FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v CONN & ORS *[2010] FMCA 828*

INDUSTRIAL LAW – Breaches of award – multiple breaches by the employer relating to payment of wages and salary entitlements – underpayment of employees – underpayment of various penalty rates – consideration of factors relevant to fixing the amount of penalties – pecuniary penalties.

Crimes Act 1914
Fair Work Act 2009
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Workplace Relations Act 1996

Australian Ophthalmic Supplies Pty Limited v McAlary-Smith [2008] FCAFC 8
Community & Public Sector Union v Telstra Corp Ltd [2001] FCA 1364
Cotis v Macpherson [2007] FMCA 2060
Cotis v Pow Juice Pty Ltd [2007] FMCA 140
Kelly v Fitzpatrick [2007] FCA 1080
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
PKIU v Vista Paper Products Pty Ltd (1994) 127 ALR 673
Ponzio v B & P Caelli Construction Pty Ltd [2006] FCA 1221
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Walsh v Tattersall (1996) 188 CLR 77
Workplace Ombudsman v Saya Cleaning Pty Ltd [2009] FMCA 38

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	NATHAN CONN
Second Respondent:	TONY HINAI
Third Respondent:	GEORGE HALLIDAY
File Number:	BRG 1004 of 2009
Judgment of:	Burnett FM
Hearing date:	11 October 2010
Date of Last Submission:	11 October 2010

Delivered at: Brisbane

Delivered on: 12 October 2010

REPRESENTATION

Counsel for the Applicant: Mr C. Murdoch

Solicitors for the Applicant: Freehills

There was no appearance by or on behalf of the first, second or third respondents

THE COURT DECLARES:

(1) That Enterprise Car Rental Group Pty Ltd has breached:

(a) section 182(1) of the *Workplace Relations Act 1996* by failing to pay the guaranteed basic periodic rate of pay payable under the preserved Australian Pay and Classification Scale derived from the *Motoring Services Award – South East District 2003* to Michael Dodge and Simon McLaughlin;

(b) section 182(1) of the *Workplace Relations Act 1996* by failing to pay the guaranteed basic periodic rate of pay payable under the preserved Australian Pay and Classification Scale derived from the *Clerical Employees Award – State 2002* to Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Coe and Samuel McLaughlin;

(c) section 185(2) of the *Workplace Relations Act 1996* by failing to pay casual loading at least equal to the guaranteed casual loading percentage under the Preserved Australian Pay and Classification Scale derived from the *Motoring Services Award – South East District 2003* of 23% to Michael Dodge and Simon McLaughlin;

(d) section 185(2) of the *Workplace Relations Act 1996* by failing to pay casual loading at least equal to the guaranteed casual loading percentage under the Preserved Australian Pay and Classification

Scale derived from the *Clerical Employees Award – State 2002* of 23% to Samuel McLaughlin;

(e) section 235(2) of the *Workplace Relations Act 1996* by failing to pay untaken accrued annual leave on termination of employment to Jason Dodge, Marianne Earley, Melissa Carroll and Kassandra Coe;

(f) section 346ZD of the *Workplace Relations Act 1996* by failing to pay Jason Dodge compensation when the Employee Collective Agreement for Enterprise Car Rental Group Pty Ltd did not initially pass the Fairness Test under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*;

(g) clause 5.4.2 of the Notional Agreement Preserving a State Award, derived from the *Motoring Services Award – South East District 2003* by failing to make superannuation contributions to Michael Dodge and Simon McLaughlin at the correct rate;

(h) clause 5.5.2 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* ensure that no more than 2 days wages are held owed to Michael Dodge and Simon McLaughlin;

(i) clause 5.5.3 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* by failing to pay final payment on termination to Michael Dodge and Simon McLaughlin;

(j) clause 6.2.3 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* by failing to pay penalty rates to Michael Dodge and Simon McLaughlin for work performed on Saturday over 4 hours;

(k) clause 6.2.4 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* by failing to pay penalty rates to Michael Dodge and Simon McLaughlin for work on Sunday;

(l) clause 6.3.1 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District*

2003 by failing to provide meal breaks to Michael Dodge and Simon McLaughlin;

(m) clause 6.4.1 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* by failing to pay overtime rates to Michael Dodge and Simon McLaughlin for work performed in excess of ordinary hours and failure to pay meal allowances;

(n) clause 6.5.2 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* by failing to provide a rest pause to Michael Dodge and Simon McLaughlin of not less than 10 minutes duration in the first and second half of the day's work, and rest pauses for time worked over 4 hours;

(o) clause 7.6.2 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* by failing to pay penalty rates to Michael Dodge and Simon McLaughlin for work performed on a public holiday;

(p) clause 6.1.2 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to pay Jason Dodge, Marianne Earley, Melissa Carroll, and Kassandra Coe Saturday penalty rates at time and a quarter for ordinary hours worked between 6:30am and 12:30pm;

(q) clause 6.7.1 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to pay Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Coe and Samuel McLaughlin, for all work performed outside the ordinary working hours at the rate of time and a-half for the first 3 hours and double time for all work in excess of 3 hours on Monday to Friday and hours after 12:30pm on Saturday;

(r) clause 6.7.4 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to pay Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Coe, and Samuel McLaughlin, at the rate of double time for all work performed on a Sunday;

(s) clause 6.7.6 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to provide Jason Dodge, Marianne Earley, Melissa Carroll and Kassandra Coe a tea break when working overtime after 6:30pm and a meal allowance of $9.60;

(t) clause 6.7.8 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to pay Jason Dodge, Marianne Earley, Melissa Carroll and Kassandra Coe at the rate of double ordinary rates for work performed during a meal break, when working overtime after 6.30pm;

(u) clause 7.6.1 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to pay Jason Dodge, Marianne Earley, Melissa Carroll and Kassandra Coe the rate of double time and a-half on a public holiday;

(v) clause 5.8.2 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to make superannuation contributions to Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Coe and Samuel McLaughlin based on ordinary time earnings at the correct rate of pay;

(w) clause 6.5.2 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to pay Jason Dodge, Marianne Earley, Melissa Carroll and Kassandra Coe at double ordinary rates for time worked during meal times;

(x) clause 6.6.1 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to provide Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Coe and Samuel McLaughlin a rest pause of not less than 10 minutes duration in the first and second half of the day's work;

(y) clause 6.6.4 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to provide Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Coe and Samuel McLaughlin a 10 minute rest pause when working in excess of 4 consecutive hours;

(z) clause 5.6.2 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to provide all wages owing to Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Coe and Samuel McLaughlin within 15 minutes of ceasing work;

(aa) clause 6.5.1 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to provide Jason Dodge, Marianne Earley, Melissa Carroll and Kassandra Coe a meal break when required to work for more than 6 hours; and

(bb) clause 7.1.5 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing pay Dodge, Marianne Earley, Melissa Carroll and Kassandra Coe annual leave loading.

(2) That the total underpayments were as follows:

(a) the sum of $29,918.69 for Jason Dodge;

(b) the sum of $6,495.57 for Marianne Earley;

(c) the sum of $9,203.79 for Melissa Carroll;

(d) the sum of $6,681.51 for Kassandra Coe;

(e) the sum of $1,280.29 for Samuel McLaughlin;

(f) the sum of $5,783.87 for Simon McLaughlin; and

(g) the sum of $2,059.47 for Michael Dodge.

(3) That, pursuant to section 728 of the *Workplace Relations Act 1996*, the First Respondent was involved in the contraventions at paragraph 1 above and has contravened the provisions in paragraph 1 above.

ORDERS

(4) That pursuant to section 719(1) of the *Workplace Relations Act 1996*, the First Respondent pay a pecuniary penalty, of $110,000.00 in respect to the contraventions at paragraph 1 above.

(5) That pursuant to section 841 of the *Workplace Relations Act 1996* the First Respondent pay the penalty in paragraph 4 above as follows:

(a) the sum of $29,918.69 to Jason Dodge;

(b) the sum of $6,495.57 to Marianne Earley;

(c) the sum of $9,203.79 to Melissa Carroll;

(d) the sum of $6,681.51 to Kassandra Coe;

(e) the sum of $1,280.29 to Samuel McLaughlin;

(f) the sum of $5,783.87 to Simon McLaughlin;

(g) the sum of $2,059.47 to Michael Dodge; and

(h) the sum of $48576.81 to the Commonwealth Consolidated Revenue Fund.

(6) That the sums payable by the First Respondent pursuant to paragraphs 4 and 5 above, be paid within 30 days of the date of this order.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

BRG 1004 of 2009

FAIR WORK OMBUDSMAN
Applicant

And

NATHAN CONN
First Respondent

TONY HINAI
Second Respondent

GEORGE HALLIDAY
Third Respondent

REASONS FOR JUDGMENT

1. This application is brought by the Fair Work Ombudsman. Before proceeding into the substance of the application, it first needs to be noted that there has been no appearance by either of the first, second or third respondents. So far as the first respondent is concerned, steps have been taken to ensure service of the material upon him. Service of the material relevant to the application was recently served by forwarding material to his post office box, that being an address given to the applicant by the solicitors who at the time acted for the respondent.

2. The first respondent has also been informed recently by both text and telephone message of the proceedings, and furthermore, has been in receipt, as recently as 8 October 2010, with submissions in respect of liability and penalty. Despite this, the first respondent has not appeared. The first respondent was formerly represented by solicitors.

Those solicitors ceased to act on 7 July 2010, when they sought to withdraw as solicitors on the record and since that time, the first respondent has been contacted by forwarding material to the post office box address provided by his former solicitors.

3. I am satisfied that he is aware of the proceeding and that it was to proceed before me for hearing yesterday, that is, on 11 October 2010, and that his non-appearance was intentional. His non-appearance is indicative of his attitude generally to the application. It is, in my view, appropriate to proceed to determine the application in his absence, as I am authorised to do by operation of r 13.03A of the Court's Rules. So far as the second and third respondents are concerned, in respect of each of those respondents the applicant has filed a notice of discontinuance and accordingly, their appearance is no longer required.

4. This application concerns the Enterprise Car Rental Group Pty Ltd, which conducted a rental car business trading as Abel Rental Car from various locations in Brisbane from at least December 2005 until 5 May 2009 when it was placed under external administration and a liquidator was appointed. Throughout that period, Nathan Conn, the first respondent, was its sole director. He was also involved in the day-to-day management of the company and as events reveal, a person within the company who determined the wages and entitlements to be paid to the company's employees and the rostering arrangements to be adopted.

5. For various periods between December 2005 and May 2009 the company employed the following:

   a) Jason Dodge, August 2006 to 9 April 2008;

   b) Marion Early from 22 May 2006 to 2 November 2006;

   c) Melissa Carol from 1 February 2006 to July 2006;

   d) Kassandra Ko from 10 July 2006 to 16 February 2007;

   e) Samuel McLachlan from December 2005 to July 2008;

   f) Simon McLachlan from January 2006 to 9 February 2007; and

   g) Michael Dodge from September 2006 to 17 February 2007.

6. At the relevant times, the employees were variously covered by either a notional agreement, pursuant to a state award, being the Motoring Services Award – South-Eastern District 2003, the motoring NAPSA which is now an award based under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act), or the employees were covered by the Preserved Australian Pay and Classification Scale originating from the clerical NAPSA, that is the Preserved Clerical APCS, which is now a transitional APCS, which arises from a notional agreement preserving the State award, specifically the Clerical Employees Award State – 2002, the clerical NAPSA, which is also an award based transitional instrument under the Transitional Act.

7. Finally, the employees were also entitled to the benefit of an employee collective agreement called the Employee Collective Agreement, for Enterprise Car Rental Group Pty Ltd, which is a collective agreement based transitional instrument under the Transitional Act. The collective agreement had, however, not passed the fairness test as required by s.436M of the *Workplace Relations Act* (WR Act). Accordingly, an undertaking had been given by the employer to vary the collective agreement in respect of the rates of pay in order to pass the fairness test.

8. The collective agreement had been lodged on 17 August 2007, but was not subject to any undertaking, until 1 October 2008, to vary rates of pay. Accordingly, the employer was, by operation of s. 346X and s.346ZI of the WR Act, subject to an obligation to pay the shortfall between the wages they were receiving under the collective agreement and the value of entitlements they would have been entitled to under the applicable industrial instrument, for the collective agreement during the fairness test period, that is, between 17 August 2007, and 1 October 2008. The employer was bound by each of the industrial instruments insofar as they concerned the employees and was also bound by the collective agreement, as varied by operation of the fairness test and made subject to undertakings.

9. The applicant is an inspector pursuant to s.701 of the *Fair Work Act 2009*, and has standing to prosecute the complaint. It seeks declarations in respect of breaches alleged, and for the imposition of

penalties in terms of draft order exhibit 6. Broadly, 24 contraventions are alleged and the applicant seeks findings and declarations of contraventions in respect of each of those breaches. The contraventions alleged are as follows:

10. The contraventions comprise the allegations that Enterprise Car Rental Group Pty Ltd has breached:

"a) section 182(1) of the *Workplace Relations Act 1996* by failing to pay the guaranteed basic periodic rate of pay payable under the preserved Australian Pay and Classification Scale derived from the *Motoring Services Award – South East District 2003* to Michael Dodge and Simon McLaughlin;

b) section 182(1) of the *Workplace Relations Act 1996* by failing to pay the guaranteed basic periodic rate of pay payable under the preserved Australian Pay and Classification Scale derived from the *Clerical Employees Award – State 2002* to Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Ko and Samuel McLaughlin;

c) section 185(2) of the *Workplace Relations Act 1996* by failing to pay casual loading at least equal to the guaranteed casual loading percentage under the Preserved Australian Pay and Classification Scale derived from the *Motoring Services Award – South East District 2003* of 23% to Michael Dodge and Simon McLaughlin;

d) section 185(2) of the *Workplace Relations Act 1996* by failing to pay casual loading at least equal to the guaranteed casual loading percentage under the Preserved Australian Pay and Classification Scale derived from the *Clerical Employees Award – State 2002* of 23% to Samuel McLaughlin;

e) section 235(2) of the *Workplace Relations Act 1996* by failing to pay untaken accrued annual leave on termination of employment to Jason Dodge, Marianne Earley, Melissa Carroll and Kassandra Ko;

f) section 346ZD of the *Workplace Relations Act 1996* by failing to pay Jason Dodge compensation when the Employee Collective Agreement for Enterprise Car Rental Group Pty Ltd did not

initially pass the Fairness Test under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*;

g) clause 5.4.2 of the Notional Agreement Preserving a State Award, derived from the *Motoring Services Award – South East District 2003* by failing to make superannuation contributions to Michael Dodge and Simon McLaughlin at the correct rate;

h) clause 5.5.2 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* ensure that no more than 2 days wages are held owed to Michael Dodge and Simon McLaughlin;

i) clause 5.5.3 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* by failing to pay final payment on termination to Michael Dodge and Simon McLaughlin;

j) clause 6.2.3 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* by failing to pay penalty rates to Michael Dodge and Simon McLaughlin for work performed on Saturday over 4 hours;

k) clause 6.2.4 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* by failing to pay penalty rates to Michael Dodge and Simon McLaughlin for work on Sunday;

l) clause 6.3.1 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* by failing to provide meal breaks to Michael Dodge and Simon McLaughlin;

m) clause 6.4.1 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* by failing to pay overtime rates to Michael Dodge and Simon McLaughlin for work performed in excess of ordinary hours and failure to pay meal allowances;

n) clause 6.5.2 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District*

2003 by failing to provide a rest pause to Michael Dodge and Simon McLaughlin of not less than 10 minutes duration in the first and second half of the day's work, and rest pauses for time worked over 4 hours;

o) clause 7.6.2 of the Notional Agreement Preserving a State Award derived from the *Motoring Services Award – South East District 2003* by failing to pay penalty rates to Michael Dodge and Simon McLaughlin for work performed on a public holiday;

p) clause 6.1.2 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to pay Jason Dodge, Marianne Earley, Melissa Carroll, and Kassandra Ko Saturday penalty rates at time and a quarter for ordinary hours worked between 6:30am and 12:30pm;

q) clause 6.7.1 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to pay Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Ko and Samuel McLaughlin, for all work performed outside the ordinary working hours at the rate of time and a-half for the first 3 hours and double time for all work in excess of 3 hours on Monday to Friday and hours after 12:30pm on Saturday;

r) clause 6.7.4 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to pay Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Ko, and Samuel McLaughlin, at the rate of double time for all work performed on a Sunday;

s) clause 6.7.6 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to provide Jason Dodge, Marianne Earley, Melissa Carroll and Kassandra Ko a tea break when working overtime after 6:30pm and a meal allowance of $9.60;

t) clause 6.7.8 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to pay Jason Dodge, Marianne Earley, Melissa Carroll and Kassandra Ko at the rate of double ordinary rates for work

performed during a meal break, when working overtime after 6.30pm;

u) clause 7.6.1 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to pay Jason Dodge, Marianne Earley, Melissa Carroll and Kassandra Ko the rate of double time and a-half on a public holiday;

v) clause 5.8.2 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to make superannuation contributions to Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Ko and Samuel McLaughlin based on ordinary time earnings at the correct rate of pay;

w) clause 6.5.2 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to pay Jason Dodge, Marianne Earley, Melissa Carroll and Kassandra Ko at double ordinary rates for time worked during meal times;

x) clause 6.6.1 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to provide Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Ko and Samuel McLaughlin a rest pause of not less than 10 minutes duration in the first and second half of the day's work;

y) clause 6.6.4 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to provide Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Ko and Samuel McLaughlin a 10 minute rest pause when working in excess of 4 consecutive hours;

z) clause 5.6.2 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to provide all wages owing to Jason Dodge, Marianne Earley, Melissa Carroll, Kassandra Ko and Samuel McLaughlin within 15 minutes of ceasing work;

aa) clause 6.5.1 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing to provide Jason Dodge, Marianne Earley, Melissa Carroll and Kassandra Ko a meal break when required to work for more than 6 hours; and

bb) clause 7.1.5 of the Notional Agreement Preserving a State Award derived from the *Clerical Employees Award – State 2002* by failing pay Dodge, Marianne Earley, Melissa Carroll and Kassandra Ko annual leave loading."

11. In respect of the contraventions alleged, the only matter to be noted is that in para 1(m), the allegation appears to be bad for duplicity insofar as it complains that there was a contravention of clause 6.4.1, in respect of the Motoring Services Award to pay overtime rates to Michael Dodge and Simon McLachlan, for work performed in excess of ordinary hours and for failure to pay meal allowances. See *Walsh v Tattersall* (1996) 188 CLR 77. In the circumstances, following discussion with counsel, I direct that the words "and failure to pay meal allowances" be struck from that paragraph. The application will proceed in respect of only the failure to pay overtime rates, in respect of that complaint.

12. In drafting the application and the proposed orders, the applicant has been particularly mindful of s. 719(2) of the WR Act. Relevantly, it provides that where two or more breaches of an applicable provision are committed by the same person and the breaches arose out of the same course of conduct, the breaches shall, for the purposes of s.719, be taken to constitute a single breach.

13. In this case, there are multiple breaches by the employer relating to payment of wages and salary entitlements, being: base wage entitlements, casual loading, superannuation contributions, holding of wage provisions, failure to pay final payment on termination, failure to pay penalty rates for work performed on a Saturday over four hours, or in excess of four hours, failure to pay penalty rates on Sunday, failure to provide meal breaks, failure to pay overtime for work performed in excess of ordinary hours, failure to provide rest pauses and failure to pay penalty rates for work on a public holiday.

14. These contraventions occurred in respect of each of the employees noted above, who were employed under either the motoring services NAPSA and/or the clerical employees NAPSA. In addition, there were contraventions by underpayment, in accordance with the undertaking, given in respect of the collective agreement. Each of Jason Dodge, Marion Early, Kassandra Ko and Samuel McLachlan were employed as customer services officers at the level 3 classification, under the clerical NAPSA. Melissa Carol was also employed under the clerical NAPSA, as a manager/supervisor, at the level 5 classification. The remaining employees were employed under the motoring services NAPSA.

15. The applicable wage instrument is to be found by reference to Division 2 of Part 7 of the WR Act, which prescribes the key minimum entitlements in relation to basic rates of pay, and casual loadings, and forms part of the Australian Fair Pay and Conditions Standard. Section 182 of the WR Act, provides a guarantee of the APCS basic periodic rates of pay, and s.178 defines the APCS as including a preserved APCS. Section 208(1) of the WR Act, prescribes that if a pre-reform wage instrument contains rate provisions determining one or more basic periodic rates of pay payable to employee, then the reform commencement that is taken to be a preserved APCS then from the reform commencement that is take to be the preserved APCS. Further, s.208(2) of the WR Act, provides that a preserved APCS is derived from the pre-reform wage instrument.

16. Pursuant to s.178 of the WR Act, a pre-reform wage instrument is defined as including a pre-reform non-federal wage instrument, which is further defined in that section to include a pre-reform state wage instrument. A pre-reform state wage instrument includes a State award as in force immediately before the reform commencement. So far as is relevant to this case, there are two. First is the Motoring Services Award – South-Eastern District 2003, or the Motoring Award, and then the Clerical Employees Award State – 2002, or the Clerical Award. They were both in force immediately prior to the reform commencement and contain the rate provisions determining basic periodic rates of pay payable to employees. It follows that by operation of s.208 of the WR Act there were at times material to these proceedings a preserved APCS derived from the Motoring Award and the Clerical Award.

17. Pursuant to s.204(1) of the WR Act, the question as to whether the employment of a particular person is covered by an APCS is determined by reference to the coverage provisions of that APCS, and I will simply make observations in relation to the relevant provisions and which I will incorporate in the revised reasons. The coverage provisions of the motoring APCS are defined in the coverage provisions in the Motoring Award, in particular, at clause 1.3 which is in the following terms:

> *"1.3 Application*
>
> *1.3.1 This Award applies in, or at, establishments or enterprises, or sections thereof, which operate as garages, service stations, car parks, towing services or used vehicle yards in, or in connection with, motorised transport and/or to like establishments or services in respect of all employees, and their employers, engaged in any one or more of the following duties sand/or pursuits:*
>
> *Retail selling and/or dispensing from pumps of petrol, oil and other related petroleum products and/or substitutes; retail selling of driveway requisites; cleaning and/or polishing and/or greasing and/or otherwise carrying out related servicing on vehicles; changing and/or repairing inner tubes and/or tyres; changing wheels, light bulbs, wiper blades and generally attending to the maintenance of vehicles, and the employer's premises, where no more than an elementary mechanical knowledge is required; applying anti-corrosive and other protective treatments; tow truck operators and their assistants; and car park attendants:*
>
> *"Like establishments or services" includes marine service stations; used car, caravan and/or trailer yards; wrecking yards' tyre fitting depots; vehicle hiring services; and anti-corrosive and other protective treatment, steam cleaning, car washing and/or cleaning services; and all other places at which the aforementioned duties sand pursuits may be carried out."*

18. It is provided by clause 1.6 that the award is legally binding upon employers as prescribed by clause 1.3 and their employees and the union and its members. The evidence demonstrates that the employees, Simon James McLachlan and Michael John Dodge, were properly categorised within the meaning of the Motoring Award, because the duties they performed included: washing and cleaning of vehicles, picking up and dropping off of customers, generally clearing of the

office and yard, garden maintenance, inspecting vehicles, and fuelling vehicles. They were all matters relevant to the employer's conduct of its car rental business, and vehicle hire service, which is an establishment expressly named as a like establishment or service under clause 1.3.1 of the Motoring Award.

19. So far as the Clerical Award is concerned, the coverage provisions of the Clerical APCS are derived from the coverage provisions of the Clerical Award. That award provides, at clause 1.4, that the award applies to persons employed wholly or principally as a clerk as defined within the state of Queensland. Clause 1.5 provides that the parties are bound as follows: the employees as prescribed by clause 1.4 and 1.6 and their employers and upon the Australian Municipal Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees and/or Federated Clerks' Union of Australia, Northern Queensland Branch and Union of Employees and its members.

20. A clerk is defined at clause 1.6.2 as follows:

> *""1.6.2 "Clerk" means any person employed either exclusively or principally in the pursuit or vocation of writing, engrossing, typing, or calculating, whether by ordinary means or by means of any process calculated to achieve a like result, and/or in invoicing, billing, charging, checking, or otherwise dealing with records, writings, correspondence, books, and accounts of any person, firm, company, association, corporation, or Local Authority, whether employed in trading, law, insurance, manufacturing, buying, selling, forwarding, receiving and recording. The term "Clerk" also includes any person engaged exclusively or principally in attending to telephone switchboards, receiving and answering calls, and manipulating any apparatus to enable people to converse, as well as manipulating any keyboard or other apparatus to facilitate communication, or in any other clerical capacity whatsoever, but does not include persons engaged solely in collecting money out of doors."*

21. At clause 5.2.3, a level 3 clerk is defined to include:

> *"Characteristics:*
>
> *Employees at this level have achieved a standard to be able to perform specialised or non-routine tasks or features of the work.*

Work is likely to be without supervision with general guidance on progress and outcomes sought and involves the application of knowledge with depth in some areas and a broad range of skills. Initiative, discretion and judgment are required in carrying out assigned duties.

…

Typical Duties/Skills:

Indicative typical duties and skills in this level may include:

- Prepare cash payment summaries, banking report and bank statements, calculate and maintain wage and salary records; follow credit referral procedures; apply purchasing and inventory control requirements; post journals to ledger etc. at a higher level than at Level 2.

- Provide detailed advice and information on the organisation's products and services; respond to client/public/supplier problems within own functional area utilising a high degree of interpersonal skills…"

22. At clause 5.2.5 a level 5 clerk is defined:

"Characteristics:

Employees at this level are subject to broad guidance or direction and would report to more senior staff as required.

Such employees will typically have worked or studied in a relevant field and will have achieved a standard of relevant and/or specialist knowledge and experience sufficient to enable them to independently advise on a range of activities and features and contribute, as required, to the determination of objectives, within the relevant field(s) of their expertise."

23. The evidence demonstrates that it would seem the employees: James Dodge, Marion Dodge, Kassandra Ko, at least for part of the time, and Samuel McLachlan were each employed as level 3 clerks. Melissa Carol and Kassandra Ko, at least for part of the time, were employed as level 5 clerks.

24. So far as the evidence is concerned, relating to those matters, the level 3 employees each undertook duties which included: the opening of the office, till reconciliations, starting up and logging onto the computer

system, taking payment details, selling insurance, upgrades to customers, conducting vehicle inspections with customers, giving quotes for customers, detailing cars, and limited levels of supervision with weekend shifts regularly involving a customer service operator operating alone, or with only one other customer service officer.

25. So far as the level 5 employees are concerned, the evidence demonstrates that the duties those personnel undertook, or those employees undertook, included duties consistent with employment as a branch manager or supervisors which included: generating key performance indicator on weekly staff reports, managing staff, processing accidents and damages claims, weekly reconciliations, signing off timesheets, performance in managing staff, drafting staff letters, employing and terminating staff as directed, training staff, altering daily hire rates within a certain range, and acting as a first level for escalation of customer complaints.

26. Dealing then with the discrete contraventions. So far as Jason Dodge was concerned, the employer was obliged to pay Mr Dodge a basic guaranteed periodic rate of pay, at least equal to the basic pay of a level 3 employee under the clerical NAPSA. During the relevant period there was a difference between the basic periodic rate of pay, which Mr Dodge was entitled to be paid under the clerical NAPSA and the preserved clerical APCS and what he was actually paid. Those matters have been particularised in annexure A to exhibit 1.

27. In addition, there was an underpayment of various penalty rates. The employer failed to pay Mr Dodge Saturday penalty rates at time and a quarter for ordinary hours worked between 6.30am and 12.30pm. In addition, the employer failed to pay Mr Dodge for all work performed outside the ordinary working hours, at the rate of time and a half for the first three hours and double time for work in excess of three hours on Monday to Friday and after 12.30 on Saturday. Further, the employer failed to pay Mr Dodge at the rate of double time for all work performed on a Sunday.

28. It failed to pay Mr Dodge double ordinary rates for time worked during meal times. It also failed to provide Mr Dodge with a tea break when working overtime after 6.30 pm and did not pay him at the rate of double ordinary rates for working during a meal break. The employer

also failed by not providing a meal allowance on certain occasions. The overall result is that Mr Dodge was underpaid a sum of $28,896.94 as is particularised in annexure A to exhibit 1. In addition, the employer failed to pay Mr Dodge superannuation of an amount equal to 9 per cent of his ordinary time earnings, resulting in an underpayment of $945.09, as is particularised in annexure B to exhibit 1.

29. There was also a failure by the employer to pay Mr Dodge a sum of $76.66, in respect of accrued but untaken leave, on termination of his employment. That sum is particularised in annexure C of exhibit 1. There was also a failure by the employer to pay Mr Dodge his annual leave loading on termination of his employment on his accrued untaken leave. Furthermore, the employer, as I had earlier noted, failed to provide Mr Dodge with meal breaks when he was required to work for more than four hours. Also, it did not provide Mr Dodge with a rest pause of not less than 10 minutes duration in the first and second half of the day's work. It also failed to provide Mr Dodge with a 10 minute rest pause when working in excess of four consecutive hours.

30. Finally, the employer failed to provide Mr Dodge with all wages owing to him, within 15 minutes of him ceasing work. In that regard, Mr Dodge gave notice of his intention to cease work, on 9 April 2008. He requested his final payment from the employer, but did not receive that final payment until 22 April 2009. Generally, the employer also failed to pay Mr Dodge compensation in respect of the fairness test shortfall period, being that period where the collective agreement did not initially pass the fairness test. Those matters are included in the calculations addressed in annexure A to exhibit 1.

31. So far as the employees Marion Early and Melissa Carol are concerned, the evidence demonstrates that the employer failed to pay those employees the basic periodic rates of pay applicable under the clerical NAPSA, and the preserved clerical APCS. In addition, the employer failed to pay Ms Early and Ms Carol Saturday penalty rates at a time and a quarter for ordinary hours worked between 6.30 am and 12.30 pm. It also failed to pay Ms Early and Ms Carol for all work performed outside the ordinary working hours, at the rate of time and a

half for the first three hours and double time for all work in excess of three hours on Monday to Friday and hours after 12.30 on Saturday.

32. It failed to pay Ms Early and Ms Carol the rate of double time for work performed on a Sunday. It also failed to pay Ms early and Ms Carol at double ordinary rates for time worked during meal times. In addition, it failed to provide Ms Early and Ms Carol with a tea break when working overtime after 6.30pm and not paying that at the double ordinary rates for working during a meal break. It failed to provide meal allowances at certain times. It also failed to provide Ms Early and Ms Carol at the rate of double time and a half for work on a public holiday.

33. In addition, it failed to pay Ms Early and Ms Carol superannuation contributions based on ordinary time earnings at the correct rate of pay under the clerical NAPSA and preserved APCS. In addition, it failed to provide Ms Early and Ms Carol all wages owing to them within 15 minutes of them ceasing employment. Finally, the employer breached its obligations by failing to pay Ms Early and Ms Carol in accordance with ss.232, 234(1), and 235(2) of the WR Act, the sums due in respect of accrued, but untaken annual leave on termination of their employment. The total amounts unpaid to each of Ms Early and Ms Carol are $6048.03, and $8358.51 respectively, the particulars of which are to be found in exhibit 2.

34. Kassandra Ko was also employed under the clerical NAPSA and preserved clerical APCS. The employer breached its obligations to her by failing to pay her Saturday penalty rates at time and a quarter for ordinary hours worked between 6.30 am and 12.30 pm. In addition, it failed to pay her for all work performed outside the ordinary working hours at the rate of time and a half for the first three hours, and double time for all work in excess of three hours on Monday to Friday and hours after 12.30 pm on Saturday.

35. The employer breached its obligations by failing to pay Ms Ko at the rate of double time for all work performed on a Sunday. In addition, it breached by failing to pay Ms Ko at double ordinary rates for the time worked during meal times. It also breached by failing to provide Ms Ko with a tea break when working overtime after 6.30pm and not

paying her at the rate of double ordinary rates for working during the meal break and not providing a meal allowance on certain occasions.

36. Finally, it also breached by failing to pay Ms Ko at the rate of double time and a half for work on a public holiday. The value of underpayments for Ms Ko total $6613.00, which sums are particularised in exhibit 2. In addition, the employer breached by failing to pay Ms Ko superannuation contributions based on her ordinary time earnings, at the correct rate, under the clerical NAPSA, and preserved clerical APCS, and failed to provide Ms Ko wages owing to her within 15 minutes of ceasing employment, and failing to pay accrued untaken annual leave on termination of her employment. That total is $6681.51, as is particularised in exhibit 2.

37. Samuel McLachlan was employed under the clerical NAPSA, and the preserved clerical APCS. The employer breached, in respect of him, by failing to pay him for all work performed outside ordinary working hours, at the rate of time and a half for the first three hours and double time for all work in excess of three hours on Monday to Friday, and the hours after 12.30pm on Saturday. It also breached by failing to pay him at the rate of double time for all work performed on a Sunday. It breached by failing to provide him with a rest pause, of not less than 10 minutes duration, in the first and second half of the day's work. It breached by failing to provide him with 10 minutes rest pause when working in excess of 24 consecutive hours.

38. It breached by failing to provide him all wages owing within 15 minutes of ceasing work. It also breached by failing to pay a casual loading, in addition to his basic rate of pay, pursuant to the preserved clerical APCS, the Act providing that a casual employee must be paid, in addition to his actual basic rate of pay, a casual loading that is at least equal to the guaranteed casual loading percentage of that actual basic period of pay - that casual loading percentage provided for under the APCS, and the preserved clerical APCS at 23 per cent. Finally, in respect of him, the employer breached the clerical NAPSA by failing to ensure all hours worked by him were continuous. As a result of the breaches, Mr McLachlan sustained a loss of $1280.29, the particulars of which can been seen calculated in exhibit 2.

39. The employees Michael Dodge and Simon McLachlan, were employed under the preserved motoring APCS. They were employed on a casual basis, and were entitled to a casual loading percentage of 23 per cent. The employer breached its obligations to them by failing to pay each of Mr Dodge and Mr McLachlan, the basic periodic rates of pay as required for under the preserved motoring APCS. It also failed to pay or make superannuation contributions to each of those employees at the correct rate under the motoring NAPSA and the motoring APCS.

40. It also failed to ensure that no more than two days wages were held owing to each of those employees. It contravened by failing to provide them final payment on termination. It contravened by failing to pay them penalty rates for work performed on a Saturday over four hours. It also failed by failing to provide them with penalty rates for work on a Sunday and by failing to provide them with meal breaks. In addition, it failed to provide them with overtime rates for work performed in excess of ordinary hours and meal allowances.

41. It failed to provide them with a rest pause of not less than 10 minutes duration in the first and second half of the day's work and rest pauses for time worked over four hours. In addition, it failed to provide penalty rates for worked performed on a public holiday. As a result of those breaches, Mr Dodge and Mr McLachlan sustained losses of $2059.47 and $5783.87 respectively, by way of underpayment. Those sums also are particularised in exhibit 2.

42. Concerning Mr Conn and his involvement in these contraventions; as earlier noted, there were two other respondents to the application in addition to Mr Conn. Those persons were Tony Hinai, and George Halliday. They each filed affidavits in the proceeding, following which, the applicant determined to file notices of discontinuance. The affidavits of those two witnesses shed considerable light on the employer's conduct, and the involvement of Mr Conn, the first respondent, in that conduct. Unsurprisingly, the lower level employees can by and large only give evidence of Mr Conn's involvement in the most general terms, that is, with the exception of the evidence of Jason Dodge, who received an email containing an adverse admission and Melissa Carol, who was employed as a manager.

43. Mr Halliday was employed by the employer from January 16, 2006, until about November 2008. He was employed with the title of general manager, although he has complained that his duties did not reflect the title of his position, because after about three months following his employment, the director of the employer, that is Mr Conn, the first respondent, made it clear to him that he, that is Mr Conn, was going to make all the decisions in relation to the management of the employer. In particular, in his affidavit he deposes of the nature of Mr Conn's involvement in the day-to-day operations of the company. It is clear that Mr Conn was extensively involved in the day-to-day management of the company, it being largely undertaken by him.

44. He noted that Mr Conn was the person who determined the wages to be paid to the employees, and that he determined the entitlements that the employees were to receive. He said Mr Conn also determined the rostering arrangements, and directions to work overtime. Although he noted there was some involvement by Mr Hinai in relation to some of these matters, it seems he attributes overarching control to Mr Conn. He complained that, in his position, he, that is Mr Halliday, did not have the power to direct what duties were to be performed by any of the employees of the employer, that being a matter which was subject to direction by Mr Conn.

45. So far as the collective agreement is concerned, Mr Halliday notes his involvement in the negotiation of the collective agreement and in particular, noted that Mr Conn was intimately involved in that process. He noted that the agreement was finally reviewed and settled by Mr Conn and that the terms and conditions set out in the agreement were put to the employer's employees for approval and the terms that were put to those employees were those that were determined by Mr Conn alone. That is the agreement that ultimately failed to pass the fairness test under the WR Act.

46. He noted that when a complaint had been received from the Fair Work Ombudsman, he had, that is Mr Halliday, responded in respect of the investigation, however, the content of the letter was determined and finalised by Mr Conn, not by himself. He complains that he did not make the decision as to what the content of the response to the Fair Work Ombudsman was to be, but rather, that was a matter that was

directed by Mr Conn. In summary, from Mr Halliday's evidence, it appears that Mr Conn was a person who was involved in the operation of the business and knew full well what was going on within the business, so far as it concerned the contraventions which the evidence demonstrates appear to have occurred.

47. The other member of management was Mr Hinai. He was employed with the employer from about 19 September 2005 until he resigned on 19 March 2007. He was styled Operations Manager and, to some extent, had day-to-day management responsibilities directed to that matter. So far as employment and remuneration were concerned, he swore in his affidavit that he had no authority to set remuneration levels for staff. Those were matters that were left for and determined by the first respondent, Mr Conn.

48. He swore that he was told by Mr Conn, when he first commenced in his position, what salaries he was to offer new staff and that those salaries were determined by the first respondent. He swore that Mr Conn also told him that all new staff were to be subject to a three-month probationary period and that after that period, if they were successful, they were then to be awarded a pay rise, and that he would make recommendations in relation to that matter. In respect of that matter, he noted that, after employees were appointed, after Mr Conn's approval, their consequent confirmation would only be subject to Mr Conn's final approval after the end of the probation period.

49. He recalls, on one occasion, discussing the application of award rates to the employer's employees and that the first respondent, Mr Conn's response, was to the effect that the employer was not required to pay award wages, because it had an enterprise agreement. Mr Hinai had no experience with these agreements, so did not question Mr Conn in relation to those matters. Mr Hinai also noted that Mr Conn was responsible for the drafting of rosters. Although they were drafted by location managers, they were then subject to confirmation by Mr Conn. Although recommendations were made to Mr Conn about allocations, those were matters which were ultimately concluded by Mr Conn.

50. Likewise, in relation to overtime and penalty rates, he stated that he had no authority to approve overtime payments or penalty rate payments for the staff, as the responsibility for those decisions rested

solely with Mr Conn. The same appears to have applied in respect to annual leave. With requests for annual leave, although being sent initially to Mr Hinai, once assessed by him, they would be forwarded to Mr Conn for approval. They would only be granted if Mr Conn approved. Finally, in respect of superannuation, he noted that he had no authority to direct superannuation contributions be made on behalf of the employer. He had no involvement in the payroll processes and had no knowledge as to whether or not superannuation payments were made.

51. He said that he did recall on one occasion when he was present at a staff meeting when one or more of the staff members had asked questions as to when the superannuation contributions would be paid. Mr Conn replied that he would look into it. In respect of his own superannuation, Mr Hinai noted that the employer failed to make the required minimum superannuation contributions during his period of employment. It would seem, by reference to that matter that, by inference, the employer, with the knowledge of Mr Conn, was not making superannuation payments.

52. The attitude of Mr Conn was evidenced in a number of emails which are attached to the affidavit of Mr Hinai. For instance, an email forwarded on 11 October 2006, in response to a complaint, Mr Conn informed Mr Hinai in no uncertain terms that it was "his way or the highway." Furthermore, his intimate involvement in the leave arrangements can be seen in an email forwarded by Mr Conn on 12 September 2006 and his involvement in rostering can be seen from an email of 4 September 2006. It is plain from the affidavit of those two gentlemen that Mr Conn was intimately involved in many aspects of the company.

53. That, to some extent, is corroborated by the evidence of two minor employees, that is Stanley Dodge who, in his affidavit, noted that Mr Conn controlled pay slips and commissions and was very much involved in that function. Also the email train from Mr Dodge, commencing 6 July 2009, it being an email train that appears to have been cc'd to Mr Conn, where matters of pay slips and commissions were discussed.

54. The affidavit of Melissa Carol, who was employed as a manager of one of the agencies, also provides evidence in respect of Mr Conn's involvement in her day-to-day management and, in particular, his involvement in ensuring that timesheets were filled out. In particular, she saw evidence in relation to a form of timesheet which was completed. The form did not make provision for breaks and the like as ought to have been allowed for under the award. Likewise, she gave direct evidence in respect of complaints concerning her own overtime and Mr Conn's involvement in signing off on pay sheets.

55. Generally speaking, concerning contraventions, as I had earlier noted, s.719(2) of the WR Act, requires a court to consider two or more breaches of an applicable provision that arise out of a course of conduct, to be taken to constitute one single breach of the applicable provision. It has been held in relation to this clause that

a) where breaches of a particular term arise out of the same course of conduct, even if they involve different employees, they must be treated as a single breach – see, for example, *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140; and

b) where there are breaches of two distinct terms of an industrial instrument, they are not to be treated as a single breach even if they arise from the one course of conduct – see, for example, *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7.

56. It follows then, having regard to those principles and to the facts of this case, first, I am satisfied that the contraventions alleged against the employer have been committed and as are particularised in exhibit 1, they being demonstrated on the evidence. Furthermore, I am satisfied that the first respondent, Mr Conn, had intimate knowledge of the course of conduct and was involved in the conduct occasioning the contraventions, which are the subject of allegations in exhibit 1. I should just make this plain concerning the first respondent. I am satisfied the evidence clearly demonstrates that he was the directing mind and will of the employer. He did, from time to time, directly or indirectly, supervise the employees during their employment, was knowingly concerned with the duties performed by the employees, concerned with the rostering arrangements, overtime, and was concerned with the processing of the employee's timesheets. So much

in my view stands to reason, apart from any other fact, that he was the person with the most interest in those matters, as he was the principal shareholder and he was the sole director of the company. I will strike out reference to him being the principal shareholder.

57. It follows in the circumstances that I will make declarations in terms of paragraphs 1(a) to 1(bb) of exhibit 6.

Penalty

58. So far as the penalty is concerned, the relevant sections of the Act, namely, ss.719(1) and 728, enable the court to impose a penalty in respect of a breach of an applicable provision to a person bound by the provision. Applicable provision is defined in s.117, to include a term of the Australian Fair Pay and Conditions Standard, and a collective agreement. Both the Motoring and the Clerical NAPSAs, as may be in force, as if they were collective agreements. Section 719(2) of the Act, provides that where two or more breaches are committed by the same person, and the breaches arose out of a course of conduct by the person, the breaches shall, for the purposes of s.119, be taken to constitute a single breach.

59. Section 728 then provides that a person, who is involved in a contravention of a civil remedy provision, is treated as having contravened the civil remedy provision. Section 727 provides that a civil remedy provision includes a breach under s.719. The maximum penalty for a breach of s.719 is 60 penalty units which is $6,600.00 per breach, given a penalty measure of $110.00, as provided for in s.4AA of the *Crimes Act 1914*. In terms of the approach to determining penalty, the first step of course involves identifying the separate contraventions. That step has already been undertaken.

60. Next, it is then necessary, to the extent that two or more contraventions have common elements, to take those matters into consideration, when considering what an appropriate penalty is, in all of the circumstances for each contravention. It is the case that the respondent should not be penalised more than once for the same conduct and the penalties imposed by the court should be an appropriate response to what the

respondent did. This task is different and distinct from the final task of application of the totality principle.

61. Third, the court needs to consider an appropriate penalty to impose, in respect of each course of conduct, having regard to the circumstances of the case and finally, having fixed an appropriate penalty for each group of contraventions or conduct or course of conduct, the court should then take a final look at the aggregate penalty to determine whether it is an appropriate response to the conduct which led to the breaches. The court should apply an instinctive synthesis in making this assessment and this is what is known colloquially as the totality principle.

62. In terms of the groupings, exhibit 6 identifies those matters and as I noted, identifies, in effect, 24 discrete contraventions. As to factors relevant to penalty, those matters have been traversed on many occasions before today. The principles are broadly identified in the decisions of *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, *Kelly v Fitzpatrick* [2007] FCA 1080 and *Australian Ophthalmic Supplies Pty Limited v McAlary-Smith* [2008] FCAFC 8 and I will not restate them today.

63. So far as the relevant considerations are and they are non-exhaustive; first is the nature and extent of the conduct and the circumstances in which the conduct took place. The respondent's conduct occurred over a period of two years and was in relation to seven employees. It is likely that the contraventions would have continued, had it not been for the employees' employment ending. Compliance with the APCS and the NAPSAs is important and of course, should not be ignored by employers. These contraventions occurred in circumstances where the respondent determined the amounts that would be paid to the employees with little regard to the employer's obligations under the law, and indeed, with almost contumelious disregard to them.

64. So far as the nature and extent of any loss or damage is concerned, there were significant underpayments of benefits to employees. These underpayments total $61,423.19. I have already identified the specific amounts underpaid to individual employees. They are not insignificant amounts, particularly when one has regard to the fact that most of these employees were at the semi to unskilled range of employees, in respect

of whom, one would expect, their financial resources are, at the best of times, limited. The hardship that would have been occasioned by the chiselling at the margins of their very basic and meagre wages, is in my view, a significant matter.

65. I have not lost sight of the fact that the employees have not yet been paid and I will make further observations in respect of that matter shortly. There is no evidence of any similar previous conduct. It is plain, from the evidence in this case, that the contraventions have arisen out of a course of conduct that have common elements. The employer seems to have set upon this course, in my view, quite deliberately.

66. So far as the business is concerned, the evidence with respect to the size of the business is limited, however, it does appear as though the business was not insubstantial, with the business operating from several locations throughout Brisbane. Regardless of the size of the business, that fact does not absolve the respondent and the employer of their obligations to comply with the law, in relation to the employment of its employees.

67. In *Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38 at paragraphs [26] – [30] Federal Magistrate Simpson provided a summary of the case law in this respect:

> *"The first respondent is a small company and, I infer, has very few assets. However, as Justice Tracey said in Kelly v Fitzpatrick:*
>
> > *"No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction must be imposed at a meaningful level.""*

68. Further, in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at paragraphs [27] – [29] it was said:

> *"Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial*

instruments arise regardless of their size. Such a factor should be of limited relevance to a Court's consideration of penalty."

69. The applicant submits that the respondent's unknown financial situation should have no impact on assessment on penalty. In *PKIU v Vista Paper Products Pty Ltd* (1994) 127 ALR 673 Wilcox CJ, in penalising both a company in receivership and its bankrupt controlling director, said:

> *"While this evidence suggests that both Vista and Mr McNamee may have difficulty in paying penalties, I do not think I should allow it to deflect me from imposing whatever penalties are otherwise appropriate."*

70. Driver FM said in *Cotis v Macpherson* [2007] FMCA 2060 at paragraph [12]:

> *"It is, in my view, important to make the point that employers should not and cannot regard insolvency, either personal or corporate, as a refuge from their responsibilities under the Workplace Relations Act."*

71. I am also mindful, having regard to the fact that the employer subsequently went into liquidation and that there has been significant underpayment of wages, that there are in fact competition effects incidental to the conduct of the employer. This employer was clearly conducting a marginal operation and it is not beneficial to see operators of this kind subsidised, in effect, by a breach of employment regulation to achieve some commercial advantage against law abiding competitors. No doubt that was the intention here.

72. In terms of the deliberateness of the breaches, I am satisfied that the evidence demonstrates that the breaches, in this instance, were quite deliberate and made with the full knowledge of the governing mind of the first respondent. To the same effect, senior management was clearly involved in this matter, given that the first respondent was the governing mind, being the sole director and secretary of the employer. So far as contrition, corrective action and cooperation with enforcement authorities are concerned, it is fair to summarise this matter by saying there is no evidence of any. There has been no repayment of the underpaid benefits and there was certainly no effort to assist the applicant in prosecution of its investigation.

73. So far as ensuring compliance with minimum standards are concerned, the principal objects of the Act emphasise the importance of an effective safety net of minimum terms and conditions of employment, together with effective enforcement of those minimum standards. The provisions concerning compliance of Part 14 of the WR Act, is one of the ways in which the WR Act seeks to give effect to this principal object. The importance of the safety net, is reflected not only in the magnitude of the maximum penalties available in respect of any breach of an applicable provision, but also in the legislature's increase of those maximum penalties in August 2004 from $2,000.00 to 60 penalty units or $6,600.00.

74. There is also a need to take into account the need for specific and general deterrence. It is well established that deterrence is a relevant factor in the imposition of a penalty and that there is a need for both specific and general deterrence in this matter. Searches revealed that, in this instance, the respondent is currently the director of 12 companies in addition to the employer. It follows, in my mind, that specific deterrence needs to be addressed in this case, in order to deter the respondent from committing any further breaches in future in any further dealings he might have with employees.

75. So far as general deterrence is concerned in determining the appropriate penalty, the observations of Lander J in *Ponzio v B & P Caelli Construction Pty Ltd* [2006] FCA 1221 are apposite. His Honour observed:

> *"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 ok 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."*

76. Similarly in *Community & Public Sector Union v Telstra Corp Ltd* [2001] FCA 1364 Justice Finkelstein noted that:

> *"…even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to make the law's disapproval of the conduct in question, and act as a warning to others not to engage in similar conduct."*

77. One further matter ought to be observed. Broadly, while the court may order the imposition of a pecuniary penalty and order the payment of the penalty to the Commonwealth or a person in particular, there is no particular power for the court to direct an individual respondent, being a person concerned with a contravention, to make reparation to an employee for any sum that the employee may be out of pocket of by reason of any contravention. As this case demonstrates, this deficiency distorts the penalty assessment exercise. If the objects of the Act, and the principles applicable to sentencing, are to be strictly applied, the Act needs to enable any compensatory aspects related to contraventions by persons concerned with such contravention to be examined and dealt with separately from the approach to be adopted to the imposition of penalty.

78. In this case, the underpayments total $61,423.19. The maximum penalty that can be imposed is the sum of $158,400.00, that is 24 contraventions times 60 penalty units at $110.00 per penalty unit. Many of the contraventions in this case fall to the lower end of the penalty scale and quite a number are at the higher end. However, the penalty assessment process is distorted, in this instance, by the need to factor in a basic reparation sum of $61,423.19, before any real penalty is imposed upon the employer. That calls for weighting, to allow for the fact that each penalty, assuming an equal distribution of the underpayment, has a base point of 23 penalty units. With those observations in mind, I have come to the view that the following penalties ought to be imposed.

79. Dealing with then each of the contraventions commencing at paragraph 1(a), through to 1(bb), the penalties will be as follows:

    a) 50 penalty units;

b) 50 penalty units;

c) 40 penalty units;

d) 40 penalty units;

e) 35 penalty units;

f) 40 penalty units;

g) 35 penalty units;

h) 30 penalty units;

i) 30 penalty units;

j) 40 penalty units;

k) 40 penalty units;

l) 30 penalty units;

m) 35 penalty units;

n) 30 penalty units;

o) 35 penalty units;

p) 35 penalty units;

q) 35 penalty units;

r) 35 penalty units;

s) 30 penalty units;

t) 35 penalty units;

u) 35 penalty units;

v) 40 penalty units;

w) 35 penalty units;

x) 30 penalty units;

y) 30 penalty units;

z) 30 penalty units;

aa) 30 penalty units; and

bb) 40 penalty units.

That totals 1000 penalty units or a total fine of $110,000.00.

80. I am required to consider those penalties, in the context of the totality principle, which requires me to review the aggregate penalty, and consider whether the aggregate penalty against the respondent is just and appropriate in all the circumstances. In *Kelly*, at para 30, Tracey J held in relation to penalties for multiple breaches that the totality of penalty should be taken into account:

> *"Another factor which must be taken into account in the fixing of pecuniary penalties for multiple breaches of statutory stipulations is the totality principle. This principle is designed to ensure that the aggregate of the penalties imposed is not such as to be oppressive or crushing. Different views have been expressed as to the manner in which the principle ought properly to be applied. On one view the starting point should be the determination of an appropriate total penalty. That figure would then be divided by the number of breaches to produce a penalty for each breach: see CPSU v Telstra Corporation Limited (2001) 108 IR 228 at 230[7]. The orthodox position, however, which I consider should be adopted, is that the starting point is the determination of appropriate penalties for each contravention of the statutory norm. The aggregate figure is then considered with a view to ensuring that it is an appropriate response to the conduct which led to the breaches: see Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36 at 53. See also Ponzio v B & P Caelli Constructions Pty Ltd [2007] FCAFC 65 at [145] per Jessup J. This approach was recently described, in the criminal context from which the totality principle is derived, as "the orthodox, but not necessarily immutable, practice" adopted by sentencing courts: see Johnson v R [2004] HCA 15; (2004) 205 ALR 346 at 356[26] per Gummow, Callinan & Heydon JJ."*

81. Those observations have been endorsed by the full court in the *Australian Ophthalmic Supplies v McAlary-Smith*.

82. Having regard to the overall seriousness of the contraventions involved and particularly having regard to the order that I propose to make in relation to the payment of part of that sum to the employees involved, I do think that the penalty is appropriate, having regard to the course of conduct, the contraventions and is a just penalty in all of the circumstances.

83. I propose then to make orders in terms of para 2, which are declarations that the underpayments are as particularised in paragraphs 2(a) to 2(g) of exhibit 6, a declaration in terms of para 3, which is that the first respondent was involved in the contraventions, and then orders that pursuant to s.119, the first respondent pay a pecuniary penalty fixed in the sum of $110,000.00 in respect of the contraventions. I order in terms of para 5 of exhibit 6 with the difference being paid to the Commonwealth, and I will make an order in terms of para 6 of exhibit 6.

I certify that the preceding eighty-three (83) paragraphs are a true copy of the reasons for judgment of Burnett FM

Date: 2 November 2010