Fair Work Ombudsman v Pocomwell Ltd (No 1) [2013] FCA 250; *Fair Work Ombudsman v Pocomwell & Others (No 2)* [2013] FCA 1139

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It is estimated that the Philippines provides around 460 000 seafarers on foreign flagged ships around the world.[1] There are more Filipino seafarers than any other nationality in the world,[2] and it is believed that some 20% to 30% of the world's seafarers are Filipino. A recent case explored the liability of employers for wage conditions of Filipino seafarers within Australia's Exclusive Economic Zone (EEZ).

Facts

Four of these seafarers, who carried out painting duties, were employed aboard a Chinese flagged oil rig, the *Nan Hai VI*, which is a semi-submersible mobile offshore drilling unit (MODU) and flies a Peoples Republic of China flag. The other oil rig upon which the painters briefly worked, flew a Singapore flag. The operator of the oil rigs was Maersk Drilling Australia Pty Limited. It was alleged by the Fair Work Ombudsman (FWO) that the four Respondents, in employing the painters on these oil rigs at Filipino rates, had underpaid these workers in relation to Australian Award rates laid down under the *Fair Work Act 2009* (Cth).[3]

The First Respondent was the nominal employer, Pocomwell Limited, which was registered in Hong Kong and had entered into written contracts with the seaman. The Second Respondent was the agent of Pocomwell Limited and had arranged for their recruitment on employment contracts with Pocomwell Limited, pursuant to an Agreement in writing made with the Third Respondent, Survey Spec Pty Limited, and its chief executive officer, Thomas Civiello, who was the Fourth Respondent. The Second Respondent, Supply Oilfield and Marine Personnel Services Inc (SOMPS) was a registered Filipino company and would receive USD 92.00 a day for providing the painters. Pursuant to an Agreement made between March and July 2009, Maersk Drilling Australia Pty Limited, the pleaded operator of the *Nan Hai VI*, agreed to pay Survey Spec some AUD 400 per day for each of the employees.[4]

It was alleged that from 1 January 2010 until 1 March 2011 the painters were not paid entitlements derived from the *Fair Work Act 2009* (Cth) and authorised under the relevant Australian award, the *Hydrocarbons Industry (Upstream) Award*. The MODUs were in the EEZ beyond Australia's territorial waters at all relevant times. The central issue, upon which the case was decided, was whether Australia had jurisdiction to assert breaches of the *Fair Work Act*. This question arose in three ways. First, whether jurisdiction for ascertaining and deciding the appropriate levels of wage remuneration in these circumstances rested with the Philippines, the flag state, or with Australia. Secondly, if it was appropriate for Australia to exercise jurisdiction in the EEZ in these circumstances, were the rigs 'fixed platforms' to which section 33 of the *Fair Work Act* would apply in the EEZ. Thirdly, if the MODUs were not 'fixed platforms', whether regulations made by Julia Gillard, when she was Minister for Employment, under regulation 1.15E of the *Fair Work Regulations 2009* (Cth), that make majority Australian resident crewed ships subject to the penalty provisions under the Act, applied in the circumstances. This raised the issue of how the *Fair Work Act* and its regulations were to be construed in light of Australia's international law obligations and the concurrent jurisdiction of other States3b.[5]

The painters on the *Nan Hai VI* were all under written contracts, prescribed by the Philippines Overseas Employment Administration (POEA), which is an agency attached to the Philippines Department of Labour and Employment (DOLE). The licensing of overseas principals, and manning agents, such as the First and Second Respondents, was and is subject to a stringent statutory contractual regime imposed by the Philippines government since seafaring is an important part of the nation's lifeblood. Pocomwell and SOMPS were accredited to recruit and deploy Filipino seafarers, and these painters were subject to

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[1] *Filipino seamen*, Wikipedia, http://en.wikipedia.org/wiki/Filipino_seamen fn 3.

[2] Wikipedia, above n 1, fn 4.

[3] *Fair Work Ombudsman v Pocomwell Ltd (No 1)* [2013] FCA 250 (25 March 2013) (*'Pocomwell (No 1)'*); *Fair Work Ombudsman v Pocomwell & Others (No 2)* [2013] FCA 1139 (1 November 2013) (*'Pocomwell (No 2)'*).

[4] *Pocomwell (No 1)* [2013] FCA 250 (25 March 2013) [10], [16]-[29].

[5] *Pocomwell (No 2)* [2013] FCA 1139 (1 November 2013) [1]-[7]. In addition, this recitation of the facts makes use of uncontested facts that was contained within the documentary evidence at trial.

administrative and disciplinary action in the event of any violations of statutory or other contractual terms of their employment either on the initiative of the POEA or by complaint of Filipino seafarers, unions or management. Each of the contracts, at the relevant time entered into with the painters, provided that the POEA statutory rules would apply. The POEA itself had jurisdiction to hear disciplinary action against foreign employers and principals and had a range of penalties open to it, including suspension and cancellation, which could be imposed upon the employer. An aggrieved person could institute disciplinary action against the employer if there were some violation of the contractual and statutory terms. Monetary and other penalties might be imposed for violations. The wage levels for seafarers in the Philippines are established after conferral with stipulated National representatives. Under Filipino law, the wage payments made to the painters were adopted as appropriate by the Filipino government. Although low compared with comparable Australia rates, they were significantly higher than the minimum statutory seafarers rates imposed under Filipino law, and the contracts said that the conditions of employment could not be changed without approval by the POEA. The position therefore was that the Philippines government had expressly endorsed the wage levels paid to the painters. The legislative rules governing the POEA, and the terms incorporated into the painters' contracts, provided for the law of the Philippines to apply and for the exclusive jurisdiction of the Manila Courts.

The Stay Application: The Argument in *Pocomwell (No 1)*

It was argued at the preliminary stage by the Respondents that the proceedings should be stayed in Australia for two reasons. First, by the first and second respondents that an Australian Court is a 'clearly inappropriate forum' to exercise jurisdiction. It was contended this was so because the First and Second Respondents are foreign corporations and have no place of business, residence or other connection with Australia. The painters were Filipino nationals who had no residential or other connection with Australia. The MODUs flew the flag of foreign States and did not dock in Australia. The payments made to the Respondents were made under contracts prescribed by the POEA as an agency of the Filipino government. The First and Second Respondents were licensed and accredited by the POEA to enter into the contracts. The wage payments were made in the Philippines and in Filipino currency. The Filipino law provided for exclusive Filipino jurisdiction to hear and determine disciplinary action. Secondly, it was contended by all the Respondents that the *Fair Work Act 2009* (Cth), should be read as subject to the concurrent jurisdiction of other States, such as the Philippines, and to Australia's international obligations in relation to foreign flagged ships, and that the Act was not an Act asserting exclusive jurisdiction, whereas the Filipino legislation asserted exclusive jurisdiction over the Filipino seaman, in relation to disciplinary action for the enforcement and observance of labour conditions.

The Clearly Inappropriate Test

The test for a stay of proceedings that an Australian Court is a 'clearly inappropriate forum' to exercise jurisdiction differs significantly now from the criterion adopted by the other English speaking jurisdictions. In *Voth v Manildra Flour Mills Pty Limited*[6] the action arose out of damages sought for alleged negligent acts by the Appellant in the course of his practice as an accountant in Missouri. The Appellant had moved to have the service of the Statement of Claim set aside and, in the alternative, an order that proceedings be stayed pending determination of the issues between the parties in the United States. This contention failed before the single judge and before a majority of the New South Wales Court of Appeal (Kirby J dissenting) but succeeded in the High Court. However, notwithstanding their ultimate conclusion, the Court considered the test was whether the Australian Court was a 'clearly inappropriate forum' and not whether the Australian Court was 'the more appropriate forum' which appears now to be the test in the United Kingdom. In doing so, the joint judgment adopted what Deane J in *Oceanic Sun Line Special Shipping Company Inc v Fay*[7] said: 'a party who has regularly invoked the jurisdiction of a competent Court has a prima facie right to insist upon its exercise and to have his claim heard and determined….'.[8] Their Honours echoed that in saying that where a Plaintiff has regularly invoked the jurisdiction of a Court, it has a prima facie right to insist upon its exercise.[9] Secondly, traditionally a stay of proceedings, which has been regularly commenced, on inappropriate forum grounds, is to be exercised in accordance with the general principles empowering the Court to dismiss or stay proceedings which are oppressive, vexatious or an abusive process and the rationale for the exercise of the power to stay is the avoidance of injustice between parties in the

[6] (1990) 171 CLR 538 (*'Voth'*).
[7] (1988) 165 CLR 197 (*'Oceanic Sun'*).
[8] Ibid 241.
[9] *Voth* (1990) 171 CLR 538, 554. (Mason CJ, Deane, Dawson and Gaudron JJ).

particular case.[10] Thirdly, the mere fact that convenience favours another jurisdiction being a more appropriate forum, does not justify the grant of a stay.[11] However, Deane J said that the words 'oppressive' and 'vexatious' should not be too rigidly construed. 'Oppressive' in this context meant seriously and unfairly burdensome, prejudicial or damaging while 'vexatious' should be understood as meaning productive of serious and unjustified trouble and harassment.[12] The Court recognised that the availability of relief in a foreign forum will always be a relevant factor in deciding whether or not the local forum is clearly an inappropriate one.[13] In stating that the principles are those which are set out by Deane J in *Oceanic Sun*,[14] their Honours also said the discussion by Lord Goff in *Spiliada*[15] of relevant 'connecting factors' and 'legitimate personal or juridical advantage' would provide valuable assistance.[16] Lord Goff referred to Lord Keith's allusion to the 'natural forum' being 'that with which the action had the most real and substantial connection'. Lord Goff saw these connecting factors including not only convenience or expense (such as the availability of witnesses) but also factors such as the law governing the relevant transaction.[17] In *Oceanic Sun*, Deane J explained that notions of vexation and oppression involved an essential element of injustice. Where an action has no significant connection at all with the territorial jurisdiction of a Court in which it is instituted, proceedings would be vexatious or oppressive, and where the expense and inconvenience are of such a character, to allow the action to go on, would result in real injustice, a stay should be ordered. Those words should be read as describing the objective effect of continuing the proceedings in the particular forum rather than a description of the conduct of those who initiated proceedings by selecting this forum.[18]

The Ruling on the Stay Application in Pocomwell (No 1)

In *FWO v Pocomwell Limited*,[19] Barker J referred to the *Voth* case stating that in circumstances where it is the *Fair Work Act* that the FWO are seeking to apply, it cannot be said that the Australian Court is a clearly inappropriate forum. There is no prospect that any alternative foreign forum would be available to determine the rights and duties of workers in the application of an Australian Act such as the *Fair Work Act* which, on the face of it, appeared mandatory.and not discretionary[20] His Honour said that it is not true that the First and Second Respondents had no connection whatsoever with Australia. They have a connection in that they were alleged to have entered into employment contracts in respect of work to be conducted within the Australian EEZ.[21] The Contracts did provide that the MODUs, upon which the seaman worked, would be off the Northwest Shelf of Australia. The other basis upon which the stay was applied for was that the Fair Work Act should be read as intending to be subject to competing jurisdictions, and to international obligations which Australia had entered into. In short, the Respondents contended the Act was not to be construed as a mandatory Act, when viewing its reach in regard to the operation of its civil penalty provisions as they related to platforms and, alternatively, majority Australian crewed ships.[22] However, His Honour stated the purpose of the application had necessarily to be determined at that stage on the assumed basis that the two rigs in question might be 'fixed platforms'.[23] As for the alternative contention that Regulation 1.15E was invalid, that would be determined at the trial if the Applicant's primary case that the rigs were 'fixed platforms' did not succeed.[24]

Akai Pty Ltd v People's Insurance Co Ltd[25] and Jurisdiction Clauses

Subsequent to the *Voth* case, the High Court by majority of three to two found that the interpretation of terms of an insurance policy would be determined in NSW and not England even though the policy provided that the law of England governed the policy and any dispute be heard in the English Courts. The majority judgment analysed the provisions of the *Insurance Contracts Act 1984* (Cth) and in particular, section 8 which extended the application of the Insurance Act to contracts of insurance where the proper law would be

[10] Ibid 554.
[11] Ibid.
[12] Ibid.55, citing *Oceanic Sun* (1988) 165 CLR 197.
[13] *Voth* (1990) 171 CLR 538, 558 (Mason CJ, Deane, Dawson and Gaudron JJ) .
[14] Ibid 564.
[15] *Spiliada Maritime Corp v Cansuler Ltd* [1987] AC 460 (*'Spiliada'*)
[16] *Voth* (1990) 171 CLR 538, 565.
[17] *Spiliada* [1987] AC 460, 476.
[18] *Oceanic Sun* (1988) 165 CLR 197 (Deane J)
[19] *Pocomwell (No 1)* [2013] FCA 250 (25 March 2013).
[20] Ibid [14].
[21] Ibid[11].
[22] Ibid [28] – [30].
[23] Ibid [23].
[24] Ibid [37].
[25] (1996) 188 CLR 418 (*'Akai'*).

the law of the State or Territory to which the Act extended.[26] It was the statute which 'demands application in an (Australian) Court irrespective of the identity of the lex causae'.[27] The majority considered it was relevant to have regard to places of residence or business of the parties; the place of contracting; the place of performance and the nature and subject matter of the contact. The policy had no factual connection at all with England. The risk was very substantially situated in New South Wales.[28] Their Honours considered that public policy considerations may flow from, even if not expressly mandated by, the terms of the Constitution or Statute, enforcing the Australian forum.[29]

Criticism of the Akai Principle

In an incisive chapter 'Declining jurisdiction in principle'[30] Mary Keyes summarised the problems with *Akai* by stating:

> Therefore, the majority expressly approved an approach to declining jurisdiction which commences with a consideration of whether a local mandatory law would be applied if a trial on the substantive issues were held in the forum. This is to be determined by reference to the criteria of application employed in the statute as interpreted. If the statute applies, the court's constitutional obligation to ensure its application determines the resolution of the stay application. Unless the defendant can prove that the foreign court will apply Australian legislation, the court regards itself as constitutionally obliged to refuse the stay application, because otherwise the statute will not be applied. The majority observed that the potential application of a foreign statute was a 'conceptually distinct' situation and that in such cases, the foreign statute would only be applicable if it was indicated as part of the lex causae. This means that foreign mandatory laws are not to be treated any differently to other kinds of foreign law. The decision of the majority fails to appreciate the dangers of judicial chauvinism, especially when application of local law to protect a local litigant is sought. Conventionally, the question of balancing relevant state interests in the substantive resolution of international disputes has been deferred to the choice of law stage. .
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> The minority in Akai, Dawson and McHugh JJ, took the conventional approach. They held that the 'application for a stay of the New South Wales proceedings could and should have been determined by reference to the choice of courts provision alone'. In their view the law to be applied in the substantive resolution of the dispute was not relevant in determining whether the jurisdiction clause was effective.
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> The result in Akai is unfortunate. Certainly it is within legislative competence for the parliament to enact mandatory legislation which denies effect to contractual choices of foreign jurisdictions, and the court must give effect to such directions. This is the appropriate method of addressing concerns with evasion of the law. However, as the dissenting judges Dawson and McHugh JJ observed, the use of jurisdictional clauses is common in international contracts.They stated that it would be a serious and far reaching interference with the freedom of the parties to such contracts to prevent them from making provision to that effect.If that was the intention of the legislature one would expect at least express words

It may be that enforcement of civil penalties under the *Fair Work Act* will someday herald a markedly different approach from that which is applicable to choice of jurisdiction clauses in private contracts which conflict with Australian legislation. None of the cases cited related to enforcement of penal provisions where different conceptions and standards of unlawful conduct apply in different States, but the approach taken in *Pocomwel*l inevitably follows that adopted in both *Voth* and *Akai* in the majority judgements. The heavy focus upon a Court's constitutional obligation to enforce what it perceived to be mandatory laws, prevails over any balancing exercise which would take into account the existence of concurrent jurisdiction, ie. the Philippines, which has its own regime of penal enforcement. In *Pocomwell (No. 1)* the view was taken that since there was no alternative foreign forum available to determine rights and duties of workers for the application of an Australian Act, which was taken to be mandatory,[31] the existence of a parallel regime stipulating contractual and penal obligations applicable to the painters was of no consequence.

A 'Mandatory' Act is here used in the limited sense of an Act which directs Australia to exercise jurisdiction. It does not mean an Act that asserts exclusive jurisdiction such as the Philippines Legislation.[32].

[26] Ibid page 433 (Toohey, Gaudron and Gummow JJ).
[27] Ibid 436.
[28] Ibid 437.
[29] Ibid 447.
[30] Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 86.
[31] *Pocomwell (No 2)* [2013] FCA 1139 (1 November 2013) [14].
[32] Andrew Bell, *Forum Shopping in Venue in Transnational Litigation* (OUP, 2003) [5.37]-[5.48].

Pocomwell (No 2): Fixed Platforms

The omission here was that the Respondents did not pay wage rates prescribed under Awards recognised by the *Fair Work Act* during the time when the MODUs were in the exclusive economic zone (EEZ). Section 33 of the *Fair Work Act* made the provisions of the Act apply to 'fixed platforms in the EEZ' which under section 12 was defined to mean '….an artificial island, installation or structure permanently attached to the seabed for the purpose of exploration for, or exploitation of, resources or for other economic purposes'.[33] The rigs were there for the purpose of exploration and the question was whether it could be said that each of the rigs was an artificial island, installation or structure permanently attached to the seabed. It was accepted that the rigs were 'structures' but it was ultimately found that the MODUs were not 'permanently attached to the seabed…'. His Honour arrived at this conclusion having analysed both the history of this wording, which was derived from earlier international conventions, and consideration of what structures the Act was intended to apply to.[34] Secondly, it involved an analysis of the MODUs which, as submersibles or semi-submersibles, as explained by an expert, were not, even during drilling exercises, permanently attached to the seabed[35].

Ships

However, His Honour did find that the MODUs would constitute 'ships' which are defined in section 12 of the Act to include 'barge, lighter, or other vessel'. His Honour found each rig was a 'vessel' and therefore within the definition.[36] This then raised the question of whether Regulation 1.15E of the Regulations introduced in 2010 made the MODUs 'majority Australian-crewed ships' subject to the penal provisions of the Act. His Honour did find regulation 1.15E valid but the regulation necessarily required proof that the majority of the crews are residents of Australia and the operator is a resident of Australia; or has its principal place of business of Australia; or is incorporated in Australia. The Regulation had been made under section 33(3) of the Act which provided that regulations could prescribe further extensions of the Act or provisions of the Act to and in relation to the EEZ. The crews of these MODUs, which fluctuated in number and composition over the extended period pleaded, needed to be proved to be majority Australian residents, and the FWO case foundered irretrievably on this point in the face of the Third and Fourth Respondents' detailed analysis accepted by his Honour that this had not been established.by the available evidence[37]

The Exclusive Economic Zone

The EEZ is a maritime zone extending from the outer limit of the territorial sea (12 nautical) to 200 nautical miles from the base lines. Within the EEZ, Australia as the coastal state has sovereign rights over the natural resources whilst other states continue to enjoy certain freedoms associated with the regime of the high seas, such as freedom of navigation.[38] Ordinarily, and applying the *Interpretation Act*, a reference to Australia is taken to include a reference to the coastal sea of Australia which includes the territorial sea.[39] The territorial sea extends to a limit not exceeding 12 nautical miles from the coast but no further.[40] However, section 33 of the *Fair Work Act*, extends the operation of the Act and its penal provisions to the EEZ and the waters above the continental shelf.[41]

The definition of the EEZ in the Act refers to, and is defined by, the *Seas and Submerged Lands Act 1973* (Cth) which refers to the limited 'sovereign rights' enjoyed in the zone by Australia under articles 55 and 57 of UNCLOS which was adopted on 10 December 1982 and entered into force on 16 November 1994.[42]

In a note to Regulation 1.15E, it is said that the operation of the *Fair Work Act* to and in relation to majority Australian crewed ships in the EEZ is subject to Australia's international obligations relating to foreign ships and to the concurrent jurisdiction of a foreign State. It was argued by the Respondents that if Regulation 1.15E is capable of applying to foreign flagged ships in the EEZ, it should be considered ultra vires or read

[33] *Fair Work Act 2009* (Cth) s 12.
[34] *Pocomwell (No 2)* [2013] FCA 1139 (1 November 2013) [129]–[143].
[35] Ibid [114] – [117].
[36] Ibid [151].
[37] Ibid [231] – [235].
[38] *United Nations Convention on the Law of the Sea* (UNCLOS), 1982, 1833 UNTS 3 arts, 55, 56, 87.
[39] *Acts Interpretation Act 2001* (Cth) s 2B.
[40] *Seas and Submerged Lands Act 1973* (Cth)
[41] An area defined in UNCLOS art 76..
[42] 1982, 1833 UNTS 3.

down so as not to apply by reason of principles of international law. It was argued by the Respondents that the coastal States' rights in the EEZ, are limited under the *Fair Work Ac*t, having regard to relevant principles of international law.

Canons of Construction: the Fair Work Act 2009 (Cth)

In *Barcelo v Electrolytic Company of Australasia Limited,*[43] Dixon J stated[44] that every statute is to be interpreted and applied as far as its language admits, so as not to be inconsistent with the comity of nations or with the established rules of international law. Thus, it is to be understood and implied that the legislation of a country is not intended to deal with persons over which, according to the comity of nations, the jurisdiction properly belongs to some other foreign sovereign or State. In *Wanganui Rangitikei Electric Power Board v Australian Mutual Provident Society,*[45] Dixon J had said[46] that where an enactment describes Acts, matters or general words, so that it is intended that application would be universal, it is to be read as confined to what, according to the rules of international law, is within the province of the law to effect or control. General words should not be understood as extending to cases which, according to rules of private international law administered by the courts, are governed by foreign law.

While it was acknowledged by the Respondents in *Pocomwell* that it was open to Australia to pass laws and regulations which are inconsistent with UNCLOS, a statute is to be interpreted and applied as far as its language permits, so that it is in conformity with, and not in conflict with, established rules of international law or with a treaty or international convention to which Australia is a party.[47]

It was submitted by the Respondents that Parliament did not intend to authorise under the Act the making of regulations that would be inconsistent with international law. It was argued that there was support for this both in the Explanatory Memorandum to the Bill and in section 3 of the Act which included, as one of the objects of the Act, that account be taken of Australia's International Labour Obligations. On this basis, the Regulation 1.15E should be read as not extending to the painters, who were subject to statutory imperatives under the Filipino Law and whose Courts asserted jurisdictional exclusivity. Secondly, as these were foreign flagged ships under UNCLOS, Australia does not have exclusive jurisdiction in relation to labour conditions on such ships in the EEZ. Therefore, if Regulation 1.15E could not be read down to accord with these competing claims of jurisdiction, then it was submitted 1.15E was ultra vires the *Fair Work Act* because the Act was not to be read as authorising legislative competence over foreign flagged ships whose crew members were subject to the jurisdiction of another state.[48]

The UNCLOS Jurisdiction of the Flag State: and the Ruling in Pocomwell (No 2)

His Honour found that under Article 56, which provides that the coastal State has sovereign rights for the purpose of exploration of natural resources, the coastal State is the only State that can exploit them.[49] His Honour allowed that the coastal state's 'sovereign rights' in relation to the EEZ are more limited than its sovereignty' with respect to its territorial sea, but his Honour said that if the coastal state 'can regulate who can or cannot exploit the natural resources of its EEZ, then it logically follows, in my view, that it can regulate the manner in which, and the terms on which, such resources are explored and exploited, conserved and managed'.[50] Although articles of UNCLOS, such as Articles 92(1), 94(1) and 94(2)(b), may appear to give primacy to the Flag State in matters relating to labour relations on board ships, his Honour said such provisions needed to be read subject to Article 56(1)(a). That is, the coastal State retains the sovereign rights to regulate the manner in which the natural resources within its EEZ are explored and exploited, conserved and managed.[51] His Honour concluded[52] that a coastal State's sovereign rights do encompass the right to regulate labour relations on board foreign flagged ships engaged in the exploration and exploitation of natural resources in its EEZ. Therefore, since Australia has rights under UNCLOS in relation to the regulation of labour relations on vessels that may be classified as 'foreign flagged ships' that are operating in

[43] (1932) 48 CLR 391.
[44] Ibid 423-424.
[45] (1934) 50 CLR 581.
[46] Ibid.
[47] *Minister for Immigration, Ethnic Affairs v Teoh* (1995) 183 CLR73, 277-288.
[48] *Pocomwell (No 2)* [2013] FCA 1139 (1 November 2013) [35] – [54].
[49] Ibid [91]; UNCLOS art 56(1) provides that in the EEZ coastal States have '(a) sovereign rights for the purpose of exploration…'.
[50] Ibid [91].
[51] Ibid [93].
[52] Ibid [97].

the Australian EEZ, regulation 1.15E applies is not inconsistent with international law, and is not 'ultra vires' the Fair Work Act[53].

It can be seen therefore that Pocomwell's case gave a wide construction to the rights of a coastal State in the EEZ in relation to foreign flagged ships. The limited sovereign rights which a coastal State has over the resources in this area prevails over the Flag State's control of administrative matters and labour conditions in the circumstances mentioned in Articles 94(1),94(2)(b) and 94(3)(b) of UNCLOS.[54] Both Australia and the Philippines are signatories to the *Maritime Labour Convention 2006*, which stipulates that each member state shall verify that ships that fly its Flag comply with the requirements of the Convention as those are implemented in national law and regulations.[55] Therefore, there is an obligation upon Flag States to ensure that there is compliance with statutory contractual terms. However, the *Maritime Labour Convention* had not entered into force until 20 August 2013, which was after the time the conduct in Pocomwell occurred. It could not therefore be said that Regulation 1.15E, in stipulating that on majority Australian crewed ships the crew was required to be paid Australian rates, contravened the articles of the *Maritime Labour Convention* which called for observance of national law, notwithstanding the apparent anomaly of imposing foreign wage rates upon Filipinos who would never be subject to Australian tax, cost of living or social conditions.

There was much media indignation expressed about the significantly lower pay provided to the painters over other members of the crew who were subject to Australian Awards. Yet had the *Maritime Labour Convention 2006* applied it would have required that member states, which include both the Phillipines and Australia, shall verify that ships that fly its flag comply with national laws and regulations.[56] The obligation upon foreign Flag States is to ensure there is compliance with statutory contractual terms. Under general international law, States may exercise legislative jurisdiction over their nationals even when outside their territory.[57]
However, in *Pocomwell (No 2)* it was found that there was no ambiguity in the Fair Work Act and Regulation. Under the Explanatory Memorandum[58] to the Bill it was said that 'all seafarers working regularly in or beyond the waters of Australia's EEZ and continental shelf will have the benefit of Australia's Workplace Relations Law and a fair safety net of employment conditions in circumstances where there is an appropriate connection with Australia'.[59] Had that connection with Australia been successfully proved by the FWO, Regulation 1.15E was intended to extend the Act to foreign flagged ships. His Honour found that there was no inconsistency with Article 87(1)(a) of UNCLOS which gave rights of freedom of navigation to other states.[60] The extension of the Act to foreign flagged ships in the EEZ does not obviate or remove Australia's international obligations relating to foreign flagged ships that may pass through the EEZ for purposes not connected with Australian sovereign rights under UNCLOS, but here the sovereign rights of exploration embraced the incidental right to impose labour conditions.[61]

Summary of Principles

The *Pocomwell* cases affirmed the Australian approach to jurisdictional competence which imposes a heavy burden upon an applicant seeking to argue that another state should be the preferred jurisdiction especially where an Australian Act is viewed as 'mandatory'. Furthermore, a broad construction is now given to Australia's 'sovereign rights' as a coastal state in the EEZ in relation to labour conditions, and consequently to the regulatory power given in that area to the Minister: provided always that the foreign flagged ship in the EEZ can be proved to be majority Australian resident crewed.

The *Fair Work Act* and Regulations afford a broad and extended definition of 'ships' so as to include mobile oil rigs, whether or not self-propelled, though the status of such rigs was not seriously considered by UNCLOS when the Convention was introduced over thirty years ago. It remains to be seen if the operation of the *Maritime Labour Convention* will modify the reach of the *Fair Work Act* and its successors in years to

[53] Ibid [104].
[54] 'Art 94(2) In particular every State shall:
(b)assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.'
'Art 94(3) Every state shall take measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia: (b) manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments.'
[55] *Maritime Labour Convention*, 2006, regulation B5.1.4
[56] *Pocomwell (No 2)* [2013] FCA 1139 (1 November 2013).
[57] Deidre Fitzpatrick and Michael Anderson, *Seafarers' Rights* (OUP, 2005) 165 [4.73].
[58] *Fair Work Amendment Regulations 2009 (No 1)* (Cth)
[59] *Pocomwell (No 2)* [2013] FCA 1139 [74] (1 November 2013).
[60] Ibid [100].
[61] Ibid [104].

come in relation to labour relations on foreign flagged ships that enter the area of the EEZ and continental shelf. The *Pocomwell* decisions are likely to influence the conduct of employers of foreign seafarers on foreign flagged ships, which do not dock in Australia, and which ships enter the EEZ carrying a crew with a preponderance of Australian residents on board.