FEDERAL MAGISTRATES COURT OF AUSTRALIA

COTIS v MACPHERSON *[2007] FMCA 2060*

INDUSTRIAL LAW – Awarding penalties under the *Workplace Relations Act 1996* (Cth) – consideration of factors relevant to the amount of penalty.

BANKRUPTCY – A penalty under s.719 of the *Workplace Relations Act 1996* (Cth) is a penalty imposed by a court in respect of an offence against Commonwealth law and hence is not a provable debt.

Bankruptcy Act 1966 (Cth), ss.1, 58, 60, 82
Federal Magistrates Court Rules 2001 (Cth)
Workplace Relations Act 1996 (Cth), ss.167, 718, 719, 727, 728, 836, 841
Workplace Relations Regulations 2006

Australian Winch & Haulage Co Pty Ltd v State Debt Recovery Office (2005) 189 FLR 315
Cotis v Pow Juice Pty Limited [2007] FMCA 140
CPSU v Telstra Corporation Limited (2001) 108 IR 228
Gibbs v The Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216
Green v Schneller (2001) 189 FLR 82
Kelly v Fitzpatrick [2007] FCA 1080
Lynch v Buckley Sawmills Pty Ltd (1984) 3 FCR 503
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Mathers v Commonwealth (2004) 134 FCR 135
Melnik v Melnik [2005] FCAFC 160
Rajagopalan v B M Sydney Building Materials Pty Ltd [2007] FMCA 1412
Re Sharp; ex parte Tietyens Investments Pty Ltd (in liq) [1998] FCA 1367
State of Victoria v Mansfield (2003) 130 FCR 376; 199 ALR 395
Storey v Lane (1981) 147 CLR 549

Applicant:	KATE COTIS
Respondent:	STUART MACPHERSON
File Number:	SYG1912 of 2007
Judgment of:	Driver FM

Hearing date:	7 December 2007
Delivered at:	Sydney
Delivered on:	7 December 2007

REPRESENTATION

Counsel for the Applicant:	Ms R Pepper
Solicitors for the Applicant:	Sparke Helmore

There was no appearance by or on behalf of the respondent.

ORDERS

(1) The Court declares that the respondent contravened rule 19.22 of chapter 2 of the *Workplace Regulations 2006* (Cth) (as in force prior to December 2006) ("the Workplace Regulations").

(2) Pursuant to s.719(1) and s.841(b) of the *Workplace Relations Act 1996* (Cth) ("the Workplace Relations Act") the respondent shall pay Talika Lewis the following penalties for breaches of the Workplace Regulations and the Broken Hill Commerce and Industry Agreement Consent Award 2001 ("the first Award"):

(a) $1,500 for the breach of clause 34(1.32) of the first Award in relation to notice of termination;

(b) $750 for the breach of regulation 2.19.22 in relation to the content of payslips;

(c) $800 for the breach of clause 5(1.3) and 6(1.4) of the first Award in relation to annual leave entitlement and loading;

(d) $3,000 for the breach of clause 33(1.31) of the first Award in relation to superannuation;

(e) $1,200 for the breach of clause 38(1.36) of the first Award in relation to shift payments; and

(f) $1,750 for the breach of appendix Q clause 18.2(c) of the Award in relation to meal breaks.

(3) Pursuant to s.719(1) and s.841(b) of the Workplace Relations Act the respondent shall pay Emma Everett the following penalties for breaches of the Workplace Regulations and the first Award:

(a) $1,500 for the breach of clause 341(1.32) of the first Award in relation to notice of termination;

(b) $750 for the breach of regulation 2.19.22 in relation to the content of payslips; and

(c) $1,200 for the breach of the first Award in relation to shift payments.

(4) Pursuant to s.719(1) and s.841(b) of the Workplace Relations Act, the respondent shall pay Andrew Brown the following penalties for breaches of the Workplace Regulations and the Bread Industry (State) Award ("the second Award"):

(a) $750 for the breach of regulation 2.19.22 in relation to the content of payslips;

(b) $1,750 for the breach of clause 6 of the second Award in relation to meal breaks;

(c) $800 for the breach of clauses 11 and 12 of the second Award in relation to annual leave and annual leave loading; and

(d) $3,000 for the breach of clause 7 of the second Award in relation to superannuation.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1912 of 2007

KATE COTIS
Applicant

And

STUART MACPHERSON
Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. This is an application seeking declarations and the awarding of penalties under the *Workplace Relations Act 1996* (Cth) ("the Workplace Relations Act"). The proceedings began with an application filed on 20 June 2007, although the applicant, an inspector under the Workplace Relations Act, now relies upon a further amended application filed in court today by leave. That application seeks a declaration that, by the operation of s.728 of the Workplace Relations Act the respondent, Stuart Macpherson, contravened reg.19.22 of ch.2 of the *Workplace Relations Regulations 2006* (Cth) ("the Regulations") as they stood prior to December 2006. The further amended application also seeks a declaration that by the operation of s.728 of the Workplace Relations Act Mr Macpherson breached identified applicable provisions for the purposes of s.719 of the Workplace Relations Act, and that he pay penalties pursuant to s.719. The penalties are sought to be paid to three identified employees whose entitlements were the subject of the asserted breaches.

2. The application is supported by the affidavits of the applicant, Ms Cotis, made on 19 June 2007 and filed the following day, and the affidavits of the affected employees, Talika Lewis, Emma Everett and Andrew Brown, all made on 22 October 2007 and filed on 24 October 2007.

3. I received all of the affidavit material without any objection from Mr Macpherson, who did not attend today's hearing. I am satisfied from the affidavit of Carla Jo Fitzgerald, filed in court today by leave, that Mr Macpherson has been personally served with the originating process in the proceeding and the supporting affidavit and that the applicant has used her best endeavours to serve subsequent material upon him in accordance with the *Federal Magistrates Court Rules 2001* (Cth) ("the Federal Magistrates Court Rules").

4. On 28 November 2007 Mr Macpherson wrote to Turner FM, who was formerly dealing with this matter. In that letter Mr Macpherson relevantly states that he has no dispute with the information provided by Ms Cotis. I take that to mean that he has received the affidavit of Ms Cotis and its annexures and that he does not contest the accuracy of the matters deposed to by Ms Cotis. Mr Macpherson says that he does disagree with "some former staff comments," although he goes on to say that he does not see any "future value in arguing that." He states that he did not require those persons to attend Court. I take that to mean that Mr Macpherson received the affidavits by the three former employees, and while he does not accept the accuracy of all that is in those affidavits, he does not actively contest that evidence. Mr Macpherson, in the letter, goes on to provide what might be described as his view of the conduct of his business leading up to these proceedings, the insolvency of the business and his own bankruptcy. He says that he is deeply sorry about the way in which the business declined and all the circumstances surrounding and as a result of that decline. He makes some statements as to his present financial circumstances, which I take to be an assertion of impecuniosity. I filed the letter in court today and decided to treat it as a submission. It appears that apart from writing this letter, Mr Macpherson has elected not to take any active part in the proceeding.

5. The facts in relation to this matter are conveniently summarised in a statement of facts filed on 26 October 2007 on behalf of the applicant. I incorporate that statement in this judgment with minor amendments:

(a) The respondent was the sole director of Alomace Pty Ltd (ACN 076653828) (Alomace), a constitutional corporation which operated a Brumby's bakery franchise in Broken Hill (Brumby's) between 6 December 1996 and 31 July 2006, when the bakery closed down.

(b) On 9 August 2006, the applicant, a workplace inspector under s.167 of the Workplace Relations Act, employed by the Workplace Ombudsman (formerly the Office of Workplace Services) (WO), spoke to the respondent and he advised that Alomace was about to go into receivership.

(c) The applicant conducted an investigation into the closure of Brumby's. During the investigation, the applicant:

(i) issued a notice to produce documents to the respondent on 9 August 2006 (Annexure 'KEC3' to the affidavit in support of application);

(ii) issued a 'first breach notice – summary of breaches' to the respondent on 21 August 2006 (Annexure 'KEC5' to the affidavit in support of application);

(iii) received a letter from the respondent on 2 September 2006 (Annexure 'KEC6' to the affidavit in support of application); stating that:

- he assumed all breaches related to the last pay period;
- he could not pay outstanding entitlements because he had no money;
- he was unable to retrieve information relating to 'outstanding holiday pay etc' because his computer was broken and he could not afford to repair it; and
- he had very little money, no income and was 'living out of the boot of his car'.

(iv) issued a further breach notice on 11 September 2006 (Annexure 'KEC7' to the affidavit in support of application);

(v) issued a final breach notice on 27 September 2006 (Annexure 'KEC8' to the affidavit in support of application); and

(vi) conducted interviews with and took statements from former employees of Alomace, including: Ms Talika Lewis; Ms Emma Everett and Mr Andrew Brown.

(d) Talika Lewis and Emma Everett were employed under the Broken Hill Commerce and Industry Agreement Consent Award (2001) (Broken Hill Award) (Annexure 'A' to the Affidavit of Talika Lewis) and Andrew Brown was employed under the Bread Industry (State) Award (Bread Award) (Annexure 'A' to the affidavit of Andrew Brown).

(e) The respondent was bound by both the Broken Hill Award and the Bread Award.

(f) The respondent was required to comply with the following clauses of the Broken Hill Award:

5. (1.3) Annual leave

Each employee after twelve months service in any one establishment of one employer shall be granted five (5) weeks holidays on full pay. Provided that by agreement between the employer and employee, one (1) weeks entitlement under this clause may be "cashed out" and the period of actual leave reduced to four weeks. Each year stands alone.

6. (1.4) Annual leave loading

(a) Employees shall be granted an annual leave loading of 17.5% on their holiday pay.

33 (1.31) Broken Hill Town Industries Superannuation Fund

(a) In accordance with the handing down by the Commonwealth Government of legislation which establishes a requirement to pay employees (as defined) SGC from the first pay period to commence on or after January 1, 1989, the employer will pay into an "approved" Occupational Superannuation Fund the percentage of ordinary time earnings prescribed by Superannuation Guarantee legislation on behalf of eligible employees.

34 (1.32) Termination of Employment

(1) General Termination -

(a) To terminate employment either party shall be given one week's notice - if the employer fails to do so he shall pay one week in lieu of notice and similarly if the employee fails to do so he shall forfeit one week's pay.

38 (1.36) Wages Policy and Payment

(d) Wages including overtime shall be paid weekly or fortnightly. Such payment shall be made in the employers' time.

APPENDIX Q - SHOP ASSISTANTS

18.2(c) An employee who works five ordinary hours or more on any day shall be allowed on such day an unpaid meal break of one hour between the hours commencing not earlier than 11.30 am and finishing not later than 3.00 pm. Provided that where agreement exists between the employer and employee, a meal break of between 30 minutes and one hour may apply. The meal break shall be given and taken so that no employee shall work more than five consecutive hours without a meal.

(g) The respondent was required to comply with the following clauses of the Bread Award:

6. Meals

(i) Each employee must take and each employer must give on each day at least half an hour for a meal after the expiration of 3 hours and commencing within 5 hours of starting work.

(ii) An employee not commencing a meal break within 5 hours of starting work shall be paid ordinary time extra until a meal break is taken with a minimum of one half hours pay at such rate.

(iii) Meal breaks shall not count as time worked.

(iv) The meal breaks prescribed in this clause shall be given and taken so as not to interfere with the continuity of work and

at times mutually agreed between the employer and the employee.

11. Annual Holidays

(1) Except as otherwise provided in this Act, every worker shall at the end of each year of the worker's employment by an employer become entitled to an annual holiday on ordinary pay.

Such annual holiday shall:

(a) where any such year of employment ends upon or before 30 November 1974, be of three weeks,

(b) where any such year of employment ends after 30 November 1974, be of four weeks.

12. Annual Holiday Loading

(iv) The loading is 17.5% of the employee's ordinary rate of pay for the period of the annual holiday prescribed by clause 11, Annual Holidays of this award for the classification in which the employee was employed immediately before commencing the annual holiday period or separate periods.

17. Occupational Superannuation

(i) The employer shall pay on behalf of each full-time adult employee with six months continuous service 3% of the employee's ordinary rate of pay per week in a superannuation fund meeting the requirements set down by the Commissioner for Occupational Superannuation.

(h) The respondent was also required at all relevant times to comply with regulation 19.22 of Chapter 2 of the Workplace Relations Regulations (as in force prior to December 2006) which provides:

19.22 Pay slips – subsection 836 (2) of the Act

(1) An employer who employs an employee must issue to the employee a written pay slip relating to each payment by the employer of an amount to the employee as remuneration.

(2) The pay slip must be issued within 1 day of the payment to which the pay slip relates being made to the employee.

(3) The employer must include on a pay slip particulars specified in regulation 19.23.

(4) Strict liability applies to the physical elements in subregulations (1) and (2).

Note For strict liability, see section 6.1 of the Criminal Code.

(5) Subregulations (1) and (2) are civil remedy provisions.

(i) On 8 February 2007, the Supreme Court of Queensland ordered that Alomace be wound up in insolvency and appointed Mr John Park and Ms Lorraine Smith as liquidators.

(j) On or about 18 May 2007 the applicant received a letter from Currie Biazos Insolvency Accountants enclosing a Notification of Bankruptcy of the respondent, a certificate of Appointment and a proof of debt form.

6. Also relevant is the fact that Mr Macpherson is an undischarged bankrupt. He became bankrupt prior to the institution of this proceeding and a question arose in my mind whether the proceeding might be stayed by the operation of s.58(3) of the *Bankruptcy Act 1966* (Cth) ("the Bankruptcy Act").

7. I invited submissions from the applicant on that issue and Ms Pepper provided them to me in court today in writing and also made oral submissions. Having considered the matter, I agree with the applicant's submissions and adopt with minor amendments the following submissions filed in court by leave today on the issue of the application of the Bankruptcy Act to this matter:

a) insofar as the applicant seeks declarations in paragraphs 1 and 2 of the further amended application ("the application"), s.58(3) is not enlivened and the Court is not impeded by the Bankruptcy Act in granting this relief; and

b) insofar as the applicant seeks the imposition of a penalty in paragraph 3 of the application, s.58(3) of the Bankruptcy Act has no application because it is not a provable debt.

Factual Background

It is sufficient to note that the respondent was declared bankrupt on 20 April 2007 and Mr Bevin Robert Schafferius was appointed the Trustee in Bankruptcy (see the affidavit of Ms Kate Cotis, the

applicant, sworn 20 June 2007 at paragraph 17 and annexure 'KEC 11').

Legislative Framework

Pursuant to the application:

a) by operation of s.728 of the Workplace Relations Act the applicant submits that there was a contravention by Mr Macpherson of s.719 of the Workplace Relations Act and reg 19.22 of the Regulations as it operated prior to December 2006;

b) by operation of s.728 of the Bankruptcy Act there is sought the imposition and recovery of a penalty from the respondent pursuant to s.719(1) of the WRA insofar as he breached various clauses of the Broken Hill Commerce and Industry Agreement Consent Award 2001 and the Bread Industry (State) Award.

Section 718 of the Workplace Relations Act permits an inspector, such as the applicant, to apply to the Court for a penalty or other remedy, such as a declaration.

Section 719 of the Workplace Relations Act permits the Court to impose a penalty on the respondent for breaches of the Workplace Relations Act. The penalty is a civil remedy. Although it is the employer, namely, Alomace Pty Limited, which is primarily liable under s.719 of the WRA for any penalty imposed, the respondent, as an individual, has accessorial liability pursuant to s.728 of the Workplace Relations Act (s.728 applies to persons who have, amongst other things, "aided, abetted, counselled or procured" a contravention of a "civil remedy provision". Section 719 is deemed to be a "civil remedy provision" by reason of s.727 of the Act).

Sections 58 and 60 of the Bankruptcy Act relevantly provide as follows:

58 Vesting of property upon bankruptcy–general rule

(1) Subject to this Act, where a debtor becomes a bankrupt:

(a) the property of the bankrupt, not being after-acquired property, vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate of the bankrupt by virtue of section 156A, in that registered trustee; and

(b) after-acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt, in the Official Trustee or, if a registered trustee is the trustee of the estate of the bankrupt, in that registered trustee.

…

(3) Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:

(a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or

(b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.

60 Stay of legal proceedings

(1) The Court may, at any time after the presentation of a petition, upon such terms and conditions as it thinks fit:

…

(b) stay any legal process, whether civil or criminal and whether instituted before or after the commencement of this subsection, against the person or property of the debtor:

(i) in respect of the non-payment of a provable debt or of a pecuniary penalty payable in consequence of the non-payment of a provable debt; or

(ii) in consequence of his or her refusal or failure to comply with an order of a court, whether made in civil or criminal proceedings, for the payment of a provable debt;

and, in a case where the debtor is imprisoned or otherwise held in custody in consequence of the non-payment of a provable debt or of a pecuniary penalty referred to in subparagraph (i) or in consequence of his or her refusal or failure to comply with an order referred to in subparagraph (ii), discharge the debtor out of custody.

…

*In this section, **action** means any civil proceeding, whether at law or in equity.*

Section 82 defines what constitutes a "provable debt" for the purposes of ss.58 and 60 of the Act. It provides that (emphasis added):

82 Debts provable in bankruptcy

(1) Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy.

…

(2) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy.

(3) Penalties or fines imposed by a court in respect of an offence against a law, whether a law of the Commonwealth or not, are not provable in bankruptcy.

…

*(8) In this section, **liability** includes:*

(a) compensation for work or labour done;

(b) an obligation or possible obligation to pay money or money's worth on the breach of an express or implied covenant, contract, agreement or undertaking, whether or not the breach occurs, is likely to occur or is capable of occurring, before the discharge of the bankrupt; and

(c) an express or implied engagement, agreement or undertaking, to pay, or capable of resulting in the payment of, money or money's worth, whether the payment is:

(i) in respect of amount–fixed or unliquidated;

(ii) in respect of time–present or future, or certain or dependent on a contingency; or

(iii) in respect of the manner of valuation–capable of being ascertained by fixed rules or only as matter of opinion.

Section 58(3): applicable principles

The applicant is not a creditor enlivening s.58(3) of the Bankruptcy Act

Upon the declaration of bankruptcy all property of the bankrupt vests in the Official Trustee (s.58(1)). Therefore, a "creditor" may not commence any legal proceedings if the proceedings are in respect of a "provable debt" (s.58(3)).

The applicant, in applying for the relief set out in the Application, is not a "creditor" for the purpose of s.58(3) of the Bankruptcy Act but rather is a person to whom standing has been given pursuant to the Workplace Relations Act to commence proceedings against the respondent (the term "creditor" is not relevantly defined in s.1 of the Bankruptcy Act).

Accordingly, s.58(3) of the Bankruptcy Act is not enlivened and leave need not be sought by the applicant prior to commencing these proceedings and the respondent cannot apply to have the proceedings stayed pursuant to s.60(1)(b)(i) of the Bankruptcy Act (see further below).

Even if the applicant were a creditor for the purpose of s.58(3) of the Bankruptcy Act, the relief sought does not engage the Bankruptcy Act

If the applicant were a creditor for the purpose of s.58(3) of the Bankruptcy Act, neither the declarations nor the penalty sought are "provable debts" for the purpose of the Bankruptcy Act and thus s.58(3) has no application.

In order to determine if leave is required under s.58(3) it is necessary to consider whether the relevant proceedings are as specified in that provision "in respect of a provable debt".

The words "in respect of" are widely construed, particularly in light of the policy underlying that provision and the Bankruptcy Act generally of ensuring a fair distribution of the bankrupt's assets among creditors, so that no one creditor receives undue advantage (see *Re Sharp; Ex parte Tietyens Investments Pty Ltd (in liq)* [1998] FCA 1367 at 7 and *Green v Schneller* (2001) 189 FLR 82 at 85-87).

The nexus required between the proceeding and the provable debt may be both direct and indirect (*Melnik v Melnik* [2005] FCAFC 160 at [45]-[48]).

It is therefore necessary to examine whether or not the civil penalty and declarations sought in the application give rise to "a provable debt". If they do not then s.58(3) does not apply.

The term "provable debt" is broadly defined in s.82(1) of the *Bankruptcy Act* and would appear to apply to the recovery of, for example, payments sought from the respondent to satisfy any outstanding employee entitlements (*Storey v Lane* (1981) 147 CLR 549).

As defined the term would clearly not apply to declaratory relief.

However, in relation to the penalty sought to be imposed on the respondent, the penalty is not a provable debt (*Mathers v Commonwealth* (2004) 134 FCR 135 at [13]-[14] and [22]-[29] and *Australian Winch & Haulage Co Pty Ltd v State Debt Recovery Office* (2005) 189 FLR 315 at [10]) and is therefore not subject to the prohibition in s.58(3) against the commencement of legal proceedings.

For the reasons given above, insofar as relief sought is concerned, the Court does not, because it is not a provable debt, have any jurisdiction to stay or otherwise determine incompetent the proceedings commenced by the applicant against the respondent.

8. In addition to those submissions I note that the learned authors in McDonald, Henry and Meek, *Australian Bankruptcy Law and Practice*, at page 1-4085, paragraph 82.3.05, state:

> *Section 82(3)* [of the Bankruptcy Act] *makes it clear that all penalties or fines imposed by courts are not provable debts. In addition, statutory fines initially imposed by bodies that are not courts (eg parking fines imposed by, and ultimately payable to, a local council or other authority, pursuant to the "PERIN" procedure in Sch 7 to the* Magistrates Court Act 1989 *(Vic) have been held to be "fines imposed by a Court" under s 82(3) where the orders for their collection and enforcement are made by a court, and orders for payment of the fines are deemed by legislation to be orders of a court.*

9. The learned authors refer to *State of Victoria v Mansfield* (2003) 130 FCR 376; 199 ALR 395. The learned authors go on to state that:

> *The "offence against a law" for which the penalty or fine was imposed need not be criminal in nature, and a pecuniary penalty imposed under s 76 of the Trade Practices Act 1974 breaches of Pt IV of that Act (which due to s 78 are not criminal) would not be*

a provable debt due to the operation of s 82(3): Mathers v Commonwealth *(2004) 134 FCR 135.*

10. I find, on the basis of the submissions and the authorities referred to that, for the purposes of s.82(3) of the Bankruptcy Act, the penalties sought by the applicant in this proceeding are penalties for fines imposed by a court in respect of an offence against a law of the Commonwealth and hence are not provable in bankruptcy. It follows that s.58(3) of the Bankruptcy Act provides no bar to the present proceeding. It also follows that any penalties imposed by the Court would remain payable after the discharge of Mr Macpherson from bankruptcy, and that bankruptcy provides no release in respect of them.

11. The applicant, through her counsel, has provided submissions in relation to the relief sought both orally and in writing. I, in essence, agree with those submissions. In particular I adopt, with respect, paragraphs 6 to 12:

> The applicable principles in relation to penalties in such matters are uncontroversial (*Kelly v Fitzpatrick* [2007] FCA 1080). In *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, Mowbray FM identified 'a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty'. They are:
>
> a) the nature and extent of the conduct which led to the breaches;
>
> b) the circumstances in which that conduct took place;
>
> c) the nature and extent of any loss or damage sustained as a result of the breaches;
>
> d) whether there had been similar previous conduct by the respondent;
>
> 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 cooperated with the enforcement authorities;

l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and

m) the need for specific and general deterrence.

Application of principles to facts of the present case

The nature and extent of the conduct

The breaches in this matter involve a failure to afford important entitlements such as:

a) notice of termination;

b) relevant information on payslips;

c) annual leave and annual leave loading;

d) superannuation; and

e) meal breaks.

These breaches were significant in number, affected all employees interviewed by the applicant (including the three employees who have given evidence) and occurred over a period exceeding two years.

The broad ranging nature of the contraventions reveals a disregard for the respondent's statutory obligations.

Further, there is no evidence that the respondent ever sought to understand his obligations in order to comply with them. Arguably, a number of the breaches would have continued had the store not closed down.

Circumstances in which the conduct took place

Some of the contraventions of the applicable provisions occurred as a result of Brumby's closing without notice, however many contraventions relate to the period before the store closed, such as failing to provide meal breaks, superannuation and correct information on payslips (see for example the affidavit of Emma Everett at paragraphs 10 and 13; the affidavit of Andrew Brown at paragraphs 12-

> 14, 23, 24 and 28 and the affidavit of Talika Lewis at paragraphs 6, 17-19, 25, 28-29).
>
> Further, the respondent has operated Brumby's for nearly ten years. He therefore had significant business experience. On the other hand, many of Brumby's employees were young and vulnerable (see the affidavits of Emma Everett and Talika Lewis at paragraphs 4 and 1 and 3 respectively) and could easily have been taken advantage of. Membership of this vulnerable group is a significant factor in determining quantum (*Cotis v Pow Juice Pty Limited* [2007] FMCA 140).

12. In addition, in relation to the circumstances in which the conduct took place, it is, in my view, important to make the point that employers should not and cannot regard insolvency, either personal or corporate, as a refuge from their responsibilities under the Workplace Relations Act. The mere fact that a business fails and that its premises close is not an excuse for a failure to pay entitlements due to employees, including entitlements in respect of the termination of their employment, which is a necessary consequence of the closure of the business. I also agree with and adopt for the purposes of this judgment paragraphs 13 and 14 of the written submissions:

> The loss for the employees in this matter is not insignificant (see paragraphs 11-13).
>
> Importantly, the respondent has not made any attempt to pay the ex-employees their accrued entitlements and the employees are currently still out of pocket.

13. There is no evidence whether Mr Macpherson engaged in similar conduct in contravention of the Workplace Relations Act previous to the matters identified in these proceedings.

14. In relation to whether the breaches were properly distinct or arose out of one course of conduct, I accept that the classes of breaches identified by the applicant are separate and distinct and call for the imposition of separate penalties, and in that regard I agree with and adopt paragraph 16 of the submissions:

> Each separate obligation found in an award is regarded as a term for the purposes of the imposition of such a penalty (*Kelly v Fitzpatrick* at [11] citing *Gibbs v The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223)

15. Within that there were courses of conduct that, pursuant to s.719(2) of the Workplace Relations Act, need to be regarded as a single course of conduct even though a number of instances of breaches were involved, including in relation to superannuation benefits extending over a period of about two years.

16. I also agree with paragraph 19 of the written submissions in relation to the size of the respondent's business. In that regard I reiterate the observations on that point that I made in *Rajagopalan v B M Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at paragraphs 27 to 29:

> *Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award.*[1] *Obligations by employers for adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevance to the Court's consideration of penalty. As stated recently, by Tracey J in* Kelly v Fitzpatrick *[2007] FCA 1080, at [28]:*
>
> > No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction must be imposed at a meaningful level.
>
> …

17. In issue in this matter is whether the identified breaches were deliberate. I do not think that they were deliberate in the sense of Mr Macpherson setting out with an intention to breach the Workplace Relations Act. However, the facts compel the conclusion that Mr Macpherson was at least reckless in relation to the responsibilities of his company and himself as an employer. Mr Macpherson was made aware of some of the breaches by employees whilst the business was still in operation. He also acknowledged the breaches to the inspector following the closure of the business. Mr Macpherson has no contest with the evidence provided by Ms Cotis.

[1] *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503 at 508.

18. It follows, and I find, that the breaches were, in whole or part, known to Mr Macpherson and that he failed to remedy the situation. Mr Macpherson was at all relevant times,the sole director of the employing company and the manager of the business. The breaches occurred because of his personal defaults.

19. The applicant asserts that Mr Macpherson has not exhibited contrition at any stage. He has attempted to do so in his letter to the Court. This is belated and of limited value. Mr Macpherson has, apart from that letter, not taken an active part in these proceedings. He has absented himself from Broken Hill where the business was conducted and he has appeared to have attempted to wash his hands of the consequences of his actions. I do not accept that he has exhibited any genuine contrition. Further, Mr Macpherson has not taken or attempted any corrective action in relation to the breaches. The matters drawn to his attention by his employees when the business was conducted were not rectified. Although the business has closed there is nothing to indicate that if Mr Macpherson conducted another business when he is discharged from bankruptcy, similar problems would not occur.

20. Paragraph 25 of the submissions deals with co-operation with the enforcement authorities. I agree with and adopt that paragraph:

> The respondent has provided limited co-operation in this matter. Initially, the respondent acknowledged some of the breaches to the Inspector. However, he has failed to produce documents in response to a notice to produce and has not responded to any of the breach notices (see the affidavit of Kate Cotis at paragraphs 7-13).

21. In his correspondence Mr Macpherson seeks to avoid a conclusion of a want of co-operation by stating that all of his documents are in the hands of the liquidator of his company. Assuming that to be true, that does not relieve him of the need to co-operate with enforcement authorities by ensuring, as far as he is able, that the liquidator provided to the enforcement authorities what they required. There was no evidence of any attempt by him to do so.

22. I agree with and adopt for the purposes of this judgment paragraph 26 of the submissions in relation to enforcing compliance with minimum standards, and paragraphs 27 to 29 in relation to deterrence:

In *Kelly v Fitzpatrick*, his Honour said:

> *One of the principal objects of the Act is the maintenance of a safety net of minimum terms and conditions of employment and effective enforcement of the obligations imposed by Awards and other industrial instruments. To this end the Act makes provision for the investigation of alleged breaches of obligations imposed by industrial instruments and the imposition of penalties where it is established that breaches have occurred. As already noted, those penalties were significantly increased by Parliament in 2004.*

Deterrence

The penalty in this matter must reflect the need for general deterrence.

In *Kelly v Fitzpatrick*, his Honour referred with approval to the comments of Finkelstein J in *CPSU v Telstra Corporation Limited* (2001) 108 IR 228 at 231 where his Honour said:

> *even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to make the law's disapproval of the conduct in question, an act as a warning to others not to engage in similar conduct.*

Further, the need for general deterrence is high in industries, such as in the present case, where young, low paid workers are engaged (*Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412).

23. In this matter I regard deterrence as a particularly important consideration, given the mischief of a small business which ran for a period of about 10 years over which time numerous breaches of the relevant awards or regulations occurred, and then closed abruptly in circumstances where employees were left out of pocket.There is a need for employers to understand that their obligations to their employees must be taken seriously, and that those obligations cannot be avoided through the expedient of corporate or personal insolvency.

24. In *Rajagopalan* I dealt with the totality principle in paragraphs 33 to 44. I also had regard in that case to penalties awarded in comparable circumstances. I reiterate in this matter that a factor which should be taken into account in fixing the pecuniary penalties for multiple breaches is the totality principle. As in *Rajagopalan* I adopt, with

respect, the observations of Tracey J in *Kelly v Fitzpatrick* [2007] FCA 1080.

25. In this matter 13 breaches have been identified and, in respect of each breach, the maximum penalty that could be awarded is $6,600, leading to a total potential liability of $85,800. The applicant has submitted that given the number of breaches and the circumstances of them, the fact that the employees have not been paid their entitlements, and that there are three of them, and that no corrective action has been taken, and because of the cavalier attitude displayed by Mr Macpherson, substantial penalties should be awarded to reflect the fact that this matter falls at the higher end of the scale of seriousness.

26. I accept that, but I also take the view that one needs to treat with caution substantial penalty awards in proceedings involving corporate respondents, where the maximum payable penalty is about five times the maximum payable by an individual.

27. I regard all of the breaches identified as serious, particularly having regard to the circumstances, but I am particularly concerned about the breaches in relation to unpaid superannuation benefits over a period of about two years, and unpaid wages both for shift work and in relation to termination of employment without notice. I also regard as particularly serious the failure to provide meal breaks or penalty payments in lieu of meal breaks, having regard to the potential impact on occupational health and safety.

28. In all the circumstances I have decided to award the penalties set out in the orders made above.

I certify that the preceding twenty-eight (28) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 11 December 2007