



SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand



Increased Scrutiny and Penalties for Foreign-Flagged Vessels and Crew Payments

Earlier this year, the Senate Rural and Regional Affairs Committee commenced an investigation into “Flag-of-Convenience” (FoC) shipping in Australia and the potential exploitation and corruption of seafarers employed on these vessels. The committee found, amongst other things, that foreign-flagged ships were knowingly (or unknowingly) skirting their wage obligations in relation to meeting Australian employment standards when conducting Australian coastal voyages. As a result, the Fair Work Ombudsman (FWO) has recently been taking a proactive approach in investigating circumstances where they suspect that foreign-flagged vessels may be underpaying their crew whilst in Australian waters and commencing penalty prosecutions.

In recent times, Australian seafarers have been gradually and increasingly replaced with “cheaper” foreign crew. One reason for this may be that Australia imposes strict obligations on the working conditions for seafarers, whereas other jurisdictions are more relaxed in their requirements. This has provoked national security concerns according to the International Transport Workers’ Federation and resulted in the committee conducting an investigation into the use of FoC shipping in Australia, with a particular focus on seafarer conditions, including employment conditions.

Rights and Entitlements Under the Fair Work Act

Australia imposes a number of worker rights and entitlements under the Fair Work Act (FW Act), including a safety net of minimum terms and conditions of employment, such as:

- (a) National Minimum Wage
- (b) termination of employment protections
- (c) record keeping and pay slip obligations
- (d) protections for workplace rights and freedom of association.

The FW Act rights and entitlements apply to ships with an ownership or trading connection with Australia and can extend to foreign crew in Australian waters.

When does the Fair Work Act Apply?

The FW Act will apply to a ship operating in Australian waters if it:

- (a) is registered on the Australian General Shipping Register (AGSR) (eg, an Australian-flagged ship)
- (b) supplies, services, or operates in connection with, a fixed platform and operates to and from an Australian port
- (c) is operated or chartered by an Australian employer and uses Australia as a base
- (d) is majority Australian crewed
- (e) is a foreign-flagged ship conducting Australian coastal trade and which has made at least two Australian coastal voyages in the last 12 months.

It is this latter provision which continues to catch many foreign-flagged ship owners, operators and charterers unaware, with potentially costly consequences.

The FW Act does not apply to:

- (a) foreign-flagged ships (subject to the considerations above) exercising a right of innocent passage or transit passage through Australian waters
- (b) ships registered on the Australian International Shipping Register (AISR) which are engaged in international trading.

Prior to the committee investigation, FoC ships were either operating without fear of regulatory investigations or out of ignorance about the possible application of the FW Act to foreign seafarers in Australian waters.

Committee Findings

The committee investigation concluded with a number of recommendations aimed at improving the maritime skills of Australian seafarers, which include:

- (a) FWO implement a programme of inspection for ships with foreign seafarers to verify that the wages paid onboard accord with Australian legal requirements
- (b) the Australian Government provide adequate funding to the FWO to implement an inspection programme of ships with foreign crews, to assess the payment of wages.

As a result of the increased focus on foreign crew payment compliance, earlier this year the FWO recovered A\$100,649 for ten seafarers from the Philippines who were underpaid while working in Australian waters. The underpayments occurred during voyages that the foreign-flagged vessel conducted in the Australian Exclusive Economic Zone between January and June 2016, which were subject to the FW Act. The operator of the ship was also issued with a formal caution and warned that if a similar incident occurred in the future, it would likely be prosecuted and fined, in addition to having to pay any underpayments. If prosecuted, each instance of failure to pay correct wages to each seafarer constitutes a separate offence with a maximum penalty of A\$63,000, so total penalties can quickly rise into the hundreds of thousands of dollars, on top of being ordered to back pay the seafarers.

Incidents like the above-mentioned are not unusual and the FWO has shown a recent inclination to investigate incidents of all sizes. We are involved in a current Federal Court matter involving a client who has been subject to an investigation initiated by the FWO to establish whether there have been any breaches of guaranteed labour conditions protected by Australian law. In particular, potential breaches of National Employment Standards relating to minimum wages.

The message is clear. Shipowners, operators and charterers employing crew need to understand their workplace obligations when operating in Australian waters because ignorance will likely result in prosecution.

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