FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v CLEANERS NEW SOUTH WALES PTY LTD [2009] FMCA 683

INDUSTRIAL LAW – Breaches of the *Workplace Relations Act 1996* (Cth) – employees subject to duress to sign AWAs – imposition of penalties.

Workplace Relations Act 1996 (Cth), ss.167, 400, 405, 407, 719

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8; (2008) 165 FCR 560
Brobbel v Darrell Lea Chocolate Shops Pty Ltd [2008] FMCA 714
Cameron v R [2002] HCA 6; (2002) 209 CLR 339
Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd (No 2) (1999) 94 IR 231
Mill v R [1998] HCA 70; (1988) 166 CLR 59
Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383, [2008] FCAFC 70
Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union [2008] FCAFC 170
Rojas v Esselte Australia Pty Ltd (No 2) (2008) 177 IR 306, [2008] FCA 1585

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	CLEANERS NEW SOUTH WALES PTY LTD
File Number:	SYG510 of 2008
Judgment of:	Driver FM
Hearing date:	17 July 2009
Delivered at:	Sydney
Delivered on:	29 July 2009

REPRESENTATION

Counsel for the Applicant:	Mr M Cleary
Solicitors for the Applicant:	Corrs Chambers Westgarth
Counsel for the Respondent:	Ms C Ronalds, SC
Solicitors for the Respondent:	Price WaterhouseCoopers

ORDERS

(1) Pursuant to ss.407(1)(b) and 407(2)(zi) of the *Workplace Relations Act 1996* (Cth), the respondent shall pay the Commonwealth penalties totalling $80,000 for breaches of s.400(5) of the Workplace Relations Act.

(2) Payment of the penalty in order 1 is to be made within 60 days.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG510 of 2008

FAIR WORK OMBUDSMAN
Applicant

And

CLEANERS NEW SOUTH WALES PTY LTD
Respondent

REASONS FOR JUDGMENT

Introduction and background

1. By an amended application filed on 22 May 2009 the Fair Work Ombudsman seeks relief pursuant to ss.405(1)(f), 407(1)(b) and 407(2)(zi) of the *Workplace Relations Act 1996* (Cth) ("the Workplace Relations Act") in respect of breaches of s.400(5) of the Workplace Relations Act. The proceedings were instituted in the name of Helen Yuen, a workplace inspector but the names of the applicant (and the respondent) were changed. The application asserts contraventions of s.400(5) of the Workplace Relations Act in connection with Australian Workplace Agreements concerning 12 named employees of Cleaners New South Wales Pty Ltd ("the company") and seeks orders for the imposition of a penalty or penalties in respect of the asserted breaches in relation to those employees.

2. The company is a registered company limited by shares of which Mr Robert Swan is the sole director and sole shareholder. The company supplies cleaners in connection with its cleaning business. The 12

named employees were employed in workplaces at Batemans Bay, Nowra and at the Strathfield post office.

3. The company admits that it breached s.400(5) of the Workplace Relations Act but the parties remain in dispute on the question of the imposition of an appropriate penalty. The Fair Work Ombudsman seeks that whatever penalty that is imposed be paid to the Commonwealth.

The evidence

4. The parties have agreed on the following statement of facts.

> *Inspector Helen Yuen (Applicant) is and was at all material times a workplace inspector, appointed under section 167 of the* Workplace Relations Act 1996 *(Cth) (WR Act) and employed by the Office of the Workplace Ombudsman (WO).*
>
> *Cleaners New South Wales Pty Limited (Respondent) is a constitutional corporation which carries on the business of providing cleaning staff in New South Wales in the tertiary education, commercial, hospitality and retail sectors. At all material times, the Respondent employed approximately 800 cleaners. Mr Robert Swan is the sole shareholder and director of the Respondent.*
>
> *In December 2006 and early 2007, a number of Australian Workplace Agreements (AWAs) made with individual cleaners, were lodged with the Workplace Authority. None of these AWAs were accepted by the Workplace Authority on the basis that they contained technical problems.*
>
> *At all material times, the Respondent was the employer of:*
>
> *(a) Ron Shaw, Julie Shaw, Daniel Lyons, Lynda Hall, David Joseph, and Audrey Thompson (Batemans Bay Employees);*
>
> *(b) Mary O'Leary, David Dodd, Mary Reminis and Ziggy Brook-West (Nowra Employees); and*
>
> *(c) Sushil Manandhar, and Mohammad Shahin (Strathfield Post Office Employees).*
>
> *The employees listed ... above, were at all material times employed as cleaners and cleaned various sites in respect of which the Respondent was contracted to supply cleaners.*

At all material times, Ms Kim Gallagher was employed by the Respondent as an Area Manager and managed a number of the Respondent's employees including the Batemans Bay Employees and the Nowra Employees.

At all materials times, Mr John Kalaitzakis was employed by the Respondent as an Area Manager and managed a number of the Respondent's employees including the Strathfield Post Office Employees.

Duress - Batemans Bay Employees

The Respondent, through its employee Ms Gallagher, applied duress to the Batemans Bay Employees in connection with the making of AWAs.

On or around 30 November 2006, Ms Gallagher held a meeting with the Batemans Bay Employees at their place of work, being Stocklands Batemans Bay.

At this meeting, Ms Gallagher informed the Batemans Bay Employees that they would be receiving AWAs and that "you will have to sign it otherwise you won't have a job", *or words to that effect.*

On or around 15 December 2006, Ron Shaw, the leading hand at Stocklands Batemans Bay, received a package from Ms Gallagher in the mail which contained a number of separate bundles of documents to be distributed to each of the Batemans Bay Employees. Each bundle of documents contained a covering letter, a copy of a document titled, "Workplace Agreement Highlighting Important Issues" (Memo) and an information statement from the Office of the Employment Advocate (now known as the Workplace Authority) and an AWA. The Memo contained the statement: "If cleaner will not sign, he/she do not have a job."

In a telephone conversation on or about 15 December 2006, Ms Gallagher said to Mr Shaw, in relation to the AWAs, words to the effect of "the AWAs need to be signed by Christmas".

None of the Batemans Bay Employees signed the AWAs.

On or about 11 January 2007, Ms Gallagher attended Stocklands Batemans Bay and wrote a note in the staff communications book to be read by the Batemans Bay employees which stated that the Respondent was giving staff two weeks' notice of its intention to put contractors on site.

In or about January 2007, Ms Gallagher said to Mr Shaw in relation to the Batemans Bay Employees words to the effect of "since all staff have not signed the AWAs, I will be giving you all two weeks' notice".

In relation to the AWAs offered to them by Kim Gallagher on behalf of the Respondent, the Batemans Bay Employees:

(a) regarded the statement in the Memo referred to at paragraph 11 above as:

(i) threatening and designed to pressure each of them into signing the AWAs; and

(ii) a real threat to their continued employment with the Respondent, and

(b) were concerned about the effect of the AWAs on their financial security.

Duress – Nowra Employees

In or about March 2008, the Applicant contacted and interviewed several members of staff employed by the Respondent at its Nowra site. These interviews were conducted by the Applicant following discussions with the Applicant's legal advisers and the Respondent in relation to the allegations of duress against the Strathfield Post Office Employees and the Batemans Bay Employees.

In or around mid December 2006, Ms Gallagher, on behalf of the Respondent provided an AWA to each of the Nowra Employees, together with a copy of the Memo.

In relation to the AWA being offered to each of the Nowra Employees, Ms Gallagher said words to the following effect to the Nowra Employees:

(a) to Mary Lou O'Leary, "If you don't sign the AWA, you won't have a job";

(b) to Ziggy Brook-West, "Whoever doesn't sign the AWAs, I will sack you all and I will get a whole new crew in";

(c) to Mary Reminis, "If you don't sign the AWA, you won't have a job";

(d) *to David Dodd,* "You have to sign the AWA or else the site will need to be restructured and you will miss out on weekend work".

None of the AWAs signed and lodged at this time were ever registered as a consequence of the technical errors referred to in paragraph 3 above.

In relation to the AWAs offered to the Nowra Employees by Ms Gallagher on behalf of the Respondent:

(a) *each of the Nowra Employees felt they had no choice but to sign the AWAs;*

(b) *Ziggy Brook-West and Mary Reminis felt that their continued employment with the Respondent was threatened.*

Duress – Strathfield Post Office Employees

In or around December 2006, the Respondent, through its employee Mr Kalaitzakis, applied duress to the Strathfield Post Office Employees in connection with the making of AWAs.

In or around early December 2006, Mr Kalaitzakis, on behalf of the Respondent provided the Strathfield Post Office Employees an AWA and said to each of them words to the effect of "if you don't sign these AWAs, you will lose your jobs".

When he provided Sushil Manandhar the AWA, Mr Kalaitzakis said words to him to the effect of "someone's going to lose, someone's going to win."

The Strathfield Post Office Employees did not sign the AWAs given to them by Mr Kalaitzakis.

On or around 21 December 2006, the Respondent commenced paying the Strathfield Post Office Employees in accordance with the rates set out in the AWAs offered to them by Mr Kalaitzakis in early December 2006, despite neither employee having signed the AWA.

On or about 28 December 2006, Mr Kalaitzakis, on behalf of the Respondent, provided each of the Strathfield Post Office Employees another AWA and said words to the following effect to Sushil Manandhar "you have to sign it in five days or write a letter about why you don't want to sign it."

In or around January 2007, Mr Kalaitzakis said to the Strathfield Post Office Employees words to the effect of "when will you be signing the AWA?"

Mohammad Shahin felt that his employment with the Respondent would be threatened or terminated if he did not sign the AWA.

The Strathfield Post Office Employees did not sign the second AWA provided to them by Mr Kalaitzakis.

Contraventions of the WR Act

The Respondent breached section 400(5) of the WR Act when it applied duress to the Batemans Bay Employees, the Nowra Employees and the Strathfield Post Office Employees in connection with the making of AWAs, as set out ... above.

Investigation and Institution of Proceedings

On or about 3 January 2007, Sushil Manandhar, one of the Strathfield Post Office employees, made a complaint to the WO alleging duress by the Respondent in relation to an AWA and that the Respondent had been underpaying him.

Following receipt of this complaint, the WO conducted an initial investigation into the Respondent's employment practices. This included telephone interviews with employees and management staff at various locations in New South Wales.

On or about 24 January 2007, the WO sent a request for records to the Office of the Employment Advocate (now referred to as the Workplace Authority) for all records of telephone calls relating to the Respondent.

On or about 15 March 2007, the WO served a Notice to Produce on the Respondent seeking amongst other things, documents relating to AWAs and time and wage records for various sites.

On or about 7 June 2007, the WO issued a breach notice to the Respondent in relation to alleged breaches of the WR Act and Workplace Relations Regulations 2006 *(Cth).*

On or about 15 October 2007, the WO sent a request for records to the Workplace Authority seeking, amongst other things, verified copies of the template AWAs lodged by the Respondent between 1 January 2007 and 1 October 2007.

On or about 15 October 2007, two Notices to Produce were served by the WO seeking copies of AWAs made with employees between 1 January 2007 and 1 October 2007. The majority of these records were produced on or about 30 October 2007.

On 3 March 2008, the Applicant commenced these proceedings.

Between March and June 2008, there was without prejudice correspondence between the parties' solicitors regarding the issue of the proper employer of the employees and attempts to resolve this issue. The parties have agreed to remove the Second Respondent [a related company] *from these proceedings.*

Since the initial contact with the WO in March 2007, the Respondent has cooperated with the WO, including by providing information to the WO when requested.

5. The company also relies upon the affidavits of Robert John Swan made on 14 July 2009, Judith Louise Koch made on the same day, Peter John Monaghan made on 10 July 2009 and Mohammad Shahin made on the same day. None of the deponents were required for cross-examination.

Submissions

6. Both parties made written and oral submissions on penalty. The Fair Work Ombudsman asserts that there are 21 separate and distinct contraventions of s.400(5) of the Workplace Relations Act and that a penalty should be imposed in respect of each of them. The conduct of two of the company's managers towards the 12 named employees is identified in relation to those 21 asserted breaches. The Fair Work Ombudsman submits that in each case, the contravening conduct engaged in by the two managers (Ms Gallagher and Mr Kalaitzakis) respectively, constituted a separately identifiable application of duress such as to pressure the employee concerned to agree to the proposed AWA.

7. The Fair Work Ombudsman refers to authority in relation to the factors relevant to the imposition of penalty and submits:

   a) the company's conduct in relation to the AWAs it sought to make with each of the 12 employees demonstrates a deliberate policy

and systematic disregard by the company of the prohibition on exercising duress pursuant to s.400(5);

b) the particulars of the relevant conduct are said to support this conclusion;

c) the 12 employees should be considered to be vulnerable by reason of being low paid workers who might find it hard to find alternative employment, as they were unskilled and two of the three worksites were in regional centres;

d) the conduct was planned and deliberate and extended over a period of between two and three months;

e) the employees concerned suffered non economic damage in that their employment was threatened;

f) the company operates a large business employing large numbers of people;

g) Ms Gallagher and Mr Kalaitzakis were part of the senior management of the company and were responsible for 28 and 30 worksites respectively;

h) although the company has been co-operative since March 2007, it only co-operated and took corrective action following the making of a complaint;

i) the Court should have regard to the gravity of the employer's wrongdoing and the integrity of the statutory scheme generally;

j) there is a need in this case for penalties to be imposed by the Court furthering the objective of specific deterrents, having regard to the circumstances in which the contraventions occurred and the nature of the company's business, particularly having regard to the facts that the contraventions were deliberate, co-ordinated and systematic and carried out by senior managers, the company applied duress to 12 of its employees in three different sites, the employees were low paid and vulnerable and the company is a large organisation;

k) there is also a need in this case for penalties to be imposed by the Court in furtherance of the objective of general deterrence having regard in particular to the fact that cleaning industry employees are frequently vulnerable and have non English speaking backgrounds and that employees in the cleaning industry are low paid and many are not aware of their entitlements;

l) the relevant authorities indicate that a substantial penalty is called for in the present circumstances and no discount should be applied;

m) a mid range penalty for each of the 21 breaches is called for producing an aggregating sum of six figures.

8. The company contests that there was a deliberate policy and systematic disregard by it in relation to the admitted breaches. Mr Swan deposes that there was no knowing or deliberate breach or disregard of the law and the company acted on advice. Ms Gallagher acted against specific instructions and both she and Mr Kalaitzakis have been dismissed in consequence of their actions. Mr Swan is supported by Ms Koch in her affidavit. The company denies that senior management was involved in the breaches and asserts that Ms Gallagher and Mr Kalaitzakis were junior managers.

9. The company also disputes that its employees were vulnerable on the basis of pay or English language ability or otherwise and refers to the affidavit of Mr Shahin. The company further disputes that it is a "large organisation". It submits that its operation is a relatively modest one. The company criticises the Fair Work Ombudsman for making generalised assertions based upon the cleaning industry as a whole.

10. The company submits that the Court should treat the breaches as two courses of conduct by Ms Gallagher and Mr Kalaitzakis. It submits that the conduct occurred over a relatively short period at the three work sites by those two individuals acting alone.

11. While the company accepts that it is responsible for the actions of its managers (even the actions of Ms Gallagher taken in defiance of instructions) it submits that a modest penalty is appropriate. The company points to its strong relationship with the relevant trade union

and its reliance upon advice. It submits that no vulnerable workers were involved and it was a short course of conduct involving the relevant incidents. It submits that the actions of Ms Gallagher and Mr Kalaitzakis were unauthorised and senior management was unaware of the conduct when it was happening. Both Ms Gallagher and Mr Kalaitzakis were dismissed because of their actions. There is said to be no authorisation or direction by senior management. While the company concedes that the employees presented with AWAs were subjected to duress it points out that the threats were not carried out and that either the employees did not sign the AWAs or that they were not registered. The company has not been involved in any similar or related proceedings and no penalty proceedings have previously been heard and determined against it. The company was at the time relatively unsophisticated in the way that it was run.

12. The company is critical of the litigation policy of the Fair Work Ombudsman on the basis that it pursues enforcement action regardless of voluntary compliance. The company submits that it has shown contrition and corrective action, including the making of an apology to staff. New systems are now in place for all new employees with proper induction and engagement processes with external reviews and audits. While the company concedes that there is an issue concerning the enforcement of minimum standards and deterrents, it submits that those factors did not outweigh the particular circumstances of this case.

13. The company submits that a low range penalty for two consolidated courses of conduct should be imposed. The company also seeks a penalty discount of 25 per cent.

14. The company reiterates that the factors bearing in particular on the imposition of a penalty include:

    a) that the actions of Ms Gallagher and Mr Kalaitzakis were unauthorised;

    b) their employment was terminated;

    c) there was a limited ambit of the conduct in time and manner;

    d) there was a single course of conduct by the two individuals;

e) there was a limited impact on the 12 affected employees;

f) the company has engaged in significant expenditure in overhauling its systems to ensure compliance;

g) the company admitted the breaches early and co-operated;

h) the company has shown contrition; and

i) there was no involvement by senior management in the breaches.

Consideration

Factors relevant to penalty

15. In *Rojas v Esselte Australia Pty Ltd (No 2)*[1] at 64 his Honour Moore J considered the decision of her Honour Branson J in *Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd (No 2)*[2] where her Honour said:

> *The Act gives no explicit guidance as to the circumstances in which an order imposing a penalty under s 298U of the Act will be appropriate or as to the circumstances in which a penalty of or near the maximum, or alternatively of a lesser amount, may be called for. The Court is simply directed to consider what is appropriate in all the circumstances of the case.*
>
> *The following matters, which are not intended to comprise an exhaustive list, seem to me to be considerations to which the Court may appropriately have regard in determining whether particular conduct calls for the imposition of a penalty, and assuming that it does, the amount of the penalty:*
>
> *(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 has previously been found to have engaged in conduct in contravention of Part XA of the Act;*
>
> *(c) Where more than one contravention of Part XA is involved, whether the various contraventions are properly seen as*

[1] (2008) 177 IR 306, [2008] FCA 1585
[2] (1999) 94 IR 231 at [7]-[8]

distinct or whether they arise out of the one course of conduct;

(d) The consequences of the conduct found to be in contravention of Part XA of the Act;

(e) The need, in the circumstances, for the protection of industrial freedom of association; and

(f) The need, in the circumstances, for deterrence.

16. At [65] of his decision, Moore J continued:

> *Although "check lists" of the above kind are a useful starting point in determining whether a penalty ought to be imposed, and if so the level of such penalty, at the end of the day the task of the Court is to fix a penalty that pays appropriate regard to the contraventions that have occurred:* Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith *[2008] FCAFC 8; (2008) 165 FCR 560 at [91]. Moreover, as the Full Court noted* in Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union *[2008] FCAFC 170 at [60], while general guidance as to the appropriate penalty may be obtained through an analysis of comparable cases, it remains necessary for the Court to give careful consideration to the circumstances of the case before it (see also* Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith *[2008] FCAFC 8; (2008) 165 FCR 560 at [12] per Gray J).*

17. In the present case, there is no doubt that the company wished the 12 employees to sign AWAs and set in place a deliberate scheme to obtain that object. The company was lax in giving its managers (Ms Gallagher and Mr Kalaitzakis) too free a hand in the achievement of its objective. By threatening the employment of the 12 staff the company, through its managers, acted in disregard of the Workplace Relations Act. I accept, from the evidence of Mr Swan and Ms Koch, that when the circumstances came to their attention they issued corrective instructions but, the damage had already been done and Ms Gallagher acted further in disregard of the instructions given to her. The company accepts liability for the actions of Ms Gallagher and Mr Kalaitzakis. While I accept that Ms Gallagher and Mr Kalaitzakis were not "senior managers" (in that they were not presented as part of the senior management team of the company) they had significant management responsibilities and substantial freedom of action within their area of responsibility. They were not junior managers subject to

day to day supervision or control. I find that Ms Gallagher and Mr Kalaitzakis were middle managers of the company.

18. On the other hand, the threats to the employment of the 12 staff were not carried out. The staff either declined to sign the AWAs they were given or, where the AWAs were signed, they were not registered because of technical defects. Mr Swan and Ms Koch were not personally involved in the admitted breaches. Their fault is one of omission rather than commission. They gave too much latitude to Ms Gallagher and Mr Kalaitzakis. They acted appropriately when the circumstances came to their attention.

19. The company has not previously been found to have contravened the *Workplace Relations Act*. The company operates only within New South Wales but is a substantial employer, having at the relevant time around 800 employees. Although the company has recently suffered a significant loss of market share, it appears to remain a viable and profitable business.

20. The 12 employees did not suffer economic loss because of the contraventions. They did suffer non economic loss although, as the affidavit of Mr Shahin shows, the extent of that loss is likely to have varied significantly from one individual to the next. This reflects the variable vulnerability (or resilience) of individuals when confronted with a threat to their employment. None of the employees were ultimately required to, or did, enter into enforceable AWAs. The company dismissed both Ms Gallagher and Mr Kalaitzakis because of their actions. Systemic corrective action has been taken by the company in order to seek to ensure that the conduct is not repeated. This has involved the introduction of more robust (and expensive) administrative controls. Mr Swan and Ms Koch have expressed their regret for what occurred although it does not appear that this has extended to a personal apology to the 12 affected staff.

21. On any view, there was more than one contravention of s.400(5) of the Workplace Relations Act. The Fair Work Ombudsman submits that there were 21 separate and distinct contraventions. The company submits that there were only two based upon a single course of conduct by Ms Gallagher and Mr Kalaitzakis. Section 719 of the Workplace Relations Act requires that where two or more breaches of an

applicable provision are committed by the same person and arise out of the course of conduct by that person, they are to be treated, for the purposes of s.719 as constituting a single breach of a term. The principles to be applied in determining whether s.719(2) operates in that manner are established by reference to the authorities. However, s.719 applies in respect of breaches of awards and other instruments, not in relation to a contravention of s.400(5). Nevertheless, the company asserts that Ms Gallagher and Mr Kalaitzakis were each engaged in a single course of conduct of applying duress to cause the 12 employees to sign the AWAs. That issue was considered by the Full Federal Court in *Mornington Inn Pty Ltd v Jordan*[3] where Gyles J and Stone and Buchanan JJ divided on that issue, and the impact of the totality principle. At [51] Stone and Buchanan JJ said:

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

22. In this case the company does submit that that course should be adopted. That approach may, however, be criticised on the basis that it suggests that the application of duress to many employees is no more grievous than the application of duress to a single employee. That is a difficult proposition to accept. On the other hand, treating 21 admitted breaches as separate and distinct suggests that the conduct was more grievous in respect of some employees than others. In my view, Ms Gallagher and Mr Kalaitzakis were engaged in a course of conduct to apply duress to the 12 employees to sign AWAs. I do not think it material that the duress was applied on more than one occasion to some employees but on only one occasion to others. The intended effect on all was the same but the actions in respect of each of the 12 employees

[3] (2008) 168 FCR 383, [2008] FACFC 70

should properly be seen as a separate breach. The conduct was materially the same but directed against each of the 12 employees. I proceed on the basis that Ms Gallagher and Mr Kalaitzakis engaged in a course of conduct against each of the 12 employees and that 12 breaches occurred.

23. The company has enjoyed good relations with the relevant trade union and there is no need in the circumstances of this case to take into account the need for protection of industrial freedom of association. The company has recognised that the attempt to impose AWAs on its employees was a poor idea and Mr Swan in particular regrets that the company ever engaged in the process of introducing AWAs. I understand the company to be now committed to processes of collective bargaining.

24. Neither is there a need for particular deterrence against the company. It has recognised its fault and has taken corrective action in order to ensure that future breaches do not occur. The senior management of the company (including Mr Swan) have shown contrition. The Fair Work Ombudsman submits that there is a need for general deterrence to be reflected in the penalty applied because the cleaning industry is known for the vulnerability of the workers engaged in it, because of low pay, limited work skills and (often) limited English language skills. While there may be some force in that submission, the company is correct to point out that it would be inappropriate to make it the scapegoat for the entire industry, particularly in circumstances where the company has taken corrective action, has shown contrition and has co-operated with the Fair Work Ombudsman.

25. That said, I do not accept the criticisms made by the company of the Fair Work Ombudsman's litigation policy. Actions taken by the Fair Work Ombudsman to enforce compliance with the Workplace Relations Act are taken in part to create publicity in order to achieve a normative effect upon the behaviour of employers. That is appropriate. That publicity is no doubt an embarrassment to the company and that embarrassment is a penalty in itself. The bringing of proceedings in the Court, and the publicity attending those proceedings, are part of a general process for deterring contraventions of the Workplace

Relations Act. So is the imposition of an appropriate penalty in each case.

26. The maximum penalty that may be imposed by the Court for the breaches in this case is $33,000 for a body corporate in relation to each breach. As noted above, I have decided to proceed on the basis that there were 12 breaches involving a course of conduct in relation to each of the 12 employees. Having regard to the circumstances detailed above, I have concluded that a mid range penalty of $10,000 should be imposed for each of the 12 breaches.

27. It is then necessary to consider the application of the totality principle to the overall conduct of the company and the issue of any appropriate discount. The High Court described the totality principle in *Mill v R*[4] in the following terms:

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

[4] [1998] HCA 70; (1988) 166 CLR 59 at 62-63

appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred.

28. In relation to the imposition of civil penalties under the Workplace Relations Act, Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*[5] said at [102]:

> *The totality principle is a guide to sentencing practice. It must be adapted to the circumstances. It is designed to avoid injustice in the overall result. It is not a principle which suggests that a penalty should necessarily be reduced from an aggregate total fixed for multiple offences. Rather, it involves a final check to ensure that a total or aggregate penalty is not, in all the circumstances, excessive. It may not be. There was no evidence about the likely effect of any particular level of penalty upon the appellant. I find it difficult to see the first ground of appeal in the present case therefore (even if it does refer to the totality principle) in a different category from an allegation that the penalty was excessive or as raising any different considerations from the second ground. Clothing it in language suggesting failure to take account of relevant matters does nothing to alter its basic character of a challenge to quantum.*

29. A mid range penalty of $10,000 in respect of each breach in this case would produce an aggregate penalty in respect of the 12 breaches of $120,000. While there is no "going rate" for an aggregate penalty in cases in this jurisdiction and penalties are not a matter of precedent, it is relevant to have regard to other cases in consideration of the totality principle. I was taken by counsel for the Fair Work Ombudsman to five decisions of this Court in which penalties of between $6,700 and $17,000 were imposed for breaches of s.400(5). In *Brobbel v Darrell Lea Chocolate Shops Pty Ltd*[6] the Court awarded penalties totalling $120,000 being $10,000 in respect of each of the 12 contraventions of s.400(5). As here, the company co-operated with the Fair Work Ombudsman and took corrective action and showed contrition. The conduct was over a similar period (or perhaps slightly longer). The relevant employees were more obviously vulnerable than in this case

[5] [2008] FCAFC 8
[6] [2008] FMCA 714

and they also suffered economic loss (although that was rectified). In my view viewed overall, the conduct of the company in this case was somewhat less grievous than the conduct in *Darrell Lea* and the impact on employees was less. The aggregate penalty should be less than was applied in *Darrell Lea*. An appropriate aggregate penalty in my view is $100,000.

30. I also think it would be appropriate to grant the company a discount, having regard to its co-operation with the Fair Work Ombudsman. The Ombudsman submits that while the company co-operated after the making of the complaint it did not take corrective action promptly. It is admitted that the company has been co-operative since March 2007. The agreed statement of facts has saved significant time and cost. The company has been frank and open in admitting its fault and expressing its contrition. The company has acted responsibly in accepting liability for the actions of Ms Gallagher in particular in circumstances where the company might have sought to avoid that liability because, on the evidence, she acted in defiance of express instructions and may have therefore acted outside the ambit of her actual and ostensible authority. The provision of a discount in these circumstances is analogous to a reduction on sentence in criminal proceedings and may be analysed by reference to the majority judgment in *Cameron v R*[7]. While it is not a sufficient basis for a discount that an admission saves the cost of a contested hearing (which would discriminate against a person who exercised a right to contest allegations) a discount may be justified where it is a demonstration of a willingness to facilitate the course of justice. Contrition and acceptance of responsibility also warrant consideration where shown. The maximum discount in criminal proceedings is thought to be 25 per cent where a plea of guilty is made at the first reasonable opportunity. In the present case the agreed statement of facts was filed on 22 May 2009, although the company was co-operating from a much earlier stage. Taking into account the acceptance of wrongdoing and expressions of regret by Mr Swan and Ms Koch in particular and the demonstrated willingness of the company to facilitate the course of justice by accepting liability for the actions of both Ms Gallagher and Mr Kalaitzakis, I find that a discount of 20 per cent is appropriate.

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[7] [2002] HCA 6; (2002) 209 CLR 339

31. It follows, in all the circumstances, that penalties totalling $80,000 should be imposed. I will so order.

I certify that the preceding thirty-one-one (31) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate: Driver

Date: 29 July 2009