FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd

[2015] FCA 275

Citation:	Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd [2015] FCA 275
Parties:	**FAIR WORK OMBUDSMAN v SKILLED OFFSHORE (AUSTRALIA) PTY LTD (ACN 109 339 433) and MARITIME UNION AUSTRALIA**
File number:	WAD 251 of 2011
Judge:	**GILMOUR J**
Date of judgment:	27 March 2015
Catchwords:	**INDUSTRIAL LAW** - penalties – imposition of penalties on the second respondent following declarations that the second respondent contravened the *Workplace Relations Act 1996* (Cth) and the *Fair Work Act 2009* (Cth) – nature and extent of conduct – nature and extent of loss or damage – general and specific deterrence - totality principle. **COMPENSATION** – principles of compensation under the *Workplace Relations Act 1996* (Cth) and the *Fair Work Act 2009* (Cth) – loss of potential income earned - contribution under the *Fair Work Act 2009* (Cth)
Legislation:	*Workplace Relations Act 1996* (Cth) ss 792(1)(d), 796(5), 797(3), 807(1)(a) *Fair Work Act 2009* (Cth) ss 346(a), s 545, 546 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) *Trade Practices Act 1974* (Cth) s 76 *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) s 7
Cases cited:	*Aitken v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia - Western Australian Branch* (1995) 63 IR 1 *Australian Competition and Consumer Commission v AGL Sales Pty Ltd (No 2)* [2013] FCA 1360 *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011)

193 FCR 526
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
Belan v Casey (2003) 57 NSWLR 670
Burke v LFOT Pty Limited (2002) 209 CLR 282
Cockburn v GIO Finance Ltd (No 2) (2001) 51 NSWLR 624
Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd (No 2) (1999) 94 IR 231
Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 4) [2012] FCA 1454
Construction, Forestry, Mining and Energy Union v Cahill (2010) 269 ALR 1
Construction, Forestry, Mining and Energy Union v Hamberger (2003) 127 FCR 309
Dafallah v Fair Work Commission [2014] FCA 328
Draffin v Construction, Forestry, Mining and Energy Union (2009) 189 IR 145
Elias v The Queen (2013) 248 CLR 483
Fair Work Ombudsman v AJR Nominees Pty Ltd (No 2) [2014] FCA 128
Fair Work Ombudsman v Offshore Marine Services Pty Ltd (2012) 219 IR 435
Fair Work Ombudsman v Offshore Marine Services Pty Ltd (No 2) [2013] FCA 943
Friend v Brooker (2009) 239 CLR 129
General Manager of Fair Work Australia v Health Services Union [2013] FCA 1306
Hamberger v Construction Forestry Mining & Energy Union [2002] FCA 585
HIH Claims Support Limited v Insurance Australia Limited (2011) 244 CLR 72
Idameneo (No 123) Pty Ltd v Dr Colin Gross [2012] NSWCA 423
Karl Suleman Enterprizes Pty Limited (in liquidation) v Babanour (2004) 49 ACSR 612
Lawson Hill Estate Pty Ltd v Tovegold Pty Ltd (2004) 214 ALR 478
Mahoney v McManus (1981) 180 CLR 370
Markarian v The Queen (2005) 228 CLR 357
Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383
Murphy v Overton Investments Pty Limited (2004) 216 CLR 388
National Tertiary Education Union v Royal Melbourne Institute of Technology (2013) 234 IR 139
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357
Ponzio v B&P Caelli Constructions Pty Ltd (2007) 158

FCR 543
Qantas Airways Ltd v Gama (2008) 167 FCR 537
Sang Lee Investment Co Ltd v Wing Kwai Investment Co Ltd [1983] HKLR 197
Stuart-Mahoney v Construction, Forestry, Mining and Energy Union (2008) 177 IR 61
The Attorney-General v Tichy (1982) 30 SASR 84
The Commonwealth of Australia v Amann Aviation Pty Limited (1991) 174 CLR 64
Trade Practices Commission v CSR Limited (1991) ATPR ¶41-076
Veen v The Queen (No 2) (1988) 164 CLR 465
Whitfeld v De Lauret and Company Limited (1920) 29 CLR 71
Wong v The Queen (2001) 207 CLR 584

Date of hearing:	1 & 2 December 2014
Place:	Perth
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	166
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IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
FAIR WORK DIVISION **WAD 251 of 2011**

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**SKILLED OFFSHORE (AUSTRALIA) PTY LTD (ACN 109 339 433)** **First Respondent**
	MARITIME UNION AUSTRALIA **Second Respondent**

JUDGE: **GILMOUR J**
DATE OF ORDER: **27 MARCH 2015**
WHERE MADE: **PERTH**

THE COURT ORDERS THAT:

1. A penalty of $79,200.00 be imposed on the second respondent for its contraventions of the *Workplace Relations Act 1996* (Cth) and the *Fair Work Act 2009* (Cth).
2. The second respondent pay Mr Bruce Love $352,100.00 and Mrs Lynne Love $371,200.00.
3. The first respondent pay the second respondent one-third of the sums in order 2.
4. Liberty granted to the parties to be heard on the question of any interest that should be paid in respect of the compensation orders as well as on the question of costs.

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

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JUDGE:	**GILMOUR J**
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PLACE:	**PERTH**

REASONS FOR JUDGMENT

Introduction

1 On 8 October 2013, the Court made declarations (the Declarations), following the Court's judgment of 18 September 2013: *Fair Work Ombudsman v Offshore Marine Services Pty Ltd (No 2)* [2013] FCA 943 (the MUA Liability Judgment), that the second respondent (the MUA), at various times throughout 2009, had contravened provisions of the *Workplace Relations Act 1996* (Cth) (WR Act) and the *Fair Work Act 2009* (Cth) (FW Act) by engaging in unlawful conduct in relation to the proposed employment of Bruce Love and Lynne Love (the Loves) and in relation to their proposed membership of the MUA. Some of the contraventions involved accessorial liability for which OMS was principal; for others, the MUA was directly liable.

2 The MUA Liability Judgment followed an earlier judgment by which the first respondent, then called Offshore Marine Services Pty Ltd (OMS), was the subject of declarations that it had contravened s 792(1)(d) of the WR Act and s 346(a) of the FW Act: *Fair Work Ombudsman v Offshore Marine Services Pty Ltd* (2012) 219 IR 435 (the OMS Penalty Judgment).

3 The declarations of contravention made against OMS were based upon admissions by OMS (OMS Penalty Judgment at [1]) and the MUA had no active role in that part of the proceedings. The factual premise of OMS' admissions of contravention was that it had contravened the WR Act and FW Act by refusing to employ the Loves: OMS Penalty Judgment at [1]. OMS was found to have engaged in four contraventions arising out of that factual premise (the OMS Contraventions). The Court treated the OMS Contraventions as a single course of conduct, considered that a penalty in the low to mid-range was appropriate and, in the context of a maximum penalty of $66,000, imposed a penalty of $7,500: OMS Penalty Judgment at [26], [68].

4 These reasons should be read together with those in the MUA Liability Judgment and the OMS Penalty Judgment. Although OMS has since changed its name I will continue to refer to it as OMS for consistency and ease of comprehension.

5 The applicant submits that the Court should exercise its power pursuant to s 807(1)(a) of the WR Act and s 546 of the FW Act to impose substantial pecuniary penalties on the MUA in respect of the contraventions.

6 The applicant further submits that the Court should order the MUA to pay compensation to each of the Loves for loss or damage they have suffered as a result of the contraventions. The Court has power to award such compensation pursuant to s 807(1)(b) of the WR Act and s 545 of the FW Act.

7 In addition to the evidence before the Court in the MUA liability hearing, in support of these submissions the applicant relies upon:

(a) the third affidavit of Bruce Edward Love made 28 July 2014 (Third Bruce Love Affidavit);

(b) the fourth affidavit of Bruce Edward Love made 25 September 2014 (Fourth Bruce Love Affidavit);

(c) the second affidavit of Lynne Christine Love made 28 July 2014 (Second Lynne Love Affidavit);

(d) the third affidavit of Lynne Christine Love mad 25 September 2014 (Third Lynne Love Affidavit);

(e) the second affidavit of Tamianne McSherry made 28 July 2014 (Second McSherry Affidavit); and

(f) the third affidavit of Tamianne McSherry made 26 September 2014 (Third McSherry Affidavit); and

(g) the fourth affidavit of Tamianne McSherry made 26 November 2014 (Fourth McSherry Affidavit).

The contraventions

8 At [164] to [171] of the MUA Liability Judgment, the Court summarised the 12 contraventions and the MUA's relevant conduct.

9 First, the Court held that the MUA was liable as an accessory, in that it was involved in four contraventions of OMS (the MUA Contraventions as an Accessory), as follows:

(a) prior to 1 July 2009, refusing to employ Bruce Love because Bruce Love was not an officer or member of the MUA, in contravention of s 792(1)(d) of the WR Act (Contravention 1 – paragraph 11 of the Declarations);

(b) prior to 1 July 2009, refusing to employ Lynne Love because Lynne Love was not an officer or member of the MUA, in contravention of s 792(1)(d) of the WR Act (Contravention 2 – paragraph 12 of the Declarations);

(c) after 30 June 2009, refusing to employ Bruce Love because Bruce Love was not an officer or member of the MUA, in contravention of s 346(a) of the FW Act (Contravention 3 – paragraph 9 of the Declarations); and

(d) after 30 June 2009, refusing to employ Lynne Love because Lynne Love was not an officer or member of the MUA, in contravention of s 346(a) of the FW Act (Contravention 4 – paragraph 10 of the Declarations).

This conduct involved four separate contraventions on the part of OMS, as set out above. For the purposes of imposing a penalty on OMS, however, these contraventions were treated by the Court in the OMS Penalty Judgment as a single course of conduct "taking place through most of 2009" (at [6]).

10 Second, the Court held at [168] to [171], that the MUA was directly liable, or liable as a principal, for eight contraventions (the MUA Contraventions as Principal), as follows:

(a) after 1 July 2009, the MUA took adverse action against Bruce Love because he was not a member of the MUA, such adverse action being the prejudicing of Bruce Love in prospective employment by:

(i) not granting him membership of the MUA so that he would be able to obtain employment with OMS; and

(ii) advising, encouraging or inciting OMS not to employ him –

in contravention of s 346(a) of the FW Act (Contravention 5 - paragraph 1 of the Declarations);

(b) after 1 July 2009, the MUA took adverse action against Lynne Love because she was not a member of the MUA, such adverse action being the prejudicing of Lynne Love in prospective employment by:

(i) not granting her membership of the MUA so that she would be able to obtain employment with OMS; and

(ii) advising, encouraging or inciting OMS not to employ her –

in contravention of s 346(a) of the FW Act (Contravention 6 – paragraph 2 of the Declarations);

(c) prior to 1 July 2009, the MUA advised, encouraged or incited OMS to maintain and apply the OMS employment practice (as that term is defined in para [4] of the MUA Liability Judgment) (the OMS employment practice) with respect to Bruce Love, so as to cause OMS not to employ Bruce Love as he was not a member of the MUA, in contravention of s 796(5)(a) of the WR Act (Contravention 7 - paragraph 3 of the Declarations);

(d) prior to 1 July 2009, the MUA advised, encouraged or incited OMS to maintain and apply the OMS employment practice with respect to Lynne Love, so as to cause OMS not to employ Lynne Love as she was not a member of the MUA, in contravention of s 796(5)(a) of the WR Act (Contravention 8 - paragraph 4 of the Declarations);

(e) prior to 1 July 2009, the MUA took action that had the effect of directly prejudicing Bruce Love in his prospective employment by:

(i) refusing him MUA membership; and

(ii) advising, encouraging or inciting OMS not to employ him –

in contravention of s 797(3)(a) of the WR Act (Contravention 9 – paragraph 5 of the Declarations);

(f) prior to 1 July 2009, the MUA took action that had the effect of directly prejudicing Lynne Love in her prospective employment by:

(i) refusing her MUA membership; and

(ii) advising, encouraging or inciting OMS not to employ her –

in contravention of s 797(3)(a) of the WR Act (Contravention 10 - paragraph 6 of the Declarations);

(g) prior to 1 July 2009, the MUA advised, encouraged or incited OMS to take action which had the effect of directly prejudicing Bruce Love in terms of his prospective employment, namely, to not employ him because he was not a member of the MUA, in contravention of s 797(3)(b) of the WR Act (Contravention 11 - paragraph 7 of the Declarations); and

(h) prior to 1 July 2009, the MUA advised, encouraged or incited OMS to take action which had the effect of directly prejudicing Lynne Love in terms of her prospective employment, namely, to not employ her because she was not a member of the MUA, in contravention of s 797(3)(b) of the WR Act (Contravention 12 - paragraph 8 of the Declarations).

Jurisdiction of the Court

11 The applicant has standing to seek the orders for the imposition of penalties and compensation in respect of the contraventions found, for the reasons set out at [12] of the MUA Liability Judgment. Penalties and compensation may be ordered under both the WR Act and the FW Act; the former continues to apply by virtue of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), as explained at [12] of the MUA Liability Judgment.

12 Contraventions 1 to 12 above are all contraventions of a civil remedy provision of the WR Act or FW Act. The MUA, as a person who has contravened a civil remedy provision, may be ordered to pay a pecuniary penalty or compensation by the Court: WR Act, s 807; FW Act, ss 545 and 546. Such is also the position in respect to OMS, a matter to which I will return.

Penalties

General principles

13 There is no controversy as to the generally applicable principles. The following summary adopts what is found in the applicant's written submissions which were substantially adopted by the MUA, together with some additional matters from the MUA's submissions. Together they reflect accurately the principles involved.

14 The overriding principle when fixing a penalty is to ensure that it is proportionate to the gravity of the contravening conduct: *The Attorney-General v Tichy* (1982) 30 SASR 84 at 92-93.

15 The principal, if not the only, purpose for the imposition of a civil penalty is deterrence. In *Trade Practices Commission v CSR Limited* (1991) ATPR ¶41-076 at 52,152 French J (as his Honour then was) said of a penalty imposed under s 76 of the then *Trade Practices Act 1974* (Cth):

> Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution or rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV. Nor, if it be necessary to say so, is there any compensatory element in the penalty fixing process [citations omitted]. The principal, and I think probably the only, object of the penalties imposed by s.76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by contravenor and by others who might be tempted to contravene the Act.

16 To similar effect in *General Manager of Fair Work Australia v Health Services Union* [2013] FCA 1306, which concerned civil penalty proceedings against the Health Services Union, Middleton J said at [24]:

> The principal purpose for the imposition of a financial penalty is deterrence: to deter the contravening party from repeating its contraventions, and more generally deterring others who may have contemplated engaging in similar conduct: *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 249 at [41] and [62]-[64].

17 As his Honour had previously observed in *Australian Competition and Consumer Commission v AGL Sales Pty Ltd (No 2)* [2013] FCA 1360 at [9]:

> [a]chieving a penalty of appropriate deterrent value is the purpose of having regard to all relevant factors and recourse to the tools of analysis used when exercising the penalty fixing discretion, including the one transaction principle (also referred to as the one course of conduct principle) and the totality principle.

18 The approach taken in *CSR* was endorsed by Burchett and Kiefel JJ in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 292. In particular their Honours rejected the characterisation of a civil penalty as a criminal sanction and that its purpose was not punishment.

19 The Court's task is one of "instinctive synthesis": *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [27] per Gray J and [55] per Graham J. This requires the Court to take into account all relevant factors and then arrive at a single result which takes due account of them all: *Wong v The Queen* (2001) 207 CLR 584 at [74]-[76] per Gaudron, Gummow and Hayne JJ; see also *Markarian v The Queen* (2005) 228 CLR 357 at [37] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

20 Proportionality and consistency commonly operate as a final check on the penalty assessed: *Australian Ophthalmic Supplies* at [54] and cases there cited.

21 There are a range of factors which may be relevant to the circumstances of a particular case when assessing the appropriate penalty: see, for example, *Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd (No 2)* (1999) 94 IR 231 at [8]; *Construction, Forestry, Mining and Energy Union v Hamberger* (2003) 127 FCR 309 at [51], quoting Cooper J in *Hamberger v Construction Forestry Mining & Energy Union* [2002] FCA 585 at [15]. It is not a question of applying checklists. This could readily transform the process of instinctive synthesis into the application of a rigid catalogue of matters for attention.

22 Nor is it a matter of comparison with other cases: *NW Frozen Foods* at 295; *Australian Ophthalmic Supplies* at [56]-[57] and [87].

Maximum penalties

23 At the time of the contraventions, s 807(2) of the WR Act and s 546(2) of the FW Act prescribed the maximum penalty for an individual contravention of a civil remedy provision to be 300 penalty units, or $33,000, in the case of a body corporate such as the MUA (the maximum for an individual was $6,600).

24 There being 12 contraventions on the part of the MUA, the maximum penalty that may be imposed is $396,000. By reason of the operation of the principles set out above, and those below, the Court will not impose a penalty of that sum. It is appropriate, however, for

the Court to consider the maximum penalties that could be imposed on the MUA, as part of the comparative exercise of assessing where the current contraventions sit: *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at [88]. However, the maximum penalty for an offence fixes the end of the sentencing yardstick and is appropriately reserved for the worst possible type of contravention: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 478.

25 However, the following further matters are relevant to the consideration of penalty.

26 While the effect of the conduct on the public is a permissible factor, in the MUA's submission there is less need to give weight to the harm caused by the contravention where there is a concurrent claim for compensation the outcome of which is likely to be that any harm will be redressed by a compensation order. The MUA submits that if the economic harm caused by the conduct were given weight at the sentencing stage and then founded a compensation order, there would be a risk of double punishment.

27 I do not consider the notion of double punishment as apt. The extent of any loss caused as a result of a contravention is relevant to assessing the gravity of that contravention. An order for compensation in respect of the loss suffered is made separately and for a different purpose to that of the imposition of a penalty. The purpose of the compensation order is to restore the person who suffered the loss to the position he or she would be in but for the contravention: *The Commonwealth of Australia v Amann Aviation Pty Limited* (1991) 174 CLR 64. The purpose of ordering the compensation is not to punish the contravener, it is compensatory: see, for example, *Whitfeld v De Lauret and Company Limited* (1920) 29 CLR 71. Nonetheless, the fact that an order of compensation is made is, in my opinion, entitled to be given some weight in respect of penalty. This is only because the extent of any loss will be diminished by the payment of compensation. There is in this case no reason to think that any compensation ordered will not be paid. However, it is but one factor.

28 "[W]here there is an interrelationship between the *legal and factual elements of two or more offences* for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality": *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1 at [39] (original emphasis).

29 So far as the sentencing discretion may be affected by past contraventions by the contravener, the most relevant question is whether there has been "*similar* previous conduct": *Fair Work Ombudsman v AJR Nominees Pty Ltd (No 2)* [2014] FCA 128 at [12], [21]

(emphasis added): see also *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 4)* [2012] FCA 1454 at [17]: "There is no evidence that the respondent has previously contravened provisions *of the relevant kind* …" (emphasis added).

30 As with sentencing in other contexts, "[l]ike cases should be treated in like manner" and sentencing "should be systematically fair" which "involves, amongst other things, reasonable consistency": *Wong* at [6], quoted with apparent approval in *Elias v The Queen* (2013) 248 CLR 483 at [28].

31 Finally, the "totality principle", which operates as the "final step" in the sentencing process, was described in the following way by Goldberg J in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 53: the Court must "as a check, at the end of the process, consider whether the aggregate is appropriate for the total contravening conduct involved". The principle is "designed to 'ensure that the aggregate of penalties imputed is not such as to be oppressive or crushing'": *AJR Nominees* at [69], quoting from *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* (2008) 177 IR 61 at [60]. The application of the totality principle may warrant the Court applying a discount to a penalty, particularly where contraventions are related: as in, for example, *AJR Nominees* at [70]-[71] and *National Tertiary Education Union v Royal Melbourne Institute of Technology* (2013) 234 IR 139 at [145].

Relevant considerations in the assessment of penalty

32 Bearing in mind the warning against applying a rigid checklist of matters, the authorities have recognised the following factors, amongst others, as potentially relevant to the imposition of a pecuniary penalty in an industrial regulatory context:

(a) the nature and extent of the conduct which led to the breaches;

(b) the circumstances in which the relevant conduct took place;

(c) the nature and extent of any loss or damage sustained as a result of the breaches;

(d) previous contraventions of industrial legislation;

(e) whether the breaches were properly distinct or arose out of the one course of conduct;

(f) the size of the business enterprise involved;

(g) whether or not the breaches were deliberate;

(h) whether senior management was involved in the breaches;

(i) whether the party committing the breach had exhibited contrition;

(j) whether the party committing the breach had taken corrective action;

(k) whether the party committing the breach had co-operated with the enforcement authorities; and

(l) the need for general and specific deterrence.

See *Stuart-Mahoney* at [40].

33 Furthermore, the imposition of pecuniary penalties for contraventions of civil penalty provisions should give effect to the statutory purposes of the WR Act and the FW Act.

34 As I have mentioned, these considerations are neither exhaustive nor applicable in all cases involving the imposition of pecuniary penalties. However they do provide a useful guide for the Court as to the appropriate matters which may, or may not, be considered relevant in the assessment of pecuniary penalties under the WR Act and the FW Act.

NATURE AND EXTENT OF THE CONDUCT AND CIRCUMSTANCES IN WHICH IT OCCURRED

35 The courses of conduct as I have characterised them endured for almost the whole of 2009. The lengthy period involved adds significantly to the gravity of the contraventions and should be reflected in the penalties to be imposed.

36 The effect of this conduct of the MUA was to prevent the Loves from obtaining employment because they were not part of the MUA's "closed shop". They were not part of that closed shop because, notwithstanding their attempts to join the MUA, the MUA, by the actions in particular of its State Secretary, Mr Chris Cain, refused to grant the Loves MUA membership: MUA Liability Judgment at [3] to [7].

37 This conduct of the MUA in effectively procuring the instigation and maintenance by OMS of the OMS employment practice (MUA Liability Judgment at [6]), as I have said, lasted for almost a whole year. That was the very year during which the Loves were seeking, and taking proactive steps to obtain, employment on a vessel, with the assistance of Ms McSherry (then Wright) of OMS. The MUA's conduct prevented each of the Loves from obtaining that employment. In *Draffin v Construction, Forestry, Mining and Energy Union* (2009) 189 IR 145, the Full Court discussed the relative culpability of an employer that bowed to union pressure with the culpability of the Union. It held that the employer's

conduct was not as serious. The Full Court noted that the Union was the moving party and while the employer contravened the Act, it was because of the Union's conduct and not because it chose to do so on its own initiative. Such, I found, was the position in this case.

38 The applicant submits that the MUA's role in ensuring that the OMS employment practice was maintained, alongside its own "MUA membership practice" of granting memberships to persons offered employment with OMS only when there were no existing MUA members available to take up that offer of employment (MUA Liability Judgment at [5]), was central and essentially decisive in the Loves not obtaining the employment. While OMS, in applying and maintaining the OMS employment practice was in part, and by its own admissions, also culpable, the MUA was the "moving party" and the party principally responsible for the Loves being denied employment. That it was the "moving party" is not, contrary to the submissions by the MUA, an emotive allegation with no precise content.

39 The MUA rightly acknowledged that there are differences between the circumstances of the MUA and OMS but submits that there is a public interest in the penalties imposed on the MUA not departing too substantially from those imposed on OMS. This, it contends, is so because a critical element of a number of the contraventions was OMS' deliberate and conscious adoption of the OMS employment practice. It is plain, I accept, that the contraventions were brought about by the joint conduct of the two entities. However, I reject the submission that for this reason there is a need to apply systemic consistency in the imposition of penalties and that the low to mid-level penalties imposed on OMS should furnish a yardstick to guide the Court's discretion in assessing the penalties to be imposed upon the MUA.

40 There is no parity or even an approximate parity in this case.

41 For the reasons I have referred to above I find that the culpability of the MUA was far greater than that of OMS.

42 As the Court has held, the Loves were the victims of these unlawful industrial practices (MUA Liability Judgment at [7]). They were also the victims thereafter of a direct rejection of their applications for MUA membership at the instance of Mr Cain (MUA Liability Judgment at [72] to [89]). That conduct of refusing or not granting the Loves membership of the MUA was separate and distinct from the broader conduct of the MUA in relation to the unlawful industrial practices.

43 The MUA submits that its contraventions should be understood in the context of the MUA's registered rules, which provide that an object of the MUA is, as might be expected of a labour union, to "secure preference of employment for members": cl 4(d). Whilst acknowledging that in engaging in the contraventions, it went too far in pursuing that object it nonetheless submits that its conduct needs to be understood in the context of its pursuit of what is its legitimate object of representing its members. This, it submits, whilst not excusing the MUA contraventions, furnishes an explanation which has some mitigating effect.

44 I reject this submission. It is contrary to the freedom of association principles embodied in the WR Act and the FW Act. Acceptance of such a submission would send entirely the wrong message to any union which might contemplate such conduct.

45 I find that the MUA's conduct was deliberate and objectively serious in its nature and should, where the contraventions were as principal, attract penalties in the mid to high range.

NATURE AND EXTENT OF LOSS OR DAMAGE

46 The nature and extent of the loss or damage arising out of the contraventions suffered by the Loves as a result of their not obtaining employment with OMS is very substantial. That compensation will be awarded to the Loves is a factor to be taken into account. In this context it remains the case that the loss and damage caused was substantial and prolonged even beyond the periods of the contraventions. Consideration of this factor is relevant to a consideration of penalty because it informs the question of how serious was the conduct. It involves no element of double punishment.

WHETHER THE CONTRAVENTIONS WERE DISTINCT OR AROSE OUT OF THE ONE COURSE OF CONDUCT

47 The applicant submits that the eight MUA Contraventions as Principal should be treated as four separate courses of conduct because they involve the separate conduct, which took place throughout most of 2009, of:

(a) refusing Bruce Love MUA membership (Contravention 5);

(b) refusing Lynne Love MUA membership (Contravention 6);

(c) in effect preventing OMS from employing Bruce Love (Contraventions 7, 9 and 11); and

(d) in effect preventing OMS from employing Lynne Love (Contraventions 8, 10 and 12).

48 The MUA, by contrast, submits that in all the circumstances, the MUA should be treated as having engaged in two courses of conduct, with a sanction falling in the middle of the range.

49 The MUA accepts that it is appropriate for the Court to impose a pecuniary penalty. In my view, the accessorial liability of the MUA was closely related to that of liability as principal. For example, accessorial liability for OMS refusing to employ the Loves is closely related to the liability of the MUA in advising, encouraging or inciting OMS to maintain and apply the OMS employment practice so as to cause OMS not to employ the Loves. So too there is a close interrelationship as between the several contraventions as principal. This is self-evident upon a consideration of the text of the Declarations. Although there are separate contraventions in respect of each of the Loves I regard these contraventions as part of each course of conduct in the sense I will shortly describe. That said, I accept that the fact that these two people were individually affected by the contraventions rather than just one is a matter that is relevant to an assessment of the gravity of the conduct and therefore relevant to the assessment of appropriate penalties. Furthermore, the number of contraventions in which the MUA engaged was enlarged because partway through the relevant period, the FW Act replaced the WR Act.

50 Viewed thus, it seems to me that there were two courses of conduct broadly in the way contended for by the MUA:

(1) advising, encouraging or inciting OMS to adopt the OMS employment practice; and

(2) refusing MUA membership to the Loves.

INVOLVEMENT OF SENIOR MANAGEMENT

51 All of Contraventions 1 to 12 involved some of the most senior members of the MUA: Mr Cain, the Western Australia State Secretary; Mr Ian Bray, the Western Australia Assistant State Secretary; Mr Will Tracey, Western Australia State Organiser; and Mr Michael Canning, Western Australia State Organiser (see MUA Liability Judgment at [20] and following).

SIZE OF MUA

52 The MUA is a large national union.

53 The MUA has not led any evidence of impecuniosity and nor does it assert that it has any issues with the capacity to pay any penalties.

WHETHER OR NOT THE BREACHES WERE DELIBERATE

54 The MUA's conduct involved deliberate acts which resulted in the contraventions.

CONTRITION, CORRECTIVE ACTION AND CO-OPERATION WITH ENFORCEMENT AUTHORITIES

55 To date, and notwithstanding the findings in the MUA Liability Judgment, the MUA has not put forward any expressions of contrition or any evidence of corrective action being taken by it.

56 The MUA has made no admissions of contraventions in the proceeding and has thereby put the applicant, and the Court, to the time and expense of a trial. It has not co-operated in any way to date. I do not regard the fact that the MUA advanced a no case submission as an aggravating factor. Conversely, it is not a mitigating factor. I regard it as neutral in significance.

PRIOR RELEVANT CONDUCT

57 The MUA has engaged in a significant number of prior contraventions of similar legislation and these are relevant to the assessment of penalty. These are outlined in a table annexed to the applicant's submissions (Table A).

58 However, Table A does not make clear how the conduct constituting those contraventions is said to be similar to that at issue in the present case. Moreover, the six judgments the applicant has identified cover a period going back seventeen years.

GENERAL AND SPECIFIC DETERRENCE

59 Engaging in conduct with an intention to enforce a closed shop on the Western Australian waterfront is, as I have already found, objectively serious. So too is conduct which denies two persons employment for which they were otherwise suitable (OMS Penalty Judgment at [21]), in that they were trained and capable job seekers, because they were not accepted members of that closed shop.

60 As the applicant submits such conduct infringes, in a most serious and damaging way for the two employees concerned, their freedom of association. What I said, albeit in the

context of the conduct of OMS, as to the importance of freedom of association in the OMS Penalty Judgment at [36] to [39] remains an important consideration in the present matter.

61 In the circumstances, penalties must reflect the objective seriousness of this type of conduct and act as a deterrent to others who might be likely to engage in contraventions: *Ponzio v B&P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [93].

62 Specific deterrence is also relevant. The penalties must be sufficient to deter the MUA from engaging in further unlawful conduct of this type. That it should think that somehow the fact that it was pursuing a legitimate objective in an unlawful manner should be regarded as mitigatory rather suggests that there is a need for specific deterrence in this case. There has been no expression, unlike the case of OMS, of contrition, nor any indication that steps have been taken involving corrective action: see *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at [37].

TOTALITY PRINCIPLE

63 The totality principle, to which I have referred, requires to be taken into account in determining the appropriate level of penalty.

Penalties to be imposed

64 If I were to treat each course of conduct as but two separate contraventions primarily of the MUA Contraventions as Principal and limit the penalties to those this would result in a total maximum penalty of $66,000. Fixing a penalty in the mid to high range (at 65%) would result in a total penalty of $42,900.

65 However, I do not regard this as properly reflecting the objective seriousness of the MUA's conduct involving, as it did, gross interference with the freedom of association rights of the Loves, depriving them, at a critical time of their lives, of the opportunity to gain well paid employment. These serious consequences for the Loves involved the MUA not only in refusing the Loves membership of the MUA but in the intimidation, by threats of industrial action, of OMS to which that company succumbed, such that OMS, although it wanted to employ the Loves, did not do so. The MUA's conduct involved its blatant use of illegitimate industrial action power to bully OMS into not employing the Loves.

66 Such conduct deserves a very significant penalty. Were I to have imposed penalties for each contravention as principal at 65% of the maximum and at 45% as accessory the result would be $231,000. This would be excessive viewed as a totality.

67 I have assessed the penalties individually and set these out under Annexure A to these reasons.

68 The penalties assessed in respect of the contraventions set out in Annexure A will be concurrent as follows, but the concurrent penalty in each case will be cumulative with the other penalties as follows:

Concurrent penalties	**Penalty**
Contraventions 5 and 9	$21,450
Contraventions 6 and 10	$21,450
Contraventions 7, 8, 11 and 12	$21,450
Contraventions 1-4	$14,850
	$79,200

The compensation claim

General principles

69 The applicant seeks orders for compensation pursuant to s 807(1)(b) of the WR Act and/or s 545(2)(b) of the FW Act for the loss suffered by each of Bruce Love and Lynne Love arising from the MUA's contraventions of the WR Act and FW Act.

70 The WR Act and the FW Act do not prescribe the measure of damages recoverable by a person for contravention of civil remedy provisions. Section 545(1) of the FW Act confers a discretion upon this Court to make an order that it considers "appropriate".

71 Fixing compensation under the FW Act and the WR Act is a statutory task "and the Court must not substitute that task with approaches derived from the general law": *Dafallah v Fair Work Commission* [2014] FCA 328 at [149] citing *Murphy v Overton Investments Pty Limited* (2004) 216 CLR 388 at [44]; *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 at [94].

72 The level of compensation awarded should be no greater than what is "reasonable" in the circumstances: see, for example, *Aitken v Construction, Mining, Energy, Timberyards,*

Sawmills and Woodworkers Union of Australia – Western Australian Branch (1995) 63 IR 1 at 9.

73 Both under the FW Act and the WR Act, the making of a compensation order is confined by the express purposes of such orders: "compensation for loss … suffered because of the contravention" (FW Act, s 545(2)(b)) and "compensation for damage suffered … as a result of the contravention" (WR Act, s 807(1)(b)). In both cases, the statutory precondition to a compensation order is that there has been loss or damage suffered because, or as a result of, the contravention. There must be "an appropriate causal connection between the contravention and the loss claimed": *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526 at [423].

74 I concluded in the MUA Liability Judgment that during December 2008 the Loves moved from Victoria to Perth and from January to December 2009 they sought employment with OMS as cleaners and/or stewards on vessels operated through OMS but by reason that they could not obtain membership with the MUA despite all their efforts to do so, they were never employed by OMS although it actually wanted to employ them and had employment available for them: MUA Liability Judgment at [53]. I also found that Ms McSherry went to great lengths to prepare the Loves to be qualified for employment by OMS as cleaners and/or stewards. She continued those efforts over almost the whole of 2009 to place them on a vessel but was unable to consummate those efforts solely because they could not get MUA membership. Not only she but also Mr Quirk, OMS' human resources manager, had given evidence to this effect which I accepted: MUA Liability Judgment at [116]. A reasonable assessment of compensation in a case such as this is the amount of income each would have expected to receive as cleaners and/or stewards over relevant periods.

75 It appears they would have been covered by the applicable enterprise agreement pay rates, in respect of that ongoing employment.

76 Ms McSherry deposed in the Second McSherry Affidavit that this was likely to have been ongoing work.

77 The applicant, in this regard, relies particularly upon the Third Bruce Love Affidavit, the Second Lynne Love Affidavit and the Second McSherry Affidavit.

78 OMS declined to make submissions about the appropriate quantum of compensation to be ordered, although it put on evidence which was capable of informing this question.

Quantum of compensation – Bruce Love

79 Basic annual remuneration for a position of a casual cleaner or steward with OMS would be approximately $109,000. Lynne Love deposed in her affidavit sworn on 6 August 2012 (First Lynne Love Affidavit) that Ms McSherry outlined that the remuneration would be $109,886.40 per annum, each. This figure equates to $91,572 as a base salary plus the additional 20% casual loading which casual employees are entitled to under cl 9 of the *Offshore Marine Services Pty Ltd Integrated Ratings, Cooks, Caterers and Seafarers (Offshore Oil and Gas) Enterprise Agreement 2010* (the Enterprise Agreement).

80 However, I have also considered the Enterprise Agreement. The figure deposed in the First Lynne Love Affidavit is within $1.20 (per annum) of the figure cited in the Enterprise Agreement, with the 20% casual loading. It will be sufficient to use the deposed figure.

81 Mr Love estimates that he would have worked for OMS for five to ten years. He was born on 23 July 1957. In early 2009 he was aged 51 years.

82 The figures put forward by the applicant proceed on the basis that the Loves would have been employed by OMS from 1 March 2009. However I find that they would have likely commenced in the position from 1 August 2009. Whilst the Loves completed the pre-requisite courses and qualifications by late-February 2009, they most likely would have secured a position in the second half of 2009.

83 An email sent by Ms McSherry to the Loves on 22 June 2009 outlined how the offshore industry had "become quite slow" in the preceding months, but an expected upturn was looming in the "next couple of months" with the commencement of the Gorgon Project. The figures contained within Annexure SG-1 to the affidavit of Ms Susan Grylls sworn on 26 September 2014 (Grylls Affidavit) illustrates a sharp rise in the number of paid casual steward employees in August 2009. This coincides with a similarly sharp rise in the number of paid permanent steward employees in the same month (Annexure SG-2).

84 Nonetheless, I will use the calculations proffered by the applicant for the period 1 July 2009 forwards and simply adjust those, in a broad fashion, to calculate the losses commencing from 1 August 2009.

85 For the financial years commencing 1 July 2009 and concluding 30 June 2014, Bruce Love's gross income was as follows:

Financial year ending	Gross income
30 June 2010	$34,561.00
30 June 2011	$55,700.00
30 June 2012	$35,838.00
30 June 2013	$27,926.00
30 June 2014	$68,635.93

86 Had Bruce Love obtained employment with OMS and worked until the end of the 2014 financial year, Bruce Love would potentially have earned at least $109,886.40 per year, and had the potential at some stage to earn the higher rates of pay for a steward's position set out in the Schedules to the Enterprise Agreement.

87 The difference between the income he did earn in the relevant period compared to what he would have earned if employed by OMS (and conservatively assuming that he received no pay rises due to promotion or periodic pay rises) is set out below:

Financial year ending	Gross income	Potential OMS earning less actual income
30 June 2010	$34,561.00	$75,325.40
30 June 2011	$55,700.00	$54,186.40
30 June 2012	$35,838.00	$74,048.40
30 June 2013	$27,926.00	$81,960.40
30 June 2014	$68,635.93	$41,250.47
TOTAL LOSS		**$326,771.07**

88 Accordingly, he suffered a potential past loss of basic income of $326,771.07 in respect of the period 1 July 2009 to 30 June 2014. I will refer to this figure later in these reasons.

89 Having regard to the vicissitudes of life, including the possibility that he may have stayed in employment for up to ten years, weighed against an earlier loss of employment or departure, the applicant submits that a further one year's loss should be allowed for based on the loss for the year ending 30 June 2014.

Quantum of compensation – Lynne Love

90 Lynne Love was born on 1 May 1959. The applicant makes the following submissions in relation to compensation for her losses. In early 2009 she was aged 50 years.

91 Her basic potential remuneration as a casual cleaner or steward on offshore exploration vessels, for which OMS supplied labour, was $109,886.40 per year.

92 She said that she would have stayed working with OMS for at least five years and as long as seven years.

93 For the financial years commencing 1 July 2009 and concluding 30 June 2014 her gross income was as follows:

Financial year ending	Gross income
30 June 2010	$27,543.00
30 June 2011	$53,893.00
30 June 2012	$33,917.00
30 June 2013	$9,071.00
30 June 2014	$21,235.00

94 Had she obtained employment with OMS and worked until 30 June 2014, she would potentially have earned $109,886.40 per year, and was likely to earn the higher rates of pay for a steward's position set out in the Schedules to the Enterprise Agreement.

95 The difference between the income she did earn compared to what she would have earned if employed by OMS is set out below:

Financial year ending	Gross income	Potential OMS earning less actual income
30 June 2010	$27,543.00	$82,343.40
30 June 2011	$53,893.00	$55,993.40
30 June 2012	$33,917.00	$75,969.40
30 June 2013	$9,071.00	$100,815.40
30 June 2014	$21,235.00	$88,651.40

Financial year ending	Gross income	Potential OMS earning less actual income
TOTAL LOSS		**$403,773.00**

96 Accordingly, she has suffered a potential past loss of basic income of $403,773.00 in respect of the period 1 July 2009 to 30 June 2014. I will refer to this figure later in these reasons.

97 Weighing up the various vicissitudes of life, including the possibility of staying longer at OMS or an early departure for any reason, the applicant does not seek any sum additional to this amount of past loss for Lynne Love.

98 That the Loves' employment would have been on a casual basis is a relevant factor.

99 Under cl 10.1 of the *Offshore Marine Services Pty Ltd - Integrated Ratings, Cooks, Caterers and Seafarers Agreement, 2006 – 2009*, that employment would have been terminable:

(a) if the Loves had been employed for a specified period of time, on the specified date;

(b) if the Loves had been employed for a specified task, at the date of completion of the task; and

(c) if the Loves had been employed for less than a year, by fourteen days' notice or payment in lieu.

100 Similarly, under cl 11.1(b) of the Enterprise Agreement the Loves' engagement would have been terminable with seven days' notice (and any period that the Loves were offshore).

101 The MUA submits that the Loves, if engaged, would have been subjected to difficult and abnormal working conditions: five weeks on, five weeks off; and living offshore in confined quarters on a vessel. Accordingly, it contends that there is no strong inference that any person would be willing to sustain employment under those conditions for an extended period. Such an inference, the MUA submits, is particularly weak in the case of the Loves. It makes that submission for the following reasons:

(a) in 2008 or 2009, the Loves took jobs at a caravan park but "this employment only lasted a week as [Lynne Love] wasn't really comfortable with the accommodation provided";

(b) in December 2009, Bruce Love quit his then job at Rockingham Food because he found the management style "frustrating";

(c) in 2009 or 2010, the Loves quit their then jobs at the City Waters Motel, again because Bruce Love disliked the management style of the owner;

(d) in 2011, the Loves quit their then jobs at the Kings Park Motel because they "found the lack of outdoor space difficult" and had problems with the "living quarters". According to Lynne Love, they quit in part because the "living quarters were … very small and did not have any outside private space for us to relax in".

102 The MUA submits there is no safe inference that the Loves would have been willing to retain for five years ongoing employment involving extended periods at sea on a vessel. Accordingly the MUA contends that the Loves' post hoc statements that they would have been willing to work for an extended period in that environment should be treated with great caution.

103 Lastly, the MUA submits that there is evidence that the Loves would only have been willing to remain with OMS so long as they could be rostered on together. If the Loves were only willing to work with OMS if both had work with OMS and if both were rostered on to the same vessels then, to sustain the applicant's contention, it would be necessary to find that OMS would, over the relevant period, have employed both of the Loves and would have been willing and able to roster them on to the same shifts.

104 Mr Stuart Caldwell, Operations Manager at OMS, was called by OMS. His concessions under cross-examination softened the harder edges of his written evidence. He described, in his oral testimony, conditions on OMS vessels, which included air-conditioning, as ranging from good to excellent. Part of his role at OMS is to inspect vessels to ensure that conditions for employees are satisfactory. He said the company had key people on these vessels working towards providing a very good environment for workers. Conditions on vessels had been getting better over the last ten years but particularly so in the last five to six years. Rosters of four weeks on, four weeks off were, he said, unremarkable amongst "Fly In

Fly Out" (FIFO) workers in Western Australia. Nonetheless he said that living space on board the vessels was limited. In one sense this is self-evident.

105 There was evidence that some stewards had been working for OMS for 10 years and more. Mr Caldwell agreed that it was by no means unknown for people to be working in such jobs "year in year out". Some workers, on the other hand, stayed for only short periods. Mr Caldwell suggested that it was a shock for some stewards, when they first go offshore, to see how hard the work is.

106 The pay was highly attractive, being well above what the Loves might earn in an "ordinary" job in Perth. This was a significant motivation for them.

Consideration

107 Each of the Loves was determined to obtain employment on a vessel with OMS. They spent their own money to pay for training courses and it seems also medical assessments, just so that they were eligible to commence work with OMS. In order to obtain the employment he strongly wanted to secure, Bruce Love lost weight so as to pass the medical assessment required to work on offshore vessels. This enabled him to pass his second medical assessment, having failed his first.

108 I infer that all personnel seeking employment on OMS vessels were also required to obtain such qualifications and pass relevant medical tests. However, the relevance of these findings combines with the objective evidence of their histories of long involvement in the workforce and a tenacious determination to overcome personal and financial adversity. They are not people with an "entitlement" mindset. They have demonstrated over a long period a very strong work ethic. They might reasonably be described as "salt of the earth" people.

109 The Loves regarded their potential jobs with OMS as a way to rebuild their financial position following some financial set-backs in relation to small business ventures in which they had been involved. They reasonably saw the OMS jobs as a way to set themselves up for retirement, which, as at 2009, was not an option for them for many years into the future given their then financial position.

110 The Loves waited in vain throughout much of 2009 to obtain the well-remunerated employment that OMS had available for them. I find that the Loves would not have readily given up such employment. It was their goal to obtain that employment and to prosper in it for the periods of time to which they each depose.

111 There is evidence that the relevant period included a period in 2009 in which the financial climate at the time was difficult. Furthermore, not everyone who wished to have employment with OMS during the relevant period was able to be rostered on. For example, as at 4 December 2009, there were 20 stewards waiting to be rostered on by OMS. Such work was, to an extent, seasonal in that there was some fall off in positions available during the winter period.

112 However, I do not know anything of the characteristics of those MUA members. What I have found both in the MUA Liability Judgment and reaffirmed in the evidence of Ms McSherry upon the present application is that she was impressed with the Loves and wanted to employ them as stewards on vessels. I find that this would have occurred. It is no answer to say that OMS preferred experienced personnel. The fact is, despite this, and the existence of some "beached" MUA members, Ms McSherry wanted to employ them. Had this occurred they quickly would have gained experience. The Loves had experience in hospitality. They had together for a period run a café.

113 I do not accept the MUA's characterisation of the job of steward on a vessel as difficult and abnormal. It was but an attempt to paint the bleakest possible picture of such work by the MUA. By its description it was not technically difficult or physically arduous. Whilst work rosters of five weeks on and five weeks off, or similar, may not be the norm, at least in Western Australia, for many years now, such rosters have become a way of life for many FIFO workers employed in the northwest of the State. It should not be thought of necessarily as an obstacle to a conclusion that the Loves would have been able to undertake such work. The position is neutral. Some might not like it. Others might be attracted to a regime that gives them relatively high paid employment and effectively up to 6 months paid leave a year.

114 The Loves gave evidence that they were prepared to work on separate rosters. They have demonstrated the capacity in other work to do so. For example, since May 2013 Lynne Love has been employed at a health food shop as a sales assistant while Bruce Love has been the manager of two residential villages.

115 The claims on their behalf extend to the full amount payable under the Enterprise Agreement for casual stewards. The MUA submits that this makes no allowance for the likelihood that such work would not have been full-time. They rely upon statistical evidence produced by Ms Grylls but she was not the person who could explain the significance of the

statistics. They also adduced statistical evidence through Mr David Clay, a Commercial Analyst employed by OMS. Some of his evidence is to an extent self-explanatory. What may be concluded from it on its application to these claims for compensation is not so readily ascertainable. Accordingly, it does not necessarily follow that the Loves should be regarded as falling within the average of all casual stewards either as to periods of employment within any year or as to the amounts each would have earned. A bar chart table marked as annexure "AW 24" to the affidavit of Alexandra Valerie Williams (sworn 1 December 2014) shows that the highest paid steward during January 2009 to August 2014 earned approximately $45,000 a month and the lowest less than $1,000 a month. However, it can readily be seen from the bar chart how a number of stewards working only for short periods would significantly affect the average of any particular set of figures across a month or a year. The bulk of employees fall somewhere between these two extremes.

116 Approximately two-thirds achieved monthly wages in excess of $15,000. More than half achieved monthly wages of $5,000 or more. These employees may be characterised as forming the "median band". That is to say falling between $5,000 per month and $15,000 per month. The annualised median band falls between $60,000 and $180,000.

117 As I said, I know nothing of why some stewards worked for such short periods. Perhaps they were itinerant and were just passing through. Perhaps they became ill. There are any number of reasons. However, there was no evidence as to such matters.

118 I propose to consider two alternative approaches to the assessment of compensation. The first approach will involve an assumption that the Loves would have worked as full-time casuals but apply a discount to take into account the probabilities that they would not have actually worked full-time.

119 The second approach will assume that in the relevant periods each would have earned 30% more than the average of wages earned by casual stewards. I do this for two reasons. First, it is readily apparent that the income casual stewards who for whatever reason did not work much in any year can significantly reduce the averages. Second, I regard the Loves as people who for the reasons I have described would have been above average employees.

FIRST APPROACH

120 Beyond the yearly wages which the Loves may have earned there was the likelihood of additional allowances under the Enterprise Agreement. These were potentially very significant.

121 The applicant submits that it has taken a conservative approach in the figures suggested as appropriate compensation. Its figures do not make provision for very significant allowances available to employees. These allowances could run into tens of thousands of dollars.

122 It is evident from the Enterprise Agreement that this is indeed so. The Enterprise Agreement came into operation from 10 August 2010.

123 There was also before the Court an earlier agreement, entitled *Offshore Marine Services Pty Ltd - Integrated Ratings, Cooks, Caterers and Seafarers Agreement, 2006-2009* to which I have referred. This agreement was, on its terms, in force from 22 March 2006 to 21 March 2009 and provided for similar allowances.

124 However, I will focus upon the provisions of the 2010 Enterprise Agreement, as the Loves sought employment with OMS from early 2009 onwards.

125 The Schedules to the Enterprise Agreement provide for rates of pay for employees on the different types of vessels. These Schedules provide for an annual increase of 6.00% from 2010 onwards. Counsel for the applicant proceeded on the basis that allowances would also increase in time. I will assume that this is so.

126 As mentioned, cl 9 of the Enterprise Agreement provides that persons engaged as casual employees will be paid a casual loading on their base salary of 20%, and that such employees accrue one day's leave for each day of duty. It provides that the casual loading will be paid either on termination of employment or in each pay period, at the employer's discretion.

127 Clause 30 of the Enterprise Agreement is specifically entitled "Allowances". There are numerous allowances set out under this heading, many relating to reimbursement or payment of stipulated amounts to cover living expenses. I will refer to one example.

128 There are generous allowances for employees required to share accommodation. If an employee is sharing accommodation and is not already in receipt of any monetary

consideration, they are entitled to $44.70 per day on each day they share a cabin with one other person, $54.70 per day on each day an employee shares a cabin with two other persons, and $64.70 per day on each day an employee shares a cabin with three other persons.

129 Outside of these specified 'allowances', there are numerous other provisions for reimbursement, allowances and compensation to employees for additional duties or any diminution of the quality of workplace conditions.

130 By cl 13, where a vessel is required to sail with less than the normal complement of employees, the aggregate wage for the absentee employees is to be divided amongst the employees on the vessel for the period of short handedness.

131 Clause 14 provides for a "two-crew duty system", whereby there are two crews to each vessel, one on duty and the other off duty or in transit. By cl 14.2, to compensate for public holidays, various forms of leave and time spent travelling in off duty time, a permanent employee will accrue time off at the rate of 1.153 days leave and a casual employee will accrue one day for each day spent on duty under the two-crew duty system. Under cl 14.5.2.2, where in connection with a 'swing change' an employee spends more than one "off duty" day travelling to or from the vessel, the employee is paid a "dead day" for each additional day or part thereof spent travelling.

132 Under cl 15.4, where the crew change does not occur upon the due date, a penalty payment, on top of all other remuneration, is paid after a specified number of days, the number depending upon the nature of the cycle.

133 Pursuant to cl 31, where an employee is employed on a vessel engaged on a "construction project", defined as work involving the installation of new jackets, topsides, pipelines, flow lines, risers and associated mooring systems for offshore platforms, monopods, FPSO's and FSO's, and certain other conditions are satisfied, the employee will be paid a "Project Allowance – Bonus (PAB)". Under cl 31.5, the PAB is said to equate to $175 for each duty day engaged on the construction project. However, cl 31.6 sets out the annual increases in the PAB to be paid.

134 Pursuant to cl 37, employees are entitled to a clothing allowance of $642.10 per year, paid in equal instalments for each pay period. Certain articles, such as high visibility overalls, are provided at no cost to the employee.

135 Clause 53 provides that permanent employees will also be paid an allowance of $3,890.00 per year to be paid fortnightly upon the provision of evidence of health fund membership to the employer.

136 As set out under Schedule 3, where certain types of 'stand-by' vessels are required to handle and carry cargo to or from an offshore installation, an additional allowance is also payable to all employees to compensate for additional duties. This is specified to be $60.80 per day.

137 Such amounts which could have figured in tens of thousands of dollars of additional pay have not been taken into account. Certainly some stewards earned well above what is being claimed in this proceeding. Nor has the prospect that at some stage, after several years, they may have been promoted to chief stewards.

138 The Court is required to do the best it can. In the case of Bruce Love I find that a period of six years is a reasonable period to compensate him. That is from 1 August 2009 to 31 July 2015. I would allow a period of five years in the case of Mrs Love from 1 August 2009 to 31 July 2014.

139 In the case of Bruce Love, although I am calculating the loss from 1 August 2009, I will use the figure cited at [88] of these reasons as a starting point: $326,771.07, which represents the loss quantified for five years. I will add, as a lump sum, the amount that represents the additional loss suffered assuming the salary increased by 6% annually as provided for in the Enterprise Agreement; this amounts to $70,007.85. This produces a total loss of $396,778.92 (rounded to two-decimal places) for 1 August 2009 to 31 July 2014.

140 The compensation for the loss suffered by Bruce Love for the sixth year will, as submitted by the applicant, be based on the gross income he earned in the financial year ending 30 June 2014, but I will subtract this from the salary he would have earned with the 6% rise compounded annually. This results in a total loss of $475,195.78 (again, rounded to two-decimal places) for 1 August 2009 to 31 July 2015.

141 In the case of Lynne Love, similarly to the calculations for Bruce Love, I will adjust the figure of $403,773 cited at [96] of these reasons by adding the loss suffered if the salary increased by 6% annually. This produces a total loss of $473,780.85 (rounded to two-decimal places) for 1 August 2009 to 31 July 2014.

142 However, work as stewards on a continuous basis was by no means a given. Whilst I find that the Loves were the sort of hard-working and mature people who would likely impress as employees, the winter trough in available jobs and other commercial intrusions which may have impacted this field of endeavour, warrant a discount.

143 Accordingly, I would, in employing this approach, discount the compensation figures I have assessed by an amount of 20%. I will also round down or up the figures assessed to the nearest hundred dollars.

144 The result, utilising this approach is as follows:

Bruce Love - $475,195.78 less 20% - $380,156.63

Lynne Love - $473,780.85 less 20% - $379,024.68

145 It is instructive to compare these conclusions with what would have been the position were I to have adopted the average amounts earned by casual stewards as set out in annexure "SG-5" to the affidavit of Ms Susan Elizabeth Grylls (sworn 26 September 2014). I have assumed that this includes all allowances. The total for the five-year period ending with the financial year 2013-2014 is $391,608. I will adjust this figure by taking into account the 30% increase described earlier.

146 The loss then to Bruce Love would have been as follows:

Total 5 years' pay ($391,608 plus 30%)		509,090.40
Add 1 more year (at 2013-14 rate: $81,731 plus 30%)		106,250.30
Less income earned	291,296.86	
		324,043.84

147 The loss calculated in the same way distributable to Lynne Love is as follows:

Total 5 years' pay		509,090.40
Less income earned	145,659	
		363,431.40

148 As I have explained the average yearly income figures used in the Second Approach are unfortunately affected by some very low annual figures. The median band which I earlier

described produces higher monthly and annual figures. The annual figure lies between $60,000 and $180,000. I have adopted figures which fall within the median band.

149 It may be seen that the First Approach utilises an annual income (before deducting income actually earned) of approximately $110,000 per annum. The average of the median band is $120,000 per annum.

150 I will take the average of the two approaches rounded to the nearest $100 and order that compensation be paid by the MUA as follows:

Bruce Love : $352,100
Lynne Love : $371,200

Contribution

151 The applicant does not propose to make submissions on the issue of contribution as between the MUA and OMS. The applicant only seeks orders for compensation as against the MUA.

152 The MUA's submission that OMS should contribute to any compensation awarded to the Loves is put on three bases:

(a) First, OMS should under the general law be required to contribute to satisfaction of the liability.

(b) Secondly, OMS should contribute to the liability under s 7(1)(c) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) (Law Reform Act).

(c) Thirdly, the Court can, on its own initiative (FW Act s 545(4)(a)), make an order against OMS under s 545(2)(b) of the FW Act.

153 I have, because of the views to which I have come, not found it necessary to consider the first two bases of contribution.

Section 545(2)(b) of the FW Act

154 The MUA submits that as an alternative to finding that the MUA has a right to contribution under the general law the Court can achieve the same result more directly by making compensation orders against both the MUA and OMS under s 545(2)(b) of the FW Act. It submits that it would not be an impediment that such an order was not sought against

OMS by the applicant: the MUA points to s 545(4)(a) which enables the Court to make a compensation order on its own initiative.

155 OMS submits that that the proper construction of the power of the Court to make orders on its own initiative is that the power is limited to the time at which the relevant proceedings were before the Court – in this case, when the Court was dealing with OMS for its contraventions in 2012. However, s 545 is not so confined in its reach.

156 This Court has a very wide power under s 545(1) of the FW Act to make an "appropriate" order where a person has contravened a civil remedy provision. This, in my opinion, extends in the present circumstances to an order directed to OMS.

157 However, I do not consider that I should make a compensation order against OMS directly in favour of the Loves.

158 The MUA instituted its proceedings against OMS seeking contribution. Accordingly, an order under s 545(1) appropriate to these circumstances is that OMS be ordered to make contribution to the MUA.

Proportion of contribution

159 The assessment of the appropriate proportion requires consideration of both causation and relative culpability.

160 The MUA contraventions involved it in persuading OMS to follow the OMS employment practice as well as refusing to permit the Loves to join the MUA.

161 The Loves' loss was caused because of *both* of those things. If the MUA had granted membership to the Loves, the loss would not have been caused.

162 OMS had no involvement in the MUA's refusal to permit the Loves to join the MUA.

163 I have already concluded that the MUA has far greater culpability than OMS.

164 I would apportion culpability as between the MUA and OMS as being two-thirds and one-third respectively.

Interest and costs

165 I will accede to the applicant's application that it be granted liberty to be heard on the question of any interest that should be paid in respect of the compensation orders as well as on the question of costs.

166 That liberty will extend also to the MUA and OMS.

I certify that the preceding one hundred and sixty-six (166) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour.

Associate:

Dated: 27 March 2015

ANNEXURE A

Provision Contravened		Description of Contravention	Maximum penalty	Penalty ($)
Contraventions as an accessory				
1.	s 792(1)(d) WR Act by virtue of s 728 WR Act	Prior to 1 July 2009, refusing to employ Bruce Love because he was not an officer or member of the MUA.	$33,000	14,850
2.	s 792(1)(d) WR Act by virtue of s 729 WR Act	Prior to 1 July 2009, refusing to employ Lynne Love because she was not an officer or member of the MUA.	$33,000	14,850
3.	s 346(a) FW Act by virtue of s 550 FW Act	After 30 June 2009, refusing to employ Bruce Love because he was not an officer or member of the MUA.	$33,000	14,850
4.	s 346(a) FW Act by virtue of s 550 FW Act	After 30 June 2009, refusing to employ Lynne Love because she was not an officer or member of the MUA.	$33,000	14,850
Direct Contraventions				
5.	s 346(a) FW Act	After 1 July 2009, the MUA took adverse action against Bruce Love because he was not a member of the MUA, by prejudicing Bruce Love in his prospective employment by: (i) not granting him membership of the MUA; and (ii) advising, encouraging or inciting OMS not to employ him.	$33,000	21,450
6.	s 346(a) FW Act	After 1 July 2009, the MUA took adverse action against Lynne Love because she was not a member of the MUA, by prejudicing Lynne Love in her prospective employment by: (i) not granting her membership of the MUA; and (ii) advising, encouraging or inciting OMS not to employ her.	$33,000	21,450

Provision Contravened		Description of Contravention	Maximum penalty	Penalty ($)
7.	s 796(5)(a) WR Act	Prior to 1 July 2009, the MUA advised, encouraged or incited OMS to maintain and apply the OMS employment practice with respect to Bruce Love so as to cause OMS not to employ him because he was not a member of the MUA.	$33,000	21,450
8.	s 796(5)(a) WR Act	Prior to 1 July 2009, the MUA advised, encouraged or incited OMS to maintain and apply the OMS employment practice with respect to Lynne Love so as to cause OMS not to employ her because she was not a member of the MUA.	$33,000	21,450
9.	s 797(3)(a) WR Act	Prior to 1 July 2009, the MUA took action that had the effect of directly prejudicing Bruce Love in his prospective employment by: (i) refusing him MUA membership; and (ii) advising, encouraging or inciting OMS not to employ him.	$33,000	21,450
10.	s 797(3)(a) WR Act	Prior to 1 July 2009, the MUA took action that had the effect of directly prejudicing Lynne Love in her prospective employment by: (i) refusing her MUA membership; and (ii) advising, encouraging or inciting OMS not to employ her.	$33,000	21,450
11.	s 797(3)(b) WR Act	Prior to 1 July 2009, the MUA advised, encouraged or incited OMS to take action which had the effect of directly prejudicing Bruce Love in his prospective employment, namely to not employ him because he was not a member of the MUA.	$33,000	21,450
12.	s 797(3)(b) WR Act	Prior to 1 July 2009, the MUA advised, encouraged or incited OMS to take action which had the effect of directly prejudicing Lynne Love in her prospective employment, namely to not employ her because she was not a member of the MUA.	$33,000	21,450
				$231,000