CHIEF INDUSTRIAL MAGISTRATE'S COURT

New South Wales

Jurisdiction: Civil

Parties: **Prosecutor:** Inspector Mandy Polgar
Office of Workplace Ombudsman
formerly Office of Workplace Services
Defendant: Raxigi Pty Ltd

Case Number: 103819/06/4 &103803/06/4 (Newcastle)

Hearing Dates: 4 May 2007; 7 June 2007.
31 July 2007(on Sentencing)

Date of Decision: **24 July 2007(On Liability)**
9 August 2007 (On Sentence)

Legislation: Workplace Relations Act 1996 (Cmwlth)
Ss 718 &719.
Motels, Accommodation and Resorts Award 1998.

Magistrate: G A Miller

Representation: Prosecutor: Mr A Hatcher of Counsel
Respondent: Mr R Warren of Counsel

Reasons for decision on Sentence and Orders

Introduction

In its judgment of 25 July 2007, the Court found that the defendant had committed nine breaches of the *Motels, Accommodation and Resorts Award 1998* ("the Award") with respect to two employees, Donna Maria Wondergem and Sandra Davies. The Court further found that the amount of $13,796.66 was outstanding to Ms Davies as a result of those breaches.

The breaches established are as follows:

In regard to Donna Wondergem-

1. Failure to comply with Clause 13. Types of Employment, Sub-Clause 13.2 Casual Employment of the Award, regarding rates of pay and including the award increase due from the pay period commencing on or after 24 June 2005.
2. Failure to comply with Clause 13. Types of Employment, Sub-Clause 13.2 Casual Employment of the Award, regarding work performed on holidays.

In regard to Sandra Davies-

1. Failure to comply with Clause 15. Redundancy of the Award
2. Failure to comply with Clause 16. Notice of Termination of the Award.
3. Failure to comply with Clause 20. Payment of Wages, Time and Wages Records of the Award
4. Failure to comply with Clause 23. Hours of Work, Sub-Clause 23.8 Work Outside Daily Hours of the Award.
5. Failure to comply with Clause 23. Hours of Work, Sub-Clause 23.10 Work on Rostered Days Off of the Award.
6. Failure to comply with Clause 25. Overtime of the Award.
7. Failure to comply with Clause 28. Annual Leave, Sub-Clause 28.7 Pro-rata Leave.

In addition to seeking the imposition of a penalty under s719 (1) and 719(4) of the *Workplace Relations Act 1996* (Cth) ("the Act") for the breaches an order is sought

by the prosecutor under the current subsection 719(6) of the Act for payment of outstanding award entitlements to Donna Wondergem in the amount of $252.57 and to Sandra Davies in the amount of $13,796.66.

Maximum Penalty

Since 10 August 2004, the maximum penalty for breach of a federal award by a corporation has been 300 penalty units, or $33,000: s 719(4)(b) of the Act, and s 178(4)(a) of the Act as it was from 10 August 2005 to 26 March 2006. Prior to 10 August 2004, the maximum penalty was $10,000.

The maximum penalty has been significantly increased in the last two years from $10,000 to $33,000, an increase of 230%. Mr Hatcher submits that the Parliament has signalled that it regards contraventions of industrial instruments, such as the agreement here, as a serious matter. It established significant penalties in relation to such contraventions and the Court needs to deal with the imposition of penalty(s) in a serious manner. In particular, to make clear to others that such conduct is not acceptable and not to be tolerated.

In *Finance Sector Union v Commonwealth Bank of Australia* (2005) 147 IR 462 Merkel J, in a slightly different context, in respect of the recent significant increase in penalties stated at [75]:

> *It may be that breaches by unions and employers of industrial legislation from time to time have been accepted as part of the give and take of industrial disputation. However, in recent years industrial legislation has increasingly codified and prescribed what is acceptable, and what is unacceptable, industrial conduct. The legislature has, over time, also moved to increase the penalties that may be imposed in respect of unlawful industrial conduct. In my view, any light handed approach that might have been taken in the past to serious, wilful and ongoing breaches of the industrial laws should no longer be applicable.*

Of the breaches found to have occurred:

(i) All of the breaches concerning Ms Davies involved conduct by the defendant post- 10 August 2004 – see Ex 2.

(ii) The breaches concerning Ms Wondergem involved conduct which was almost entirely post-10 August 2004 – see Ex 3 Tab 39 ($6.23 of $252.57 was owing pre-10 August 2004).

Accordingly, the higher maximum penalty of $33,000 applies to each breach.

The Application of s 719(2) of the Act

The number of breaches, for the purpose of determining penalty, is affected by s 719(2) of the Act, which provides:

> *(2) Subject to subsection (3), where:*
>
> *(a) 2 or more breaches of an applicable provision are committed by the same person; and*
>
> *(b) the breaches arose out of a course of conduct by the person;*
>
> *the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term.*

(Previous equivalent provisions to section 719(2) were to be found in section 178(2) of the Act as it was before 27 March 2006 and section 119(1A) of the preceding *Conciliation and Arbitration Act 1904*)..

The principles concerning the application of s 719(2) may be summarised as follows:

(i) If a respondent wishes to submit that multiple breaches of an applicable provision arose out of a course of conduct by it, then unless there is clear and unequivocal evidence in the applicant's case of such a course of conduct it is incumbent upon the respondent to lead evidence to support such a submission before the court could be satisfied that such was the case: *AMIEU v Meneling Station* (1987) 16 IR 245.

(ii) Each separate obligation in an industrial instrument is to be regarded as a “term” for the purposes of section 719(2), so that where there are breaches of distinct provisions of the industrial instrument, section 719(2) cannot be applied to reduce these to a single breach: see *Gibbs v Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 237; *Masters v Highway One Transport Pty Ltd* (1990) 33 IR 1 at 4.

(iii) Repeated breaches of a particular provision of an industrial instrument over a period of time may, depending upon the particular facts, attract the operation of section 719(2): see e.g. *Quinn v Martin* (1977) 16 ALR 141; *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 266-7.

(iv) Breaches of a particular provision of an industrial instrument in relation to a number of different employees may again, depending upon the particular circumstances, attract the operation of section 719(2): see e.g. *Clothing and Allied Trades Union v Snugglerite Industries Pty Ltd* (1990) 34 IR 124 at 126.

(v) Even where section 719(2) does not operate with respect to different breaches, the Court may nonetheless apply the principle of totality so that the respondent is not multiply penalised for breaches which have an interlocking relationship and arise out of a single action: *BHP Steel (AIS) Pty Ltd v CFMEU* [2000] FCA 1908 at [8]; *Transport Workers Union of Australia v Glynburn Contractors (Salisbury) Pty Ltd* (1991) 37 IR 313 at 314.

The Prosecutor's submission on s719(2)

The prosecutor submitted on the issue of totality, s719(2) provides a statutory mechanism for breaches arising out of the course of conduct by the defendant beyond that the principle of totality has limited work to do as per para (v) above.

In these matters, the prosecutor would accept that, upon the application of s 719(2):

(i) The two breaches with respect to Ms Wondergem are reduced to one breach.
(ii) Breaches 4, 5, and 6 are reduced one breach, making a total of five breaches with respect to Ms Davies.

The total number of breaches the prosecutor submitted, for the purpose of penalty, is therefore six. This was the basis upon which the prosecutor ran its case [Transcript 113 lines 14-18]. The aggregate maximum penalty in this case the prosecutor submitted is therefore $198,000.

The prosecutor submitted the principle of totality has no relevant application here, since the six breaches are separate in nature, do not involve related provisions of the Award and arise out of different conduct.

The defendant's submission on s719(2)

The defendant submitted the total number of breaches was three. The two breaches with respect to Ms Wondergem are as conceded by the prosecutor reduced to one breach and breaches 4, 5, and 6 in regard to Ms Davies are reduced to one breach. However the defendant submitted that breaches 1, 2, 3, and 7 with respect to Ms Davies constitute one breach making a total of only two breaches in respect of Ms Davies.

The defendant submitted that breaches 1,2,3,and 7 have clearly an interlocking relationship and arise out of a single action as all are related as a result of a failure to pay Ms Davies on termination as a result of the decision to sell the Molly Morgan Motel with her termination being as a consequence of that sale. There is a clear link between each breach therefore the Court should be attracted to the principle of totality. The single action of the termination of Ms Davies upon the sale of the motel led to those four breaches. The defendant submitted the words of the Industrial Court of NSW in *Department of Education and Training v Keenan* 105 IR 192 at

[21],[22],and [23] in regard to the application of the principle of totality, should be considered as apposite here.

Consideration on the application of s719(2)

Section 719(2) of the Act requires that where two or more breaches of an applicable provision (here a term of the Award) are committed by the same person and arise out of a course of conduct by that person, they are to be treated for the purposes of s719 as constituting a single breach of a term.

As stated earlier the principles to be applied in determining whether s719(2) operates in this matter are established in a number of decisions considered under s178 (2) of the pre-reform Act. Within this civil jurisdiction for the enforcement of industrial instruments s719(2) provides a statutory mechanism for breaches arising out of the course of conduct by the defendant beyond that the principle of totality (as fully discussed in *Keenan* (above) has limited work to do as per para (v) above.

In *Gibbs v Mayor, Councillors and Citizens of the City of Altona* (1992) 37 *FCR* 216 at 223, Gray J states:

> *The object of s178 (2) appears to be that a party bound by an award and pursuing a course of conduct involving repeated acts or omissions, which would ordinarily be regarded as giving rise to a series of separate breaches, should not be punished separately for each of those breaches. If such a party has pursued a course of conduct which gives rise to breaches of several different obligations, there is no reason why it should be treated as immune in respect of its breach of one obligation, merely because it has acted in breach of another. This reasoning leads to the conclusion that each separate obligation found in an award is to be regarded as a "term", for the purposes of s178 of the Act. The ascertainment of what is*

a term should depend not on matters of form, such as how the award maker has chosen to designate by numbers or letters the various provisions of an award, but on matters of substance, namely the different obligations which can be spelt out. For these reasons, I incline to the view that each separate obligation imposed by an award is to be regarded as a "term", for the purposes ofs178 of the Act. If the different terms impose cumulative obligations or obligations that substantially overlap, it is possible to take into account the substance of the matter by imposing no penalty, or a nominal penalty, in respect of breaches of some terms, but a substantial penalty in respect of others.

In *Masters v Highway One Transport Pty Ltd* (1990) 33 IR 1 at 4, O'Loughlin J states:

..In this case, there were separate provisions of the award in relation first, to the rate of pay, secondly, to overtime and finally, to the keeping of records – and all three provisions were continuously breached. Each of the three provisions was a "term" as that word is used ins178 (2). Hence the repetitive acts of underpayment can properly be described as "two or more breaches of a term" arising out of a "course of conduct" on the part of the respondent. That being the case, the last few words of the subsection can be called in aid of the respondent so that those repetitive breaches are taken "to constitute a single breach of the term". But those same repetitive breaches of "the term" that related to the rate of pay are separate and apart from the repetitive breaches of "the term" that related to the failure to pay overtime; each failure to pay overtime was a breach of the same term

and can also be taken "to constitute a single breach of the term"; but that second mentioned term was different from the term that related to the correct rate of pay.

Following their Honours reasoning in *Gibbs v Mayor, Councillors and Citizens of the City of Altona* and *Masters v Highway One Transport Pty Ltd*, I find that the breaches in this matter involved a failure to pay employees in accordance with the provisions of the Award in six clearly identifiable and distinct categories. There were breaches of six separate terms of the Award and they cannot be treated as a single breach for the purpose of penalty. They must be treated as separate and cannot be consolidated as a single breach.

However, this raises the question whether, although separate, the provisions have an overlapping obligation**.** This arises with respect to one of the six provisions – Cl 20- the waiting time provision. It arose to the extent that the respondent failed to make a payment of the entitlement on the relevant day. This resulted in a penalty payment within the clause for the non payment of the entitlement. It is in effect a penalty upon a penalty (see later). For the remaining five breaches, there is no overlap and they were clearly separate obligations.

General Considerations Applicable to the Assessment of Penalty

There are a number of decisions which identify the considerations relevant to determination for penalty for breaches of federal industrial instruments or legislation. These include *CFMEU v Coal and Allied Operations Pty Ltd (No 2)* (1999) 94 IR 231 at [8] (applied in *Australian Workers Union v Johnson Matthey (Aust) Ltd* [2000] FCA 728 and *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v DMG Industries Pty Ltd* [2000] FCA 1492), *Age Co Limited v Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union* (2000) 103 IR 148 at [19]-[22], *Textile, Clothing and Footwear Union v Lotus Cove Pty Ltd* [2004] FCA 43, and *Mason v Harrington Corporation Pty Ltd t/as Pangaea Bar and Restaurant* [2007] FMCA 1065 at [18]-[24].

The considerations identified include:

(i) The nature and extent of the conduct – i.e. its "objective seriousness".

(ii) The circumstances in which the relevant conduct took part.

(iii) Whether the defendant has previously been found to have engaged in similar conduct.

(iv) The consequences of the conduct in breach of the applicable provisions – particular, whether the breaches are simply "technical", or whether they result in actual detriment to relevant employees.

(v) The size and financial status of the defendant.

(vi) Whether the defendant has admitted or contested the breaches in the relevant court proceedings.

(vii) Whether the defendant has co-operated with the prosecuting authority, taken corrective action, and/or demonstrated contrition.

(viii) The need, in the circumstances, for deterrence, which may include both general and special deterrence.

The courts have placed special emphasis on general deterrence in recent times in setting pecuniary penalties. For example, Merkel J in *Finance Sector Union v Commonwealth Bank of Australia* (2005) 147 IR 462 at [60] said:

> *"Once again, I see the most important factor in relation to penalty as general deterrence. Seeking to achieve any end by unlawful means should be deterred. That is particularly so where the end is itself unlawful. The changing rules of industrial regulation can be set at nought if the Court does not act strongly to discourage and deter the parties from flagrantly and deliberately breaching terms of freely made industrial agreements, merely because their own self interest later dictates against compliance with those terms."*

(The above decision was subject to an appeal to a Full Court of the Federal Court. The penalty imposed in that case was reduced, but there was no demur as to the principle stated above).

Relevant Considerations in this Case

In this case, having regard to the principles stated above, the following matters are relevant:

I. Contrary to the evidence of Mr Hovanessian that the breaches were not deliberate, an oversight or a mistake or not pursued at the time because of family difficulties, it is clear that the breaches were either committed deliberately, or once identified by the prosecutor, deliberately not rectified. With respect to Ms Davies, the failure to provide her with the required notice or severance pay was entirely deliberate, having regard to the nature of its sale arrangements with Bittini Pty Ltd. The other breaches, even if initially inadvertent, were identified by the prosecutor well before these proceedings were commenced, but no action was taken to rectify them. In particular:

II. The breach with respect to Ms Wondergem was identified by the defendant itself in October 2005 [Ex 3 Tab 20] and by the prosecutor in December 2005 [Ex 3 Tab 21], but not rectified in terms of back-payment until October 2006, after the commencement of proceedings [Ex 3 Tab 4].

III. The breaches with respect to Ms Davies were identified to the defendant in a letter from the prosecutor dated 14 March 2006 [Ex 3 Tab 27], and in a formal breach notice dated 11 May 2006 [Ex 3 Tab 32]. There was a reminder letter about these matters dated 29 May 2006 [Ex 3 Tab34]. The failure of the defendant to take any action with respect to the identified breaches, or even to reply to any of these letters, necessitated the commencement of these proceedings.

IV. The breaches led to underpayments to Ms Davies and Ms Wondergem, thus causing actual financial detriments to persons who would in the community be classed as low-paid workers. In Ms Davies' case, the underpayments can fairly be described as significant in quantum (being equivalent to about 25 weeks pay at her then weekly rate).

V. The defendant has not previously been found by a court to have contravened an industrial instrument or industrial relations legislation. The

defendant company has been incorporated for some 26 years. However, the defendant has been the subject of enforcement action by the prosecutor or its statutory predecessor on previous occasions: see Ex 3 Tabs 43-45.The circumstances of this action must be taken into account. The underpayment was corrected on the instructions of Mr Hovanessian when brought to his attention. However, no weight should be given to this matter in the terms of this sentencing procedure on decided principles.

VI. Testimonials presented to the Court from substantial referees speak highly of the personal character of Mr Hovanessian, the sole director of the defendant company, his integrity, his support to his family and to the community, particularly to his native Armenian Community , his charitable works and his substantial anonymous donations to his Church. Although the defendant is a corporation, Mr Hovanessian is the sole director, the directing mind of the company. Accordingly, in my view this is a subjective factor relevant in assessing penalty. At the very least, despite the testimonials to the director character, he was reckless in the company's failure to meet its statutory obligations to its employees.

VII. Although the defendant is not a large employer in terms of number of employees, it holds or has held significant assets and has operated a large number of different businesses: see Ex 3 Tabs 14, 16. The defendant did not raise an incapacity to pay fines. However, it did point out the Molly Morgan Motel was sold to reduce debt. Likewise, other properties were on the market for sale to refinance and stabilise the ongoing company business. However, the defendant indicated any sizeable penalty imposed would result in an application to pay by instalments. No financial documents were presented to the Court.

VIII. The defendant did not make any formal admissions as to the charges against it, and consequently put the prosecutor to the expense and effort of engaging in a full hearing to prove each of the breaches. The defendant engaged in this conduct notwithstanding that, at the hearing, it did not offer any actual contest to three of the six alleged breaches.

IX. The defendant had not, at the time of hearing, taken any action to rectify any of the breaches with respect to Ms Davies. With respect to Ms Wondergem, her underpayment was rectified shortly after the proceedings were commenced. However, Mr Hovanessian was at pains to point out that this did not constitute any admission, and that this amount was paid only because he regarded it as a trivial sum.

X. The conduct referred to in paragraphs [] and []above is demonstrative of a lack of contrition and lack of corrective action. However the company in submissions on penalty, belatedly, placed on record it regretted the time and trouble placed on all by its actions.

XI. The defendant did not co-operate with the prosecutor in relation to these matters. In particular, the defendant:

- repeatedly failed to comply with requests made by the prosecutor for the production of documents [see Ex 5 pars 4-24], including formal requests made under the provisions of the Act, a failure to comply with which constituted an offence [Ex 3 Tab 26];
- attempted to deceive the prosecutor by claiming that back-payments had been made, when in fact they had not been made: see Ex 5 pars 5-9; and
- failed to comply with a subpoena issued by the Court, at the prosecutor's request, for production of documents, as the Court has found.

- Indeed, the defendant has taken an attitude of contemptuous disregard towards the enforcement activities of the prosecutor.

Because of the matters referred to above, this is a case where special deterrence, in addition to general deterrence, has to have significant weight in the assessment of penalty.

Clause 20- Waiting Time

I note that some special consideration needs to be given to the penalty (if any) to be imposed with respect to the breach of clause 20 of the Award, relating to the failure to pay waiting time. Subclauses 20.1.6 and 20.1.8, which impose the waiting time requirement, can fairly be characterised as themselves penal in nature (rather than compensatory for work performed or for other incidences of the employment relationship). It is open for the Court to conclude that imposing a penalty of a particular quantum, or alternatively any penalty, with respect to the breach of these provisions might constitute a form of double counting – that is to say, a penalty upon a penalty. Accordingly an allowance will be made in respect of the penalty for the breach of this clause.

Quantum of Penalty

The prosecutor conceded it is not the role of the prosecutor to make a submission as to the precise quantum of the penalty, if any, to be imposed upon the defendant. However, the prosecutor submitted the following recent decisions provide guidance to the Court as to the appropriate range in which the penalty should fall:

- In *Mason v Harrington Corporation Pty Ltd t/as Pangaea Bar and Restaurant* [2007] FMCA 1065, Mowbray FM ordered an aggregate penalty of $64,000 for seven breaches of the relevant award: [73]-[74]. The aggregate maximum penalty available for the seven breaches was $231,000 (see [75]), so that the aggregate penalty order represented just under 23% of the maximum. The defendant received a 25% discount (from $85,000) for a late admission of the breaches: see [58], [74]. The breaches in this case led to underpayments totaling $7,867 to two employees: see [7].

- In *Flattery v Zeffirelli's Pizza Restaurant* [2007] FMCA 9, Mowbray FM ordered an aggregate penalty of $50,000 for eight breaches of

the relevant award: see [90]. The aggregate maximum penalty available for the eight breaches was $264,000 (see [91]), making the aggregate penalty imposed just under 19% of the maximum. In this case, the underpayments to two employees resulting from the breaches totalled some $5,052. The defendant admitted the breaches, and received a 30% discount on a total penalty of $70,000 as a result: [90].

- In *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140, Lloyd-Jones FM imposed an aggregate penalty of $49,500 for six award breaches, representing 25% of the aggregate maximum penalty of $198,000: see [79]. Here the penalty was reduced from the maximum by 50% so that it represented "a significant deterrence without being oppressive", then reduced by "a further 25%" due to the defendant's admissions "in recognition of the avoidance of litigation" (i.e. the discount for the admission was actually 50%): [79]. The underpayments, to 22 employees, totalled $5,019: [82].

In each case above, these were first contraventions by the respective defendants.

The prosecutor submitted this is a case where a significant penalty needs to be imposed. By reason of the matters identified in above - particularly the failure of the defendant to admit the breaches prior to the hearing, and the non-cooperation of the defendant with the prosecutor – it submitted that the penalty should be in the mid-range, and should (proportionate to the aggregate maximum penalty) be higher than the penalties awarded in the three cases referred to in paragraph 13 above.

There is always a difficulty and danger in comparing sentences imposed in one case with another because of the varying facts and circumstances. The determination of an appropriate sentence is a discretionary exercise carried out in accordance with the sentencing rules: *Ibbs v R* (1987) 163 CLR 447.

Penalty

In all the circumstances I agree with the prosecutor that the penalty should be in the mid range. There is a clear need for a significant penalty to communicate the unacceptability of this type of behaviour.

On being informed of the underpayments the defendant was uncooperative with the Authority in resolving the issue and persisted in non paying significant amounts. General deterrence is required because of the nature of the breaches and to send a clear message to employers that breaches of this nature will not go unpunished. Specific deterrence is required to ensure the defendant changes its practices to avoid a further breach. On the other hand any deterrent element in the penalty should not be oppressive.

I note the subjective factors in favour of the defendant particularly its prior good record over 26 years and the effect that a large and oppressive penalty would have upon the ability of the defendant to carry on its business. On the other hand the objective seriousness of the breaches cannot be ignored.

This is not a matter where the defendant is entitled to a discount for an admission of liability prior to the hearing.

Following the principle in *Community and Public Sector Union v Telstra Corp Ltd (*2001) FCA 1364 at [7] per Finkelstein J, whereby his Honour adopted the approach that the primary emphasis should not be placed on the number of breaches, even taking into account s 178 (2) of the Act but an appropriate approach in such a case is to determine penalties by reference to the "totality principle". Finkelstein J explained the approach:

> *The principle is that in imposing a penalty for a number of offences it is necessary to ensure that the penalties in aggregate are just and appropriate. One way the totality principle can be given effect is to determine what is an appropriate total penalty and then divide that penalty by the number of offences to produce a penalty for each separate offence.*

I set the aggregate penalty at $66,000 after a reduction of the maximum available penalty by 60%. I believe that the penalty should represent a significant deterrence without being oppressive. I therefore reduce the maximum penalty by 60%.

The Act provides for a separate penalty for breach of each term of an industrial instrument, which is set at $33,000. In this matter, six individual terms have been breached at $33,000 each, with a maximum total of $198,000. However, there is a discretion within the Court not to impose a penalty for a breach, a discretion not often used in these matters but one that I am of the opinion should be exercised I n regard to cl 20-waiting time, given the unusual nature of that clause in its extended operation and in effect providing already a penalty for its non observance. That reduces the maximum penalty that could be imposed in this matter to $165,000.

I apportion the total of $66,000 in the following way. With the exception of clause 20 of the Award to which no penalty should apply, the remaining breaches should warrant equal penalty and I allocate $13,200 to each.

Section 841 of the Act provides that:

> *841 Application of penalty*
>
> *A court that imposes a pecuniary penalty under this Act (other than a penalty for an offence) may order that the penalty, or a part of the penalty, be paid:*
>
> *(a) to the Commonwealth; or*
>
> *(b) to a particular organisation or person.*

As Ms Polgar is an officer of the Commonwealth and made this application in that capacity, it is appropriate that the penalty be paid to the Commonwealth. I will give the defendant a period of 28 days in which to pay the penalty, bearing in mind the submission by its counsel in respect of its financial position. I will allow a period of 28

days for the respondent to make any submissions on the time for payment and whether payment may be made in instalments.

Orders

The Court makes the following orders:

(i) The defendant shall pay the penalty amount of $66,000 to the Commonwealth within 28 days.

(ii) The defendant shall pay the amount of $13,796.66 to Sandra Lee Davies within 28 days.

(iii) The defendant shall pay interest on the amount in (ii) above, calculated from the date of the breach notice (11 May 2006) to the date of the order at the rate of interest prescribed in Schedule 5 of the *Uniform Civil Procedure Rules 2005* NSW.

G A MILLER
Acting Magistrate