FEDERAL MAGISTRATES COURT OF AUSTRALIA

SALANDRA v RISBORG SERVICES PTY LTD & ORS [2008] FMCA 76

INDUSTRIAL LAW – Application for imposition of penalties – underpayment of employees – civil penalty hearing – agreed facts – consideration of matters relevant to penalty – knowingly concerned in breach – same course of conduct – employer knowingly continued to breach Federal Minimum Wage provision in relation to 64 employees for 16 months.

Workplace Relations Act 1996 (Cth) ss.4(1), 41, 169, 182(3), 182(4), 185(2), 194, 718, 719, 719(1) & (4), 720-723, 728
Corporations Act 2001 (Cth) Pt.5.3A
Federal Magistrates Court Rules 2001 (Cth) rr.4.03, 4.05
Workplace Relations Amendment (Work Choices) Act 2005 (Cth)
Crimes Act 1914 (Cth) s.4AA

Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Finance Sector Union v Commonwealth Bank of Australia [2005] FCA 1847
CPSU v Telstra Corporation Limited (2001) 108 IR 228
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Cotis v Power Juice Pty Ltd [2007] FMCA 140
R v Shannon (1979) 21 SASR 442
Glenn Jordan v Mornington Inn Pty Ltd [2007] FCA 1384
Australian Competition and Consumer Commission v Visy Industries Holdings Pty Limited (No 3) [2007] FCA 1617

Applicant:	MARISA SALANDRA
First Respondent:	RISBORG SERVICES PTY LTD ACN 105 173 608
Second Respondent:	DION ARNE RISBORG
Third Respondent:	HEATHER JANE RISBORG
File number:	ADG 207 of 2007
Judgment of:	Simpson FM
Hearing dates:	10, 11 & 17 October 2007

Date of last submission:	17 October 2007
Delivered at:	Adelaide
Delivered on:	31 January 2008

REPRESENTATION

Counsel for the Applicant:	Mr G Evans QC with Mr J Connelly
Solicitors for the Applicant:	Hunt and Hunt
Counsel for the Second and Third Respondents:	Mr F Camatta with Ms M Conduit
Solicitors for the Second and Third Respondents:	Camatta Lempens

ORDERS

(1) The second respondent pay the Commonwealth a penalty of $4,950 for being knowingly concerned in the first respondent's contravention of s.182(3) of the *Workplace Relations Act 1996* (Cth) ("the Act").

(2) The second respondent pay the Commonwealth a penalty of $4,950 for being knowingly concerned in the first respondent's contravention of s.182(4) of the Act.

(3) The second respondent pay the Commonwealth a penalty of $4,950 for being knowingly concerned in the first respondent's contravention of s.185(2) of the Act.

(4) The third respondent pay the Commonwealth a penalty of $3,960 for being knowingly concerned in the first respondent's contravention of s.182(3) of the Act.

(5) The third respondent pay the Commonwealth a penalty of $3,960 for being knowingly concerned in the first respondent's contravention of s.182(4) of the Act.

(6) The third respondent pay the Commonwealth a penalty of $3,960 for being knowingly concerned in the first respondent's contravention of s.185(2) of the Act.

(7) Payment of the penalties imposed by orders 1 to 3 above are to be paid within 12 months of today's date.

(8) Payment of the penalties imposed by orders 4 to 6 above are to be paid within six (6) calendar months of today's date.

(9) Proceedings against the First Respondent are adjourned to **9.30 am** on **12 March 2008** for mention.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT ADELAIDE

ADG 207 of 2007

MARISA SALANDRA – (Office of Workplace Ombudsman)
Applicant

And

RISBORG SERVICES PTY LTD – ACN105 173 608
First Respondent

DION ARNE RISBORG
Second Respondent

HEATHER JANE RISBORG
Third Respondent

REASONS FOR JUDGMENT

Introduction

1. In this matter amendments[1] to the *Workplace Relations Act 1996* (Cth) ("the Act") that came into effect on 27 March 2006 resulted in a section of the workforce, namely trolley collectors, having their hourly rates of pay doubled and in some cases trebled. Although the employer here knew of the legislative changes it underpaid its employees and continued to do so for more than 16 months. It then went into administration and later liquidation. These proceedings have continued as a penalty hearing solely against the former directors of the employer company.

[1] *Workplace Relations Amendments (Work Choices) Act 2005* (Cth).

The Proceedings

2. The applicant is a workplace inspector ("the Workplace Inspector") appointed by and subject to the direction of the Office of the Workplace Ombudsman, formerly known as the Office of Workplace Services. The responsibilities of workplace inspectors includes the investigation of allegations that employers have failed to observe the Australian Fair Pay and Conditions Standard[2] ("AFPCS") and, in appropriate cases, to apply to the Court for judicial determination of alleged breaches of the AFPCS, the imposition of penalties and for other forms of relief.[3]

3. In the present case the Workplace Inspector alleges that between 27 March 2006 and 14 May 2007 the employer, the first respondent Risborg Services Pty Ltd ("Risborg"), was guilty of 1,764 breaches of certain of the wages provisions of the AFPCS.

4. The Workplace Inspector further alleges that Risborg's directors, the second and third respondents ("Mr Risborg" and "Ms Risborg" respectively), were involved in Risborg's contraventions and, by reason of s.728 of the Act, are each to be treated as having contravened the provisions alleged against Risborg.

5. On 16 August 2007 a meeting of directors of Risborg comprising Mr and Ms Risborg resolved to appoint an Administrator pursuant to Pt.5.3A of the *Corporations Act 2001* (Cth) as the company was insolvent or likely to become insolvent. In his report to creditors of 4 September 2007 the Administrator recommended that Risborg be placed into liquidation. At a meeting of creditors held on 12 September 2007 it was unanimously resolved that the company be wound up. As a result of these events counsel for the Workplace Inspector informed this Court on 10 October 2007 that for the time being it was not intended to proceed against Risborg. The matter has proceeded therefore solely in relation to Mr and Ms Risborg.

6. These proceedings were commenced on 26 July 2007 and the application and supporting affidavit served on all respondents the next day. At the first return date on 13 August 2007 there was no appearance by any of the respondents. The matter was adjourned to 17 August

[2] Section 169 of the Act.
[3] Sections 718-723 of the Act.

2007 at which time Counsel for Mr and Ms Risborg appeared but there was no appearance by or on behalf of Risborg. The Workplace Inspector had earlier that day filed an application for summary judgment in relation to the claims against Mr and Ms Risborg. Orders were then made listing the summary judgment application for argument on 10 October 2007 and giving Mr and Ms Risborg leave to file affidavits in opposition to the application. It was further ordered that Mr and Ms Risborg each comply with rr.4.03 and 4.05 of the *Federal Magistrates Court Rules 2001* (Cth) by filing responses and affidavits by 31 August 2007. To ensure that the matter was dealt with expeditiously, and notwithstanding that a summary judgment application was to be dealt with on 10 October 2007, the action was listed for trial on 12 November 2007. Consequential trial directions were also ordered.

7. On 31 August 2007 the respondents' solicitors sent a letter to solicitors for the Workplace Inspector indicating that Mr and Ms Risborg did not oppose the imposition against them of a civil penalty pursuant to ss.719(1) and 728 of the Act. The letter proposed that as the summary judgment argument would no longer be needed, the hearing time set aside on 10 October 2007 be used for the purpose of submissions in relation to the civil penalties to be imposed on Mr and Ms Risborg. At no stage have any of the respondents filed responses.

8. The penalty hearing took place on 10, 11 and 17 October 2007. The following material was tendered by consent without either side requesting that the material be supplemented with oral evidence whether by way of further evidence in chief or by way of cross-examination:

    a) Affidavit of the Workplace Inspector filed 26 July 2007 (Exhibit A1);

    b) Affidavit of the Workplace Inspector filed 17 August 2007 (Exhibit A2);

    c) Affidavit of the Workplace Inspector filed 14 September 2007 (Exhibit A3);

    d) Schedule of particulars of breaches headed "Risborg Services Pty Ltd – Employee List" (Exhibit A4);

e) Schedule of underpayments headed “Risborg Services Pty Ltd – Calculation of Underpayment” (Exhibit A5);

f) Schedule headed “Risborg Services Pty Ltd” showing changes to hourly rates of pay for several employees (Exhibit A6);

g) Statement of Agreed Matters (Exhibit A7);

h) Notice to produce dated 28 February 2007 (Exhibit A8);

i) Affidavit of Mr Risborg filed 31 August 2007 (Exhibit R1); and

j) Affidavit of Ms Risborg filed 4 September 2007 (Exhibit R2).

Background

9. Risborg is a company that was incorporated in South Australia in June 2003. At all material times Mr and Ms Risborg were directors of Risborg and Mr Risborg its company secretary.

10. Risborg was at all relevant times in the business of providing trolley collection services to a number of supermarkets in South Australia. It employed numerous people on a casual basis to perform the task of collecting empty shopping trolleys left by shoppers in and around supermarkets and returning them to the appropriate collection point at the supermarket.

11. The trolley collection work did not require any great skill and attracted people who might, for a broad range of reasons, otherwise find it difficult to obtain other suitable work. It is common ground that these people included some of the most vulnerable members of our community including those with health problems, intellectual or physical disabilities, juveniles, the elderly and students.

12. It is Mr and Ms Risborg’s case that, for many years, these people had been exploited by employers in this industry. They were not covered by an award. Mr Risborg says that in 2005 some employers were considering paying trolley collectors an hourly wage of only $4.00 per hour. Mr Risborg says that prior to 27 March 2006 Risborg was paying adult employees at the rate of $6.50 per hour. I accept as true what Mr Risborg tells me in relation to these matters.

13. Mr Risborg says that for some time he had been concerned about the exploitation of employees that was taking place. In about March 2005 he commenced discussions with a representative of the Shop Distributive and Allied Employees Association ("the SDA") together with representatives from another company that provided trolley collection services in South Australia. Mr Risborg says that these discussions took place with the intention of implementing an award whereby the base minimum wage for trolley collectors would be approximately $12.00 per hour. A draft award was annexed to Mr Risborg's affidavit. I note that the draft award includes suggested minimum full time adult ordinary time pay ranging from $473.94 to $547.70 per week depending on the grade of the employee. It also contains provisions for pro-rate wages for junior employees and employees with disabilities.

14. On 27 March 2006 the bulk of the provisions in the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ("the Work Choices amendments") came into operation. This included the AFPCS and thereby the Federal Minimum Wages provisions. These provisions applied to all employers to whom the Act applied whether or not the employee was covered by an award. Standard and special minimum wages[4] were provided for in the AFPCS as well as the minimum allowance to be paid where an employee is employed on a casual basis. The Australian Fair Pay Commission ("the Commissions") is a body created by the Work Choices amendments and was given responsibility, inter alia, for wage setting. The Commission initially set both the standard and special Federal Minimum Wage at $12.75 per hour (ie $484.50 per 38 hour week). As a result, all employers to whom the Act applied had thereafter to pay all employees no less than $12.75 per hour. If they were employed on a casual basis they were also entitled to a 20% loading thereby increasing their hourly rate to $15.30 (ie $581.40 per 38 hour week). The exploitation of employees in this industry should therefore have substantially come to an end on 27 March 2006. In the case of Risborg's employees it did not.

15. Mr Risborg has annexed to his affidavit a document that he says is a true copy of a contract between Coles Myer Ltd ("Coles") and FAB

[4] Employees who were either junior employees or employees with a disability were entitled to be paid the special Federal Minimum Wage whereas other employees were to be paid pursuant to the standard Federal Minimum Wage (s.194 of the Act).

Shopping Centre Services Pty Ltd ("FAB") for the provision of trolley collection services. The contract is signed by Andrew Targett, General Manager Strategic Procurement of Coles and dated 26 August 2005. The document is not signed by FAB. A schedule to the contract says that the commencement date for the contract was to be 1 September 2005 and that it would end on 31 July 2008. Paragraph 5 of the contract deals with payment and says that;

> *in consideration of the Contractor providing the Services in accordance with the terms and conditions of this agreement (Coles) agrees to pay the Fee to the Contractor in accordance with the payment details set out in Schedule 1.*

"Fee" is defined in the contract to mean,

> *the fees payable by (Coles) for performance of the Services as set out in Schedule 4.*

Schedule 4 has the heading *"Price Schedule (Fees) and Sites"* under which it says that it is,

> *necessary to refer to the CD ROM attached to the agreement.*

Neither the CD ROM nor the information contained on the CD ROM have been provided to the Court.

16. In paragraphs 12 and 13 of his affidavit Mr Risborg says that Risborg was a franchisee of FAB and that as a franchisee of FAB, Risborg was assigned a number of contracts between FAB and Coles applicable to a number of Coles and Bi-Lo Supermarkets. (Whilst in his affidavit Mr Risborg refers to "contracts" I take him to mean "contract" and that he is referring to the Coles contract earlier referred to). Although Mr Risborg does not expressly say so in his affidavit I accept the statement that was made by his Counsel during submissions that it was the Coles contract that was assigned by FAB to Risborg. However, significantly, no mention was made in Mr Risborg's affidavit as to when that contract was assigned to Risborg nor was there any evidence put before the Court to prove the details and circumstances of the assignment.

17. As a major aspect of Mr and Ms Risborg's submissions in mitigation of penalty hinged on the suggestion put on their behalf that Risborg was in a

predicament as a result of having this contractual obligation it is remarkable that Mr and Ms Risborg did not put proper and complete evidence before the Court about the assignment of the Coles contract and Risborg's reason for agreeing to the assignment. Counsel for Mr and Ms Risborg submitted that the Coles contract required Risborg to provide trolley collection services to some 25 Coles and Bi-Lo Supermarkets throughout parts of South Australia and that the Coles contract fixed the fee that Risborg would be entitled to. The contract, it was said, did not allow for an increase in the fee even in circumstances where Risborg became legally obliged to give its employees a pay rise. It was further submitted on their behalf that when the Federal Minimum Wage came in on 27 March 2006 the contract became unprofitable.

18. No adequate explanation has been given to the Court as to why Risborg took an assignment from FAB of this fixed fee contract in circumstances where Mr Risborg had since March 2005 been working towards the implementation of a trolley collectors' award which would, if implemented, have substantially increase pay to trolley collectors throughout Australia. Risborg took an assignment of the Coles contract when it knew or should have known that it would be (or soon become) an unprofitable contract. There is no suggestion that Risborg was compelled to accept an assignment of the contact. I am entitled to assume that those who stood behind Risborg, namely Mr and Ms Risborg, saw some benefit in having the inevitably unprofitable contract assigned to Risborg. I have not been told what that benefit was.

19. Mr Risborg says that in April 2006 he attempted to re-negotiate the Coles contract to increase the fee payable to Risborg to take into account the increased wages payable to Risborg's trolley collector employees. Predictably, on 12 April 2006 Coles said that they would not agree to any increase in the fee payable.

20. Mr Risborg said that he then had discussions with the Managing Director of FAB to see if he could "hand back the Coles contract" but that the Managing Director said that they would not agree to this. Mr Risborg said that FAB agreed instead to assist by reducing the royalties that Risborg apparently had to pay FAB from 10% to 5%.

21. In about April 2006 Mr Risborg sent a letter to all employees of Risborg which was in the following terms:

Important Note:
To all employees,
You will all be aware that Government Legislation has enabled an increase in wages for all South Australian workers.
You are entitled to receive different rates of pay, for work performed since the 17th day of April (2006).

- *This has dramatically increased the amount of money which we are required to pay our staff.*
- *At this stage, we have not been able to renegotiate our contracts with our clients – we have not received more money.*
- *The amount of money which we are required to pay-out exceeds the amount of money which we are receiving.*

We are unable to pay people money that we do not have:
Our solution:
What we are able to do, is:

- *We will calculate your wages at the new pay-rate, which will determine how much you are entitled to.*
- *But, for those who are on rates that exceed $10.00/hr, we will only able (sic) to pay you a maximum of $10.00 per hour, during the transitional stage of re-negotiation.*
- *We will record how many hours that you have worked, and multiply this by the difference in your hourly rate (your correct hourly rate-minus $10.00 per hour).*
- *As soon as we are able to secure an increase from our clients, You will receive ALL of the balance of your wages as back-pay.*

Ultimately, we can not give you money that we do not have. Those of you who are cooperative and patient will get every dollar that you are entitled to.
We ask your cooperation through this period.
Thank you and regards,
Dion Risborg.

22. Risborg continued to trade and to underpay its trolley collectors generally in accordance with the letter of April 2006. Some employees were paid marginally more but no explanation has been provided for this difference.

23. In or about October or November 2006 Mr Risborg sent a further letter to all employees in the following terms:

> *Important Note:*
> *To all employees,*
> *You will all be aware that Government Legislation has enabled an increase in wages for all South Australian workers.*

You are entitled to receive different rates of pay as outlined below.

- *This has dramatically increased the amount of money, which we are required to pay our staff.*
- *At this stage, we have not been able to reach an agreement to alter the current contracts – we have therefore not received more money.*
- *The amount of money which we are required to pay-out exceeds the amount of money which we are receiving.*

We are unable to pay Staff money that we do not have;
Our solution:
What we are able to do, is:

- *We will only able (sic) to pay you the current rate of $10.00 per hour, during this transitional stage of re-negotiation.*
- *As soon as we are able to secure an increase from our clients, you will immediately receive the new amount $12.75 / hour.*

We ask your cooperation through this period. Please feel free to call us with any questions you might have.
Thank You and Regards,
I ……totally accept this payment
DION RISBORG
Director
Risborg Services

24. On 1 December 2006 the standard Federal Minimum Wage was increased to $16.16 per hour, which, with the 20% casual loading, meant they were thereafter entitled to be paid $19.39 per hour (ie $736.82 per 38 hour week).

25. On 4 January 2007 the Workplace Ombudsman received a complaint in relation to Risborg's underpayment of certain of its employees. The Workplace Ombudsman referred the matter to the Workplace Inspector for investigation. The investigation resulted in these proceedings being commenced on 26 July 2007.

26. On 10 August 2007 Mr Risborg sent a letter to employees which included the following passage:

> *Due to the legal action of the Workplace Ombudsman, Mr Nicholas Wilson Risborg Services Pty Ltd (sic) will cease operations. However all employees of Risborg Services will now be employed by FAB Shopping Centre Services and will receive their wages from FAB as of Monday 6 August 2007.*

27. I assume that those ex-Risborg employees who took up the offer of work with FAB were thereafter paid in conformity with the requirements of the Act.

Admitted facts

28. The Statement of Agreed Matters (Exhibit A7) said:

- *The parties ask the Court to proceed on the basis of the facts set out in this statement and those contained in the affidavits and their annexures.*

- *The parties may make submissions on the weight to be given to the matters contained in the affidavits and as to any inferences to be drawn from the matters contained in the affidavits.*

- *The second and third respondents admit liability for certain breaches which arose out of a course of conduct which led to breaches of three provisions of the Workplace Relations Act such that the breaches shall be taken for the purposes of Section 719 of the Workplace Relations Act to constitute three single breaches of the following terms of the Workplace Relations Act:-*

  i) Section 182(3)

  ii) Section 182(4)

  iii) Section 185(2).

- *The underpayments pursuant to Section 182(3) in relation to the guaranteed standard FMW total $128,061.18 and relate to 58 separate employees.*

- *The underpayments pursuant to Section 182(4) in relation to the guaranteed special FMW total $8,318.46 and relate to six separate employees.*

- *The underpayments pursuant to Section 185(2) in relation to the guarantee of casual loadings total $34,094.92 and relate to 64 separate employees.*

- *Each employee was paid on a fortnightly basis. However, not all of the employees who were underpaid were engaged for all of the period from 27 March 2006 to 14 May 2007 and not all of the employees performed work in each fortnight during that period.*

29. The admissions made by Mr and Ms Risborg in Exhibit A7 when combined with the other material tendered by consent enable me to make findings of all the essential facts necessary to constitute the contraventions alleged against each of them. I therefore find that on numerous occasions as detailed in the table below between 27 March 2006 and 14 May 2007 Risborg breached subs-ss.182(3) (underpayment of standard Federal Minimum Wage), 182(4) (underpayment of special Federal Minimum Wage) and 185(2) (non-payment of casual loading) and that Mr and Ms Risborg were each knowingly concerned in Risborg's contraventions:

Section Breached	Number of breaches	Number of employees	Total amount of underpayment
182(3)	819	58	$128,061.18
182(4)	63	6	$8,318.46
185(2)	882	64	$34,094.92
Total	**1,764**	**64**	**$170,474.56**

Course of conduct

30. By reason of s.719 of the Act the Court is obliged to treat two or more breaches of the same provision by the same person as constituting a single breach if the breaches arose out of a course of conduct by the person. On the basis of the Statement of Agreed Matters (Exhibit A7) and the letters sent by Mr Risborg in about April 2006 and in about October and November 2006[5] I find that the 819 breaches of s.182(3), the 63 breaches of s.182(4) and the 882 breaches of s.185(2) each arose out of

[5] Paragraphs 21 and 23 of these reasons.

courses of conduct by Risborg and therefore constitute single breaches by each of Mr Risborg and Ms Risborg of each of these sections.

Penalty

General

31. Penalty is determined by s.719(4) of the Act. The maximum penalty that may be imposed is 60 penalty units for an individual. By reason of s.4(1) of the Act, penalty unit has the same meaning as given by s.4AA of the *Crimes Act 1914* (Cth) which in turn provides that, unless a contrary intention appears, penalty unit is $110. The maximum penalty that can therefore be imposed in relation to each of the three provisions that the Court is concerned with in this case is $6,600 in relation to each of Mr and Ms Risborg.

32. Counsel for the Workplace Inspector informed the Court that although the impugned conduct by the respondents is for the period from 27 March 2006 to 14 May 2007, Risborg continued to trade through to the appointment of the administrator on 16 August 2007. The Court is further informed that during that last three month and one day period further breaches of the relevant provisions occurred. Mr Risborg admits as much in his affidavit.

33. Many of the considerations that need to be addressed when considering penalty in matters such as the present case were helpfully identified in the oft referred to decision of Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7. With some modification and additions I have relied on the list of considerations there referred to. The matters that I have considered in deciding whether a penalty should be imposed and if so its quantum are as follows:

    a) The nature and extent of the conduct which led to the breaches;

    b) The circumstances in which the conduct took place;

    c) The nature and extent of any loss or damage sustained as a result of the breaches;

    d) Whether there has been similar previous conduct by the party;

e) Whether the breaches were properly distinct or arose out of the one course of conduct;

f) The size of the business enterprise involved;

g) Whether or not the breaches were deliberate;

h) Whether senior management was involved in the breaches;

i) Whether the party committing the breach had exhibited contrition for the breach firstly, by taking action to make reparation for any loss resulting from the breach whether or not there was a legal obligation to do so and second, in any other manner.

j) Whether the party committing the breach has taken corrective action to ensure further breaches to not occur;

k) Whether the party committing the breach has cooperated with the enforcement authorities;

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

m) The need for specific and general deterrence;

n) If the party has admitted the breaches of the applicable provisions – that fact; and

o) If the party is an individual, the character, antecedents, age, means and physical or mental condition of the party.

The nature and extent of the conduct which led to the breaches

34. The underpayments were deliberate, ongoing and substantial. Mr and Ms Risborg knew of the changes to the legislation and that Risborg had a legal obligation to pay the relevant Federal Minimum Wage and casual bonuses. There was a flagrant disregard of the company's obligations that went on for some 17 months. The letter sent to all employees by Mr Risborg on 10 August 2007[6] suggests that this conduct would have

[6] Referred to in paragraph 26 of the reasons.

continued had it not been for the action of the Workplace Ombudsman in commencing these proceedings against the respondents.

35. Had Risborg recognised that it was unable to meet its debts to its employees as they fell due it could and should have immediately ceased trading. The likely result of it doing so would be that Coles would enter a new contract with another company that was willing to provide trolley collection services. That new contract would have enabled the new employer to pay their trolley collector employees in accordance with the FMW with the possible result that some if not all of the employees that we are here concerned with would have been paid in accordance with the appropriate Federal Minimum Wage. By sending the letters of April and October/November 2006, Risborg misled its employees into believing that they might eventually be paid their full entitlements and to continue working. I note that when an administrator was eventually appointed in August 2007 Risborg's former employees had the immediate opportunity to be engaged by FAB who would then be providing the services to the Coles of supermarkets. This should have occurred as soon as Risborg was in the position of not being able to pay its employees their full entitlements. No satisfactory explanation has been provided to this Court by Mr or Ms Risborg to explain why this did not occur.

The circumstances in which the conduct took place

36. I have earlier stated that I do not accept Mr and Ms Risborg's explanation for their conduct from March 2006 in failing to pay the company's employees their full entitlements. Whilst I accept that Risborg had a legal obligation to provide the trolley collection services to the Coles group of supermarkets and that that contract contained a fixed fee that made the contract unprofitable with the introduction of the Federal Minimum Wage, I do not accept that this result was unexpected by Mr and Ms Risborg. I conclude that the conduct of Mr and Ms Risborg in continuing to allow Risborg to commit the breaches of the Act that it did was with the intention of ultimately having the company wound up.

The nature and extent of any loss or damage sustained as a result of the breaches

37. The loss suffered by Risborg's employees for the period of the Workplace Ombudsman's audit was great. Sixty-four employees (six of whom were either junior employees or disabled employees) lost a total of $170,474.56. Twelve of the employees were underpaid by more than $5,000, two of whom were underpaid by more than $10,000. In relation to 34 of the 64 employees underpayment of their wages continued from 14 May 2007 until 16 August 2007. It is not possible to calculate the additional loss suffered. I consider the nature and extent of any loss to be high both as to the number of employees underpaid and the amounts involved. I also take into account that many of those who suffered the losses were the vulnerable members of our community.

Whether there has been similar previous conduct by the party

38. There is no evidence of similar previous conduct by Risborg or Mr and Ms Risborg.

Whether the breaches were properly distinct or arose out of the one course of conduct

39. I have previously considered the question of course of conduct and come to the conclusion that the 1,764 breaches of the Act have to be treated as three breaches as a result of there being courses of conduct in relation to the breaches of each of ss.182(3), 182(4) and 185(2). I take into account that there was a close connection between each of those three breaches in that the company had decided to pay all workers (or most workers) on the basis of $10.00 per hour irrespective of whether they were entitled to a Standard Federal Minimum Wage, a Special Federal Minimum Wage or a casual loading.

The size of the business enterprise involved

40. I accept that the private company was owned and managed by Mr and Ms Risborg. The company does not appear to have significant assets. So far as I am aware the only employees of the company other than the trolley collectors were Mr Risborg, Ms Risborg and Ms Huong Hurst a

qualified accountant who was concerned with record keeping for the company who resigned from her employment in early May 2007. No evidence has been put before me about the turnover and profitability of the company prior to the implementation of the Federal Minimum Wage.

Whether or not the breaches were deliberate

41. As previously mentioned the breaches here were deliberate. They continued even after the Workplace Ombudsman contacted Risborg about its conduct.

Whether senior management was involved in the breaches

42. Mr and Ms Risborg were the only managers of this business.

Whether the party committing the breach had exhibited contrition for the breach, firstly by taking action to make reparation for any loss resulting from the breach whether or not there was a legal obligation to do so, and, second, in any other manner

43. Mr and Ms Risborg have taken no steps to make reparation for the loss suffered by Risborg's employees. Although there is no legal obligation on them to do so it would have been a significant mitigatory factor had they made some attempt at reparation. The Risborg's have done nothing that exhibits contrition. In fact, Mr Risborg's letter to employees of 10 August 2007 in which he attempts to blame this legal action by the Workplace Ombudsman for the company ceasing operations indicates that he at least still does not accept responsibility for the predicament that Risborg's employees were put into.

Whether the party committing the breach has taken corrective action

44. Mr and Ms Risborg and therefore Risborg ceased committing the breaches with the appointment of an administrator at which stage the company ceased trading. Until that happened the company had for more than 16 months continued to breach the relevant legislation. Whereas most companies would cease committing breaches of the legislation once they realised the true position this company did just the opposite.

Whether the party committing the breach has cooperated with the enforcement authorities

45. Mr Risborg says that he has at all times attempted to cooperate with the applicant in its investigation and to provide the Workplace Ombudsman with any information or documentation that it requested. He refers in particular to a transcript of interview that was taken on 10 May 2007. I also note that there is a transcript of interview dated 24 May 2007 of Ms Risborg. Against that it is to be noted that a Notice to Produce (Exhibit A4) was served on Risborg on 28 February 2007 but that it was not responded to. Mr Risborg explains his conduct in failing to respond to the Notice to Produce in his record of interview by saying that his wife had had a baby and he had to go to a conference in New Zealand. I take these matters into account.

The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements

46. I am assisted by a number of cases that deal with this factor. In *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847 Merkel J said:

> *Once again I see the most important factor in relation to penalty as general deterrents. 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 a naught if the Court does not act strongly to discourage and deter the parties from flagrantly and deliberately breaching terms – in this case of freely made industrial agreements – merely because their own self interest later dictates against compliance with those terms.*

47. In *CPSU v Telstra Corporation Limited* (2001) 108 IR 228 His Honour Finkelstein J said:

> *Even if there be no need for specific deterrents there will be occasions when general deterrents must take priority and, in that case, a penalty should be imposed to mark the laws disapproval of the conduct in question and to act as a warning to others not to engage in similar conduct.*

48. In *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at 41 on the topic of specific deterrents Driver FM said:

> *It is important that breaches of awards, enterprise agreements and the like be deterred. It is particularly important that deterrents be seen and acknowledged by persons who might otherwise display a cavalier attitude to their obligations.*

49. On the basis of these and other cases it is clear that the penalty imposed should act as a specific deterrent to Mr and Ms Risborg to ensure that they treat legislation such as this with the importance that it warrants, and as a general deterrent to the rest of the business community so as to send a clear message to them that Parliament and the Courts treat such conduct as we have here as extremely seriously.

If the party has admitted the breaches of the applicable provisions – that fact

50. It was submitted on behalf of Mr and Ms Risborg that they are each entitled to significant discounts for early admission of liability. *Cotis v Power Juice Pty Ltd* [2007] FMCA 140 was cited. In that case a 25% reduction of penalty was made to acknowledge the respondent's admission of breach even though the admission came at a very late stage. It was submitted on behalf of Mr and Ms Risborg that on the basis of that case they should be given no less than a 30% discount on penalty for their early admission of liability. For reasons that follow, I do not agree.

51. The principles governing the mitigatory effect of pleas of guilty were dealt with in the case of *R v Shannon* (1979) 21 SASR 442 at 452-453 in which King CJ said:

> *1. A plea of guilty may be taken into account in mitigation of sentence where:*
>
> *(a) It results from genuine remorse, repentance or contrition, or*
>
> *(b) It results from a willingness to cooperate in the administration of justice by saving the expense and inconvenience of a trial, or the necessity of witnesses giving evidence, or results from other consideration which is in the public interest; notwithstanding that the*

motive, or one of the motives for such cooperation may be a desire to earn leniency,

and where to allow the plea a mitigatory effect would be conducive to the public purposes which the sentencing judge is seeking to achieve.

2. *A plea of guilty is not of itself a matter of mitigation where it does not result from the any of the above motives, but only from a recognition of the inevitable, or is entered as the means of inducing the prosecution not to proceed with a more serious charge.*

3. *In cases falling within (1), the judge is not bound to make a reduction, but should consider the plea with all the other relevant factors in arriving at a proper sentence.*

4. *In assessing the weight to be attached to a plea of guilty as a factor making for leniency, it is proper for the judge to bear in mind that it is important to the administration of justice that guilty persons should not cause expense to the public and delay to other causes by putting forward false stories and on the basis of such false stories contesting the charges against them.*

5. *The above propositions are not to be taken as weakening in any way the principle that there must be no increase in the sentence which is appropriate to the crime because the offender has contested the charge.*

52. *R v Shannon* has been cited with approval in *Glenn Jordan v Mornington Inn Pty Ltd* [2007] FCA 1384 and more recently in *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Limited (No 3)* [2007] FCA 1617 at para.316.

53. Each case therefore has to be considered on its merits. As previously mentioned the Risborg's have not shown contrition. In my view their plea of guilty is simply a recognition of the inevitable. I make some allowance for the plea of guilty but not to the extent sought.

If the party is an individual, the character, antecedents, age, means and physical or mental condition of the party

54. Dealing firstly with Mr Risborg, he is an undischarged bankrupt having been declared bankrupt in May 2005 on a petition by the Deputy

Commissioner of Taxation. Mr Risborg has had other business experience apart from Risborg. In November 2001 he was appointed director, shareholder and company secretary of Risborg Investments Pty Ltd. He ceased being director and company secretary of this company in October 2005. That company has since been deregistered.

55. Mr Risborg was director and company secretary of Risborg Cleaning Pty Ltd from 19 June 2003 to 6 February 2006. That company also has since been deregistered.

56. Between 4 February 2004 and 28 June 2005 Mr Risborg was a director of Japan Karate Association of Australia ("JKA") Pty Ltd, an Australian proprietary company that is still registered. Mr Risborg says that this organisation is a "non profit volunteer based organisation".

57. Mr Risborg says that since the company was incorporated he has been paid a wage of approximately $32,000 per year and that he has not taken any distribution from the company other than a wage. He says he has been working an average of 60 hours per week from about 7.00 am until 8.00 pm every day managing store issues.

58. Mr Risborg says that he and Ms Risborg have three children aged, five, three and six months and that the middle child has a disorder and special learning needs which limits how much time his wife can work.

59. Mr Risborg says that he is currently renting a house and that he and Ms Risborg do not own any real property. He says that they have two cars of little value and a small amount of money in a savings account.

60. As well as being a director of Risborg, Ms Risborg was a part-time employee of the company carrying out administrative work for the company which included organising correspondence and payslips. Ms Risborg received a wage from Risborg of approximately $27,000 per year. She too has not taken any other distribution from the company other than her wage. As at 31 August 2007 she was unemployed.

Determination

61. In light of the above considerations I have to determine the appropriate penalty. I have considered all of the submissions put by Counsel for the

applicant and Counsel for the respondent and considered them in light of the evidence that is before me.

62. As already mentioned I consider this an extremely serious breach of the relevant provisions. In my view Mr Risborg's conduct is more serious than Ms Risborg's as the evidence discloses that he was the one on behalf of the company that was fully involved throughout. He was the one who managed the company on a day to day basis. He was the one who sent the letters to the employees encouraging them to continue working notwithstanding the fact that the company was unable to pay employees their full entitlements. Whilst Ms Risborg was sufficiently involved in the company's breach to make her culpable I consider that the extent of her involvement was not as great as Mr Risborg's.

63. I have come to the conclusion that in relation to Mr Risborg there should be a penalty of $4,950 in relation to the breaches of each of ss.182(3), 182(4) and 185(2) of the Act making a total penalty of $14,850.

64. In relation to Ms Risborg I would impose a penalty of $3,960 in relation to each of ss.182(3), 182(4) and 185(2) of the Act making a total penalty of $11,880.

65. There will be orders as detailed at the beginning of these reasons.

I certify that the preceding sixty-five (65) paragraphs are a true copy of the reasons for judgment of Simpson FM

Associate: Julie Davey

Date: 31 January 2008