FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v AUSSIE JUNK PTY LTD (IN LIQUIDATION) & ANOR *[2011] FMCA 391*

INDUSTRIAL LAW – contraventions – admitted breaches at the conclusion of trial – considerations regarding penalty – accessorial liability – course of conduct – multiple contraventions

Crimes Act 1914 s.4AA
Fair Work Act 2009 s.687, 701
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 s.11(1), 13(1)
Workplace Relations Act 1996 s.4(1), 182, 183, 185(2), 208, 687, 701, 717, 718, 719(1),(2) & (4)(a), 728(1) & (2), 792(1)(a), 793(1)(j), 807(2)

A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union [2008] FCA 466
Australian Nursing Federation v Alcheringa Hostel Inc (2004) 136 FCR 530
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
CPSU v Telstra Corporation 108 IR 228
Community & Public Sector Union v Telstra Corporation Ltd (2001) 108 IR 228
Construction, Forestry, Mining and Energy Union v Williams (2010) 262 ALR 417
Construction, Forestry, Mining and Energy Union v Stuart-Mahoney [2011] FCA 56
Finance Sector Union v Commonwealth Bank of Australia (2006) 224 ALR 467
Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216
Hili v R; Jones v R (2010) 85 ALJR 195
Kelly v Fitzpatrick (2007) 166 IR 14
Lynch v Buckley Sawmills Pty Ltd (1984) 3 FCR 503
McDonald v Australian Building & Construction Commissioner [2011] FCAFC 29
McIver v Healey [2008] FCA 425
Maritime Union of Australia v Geraldton Port Authority (No.2) (2000) 94 IR 404
Markarian v The Queen (2005) 228 CLR 357
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285
Pearce v The Queen (1998) 194 CLR 610
Plancor Pty Ltd v Liquor, Hospitality & Miscellaneous Union (2008) 171 FCR 357

Poletti v Ecob (1989) 91 ALR 381
Ponzio v B & P Caelli Construction Pty Ltd (2007) 158 FCR 543
Printing & Kindred Industries Union v Vista Paper Products Pty Ltd (1994) 127 ALR 673
Seymour v Stawell Timber Industries Pty Ltd (1985) 9 FCR 241
Stuart-Mahoney v Construction, Forestry, Mining and Energy Union (2008) 177 IR 61
White v Construction, Forestry, Mining and Energy Union [2011] FCA 192

Transport Workers (Refuse, Recycling and Waste Management – ACT) Award 2004
Clerks (ACT) Award 1998

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	AUSSIE JUNK PTY LTD (IN LIQUIDATION)
Second Respondent:	DENNIS RICHTER
File Number:	CAG 19 of 2009
Judgment of:	Neville FM
Hearing date:	16, 17, 18 August 2010
Date of Last Submission:	20 October 2010
Delivered at:	Canberra
Delivered on:	31 May 2011

REPRESENTATION

Counsel for the Applicant:	Ms E Brus
Solicitors for the Applicant:	Clayton Utz, Canberra
Counsel for the First Respondent:	
Solicitors for the First Respondent:	
Counsel for the Second Respondent:	Self represented
Solicitors for the Second Respondent:	

ORDERS

THE COURT NOTES THAT:

A. On 18 August 2010 the Second Respondent admitted the matters pleaded in paragraphs 1 to 14 and 16 to 20 of the Amended Statement of Claim filed 16 October 2009.

B. On 18 August 2010 the Court made a Declaration that by virtue of the Second Respondent's admission of paragraph 19 of the Amended Statement of Claim, the Second Respondent was a person involved in the contraventions detailed in that Declaration within the meaning of section 728 of the *Workplace Relations Act 2006.*

THE COURT ORDERS THAT:

(1) The Second Respondent is to pay a pecuniary penalty of $72,000.00. That penalty is to be paid to the Applicant. The Applicant is then directed to pay it to the employees according to the percentage amount owed to each employee and what that amount represents as a percentage of the total sum owing to all the employees.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT CANBERRA

CAG 19 of 2009

FAIR WORK OMBUDSMAN
Applicant

And

AUSSIE JUNK PTY LTD (IN LIQUIDATION)
First Respondent

DENNIS RICHTER
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The Applicant is a statutory appointee of the Commonwealth pursuant to s.687 of the *Fair Work Act* 2009 ("the FW Act"), and a Fair Work Inspector pursuant to s.701 of that Act.

2. The First Respondent, Aussie Junk Pty Ltd (In liquidation) ("Aussie Junk"), was placed in liquidation on 30th July 2009. In light of this, by consent, on 19th August, orders were made whereby the proceedings against Aussie Junk were permanently stayed. And, in consequence of this course, the Applicant did not press for orders against Aussie Junk.

3. The Second Respondent, Mr Richter, was the sole director and company secretary of Aussie Junk. For various parts of the litigation, which were commenced on 12th May 2009, Mr Richter was legally

represented. However, for some time prior to the hearing, and during the trial, he was a self-represented litigant.

4. As initially pleaded and conducted, these proceedings involved questions of liability and attendant penalty in relation to the under-payment of wages to 10 former employees of Aussie Junk. Those employees ("the employees") and the amounts underpaid, which total $259,315.06, are as follows:

    (i) Michael Burness - $9,130.57

    (ii) Lynn Chamberlaine - $17,555.23

    (iii) Anthony Cochrane - $8,143.13

    (iv) Matthew Coles - $34,101.33

    (v) Dong won Kim - $11,015.86

    (vi) Laurie McGlynn - $3,524.21

    (vii) Lance Spencer - $14,386.95

    (viii) Jamie Winters - $80,724.57

    (ix) Justin Winters - $37,161.42

    (x) Peter Winters - $43,571.79

5. Of those listed, messrs. Burness, Chamberlaine, Kim, McGlynn, Spencer, Jamie Winters, Justin Winters and Peter Winters, swore affidavits in support of the application,[1] which sought certain declarations and various penalties, both of which are particularised later in these reasons. And of the employees who swore affidavits, only Mr Peter Winters, Mr Justin Winters, Mr McGlynn, Mr Kim, Ms Chamberlaine, and Mr Spencer were cross-examined, albeit extremely briefly, by Mr Richter. Mr Richter, of course, was cross-examined, at considerable length.

6. For his part, Mr Richter called only one witness, his son. His evidence was very brief and of no relevance.

[1] The affidavits of Mr Burness and Mr Justin Winters, however, were not relied upon by the Applicant.

7. In addition to the evidence of the former employees, the Applicant also relied upon evidence from Ms O'Keefe, who is an inspector in the Applicant's office. *Via* three affidavits,[2] she provided detailed calculations in relation to the under-payments. It is appropriate to record the invaluable assistance provided by Ms O'Keefe's labours. This is especially so because of the parlous state of Aussie Junk's records. One example must suffice.

8. On 21st June 2010, Mr Richter filed an affidavit in the first paragraph of which he stated: "… attachments are true copies of 919 pages of paperwork from 6 boxes released to Clayton Utz as further evidence for my case…." Dutifully, Ms O'Keefe went through all of the copies of pay-slips, rosters, sign-on sheets and similar documentation.[3]

9. Towards the conclusion of the trial in the course of which none of the detailed evidence adduced by the Applicant was seriously or effectively challenged, Mr Richter formally admitted to the breaches set out in the Application.[4] Accordingly, the substantive matter that remains to be determined relates to penalty, in relation to which the Applicant and the Second Respondent filed detailed submissions in accordance with an agreed time-table.

10. These reasons proceed as follows: (a) background; (b) the legislative frame-work; (c) breaches admitted; (d) jurisprudence in relation to penalty; and (e) discussion & conclusion.

Background

11. Aussie Junk was a constitutional corporation under the *Workplace Relations Act* 1996 ("the WR Act"). It operated two waste management facilities in the Australian Capital Territory.[5]

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[2] The three affidavits in question are dated, respectively, 17th November 2009, 12th March & 26th July 2010.

[3] Not untypical in cases of this kind, there was a significant amount of documentation. In the present matter, there were four folders of tendered documents, and a further six folders of exhibits – just from the Applicant.

[4] I note and deal with later in these reasons Mr Richter's contentions contained in his written submissions (post trial), whereby he sought to move away from the admissions made at the conclusion of the trial by claiming that various pressures (personal, business and litigious) were impacting on him such that he felt almost coerced to accede to the contraventions.

[5] To a significant degree, what follows is taken from the detailed written submissions on behalf of the Applicant. Given that there was no serious challenge to most factual matters, and given the Second

12. Six of the employees worked on a full-time basis; one was employed on a part-time basis, and two were employed casually. The tenth employee was engaged part-time as an administration assistant.

13. On 27th May 2008, the Workplace Ombudsman received a complaint from Mr Jamie Winters in relation to his employment with Aussie Junk as the Full Time Assistant Manager, for issues relating to hourly rate, time worked, allowances, penalty rates, public holidays, annual leave, personal leave and superannuation. Mr Winters' claim was first allocated to Inspector Karen Reedy of the Applicant's office for investigation. On 24th June 2008, upon Inspector Reedy's resignation, Mr Winters' claim was then allocated to Inspector Belinda O'Keefe.

14. On 21st July 2008, Inspector O'Keefe and Inspector Jeffrey Beaver attended the workplace at the request of Mr Winters. As a result, an additional four employees lodged complaint forms and from whom Inspector O'Keefe and Inspector Beaver took statements.

15. On 22nd July 2008, Inspector O'Keefe issued a Breach Notice to the Second Respondent regarding the Employees' claims.[6]

16. On 23rd July 2008, Mr Winters, his brother Mr Justin Winters, and their Father, Mr Peter Winters (all employees of Aussie Junk), were terminated from their employment by the Second Respondent.[7] Another employee, Mr Laurie McGlynn, resigned upon the termination of the Winters' employment and lodged a claim against Aussie Junk.[8]

17. The Applicant's investigation revealed that Aussie Junk had failed (a) to pay the employees the correct hourly rates, allowances, penalty rates, public holiday rates, superannuation, (b) to keep accurate records in relation to annual and personal leave, and (c) to keep accurate and appropriate time and wage records.

Respondent's admissions in relation to liability, the outline of facts from Counsel for the Applicant may be taken as something of an agreed statement of facts. Any relevant challenges by Mr Richter to the outline given here are noted. As already indicated, they are dealt with in more detail later in these reasons.

[6] See Exhibit BK-1, Tab 5. The a further copy of the Notice was sent by fax to Mr Richter on 4th August 2008, a copy of which is located in the same Exhibit to which I have referred.

[7] See Exhibit C (Tender Bundle Vol.1), pp.26 & 62.

[8] See Exhibit C, p.71 (Mr McGlynn's affidavit).

18. As previously noted, the original Application was filed on 12th May 2009. An Amended Application and Statement of Claim were filed on 16th October 2009. As pleaded, the declaratory relief sought against Aussie Junk was in relation to the following contraventions of the *Workplace Relations Act* 1996:

    (i) s.182(1) of the WR Act

    (ii) s.185(2) of the WR Act

    (iii) s.792(1)(a) of the WR Act

    (iv) clauses 15, 16.1.2, 16.1.3, 16.1.6, 16.1.7, 16.2.1, 16.2.2, 20.2 and 23.1 of the *Transport Workers (Refuse, Recycling and Waste Management – ACT) Award 2004* ("the Transport Workers' Award"); and

    (v) clause 15 of the *Clerks (ACT) Award 1998* ("the Clerks Award")

19. The Applicant also sought a declaration that the Second Respondent was involved in the contraventions within the meaning of s.728 of the WR Act and had thereby also contravened the WR Act.

20. Further, the Applicant sought orders pursuant to s.719(1) and s.807 of the WR Act that the Second Respondent pay pecuniary penalties by reason of his involvement in the contraventions.

The Legislative Framework

21. On 1st July 2009, the WR Act was repealed and the *Fair Work Act* commenced.

22. In relation to breaches of the WR Act occurring prior to 1st July 2009, s.11(1) of Part 3 of Schedule 2 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ("the Transitional Act") provides that the WR Act continues to apply on or after 1st July 2009 in relation to conduct that occurred before that date.

23. Section 13(1) of Part 3 of Schedule 18 of the Transitional Act gives Fair Work Inspectors the power to make or continue applications under the WR Act.

24. *Provisions regarding underpayments*: The prosecution concerning underpayments is brought under s.718(1) of the WR Act in relation to breaches of that Act, the Transport Workers Award and the Clerks Award. Section 719(1) of the WR Act enables a court of competent jurisdiction (including this Court[9]) to impose a penalty in relation to a breach of an applicable provision by a person bound by that provision. An "applicable provision" is defined in s.717 of the WR Act to include a term of the Australian Fair Pay and Conditions Standard ("AFPCS"), and a term of an award.

25. Section 719(2) of the WR Act provides that where two or more breaches of an applicable provision are committed by the same person, and the breaches arose out of a course of conduct by that person, the breaches shall, for the purposes of s.719, be taken to constitute a single breach of the term.

26. Section 719(4)(a) of the WR Act proscribes the maximum penalty that may be imposed by this Court to be, in the case of an individual, 60 penalty units, and in the case of a body corporate, pursuant to s.719(4)(b), 300 penalty units. Section 4(1) of the WR Act provides that "penalty unit" has the same meaning as in the *Crimes Act 1914* (Cth). Section 4AA of the *Crimes Act* defines "penalty unit" to be $110. The maximum penalty that may be imposed by the Court for breach by an individual of an award or the AFPCS is therefore $6,600.

27. *Provisions regarding termination*: The prosecution in relation to breaches of s.792(1)(a) are brought under s.807 of the WR Act.

28. Section 807(2) of the WR Act proscribes the maximum penalty that may be imposed by this Court to be, in the case of an individual, 60 penalty units and in the case of a body corporate, 300 penalty units.

[9] Section 717 of the WR Act defines an "eligible court" to include the Federal Magistrates Court of Australia.

The maximum penalty that may be imposed by the Court for breach by an individual of s.792(1)(a) is $6,600.[10]

Breaches Admitted: The WR Act & Awards

29. I accept the essential detail, but which I have amended as appropriate, of the following submissions from Counsel for the Applicant in relation to the breaches admitted by Mr Richter.

30. Part 7 of the WR Act is entitled, "The Australian Fair Pay and Conditions Standard" and sets out key minimum entitlements of employment. Part 7 Division 2 deals with "Wages." Subdivision B of that Part deals with a statutory guarantee, in s.182 of the WR Act, of basic rates of pay. Section 183 deals with 'guaranteed hours' for the purposes of s.182.

31. Section 208 of the WR Act preserves basic periodic rates of pay derived from a pre-reform "wage instrument", such as the awards involved in these proceedings. Indeed, as submitted by Counsel for the Applicant, because the employees were covered by either the Transport Workers' Award or the Clerks Award, Aussie Junk was required to pay each of the employees at a rate at least equal to the applicable APCS (Australian Pay & Classification Scales) derived from those awards, as adjusted from time to time by the Australian Fair Pay Commission, for each hour that they worked.

32. Aussie Junk contravened s.182(1) in that it failed to pay the applicable APCS, which resulted in underpayments to each of the employees previously mentioned.

33. *Breach of s.185(2) of the WR Act*: Section 185(2) provides that a casual employee must be paid a casual loading that is at least equal to the guaranteed casual loading percentage of the basic periodic rate of pay, in addition to his or her actual periodic rate of pay.

34. In the circumstances of this case and the operation of this section, Aussie Junk was required to pay Mr Lance Spencer a casual loading of

[10] In addition to imposing a pecuniary penalty, s.807(1) of the WR Act authorises the Court to order that a defendant pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention. As well, there is a general, further discretionary power for the Court to make "any other order that the Court considers appropriate."

20% for each hour that he worked on a casual basis during the initial period of his employment, and for pay periods commencing on 5th July and 16th August 2006.

35. Aussie Junk failed to pay Mr Spencer this casual loading, thereby resulting in the underpayments to which reference has previously been made.

36. *Breach of s.792(1)(a)*: Section 792(1) relevantly provides that an employer must not, for a prohibited reason, or for reasons that include a prohibited reason, dismiss – or threaten to do so - an employee.

37. "Prohibited reason" is defined in s.793. Section 793(1)(j) refers to a person who has made or who proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek compliance with that law or the observance of a person's rights under an industrial instrument.

38. Aussie Junk terminated the employment of Jamie, Justin and Peter Winters on or about 23rd July 2008, essentially because these employees had complained to the Workplace Ombudsman and the Transport Workers Union in relation to under-payment of their entitlements. This conduct constituted a breach of s.792(1)(a) of the WR Act.

39. *Breaches of the Transport Workers Award*: The following matters may be noted summarily concerning the nine (9) breaches of this award, and which I accept:[11]

    (a) Aussie Junk breached *clause 15* of the Transport Workers Award by failing to provide each of the employees, except for Ms Chamberlaine, with the applicable rates of pay associated with their duties performed whilst engaged as employees;

    (b) Aussie Junk breached *clause 16.1.2* by failing to pay Justin Winters a daily first aid allowance in addition to his ordinary rate by virtue of his appointment as a first-aid

[11] Copies of the relevant Awards were before the Court: see Exhibit Bk-1 (Folder 1) and the material behind Tabs 1-4.

provider and/or being the only employee employed by Aussie Junk with a first aid qualification, resulting in underpayments;

(c) Aussie Junk breached *clause 16.1.3* by failing to pay each of the employees, except for Ms Chamberlaine, their applicable money handling allowance associated with their duties performed, resulting in underpayments;

(d) Aussie Junk breached *clause 16.1.6* by failing to pay each of the employees, except for Ms Chamberlaine, their special industry allowance associated with their duties performed, resulting in underpayments;

(e) Aussie Junk breached *clause 16.1.7* by failing to pay each of the employees, except for Ms Chamberlaine, their Municipal Waste allowance associated with their duties performed, resulting in underpayments;

(f) Aussie Junk breached *clause 16.2.1* by either failing to pay each of the employees, except for Ms Chamberlaine, an equipment allowance associated with their duties performed, or by failing to reimburse employees for the cost of any gear or equipment used during the course of employment, resulting in underpayments;

(g) Aussie Junk breached *clause 16.2.2* by failing to provide each of the employees, except for Ms Chamberlaine, reimbursement for appropriate footwear each twelve month period of employment, resulting in underpayments;

(h) Aussie Junk breached *clause 20.2* by failing to provide each of the employees, except for Ms Chamberlaine, with payment on termination, resulting in underpayments;

(i) Aussie Junk breached *clause 23.1* by failing to provide each of the employees, except for Ms Chamberlaine, overtime payments for hours worked in excess of 38 hours per week, resulting in underpayments.

40. *Breaches of the Clerks Award*: During the period 10th February 2006 to 26th March 2006, Aussie Junk breached *clause 15* of the Clerks Award by failing to provide employee Lynne Chamberlain with the applicable rates of pay associated with her duties, resulting in underpayments.

Mr Richter's Involvement in the Contraventions

41. Section 728 of the WR Act deals with 'accessorial liability.' That section provides:

> *s.728(1): A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.*
>
> *s.728(2): For this purpose, a person is involved in a contravention of a civil remedy provision if, and only if, the person:*
>
> *(a) has aided, abetted, counselled or procured the contravention; or*
>
> *(b) has induced the contravention, whether by threats or promises or otherwise; or*
>
> *(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*
>
> *(d) has conspired with others to effect the contravention.*

42. The Applicant submitted, which I accept, that Mr Richter was "involved" in the contraventions by virtue of his admissions made in Court on 18th August. Further, Mr Richter:

> *(a) had knowledge of the facts and matters constituting the contraventions by virtue of his position as sole Director and Company Secretary of the First Respondent;*
>
> *(b) was the person solely responsible for determining and setting wage rates and conditions for the Employees;*[12]

[12] This is evidenced by conversations carried out by various deponents with Mr Richter, in which Mr Richter demonstrated significant control over the determination of pay rates - see Exhibit C, p.21 (par. 29), p.22 (par. 33 & 34), p.23 (par. 44 &45), p.55 (par. 36-40), p.71 (par. 21), p.75 (par. 21), p.77 (par. 38),

(c) received audits from KPMG in October 2007 and Thiess in June 2008 which confirmed significant employee underpayments;[13]

(d) received a breach notice from the Applicant on 22 July 2008;[14]

(e) did not take any steps to increase pay rates for employees at all during the course of the investigation;

(f) was aware, prior to the commencement of these proceedings, that the rectification payments owed to the relevant employees were outstanding;[15]

(g) had control of Aussie Junk's finances;

(h) was the person with the authority to direct any rectification payments of entitlements to the relevant employees; and

(i) was the person who determined to terminate, and carried out the termination of, the employment of Jamie Winters, Justin Winters and Peter Winters.[16]

43. Each of these matters, individually, is significant; collectively and cumulatively, they present and confirm, in my view, very clear and cogent evidence of Mr Richter's (a) failure to attend, or to do so adequately, to the on-going under-payment of the staff employed by Aussie Junk, and (b) his direct involvement in the dismissal's of the three members of the Winters' family. What is especially troubling is his failure to acknowledge the reality of the situation of the employees in the light of the detailed material in the two audit reports from KPMG and Thiess, as well as after receipt of the breach notice in July and August 2008. Such matters, in my view, are particularly relevant to the Court's consideration and determination of an appropriate penalty for the contraventions admitted.

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[13] The so-called "KPMG Report", was annexure A to Ms Aeub's Affidavit, filed 19th November 2009. It was formally tendered and became Exhibit F. Pages 4-6 of that Report dealt with KPMG's "Findings", which included the statement (at par.5): "It should be noted that since May 2007 Aussie Junk have been aware that they have not been complying with the Award wage rates." The "Thiess Report" became Exhibit G: in particular, among other places, see sections entitled "Overpayment/ Shortfall" and "Conclusion" on pp.3, 6, 9 10, 11, 12 of that Report.

[14] See Exhibit BK-1, Tab 5.

[15] See the Second Respondent's receipt of the breach notice (Tab 5 of Exhibit BK-1) and Exhibits F and G.

[16] See Exhibit C, pp.25, 62 and 67.

Principles Concerning Penalty

44. In *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission*, the Full Court of the Federal Court (Burchett and Kiefel JJ; Carr J agreeing) said:[17]

> *Cases are authorities for matters of principle; but the penalty found to be appropriate, as a matter of fact, in the circumstances of one case cannot dictate the appropriate penalty in the different circumstances of another case.*

45. Rather more recently, in *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union*, Gyles J said:[18]

> *A number of authorities discuss the factors to be taken into account in fixing a penalty, many of them borrowing from related fields, including the criminal law. It is sufficient to refer to the recent case of Kelly v Fitzpatrick [2007] FCA 1080; (2007) 166 IR 14 as an example. However, the discretion is at large. There are no mandatory statutory criteria and it is wrong to regard factors seen as relevant by one court as statutory criteria. Indeed, lists of factors can confuse an essentially straightforward task and lead to over-elaborate reasoning.*

46. Accepting the significance of Gyles J's comments in *Silvestri*, in rather more detail in *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union*, Tracey J said (in the legislative context of that case):[19]

> *In my view, potentially relevant and applicable considerations for determining the appropriate penalty for a contravention of the BCII Act include:*
>
> *• The nature and extent of the conduct which led to the breaches.*
>
> *• The circumstances in which that relevant conduct took place.*
>
> *• The nature and extent of any loss or damage sustained as a result of the breaches.*

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[17] (1996) 71 FCR 285 at p.295.
[18] [2008] FCA 466 at [6].
[19] (2008) 177 IR 61 at [40]. See also the comments of the Full Court (Moore, Middleton & Gordon JJ) in *Construction, Forestry, Mining and Energy Union v Williams* (2010) 262 ALR 417 at pp.428-429 [28] – [33]; Kenny J in *White v Construction, Forestry, Mining and Energy Union* [2011] FCA 192 at [5], [6] & [8], and Ryan J in *Construction, Forestry, Mining and Energy Union v Stuart-Mahoney* [2011] FCA 56 at [80] & [82]. His Honour was there sitting as the Full Court. See also the Full Court judgment in *Plancor Pty Ltd v Liquor, Hospitality & Miscellaneous Union* (2008) 171 FCR 357 at pp.368-369 [35] – [37] (Gray J), and at pp.374-379 [57] – [69] (Branson & Lander JJ).

> • *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.*
>
> • *The need for specific and general deterrence.*

47. The following matters, raised by the Applicant in submissions, are relevant and warrant a degree of separate attention.

48. First, each breach of each separate obligation found in the WR Act in relation to the employees is a separate contravention of a term of an applicable provision for the purposes of section 719.[20] Further, breach of s.792(1)(a), which is separately prosecuted under s.807 of the WR Act, is also a separate contravention of a civil remedy provision of the WR Act.

49. Secondly, a significant consideration (noted by Tracey J above) also relates to whether the breaches admitted in the current matter constitute a single course of conduct for the purposes of s.719(2) of the WR Act. For reasons noted later, this section has no application in relation to

[20] See *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at p.223 (Gray J); *McIver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J).

breaches under s.792(1)(a) regarding the dismissal of the employees of Aussie Junk, to which I have earlier referred.

50. Thirdly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The Respondents, and in this context I intend to emphasis or focus on Mr Richter, should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the Respondents did.[21]

51. The Court must also have regard to the "totality principle",[22] and "whether the aggregate was just and appropriate" in all the circumstances of the case,[23] in relation to which an "instinctive synthesis" is to be applied in accordance with that "principle's" explanation by McHugh J in *Markarian v The Queen*.[24] It is apposite to note McHugh J's helpful summary of his detailed discussion of "instinctive synthesis" (at [71]): "There is only human judgment based on all the facts of the case, the judge's experience, the data derived from comparable sentences, the guidelines and principles authoritatively laid down in statutes and authoritative judgments." What follows seeks to apply his Honour's instruction to the facts of this matter.

Facts & Law: Consideration

52. In the light of the admissions made by Mr Richter on 18th August 2010, and from the materials before the Court, the following matters may be noted and accepted by the Court.

53. Aussie Junk engaged in the following breaches:

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[21] *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 ("McAlary-Smith") at [46] (Graham J), where his Honour referred to the joint judgment of McHugh, Hayne & Callinan JJ in *Pearce v The Queen* (1998) 194 CLR 610 at [40].
[22] See the comments of the Full Court in *McAlary-Smith* (2008) 165 FCR 560 at [66] – [80] (Graham J), and at [102] – [108] (Buchanan J).
[23] See the comments of Graham J in *McAlary-Smith* at 165 FCR at [73] & [78], and those by the Full Court (North, McKerracher & Jagot JJ) in *McDonald v Australian Building & Construction Commissioner* [2011] FCAFC 29 at [12] – [25], [28] & [34].
[24] *Markarian v The Queen* (2005) 228 CLR 357 at pp.377-390 [48] – [84]. See also the comments in the joint judgment (Gleeson CJ, Gummow, Hayne & Callinan JJ) in *Markarian* 228 CLR at [31], [37] & [39], and the Full Court in *McDonald v Australian Building & Construction Commissioner* [2011] FCAFC 29 at [28].

(a) failure to pay its employees a basic periodic rate at least equal to the applicable APCS for each hour worked pursuant to s.182(1) of the WR Act (maximum penalty in relation to the Second Respondent: $6,600);

(b) failure to pay its employees a guaranteed casual loading of 20% for each hour that they worked in addition to their basic periodic rate of pay pursuant to s.185(2) of the WR Act (maximum penalty for the Second Respondent: $6,600);

(c) failure to pay applicable rates of pay, allowances and overtime in accordance with clauses 15, 16.1.2, 16.1.3, 16.1.6, 16.1.7, 16.2.1, 16.2.2, 20.2 and 23.1 of the Transport Workers Award (maximum penalty for the Second Respondent: $6,600 for each term);

(d) failure to pay in accordance with clause 15 of the Clerks Award (maximum penalty for the Second Respondent: $6,600); and

(e) the termination of three separate employees for reasons prohibited by s.793(1)(j) of the WR Act (maximum penalty for the Second Respondent: $6,600 for each breach).

54. I have previously noted the importance of s.719(2) of the WR Act in relation to whether separate acts or decisions, as opposed to a single act or decision, constitute a 'course of conduct'. It is sufficient to note here, in accordance with the Applicant's submissions, that the latter case will constitute a course of conduct, but the former will not.[25]

55. From what was admitted by Mr Richter, and in the light of the unchallenged (a) testimony of the employees and (b) the documentary evidence, it is clear that there were repeated breaches by Aussie Junk of ss.182(1) and 185(2) of the WR Act, and of the two awards referred to in relation to one or more of the employees.

56. The Applicant submitted that, while there were multiple breaches, there were in fact 12 contraventions. For the reasons already given, I accept this submission.

57. I also accept the submission that the onus of establishing the benefit of s.719(2) of the WR Act in relation to a "single breach" arising out of a

[25] See *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241at pp.266-267 per Gray J (with whom Northrop J agreed at p.245).

"course of conduct" falls on the Respondents. The Applicant accepted that based on the facts in this case the Respondents have the benefit of s.719(2) of the WR Act in relation to repeated breaches of each term in relation to each of the employees. However, the Applicant also submitted that, in the light of authority, s.719(2) operated only in relation to two or more breaches of the *same term* of the Act.[26] I accept this submission also.

58. In the light of the admissions made by Mr Richter, the Applicant submitted that the Court should consider that the maximum penalty it could impose on the Second Respondent in relation to the breaches particularised is $79,200.

59. The Applicant further submitted that s.719(2) of the WR Act did not apply to breaches concerning s.792 in relation to the dismissal of employees. It followed, the Applicant contended, that the dismissals of three employees of Aussie Junk (all members of the Winters' family) constituted three separate contraventions.

60. In *Community & Public Sector Union v Telstra Corporation Ltd*,[27] Finkelstein J said that the "principal case" in this area is the decision of RD Nicholson J in *Maritime Union of Australia v Geraldton Port Authority (No.2)*.[28] Both of these cases were cited with approval by Ryan J in *Australian Nursing Federation v Alcheringa Hostel Inc*, and by Merkel J in *Finance Sector Union v Commonwealth Bank of Australia*.[29] In my view, the succinct statement of Finkelstein J in *CPSU v Telstra Corporation*, at [4], is to the point: "The Full Court held that the position of each employee under an award or a certified agreement had been prejudicially altered. It follows that the number of contraventions must equal the number of such employees." Respectfully, I accept and adopt his Honour's statement and apply it to the circumstances of this matter. Accordingly, in the light of the authorities noted, the Applicant's submission, that the breaches in

[26] Each repeated breach is treated as part of the same course of conduct: see *Quinn v Martin* (1977) 16 ALR 141 at pp.143-5 (Smithers, Evatt and Keely JJ) and *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at pp.266-7 (Gray J, Northrop J agreeing). *Gibbs v The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at p.223.
[27] *Community & Public Sector Union v Telstra Corporation Ltd* (2001) 108 IR 228 at p.229 [3].
[28] *Maritime Union of Australia v Geraldton Port Authority (No.2)* (2000) 94 IR 404.
[29] *Australian Nursing Federation v Alcheringa Hostel Inc* (2004) 136 FCR 530 at p.541 [35] & [36]; *Finance Sector Union v Commonwealth Bank of Australia* (2006) 224 ALR 467 at p.470 [7].

relation to the dismissal of the three members of the Winters' family should be treated as three separate contraventions of the WR Act, should be accepted.

61. The Applicant further submitted that the maximum penalty in relation to these 'dismissal contraventions' that the Court could impose is $19,800.

Mr Richter's Submissions

62. The following matters should be noted from Mr Richter's written submissions, filed 11th October 2010.[30]

63. First, Mr Richter confirmed that he continues to operate a business or businesses: pars.6.6(a); 7.10 & 7.12.

64. Secondly, he confirmed that he had made 'additional payments' to various of the employees but which were not strictly in conformity with relevant awards: pars.1.2(2); 1.7; 1.8; 5.1; 5.20; 5.23; 6.2; 7.2.

65. Thirdly, Mr Richter submitted that any under-payments were actually inadvertent, accidental and certainly non-deliberate: pars.1.4; 1.5; 5.1; 5.9.

66. Fourthly, in a similar vein, he submitted that, while there was [some] poor record-keeping (par.6.2), and because he was pre-occupied with family illness (including his own in the course of the trial – for which there was no evidence) and difficulty (pars.1.1; 7.4), it was [in reality] the responsibility of others to ensure that the employees were properly paid: pars.1.3; 1.4; 5.14; 5.23; 6.3 & 6.12.

67. In this regard, it is important to record one submission in particular. At par.6.7, Mr Richter submitted:

> *I submit that the underpayment breaches arose out of circumstances, where [sic] not deliberate and resulted primarily from a lack of oversight, rectification was hindered by a missing records [sic] and hostile managers (Zammit and Winters), and rectification was attempted albeit not sufficient. I am of the*

[30] For ease of reference, unless otherwise required I will refer to matters according to Mr Richter's numbering and do so in the body of the reasons.

opinion that the majority of breaches have resulted in minor underpayments and the penalty for these should be towards the lower end of the range.

68. While he accepted some responsibility for the breaches (pars.5.6; 5.11; 5.23), Mr Richter (a) denied responsibility in other parts of his submissions (pars.1.4 & 5.3),[31] (b) claimed that some of the evidence relied on by the Applicant was false and [otherwise] incorrect (par.2.0(b)); and (c) generally challenged the evidence. He also claimed/submitted that he had no [actual] knowledge of the breaches or the matters related to them: par.6.11.

69. At par.6.13, Mr Richter submitted:

> *... I claim that I was NOT an intentional participant in any perceived Contravention, and that I was mostly ignorant of the essential knowledge of the essential facts constituting the Contravention. I also claim that I was NOT wilfully blind to any of my obligations.*

70. Then, in par.7.8, Mr Richter stated:

> *... The truth is that I was and still am NOT fully convinced the claims that I intentionally set out to commit fraud of any kind or to blatantly underpay anyone. My errors, are that I was unaware of many of the requirements, and I was making what I thought was correct cash payments, be [sic] that they were NOT being recorded against the appropriate requirements identified by the Applicant.*

71. Given (a) the unchallenged evidence before the Court, and (b) giving every allowance to Mr Richter as an unrepresented litigant, I cannot and do not accept his submissions. His legal responsibilities could not be delegated to others. Nor could he at the time, nor can he do so now, claim ignorance of the requirements of proper payment to the employees. The KPMG and Thiess reports, as well as the Breach Notice, fix him with responsibility which cannot be shirked or otherwise avoided.

72. *Determination of Penalties*: Having regard to the considerations noted by Tracey J in *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union*, detailed in [55] of these reasons, as well as the other

[31] These denials related specifically to the terminations of the three employees previously mentioned.

cases and the principles drawn from them to which I have earlier referred, the following matters are relevant to the Court's determination of penalties in these proceedings.

73. The conduct in this case involved the failure by Aussie Junk to afford its employees the minimum legislative rate of pay, casual loading, award terms and conditions.

74. Mr Richter was the sole Director and Company Secretary of Aussie Junk. He was the person solely responsible for determining and adjusting wage rates and conditions for the employees.

75. I have already highlighted the Court's concern that Mr Richter was on notice from at least October 2007, when he received the KPMG audit report,[32] that the employees were not being paid their entitlements. Notwithstanding this and further advice from Theiss in June 2008,[33] and the Workplace Ombudsman in August 2008,[34] Mr Richter failed to rectify the underpayments. His response, in my view, was less than satisfactory.

76. In his submissions in Court, in his documentary material, and (as I have previously noted) in his written submissions, Mr Richter sought to justify or off-set his non-compliance with the pay loadings and breach of awards and conditions by contending that he paid other allowances to the employees in lieu of what was prescribed by the awards.

77. I do not accept Mr Richter's submission in this regard. Payment of what he regarded as additional, if not almost *ex gratia*, moneys to employees is not a substitute for compliance with award terms and conditions.

78. I have also noted that the sum of outstanding payments owed to the employees totalled $259,315.06. This is a significant sum. It has not been rectified since Aussie Junk was placed in liquidation in July 2009. In those circumstances, the prospect of re-payment from Aussie Junk must be considered remote.

[32] See Exhibit G and Exhibit C, p.150 (par.3)
[33] See Exhibit F, Exhibit D, p.150 (par.3)
[34] See Exhibit BK-1, Tab 5.

79. The Applicant noted that there had been one earlier breach by Aussie Junk concerning a former employee of Aussie Junk. The under-payment there in question, of $10,047.44, was fully rectified.

80. Although recorded earlier in these reasons, summarily, the breaches were:

(a) breach of subsection 182(1) of the WR Act

(b) breach of subsection 185(2) of the WR Act

(c) breach of clause 15 of the Transport Workers Award

(d) breach of subclause 16.1.2 of the Transport Workers Award

(e) breach of subclause 16.1.3 of the Transport Workers Award

(f) breach of subclause 16.1.6 of the Transport Workers Award

(g) breach of subclause 16.1.7 of the Transport Workers Award

(h) breach of subclause 16.2.1 of the Transport Workers Award

(i) breach of subclause 16.2.2 of the Transport Workers Award

(j) breach of subclause 20.2 of the Transport Workers Award

(k) breach of subclause 23.1 of the Transport Workers Award

(j) breach of clause 15 of the Clerks Award

(k) three separate breaches of subsection 792(1)(a) of the WR Act

81. The breaches just detailed constitute 15 separate contraventions. In relation to the same course of conduct but which results in breaches of separate sections of the WR Act and or an award, I accept that there is no application of s.719(2). I also accept that, on the basis that there are

15 separate breaches, the maximum penalty the Court may award against Mr Richter is $99,000.[35]

82. I have previously noted that Aussie Junk operated two waste management facilities in the ACT. It employed approximately 37 employees during the relevant period.[36]

83. To the degree that an employer might seek to claim that the [relatively] modest size of its business entitles it to some concessional application of the relevant legislation and or awards, such a view is unsustainable. Similarly, as I have already observed, where there are statutory or award payments to which employees are entitled, and the employer (as was asserted here) pays extra amounts other than for the purposes of satisfying the strict legal entitlements of an employee, the employer cannot use those "extra amounts" either as satisfaction for payment of those entitlements, or as some form of 'set-off' against their payment.[37]

84. I have already indicated that I accept the Applicant's submission that Mr Richter was the decision-maker and controller of Aussie Junk. Whatever the delegations to and the responsibilities of others in Aussie Junk, primary responsibility fell to Mr Richter. In every respect, Aussie Junk was 'his company.'

85. Mr Richter submitted that, to a very significant degree, his personal circumstances were such that (a) at much (or at least some) of the relevant times, he was pre-occupied with family matters (including the unfortunate death of his wife), (b) especially while he resided (as he still does) in Queensland, he relied heavily on other personnel of Aussie Junk, but now, with hindsight, he should not have done so, and (c) a substantial penalty would impose financial hardship on him. These matters, he submitted, should be taken into account in the Court's determination of penalty.

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[35] See [58] & [61] of these reasons.
[36] See Exhibit G (p.3) which refers to the number of employees in October 2007.
[37] See, for example, the comments of Keely J in *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503. His Honour's remarks were endorsed by a Full Court (Keely, Gray & Ryan JJ) in *Poletti v Ecob* (1989) 91 ALR 381 at p.394.

86. In relation to 'financial hardship', it is helpful to note the comments of Wilcox CJ in *Printing & Kindred Industries Union v Vista Paper Products Pty Ltd*:[38]

> *Mr McNamee's claim that Vista was unable to find the funds necessary to reinstate the dismissed employees as from 10 July 1991 requires consideration. I should say that Mr Rothman objected to the admission of evidence about Vista's (or Mr McNamee's) financial position. He said it was irrelevant. But I ruled that it was relevant, at least in relation to the quantum of any penalty to be imposed on the respondents.* ***In determining what monetary penalty to impose on an offender it is usual for a court to take into account the offender's capacity to pay. A monetary sum that would constitute a reasonable penalty to a person of average income might be unduly oppressive if imposed on an impecunious person.***

87. The Applicant submitted that while the Respondents did not deliberately set out to breach the WR Act, the Second Respondent was wilfully blind in shutting his eyes to his responsibilities as an employer. By and large, I accept this submission. I have noted on a number of occasions in these reasons that Mr Richter was fixed with notice of the problems with Aussie Junk and the failure to comply with the payment of award entitlements. The failure to remedy these problems in the light of the two audit reports mentioned (by KPMG and Thiess), and highlighted by the Applicant in the breach notice, must be sheeted home to Mr Richter.

88. Regarding 'contrition, corrective action and co-operation with authorities,' in my view, regrettably, there has been little evidence of such matters. While co-operative during the trial, and invariably congenial in all dealings directly with the Court, Mr Richter's submissions are replete with excuses and justifications for his actions, or the lack thereof. In his submissions (par.8.2), Mr Richter sought "forgiveness" for 'any contraventions that were obviously committed unknowingly.' The Court is not endowed with jurisdiction to grant such relief. Moreover, notwithstanding his admissions in relation to the breaches detailed, by none too subtle comments in his submissions, he has sought either to diminish his responsibility and or to suggest that

[38] *Printing & Kindred Industries Union v Vista Paper Products Pty Ltd* (1994) 127 ALR 673 at p.686 (emphasis added).

he was, in some unaccounted way, cajoled or forced into the admissions he made. I do not accept such submissions or suggestions. And, in the light of these comments, I do not see that there is any relevant acceptance of responsibility, let alone "contrition" for the breaches and the impact of them on the former employees of Aussie Junk.

89. In fixing an appropriate penalty, the Court must also have regard to ensuring that there is (a) a degree of consistency in comparable proceedings, (b) basic compliance with the standards set by the WR Act and relevant awards, and (c) appropriate regard to the circumstances in which the contravention occurred and "the need to sustain public confidence in the statutory regime which imposes the obligations."[39]

90. On the subject of "consistency", in *McDonald v ABCC*, the Full Court quoted the High Court's comments in *Hili v The Queen*, thus:[40]

> *In Hili v R; Jones v R (2010) 85 ALJR 195 (Hili) the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) said:*
>
> > *[48] Consistency is not demonstrated by, and does not require, numerical equivalence. [...]*
> >
> > *[49] The consistency that is sought is consistency in the application of the relevant legal principles.*

91. As to "deterrence" (general and specific), there is abundant guidance. For example, in *Ponzio v B & P Caelli Construction Pty Ltd*, Lander J said:[41]

> *There are three purposes at least for imposing a penalty: punishment; deterrence; and rehabilitation. The punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment: R v Hunter (1984) 36 SASR 101 at 103. Therefore the circumstances of the offence or contravention are especially important. The penalty must recognise the need for deterrence, both personal and general. In*

[39] *Plancor* 171 FCR at p.376 [60] (Branson & Lander JJ).
[40] *McDonald v ABCC* [2011] FCAFC 29 at [23].
[41] *Ponzio v B & P Caelli Construction Pty Ltd* (2007) 158 FCR 543 at [93]. Similar remarks had earlier been made by Finkelstein J in *CPSU v Telstra Corporation* 108 IR 228 at pp.230-231 [9]. See too the comments of the Full Court in *Plancor* 171 FCR at [37] (Gray J) and (in essentially identical terms) at [60] (Branson & Lander JJ).

regard to personal deterrence, an assessment must be made of the risk of re-offending. 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.

92. In relation to "specific deterrence", the Applicant pointed to the following matters for the Court's consideration:

> *(a) Mr Richter continues to operate several businesses similar to that which Aussie Junk operated;*
>
> *(b) [as previously noted] there has been no attempt by Mr Richter to rectify the situation regarding the now long-outstanding payments to the employees;*
>
> *(c) Aussie Junk remains in liquidation;*
>
> *(d) Mr Richter chose to defend the proceedings, and only admitted liability effectively at the conclusion of the trial.*

93. Relying upon comments by, among others, the Full Court in *McAlary-Smith* regarding the 'totality principle',[42] to which I have previously referred, the Applicant submitted that the penalties the Court should impose in this matter should be in the "mid to high range." In this regard, I recall Buchanan J's observation in *McAlary-Smith*, at [91]:

> *At the end of the day the task of the court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.*

94. Having regard to the facts and circumstances outlined in these reasons, and the relevant legal principles, in my view, the penalty that should be

[42] In this regard, among many places, see Buchanan J in *McAlary-Smith* at [98] – [103], with which Gray J essentially agreed, at [18] – [23].

imposed on the Second Respondent concerning all of the breaches to which he admitted on 18th August 2010 is $72,000. That penalty is to be paid to the Applicant. The Applicant is then directed to pay it to the employees according to the percentage amount owed to each employee and what that amount represents as a percentage of the total sum owing to all the employees.

I certify that the preceding ninety-four (94) paragraphs are a true copy of the reasons for judgment of Neville FM

Associate:

Date: 31 May 2011