FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v STACBORN PTY LTD T/AS EAGLE BOYS CESSNOCK [2012] FMCA 890

INDUSTRIAL LAW – Civil penalties – contraventions of Workplace Relations Act 1996 and Fair Work Act 2009 admitted – factors for consideration.

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)
Fair Work Act 2009 (Cth), ss.45, 539, 546, 557
Workplace Relations Act 1999 (Cth), ss.182, 185, 717, 718, 719

Uniform Civil Procedure Rules 2005 (NSW)

Australian Opthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560; [2008] FCAFC 8
Cotis v Macpherson [2007] FMCA 2060
Cotis v Pow Juice Pty Ltd [2007] FMCA 140
Fair Work Ombudsman v Land Choice Pty Ltd & Anor [2009] FMCA 1255
Fair Work Ombudsman v Gavin Francis Sheehan t/as Greenvale Rose Farm [2012] FMCA 344
Gibbs v The Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216; [1992] FCA 374
Kelly v Fitzpatrick (2007) 166 IR 14; [2007] FCA 374
Lynch v Buckley Sawmills Pty Ltd (1984) 3 FCR 503; [1984] FCA 348
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25
Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant and Bar [2007] FMCA 7
McIver v Healey [2008] FCA 425
Ponzio v B & P Caelli Constructions Pty Ltd and Others (2007) 158 FCR 543; [2007] FCAFC 65
Printing and Kindred Industries Union and Others v Vista Paper Products Pty Limited and Another (1994) 127 ALR 673
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Seymour v Stawell Timber Industries Pty Ltd (1985) 9 FCR 241; [1985] FCA 237
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550
Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd (2002) 121 IR 250

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	STACBORN PTY LTD (ACN 133 158 755) T/AS EAGLE BOYS CESSNOCK
File Number:	SYG2975 of 2011
Judgment of:	Barnes FM
Hearing date:	21 June 2012
Date for Last Submission:	5 July 2012
Delivered at:	Sydney
Delivered on:	28 September 2012

REPRESENTATION

Counsel for the Applicant:	Ms C Howell
Solicitors for the Applicant:	Fair Work Ombudsman Legal
Counsel for the Respondent:	Mr B Watts
Solicitors for the Respondent:	Smyth Turner Wall

DECLARATIONS

(1) The respondent contravened the *Breakel Pty Ltd Certified Agreement 2004* (the Certified Agreement) by failing to pay Kylie Emmett the minimum rates of pay specified in cl.3.2.1(c) of the Certified Agreement during the period from 13 October 2008 to 12 October 2009.

(2) The respondent contravened the Certified Agreement by failing to pay Kylie Emmett the minimum overtime payments specified in cl.4.2 of the Certified Agreement in the period from 13 October 2008 to 12 October 2009.

(3) The respondent contravened the Certified Agreement by failing to pay the following employees the minimum adult rates of pay specified in sub-cl.3.3(1) of the Certified Agreement, in the period from 13 October 2008 to 12 October 2009 (or part thereof):

(a) Arshad Ahmed;

(b) Brodie Jurd; and

(c) Mitchell Madzonga.

(4) The respondent contravened the Certified Agreement by failing to pay the following employees the minimum junior rates of pay specified in cll.3.3(1) and 3.5 of the Certified Agreement in the period from 13 October 2008 to 12 October 2009 (or part thereof):

(a) Peter Cowan;

(b) Brodie Jurd;

(c) Lacey McMillan; and

(d) Austin Podder.

(5) The respondent contravened the Australian Pay and Classification Scale derived from the *Shop Employees' (State) Award AN120499* (Shop Employees Pay Scale) by failing to pay Kylie Emmett her

guaranteed basic periodic rates of pay under the Shop Employees Pay Scale in the period from 13 October 2008 to 31 December 2009.

(6) The respondent contravened the Australian Pay and Classification Scale derived from the *Transport Industry Retail (State) Award AN120618* (Transport Industry Pay Scale) by failing to pay the following employees their guaranteed basic periodic rates of pay under the Transport Industry Pay Scale in the period from 13 October 2008 to 31 December 2009 (or part thereof):

(a) Daniel Aubrey;

(b) John Carbone;

(c) Casey Cross;

(d) Ellen Feenan;

(e) Todd Jory;

(f) Brodie Jurd;

(g) David Kearney;

(h) Mitchell Madzonga; and

(i) Ronak Panchal.

(7) The respondent contravened the Transport Industry Pay Scale by failing to pay the following employees their guaranteed casual loadings under the Transport Industry Pay Scale in the period from 13 October 2008 to 31 December 2009 (or part thereof):

(a) Daniel Aubrey;

(b) John Carbone;

(c) Casey Cross;

(d) Ellen Feenan;

(e) Todd Jory;

(f) Brodie Jurd;

(g) David Kearney;

(h) Mitchell Madzonga; and

(i) Ronak Panchal.

(8) The respondent contravened the *Fast Food Industry Modern Award 2010* (Modern Award), by failing to pay Kylie Emmett the minimum transitional pay rate prescribed pursuant to item A.2.3 of Schedule A of the Modern Award in the period from 1 January 2010 to 30 June 2010.

(9) The respondent contravened the Modern Award by failing to pay the following employees the minimum transitional pay rates prescribed pursuant to item A.2.3 of Schedule A of the Modern Award in the period from 1 January 2010 to 30 June 2010 (or part thereof):

(a) Casey Cross;

(b) Ellen Feenan;

(c) Brodie Jurd;

(d) David Kearney;

(e) Brendan Kendall;

(f) Elizabeth Kermode;

(g) Mitchell Madzonga;

(h) Peter Manwarring; and

(i) Ashton Williams.

(10) The respondent contravened the Modern Award by failing to pay the following employees the minimum transitional casual loading prescribed pursuant to item A.5.2 of Schedule A of the Modern Award in the period from 1 January 2010 to 30 June 2010 (or part thereof):

(a) Casey Cross;

(b) Ellen Feenan;

(c) Brodie Jurd;

(d) David Kearney;

(e) Brendan Kendall;

(f) Elizabeth Kermode;

(g) Mitchell Madzonga;

(h) Peter Manwarring; and

(i) Ashton Williams.

(11) The respondent contravened the Modern Award by failing to pay the following employees the special clothing allowance prescribed by cl.19.2(b)(ii) of the Modern Award in the period from 1 January 2010 to 30 June 2010 (or part thereof):

(a) Casey Cross;

(b) Kylie Emmett;

(c) Ellen Feenan;

(d) Jake Harvey;

(e) Brodie Jurd;

(f) David Kearney;

(g) Brendan Kendall;

(h) Elizabeth Kermode;

(i) Mitchell Madzonga;

(j) Peter Manwarring; and

(k) Ashton Williams.

(12) The respondent contravened the Modern Award by failing to provide Jake Harvey the minimum engagement for casual employees prescribed by cl.13.4 of the Modern Award in the period from 1 January 2010 to 30 June 2010.

ORDERS

(1) Pursuant to s.719(6) of the *Workplace Relations Act 1996* (the WR Act) and s.545(2)(b) of the *Fair Work Act 2009* (the FW Act) the respondent pay the total amounts underpaid which remain outstanding to the following persons:

(a) Arshad Ahmed - $1,280.18

(b) Peter Cowan - $964.61

(c) Casey Cross - $1,886.93

(d) Kylie Emmett - $960.23

(e) Ellen Feenan - $4,930.86

(f) Jake Harvey - $48.86

(g) Todd Jory - $1,449.04

(h) Brodie Jurd - $8,951.75

(i) David Kearney - $1,470.05

(j) Mitchell Madzonga - $11,478.00

(k) Peter Manwarring - $556.96

(l) Ronak Panchal - $3,639.86

(m) Austin Podder - $697.08

(2) Pursuant to s.722 of the WR Act and s.547 of the FW Act the respondent pay interest on the amounts referred to in Order 1 above at the rates provided in the Uniform Civil Procedure Rules (NSW) for pre-judgment interest from the date of each underpayment until the date of these orders, with each party having liberty to apply if there is any dispute over the amount of interest payable.

(3) The respondent pay a penalty of $5,000 in relation to its breach of the minimum rates of pay requirements of the Certified Agreement, the Shop Employees Pay Scale and the Modern Award (and s.45 of the FW Act) in respect of Kylie Emmett.

(4) The respondent pay a penalty of $2,000 in relation to its breach of cl.4.2 of the Certified Agreement in relation to its failure to pay overtime rates to Kylie Emmett.

(5) The respondent pay a penalty of $12,000 in relation to its breach in respect of its failure to pay minimum rates of pay prescribed in the Certified Agreement, the Transport Employees Pay Scale and the Modern Award in respect of the employees listed in Declarations 3, 4, 6 and 9 above.

(6) The respondent pay a penalty of $8,000 in relation to its breach of s.585(2) of the WR Act and s.45 of the FW Act in respect of its failure to pay casual loadings to the employees listed in Declarations 7 and 10 above as prescribed in the Transport Employees Pay Scale and the Modern Award.

(7) The respondent pay a penalty of $2,000 in relation to its breach of s.45 of the FW Act in respect of its failure to pay the special clothing allowance prescribed in the Modern Award to the employees listed in Declaration 11 above.

(8) The respondent pay a penalty of $1,000 in relation to its breach of the Modern Award and s.45 of the Fair Work Act in respect of its failure to pay Jake Harvey the amount prescribed in the Modern Award for a minimum shift duration.

(9) The payments in Orders 1 and 2 be paid to the persons listed in Order 1 on or before 31 December 2012.

(10) The penalties imposed by Orders 3 to 8 be paid on or before 28 September 2013.

(11) The penalties referred to in Orders 3 to 8 shall be paid to the Commonwealth.

(12) Entry of these orders be deferred for 7 days.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG2975 of 2011

FAIR WORK OMBUDSMAN
Applicant

And

STACBORN PTY LTD (ACN 133 158 755) T/AS EAGLE BOYS CESSNOCK
Respondent

REASONS FOR JUDGMENT

These proceedings

1. This is an application for the imposition of penalties and orders requiring payment of outstanding amounts in respect of admitted contraventions by the respondent Stacborn Pty Ltd of the *Workplace Relations Act 1996* (Cth) (the WR Act) (including through the continued application of the WR Act by reason of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the Transitional Act)) and also of the *Fair Work Act 2009* (Cth) (the FW Act).

2. The applicant, the Fair Work Ombudsman (the FWO), commenced proceedings in this court by application filed on 23 December 2011 accompanied by a statement of claim filed on the same date. In a response filed on 7 March 2012 the respondent admitted the alleged contraventions. A statement of agreed facts (the SOAF) was filed on 9 May 2012.

3. The applicant relied on affidavits of Evan Richard Brownell, a Fair Work Inspector (FWI), affirmed on 6 June 2012, Ellen Feenan sworn on 4 June 2012 and Brodie Jurd sworn on 12 June 2012, while the respondent relied on an affidavit of Peter John Stacey sworn on 22 May 2012.

The agreed facts

4. The summary of facts contained herein is based on the SOAF and the other evidence before the court.

5. On or around 13 October 2008 the respondent purchased and became the operator of a fast food pizza franchise located in Cessnock, New South Wales known as Eagle Boys Cessnock. From that date to 30 June 2010 (the Audit Period) the respondent employed 19 employees listed in Schedule A to the SOAF. Twelve of these employees were junior employees and four were from a non-English speaking background, including recent migrants to Australia.

6. In about March 2010 the FWO commenced an audit in relation to the respondent to assess its compliance with workplace obligations. The FWO subsequently commenced an investigation which revealed that the respondent may have contravened workplace relations laws in respect of the employees.

7. During the audit period, or part thereof, Kylie Emmett was employed by the respondent as a part-time employee. Jake Harvey was employed by the respondent as a casual employee. These employees performed designated operational functions at the business premises of the respondent, including making pizzas, dispatch, serving customers, handling money, answering phones and, when required, cleaning. For convenience, they are referred to as the shop employees. Other than Jake Harvey and Kylie Emmett, the remaining employees predominantly performed pizza delivery duties and are referred to for convenience as the delivery drivers. The delivery drivers were all employed on a casual basis.

8. In essence, the contraventions admitted to by the respondent involved failing to afford the employees their statutory minimum entitlements,

including minimum wages, overtime, casual loadings, minimum engagements and allowances.

9. Identification of the admitted contraventions is complicated by the fact that a number of industrial instruments regulated the employees' employment during the audit period, including the *Breakel Pty Ltd Certified Agreement 2004* (the Certified Agreement), a pre-reform certified agreement which applied until 12 October 2009 to seven employees who had worked for the prior owner of the business; the Australian Pay and Classification Scale (APCS) derived from the *Shop Employees' (State) Award AN120499* (the Shop Employees Pay Scale); the APCS derived from the *Transport Industry Retail (State) Award AN120618* (the Transport Industry Pay Scale); and the *Fast Food Industry Modern Award 2010* (the Modern Award). In addition the applicable legislation changed. The WR Act was in force from 30 October 2008 until 1 July 2009. The Transitional Act continued the operation of aspects of the WR Act until 31 December 2009. Relevant provisions of the FW Act applied from 1 July 2009 or 1 January 2010. The applicant submitted that some 59 contraventions could be identified which, by virtue of the course of conduct provisions in s.719(2) of the WR Act and s.557 of the FW Act, were said to result in 12 potential contraventions. As discussed further below, I am satisfied that the course of conduct provisions are so applicable and hence have adopted the applicant's categorisation of the contraventions arising out of a single course of conduct. Insofar as the various contraventions involved underpayment, the parties have agreed as to the extent of the underpayment and there is evidence before the court as to the amount that remains outstanding to each of 13 employees.

Admitted contraventions

10. I am satisfied on the basis of the SOAF and the other evidence before the court that the respondent contravened the WR Act (including through the operation of the Transitional Act) and the FW Act as follows:

    1) Failure to pay Kylie Emmett the minimum rate of pay for a part-time pizza employee.

The respondent contravened the Certified Agreement by failing to pay Kylie Emmett the minimum rates of pay specified in cl.3.2.1(c) of the Certified Agreement during the period from 13 October 2008 to 12 October 2009 (see s.718(1) and item 6 of Division 1 of Part 2 of Schedule 7 to the WR Act and sub-item 2(1) of Schedule 16 to the Transitional Act). These were repeated contraventions in respect of one employee.

2) Failure to pay Kylie Emmett overtime payments.

The respondent failed to provide the minimum overtime payments specified in cl.4.2 of the Certified Agreement to Kylie Emmett in the period 13 October 2008 until 12 October 2009 (see s.718(1) and item 6 of Division 1 of Part 2 of Schedule 7 to the WR Act and sub-item 2(1) of Schedule 16 to the Transitional Act). These were repeated contraventions in respect of one employee.

3) Failure to provide the minimum adult rates of pay to adult delivery drivers.

The respondent contravened the Certified Agreement by failing to pay Arshad Ahmed, Brodie Jurd and Mitchell Madzonga the minimum adult rates of pay specified in sub-cl. 3.3(1) of the Certified Agreement in the period from 13 October 2008 to 12 October 2009 (or part thereof) (see s.718(1) and item 6 of Division 1 of Part 2 of Schedule 7 to the WR Act and sub-item 2(1) of Schedule 16 to the Transitional Act). These were repeated contraventions in relation to three employees.

4) Failure to pay minimum rates of pay to junior delivery drivers.

The respondent failed to provide the minimum junior rates of pay specified in cll.3.3(1) and 3.5 of the Certified Agreement to Peter Cowan, Brodie Jurd, Lacey McMillan and Austin Podder (in the case of Brodie Jurd until she turned 21 years of age) (see s.718(1) and item 6(d) of Division 1 of Part 2 of Schedule 7 to the WR Act and sub-

item 2(1) of Schedule 16 to the Transitional Act). These were repeated contraventions in relation to four employees.

5) Failure to pay guaranteed APCS basic periodic rates of pay prescribed by the Shop Employees Pay Scale to Kylie Emmett.

   The respondent failed to pay Kylie Emmett her guaranteed basic periodic rates of pay under the Shop Employees Pay Scale for the period from 13 October 2009 to 31 December 2009. During this period the respondent was covered by the APCS derived from the Shop Employees Pay Scale in respect of the employment of Kylie Emmett and the failure to pay her the basic prescribed periodic rates was a failure to pay guaranteed APCS basic periodic rates of pay (see s.182(1) of the WR Act as continued by item 5 of Schedule 16 to the Transitional Act). This breach involved repeated contraventions involving one employee.

6) Failure to pay guaranteed APCS basic periodic rates of pay under the Transport Industry Pay Scale to delivery drivers.

   In the period from 13 October 2008 to 31 December 2009 the respondent was required to pay nine delivery drivers (Daniel Aubrey, John Carbone, Casey Cross, Ellen Feenan, Todd Jory, Brodie Jurd, David Kearney, Mitchell Madzonga and Ronak Panchal) an hourly rate no less than the guaranteed basic periodic rate of pay prescribed by cl.38 of the Transport Employees Pay Scale, but failed to do so on a repeated basis (see s.182(1) of the WR Act as continued by item 5 of Schedule 16 to the Transitional Act).

7) Failure to pay guaranteed casual loadings to delivery drivers.

   The respondent was required to pay the nine employees listed under contravention six above the guaranteed casual loading percentage provided for in the Transport Employees Pay Scale for the period 13 October 2008 to 31 December 2009 or part thereof (see s.185(2) of the WR Act as continued by item 5 of Schedule 16 to the Transitional Act).

It involved repeated contraventions involving nine employees.

8) Failure to pay minimum transitional pay rates to Kylie Emmett.

For the period from 1 January 2010 to 30 June 2010 the respondent failed to pay Kylie Emmett the minimum transitional pay rate derived from the Shop Employees Pay Scale prescribed pursuant to item A 2.3 of Schedule A of the Modern Award. The failure to do so was a contravention of s.45 of the FW Act. This was a repeated contravention involving one employee.

9) Failure to pay transitional minimum pay rates to the delivery drivers.

During the period from 1 January 2010 to 30 June 2010, or part thereof, the respondent contravened the Modern Award by failing to pay nine employees (Casey Cross, Ellen Feenan, Brodie Jurd, David Kearney, Brendan Kendall, Elizabeth Kermode, Mitchell Madzonga, Peter Manwarring and Ashton Williams) the required transitional minimum pay rates derived from the Transport Employees Pay Scale prescribed pursuant to item A.2.3 of Schedule A to the Modern Award. This was a contravention of s.45 of the FW Act involving repeated contraventions in relation to nine employees.

10) Failure to pay delivery drivers the required transitional casual loading under the Modern Award.

For the period from 1 January 2010 to 30 June 2010, or part thereof, the respondent failed to pay the nine employees listed under contravention nine above the minimum transitional casual loading under the Transport Employees Pay Scale prescribed pursuant to item A.5.2 of Schedule A to the Modern Award in contravention of s.45 of the FW Act. This was a repeated contravention involving nine employees.

11) Failure to pay the required special clothing allowance to casual and part-time employees.

In the period from 1 January 2010 to 30 June 2010, or part thereof, the respondent failed to pay 11 employees (Casey Cross, Kylie Emmett, Ellen Feenan, Jake Harvey, Brodie Jurd, David Kearney, Brendan Kendall, Elizabeth Kermode, Mitchell Madzonga, Peter Manwarring and Ashton Williams) the required special clothing allowance prescribed by cl.19.2(b)(ii) of the Modern Award applicable in circumstances where the employees were required to wear and launder a uniform, in contravention of s.45 of the FW Act. These were repeated contraventions involving 11 employees.

12) Failure to provide a minimum engagement for Jake Harvey, a casual employee.

In the period from 1 January 2010 to 30 June 2010 the respondent failed to pay one casual employee, Jake Harvey, for a minimum shift duration of three hours in contravention of cl.13.4 of the Modern Award and therefore of s.45 of the FW Act. This was a repeated contravention involving one employee.

The applicable legislation

11. As indicated above, the WR Act was repealed on 1 July 2009. However that Act continued to apply to certain of the contraventions relied on in these proceedings after the repeal date pursuant to sub-item 14 of Part 3 of Schedule 18 to the Transitional Act and sub-item 13(1) of Part 3 of Schedule 18 to the Transitional Act. The power to impose a penalty in respect of contraventions of ss.182 and 185 of the WR Act arises from s.719(1) of the WR Act (and see s.717(a)(ii)). The power to impose a penalty in respect of contraventions of the Certified Agreement also arises from s.719(1) of the WR Act (and see s.718(1) and item 6 of Schedule 7 to the WR Act which provides that a pre-reform certified agreement, such as the Certified Agreement in issue in these proceedings, may be enforced as if it were a collective

agreement). The power to impose a penalty for breaches of ss.182, 185 and 718(1) of the WR Act was continued during the period from 1 July 2009 to 30 June 2010 by virtue of sub-item 2(1) and item 5 of Schedule 16 to the Transitional Act.

12. The power to impose a penalty in respect of contraventions of s.45 of the FW Act arises from s.546 of the FW Act (see s.539 of the FW Act).

13. The maximum penalty that may be imposed by the court for each contravention by a body corporate at all relevant times is the sum of $33,000 in relation to each contravention (see s.719(4)(a) of the WR Act and s.546(2) of the FW Act). However multiple breaches may, depending on the circumstances, attract the operation of the course of conduct provisions contained in s.719(2) of the WR Act and s.557 of the FW Act where the breaches arise out of the same course of conduct and are committed by the same person.

Principles relevant in determining penalty

14. The first step in determining appropriate penalties is to identify the separate contraventions involved. Each breach of separate obligations found in the WR Act and the FW Act in relation to each employee is a separate contravention (see *Gibbs v The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223; [1992] FCA 374 and *McIver v Healey* [2008] FCA 425 at [16] per Marshall J). However, it is necessary for the court to consider whether the individual breaches constitute a single course of conduct in accordance with s.719(2) of the WR Act and s.557(1) of the FW Act.

15. Furthermore, to the extent that two or more contraventions have common elements, this should be taken into account in determining an appropriate penalty in all the circumstances, having regard to the fact that the respondent should not be penalised more than once for the same conduct. The penalties should be an appropriate response to the conduct in question (see *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560; [2008] FCAFC 8 at [46]). It is necessary to consider the appropriate penalty for the single breaches and, if relevant, each group of contraventions, taking into account all of the relevant circumstances. Finally, it is appropriate to consider

whether the total penalty is an appropriate response to the conduct which led to the breaches (see *Kelly v Fitzpatrick* (2007) 166 IR 14 at 30; [2007] FCA 374 and *Australian Ophthalmic Supplies* at [23], [71] and [102]). The court should then engage in what has been described in *Australian Ophthalmic Supplies* as an "*instinctive synthesis*" in making the assessment under the "*totality principle*" (at [27], [55] and [78]).

16. Counsel for the respondent did not take issue with the approach to be taken in relation to the assessment of penalties as a matter of principle. The respondent accepted that it was appropriate that it be ordered to pay a penalty to the Commonwealth of Australia and also to pay the outstanding amounts underpaid to the employees which remain outstanding with interest. Where the parties differed was in relation to their assessment of the appropriate amount of the penalties and the time that should be allowed for payment of the penalties and the underpayments. The FWO did not propose a figure for the penalties to be imposed for the contraventions, but submitted that the penalties should be in the mid to low range. The respondent submitted that the penalties should be in the low range. There was only limited evidence before the court relevant to penalties in the affidavit of Mr Stacey, a director of the respondent, and in evidence of FWO interviews with the directors of the respondent. Counsel for the FWO indicated that no objection was taken to the court having regard to the respondent's submissions in relation to the circumstances of the respondent relevant to the quantification of the amount of appropriate penalties.

Grouping of contraventions – course of conduct and common elements

17. As indicated, multiple breaches of particular provisions (as are admitted in this case) may attract the course of conduct provisions in the WR Act and the FW Act. It is relevant to have regard to whether the breaches arose out of separate acts or decisions of the employer or out of a single act or decision such as to constitute a course of conduct (see *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 266-277; [1985] FCA 237 per Gray J, with whom Northrop J agreed). It is for the respondent to establish that such provisions should apply. However the applicant accepted in this case that based on the facts of the case the respondent should have the benefit of s.719(2) of the WR

Act and s.557 of the FW Act in relation to repeated breaches of each particular provision in relation to each employee as described above. Hence, in circumstances where the 59 contraventions identified related to multiple employees, the course of conduct provisions would reduce the number of potential contraventions from 59 to the 12 contraventions identified in [11] above. I agree.

18. In addition, it was submitted that where separate contraventions were admitted that arose under different legislation, but were in essence the same conduct, it was necessary for the court to consider whether there was in fact a single course of conduct or common element straddling the contravention periods for the purpose of determining appropriate penalties. The applicant also submitted, and the respondent accepted, that in the particular circumstances of this case the respondent should not be penalised more than once for the same conduct over a period of time where additional contraventions would be attributable to legislative changes. I have borne in mind the need to consider that where contraventions have common elements, this should be taken into account when considering an appropriate penalty to ensure that the respondent is not punished more than once for the same or substantially similar conduct.

19. Relevantly the respondent's failures to pay the minimum rates of pay to Kylie Emmett under the Certified Agreement, the Shop Employees Pay Scale and the Modern Award, all arose out of the one decision by the respondent to pay Kylie Emmett a flat rate of $11 per hour. Similarly, the respondent's failure to pay minimum rates of pay to both junior and adult delivery drivers under the Certified Agreement, the Transport Employees Pay Scale and the Modern Award all arose out of the one decision to pay the delivery drivers a flat rate of $9 per hour. The respondent's failure to pay the correct casual loading percentage under the Transport Employees Pay Scale and the Modern Award also arose out of the one decision not to pay any casual loading to the delivery drivers. I accept that it is appropriate to impose one penalty in respect of each of the grouped contraventions in these respects.

20. Having regard to these principles, I am satisfied that, as each of the parties proposed, the penalties imposed by the court should reflect the fact that one penalty should be imposed for each group of

contraventions consisting of the same course of conduct but potentially subject to more than one penalty as a result of legislative changes. It is appropriate to make the declarations sought by the applicant that the respondent engaged in 12 contraventions as set out above and to impose six penalties in relation to what can be described as six categories of contravention consisting of:

a) Failure to pay minimum rates of pay to Kylie Emmett arising from the Certified Agreement, the Shop Employees Pay Scale and the Modern Award;

b) Failure to pay overtime rates to Kylie Emmett arising from the Certified Agreement (it was clarified in oral submissions that the Shop Employees Pay Scale and the Modern Award were not applicable);

c) Failure to pay minimum rates of pay to the remaining employees arising from the Certified Agreement, the Transport Employees Pay Scale and the Modern Award;

d) Failure to pay the required casual loadings to the remaining employees arising from the Transport Employees Pay Scale and the Modern Award;

e) Failure to pay the special clothing allowance prescribed in the Modern Award; and

f) Failure to pay wages for the minimum shift duration to Jake Harvey prescribed in the Modern Award.

21. In essence, it was suggested by the FWO that the court should proceed on the basis that six penalties of $33,000 should be the maximum number of penalties to be imposed. It was submitted that penalties in the low to low-mid range were appropriate. The respondent contended that six penalties in the low range would be appropriate.

Factors relevant in determining penalty

22. The court is not restricted in the matters which may be taken into account in the exercise of its discretion in relation to penalty (see *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11] and

Australian Ophthalmic Supplies at [91] per Buchanan J). The factors generally relevant to the imposition of a penalty under the WR Act (and by analogy the FW Act) were referred to by Mowbray FM in *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant and Bar* [2007] FMCA 7 (at [24]) as follows and considered (at [26]-[55]):

a) The nature and extent of the conduct that led to the breaches;

b) The circumstances in which the conduct took place;

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

d) Whether there had been similar previous conduct by the respondent;

e) Whether the breaches 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 breaches were deliberate;

h) Whether senior management was involved in the breaches;

i) Whether the party committing the breach had exhibited contrition;

j) Whether the party committing the breach had taken corrective action;

k) Whether the party committing the breach had cooperated 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.

23. These considerations were adopted by Tracey J in *Kelly v Fitzpatrick* at [14].

Nature and extent of the conduct and the circumstances in which it took place

24. The respondent purchased the Eagle Boys Cessnock franchise on 13 October 2008. The directors and operators of the respondent are Mr and Mrs Stacey, who, I was told from the bar table, completely lacked business experience prior to the acquisition and had never previously operated a retail business. Indeed, Mr Stacey had for some nine years worked as a casual pizza delivery driver for the previous owner of the business. Thereafter he paid the delivery drivers the same hourly rate that he had been paid.

25. At the time of purchase of the business Mr and Mrs Stacey claim that they were assured by the outgoing franchisee that a workplace agreement entered into by the vendor was continuing and that they were told about a payment schedule in accordance with such workplace agreement. They understood that they were continuing to operate under the agreement until advised by the FWO in March 2010 that an audit was required. As a result of the audit the respondent changed its payment arrangements. Mr Stacey's unchallenged evidence is that they "*made regular enquiries from the National Retailers Association* [and] *the Franchisor Eagle Boys Dial-a-Pizza Australia Pty Ltd as to the system of payment of the Award*" and were "*assured ... that the system* [they] *were operating under was correct*". The extent of such enquiries is not apparent on the evidence before the court.

26. However the contraventions in question represent a failure by the respondent to provide its employees with their statutory minimum entitlements, including minimum wages, overtime, casual loading, minimum engagements and allowances under various industrial instruments, which resulted in a total underpayment of $48,904.95 to the employees during the audit period from 13 October 2008 to 30 June 2010. The contraventions were widespread and of relatively long duration (see *McIver v Healey* at [34]). They arose as a result of the employer, over a period of nearly two years, paying employees flat hourly rates of pay that were up to 49.3 per cent below legal minimum hourly rates and failing to provide casual employees with any casual loading at all.

27. The applicant drew no distinction in written submissions between the nature, duration and extent of the various contraventions engaged in by the respondent, but addressed this issue in oral submissions. The underpayments of minimum rates of pay and casual loading continued over the whole of the audit period. One employee was underpaid as a part-time employee, while a number of casual delivery drivers, including junior and adult delivery drivers, were underpaid throughout the whole period. However other contraventions did not continue throughout the whole period. In particular, the contraventions of the Modern Award consisting of the failure to pay the special clothing allowance and the failure to provide one employee with the minimum engagement period for casual employees were for a limited period from 1 January 2010 to 30 June 2010. Jake Harvey was engaged for two hour rather than three hour periods. This last failure was of less significance in scale and duration than the other contraventions in issue. It was also clarified in oral submissions that the failure to pay Kylie Emmett overtime rates only arose under the Certified Agreement in effect until 12 October 2009. Counsel for the applicant acknowledged, and I accept, that there were some differences in the relative seriousness of the contraventions and that the failure to pay minimum rates of pay to the drivers was the most serious contravention.

28. FWI Brownell notified the respondent of potential contraventions on 13 April 2010. On 17 June 2010 the FWO issued a contravention letter with details of the contraventions and explanatory information to enable the respondent to take steps to rectify the contraventions. FWI Brownell also had discussions with Mr and Mrs Stacey in this respect. The applicant has acknowledged that from the date of receiving the contravention letter in June 2010 the respondent paid the correct wages and payments.

29. The applicant acknowledged that the respondent's conduct took place during a period of change in Commonwealth workplace relations legislation and that was properly to be taken into account in reducing the number of contraventions. Despite this it was submitted, and I accept, that changes in legislation do not excuse the conduct. Nor does reliance on advice provided by others (see *Fair Work Ombudsman v*

Gavin Francis Sheehan t/as Greenvale Rose Farm [2012] FMCA 344 at [44]).

Nature and extent of the loss

30. As indicated, the total underpayment to employees during the audit period as a result of the contraventions was the sum of $48,904.95. This was a significant underpayment. It involved low paid and/or junior employees. According to FWI Brownell, the respondent indicated on 24 June 2010 that it was willing to undertake a review of employee entitlements and take steps to back-pay underpaid employees. However it did not advise the FWO of a strategy for such repayments during the rest of 2010. FWI Brownell indicated to the respondent in December 2010 that it was not acceptable to have no payment plan in place for rectification. An additional contravention letter was issued in March 2011.

31. There is evidence of some ad hoc repayments by the respondent to various employees amounting to $10,590.54. The parties have calculated the outstanding amounts owed to thirteen employees at $38,314.41 and agree that orders should be made that the respondent pay the total amounts underpaid to these employees and interest thereon.

32. The fact that the underpayments affected junior employees and employees who were either recent migrants and/or from a non-English speaking background is of some significance. Moreover as the directors of the respondent only became aware of the contraventions after the audit began, it is likely that, but for the intervention of the FWO, the contravening conduct would have continued (see *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140 at [58]). The respondent has taken steps to locate and make some payments to affected employees by instalments. It was submitted for the respondent that its financial situation limited the amount repaid and the speed of repayments. This is consistent with the evidence of Mr Stacey in an interview with the FWO on 18 August 2011.

Similar previous conduct

33. There is no evidence that the respondent has previously engaged in similar conduct.

Whether the breaches arose out of the one course of conduct

34. This issue has been discussed above. The applicant submits, the respondent agrees and I accept that in this case, having regard to the course of conduct provisions, it is appropriate to impose six penalties.

Size and financial circumstances of the business

35. The business in question is a country town pizza franchise business owned by a company of which a husband and wife are directors and operators. The business employed some 19 employees during the relevant time. However, apart from Kylie Emmett, who was employed part-time, the other employees were employed as casual employees, predominantly performing delivery duties using vehicles supplied by the respondent to deliver fast food such as pizzas and beverages to the respondent's customers. The respondent operated a shop in which pizzas were made and dispatched. I accept that the contraventions were the result of ignorance, rather than a choice by the respondent reflecting its financial difficulty or size as employer (see *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [27]-[29]).

36. Mr Stacey told FWI Brownell that Stacborn's poor financial circumstances had contributed to the delays in rectifying the underpayments to the employees and explained the steps taken in relation to repayments to various employees over a period of time. Mr Stacey also told FWI Brownell that the business was struggling and was for sale. Stacborn did not submit that its financial circumstances (which were not disputed by the applicant) excused the contraventions. I have had regard to the small size and, insofar as is possible on the evidence before the court, the financial difficulties of the respondent.

37. I have also borne in mind the caution expressed by Keely J in *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503 at 508; [1984] FCA 348 as follows:

> *... it is important that the respondent – and other employers bound by the award or by other awards under the Act – understand the importance of complying with an award, and it follows that any decision taken by them which is regarded as effecting their obligations to comply with particular provisions of an award or the award generally should only be taken after careful consideration. They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed.*

38. Notwithstanding the respondent's financial circumstances and small size, as stated in *Kelly v Fitzpatrick* at [28], the law should mark its disapproval of contravening conduct and set a penalty which serves as a warning to others.

Deliberateness of the breaches

39. There is evidence from two former employees of Stacborn that the directors of the respondent were, at least in a very general sense, placed on notice that employees were concerned about their low wages.

40. Brodie Jurd worked for the prior owner of the business in 2008 as a casual pizza delivery driver and then with Stacborn until 28 February 2010. For the duration of his employment he was paid $9 an hour as a pizza delivery driver. His evidence is that at a team meeting, on a date he could not recall, another pizza delivery driver asked the directors why delivery drivers were not paid as much as the kitchen hands and was informed that at that time they did not have the money to pay higher wages as they had high overheads. However this conversation is not such as to have put the respondent on notice of contraventions of the nature set out above although it did raise a general concern about the hourly rate paid to the delivery drivers.

41. Brodie Jurd's evidence as to his limited success in attempting to obtain rectification of the underpayments due to him was also referred to in

submissions for the applicant in relation to deliberateness of the breaches. However this part of Mr Jurd's evidence related to events after his employment ceased in relation to recovery of back payments. On the evidence before the court, it does not establish that the breaches were deliberate.

42. Ellen Feenan was employed by the respondent from December 2008 to January 2011 as a casual pizza delivery driver. She gave evidence that Mr Stacey was placed on notice that she was concerned in relation to her low wages because in December 2008 she raised with him the fact that a friend received $13 an hour as a delivery driver for another company and they were getting only $9 an hour. Mr Stacey was said to have responded that the drivers for the other company drove their own cars and received petrol money but that he supplied the work car. In June 2010, Ellen Feenan used her own car for deliveries as she was unable to drive the manual vehicles then provided by Stacborn. Mr Stacey was said to have told her that he would "*put* [her] *on the work account at the petrol station so* [she could] *fill up that way*".

43. Ellen Feenan also recalled that at a team meeting at an unspecified time a pizza delivery driver had raised the issue of why kitchen hands were paid more than delivery drivers (when the kitchen hands were younger). Mr Stacey had said that was the way the award worked. Ellen Feenan also gave evidence of a failure to receive all her wage entitlements from Stacborn.

44. These general queries should have alerted the respondent to some employee concern, although I accept that the respondent first became aware of the contraventions after the FWO commenced its investigation. While Mr Stacey gave unchallenged evidence that the respondent received verbal advice from an employer association, from the franchisor and from the previous owner that the system of paying employees in the business was correct, the respondent has not provided any evidence of written advice to this effect. The advice that the respondent says it received does not provide an excuse to avoid responsibility for the underpayments (see *Mason v Harrington* at [47]). As Mowbray FM stated in *Mason v Harrington* (at [45]):

> *It is to be expected in the circumstances that the Corporation would seek professional assistance from its industry association.*

This was quite a responsible thing to do, but the Corporation can not hide behind the advice it received from such an association.

Contrition, corrective action, cooperation with authorities

45. The applicant acknowledged, and I accept, that the respondent generally demonstrated a cooperative attitude throughout the investigation. The directors took part in two detailed on-site discussions concerning the contraventions in April and June 2010 and both voluntarily participated in recorded interviews on 18 August 2011. The matter has proceeded by way of the SOAF with the respondent admitting all of the alleged contraventions. This cooperation has significantly reduced the cost of these proceedings.

46. However the respondent has taken only limited corrective action to rectify the underpayments since first being issued with the contravention letter in June 2010 which provided the information necessary to take steps to rectify the contraventions. FWI Brownell visited the business premises to discuss the underpayments and rectification steps. The respondent failed to provide a detailed plan for rectification of underpayments despite repeated requests from August to December 2010 and notwithstanding that it indicated that it was willing to undertake a review of employee entitlements and take steps to back-pay employees. Repayments have been made on an ad hoc basis with regular instalment payments to some employees on the basis that the directors intend to endeavour to pay as much as possible to some people and then reimburse other people who have not yet been paid. As at the time of the hearing, the respondent had repaid the amount of $10,590.54 out of the total underpayment of $48,904.95. Employees are out of pocket and there is no guarantee that they will all receive all of their outstanding entitlements.

Ensuring compliance with minimum standards

47. A principal object of the WR Act and the FW Act is the maintenance of an effective safety net and effective enforcement mechanisms. The substantial maximum penalty set by the legislature for breaches of such minimum entitlements (which in the case of a corporation is a maximum of $33,000 for each contravention) reinforces the importance

placed on compliance with minimum standards. In this case the hourly rates of pay paid by the respondent to its employees were in some cases almost 50 per cent less than the minimum required by the relevant industrial instruments. Such contraventions should be the subject of penalties imposed at a meaningful level to ensure compliance with minimum standards.

General deterrence

48. General deterrence is of some significance in the present case involving, as this matter does, significant underpayments to employees covered by various industrial instruments. As Lander J stated in *Ponzio v B & P Caelli Constructions Pty Ltd and Others* (2007) 158 FCR 543; [2007] FCAFC 65 at [93]:

> *In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: Yardley v Betts (1979) 22 SASR 108. The penalty therefore should be of a kind that 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.*

49. The penalties in this case should be imposed at a meaningful level so as to deter other employers from engaging in similar contraventions.

Specific deterrence

50. The respondent ceased the underpayments when they received the contravention letter in June 2010. However, the hourly rates of pay paid to the respondent's employees were significantly lower than those required under the various industrial instruments. The total underpayment is a significant amount. The majority of the employees affected were junior employees and four of them were overseas workers. Further, despite a period of nearly two years since the

respondent was first provided with detailed information on how to rectify underpayment, only $10,590.54 has been paid to date by the respondent. Employees are still owed money. The penalties should be set at an amount that make it clear that failing to comply with minimum obligations will not be tolerated by the courts.

Conclusion and totality principle

51. I find that the respondent breached each of the provisions set out above. In assessing the appropriate penalties, I have had regard to the nature, scale and duration of the contraventions.

52. The parties accepted, and I agree, that the various breaches of particular kinds of requirements of the Certified Agreement, the Shop Employees Pay Scale and the Modern Award should be subject to the imposition of only one penalty. I have proceeded on this basis. Hence, penalties should be imposed in relation to only six contraventions, having regard to the fact that there was a single course of conduct with common elements straddling the contravention periods. The penalties imposed for each "*category*" of contravention may be seen in light of the fact that other grouped contraventions are not subject to separate penalties. It is appropriate that the applicant's concession in relation to the nature of the contraventions should be recognised in this way (cf *Fair Work Ombudsman v Land Choice Pty Ltd & Anor* [2009] FMCA 1255 at [112]).

53. The maximum penalty in the case of a corporation under both the WR Act and the FW Act is $33,000 for each contravention. The applicant proposed and I accept that in this case only six penalties should be imposed by virtue of grouping together the contraventions that resulted from a single decision in relation to a particular kind of entitlement.

54. Thus, I accept the applicant's submission that the respondent's failure to pay the minimum rates of pay to Kylie Emmett under the Certified Agreement, the Shop Employees Pay Scale and the Modern Award should be subject to one penalty, while the failure to pay her overtime should be the subject of a separate penalty.

55. I also accept that the failure to pay minimum rates of pay to the delivery drivers, including junior and adult delivery drivers, under the

Certified Agreement, the Transport Employees Pay Scale and the Modern Award should be reflected in the imposition of one penalty, having regard to the one decision by the respondent to pay the delivery drivers a flat rate.

56. I accept that one penalty should be imposed in respect of the one decision by the respondent to not pay any casual loading to the delivery drivers. One penalty should be imposed in relation to the failure to pay the special clothing allowance to all employees. The failure to pay Kylie Emmett the special clothing allowance should not be subject to a separate penalty, as in effect it was part of the same conduct as the contravention in relation to the other employees.

57. Finally one penalty should be imposed in respect of the failure to pay wages to Jake Harvey for the minimum shift duration.

58. The applicant sought the imposition of penalties in the low to low-mid range. The respondent contended that low range penalties were appropriate. In oral submissions each party acknowledged that the most serious contraventions were those that affected a number of employees over the entire period of the audit.

59. I have had regard to the evidence before me and the submissions of the parties. The most significant and central of the breaches by the respondent related to its failure to pay the correct minimum rates of pay to the employees. These breaches continued through the whole audit period and over the time different instruments were applicable. The rates paid did not increase during the audit period. As counsel for the respondent conceded, there were failures in its "*due diligence*" on taking over the business. The respondent continued to pay the drivers what Mr Stacey had earned when working as a driver for the previous operator of the business. However the rates of pay remained the same through all of the audit period. This was the most serious of the breaches. That should be reflected in the penalty. The failure to pay casual loadings to the delivery drivers was also an ongoing failure of some significance although it may be seen as initially reflecting a continuation of the payment previously made to Mr Stacey.

60. I accept that the breaches were the result of ignorance and a failure by the respondent to understand its obligations and to keep up with and

properly investigate its obligations over time in circumstances where the operators lacked prior experience in running a business. I also accept that the respondent has cooperated with the FWO in relation to the litigation, that it altered its payments when informed of the correct amounts and has made some (albeit limited and not as early or as consistent as should have been the case) repayments. I accept that it has done so in circumstances of some financial constraint. I accept that there is little need for specific deterrence.

61. However, in setting appropriate penalties I have borne in mind that the breaches represented significant underpayments to young and vulnerable employees. There is a need for general deterrence. The amount of the penalty should be mitigated by the lack of deliberateness, the cooperation, contrition and partial rectification by the respondent and the absence of evidence of any similar previous conduct by this small, family-run company in constrained financial circumstances. This is not a case in which it is sought that penalties be paid to affected employees in lieu of payment by the respondent of amounts by which they were underpaid. Rather the applicant seeks orders for both repayments to affected employees and the imposition of penalties.

62. In all the circumstances, bearing in mind the maximum penalty applicable, I am of the view that, overall, penalties at the low to low-mid range are appropriate. Some distinctions can be drawn in relation to the nature, extent and duration of the contraventions. The central failure to pay minimum rates of pay to delivery drivers over the whole period should be reflected in a penalty of $12,000. This was the most serious and on-going contravention. The failure to pay casual loadings to the delivery drivers is also of significance and continued through the whole audit period. It should also be subject to a penalty of $8,000.

63. The contraventions concerning the rates of pay paid to Kylie Emmett are of the same nature as those involving the delivery drivers but occurred in relation to a part-time employee and liability arose under different provisions. The penalty should reflect this and should be the sum of $5,000. An appropriate penalty for the failure to pay overtime rates to Kylie Emmett while the Certified Agreement was in effect is $2,000. The appropriate penalty for the failure to pay the special

clothing allowance to all the employees for the period from 1 January 2010 to 30 June 2010 is the sum of $2,000. Finally, the failure to provide the minimum engagement for casual employees to one employee, Jake Harvey, during the period 1 January 2010 to 30 June 2010 should be subject to a penalty of $1,000. This amounts to a total penalty of $30,000.

64. I have considered whether the aggregate of the penalties is an appropriate response to the conduct which led to the contraventions having regard to the need to ensure that it is not oppressive or crushing (see *Kelly v Fitzpatrick* and *Australian Ophthalmic Supplies*). In applying the totality principle, I have engaged in the "*instinctive synthesis*" approach adopted in *Australian Ophthalmic Supplies* (at [27], [55] and [78] and see *Markarian v The Queen* (2005) 228 CLR 357 at 378; [2005] HCA 25 per McHugh J).

65. Having regard to the totality principle, I have satisfied myself, taking into account all of the factors above, that the aggregate of the penalties in the amount of $30,000 is just and appropriate in all the circumstances of the case.

66. It is not in dispute that the penalties should be paid to the Commonwealth of Australia. Nor is it in dispute that an order should also be made that the respondent pay the total amounts underpaid to the employees which remain outstanding, with interest thereon, in accordance with s.722 of the WR Act and s.547 of the FW Act. In the absence of any contention to the contrary, interest should be calculated at the rates provided for under the Uniform Civil Procedure Rules (NSW) for pre-judgment interest (and see *Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd* (2002) 121 IR 250). I intend to give the parties liberty to apply if there is any dispute over the amounts of interest payable.

67. The only outstanding issue is the time for payment of penalties and any unpaid monies and interest to the employees. The applicant submitted that the court should order that such payments be made within 28 days of the date of the order for payment. The respondent sought 12 months to pay.

68. The respondent submitted that in circumstances where the directors of Stacborn were a husband and wife and had no source of income other than from the company, their efforts to repay money must be seen in context. It was contended that orders for the repayment of the money and for the payment of penalties should have regard to the financial position of the corporation and the controllers of the corporation in circumstances where the business operated by the corporation was a pizza delivery business in a small town. The business was said to have been on the market since March 2011. It has not been sold. It was submitted that it was only by the sale of the business that the respondent would have any serious prospect of paying penalties and repaying the money, other than in an ad hoc fashion from ongoing trading revenue. It was contended that the respondent needed a sufficient period of time either to sell the business or to raise the funds to meet the penalties and its repayment obligations. On this basis the respondent submitted that the orders should allow 12 months to pay the penalty and repayments on the basis that the respondent would continue to make ad hoc payments from trading revenue to reimburse employees as it had been doing to date.

69. The parties were given the opportunity to bring to the attention of the court any authorities addressing the specific issue of time to pay penalties or to make good underpayments. After the hearing the applicant provided the court with a list of authorities said to be of relevance in relation to the issue of time to pay.

70. Counsel for the respondent advised that he would not be filing any further list of authorities. As stated in *Lynch v Buckley Sawmills (*at 508) employers:

> *...must not be left under the impression that in times of financial difficulty they can breach an award made under the Act, either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed.*

71. Such a general principle is of some relevance in relation to the time allowed for payment. As to the claims that the respondent would have difficulties in paying penalties, as Wilcox CJ stated in relation to such a contention in *Printing and Kindred Industries Union and Others v*

Vista Paper Products Pty Limited and Another (1994) 127 ALR 673 at 688 that "*I do not think I should allow it to deflect me from imposing whatever penalties are otherwise appropriate*". Similarly, in *Cotis v Macpherson* [2007] FMCA 2060 (at [12]), Driver FM made the point that "*employers should not and cannot regard insolvency, either personal or corporate, as a refuge from their responsibilities*" (also see *Fair Work Ombudsman v Land Choice* at [124]-[130].)

72. I accept that the respondent's difficulty in paying a penalty (proceeding for present purposes on the basis of accepting the claims made from the bar table in that respect) should not prevent a court from imposing penalties that are otherwise appropriate. However, I consider that it is appropriate to allow the respondent some time to pay the penalties imposed and to reimburse the former employees, notwithstanding the limited information before the court. I took such an approach in *Fair Work Ombudsman v Land Choice* in relation to penalties imposed on a respondent. However a distinction can be drawn between the time for payment of penalties to the Commonwealth and the rather more pressing need for repayment of the amounts due to the employees.

73. On the evidence before the court, I propose to allow the respondent 12 months to pay the penalties imposed but, making due allowance for the time that the underpayments to the employees have been outstanding, the amounts that have been repaid since the contraventions were drawn to the attention of the respondent, the time that has passed and all the other circumstances of this case, I consider it appropriate to order that the repayments to the employees be made by 31 December 2012.

I certify that the preceding seventy-three (73) paragraphs are a true copy of the reasons for judgment of Barnes FM

Associate:

Date: 28 September 2012