FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v HUNGRY JACK'S PTY LTD *[2011] FMCA 233*

FAIR WORK – Numerous contraventions of industrial obligations arising from failure to register certified agreement – agreed statement of facts – grouping of contraventions – consideration of matters relevant to penalty.

Restaurant Keepers Award
National Training Wage (Tasmanian Private Sector) Award
Workplace Relations Act 1996, subs.208(1), 719, 719(2)
Workplace Relations Regulations 2006

Darlaston v Parker (No 2) [2010] FCA 1382
Klousia v TKM Investments Pty Ltd [2009] FMCA 208
Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	HUNGRY JACK'S PTY LTD (A.C.N 008 747 073
File Number:	MLG 653 of 2010
Judgment of:	Burchardt FM
Hearing date:	14 February 2011
Date of Last Submission:	14 February 2011
Delivered at:	Melbourne
Delivered on:	12 April 2011

REPRESENTATION

Counsel for the Applicant:	Mr B. Vallence
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondent:	Mr C. O'Grady
Solicitors for the Respondent:	HWL Ebsworth

THE COURT DECLARES THAT THE RESPONDENT CONTRAVENED:

(1) Subsection 182(1) of the *Workplace Relations Act 1996* (Cth) ("the Act") by failing to pay full time and part time employees an amount at least equal to the correct periodic amount that was payable under the APCS derived from the *Restaurant Keepers Award.*

(2) Subsection 182(1) of the Act by failing to pay the trainee employees an amount at least equal to the correct periodic amount that was payable under the APCS derived from the *National Training Wage (Tasmanian Private Sector)* Award.

(3) Subsection 185(2) of the Act by failing to pay to casual employees a casual loading of 25% as required by the APCS derived from the *Restaurant Keepers Award* for all hours worked.

(4) Subclause 14(a)(ii) of the NAPSA derived from the *Restaurant Keepers Award* by failing to pay to casual employees a loading of 25% for all work performed on Saturdays.

(5) Subclause 14(a)(iii) of the NAPSA derived from the *Restaurant Keepers Award* by failing to pay to casual employees a loading of 50% for all work performed on Sundays.

(6) Subclause 14(a)(iv) of the NAPSA derived from the Restaurant Keepers Award by failing to pay to casual employees a loading of 125% for all work performed on public holidays.

(7) Subclause 14(a) of the NAPSA derived from the *Restaurant Keepers Award* by failing to pay casual employees on the basis of a minimum 2 hour period of engagement.

(8) Subclause 9(f)(i) of the NAPSA derived from the *Restaurant Keepers Award* by failing to pay to full time and part time employees an annual leave loading of 17.5%.

(9) Subclause 25(a) of the NAPSA derived from the *Restaurant Keepers Award* by failing to pay to full time and part time employees time and a

half for the first two hours and double time thereafter for work performed outside the ordinary hours.

(10) Subclause 25(c)(i) of the NAPSA derived from the *Restaurant Keepers Award* by failing to pay to full time and part time employees time and quarter for all ordinary time worked on Saturdays.

(11) Subclause 25(c)(ii) of the NAPSA derived from the *Restaurant Keepers Award* by failing to pay to full time and part time employees time and three quarters for all ordinary time worked on Sundays.

(12) Subclause 25(d) of the NAPSA derived from the *Restaurant Keepers Award* by failing to pay to full time and part time employees double time and half for work performed on public holidays.

(13) Subclause 25(h)(i) of the NAPSA derived from the *Restaurant Keepers Award* by failing to pay to full time and part time employees time and three quarters for the first two hours and double time thereafter for work performed outside ordinary hours on a Saturday.

(14) Subclause 25(h)(ii) of the NAPSA derived from the *Restaurant Keepers Award* by failing to pay to full time and part time employees double time for work performed outside ordinary hours on a Sunday;

(15) Subclause 27(a) of the NAPSA derived from the *Restaurant Keepers Award* by failing pay part time employees on the basis of a minimum 3 hour period of engagement.

(16) Regulation 19.5(1) of the *Workplace Relations Regulations 2006* (Cth) by failing to make and keep records relating to the employees in a condition that allowed a workplace inspector to determine the employees' entitlements and whether the employees were receiving those entitlements.

THE COURT ORDERS:

(17) That a penalty of $99,000 be imposed on the Respondent pursuant to subsection 719(1) of the Act for its contraventions of the *Workplace Relations Act 1996* and the NAPSA derived from the *Restaurant Keepers Award* as declared above.

(18) That a penalty of $1,500 be imposed on the Respondent pursuant to regulation 14.4 of the *Workplace Relations Regulations 2006* for breaching regulation 19.5(1) of the Regulations as declared above.

(19) That the above ordered penalties be paid into the Consolidated Revenue Fund of the Commonwealth pursuant to subsection 841(a) of the Act.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 653 of 2010

FAIR WORK OMBUDSMAN
Applicant

And

HUNGRY JACK'S PTY LTD A.C.N. 008 747 073
Respondent

REASONS FOR JUDGMENT

1. Between about October 2001 and August 2008 Hungry Jack's treated its employees in Tasmania as though an agreement it had entered into with the Shop Distributive & Allied Employees Association ("the SDA") validly applied to them. In fact, the SDA agreement did not validly apply to them because it was never registered with the Australian Industrial Relations Commission.

2. This failure to register the agreement led to multiple breaches of the relevant industrial instruments that applied between 27 March 2006 and 25 August 2008. A total of $665,695.51 was underpaid to 693 Hungry Jack's employees in Tasmania during this period, and regulations in relation to record-keeping were unobserved.

3. The applicant seeks penalties be imposed at about the middle of the relevant range in respect of what it says should be categorised as 11 categories of contravention. Hungry Jack's says that no or minimal penalties should be imposed for a variety of reasons.

4. For the reasons that follow, I think that Hungry Jack's should pay a penalty of 40 per cent of the applicable maximum in respect of the 11 categories of contravention indicated by the applicant.

The relevant facts

5. The parties have filed a statement of agreed facts ("SOAF") and the respondent has filed without objection a statement of unopposed facts ("SOUF"). The matters set out in this judgment are taken from those agreed facts (the unopposed facts are to all effects and purposes agreed). Where there has been any difference of opinion between the parties as to what I should make of the SOAF, I will indicate the same specifically and my views about them.

6. Hungry Jack's entered into the Tasmanian market in April 2000. Consistent with its practice in other states and territories, Hungry Jack's started negotiations with the SDA, Tasmanian branch, with a view to putting in place a certified collective agreement to regulate the terms and conditions of employment of its employees in Tasmania. It sought that this be consistent with its other agreements around Australia.

7. In 2001 Hungry Jack's reached agreement with the SDA on the terms of a collective agreement. The agreement was subject to a paid meeting of Hungry Jack's employees in Tasmania and was approved by majority of them. The SDA facilitated and conducted the meeting. It was the intention of both the SDA and Hungry Jack's that the agreement would be lodged with and then certified by the AIRC. The agreement provided for salary rates that were inclusive of overtime, shift penalties and weekend penalty rates.

8. After the meetings of Hungry Jack's employees which approved the agreement, Hungry Jack's implemented and applied the agreement on and from 1 October 2001.

9. I note that the SOUF asserts at paragraph 9 that "both Hungry Jack's and the SDA implemented and applied the agreement on and from 1 October 2001". I have taken this to mean, as in my opinion it only can, that Hungry Jack's applied the terms of the agreement to its employees and that the SDA did nothing to oppose that course of

action. The SDA cannot, since it was not the employer, have applied the agreement to the employees. It is not clear how the SDA could have "implemented" the agreement. The primary implementation that the SDA could have undertaken was to have the agreement certified, which it failed to do. Nonetheless, I accept, as is implicit in the SOUF, that following October 2001 the SDA conducted itself in its dealings with Hungry Jack's as though the agreement was in effect.

10. From paragraph 10 of the SOUF I gather that there was in place a practice in other states that the SDA would initiate and pursue the certification or registration process in the AIRC or relevant State Industrial Commission. The SOUF goes on to say "in conformity with this practice Hungry Jack's left it to the SDA to initiate and pursue the certification process in relation to the agreement in the AIRC".

11. It is clear, however, that the agreement was never submitted to the AIRC by the SDA or Hungry Jack's for certification.

12. As a result of the non-certification of the agreement, Hungry Jack's was, prior to 27 March 2006, bound by the *Restaurant Keepers Award* made by the Tasmanian Industrial Commission and, to the extent that it applied, the *National Training Wage (Tasmanian Private Sector) Award* ("the State Training Award"). As and from 27 March 2006, by reason of subsection 208(1) of the *Workplace Relations Act 1996* (Cth) ("the WR Act"), there is deemed to be a preserved Australian Pay and Classification Scale ("APCS") derived from the State Award and the State Training Award. By reason of clause 31 to schedule 8 of the WR Act, a notional agreement preserving the State Award ("NAPSA") is taken to have come into operation in respect of the business of Hungry Jack's in Tasmania, which at all material times from 27 March 2006 onwards bound Hungry Jack's.

13. Without going into unnecessary detail as to the statutory provisions, the net effect was that Hungry Jack's was required to pay appropriate basic periodic rates of pay, overtime, public holiday pay, casual loading and the like to its employees. Hungry Jack's was also required by the *Workplace Relations Regulations 2006* (Cth) ("the Regulations") to make and keep records relating to its employees.

14. Hungry Jack's did not provide to its employees the benefits of the APCS and/or the NAPSA and did not pay the base rates of pay, overtime, public holiday loadings, casual loadings and the like. The details of these underpayments are set out in the schedules to the statement of claim in this proceeding and as I have indicated, amount in total to over $665,000.

15. It is common cause that if the SDA agreement had in fact been certified, Hungry Jack's would not have contravened any of the industrial instruments of the Regulations.

Formal matters

16. There is no issue in this case as to what might be described as formal matters, i.e. the capacity and authority of the applicant to bring these proceedings, the incorporation of the respondent or the like.

The evidence as to what passed between the parties or otherwise from 2001 onwards

17. Between 2001 and 2006 Hungry Jack's opened a further five stores in Tasmania. Employees who worked in those stores were employed pursuant to the SDA agreement.

18. In July 2006 John Ryan, the National Industrial Officer of the SDA, sent an email to Ben Thompson of Hungry Jack's. The email did not alert Mr Thompson, who was a solicitor acting on behalf of Hungry Jack's, to the fact that the agreement had not been certified. Rather, it referred to the nominal expiry date of the agreement, a matter which might reasonably give rise to the understanding on the part of both of the correspondents that the agreement was indeed operative.

19. The email went on to seek significant pay adjustments and stated inter alia:

> *"The actual wage rates payable in Tasmania are grossly undervalued in comparison with award rates and other food rates and the movement in Safety Net Adjustments."*

20. Further correspondence followed between Mr Thompson and officers of the SDA. Before the Court, both sides sought to take sustenance from this correspondence. The applicant submitted that it should have alerted the respondent to the fact that the agreement had not been certified because of the low level of Tasmanian wage rates, and the respondent sought to take from it that the correspondence reasonably led it to assume that the agreement was valid and of legal effect.

21. In February 2007 Mr Ryan sent an email to Paul Griffin, State Secretary of the SDA, about a proposed national collective agreement with Hungry Jack's.

22. In August 2007 the then Office of Workplace Services conducted a national fast-food targeted compliance campaign. This audit discovered anomalies in relation to Hungry Jack's industrial arrangements. On 29 October 2007 a senior workplace inspector sent an email to the National Payroll Manager of Hungry Jack's in which it was asserted inter alia that "employees in the above stores are engaged under an agreement which, according to Mr Paul Griffin of the SDA, was not lodged and is therefore not a valid industrial instrument".

23. The inspector went on to ask what legitimate industrial instrument might be the source of the pay rates being paid to employees.

24. On 31 October 2007 Mr Griffin of the SDA sent an email to Mr de Bruyn of the SDA in which he stated inter alia that he was contacted by a workplace ombudsman inspector, that an agreement had been agreed to by the branch and Hungry Jack's in 2002 and an admission that he had no recollection of the agreement ever being registered. He went on to say:

> *"You may recall during our recent Fast Food discussions, the reason the Agreement had not been registered was due to the total lack of response to letters and phone calls by John O'Brien of Hungry Jack's to me in order to have arrangement registered. In the end I just gave up."*

25. The applicant sought to take from this that the agreement had not been registered because of deficiencies in conduct by Hungry Jack's. The respondent, by way of contrast, pointed out that the correspondence

was not addressed to it and might be seen as a self-serving endeavour by Mr Griffin to protect his own circumstances.

26. In the end, and in the absence of cross-examination of Mr Griffin, I am not prepared to accept as a fact that the reason the agreement was not registered was because of obstruction by Hungry Jack's. When analysed in detail, Mr Griffin's remarks, even if accepted as being true, still show that he failed to take any steps to compel Hungry Jack's to register the agreement.

27. It is plain that the agreement was not registered and that neither party took any appropriate steps to ensure that it was. Likewise, no steps were taken to register the agreement with the Tasmanian Industrial Relations Commission.

The conduct after the OWS intervened

28. The course of events following the initial conduct from the Workplace Inspector, Mr Smith, in October 2007 is set out in some detail in the SOAF. It shows the process whereby it was confirmed that the agreement was not certified, and the gradual working out of the consequences thereof. The process of working out who the relevant workers were who had been underpaid was time-consuming and complex and I draw no adverse inference against Hungry Jack's as a result of the delays that were involved. By August 2008 Hungry Jack's Mr O'Brien advised Inspector Chapman that all employees were being paid pursuant to the appropriate award.

29. That date was of course the end of the relevant period for the purposes of these proceedings.

30. In response to Inspector Chapman's request by letter on 5 September 2008 that Hungry Jack's rectify all underpayments, Hungry Jack's took legal advice. On 16 October 2008 Mr O'Brien wrote to Inspector Chapman stating inter alia that senior counsel had "raised the argument that the *Restaurant Keepers Award* (NAPSA) is inapplicable to the company's operations in Tasmania". The letter indicated that Hungry Jack's was preparing a submission on this point to be provided to the Workplace Ombudsman to support the contention that the award did not and had not applied.

31. That was followed on 27 October 2008 by a further email from Mr O'Brien to Inspector Chapman enclosing the foreshadowed submission and asserting that Hungry Jack's did not come within the coverage or scope provisions of the Restaurant Keepers Award because it was not a restaurant within the meaning of the award, and that employees had been engaged under common law contracts of employment and that, therefore, there were no practical consequences of the non-certification of the SDA agreement.

32. In the ultimate, as was scarcely surprising, the applicant did not accept Hungry Jack's assertions and Hungry Jack's ultimately abandoned them.

33. In fact Hungry Jack's repaid a very substantial amount of money. The respondent in fact paid $903,367.67, a total of $237,672.16 in excess of the figures calculated by the applicant. The respondent has not sought and will not seek to recover those overpayments from the relevant employees.

The applicable law

34. The approach to penalty proceedings such as these has become, in my opinion, relatively clear as the line of authorities has now progressed. There are a number of matters to which regard may be had, but they are not to be regarded as a checklist. See *Darlaston v Parker (No 2)* [2010] FCA 1382 at [6]-[8] per Flick J and the authorities referred to therein. I bear steadily in mind the observation of Gyles J in *Silvestri* at [6].

> *"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."*

35. In this case, as indeed in *Darlaston*, additional issues were raised as to the extent to which it could be said that the contraventions were all but

part of a single course of conduct and even if this were not the case, the extent to which the fact that all the contraventions arose out of the single failure to certify the SDA agreement and the failure to realise this was the case might be said to operate. Likewise, and to an extent in an interrelated way, the case raised the issue of the extent of overlap between the various contraventions and, further, the application of the totality principle.

Consideration of the number of contraventions

36. The respondent has admitted 15 separate contraventions of the provisions of the ACPS and the NAPSA and one of the regulations.

37. Each of the contraventions involved multiple acts of contravention in respect of the employees concerned during the relevant period. The applicant however accepts (see paragraph 5.2 in the applicant's written submissions) that subsection 719(2) of the WR Act operates so as to limit those contraventions to one contravention of each provision of the ACPS and the NAPSA. The same concession is made in relation to multiple contraventions of the regulation.

38. It is common cause that the maximum penalty that could be imposed for each contravention is 300 penalty units, or $33,000, in respect of contraventions of the ACPS and the NAPSA, and $5,500 in respect of the contravention of the regulations.

39. The applicant also accepts (see paragraph 5.6 of the applicant's written submissions) that some of the contraventions have common elements and that this should be taken into account in considering an appropriate penalty to ensure that the respondents are not punished more than once for the same or substantially similar conduct.

40. The applicant submitted that the appropriate way to respond to the element of overlap is to categorise the contraventions into 11 distinct groups (set out in detail at paragraph 7.2 of the applicant's written submissions).

41. That grouping is, subject to the submissions of the respondent, prima facie appropriate. The respondent accepts the general categorisation appearing at paragraph 7.2 of the applicant's written submissions, but

submits that the categorisation fails to give sufficient regard to the fact that all of the conduct of the respondent arose out of the fact that it paid its employees pursuant to the SDA agreement and that the contraventions flowed from the failure to ensure the agreement was certified (respondent's written submissions paragraph 91). The respondent, having referred to a decision of O'Sullivan FM in *Klousia v TKM Investments Pty Ltd* [2009] FMCA 208, went on to say at paragraph [94]:

> *"Applying this approach, the Court would proceed on the basis that the contraventions fell into two groups, namely: a failure to pay the correct rates of pay; and a failure to maintain the correct records. The Court might also consider that there were potentially three groups of contravention if it sought to treat contraventions of the ACPS as separate from the contraventions of the NAPSA.*
>
> *Alternatively, if the Court determines to accept that the contraventions should be grouped into the 11 categories identified, then the maximum penalty would total $335,000."*

42. In *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216, Gray J explained at p 223 that:

> *"Each separate obligation found in an award is to be regarded as a "term", for the purposes of s.178 of the Act. ... If the different terms impose cumulative obligations or obligations that substantially overlap, it is possible to take into account the substance of the matter by imposing no penalty, or a nominal penalty, in respect of breaches of some terms, but a substantial penalty in respect of others."*

43. In my opinion, and bearing in mind that it is the overarching responsibility of the Court to take this case, as indeed every case, on its own facts and circumstances, the proper analysis is a synthesis of the positions of the parties. On the one hand I accept that the contraventions cannot be classified as merely one because they arose out of one course of conduct. The effect of the respondent's conduct all flowed from the same original cause but found its result in contraventions of numerous different terms of the relevant industrial instruments and regulations. To that extent the applicant is correct.

44. On the other hand, however, in the particular circumstances of this case, in assessing the penalty to impose in respect of each of the 11 contraventions, I should pay proper regard to the fact that they all arose out of this single origin. It is to be noted further that the respondent has already had the benefit of s.719 inasmuch as its multiple contraventions of the industrial instruments and regulations have all been reduced to 11 in any event.

Matters relevant to the quantum of penalty

45. The parties' written and oral submissions traversed a considerable number of matters said to be directly relevant to matters of penalty. I do not propose to traverse each and every one. If a matter is not mentioned it is because I do not regard it as having a particular force. The matters I would regard as being of particular relevance in this case are as follows.

46. First, and very importantly, this was contravention on a major scale. There is no evidence before me of the circumstances prior to March 2006 but the various contraventions extended over a period of two and a half years from that date until August 2008. The total amount underpaid is, as the applicant correctly submits, enormous.

47. While the respondent sought to an extent to downplay the effects (or presumed effects) of the various underpayments that took place, the applicant is right to point to the fact that more than 30 employees were underpaid more than $4,000 each, and the highest individual underpayment was over $10,000. These underpayments have all been rectified, but the fact is that the relevant employees were denied the sums that they were lawfully due at the time they were actually working. It is not unreasonable to suppose that employees in this industry, where wages are scarcely munificent, may have been significantly disadvantaged, at least in some instances, by such underpayment.

48. The respondent has, understandably enough perhaps, laid great emphasis on what it asserts is the failure of the SDA to certify the agreement. I note that the SOUF establishes that it had been the

practice of Hungry Jack's to rely in effect on the SDA to attend to certification of agreements and that was its expectation in this instance.

49. I also note that Hungry Jack's was, for such a large employer, unsophisticated in industrial relations matters. It had no designated human resources manager until 2008. Matters such as industrial negotiations were left, it would appear, to state area managers, who would not prima facie appear to be likely to have much experience in such matters and would have doubtless many other duties to attend to. Even accepting the position contended for by the respondent at its highest, it cannot evade its responsibilities. As an employer, one might perhaps even say as a large employer with major resources available to it, it was Hungry Jack's responsibility to ensure that it met its lawful obligations in relation to compliance with industrial instruments. Indeed it is because it was such a large employer that the single error produced such significant results.

50. I accept of course that the outcome that has obtained did not happen because of some wilful determination on the part of Hungry Jack's to evade or disobey the law. It embarked upon a course of conduct that had served it, it would appear, well in the past. Nonetheless, it was Hungry Jack's responsibility every bit as much as the SDA's to ensure that the agreement was certified.

51. The underpayment involved a number of part-time and casual employees who would reasonably be taken to be vulnerable and disadvantaged in terms of any bargaining.

52. There is no suggestion that Hungry Jack's has contravened any Commonwealth workplace laws in the past and I note from the SOUF that Hungry Jack's was found to be compliant in an audit conducted in Western Australia.

53. The conduct of Hungry Jack's was in the main cooperative. The initial assertion by Hungry Jack's of the position that it was not lawfully bound to comply with any of the industrial instruments it now concedes it had breached was not helpful, but that position was not held or maintained for any length of time.

54. Hungry Jack's deserves credit for the amount of time and effort it put into rectifying the underpayments once it finally accepted that they were there. This process cost Hungry Jack's some $80,000 (a figure to be seen in context of the profits in millions of dollars made in most recent years). The conduct of Hungry Jack's did not involve the conduct of anybody who could properly be described as senior management. Indeed, the most one appears to be able to say is that the area manager in Tasmania was less than proactive in ensuring appropriate compliance steps.

55. This is a case in which specific deterrence is not likely to have a great part to play. Hungry Jack's has now appointed a human resources manager. Hungry Jack's is not likely to contravene again.

56. As to contrition, I think this is a slightly more neutral point than the parties sought to contend. The correspondence sent to employees merely asserted that underpayments had happened as the result of an "administrative error", and while this is true on one version of the events, there is no unequivocal assertion of apology that I have been able to ascertain in the materials. Against this, however, Hungry Jack's has made public statements that would reassure the Court as to its future conduct, and it has, and in my view very properly, indicated that it will take no steps to recoup the several hundred thousand dollars that it erroneously overpaid.

57. In the end, and making every allowance for the fact that all the contraventions stemmed from the same misunderstanding, it is a matter of balancing this mitigating factor with the fact that it should never have occurred at all.

58. As I have earlier said, Hungry Jack's simply cannot evade its ultimate responsibility for its actions. Whilst the SDA should have had the agreement certified, so too it remained at all times the employer's responsibility to do so. In the end it was Hungry Jack's that got the benefit of not paying out the moneys that it should have at the relevant time. It was able, as a matter of reasonable inference, to hold onto that money and use it for other purposes.

59. This brings the Court to the question of general deterrence. It is important, I regard this as self-evident, that large corporations comply

with their lawful obligations in compliance with industrial instruments applicable to them. Failure to do so produces exactly the sort of difficulties that have emerged here. One decision produces multifaceted results. It is important that large corporations be reminded of their obligations and be deterred from failure to discharge them.

60. Bearing in mind all the above considerations, in my opinion the appropriate penalty in this case is 30 per cent of the applicable maximum in respect of each of the contraventions. I should emphasise that this figure gives full weight to the fact that the contraventions all arose out of the one particular circumstance (the failure to certify the agreement) and the mitigating conduct of the respondent referred to above.

Totality principle

61. In *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [42], Gyles, Stone and Buchanan JJ described the totality principle as:

> *"The totality principle, which is a final check to be applied to ensure that a final, total or aggregate, penalty is not unjust or out of proportion to the circumstances of the case."*

62. The penalties I will impose will involve a total of $9,900 in respect of the 10 contraventions of the ACPS and the NAPSA and $1,500 in respect of the regulations. That is a total $100,500. In the circumstances of this case, including perhaps most relevantly the scale of the contraventions and the size of the respondent and the resources available to it, I do not think that this outcome is unjust or out of proportion to the circumstances of the case.

Remedies

63. The parties have in the main agreed the orders and declarations that should be made. The matters in disagreement essentially were related to the number of contraventions that should be held to be established and the penalties that should be imposed, if any, in respect of them. I propose to make orders in the terms sought by the applicant but will

give the parties an opportunity to address me in case there are any other matters arising.

I certify that the preceding sixty-three (63) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Associate:

Date: 12 April 2011