FEDERAL MAGISTRATES COURT OF AUSTRALIA

DENNINGTON v GREGORY PRESCOTT & ANOR *[2008] FMCA 1105*

INDUSTRIAL LAW – Application for civil penalty – breach of applicable provisions – breaches admitted – considerations as to penalty.

Workplace Relations Act 1996 (Cth) ss.167, 718, 719

TWU v DHL Excel Supply Chain (Australia) Pty Ltd (No.2) [2008] FMCA 920
FSU v Commonwealth Bank (2005) 224 ALR 467
CPSU v Telstra (2001) 108 IR 228
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Kelly v Fitzpatrick (2007) 166 1R 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
CFMEU v Coal and Allied Operations Pty Ltd (No.2) (1999) 94 IR 231
Commonwealth Bank of Australia v FSUA [2007] FCAFC 18
Rajogopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Veen (No.2) (1998) 164 CLR 465
Cotis & Pow Juice Pty Ltd [2007] FMCA 140
Mornington Inn v Jordan [2008] FCAFC 70

Applicant:	SALLY DENNINGTON
First Respondent:	GREGORY PRESCOTT
Second Respondent:	MICHAEL HIBBERD
File Number:	LNG 42 of 2006
Judgment of:	O'Sullivan FM
Hearing date:	21 July 2008
Date of Last Submission:	21 July 2008
Delivered at:	Melbourne
Delivered on:	4 August 2008

REPRESENTATION

Counsel for the Applicant:	Mr J. Bourke
Solicitors for the Applicant:	Clayton Utz
Counsel for the First and Second Respondents:	Mr G. Livermore
Solicitors for the First and Second Respondents:	Simmons Wolfhagen

ORDERS

(1) That the respondents pay the Commonwealth the following penalties:

(a) the first respondent in respect of the breaches of clause 15.2 of the *Hospitality Industry, Accommodation, Hotels, Resorts and Gaming Award 1998* by failing to pay the employees listed in Annexure A the amount set out therein the sum of $4,800.00; and

(b) the second respondent in respect of the breaches of clause 15.2 of the *Hospitality Industry, Accommodation, Hotels, Resorts and Gaming Award 1998* by failing to pay the employees listed in Annexure A the amount set out therein the sum of $4,800.00.

(2) The penalties in Order 1 be paid into consolidated revenue on or before 21 August 2008.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

LING 42 of 2006

SALLY DENNINGTON
Applicant

And

GREGORY PRESCOTT

First Respondent

And

MICHAEL HIBBERD
Second Respondent

REASONS FOR JUDGMENT

1. These reasons for decision concern proceedings for the imposition of penalties under the *Workplace Relations Act 1996* ("the WR Act").

2. Sally Dennington ("the applicant") is a workplace inspector employed by the Workplace Ombudsman and appointed as such under section 167 of the WR Act.

3. Gregory Prescott and Michael Hibberd ("the respondents") operated the Club Hotel in Glenorchy, Tasmania and were bound by the *Hospitality Industry Accommodation, Hotels, Resorts and Gaming Award 1998* ("the Award").

4. The applicant commenced proceedings against the respondents in 2006 for penalities as a result of breaches of the Award along with orders for payment of monies due.

5. Between the commencement of the proceedings and the hearing the breaches were admitted, the underpayments were remedied and the applicant ultimately only sought orders for penalty against the respondents. The matter proceeded to hearing for the purposes of determining an appropriate penalty on the respondents only.

The application

6. In the second further amended application filed 20 May 2008 the applicant sought the following orders:

> *"1. An order imposing penalties pursuant to section 719(1) of the* Workplace Relations Act 1996 *against each of the First and Second Respondents (trading as Club Hotel Glenorchy (ABN 49 396 574 355)) for breaching the following clauses of the Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998 (AW783479) in respect of the employees listed in* ***Schedule 1*** *(as further amended):*
>
> *(a) Clause 15.2 - Casual employment*
>
> *2. The basis for the application is set out in the affidavit of Inspector Sally Dennington sworn on 31 October 2006 and any further affidavits to be filed and served prior to trial."*

7. At the hearing on 21 July 2008 the applicant was represented by Mr Bourke of Counsel and the respondents by Mr Livermore of Counsel.

8. The applicant relied on:

- the second further amended application filed 20 May 2008;
- her affidavits sworn 31 October 2006 and 22 May 2008; and
- outline of submissions on penalty filed 16 July 2008.

9. The respondents relied on:

- their response filed 29 April 2008; and

- affidavit of Ms Johnston sworn 19 June 2008.

Background

10. The penalty hearing proceeded essentially on the basis of agreed facts. The Court was advised the agreed facts were at paragraphs [1]-[25] of the applicant's outline of submissions on penalty filed 16 July 2008 and were as follows:

> *"1. By Application dated 31 October 2006, the Applicant (**Dennington**) commenced proceedings seeking penalties pursuant to the Workplace Relations Act 1996 (**the WR Act**) against the Respondents, who jointly traded as the Club Hotel, Glenorchy (**the Club Hotel**),[1] for breaches of the Hospitality, Industry – Accommodation, Hotels, Resorts and Gaming Award 1998 (**the Award**). The application also sought an order that any underpayments due under the Award be paid by the Club Hotel.*
>
> *2. The Application was accompanied by an affidavit of Dennington sworn 31 October 2006.*
>
> *3. On 11 April 2008, Dennington filed a Further Amended Application. The Club Hotel filed a Response to the Further Amended Application dated 29 April 2008. The Response substantially admitted most of the matters set out in the Further Amended Application.*
>
> *4. Thereafter, on 20 May 2008, Dennington filed a Second Further Amended Application that accepted the matters which had previously been in dispute between the parties based on the Further Amended Application and the Club Hotel's Response to that Application.*
>
> *5. By reason of the matters above, the matter proceeds now by way of penalty based on the matters set out in Schedule 1 (Amended) (**the Admitted Schedule**) that forms part of the Second Further Amended Application dated 20 May 2008.*
>
> *The agreed facts*
>
> *6. The Admitted Schedule discloses that during various periods, the earliest period commencing on 7 July 2002, and*

[1] For convenience, the Respondents are referred to collectively as "the Club Hotel" in those submissions.

the latest period of underpayment concluding on 25 June 2006, the Club Hotel underpaid 31 casual employees moneys due to them pursuant to clause 15.2 of the Award.

7. The relevant part of clause 15.2, which is entitled "casual employment", reads as follows:

"***15.2.1*** *A casual employee is an employee engaged as such.*

15.2.2 Penalty rates

The Workplace Relations Act 1996 provides that the standard casual loading of 25 per cent for work performed under this Award is a key minimum entitlement (a preserved APCS) and a constituent part of an Australian Fair Pay and Conditions Standard now administered by the Australian Fair Pay Commission. The penalty payments provided in this clause are payable in addition to the preserved APCS relevant to casual employees:

15.2.2(a) *For work performed between the hours of 7.00 p.m. and midnight, a casual employee must be paid an additional $1.54 per hour or any part of an hour with a minimum daily payment of $2.33 and a maximum daily payment of three hours. For work performed between midnight and 7.00 a.m., a casual employee must be paid an additional $2.20 per hour or part of an hour for such time worked within the said hours with a minimum payment of $2.33 and a maximum daily payment of three hours. For the purposes of this clause, midnight shall include midnight Sunday.*

15.2.2(b) *For work on Saturday a casual employee must be paid 25 per cent additional;*

15.2.2(c) *For work performed on a Sunday a casual employee must be paid 50 per cent additional;*

15.2.2(d) *For work performed on a holiday prescribed by this Award a casual employee must be paid 150 per cent additional.*

15.2.3 *Casual employees must be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly.*

15.2.4 *On each occasion a casual employee is required to attend work he or she is entitled to a minimum payment of two hours work."*

8. *The quantum of the underpayment in respect of any particular casual employee ranged from $41.29 to as high as $9,876.45. The documentation in respect of the calculations of each underpayment for each relevant employee are further set out in the tabulated folder which has been filed in this proceeding. The contents of this folder is not disputed.*[2] *The total amount of the underpayments is $38,333.63.*

The contravening conduct prior to Work Choices

9. *Significant amounts of the underpayments of the Award occurred prior to the commencement of the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (**Work Choices Act**), namely, prior to 27 March 2006. The failure of the Club Hotel to comply with its Award obligations prior to the Work Choices Act constituted a breach of the then s.178(1) of the WR Act, prior to its amendment by the Work Choices Act 1996 (**the Pre-reform Act**).*

10. *Dennington, being an Inspector appointed under s.167 of the WR Act, may bring proceedings under s.178 of the Pre-reform Act in relation to breaches of the Award prior to 27 March 2006.*[3]

11. *Section 178(2) of the Pre-reform Act provided that where two or more breaches of a term of an award are committed by the same person, and the breaches arose out of the course of conduct by the person, the breaches shall, for the purposes of s.178, be taken to constitute a single breach of the term.*

The contravening conduct post Work Choices

12. *In respect of underpayments that occurred after 27 March 2006, such underpayments constitute a contravention of s.719(1) of the WR Act.*

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[2] See paragraph 2 of the Respondent's response dated 29 April 2008.

[3] *Workplace Relations Regulations 2006*, Chapter 7, regulation 2.14 and 2.19. For an example of such a contravention, see *Australian Ophthalmic Supplies v McAlary-Smith* [2008] FCAFC 8 and *Kelly v Fitzpatrick* [2007] FCA 1080.

13. *Section 719(1) of the WR Act enables the Court to impose a penalty in respect of a breach of an "applicable provision" by a person bound by the provision.*

14. *An "applicable provision" is defined in s.717 to include a term of the Australian Fair Pay and Conditions Standard (**AFPCS**).*[4]

15. *Pursuant to s.178 of the WR Act, an Award in place prior to 27 March 2006 is taken to be a "pre-reform wage instrument".*

16. *Pursuant to s.208 of the WR Act, effective from 27 March 2006, a pre-reform wage instrument is taken to be a "preserved APCS"*[5].

17. *Section 171(3) of the WR Act provides that Divisions 2 to 6 of Part 7 constitute the "Australian Fair Pay and Conditions Standard".*

18. *Section 172 of the WR Act provides that the Australian Fair Pay and Conditions Standard provides minimum entitlements of employment for employees.*

19. *Division 2 of Part 7 of the WR Act provides the minimum wages that are required to be paid under the Australian Fair Pay and Conditions Standard. The minimum wages include a preserved APCS such as the Award in respect of casual employees.*[6]

20. *By reason of the matters above, a breach of the Award, from 27 March 2006, constitutes a breach of s.719(1) of the WR Act.*[7]

The relevant maximum penalties

21. *In respect of a contravention of s.719 of the WR Act, the prescribed maximum penalty that may be imposed by the Court for an individual is 60 penalty units and in the case of a body corporate, 300 penalty units. This results in the maximum available penalty for a breach of s.719 of*

[4] The definition of "Award" in s.4 of the WR Act includes a Pre-reform Award.
[5] APCS is an abbreviation for Australian Pay and Classification Scale.
[6] Section 178 of the WR Act.
[7] For an example of a breach of a pre-Reform Award that resulted in a contravention of s.719, see *Kelly v Fitzpatrick* [2007] FCA 1080.

$6,600.00 for an individual and $33,000.00 for a body corporate.[8]

22. *Between 10 August 2004 and 26 March 2006, the maximum penalties under s.178(4)(a)(ii) of the Pre-reform Act were also 60 penalty units for an individual and 300 penalty units for a body corporate.*[9]

23. *Prior to 10 August 2004, the maximum penalties under s.178(4) of the Pre-reform Act were $2,000.00 for an individual and $10,000.00 for a body corporate.*

The unlawful conduct is to be treated as one contravention

24. *Each of the Respondents is entitled to the benefit of s.719(2) of the WR Act and, to the extent applicable, s.178(2) of the Pre-reform Act, in that each of the breaches of the Award concerning each of the relevant employees arose out of one course of conduct.*[10]

25. *By reason of the matters above, the maximum penalty available for each of the Respondents in $6,600.00."*

The legal framework

11. As is clear from the above background the breaches, the subject of these proceedings, were admitted ("the Admitted Schedule"). Those breaches which are set out in the Admitted Schedule are Annexure A to these reasons.

12. Section 719(1) of the Act came into force on 27 March 2006. An eligible court (which includes the Federal Magistrates' Court) may impose a penalty in respect of a breach of an "*applicable provision*" which is defined in s.717 to include a term of an award such as the Award in this case. Section 719(2) is as follows:

> *"Subject to subsection (3), where:*
>
> *(a) 2 or more breaches of an applicable provision are committed by the same person; and*

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[8] Section 4(1) of the WR Act provides that a "penalty unit" has the same meaning as the *Crimes Act 1914* (Cth). Section 4AA of the *Crimes Act* defines a "penalty unit" to be $110.00.

[9] Act No. 112 of 2004, s.3 and Schedule 3, items 6-17.

[10] *Gibbs v City of Altona* (1992) 37 FCR 216 at 233. See also *Flattery v The Italian Eatery* (2007) 163 IR 14 at [12] (Mowbray, FM); *Mornington Inn v Jordan* [2008] FCAFC 70 at [41] (Stone and Buchanan JJ).

(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.

13. Section 719(4) prescribes maximum penalties for breach of an applicable provision of 60 penalty units for an individual and 300 penalty units for a body corporate.

14. The breaches occurred both before and after the commencement of s.719 in its present form and the other amendments introduced by the Work Choices Act on 27 March 2006. Prior to that time s.178(1) of the Act relevantly provided:

> *"Where an organisation or person bound by an award … breaches of term of the award … a penalty may be imposed by the court…"*

15. Subsection 178(2) was in substantially the same terms as the present s.719(2).

16. Chapter 7, reg. 2.14 of the *Workplace Relations Regulations 2006* provides that after the commencement of the Work Choices Act an application may be made to the Court by a workplace inspector for the imposition of a penalty under s.178 in respect of breaches of a federal award which occurred prior to 27 March 2006.

17. By reason of (the old s.178 and now) s.719 of the WR 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 arise out of a course of conduct by the person. I accept the parties agreement in this regard is as set out above in paragraph 10.

18. Finally, by virtue of the above the maximum penalty that may be imposed on each of the respondents is 60 penalty units. The maximum penalty that can be imposed in relation to the breach of the applicable provision of the Award is $6,600 in relation to each of the respondents.

Approach to penalty proceedings

19. The applicant's submissions noted:

"26. The role of civil penalty provisions in the current industrial regime has been identified by Merkel J in Finance Sector Union v Commonwealth Bank of Australia *(2005) 224 ALR 467 at 487 [72], in the following manner:*

> "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. As is apparent from the penalties that I have imposed, I have not accepted that such an approach, which was urged by CBA (which contended that either no penalty or only a nominal penalty was appropriate), is applicable in the present case"

27. One frequently cited statement of relevant considerations (but not exhaustive) for the assessment of civil penalties is the judgment of Branson J in CFMEU v Coal and Allied Operations Pty Ltd *(No.2) (1999) 94 IR 231 at [8]. Branson J in that case identified the main considerations for the Court to consider as follows:*

(a) The circumstances in which the relevant conduct took place (including whether the conduct was undertaken in deliberate defiance or disregard of the Act);

(b) Whether the Respondent had previously been found to have engaged in contravening conduct;

(c) When more than one contravention was involved, whether the various contraventions are properly to be seen as distinct or arising out of one course of conduct;

(d) The consequences of the conduct; and

(e) The need for deterrence.

20. The parties agreed the approach to penalty in matters such as the present case was as set out above and that the particular considerations

relevant in deciding whether a penalty should be imposed, and if so its quantum, are as follows in this case:

- nature and extent of unlawful conduct;
- circumstances of unlawful conduct;
- specific deterrence; and
- general deterrence.

21. In *TWU v DHL Excel Supply Chain (Australia) Pty Ltd (No.2)* [2008] FMCA 920, Smith FM said:

> *"3. The ultimate object of an assessment of penalty is to arrive at an amount within the range of penalties provided in the legislation which is proportionate to the gravity of the offence committed (cf.* Graham J in Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith *[2008] FCAFC 8 at [54]). Although I must explain the considerations which influence my assessment, it has been recognised that sentencing is an 'instinctive synthesis' of relevant considerations. Helpful lists of considerations have been adopted in previous cases, and I am entitled to draw from these, without treating them as a substitute for "the unrestrained statutory discretion" (cf. Gyles J in* Sharpe v Dogma Enterprises Pty Ltd *[2007] FCA 1550 at [11]).*
>
> *4. I propose to discuss what I regard as significant considerations in the present case under headings which reflect the matters listed by Branson J in* Commonwealth Bank of Australia v Finance Sector Union of Australia *(2007) 157 FCR 329 at [181] and the longer list of considerations which was distilled by Mowbray FM in* Mason v Harrington Corporation Pty Ltd *[2007] FMCA 7, as summarised by Tracey J in* Kelly v Fitzpatrick *(2007) 166 IR 14 at [14]. And those referred to by the parties."*

22. Turning then to consider those factors and the parties submissions which addressed the above considerations, if not under the specific headings referred to in *Kelly v Fitzpatrick* (2007) 166 IR 14.

Nature and extent of conduct

23. The applicant submitted:

> *"28. The conduct of the Club Hotel was serious and extensive. It involved underpayments to a large body of employees over an extensive period. The total quantum of the underpayments is also significant."*

24. In this matter the conduct admitted by the respondents spanned the period from 2002 to 2006 concerned 31 employees and resulted in underpayments of between $41.29 and $9,876.45 for those employees. In total the underpayments, which had been remedied by the time of the hearing totalled in excess of $38,000.00. The nature of the breaches involved failure to pay employees in accordance with their minimum entitlements under the Award.

The circumstances in which the unlawful conduct took place

25. In relation to this particular consideration the applicant submitted:

> *"29. Given the extent of the underpayments and the period of time over which they occurred, at the very least, it could be said that the Respondents had little or no regard to their obligations to pay the correct wages to casual staff as required both under the Pre-reform Act and the WR Act.*
>
> *30. This attitude is also reflected in terms of the Club Hotel's poor wage records that were kept and/or retained.*[11]*"*

26. The applicant did not suggest the conduct was deliberate. The applicant submitted it occurred over such a period as to indicate the respondents failed to turn their minds to whether or not they were meeting their obligations under the WR Act.

27. To reinforce this submission, the applicant relied on the following paragraphs of her affidavit:

> *"4. On 20 July 2006, a Notice of Produce was served on Prescott and Hibberd to produce, amongst other things, all time and wage records in relation to employees employed at the Club Hotel between the period 1 December 2002 until 30 June 2006, including all time sheets and staffing rosters.*
>
> *5. Pursuant to this Notice to Produce, a number of documents were produced, which included some time sheets, payment*

[11] Dennington affidavit sworn 22 May 2008 at [4]-[10] and [25].

summaries and payslips. The documents produced did not include all relevant time sheets, payment summaries and payslips for the entire period the subject of the Notice to Produce. No rosters were produced, as required in the Notice to Produce. This made any accurate calculation of the level of underpayments applicable to the relevant employees of the Club Hotel extremely difficult, and in some cases, these calculations could not be done in full.

6. *In respect to the time sheets produced they covered only a period of approximately three months. For some employees, there were no time sheets, payment summaries or pay slips produced and underpayments for these employees could not be identified.*

7. *Depending on the records that were produced for any particular employee of the Club Hotel, the calculations were done either based on available time sheet calculations, payment summary calculations or payslip calculations.*

8. *In respect of time sheet calculations, the time sheets did indicate all hours worked by the relevant employee and therefore full calculations were able to be processed but only for a three month period. These calculations included any applicable rates for weekend work, public holidays and overtime.*

9. *Some calculations were required to be done based on payment summaries. These* "payment summaries"*, however, indicated total hours worked for each week, but specific hours and days were not identifiable. Therefore, the calculations had to be based on the ordinary hourly rate applicable for that employee. Additional claims in relation to penalty allowances for weekend work, public holidays or overtime could not be made because of this lack of information.*

10. *Some calculations in respect of employees were done by way of calculations based on payslips. The payslips only indicated total hours worked for a specific week. As such, specific hours and days were not identifiable. Therefore, the calculations were based on the ordinary hourly rate applicable for that employee. Additional claims in relation to penalty allowances for weekend work, public holidays or overtime could not be made because of this lack of information.*

…

25. *Generally, the time and wage records produced by the Respondents were inadequate and of insufficient detail, accuracy and description to assist in any accurate calculation of the underpayments owing to the relevant employees. This made the calculation of underpayments in this matter much more difficult and caused considerable delay."*

28. The respondents did not take issue with the applicants evidence about those records. The respondents instead submitted that their conduct in failing to ensure their obligations under the WR Act were being met was "*negligent*". In this regard the respondents pointed out that Mr Hibberd had deposed:

> *"4. In or around November 2002, Mr Todd Plunkett, the then Hotel Operations Manager for the Club Hotel and 2 other hotels owned by the Hibberd & Prescott Group, was requested to arrange employment packages for all new employees and to standardise employment for current employees of the Group and which included the offering of an Australian Workplace Agreement to the then current employees of the The Club Hotel.*
>
> *5. In 2002, the benefits provided to employees pursuant to the proposed AWA included the provision of knock-off drinks, tea and coffee during roster shifts, breaks (at the discretion of shift supervisions) reasonable post mix drinks during shifts, meals from the hotel menu, staff parties to the value of $120.00 per employee per year, discounted dining at Altitude 464 and relevant external training.*
>
> *6. The level applicable to each employee's wage pursuant to the proposed AWA did not correspond directly with each of the award levels provided in the Award.*
>
> *7. At all material times up to the commencement of the investigation by the Office of Workplace Standards ("OWS") in June 2006, I have assumed that the provisions of the AWA as referred to above applied. Since the commencement of the investigation by OWS I have been made aware that legislative provisions relating to the lodgement of AWA's for the Club Hotel employees have not been followed, and as a consequence the AWA's have not been validly registered."*

29. As is clear from the respondents' position clearly they did not pay attention, or give thought, to their obligations under the WR Act. That they say they were negligent is hardly an answer when the statutory regime that pertained at the time when the majority of underpayments occurred (i.e. before March 2006) required workplace agreements to be approved **before** they came into operation.

Specific deterrence

30. In relation to this particular consideration the applicant submitted:

> "*31. One of the most significant issues that a court ought to have regard to in arriving at the level of penalty is deterrence, both specific and general.*[12]
>
> *32. The level of contrition, corrective action, and co-operation with Dennington will be relevant matters in determining what weight is to be given to specific deterrence.*
>
> *33. The Club Hotel has admitted its contraventions and taken corrective action by paying the relevant employees the moneys that were due to them.*[13]
>
> *34. Nevertheless, the Club Hotel's co-operation with Dennington was not immediately forthcoming. The Club Hotel initially denied all liability in the proceeding. The Club Hotel thereafter vigorously opposed all efforts by Dennington to obtain relevant business records to establish and/or quantify the level of the Club Hotel's breaches of the Pre-reform Act and of the WR Act. It was only after this resistance was unsuccessful that co-operation by the Club Hotel has been forthcoming.*[14]
>
> *35. In such circumstances, any "discount" due to admissions of liability should not be significant.*[15]

31. The applicant referred to the decision in *CPSU v Telstra* (2001) 108 IR 228 at 230:

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[12] See *CPSU v Telstra* [2001] FCA 1364 at [9].
[13] See Dennington affidavit sworn 22 May 2008 at [26].
[14] See Dennington affidavit sworn 22 May 2008 at [12]-[24].
[15] For a discussion as to the fact that an admission of liability will not necessarily result in a "discount" in penalty, see *Mornington Inn v Jordan* [2008] FCAFC 70 at [76]-[78] (Stone and Buchanan JJ).

> *"9. On the other hand, the basic objective of punishment should be to enhance social welfare by minimising the net social cost of wrongdoing. This is achieved by deterrence. Here I speak not only of specific deterrence but also general deterrence. In a case such as the present, that may be of some importance. The reason is that Telstra submits that there is no need to impose any penalty because it will not offend again. That may be true. But even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and to act as a warning to others not to engage in similar conduct:* R v Thompson *(1975) 11 SASR 217. It is also important to remember that proscribed conduct is often engaged in because it is profitable, or will enhance the profitability of the company. To deter conduct engaged in with that purpose, any penalty imposed must have the potential to render the conduct unprofitable…"*

32. The applicant acknowledged the respondents had admitted and remedied the underpayments. However, the applicant submitted the co-operation had not been immediate and the respondents had a history of vigorous opposition to the application in its early stages. The applicant submitted it was only after the parties attended mediation in August 2007 that there was some change.

33. The applicant referred to paragraphs 12-18 of her affidavit.

> *"12. On 14 November 2006, the Respondents filed a response seeking orders that the Application be dismissed.*
>
> *13. In support of the response, Hibberd filed on behalf of the Respondents an affidavit sworn 14 November 2006.*
>
> *14. In an attempt to obtain further documentation to complete all necessary underpayments calculations, I caused a subpoena to be issued to Hibberd seeking further documentation, such subpoena being returnable on 11 December 2006. The Respondents sought to set aside this subpoena.*
>
> *15. The hearing of the argument in respect of the application to set aside this subpoena was heard on 6 February 2007 before Burchardt, FM.*

16. *On 9 March 2007, Burchardt, FM delivered his decision in respect of the application to set aside the subpoena (*Dennington v Prescott & Anor [2007] FMCA 263). *In substance, only part of categories of documents the subject of the subpoena were required to be produced.*

17. *On 27 April 2007, the Respondents produced additional documents in response to the subpoenas. These additional documents, however, gave little to no assistance in further clarifying and calculating underpayments.*

18. *On 13 June 2007, the proceedings was referred to the Docket of O'Sullivan, FM. The proceedings was otherwise referred to a mediation and case conference in Hobart before Registrar or Deputy Registrar."*

34. I accept the applicant's submissions that the respondents' co-operation was forthcoming only late in the piece and only effectively after they had realised the inevitable. Moreover I take into account the thrust of the applicant's submission that the state of the respondents' records made the investigation more difficult.

Whether there has been similar previous conduct

35. It was agreed neither of the respondents had prior convictions as that term is understood for the purposes of these proceedings. However, the applicant in submissions did refer to a contravention by the second respondent. In submissions the applicant's position had been:

> *"36. …that the second Respondent (**Hibberd**) has previously been found guilty of a contravention of the WR Act (duress in respect of an AWA), namely, on 19 September 2007.*[16] *Dennington is unaware of any previous contraventions by the first Respondent (**Prescott**).*[17]

36. The applicant submitted that by virtue of this Mr Hibberd's character was an issue. The applicant acknowledged the previous contravention was not found proven at the time of these breaches (i.e those in the Admitted Schedule). However the applicant's position was Mr Hibberd's character was still a factor in the sentencing discretion. The applicant referred to

[16] Although the previous contravention of Hibberd was not found proven prior to these breaches of the Award, the previous contravention is still relevant to the sentencing discretion. See Fox and Freiberg, *Sentencing* (2nd Edition) at [3.701]-[3.706].
[17] Dennington affidavit sworn 22 May 2008 at [27]-[28].

Veen (No.2) (1988) 164 CLR 465. The respondents submitted there were no prior convictions and the matter referred to by the applicant should not be taken into account.

37. It can be relevant to have regard to matters such as character, prior convictions, age, means and physical or mental condition of an individual respondent in assessing a penalty. However, the contravention referred to here was not found proven at the time these admitted breaches occurred. Nonetheless the applicant maintained to the extent I can I should take it into account. There was no other submission on which it was said it was possible to distinguish these partners (i.e. the respondents) in terms of quantum of penalty.

General deterrence

38. The applicant submitted a factor of great significance in the exercise of any sentencing discretion is that of general deterrence.

39. In relation to general deterrence the applicant, with reference to the decisions which were attached to her submissions on penalty, submitted that the general rule is the quantum of any penalty exceeds the underpayment in question.

40. In this case the applicant noted that wasn't "*mathematically possible"* to do so and it was fortuitous for the respondents, they had used a partnership rather than a company as the vehicle for the business.

41. The applicant also referred to the decision of Merkel J in *FSU v The Commonwealth Bank* (2005) 224 ALR 467 at 41-43:

> *"41. However, the factor of greatest significance in relation to penalty in the present case is the need to impose a penalty that will constitute a general deterrent to others who may be disposed to engage in proscribed conduct of a similar kind. In Leahy at [23] I cited the observations of Finkelstein J in* Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd *(2001) ATPR 41-815; [2001] FCA 383 to the effect that, for a penalty to have the desired effect, it must be imposed at a meaningful level and therefore must be such that a potentially offending corporation will see the penalty as not worth the prospect of gain.*

> *42. The WR Act strikes a balance between employers and their organisations on the one hand, and employees and their organisations on the other hand. Irrespective of whether the legislative pendulum has moved, or is moving, away from or towards awards, enterprise bargaining agreements or individual contracts, the one legislative constant has been the protection conferred by the freedom of association provisions, or their statutory predecessors in Pt XA. It is the freedom guaranteed by those provisions that has enabled the balance previously struck by the legislature to continue to provide a framework that supports* fair *agreement making under the applicable legislative regime. CBA's conduct struck at the heart of that process because it undermined that freedom of association by discriminating against CBA employees because of their entitlement to the benefit of EBAs and AWAs that CBA had negotiated and agreed to with the FSU (the EBAs) or its managerial employees (the AWAs). At a time when employees' entitlements under industrial instruments might be shrinking to the most basic entitlements, it becomes more, rather than less, important that all employers, and particularly large employers, are deterred from injuring or prejudicially altering the position of their employees because of the industrial entitlements the employers had agreed to provide in accordance with the procedures laid down in the WR Act.*
>
> *43. The penalty that is appropriate in all the circumstances is one that deters not only CBA, but also other employers, from implementing schemes analogous to that created by CBA in order to prejudicially alter the position of employees because of their entitlements under industrial instruments made under the WR Act."*

42. In relation to the delay and the applicant's criticism of their conduct early in the proceedings the respondents position was, it was not until mediation had occurred that anything meaningful by way of attempts to resolve the matter by the applicant were taken. The respondents as set out in Ms Johnston's affidavit had been critical that the applicant had not afforded them the opportunity to voluntarily rectify the underpayments before commencing proceedings.

43. There have been many decisions of this Court and the Federal Court that involved consideration of penalties for underpayments of wage

(see eg. *Kelly v Fitzpatrick, (supra) Mason v Harrington (supra) and Cotis v POW Juice* [2007] FMCA 140).

44. These cases make clear the special need for deterrence where the employees concerned are at a disadvantage and rely on minimum award entitlements such as is the case here with respect to the casual loading.

45. In this case there is a need to mark the laws disapproval of the conduct in question and to act as a warning to others not to engage in similar conduct. I bear in mind the remarks of Tracy J in *Kelly v Fitzpatrick* at [28] that:

> *"No less than large corporation employers, small buinesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction* "must be imposed at a meaningful level": *see* Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd *[2001] ATPR 41-815 at [13]."*

Whether the party committing the breach had exhibited contrition

46. This consideration has already been addressed elsewhere.

Penalties

47. In relation to the appropriate penalty the applicant's position was that this was not a case where there should be no discount. The applicant submitted there should be some discount but it should be of "*short compass"*.

48. The applicant submitted having regard to the above matters the appropriate orders were:

> *"(a) A penalty of $4,800.00 be imposed on the first Respondent (Prescott) for his contravention of s.178 of the Pre-reform Act and s.719 of the WR Act, such penalty to be paid into Consolidated Revenue Fund on or before 21 August 2008.*
>
> *(b) A penalty of $5,200.00 be imposed on the second Respondent (Hibberd) for his contravention of s.178 of the*

Pre-reform Act and s.719 of the WR Act, such penalty to be paid into Consolidated Revenue Fund on or before 21 August 2008."

49. The respondent's position in relation to penalty was there ought be no difference in the amount imposed on them. The respondents took the position there ought be a discount as the conduct leading to the breaches was negligent and there had been a significant degree of co-operation. Accordingly, the respondent's position was there ought be a penalty at the low to mid range.

Conclusion

50. 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 the respondents.

51. In my view the conduct is serious. In coming to that view I have had regard to the breaches which involved a failure to provide basic entitlements under the Award. It is no answer on the respondent's part to say their conduct was negligent. In *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 Driver FM (in comments that are particularly apt in the context of this matter given the respondents attitude to compliance with their obligations) 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 those who might otherwise display a cavalier attitude to their obligations."*[18]

52. As previously mentioned the respondents have co-operated but in my view their co-operation was obtained once they recognised the inevitable (see *Mornington Inn v Jordan* [2008] FCAFC 70). Therefore I would make some allowance for this but not to the extent sought.

53. I accept that the monetary amount of any penalty that the Court could impose in this matter might appear insufficient in itself to carry a deterrent impact. I also accept the thrust of the applicant's submission that it was fortuitous the respondents did not conduct the business through a corporate vehicle as the penalties would have been greater.

[18] *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412

54. However, these findings which include the respondent's admission they were *"negligent"* in ensuring they met their obligations under the WR Act will be a matter of record as will the imposition of the penalties themselves. I have also taken into account the applicant has been spared the expense of preparation for trial on liability and the penalty hearing proceeded on basis of agreed facts.

55. Finally, notwithstanding the applicant's attempt to suggest character provided a basis to apply different penalities to the respondents there have been no prior convictions and so I cannot differentiate Mr Hibberd as a repeat offender at the time of the breaches in the Admitted Schedule at Annexure A. I also note the respondents were partners and for these reasons I am satisfied it is inappropriate to apply different penalities. Accordingly I impose an equal penalty on each of the respondents of $4,800.00 for the breaches involved.

56. For the reasons set out above I make the orders set out at the beginning of these reasons for decision.

I certify that the preceding fifty-six (56) paragraphs are a true copy of the reasons for judgment of O'Sullivan FM

Deputy Associate: Haylee Hobbs

Date: 4 August 2008

ANNEXURE A

ADMITTED SCHEDULE

EMPLOYEE NAME	EMPLOYMENT STATUS	PERIOD OF UNDERPAYMENT	TOTAL UNDERPAYMENT	HAS THE UNDERPAYMENT BEEN REMEDIED?	BASIS FOR CLAIM[19]
AZZOPARDI Brennan	Casual	25 December 2005 - 1 January 2006	$41.29	Yes	See Tab 2
BARWICK, Kate	Casual	8 August 2004 - 25 June 2006	$2022.83	Yes	See Tab 3
BICKERTON Kristina	Casual	2 April 2006 - 25 June 2006	$354.09	Yes	See Tab 5
BIRCHALL, Leonard	Casual	4 July 2004 - 25 June 2006	$372.67	Yes	See Tab 6
BLANDON, Tara	Casual	13 March 2005 - 25 June 2006	$1435.82	Yes	See Tab 7
BURNETT, Wanda	Casual	4 July 2004 - 25 June 2006	$1,775.57	Yes	See Tab 8
CASPERSZ, Tamieka	Casual	22 May 2005 - 25 June 2006	$1519.47	Yes	See Tab 10
CRAWFORDKaren	Casual	19 February 2004 - 25 June 2006	$9876.45	Yes	See Tab 11
CURTAIN, Chantelle	Casual	14 November 2004 - 25 June 2006	$390.84	Yes	See Tab 12
DONAGHY, Alanah	Casual	8 August 2004 - 11 June 2006	$1855.56	Yes	See Tab 13
EADIE, Mathew	Casual	7 July 2002 - 25 June 2006	$1763.20	Yes	See Tab 15
FARRELLY, Samantha	Casual	16 February 2003 - 25 June 2006	$2756.33	Yes	See Tab 16
GOVERNOR, Debbie	Casual	19 March 2006 - 25 June 2006	$588.00	Yes	See Tab 18
HALL, Tina	Casual	4 July 2004 - 18 June 2006	$635.00	Yes	See Tab 19
JOHNSON, Tracey	Casual	2 January 2005 - 25 June 2006	$3500	Yes	See Tab 20
LANGFORD, Brodie	Casual	19 June 2005 - 25 June 2006	$526.54	Yes	See Tab 21
LITTLE, Ashley	Casual	4 July 2004 - 25 June 2006	$1,195.18	Yes	See Tab 22
LUTTRELL, Anthony	Casual	30 March 2003 - 20 April 2003	$110.10	Yes	See Tab 23
MacDONALD, Jason	Casual	4 July 2004 - 21 May 2006	$19.65	Yes	See Tab 24
MacMILLAN, Amanda	Casual	7 July 2002 - 25 June 2006	$1,308.00	Yes	See Tab 25

[19] The reference to the "Tab" number is a reference to a tabulated folder containing relevant documents that show the calculations and methodology adopted in respect of each individual underpayment of an employee. These folders have been provided by the applicant without prejudice to the applicant's right to rely on additional documentary evidence and other evidence at trial.

MacMILLAN, Benjamin	Casual	5 March 2006 - 25 June 2006	$912.39	Yes	See Tab 26
McGUIRE, Cindy	Casual	3 July 2005 - 25 June 2006	$912.61	Yes	See Tab 27
MOODY, Aaron	Casual	29 May 2005 - 14 May 2006	$162.72	Yes	See Tab 28
NEAL, Tarquin	Casual	7 May 2006 - 25 June 2006	$173.35	Yes	See Tab 29
PURDON, Jane	Casual	4 June 2004 - 15 May 2005	$430.97	Yes	See Tab 30
REEVE, Melissa	Casual employee in 2003 and full time in July 2004	22 December 2002 - 29 June 2003	$190.13	Yes	See Tab 31
SANTI, John	Casual employee until 4 July 2004. Thereafter, full time.	8 June 2003 - 4 July 2004	$476.37	Yes	See Tab 32
TAKAWE, Elizabeth	Casual	20 February 2005 - 25 June 2006	$1,803.00	Yes	See Tab 33
WILLIAMS, Colleen	Casual	7 July 2002 - 25 June 2006	$61.19	Yes	See Tab 35
WOOD, Lauren	Casual	4 July 2004 - 19 March 2006	$565.31	Yes	See Tab 36
WRIGHT, Donna	Casual	12 March 2006 - 25 June 2006	$599.00	Yes	See Tab 37
TOTAL:			$**38,333.63**		