants submitted that it is first necessary to construe the scope of the power under s 9A(6) before determining what policy considerations may inform its exercise.
8. Thirdly, contrary to the Minister’s position, the appellants submitted that the differences between ss 8, 9 and 9A of the *Act* supported their argument that s 9A serves a discrete and operational function under the scheme of the *Act*. The definitions in ss 5, 8 and 9 of “migration zone”, “Australian resources installation” and “Australian sea installation” respectively, provide three criteria by which persons are regulated under the *Act*: geographical location, vessel type, and the connection between the two. Section 9A was enacted to introduce a wholly new framework for regulating the offshore resources industry in the light of gaps found in the previous scheme in *Allseas*. The appellants argued that the inclusion of the Ministerial discretion in s 9A(6) to alter the scope of the deeming provision in s 9A(1), where no equivalent provision appears in ss 8 and 9, reflects the conceptual differences between the provisions. The breadth of the operations and activities under the *Offshore Petroleum Act* and *Offshore Minerals Act* (to which s 9A(5)(a) and (b) refer) indicates that the power to exclude any such activities or operations should be exercised sparingly and not liberally.
9. Finally, in response to the Minister’s submission that the appellants had failed precisely to identify the limits of the power under s 9A(6) under their preferred construction, the appellants submitted that this was unnecessary for the purposes of the current proceedings where it was not disputed that the effect of the Determination was to extinguish, at least for the time being, **any** class of activity or operation from the definition of “offshore resources activity”. The appellants added, however, that at the very least, a valid determination under s 9A(6) needed to retain within that definition **a** class of operation or activity under each of the *Offshore Petroleum Act* and *Offshore Minerals Act*.

## Disposition of the appeals

1. Neither appellant contended that the Determination was made for an unauthorised purpose or was void for unreasonableness. Their legal challenge was and is one of simple *ultra vires*. The general approach to such a challenge was described by Rich J in *Footscray Corporation v Maize Products Pty Ltd* (1943) 67 CLR 301 (***Footscray Corporation***)at 308 as follows:

Authorities are of little use in determining the validity of a particular by-law. The appropriate steps are to construe the statute under which the by-law is made and then interpret it to ascertain whether it is within the ambit of the statute.

Although those observations were directed to a local government by-law, we consider that they apply to any subordinate legislative instrument, including the Determination.

1. The focus must necessarily be on construing the enabling statute and then construing the relevant subordinate legislative instrument to determine whether it is within the enabling power. As noted above, the primary judge set out relevant extracts from recent High Court decisions in which the Court has emphasised the importance of consideration of the text itself in the task of statutory construction, while also noting that the statutory text must be considered in its context, which can include legislative history and extrinsic materials. The extracts included the following passage from *Alcan* at [47] per Hayne, Heydon, Crennan and Kiefel JJ, which is frequently cited:

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is to seeking to remedy.

1. The primary judge noted that this passage from *Alcan* was repeated by French CJ and Hayne J in *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AAQS* *v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [23] and their Honours’ further statement at [24] (footnotes omitted):

The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, “[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute” (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision “by reference to the language of the instrument viewed as a whole”, and “the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed”.

(See also *Consolidated Media Holdings* at [39]; *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* [2013] HCA 16; (2013) 87 ALJR 588 at [47]; *Thiess* at [22]; *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 at [88]-[89] and *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 (***CIC Insurance***) at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ).

1. The task of construing the *Act* and the Determination is further assisted by some other general principles of statutory construction. As noted above, the primary judge made reference to some of these principles, including principles guiding the construction of definitional provisions; the requirement of s 11B(1) of the *Acts Interpretation Act* that an amending Act be construed with the amended Act and the requirement that delegated legislation, such as the Determination, must conform to the purposes for which it is enabled.
2. On the third of those matters, the primary judge made reference to *Swan Hill Corporation* and *R v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170 (***Northern Land Council***). It is desirable to set out relevant passages from those decisions. In *Swan Hill Corporation*, in the context of determining the validity of a local government by-law, Dixon J said at 756:

In considering the validity of any provision adopted in the supposed exercise of a limited power of a legislative nature, the first and often most decisive step is to ascertain the true scope of the measure impugned and the legal effect it would produce.

1. At 755 of *Swan Hill Corporation*,Rich J reiterated his earlier observations in *Footscray Corporation* regarding the limited utility of former decisions in construing similar phrases in different legislative provisions (in the context of ascertaining the meaning and scope of the word “regulating” and “restraining”), with which we respectfully agree and apply here:

For my part I think that the interpretation of by-law-making power is not made easier or more certain by the constant recourse to former decisions on powers on very different subjects which happen to contain some of the catch words and phrases belonging to the draftsman’s vocabulary. I recognize that the desire to obtain consistency and continuity of decision – a desire highly commendable – naturally leads to an examination of former cases presenting analogies proximate or remote to the problem which happens to be in hand. But sometimes a greater certainty is actually obtained by the more direct course of natural and instinctive interpretation based upon ordinary experience of the use of English terms and due reflection upon the character and implications of the subject matters.

1. Relevant guidance may also be obtained from the following passages in *Northern Land Council*,which involved a challenge to the validity of a Regulation made by the Administrator of the Northern Territory under the *Planning Act 1979* (NT), which had the effect of extending the township of Darwin (with a population then of about 50,000) to cover an area of 4,350 square kilometres thereby rendering that land unavailable to be claimed as unalienated Crown land under s 50(1)(a) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). At 187, after stating that the regulation-making power was to be exercised only for planning purposes, Gibbs CJ added that such a power “does not enable…[the making of] regulations ‘which go outside the field of operation which the Act marks out for itself’”. His Honour then cited approvingly the following statement of principle in *Shanahan v Scott* (1957) 96 CLR 245 at 250:

… such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.

1. Another passage from *Northern Land Council* is that from the judgment of Stephen J at 204, which is relevant here and, in particular, to the correctness of the primary judge’s finding that the Minister’s power under s 9A(6) is unfettered:

Where a Parliament confers powers they will seldom if ever be conferred in gross, devoid of purposes or criteria, express or implied, by reference to which they are intended to be exercised.

1. Applying those principles and guidance, we consider that the task of construing s 9A and related provisions in the *Act* with a view to determining whether the Determination is *ultra vires* should proceed as follows.
2. First, s 9A(1) effectively creates a rule or proposition that a person who is engaged in an offshore resources activity as defined in s 9A(5) is deemed to be in the migration zone. That rule or proposition operates by reference to the definition of offshore resources activity in s 9A(5). The deeming rule applies except where the Minister has made a relevant determination under s 9A(6). Sections 9A(5)(a) and (b) manifest a clear statement of Parliamentary intention to bring within the regulatory ambit of the *Act* persons who are engaged in operations and activities carried out under the two specified and existing Commonwealth Acts which regulate a large part of Australia’s offshore resources industry. However, the Minister has a power to determine exceptions to that state of affairs. In the case of s 9A(5)(c), which relates to other non-specific legislation of the Commonwealth, a State or a Territory, any activity, operation or undertaking which is carried out under such legislation is captured by the *Act* only if the Minister so determines. Accordingly, the Minister’s power of determination under s 9A(6) operates differently in relation to s 9A(5)(a) and (b) than it does with (c).
3. In our view, particular significance attaches to the fact that the term “except” was deliberately chosen in s 9A(5) in defining “offshore resources activity” by reference to a potentially wide range of operations or activities carried out under the *Offshore Petroleum Act* or the *Offshore Minerals Act* **except** an operation or activity determined by the Minister under s 9A(6). When used in that context, we consider that the term “except” (which appears in s 9A(5)(a) and (b), but not in s 9A(5)(c)) does not denote that the Minister’s power of determination can be exercised so as completely to extinguish the items within the relevant category or class in s 9A(5)(a) or (b). Indeed, we consider that the term should be given its ordinary meaning, which is reflected in the following extract from *Cockle* at 165 per Dixon CJ, McTiernan and Kitto JJ:

An exception assumes a general rule or proposition and specifies a particular case or description of case which would be subsumed under the rule or proposition but which, because it possesses special features or characteristics, is to be excluded from the application of the rule or proposition. It is not a conception that can be defined in the abstract with exactness or applied with precision; it must depend very much upon context.

To similar effect, Williams J in *Cockle* at 168 said the following about the concept of an “exception” (which applies equally to the verb “except”):

It is a particular thing or things excepted out of the general thing granted.

1. Having regard to these textual matters, we consider that the Minister’s power under s 9A(6) to create an exception to the rule cannot be used to eviscerate a substantial part of the rule by denuding s 9A(5)(a) and (b) of any content. That construction is not avoided by the possibility that the Minister might in the future make a determination in relation to s 9A(5)(c) which has the effect of adding a further activity, operation or undertaking to the *Act’s* regulatory scheme. It is evident that, under the *2013 Amending Act*,while the Minister was given a power to adjust the particular activities which were captured by the regulatory scheme of the *Act* by the combined operation of s 9A(1) and (5), it was not intended that the Minister could use that power to restore the position which existed when *Allseas* was decided.
2. Secondly, the *Act* and the *2013 Amending Act* must be regarded as “one connected and combined statement” of the Parliament: *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* [1995] HCA 44; (1995) 184 CLR 453 at 479 and s 11B of the *Acts Interpretation Act*. Section 9A(1) is a deeming provision which identifies what is an offshore resources activity for the purposes of the *Act*. Similarly, s 41(2B) is a related provision outlining certain visa requirements. If the Determination is valid, ss 9A(1) and 41(2B) would be rendered otiose. The definition and the related provisions were intended to have work to do: *Project Blue Sky* *Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [71]*.* Properly construed, what the text of the statute reflects is that the Parliament intended that, in the case of s 9A(5)(a) and (b), the scope of the definition of “offshore resources activity” was able to be contracted to some extent but that a level of operation or activity should be maintained beyond that which related to the matters described in ss 8 and 9: cf *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410. If the Parliament’s intention was that the power under s 9A(6) could be used to reverse the definitions in s 9A(5), it might be expected that an expression such as “subject to” would have been used and not the term “except”.
3. Thirdly, we do not accept the Minister’s submission that there is no relevant “rule” because the way in which the Minister exercises the power conferred by s 9A(6) determines the scope of the “rule” in s 9A(1), with the consequence that the making of a Ministerial determination cannot empty any rule because the rule is inherently susceptible to contraction or expansion depending on the exercise of the Minister’s power under s 9A(6). That submission is inconsistent with the text and structure of s 9A as discussed above.
4. Fourthly, we consider that the construction set out above conforms with and promotes the purpose and object of the *2013 Amending Act* (see s 15AA of the *Acts Interpretation Act*). As directed by the High Court in *CIC Insurance* at 408, the modern approach to statutory interpretation insists that context be considered at the outset and not merely when ambiguity might be thought to arise. Moreover, context includes the mischief which the relevant provisions were intended to remedy and reference can be made to documents such as the Explanatory Memorandum to the *2013 Amending Bill* with a view to ascertaining that purpose or mischief.
5. The purpose or mischief to which the *2013 Amending Act* was directed is apparent in the following passages from the Explanatory Memorandum which, although lengthy, are important to the proper construction of s 9A and s 41(2B) and (2C):

OUTLINE

…

The Government is committed to maintaining the security of Australia’s borders.

Under the current legislative framework, the Government has an incomplete picture of the number of foreign workers in the offshore maritime zone. This is in part due to the absence of a regulated visa regime to capture those engaged in Australia’s offshore maritime zones and the corresponding migration information. There are security ramifications as a result of the inability to regulate foreign workers engaged in offshore resources activities in an immigration context. The June 2012 Report of the Offshore Oil and Gas Resources Sector Security Inquiry recognised that visa security checks are one of the only ways Australia is able to examine non-citizen workers in this security-sensitive industry.

The exploration and exploitation of the natural resources in Australia’s offshore maritime zones contributes significantly to the Australian economy and employs thousands of Australian workers. The inability for the Government to regulate foreign workers in Australia’s offshore resources industry undermines the integrity of Australia’s migration program and visa regime regulating work entitlements. As a result, there is a risk that foreign workers undertaking activities involved in the exploration and exploitation of Australia’s natural resources and who therefore form part of the Australian employment sector may be working under conditions and receiving wages that do not adhere to Australian standards. This reduces work opportunities for Australian citizens and non-citizens who hold relevant visas permitting work and also puts businesses that only engage workers who hold valid visas to work at a competitive disadvantage.

The amendments in this Bill will regulate foreign workers participating in offshore resources activities by bringing these persons into the migration zone and thereby requiring them to hold a visa under the Act. In terms of selecting offshore resources activities, the Taskforce recommended referencing a legislative solution that comprehensively administer the activities of the offshore resources industry comprising the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Offshore Petroleum Act) and the *Offshore Minerals Act 1994* (the Offshore Minerals Act). In addition to these two Acts, the Bill will create a power for the Minister to make a determination in writing for the purposes of defining offshore resources activity. This will provide the Minister with flexibility to declare certain activities administered by other regulatory schemes as offshore resource activities for the purposes of the new deemed migration zone. This would include projects that take place in areas that are within the coastal waters of the States and the Northern Territory which are regulated under State and Territory laws rather than their Commonwealth equivalents.

The legislative measures will supplement the current framework under the Act which defines, as part of the migration zone, Australian resources installations and Australian sea installations. Together with the existing provisions in the Act, this new comprehensive framework will ensure that workers in Australia’s offshore resources industry are regulated under the Act and required to hold specific visas. Individuals who engage in offshore resources activities in Australia’s offshore maritime zones will be subject to existing compliance measures in the Act which address breaches of work and visa conditions.

…

SCHEDULE 1 – Amendments

Part 1 – Amendments

*Migration Act 1958*

…

**Item 6 After section 9**

…

38. New section 9A creates a new framework that provides that persons in an area participating in, or supporting, an offshore resources activity are taken to be in the migration zone (the deeming provision). New section 9A further clarifies how this new framework operates by deeming when persons are taken to be in Australia, taken to travel to Australia, taken to enter Australia and or taken to leave Australia. It further defines offshore resources activity for the purposes of the Act. The purpose of this amendment is to bring persons participating in, or supporting, an offshore resources activity in the relevant area within the ambit of the Act, thereby requiring these persons to hold visas.

…

41. New section 9A is based on the recommendations of the Taskforce. The Taskforce recommended that the existing legislative framework that essentially provides that persons are in the migration zone based on where they are physically located be supplemented with a new legislative concept. The policy intention is to provide that all offshore resource workers, including support staff, are taken to be in the migration zone when they are engaged to conduct activities regulated by Commonwealth, State and Territory legislation relating to the exploration and exploitation of Australia’s natural resources.

…

48. New subsection 9A(1) operates as the new deeming provision and supplements the current definition of the ***migration zone*** in subsection 5(1) for the purposes of offshore resources activities. However, it does not modify the existing definition of the ***migration zone*** in subsection 5(1).

49. The purpose of this amendment is to require persons participating in, or supporting, an offshore resources activity in a relevant area to hold visas to work. Current subsection 5(23) provides that to avoid doubt, in this Act ***is taken***, when followed by the infinitive form of a verb, has the same force and effect as ***is deemed*** when followed by the infinitive form of that verb. New subsection 9A(1) therefore operates as a deeming provision.

50. New subsection 9A(1) does not define what “an area” is and has been left deliberately broad. Instead, it is intended for the relevant area to be read in conjunction with the definition of offshore resources activity in new subsection 9A(5). New subsection 9A(5) refers to certain operations or activities under the Offshore Petroleum Act, Offshore Minerals Act or a law of the Commonwealth, a State or a Territory determined by the Minister. Those Acts themselves will define the area (for example, a licence under the Offshore Minerals Act will define a particular area in which the regulated operation may take place).

*Meaning of offshore resources activity*

*Subsection 9A(5)*

…

90. New subsection 9A(5) is not intended to modify the existing framework created by these Acts relating to offshore resources activities, and define new activities, but rather link to existing activities. When selecting the activities associated with the exploration and exploitation of Australia’s natural resources, the Taskforce recognised that there is already a regime which comprehensively covers the activities of the offshore resources industry. The Taskforce concluded that linking the Act to the current regulatory schemes under the Offshore Petroleum Act, the Offshore Minerals Act and related State and Territory legislation, would ensure that the Migration Act covers the same activities being conducted under existing legislation regulating the offshore resources industry.

…

92. New paragraphs 9A(5)(a) and 9A(5)(b) make it clear that all regulated operations under the Offshore Petroleum Act and all activities performed under a licence or a special purpose consent under the Offshore Minerals Act are captured by the definition of offshore resources activity unless the Minister has excluded the operation or activity by using his powers under subsection 9A(6). This would allow the Minister to exclude from the Act activities defined under the Offshore Petroleum Act and the Offshore Minerals Act which the Minister considers unsuitable to be captured by the definition of offshore resources activity.

…

94. New subparagraph 9A(5)(c)(ii) provides that an ***offshore resources activity*** can also include an activity, operation or undertaking (however described) that is being carried out, or is to be carried out under a law of the Commonwealth, a State or a Territory determined by the Minister under subsection 9A(6).

95. The purpose of this amendment is to enable the Minister to determine as an offshore resources activity, an activity which is not covered by the Offshore Petroleum Act or the Offshore Minerals Act under new subsection 9A(6) for the purposes the deeming provision in new subsection 9A(1). Therefore, a person who is carrying out an activity under legislation that the Minister has determined to be an offshore resources activity would be taken to be in the migration zone because they are participating in an offshore resources activity.

96. This provision recognises and accounts for changes in the offshore resources sector and possible advances in technology. It recognises that additional laws may be developed in the future to govern new offshore resource activities that may emerge.

…

*Subsection 9A(6)*

99. New subsection 9A(6) provides that the Minister may, in writing, make a determination for the purposes of the definition of ***offshore resources activity*** in subsection 9A(5).

100. More specifically, this amendment provides the Minister with the power to make determinations with respect to the definition of offshore resources activity by:

• exempting certain regulated operations under the Offshore Petroleum Act from the definition of offshore resources activity;

• exempting certain activities performed under a licence or a special purpose consent under the Offshore Minerals Act from the definition of offshore resources activity;

• capturing certain activities, operations or undertakings carried out, or to be carried, out under a law of the Commonwealth, a State or a Territory;

• determining the specific law of the Commonwealth, State or a Territory in which those activities are carried out under; and/or

• limiting the area in which those activities are carried out under.

101. The purpose of this amendment is to provide the Minister with the flexibility and ability to exempt certain activities administered by the Offshore Petroleum Act and the Offshore Minerals Act from the definition of offshore resources activity. Further, this amendment will provide the Minister with the ability to capture certain other activities not administered by these two Acts but administered by a law of the Commonwealth, a State or a Territory.

102. This amendment will also provide the Minister with an additional tool to ensure that any future emergency can be effectively dealt with and to exclude any unintended consequences which may breach Australia’s international obligations.

…

*Subsection 9A(7)*

*…*

105. A legislative instrument is to be utilised as the Minister would need flexibility to make determinations for the purpose of the definition of offshore resources activity and these instruments would need to be revised frequently, in consultation with stakeholders.

…

**Item 8 After subsection 41(2A)**

…

*Subsections 41(2B) and 41(2C)*

123. New subsection 41(2B) provides that in addition to any restrictions applying because of Regulations made for the purposes of paragraph 41(2)(b), a condition of a visa that allows the holder of the visa to work is not taken to allow the holder to participate in, or support, an offshore resources activity in relation to any area unless the visa is:

• a permanent visa;

• or a visa prescribed by the regulations for the purposes of this subsection.

124. The purpose of this amendment is to ensure that all non-citizens engaged in an offshore resources activity hold a visa or a permanent visa to participate in, or support, the relevant activity.

125. A person who is not the holder of a permanent visa or a visa prescribed by the Regulations for the purposes of new subsection 41(2B) could not lawfully participate in, or support, an offshore resources activity.

…

128. New subsection 41(2C) provides that to avoid doubt, for the purposes of subsection 41(2B), a person may participate in, or support, an offshore resources activity in relation to an area whether the person:

• is on an Australian resources installation in the area;

• or is, under section 9A, otherwise in the area to participate in, or support, the activity.

129. This new subsection mirrors new subsection 9A(8) which is inserted by item 6 above. The purpose of this amendment is to put beyond doubt that persons engaged in any type of offshore resources activity in the relevant area will be required to hold a permanent visa; or a visa prescribed by the Regulations to participate or support that activity. This will be the case regardless of whether the person is engaged in an activity on an Australian resources installation and is already taken to be in the migration zone under the Act or is participating in or supporting an offshore resources activity for the purposes of new section 9A and will therefore be taken to be in the migration zone under new subsection 9A(1).

130. The policy intention behind new subsections 41(2B) and 41(2C) is to enable the Department to identify the number of non-citizens working in the offshore resources sector and information about the work they are doing. Without a specific visa for this work, this will not be possible. Identification of the number of non-citizens working in the sector enables identification of training needs for Australian workers. The Taskforce also received feedback that the current visa products available are not suitable for the needs of industry, for example, where there is a need to transfer a worker from one offshore project overseas to a project in Australian waters at short notice. The new visa product would provide flexibility for industry and would enable the Department to identify the number of non-citizens working in the sector.

…

(Emphasis in original.)

1. Those passages indicate the following matters concerning the purpose of the relevant amendments:
2. the *2013 Amending Act* was intended to introduce a new concept into the *Act*, by deeming a person to be in the migration zone where the person was involved in “offshore resources activity” as defined in s 9A(5);
3. an express purpose of the amendments, driven in part by border security considerations, was to **regulate** foreign workers participating in offshore resources activities by bringing these persons into the migration zone and thereby requiring them to hold a specified visa under the *Act*;
4. the amendments introduced by the *2013 Amending Act* were intended to supplement and expand the previous framework under the *Act* which defined the migration zone by reference to “Australian resources installations” and “Australia sea installations”; and
5. the Minister was empowered to make a legislative determination in writing for the purposes of defining “offshore resources activity” to provide the Minister with flexibility to:
	* 1. exempt from that definition **certain** operations or activities carried out under the *Offshore* *Petroleum Act* or the *Offshore Minerals Act* where, for example, the Minister considered them to be unsuitable to be included within the definition and, therefore, subject to regulation under the *Act*; and
		2. capture certain other activities, operations or undertakings administered by regulatory schemes other than the *Offshore* *Petroleum Act* and the *Offshore Minerals Act* as determined by the Minister.
6. These extracts from the Explanatory Memorandum support the textual construction of s 9A(6) in [65]-[67] above. In particular, the Explanatory Memorandum makes it clear that the primary purpose of the amendments was to have the *Act* apply to foreign workers who are engaged in offshore resource activities or operations, by requiring them to hold specified visas. Recognising, however, that there may need to be some particular exceptions or exemptions from such regulation, the Minister was empowered to make a determination to that effect. The Parliament’s intention was to confer upon the Minister a power to except or exempt particular activities or operations carried out under the *Offshore Petroleum Act* or *Offshore Minerals Act*, not to reverse the Parliament’s desire and intention to bring within the *Act* non-citizens who are engaged in operations and activities under the *Offshore Petroleum Act* or the *Offshore Minerals Act*.
7. Fifthly, the textual and contextual reasons for construing the relevant provisions in the manner indicated above is further reinforced in our view by consideration of the relationship between the Executive and Legislative branches of government. It is not readily to be supposed that a legislative provision giving the Executive power to modify the reach of a statutory provision (by creating exceptions) should be understood as permitting the *de facto* repeal of the only part of the provision which supplied an immediate and substantive content to the new concept of “offshore resources activity” (i.e. in s 9A(5)(a) and (b)). We respectfully agree with the following statement by Weinberg J in *Vanstone* at [101]:

Pearce [Pearce and Argument, *Delegated Legislation in Australia,* Butterworths, 2nd Edition (1999)] suggests that the doctrine of separation of powers limits the scope of delegated legislation in two ways. First, it is not permissible for legislation to be made by a body other than the parliament without the authority of the parliament. Second, while the parliament may empower another body to alter the effect of an Act, that power will be strictly construed. The delegate will not be permitted to destroy the purpose of the empowering Act: *State of New South Wales v Law* (1992) 29 ALD 215.

1. We are not persuaded by the Minister’s submission that the primary judge’s construction should be affirmed because of the difficulties of precisely identifying the boundaries of the Minister’s power under s 9A(6) including, for example, identifying the threshold at which the exercise of the power would tip from being valid to invalid. The validity of any other determination purportedly made under s 9A(6) will necessarily fall to be determined having regard to all the relevant circumstances and will be guided by the general principle that the power is limited by the subject matter, scope and purpose of the relevant legislative provisions. An abstract bright line which demarcates the boundary between validity and invalidity in this context cannot be drawn. But the same is true of other settings where the question arises as to whether the exercise of a power to make subordinate legislation is authorised by the enabling Act. The point is well illustrated by the long series of cases which have grappled with the question whether a power to regulate includes a power to prohibit (see the many cases on this topic referred to in Pearce and Argument, *Delegated Legislation in Australia,* Butterworths, 3rd Edition (2005) at [15.3]-[15.14]). Difficulties of construction relating to hypothetical future determinations under s 9A(6) should not stand in the way of determining whether the Determination is *ultra vires*.
2. Nor do we accept the Minister’s separate submission, which was emphasised in oral address, that the effect of the *2013 Amending Act* merely operates at the “margins” of the definition of the “migration zone” in s 5 of the *Act*. As is evident from both the terms of s 9A and the relevant parts of the Explanatory Memorandum set out above, effect was given to the intention that, *prima facie*,all regulated operations and activities under the *Offshore Petroleum Act* and *Offshore Minerals Act* would be regulated under the *Act*, not by amending the definition of “migration zone” in s 5, but by linking the existing regulatory framework under the *Act* to the wide range of operations and activities carried out under these other two Commonwealth Acts (together with, potentially, operations, activities and undertakings carried out under related Commonwealth, State or Territory legislation as determined by the Minister). A wide range of activities and operations relating to offshore petroleum and mineral resources are regulated by these two Commonwealth Acts through an array of permits, leases, licences and authorities. The activities regulated under these Acts are broader than those which are captured by the definitions of “Australian resources installation” and “Australian sea installation” in ss 8 and 9 (which are picked up in the definition of “migration zone” in s 5). As confirmed by the Explanatory Memorandum, the new concept of “offshore resources activity”, as defined in s 9A(5), provided a “comprehensive framework” which, together with the then existing framework, would ensure that foreign workers in Australia’s offshore resources industry would be required to hold specific visas. It is an understatement to describe the effect of the amendments as merely “marginal”.
3. Sections 41(2B) and (2C) also demonstrate that the amendments were not merely marginal in character. These provisions have an important substantive effect. In the case of s 41(2B), a person who is engaged in an offshore resources activity as defined must hold either a permanent visa or a visa prescribed by the regulations for the purposes of the provision. Consequently, a person who is engaged in an offshore resources activity who does not hold a permanent visa or a prescribed visa could not lawfully participate in, or support, an offshore resources activity. And, to avoid doubt, s 41(2C) provides that, for the purposes of s 41(2B), a person may engage in an offshore resources activity in relation to an area whether the person is on an Australian resources installation in the area (as defined in s 5) or is, under s 9A, otherwise in the area to participate in, or support, such an activity. Accordingly, any person engaged in any type of offshore resources activity in the relevant area is required to hold a permanent visa or a visa prescribed by the regulations to participate or support that activity, regardless of whether the person is already taken to be in the migration zone because he or she is on an Australian resources installation or is participating in, or supporting, an offshore resources activity under the new s 9A.

## What is the appropriate relief?

1. The orders that the appellants have sought in the event that their respective appeals are allowed include setting aside the orders of the primary judge and, in lieu thereof, making the following declarations:
2. A declaration pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) that paragraph 1 of legislative instrument IMMI 14/077 (being the Determination in issue), purportedly made by the first respondent and registered in the Federal Register of Legislative Instruments on 17 July 2014, is not authorised by s 9A(6) of the *Migration Act 1958* (Cth) or otherwise and is invalid.
3. A declaration pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) that paragraph 2 of legislative instrument IMMI 14/077, purportedly made by the first respondent and registered in the Federal Register of Legislative Instruments on 17 July 2014, is not authorised by s 9A(6) of the *Migration Act 1958* (Cth) or otherwise and is invalid.
4. The parties were given an opportunity to make supplementary written submissions on the appropriate form of declaratory relief. The Court was concerned that a declaration of invalidity *ab initio* could give rise to practical difficulties. The parties made brief supplementary submissions. The Minister did not dispute that the relief sought by the appellants was appropriate if the appeals were allowed. The Minister also indicated that active consideration was being given to measures that might be taken to address the practical ramifications of the Determination being ruled invalid.
5. In the light of the appellants’ success in respect of establishing the invalidity of both paragraphs 1 and 2 of the Determination, we consider that the appropriate declaratory relief is simply to declare that legislative instrument IMMI 14/077 as registered in the Federal Registry of Legislative Instruments on 17 July 2014 is not authorised by s 9A(6) of the *Act* or otherwise and is invalid.

## Conclusion

1. Both appeals should be allowed and appropriate declarations made. The Minister acknowledged that there was no reason why costs should not follow the event. Orders will be made accordingly.

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| --- |
| I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Gordon, Katzmann and Griffiths. |

Associate:

Dated: 26 March 2015