FEDERAL MAGISTRATES COURT OF AUSTRALIA

JONES v HANSSEN PTY LTD *[2008] FMCA 291*

INDUSTRIAL LAW – Penalty – breaches of civil penalty provisions – lodgement of unapproved AWA – failure to lodge approved AWA within time – failure to provide employees with ready access and information statement – consideration of factors relevant to penalty.

Workplace Relations Act 1996 (Cth), ss.167(2)(a), 337, 341, 342, 407, 841

ACCC v ABB Transmission and Distribution Ltd (No 2) [2002] FCA 559
ACCC v IPM Operations Maintenance Loy Yang Pty Ltd (No 2) [2007] FCA 11
ASC v Forem-Freeway Pty Ltd (1999) 30 ASCR 339Australian Ophthalmic
Australian Ophthalmic Suppliers Pty Ltd v McAlary-Smith [2008] FCAFC 8
BHP Steele (AIS) Pty Ltd v CFMU [2000] FCA 1908
Carr v CEPU & Anor [2007] FMCA 1526
Coal & Allied Operations Pty Ltd (No 2.) [1999] FCA 1714
Commonwealth Bank of Australia & Anor v Finance Sector Union (2007) 157 FCR 329; [2007] FCAFC 18
Cotis v Pow Juice Pty Ltd [2007] FMCA 140
Finance Sector Union v Commonwealth Bank of Australia (2005) 224 ALR 467; [2005] FCA 1847
Flattery v The Italian Eatery trading as Zeffirelli's Pizza Restaurant [2007] FMCA 9
Jordan v Mornington Inn Pty Ltd [2007] FCA 1384
Lawlor v Dartbridge Pty Ltd & Anor [2007] FMCA 2119
Lee v Hanssen Pty Ltd [2004] WAIRComm 10868
Leighton Contractors & Anor v CFMEU & Ors [2006] WASC 317
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
TWU v Glynburn Contractors (Salisbury) Pty Ltd (1991) 37 IR 313
WABLPPUW v Hanssen Pty Ltd (unreported, Industrial Magistrates Court of Western Australia, Cicchini IM, 2 March 2000)

Applicant:	ANDREW MARK JONES
Respondent:	HANSSEN PTY LTD
File Number:	PEG 183 of 2007
Judgment of:	Lucev FM

Hearing date:	5 November 2007
Date of Last Submission:	5 November 2007
Delivered at:	Perth
Delivered on:	11 March 2008

REPRESENTATION

Counsel for the Applicant:	Ms G Archer
Solicitors for the Applicant:	Clayton Utz
Counsel for the Respondent:	Mr THF Casperz
Solicitors for the Respondent:	Jackson McDonald

ORDERS

(1) *That in respect of each of the admitted contraventions of section 341 of the Workplace Relations Act 1996* (Cth) the Respondent pay a penalty of $11,550.00

(2) *That in respect of the admitted contravention of section 342 of the Workplace Relations Act 1996* (Cth) the Respondent pay a penalty of $750.00.

(3) *That in respect of each of the admitted contraventions of section 337(1) and (8) of the Workplace Relations Act 1996* (Cth) the Respondent pay a penalty of $5,775.00.

(4) *That in respect of each of the admitted contraventions of section 337(2) and (9) of the Workplace Relations Act 1996* (Cth) the Respondent pay a penalty of $5,775.00.

(5) Payment of the penalties be made within 28 days to Consolidated Revenue.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT PERTH

PEG 183 of 2007

ANDREW MARK JONES
Applicant

And

HANSSEN PTY LTD
Respondent

REASONS FOR JUDGMENT

Application

1. By application made on 12 September 2007 the Applicant, a workplace inspector appointed pursuant to s.167(2)(a) of the *Workplace Relations Act 1996* (Cth),[1] alleged that the Respondent had contravened various sections of the *WR Act*, namely ss.337, 341 and 342. The Applicant sought that the Respondent pay a pecuniary penalty under ss.407(1)(b) and 407(2)(g) of the *WR Act*, and that that penalty be paid to the Commonwealth under s.841 of the *WR Act*.

Consent declarations and orders

2. At the first directions hearing of the matter on 15 October 2007 the Respondent consented to the Court making declarations in the following terms:

[1] "*WR Act*".

1. In contravention of section 341 of the Workplace Relations Act 1996 (Cth) ("the Act"), the Respondent lodged an unapproved Australian Workplace Agreement ("AWA") in relation to each of the following employees:

(a) Vicente ALCOSER, whose AWA purported to be signed and dated by the employee on 21 June 2006 but was lodged on 20 June 2006 with the Office of the Employment Advocate ("OEA") (which became the Workplace Authority on 1 July 2007);

(b) Martin BITANG, whose AWA purported to be signed and dated by the employee on 21 June 2006 but was lodged on 20 June 2006 with the OEA;

(c) Daniel GUCOR, whose AWA purported to be signed and dated by the employee on 21 June 2006 but was lodged on 20 June 2006 with the OEA;

(d) Mequias LAMOSTE, whose AWA purported to be signed and dated by the employee on 21 June 2006 but was lodged on 20 June 2006 with the OEA;

(e) Conrado LOGRONO, whose AWA purported to be signed and dated by the employee on 21 June 2006 but was lodged on 20 June 2006 with the OEA;

(f) Crisanto Tabac MERINA, whose AWA was signed by the employee, however, it was not dated by the employee, and was not signed or dated by the employer, and there was therefore no witness to a signature by the employer, yet it was lodged on 20 June 2006 with the OEA;

(g) Marites PONCE, whose AWA purported to be signed and dated by the employee on 21 June 2006 but was lodged on 20 June 2006 with the OEA;

(h) Felix SERIVANO; whose AWA purported to be signed and dated by the employee on 21 June 2006 but was lodged on 20 June 2006 with the OEA;

(i) Eduardo VEDRA, whose AWA purported to be signed and dated by the employee on 21 June 2006 but was lodged on 20 June 2006 with the OEA; and

(j) Carl UY, whose AWA purported to be signed and dated by the employee on 21 June 2006 but was lodged on 20 June 2006 with the OEA.

Specifically, it is alleged that the AWAs were not approved in that the AWAs were not dated by the employee at the time of lodgment, and/or the AWAs were not signed by the employer at the time of lodgment, and/or the AWAs were not dated by the employer at the time of lodgment, in accordance with section 340 of the Act;

2. In contravention of section 342 of the Act, the Respondent failed to lodge the following employee's AWA with the OEA within 14 days after approval:

(a) Ronald SALAZAR, whose AWA purported to be approved on 22 June 2006 but was not lodged with the OEA until 10 July 2006;

3. In contravention of sections 337(1) and 337(8) of the Act, the Respondent failed to take reasonable steps to ensure that each of the following employees had, or had ready access to his AWA during the 7 day period beginning 7 days before his AWA was approved:

(a) Anthony FRAMPTON, whose AWA purported to be approved on 18 August 2006;

(b) Raymond HENNESSY, whose AWA purported to be approved on 24 August 2006;

(c) Cristino ORANO, whose AWA purported to be approved on 13 June 2006;

(d) Ronald SALAZAR, whose AWA purported to be approved on 22 June 2006; and

(e) Ronan Pio TWOMEY, whose AWA purported to be approved on 25 August 2006;

4. In contravention of sections 337(2) and 337(9) of the Act, the Respondent failed to take reasonable steps to ensure that each of the following employees were given an information statement at least 7 days before his AWA was approved:

(a) Anthony FRAMPTON;

(b) Raymond HENNESSY;

(c) Cristino ORANO;

(d) Ronald SALAZAR; and

(e) Ronan Pio TWOMEY."

3. The matter was adjourned to a penalty hearing on 5 November 2007. Both parties were given leave to file and serve any affidavits concerning the penalty proceedings. Neither party filed further affidavits relevant to the facts in the matter, the Applicant relying on his affidavit filed 12 September 2007 and the Respondent on his affidavit filed 12 October 2007.[2]

WR Act contravened

4. The contraventions of the *WR Act* to which the Respondent consented to declarations being made about were, in summary, of four civil remedy provisions, three of which related to a number of employees, as follows:

   a) lodging ten unapproved AWAs, contravening s.341 of the *WR Act*;

   b) failing to lodge an approved AWA within 14 days, contravening s.342 of the *WR Act*;

   c) failing to take reasonable steps to ensure that five employees had, or had ready access to, each of those employees AWAs during the 7 day period beginning 7 days before the AWAs were approved, contravening s.337(1) and (8) of the *WR Act*; and

   d) failing to take reasonable steps to ensure that five employees were provided with an information statement at least seven days before each of those employees AWAs was approved, contravening s.337(2) and (9) of the *WR Act*.

5. The contraventions occurred from June to August 2006.

[2] There was an affidavit of Renae Louise Harding, a solicitor for the Respondent, handed up at the penalty hearing itself, but that affidavit went only to noting a judgment of this Court in *Lawlor v Dartbridge Pty Ltd & Anor* [2007] FMCA 2119 ("*Lawlor*")and the penalty outcome.

Assessment of penalty – general considerations

6. Based on a series of decided cases in the Federal Court and this Court[3] there does not appear to be a dispute about the relevant considerations for assessment of penalty, which are as follows:

   a) the circumstances of the conduct (including deliberate defiance or disregard of the *WR Act*);

   b) relevant record of civil penalty contraventions;

   c) whether the contraventions are distinct or arise from a single course of conduct;

   d) the consequences of the contravening conduct;

   e) deterrence, both general and specific;

   f) the objects of the *WR Act*;

   g) the size and financial resources of the contravener;

   h) co-operation with regulatory authorities;

   i) the contravener's contrition;

   j) the size of the prescribed penalty, and any recent increases to that prescription; and

   k) the totality principal.

Circumstances of the conduct

7. The fifteen employees concerned were in Australia on subclass 457 visas. As such their remaining in Australia was, at least in part,

[3] The cases include *Coal & Allied Operations Pty Ltd (No 2.)* [1999] FCA 1714 per Branson J at 7-8 ("*Coal & Allied Operations*"); *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140at para 49 per Lloyd-Jones FM ("*Pow Juice*"); *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at paras 19-22, 36-37, 50 and 59 per Mowbray FM ("*Harrington Corporation*"); *Carr v CEPU & Anor* [2007] FMCA 1526 at para 7 per Lucev FM ("*Carr*").

dependent upon their remaining on good terms with the Respondent, who was their sponsor for migration purposes.[4]

8. The Respondent was aware of the employees' vulnerability. Mr Hanssen, the director and secretary of the Respondent, acknowledged that the employees "would sign anything" because they "are frightened of … being sent back". [5] The Court has no difficulty in concluding that this was a vulnerable set of employees, that the Respondent, through its principal officer Mr Hanssen had knowledge of that, and that he exploited his perception of these employees as being malleable to the wishes of the Respondent.

9. The Respondent obtained detailed legal advice which correctly set out the Respondent's obligations with respect to the entering into and lodgement of AWAs with the Respondent's employees. The legal advice obtained was not followed by the Respondent, at least in relation to the contraventions.

10. The unapproved AWAs were lodged on 20 June 2006. They were purportedly dated by the employees on 21 June 2006. Mr Hanssen admitted asking the employees not to date the AWAs, and that that was done because he intended to date them.[6] Mr Hanssen did so because he was aware of the 7 day access requirement.[7] The Court finds that he did this deliberately in circumstances where he knew that the documents might not accurately reflect whether or not the employees had been afforded the requisite 7 day access period.

11. Mr Hanssen sought to justify the conduct on the basis that it was common practice in the building industry not to date various documents.[8] However much that might be the case in the building industry it cannot countenance such a practice in respect of statutory requirements, particularly where:

    a) the Respondent had taken specific legal advice about its obligations in the AWA approval process; and

[4] *Harrington Corporation* at para 59; *Flattery v The Italian Eatery trading as Zeffirelli's Pizza Restaurant* [2007] FMCA 9 at para 28 ("*Zeffirelli's Pizza Restaurant*").
[5] Applicant's affidavit at pages 318-319.
[6] Applicant's affidavit at page 307.
[7] Applicant's affidavit at page 307.
[8] Applicant's affidavit at page 308.

b) Mr Hanssen admitted that the Respondent "mucked around with the dates a bit" because it "thought we were breaching" the 7 day requirement. Moreover he regarded this as of little consequence.[9]

Relevant record of civil penalty contraventions

12. The Applicant asserted that the Court ought have regard to the fact that the Respondent had previously been found to have contravened:

    a) in 2004, a civil penalty provision of the *Industrial Relations Act 1979* (WA) concerning right of entry provisions; and

    b) in March 2000, the Building Trades Construction Award by failing to keep requisite pay records, failing to pay and failing to provide pay packet details to an employee.[10]

13. The Applicant concedes that the above contraventions were of a different character to the contraventions in this case.

14. The Respondent says that it has no prior history of any contraventions of the *WR Act*.

15. The issue is whether or not the Court ought to take account of non-*WR Act* civil penalty contraventions. The Court dealt with this matter in *Carr* where it said as follows:

> *"The applicant submitted that in setting penalty the Court ought to take account of non-BCII Act civil penalty contraventions, at least where they relate to the taking of industrial action. On that basis the breaches of the WR Act and the TP [Trade Practices] Act set out above were said to be relevant to setting penalty. That arguably common sense approach is not supported by the case law. Albeit part of a non-exhaustive list of factors when set out in Coal & Allied Operations, the consideration for penalty purposes of prior civil penalty breaches appears to be restricted to like contraventions of the Act which has been found to be breached.*[11]

[9] Applicant's affidavit at page 319.
[10] *Lee v Hanssen Pty Ltd* [2004] WAIRComm 10868; *WABLPPUW v Hanssen Pty Ltd* (unreported, Industrial Magistrates Court of Western Australia, Cicchini IM, 2 March 2000).
[11] *Coal & Allied Operations* at para 8(b) per Branson J; *Leighton Contractors & Anor v CFMEU & Ors* [2006] WASC 317 at para 67 per Le Miere J ("*Leighton Contractors*"); *Commonwealth Bank of Australia & Anor v Finance Sector Union* (2007) 157 FCR 329; [2007] FCAFC 18 at para 181 ("whether particular conduct under the Act calls for the imposition of a penalty"), and sub-para 181(b)

> *In Leighton Contractors the Supreme Court of Western Australia in fixing penalty for unlawful industrial action in contravention of s.38 of the BCII Act was referred to eight proceedings against the CFMEU over the previous six years. The Supreme Court said those contraventions were "of a different nature than the contraventions now being considered and did not involve contraventions of the [BCII] Act."*[12] *Having referred to the approach of the Federal Court in Coal & Allied Operations as the "correct approach" the Supreme Court said it "is not appropriate to consider all contraventions of any industrial legislation by any Branch of the first defendant [the CFMEU] anywhere in Australia" and that it "is inappropriate to take account of … contraventions of different legislation."*[13] *It therefore appears that the relevant civil penalty contraventions for present purposes are any prior contraventions of the BCII Act, of which there are none by either the CEPU or Mr Harkins. Therefore, any contravention by the CEPU of other laws concerning industrial action is not to be taken into account by the Court. The CEPU it is to be treated for present purposes as a first time contravener. Mr Harkins is a first time contravener."*[14]

16. For the same reasons, the Respondent here must be treated as a first time contravener.

Distinct or single course of conduct

17. In this case the Respondent consented to the making of declarations which in their terms admit several distinct contraventions, in respect of multiple employees, of ss.337 and 341 of the *WR Act*, and a single breach of s.342 of the *WR Act*.

18. Conduct arising from a course of conduct cannot be treated as a single breach (unless there is a single breach) for the purposes of s. 407 of the *WR Act*.[15] Each separate AWA is "a workplace agreement" for the purposes of ss.337 and 341. Nevertheless the Court may take account of the fact that the conduct does arise out of a single course of conduct,

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("whether the respondent has previously been found to have engaged in conduct in contravention of Part XA of the Act").

[12] *Leighton Contractors* at para 67 per Le Miere J.

[13] *Leighton Contractors* at para 67 per Le Miere J.

[14] *Carr* at para 22 per Lucev FM. The footnotes in the above quotation are the same footnotes as appeared in the original quotation, renumbered to accord with the numbering of the footnotes in this Judgment and with the full name of abbreviated case names inserted where appropriate.

[15] Compare section 719 of the *WR Act* which expressly provides for conduct arising from a course of conduct to be treated as a single breach.

if that is the case.[16] Where, as here, in relation to ss.337 and 341 of the *WR Act*, individual employees have been separately affected by like contraventions those contraventions are not to be treated as arising form a single course of conduct.[17] In those circumstances, the contravener is protected from a disproportionately harsh overall penalty by the totality principal.

Consequences of the contravening conduct

19. Because the declarations are admissions of each of the contraventions and the elements thereof the consequences of the contravening conduct must be that:

    a) the Respondent lodged and attempted to have registered AWAs which had not been approved by employees in accordance with the provisions of the *WR Act*;

    b) employees were not afforded the ready access to the AWAs to which they were entitled in the seven day access period prior to approval;

    c) employees were not provided with information statements concerning the AWAs within the required seven day period prior to approval; and

    d) one approved AWA was not lodged within the required time period after approval (it was lodged four days late).

20. There is no dispute that the consequences of the conduct in para. 19(d) above are not serious and it is a contravention at the very low end of the scale.

21. The consequences of the conduct in para. 19(a)-(c) above are however far more serious. They strike at:

    a) the essence of the scheme of the *WR Act* which provides for employees to be protected by having adequate time (or at least the

[16] *BHP Steele (AIS) Pty Ltd v CFMU* [2000] FCA 1908 at para 8; *TWU v Glynburn Contractors (Salisbury) Pty Ltd* (1991) 37 IR 313 at 314.
[17] *Jordan v Mornington Inn Pty Ltd* [2007] FCA 1384.

time prescribed by the *WR Act*) to consider their AWAs, and to consider the information statements in relation to their AWAs; and

b) the trust invested in employers by the Parliament when providing for greater self-regulation in the AWA approval process.

22. These consequences are therefore most serious. It is a matter of serious concern to the Court that the Respondent seemed to regard them as being of little consequence. Further, the Respondent endeavoured to argue that the scheme of self-regulation was an excuse for its conduct, because of the complexity of the terms of the *WR Act* in relation to AWA approvals. This however ignores the following facts:

a) that the Respondent received detailed legal advice concerning its obligations and the process for AWA approvals from its solicitors;

b) the conduct was not caused by the supposed complexity of the approval process for AWAs, but rather the deliberate conduct of the Respondent (particularly as to the dating of the AWAs by Mr Hanssen) based on a perception of the employees' malleability and alleged practices in the building industry.

23. The vulnerability of these particular employees only highlights the seriousness of the consequences of the contravening conduct.

Deterrence

24. In *Carr* the Court said this of deterrence:

> *"General and specific deterrence are significant considerations given that deterrence is a primary objective of imposing penalties.*[18] *It is necessary for deterrence to be both specific and general. Specific deterrence relates to the need to deter a contravener from further contravention of the BCII Act, whilst general deterrence refers to the need to deter others from contravening the BCII Act by showing the seriousness with which the Court considers the contraventions. The penalties must be meaningful and consistent with other considerations to be taken into account in determining an appropriate penalty.*[19] *In the light*

[18] *Leighton Contractors* at para 74 per Le Miere J.
[19] *ACCC v IPM Operations Maintenance Loy Yang Pty Ltd (No 2)* [2007] FCA 11 at para 66 per Young J.

> *of legislative changes in recent years, a "light handed approach" is no longer applicable to the imposition of civil penalties for breaches of industrial law.*[20] *The penalty imposed in Commonwealth Bank for breach of s.298K of the WR Act was reduced from $600,000 to $300,000 on appeal but a penalty of $150,000 for breach of a certified agreement was not reduced.* [21] *The reduction in the s.298K penalty was because the penalty was "manifestly excessive" having regard to previous penalties under s.298K of the WR Act.*[22] *There was however no disagreement in principle with the judgment in Commonwealth Bank, and in Commonwealth Bank Appeal Branson J noted this,*[23] *and went on to observe that it might be appropriate for penalties under s.298K of the WR Act to "rise appreciably".*[24] *This more heavy-handed approach applies particularly where breaches are "serious, wilful and ongoing".*[25] *This Court has previously adopted an approach to penalties in industrial law matters, albeit under the WR Act, reflecting the approach in Commonwealth Bank,*[26] *and it is appropriate to do so in this case, having regard to the fact that the contraventions were serious and wilful, but short rather than ongoing."*[27]

25. Recognising that *Carr* was a case in which the penalties were agreed, it is nevertheless the case that the approach to deterrence outlined in the preceding paragraph is apposite in this case, adapted to the *WR Act* context in which the penalties are to be determined.

26. In this case because of the deliberateness of the Respondent's conduct, and the seriousness of the consequences of the conduct in respect of all but the contravention of s.342 of the *WR Act*, it is appropriate that the penalty reflect a greater level of specific deterrence than might ordinarily be the case.

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[20] *Finance Sector Union v Commonwealth Bank of Australia* (2005) 224 ALR 467 at 487 per Merkel J; [2005] FCA 1847 at para 72 per Merkel J ("*Commonwealth Bank*").
[21] *Commonwealth Bank Appeal*.
[22] *Commonwealth Bank Appeal*, FCR at 364 per Branson J; FCAFC at para 191 per Branson J (with whom Spender J specifically agreed on this point: FCR at 333 and 334; FCAFC at paras 17 and 19).
[23] *Commonwealth Bank Appeal*, FCR at 364 per Branson J; FCAFC at para 191 per Branson J.
[24] *Commonwealth Bank Appeal*, FCR at 364 per Branson J; FCAFC at para 192 per Branson J.
[25] *Commonwealth Bank*, ALR at 487 per Merkel J; FCA at para 72 per Merkel J.
[26] *Harrington Corporation Pty Ltd* at para 22 per Mowbray FM; *Zeffirelli's Pizza* at para 16 per Mowbray FM.
[27] *Carr* at para 29 per Lucev FM.

Objects of the *WR Act*

27. Changes made to the *WR Act* by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)[28] established a mandatory self compliance regime for employers entering into AWAs with their employees, designed to enhance compliance with the *WR Act* and improve protection for employees.[29]

28. This Court has previously recognised the importance of employers complying with their obligations and being responsible for the conduct in the context of a more devolved and deregulated workplace relations environment.[30]

29. In this case the Respondent's contravening conduct is contrary to the objects of the *WR Act*, and did not reflect the Respondent's responsibility as an employer in a deregulated environment to conduct itself appropriately and comply with its statutory obligations. In assessing the seriousness of the Respondent's conduct, and what the level of penalty might be, the Court must have regard to the statutory purposes of the *WR Act*. One of the reasons why the conduct of the Respondent is serious is that if it were left unchecked, it might undermine some of the statutory objects and purposes of the *WR Act* which the Court has set out above.

Size and financial resources of the respondent

30. In setting penalties for both individuals and corporations it is an established principle that regard is had to financial position, and more particularly capacity to pay.[31]

31. There is no dispute that the Respondent is a largish Perth based construction company. There is no evidence of any inability to pay any penalty imposed, even at the level proposed by the Applicant.

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[28] "*Work Choices Act*".
[29] *WR Act* s.3(e) and (f) and Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) at pages 1-2.
[30] *Pow Juice* at para 63 per Lloyd-Jones FM.
[31] *ASC v Forem-Freeway Pty Ltd* (1999) 30 ASCR 339 at 351 per Madgwick J*; ACCC v ABB Transmission and Distribution Ltd (No 2)* [2002] FCA 559.

Co-operation with regulatory authorities

32. The Respondent has cooperated with the Workplace Ombudsman (previously the office of Workplace Services) in its investigation.

33. The Respondent also admitted the contraventions prior to the first directions hearing in the matter, thus further cooperating with the Workplace Ombudsman and saving considerable expenditure of resources by the Workplace Ombudsman and this Court.

34. Notwithstanding the Court's findings as to the nature and circumstances of the conduct by the Respondent it's cooperation with the regulatory authorities and early admission of the contraventions entitles it to a substantial penalty reduction.

Contrition

35. There is evidence of contrition by the Respondent in:

    a) it's cooperation with the regulatory authority;

    b) it's early admission of the contraventions; and

    c) the adoption of correct procedures with respect to the AWA approval process for subsequent AWAs entered into by employees.

36. There was an expression of contrition on behalf of the Respondent by Counsel for the Respondent at the penalty hearing. There was however no evidence on affidavit of the Respondent's contrition. That is significant because at the first directions hearing the Respondent's principal officer, Mr Hanssen, sought to make a statement directly to the Court. The Court denied him that opportunity on the basis that he had Counsel representing him at that time, and that it was not appropriate to do so at a first directions hearing at which the contraventions had been admitted and at which the Court was setting the matter down for a penalty hearing, which, significantly, included leave to the Respondent to file further affidavit evidence. In circumstances where no further affidavit evidence has been filed the evidence of contrition is limited as indicated above. Despite the limitations there is however reasonably significant evidence of

contrition, embodying some of the steps which the Federal Court has recently identified as indicia of contrition.[32]

37. The Respondent is therefore entitled to a substantial discount by reason of the available evidence of contrition, but not as much of a discount as it would have been entitled to had there been further direct evidence of contrition from the Respondent.

Size of the prescribed penalty

38. The maximum penalty for breaches of ss.337 and 342 is $16,500.00. The maximum penalty for a breach of s.341 is $33,000.00. The s.342 penalty is dealt with separately below.

39. Having regard to the cooperation with regulatory authorities, and the early admission of the contraventions, the Court considers that the Respondent is entitled to a penalty reduction in the range of 25-30% for the cooperation and early admission. In relation to the evidence of contrition, and recognising there is a significant overlap between that and the issues of cooperation and the early admission, the Court considers that a further penalty reduction of 25-30% is appropriate, but that penalty reduction must take account of the overlap. Therefore, considering these matters together, and taking account of the overlap, the Court considers that the Respondent is entitled to a penalty reduction of 40-50% for the combined elements of cooperation, early admission and contrition.

40. The Respondent is also entitled to a penalty reduction of 20-30% as a first time contravener.

41. The Court has found that the contraventions were deliberate, and exploited vulnerable employees, and in that regard, it is appropriate to note that whilst both the contraventions of ss.337 and 341 are serious, neither is in the worst category of cases which might come before this Court. In those circumstances, the Court considers that a further penalty reduction of 5-10% is appropriate.

[32] *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at para 16 per Gray J (*"Australian Ophthalmic Supplies"*).

42. In determining the final amount of penalty for the ss.337 and 341 contraventions the Court must take account, for the reasons expressed above, of the need for specific deterrence. Therefore, the penalty reductions will be at the lower end of the ranges of penalty indicated above.

43. The Court therefore concludes that the Respondent is entitled to a penalty reduction of 65% on the maximum penalty for each of the contraventions of ss.337 and 341 of the *WR Act*.

44. Subject to the application of the totality principal the penalty for each of the breaches of:

    a) s.337 will be $5,775.00, giving a total of $57,750.00 for the 10 separate contraventions of s.337; and

    b) s.341 will be $11,550.00, giving a total of $115,500.00 for the 10 separate contraventions of s.341 of the *WR Act.*

45. The contravention s.342 stands alone. It is common ground that it is not a particularly serious breach, being a late filing of an approved AWA, and then by only 4 days. The maximum penalty for this breach of s.342 of the *WR Act* is $16,500.00. In all of the circumstances the Court considers that a penalty of $750.00 is appropriate for this contravention.

46. The total of the penalties for the 21 contraventions admitted is therefore $174,000.00.

47. The Court has considered the judgment in *Lawlor*. Noting that the fines there were imposed on a director not a corporation, the judgment is not, because of its generality, particularly helpful, especially when regard is had to the manner and form of the argument in this case. In any event, penalty is not determined by precedents.

The totality principal

48. It is not disputed that the totality principal ought to be applied to penalty in this case.

49. The application of the totality principal has given rise to different approaches. This Court intends to follow the approach adopted by the majority of the judges in *Australian Ophthalmic Supplies*: that is to consider by an approach of instinctive synthesis whether or not the overall penalty is appropriate.[33]

50. In the circumstances of this case, albeit that the ss.337 and 341 penalties are serious, it is nevertheless the case that this is a first time contravener (for present purposes) and the cases do not fall within the most serious category of cases. A fine of $173,250.00 is a substantial fine, but there are 20 admitted contraventions of ss.337 and 341. In the circumstances, the Court considers $173,250.00 an appropriate penalty.

51. There is no reason to adjust the penalty of $750.00 for the s.342 contravention.

52. There will be orders for payment of the penalties indicated above, to Consolidated Revenue, with 28 days to pay.

I certify that the preceding fifty-two (52) paragraphs are a true copy of the reasons for judgment of Lucev FM

Associate: Rachel Peattie

Date: 11 March 2008

[33] *Australian Ophthalmic Supplies* at paras. 27-28 per Gray J and para. 78 per Graham J