

# FEDERAL COURT OF AUSTRALIA

## Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3) [2011] FCA 579

- Citation: Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3) [2011] FCA 579
- Parties: **FAIR WORK OMBUDSMAN v KENTWOOD INDUSTRIES PTY LTD (ACN 086 269 794) and JIAN YANG ZHANG**
- File number: WAD 127 of 2009
- Judge: **MCKERRACHER J**
- Date of judgment: 31 May 2011
- Catchwords: **INDUSTRIAL LAW** – pecuniary penalty – assessment of penalty – approach to determining penalty – factors relevant to determining appropriate penalty – breaches of several terms of award – contraventions of *Workplace Relations Act 1996* (Cth) – underpayment of employees – whether multiple contraventions should be treated as a single contravention – whether the contraventions arose out of one course of conduct – whether the contraventions can be grouped into categories – assessing the different levels of seriousness of breach – application of totality principle – *Workplace Relations Act 1996* (Cth), s 719 – payment of outstanding wages – interest on outstanding wages – declaratory relief
- Legislation: *Crimes Act 1914* (Cth) s 4AA  
*Workplace Relations Act 1996* (Cth) ss 182, 182(1), 189, 189(1), 189(2), 235, 235(2), 719(6), 722, 728, 824, 841  
*Federal Court Rules O 35 r 8*
- Cases cited: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 2)* (2010) 199 IR 373  
*Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (No 2)* [2011] FCA 394  
*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560  
*Australian Securities and Investments Commission v FUELbanc Australia Ltd* (2007) 162 FCR 174  
*Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2)* [2010] FCA 1156  
*John Holland Pty Ltd v Maritime Union of Australia (No 2)*

(2010) 192 IR 431  
*Kelly v Fitzpatrick* (2007) 166 IR 14  
*Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7  
*McDonald v Australian Building and Construction  
Commissioner* [2011] FCAFC 29  
*Stuart-Mahoney v Construction, Forestry, Mining and  
Energy Union* (2008) 177 IR 61  
*Warramunda Village Inc v Pryde* (2001) 105 FCR 437

Date of hearing: Determined on the papers

Date of last submissions: 31 January 2011

Place: Perth

Division: FAIR WORK DIVISION

Category: Catchwords

Number of paragraphs: 53

Counsel for the Applicant: R Hooker

Solicitor for the Applicant: Corrs Chambers Westgarth

Counsel for the Respondents: The Respondents did not appear

**IN THE FEDERAL COURT OF AUSTRALIA  
WESTERN AUSTRALIA DISTRICT REGISTRY  
FAIR WORK DIVISION**

**WAD 127 of 2009**

**BETWEEN: FAIR WORK OMBUDSMAN  
Applicant**

**AND: KENTWOOD INDUSTRIES PTY LTD (ACN 086 269 794)  
First Respondent**

**JIAN YANG ZHANG  
Second Respondent**

**JUDGE: MCKERRACHER J**

**DATE OF ORDER: 31 MAY 2011**

**WHERE MADE: PERTH**

**THE COURT DECLARES THAT:**

1. The First Respondent contravened s 182(1) of the *Workplace Relations Act 1996* (Cth) (**the WR Act**) by failing to pay the minimum hourly rates (as contained in the applicable preserved Australian Pay and Classification Scale (**APCS**)) in respect of the First Respondent's employees as follows:
  - (a) in relation to Zhaolin Yuan,
    - (i) for the period 27 March 2006 to 2 February 2007, Mr Yuan was entitled to be paid \$68,680.77 in wages;
    - (ii) the First Respondent did not pay Mr Yuan any amount over that period resulting in an underpayment of \$68,680.77.
  - (b) in relation to Zheng Shun Zeng,
    - (i) for the period 2 May 2006 to 12 July 2007, Mr Zeng was entitled to be paid \$54,565.21 in wages;
    - (ii) the First Respondent paid Mr Zeng \$9,798.20 over that period resulting in an underpayment of \$44,767.01.
  - (c) in relation to Jian Hang Qi,

- (i) for the period 2 May 2006 to 25 July 2007, Mr Hang was entitled to be paid \$55,008.49 in wages;
    - (ii) the First Respondent paid Mr Hang \$9,119.80 over that period resulting in an underpayment of \$45,888.69.
  - (d) in relation to Zongxin Shen,
    - (i) for the period 30 September 2006 to 12 July 2007, Mr Shen was entitled to be paid \$33,962.66 in wages;
    - (ii) the First Respondent paid Mr Shen \$7,502.80 over that period resulting in an underpayment of \$26,459.86.
  - (e) in relation to Jian Guo Qi,
    - (i) for the period 2 May 2006 to 12 July 2007, Mr Guo was entitled to be paid \$54,207.77 in wages;
    - (ii) the First Respondent paid Mr Guo \$9,119.80 over that period resulting in an underpayment of \$45,087.97.
2. The First Respondent contravened s 189(1) of the WR Act by failing to pay its employees in accordance with guaranteed frequency of payment provisions as follows:
- (a) in relation to Zhaolin Yuan,
    - (i) Mr Yuan's contract of employment provided he would be paid monthly;
    - (ii) the First Respondent did not pay Mr Yuan for the first five months of his employment;
    - (iii) thereafter, the First Respondent paid Mr Yuan monthly.
  - (b) in relation to Jian Hang Qi,
    - (i) Mr Hang's contract of employment provided he would be paid monthly;
    - (ii) the First Respondent did not pay Mr Hang for the first three months of his employment;
    - (iii) thereafter, the First Respondent paid Mr Yuan monthly.

- (c) in relation to Jian Guo Qi,
  - (i) Mr Guo was entitled to be paid weekly under the preserved APCS derived from the *National Joinery and Building Trades Products Awards 2002*;
  - (ii) the First Respondent did not pay Mr Guo for the first three months of his employment;
  - (iii) thereafter, the First Respondent paid Mr Guo monthly.
- 3. The First Respondent contravened s 189(2) of the WR Act in relation to its employee Zheng Shun Zeng in that:
  - (a) Mr Zeng's contract of employment provided he would be paid monthly;
  - (b) the First Respondent did not pay Mr Zeng for the first three months of his employment;
  - (c) thereafter, the First Respondent paid Mr Zeng monthly.
- 4. The First Respondent contravened s 235(2) of the WR Act by failing to pay the First Respondent's employees' accrued annual leave entitlements on termination of their employment as follows:
  - (a) in relation to Zhaolin Yuan,
    - (i) as at the date of termination of his employment, Mr Yuan was entitled to be paid \$2,920.23 in accrued annual leave;
    - (ii) the First Respondent paid Mr Yuan \$2,600 on or about 20 June 2007, resulting in an underpayment of \$320.23.
  - (b) in relation to Zheng Shun Zeng,
    - (i) as at the date of termination of his employment, Mr Zeng was entitled to be paid \$2,867.46 in accrued annual leave;
    - (ii) the First Respondent failed to pay Mr Zeng any of his accrued annual leave resulting in an underpayment of \$2,867.46.
  - (c) in relation to Jian Hang Qi,
    - (i) as at the date of termination of his employment, Mr Hang was entitled to be paid \$2,982.06 in accrued annual leave;

- (ii) the First Respondent failed to pay Mr Hang any of his accrued annual leave resulting in an underpayment of \$2,982.06.
  - (d) in relation to Zongxin Shen,
    - (i) as at the date of termination of his employment, Mr Shen was entitled to be paid \$1,911.64 in accrued annual leave;
    - (ii) the First Respondent failed to pay Mr Shen any of his accrued annual leave resulting in an underpayment of \$1,911.64.
  - (e) in relation to Jian Guo Qi,
    - (i) as at the date of termination of his employment, Mr Guo was entitled to be paid \$3,128.78 in accrued annual leave;
    - (ii) the First Respondent failed to pay Mr Guo any of his accrued annual leave resulting in an underpayment of \$3,128.78.
5. The First Respondent contravened cl 15 of the *Notional Agreement Preserving the Western Australian Building Trades (Construction) Award 1987* by failing to pay the First Respondent's employees the minimum hourly rates of pay for overtime work performed in excess of 8 hours per day or outside the ordinary spread of hours (7.00am – 6.00pm Monday to Friday and to noon on Saturdays) or on weekends as follows:
- (a) in relation to Zhaolin Yuan,
    - (i) for the period 27 March 2006 to 2 February 2007, Mr Yuan worked overtime in excess of or outside of ordinary hours;
    - (ii) the First Respondent failed to pay the minimum hourly rates of pay for the overtime worked by Mr Yuan.
  - (b) in relation to Zongxin Shen,
    - (i) for the period 19 June 2007 to 12 July 2007, Mr Shen worked overtime in excess of or outside of ordinary hours;
    - (ii) the First Respondent failed to pay the minimum hourly rates of pay for the overtime worked by Mr Shen.
  - (c) in relation to Jian Guo Qi,

- (i) for the period 19 June 2007 to 12 July 2007, Mr Guo worked overtime in excess of or outside of ordinary hours;
  - (ii) the First Respondent failed to pay the minimum hourly rates of pay for the overtime worked by Mr Guo.
- 6. The First Respondent contravened cl 16 of the *Notional Agreement Preserving the Western Australian Building Trades (Construction) Award 1987* by failing to pay the First Respondent's employees additional hourly amounts for all time worked on Sundays and after 12 noon on Saturdays as follows:
  - (a) in relation to Zhaolin Yuan,
    - (i) for the period 27 March 2006 to 2 February 2007, Mr Yuan performed some work on Sundays and after 12 noon on Saturdays;
    - (ii) the First Respondent failed to pay the minimum hourly rates of pay for the time worked by Mr Yuan on Sundays and after 12 noon on Saturdays.
  - (b) in relation to Zongxin Shen,
    - (i) for the period 19 June 2007 to 12 July 2007, Mr Shen performed some work on Sundays and after 12 noon on Saturdays;
    - (ii) the First Respondent failed to pay the minimum hourly rates of pay for the time worked by Mr Shen on Sundays and after 12 noon on Saturdays.
  - (c) in relation to Jian Guo Qi,
    - (i) for the period 19 June 2007 to 12 July 2007, Mr Guo performed some work on Sundays and after 12 noon on Saturdays;
    - (ii) the First Respondent failed to pay the minimum hourly rates of pay for the time worked by Mr Guo on Sundays and after 12 noon on Saturdays.
- 7. The First Respondent contravened cl 17 of the *Notional Agreement Preserving the Western Australian Building Trades (Construction) Award 1987* by failing to pay the First Respondent's employee Zhaolin Yuan the minimum hourly rates of pay for work performed during the period 27 March 2006 to 2 February 2007 on a public holiday.

8. The First Respondent contravened cl 20 of the *Notional Agreement Preserving the Western Australian Building Trades (Construction) Award 1987* by failing to pay the First Respondent's employee Zhaolin Yuan a meal allowance of \$10.20 on each occasion when he was required to work at least one and a half hours of overtime during the period 27 March 2006 to 2 February 2007.
9. The First Respondent contravened cl 13 of the *Notional Agreement Preserving the Western Australian Building Trades (Construction) Award 1987* by failing to provide the First Respondent's employees with rostered days off and failing to pay the minimum hourly rates of pay for work performed on a rostered day off as follows:
  - (a) in relation to Zhaolin Yuan,
    - (i) for the period 27 March 2006 to 2 February 2007, Mr Yuan performed work on days that ought to have been rostered days off;
    - (ii) the First Respondent failed to pay the minimum hourly rates of pay for work performed on a rostered day off.
  - (b) in relation to Zongxin Shen,
    - (i) for the period 19 June 2007 to 12 July 2007, Mr Shen performed work on days that ought to have been rostered days off;
    - (ii) the First Respondent failed to pay the minimum hourly rates of pay for work performed on a rostered day off.
  - (c) in relation to Jian Guo Qi,
    - (i) for the period 19 June 2007 to 12 July 2007, Mr Guo performed work on days that ought to have been rostered days off;
    - (ii) the First Respondent failed to pay the minimum hourly rates of pay for work performed on a rostered day off.
10. The First Respondent contravened cl 22(7)(b) of the *Notional Agreement Preserving the Western Australian Building Trades (Construction) Award 1987* by failing to pay the First Respondent's employee Zhaolin Yuan annual leave loading in that:
  - (a) as at the date of termination of his employment, Mr Yuan was entitled to be paid \$511.04 in annual leave loading;



- (b) the First Respondent failed to pay Mr Yuan any of the annual leave loading, resulting in an underpayment of \$511.04.
11. The Second Respondent contravened the WR Act and the *Notional Agreement Preserving the Western Australian Building Trades (Construction) Award 1987* by reason of his involvement in each of the contraventions outlined in paragraphs 1 to 10 within the meaning of s 728 of the WR Act.

**THE COURT ORDERS THAT:**

1. The First Respondent pay to Zhaolin Yuan within 28 days:
  - (a) \$69,512.04 in respect of the underpayment of wages and entitlements, pursuant to s 719(6) of the WR Act;
  - (b) \$15,579.09, being interest from 2 February 2007 (the date of termination) to judgment (27 October 2010) at the rate of 6% per annum (\$11.43 per day) for 1363 days, pursuant to s 722 of the WR Act and O 35 r 8 of the *Federal Court Rules*; and
  - (c) interest from the date of judgment (27 October 2010) on the total sum of \$85,091.13, at the rate of 10.5% per annum (\$24.48 per day).
2. The First Respondent pay to Zheng Shun Zeng within 28 days:
  - (a) \$47,634.47 in respect of the underpayment of wages and entitlements, pursuant to s 719(6) of the WR Act;
  - (b) \$9,419.49, being interest from 12 July 2007 to judgment (27 October 2010) at the rate of 6% per annum (\$7.83 per day) for 1203 days, pursuant to s 722 of the WR Act and O 35 r 8 of the *Federal Court Rules*; and
  - (c) interest from the date of judgment (27 October 2010) on the total sum of \$57,053.96, at the rate of 10.5% per annum (\$16.41 per day).
3. The First Respondent pay to Jian Hang Qi within 28 days:
  - (a) \$48,870.75 in respect of the underpayment of wages and entitlements, pursuant to s 719(6) of the WR Act;
  - (b) \$9,555.70, being interest from 25 July 2007 (the date of termination) to judgment (27 October 2010) at the rate of 6% per annum (\$8.03 per day) for

1190 days, pursuant to s 722 of the WR Act and O 35 r 8 of the *Federal Court Rules*; and

(c) interest from the date of judgment (27 October 2010) on the total sum of \$58,426.45, at the rate of 10.5% per annum (\$16.81 per day).

4. The First Respondent pay to Zongxin Shen within 28 days:

(a) \$28,371.50 in respect of the underpayment of wages and entitlements, pursuant to s 719(6) of the WR Act;

(b) \$5,605.98, being interest from 12 July 2007 (the date of termination) to judgment (27 October 2010) at the rate of 6% per annum (\$4.66 per day) for 1203 days, pursuant to s 722 of the WR Act and O 35 r 8 of the *Federal Court Rules*; and

(c) interest from the date of judgment (27 October 2010) on the total sum of \$33,977.73, at the rate of 10.5% per annum (\$9.77 per day).

5. The First Respondent pay to Jian Guo Qi within 28 days:

(a) \$48,216.75 in respect of the underpayment of wages and entitlements, pursuant to s 719(6) of the WR Act;

(b) \$9,539.79, being interest from 12 July 2007 (the date of termination) to judgment (27 October 2010) at the rate of 6% per annum (\$7.93 per day) for 1203 days, pursuant to s 722 of the WR Act and O 35 r 8 of the *Federal Court Rules*; and

(c) interest from the date of judgment (27 October 2010) on the total sum of \$57,756.54, at the rate of 10.5% per annum (\$16.61 per day).

6. The First Respondent pay to the Commonwealth Consolidated Revenue Fund within 28 days **\$123,000** made up of the following penalties:

**\$17,000** for contravention of s 182 of the WR Act for 5 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;
- Zheng Shun Zeng for the period 2 May 2006 to 12 July 2007;
- Jian Hang Qi for the period 2 May 2006 to 25 July 2007;

- Zongxin Shen for the period 30 September 2006 to 12 July 2007; and
- Jian Guo Qi for the period 2 May 2006 to 12 July 2007.

**\$17,000** for contravention of s 189 of the WR Act for 4 employees:

Being:

- Zhaolin Yuan for the first five months of employment;
- Jian Hang Qi for the first three months of employment; and
- Jian Guo Qi for the first three months of employment.
- Zheng Shun Zeng for the first three months of employment.

**\$15,000** for contravention of cl 15 NAPSA for 3 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;
- Zongxin Shen for the period 19 June 2007 to 12 July 2007; and
- Jian Guo Qi for the period 19 June 2007 to 12 July 2007.

**\$15,000** for contravention of cl 16 NAPSA for 3 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;
- Zongxin Shen for the period 19 June 2007 to 12 July 2007; and
- Jian Guo Qi for the period 19 June 2007 to 12 July 2007.

**\$15,000** for contravention of cl 20 NAPSA for 1 employee:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007.

**\$13,000** for contravention of cl 22 NAPSA for 1 employee:

Being:

- Zhaolin Yuan.

**\$13,000** for contravention of s 235 of the WR Act for 5 employees:

Being:

- Zhaolin Yuan;
- Zheng Shun Zeng;
- Jian Hang Qi;
- Zongxin Shen; and
- Jian Guo Qi.

**\$8,000** for contravention of cl 17 NAPSA for 1 employee:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007.

**\$10,000** for contravention of cl 13 NAPSA for 3 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;
- Zongxin Shen for the period 19 June 2007 to 12 July 2007; and
- Jian Guo Qi for the period 19 June 2007 to 12 July 2007.

7. The Second Respondent pay to the Commonwealth Consolidated Revenue Fund within 28 days **\$24,600** made up of the following penalties:

**\$3,400** for contravention of s 182 of the WR Act for 5 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;
- Zheng Shun Zeng for the period 2 May 2006 to 12 July 2007;
- Jian Hang Qi for the period 2 May 2006 to 25 July 2007;
- Zongxin Shen for the period 30 September 2006 to 12 July 2007; and
- Jian Guo Qi for the period 2 May 2006 to 12 July 2007.

**\$3,400** for contravention of s 189 of the WR Act for 4 employees:

Being:

- Zhaolin Yuan for the first five months of employment;
- Jian Hang Qi for the first three months of employment; and
- Jian Guo Qi for the first three months of employment.

- Zheng Shun Zeng for the first three months of employment;

**\$3,000** for contravention of cl 15 NAPSA for 3 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;

- Zongxin Shen for the period 19 June 2007 to 12 July 2007; and

- Jian Guo Qi for the period 19 June 2007 to 12 July 2007.

**\$3,000** for contravention of cl 16 NAPSA for 3 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;

- Zongxin Shen for the period 19 June 2007 to 12 July 2007; and

- Jian Guo Qi for the period 19 June 2007 to 12 July 2007.

**\$3,000** for contravention of cl 20 NAPSA for 1 employee:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007.

**\$2,600** for contravention of cl 22 NAPSA for 1 employee:

Being:

- Zhaolin Yuan.

**\$2,600** for contravention of s 235 of the WR Act for 5 employees:

Being:

- Zhaolin Yuan;

- Zheng Shun Zeng;

- Jian Hang Qi;

- Zongxin Shen; and

- Jian Guo Qi.

**\$1,600** for contravention of cl 17 NAPSA for 1 employee:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007.

**\$2,000** for contravention of cl 13 NAPSA for 3 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;

- Zongxin Shen for the period 19 June 2007 to 12 July 2007; and

- Jian Guo Qi for the period 19 June 2007 to 12 July 2007.

8. The Respondents pay the Applicant's costs of the action on a party/party basis within 28 days of taxation or agreement, in accordance with s 824 of the WR Act.
9. The Applicant has liberty to apply in the event of non-compliance with any order herein.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.  
The text of entered orders can be located using Federal Law Search on the Court's website.

**IN THE FEDERAL COURT OF AUSTRALIA  
WESTERN AUSTRALIA DISTRICT REGISTRY  
FAIR WORK DIVISION**

**WAD 127 of 2009**

**BETWEEN: FAIR WORK OMBUDSMAN  
Applicant**

**AND: KENTWOOD INDUSTRIES PTY LTD (ACN 086 269 794)  
First Respondent**

**JIAN YANG ZHANG  
Second Respondent**

**JUDGE: MCKERRACHER J**

**DATE: 31 MAY 2011**

**PLACE: PERTH**

**REASONS FOR JUDGMENT**

**INTRODUCTION**

1 In *(Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2) [2010] FCA 1156)*  
(**Kentwood No 2**), I gave reasons and made the following orders:

1. The applicant do file and serve within 21 days a minute of orders as to declarations, repayments, interest and costs reflecting these reasons.
2. Any submissions from the respondents in relation to that minute be filed and served within a further 14 days
3. The applicant have a further 10 days within which to reply.
4. The respondents are to file submissions on penalty within 28 days of service of the applicant's minute.
5. The applicant will have 10 days to reply to those submissions.
6. The determination as to penalty will be adjourned until receipt of those submissions.

2 On 30 December 2010, the Court was advised that Mr Zhang was in no fit condition, mentally or physically, to comply with the orders or to 'comprehend the legal process of the case'. I have set out in detail in *Kentwood No 2* the measures taken to endeavour to afford the respondents a reasonable opportunity to be heard in relation to all matters concerning this litigation. As against that consideration, the public interest in finality and compliance with important industrial law obligations is to be balanced. It is necessary to proceed to a final determination of this dispute. These reasons are therefore the determination on penalty. Before reaching conclusions on penalty, I will, for convenience, reiterate the substance of the

views expressed in Kentwood No 2 on that topic (at [210]-[252]). The same abbreviations have been adopted.

## **DECLARATIONS**

3           In Kentwood No 2 (at [210]) I observed that there may be a public interest in the granting of declaratory relief in regulatory proceedings to record the contraventions' seriousness and to explain the basis for the imposition of pecuniary penalties and other relief (see the analysis by Heerey J in *Australian Securities and Investments Commission v FUELbanc Australia Ltd* (2007) 162 FCR 174 (at [46]-[66]) and *Warramunda Village Inc v Pryde* (2001) 105 FCR 437 (per Gray, Branson and North JJ) (at [12])). A declaration in this case may indicate the importance of compliance with statutory standards, particularly in the employment of low paid and/or vulnerable employees. I will make the declarations sought.

## **PENALTY**

4           Relevantly, s 719 of the WR Act authorises the Court to impose a penalty in respect of a contravention of an applicable provision by a person bound by the provision. Relevantly, 'applicable provision' is defined to include:

- (a) a term of the Standard; and
- (b) a term of a collective agreement.

5           Pursuant to cl 31 of Sch 8, on 27 March 2006, the NAPSA came into operation. Under cl 43 of Sch 8, a term of the NAPSA may be enforced as if it were a term of a collective agreement and therefore an 'applicable provision' for the purposes of s 719(1).

6           Section 719(2) provides that where two or more contraventions of an applicable provision are committed by the same person and arise out of a course of conduct by the person, the contraventions shall, for the purposes of s 719, be taken to constitute a single contravention of the provision.

7           Pursuant to s 719(4)(b), the maximum penalty that may be imposed by the Court on Kentwood in respect of each of the contraventions is 300 penalty units. The maximum penalty that may be imposed on Mr Zhang in respect of each of the contraventions is 60 penalty units.



8 A penalty unit is defined under s 4AA of the *Crimes Act 1914* (Cth) to be \$110. Accordingly, the maximum penalty that may be imposed for each contravention of the Standard or the NAPSA by Kentwood is \$33,000, and for each contravention of the Standard or the NAPSA by Mr Zhang, \$6,600.

### The approach in determining penalty

9 Recently in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 2)* (2010) 199 IR 373, Barker J set out relevant considerations as to the imposition of penalty. His honour's analysis was upheld by the Full Court on appeal in *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29. Barker J stated (at [4] to [11]):

4 Sentencing (which the imposition of a civil penalty is an instance of) is one of the most, if not the most difficult tasks that judicial officers perform: *CFMEU v Williams* [2009] FCAFC 171; (2009) 262 ALR 417 (*Williams*) at [28].

5 The overriding principle is to ensure that the sentence is proportionate to the gravity of the contravening conduct: *Attorney General (SA) v Tichy* (1982) SASR 84 at 92-93.

6 The purpose to be served by the imposition of penalties is at least threefold:

- (1) Punishment, which must be proportionate to the offence and in accordance with prevailing standards;
- (2) Deterrence, both personal (assessing the risk of re-offending) and general (a deterrent to others who might be likely to offend); and
- (3) Rehabilitation.

See *Ponzio v BP Caelli Constructions Pty Ltd* [2007] FCAFC 65; (2007) 158 FCR 543 (*Ponzio*), Lander J at [93]-[94].

7 The task which a sentencing judge is faced with is one of "instinctive synthesis": *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 (*Australian Ophthalmic Supplies*), Gray J at [27] and Graham J [55]. Such a process requires that a court take into account all relevant factors and to arrive at a single result which takes due account of them all: see *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at [74]-[76]; *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 (*Markarian*), Gleeson CJ, Gummow, Hayne and Callinan JJ at [37]-[39]. The penalty must not be so great as to crush the person upon whom the penalty is imposed or reveal the person as a scapegoat: *Ponzio* at [93] (Lander J); *McDonald v R* (1994) 48 FCR 555 at 563. The maximum penalty is reserved for only the most serious of contraventions: *Markarian* at [31]. Proportionality and consistency commonly operate as a final check on the penalty assessed: *Australian Ophthalmic Supplies* at [53].

...

10 However, courts have warned against the use of checklists because they give

rise to the risk of transforming the process of instinctive synthesis into the application of a rigid catalogue of matters for attention. Accordingly in *Australian Ophthalmic Supplies* at [91], Buchanan J observed:

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

11 The courts also warn against comparing the case the subject of the assessment with any other particular case so as to derive from it the amount of penalty (or tariff) to be fixed: *NW Frozen Foods Pty Ltd v Australian Consumer and Competition Commission* (1996) 71 FCR 285, at 295; *Australian Ophthalmic Supplies*, Graham J at [56]-[57] and Buchanan J at [87].

10 The applicant submits (and I accept) that it is appropriate in this proceeding to take a four step approach to determining an appropriate penalty.

1. First, each contravention of each separate obligation sourced in the Standard or the NAPSA is a separate contravention of an applicable provision for the purposes of s 719 of the WR Act. However, pursuant to s 719(2), multiple contraventions of the same applicable provision may be treated as a single contravention, if the Court considers them to be part of a single ‘course of conduct’. It is necessary to identify the maximum penalty for each separate contravention.
2. Second, it is necessary then to consider an appropriate penalty to impose in respect of each contravention (whether a single contravention alone or as part of a course of conduct), having regard to all of the circumstances of the case.
3. Next, to the extent that two or more contraventions have common elements, this may be taken into account when considering what is an appropriate penalty for each contravention. The respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to the respondents’ actions.
4. Finally, having fixed an appropriate penalty for each separate contravention, group of contraventions or course of conduct, a final review of the aggregate penalty is necessary to determine whether it is an appropriate response to the conduct which led to the contraventions. Put another way, a Court may apply an overall ‘instinctive synthesis’: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 (at [55] and [78]) per Graham J. In the same case, Gray J said (at [23]):

What [is] required [is] to determine an appropriate level of penalty for each

contravention, as if it were a separate offence, and then look at the aggregate of those penalties in the light of the overall conduct of the [offender], to form a view as to whether that aggregate [is] out of proportion to that overall conduct.

And (at [27]):

... Graham J and I proceed by what the High Court has called “instinctive synthesis”. See *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at [37], where the majority approved what was said by Gaudron, Gummow and Hayne JJ in *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at [74]-[76].

Buchanan J described it as follows (at [102]):

The totality principle is a guide to sentencing practice. It must be adapted to the circumstances. It is designed to avoid injustice in the overall result. It is not a principle which suggests that a penalty should necessarily be reduced from an aggregate total fixed for multiple offences. Rather, it involves a final check to ensure that a total or aggregate penalty is not, in all the circumstances, excessive.

### **Identifying the contraventions**

11 As set out in *Kentwood No 2* (at [224]), in relation to the work undertaken by the employees in Western Australia, the respondents contravened the following provisions of the NAPSA:

- (a) cl 13 - rostered days off (in respect of Messrs Yuan, Shen and Guo);
- (b) cl 15 - payment of overtime in relation to hours worked Monday-Friday and to noon on Saturdays (in respect of Messrs Yuan, Shen and Guo);
- (c) cl 16 - payment of overtime in relation to hours worked on Sundays and after noon on Saturdays (in respect of Messrs Yuan, Shen and Guo);
- (d) cl 17 - public holiday rates (in respect of Mr Yuan);
- (e) cl 20 - meal allowance for overtime (in respect of Mr Yuan);
- (f) cl 22(7)(b) - annual leave loading (in respect of Mr Yuan).

12 The respondents have contravened the following provisions of the Standard:

- (a) s 182(1) of the WR Act guaranteed basic periodic rates of pay (in respect of Messrs Yuan, Zeng, Hang, Shen and Guo);
- (b) s 189(1) of the WR Act – guaranteed frequency of payment where provided in an APCS (in respect of Messrs Yuan, Hang and Guo);
- (c) s 189(2) of the WR Act – guaranteed frequency of payment where not provided in an APCS (in respect of Mr Zeng);

- (d) s 235(2) of the WR Act – payment of accrued annual leave on termination (in respect of Messrs Yuan, Zeng, Hang, Shen and Guo).

**Whether multiple contraventions should be treated as a single contravention?**

13 To determine whether multiple contraventions of the same civil remedy provision arose from a single course of conduct, one consideration may be the number of discrete decisions taken as to the respective contraventions. In this instance, the employees were employed by Kentwood at different times although their various periods of employment overlapped. Kentwood made a decision to employ the employees on three separate occasions: Mr Yuan in December 2005, Mr Zeng, Mr Hang and Mr Guo in April/May 2006, and Mr Shen in August/September 2006. However, the terms and conditions of employment were effectively decided by Kentwood, under the direction of Mr Zhang, on one occasion, in December 2005 (when entering into an employment contract with Mr Yuan) to employ Chinese citizens as sponsored Subclass 457 visa workers. The respondents' subsequent implementation of that decision by employing the remainder of the employees pursuant to those terms and conditions of employment might be characterised as arising from a single course of conduct despite the separate commencement dates of the respective employees.

14 Secondly, in February 2007, although the respondents significantly reduced the employees' hours, they continued to implement the initial payment arrangements, thereby remaining in contravention of the NAPSA and the Standard. The respondents' adjustment of arrangements on or about 26 February 2007 may be considered a distinct event. Contraventions after that date may on one view be seen as giving rise to a separate course of conduct flowing from that decision rather than merely forming part of an overall course of conduct together with the contraventions which preceded that date.

15 Thirdly, although Kentwood contravened one provision concerning the employees' base rate of pay, namely, s 182(1) of the WR Act (guaranteed basic periodic rates of pay) in respect of each employee, the matter is more complex. The relevant basic rates of pay were derived from different industrial instruments (which were all Australian Pay and Classification Scales (Pay Scales) under the WR Act):

- (i) the preserved WA Pay Scale (for all work undertaken in Western Australia);
- (ii) the preserved Federal Award Pay Scale (for carpentry work undertaken by Messrs Yuan, Hang and Guo in Victoria); and

- (iii) the preserved MWO Pay Scale (for construction work undertaken by Messrs Zeng and Shen in Victoria).

16 Nevertheless, despite the different sources from which the Pay Scales were derived, the obligation contravened by the respondents in relation to all employees concerning base rates of pay was contained in one 'applicable provision' of the Standard, that is, s 182(1) of the WR Act. The course of conduct principles may apply such that the respondents should be treated as having committed one contravention of s 182(1) for each relevant period (for example, pre and post February 2007).

### **The maximum penalties**

17 The applicant has contended that the maximum penalty the Court could reasonably impose on Kentwood is \$462,000 (made up of 14 contraventions at \$33,000 each) constituted as follows:

- (a) two contraventions of cl 13 of the NAPSA - rostered days off (one in relation to Mr Yuan prior to February 2007; one in relation to Messrs Shen and Guo in June/July 2007);
- (b) two contraventions of cl 15 of the NAPSA - payment of overtime in relation to hours worked Monday-Friday and to noon on Saturdays (one in relation to Mr Yuan prior to February 2007; one in relation to Messrs Shen and Guo in June/July 2007);
- (c) two contraventions of cl 16 of the NAPSA - payment of overtime in relation to hours worked on Sundays and after noon on Saturdays (one in relation to Mr Yuan prior to February 2007; one in relation to Messrs Shen and Guo in June/July 2007);
- (d) one contravention of cl 17 of the NAPSA - public holiday rates (in relation to Mr Yuan);
- (e) one contravention of cl 20 of the NAPSA - meal allowance for overtime (in relation to Mr Yuan);
- (f) one contravention of cl 22(7)(b) of the NAPSA - annual leave loading (in relation to Mr Yuan);
- (g) two contraventions of s 182(1) of the WR Act - guaranteed basic periodic rates of pay (one in relation to all the employees before February 2007; one in relation to all the employees except Mr Yuan after February 2007);

- (h) one contravention of s 189(1) of the WR Act - guaranteed frequency of payment where provided in an APCS;
- (i) one contravention of s 189(2) of the WR Act - guaranteed frequency of payment where not provided in an APCS;
- (j) one contravention of s 235(2) of the WR Act - payment of accrued annual leave on termination.

18 Similarly, the applicant argues that the maximum penalty the Court could reasonably impose on Mr Zhang is \$92,400 (made up of the same 14 contraventions but by Mr Zhang, at \$6,600 each) constituted as follows:

- (a) two contraventions of cl 13 of the NAPSA - rostered days off (one in relation to Mr Yuan prior to February 2007; one in relation to Messrs Shen and Guo in June/July 2007);
- (b) two contraventions of cl 15 of the NAPSA - payment of overtime in relation to hours worked Monday-Friday and to noon on Saturdays (one in relation to Mr Yuan prior to February 2007; one in relation to Messrs Shen and Guo in June/July 2007);
- (c) two contraventions of cl 16 of the NAPSA - payment of overtime in relation to hours worked on Sundays and after noon on Saturdays (one in relation to Mr Yuan prior to February 2007; one in relation to Messrs Shen and Guo in June/July 2007);
- (d) one contravention of cl 17 of the NAPSA - public holiday rates (in relation to Mr Yuan);
- (e) one contravention of cl 20 of the NAPSA - meal allowance for overtime (in relation to Yuan);
- (f) one contravention of cl 22(7)(b) of the NAPSA - annual leave loading (in relation to Yuan);
- (g) two contraventions of s 182(1) of the WR Act - guaranteed basic periodic rates of pay (one in relation to all the employees before February 2007; one in relation to all the employees except Mr Yuan after February 2007);
- (h) one contravention of s 189(1) of the WR Act - guaranteed frequency of payment, where provided in an APCS;
- (i) one contravention of s 189(2) of the WR Act - guaranteed frequency of payment, where not provided in an APCS;
- (j) one contravention of s 235(2) of the WR Act - payment of accrued annual leave on termination.

19            However, the contraventions have common elements. 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.

### **Factors relevant to determining an appropriate penalty**

20            A non-exhaustive list of factors potentially relevant to the imposition of a penalty under the WR Act includes:

- (a) the nature and extent of the conduct which led to the contraventions;
- (b) the circumstances in which that conduct took place;
- (c) the nature and extent of any loss or damage sustained as a result of the contraventions;
- (d) whether there has been similar previous conduct by the respondent;
- (e) whether the contraventions were properly distinct or arose out of the one course of conduct;
- (f) the size of the business enterprise involved;
- (g) whether or not the contraventions were deliberate;
- (h) whether senior management was involved in the contraventions;
- (i) whether the party committing the contraventions has exhibited contrition;
- (j) whether the party committing the contraventions has taken corrective action;
- (k) whether the party committing the contraventions has co-operated with the enforcement authorities;
- (l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- (m) the need for specific and general deterrence.

(see *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7; *Kelly v Fitzpatrick* (2007) 166 IR 14 (at [14]); *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* (2008) 177 IR 61 (at [40]) and *John Holland Pty Ltd v Maritime Union of Australia (No 2)* (2010) 192 IR 431 (at [27]) and *McDonald* (at [15])).

21            The summary is a convenient checklist, but does not restrict the matters which may be taken into account in the exercise of the Court's discretion. The task of the Court is to fix penalties which pay appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.

***Nature and extent of conduct***

22           The contraventions set out in para 11 and para 12 were extensive and demonstrate little regard for the obligations of an employer under Commonwealth workplace law. They involved a failure to provide the most basic remuneration entitlements under the WR Act and the NAPSA over a lengthy period. The contraventions resulted in significant underpayments to five of Kentwood's employees. Kentwood paid the employees about one-fifth of their statutory minimum remuneration entitlements throughout their employment. Kentwood failed to pay Messrs Zeng, Hang and Guo any money at all for the first three months of their employment, or Mr Yuan for the first five months of his employment.

23           Kentwood's failure, under the direction and control of Mr Zhang, to pay the employees their entitlements for annual leave and overtime was harsh. The respondents denied the employees any real opportunity to take time off work or to decline to work overtime. This was particularly onerous given that the employees all worked 10-11 hours per day for six-seven days per week until February 2007 when the work practices were moderated following and inferentially in consequence of the visit to Kentwood's worksites by DIAC and the Workplace Ombudsman earlier that month. There is no evidence that the moderation in work practices would have occurred had it not been made clear that Kentwood was the subject of scrutiny by a Commonwealth government authority.

24           Kentwood (and hence Mr Zhang) derived a significant benefit from the underpayments. That benefit was continued as they have not yet repaid any of the amounts owed.

25           In addition, in February 2007, Mr Zhang asked some of the employees to sign a sham record of hours worked to conceal the respondents' contraventions in relation to failure to pay overtime.

***Circumstances in which the conduct took place***

26           The respondents' conduct concerned employees who were particularly vulnerable. Kentwood and Mr Zhang were aware of their vulnerability. As Subclass 457 visa migrant workers, the employees were highly reliant on Kentwood (and hence Mr Zhang) while in Australia. Kentwood recruited the employees in China and organised their visas to work in



Australia. In the case of Mr Yuan, Mr Zhang personally recruited his services. Third party agents were used by Kentwood and Mr Zhang to recruit the remainder of the employees.

27 Four of the employees were required to pay (in advance) a fee of 15,000 RMB to Kentwood or its agent for organising a visa. Significantly, this amount was the equivalent of up to four months' wages at the rate specified in the employment contract.

28 The employees were not fluent in English and had not previously worked in Australia. It is reasonable to infer that they had limited knowledge, if any, as to how to exercise their rights under relevant industrial instruments and standards.

29 There is no evidence that either Kentwood or Mr Zhang took any steps to ensure the employees were aware of the full scope of their employment entitlements under Australian law. Nor is there any evidence that either Kentwood or Mr Zhang took any steps to try to ensure that they achieved compliance with their statutory employment obligations.

***Nature and extent of loss or damage***

30 The underpayments in this case total approximately \$240,000. The magnitude of the underpayments is significant. By reason of their visa status, absence of Australian work experience and poor English skills, the employees had limited capacity to mitigate the impact of the contraventions. Kentwood's decision, under the direction of Mr Zhang, to pay the employees only a small sum during their employment meant that the employees experienced significant/substantial financial hardship.

***Whether the contraventions were properly distinct or arose out of one course of conduct***

31 I have considered this earlier in paras 13 to 16.

32 Some of the 14 contraventions have common elements and 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.

33 Considering the common elements, 14 contraventions may reasonably be grouped into the following six categories:

- failure to pay the guaranteed basic rate of pay;
- failure to comply with frequency of payment obligations;
- failure to pay overtime and failure to pay overtime meal allowances;
- failure to pay public holiday rates;
- failure to pay accrued annual leave and failure to pay annual leave loading; and
- failure to provide rostered days off.

34 It is appropriate to recognise the common elements in the contraventions when assessing the appropriate penalty to impose in respect of each of the 14 contraventions.

***Contrition, corrective action and cooperation with enforcement authorities***

35 The applicant argues that the respondents have provided little or no co-operation to it and have shown little regard for the role of the Fair Work Ombudsman as a public regulator, for the efficient administration of justice, and specifically for the efficient conduct of these proceedings. Mr Zhang has returned to China and has failed to attend court on multiple occasions. No representative of either respondent had been engaged to attend court on those occasions.

***Ensuring compliance with minimum standards and deterrence***

36 In imposing a penalty against the respondents, it is necessary for the Court to set the penalty in a range that reinforces the fundamental importance of compliance with the employment standards enshrined in Commonwealth workplace laws.

37 Given the vulnerability of Subclass 457 visa migrant workers in the Australian community, general deterrence is particularly important.

38 When utilising a Commonwealth government scheme designed to assist employers with obtaining labour resources, employers should abide by other Commonwealth laws regulating the use of that labour. Failure by employers to comply with Commonwealth workplace laws in relation to migrant workers can result not only in exploitation of vulnerable workers, but can also give the non-compliant employer an unfair comparative advantage against competing Australian businesses and workers operating lawfully. By imposing a penalty in an appropriate range, the Court can attempt to counteract, or at least reduce, those dangers.

39 In relation to specific deterrence, although it appears Mr Zhang no longer resides in Australia, Kentwood continues to conduct business in Australia and Mr Zhang remains a director of Kentwood.

40 There is no evidence that Mr Zhang intends not to return to Australia or to have no further involvement in the operation of business in Australia (whether through Kentwood or through another entity). Accordingly, since Mr Zhang remains a director of Kentwood, specific deterrence is of relevance to both respondents.

## CONCLUSION

41 The applicant contends that:

- (a) The serious course of sustained and conscious underpayment of wages and other entitlements, and related statutory contraventions to the severe detriment of a vulnerable group of low paid employees, requires the Court to impose penalties for each group of contraventions which 'closely approach the statutory maxima'.
- (b) In the absence of any credible material or submission put before the Court in mitigation of the contraventions (beyond the fact that the respondents are to be treated as first offenders under the WR Act and related industrial instruments) the total penalties should be in the higher range of penalties available to the Court. The applicant submits that a penalty of not less than 80% of the maximum penalty would be appropriate in all the circumstances of this case.
- (c) The penalty should be made payable into consolidated revenue pursuant to s 841 of the WR Act.

42 For the following reasons, I do not, with respect, agree that 80% of the maximum penalty is appropriate.

43 First, although I have not had the benefit of submissions on behalf of the respondents in relation to penalty, and notwithstanding that I accept the seriousness of the contraventions, fixing the penalty at 80% of the maximum penalty in the case of a first offender would, in my view, be unduly harsh in most instances. For a recent example of the relevance of a first offence, see *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (No 2)* [2011] FCA 394 per Barker J (at [21]).

44           Secondly, although Kentwood conducted operations in various States (through  
Mr Zhang), there is no other evidentiary basis on which I could reach a conclusion that the  
operations of the Kentwood were ‘sophisticated’ in the sense contended for by the applicant.

45           I accept, as the applicant suggests, that there is no evidence that the respondents were  
unaware that their manner of operation contravened important industrial statutes but given  
Mr Zhang’s very limited command of English, it would be reasonable to infer that he was not  
intimately familiar with his legal obligations in that area. While ignorance is not a defence to  
liability, it might be said that for at least a significant portion of the time during which the  
offences were committed, there is no indication that the respondents were aware of the  
seriousness of the breaches.

46           I also take into account the fact that the respondents will be ordered to repay to the  
employees the sums which should have been paid to them (with interest) and that the  
respondents will be liable for the taxed or agreed costs of these proceedings.

47           As to grouping of contraventions, in my view it is appropriate to approach the fixing  
of penalties on the basis of nine breaches rather than 14 in consequence of which the total  
maximum penalty would be \$297,000 for Kentwood and \$59,400 for Mr Zheng. The reason  
for this is that the respondents’ continued breach after February 2007 in relation to the  
reduction in employee hours would not result in a new contravention but be in the same  
course of conduct of implementing the terms and conditions of employment decided in  
December 2005. This is particularly so having regard to the common elements of the  
contravention. Although there are suggestions that the reduction in hours occurred in  
response to the respondents’ having been alerted to an investigation, it is not possible to reach  
a firm view on this topic.

48           Notwithstanding the seriousness of the contraventions as discussed above, I consider  
that the appropriate range is closer to 40% of the maxima taking into account six groupings  
identifying relative seriousness of respective offences. In fixing the figure at this rate, rather  
than at a lower rate, I take particular note of the vulnerability of the employees and that there  
have been no voluntary payments or underpayments rectified by either of the respondents or  
to the extent there has been, it has been inconsequential. I would not apply any discount in

respect of the penalties imposed for the same reasons and also the general lack of cooperation of the respondents with the duly authorised authority.

49 The appropriate penalties, in my view, and which I will order are as follows.

50 The first respondent pay to the Commonwealth Consolidated Revenue Fund **\$123,000** within 28 days made up of the following penalties:

**\$17,000** for contravention of s 182 of the WR Act for 5 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;
- Zheng Shun Zeng for the period 2 May 2006 to 12 July 2007;
- Jian Hang Qi for the period 2 May 2006 to 25 July 2007;
- Zongxin Shen for the period 30 September 2006 to 12 July 2007; and
- Jian Guo Qi for the period 2 May 2006 to 12 July 2007.

**\$17,000** for contravention of s 189 of the WR Act for 4 employees:

Being:

- Zhaolin Yuan for the first five months of employment;
- Jian Hang Qi for the first three months of employment; and
- Jian Guo Qi for the first three months of employment.
- Zheng Shun Zeng for the first three months of employment.

**\$15,000** for contravention of cl 15 NAPSA for 3 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;
- Zongxin Shen for the period 19 June 2007 to 12 July 2007; and
- Jian Guo Qi for the period 19 June 2007 to 12 July 2007.

**\$15,000** for contravention of cl 16 NAPSA for 3 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;
- Zongxin Shen for the period 19 June 2007 to 12 July 2007; and
- Jian Guo Qi for the period 19 June 2007 to 12 July 2007.

**\$15,000** for contravention of cl 20 NAPSA for 1 employee:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007.

**\$13,000** for contravention of cl 22 NAPSA for 1 employee:

Being:

- Zhaolin Yuan.

**\$13,000** for contravention of s 235 of the WR Act for 5 employees:

Being:

- Zhaolin Yuan;
- Zheng Shun Zeng;
- Jian Hang Qi;
- Zongxin Shen; and
- Jian Guo Qi.

**\$8,000** for contravention of cl 17 NAPSA for 1 employee:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007.

**\$10,000** for contravention of cl 13 NAPSA for 3 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;
- Zongxin Shen for the period 19 June 2007 to 12 July 2007; and
- Jian Guo Qi for the period 19 June 2007 to 12 July 2007.

51 The second respondent pay to the Commonwealth Consolidated Revenue Fund within 28 days **\$24,600** made up of the following penalties:

**\$3,400** for contravention of s 182 of the WR Act for 5 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;
- Zheng Shun Zeng for the period 2 May 2006 to 12 July 2007;
- Jian Hang Qi for the period 2 May 2006 to 25 July 2007;
- Zongxin Shen for the period 30 September 2006 to 12 July 2007; and
- Jian Guo Qi for the period 2 May 2006 to 12 July 2007.

**\$3,400** for contravention of s 189 of the WR Act for 4 employees:

Being:

- Zhaolin Yuan for the first five months of employment;
- Jian Hang Qi for the first three months of employment; and
- Jian Guo Qi for the first three months of employment.
- Zheng Shun Zeng for the first three months of employment;

**\$3,000** for contravention of cl 15 NAPSA for 3 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;
- Zongxin Shen for the period 19 June 2007 to 12 July 2007; and
- Jian Guo Qi for the period 19 June 2007 to 12 July 2007.

**\$3,000** for contravention of cl 16 NAPSA for 3 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;
- Zongxin Shen for the period 19 June 2007 to 12 July 2007; and
- Jian Guo Qi for the period 19 June 2007 to 12 July 2007.

**\$3,000** for contravention of cl 20 NAPSA for 1 employee:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007.

**\$2,600** for contravention of cl 22 NAPSA for 1 employee:

Being:

- Zhaolin Yuan.

**\$2,600** for contravention of s 235 of the WR Act for 5 employees:

Being:

- Zhaolin Yuan;
- Zheng Shun Zeng;
- Jian Hang Qi;
- Zongxin Shen; and
- Jian Guo Qi.

**\$1,600** for contravention of cl 17 NAPSA for 1 employee:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007.

**\$2,000** for contravention of cl 13 NAPSA for 3 employees:

Being:

- Zhaolin Yuan for the period 27 March 2006 to 2 February 2007;
- Zongxin Shen for the period 19 June 2007 to 12 July 2007; and
- Jian Guo Qi for the period 19 June 2007 to 12 July 2007.

52           Declarations and orders consistent with these reasons will be made.

53           In addition, I will order that:

- the respondents pay the applicant's costs of the action within 28 days of taxation or agreement, in accordance with s 824 of the WR Act; and
- the applicant have liberty to apply in the event of non-compliance with any order herein.

I certify that the preceding fifty-three



(53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher.

Associate:

A handwritten signature in blue ink, appearing to be 'J. McKerracher', written over a faint circular stamp.

Dated: 31 May 2011