FEDERAL COURT OF AUSTRALIA

Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70

APPEAL – sentence – totality principle – whether appellable error in exercise of judicial discretion – approach taken by primary judge legitimately available – no error demonstrated

INDUSTRIAL LAW – whether multiple contraventions amounted to a single course of conduct – whether totality principle should reduce aggregate sentence

PRACTICE AND PROCEDURE – sentencing principles – discount for plea of guilty not available only because it saves the cost of a contested hearing – need to show a willingness to facilitate the course of justice and/or acceptance of wrongdoing

WORDS AND PHRASES – '*Course of conduct*'

Crimes Act 1914 (Cth) s 4K
Evidence Act 1995 (Cth) s 191
Trade Practices Act 1974 (Cth) s 79(2)
Workplace Relations Act 1996 (Cth) ss 400(5), 792, 824

Jordan v Mornington Inn Pty Ltd [2007] FCA 1384; 166 IR 33, upheld

Alfred v Walter Construction Group Limited [2005] FCA 497
Attorney-General v (SA) Tichy (1982) 30 SASR 84
Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36
Australian Competition and Consumer Commission v Chubb Security Australia Pty Ltd [2004] ATPR 42-041, [2004] FCA 1750
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Cameron v R (2002) 209 CLR 339
Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority (1993) 32 NSWLR 683
Carr v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2005] FCA 1802
Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission (2000) 203 CLR 194
Dinsdale v R (2000) 202 CLR 321
Hamberger v Construction Forestry Mining and Energy Union [2002] FCA 585
House v R (1936) 55 CLR 499
Johnson v R (2004) 78 ALJR 616
L Vogel & Son Pty Ltd v Anderson (1968) 120 CLR 157
Markarian v R (2005) 228 CLR 357
McDonald v R (1994) 48 FCR 555
Mill v R (1988) 166 CLR 59
Pearce v R (1998) 194 CLR 610
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543

R v Holder [1983] 3 NSWLR 245
R v Sgroi (1989) 40 A Crim R 197
Trade Practices Commission v TNT Australia Pty Limited [1995] ATPR 41-375

MORNINGTON INN PTY LTD v GLENN JORDAN
TAD 34 OF 2007

GYLES, STONE AND BUCHANAN JJ
7 MAY 2008
SYDNEY (VIA VIDEO LINK TO HOBART) (HEARD IN HOBART)

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

TASMANIA DISTRICT REGISTRY **TAD 34 OF 2007**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**MORNINGTON INN PTY LTD (ACN 116 830 703)** **Appellant**
AND:	**GLENN JORDAN (A WORKPLACE INSPECTOR)** **Respondent**

JUDGE:	**GYLES, STONE AND BUCHANAN JJ**
DATE OF ORDER:	**7 MAY 2008**
WHERE MADE:	**SYDNEY (VIA VIDEO LINK TO HOBART) (HEARD IN HOBART)**

THE COURT ORDERS THAT:

The appeal be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY **TAD 34 OF 2007**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**MORNINGTON INN PTY LTD (ACN 116 830 703)** **Appellant**
AND:	**GLENN JORDAN (A WORKPLACE INSPECTOR)** **Respondent**

JUDGE:	**GYLES, STONE AND BUCHANAN JJ**
DATE:	**7 MAY 2008**
PLACE:	**SYDNEY (VIA VIDEO LINK TO HOBART) (HEARD IN HOBART)**

REASONS FOR JUDGMENT

GYLES J

1 This is an appeal against the imposition of penalties for admitted breaches of s 400(5) and s 792 of the *Workplace Relations Act 1966* (Cth) (the Act) based upon an agreed statement of facts. Those facts are summarised in the judgment below (*Jordan v Mornington Inn Proprietary Limited* (2007) 166 IR 33, [2007] FCA 1384 at [5]–[87]) and need not be repeated in full. I would join Stone and Buchanan JJ in dismissing the appeal against the penalties imposed were it not for one issue – the failure of the trial judge to apply the totality principle, firstly, to the contraventions in relation to Sharon Ann Thompson and, secondly, overall, leading to a result that is manifestly excessive.

2 The events occurred in relation to a hotel motel with associated gaming facilities in Mornington, an Eastern Shore suburb of Hobart, conducted by the appellant company, which also operated another five hotels. It took over ownership and control of the hotel in November 2005. The appellant was controlled by Emmanuel Kalis. The hotel had approximately 39 employees. In early 2006 the decision was taken to employ casual staff on Australian Workplace Agreements (AWAs). The contravening conduct was aimed at implementing that decision.

3 A brief chronology of events for present purposes is as follows:

3 July 2006	An AWA distributed to all casual employees with a request to sign and return it by 5.00 pm Monday 10 July 2006.
10 July 2006	John Barry commenced employment as Hotel Manager.
On or about 10 July 2006	Contravening conduct by Barry towards Sharon Ann Thompson.
11 or 12 July 2006	Contravening conduct by Barry towards Thompson.
Week commencing 10 July 2006	Contravening conduct by Barry towards Thompson.
14 July 2006	Contravening conduct by Barry towards Alice Louise Bruce.
14 July 2006	Contravening conduct by Barry towards Debby Maree Hyland.
Week beginning 17 July 2006	Contravening conduct by Barry towards Thompson.
Week beginning 17 July 2006	Contravening conduct by Barry towards Karen Mary Lucas.
21 July 2006	Contravening conduct by Barry towards Thompson.
24 and 25 July 2006	Contravening conduct by Barry towards Thompson.
July 2006	Contravening conduct by Barry towards Fabian Di Domenico.

4 The conduct of Barry in relation to Thompson, Bruce, Hyland and Lucas on behalf of the appellant, contravened both s 400(5) and s 792 of the Act. Each was held to be a separate contravention, even if it could be described as part of, or arising out of, the same course of conduct. The conduct in relation to Di Domenico contravened s 792.

5 In *Mill v R* (1988) 166 CLR 59 the High Court said (at 62–63):

> *'The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas,* Principles of Sentencing, *2nd ed. (1979), pp. 56-57 as follows (omitting references):*
>
> > *"The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong['']; 'when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."*
>
> *See also Ruby,* Sentencing, *3rd ed. (1987), pp. 38–41. Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred.'*

(See also *R v Holder* [1983] 3 NSWLR 245 per Street CJ at 260 and *McDonald v R* (1994) 48 FCR 555.) Another, related, principle is that it is wrong to punish an offender twice for the commission of elements of offences that are common (*Pearce v R* (1998) 194 CLR 610 at [40] per McHugh, Hayne and Callinan JJ). The *Pearce* principle was accommodated here as penalties were imposed for only the most serious of the two offences arising out of the same facts where both were applicable (*Jordan* 166 IR 33, [2007] FCA 1384 at [92], [93] and [119]). These principles were discussed in *Johnson v R* (2004) 205 ALR 346; 78 ALJR 616 per Gleeson CJ at [3]–[5] and per Gummow, Callinan and Heydon JJ at [18]–[35]. They were developed in relation to sentencing to imprisonment, with particular reference to concurrence of sentences. Nonetheless, the principle of totality was held to be applicable where the penalty imposed is by way of fine (*R v Sgroi* (1989) 40 A Crim R 197 at 203; cf

Kirby P in *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 704).

6 *L Vogel & Son Pty Ltd v Anderson* (1968) 120 CLR 157 concerned the imposition of pecuniary penalties pursuant to the *Customs Act 1901–1960* (Cth). The trial judge (Kitto J) held that each step in importation was a separate and distinct piece of conduct, each being a contravention. The Full Court approved that reasoning, adding (120 CLR at 168):

> '*… we agree that, in determining the appropriate penalties to be imposed in respect of the numerous offences, it was material to take into consideration—as his Honour did—that, though the offences in each group were separate offences in law, they were substantially contemporaneous and connected.*'

7 Burchett J expressly applied that approach to the imposition of civil penalties in *Trade Practices Commission v TNT Australia Pty Limited* [1995] ATPR 41-375 at 40,169 as did Goldberg J in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 53. The principle has been applied since then in civil penalty cases too numerous to mention. Jessup J recently applied the principle in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [145]–[147]; see also Lander J at [94]. The most recent consideration of this principle in the Full Court was in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 per Gray J at [18]–[25] and [27], Graham J at [66]–[78] and Buchanan J at [94]–[103].

8 Variations on the principle find their way into some statutes in different forms, eg, s 719(2) of the Act; *Trade Practices Act 1976* (Cth), s 79(2); *Crimes Act 1914* (Cth), s 4K.

9 A sentencing judge must give effect to the totality principle where applicable – it is not discretionary. To fail to do so is an appealable error (*Johnson* 205 ALR 346 per Gummow, Callinan and Heydon JJ at [35], agreed with by Gleeson CJ at [1] and Kirby J at [38]).

10 Should the Thompson contraventions have been grouped for application of the totality principle? In speaking of the facts relating to Thompson, in the course of final submissions at the trial, counsel for the then applicant (the respondent here) said:

> '*Now, that is separate contraventions. Same pattern of conduct and totality principle will apply to this, but these are separate contraventions in my submission.*'

Counsel then referred to the decision of Finkelstein J in *Carr v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2005] FCA 1802 in which the totality principle was applied to separate contraventions. Counsel had referred to that case and others in his written submissions as to the totality principle.

11 At the conclusion of final submissions the judge directed that each party file a statement of the range of suggested penalties. Counsel for the then applicant suggested $11,000–$16,500 in respect of each of the Thompson contraventions but, applying the totality principle to those contraventions (and including a 10% discount), he suggested reducing the range from $59,400–$89,100, on the one hand, to $40,000–$60,000 on the other. Counsel explained that the range was to enable the judge to give effect to his views as to the issue of corporate responsibility for the actions of Barry. Counsel for the then respondent (the appellant here) submitted, in respect of Thompson, one breach with six particulars of conduct constituting the breach with a range of $20,000–$25,000.

12 In the event, the judge imposed a penalty of $17,000 net of discount in respect of each contravention, including each of the six Thompson contraventions. That was a total of $102,000 for the Thompson contraventions – well above the range indicated by counsel. His Honour said (166 IR 33, [2007] FCA 1384 at [124]):

> '*I have not drawn any distinction between the different contraventions, other than the Thompson ones where the result flows from the fact that there were six separate contraventions. While there were different features of the conduct in each contravention, and some conduct may have affected some employees more than others, by far the most significant aspect is that they were all committed as part of a deliberate policy.*'

13 His Honour had said earlier (166 IR 33, [2007] FCA 1384 at [90]–[91]):

> '*In the case of Ms Thompson, the agreed facts disclose six separate occasions when duress was applied and when, at the same time, there was injury in employment. The question arises whether as the respondent argues, there was, in respect of each statutory provision, only one contravention constituted by a course of conduct or whether there were six separate contraventions.*

> *In my opinion, the latter is the correct characterisation. The statutory provisions are not directed to a continuing state of affairs, but rather conduct which answers a particular description. If there are episodes of conduct distinct in time or place, albeit related and engaged in with the same purpose, there will be separate contraventions. To take an example discussed in argument, if an employer on each morning of a week threatened to assault an employee if he did not sign an AWA, there would be a contravention on each day. The evidence in relation to Ms Thompson is in essence no different: cf* Carr v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union *[2005] FCA 1802 at [12] and [16]. However, before penalties are finally fixed in respect of all contraventions, and not just those concerning Ms Thompson, I must look at the totality of all the unlawful conduct:* Mill v The Queen *(1988) 166 CLR 59 at 63,* Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 2) *(2005) 215 ALR 281 at [14].'*

14 At that point his Honour correctly distinguished between the question as to whether there were separate contraventions and the different question as to the application of the totality principle. The later reference to the totality principle by his Honour was in the following context (166 IR 33, [2007] FCA 1384 at [124]–[125]):

> *'The present contraventions are somewhere between a half ($15,000) and two-thirds ($20,000) of the way along the spectrum of seriousness, that is to say $17,500. After the rounding down mentioned I would impose a penalty of $17,000 in respect of each contravention. I have not drawn any distinction between the different contraventions, other than the Thompson ones where the result flows from the fact that there were six separate contraventions. While there were different features of the conduct in each contravention, and some conduct may have affected some employees more than others, by far the most significant aspect is that they were all committed as part of a deliberate policy.*
>
> *I apply the totality principle by looking at the ultimate result, $170,000. The totality principle does not necessarily require a discount. I do not think any is called for in the present case. The conduct of the respondent was deliberate and reprehensible and caused great distress to innocent employees. Financial loss (before the compensation orders I have made) was in one case almost $4,000. That is a lot of money for someone on $17 per hour.'*

15 It is clear that, in the result, the judge did not apply the totality principle to the Thompson contraventions. There was no explanation as to why that was so. That is surprising in view of the contrary approach of the then applicant. In my respectful opinion, application of the principle was required by the circumstances of the case. The six contraventions were plainly part of the same course of conduct and took place within a

relatively short space of time, all with the same modus operandi and objective. The gist of each was the reduction or elimination of the availability of casual work if the AWA was not signed. The objective was the same as that in relation to each of the other employees. The circumstances relating to Thompson were more serious than those in relation to the other employees because of the persistence involved in the face of her refusal to yield and some extra aggression, but were not different in kind. In my respectful opinion, his Honour was required to separately consider the Thompson contraventions and apply the totality principle to them. Counsel for the applicant below did no more than recognise the reality of the situation when he conceded that the totality principle would apply to them because the same pattern of conduct was involved.

16 What was said by the trial judge about applying the totality principle to the ultimate overall result does not cure the problem. There were common features of the Thompson contraventions that did not apply to the other contraventions – most obviously the person subject to the conduct. It is arguable that there were sufficient common features between all contraventions to justify application of the totality principle to the overall result, but only after the Thompson contraventions had been appropriately assessed. Moreover, the trial judge made no allowance for the totality principle in the overall result.

17 It follows that his Honour erred in not separately considering the Thompson contraventions. The error concerned a significant proportion of the total penalty. The appeal should succeed in that respect. The question arises as to whether the matter should be remitted to his Honour to reconsider penalties for those contraventions. That has not been suggested by the parties and would lead to further delay and cost. The penalty is based upon an agreed set of facts and his Honour's reasons give a good account of his overall views. This Court should consider the appropriate penalty.

18 Counsel for the appellant submits that the totality principle should be applied on the basis that, once contraventions are grouped, then the penalty should not exceed the maximum penalty for one contravention, although the combination of contraventions would inevitably increase the seriousness with which the conduct would be viewed and, so, push up the penalty further towards the maximum. Counsel was not able to cite any authority in direct support of that proposition. The fact that some statutes make that provision is of no

assistance where there is no such provision applicable, as in the present case. This submission is directly contrary to the result in *Carr* [2005] FCA 1802 and was not accepted by Bennett J in *Australian Competition and Consumer Commission v Chubb Security Australia Pty Ltd* [2004] ATPR 42-041, [2004] FCA 1750 at [143]. I reject the submission. That is not to deny that the maximum penalty may provide a useful yardstick.

19 I accept, as a starting point, the trial judge's assessment of $17,000 for each contravention, leaving the Thompson contraventions aside, although severe, and more than suggested by counsel for the applicant below. I regard the total effect of the Thompson contraventions as being twice as serious as those in relation to each of the other employees. I would therefore allow the appeal, and set aside the penalty in relation to Thompson. That would result in overall penalties for the Thompson contraventions in an amount of $34,000 appropriately apportioned. The effect would be to reduce the total of all penalties by $68,000 to $102,000.

20 It is submitted on behalf of the appellant that the contraventions in respect of the various employees were all part of one multifaceted course of conduct so as to call for application of the totality principle to the overall result. I agree. They were each instances of the working out of a single policy decision in relation to one quite small workplace. The conduct was similar in each case, with the same objective. It took place within a short period of time. It was connected. The trial judge recognised that the totality principle should be applied, but did not reduce the penalties at all on that account. That was an error in principle. There were sufficient common features and a sufficient connection to require an allowance to be made on that account. Again, this Court should assess the correct result rather than remit the issue.

21 The amount of $102,000 is approximately three times the maximum penalty for any one contravention. In my opinion, that overestimates the overall gravity of the conduct. In my view, a total penalty of $66,000, being twice the maximum, would be appropriate, apportioned as to $11,000 in relation to each employee apart from Thompson and $22,000 in relation to the Thompson contraventions, appropriately apportioned between them.

I certify that the preceding twenty-one (21) numbered paragraphs are a

true copy of the Reasons for Judgment herein of the Honourable Justice Gyles.

Associate:

Dated: 7 May 2008

IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY **TAD 34 OF 2007**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**MORNINGTON INN PTY LTD** **Appellant**
AND:	**GLENN JORDAN** **Respondent**

JUDGES:	**GYLES, STONE AND BUCHANAN JJ**
DATE:	**7 MAY 2008**
PLACE:	**SYDNEY (VIA VIDEO LINK TO HOBART) (HEARD IN HOBART)**

REASONS FOR JUDGMENT

STONE AND BUCHANAN JJ:

22 This appeal challenges the level of penalties imposed for admitted breaches of the *Workplace Relations Act 1996* (Cth) ('the Act') when the appellant applied duress to four employees to sign Australian Workplace Agreements ('AWAs') and altered the position of those four employees, and another, to their prejudice for the prohibited reason that they were entitled to the benefit of the Australian Fair Pay and Conditions Standard established pursuant to the Act (*Jordan v Mornington Inn Pty Ltd* [2007] FCA 1384; 166 IR 33).

Background

23 The appellant operated a hotel known as the Mornington Inn Hotel Motel ('the hotel') in Tasmania. The licensee was Emmanuel Kalis. The appellant took over the ownership and control of the hotel in November 2005 and Mr Kalis took over the hotel licence at the same time. At the time the offences occurred it employed, amongst others, Ms Alice Bruce, Ms Debby Hyland, Ms Sharon Thompson, Ms Karen Lucas and Mr Fabian Di Domenico. The appellant was bound by the Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1995 ('the award') which applied to the employment of those five employees.

24 Counsel for the appellant told the primary judge during the proceedings at first

instance that there were six or seven hotels in the 'Kalis Group' the first of which was purchased in 2000. Counsel for the appellant also told the primary judge that from the time the Mornington Inn was purchased in November 2005 until about February 2006 the manager of that hotel was Mr John Barry.

25 At another of the hotels in the Kalis Group, the Black Buffalo Hotel, staff were employed on AWAs. In early 2006 the appellant decided that it wanted to employ the casual staff at the hotel on AWAs. The appellant, it was agreed at first instance, wanted to 'do away with the penalty rates under the Award and move to a flat hourly rate of pay'. On 3 July 2006 each of the employees earlier mentioned was sent a letter signed by Mr Kalis attaching an AWA for signature together with an information statement. The letter read:

> *'Please find attached an AWA and Information Statement for employees for the Mornington Inn.*
>
> *Would you please read all information and sign the AWA and return it to the hotel by 5pm on Monday 10th July 2006.'*

26 The AWAs proposed excluded the operation of the Award generally. They also specifically: excluded penalty rates and allowances provisions in the Award; provided that ordinary hours might be worked on any day of the week, Monday to Sunday inclusive; excluded meal and rest break provisions contained in the Award; excluded public holiday provisions contained in the Award; and excluded a number of allowances provided for in the Award.

27 Mr Barry returned as manager of the hotel on 10 July 2006 having previously been employed at the Black Buffalo Hotel. He was given the full responsibility for running the hotel. He set about giving effect to the desire of the appellant, and the initiative of Mr Kalis, to introduce AWAs at the hotel.

The proceedings at first instance

28 The proceedings which led to the imposition of the penalties under challenge in the present appeal were commenced on 31 October 2006. They were, in due course, fixed for a four day trial commencing on 27 August 2007. In mid-August 2007, after affidavit evidence was filed and served on the appellant by the respondent, after the case was pleaded by both

parties and about two weeks before the trial was to commence, the primary judge was informed that appellant proposed to admit liability. That occurred about nine-and-a-half months after the proceedings had been commenced.

29 In the intervening period, amongst other things, the appellant, on 29 May 2007, filed a Defence to an Amended Statement of Claim. In that Defence the appellant denied that Mr Barry acted within his actual or apparent authority, did not admit that it was vicariously liable for his conduct (amongst others), denied that the AWA offered to employees was less favourable than the Award, denied that the hourly rate of pay was lower in the AWA than in the Award, denied that AWA earnings were less than award earnings for hours normally worked by employees, denied that duress was applied, denied any breach of s 400(5) of the Act, denied that the position of the employees identified earlier had been altered to their prejudice, denied any breach of s 792 of the Act and denied that the employees mentioned earlier had lost earnings as a result of their position being altered to their prejudice.

30 By contrast, in an Agreed Statement of Facts which was put before the primary Judge, having been signed by solicitors for both parties, the appellant admitted each of the allegations set out above.

31 The allegations made in the Amended Statement of Claim which were, in due course, admitted were that the appellant had breached s 400(5) of the Act in relation to Ms Bruce, Ms Hyland, Ms Thompson and Ms Lucas and had breached s 792 of the Act in relation to those four employees and Mr Di Domenico. In the case of Ms Thompson only, six contraventions of each statutory provision were alleged. They concerned events occurring on a number of occasions whereas, in the case of the other employees, the offences alleged concerned Mr Barry's conduct on one occasion only with respect to each employee. The consequence of the way in which the offences were identified was that there were 19 offences charged (one each concerning Ms Bruce, Ms Hyland and Ms Lucas under s 400(5)), one each concerning Ms Bruce, Ms Hyland and Ms Lucas under s 792, six concerning Ms Thompson under s 400(5), six concerning Ms Thompson under s 792 and one concerning Mr Di Domenico under s 792).

32 At the hearing before the primary judge it was agreed that, where it was alleged that

the same conduct represented a breach of both s 400(5) and s 792, a penalty should only be imposed for the breach of s 400(5). The result of this agreement was that although appropriate declarations were made by consent with respect to each of the 19 offences alleged (i.e. under both s 400(5) and s 792) penalties were only imposed in respect of the breaches of s 400(5) (Ms Bruce, Ms Hyland, Ms Lucas and six offences concerning Ms Thompson) and in addition, a penalty was imposed with respect to the breach of s 792 concerning Mr Di Domenico. Accordingly, ten penalties were imposed. Each was set at $17,000. The total penalty was $170,000.

33 The primary judge's findings, which were based upon the Agreed Statement of Facts, concerning the treatment given to the individual employees are set out from [22] to [84] of his Honour's judgment. It is not necessary to repeat the detail here. Obviously enough, in the circumstances, there was not, and could not be, any challenge to those findings. The primary judge also made findings, again based on the Agreed Statement of Facts, concerning the conduct of Mr Barry and other management staff at the hotel ([85] – [87]). The primary judge concluded that in Ms Thompson's case the Agreed Statement of Facts disclosed six separate offences, as admitted by the appellant. He accepted that:

> *'Before penalties are finally fixed in respect of all contraventions, and not just those concerning Ms Thompson, I must look at the totality of all the unlawful conduct:* Mill v The Queen *(1988) 166 CLR 59 at 63*, Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 2) *(2005) 215 ALR 281 at [14].'*

34 When he came to state his conclusions as to the penalties to be imposed, after discussing some particular matters bearing upon the fixation of penalties to which it will be necessary to return, the primary judge stated that he *'would impose a penalty of $17,000 in respect of each contravention'*. His Honour then made the following important statement:

> *'I have not drawn any distinction between the different contraventions, other than the Thompson ones where the result flows from the fact that there were six separate contraventions. While there were different features of the conduct in each contravention, and some conduct may have affected some employees more than others, by far the most significant aspect is that they were all committed as part of a deliberate policy.'*

The significance of this passage is twofold. First, his Honour declined to treat the

contraventions concerning Ms Thompson as involving any overlapping conduct which would justify a reduction in penalty for those offences. Secondly, his Honour took the view that the same penalty was called for in the case of each of the ten admitted contraventions notwithstanding different features of the offending conduct with respect to different employees. His Honour clearly regarded it as of most significance that all the offences flowed from the pursuit of a deliberate policy.

35 Finally, his Honour checked the ultimate result, $170,000 by reference to the totality principle but concluded that no reduction was required in the circumstances of the case.

The appeal

36 It is accepted by the appellant that in order to succeed in any respect on its appeal it must show that the exercise of the primary judge's judicial discretion miscarried in one of the ways referred to in *House v R* (1936) 55 CLR 499 at 504-5.

37 The appellant relied upon, and pursued, nine grounds of appeal, as follows:

> *'1. That the Learned Trial Judge erred in fact and in law in that he held that, in respect of imposition of penalty for the Thompson breaches, there were six separate contraventions of section 400(5) of the Workplace Relations Act 1996 (Cth) and imposed penalty accordingly;*
>
> *2. The Learned Trial Judge erred in fact and in law in holding that there was insufficient evidence before him to determine whether or not there was sufficient financial hardship to mitigate what would otherwise be an appropriate penalty;*
>
> *3. That the Learned Trial Judge erred in fact and in law in only reducing the penalty which he imposed by 10% for the plea of guilty;*
>
> *4. That the Learned Trial Judge erred in fact and in law in holding that the submission that there should be a further discount in respect of the plea of guilty for the giving up of the possibility of a defence amounted to aggravation;*
>
> *5. That the Learned Trial Judge erred in fact and in law in holding that the argument advanced by the Appellant about its liability for Mr Barry's conduct highlighted a lack of contrition or remorse on the part of the Appellant;*
>
> *6. That the Learned Trial Judge erred in fact and in law in holding that the starting point for the imposition of penalty was the statutory*

maximum;

7. That the Learned Trial Judge erred in fact and in law in adopting a mathematical approach to the imposition of penalty on the Appellant;

8. That the Learned Trial Judge erred in fact and in law in failing to apply the totality principle whereby the learned trial Judge failed to reduce what he regarded as an appropriate penalty having regard to the totality principle;

9. The penalty of $170,000 imposed by the learned trial Judge on the Appellant for the 10 contraventions of the Workplace Relations Act 1966 (Cth) was manifestly excessive in all the circumstances.'

38 There is some overlap between the grounds and some, particularly later grounds, arose in the alternative in the event that earlier challenges were not successful.

Ground 1 - *That the Learned Trial Judge erred in fact and in law in that he held that, in respect of imposition of penalty for the Thompson breaches, there were six separate contraventions of section 400(5) of the Workplace Relations Act 1996 (Cth) and imposed penalty accordingly.*

39 The primary judge decided that he should treat the admitted offences concerning Ms Thompson as separate contraventions each justifying a penalty the same as the penalty to be imposed for contraventions concerning other employees. The primary judge decided that they should not be treated as 'a course of conduct'. He explained why that was so as follows (at [90]-[91]):

'90 In the case of Ms Thompson, the agreed facts disclose six separate occasions when duress was applied and when, at the same time, there was injury in employment. The question arises whether as the respondent argues, there was, in respect of each statutory provision, only one contravention constituted by a course of conduct or whether there were six separate contraventions.

91 In my opinion, the latter is the correct characterisation. The statutory provisions are not directed to a continuing state of affairs, but rather conduct which answers a particular description. If there are episodes of conduct distinct in time or place, albeit related and engaged in with the same purpose, there will be separate contraventions. …'

40 The agreed facts concerning Ms Thompson are as follows:

'48 On 3 July 2006, the respondent handed to Ms Thompson the Letter signed by EK, the AWA and the OEA Information Statement.

49 At this time, Ms Thompson had been working at the Hotel since February 2005, as a cleaner initially, and had in recent times started to do some shifts as a Bar and Gaming Attendant. She had been working between 30 and 35 hours per week, including regular evening shifts and weekend work. She did cleaning shifts on Saturdays and Sundays which, with penalty rates, made up most of her weekly pay. She was working shifts in the Bar and Gaming area, usually two evening shifts and had recently been rostered Sunday shifts. She was getting penalty rates for the evening shifts and the weekend shifts.

50 In accordance with the preserved APCS, Ms Thompson was paid an hourly rate of $17.31 for all hours she worked being a flat rate which included $12.982 in respect of the basic periodic rate of pay and the 25% casual loading. On top of this flat rate, Ms Thompson was receiving penalty rates for working evening, Saturday and Sunday shifts in accordance with her entitlement under the Award.

51 Ms Thompson saw that under the AWA she was to get a fixed hourly rate of $17.50 with no penalties. She did not want to sign the AWA because she knew it would mean less money for her given the wages she was used to earning from working her usual hours and the casual loading and penalty rates that applied. Given the nature of the work performed by Ms Thompson after she signed the AWA, she would have been entitled, in accordance with the preserved APCS, to be paid an hourly rate of $17.91 for all hours she worked, being a flat rate which included $13.432 in respect of the basic periodic rate of pay and the 25% casual loading.

52 ***In the week commencing 10 July 2006, JB told Ms Thompson that people who sign the AWA would get work and those that do not, will not get work.*** *He said that those who do not sign the AWA would get their hours cut.*

53 ***A day or so later, JB approached Ms Thompson again*** *to ask her whether she had signed the AWA. Ms Thompson told JB that she had not and that she was still thinking about it and that she wanted to speak with senior management to discuss some of her concerns. Ms Thompson states that, in response, JB became quite aggressive and forceful and repeated that if she did not sign the AWA, she would lose hours.* ***JB again said that those employees who did not sign the AWA would not get work****.*

54 ***Later in the week beginning 10 July 2006, Ms Thompson again approached JB*** *to ask him about her hours and what would happen if she did sign the AWA. Ms Thompson asked JB what hours she would get if she signed the AWA and how many hours she would lose if she*

did not sign the AWA.

55 *JB would not give her a direct answer to her questions. JB just kept saying that those who signed would get more hours. As she did not understand how this would work, Ms Thompson questions JB further. In response,* ***JB became angry and repeated that those who signed would get more hours and those who did not would lose their hours.***

56 ***Mr Thompson was upset and in tears*** *and thought about leaving the Hotel. She felt bullied and threatened. Ms Thompson states that after this conversation, JB came up to her and said that it is the same for everybody and then he just walked away. After this, Ms Thompson tried to stay out of JB's way and continued to work her cleaning shift.*

57 ***In the week beginning 17 July 2006, JB approached Ms Thompson again*** *to see whether she had signed the AWA. Ms Thompson was working on a cleaning shift with another employee, Karen Lucas. Ms Thompson said no, she had not signed the AWA.* ***JB got very angry and shouted at both Ms Thompson and Ms Lucas saying that if they did not sign the AWA they would not be getting any work****.*

58 *Later that week, Ms Thompson went to see MJ and complained about JB's behaviour. Ms Thompson told MJ that JB was very forceful and that he had told her that she would lose work if she did not sign the AWA. Ms Thompson said that she felt that JB was bullying and threatening her. MJ said that JB should not have done this. MJ seemed cross at hearing this. Ms Thompson expressed concern about losing lots of money by losing weekend work if she did not sign the AWA. MJ said that she did not have to sign the AWA if she did not want to, but that if she did not sign the AWA, MJ could not guarantee that she would not lose work.*

59 *MJ also suggested to Ms Thompson that she talk with CS (the Hotel Manager at the Black Buffalo Hotel) who may be able to get work for her at the Black Buffalo Hotel. Soon after the meeting with MJ, Ms Thompson met with CS. During this meeting CS suggested that both Ms Thompson and Ms Lucas meet with JB to sort out their issues.*

60 *Ms Thompson left that meeting under the clear impression that if she did not sign the AWA she would lose shifts.*

61 ***Late in the week commencing 17 July (i.e. around 20 July), Ms Thompson again approached JB and said she was still unsure about signing the AWA. She was in tears during this conversation. JB said it was up to her as to whether or not she signed the AWA.***

62 ***On Friday 21 July 2006, JB called Ms Thompson and told her not to come into work on the weekend to do a cleaning shift as rostered as***

this shift had been taken away from her. *JB said that he had contractors organised to come in and do the cleaning on the weekend.*

63 *JB knew that Ms Thompson needed the money she earned for working the cleaning shifts on the weekend.*

64 *On Monday 24 July 2006, Ms Thompson came to work to do a cleaning shift. She noted that her roster for this week had been changed. During the previous week, she noted that in the roster for the week beginning 24 July 2006, she was rostered for evening shifts in the Bar and Gaming area on Monday, Tuesday and Wednesday of that week. Ms Thompson noted on 24 July 2006 that the roster had been changed to remove her from the Monday and Wednesday bar shifts.*

65 *JB changed the roster to remove the shifts from Ms Thompson because she had not signed the AWA.*

66 ***On 25 July 2006 Ms Thompson met with JB*** *and asked him whether he was willing to have a meeting with her, CS and Ms Lucas. JB agreed and the meeting was held that afternoon. JB told Ms Thompson to bring back the AWA signed or unsigned.*

67 ***At the meeting, JB said that if Ms Thompson had decided not to sign the AWA, then she could not expect to work weekend and evening shifts.***

68 *On 26 July 2006, feeling that she had no real alternative at that stage, Ms Thompson signed the AWA. Ms Thompson had already lost shifts and was concerned that if she did not sign the AWA, she would lose more shifts. …*

69 *A declaration receipt was issued by the OEA on 7 August 2006.*

70 *By his conduct, JB deliberately placed illegitimate pressure on Ms Thompson to sign the AWA. JB knew that Ms Thompson would quickly feel the financial impact of reduced shifts. JB knew that Ms Thompson would feel that she had no practical choice but to sign the AWA if she wanted to maintain her employment with the respondent without an immediate and significant reduction in earnings through less shifts.*

71 *Before JB's conduct, Ms Thompson had a reasonable expectation of continuing to work her normal hours and receive her entitlements under the Award and the preserved APCS. By his conduct, JB removed that expectation when he placed Ms Thompson in a position where she had to choose between signing the AWA (and earning a lower hourly rate) or not signing the AWA (and having her hours cut back). This injured Ms Thompson in her employment and prejudicially altered her position in employment. The reason JB engaged in this conduct was because Ms Thompson was entitled to the benefit of the*

Award and the preserved APCS.

72 As a result of this conduct, Ms Thompson lost shifts while she had not signed the AWA and after she signed the AWA, she lost remuneration. Further details of the actual shifts lost and the remuneration lost by Ms Thompson as a result will be provided separately.'

(We have emphasised the passages which pertain most directly to the specific instances of admitted duress. 'JB' is Mr Barry)

41 In some circumstances a statute may direct the way in which a continuing breach or a course of conduct is to be penalised. For example, the *Trade Practices Act 1974* (Cth) s 79(2) provides, in substance, that conviction for two or more offences against the same statutory provision, of the same character, occurring at about the same time shall be punished as one offence against the statutory provision. In the Act itself s 719 provides, in respect of breaches of awards and other instruments, that a continuing breach is to be treated as a single breach. No similar provision applied to the offences against s 400(5) and s 792 which were alleged against the appellant. The appellant argued, however, that 'Mr Barry engaged in one multifaceted course of applying duress to bring about the signing of the AWA' so far as Ms Thompson was concerned. The argument relied upon observations of Gleeson CJ in *Johnson v R* (2004) 78 ALJR 616 ('*Johnson*') at [4]-[5] where the Chief Justice cited with approval observations of Wells J in *Attorney-General v (SA) Tichy* (1982) 30 SASR 84 at 92-3 which included the following:

'Where there are truly two or more incursions into criminal conduct, consecutive sentences will generally be appropriate. Where, whatever the number of technically identifiable offences committed, the prisoner was truly engaged upon one multi-faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient.'

42 For the purpose of the present discussion the general principle which appears to be relied upon by the appellant may be accepted, although it is important to distinguish it from the application of the totality principle which is a final check to be applied to ensure that a final, total or aggregate, penalty is not unjust or out of proportion to the circumstances of the case.

43 The totality principle was described by the High Court in *Mill v R* (1988) 166 CLR 59

(*'Mill'*) at 62 – 63 as follows:

> *'The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas,* Principles of Sentencing, *2nd ed (1979), pp 56-57, as follows (omitting references):*
>
> > *"The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong[']; 'when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."*
>
> *See also Ruby,* Sentencing, *3rd ed (1987), pp 38-41. Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred.'*

44 The principle invoked by the appellant may also be seen, in a different context, in *Pearce v R* (1998) 194 CLR 610 (*'Pearce'*) where the majority judgment said at [40]:

> *'To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.'*

45 Their Honours were not there concerned with the totality principle as described in

Mill. In fact they said at [49]:

> *'Looked at overall, it may well be said that the effect of the sentences imposed on this appellant was not disproportionate to the criminality of his conduct.'*

46 The distinction is an important one to make in the present case because of the possibility that confusion arose concerning whether the six separate offences admitted in relation to Ms Thompson should be treated as overlapping offences in the first instance or whether any consequence of the fact that they might be treated as separate contraventions should await the application of the totality principle at the end of the case.

47 In support of his decision to set a penalty for each of the contraventions concerning Mr Thompson his Honour referred to the judgment of Finkelstein J in *Carr v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2005] FCA 1802 at [12] and [16] (*'Carr'*). In *Carr* Finkelstein J imposed penalties upon a union for picketting at different sites and on some different days. He said (in the passages referred to by the primary judge in the present case):

> *'12 The cases say that if "a number of acts of a similar nature committed by one or more defendants [are] connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise" they should be regarded as one activity or one offence:* Director of Public Prosecutions v Merriman *[1973] AC 584, 607 per Lord Diplock. In substance it is necessary to apply some common sense to the facts. It seems to me to be both appropriate and fair to treat the union as having committed separate offences, one on each of the days on which its organisers engaged in the conduct earlier described. If that conduct was engaged in at more than one site, then there will be a separate offence committed at each site. The upshot of this approach is that the union has contravened s 170NC on six separate occasions. Notwithstanding the number of separate contraventions it is still necessary for me to apply the totality principle. As to this principle see* Mill v The Queen *(1988) 166 CLR 59.*
>
> …
>
> *16 Turning to the individual respondents, I have approached the ascertainment of the number of offences committed by them in the same way as the union: one offence for each day's conduct at a particular site. The result is that Mr Mulipola has committed five contraventions, Mr Eiffe one contravention, and Mr Thomas and*

Mr Mansour one contravention, of s 170NC.'

48 However, Finkelstein J went on to impose a single aggregated penalty of $25,000 on the union pursuant to the following declaration:

> *'1. On 11, 14, 18 and 26 June 2003 the first respondent, Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, contravened s 170NC of the* Workplace Relations Act 1996 *(Cth).'*

49 It may be seen that the six separate offences were not, in the Order, clearly identified. The decision in *Carr* is therefore of limited assistance. It is an example of a case where it was appropriate to distinguish separate contraventions but not an illustration of the fixation of individual penalties. By way of contrast, in *Hamberger v Construction Forestry Mining and Energy Union* [2002] FCA 585 Cooper J took the view that discrete contraventions of the Act should be treated as arising in a single course of conduct and penalised as one offence after he found that a union and its officers had contravened the Act on two separate days, almost a month apart. His Honour said (at [11]):

> *'The conduct which occurred on 29 January 1999 took as its focus the removal of Leroy from the site because he would not join an industrial association. That conduct was engaged in again on 26 February 1999 with a view to achieving the same purpose. In my view, it is appropriate to treat all of the incidents as having arisen in a single course of conduct aimed at procuring the removal of Leroy from the site. Although part of a single course of conduct, and thus not attracting a separate penalty for each separate contravention, the persistence in the conduct over time is a circumstance of aggravation when one looks at the culpability of the conduct viewed as a whole.'*

50 In the present case the appellant argued that an approach of this kind should have been followed by the primary judge, so that, if it was necessary or appropriate to regard Mr Barry's conduct towards Ms Thompson as worse than with respect to other employees, that might be accommodated by a relatively more severe, but still single, penalty so far as the conduct towards Ms Thompson was concerned. The appellant contended, furthermore, that any penalty would be constrained by the maximum statutory penalty for one offence, notwithstanding its admission of six separate contraventions.

51 It is clear that Mr Barry's treatment of Ms Thompson occurred in the pursuit of the

overall objective of prevailing upon a number of employees to sign AWAs. However, so to conclude does not compel a finding that the offences relating to Ms Thompson should necessarily be considered, and penalised, together. On that reasoning the contraventions concerning the other employees might be seen also as part of the same course of conduct. Such an approach would suggest a single penalty fixed for all contraventions, treating them all as part of the one course of conduct. Although that might be a proper course in some cases, nobody suggested it was the course to be adopted in the present case.

52 The rationale for treating the events concerning Ms Thompson as a single, separate, course of conduct turns on the notion that the same employee was involved in each incident even though the specific instances of duress occurred on different days.

53 The primary judge's conclusions concerning Mr Barry's conduct with respect to Ms Thompson were expressed as follows:

> *'65 By his conduct Mr Barry deliberately placed illegitimate pressure on Ms Thompson to sign the AWA. He knew that she would quickly feel the financial impact of reduced shifts. He knew that she would feel that she had no practical choice but to sign the AWA if she wanted to maintain her employment with the respondent without an immediate and significant reduction in earnings through less shifts.*
>
> *66 Before Mr Barry's conduct, Ms Thompson had a reasonable expectation of continuing to work her normal hours and receive her entitlements under the Award and the preserved APCS. By his conduct Mr Barry removed that expectation by placing Ms Thompson in a position where she had to choose between signing the AWA (and earning a lower hourly rate) or not signing the AWA (and having her hours cut back). This injured Ms Thompson in her employment and prejudicially altered her position in employment. The reason Mr Barry engaged in this conduct was because Ms Thompson was entitled to the benefit of the Award and the preserved APCS.'*

54 These findings reflected the agreed facts earlier set out. The primary judge used very similar language when describing the impact of Mr Barry's conduct on other employees (e.g. at [30]–[31], [42]-[43], [74]-[75] and [83]). These conclusions give support to the appellant's submission. They suggest a course of dealing with Ms Thompson directed to a single end.

55 The practical consequence of treating the contraventions as separate and penalising

them equally with other admitted contraventions was, ultimately, that Mr Barry's conduct concerning Ms Thompson incurred a penalty of $102,000 whereas with respect to other employees it incurred a penalty of $17,000 in each case. It is difficult to discern from the statement of the primary judge's conclusions a finding that Mr Barry's conduct with respect to Ms Thompson, although manifest in offences against the Act on six separate occasions, was, in substance, six times more reprehensible than it was with respect to other employees.

56 In supplementary written submissions made to the primary judge after the hearing both parties suggested appropriate penalties for the admitted offences, according to different conclusions to which his Honour might come after considering the matters before him. Counsel for the applicant below (the respondent to the appeal) accepted the possibility of some reduction of a final total penalty by reference to the totality principle. He argued that the only basis for some reduction could be found in the fact there were six different contraventions concerning Ms Thompson. The calculations advanced yielded penalties of a lesser order (both for the individual contraventions concerning Ms Thompson and as a final penalty) than the penalties fixed by the primary judge. Some of the calculations proffered by the applicant below dealt with the possibility the primary judge might accept some diminished level of corporate responsibility for Mr Barry's conduct. They need not now be taken into account because submissions to that effect were, as will be discussed, rejected. The calculations based on a full measure of corporate responsibility suggested penalties totalling $158,000 or, if the totality principle was applied in respect of the contraventions concerning Ms Thompson, $123,300.

57 His Honour was not, of course, bound by the calculations provided by counsel for the respondent, or obliged to treat them as concessions which must have been applied in favour of the appellant but they do provide some further support for the idea that a penalty six times greater, where Ms Thompson was concerned, was out of proportion to Mr Barry's conduct towards her.

58 The appellant's argument is not without some attraction. It would have been open to the primary judge to have treated the events as involving in substance a single course of conduct, at least so far as they involved Ms Thompson, but he was not obliged to do so. There were other factors before the primary judge that suggested that the contraventions

should be treated separately and as equally serious. The contraventions occurred on different days. They each involved conduct which, viewed in isolation, was of the same character and significance as the individual events concerning other employees. The fact that Mr Barry persisted, in circumstances where Ms Thompson was obviously distressed, gives support to the idea that the repeat contraventions could be regarded progressively more seriously rather than less seriously. Of real significance also is the fact that the appellant, by the Agreed Statement of Facts and its consent to the declarations to be made, explicitly accepted that Mr Barry's conduct was to be regarded as six separate contraventions of s 400(5) and s 792 of the Act, rather than as a course of conduct representing a single contravention.

59 The question to be answered is whether appellable error occurred. That question is not to be answered by a conclusion that it would have been open to his Honour to take the course urged by the appellant even if, in principle, it was accepted as available by the respondent. The decision to be made by the primary judge in this, as in other, respects called for the exercise of a judicial discretion. Error in the exercise of such a discretion is not established by identifying an appropriate alternative course of action or even by appealing to a preference on the part of an appeal court for the use of that alternative.

60 Many cases have spoken of the flexibility which a sentencing judge possesses. In *Pearce* the majority judgment said (at [46]):

> *'Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision.'*

(This observation was footnoted by a reference to *House v R*).

61 In *Johnson* the majority judgment said (at [26]):

> *'Judges of first instance should be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime under which the sentencing is effected.'*

62 In *Markarian v R* (2005) 228 CLR 357 (*'Markarian'*) the majority judgment said (at [25]):

> *'As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in* House v The King, *itself an appeal against*

> *sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy".*

and (at [27]):

> *'Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies.'*

63 Once it is accepted that there is no single correct approach to the task of deciding upon the appropriate penalties to be imposed for the admitted individual contraventions, particular attention is required to the nature and quality of error which must be demonstrated before appellate intervention is required or justified. Both parties accepted, in accordance with authority, that the basic principles are as stated by *House v R*. The majority judges in *House v R* said (when themselves actually applying their own statement of principle to the judgment under appeal in that case):

> *'In the circumstances we have stated we do not think that we can say that the sentence, although severe, was unreasonable or clearly unjust, and there is no other ground for saying that it arose from error of fact or of law, or failure to take into account any material consideration, or from giving undue weight to any circumstance or matter.'*

64 Such an observation may be made equally about the outcome of the present case. It is not enough that we might have taken a different course. There is no doubt that the overall penalty imposed (and so much as arose from the events related to Ms Thompson in particular) was a severe one. It clearly reflected the primary judge's disapproval of the appellant's conduct through its chosen and employed agent, Mr Barry. We do not think,

however, it can be said that the approach taken with respect to the contraventions concerning Ms Thompson was not legitimately available.

65 In *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* (2000) 203 CLR 194, in an appeal from this Court, Gleeson CJ, Gaudron and Hayne JJ, in their joint judgment, said:

> *'Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made,* ***the correctness of the decision can only be challenged by showing error in the decision-making process****. And unless the relevant statute directs otherwise,* ***it is only if there is error in that process that a discretionary decision can be set aside*** *by an appellate tribunal.'*
> (emphasis added)

66 Their Honours then referred to *House v R* to identify the appellable errors which might arise in relation to judicial (as opposed to other) discretions. Their Honours also said (at [14]):

> *'Ordinarily, if there has been no further evidence admitted and if there has been no relevant change in the law****, a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error*** *on the part of the primary decision-maker. That is because statutory provisions conferring appellate powers, even in the case of an appeal by way of rehearing, are construed on the basis that, unless there is something to indicate otherwise,* ***the power is to be exercised for the correction of error****. However, the conferral of a right of appeal by way of a hearing de novo is construed as a proceeding in which the appellate body is required to exercise its powers whether or not there was error at first instance.'*
> (Emphasis added.)

67 The present case does not involve a right of appeal by way of hearing *de novo*. Error must first be shown to permit appellate intervention. The error must be of the kind identified in *House v R*. No such error has been demonstrated in the present case in relation to the penalties fixed with respect to Mr Barry's conduct towards Mr Thompson.

68 The primary judge indicated, by his reasons for judgment, that he understood the matters at issue. In the end he appears to have made a deliberate choice to punish the contraventions involving Ms Thompson as separate contraventions and at the same level as the others. This may represent a stern approach but we do not think it can be said that an

appellable error was thereby committed. Accordingly we dismiss ground 1 of the appeal.

Ground 2 *- The Learned Trial Judge erred in fact and in law in holding that there was insufficient evidence before him to determine whether or not there was sufficient financial hardship to mitigate what would otherwise be an appropriate penalty.*

69 The primary judge referred to submissions made from the bar table that the appellant had, in recent years, made modest profits. He said: *'There is no evidence as to the assets or income of the Group'*. His Honour then said: *'As to the* [appellant's] *own financial position, however, in considering the size of a penalty, capacity to pay is of less relevance than the objective of general deterrence: …*'. As a statement of principle the observation is unimpeachable and no challenge was made to it. It was submitted, however, that the primary judge was wrong not to mitigate the penalty by reason of financial hardship. A central problem with this submission is that he was not asked to do so.

70 The only material before the primary judge which might bear upon the issue was advanced during submissions in the case below in the following way:

> *'The financial statements for the financial year ended 30 June 2006 disclose that the net profit for that year was $146,219. I will come to the relevance of this in a second. The financial statements haven't been prepared by an accountant for the financial year ended 30 June 2007, that is, yet, but my instructions are the Mornington Inn doing the best it can that its net profit is likely to be 113,000. Now, that is relevant, because* ***one of the factors that your Honour has to take into account when considering the sentence is the aspect of specific deterrence****. That is, to deter this company. If you were dealing with BHP then you would need to impose a very significant penalty to have any reasonable specific deterrence, but you are not. You are dealing with a company that has a net profit of about $100,000. So that* ***to satisfy the requirements of personal specific deterrence it is not necessary to impose a large fine****.*
>
> *So using an analogy, if one were imposing a fine for some sort of conduct on a person who is unemployed, a low fine would have as much of a specific deterrent effect as a high fine for somebody who is employed. So* ***that is why I tell you what the trading profit is****.'*
> (Emphasis added.)

71 These were not submissions about mitigation. They were submissions about the lack of any need, so it was argued, for specific deterrence. The primary judge did not say that the penalties he imposed were set to reflect any particular need for specific deterrence. Nor did

he fail to take into account any submission to the effect that the financial position of the hotel should otherwise be regarded as a mitigating factor. There were no other submissions which suggested that lack of capacity or any other financial circumstance should be taken into account in mitigation. Counsel for the appellant made clear on the appeal that he did not address any submission to the question of financial hardship. The ground of appeal was misdirected and must be rejected.

Ground 3 *- That the Learned Trial Judge erred in fact and in law in only reducing the penalty which he imposed by 10% for the plea of guilty*.

72 The primary judge found that *'at the most a modest discount for admission of liability may be allowable'*. He quantified the discount at 10%. The principal matter relied upon in support of the suggestion that a greater discount than ten percent was due for 'the plea of guilty' was the argument that the appellant's admission of liability simply entitled it to a greater discount.

73 The appellant's arguments in support of this ground of appeal misunderstand the basis upon which a discount is made for an admission of liability and the circumstances in which that might occur. The majority judgment in *Cameron v R* (2002) 209 CLR 339 (*'Cameron'*) explained the rationale for providing a discounted sentence for a plea of guilty in criminal proceedings. Their Honours said:

> *'11 It is well established that the fact that an accused person has pleaded guilty is a matter properly to be taken into account in mitigation of his or her sentence. In* Siganto v The Queen *it was said:*
>
> > *"a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case."*
>
> *It should at once be noted that remorse is not necessarily the only subjective matter revealed by a plea of guilty. The plea may also indicate acceptance of responsibility and a willingness to facilitate the course of justice.*
>
> *12 Although a plea of guilty may be taken into account in mitigation, a convicted person may not be penalised for having insisted on his or her right to trial. The distinction between allowing a reduction for a plea of guilty and not penalising a convicted person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction, albeit one the rationale for*

> *which may need some refinement in expression if the distinction is to be seen as non-discriminatory.*
>
> *13 It is difficult to see that a person who has exercised his or her right to trial is not being discriminated against by reason of his or her exercising that right if, in otherwise comparable circumstances, another's plea of guilty results in a reduction of the sentence that would otherwise have been imposed on the pragmatic and objective ground that the plea has saved the community the expense of a trial. However, the same is not true if the plea is seen, subjectively, as the willingness of the offender to facilitate the course of justice.*
>
> *14* ***Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.****'*
> (Emphasis added.)

74 It is important to note that it is not a sufficient basis for a discount that the plea has saved the cost of a contested hearing – that would discriminate against a person who exercised a right to contest the allegations. A discount may be justified, however, if the plea is properly to be seen as willingness to facilitate the course of justice. Remorse and an acceptance of responsibility also merit consideration where they are shown.

75 A conventional consideration in assessing a discount in a criminal case for a plea of guilty is the stage in the proceedings at which the plea is entered. Normally, the maximum discount for this factor, sometimes thought to be 25%, is reserved for a plea made at the first reasonable opportunity although, as was indicated in *Cameron* (at [23] – [24]) there is no obligation to make an early plea to a charge which wrongly particularises the substance to which the charge relates.

76 As Branson J has pointed out (see *Alfred v Walter Construction Group Limited* [2005] FCA 497) the rationale for providing a discount for an early plea of guilty in a criminal case does not apply neatly to a case, such as the present, where a civil penalty is sought and the case proceeds on pleadings. Nevertheless, in our view, it should be accepted, for the same reasons as given in *Cameron*, that a discount should not be available simply because a respondent has spared the community the cost of a contested trial. Rather, the benefit of such

a discount should be reserved for cases where it can be fairly said that an admission of liability: (a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice.

77 A respondent who admits liability will spare itself the unnecessary cost of a contested hearing. Its motivation, therefore, should not be regarded as unduly altruistic. Depending on the stage at which liability is admitted it may or may not relieve an applicant of the bulk of the cost of preparing for a trial. In a case such as the present where the provisions of the Act (see s 824) effectively denied the applicant its costs if successful it would be unsatisfactory if a respondent could insist upon a large discount in circumstances where it had forced an applicant to incur most of the costs of preparing for a trial but avoided that expense itself. The respondent (the applicant below) was compelled to prepare and reveal its whole evidentiary case. We were told from the bar table that the appellant's Defence was filed after the respondent's affidavit evidence had been provided. Even after it had the advantage of seeing the applicant's evidentiary case the appellant denied liability. It did not, as it might have, even then judiciously admit matters which, as it later accepted, could not really be contested. The judge was not informed of its change of position until two weeks before the trial was to begin. It is impossible to resist a conclusion that the appellant was finally moved by its assessment of the strength of the case against it rather than any desire to facilitate the course of justice.

78 The primary judge found moreover, that there was no evidence of contrition or remorse. He said: *'Frank admissions of wrongdoing, and apologies to the employees who have been disgracefully treated, may have operated in mitigation. None were forthcoming'*. In the circumstances of the present case, the admission of liability two weeks before the trial was not evidence of contrition or remorse or, except in the most formal of senses, an indication of acceptance of wrongdoing. It would have been open to the primary judge, in our view, to refuse any discount for the admission of liability. There is no basis, therefore, upon which to complain about the allowance of a 'modest' discount of 10%. It was more than ample in the circumstances of this case.

79 However, a further complaint was made. It was argued that the primary judge had, in effect, withheld some part of the discount for an early plea because he disapproved of the

position taken by the appellant at the hearing. In our view this argument misunderstands the reasoning of the primary judge. The primary judge simply rejected the submission in question, with which we deal below, because it deserved no weight. That is an assessment with which we agree. Although the primary judge described the argument as 'almost' an aggravation it is clear he did not increase the penalties in response to it.

80 The submission rejected was that the appellant should have some credit, by way of discount to the penalties, because it may have had available to it a defence, which it elected to forego, that it was not, in large measure, responsible for Mr Barry's conduct. His Honour clearly thought the argument inappropriate in the circumstances. We agree with that assessment.

81 Included in the Agreed Statement of Facts were the following matters:

> *'(23) On 10 July 2006, JB commenced employment with the respondent as the Hotel Manager at the Hotel. He was given the full responsibility for running the Hotel, including managing staff and rosters. JB was employed by the respondent to work as the Manager at the Hotel because of his experience in the industry.*
>
> …
>
> *(93) For all relevant purposes, **the conduct of JB is the conduct of the respondent** because at all relevant times JB acted within his actual or apparent authority.*
>
> *(94) JB was employed as the Hotel Manager and was given the responsibility of running the Hotel and handling all staff issues.*
>
> *(95) Throughout, other representatives of the respondent knew that JB was following up the Relevant Employees about the AWAs and failed to take any steps to ensure that he did not do this in an unlawful way.'*
>
> (Emphasis added.)

82 Other agreed facts dealt in detail with the conduct of Mr Barry towards each of the employees. The Statement of Agreed Facts concluded:

> *'(97) **Based on the agreed facts set out above**, the respondent admits that it has breached the WR Act in relation to the named Relevant Employees.'*
>
> (Emphasis added.)

83 Section 191 of the *Evidence Act 1995* (Cth) provides:

> *'(1) In this section:*
> **agreed fact** ***means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed****.*
>
> *(2) In a proceeding:*
> *(a) evidence is not required to prove the existence of an agreed fact; and*
> *(b)* ***evidence may not be adduced to contradict or qualify an agreed fact****;*
> ***unless the court gives leave****.*
>
> *(3) Subsection (2) does not apply unless the agreed fact:*
> *(a) is stated in an agreement in writing signed by the parties or by lawyers representing the parties and adduced in evidence in the proceeding; or*
> *(b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.'*
>
> (Emphasis added.)

84 It was certainly not open to the appellant to rely upon simple assertion from the bar table to diminish the clear effect of an agreed fact. The appellant made concessions about Mr Barry's conduct in circumstances which were inextricably connected with its own interests. By subscribing to the Agreed Statement of Facts the appellant accepted responsibility for Mr Barry's conduct. Mr Barry was not a party to the proceedings. He did not give evidence. He had, therefore, no opportunity to be heard in relation to the concessions which were made. It was not open, in the circumstances, to advance an argument that Mr Barry alone, or in greater measure than the appellant, bore responsibility for the admitted contraventions. The suggestion provided no basis for any discount.

85 This ground of appeal should be rejected.

Ground 4 *- That the Learned Trial Judge erred in fact and in law in holding that the submission that there should be a further discount in respect of the plea of guilty for the giving up of the possibility of a defence amounted to aggravation***.**

86 This ground is related to the argument discussed above. It proceeds upon a misstatement of what the primary judge said. His Honour said, of an argument that Mr Barry was engaging in a frolic of his own, that *'such an argument almost amounts to an aggravation'*. His Honour did not say either that he had reduced the discount which he

would give as a result (although he clearly rejected the argument as having no merit) or that any part of the penalties fixed were fixed or increased as a result of the argument being advanced. As we have already indicated, in our view the argument deflecting responsibility away from the appellant was not open to it. This ground is without substance and should be rejected.

Ground 5 *- That the Learned Trial Judge erred in fact and in law in holding that the argument advanced by the Appellant about its liability for Mr Barry's conduct highlighted a lack of contrition or remorse on the part of the Appellant.*

87 There can be no doubt, as his Honour said, that the argument that Mr Barry was on a frolic of his own *'highlights the lack of any contrition or remorse on the part of the respondent'*. There was no evidence of contrition or remorse. It was clearly not wrong to say that the argument highlighted that fact. This ground should be rejected.

Ground 6 *- That the Learned Trial Judge erred in fact and in law in holding that the starting point for the imposition of penalty was the statutory maximum.*

88 This ground proceeds upon an incorrect legal premise. In *Markarian* the High Court drew attention (at [30]-[31]) to the need for *'careful attention to maximum penalties'* because, amongst other things, *'they invite comparison between the worst possible case and the case before the court at the time'* and because they provide a *'yardstick'*. Contrary to this ground of appeal, and the proposition it contains, his Honour was clearly correct in starting with a consideration of the statutory maximum penalty of $33,000 for each offence and then considering how the circumstances before him might be compared to a worst possible case. This ground of appeal must be rejected.

Ground 7 *- That the Learned Trial Judge erred in fact and in law in adopting a mathematical approach to the imposition of penalty on the Appellant*

89 In the course of his consideration of how the cases before him compared to a worst possible case his Honour expressed the view that (after allowing a discount of about 10%) they were *'somewhere between a half ($15,000) and two-thirds ($20,000) of the way along the spectrum of seriousness, that is to say $17,500'*. His Honour rounded that figure down to $17,000. There was no error in his Honour providing figures to assist in the appreciation of his conclusions about the gravity of the offences. That does not involve a 'mathematical approach' as seems to be alleged by the appellant. The only other respect in which his

Honour appears to have adopted a mathematical approach was in applying the discount of 10 percent as an acknowledgement for the appellant's admission of liability. Normally such a discount would be applied to a sentence otherwise notionally fixed. His Honour applied it, in the first instance, to reduce the statutory maximum penalty. This was a more generous approach than conventionally adopted. Arguably it involved an error for that reason but it is not an error which can sound to the appellant's benefit. This ground of appeal must be rejected also.

Ground 8 **-** *That the Learned Trial Judge erred in fact and in law in failing to apply the totality principle whereby the learned trial Judge failed to reduce what he regarded as an appropriate penalty having regard to the totality principle*.

90 There is no doubt that the penalty was a very substantial one. In large measure it was fixed at the level determined by the primary judge because his Honour concluded he should fix six penalties in respect of matters concerning Ms Thompson, each at the same level as penalties in respect of matters concerning other employees. It would have been open to his Honour, at this point, even if earlier rejecting any submission that there should initially be a reduction in those individual penalties or in their aggregate, to reduce the final sum of $170,000 by reference to the totality principle.

91 We are conscious of the need for the trial judge, in accordance with the totality principle, to have taken '*a last look at the total just to see whether it looks wrong'* (see the extract from *Mill* earlier quoted). However, it is clear, using this test, that the primary judge did not fail to apply the totality principle. As his Honour said: '*The totality principle does not necessarily require a discount'*. His Honour thought no reduction from the figure he had determined ($170,000) was required.

92 That conclusion involved the final exercise of a judicial evaluation in the sentencing process. The question on the appeal is whether declining to make any reduction reveals an appellable error. We are not persuaded such an error has been revealed. It does not matter that we may have reached a different view and exercised the discretion to different effect unless the sentence was manifestly excessive, a question which we address shortly. Ground 8 must be rejected.

Ground 9 - *The penalty of $170,000 imposed by the learned trial Judge on the Appellant for the 10 contraventions of the Workplace Relations Act 1966 (Cth) was manifestly excessive in all the circumstances.*

93 A contention that a penalty is manifestly excessive invites a conclusion. The conclusion does not depend upon identified error in reasoning but rather upon its evident and inappropriate consequence (see *Dinsdale v R* (2000) 202 CLR 321 at [6] and [59]). We accept that the penalty is a severe one. We do not accept that it lies outside the range available to the trial judge pursuant to a proper exercise of judicial discretion. We reject this ground of appeal also.

Conclusion

94 Each of the grounds of appeal fails. The appeal should be dismissed. The respondent did not seek costs, no doubt because of the restrictions which flow from the operation of s 824 of the Act.

I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Stone and Buchanan.

Associate:

Dated: 7 May 2008

Counsel for the Appellant:	Mr D Barclay
Solicitor for the Appellant:	Page Seager Lawyers
Counsel for the Respondent:	Mr R Dalton
Solicitor for the Respondent:	DLA Phillips Fox
Date of Hearing:	25 February 2008
Date of Judgment:	7 May 2008