sch.1 and item 12 of sch.18. However, the presently relevant functions of the Workplace Ombudsman were assumed by the current applicant: s.682(1)(d) of the *Fair Work Act 2009* ("FWA"). Sections 718(1) and 167(1A) of the WRA empowered the Workplace Ombudsman to bring these proceedings. Item 13 of sch.18 to the Fair Work (TPCA) Act and s.701 of the FWA empower the applicant to continue these proceedings.

9. On 9 September 2009 the Fair Work Ombudsman was substituted for the Workplace Ombudsman as the applicant in these proceedings.

Background facts

10. A statement of agreed facts was filed by the parties on 6 August 2009. Relevant agreed facts are summarised below.

Glenn Impson

11. The respondent operates a trucking business principally engaged in transporting timber logs from areas of state forest to various mills in Western Australia.

12. On 14 February 2005 Glenn Impson commenced employment with the respondent as full-time truck driver. His employment ceased on 19 February 2007. From 5 March 2005 to 19 February 2007 Mr Impson's employment terms and conditions were governed by an AWA registered pursuant to the WRA prior to its amendment by the Work Choices Act.

13. The AWA was approved by the Office of the Employment Advocate ("OEA") on 15 June 2005, subject to a written undertaking signed by or on behalf of the respondent on 9 May 2005 and filed with the OEA on 10 June 2005 ("Undertaking").

14. The AWA provided for remuneration in the form of a base salary and a "production bonus".

15. The Undertaking stated:

> *Production Bonus: The Company guarantees to make available to the two haulage teams a minimum total of 194,000 tonnes upon*

which payment of $0.51 per tonne will be made to each respective team member. Any tonnage supplied and carried above the minimum guarantee will also carry a rate of $0.51 per team member.

16. The applicant alleges, and the parties have agreed, that during the relevant period Mr Impson was entitled to a total production bonus of $91,763.56 but was only paid a total production bonus of $63,210.91. This amounted to an underpayment of $28,552.65 in breach of clause 11 of the AWA and the Undertaking.

17. After Mr Impson ceased his employment with the respondent on 19 February 2007 he lodged a complaint with the Workplace Ombudsman in relation to the underpayment of his entitlements. Following its investigations into the complaint, the Workplace Ombudsman served the respondent with a breach notice dated 19 November 2007 erroneously alleging that the respondent had underpaid Mr Impson by $58,104.87. A revised allegation of $28,552.65 was notified to the respondent by letter dated 24 April 2009.

18. On 12 June 2009, and before the commencement of these proceedings, the respondent paid the outstanding entitlement less a deduction for tax.

Geoffrey Shaddick

19. On 15 August 2005 Geoffrey Shaddick commenced employment with the respondent as a full-time truck driver. His employment with the respondent ceased on 9 June 2006.

20. From 15 August 2005 to 9 June 2006 Mr Shaddick's employment terms and conditions were governed by an AWA registered pursuant to the WRA and approved by the OEA on 19 January 2006. Mr Shaddick's remuneration during his employment with the respondent was relevantly identical in its terms to clause of 11 of Mr Impson's AWA, as effectively amended by the Undertaking. Significantly, the terms of the production bonus were identical to those quoted above at [15].

21. The applicant alleges, and the parties have agreed, that Mr Shaddick was entitled during the relevant period to a total production bonus of $43,261.75 but he was paid a total production bonus of $24,234.06.

This amounted to an underpayment of $19,027.69 and a breach of clause 11 of Mr Shaddick's AWA.

22. Mr Shaddick ceased his employment with the respondent on 9 June 2006 but was re-employed on 8 November 2006. That employment was terminated on 12 March 2007.

23. Mr Shaddick subsequently lodged a complaint with the Workplace Ombudsman regarding the underpayment of his entitlements. Following its investigations into the complaint, the Workplace Ombudsman served the respondent with a breach notice dated 27 February 2008 incorrectly alleging that the respondent had underpaid Mr Shaddick by $21,836.02. A revised allegation of $19,027.69 was notified to the respondent by letter dated 24 April 2009.

24. On 12 June 2009, and before the commencement of these proceedings, the respondent paid the outstanding entitlements less tax.

Breach of *Workplace Relations Act*

25. In light of the facts agreed by the parties and which are rehearsed above, I find that the respondent contravened s.719(1) of the Act by failing to pay Messrs Impson and Shaddick in accordance with their respective AWAs.

26. Pursuant to s.719(4) of the WRA and s.4AA *Crimes Act 1914* (Cth), the maximum pecuniary penalty for contravention of s.719(1) by a body corporate is $33,000.

The evidence

Applicant

Glenn Impson

27. In his affidavit sworn 15 August 2009 Mr Impson relevantly deposed that:

    a) he was employed as truck driver with the respondent from 14 February 2005 to 19 February 2007;

b) in about early February 2005 he attended a job interview with the respondent's directors – Messrs Palermo and Connelly – where he was given the AWA and a letter of offer of employment and was asked to read the AWA;

c) after reading the AWA Mr Connelly explained aspects of the remuneration package stating, among other things, that Mr Impson would receive:

   i) a guaranteed weekly wage;

   ii) a "tonnage bonus" based on the amount (in tonnes) carted by his team each week, with a guaranteed minimum of 194,000 tonnes per year, principally calculated at a rate of $0.51 per tonne;

   iii) a two percent pay rise to the base wage each year; and

   iv) a total remuneration package of around $70,000;

d) he signed the AWA on 14 February 2005, his first day of work, and was not informed of what happened with the AWA after this;

e) he contacted the OEA around twelve months after commencing employment and was advised that his AWA had passed the "no disadvantage" test;

f) after a few pay periods, he realised that the respondent was taking the weekly wages out of the tonnage bonus instead of paying both the wages and the tonnage bonus;

g) following this discovery, and at various times during his employment, several members from his team (including himself) raised the concern that they were being underpaid, specifically, that they did not seem to be receiving enough tonnage bonus, but they were always advised to read the employment contract; and

h) after his resignation in February 2007 he complained to the Workplace Ombudsman about the underpayments.

Geoffrey Shaddick

28. In his affidavit sworn 15 August 2009 Mr Shaddick deposed to the following:

a) he was employed by the respondent as a truck driver for the "Northern Team" from 15 August 2005 to 9 June 2006 and from 8 November 2006 to 12 March 2007;

b) in early August 2005 he attended a job interview with Mr Palermo where he was given the AWA and asked to read it;

c) after reading the AWA Mr Palermo explained aspects of the remuneration package, stating that he would receive:

i) a base weekly wage;

ii) a bonus based on $0.51 per tonne of wood carted by the Northern Team, with a guaranteed minimum of 194,000 tonnes per year for the purposes of the tonnage bonus;

iii) a two percent pay rise to the base wage each year; and

iv) a total remuneration package of around $70,000;

d) he signed the AWA on 15 August 2005, on his first day of work, and was not informed of what happened with the AWA after this;

e) after commencing employment he raised the issue of underpayment several times with Messrs Palermo and Connelly but was not given responsive replies, often being advised to read the employment contract;

f) after March 2007, Mr Impson's wife drew his attention to the fact that the respondent was taking the base wage out of the tonnage bonus instead of paying both the wage and the bonus.

The Respondent

Liberato Palermo

29. In his affidavit sworn on 3 September 2009, Mr Palermo deposed to the following:

a) he is a director of the respondent, which he and Wayne Connelly established in March 2003. At the time of his affidavit, the respondent employed 41 people;

b) the respondent's main business is harvesting and haulage from native forests and has had a series of contracts over a number of years with the Western Australian Forests Products Commission ("FPC"). It was common for access under those concessions to be subject to numerous conditions including ones which limited access to daylight hours and fine weather;

c) it is common for forestry harvesting businesses to cease operations during winter and it is also common to prepare business plans on the basis that there will be only about one hundred and fifty productive working days each year;

d) Mr Palermo thought it would be best to develop a payment scheme which took into account the seasonal nature of the work, in preference to using the *Timber Workers Award No. 36 of 1950* ("Award"). He reached this conclusion because there was a labour shortage and, as it is common for forestry companies to shut down in winter, there was a disincentive for employees to stay with their employer. This required staff to be re-hired every spring which, he deposed, was unsatisfactory for employers and employees;

e) the respondent deployed two haulage teams, the "Northern team" and the "Southern team", each team having between three and six members at any particular time;

f) in consultation with Mr Connelly, Mr Palermo developed a payment scheme ("Payment Scheme") where employees' pay would be based primarily on the amount of timber carted by each of the two teams;

g) Mr Palermo calculated the amount to be paid per tonne under the Payment Scheme by taking into account the volume of wood that the FPC contracted to make available for harvesting each year, the number of people required to do the work, the wages which would have been payable under the Award and the wages generally paid to truck drivers in the forest industry;

h) Mr Palermo arrived at an estimate of the amount that a driver would be paid under the Award and then applied a percentage increase to that figure to arrive at a target payment of $55,000 to $65,000 per annum. Having done that, he worked backwards to arrive at a payment per tonne ("Tonnage Payment") which he thought would be an incentive to the drivers by giving them an opportunity to earn more than they could under the Award and which was also affordable to the respondent;

i) he decided that the Tonnage Payment under the Payment Scheme should be underpinned by a minimum or base payment ("Minimum Payment") based on the basic Award entitlement which would mean that their wages were not completely dependent on the tonnages hauled and that they would have a measure of security;

j) it was never his intention that employees would receive a Tonnage Payment in addition to receiving the entire annual salary based on the Award.

30. In about March 2004 Messrs Palermo and Connelly discussed the preparation of an AWA for the respondent's truck drivers and they also discussed it with one Trevor Holm. It was Mr Palermo's understanding that Mr Holm was experienced in employee relations and applicable legislation and had worked in the federal public service and in a senior executive role in Australia Post. Mr Palermo relied upon the skill and expertise of Mr Holm in developing the AWA and in dealing with the OEA.

31. Mr Palermo instructed Mr Holm that the Payment Scheme was to meet applicable legislative requirements for AWAs. He gave Mr Holm a brief on his expectations as to how the Payment Scheme operated and how the AWA had to reflect the Payment Scheme.

32. When Mr Palermo read the draft AWA produced by Mr Holm he considered that it reflected his understanding of the Payment Scheme, namely that the Tonnage Payments were the main element of the drivers' wages and that the Minimum Payments would only be a supplement to the Tonnage Payment in limited circumstances. Mr Holm also advised that the AWA met necessary legal requirements. Mr Holm told Messrs Palermo and Connelly that the AWA took a long time to be approved because the OEA could not understand what they were attempting to achieve.

33. The respondent subsequently introduced the AWAs to its truck drivers in meetings held with each of the two teams. During those meetings Messrs Palermo and Connelly explained the operation of the payment arrangements as they understood them. Ten drivers were subsequently employed on the AWAs and none of them had any complaints about the way they were paid.

34. In his affidavit, Mr Palermo challenged a number of Mr Impson's statements contained in his affidavit sworn 15 August 2009. Most significantly:

a) Mr Palermo said that he had a discussion with Mr Impson, similar in content to the conversations he had had with the other truck drivers in the course of the meetings referred to above at [33];

b) he said to Mr Impson that he could expect to earn between $55,000 and $65,000 per year, although that would include working on Saturdays from time to time. He deposed that he may have mentioned $70,000 as an upper limit of how much a driver could earn;

c) at the time Mr Palermo interviewed Mr Impson for his job, the Payment Scheme had been operating for some time so the respondent was aware of a driver's general level of pay under that scheme. The $55,000 to $65,000 discussed with Mr Impson was in line with Mr Palermo's experience of the operation of the Payment Scheme;

d) he said to Mr Impson words to the effect of:

The intent of a guaranteed base rate is to give you peace of mind that if for any reason we were unable to cart any logs you will receive as a minimum $31,359.12 ... The base salary would be the basis upon which annual, sick and long service leave and any public holidays and any work performed outside of your normal scope of payment would be calculated.

e) Mr Palermo denied saying to Mr Impson that he would receive a "retainer ... plus a tonnage bonus" or words to that effect;

f) Mr Impson was given a copy of an example of one of the respondent's AWAs and was invited to read it and to talk to Mr Palermo before the start date if he had any issues;

g) upon employment, Mr Impson went through the respondent's induction process which included information on environmental policy, occupational health and safety policy, smoking policy, equal employment opportunity, grievance and issue resolution, training and development together with numerous other matters touching on the respondent's employment policies and practices;

h) the Tonnage Payment never dropped below $0.51 per tonne but if the numbers in a team were reduced the tonnage payment would be increased;

i) on about 16 September 2006, Mr Palermo conducted Mr Impson's month and three-month reviews following his engagement, the delay being caused by the failure of the respondent's transport supervisor to have conducted those reviews on time. During those reviews Mr Impson raised no concerns about his employment with the respondent or his pay;

j) during Mr Impson's employment, meetings of truck drivers, generally described as "toolbox meetings", occurred and during the course of them the issue of pay was raised. There was concern amongst some drivers in the Northern team that drivers in the Southern team were better off. While the drivers raised these and other concerns, at no time did any of them complain about the operation of the Payment Scheme as such or suggest that they

should receive the Tonnage Payment as well as the whole of the base salary under the Award;

k) Mr Palermo denied ever having spoken to Mr Impson or Mr Shaddick in terms such as "shut up and read your contract" saying that having received training in workplace facilitation, he did not address any of the respondent's employees in this manner;

l) Mr Palermo deposed that he encouraged employees to approach him on an individual basis with any pay issues they had and he spoke to Mr Impson and other of the respondent's drivers on an ad hoc basis. During these discussions Mr Impson did not raise any complaints about his pay and Mr Palermo only became aware of Mr Impson's concerns after he had resigned.

35. As for Mr Shaddick's evidence, Mr Palermo deposed:

a) during Mr Shaddick's interview Mr Palermo explained the operation of the Payment Scheme in the same way that he had with Mr Impson and also gave him a copy of the same spreadsheet he gave to Mr Impson;

b) Mr Palermo denied saying to Mr Shaddick that he would receive a base weekly wage on top of the payment of $0.51 per tonne;

c) Mr Shaddick's AWA was sent to the OEA on or about 17 August 2005 and on 19 January 2006 an approval notice was received from the OEA;

d) Mr Impson undertook a new employee induction and he underwent a three-month review some months later. Mr Palermo conducted both the induction and the review and Mr Shaddick did not raise any concerns about his employment or any concerns about his pay;

e) Mr Shaddick left the respondent's employment on 9 June 2006 for medical reasons. After he did so, he complained that he had been short paid. The amount in question related to the Tonnage Payment for his team in the period after Mr Shaddick ceased his employment. Mr Shaddick complained to the Office of Workplace

Services which ultimately advised that its investigation had not revealed any breach;

f) Mr Shaddick applied for re-employment with the respondent in or about November 2006 and he was re-employed on the same terms and conditions as before. Mr Shaddick was told that the terms and conditions had not changed and he indicated that he had no queries and was happy with the payment arrangements.

36. Since the complaints the subject of these proceedings were raised the respondent has taken legal advice concerning the AWAs entered into with Messrs Impson and Shaddick and accepts that their effect was to require the respondent to pay Messrs Impson and Shaddick the Tonnage Payment as well as the whole of the base salary component referred to in the AWAs.

Wayne Brian Connelly

37. In his affidavit sworn 3 September 2009 Mr Connelly deposed to the following:

a) he is a director of the respondent and with Mr Palermo is responsible for its day to day operations;

b) he and Mr Palermo purchased the logging operation of what was then known as "Sotico" and subsequently tendered and won further logging contracts with the FPC;

c) in 2003 an enterprise bargaining agreement had expired and consideration was given to using the Award or entering into AWAs with the respondent's employees;

d) the Award had a very low hourly rate and did not encourage drivers to work efficiently and quickly. Mr Connelly considered that the respondent needed AWAs with terms and conditions which were performance-related. Mr Palermo developed a formula for calculating employees' pays involving a fixed payment per tonne carted by each of the two teams employed by the respondent together with a base payment which would be used to calculate leave entitlements. Mr Connelly understood the Payment Scheme would give drivers the opportunity to earn

between $55,000 and $65,000 per annum which, based on his experience, was a very competitive wage;

e) in or about mid-2004 Messrs Palermo and Connelly discussed their ideas with one of Mr Connelly's friends, Trevor Holm, who was an "experienced employee relations practitioner" and was familiar with the operation of AWAs and relevant legislation. Mr Connelly approached Mr Holm and asked him to prepare an AWA for the respondent and to go through the necessary approval process;

f) from time to time Mr Holm discussed with Mr Connelly his communications with the OEA and said that he had drafted the AWA in consultation with the OEA to satisfy the no disadvantage test. On the basis of an undertaking which was given by the respondent, the AWA was approved;

g) after the AWA had been developed, Messrs Palermo and Connelly held meetings with their drivers to discuss the agreement's terms and conditions. The operation of the Payment Scheme was also explained. Mr Connelly says that the employees were told that the Tonnage Payment and the Minimum Payment were alternatives and that employees would not receive both.

38. As to Mr Impson, Mr Connelly deposed:

a) he did not interview Mr Impson. It was Mr Palermo's responsibility to interview new employees;

b) during the course of Mr Connelly's duties he regularly crossed paths with Mr Impson who in discussions said words to the effect that he was very happy with his job and enjoyed what he was doing. He never indicated that he had any issues with anything.

39. In relation to Mr Shaddick, Mr Connelly deposed that:

a) he met with Mr Shaddick from time to time but Mr Shaddick did not indicate that he had any problems with the Payment Scheme or his AWA. Mr Connelly was not aware of any complaint about underpayment until after Mr Shaddick had left the respondent's employ;

b) Mr Connelly disputed the evidence of Messrs Impson and Shaddick that Mr Palermo said to drivers "shut up and read your contract" in his presence at a toolbox meeting at the Lighthouse Hotel in Bunbury;

c) at other toolbox meetings, although employees in the Northern team complained that it was easier for the Southern team to carry more timber because the distances between their forests and mills were less than the distances travelled by the Northern team, none of the drivers ever complained about the general operation of the Payment Scheme.

Considerations as to penalty

Introduction

40. As Tracey J said in *Kelly v Fitzpatrick* (2007) 166 IR 14 at 18-19 [14], in *Mason v Harrington Corporation Pty Limited* [2007] FMCA 7 at [24] Mowbray FM identified "a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty". Tracey J adopted those considerations and described them as follows:

- *The nature and extent of the conduct which led to the breaches.*
- *The circumstances in which that conduct took place.*
- *The nature and extent of any loss or damage sustained as a result of the breaches.*
- *Whether there had been similar previous conduct by the respondent.*
- *Whether the breaches were properly distinct or arose out of the one course of conduct.*
- *The size of the business enterprise involved.*
- *Whether or not the breaches were deliberate.*
- *Whether senior management was involved in the breaches.*

- *Whether the party committing the breach had exhibited contrition.*
- *Whether the party committing the breach had taken corrective action.*
- *Whether the party committing the breach had cooperated with the enforcement authorities.*
- *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*
- *The need for specific and general deterrence.*

However, as Gyles J said in *A&L Silvestri Pty Limited v Construction, Forestry, Mining & Energy Union* [2008] FCA 466 at [6], there are no mandatory statutory criteria.

41. Considerations relevant to this case are:

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

b) the circumstances in which the conduct took place;

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

d) whether there has been similar previous conduct by the respondent;

e) whether the breaches are properly distinct or arose out of the one course of conduct

f) the size of the business enterprise involved;

g) the deliberateness of the breaches;

h) whether the respondent had a culture of compliance;

i) whether the respondent exhibited contrition;

j) whether the respondent has taken corrective action and has co-operated with the enforcement authorities; and

k) the need for specific and general deterrence.

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

42. The breaches arose out of the respondent's failure to observe, in relation to Mr Impson, the terms of his AWA and the Undertaking which the respondent made in order that that AWA might be approved, and, in relation to Mr Shaddick, the terms of his AWA. In respect of both men, the respondent paid their wages on the basis that the Tonnage Payment was an alternative to the Minimum Payment rather than an amount which was owed in addition to the Minimum Payment which, on their proper construction, was what the AWAs provided. This conduct occurred throughout Mr Impson's employment from 5 March 2005 to 19 February 2007 and throughout the first period of Mr Shaddick's employment, 15 August 2005 to 9 June 2006.

43. There is a conflict between the evidence of Messrs Impson and Shaddick and Messrs Palermo and Connelly concerning what was said about the terms and conditions of employment and what the drivers could expect to earn. None of those four witnesses was cross-examined on his affidavit. Other evidence which might indicate that one particular version was likely to be more accurate than another was not plentiful.

44. The one area which is illuminated by other evidence concerns the respondent's employees' understanding of how the AWAs were intended to work and what their attitudes to those AWAs were. In this regard, the affidavits of five of the respondent's employees which are annexed to the affidavit of Liana Marie D'Ascanio sworn 19 August 2009 are revealing. Those employees' affidavits had been supplied by the respondent to the Workplace Ombudsman in support of the former's position on the claims which Messrs Impson and Shaddick had made. The picture which emerges from them is essentially consistent with important elements of Messrs Palermo and Connelly's affidavits. The respondent's employees deposed that the Minimum Payment was only a back-stop for periods when logs were not carried but if the value of logs carried exceeded the Minimum Payment then that would be the amount which would be paid. Further, the Minimum Payment and the Tonnage Payment were alternatives. The Tonnage Payment could be drawn in full or left in a "kitty" to be drawn on when less timber was being carted. None of the drivers were pressured to

sign the AWAs and they were given somewhere between two and four weeks to consider whether to accept them or to stay on wages.

45. The respondent's evidence, which I accept, is that it sought to implement an employee pay regime which assisted it to maintain continuous employment relationships with its drivers. It did this by devising a scheme which had the effect of giving drivers the option to smooth their incomes over the year by earning productivity-related Tonnage Payments during busy working periods and, by not fully drawing those payments at the time they were earned, drawing them later when less or no timber harvesting occurred. Significantly, the AWAs which sought to put this arrangement into place also provided the payment of a base wage rate even if no timber was being carted.

46. It is not insignificant that the complaints brought to the applicant by Messrs Impson and Shaddick were only made after their employment with the respondent had ceased. It is also significant to observe that no evidence has been adduced by the applicant to suggest that any other of the respondent's employees have made complaints concerning their remuneration. The respondent's evidence is that the intended effect of the arrangement which the respondent sought to put in place was both understood and accepted by the respondent's drivers. Given what the respondent's employees say in their affidavits annexed to Ms D'Ascanio's affidavit, I accept this.

47. The respondent took advice from a consultant who appeared to have had sufficient experience and skill to draft an AWA which satisfied the respondent's business needs and the no disadvantage test which was still in force at the relevant time. Email correspondence passing between Mr Holm and the OEA and which is annexed to Mr Palermo's affidavit discloses an unremarkable and straightforward series of exchanges between Mr Holm and the OEA which, it is now apparent, documented a fundamental misunderstanding between those parties as to the intent and the actual effect of the intended AWAs.

48. Indeed, the combined weight of the five employees' affidavits, the affidavits of Messrs Palermo and Connelly and the affidavit of Mr Holm, which explains the history of the AWAs and which is also annexed to Ms D'Ascanio's affidavit, causes me to have grave reservations concerning the accuracy of Messrs Impson and Shaddick's

evidence. Important in this connection have been Mr Holm's statements in his affidavit that $80,000 per annum, which is a figure close to that to which Messrs Impson and Shaddick are agreed to be entitled under their AWAs, was an "unheard of" wage in the timber industry and one which would have put the respondent out of business.

49. The applicant placed considerable emphasis on the fact that, in relation to Mr Impson, the respondent had breached not only the terms of the AWA but also the Undertaking which had been given to the OEA. While the breach of such an undertaking should be treated with appropriate seriousness, in this case its breach was no more than the product of the respondent's failure to understand correctly how the AWA, as amended by the Undertaking, operated. The correspondence passing between Mr Holm and the OEA demonstrates that the OEA's concern was how the tonnage payment would be allocated between the drivers, not whether the tonnage payment was an alternative or a supplement to the minimum payment. The issue was resolved by making it clear, by means of the Undertaking, that the tonnage payment rate specified in the AWA and clarified in the Undertaking, was payable to each driver individually. In that respect, the respondent actually complied with the Undertaking.

The circumstances in which the conduct took place

50. The respondent introduced the subject AWAs in order to achieve greater business effectiveness and to encourage drivers to remain employed with it during periods of little or no productivity. In order to implement the payment regime which the respondent had devised, it retained the services of Mr Holm whom it understood to be expert in the field. In essence, the respondent delegated entire responsibility to Mr Holm to lawfully effectuate its idea.

51. In light of what the respondent's employees said in their affidavits annexed to Ms D'Ascanio's affidavit, I have concluded that the respondent was not aware of the shortcomings of the AWAs at any time during Messrs Impson and Shaddick's employment.

52. Consequently, although a not too sophisticated reading of the AWAs would have indicated that, on their proper construction, the Tonnage

Payment and the Minimum Salary were cumulative amounts, there is no basis to find that the respondent had any reason to believe that the AWAs provided something different from what it had instructed Mr Holm to document and implement. Consequently, in respect of the period relevant to the breaches in question, the evidence before the Court does not persuade me that, at the relevant times, the respondent had any appreciation that it was acting in breach of the AWAs. Moreover, I am satisfied that most and possibly all of its employees, including Messrs Impson and Shaddick, thought they were receiving what they had been offered and what they had agreed to be paid.

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

53. The parties have agreed that for the relevant period Mr Impson received remuneration of $125,675.76 which represented an underpayment of $28,552.65. In the relevant period, Mr Impson was entitled to be paid a production bonus totalling $91,763.56 as well as a base salary of $56,437.14. The parties agreed that he was also paid other amounts in respect of sick leave and annual leave totalling $6,027.71, producing a total remuneration entitlement of $154,228.41. The underpayment of $28,552.65 represented an 18.5% underpayment of his entitlements.

54. The parties have agreed that in the relevant period Mr Shaddick received remuneration of $51,831.24 which represented an underpayment $19,027.69. In the relevant period Mr Shaddick was entitled to be paid a production bonus totalling $43,261.75 as well as a base salary of $25,283.12. The parties agreed that he was also paid other amounts in respect of sick leave and annual leave totalling $2,314.06, producing a total remuneration entitlement of $70,858.93. The underpayment of $19,027.69 represented a 26.9% underpayment of his entitlements.

55. When considering loss or damage sustained as a result of the breach of the AWAs it should not be overlooked what the intention of the AWAs was and whether the payments which were made to Messrs Impson and Shaddick during their employment caused them any disadvantage *vis-à-vis* the award entitlements which they would have otherwise enjoyed.

In this regard, Mr Palermo's unchallenged evidence was that average annual payments in the timber carting industry for employees performing duties similar to those of Messrs Impson and Shaddick and working hours similar to Messrs Impson and Shaddick's hours were approximately $45,000-$55,000 per year. Based on what Mr Palermo says in paras.9, 20 and 133 of his affidavit, including annexure LIP 33, I conclude that such earnings would satisfy the Award's requirements. Further, one of the employees whose affidavit is annexed to Ms D'Ascanio's affidavit said that the respondent's AWA

> *... allowed me to make a comfortable living of around $50,000 to $60,000 per year.*

56. On an annualised basis, the remuneration received by Messrs Impson and Shaddick in the relevant period and referred to at [53] and [54] above was $63,977.20 and $63,272.25 respectively. Taking into account the amounts they were subsequently paid in full satisfaction of their rights under the AWAs, those amounts become $78,512.37 and $86,500.03 respectively. It is apparent that those drivers' loss and damage existed only in the context of the AWA and not in the context of the Award.

57. The circumstances of this case suggest that Messrs Impson and Shaddick may have acted opportunistically in making their complaints to the Workplace Ombudsman and that, in other circumstances, the respondent might have been entitled to seek rectification of the agreements.

Whether there has been similar previous conduct by the respondent

58. The applicant does not submit that that respondent has previously been involved in conduct of the nature admitted in these proceedings to have occurred. Mr Palermo's evidence is that it has not.

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

59. Section 719(2) of the WRA provides:

> *(2) Subject to subsection (3), where:*

(a) 2 or more breaches of an applicable provision are committed by the same person; and

(b) the breaches arose out of a course of conduct by the person;

the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term.

60. In respect of the breaches of the Impson AWA, I find that the individual fortnightly contraventions arose out of a single course of conduct with the result that, by virtue of s.719(2), those breaches are taken to constitute a single breach of the relevant term of the AWA as amended by the Undertaking. The same considerations and conclusion apply in relation to the Shaddick AWA.

61. The applicant also accepted in his written submissions that the two separate breaches arose out of a single course of conduct but observed that they should not be treated as the same breach.

The size of the business enterprise involved

62. It was not submitted that the size of the respondent's business or the extent of its financial resources had any particular relevance to these proceedings. Further, it has not been suggested that the respondent would be unable to pay such penalty as might be imposed in these proceedings.

Deliberateness of the breaches

63. At the hearing the applicant submitted that the breaches in issue arose out of recklessness on the part of the respondent, not out of deliberate and knowing breaches of the AWAs. He submitted that the AWAs and the Undertaking presented no particular difficulty in comprehension and if Messrs Palermo and Connelly had read them carefully, they would have understood what they actually provided.

64. This is a case where the respondent failed to engage a solicitor to draft an important contractual document for the regulation of employment relationships which, it must be acknowledged, are a fertile area for disagreement. While the engagement of an industrial relations

consultant to undertake certain tasks was understandable and probably appropriate, the respondent's apparent failure to obtain legal advice on the drafting of the AWAs is less easy to understand.

Whether the respondent had a culture of compliance

65. The induction processes in which Messrs Impson and Shaddick participated demonstrated a degree of sophistication indicative of an enterprise willing and able to observe modern workplace practices. Further, I have had regard to the terms of the email correspondence between Mr Holm and the OEA prior to the approval of the AWAs and discern an unfeigned willingness to address the regulator's concerns. The fact that the respondent had not previously come to the attention of the Workplace Ombudsman also suggests, although not conclusively, that it has historically met its statutory obligations.

Whether the respondent exhibited contrition

66. Mr Palermo expressly conceded in his affidavit that he now understands that the AWAs operated in the fashion contended for by the applicant. He also expressed deep regret that the respondent failed to comply with its obligations under the AWA, stating that until he received legal advice setting out the proper operation of the AWAs he was mistaken in his understanding of the effect of those agreements.

67. To be balanced against these statements is the evidence which indicates that from a relatively early date after the breach notices were served the respondent was aware that the AWAs may not have operated in the way that had been intended and that it attempted to negotiate with the Workplace Ombudsman on this basis. This behaviour demonstrates a lack of acceptance of the breaches of the AWAs which would have been apparent once the breach notices were given proper consideration.

68. However, it was not until much later, 24 April 2009, that correct quantifications of the breaches were advised to the respondent and its failure to make any payments prior to that time should not count against it. Even so, the failure to make payment until the Workplace Ombudsman made what must be considered to have been a final

demand in his solicitors' letter of 29 May 2009 suggests that the depth of contrition expressed in Mr Palermo's affidavit came fairly late.

Whether the respondent has taken corrective action and has co-operated with the enforcement authorities

69. The Workplace Ombudsman first served a breach notice on the respondent in relation Mr Impson's entitlements on 19 November 2007 and in relation to Mr Shaddick's entitlements on 27 February 2008. His solicitors first wrote to the respondent on 12 May 2008 inviting it to rectify the underpayments which were alleged to have occurred although they were incorrectly stated in that letter because the Workplace Ombudsman had incorrectly calculated them. In that letter the Workplace Ombudsman also suggested that proceedings would not be commenced if such payments were made.

70. The respondent's solicitors replied on 23 May 2008 submitting that the respondent's other workers understood the AWAs to operate in the fashion intended by the respondent. They also submitted that Messrs Impson and Shaddick were opportunistically taking advantage "of a perceived ambiguity in the drafting of the remuneration clause" in the AWAs. The Workplace Ombudsman's solicitors responded on 27 May 2008 saying, in essence, that the agreements spoke for themselves, that lay opinions could be of no assistance and that

> Prima facie, *Palcon appears to have ... evaded its obligations under those AWAs and thus accordingly breached the Act.*

71. On 23 June 2008 the respondent's solicitors provided those affidavits of Mr Holm and five of its employees which are annexed to Ms D'Ascanio's affidavit. It appears that there was some further correspondence between the solicitors for the parties after that date but it was not until their letter of 29 May 2009 that the Workplace Ombudsman's solicitors indicated that the commencement of proceedings against the respondent was consistent with his litigation policy and that he reserved the right to commence litigation for contravention of the Act whether or not the respondent rectified the underpayments which, by that time, had been correctly quantified. On 12 June 2009 the outstanding amounts were paid and these proceedings were commenced on 25 June 2009. The respondent subsequently

admitted the contraventions and participated in the filing of the agreed statement of facts.

72. The evidence does not support a conclusion that, once the Workplace Ombudsman served its first breach notices, the respondent insisted that its erroneous construction of the AWAs was correct. Indeed, from the earliest time, it conceded that there was, at least, an ambiguity. It is apparent from the correspondence annexed to Ms D'Ascanio's affidavit that the respondent was attempting to convince the Workplace Ombudsman of the reasonableness of its position because the Workplace Ombudsman's interpretation meant that the AWAs did not reflect the respondent's intention or its employees' understanding of their employment arrangements. I do not interpret this conduct to amount to a failure to co-operate with the enforcement authority but, rather, to be an attempt to convince the Workplace Ombudsman to exercise some flexibility and forbearance towards it and to recognise that the entitlements being claimed by Messrs Impson and Shaddick had never been intended to be available under the AWAs and had never been understood by the relevant parties to be available. It appears from the letter from the Workplace Ombudsman's solicitors to the respondent's solicitors dated 29 May 2009 that on 18 May 2009 the respondent made a proposal to settle the matter. That offer was rejected in the letter from the Workplace Ombudsman's solicitors dated 29 May 2009.

73. While the Workplace Ombudsman was entitled to bring these proceedings, and possibly effectively obligated to do so given the respondent's reliance on the intent not the effect of the AWAs, as observed above the respondent's attempts to argue a case based on its understanding and intention ought not to be construed as lack of co-operation. Moreover, once it became apparent that its representations and offer had been rejected and that the Workplace Ombudsman intended to commence proceedings, the respondent acted swiftly to make the payments to which Messrs Impson and Shaddick were contractually entitled. Its subsequent actions by conceding the breaches and agreeing to relevant facts, which were reinforced by Mr Palermo's expression of regret and error, meant that a contested hearing was unnecessary and public resources were able to be devoted elsewhere.

74. I also note that Mr Palermo deposes that the respondent has taken corrective action and now employs truck drivers on Award terms and conditions. The result of this has been, he deposes, that those drivers earn less than they would have earned under the Payment Scheme which he had sought to implement. This statement reflects the figures set out in [55] above.

The need for specific and general deterrence

75. In this case, I accept that the respondent recognizes its error. It has acknowledged it, rectified it, expressed contrition and taken corrective action. In all the circumstances I am not of the view that specific deterrence need play a large role in the determination of the penalty to be imposed in this case.

76. Even so, general deterrence must be considered. The position of workers is protected by the law and that protection should be enforced by the courts. Such protection involves sending a message to other participants in the relevant industry that such conduct will not escape punishment. As Lander J said in *Ponzio v B&P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [93]:

> *In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend:* Yardley v Betts *(1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty:* R v Thompson *(1975) 11 SASR 217.*

Further matters

77. In this case I find that each breach of Mr Impson's AWA and related Undertaking arose out of one course of conduct and that each breach of Mr Shaddick's AWA also arose out of one course of conduct. This has

the consequence that there have been two breaches in respect of which penalties much be considered. As already noted, the maximum penalty for each of those is $33,000.

78. Further, this is a matter in which the totality principle must be considered. That principle requires the Court to determine an appropriate level of penalty for each contravention and then to consider the aggregate of those penalties in light of the overall conduct of the respondent in question to form a view as to whether the aggregate is an appropriate response to the conduct which led to the breaches: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 246 ALR 35; *Kelly v Fitzpatrick*.

79. Finally, noting that the respondent's admissions were accompanied by expressions of contrition, I consider that a reduction of 25% in the penalties which the Court would otherwise impose gives appropriate recognition to those admissions.

Conclusion

80. Having taken into account all of the above matters, I conclude that the appropriate penalty to impose on the respondent for breach of s.719(1) in respect of Mr Impson's AWA and Undertaking is $23,000 and that the appropriate penalty to impose on the respondent for breach of s.719(1) in respect of Mr Shaddick's AWA is $17,000.

81. The total penalty is therefore $40,000. However, in light of the essential identity of the contraventions and the fact that they arose out of a common misunderstanding of the AWAs, I am of the view that $30,000 would be a just and appropriate penalty as an aggregate figure. After a 25% reduction for co-operation the total penalty is $22,500.

82. The applicant applied for any penalties to be paid to the Commonwealth and there will be an order to that effect.

I certify that the preceding eighty-two (82) paragraphs are a true copy of the reasons for judgment of Cameron FM

Associate:

Date: 8 October 2009