FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Transpetrol TM AS [2019] FCA 400

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| File number: | NSD 2042 of 2016 |
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| Judge: | **RARES J** |
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| Date of judgment: | 26 March 2019 |
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| Catchwords: | **INDUSTRIAL LAW** – where foreign employer of crew of vessel engaged in coastal trading admitted contraventions of ss 45 and 293 of *Fair Work Act 2009* (Cth) by underpaying crew members under an award or the *National Minimum Wage Order 2014* – where s 33(3) of Act and reg 1.15E of *Fair Work Regulations 2009* (Cth) extended application of Act to vessel sailing in Australia’s exclusive economic zone and waters above continental shelf under a temporary licence issued under *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) – where purpose of that extension to make cost of employing crew of vessel under temporary licence comparable to that of vessel of general licence holder for some part of voyage – where employer complied with obligations to pay crew under *Maritime Labour Convention*, employment and collective bargaining agreements as required by law in crew member’s domicile – where employer cooperated with Ombudsman and paid crew full amount of alleged underpayment – where Court found alleged underpayment greater than sum actually due – where employer bound to pay crew and allocate payments in accordance with *Maritime Labour Convention* and laws of crew member’s domicile – where Convention and crew employment and collective bargaining agreements and foreign law require particular allocations in total pay different to those under *Fair Work Act 2009* (Cth) – where employer had to comply with Convention, agreements and foreign law to maintain maritime labour certificate for vessel as required by *Marine Order 11 (Living and working conditions on vessels) 2013* and “blue certificate” for vessel as required by International Transport Workers’ Federation – whether civil pecuniary penalties should be imposed **INDUSTRIAL LAW** – whether employer entitled to set off top up payments against overall underpayment of wages – where employer paid top up amounts to employee to ensure compliance with *Maritime Labour Convention* and maintain “blue certificate” – where top up amounts achieved common wage scale for employees of same rank and seniority**ADMIRALTY** – nature of and differences between demise and time charters – where employer was a demise charterer and time chartered foreign flagged ship – where time charterer sub-chartered ship to sub-charterers – where sub-charterer holder of a temporary licence under Div 2 of *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) – application of *Fair Work Act 2009* (Cth) to a “temporary licensed ship” in Australia’s exclusive economic zone and waters above the continental shelf (s 33(3) of *Fair Work Act 2009* (Cth), reg 1.15E(1)(c) of *Fair Work Regulations 2009* (Cth)) – where sub-charterer not inform or required to inform owner or demise charterer that vessel or voyage under temporary licence held by sub-charterer – where consequence of a voyage obliged employer of vessel’s crew to pay wages in accordance with *Fair Work Act 2009* (Cth)  |
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| Legislation: | *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth) Pt 4-2, ss 3, 6, 13, 21, 28, 30, 31, 32, 34, 35, 37*Fair Work Act 2009* (Cth) ss 33, 45, 293, 539, 546, 557, 570*Navigation Act 1912* (Cth)*Navigation Act 2012* (Cth) ss 339, 340, 342*Seas and Submerged Lands Act 1973* (Cth) ss 6, 10A, 11*Shipping Registration Act 1981* (Cth)*Fair Work Regulations 2009* (Cth) regs 1.15B, 1.15E*Marine Order 11**(Living and Working Conditions on Vessels) 2013* Div 2, regs 7, 9A, 10, 53*Marine Order 11 (Living and working conditions on vessels) 2015**Marine Orders Part 53* *(Employment of Crews)**Maritime Labour Convention* done at Geneva on 23 February 2006 ([2013] ATS 29) Arts I, VI, regs 2.1, 2.2, 2.3, 5.1.1, 5.1.3, 5.1.4*United Nations Convention on the Law of the Sea* done at Montego Bay on 10 December 1982 ([1994] ATS 31) Arts 2, 3, 17-26, 56, 58, 87, 94  |
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| Cases cited: | *Australian and New Zealand Banking Group Ltd v Finance Sector Union of Australia* (2001) 111 IR 227*Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640*Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 75 ALR 461*Attorney General v Guardian Newspapers Ltd* [1987] 1 WLR 1248*Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482*Cory Brothers and Company Ltd v The Owners of the Turkish Steamship “Mecca”* [1897] AC 286*CSL Australia Pty Ltd v Minister for Infrastructure and Transport* (2014) 221 FCR 165*Flight Centre Ltd v Australian Competition and Consumer Commission* (2018) 356 ALR 389*James Turner Roofing Pty Ltd v Peters* (2003) 132 IR 122*Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* (2015) 240 FCR 578*Moree Plains Shire Council v Goater* (2016) 14 ABC(NS) 255*Poletti v Ecob (No 2)* (1989) 31 IR 321*Scandinavian Trading Tanker Co. AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 AC 694*Ship “Hako Endeavour” v Programmed Total Marine Services Pty Ltd* (2013) 211 FCR 369*Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249*Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41‑076  |
|  |  |
| Date of hearing: | 15, 21 and 29 June 2018 |
|  |  |
| Date of last submissions: | 11 February 2019  |
|  |  |
| Registry: |  |
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| Division: |  |
|  |  |
| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 133 |
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| Counsel for the Applicant: | Mr D Chin |
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| **Table of Corrections** |  |
| 26 April 2019 | In the second sentence of paragraph 132, “overreacted” has been replaced with “overreached”.  |

ORDERS

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|  | NSD 2042 of 2016 |
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| BETWEEN: | FAIR WORK OMBUDSMANApplicant |
| AND: | TRANSPETROL TM ASRespondent |

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| JUDGE: | RARES J |
| DATE OF ORDER: | 26 March 2019 |

THE COURT ORDERS THAT:

1. The proceeding be dismissed.
2. The parties have liberty to file and serve written submissions, limited to 2 pages, as to seeking any costs order on or before 2 April 2019.
3. Any party against whom or which a costs order is sought pursuant to order 2, file and serve written submissions in reply, limited to 2 pages, on or before 9 April 2019.

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

REASONS FOR JUDGMENT

RARES J:

1. The Fair Work **Ombudsman** seeks that the Court note that the respondent Norwegian corporation, **Transpetrol** TM AS, the employer of crew on an oil and chemical tanker, MT *Turmoil*, contravened the ***Fair Work Act*** *2009* (Cth) in three respects during 2013 to 2015, by failing to pay 57 employees for all their ordinary time due and 55 employees for all their overtime due in accordance with cll 25 and 28 of the ***Seagoing Industry Award*** *2010* respectively, and by failing to pay three other employees base rates of pay in accordance with cl 4.3 of the *National Minimum Wage Order 2014* (**the *NMWO***). In addition, the Ombudsman seeks orders that Transpetrol pay substantial civil pecuniary penalties for the three contraventions pursuant to s 546(1) of the *Fair Work Act.* Originally, the Ombudsman also sought declarations that Transpetrol had committed the three contraventions. However, during the course of the hearing, the Ombudsman accepted, and Transpetrol agreed, that it was sufficient when final orders are made that the Court could note that the contraventions took place.

## Introduction

1. Transpetrol was a member of the **Transpetrol group** of ship owning and operating companies, which included **Transpetrol Maritime** Services Ltd. In October 2007, Transpetrol Maritime demise chartered *Turmoil* from a Panamanian company and she was flagged in Panama.
2. Transpetrol cooperated, *first*, throughout an **investigation** that an **inspector** from the Office of the Ombudsman conducted between February 2015 and August 2016 and, *secondly*, in the course of this proceeding to narrow the areas in dispute between the parties.
3. The Ombudsman alleged (and Transpetrol admitted) that s 557(1) and (2) of the *Fair Work Act* applied to Transpetrol’s contravening conduct. That section provided that where a person contravened s 45 (which dealt with contraventions of modern awards) and or s 293 (which dealt with contraventions of national minimum wage orders) on two or more occasions and the contraventions arose out of a course of conduct by the person, all of the contraventions of the particular section were taken to be a single contravention.
4. The Ombudsman alleged that Transpetrol’s three contraventions (that Transpetrol admitted in the parties’ agreed statement of facts) in issue here are that:
5. in contravention of s 45 of the *Fair Work Act*, it failed to pay 57 crew members a total of $116,972.57 (if additional payments that Transpetrol paid to those crew members cannot be set off against the underpayments (**the set off issue**)) as part of their minimum rate of pay for ordinary hours worked in accordance with cl 25 of the *Seagoing Industry Award* between *first*, 25 February 2013 and 31 May 2013 on four voyages (**the 2013 voyages**), and *secondly*, 24 December 2014 and 16 March 2015 on another six voyages (**the 2014/15 voyages**) (**the ordinary time contravention**);
6. in contravention of s 45 of the *Fair Work Act*, it failed to pay 55 crew members a total of $128,470.74 (subject to the set off issue) as part of their overtime rate of pay for overtime worked in accordance with cl 28 of the *Seagoing Industry Award* during the 2013 and 2014/15 voyages (**the overtime contravention**); and
7. in contravention of s 293 of the *Fair Work Act*, it failed to pay three crew members a total of $9,599.63 (subject to the set off issue) as their base rate of pay in accordance with cl 4.3 of the *NMWO* during the 2014/15 voyages (**the NMWO contravention**).
8. The contraventions occurred as a result of *Turmoil* sailing under **temporary licences** issued pursuant to s 37 of the ***Coastal Trading*** *(Revitalising Australian Shipping)* ***Act*** *2012* (Cth)in the waters above the continental shelf and Australia’s exclusive economic zone (**Australian regulated waters**) during the 2013 and 2014/15 voyages. Transpetrol and Transpetrol Maritime did not arrange, or even know of, the temporary licences. Transpetrol Maritime had time chartered *Turmoil*, and her time charterers subsequently entered into sub-charters, pursuant to which the sub‑charterers applied for and obtained the temporary licences, without informing Transpetrol or Transpetrol Maritime.
9. The set off issue concerns the fact that Transpetrol paid the affected crew members a total of over $122,000 as part of their total remuneration that included differently described entitlements under their contracts of employment and thelaws applicable to any particular crew member who entered into an employment contract, or whose employment terms were, subject to the law of a nation, other than Australia, that had no equivalent under the *Seagoing Industry Award* or the *NMWO*. In these reasons, for simplicity, I will describe those laws as the **relevant national laws**. Transpetrol contended that those payments, in effect, topped up the crew members’ payments for relevant ordinary hours, overtime or base rate of pay, or should be treated, for the purposes of calculating whether those crew members had been underpaid, as having done so. Moreover, it argued that it had to pay the affected crew members their entitlements in accordance with the relevant national laws and with their contracts of employment so as to maintain in force *Turmoil*’s **maritime labour certificate** issued in accordance with reg 5.1.3 of the ***Maritime Labour Convention*** *2006* done at Geneva on 23 February 2006 ([2013] ATS 29).
10. The Ombudsman, after some adjustment to her initial position when she had sought even higher penalties, ultimately sought orders for penalties in a range between 52.5%‑60% of the maximum penalty payable for the two contraventions of s 45 (namely, between $26,775 and $30,600 each) and 45%‑52.5% of the maximum penalty payable for the contravention of s 293 (between $22,950 and $26,775). She asserted that the penalties were necessary for the principal purpose of general deterrence of employers engaged in sailing or crewing foreign-crewed ships under temporary licences in Australian coastal trade from committing similar contraventions.
11. However, Transpetrol contended that it ought not to pay a civil pecuniary penalty at all, or, if found liable to do so, the order for payment of any penalty should be suspended.

## The relevant legislation and international law

1. The *Coastal Trading Act* commenced on 1 July 2012. On 21 August 2012,the scope of the operation of the *Fair Work Act* was also extended to apply to temporary licensed ships under s 33(3) of the *Fair Work Act* when reg 1.15E of the***Fair Work Regulations*** *2009* (Cth) commenced.
2. Relevantly, the *Coastal Trading Act* stated in s 3(1) that the object of the Act is to provide a regulatory framework for coastal trading in Australia that, among other matters, promotes a viable shipping industry that contributes to the broader Australian economy, maximises the use of vessels registered in the Australian General Shipping Register in coastal trading and “**promotes competition in coastal trading**” (s 3(1)(a), (d) and (e)). Section 6(1) defined a “temporary licence” as “a licence granted under Division 2 of Part 4 and includes such a licence as varied under that Division”. Part 4-2 of that Act regulated applications for, and grants of, temporary licences.
3. Section 28, in Pt 4-2, of the *Coastal Trading Act* provided:

**28 Application for temporary licence**

(1) **A person may apply** to the Minister for a temporary licence to enable a vessel to be used to engage in coastal trading over a 12-month period if the person is:

(a) the owner, charterer, master or agent of a vessel; or

(b) a shipper.

(2) The application must be in writing and specify the following:

…

(ea) the name of the vessel **(if known)**;

(f) the ports at which the passengers or cargo are expected to be taken on board;

… (emphasis added)

1. Within two business days after the day on which the Minister receives an application under s 28, the Minister must (s 30):

(a) cause to be published on the Department’s website a copy of the application, but must delete from the copy information that the Minister is satisfied:

(i) is commercial in confidence; or

(ii) consists of personal details of an individual; and

(b) **cause the following persons to be notified of the application:**

(i) every holder of a general licence;

(ii) a body or organisation that the Minister considers would be directly affected, or whose members would be directly affected, if the application were granted. (emphasis added)

1. A general licence under the *Coastal Trading Act* authorises a vessel that is registered in the Australian General Shipping Register to engage in coastal trading (s 13(1)). A general license is subject to the conditions, pursuant to s 21(a) and (b), that the vessel to which the general licence relates continues to be registered in the Australian General Shipping Register and that, when she is used to engage in coastal trading, each seafarer working on her must be an Australian citizen, the holder of a permanent visa or a temporary visa that does not prohibit the seafarer from performing his or her work on the vessel.
2. The holder of a general license, pursuant to s 31, may give the Minister **a notice in response** within 2 business days after the day on which an application for a temporary licence is published under s 30, that states, relevantly, that one or more voyages specified in the application could be undertaken under the holder’s general licence. Under s 32, if the Minister receives a notice in response, then, as soon as practicable thereafter, the Minister must give a copy to the applicant for the temporary licence and the applicant must then undertake negotiations with the general licence holder as to whether the latter’s vessel is equipped to perform the relevant voyage or voyages and will do so in a timely manner.
3. Under s 34(1) of the *Coastal Trading Act*, the Minister may decide an application by granting or refusing it. In making a decision, if a general licence holder gives a notice in response, the Minister, under s 34(3), must have regard to, among other matters, the outcome of the negotiations under s 32, whether the vessel of the general licence holder is equipped to perform the relevant voyage, and can do so within 5 days before or after the relevant dates.
4. If the Minister decides to grant an application, he or she must, as soon as practicable, give the applicant a temporary licence pursuant to s 37 that specified the following:

**37 Issue of temporary licence**

…

(2) The licence must specify the following:

(a) the temporary licence number;

**(b) the holder of the licence**;

…

**(k) the ports at which the passengers or cargo are authorised to be taken on board**;

… (emphasis added)

1. Section 33 of the *Fair Work Act* provided:

**33 Extension of this Act to the exclusive economic zone and the continental shelf**

…

(3) Without limiting subsection (1), **if the regulations prescribe further extensions of this Act, or specified provisions of this Act, to or in relation to the exclusive economic zone or to the waters above the continental shelf, then this Act extends accordingly**. (emphasis added)

1. When the Minister issues a temporary licence under the *Coastal Trading Act*, the ship the subject of the application becomes a “temporary licensed ship” as defined in reg 1.15B of the *Fair Work Regulations*, if one of the criteria in sub-reg (b) of that definition applies. Regulation 1.15B provided:

**1.15B Definitions for Division 3**

…

 ***general licensed ship*** means a ship:

(a) in relation to which a general license has been issued and is in force; and

(b) **which engages in coastal trading under the license**.

 …

***temporary licensed ship*** means a ship:

(a) **that is used to undertake a voyage authorised by a temporary licence**; and

(b) to which one of the following applies:

(i) **within 12 months before commencing the voyage, the ship commenced at least 2 other voyages authorised by a temporary licence**;

(ii)  within 12 months before commencing the voyage:

(A) the ship commenced at least one other voyage authorised by a temporary licence; and

(B) was issued with a single voyage permit;

(iii) within 12 months before commencing the voyage, the ship was issued with at least 2 single voyage permits;

(iv) within 15 months before commencing the voyage, the ship was issued with a continuous voyage permit.

… (emphasis added)

1. Regulation 1.15E of the *Fair Work Regulations* sets out further extensions to s 33(3) of the *Fair Work Act* as follows:

**1.15E Extension of Act to the exclusive economic zone and the continental shelf­–ships**

(1) For subsection 33(3) of the Act, the Act is extended to and in relation to each of the following ships in the exclusive economic zone or the waters above the continental shelf:

…

(b) a general licensed ship;

(c) a temporary licensed ship;

…

Note: **The extension of this Act to … temporary licensed ships**, … in the exclusive economic zone and the waters above the continental shelf (including provisions relating to compliance and enforcement, administration and right of entry by reason of the extension of the rest of the Act, so far as it relates to the specified provisions) is subject to:

(a) Australia’s international obligations relating to foreign ships; and

(b) the concurrent jurisdiction of a foreign State.

(emphasis added)

1. Relevantly, ss 45 and 293 of the *Fair Work Act*,which applied to the employer of crew on a temporary licensed ship by virtue of s 33(3) of the *Fair Work Act* and reg 1.15E of the *Fair Work Regulations*, provided:

**45 Contravening a modern award**

A person must not contravene a term of a modern award.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: A person does not contravene a term of a modern award unless the award applies to the person: see subsection 46(1).

**293 Contravening a national minimum wage order**

An employer must not contravene a term of a national minimum wage order.

Note: This section is a civil remedy provision (see Part 4-1).

1. Section 546 of the *Fair Work Act* regulated applications for pecuniary penalty orders for alleged contraventions of a civil remedy provision as follows:

**546 Pecuniary penalty orders**

(1) **The Federal Court, the Federal Circuit Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision**.

Note: Pecuniary penalty orders cannot be made in relation to conduct that contravenes a term of a modern award, a national minimum wage order or an enterprise agreement only because of the retrospective effect of a determination (see subsections 167(3) and 298(2)).

*Determining amount of pecuniary penalty*

(2) The pecuniary penalty must not be more than:

…

**(b) if the person is a body corporate – 5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2)**.

*Payment of penalty*

(3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

(a) the Commonwealth; or

(b) a particular organisation; or

s(c) a particular person.

*Recovery of penalty*

(4) The pecuniary penalty may be recovered as a debt due to the person to whom the penalty is payable.

*No limitation on orders*

(5) To avoid doubt, a court may make a pecuniary penalty order in addition to one or more orders under section 545. (emphasis added)

1. Section 539(2) provided that, relevantly, the maximum number of penalty units referred to in s 546(2)(b) for a contravention of each of ss 45 and 293 was 60 penalty units.
2. Articles 2 and 3 of the *United Nations Convention on the Law of the Sea* (***UNCLOS***) done at Montego Bay on 10 December 1982 ([1994] ATS 31), provide that the sovereign rights of coastal States, such as Australia, extend over their territorial sea up to 12 nautical miles. This sovereignty is subject to a general exception, however, for foreign flagged vessels exercising a right of innocent passage as defined in Art 19 (Arts 17-26). Article 21 makes provision in respect of areas in which a coastal State may regulate innocent passage. However, Art 21 does not make any provision in respect of the application of a coastal State’s labour laws to the crew of a foreign flagged ship.
3. Article 56 of *UNCLOS* provides for a form of limited sovereignty and jurisdiction of coastal States within their exclusive economic zones. A coastal State’s sovereign rights within its exclusive economic zone extend to the exploitation of natural resources and jurisdiction with regard to the establishment and use of artificial islands, marine scientific research and the protection and preservation of the marine environment.
4. Importantly, *UNCLOS* preserves, in a coastal State’s exclusive economic zone, a vessel’s rights to freedom of navigation and innocent passage (Arts 58(1) and 87(1)) and the duties of a vessel’s flag State with regard to labour conditions (Art 94(3)).
5. Australia has exercised its sovereign rights as a coastal State, within the meaning of *UNCLOS*, in the *Seas and Submerged Lands Act 1973* (Cth), in respect of the territorial sea and the continental shelf (ss 6 and 11) and its rights and jurisdiction over its exclusive economic zone (s 10A).
6. The *Maritime Labour Convention*entered into force on 20 August 2013. Earlier, in 2009, Panama ratified the Convention and on 21 December 2011, Australia also ratified it. Australia and Panama are now parties to the Convention. Each State party that ratified the Convention undertook, pursuant to Art I(1), “to give complete effect to its provisions in the manner set out in Article VI **in order to secure the right of all seafarers to decent employment**” (emphasis added). And Art I(2) required States party to “cooperate with each other for the purpose of ensuring the effective implementation and enforcement of the Convention”.
7. Article VI of the *Maritime Labour Convention* provided that the Regulations and the provisions of Part A of the **Code** that formed part of the Convention, were mandatory while Part B was not, although States party had to give due consideration to implementing their responsibilities in the manner for which Part B provided. The Regulations and Code set out title headings and had the following structure. The first provision was a regulation that followed immediately under the title heading, (e.g. “Regulation 2.1 – Seafarers’ employment agreements”), next the Code set out a **standard** that required the State party to adopt laws to give effect to the preceding regulation (e.g. “Standard A2.1 – Seafarers’ employment agreements”), and, last, there was a guideline that suggested a means of implementation of the regulation (e.g. “Guideline B2.1 – Seafarers’ employment agreements”).
8. Importantly, for the set off issue, reg 2.1(1) of the Code required that the terms and conditions of a seafarer’s employment be set out or referred to “in a clear written **legally enforceable agreement and shall be consistent with the standards set out in this Code**” (emphasis added). In addition, reg 2.1(3) required of a State party, described in the Convention as “**the Member**”:

**To the extent compatible with the Member’s national law** and practice, seafarers’ employment agreements shall be understood to incorporate any applicable collective bargaining agreements. (emphasis added)

Critically, reg 2.2(1) provided: “All seafarers shall be paid for their work regularly and **in full in accordance with their employment agreements**” (emphasis added). And Standard A2.2(1) provided:

Each Member shall require [i.e. make laws] that payments due to seafarers working on ships that fly its flag are made at no greater than monthly intervals **and in accordance with any applicable collective [bargaining agreement**]. (emphasis added)

1. Regulation 2.3 and its associated standards and guidelines provided for hours of work and rest.
2. Regulation 5.1.1 made each State party responsible for implementing its obligations on ships “that fly its flag”. Each State party, pursuant to reg 5.1.3(3), had to:

require ships that fly its flag to carry and maintain a **maritime labour certificate** certifying that the working and living conditions of seafarers on the ship…have been inspected and **meet the requirements of national laws or regulations or other measures implementing this Convention**. (emphasis added)

1. In its Report 116 of April 2011, the Parliamentary Joint Standing Committee on Treaties examined and reported on four treaties prepared by the International Labour Organisation, including the *Maritime Labour Convention*. The Joint Committee observed that Australia was largely compliant already with all four treaties, so that ratification would be essentially an exercise to ensure international recognition of Australia’s current practices. However, the Joint Committee said that the *Maritime Labour Convention* was the exception to that, because it needed to be ratified if Australian flagged vessels were to be permitted to dock in ports of other States party without difficulty.
2. Prior to 1 July 2013, no Australian law applied to regulate the payment of wages to the crews of foreign ships. Until then, the only regulation of wages to crews of foreign ships occurred under ***Marine Orders******Part 53*** *(Employment of Crews)* made under the *Navigation Act 1912* (Cth). *Marine Orders Part 53* applied to the crew of ships registered in the Australian General or International Shipping Registers maintained under the *Shipping Registration Act 1981* (Cth) or ships on which the majority of the crew were Australian residents.
3. On 1 July 2013, the *Navigation Act 2012* (Cth) came into force. It provided the Governor-General with power to make regulations and marine orders, respectively, to give effect to the *Maritime Labour Convention* (ss 339(1), 340(1)(i) and 342).
4. Also, on 1 July 2013, *Marine Order 11 (Living and working conditions on vessels) 2013* (**the *2013 Marine Order***) came into force and replaced *Marine Orders Part 53* on the commencement of the *Navigation Act 2012* (Cth).
5. On 21 August 2013, amendments to the *2013 Marine Order* extended its operation to require that a foreign vessel (like *Turmoil*) comply with the provisions of the *Maritime Labour Convention* when entering or leaving an Australian port, the internal waters of Australia and, other than in the course of innocent passage, the territorial sea (reg 7(4)). However, the *2013 Marine Order* did not operate throughout the exclusive economic zone or the waters above the continental shelf (i.e. Australian regulated waters).
6. The owner of a vessel had to have a copy of the *Maritime Labour Convention* on board and available to seafarers (reg 9A). And, regs 10(3) and (4) provided that, if a vessel had a maritime labour certificate, as prescribed in reg 5.1.3 of the *Maritime Labour Convention*, and a current declaration of maritime labour compliance issued by the vessel’s flag State had to be attached to it and be on display and available to, among others, seafarers, as prescribed in reg 5.1.4.
7. The Ombudsman relied on reg 53(1)(b) of the *2013 Marine Order*. That provided that the owner of a vessel had to pay a seafarer “in accordance with the work agreement and, **if applicable**, the relevant instrument under the *Fair Work Act 2009* or collective agreement” (emphasis added).

## The chartering agreements for *Turmoil* and the Caltex and BP licences

1. The October 2007 demise (or bareboat) charter of *Turmoil* was on the BIMCO BARECON 89 form. It provided that Transpetrol Maritime had full possession of, and complete control over, *Turmoil*, and had power to enter into bareboat, time or voyage charters in respect of her (cll 9 and 46).
2. On 30 June 2008, while *Turmoil* was still under construction, Transpetrol Maritime entered into a time charter on the SHELLTIME 4 form with **Chevron** Transport Corporation Limited for a period of three years (**the Chevron charterparty**) that would commence once *Turmoil* was delivered and ready to carry cargo. On 19 October 2011, *Turmoil* was delivered to Chevron.
3. On 25 September 2014, Transpetrol Maritime entered into a new time charter on the BPTIME 3 form with **BP** Singapore Pte Limited for a period of one year (**the BP charterparty**).
4. Under each time charter, Transpetrol Maritime, as demise charterer, remained in possession of *Turmoil* and responsible for her crew, navigation, and other functions, including the loading and discharge of the vessel at any port.
5. Clause 13(a) of the SHELLTIME 4 form and cl 10.1 of the BPTIME 3 form, each provided (as is a commonplace clause in time charters):

**The master** (although appointed by the Owners) **shall be under the orders and directions of the Charterers as regards employment of the vessel**, agency and other arrangements, and shall sign bills of lading as Charterers or their agents may direct…without prejudice to this charter. (emphasis added)

1. And, in rider cl 4.3 of the SHELLTIME 4 form, Transpetrol Maritime, as (disponent) owners, warranted that “the officers and crew are employed under an agreement recognised and approved by the ITF and will remain so throughout the currency of this Charter Party”. The acronym “**ITF**” referred to the International Transport Workers’ Federation. The BPTIME 3 form had similar typical time charter provisions in cll 10.1, 11.1, 15.2 and 17.1.
2. On 20 June 2013, in anticipation of the *Maritime Labour Convention* coming into force, Transpetrol applied to the Panama Maritime Authority for a declaration of Convention compliance in respect of *Turmoil*. That Authority issued, in respect of *Turmoil*, a declaration of maritime labour compliance in two parts, the first on 20 June 2013 and the second on 28 July 2013. On 7 August 2013, Lloyd’s Registry, as *Turmoil*’s relevant classification society, issued a maritime labour certificate that certified that she complied with the requirements of the *Maritime Labour Convention*. Since then, no regulatory authority has raised any issue relating to *Turmoil*’s compliance with the Convention.
3. Both time charterers, Chevron and BP, were entitled to sub‑charter *Turmoil* without notifying Transpetrol Maritime and without affecting the rights and obligations of the parties under the respective time charter agreements. Chevron sub‑chartered *Turmoil* to **Caltex** Australia Petroleum Pty Ltd and BP sub-chartered her to **BP Australia** Pty Ltd respectively (**the sub-charters**).
4. It was common ground that the Minister had granted temporary licences under the *Coastal Trading Act* to *first*,Caltex, namely licence no. 0014TL0001 (**the Caltex licence**), that authorised the 2013 voyages and, *secondly*, BP Australia, namely licence no. 0006TL205 (**the BP licence**), that authorised the 2014/15 voyages.
5. An applicant for a temporary licence need not inform, far less obtain the consent of, a ship owner or demise charterer in Transpetrol Maritime’s position, in order to be able to apply for the licence. Rather, as happened here, the *Coastal Trading Act* permitted the two sub-charterers each to obtain a temporary licence to engage in Australian coastal trade. When that occurred, the ship’s owner or demise charterer, as the employer of her crew, became subject to the operation of the *Fair Work Act* by force of reg 1.15E of the *Fair Work Regulations*. That consequence was a highly unusual situation in international maritime law and not contemplated in the *Maritime Labour Convention*. The application of the *Fair Work Act* created obligations on the owner or demise charterer of a vessel that sailed under a temporary licence, as employer of the crew, to pay them wages in accordance with Australian awards or rates of pay set under the *Fair Work Act* for the time she sailed in Australian regulated waters, even if unbeknownst to that employer, a temporary licence existed and the time charterer gave the sailing orders that attracted such a liability.

## Transpetrol’s activities as employer of maritime labour

1. Carl **Hansen**, managing director of Transpetrol Maritime, had worked for over 30 years in positions in which he had had onshore managerial responsibilities for all aspects of chartering and operating ships, including negotiating charters and day-to-day management of ships under charter for owners and charterers. I accept Mr Hansen’s unchallenged evidence. He had a depth of knowledge of all aspects of the chartering business. He said that the members of the Transpetrol group were not aware of either of the temporary licences prior to learning of the Ombudsman’s investigation and they had no record of any communication from Caltex or BP Australia that either had applied for or obtained a temporary licence. He explained that Transpetrol controlled a fleet of 16 vessels and was the demise charterer of all but one of those. He said that companies in the Transpetrol group owned or controlled companies that owned 13 of those vessels, Transpetrol demise chartered two of the other vessels and time chartered the other one vessel from owners outside the Transpetrol group. The Transpetrol group had an onshore workforce of about 30 and Transpetrol Maritime was its commercial branch.
2. Prior to and during the period in which the contraventions occurred, Transpetrol had in force commercial agreements with the members of the **Wilhelmsen** global maritime industry **group,** including **Wilhelmsen Ship Management** Limited and Wilhelmsen Ship Management (India) Pvt Ltd (**Wilhelmsen India**), for relevant members of the Wilhelmsen group to act on Transpetrol’s behalf in negotiations with the ITF and local unions concerning technical services and crew management. The ITF negotiated agreements with maritime labour employers, such as shipping companies, including members of the Transpetrol group, to provide for minimum standards and conditions for seafarers.
3. On 15 August 2013, Transpetrol Maritime entered into a BIMCO SHIPMAN 2009 form ship management agreement (**the Shipman agreement**)with Transpetrol in relation to the technical and crew management of *Turmoil*. Under the Shipman agreement, Transpetrol Maritime engaged Transpetrol as its agent in, relevantly, employing and managing the crew on board *Turmoil*, including managing their remuneration and other mandatory dues related to their employment. Pursuant to the Shipman agreement, Transpetrol employed each of the 60 crew members the subject of the contraventions.
4. On 10 October 2013, Wilhelmsen Ship Management entered into a special agreement with the ITF on behalf of Transpetrol (as employing entity on behalf of Transpetrol Maritime pursuant to the Shipman agreement) in respect of *Turmoil* (**the 2013 ITF agreement**). The 2013 ITF agreement provided that Transpetrol would employ each seafarer in accordance with either the relevant collective bargaining agreement for their nationality or the ITF Standard Collective Agreement.
5. The relevant collective bargaining agreements applicable to *Turmoil* in operation when the contraventions took place were:
* *ITF Uniform TCC 2012-2014*, being the ITF uniform collective bargaining agreement for seafarers on board cargo and tanker vessels flying a flag of convenience between Wilhelmsen Ship Management and the ITF, in force between 1 January 2012 and 31 December 2014.
* *ITF Uniform (TCC) Collective Bargaining Agreement for Indian Officers*, being the collective bargaining agreement for Indian seafarer officers between the Maritime Union of India (**MUI**) and Wilhelmsen India, in force between 1 January 2012 and 31 December 2014 (**the 2012 MUI agreement**). The 2012 MUI agreement applied to all officers on board *Turmoil* who were members of MUI in the period between 1 January 2012 and 31 December 2014.
* *TCC Agreement for Indian Ratings and Petty Officers*, being the collective bargaining agreement between the National Union of Seafarers of India (**NUSI**) and Wilhelmsen India, in force between 1 January 2012 and 31 December 2014 (**the 2012 NUSI agreement**). The 2012 NUSI agreement applied to all Indian ratings and petty officers on board *Turmoil* who were members of NUSI in the period between 1 January 2012 and 31 December 2014.
* *AMOSUP ITF TCCC/Non-IBF Collective Bargaining Agreement 2013-2014*, being the collective bargaining agreement between the Associated Marine Officers’ and Seamen’s Union of the Philippines (**AMOSUP**) and Wilhelmsen Ship Management, in force between 1 January 2013 and 31 December 2014 (**the 2013 AMOSUP agreement**). The 2013 AMOSUP agreement applied to all Filipino officers and seafarers on board *Turmoil* who were members of AMOSUP during the period between 1 January 2013 and 31 December 2014.
* *AMOSUP TCCC/NON-IBF Collective Bargaining Agreement*, being the collective bargaining agreement between AMOSUP and Wilhelmsen Ship Management, in force between 1 January 2015 and 31 December 2015 (**the 2015 AMOSUP agreement**). The 2015 AMOSUP agreement applied to all Filipino officers and seafarers on board *Turmoil* who were members of AMOSUP during the period between 1 January 2015 and 31 December 2015.
* *ITF Uniform TCC 2015-2017,* being the ITF uniform collective bargaining agreement for seafarers on board cargo and tanker vessels flying a flag of convenience between Wilhelmsen Ship Management and the ITF, in force between 1 January 2015 and 31 December 2017.
* *ITF Uniform (TCC) Collective Bargaining Agreement for Indian Seafarer Officers,* being the collective bargaining agreement for Indian seafarer officers between MUI and Wilhelmsen India, in force between 1 January 2015 and 31 December 2017 (**the 2015 MUI agreement**). The 2015 MUI agreement applied to all officers on board *Turmoil* who were members of MUI in the period between 1 January 2015 and 31 December 2017.
* *TCC Agreement for Indian Ratings and Petty Officers*, being the collective bargaining agreement between NUSI and Wilhelmsen India, in force between 1 January 2015 and 31 December 2017 (**the 2015 NUSI agreement**). The 2015 NUSI agreement applied to all Indian ratings and petty officers on board *Turmoil* who were members of NUSI in the period between 1 January 2015 and 31 December 2017.
1. The ITF agreement also provided that there be individual seafarer employment agreements (**the employment agreements**) for each employee. The employment agreements specified the terms and conditions of employment for the crew member, including the relevant collective bargaining agreement referred to above that was applicable. The employment agreements stated that the ship’s “owner” was the employer, being, in fact, Transpetrol (as employing entity on behalf of Transpetrol Maritime under the Shipman agreement), and the crew manager was **Wilhelmsen** Marine **Personnel** (HK) Ltd, another company in the Wilhelmsen group.
2. The ITF agreement applied different collective bargaining agreements to different Transpetrol employees depending on their nationality or the relevant national law. This situation, if the Transpetrol group left it unaltered, would have resulted in differing salaries for crew members holding the same rank and performing the same work on a ship. In order to remove the potential for such disparities, the Transpetrol group applied one all-inclusive gross pay scale to ensure that its seafarers and officers of the same rank and seniority were paid on all ships, including *Turmoil*, the same salary for the same work, regardless of the relevant national law (**the wage scale**). The rates of pay in Transpetrol’s wage scale were, *first*, higher than those required under the applicable collective bargaining and employment agreements and, *secondly*, in accordance with at least the minimum requirements of the *Maritime Labour Convention*.
3. In addition, the *Turmoil* ITF agreement required Transpetrol to provide each crew member with a statement (effectively a **payslip**) that itemised a specific format that broke down the gross wage into the various components specified in the applicable collective bargaining agreements. Mr Hansen explained that, in each jurisdiction, the ITF and collective bargaining agreements required that a payslip be in a bespoke format that identified the gross wage amount and the amounts of each specific entitlement paid under the respective collective bargaining agreement. Transpetrol engaged Wilhelmsen Personnel to provide payroll services that included providing crew members with such detailed payslips. Each collective bargaining agreement required that different specific elements be itemised specifically in a payslip. And the payslip also itemised, as an “**owners allowance**”, the top up payment that Transpetrol made in accordance with the wage scale to arrive at the all-inclusive gross wage paid. Mr Hansen said that if there were any discrepancy from the format prescribed in the *Turmoil* ITF agreement, that could put the vessel’s “**blue certificate**” at risk. And, if a vessel does not carry a “blue certificate”, it is at risk of industrial action, including boycotts by local labour in ports of call. The importance of a “blue certificate” is also reflected in the warranties in each of the Chevron and BP charterparties referred to in [44] above.
4. Thus, Mr Hansen said Transpetrol could not vary from providing in a payslip the breakdowns that the *Turmoil* ITF and collective bargaining agreements required, even though it was not otherwise material, because of the operation of the wage scale. If there were a change to the scale of wages payable under a collective bargaining agreement, the payslip reflected those variations together with an adjustment to the “owners allowance” so as to make the entries balance in arriving at the gross wage paid in accordance with the wage scale.
5. Clearly enough, the entries in the payslips for crew members whose employment conditions were subject to different relevant national laws, but of the same rank and seniority who perform the same work, will differ. That is because the respective collective bargaining agreements, and or employment agreements and or those laws, would mandate that different items or amounts be paid in different countries. The amount of the balancing “owners allowance” will also differ, even though the gross wage of the crew members is identical.
6. Of course, these disparate payslip entries could never sensibly correlate to the separate payment obligation categories under the *Seagoing Industry Award* or *NMWO*. Mr Hansen said that, while he was generally aware that Australia had comprehensive labour rules and regulations, neither he nor any other Transpetrol group employee or agent, was aware of the *Seagoing Industry Award* or the *NMWO*. He said that Transpetrol did not have any “direct clients in Australia” during the period before the Ombudsman notified it of the investigation.

## The contraventions

1. Before 25 February 2013, *Turmoil* had sailed at least two voyages authorised by the Caltex licence. Between 25 February 2013 and 31 May 2013, *Turmoil* sailed four more voyages authorised by the Caltex licence, being the 2013 voyages, namely:
* from Port Botany, New South Wales on 25 February 2013 to Brisbane, Queensland on 1 March 2013 (**voyage 1**);
* from Brisbane on 1 March 2013 to Port Botany on 14 March 2013 (**voyage 2**);
* from Port Botany on 14 March 2013 to Groote Eylandt, Northern Territory on 29 March 2013 (excluding the period from 2.30am (UTC + 10) on 24 March 2013 to 7.30am (UTC + 10) on 25 March 2013 during which period *Turmoil* was outside Australian regulated waters)(**voyage 3**); and
* from Port Botany on 28 May 2013 to Brisbane on 31 May 2013 (**voyage 4**).
1. Before 24 December 2014, *Turmoil* had sailed at least two voyages authorised by the BP Australia licence. Between 24 December 2014 and 16 March 2015, *Turmoil* sailed six more voyages authorised by the BP Australia licence, being the 2014/15 voyages, namely:
* from Kwinana, Western Australia on 24 December 2014 to Port Botany on 27 December 2014 (**voyage 5**);
* from Kwinana on 3 January 2015 to Port Botany on 13 January 2015 (excluding the period from 5.30pm (UTC + 9) on 8 January 2015 to 2.00pm (UTC + 9) on 9 January 2015 during which period *Turmoil* was outside Australian regulated waters) (**voyage 6**);
* from Kwinana on 26 February 2015 to Port Hedland, Western Australia on 3 March 2015 (**voyage 7**);
* from Kwinana on 3 March 2015 to Broome, Western Australia on 6 March 2015 (**voyage 8**);
* from Kwinana on 6 March 2015 to Darwin, Northern Territory on 12 March 2015 (**voyage 9**); and
* from Kwinana on 12 March 2015 to Groote Eylandt on 16 March 2015 (**voyage 10**).
1. Mr Hansen deposed that, due to the nature of time charters, *first*, the Transpetrol group had no warning that *Turmoil* would enter Australian regulated waters on any of the **ten voyages** in which the contraventions occurred, *secondly*, the respective charterparties permitted the charterers (or sub‑charterers) to give sailing orders to take the vessel to any safe port, and *thirdly*, Transpetrol Maritime had not foreseen that there would be coastal trading in Australia under the Chevron or BP charterparties.

## The legal character of the contraventions

1. Once *Turmoil* proceeded on a voyage authorised by a temporary licence, after having commenced at least two other voyages authorised by a temporary licence within 12 months beforehand, shewas a “temporary licensed ship” within the meaning of reg 1.15B of the *Fair Work Regulations*. Accordingly, s 33(3) of the *Fair Work Act* and reg 1.15E(1)(c) of the *Fair Work Regulations* extended the operation of the *Fair Work Act* to her during the ten voyages. As a result, at all relevant times during each of the ten voyages, *first*, Transpetrol was an employer within the meaning of cl 4.1 of the *Seagoing Industry Award* entitling, in aggregate, each of 57 or 55 crew members to be paid respectively ordinary time and overtime, in accordance with that award, and *secondly*, the *NMWO* applied to three other crew members each of whom was entitled to the base rate of pay under the *NMWO*. All 55 crew members who were entitled to overtime payments under the *Seagoing Industry Award* were included among the 57 who were entitled to additional ordinary time payments under that award.
2. However, because it was unaware that the relevant sub-charterer had obtained a temporary licence and was causing *Turmoil* to sail voyages under it, Transpetrol continued to pay its employees on board *Turmoil* in accordance with the wage scale (and the relevant collective bargaining agreement, employment agreement and the relevant national laws of the crew member) during each of the ten voyages. In this way, on the Ombudsman’s case, Transpetrol came to have underpaid 60 seafarers a total of $255,042.94, or about half that sum, if Transpetrol can set off the alleged additional amounts that it paid them in accordance with its obligations under the *Maritime Labour Convention*. It was common ground that the underpayments that the Ombudsman alleged included:
* $116,972.57 for minimum rates of pay under cl 25 of the *Seagoing Industry Award* due to 57 employees;
* $128,470.74 for overtime rates under cl 28 of the *Seagoing Industry Award* due to 55 employees; and
* $9,599.63 for base rates of pay under cl 4.3 of *NMWO* due to three employees.
1. It also was common ground that Transpetrol, if entitled to the set off, would have underpaid a total of $132,442.01 based on the Ombudsman’s previous allegation of a total underpayment of $265,407.76. The parties did not recalculate the exact amount of what the set off would be using the Ombudsman’s final total figure for the underpayments of $255,042.94. I have assumed that the total underpayment, after set off, continued to be about half of the sum that the Ombudsman alleged.

## The Ombudsman’s investigation

1. On 19 November 2015, the inspector sent a letter headed “Findings of Contraventions” to Transpetrol that alleged total underpayments to the crew of *Turmoil* of $265,407.76. The letter required Transpetrol either to rectify the underpayments by 12 January 2016, or, alternatively, to lodge any dispute as to the findings by 3 December 2015. On 3 December 2015, Transpetrol notified the inspector of its intention to dispute his findings.
2. Transpetrol disputed the inspector’s findings in a letter it sent on 11 March 2016. Transpetrol’s letter stated that the inspector had not taken into account, in her calculations of underpayments that then totalled $265,407.76, the additional payments of allowances that Transpetrol had made to its seafarers during the ten voyages that Transpetrol argued should be set off against the underpayments, leaving a total of $132,442.01 in underpaid wages. In other words, if Transpetrol were entitled to set off those allowances against the Ombudsman’s then calculations, the quantum of the total underpayment would be approximately halved.
3. On 17 March 2016, a senior legal officer in the legal branch of the Office of the Ombudsman, James **Robertson**, responded by asserting to Transpetrol that it was not appropriate, or in accordance with settled law, to “set‑off” the allowances against the employees’ entitlements under cll 25 and 28 of the *Seagoing Industry Award*.
4. On 7 April 2016, Transpetrol notified Mr Robertson that it intended to rectify the underpayments, without admission of liability, and sought an extension of time to do so. On 11 April 2016, the Ombudsman refused that request.
5. Next, on 15 April 2016, Mr Robertson sent Transpetrol a further findings of contraventions letter. It stated that the Ombudsman had found additional underpayments of overtime to three employees and revised the total of underpayments to $265,666.88.
6. On 5 May 2016, the Ombudsman informed Transpetrol that the Australian Maritime Safety Authority had provided the Ombudsman with information indicating that *Turmoil* may have exited Australian regulated waters at certain points during the ten voyages.
7. On 2 June 2016, Mr Robertson, sent a further letter to Transpetrol, confirming that *Turmoil* did in fact exit Australian regulated waters during voyages 3 and 6. On 16 August 2016, Mr Robertson informed Transpetrol of a revised total of $255,042.94 in underpaid wages.
8. On or about 31 October 2016, without admission of liability, Transpetrol rectified in full the asserted underpayments of $255,042.94 by bank transfer to each of the affected crew members. On 11 November 2016, Transpetrol notified the Ombudsman of those payments and she accepted that the underpayments had been rectified.
9. On 16 November 2016, Mr Robertson sent Transpetrol a letter advising it that the Ombudsman intended to commence the present proceeding.

## The Ombudsman’s submissions regarding the appropriate penalty

1. The parties made extensive submissions on what remedies, including penalties, the Ombudsman might be entitled to recover. After I had reserved my decision on 29 June 2018, I invited the parties on 24 December 2018 to make further submissions to identify what, if any, requirements existed under a law of the Commonwealth prior to 1 May 2015, when *Marine Order 11 (Living and working conditions on vessels) 2015* replaced the *2013 Marine Order*. On 11 February 2019, the parties made separate written submissions on this issue.
2. The Ombudsman submitted that the contraventions were “objectively serious”. She contended that they involved contraventions of minimum standards of “the most fundamental kind”, being the failure to pay minimum wages and conditions, resulting in a significant total underpayment to “vulnerable workers on very low rates of pay”, which warranted the imposition of “meaningful penalties”.
3. The Ombudsman accepted that the contraventions were not deliberate, however, she submitted that Transpetrol had failed to carry out due diligence and to take due care to ensure its employees were paid their lawful entitlements. She argued that, notwithstanding that Transpetrol Maritime and Transpetrol may not have had actual prior knowledge of any sub‑charters or temporary licences, Transpetrol Maritime and or Transpetrol were reasonably capable of ensuring that they were alerted to the use, or proposed use, of *Turmoil* to engage in coastal trading between ports in Australia because of *first,* the requirement in the demise charter that Transpetrol Maritime maintain full possession of, and complete control over, *Turmoil* despite the time charter agreements, and *secondly*, Transpetrol remained responsible under the Shipman agreement for the employment, management and payment of the master and crew who prosecuted all voyages of *Turmoil* and who loaded and discharged cargo at any ports.
4. The Ombudsman submitted that Transpetrol Maritime was “the principal charterer” of *Turmoil* under the demise charter and therefore had a “legal or beneficial interest” in *Turmoil*. She also asserted that Transpetrol had overall general control and management of *Turmoil* and or it had assumed responsibility for her from Transpetrol Maritime under the Shipman agreement and thus, it was an “owner” of her within the meaning of s 6(1) of the *Coastal Trading Act*. As “owner” of the ship under s 6(1), the Ombudsman said that it was “thus incumbent upon the Transpetrol Group, including Transpetrol Maritime and/or Transpetrol, to have in place systems to alert it of the proposed use of the *Turmoil* for the purpose of coastal trading within the meaning of the *Coastal Trading Act*”.
5. The Ombudsman argued that Transpetrol could not set off any additional sums that it had paid the affected crew members under their employment agreements because it had “designated” that those additional payments “were for purposes other than satisfying any entitlement to basic wage rates or overtime payments” under or in accordance with the *Fair Work Act*. She relied on *Australian and New Zealand Banking Group Ltd v Finance Sector Union of Australia* (2001) 111 IR 227 at 236-239 [41]-[54] per Black CJ, Wilcox and von Doussa JJ and *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* (2015) 240 FCR 578 at 585-595 [40]-[66]; 600-601 [95]-[98] per North and Bromberg JJ.
6. The Ombudsman submitted that reg 53(1) in the *2013 Marine Order* applied to each of the 2014/15 voyages for at least part of its duration while *Turmoil* was engaged in coastal trading, and was in, entering or leaving Australian ports. She argued that, during those periods, reg 53(1) required Transpetrol, as employer of *Turmoil*’s crew, to pay them in accordance with their entitlements under the *Seagoing Industry Award* or the *NMWO*, as applicable.
7. Finally, the Ombudsman contended that the primary purpose of civil pecuniary penalties is to promote the public interest in compliance and to put a price on contravention that is sufficiently high to operate as a general deterrent, applying *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 506 [55]. The Ombudsman submitted that there was a need to “send a message to the community, **to the maritime industry at large in which Transpetrol operates**, and to employers generally, that employees must be provided with the correct entitlements” (emphasis added).
8. The Ombudsman accepted that Transpetrol had cooperated fully with the inspector during the Ombudsman’s investigation and had rectified all of the underpayments. However, she submitted that this corrective action went “no further than neutralising the aggravating effect of the unlawful conduct”. Initially, she argued that a discount of no more than 20% from the maximum penalty, which she subsequently revised to 25%, was appropriate as a base on which to calculate a penalty in a range, having regard to Transpetrol’s admissions and cooperation. She sought penalties in the following ranges:

|  |  |  |  |
| --- | --- | --- | --- |
| **Contravention** | **Maximum penalty after 25% discount** | **Penalty range sought** | **Total penalty sought** |
| **1. The ordinary time contravention** (cl 25 of the *Seagoing Industry Award*; s 45 of the *Fair Work Act*)57 employees ($116,972.57)  | $38,250, being 75% of $51,000 | 52.5% to 60% of $51,000 | $26,775 to $30,600 |
| **2. The overtime contravention** (cl 28 of the *Seagoing Industry Award*; s 45 of the *Fair Work Act*)55 employees ($128,470.74) | $38,250, being 75% of $51,000 | 52.5% to 60% of $51,000 | $26,775 to $30,600 |
| **3. The *NMWO* contravention** (s 293 of the *Fair Work Act*)3 employees ($9,599.63) | $38,250, being 75% of $51,000 | 45% to 52.5% | $22,950 to $26,775 |

## Consideration – specific and general deterrence

1. I reject the Ombudsman’s argument that Transpetrol was culpable because it failed (so she alleged) to exercise due diligence or reasonable care in relation to the use of *Turmoil* on the ten voyages. Her argument failed to take account of Transpetrol’s position as agent of the demise charterer (which I accept was responsible, under the Shipman agreement, for the demise charterer’s obligations to pay the crew) in circumstances where, *first*, *Turmoil* was subject to, respectively, time charters of three years (by Transpetrol Maritime to Chevron) and one year (by Transpetrol Maritime to BP) and under sub-charters (by Chevron to Caltex and by BP to BP Australia respectively) and, *secondly*, she was sailing voyages under the Caltex and BP Australia temporary licences.
2. It is important to appreciate that, by force of reg 1.15B of the *Fair Work Regulations*, the definition of a “temporary licensed ship” meant a ship that was used to undertake a voyage authorised by a temporary licence in circumstances, relevantly, in which within the preceding 12 month period before the particular voyage commenced, she commenced at least two other voyages authorised by a (not necessarily the same) temporary licence. Regulation 1.15E(1)(c) extended the operation of the *Fair Work Act* to a temporary licensed ship, as defined in reg 1.15B.
3. I reject the Ombudsman’s argument that, in addition, reg 53(1) of the *2013 Marine Order* applied the provisions of the *Fair Work Act* to *Turmoil* during the 2014/15 voyages so as to require Transpetrol to comply with the *Seagoing Industry Award* and the *NMWO*. I am of opinion that reg 53(1) could not have been intended to do other than enforce the provisions of the *Fair Work Act* and any instrument made under it “if applicable” to a vessel. Neither reg 53(1) nor the *2013 Marine Order* as a whole was intended or worded to impose, independently, obligations on foreign flagged ships to comply with Australian domestic employment laws, other than by enforcing the provisions of the *Maritime Labour Convention* that a vessel’s flag State had imposed in respect of her owner’s existing employment agreements with her crew. Accordingly, nothing in the *2013 Marine Order* operated to create any wider or different obligations on Transpetrol, as the employer of a ship’s crew, than already existed (whether under the laws of the ship’s flag State or by the operation of s 33(3) of the *Fair Work Act* and reg 1.15E of the *Fair Work Regulations* in respect of *Turmoil*).
4. Thus, I find that, in the circumstances here, when *Turmoil* sailed on each of the 2013 and 2014/15 voyages under the Chevron or BP licences in Australian regulated waters, Transpetrol, as employer of her crew, became liable to pay them wages in accordance with the *Fair Work Act* because reg 1.15E of the *Fair Work Regulations* applied to those ten voyages. However, this legal consequence occurred without Transpetrol having any knowledge of the existence of either the Chevron or BP licences or of the number of voyages authorised by either licence that *Turmoil* had undertaken previously, let alone that it would become liable to pay the higher wages for any of the ten voyages.
5. The different natures and incidents of each of a demise, or bareboat, charter and a time charter are well understand in maritime law. The Full Court explained the nature of a demise charter in *Ship “Hako Endeavour” v Programmed Total Marine Services Pty Ltd* (2013) 211 FCR 369 at 386‑387 [53]-[57] per Rares J, 404-405 [138]-[142] per Buchanan J. Siopis J agreed with both judgments on this issue at 372 [1]. In essence, a demise charterer is aptly described as a temporary owner because of the extent of his possession and control of the chartered ship allowing him, effectively, to do as he pleases with her (see *Hako Endeavour* 211 FCR at 386 [55], 405 [140]).
6. In contrast, under a time charter (such as in the SHELLTIME 4 and BPTIME 3 forms), the owner (or demise charterer) retains possession of the ship and employs her crew, but gives the charterer the rights to give sailing orders to the master and to use the ship to carry cargoes and undertake voyages at the charterer’s direction, subject to any limitation to that authority in the charterparty. In *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 AC 694 at 700G-H, Lord Diplock, with whom Lords Keith of Kinkel, Scarman, Roskill and Bridge of Harwich agreed, said:

A time charter, **unless it is a charter by demise**, with which your Lordships are not here concerned, transfers to the charterer no interest in or right to possession of the vessel; it is a contract for services to be rendered to the charterer by the shipowner through the use of the vessel by the shipowner’s own servants, the master and the crew, **acting in accordance with such directions** as to the cargoes to be loaded and **the voyages to be undertaken as by the terms of the charterparty the charterer is entitled to give to them**. (emphasis added)

1. And, because of a time charter’s character as a contract for services, the charterer is responsible for where the ship sails, the ports into which she calls, and the cargoes that she loads and discharges at those ports. Ordinarily, the time charterer arranges and pays (or is responsible for payment to the ship owner or demise charterer) for the costs of the bunkers, port fees and stevedoring. That is because these costs are incurred in order to perform the services that the charterer wants when employing the ship to achieve its commercial objectives.
2. In addition, Mr Hansen confirmed that, in his experience in the shipping industry, there is no general expectation that a shipowner would be informed of a charterer’s trading intentions or be given advance knowledge of any intended trading patterns. That is because a charterer’s intentions concerning the ports at which it wishes the ship to load or discharge can be commercially sensitive. Mr Hansen also said that in his experience, charterers give voyage orders directly to the master shortly before the vessel is about to leave the last port on her previous voyage so that the master can then calculate the route, cargo intake and bunkering requirements.
3. Each of Chevron and BP, as a charterer, had the right to apply for a temporary licence under s 28(1)(a) of the *Coastal Trading Act*, and could nominate, under s 28(2)(ea), in that application the name of the vessel if known. When the Minister granted a temporary licence, s 35 required him or her to publicise, among other matters, the number of voyages that it authorised. But, critically, that Act did not require the Minister to publicise the name of the vessel or vessels, even if known, that would undertake any of the voyages. Nor did s 37 require the name of a vessel to be specified in a temporary licence when issued.
4. In contrast, s 30(b)(ii) required the Minister to notify a body or organisation that he or she considered would be directly affected if the licence were granted. It is possible that the Minister could have given such a notification to a shipowner and any charterers (other than the applicant for the temporary licence), although it is notoriously difficult to identify correctly the name of the owner or a demise charterer or the interest, if any, of a disponent owner of any particular ship, especially in a limited time frame, such as the two business days that s 30 stipulated as the period within which the Minister had to give notice of an application for a temporary licence. It is unnecessary to decide whether the words “body or organisation” in s 30(b)(ii) included “person”, but on their face, those words are apt to refer to industry and industrial organisations, such as employer or trade bodies and unions, rather than to companies or individuals.
5. Moreover, a sub-charterer of a ship most often has no contractual relationship with the ship owner or demise charterer, although, here, the Chevon and BP charterparties were made directly with the demise charterer, Transpetrol Maritime. But, the sub-charters, by Chevron to Caltex and by BP to BP Australia, did not involve Transpetrol Maritime in a contractual relationship with either sub-charterer.
6. Importantly, the *Coastal Trading Act* was not enacted in 2008, when Transpetrol Maritime entered into the Chevron charterparty. Therefore, Transpetrol Maritime could not have been expected to include any provision in the additional clauses of that charterparty to address the potential (that eventuated in the case of the 2013 voyages) that the crew of *Turmoil* might become entitled to additional wages under the *Fair Work Act* if she sailed in Australian regulated waters under a temporary licence. Similarly, although the BP charterparty was made in 2014, Transpetrol Maritime was not then aware of the application and operation of the *Fair Work Act* or of the existence of any temporary licence or licences so as to put it on notice to make some provision in that charterparty in respect of those matters (to cover its position in respect of the 2014/15 voyages).
7. Moreover, both the Chevron and BP charterparties provided for *Turmoil* to trade worldwide. Thus, while it was possible that she may have undertaken one or more voyages in Australian (regulated) waters under either of the Chevron or BP charterparties, there was no particular reason why Transpetrol Maritime (as the disponent owner) or Transpetrol (as the employer of her crew) could, or would, have contemplated that, when the *Coastal Trading Act* applied pursuant to reg 1.15E of the *Fair Work Regulations* coming into force on 21 August 2012, one or more voyages could occur that would have exposed Transpetrol to liability under the internationally exceptional and unusual provisions of the *Fair Work Act*.
8. The Ombudsman did not articulate any plausible argument, beyond mere assertion, as to how Transpetrol or Transpetrol Maritime should have become aware that, *first*, *Turmoil* would sail under a temporary licence at all, *secondly*, any particular voyage was the third or later under a temporary licence within the preceding 12 months (see reg 1.15B(b)(i)) and, *thirdly*, the *Fair Work Act* applied to such a voyage and imposed liabilities on Transpetrol in addition to those under the *Maritime Labour Convention*, the relevant national laws of the crew members, andtheir employment and collective bargaining agreements. Whilst *Turmoil*’s master was Transpetrol’s employee, the terms of both time charters by Transpetrol Maritime placed him under the orders and directions of the time charterer or, when the Caltex and BP sub-charters respectively came to operation, the sub-charterers, as to the employment of the ship (see [88]-[91] above). There was no evidence as to how Transpetrol (or Transpetrol Maritime) or a reasonable foreign shipowner or employer in its position could, or should, have become aware, in the period between 2013 and its first contact with the Ombudsman, that *Turmoil* was undertaking any or all of the ten voyages as a voyage or voyages under a temporary licence or that in those circumstances, the crews had to be paid more money than they were in accordance with the *Fair Work Act*.
9. The principal purpose of civil pecuniary penalties is to promote the public interest in compliance with the provisions in the enactment that the contravenor has infringed by putting a sufficiently high price on contravention “to deter repetition **by the contravenor** and **by others** who might be tempted to contravene the Act”: *Director* 258 CLR at 506 [55], per French CJ, Kiefel, Bell, Nettle and Gordon JJ, adopting what French J had said in *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076 at 52,152 (emphasis added). When fixing a civil pecuniary penalty, the Court must make clear to both the contravenor and the market that “the cost of courting a risk of contravention…cannot be regarded as [an] acceptable cost of doing business”: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 659 [64] per French CJ, Crennan, Bell and Keane JJ (adopting what the Full Court of this Court said in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249 at 266 [68]). Their Honours (250 CLR at 659 [65]) said that general and specific deterrence had to “play a primary role in assessing the appropriate penalty in **cases of calculated contravention of legislation** where commercial profit is the driver of the contravening conduct” (emphasis added).
10. The reasonableness of a contravenor’s conduct constituting a contravention, including a genuine and reasonable misunderstanding of one’s legal position in the circumstances, is relevant to the question of whether any civil pecuniary penalty should be imposed and, if so, its amount: cf. *Flight Centre Ltd v Australian Competition and Consumer Commission* (2018) 356 ALR 389 at 405 [63]-[64] per Allsop CJ, Davies and Wigney JJ.
11. Of course, ignorance of the law is no excuse. The *Fair Work Act*, as extended by reg 1.15E made under s 33(3), applied to the ten voyages. Once it became aware of this legal rseult, Transpetrol promptly accepted its liability and paid each of its crew the full sum that the Ombudsman had calculated was due, totalling $255,042.94. Nonetheless, the contraventions occurred in circumstances where no legislation, including the *Coastal Trading Act* and the *Fair Work Act*, required the person who applied for a temporary licence to obtain the consent of, or inform, the owner, demise charterer or master of a ship about the application of the *Fair Work Act* to her on any voyage covered by a temporary licence or even to inform the owner, demise charterer or master that the voyage was occurring under a temporary licence.
12. I reject the Ombudsman’s argument that there is any need for specific deterrence of Transpetrol. There is no doubt that Transpetrol contravened the *Fair Work Act* without fault on its part or awareness of its application. And, as Mr Hansen deposed, in the future, it has every intention of complying with the somewhat singular (in international maritime trade) requirements of that Act, that apply even though a shipowner has a current valid maritime labour certificate for his ship that the *Maritime Labour Convention* required. There is nothing in the facts here to suggest that Transpetrol acted deliberately or to make profits from a “calculated contravention of legislation”: cf. *TPG* 250 CLR at 659 [65]. Quite the opposite is true. Transpetrol sought carefully to meet, and not only met but set out to exceed, its obligations to provide “decent employment” and reasonable wage and payment terms for its crew members under the law of *Turmoil*’s flag State, Panama, namely the *Maritime Labour Convention*, and the relevant national laws, India and the Philippines (see Art 1(1) of the *Maritime Labour Convention* and regs 2.1, 2.2, 2.3 and 5.1.1). It paid additional sums to its employees so as to achieve parity of remuneration for crew of the same rank and seniority who performed the same work on all ships in the Transpetrol group fleet over and above those negotiated by the ITF and the local trade unions, regardless of the different wage scales in their different home States.
13. Moreover, Transpetrol had no contractual entitlement to recoup from any sub-charterer (or, in particular, the holder of the relevant temporary licence) the liability to make payments to its employees under the *Fair Work Act*. Transpetrol had not agreed to a provision in either the Chevron or BP charterparties for recoupment of any liability to make the payments such as those that the *Fair Work Act* imposed on it as employer of the crews.
14. It follows that Transpetrol and Transpetrol Maritime got no benefit at all from any contravention. The contractual rate of hire remained constant, whereas the sub-charterers, Caltex and BP Australia, did receive the benefit of their sub-charters in circumstances where neither Transpetrol nor Transpetrol Maritime knew of, let alone, could recoup from the holders of the temporary licences, the liabilities imposed on Transpetrol by reg 1.15E of the *Fair Work Regulations*.
15. Nor, in my opinion, would it be just or fair in all the circumstances to impose a penalty on Transpetrol in order to deter others from similar, unintentional contraventions. The Ombudsman’s argument on general deterrence was, in effect, a reflection of the Admiral Byng principle, encapsulated by Voltaire, namely “pour encourager les autres”: cf. *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 75 ALR 461 at 466 per Deane J, adopting Lord Oliver of Aylmerton’s colourful description in *Attorney‑General v Guardian Newspapers Ltd* [1987] 1 WLR 1248 at 1317E-F. Moreover, there is no realistic prospect that Transpetrol will contravene again. It acted promptly to pay the full amounts that the Ombudsman ultimately asserted were underpayments (even though it believed that it was entitled to the benefit of the set off to reduce that sum) and cooperated fully in the conduct of the investigation.
16. Ordinarily, the public denunciation by a court of a wrongdoer’s conduct that contravened the law by imposing a civil pecuniary penalty and or making declarations, has the salutary effect of bringing to the market’s and community’s attention the need to comply with the law and to warn of the severity and likelihood of punishment for later infractions. However, on the basis of the present facts, that purpose is not likely to be achieved by punishing Transpetrol in the context of seeking to secure compliance with the *Fair Work Act* by foreign shipowners (including demise charterers). *First*, if a shipowner (or his master or another agent, such as Transpetrol) applies for a temporary licence, that person is likely to be, or to become (from communications with the master or other agent), personally aware of the requirement to comply with the *Fair Work Act* while the ship is regulated under reg 1.15E. But, *secondly*, if, as occurred with Transpetrol, a third party, such as a time or sub-charterer or shipper, obtains a temporary licence under the *Coastal Trading Act* without informing the shipowner or even the master, there is nothing in Australian law to require that person (or anyone else, including the Minister) to inform the shipowner, demise charterer or other employer of the ship’s crew of the existence of the temporary licence, let alone the obligations under the *Fair Work Act* that it imposes on the shipowner, demise charterer or employer.
17. In addition, as I have noted, a ship could sail in Australian regulated waters on voyages under a series of temporary licences that third parties (such as charterers, other agents, or shippers) could have obtained by applications under s 28(1) of the *Coastal Trading Act* without any knowledge or involvement of the shipowner. In that situation, when the ship sailed on a third or subsequent voyage within the 12 month period prescribed in reg 1.15B(b)(i) of the *Fair Work Regulations*, reg 1.15E(1)(c) imposed a liability on the unknowing shipowner to comply with the *Fair Work Act*.
18. Imposing a penalty on Transpetrol is unlikely to deter unintentional contravening conduct by another shipowner who had a current, valid maritime labour certificate under the *Maritime Labour Convention* in force for the crew of his ship and who is unaware, and could not reasonably be expected to be aware, that his ship is on a third or later voyage the subject of any temporary licence that a third party has obtained and used without notice to him.

## Consideration – the set off issue

1. I reject the Ombudsman’s argument that Transpetrol is not entitled to have the set off taken into account in its favour in respect of the contraventions. It entered into employment agreements with the affected crew members under the laws of Panama, *Turmoil*’s flag State, and the relevant national laws, arranged by their trade unions and the ITF. Those employment agreements had to, and did, comply with the *Maritime Labour Convention* (which Panama ratified in 2009) and crew members’ relevant national laws and the *Maritime Labour Convention*,not Australian law. The employment agreements of the crew members of different nationalities differed from one another in a substantive way because of the local laws and labour conditions in the respective countries. Transpetrol also entered the collective bargaining agreements with trade unions representing the interests of crew members in accordance with the relevant national laws. The interests of those crew members were protected by their unions and the ITF in agreeing the terms of the employment and collective bargaining agreements and obtaining them in a form that enabled Transpetrol to receive a maritime labour certificate and, I infer, a “blue certificate”. It then voluntarily “topped up” all of the payments to the affected crew members by applying a uniform wage scale.
2. The relevant principle in which the Ombudsman relied to deny that Transpetrol had any right to set off was that which Black CJ, Wilcox and von Doussa JJ identified in *Finance Sector* 111 IR at 238 [48]. There, the parties had agreed that a sum or sums of money would be paid for specific purposes, over and above, or extraneous to, award requirements. Their Honours held that those contractual provisions prevented the employer from relying on payments made pursuant to them to satisfy any “award entitlements arising outside the agreed purpose of the payments”: see too *Linkhill* 240 FCR at 603 [99] per North and Bromberg JJ.
3. This principle developed from two related considerations as Keely, Ryan and Gray JJ explained in *Poletti v Ecob (No 2)* (1989) 31 IR 321 at 332-333. There, the Full Court held that when a contract of employment provided that a sum of money was payable to and receivable by an employee for a specific purpose, over and above, or extraneous to, an entitlement under an award made pursuant to statute, the employer could not rely on the payment of that sum (due under the specific contractual provision) in satisfaction of its liability under the award. Similarly, their Honours held that, if an employer (as debtor) designated or appropriated a payment to the employee (as creditor) to satisfy a particular debt or liability, the employer could not later resile from that designation or appropriation in order to claim that the payment should be treated as satisfying a different debt or liability due to the employee under an award. The Full Court explained that this was an application of the principle that, at or before the time of making it, a debtor can appropriate a payment to the discharge of a particular liability, but if the debtor does not do so, the creditor is free to appropriate the payment as the creditor sees fit: cf. *Cory Brothers and Company Ltd v The Owners of the Turkish Steamship “Mecca”* [1897] AC 286 at 293 per Lord Macnaghten; *Moree Plains Shire Council v Goater* (2016) 14 ABC(NS) 255 at 269 [59] per Rares, Katzmann and Markovic JJ.
4. However, as Black CJ, Wilcox and von Doussa JJ explained in *Finance Sector* 111 IR at 239 [51], where the award entitlement and contractual payment (or liability) arise out of the same agreed purpose, the contractual term does not prevent the employer from claiming that the payment satisfies both obligations. They held (111 IR at 239 [52]):

It is inherent in this approach that there must be **a close correlation between the nature of the contractual obligation and the nature of the award obligations**. But **it is not necessary that the same label be used**. (emphasis added)

1. There, the Full Court held that where an employer had nominated a total payment as being in discharge of its liability to pay long service leave and a retiring allowance, because different taxation rates applied to each, “**[t]he true character of the [total] payment depends on the terms of**” the employer’s retirement/severance allowance scheme. They said that “**designation and appropriation are matters to be determined by the whole of the evidence**”: *Finance Sector* 111 IR at 239-240 [55]-[56] (see too *James Turner Roofing Pty Ltd v Peters* (2003) 132 IR 122 at 132-133 [44] per Anderson J, with whom Scott J at 134 [52] and Parker J at 136 [68] agreed). And in *obiter dicta*, North and Bromberg JJ observed in *Linkhill* 240 FCR at 601 [99], that because the purpose or intent of the parties in relation to a particular payment is central to the application of the principles relating to the ability to set off payments apparently made on one basis, or for one purpose, against a liability apparently arising on another basis:

…it may be that the principles do not translate well to a situation where the parties have created a relationship different to that which, subjectively, they had set out to make. **Those principles may not apply to the circumstances in which the parties did not intend to provide for award entitlements at all because they did not advert to** or had disavowed **the relevance of such entitlements**. (emphasis added)

1. It follows that there is no inflexible principle that precludes a creditor, who has appeared to designate or appropriate a payment to discharge a specific liability, from relying on all of the circumstances to demonstrate that the true character of the payment is, in fact, different or, alternatively, to justify the use of that payment as a set off to a different liability. And this is so even in respect of wholly domestic situations involving Australian industrial agreements and legislative instruments, such as awards: cf. *Finance Sector* 111 IR at 239-240 [55]-[56]. In addition, the application of the principle, in a case like the present, must accommodate the differing industrial relationships that arise under, and must comply with, the laws of one or more sovereign nations or under international treaties such as the *Maritime Labour Convention*, that Australia both recognises and enforces in accordance with its public international law obligations.
2. Here, the true character of Transpetrol’s total payments to the crew members of *Turmoil* was, *first*, to satisfy all contractual and relevant national law liabilities of any particular crew member, *secondly*, to ensure that all crew members received the same wage for same rank and work, regardless of the relevant national laws, by topping up their payments under a common arrangement, namely the wage scale and, *thirdly*, to ensure that *Turmoil* had both a “blue certificate” and a maritime labour certificate so that she could freely trade worldwide: *Finance Sector* 111 IR at 239 [51]-[52]; *James Turner Roofing* 132 IR at 132-133 [44]; *Linkhill* 240 FCR at 601 [99].
3. On the evidence, Transpetrol intended to pay each crew member an overall sum to cover, *first*, all of their contractual and statutory entitlements under the relevant national laws, *secondly*, its obligations under the *Maritime Labour Convention* and, *thirdly*, a top up payment in accordance with its policy of providing a common wage scale for the same ranks and work throughout the Transpetrol group’s fleet regardless of the requirements of any relevant national law. In that context, the breakdown of payments that the *Turmoil* ITF agreement required, can be seen as informing the crew member that he or she had been paid everything due under the employment contract and the relevant national law, as well as identifying any top up amount.
4. However, the character of Transpetrol’s total payment to the crew member was that it wished to pay a common lump sum, in addition to the requirements of the differing relevant national laws applicable to any particular crew member, according to the wage scale that would be more than sufficient to meet all contractual and statutory liabilities (even if overlapping) that it had to the crew member. Accordingly, the gross total payment that Transpetrol made (before the Ombudsman’s investigation) to each crew member is the relevant one for the purposes of assessing its liabilities under the *Fair Work Act* while *Turmoil* sailed on each of the ten voyages in Australian regulated waters.
5. For those reasons, I am of opinion that Transpetrol is entitled to set off fully the total wages it paid earlier to the official crew members to reduce the sum of its liabilities in respect of each of the ordinary time, overtime or *NMWO* contraventions. That enables Transpetrol to achieve a partial discharge of its additional liabilities to pay the crew members under the *Fair Work Act* during the part or parts of the ten voyages when *Turmoil* sailed in Australian regulated waters.
6. Transpetrol asserted a set off of $132,442.01 in respect of the Ombudsman’s erroneous assertion in the inspector’s letter of 19 November 2015 of a total underpayment of $265,407.76. However, *Turmoil* sailed out of and then back into Australian regulated waters on voyages 3 and 6. This happenstance ultimately led to the Ombudsman’s correction of the alleged underpayments, resulting in a reduction of about $10,000 to $255,042.94 (see [73] above). The parties did not recalculate the amount of the underpayment after allowing for a set off to accommodate the Ombudsman’s final calculation of a total underpayment of $255,042.94 in the letter of 16 August 2016. Rather, they argued the case at a level of principle and I have addressed those arguments as so framed in these reasons. And, there was no direct evidence of the precise amount that any crew member was underpaid after taking account of any set off.
7. Mr Hansen said that it was difficult to calculate how long *Turmoil* was inside Australian regulated waters and both Transpetrol and the Ombudsman had to rely on records obtained, such as from the Australian Maritime Safety Authority, after the ten voyages in order to do so, in circumstances where Transpetrol had no control over the sailing orders that the sub-charterers gave that affected when the ship sailed into or out of Australian regulated waters.
8. The purpose of the extension of the operation of the *Fair Work Act* under s 33(3) and reg 1.15E was to ensure that all ships sailing voyages under general and temporary licences in the Australian coastal trade paid their crews a similar minimum sum in accordance with Australian law. The Parliament gave effect to this purpose in the *Coastal Trading Act* and the *Fair Work Act* as follows. *First*, the Minister had to notify all holders of general licences under s 30(b)(i) of the *Coastal Trading Act* of an application for a temporary licence. *Secondly*, the holder of a general license could give a notice in response under s 31 that would cause the Minister having to have regard to the position of the general licence holder when deciding, under s 34, whether to grant the temporary licence or to let the general licence holder’s vessel perform one or more of the proposed voyages.
9. In *CSL Australia Pty Ltd v Minister for Infrastructure and Transport* (2014) 221 FCR 165, Allsop CJ, with whom Mansfield J agreed, and I considered the scheme of Pt 4-2 of the *Coastal Trading Act*. The Full Court discussed the object of that Act in s 3(1) and the Act’s legislative purposes. The Chief Justice quoted from the Minister’s second reading speech on the suite of Bills, that included the Bill that became the *Coastal Trading Act*, including the following passage (221 FCR at 174-175 [27]; see too at 224-225 [269]-[271] per Rares J):

There has been some debate regarding the industrial arrangements for vessels engaged in the domestic coastal trade.

**This government made the decision in 2009 that vessels operating in the coastal trade will be subject to the provisions of the Fair Work Act**.

This was implemented through the Fair Work Act Regulations 2010. [sic]

It is this government’s policy that this scope of coverage will not change.

**These vessels are operating in the domestic economy and these seafarers are entitled to be paid Australian wages.**

This bill is the key to the regulatory framework — a framework that supports Australian coastal shipping, while allowing for the participation of foreign vessels.

It is a framework that will enhance our participation in international trade and underpin the Australian industry with generous tax concessions that level the playing field between Australian shipping and its international competitors. (emphasis added)

1. The legislative purpose for making all ships sailing under general or temporary licences pursuant to the *Coastal Trading Act* subject to the provisions of the *Fair Work Act* was to ensure that the total liability of the ship owner, as employer of the crew, to make payment to the crew of any vessel under a temporary licence would be no less than the cost to a general licence holder of paying his crew in order to perform the same voyage.
2. The principal purpose of deterrence, when imposing a civil pecuniary penalty in circumstances such as the present, will not be advanced by imposing a penalty on a basis that does not allow a foreign shipowner or employer of a ship’s crew to set off amounts actually paid to the crew against the asserted underpayment. The legislative purpose in extending the operation of the *Fair Work Act* under s 33(3) to foreign ships trading under a temporary licence under reg 1.15E was to make those vessels competitive with ships operating in the coastal trade under a general licence issued under the *Coastal Trading Act*, by ensuring that the cost of employing crews on ships sailing under both classes of licence are at least equivalent during each voyage, or the part of a voyage in the coastal trade to which the *Fair Work Act* extends.
3. The mere fact that, on an off chance, a ship may sail into Australian regulated waters on a third or subsequent voyage (within a 12 month period) under a temporary licence, when she could just as much be sailing elsewhere in the world, does not justify the Court, when ascertaining whether an underpayment to her crew occurred and if so, how much it was, ignoring the legal and industrial realities of the substantive laws and contracts governing the relationships between the shipowner and the crew or the legislative purpose inherent in reg 1.15E of the *Fair Work Act*. This situation is distinct from one arising in the context of a contract formed in Australia between an employer and its employees, where the provisions of the *Fair Work Act* bind both parties and where the employer’s compliance with the law at all times is necessary.
4. Moreover, the Court cannot, and should not, seek to deter behaviour that, on the evidence here, was not only lawful under the relevant national laws but was also required by the *Maritime Labour Convention*, and resulted in an outcome more beneficial and generous to the crew than Transpetrol was obliged to provide as the minimum wages and entitlements that were acceptable to the relevant trade unions, the ITF and the crew members. The simple fact is that Transpetrol had a legal obligation to make the allocations that it did in order to obtain and keep in force a “blue certificate” and maritime labour certificate for *Turmoil*, the latter being necessary not only under the *Maritime Labour Convention*, but also under Australian law after 20 August 2013.

## Consideration – what orders should be made?

1. The magnitude of the total underpayments, after allowing for the set off, is not insignificant. However, Transpetrol paid the affected employees the full sum that the Ombudsman claimed that it had underpaid, which is about twice as much as I have found to have been due after allowing for the set off. That overpayment is well in excess of the total amount of the civil pecuniary penalties that the Ombudsman now seeks or ever sought.
2. I accept Mr Hansen’s evidence that the Transpetrol group has never had any finding against it of a contravention of workplace laws in Australia or any other jurisdiction. He also said that Transpetrol had expended considerable legal costs as a result of both the investigation and this proceeding.
3. In all the circumstances, I am of opinion that it would be neither just nor appropriate to order Transpetrol to pay any civil pecuniary penalty. It acted honestly and in the belief that it was not only paying the crew members the minimum amounts due under the relevant national laws, but was topping up those sums to treat all of them fairly. It complied fully with the *Maritime Labour Convention*. It has now paid the affected crew members a total of about twice what they were entitled to receive as total remuneration calculated in accordance with the *Fair Work Act* for the period that they sailed on *Turmoil* in Australian regulated waters. It also voluntarily and fully cooperated in the Ombudsman’s investigations.
4. Nor, as the Ombudsman accepted, is it necessary to make any declarations of contravention. I accept Mr Hansen’s evidence that after the Ombudsman issued a press release on 8 April 2017 about this proceeding, her allegations were published in, among other places, *World Maritime News*. He said that this had had an adverse effect on Transpetrol’s reputation, leading to its bankers and suppliers raising questions with it about allegations of “regulated slavery” and it paying crew members $1.25 per hour. He drew attention to the fact that major oil companies, that are the primary charterers of the Transpetrol group’s vessels, had stringent vetting standards, including as to management standards, ethics and public profiles of companies (such as the Transpetrol group) with which those oil companies deal.
5. I infer that the publicity already given to the Ombudsman’s claims has both required Transpetrol to explain what it has done and informed the market of, in effect, the operation of reg 1.15E of the *Fair Work Regulations* to the extent that Transpetrol’s unintentional and unknown contraventions of the *Fair Work Act* merited or would be achieved by any declaration or notation by the Court. Because of these matters, I do not consider it necessary formally to note, in making orders, that Transpetrol acknowledged the three contraventions.
6. Nor is there any need to order Transpetrol, as the Ombudsman sought, to provide its crews with a maritime industry fact sheet about their entitlements when a vessel on which they serve may be in Australian regulated waters. There is no evidence to suggest any risk that Transpetrol will contravene in the future. As Mr Hansen said, it has now taken steps to ensure that it will comply fully with its additional obligations under Australian law, if and when they arise.

## Conclusion

1. In my opinion, the Ombudsman has not made good her claims for relief. Indeed, I think that she overreached in initially seeking total penalties in the range of $81,680 to $93,840 for the three contraventions. Nothing in the facts merited penalties being sought in such significant amounts.
2. In all of the circumstances, the proceeding should be dismissed. Having regard to both s 570(1) of the *Fair Work Act* and the overall justice of the case,I am inclined to make no order as to costs but will allow the parties seven days to make submissions on costs should either seek them.

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| I certify that the preceding one hundred and thirty-three (133) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares. |

Associate:

Dated: 26 March 2019