HIGH COURT OF AUSTRALIA

FRENCH CJ,
BELL, GAGELER, KEANE AND NETTLE JJ

THE MARITIME UNION OF AUSTRALIA & ANOR PLAINTIFFS

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR DEFENDANTS

Maritime Union of Australia v Minister for Immigration and Border Protection
[2016] HCA 34
31 August 2016
S136/2015

ORDER

The questions stated by the parties in the special case dated 6 May 2016 and referred for consideration by the Full Court be answered as follows:

Question 1

Is paragraph 2 of Determination IMMI15/140, registered on the Federal Register of Legislative Instruments on 14 December 2015, invalid?

Answer

Yes.

Question 2

If the answer to Question 1 is "Yes", what relief, if any, should be granted?

Answer

It should be declared that paragraph 2 of Determination IMMI15/140, registered on the Federal Register of Legislative Instruments on 14 December 2015, is invalid and of no effect.

Question 3

Who should pay the costs of the Special Case?

Answer

The second defendant.

Representation

N J Williams SC with B K Lim for the plaintiffs (instructed by Slater and Gordon Lawyers)

S P Donaghue QC with A M Mitchelmore for the defendants (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Maritime Union of Australia v Minister for Immigration and Border Protection

Statutes – Delegated legislation – Validity – *Migration Act* 1958 (Cth) – Offshore resources industry – Where amendments to *Migration Act* had effect of extending migration zone to non-citizens participating in or supporting offshore resources activity – Where amendments created specified visa requirements for such persons – Where amendments conferred power on Minister to make determination excepting operations and activities from extended migration zone – Where Minister's determination purported to except from migration zone, and specified visa requirements, all operations and activities to extent certain vessels or structures were used – Whether determination entirely negated operation of general rule in extending migration zone to non-citizens participating in or supporting offshore resources activity – Whether determination beyond power and invalid.

Words and phrases – "Australian resources installation", "exception", "migration zone", "offshore resources activity".

Legislation Act 2003 (Cth), s 42.
Migration Act 1958 (Cth), ss 5, 8, 9A, 13(1), 41.
Migration Amendment (Offshore Resources Activity) Act 2013 (Cth).
Offshore Minerals Act 1994 (Cth), s 4, Ch 2.
Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth), s 7, Chs 2, 3.

1 FRENCH CJ, BELL, GAGELER, KEANE AND NETTLE JJ. The plaintiffs are associations of employees including persons employed in the offshore resources industry. The offshore resources industry is concerned with the exploration and exploitation of offshore natural resources including greenhouse gas, petroleum and other minerals. In 2013, the *Migration Act* 1958 (Cth) was amended with the effect that from 29 June 2014 non-citizens participating in or supporting an activity or operation within the statutory definition of "offshore resources activity" are deemed to be within the migration zone and therefore subject to specified visa requirements. The amendments conferred power on the first defendant ("the Minister") to make a determination under s 9A(6) of the *Migration Act* excepting an operation or activity from the statutory definition of "offshore resources activity". In 2015, the Minister made a determination excepting from that definition all operations and activities to the extent that they use any vessel or structure that is not an Australian resources installation ("the 2015 Determination"). The purported effect of the 2015 Determination is thus to negate the operation of the specified visa requirements in relation to non-citizens engaged in operations and activities to the extent that they use any vessel or structure that is not an Australian resources installation. This special case has been stated in order to determine the validity of the 2015 Determination. For the reasons which follow, the 2015 Determination exceeded the limits of the power conferred on the Minister under s 9A(6) and for that reason is invalid.

Legislative history

2 Since 1982, provisions of the *Migration Act* have provided to the effect that the migration zone[1] and therefore the requirement for a non-citizen to hold a visa[2] extends to non-citizens working on Australian resources installations[3]. Under the *Migration Act*, a structure or vessel is an Australian resources installation if it is attached to the Australian seabed in the sense described in s 5(14)[4] and is a fixed structure (ie, unable to move or be moved) that is used off-shore in exploring or exploiting natural resources or in associated activities[5]; a

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1 See now *Migration Act* 1958 (Cth), s 5(1).

2 See now *Migration Act*, s 13(1).

3 See now *Migration Act*, s 5(1) definition of "Australian resources installation", s 8.

4 *Migration Act*, s 5(1) definition of "Australian seabed".

5 *Migration Act*, s 5(10).

floating and moveable structure, other than a vessel, that is used wholly or principally in what broadly may be described as drilling or associated exploration activities[6]; or a vessel used wholly or principally in such drilling or associated exploration activities[7]. At all relevant times, s 5(13) of the *Migration Act* has provided, however, that the reference to "vessel" in s 5(11)(a) does not include certain kinds of vessel used or to be used wholly or principally in transporting persons or goods to or from a resources installation or manoeuvring a resources installation, or in operations relating to the attachment of a resources installation to the Australian seabed ("the s 5(13) exclusion"). Vessels falling within the s 5(13) exclusion include supply and accommodation vessels, tugs and construction vessels.

3 In *Allseas Construction SA v Minister for Immigration and Citizenship*[8], the Federal Court of Australia (McKerracher J) held that certain pipe-laying vessels fell within the s 5(13) exclusion and, accordingly, that non-citizens on those vessels were not within the migration zone and so did not require visas.

4 In response to the *Allseas* decision, the Department of Immigration and Citizenship ("the Department") developed a taskforce to conduct a review on "how best to apply the [*Migration Act*] to workers in offshore maritime zones"[9]. On the basis of the taskforce's recommendations, the Department rejected "the simple option" of amending s 5(13) to remove the exception for non-citizens working on pipe-laying vessels and other ships manoeuvring resources installations into place while attached to the Australian seabed – because, as the Department observed, that would have left non-citizens free to work in the offshore resources industry on free-floating vessels without the need to obtain a visa. Instead, the Department preferred "the broader option" of creating a "specific offshore resource work visa" and requiring all non-citizens working in the offshore resources industry to hold such a visa with an appropriate work

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6 *Migration Act*, s 5(11)(b).

7 *Migration Act*, s 5(11)(a).

8 (2012) 203 FCR 200 at 214-215 [77].

9 Australia, House of Representatives, Migration Amendment (Offshore Resources Activity) Bill 2013, Explanatory Memorandum at 1.

condition[10] but that "the legislation ... be drafted [so as] to enable particular activities to be included or excluded from the application of the migration zone as it applies to the offshore resource sector"[11].

The 2013 Amending Act

5 Pursuant to the Department's recommendation, the Parliament enacted the *Migration Amendment (Offshore Resources Activity) Act* 2013 (Cth) ("the 2013 Amending Act"). Relevantly, it added s 41(2B) and (2C) to the *Migration Act*[12], with the effect of imposing a requirement that all non-citizens participating in or supporting the offshore resources industry hold a permanent or prescribed visa with an appropriate work condition; and a new s 9A[13], with the effect of extending the migration zone to include not only specified geographical locations and offshore installations but also participation in or support of certain operations or activities that are regulated or licensed under the *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth) ("the *Offshore Petroleum Act*") and the *Offshore Minerals Act* 1994 (Cth).

The new s 41(2B) and (2C) – a visa regime for the offshore resources industry

6 Section 41 of the *Migration Act* is entitled "Conditions on visas". Sub-section (1) provides that regulations may impose conditions on visas or visas of a specified class. Sub-section (2)(b) stipulates that such conditions may restrict the work that a visa-holder may undertake in Australia.

7 Sub-section (2B) states that the fact that a visa-holder is permitted to undertake work in Australia does not necessarily allow that person to participate in or support an offshore resources activity. "Offshore resources activity" is

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10 Australia, Department of Immigration and Citizenship, Migration Amendment (Offshore Resources Activity) Bill 2013, Regulation Impact Statement at 10, 14-15.

11 Australia, Department of Immigration and Citizenship, Migration Amendment (Offshore Resources Activity) Bill 2013, Regulation Impact Statement at 14.

12 *Migration Amendment (Offshore Resources Activity) Act* 2013 (Cth), Sched 1, item 8.

13 *Migration Amendment (Offshore Resources Activity) Act*, Sched 1, item 6.

defined in s 9A(5)[14] as a regulated operation within the meaning of s 7 of the *Offshore Petroleum Act*, or an activity performed under a licence or a special purpose consent within the meaning of s 4 of the *Offshore Minerals Act*, that is carried out or to be carried out within an area and is not an operation or activity excepted by the Minister under s 9A(6). It follows that, unless an offshore resources activity is so excepted, a non-citizen will only be permitted to participate in or support that activity if he or she holds a permanent or prescribed visa.

8 Sub-section (2C) stipulates that the requirement for a non-citizen to hold such a permanent or prescribed visa extends to persons in an area regardless of whether they are on an Australian resources installation, such as an oil rig or drilling ship, or are otherwise in the area, for example, on vessels or other structures unconnected to the Australian seabed (hereafter referred to as "vessels or unmoored structures"), such as seismic exploration vessels or submarines.

The new s 9A(1)-(5) – an operational extension of the migration zone

9 Section 9A(1) provides that 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".

10 Section 9A(5) defines "offshore resources activity" as follows:

"***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:

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14 See below at [10].

(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)."

11 The Explanatory Memorandum to the Bill which became the 2013 Amending Act stated with respect to s 9A(1)-(5)[15]:

> "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.
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> ...
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> 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).
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> ...
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> 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

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15 Australia, House of Representatives, Migration Amendment (Offshore Resources Activity) Bill 2013, Explanatory Memorandum at 10-17.

Minister has excluded the operation or activity by using his powers under subsection 9A(6)."

The new s 9A(6) and (7) – the Minister's power to except operations and activities from the extended visa regime

12 Section 9A(6) provides that:

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

13 Section 9A(7) provides that a determination made under sub-s (6) is a legislative instrument but that s 42 of the *Legislation Act* 2003 (Cth), which provides for parliamentary disallowance of legislative instruments, does not apply to determinations made under s 9A(6).

14 The Explanatory Memorandum to the Bill which became the 2013 Amending Act stated with respect to s 9A(6)[16]:

"[It] 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.

...

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.

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.

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16 Australia, House of Representatives, Migration Amendment (Offshore Resources Activity) Bill 2013, Explanatory Memorandum at 17-19.

...

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."

Subsequent developments

15 Following the general election in September 2013, the newly elected federal government introduced the Migration Amendment (Offshore Resources Activity) Repeal Bill 2014 with the object of repealing the 2013 Amending Act. The Bill was passed by the House of Representatives but lapsed in the Senate.

16 On 29 May 2014, the Governor-General made the Migration Amendment (Offshore Resources Activity) Regulation 2014 (Cth), which had the purported effect of prescribing certain visas for the purposes of s 41(2B) of the *Migration Act*. That regulation was disallowed by the Senate on 16 July 2014.

17 On the following day, the Assistant Minister for Immigration and Border Protection made a determination in apparent reliance on s 9A(6) of the *Migration Act*, which had the purported effect of excepting all regulated operations and activities identified in s 9A(5)(a) and (b) from the whole of the defined content of "offshore resources activity", and therefore the apparent consequence that non-citizen workers involved in those operations and activities would not require visas.

18 On 26 March 2015, the Full Court of the Federal Court of Australia held that the determination made on 17 July 2014 was invalid. The basis of the Full Court's decision was that a power to create exceptions to a rule cannot be used to eviscerate a substantial part of the rule by denuding the rule of any content and, therefore, that the Minister's power of determination pursuant to s 9A(6) of the *Migration Act* cannot be exercised so as completely to extinguish the items within the relevant category or class in s 9A(5)[17]. There was no appeal from the Full Court's decision but there were two further developments: a ministerial determination on 27 March 2015 and a declaration as to special purpose visas on

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17 *Australian Maritime Officers' Union v Assistant Minister for Immigration and Border Protection* (2015) 230 FCR 523 at 541 [67]; see also *Cockle v Isaksen* (1957) 99 CLR 155 at 165 per Dixon CJ, McTiernan and Kitto JJ, 168 per Williams J; [1957] HCA 85.

30 March 2015. Each was directed to restricting the coverage of the visa regime prescribed by s 41(2B) and (2C), but each was promptly challenged by the plaintiffs and then revoked by the Minister before a final hearing of the matter.

The 2015 Determination

19 On 2 December 2015, the Minister took what may be seen as the final step in this legal minuet between the Minister and the Parliament[18], by making the 2015 Determination. So far as is relevant, it provides as follows:

> "a. for the purposes of paragraph 9A(5)(a) of the Act, a regulated operation (within the meaning of section 7 of the *Offshore Petroleum and Greenhouse [Gas] Storage Act 2006*), [is not a regulated operation] to the extent that the operation uses any vessel or structure that is not an Australian resources installation;
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> b. for the purposes of paragraph 9A(5)(b) of the Act, an activity performed under a licence or a special purpose consent (both within the meaning of section 4 of the *Offshore Minerals Act 1994*), [is not a regulated activity] to the extent that the activity uses any vessel or structure that is not an Australian resources installation."

The 2015 Determination is invalid

20 It will be observed that, although the 2015 Determination is drafted in the singular – in the sense that it refers to "a regulated operation" and "an activity" – its purported effect is to except from s 9A(5)(a) and (b) all operations and activities to the extent that they use any vessel or structure that is not an Australian resources installation. There are a number of reasons why such a broad-ranging exception exceeds the limited terms of the power conferred on the Minister by s 9A(6).

21 To start with, the power of exception vested in the Minister is conferred in terms of a power to except *an* operation or activity from the operation of s 9A and hence from the reach of s 41(2B) and (2C). Arguably, that includes power to except more than one operation or activity and perhaps even a class or more than one class of operation or activity[19]. But the language of s 9A(6) is ill adapted to

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18 See *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 182 [6] per French CJ; [2014] HCA 24.

19 *Acts Interpretation Act* 1901 (Cth), s 33(3A); *Legislation Act* 2003 (Cth), s 13(3).

the exception of an operation or activity to some or other specified extent, still less to the exception of all operations or activities to that specified extent.

22 Secondly, the 2015 Determination does not accord with ordinary conceptions of a power to provide for exceptions. As was stated in *Cockle v Isaksen*[20], the ordinary understanding of an exception is that:

> "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."

In *Cockle v Isaksen* terms, s 9A(1) (understood in accordance with the definition in sub-s (5)) represents the general rule that is subject to the exception under s 9A(6) of particular cases of operations or activities possessed of special features. The 2015 Determination does not provide for such an exception.

23 The 2015 Determination is drafted in terms of "the extent [to which an operation or activity] uses any vessel or structure that is not an Australian resources installation" and is thereby calculated to appear as the marking out of a particular case of operations or activities possessed of a special feature. But, despite that appearance, by stipulating that s 9A(1) shall not apply to any offshore resources activity to "the extent that the operation [or activity] uses any vessel or structure that is not an Australian resources installation", the 2015 Determination purports in effect to deprive s 9A(1) of all content and so entirely to negate the operation of the general rule. And, contrary to the defendants' contentions, it is not impossible to identify content that is necessarily within s 9A(1). As will be explained later in these reasons, the text and temporal context of the enactment of s 9A(1) inform and define its content.

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20 (1957) 99 CLR 155 at 165 per Dixon CJ, McTiernan and Kitto JJ, see also at 168 per Williams J; see also *South Australia v Totani* (2010) 242 CLR 1 at 73 [172] per Hayne J, 166-167 [459]-[461] per Kiefel J; [2010] HCA 39.

24 Thirdly, and for the same reason, the 2015 Determination is opposed to the apparent statutory purpose of s 9A(6)[21]. Granted, the power conferred by s 9A(6) is expressed in relatively broad terms, in as much as it does not specify any preconditions of its exercise or require observance of any mandatory considerations[22] and because the notion of an "offshore resources activity" is unconstrained by reference to any particular geographic or other location. It may be, therefore, that s 9A(6) entitles the Minister to take into account a wide range of factors[23]. But, as Stephen J observed in *R v Toohey; Ex parte Northern Land Council*[24], a power of the kind conferred by s 9A(6) is seldom if ever unconstrained by express or implied purposes or criteria.

25 Given that s 9A(1) was enacted in order to extend the operation of the visa regime in s 41(2B) and (2C) to non-citizens on vessels or unmoored structures who are in an area to participate in or support an offshore resources activity, it is not to be supposed that s 9A(6) was enacted with the object of enabling the entire negation of that extension. To the contrary, the text and context of the provision imply that its purpose is to provide for limited exceptions for particular activities or operations to which it may be determined from time to time the visa regime should not apply. By entirely negating the extension of the visa regime to non-citizens on vessels or unmoored structures who are in an area to participate in or support an offshore resources activity, the 2015 Determination purports in effect to repeal the operation of s 9A(1) and thereby to thwart that legislative purpose.

26 The defendants contended to the contrary that, because the sole effect of s 5(13) is to prevent vessels that are engaged in particular offshore resources activities from falling within the migration zone as defined in s 5(1), and since s 5(13) was not repealed at the time of enactment of s 9A(1), it cannot be that the statutory purpose of s 9A(1) is to extend the reach of the visa regime to non-citizens on vessels or unmoored structures who are in an area to participate in or

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21 See *State of New South Wales v Law* (1992) 45 IR 62 at 75 per Kirby P, 89 per Priestley JA.

22 Cf *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 756-758 per Dixon J; [1937] HCA 15.

23 See *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 528 [61], 539 [102] per Gleeson CJ and Gummow J, 564-565 [187] per Hayne J, 584 [246] per Callinan J; [2001] HCA 17.

24 (1981) 151 CLR 170 at 204; [1981] HCA 74.

support an offshore resources activity; for, otherwise, s 5(13) would be otiose. In the defendants' submission, the preferable view of the purpose of s 9A(1) is to leave the Minister entirely free under s 9A(6) to determine the extent to which the visa regime should apply to non-citizens on vessels or unmoored structures who are in an area to participate in or support an offshore resources activity. According to the defendants, that construction is reinforced by the fact that, perforce of s 9A(7), s 42 of the *Legislation Act* does not apply to any such determination.

27 Those arguments are not persuasive. As already observed, it is apparent from the text of s 9A(1) and (5) and the temporal proximity of the 2013 Amending Act to the decision in *Allseas* that the purpose of s 9A is to create a general rule extending the visa regime in s 41(2B) and (2C) to non-citizens on vessels or unmoored structures who are in an area to participate in or support an offshore resources activity[25]. The logical implication is that the object of retaining s 5(13) and adding s 9A – as opposed simply to repealing s 5(13) – was substantially to negate the effect of s 5(13) while retaining a degree of ministerial discretion to provide by way of specific exceptions under s 9A(6) for the application of s 5(13) in particular cases of operations or activities possessed of special features.

28 The text of s 9A(6) fortifies that construction. As was earlier noticed[26], "offshore resources activity" is defined in s 9A(5) in terms of a regulated operation (within the meaning of s 7 of the *Offshore Petroleum Act*) or an activity performed under a licence or a special purpose consent (within the meaning of s 4 of the *Offshore Minerals Act*) that is carried out or to be carried out within an area, except any operation or activity determined by the Minister under s 9A(6). Each regulated operation within the meaning of s 7 of the *Offshore Petroleum Act* is defined and regulated under Chs 2 and 3 of that Act. Similarly, each activity performed under licence or special purpose consent within the meaning of s 4 of the *Offshore Minerals Act* is in effect defined and regulated under Ch 2 of that Act. In turn, each of those provisions operates by reference to precisely delineated geographic areas comprised of graticular blocks of no more than five minutes longitude and five minutes latitude and thus an area

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25 See *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671-672 [22]-[23]; [2014] HCA 12.

26 See above at [7] and [10].

of no more than approximately 25 square nautical miles[27]. That suggests that any exception of such an operation or activity determined by the Minister under s 9A(6) should be similarly directed.

29 For the same reasons, it cannot be that the inapplication of s 42 of the *Legislation Act* to s 9A(6) was designed to afford the Minister freedom to negate the operation of the general rule established by s 9A(1). The more logical and therefore preferable view of the matter is that s 9A(7) implies a legislative recognition of the likelihood that the need for particular exceptions will arise from time to time on an irregular but presumably not infrequent basis calling for rapid, bespoke responses that the requirements of s 42 would be likely to hamper.

30 If there were any doubt about that, it is excluded by the extrinsic materials to which reference has already been made. It was expressly stated in the Explanatory Memorandum to the Bill which became the 2013 Amending Act that the purpose of retaining s 5(13) and enacting s 9A(1) was to afford the Minister a degree of flexibility in particular cases by means of determinations under s 9A(6). There is no suggestion in those materials of affording the Minister power in effect to negate the operation of the general rule established by s 9A(1); and, since power to negate the operation of the general rule would confound the ordinary understanding of an excepting power, any provision conferring such power would need to be drafted in very clear terms[28].

31 The defendants submitted by way of alternative contention that it was wrong to characterise the 2015 Determination as effectively negating the operation of s 9A(1) because, despite the 2015 Determination, s 9A(5)(a) and (b) continue to serve the function of defining "offshore resources activity" and that concept still includes what the defendants described as "a substantial part of the Australian resources industry".

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27 *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth), s 33 and Ch 1, Div 2; *Offshore Minerals Act* 1994 (Cth), s 17.

28 See for example *R v Secretary of State for Social Security; Ex parte Britnell* [1991] 1 WLR 198 at 204 per Lord Keith of Kinkel (the other members of the House agreeing at 205); [1991] 2 All ER 726 at 731-732, 732; *Law* (1992) 45 IR 62 at 75 per Kirby P, 89 per Priestley JA; *Public Service Association and Professional Officers' Association Amalgamated Union (NSW) v New South Wales* (2014) 242 IR 338 at 360-361 [103]-[108] per Basten JA.

32 That argument should also be rejected. It is true that s 9A(5)(a) and (b) continue to serve the function of defining "offshore resources activity". It is also correct that, as a result, the visa regime laid down by s 41(2B) and (2C) continues to apply to offshore resources activities as so defined and so is not deprived of relevant operation in relation to a substantial part of the offshore resources industry. But it remains that the purported effect of the 2015 Determination is to remove from the definition of "offshore resources activity" all non-citizens on vessels or unmoored structures who are in an area to participate in or support an offshore resources activity, and thereby to except the sole aspect of offshore resources activities to which s 9A(1) is capable of application. The purported effect of the 2015 Determination is, therefore, entirely to negate the operation of s 9A(1) and so confound the purpose of extending the visa regime to non-citizens on vessels or unmoored structures who are in an area to participate in or support an offshore resources activity.

33 Finally, the defendants called in aid a volume of expert evidence and analysis which was said to show that, on the basis of the most recent figures available, the number of non-citizens on vessels or unmoored structures who are in an area to participate in or support an offshore resources activity represents at most only a small portion of the total number of persons working in the offshore resources industry. The defendants contended on that basis that the effect of the exclusion of those persons from the definition of "offshore resources activity" by the 2015 Determination was de minimis.

34 That argument is misplaced. Whatever proportion of persons working in the offshore resources industry comprised non-citizens on vessels or unmoored structures who are in an area to participate in or support an offshore resources activity, it is apparent from the text and context of the legislation and the extrinsic materials to which reference has been made that the purpose of s 9A(1) is to subject *all* such persons to the visa regime of s 41(2B) and (2C) except in relation to specifically excepted operations or activities. Whether those persons comprise a small or large proportion of persons working in the offshore resources industry is for present purposes irrelevant. It is enough that, in enacting s 9A(1), the Parliament considered that the actual or potential number of such persons is sufficiently significant to warrant the application to them of the visa regime established by s 41(2B) and (2C).

Conclusion and orders

35 In the result, because the 2015 Determination purports to negate the effect of s 9A(1), it should be concluded that it is beyond power and invalid. It follows that the questions posed by the special case are to be answered as follows:

Question 1:	Is paragraph 2 of Determination IMMI15/140, registered on the Federal Register of Legislative Instruments on 14 December 2015, invalid?
Answer:	Yes.
Question 2:	If the answer to Question 1 is "Yes", what relief, if any, should be granted?
Answer:	It should be declared that paragraph 2 of Determination IMMI15/140, registered on the Federal Register of Legislative Instruments on 14 December 2015, is invalid and of no effect.
Question 3:	Who should pay the costs of the Special Case?
Answer:	The second defendant.