

FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v INDUSTRIAL ROADPAVERS (WA) PTY LTD & ANOR [2010] FMCA 204

INDUSTRIAL LAW – Civil penalty proceedings – agreed statement of facts – records relating to employees – contravention of requirement to produce records for inspection – contravention of requirement to make records relating to an employee – consent declarations and orders except as to quantum of penalty – quantum of penalty – factors for consideration in assessing quantum of penalty.

Crimes Act 1914 (Cth), s.4AA

Workplace Relations Act 1996 (Cth), ss.3(c) & (f)(i), 4(1), 169(1), 728 and 846(2)(g)

Workplace Relations Regulations 2006 (Cth), Chapter 2, regs 14.4, 19.1, 19.4, 19.8(1)(e), 19.12(1), 19.14, 19.18

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560; [2008] FCAFC 8

Carr v CEPU & Anor [2007] FMCA 1526

CFMEU v Austral Bricks (Qld) Pty Ltd (2009) 178 IR 470; [2009] FMCA 143

Dennington v Prescott [2008] FMCA 1105

Kelly v Fitzpatrick (2007) 166 IR 14, [2007] FCA 1080

Klousia v TKM Investments Pty Ltd & Anor [2009] FMCA 208

Leighton Contractors Pty Ltd v CFMEU (2006) 164 IR 375; [2006] WASC 317

Mason v Harrington Corporation Pty Ltd [2007] FMCA 7

Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383; [2008] FCAFC 70

Olsen v Sterling Crown Pty Ltd (2008) 177 IR 337; [2008] FMCA 1392

Secretary, Department of Health & Ageing v Pagasa Australia Pty Ltd [2008] FCA 1545

Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

Workplace Ombudsman v Golden Maple Pty Ltd (2009) 186 IR 211; [2009] FMCA 664

Workplace Ombudsman v KSN Engineering Pty Ltd (2009) 185 IR 316; [2009] FMCA 538

Workplace Ombudsman v SRS Investments (WA) Pty Ltd [2009] FMCA 1132

Applicant: FAIR WORK OMBUDSMAN

First Respondent: INDUSTRIAL ROADPAVERS (WA) PTY LTD

Second Respondent: MARC WILLIAM SKEWES
File Number: PEG 240 of 2009
Judgment of: Lucev FM
Hearing date: 24 March 2010
Date of Last Submission: 24 March 2010
Delivered at: Perth
Delivered on: 31 March 2010

REPRESENTATION

Counsel for the Applicant: Mr E. Schnell
Solicitors for the Applicant: Australian Government Solicitor
Counsel for the First and Second Respondents: Mr T. Pass
Solicitors for the First and Second Respondents: Frank Unmack & Cullen

ORDERS

- (1) The first respondent pay a pecuniary penalty of \$3025 for breach of regulation 19.18(1) of Part 19 of Chapter 2 of the *Workplace Regulations 2006* (Cth).
- (2) The first respondent pay a pecuniary penalty of \$3025 for breach of regulation 19.4 of Part 19 of Chapter 2 of the *Workplace Regulations 2006* (Cth).
- (3) The second respondent pay a pecuniary penalty of \$605 for breach of regulation 19.18(1) of Part 19 of Chapter 2 of the *Workplace Regulations 2006* (Cth), by reason of s.728 of the *Workplace Relations Act 1996* (Cth).
- (4) The second respondent pay a pecuniary penalty of \$605 for breach of regulation 19.4 of Part 19 of Chapter 2 of the *Workplace Regulations 2006* (Cth), by reason of s.728 of the *Workplace Relations Act 1996* (Cth).
- (5) Each of the penalties in orders (1) to (4) above be paid to the Commonwealth Consolidated Revenue Fund by 30 April 2010

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
PERTH**

PEG 240 of 2009

FAIR WORK OMBUDSMAN
Applicant

And

INDUSTRIAL ROADPAVERS (WA) PTY LTD
First Respondent

MARC WILLIAM SKEWES
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. In these proceedings the Fair Work Ombudsman seeks the imposition of penalties in relation to breaches of the *Workplace Relations Regulations 2006* (Cth).¹

Statement of agreed facts

2. A Statement of Agreed Facts was filed on 16 March 2010.
3. The Statement of Agreed Facts provides as follows (with references to attachments deleted):

THE PARTIES

1. *The Applicant is*

¹“*WR Regulations*”.

- 1.1 *a statutory appointee of the Commonwealth appointed by the Governor-General by written instrument on 1 July 2009, pursuant to sub-section 687(1) of the Fair Work Act 2009 (the FW Act), and*
 - 1.2 *a Fair Work Inspector by force of section 701 of the FW Act*
2. *Pursuant to sub-item 13(1), Schedule 18, Part 2 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (the Transitional Act), for the purposes of the application of the Workplace Relations Act 1996 (the WR Act) in relation to conduct that occurred before 1 July 2009 (the WR Act Repeal Day), an application that could have been made or continued by a Workplace Inspector may be made or continued, on and after the WR Act Repeal Day, by a Fair Work Inspector.*
3. *Pursuant to sub-item 11(1), Schedule 2, Part 3 of the Transitional Act, the WR Act continues to apply, on and after the WR Act Repeal Day, in relation to conduct that occurred before the WR Act Repeal Day.*
4. *Pursuant to sub-item 2(2), Schedule 2, Part 2 of the Transitional Act, unless a contrary intention appears, a reference to the WR Act, or to a provision or provisions of the WR Act, includes a reference to regulations made for the purposes of the WR Act, or for the purposes of the provision or provisions of the WR Act.*
5. *Pursuant to sub-regulation 14.3(2) of Chapter 2, Part 14, Division 3 (sub-regulation 14.3(2)) of the Workplace Relations Regulations 2006 (the Regulations), a Fair Work Inspector is entitled to apply to this Court for an order for a contravention of a civil remedy provision in the Regulations.*
6. *The First Respondent is and was at all relevant times a constitutional corporation within the meaning of paragraph 6(1)(a) of the WR Act*
7. *The First Respondent carries on or at all relevant times carried on, the business of earthmoving and road construction which engages or at all relevant times engaged employees.*
8. *The Second Respondent is and was at all relevant times:*

- 8.1 *one of three directors and the secretary of the First Respondent;*
- 8.2 *aware of the day to day activities of First Respondent, and*
- 8.3 *in effective control of the business operations of First Respondent.*
- 9 *At all material times Sean Williamson (the **Employee**) was an employee of the First Respondent within the meaning of sub-section 5(1) of the WR Act.*
10. *The employee was employed by the First Respondent between 15 May 2006 (the Commencement date) until on or about 12 August 2008 (the Termination date).*
11. *On or about 2 September 2008, the employee forwarded a complaint to the Applicant alleging non payment for hours worked, non payment in lieu of notice and non-payment of an unspecified amount of accrued annual leave.*
12. *At all material times, Anthony Thomas Harris (Inspector) was a workplace inspector employed by the Commonwealth of Australia and engaged by the Office of the Workplace Ombudsman (WO) ...*
13. *The inspector received a complaint dated 2 September 2008 made by the employee which alleged that the employee was not paid for hours worked from 7 August 2008 to 12 August 2008 and annual leave entitlements. ...*
14. *During October 2008, the WO advised the First and Second Respondents in writing that it had received a claim from the employee and it might commence a formal investigation. ...*

THE REQUEST FOR RECORDS

15. *On 23 February 2009 and pursuant to sub-regulation 19.18(1) of Chapter 2, Part 19, Division 5 (sub-regulation 19.18(1)) of the Regulations, the inspector issued and served, a written request (Request) to the First Respondent, ... to make available the following records (collectively, the Records) in relation to the employee:*
- 15.1 *all wage and time records relating to the employee from 1 July 2008 to the termination date;*

- 15.2 annual leave records for the full period of employment;
- 15.3 any record containing the date of commencement of employment, and
- 15.4 any record containing evidence of the date of termination of employment.
16. The request was received by the First Respondent ...
17. On 25 February 2009 the First Respondent provided the inspector with copies of fortnightly payroll advices in respect of the employee between 26 June 2008 and 6 August 2008.
18. The First Respondent failed to provide any of the other records the subject of the request (the outstanding records).
19. Between 26 February 2009 and 2 April 2009 the Inspector, and other Workplace Inspectors on his behalf, made enquiries of the First Respondent and the Second Respondent (as an officer of the First Respondent) by telephone and by e-mail seeking the outstanding records.

Specifically:

- 19.1 The inspector attempted to speak with the Second Respondent by telephone on 26 February 2009, 3 March 2009, 4 March 2009, 5 March 2009, 6 March 2009, 9 March 2009, 10 March 2009, 12 March 2009, 20 March 2009, 24 March 2009, 31 March 2009 and 2 April 2009.
- 19.2 The inspector left two messages with an officer employed by the First Respondent (the officer) on 3 March 2009 and 2 times on 4 March 2009 requesting the Second Respondent contact him back. The officer told the Inspector on 4 March 2009 that she had passed on his messages to the Second Respondent. ...
- 19.3 The Inspector left a message with the officer on 5 March 2009 requesting the Second Respondent contact him back but there was no return call.
- 19.4 The Inspector contacted the officer on 6 March 2009 requesting he speak to the Second Respondent

The officer replied the Second Respondent was in a meeting. The Inspector replied that the Second Respondent is not returning his calls and the officer responded by saying the Second Respondent is in a tender process and is not taking any calls. The Inspector requested that the Second Respondent contact him that day, however the Inspector did not receive a call from the Second Respondent.

19.5 The Inspector contacted the officer on 9 March 2009 and was advised the Second Respondent was not in the office. The Inspector requested a return call from the Second Respondent.

19.6 The Inspector wrote to the Second Respondent by email on 4 March 2009 (4 March email) and 10 March 2009 (10 March email).

19.7 The 4 March email expressly referred to the Inspector calling the Second Respondent's office several times during the previous week and each time being told that the Second Respondent was unavailable. The 10 March email expressly made reference to messages left by the Inspector and requesting a return call but the Second Respondent failed to return the Inspector's phone calls.

19.8 On 12 March 2009 the Second Respondent spoke to the Inspector and confirmed he received the 4 March and 10 March emails. The Second Respondent also told the Inspector he was aware that he faced a penalty if he failed to provide the outstanding records that were set out within the request.

19.9 Brian Ravenscroft, Workplace Inspector contacted the officer on 20 March 2009 requesting he speak to the Second Respondent. The officer replied the Second Respondent was out of the office. Mr Ravenscroft requested from the officer that the Second Respondent contact him back. ..

19.10 On 24 March 2009, the Second Respondent spoke to the inspector and gave a commitment to provide the outstanding records by 27 March 2009. The inspector told the Second Respondent that if the

outstanding records are not received by then that an infringement notice would be issued to him. ...

- 19.11 The inspector contacted the officer on 31 March 2009 requesting he speak to the Second Respondent. The officer replied the Second Respondent was out of the office. The inspector requested from the officer that the Second Respondent contact him back. ...*
- 19.12 The inspector tried to contact the Second Respondent twice on 2 April 2009. On the second occasion, the inspector spoke directly to the Second Respondent. The inspector asked when he could expect the outstanding records and the Second Respondent replied he would provide the records "when he gets to it". No further commitment was provided and the inspector responded that he would issue an infringement notice. ...*
- 20. On 8 April 2009 the Inspector issued an Infringement Notice 1801 (the Notice), ... upon the First Respondent and served the Notice upon the Second Respondent (as an officer of the First Respondent) pursuant to sub-regulation 19.46 of Chapter 2, Part 19B, Division 2 of the Regulations, for the failure to comply with the request.*
- 21 Between 16 April 2009 and 9 June 2009 the Inspector made further enquiries of the First Respondent and the Second Respondent (as an officer of the First Respondent) by telephone seeking the outstanding records.*

Specifically:

- 21.1 The Inspector contacted the Second Respondent by telephone on 20 April 2009. The Second Respondent said he would call the Inspector back between 3.00pm and 4.00pm that afternoon but failed to do so. ...*
- 21.2 The Inspector attempted to speak with the Second Respondent by telephone on 22 April 2009 and left a message with the officer for the Second respondent to contact him back.*
- 21.3 The Inspector attempted to speak with the Second Respondent by telephone on 23 April 2009 and left a message with the officer for the Second Respondent to contact him back. ...*

- 21.4 *The Inspector attempted to speak with the Second Respondent by telephone on 28 April 2009 and left a message with the officer for the Second Respondent to contact him back*
- 21.5 *The Inspector contacted the Second Respondent by telephone on 29 April 2009. The Second Respondent said he would call the Inspector back but failed to do so.*
- 21.6 *The Inspector contacted the Second Respondent by telephone on 4 May 2009. The Second Respondent said he would call the Inspector back but failed to do so. ...*
- 21.7 *The Inspector spoke to the Second Respondent by telephone on 21 May 2009. The Second Respondent failed to tell the Inspector when the outstanding records would be provided. ...*
22. *By 9 June 2009 the First Respondent had failed to comply with the notice, and on 9 June 2009 the Inspector issued and served by facsimile upon the First Respondent a Notice of Withdrawal of Infringement Notice 1801 pursuant to sub-regulation 19.52(4) of Chapter 2, Part 19B, Division 2 of the Regulations which is attached to this Statement and marked Y.*
- 23 *The First Respondent has continued to fail to make available to the Applicant all of the records the subject of the request.*

FIRST RESPONDENT'S CONTRAVENTION OF THE REGULATIONS

24. *The First Respondent agrees it contravened sub-regulation 19.18(1) of the Regulations by failing to make the records available to the Applicant in accordance with the request (the first contravention).*
- 25 *Further, the First Respondent agrees it failed to keep records relating to the employee in accordance with Chapter 2, Part 19, Division 3 of the Regulations and contravened sub-regulation 19.4 of the Regulations (the second contravention) by failing to make, or cause to be made, a record in accordance with sub-regulation 19.12(1) of the Regulations relating to:*

- 25.1 *the accrual of the employee's leave;*
 - 25.2 *any leave taken by the employee; and*
 - 25.3 *the balance of the employee's entitlement to that leave from time to time, in circumstances where the Employee was entitled to leave*
26. *Further, the First Respondent agrees it failed to keep records relating to the employee in accordance with Chapter 2, Part 19, Division 3 of the Regulations and contravened (the third contravention):*
- 26.1 *sub-regulation 19.8(1)(e) of the Regulations by failing to make, or cause to be made, a record relating to the date on which the employee's employment began; and*
 - 26.2 *sub-regulation 19.14 of the Regulations by failing to make, or cause to be made, a record relating to the termination of the employee's employment.*

SECOND RESPONDENT'S ACCESSORIAL LIABILITY

27. *The Second Respondent agrees he was involved in and responsible for the first contravention by reason that:*
- 27.1 *he was one of three directors and the secretary of the First Respondent,*
 - 27.2 *he was aware of the day to day activities of First Respondent;*
 - 27.3 *he was in effective control of the business operations of First Respondent;*
 - 27.4 *he was responsible for making and retaining records relating to the employment of the employee;*
 - 27.5 *he knew that the request had been issued by the inspector; and*
 - 27.6 *he knew, determined and directed the extent to which the First Respondent complied (or failed to comply) with the request.*
28. *Further, the Second Respondent agrees he was involved in and responsible for the second and third contraventions by reason that:*

- 28.1 *he was one of three directors and the secretary of the First Respondent,*
 - 28.2 *he was aware of the day to day activities of First Respondent,*
 - 28.3 *he was in effective control of the business operations of First Respondent; and*
 - 28.4 *he was responsible for making and retaining records relating to the employment of the employee.*
29. *In respect of the first contravention, second and third contraventions, the Second Respondent agrees he aided, abetted, counselled or procured the First Respondent to make the first contravention for the purposes of sub-section 728(1) and sub-section 728(2) of the WR Act.*

CONDUCT OF RESPONDENTS FOLLOWING APPLICATION

30. *The Applicant filed proceedings in PEG 240/2009 on 21 December 2009.*
31. *On 5 February 2010 the Applicant's solicitors received a telephone call from Frank Unmack & Cullen, advising that they acted on behalf of the Respondents. Frank Unmack & Cullen and stated they were instructed by their clients that the Respondents would*
- 31.1 *not oppose the Applicant's Application;*
 - 31.2 *agree to all of the relief sought in the Application;*
 - 31.3 *immediately provide the Applicant with all of the records sought by the Applicant.*
32. *On 8 February 2010, the Respondents filed a Notice of Address for Service and signed a Minute of Proposed Programming Orders by Consent, which provided for a Minute of Consent Final Orders, a Statement of Agreed Facts and Submissions to be filed with the Court.*
33. *On 16 February 2010 the Inspector (referred to in paragraph 12 above), received a bundle of documents from the Respondents, the subject of the Request.*
34. *At the time of filing this Statement of Agreed Facts, a small number of outstanding records are yet to be provided by the Respondents. The Respondents have advised the Applicant*

that they have had some technical difficulty obtaining these documents and have not been able to access them until recently. The Respondent has undertaken to provide the outstanding documents as soon as possible. The Applicant has accepted this undertaking

Consent declaration and orders

4. On 19 March 2010 the Court made consent declarations and orders in the following terms:

1. *The First Respondent by failing to comply with a written request by the Workplace Inspector dated 23 February 2009 to make available copies of the following records:*

1.1 *all wage and time records relating to Sean Williamson (the Employee) from 1 July 2008 to the termination date;*

1.2 *annual leave records for the full period of employment of the Employee;*

1.3 *any record containing the date of commencement of employment of the Employee; and*

1.4 *any record containing evidence of the date of termination of employment of the Employee,*

contravened sub regulation 19.18(1) of the Workplace Relations Regulations 2006 (Regulations).

2. *The First Respondent by failing to make or cause to be made a record in accordance with sub-regulation 19.12(1) of the Regulations, containing the following details:*

2.1 *the accrual of the Employee's leave*

2.2 *any leave taken by the Employee; and*

2.3 *the balance of the Employee's entitlement to that leave from time to time,*

in circumstances where the Employee was entitled to leave, contravened sub-regulation 19.4 of the Regulations.

3. *The First Respondent by failing to make or cause to be made a record in accordance with:*

- 3.1 *sub-regulation 19.8(1)(e) of the Regulations, containing the date on which the Employee's employment began, and*
- 3.2 *sub-regulation 19.14 of the Regulations, relating to the termination of the Employee's employment*
- contravened sub-regulation 19.4 of the Regulations.*
4. *The Second Respondent has, in respect of the contraventions of the Regulations referred to in paragraphs 1 to 3 above:*
- 4.1 *aided, abetted, counselled or procured the First Respondent to engage in the contraventions;*
- 4.2 *was directly or indirectly, knowingly concerned in, or party to the contraventions;*
- for the purposes of 728 of the Workplace Relations Act 1996 (the Act), by reason that the Second Respondent:*
- 4.3 *was one of three directors and the secretary of the First Respondent;*
- 4.4 *was aware of the day to day activities of First Respondent;*
- 4.5 *was in effective control of the business operations of First Respondent;*
- 4.6 *was responsible for making and retaining records relating to the employment of the employee;*
- 4.7 *knew that the request had been issued by the Inspector; and*
- 4.8 *knew, determined and directed the extent to which the First Respondent complied (or failed to comply) with the request;*
- 4.9 *was responsible for making and retaining records relating to the employment of the employee.*

THE COURT ORDERS BY CONSENT THAT:

- 5 *The First Respondent pay to the Applicant a pecuniary penalty pursuant to sub-regulation 14.4 of the Regulations in respect of its contraventions of sub-regulations 19.4 and*

19.18(1) of the Regulations in an amount to be determined by the Court.

6. *The Second Respondent pay to the Applicant a pecuniary penalty pursuant to sub-regulation 14.4 of the Regulations, in respect of his accessorial liability, for the First Respondent's contraventions of sub-regulations 19.4 and 19.18(1) of the Regulations in an amount to be determined by the Court.*

Issue

5. The only issue which remains in these proceedings is for the Court to assess the quantum of penalty payable for the contraventions by the first respondent, Industrial Roadpavers (WA) Pty Ltd,² and the second respondent, Marc William Skewes.³

Penalty – factors for consideration

General considerations

6. The considerations to be taken into account in assessment of penalty are well established,⁴ as follows:
 - a) the nature and extent of the conduct which led to the contraventions;
 - b) the circumstances of the conduct (including deliberate defiance or disregard of the *WR Act*);
 - c) relevant record of civil penalty contraventions;
 - d) whether the contraventions are distinct or arise from a single course of conduct;
 - e) the consequences of the contravening conduct;

² “Industrial Roadpavers”.

³ “Mr Skewes”

⁴ *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7; *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 (“*Kelly*”); *Olsen v Sterling Crown Pty Ltd* (2008) 177 IR 337; [2008] FMCA 1392 (“*Sterling Crown*”); *CFMEU v Austral Bricks (Qld) Pty Ltd* (2009) 178 IR 470; [2009] FMCA 143; *Workplace Ombudsman v Golden Maple Pty Ltd* (2009) 186 IR 211; [2009] FMCA 664 (“*Golden Maple*”)

- f) deterrence, both general and specific;
- g) the objects of the *WR Act*;
- h) the size and financial resources of the contravener;
- i) co-operation with regulatory authorities;
- j) the contravener's contrition;
- k) the size of the prescribed penalty, and any recent increases to that prescription; and
- l) the totality principle.

7. This is not an exhaustive list of considerations that the Court may take into account.⁵

Nature and extent of the conduct which led to the contravention

8. The nature of the conduct was a failure by the respondents to keep records as prescribed by the *WR Regulations* and a failure to produce records the subject of a written request dated 23 February 2009 by the applicant,⁶ in relation to one employee.⁷

9. The Request was to make available the following records in relation to the Employee:

- a) all wage and time records relating to the Employee from 1 July 2008 to the termination date of 12 August 2008;
- b) annual leave records for the full period of employment (being the period from and including 15 May 2006 to 12 August 2008);
- c) any record containing the date of commencement of employment; and

⁵ *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at para.11 per Gyles J; *Australian Ophthalmic Supplies v McAlary-Smith* (2008) 165 FCR 560 at 580 per Buchanan J; [2008] FCAFC 8 at para 91 per Buchanan J ("*Australian Ophthalmic Supplies*"); *Golden Maple IR* at 224 per Lucev FM; FMCA at para.11 per Lucev FM.

⁶ "Request".

⁷ "the Employee"

- d) any record containing evidence of the date of termination of employment.
10. The failure to produce these records must be considered in the context of the reason for the requirement to produce records, as set out below.⁸
 11. On 25 February 2009, Industrial Roadpavers provided the Workplace Inspector⁹ with fortnightly payroll advices in respect of the Employee between 26 June 2008 and 6 August 2008.
 12. Despite numerous enquiries made by the Inspector, the respondents failed to provide the other records, which constituted the majority of the records the subject of the Request, to the applicant. On 8 April 2009 the Inspector issued an infringement notice.¹⁰ After issuance of the Notice, further enquiries were made of the respondents in relation to production of the requested records. By 9 June 2009 the respondents had failed to comply with the Notice, and on the same date a notice of withdrawal of infringement notice was issued to the respondents.
 13. On 21 December 2009 an application was filed by the applicant in this Court seeking declarations and orders in relation to contraventions of the *WR Regulations* by the respondents, and orders for pecuniary penalties to be paid.
 14. On 16 February 2010 the respondents provided a bundle of documents to the Inspector, the subject of the Request.
 15. As at 16 March 2010, the respondents had continued to fail to make available to the applicant all of the records the subject of the Request.
 16. At hearing on 24 March 2010, Counsel for the respondents informed the Court that all requested records had been provided to the applicant. The applicant did not demur from that assertion by the respondents (which was, in any event, in accordance with an undertaking given by the respondents to the applicant).
 17. It is clear to the Court that the respondents deliberately refused to provide records to the Inspector over an extended period of time. There

⁸ See paras.28-31 below

⁹ "Inspector"

¹⁰ "Notice".

were numerous unanswered enquiries made of the respondents by the applicant to produce the same. Whilst it is clear that the respondents have fully co-operated since the institution of proceedings in the Court, the Court considers that the prolonged failure to produce is serious, and its extent in time considerable.

18. The nature of the contravention, being in relation to records for one employee, is not significant in scope. The extent of time in failing to keep and produce the records is considerable.

The circumstances of the conduct

19. The Statement of Agreed Facts provides that Mr Skewes was responsible for making and retaining records relating to the employment of the Employee. There is no specific evidence before the Court as to whether or not Industrial Roadpavers had a system in place to create and keep the relevant records in order to produce them upon request of the Inspector. There is also no evidence of whether or not a person (Mr Skewes apart) with relevant record-keeping and creation skills was employed or retained by Industrial Roadpavers.
20. It is clear that Mr Skewes acted evasively in dealing with the Inspector and showed a deliberate disregard for his obligations under the *WR Regulations*. There was a failure to keep records, and the Statement of Agreed Facts sets out the numerous attempts made by the Inspector to contact Mr Skewes in relation to provision of the requested records. Mr Skewes' attitude to producing the records appears to have been somewhat defiant, saying to the Inspector on 2 April 2009, when the Inspector telephoned him to ask when he could expect the outstanding records, that he would provide the records "...when he gets to it".

Relevant record of civil penalty contraventions

21. There is no dispute that each of the respondents is to be treated as a first time contravener

Whether the contraventions are distinct or arose from a single course of conduct

22. Industrial Roadpavers contravened sub-regulation 19.18(1) by failing to comply with the Request by the Inspector to produce records in relation to the Employee.
23. Industrial Roadpavers contravened sub-regulation 19.4 of the *WR Regulations* by failing to make or causing to be made a record in accordance with:
 - a) sub-regulation 19.12(1), in circumstances where the Employee was entitled to leave;
 - b) sub-regulation 19.8(1)(e), containing the date on which the Employee's employment began; and
 - c) sub-regulation 19.14, relating to the termination of the Employee's employment.
24. The parties have agreed that the series of contraventions of sub-regulation 19.4 should be categorised as arising from a single course of conduct and therefore amount to one contravention of sub-regulation 19.4. The single course of conduct arises because the contraventions were committed by the same person, Mr Skewes, and arose out of the same course of conduct by him, namely the failure to make, or cause to be made, records in accordance with the *WR Regulations* in relation to the Employee.
25. Mr Skewes has contravened both sub-regulations 19.18(1) and 19.4 by reason of s.728 of the *Workplace Relations Act 1996* (Cth).
26. Therefore the respondents are liable for penalties in respect of two contraventions of the *WR Regulations*.
27. There is some common ground and conduct involved in each contravention by each of the respondents, such that a small discount of 5-10% may be warranted so that the respondents are not punished unduly for the same conduct applied to both contraventions for each of the respondents.

The consequences of the contravening conduct

28. The consequences of the contraventions do not immediately impact upon any person in terms of loss or damage, but they do have the effect of undermining the relevant statutory objectives. In context, this effect must be considered as being of similar importance as would be the case if loss and damage were suffered.¹¹
29. The powers of workplace inspectors can be exercised for the purposes of determining whether various industrial instruments and minimum standards and entitlements, and the requirements of the *WR Act* and *WR Regulations* themselves, are being observed.¹²
30. One of the purposes of Part 19 of Chapter 2 of the *WR Regulations* is to provide for the inspection of records by workplace inspectors.¹³
31. The provisions of regs.19.4 and 19.18 of Part 19 of Chapter 2 of the *WR Regulations* go to the observance of entitlements of matters such as:
- a) the provision of economically sustainable safety net minimum wages and conditions for persons whose employment is regulated by the *WR Act*,¹⁴ and
 - b) ensuring compliance with minimum standards and industrial instruments through the provision of effective means for investigation and enforcement of employee entitlements.¹⁵
32. In this case, the Employee made a complaint to the applicant in September 2008. The failure of the respondents to keep records and to provide records when requested had the effect of delaying the investigation of the Employee's complaint until after the Court proceedings were instituted in December 2009.
33. By failing to provide requested records to a workplace inspector, in breach of regs 19.4 and 19.18 of Part 19 of Chapter 2 of the *WR*

¹¹ *Secretary, Department of Health & Ageing v Pagasa Australia Pty Ltd* [2008] FCA 1545 at para 56 per Flick J: "conduct ... [which] undermines the utility and effectiveness of a fundamental object". See generally *Sterling Crown IR* at 350-351 per Lucev FM; FMCA at para 51 per Lucev FM

¹² *WR Act*, s.169(1)

¹³ *WR Regulations*, Ch.2, reg 19.1.

¹⁴ *WR Act*, s 3(c).

¹⁵ *WR Act*, s 3(f)(i).

Regulations, the respondents have engaged in conduct that undermines the utility and effectiveness of principal objects of the *WR Act*, and the *WR Regulations*.¹⁶

Deterrence, both general and specific

34. General and specific deterrence are primary objectives of imposing penalties.¹⁷

35. Specific deterrence is required in this case for the following reasons:

- a) the deliberateness of the contraventions;
- b) the duration of the contraventions, the Request having been made in February 2009 and having only been substantially complied with by February 2010;
- c) the lack of contrition shown; and
- d) the fact that there has been no evidence provided that systems are in place to ensure records are kept or able to be produced on request.

36. However, the risk of the respondents re-offending is submitted by both parties as being minimal, given the co-operation shown by the respondents since the proceedings were instituted in this Court. Thus, the Court finds that whilst specific deterrence is necessary, it is necessary at a somewhat lower level because of the co-operation by the respondents, albeit late and minimal co-operation.

37. General deterrence is an important and relevant consideration in assessing penalty, in order to mark disapproval of the conduct in question, and to act as a warning to others not to engage in similar conduct.¹⁸ As noted in *Kelly*:

No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When

¹⁶ *Sterling Crown* IR at 351 per Lucev FM; FMCA at para 52 per Lucev FM.

¹⁷ *Leighton Contractors Pty Ltd v CFMEU* (2006) 164 IR 375 at 391 per Le Miere J; [2006] WASC 317 at para 74 per Le Miere J; *Carr v CEPU & Anor* [2007] FMCA 1526 at para 29 per Lucev FM

¹⁸ *Klousia v TKM Investments Pty Ltd & Anor* [2009] FMCA 208 at para 55 per FM O'Sullivan.

*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 ACCC v ABB Transmission and Distribution Ltd [2001] ATPR 41-815 at [13].*¹⁹

38. This is a case in which both specific and general deterrence must be taken into account when setting a penalty at a meaningful level.

The object of the *WR Act* and *WR Regulations*

39. The objects of the *WR Act* and *WR Regulations* are discussed above in relation to the consequences of the contravening conduct.²⁰

The size and financial resources of the contravener

40. There is limited evidence about the size and financial resources of each of the respondents.
41. The Court has not been assisted by either party in this regard. This is surprising, given that:
- a) the Court has previously held that the size and financial resources of a contravener, including their capacity to pay, are relevant factors in determining quantum of any penalty;²¹ and
 - b) the applicant, being an emanation of the Commonwealth, is obliged to act as a model litigant.
42. The following information has been provided to the Court in the Statement of Agreed Facts, namely that Mr Skewes:
- a) is one of three directors and the secretary of Industrial Roadpavers;
 - b) was in effective control of Industrial Roadpavers; and
 - c) was responsible for making and retaining records relating to the employment of the Employee.²²

¹⁹ *Kelly* IR at 21 per Tracey J; FCA at para 28 per Tracey J.

²⁰ See paras 28-33.

²¹ *Workplace Ombudsman v KSN Engineering Pty Ltd* (2009) 185 IR 316 at 323 per Lucev FM; [2009] FMCA 538 at para 13 per Lucev FM ("*KSN Engineering*")

43. There is no further evidence as to the size of Industrial Roadpavers' business, or as to the financial resources of the respondents.

44. Given:

- a) the state of the evidence;
- b) the fact that there is no evidence as to the present capacity of each of the respondents to pay a penalty; and
- c) the fact that neither party has submitted that there ought to be a reduction or increase in any quantum of penalty that ought to be imposed due to the size and financial resources of the contravener,

there is no reason, associated with the size and financial resources of the respondents, for the Court to adopt other than a normal approach to the setting of penalties.

Co-operation with regulatory authorities

45. The respondents' co-operation with the Inspector was virtually non-existent prior to the institution of proceedings in this Court. Records the subject of the 23 February 2009 Request have been provided as follows:

- a) on 25 February 2009 Industrial Roadpavers provided the Inspector with copies of fortnightly payroll advices in respect of the Employee between 26 June 2008 and 6 August 2008;
- b) on 16 February 2010 the respondents provided a bundle of documents, the subject of the Request, to the Inspector;
- c) on 22 March 2010, in the respondents' written submissions on penalty, Counsel for the respondents said that, as he understood it, the small number of outstanding documents yet to be provided had been provided to the applicant; and

²² Statement of Agreed Facts, para 27

d) on 24 March 2010, Counsel for the respondents informed the Court that all requested records had been provided to the applicant.

46. Mr Skewes was the person responsible for:

a) creating and maintaining Industrial Roadpavers' employment records; and

b) responding to relevant requests for records,

and therefore he must also take responsibility for the failure of the respondents to provide the requested records.

47. The applicant submits that:

a) Mr Skewes' conduct may be characterised as evasive and uncooperative;

b) Mr Skewes demonstrated recalcitrance in providing records to the applicant when they were requested;

c) it may be inferred by the Court that the respondents did not regard their obligations to keep and provide records seriously; and

d) although the respondents have since provided the records requested, the respondents have not provided any evidence of contrition or remorse.

48. To the extent that there has been co-operation by the respondents, it is very belated, and could be viewed as being "...only effectively after they had realised the inevitable."²³

49. The mere fact that the contravention has been admitted by the respondents and a consequent contested hearing averted does not of itself warrant a penalty reduction.²⁴ More is required, for example:

²³ *Dennington v Prescott* [2008] FMCA 1105 at para 34 per O'Sullivan FM; *Sterling Crown IR* at 356-357 per Lucev FM; FMCA at para 77 per Lucev FM

²⁴ *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at 404 per Stone and Buchanan JJ; [2008] FCAFC 70 at paras 73-74 per Stone and Buchanan JJ ("*Mornington Inn*"); *Sterling Crown IR* at 357 per Lucev FM; FMCA at para 78 per Lucev FM

- a) acceptance of wrongdoing and a suitable and credible expression of regret; or
 - b) a willingness to facilitate the course of justice.²⁵
50. In this case there is no expression of regret. There is likewise no apology in evidence and there was no apology put before the Court by Counsel for the respondents.
51. The evidence of the respondents' willingness to facilitate the course of justice is limited to the co-operation evidenced since the institution of proceedings in this Court. This may be viewed as a course of action consistent with bowing to the inevitable rather than any intrinsic desire to see justice done.²⁶
52. The Court considers that a discount of no more than 5-10% ought to be given to the respondents in relation to co-operation

The contraveners' contrition

53. As indicated above, the respondents have not provided any evidence of contrition, nor expressed any contrition at the penalty hearing.²⁷ The Court can infer a modicum of contrition from the evidence provided regarding co-operation by the respondents since the institution of proceedings. Thus, to the extent that such contrition as might be inferred might influence the Court to discount the quantum of penalty, that discount must be minimal, in the range of 5-10%. Recognising that in the circumstances of this case there is some overlap between contrition and co-operation, and, taken together, a penalty reduction in the range of 8-15% is justified.

The size of the prescribed penalty, and any recent increases to that prescription

54. The maximum allowable penalty that a Federal Magistrate may impose for contraventions of Part 19 of Chapter 2 of the *WR Regulations* is:

²⁵ *Mornington Inn* FCR at 405 per Stone and Buchanan JJ; FCAFC at para.76 per Stone and Buchanan JJ; *Sterling Crown* IR at 357 per Lucev FM; FMCA at para. 78 per Lucev FM.

²⁶ *Sterling Crown* IR at 357 per Lucev FM; FMCA at para.80 per Lucev FM

²⁷ See para.50 above.

- a) for a body corporate \$5,500; and
- b) for an individual \$1,100.²⁸

55. As discussed by this Court in *Sterling Crown*, the maximum penalty increased more than five-fold in 2006 and against that background the Federal Court has “suggested ... that the imposition of civil penalties in industrial law proceedings is no longer to be approached with a light hand, and that it might be appropriate for penalties ... to rise appreciably.”²⁹ These are matters to be considered in imposing penalties on the respondents.

The totality principle

56. The totality principle requires the Court, once it has made a judicial evaluation of what it considers to be an appropriate penalty, to examine one final time, the final penalty in order to determine whether it appears wrong.³⁰

Assessment of penalty

57. The applicant submits that a penalty reduction of 25-30% of the maximum penalty is appropriate. The respondents submit that a penalty reduction of 50-65% of the maximum penalty is appropriate.

58. There was no contention that dissimilar penalty reductions ought to apply as between the penalties or as between the respondents. The Court considers that the type of contraventions, the nature of the conduct and apparent closeness of the working relationship between the respondents requires only a single penalty reduction to be assessed, and for that reduction to apply to each contravention by each respondent.

²⁸ See ss.4(1) (definition of “penalty unit”) and 846(2)(g) of the *WR Act*, sub-reg.14 4 of the *WR Regulations* and s 4AA of the *Crimes Act 1914* (Cth).

²⁹ *Sterling Crown* IR at 346 per Lucev FM; FMCA at para 32; and see also IR at 346 and 358 per Lucev FM; FMCA at paras 31 and 83 per Lucev FM; *Workplace Ombudsman v SRS Investments (WA) Pty Ltd* [2009] FMCA 1132 at para.93 per Lucev FM.

³⁰ *Mornington Inn* FCR at 397 and 408 per Stone and Buchanan JJ; FCAFC at paras 42-43 and 91 per Stone and Buchanan JJ; *Australian Ophthalmic Supplies* FCR at 567-568 per Gray J and 577 per Graham J; FCAFC at paras.27-28 per Gray J and para.78 per Graham J; *Sterling Crown* IR at 358 per Lucev FM; FMCA at para.84 per Lucev FM.

59. Each of the respondents is to be treated as a first time offender, and in that respect it is appropriate to reduce penalty by an amount in the range of 20-30%. A discount in the range of 8-15% will be given for the minimal and late co-operation with the regulatory authority and for such contrition as might be inferred from that minimal and late co-operation. A further discount in the range of 5-10% will be given having regard to the course of conduct out of which the contraventions arose.
60. The contraventions were contrary to the objects of the *WR Act* and the purposes of the *WR Regulations*. The contraventions were:
- a) serious;
 - b) deliberate;
 - c) lengthy in time of non-compliance,
- but not in the most serious category of cases given:
- d) the small quantity of records requested;
 - e) that only one Employee was involved; and
 - f) the incident is isolated, or so it seems.
61. The above circumstances indicate that any penalty reduction ought be towards the middle of any discount range finally determined.
62. There is no useful evidence as to the size and financial resources of the respondents which might influence the quantum of penalty.
63. In determining the final amount of penalty the Court takes account of the need for specific and general deterrence. The Court does not consider that the respondents require significantly greater than normal specific deterrence, but notes the failure to express contrition, and the lack of co-operation over a significant period of time with concern. In terms of general deterrence the case does not require anything other than the ordinary general deterrence.
64. In circumstances where the Court considers that a penalty discount in the range of 33-55% is within contemplation, and taking into account

all of the factors above, the Court considers that a reduction of 45% from the maximum penalty payable is appropriate. On that basis a penalty of:

- a) \$3025 for each contravention by Industrial Roadpavers will be imposed, making a total of \$6050 in penalties for Industrial Roadpavers for both contraventions; and
- b) \$605 for each contravention by Mr Skewes will be imposed, making a total of \$1210 in penalties for Mr Skewes for both contraventions.

65. The Court has considered the totality of the penalties for each of the respondents. The totality of the penalties is meaningful, but does not appear to the Court to be out of proportion with the contraventions, or on the evidence, overly burdensome on the respondents. In short, the quantum of the penalties does not appear wrong. No adjustment of the penalties is therefore required under the totality principle.

Conclusion and orders

66. For the reasons set out above there will be penalties imposed as follows:

- a) in respect of Industrial Roadpavers a penalty of \$3025 for each contravention; and
- b) in respect of Mr Skewes a penalty of \$605 for each contravention, to be paid by 30 April 2010, and payable to the Commonwealth Consolidated Revenue Fund. There will be orders accordingly.

67. The Court will hear the parties as to costs, if any.

I certify that the preceding sixty-seven (67) paragraphs are a true copy of the reasons for judgment of Lucev FM

Associate: S. Gough

Date: 31 March 2010