FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v BENTO KINGS MEADOWS PTY LTD *[2013] FCCA 977*

INDUSTRIAL LAW – Penalty hearing – contravention of Fair Work Act – underpayment of wages – underpayment of wages – penalty rates – casual loading – failure to keep employee records and provide pay slips – statement of agreed facts – appropriate penalty.

Fair Work Act 2009 (Cth) ss.45, 323, 536, 539, 545, 546, 547, 557
Fair Work Regulations 2009
Evidence Act 1995 (Cth) s.191
Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012 (Cth)

Kelly v Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor [2010] FMCA 599
Ponzio v B & P Caelli Construction Pty Ltd (2007) 158 FCR 543
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70
Cotis v Macpherson (2007) 169 IR 310
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2) (1999) 94 IR 231
Workplace Ombudsman v Saya Cleaning Pty Ltd [2009] FMCA 38
McIver v Healey [2008] FCA 425
Gibbs v Mayor Councillors and Citizens of City of Altona (1992) 37 FCR 216
Lynch v Buckley Sawmills Pty Ltd (1985) 3 FCR 503
Printing and Kindred Industries Union & Ors v Vista Paper Products Pty Ltd (1994) 127 ALR 673
Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258
Fair Work Ombudsman v Foure Mile Pty Ltd & Anor [2013] FCCA 682
Stephen Gibbs v The Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357
Fair Work Ombudsman v Maclean Bay Pty Ltd (No.2) [2012] FCA 557

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	BENTO KINGS MEADOWS PTY LTD
File Number:	(P)LNG 51 of 2012
Judgment of:	Judge O'Sullivan
Hearing date:	26 July 2013
Date of Last Submission:	26 July 2013
Delivered at:	Melbourne
Delivered on:	1 August 2013

REPRESENTATION

Counsel for the Applicant:	Ms K. Wanless
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the Respondent:	Mr C. Green
Solicitors for the Respondent:	Page Seager Lawyers

ORDERS

THE COURT DECLARES:

(1) That Bento Kings Meadows Pty Ltd ("the respondent") contravened:

(a) section 45 of the *Fair Work Act 2009* (**FW Act**) by failing to pay:

(i) Warren;

(ii) Yong-Gang Li (Keen);

(iii) Mingyao Wu (Joy);

(iv) Max;

(v) Luyi Liu;

(vi) Chen Cui (Claire);

(vii) Haili Wang;

(viii) Yi Ling;

(ix) SoKoo Ko;

(x) Shun Zhang (Sue);

(xi) Shanki Ho;

(xii) Masabo Matsumoto; and

(xiii) Milton Lim

(collectively, the **Employees**) minimum wages for work performed on weekdays during the Relevant Period in accordance with clause 20.1 of the *Restaurant Industry Award 2010* [MA000119] (**Modern Award**);

(b) section 45 of the FW Act by failing to pay the Employees a 25% casual loading in addition to the minimum hourly wage for work performed on weekdays during the Relevant Period in accordance with clause 13.1 of the Modern Award;

(c) section 45 of the FW Act by failing to pay transitional penalty rates to the:

(i) Warren;

(ii) Max;

(iii) Luyi Liu;

(iv) Haili Wang;

(v) Chen Cui (Claire);

(vi) Yi Ling;

(vii) Sokoo Ko;

(viii) Shun Zhang (Sue);

(ix) Shanki Ho;

(x) Masabo Matsumoto; and

(xi) Milton Lim;

for work performed on weekends during the Relevant Period in accordance with clauses A.7.3 and 34.1 of the Modern Award;

(d) section 45 of the FW Act by failing to pay a transitional penalty rate to:

(i) Max;

(ii) Shun Zhang (Sue); and

(iii) Milton Lim;

for work performed between 10pm and midnight on weekdays during the Relevant Period in accordance with clauses A.7.3 and 34.2(a)(i) of the Modern Award;

(e) subsection 535(1) of the FW Act by failing to make or keep employee records in a legible form which is readily accessible to an inspector in accordance with regulation 3.31(1) of the *Fair Work Regulations 2009* (**Regulations**);

(f) subsection 535(1) of the FW Act by failing to make or keep sufficient employee records, including:

(i) the full name of the following employees:

A. Warren;

B. Max;

whether the Employee's employment was full-time, part-time, permanent, temporary or casual during the Relevant Period; and

(ii) the date on which each Employee's employment began;

(iii) in accordance with regulation 3.32 of the Regulations;

(g) subsection 535(1) of the FW Act by failing to make or keep sufficient employee records, including:

(i) the rate of remuneration paid to each of the Employees;

(ii) the net amounts paid to the Employees;

(iii) any deductions made from the amounts paid to the Employees; and

(iv) the details of the loadings and penalties payable to the Employees;

during the Relevant Period in accordance with regulation 3.33 of the Regulations; and

(h) subsection 536(1) of the FW Act by failing to give a pay slip to each of the Employees within on working day of paying an amount to the Employee in relation to the performance of work.

THE COURT ORDERS THAT:

2. The Respondent pay an aggregate penalty of $122,960.00 under subsection 539(2) of the FW Act in respect of the contraventions referred to in Order 1, within 6 months of the date of the order.

3. Under subsection 546(3)(a) of the FW Act that the penalty referred to in Order 2 above be paid to the Commonwealth.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

(P)LNG51 of 2012

FAIR WORK OMBUDSMAN
Applicant

And

BENTO KINGS MEADOWS PTY LTD
Respondent

REASONS FOR JUDGMENT

1. In many cases before this Court over the last number of years it has been repeatedly identified that there is a significant risk of underpayments and breaches of workplace legislation in the restaurant and hospitality industry where vulnerable employees such as foreign nationals on visas are employed.[1] This case is yet another example that the risk continues to exist.

2. These proceedings were commenced by the Fair Work Ombudsman ("the applicant") for declarations and other orders against Bento Kings Meadows Pty Ltd ("the respondent") for contraventions of the *Fair Work Act 2009* (Cth) ("the FW Act") and the *Fair Work Regulations 2009* ("the Regulations") alleged to have occurred between July and August 2011.

3. The respondent has since made certain admissions in relation to the contraventions of the FW Act and Regulations. As a result the

[1] see for e.g. *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In Liquidation) & Ors* [2013] FCCA 52; *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258; *Fair Work Ombudsman v Orwill Pty Ltd* [2011] FMCA 730; *Fair Work Ombudsman v Sanada Investments Pty Ltd* [2010] FMCA 401.

proceedings now concern the question of what penalties should be imposed for the admitted contraventions by the respondent. The parties however are not agreed on the penalties that should be imposed for the admitted contraventions by the respondent.

4. The applicant contends that the maximum penalty applicable in the particular circumstances for this matter is $231,000. However the applicant submits that an appropriate penalty in all the circumstances is between $104,280 and $134,640.

5. The respondent submits that the penalty sought by the applicant should be reduced as *inter alia* the respondent has cooperated, made admissions, accepted the wrong doing, expressed regret and taken steps to comply with its obligations. Beyond this the respondent made no submissions on a specific figure as to penalty.

6. The proceedings were commenced in December 2012. There were then orders by consent made on 7 February 2013. The matter was adjourned to 26 July 2013 for a penalty hearing.

7. On 9 May 2013 the parties filed a Statement of Agreed Facts ("S.O.A.F").[2] The applicant filed an outline of submissions on 24 May 2013. The respondent filed submissions on 5 July 2013. The applicant filed submission in reply on 19 July 2013.

The hearing

8. At the penalty hearing on 26 July 2013 the applicant, was represented by Ms Wanless, Solicitor. The respondent was represented by Mr Green, Solicitor.

9. At the penalty hearing the applicant relied on:

   a) statement of claim filed 18 December 2013 and marked Exhibit A1;

   b) S.O.A.F filed 9 May 2013 and marked Exhibit A2;

   c) affidavit of Lori Hillier filed 24 May 2013 and marked Exhibit A3;

[2] see s.191 *Evidence Act 1995* (Cth)

d) submissions in relation to penalty filed 5 July 2013 and marked Exhibit A4;

e) submissions in reply filed 19 July 2013 and marked Exhibit A5;

f) minute of proposed orders sought marked Exhibit A6; and

g) summary of contraventions marked exhibit A7.

10. At the penalty hearing the respondents relied on:

a) response filed 14 January 2013 and marked Exhibit R1;

b) affidavit of Kazuhiro Kojima filed 5 July 2013 and marked Exhibit R2;

c) affidavit of Zhicheng Zhang filed 5 July 2013 and marked Exhibit R3;

d) submissions filed 5 July 2013 and marked Exhibit R4; and

e) S.O.A.F filed 9 May 2013 and marked Exhibit A2.

Background

11. The respondent operated the Bento Kings Meadows restaurant (a Japanese restaurant) in Launceston from around July 2011.

12. The respondent recruited employees from an Asian community website, and employed mostly foreign nationals who spoke English as a second language, including some employees with limited English, students and visa holders. The employees performed food preparation, cooking, cleaning and customer service duties.

13. Employees were paid a set rate of pay for all hours worked. The respondent failed to pay to employees the correct minimum rates or casual loading, and the Saturday, Sunday and evening work penalties prescribed by the relevant fair work instrument. Employees were not issued with pay slips and appropriate records were not kept.

14. In August 2011 the applicant commenced an investigation that ultimately led to the commencement of these proceedings against the respondent.[3]

15. It is agreed that between 28 July 2011 and 30 August 2011 the respondent underpaid 13 casual employees a total of $9,171.11 and there have been multiple contraventions of the record keeping and payslip provisions of the FW Act and the Regulations.

The legal framework

16. These proceedings concern admitted contraventions of *inter alia* the FW Act (between July and August 2011) which are contraventions of civil remedy provisions of the FW Act.

17. The applicant is a Fair Work Inspector by force of section 701 of the FW Act and a person with standing under section 539 of the FW Act to commence these proceedings.

18. The respondent is and was a corporation for the purposes of the *Corporations Act 2001* (Cth) and covered by the FW Act.

19. Section 546 of the FW Act enables a Court to impose a penalty upon a person who has contravened a civil remedy provision.

20. Pursuant to subsections 539(2) and 546(2)(b) of the FW Act, the maximum penalty that may be imposed by this Court for contraventions of section 45 of the FW Act[4] by a body corporate is 300 penalty units.

21. Pursuant to subsections 539(2) and 546(2)(b) of the FW Act, the maximum penalty that may be imposed by this Court for contraventions of subsection 535(1) of the FW Act[5] and subsection 536(1) of the FW Act[6] by a body corporate is 150 penalty units.

22. Section 12 of the FW Act provides that *"penalty unit"* has the same meaning as in the *Crimes Act 1914* (Cth). Section 4AA of the *Crimes*

[3] See paragraphs 56-91 of S.O.A.F.
[4] Contravening a Modern Award
[5] Employer obligations in relation to employee records
[6] Employer obligations in relation to pay slips

Act 1914 defined *"penalty unit"* to be $110 at the time the admitted contraventions occurred.[7]

23. The maximum penalty that may be imposed by the Court on the Respondent in respect of each contravention of subsection 535(1) and 536(1) of the FW Act is $16,500.[8] The maximum penalty that may be imposed by the Court on the Respondent in respect of each contravention section 45 of the FW Act is $33,000.

24. Section 557(1) of the FW Act provides that where two or more breaches are committed by the same person, the Court should consider whether the breaches arose out of a course of conduct by the person, such as to be taken to constitute a single breach of the term.

Approach to penalty proceedings

25. The factors which may be taken into account is the assessment of penalty are well established. These weren't in dispute between the parties.[9] The factors relevant to the imposition of a penalty were summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, [26]-[59], as follows:

> *"a. the nature and extent of the conduct which led to the breaches;*
>
> *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 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;*

[7] see *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth) which amended the value of a penalty unit for offences after 28 December 2012.
[8] see para 15 of the applicant's submissions
[9] see para 32-34 of applicant's submissions and para 13-16 of respondents submissions.

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."

26. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14. In *Australian Ophthalmic Supplies Pty Ltd v Mc Alary-Smith* [2008] FCAFC 8 Buchanan J after referring to the decision in *Kelly v Fitzpatrick* (supra) said at [9]:

> *"9. Checklists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations…"*

27. In *Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor* [2010] FMCA 599 Driver FM summarised the approach the Court should follow in these sorts of proceedings at paragraphs 22 to 26 as follows:

> *"22. The first step for the Court is to identify the separate contraventions involved. Each breach of each separate obligation found in the AFPCS, the NAPSA is a separate contravention of a term of an applicable provision for the purposes of s.719.*[10]
>
> *23. However, s.719(2) provides for treating multiple breaches, involved in a course of conduct, as a single breach.*

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

> *24. Secondly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the respondent did.*[11] *This task is distinct from and in addition to the final application of the "totality principle".*[12]
>
> *25. Thirdly, the Court will then consider an appropriate penalty to impose in respect of each course of conduct, having regard to all of the circumstances of the case.*
>
> *26. Fourthly and finally, having fixed an appropriate penalty for each group of contraventions or course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches.*[13] *The Court should apply an "instinctive synthesis" in making this assessment.*[14] *This is what is known as an application of the 'totality principle'."*

Admitted contraventions

28. The S.O.A.F set out the admitted contraventions[15]. It was agreed for the purposes of assessing penalty there were seven different groups of contraventions.[16] Attachment A to these reasons sets out the summary of admitted contraventions and the maximising penalties. These can be further summarised as:

> *"a.* ***minimum wage contravention****, comprising the contravention of section 45 of the FW Act by failing to pay minimum wages to the Employees for work performed on weekdays during the Relevant Period in accordance with clause 20.1 of the Modern Award;*

---

11 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [46] (Graham J) (unreported, Full Court of the Federal Court of Australia, 20 February 2008, Gray, Graham and Buchanan JJ) (*Merringtons*).

12 *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [41]-[46] (Stone and Buchanan JJ) (unreported, Full Court of the Federal Court of Australia, 7 May 2008, Gyles, Stone and Buchanan JJ) (*Mornington Inn*).

13 see *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (*Kelly*); *Merringtons*, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).

14 *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).

15 S.O.A.F at paragraph 3.

16 see para 27-30 of applicant's submissions and para 2 of respondent's submissions.

b. ***casual loading contravention****, comprising the contravention of section 45 of the FW Act by failing to pay the Employees a 25% loading in addition to the minimum hourly rate of pay for work performed on weekdays during the Relevant Period in accordance with clause 13.1 of the Modern Award;*

c. ***Saturday work contravention****, comprising the contravention of section 45 of the FW Act by failing to pay 135% of the applicable minimum rate for work performed on Saturdays during the Relevant Period in accordance with clauses A.7.3 and 34.1 of the Modern Award;*

d. ***Sunday work contravention****, comprising the contravention of section 45 of the FW Act by failing to pay 145% of the applicable minimum rate for work performed on Sundays during the Relevant Period in accordance with clauses A.7.3 and 34.1 of the Modern Award;*

e. ***evening work contravention****, comprising the contravention of section 45 of the FW Act by failing to pay a transitional penalty rate for work between 10pm and midnight on weekdays during the Relevant Period in accordance with clauses A.7.3 and 34.2(a)(i) of the Modern Award;*

f. ***record keeping contravention****, comprising the contravention of:*

i. contravention of subsection 535(1) of the FW Act by failing to make or keep employee records in a legible form which is readily accessible to an inspector in accordance with regulation 3.31(1) of the FW Regulations;

ii. contravention of subsection 535(1) of the FW Act by failing to make or keep sufficient employee records, including the full name of 2 employees, whether the Employees' employment was full-time, part-time, permanent, temporary or casual, and the date on which each Employees' employment began in accordance with regulation 3.32 of the FW Regulations;

iii. contravention of subsection 535(1) of the FW Act by failing to make or keep sufficient employee records, including the rate of remuneration paid to each of the Employees, the net amounts paid to the Employees,

any deductions made from the amounts paid to the Employees and the details of the loadings and penalties payable to the Employees in accordance with regulation 3.33 of the FW Regulations;

g. ***pay slip contravention****, comprising the contravention of subsection 536(1) of the FW Act by failing to give a pay slip to the Employees within on working day of paying an amount to the Employee in relation to the performance of work between 28 July 2011 and 21 August 2011."*

Considerations

29. In submissions upon which it relied the applicant contended (and the respondent agreed) the relevant considerations when fixing penalties in this case include:

a) the nature and extent of the offending conduct;

b) the circumstances in which the conduct took place;

c) the nature and extent of any loss or damage;

d) any similar previous conduct;

e) whether the breaches were properly distinct or arose out of one course of conduct;

f) the size of the respondent's business;

g) the deliberateness of the breach;

h) the involvement of senior management;

i) the respondent's contrition, corrective action and cooperation with the enforcement authorities;

j) ensuring compliance with minimum standards; and

k) deterrence.

The nature and extent of the offending conduct

30. The applicant submitted:

"35. *The Parties have agreed that 13 Employees were underpaid a total of $9,171.11 [Kings Meadows SOAF p.38], as a result of the Respondent's failure to pay to pay the minimum rates, casual loading, and transitional Saturday, Sunday and evening work penalties prescribed by the Modern Award.*

36. *The underpayment contraventions occurred between 28 July 2011, when the Respondent commenced trading, and 30 August 2011, around the time the Office of the Applicant conducted an audit of the Respondent's compliance with its obligations as a national system employer.*

37. *The Directors of the Respondent had a business practice of paying the Employees a set rate of pay for all hours worked [Kings Meadows SOAF p.75b]. The set rates of pay failed to satisfy the minimum wage rate which applied to the Employees, let alone the casual loading or penalty rate entitlements that applied for Saturday, Sunday or evening work.*

38. *Some Employees (Warren and Yong-Gang Li (Keen)) were paid as little as $5 an hour for trial shifts [Kings Meadows SOAF p.24 (a) and (b)] and most of the Employees were paid just $8 an hour for part or all of the Relevant Period [Kings Meadows SOAF p.24].*

39. *This conduct represents a significant failure on the part of the Respondent to comply with the minimum employment obligations intended to provide a safety net for low paid workers.*

40. *The contraventions include a number of serious record keeping deficiencies, including the failure to make or keep a record of:*

    a. *the full name of 2 employees;*

    b. *whether each employee was full-time, part-time, permanent, temporary or casual;*

    c. *the date on which each employee's employment began;*

    d. *the rate of remuneration paid to each employee;*

    e. *the net amounts paid to the employees;*

    f. *any deductions made from the gross amounts paid to the employees;*

g. details of the loadings and penalty rates payable to the employees; and

h. along with a failure to keep records in a form easily accessible to an inspector [Kings Meadows SOAF p.43], which prolonged the assessment of the Respondents' compliance with their obligations.

41. The Respondent has made a rectification payment to the Collector of Public Monies in respect of one of the employees whose full name was not recorded. The Applicant submits that the failure to make or keep such a basic record in relation to an employee makes it more difficult to locate this employee to repay the amount owed as a result of the underpayment contraventions.

42. Additionally, the Respondent failed to issue any pay slips to the Employees between 30 July 2011 and 21 August 2011, as a result of which the Employees were denied proof of their employment and income during this period or the ability to check and seek advice about their entitlements.

43. The Respondent has admitted to multiple contraventions of the record keeping and payslip provisions of the FW Act and FW Regulations. The Applicant submits that such obligations play a pivotal role in monitoring compliance with the relevant industrial instruments. In support of this submission, the Applicant refers to the comments of Riethmuller FM in Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor *[2012] FMCA 258 at [67] (**Taj Palace**) with respect to the important role that pay slips play in ensuring any errors in wage payments can be quickly identified and rectified:*

> "Whilst the record keeping obligation with respect to pay slips only appears in the Regulations, its central importance in industrial matters cannot be underestimated. Proper pay slips allow employees to understand how their pay is calculated and therefore easily obtain advice. Pay slips provide the most practical check on false record keeping and underpayments, and allow for genuine mistakes or misunderstandings to quickly be identified. Without proper pay slips employees are significantly disempowered, creating a structure within which breaches of the industrial laws can easily be perpetrated."

44. *The Applicant also refers the Court to similar comments of Lucev FM in* Fair Work Ombudsman v Orwill Pty Ltd & Anor [2011] *FMCA 730 at [21] with regards to the importance of employee records in ensuring that workplace inspectors can easily assess compliance with minimum standards in industrial instruments:*

> "Manifestly, failure to make and maintain records in relation to employee entitlements, undermines the utility and effectiveness of workplace inspectors, and their ability to determine whether or not there has been compliance with minimum standards and industrial instruments, and the provision of effective means for investigation and enforcement of employee entitlements."

45. *The Applicant submits that the admitted contraventions represent a failure to provide basic and important conditions and entitlements under the FW Act. The purpose of this legislation is to provide a safety net of minimum entitlements for employees (s.3(b) of the FW Act). The legislation is also designed to provide an 'even playing field' for all employers with regard to employment costs. Contravention of these fundamental entitlements undermines the workplace relations regime as a whole and displays a disregard for the Respondent's statutory obligations. "*

31. The respondent submitted:

> *"17. The Respondent relied on its own experience when determining the wages of its employees but increased their wages as employees gained experience (Kings Meadows SOAF, p.74 and p.75).*
>
> *18. The Respondent acknowledges the seriousness of the contraventions in relation to pay slips and record keeping and agrees that recording keeping obligations are pivotal in monitoring compliance with the relevant industrial instruments."*

32. I accept the submission that the conduct involved here, both the underpayment and the serious record keeping deficiencies, represents a significant failure to comply with minimum employment obligations. The nature and extent of the conduct includes the failure to provide a

basic level of entitlements to what on any description would be described as vulnerable employees.

33. In *Fair Work Ombudsman v Go Yo Trading Pty Limited & Anor* [2012] FMCA865 at [15]-[16] it was said:

> *"15. Foreign nationals working in Australia on visas, be they 417 visas or 457 visas or some other form of visa, in my view, represent a particular class of employee who are potentially vulnerable to improper practices by their employer. The cases demonstrate that those characteristics mean that a particular employee concerned is of a vulnerable class: see, for example,* Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd *(2012) FMCA 258,* Fair Work Ombudsman v Orwill Pty Ltd *(2011) FMCA 730;* Fair Work Ombudsman v Sanada Investments Pty Ltd *[2010] FMCA 401 at [60]*.
>
> *16. It is important, in my view, that employees in such a potentially vulnerable position have their entitlements met, and that employers understand very clearly that such employees are not available for exploitation."*

34. In so far as the offending conduct concerned pay slips and employee records the applicant submitted this had made its investigation and establishing the entitlements of employees more difficult. The wisdom of the comments made in *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258 at [67] warrant repeating here:

> *"Whilst the record keeping obligation with respect to pay slips only appears in the Regulations, its central importance in industrial matters cannot be underestimated. Proper pay slips allow employees to understand how their pay is calculated and therefore easily obtain advice. Pay slips provide the most practical check on false record keeping and underpayments, and allow for genuine mistakes or misunderstandings to quickly be identified. Without proper pay slips employees are significantly disempowered, creating a structure within which breaches of the industrial laws can easily be perpetrated."*

Circumstances in which the conduct took place

35. The applicant submitted:

"*46. The Directors acknowledge that the Respondent had a practice of recruiting employees from www.youtas.com.au, an Asian community website, and employed mostly foreign nationals who spoke English as a second language, including some employees with limited English, students and visa holders [Kings Meadows SOAF p.9]. The FWO has previously found, and the Courts have observed, that it is not uncommon for these types of attributes to diminish a person's capacity to understand and enforce their workplace rights. In* Fair Work Ombudsman v Go Yo Trading Pty Limited & Anor *(Go Yo), Jarrett FM cited a number of authorities accepting the proposition that foreign nationals holding a visa fall into a class of vulnerable workers when he stated:*

> "Foreign nationals working in Australia on visas, be they 417 visas or 457 visas or some other form of visa, in my view, represent a particular class of employee who are potentially vulnerable to improper practices by their employer. The cases demonstrate that those characteristics mean that a particular employee concerned is of a vulnerable class: see, for example, *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd* (2012) FMCA 258, *Fair Work Ombudsman v Orwill Pty Ltd* (2011) FMCA 730; *Fair Work Ombudsman v Sanada Investments Pty Ltd* [2010] FMCA 401 at [60]."[17]

47. The Directors of the Respondent are both graduates of the University of Tasmania, with Mr Kojima completing a degree in business administration and tourism [Kings Meadows SOAF p.75(a)], and Mr Zhang completing an accounting degree [Kings Meadows SOAF p.74(a)].

48. As outlined above, the Directors also formed a Partnership which operated three other restaurants in Tasmania before the Respondent commenced operation, with the first restaurant commencing operation in or around October 2007. The Directors are presently subject to proceedings before this Court in relation to similar contraventions in relation to the businesses operated by the Partnership, and the Applicant submits that the inference is open that the conduct of the Respondent results from a continuation of the business practices employed by the Directors in the businesses operated by the Partnership.

[17] *Ibid* at [15].

49. The Mr Kojima has acknowledged having some awareness of minimum rates of pay [Kings Meadows SOAF p.59] and both Directors acknowledge being put on notice by their accountant that they were paying wages incorrectly [Kings Meadows SOAF p.58]. The Applicant submits that, despite this awareness, the Directors failed to take reasonable steps on behalf of the Respondent to ascertain what the applicable minimum rates were, or to pay such rates to the Employees, a basic obligation imposed on all employers under the national system. This failure is significant given the Directors had taken steps to implement a new business structure, in the form of the Respondent, to operate the business at Kings Meadows, but did not take the opportunity to review the obligations owed to the Employees.

50. The Respondent had an 'overarching responsibility'[18] as an employer to ensure compliance with employment laws, and it is the Applicant's submission that the Directors of the Respondent neglected this duty in favour of the pursuit of their own business interests.

51. This Court recently observed:

> *…it is incumbent upon employers to make all necessary enquiries to ascertain their employees' proper entitlements and pay their employees at the proper rates.[19]"*

36. The respondent submitted:

"19. When establishing their business, particularly when setting wages and conditions for employees, both Mr Kojima and Mr Zhang relied heavily upon their own experience and knowledge gained from working in the hospitality sector (Company SOAF, p.127(d) and (e) and p.128(b)), Affidavits of Kazuhiro Kojima and Zhicheng Zhang, 5 July 2013).

20. Mr Kojima and Mr Zhang arrived in Australia as students and were employed as students (Affidavit of Kazuhiro Kojima and Zhicheng Zhang, 5 July 2013).

21. In their previous employment both Mr Kojima and Mr Zhang were paid by cash or cheque and were not provided

[18] *FWO v Perfume Health Care Pty Ltd* [2012] FMCA 567 at [26]
[19] *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In Liquidation*) [2013] FCCA 52 at [46].

with payslips (Affidavit of Kazuhiro Kojima and Zhicheng Zhang, 5 July 2013).

22. At the time they commenced their business operations, neither Mr Kojima nor Mr Zhang were aware of correct rates of pay or the obligations of employers such as the requirements to keep time and wage records (Affidavits of Kazuhiro Kojima and Zhicheng Zhang, 5 July 2013).

23. Although both Mr Kojima and Mr Zhang have university qualifications, their courses did not teach them how to run a small business nor included information about wages and conditions.

24. Mr Kojima's course focused on strategies to run a business including how to market a business and human behaviour, in particular how consumers react to advertising and products (Affidavit of Kazuhiro Kojima, 5 July 2013).

25. Mr Zhang's course also did not include book keeping or record keeping requirements and instead focused on operational issues (Affidavit of Zhicheng Zhang, 5 July 2013)."

37. The applicant submitted in reply:

*"**C. CIRCUMSTANCES OF CONTRAVENTIONS***

12. The directors of the Respondent submit that they were not aware of the correct rates of pay or the requirements to keep time and wage records (paragraph 22 of Respondent's Submissions), although they have acknowledged being advised that they were not paying wages correctly and that minimum rates applied (paragraphs 58(c) and 59 of the Company SOAF).

13. To the extent that the directors of the Respondent lacked of knowledge of its precise obligations as an employer, the Applicant notes that (as is well established) ignorance of the law is no excuse.[20]

14. The Applicant refers to paragraphs 48 to 51 of the its submissions filed on 24 May 2013 and notes that the directors of the Respondent have acknowledged that they focussed on the expansion of the business at the expense of

[20] See *Fair Work Ombudsman v Access Embroidery (Australia) Pty Ltd & Anor* [2012] FMCA 835 at [41].

attending to employment obligations, and that the Respondent followed the employment they used in their other businesses (paragraphs 39 and 42 Zhang Affidavit and paragraphs 41 and 44 Kojima Affidavit).

15. Although the period in which the contraventions occurred is relatively short, this is a consequence of the audit investigation conducted by the Office of the Applicant shortly after the Respondent commenced operations, rather than being due to any changes in the conduct of the Respondent at its own initiative. The Applicant submits that the evidence indicates that the contraventions would likely have continued in the absence of intervention by the Applicant, which is a matter of serious concern.

16. As held by Mowbray FM in Flattery v The Italian Eatery t/as Zeffirelli's Pizza Restaurant[21] *at [95]:*

…a clear message needs to be sent to both the [employer] and the industry in general that underpayment of wages will not be tolerated.

17. The Respondent and employers generally must understand that they have an obligation to actively ascertain and comply with workplace laws as an integral part of the conduct of their business."

38. The submission made on behalf of the respondent effectively amounted to a plea of ignorance or a submission that the respondents statutory obligation were at least secondary to their focus on the expansion of the business. The Court must reiterate if a business engages employees they must receive all the minimum terms and conditions. Otherwise as was said in *Fair Work Ombudsman v Foure Mile Pty Ltd & Anor* [2013] FCCA 682:

> *"For the law to be otherwise would simply create a category of underpaid workers who were being exploited to subsidise inefficient or otherwise unprofitable business operations, or business start-up periods."*

Nature and extent of any loss or damage

39. The applicant submitted:

[21] (2007) 163 IR 14; [2007] FMCA 9.

> *"52. The Applicant submits that total amount of the underpayment, $9,171.11 is significant in a number of respects.*
>
> *53. The underpayment resulted from contraventions occurring in a period of approximately one month from 28 July 2011 to 30 August 2011, and is a very substantial underpayment in such a short period.*
>
> *54. The total underpayment represents over 54% of the Employee's total entitlements during this period (which amounted to $16,953.61 – see 'Total Entitlement' column in Attachment B to the Kings Meadows SOAF), meaning the Employees were paid only 46% of what they were owed during the Relevant Period. This is an exceptionally large underpayment to employees reliant on the minimum safety net comprised by Award entitlements.*
>
> *55. The average underpayment to each of the Employees during eth Relevant Period was just over $700, which is a significant amount during such a short time frame.*
>
> *56. The Respondents had the benefit of the amounts owed to the Employees for over a year until the underpayments were rectified between 10 August 2012 and 2 February 2013.*
>
> *57. While the underpayments relate to a short period, the Applicant submits that, based on the business practices implemented by the Directors and the history of their business operations, the conduct would have continued had it not been for the audit conducted by the Office of the Applicant shortly after the Respondent commenced operation."*

40. The respondent submitted:

> *"26. The Respondent accepts that the underpayment occurred and has accepted responsibility for the underpayment.*
>
> *27. The Respondent notes that whilst the period when the contraventions occurred was relatively short, comparatively the quantum of underpayment for their employees was significant."*

41. I accept, given the period over which they occurred the underpayments were significant.

Any similar previous conduct

42. The applicant submitted:

> *"58. The Applicant is not aware of any previous contraventions of workplace laws by the Respondent, but notes that similar proceedings are presently on foot against the Directors of the Respondent in respect of the businesses operated by the Partnership."*

43. The respondent submitted:

> *"28. There is no evidence, nor any suggestion, that the Respondent has previously been found by a Court to have engaged in similar conduct."*

44. It is correct, as the respondent submitted there was no evidence of the respondent having previously been found to have engaged in similar conduct.

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

45. The applicant submitted:

> *"59. In determining an appropriate penalty, the Court may take into account the fact that some of the underpayment contraventions arose out of a single course of conduct, such as the decision to pay each Employee a set hourly rate for all hours worked [Kings Meadows SOAF p.24 and 75(c)].*
>
> *60. Even if various contraventions arise from a single course of conduct, the Court is not obliged to treat the contraventions of different obligations as a single contravention attracting a maximum penalty of $33,000.*
>
> *61. The Respondent has had the benefit of section 557(1) of the FW Act, which treats multiple contraventions of a civil remedy provision as a single contravention where they arose out of a single course of conduct. Justice Gray in* Gibbs v The Mayor, Councillors and Citizens of the City of Altona *(1992) 37 FCR 216 at [233] explained the operation of the equivalent provision of the WR Act (later renumbered to subsection 719(2)) in the following terms:*

> "The object of s.178(2) appears to be that a party bound by an award and pursuing a course of conduct involving repeated acts or omissions, which would ordinarily be regarded as giving rise to a series of separate breaches, should not be punished separately for each of those breaches. If such a party has pursued a course of conduct which gives rise to breaches of several different obligations, there is no reason why it should be treated as immune in respect of its breach of one obligation, merely because it has acted in breach of another.

62. The Applicant submits that in light of the these comments, and in line with the recent decision of this Court in Garfield Berry Farm Pty Ltd & Anor *[2012] FMCA 103 at [28] that it would be "fundamentally at odds with our system of workplace entitlements to treat a breach of several obligations as if it were a breach of only one…".*

63. The Applicant submits that no discount should be afforded to the Respondent for the underpayment contraventions arising from the decision to pay the Employees a 'set' rate of pay, and it should not benefit by way of further grouping from its failure to afford the Employees their entitlements to casual loadings and penalty rates for Saturday, Sunday and evening work merely because the Respondent failed to pay each these entitlements.

64. The Applicant submits that the remaining contraventions, as set out in paragraph 28 above, are distinct and should be treated as such for the purposes of determining penalty."

46. The respondent submitted:

> *"29. The Respondent submits the breaches arose out of one course of conduct in that they all related to decisions made by Mr Kojima and Mr Zhang to set wages at a flat rate based upon the level of experience and competency of individual employees (Kings Meadows SOAF, p.74(d) and p.75(b)).*
>
> *30. Rates increased based upon an assessment of employees (Kings Meadows SOAF, p.74(e))*
>
> *31. There is a substantial overlap in contraventions and it is submitted this should be reflected in the penalties imposed."*

47. The applicant submitted in reply:

> *"**B. COURSE OF CONDUCT***
>
> *2. The Respondent submits that the contraventions arose out of one course of conduct "in that they all related to decisions made by Mr Kojima and Mr Zhang to set wages at a flat rate based on the experience and competency of individual employees" (paragraph 29 of the Respondent's Submissions).*
>
> *3. The Applicant submits that the characterisation of the contraventions as arising from a single course of conduct is incorrect for a number of reasons.*
>
> ***Record keeping and payslips***
>
> *4. Firstly, the record keeping and pay slip contraventions cannot be said to arise from the Respondent's decision to pay a flat rate of pay to the Employees (as defined in paragraph 8 of the Statement of Agreed Facts filed on 9 May 2013 (**Company SOAF**)).*
>
> *5. Rather, the record keeping and pay slip contraventions respectively arise from two separate and distinct courses of conduct:*
>
> *a. decisions made by the Respondent concerning what records would be made and how they would be kept; and*
>
> *b. the failure of the Respondent to issue payslips to employees prior to the pay period ending on 28 August 2011.*
>
> *6. Further to paragraphs 40 to 44 of the Applicant's submissions filed on 24 May 2013 and paragraph 0 above, the Applicant submits that the record keeping and pay slip contraventions are clearly district and cannot be said to overlap such that the Respondent would be punished twice for the same conduct. Rather, these contraventions respectively relate to the Respondent's failure to:*
>
> *a. keep sufficient employee records in an accessible form for compliance purposes; and*
>
> *b. issue payslips to employees to verify their income and hours worked.*

Underpayment contraventions

7. The Applicant submits that the underpayment contraventions are properly treated as five separate and distinct courses of conduct: minimum wage, casual loading, Saturday work, Sunday work, and evening work contraventions.

8. The Applicant refers to the submissions made in paragraphs 59 to 64 of the submissions filed on 24 May 2013, and the decision of Riley FM in Fair Work Ombudsman v Garfield Berry Farm Pty Ltd & Anor[22] *at [28]:*

> On one view, the decision to pay Mr McKay a flat and extremely low hourly rate could be regarded as a single course of conduct. However, that is to see the situation only from the second respondent's point of view and not from the industrial umpire's point of view. For a very long time in this country, industrial instruments have provided for wages to be calculated by reference to a variety of entitlements, including whether the hours worked were ordinary time, whether the employee was a casual and whether the employee had taken annual leave to which he or she was entitled. Each of those entitlements gives rise to a separate and distinct obligation on the part of the employer. A failure to comply with any of them exposes an employer to the risk of penalty. It would be fundamentally at odds with our system of workplace entitlements to treat a breach of several obligations as if it were a breach of only one.

9. The Respondent's conduct in paying the Employees below the applicable minimum rates of pay resulted in more than the mere technical contravention of different provisions. Rather, the Respondent denied the Employees a range of distinct entitlements (being minimum rates, casual loadings, Saturday work penalties, Sunday work penalties, and evening work penalties) which were collectively intended to comprise a minimum safety net for the Employees.

10. The Applicant submits that each of these obligations warrant separate recognition and that further grouping would give insufficient attention to the separate factual and legal character of these minimum obligations.[23] *The*

[22] [2012] FMCA 103 (unreported, Federal Magistrates' Court of Australia, 24 February 2012, Riley FM).
[23] See *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd and Stuart Ramsey* (No. 2) [2012] FCA 408 (unreported Federal Court of Australia, 20 April 2012, Buchanan J) at [2].

Applicant's approach to the contraventions already affords the Respondent the benefit of a significant reduction in the number of contraventions through the application of course of conduct and grouping principles.

11. In this regard, it is also noted that the Respondent accepts (at paragraph 12 of the Respondent's Submissions) the Applicant's submission that the obligations which were contravened can be grouped into eight[24] groups. This is consistent with the approach proposed by the Applicant in paragraph 28 of the Applicant's submissions filed on 24 May 2013, which set out seven groups of contraventions relating to minimum wages, causal loading, Saturday work, Sunday work, evening work, record keeping and pay slips, which the Applicant incorrectly referred to as being eight groups at the beginning of that paragraph."

48. I accept the submission made on behalf of the applicant on this issue. The difficulty with the respondent's submission on this factor is that it ignores the separate and distinct nature of the obligations in each of the seven grouped contraventions. The answer to the respondent's submissions is as Gray J said in *Gibbs v The Mayor, Councillors and Citizens of the City of Altona (1992)* 37 FCR 216 at 233:

> *"If a party has pursued a course of conduct which gives rise to breaches of several different obligations, there is no reason why it should be treated as immune in respect of its breach of one obligation, merely because it has acted in breach of another."*

The size of the respondent's business

49. The applicant submitted:

> *"65. The evidence indicates that the Respondent is a small business, although it should be noted that the Respondent is affiliated with the businesses operated by the Partnership comprised by the Directors.*
>
> *66. In any event, the Applicant submits that, regardless of the size of the business or its financial structures or position, an employer cannot be absolved of its legal responsibility to comply with the law in relation to the employment of its employees.*

[24] Note that this was a typographical error in the Applicant's submissions, seven groups are proposed.

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

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

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

> 'Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevance to a Court's consideration of penalty.'

69. *It is clear that the size of the business provides no excuse for non-compliance, and that penalties should be set by reference to the objective seriousness of the contravening conduct, at a level that will serve as a deterrent to others.*

70. *It is submitted that the Court should impose penalties which take into account the principles set out above."*

50. The respondent submitted:

"32. *Bento currently employs 21 employees (Affidavit of Kazuhiro Kojima, 5 July 2013) but at the time the contraventions occurred, there were approximately twice this number of employees. On this basis, the Respondent was a small employer.*

33. *The Respondent notes, as Tracey J stated in* Kelly v Fitzpatrick *at [28], and as was referred to with approval in* Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor *[2009] FMCA 38 at [26] that obligations to comply with*

workplace laws apply to all businesses, regardless of their size:

> No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur: When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction "must be imposed at a meaningful level": see *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd* [2001] ATPR 41-815 at [I3].”

51. The applicant submitted in reply:

> *“18. To the extent that the Respondent may seek to advance an argument that the penalties should be determined by reference to its financial position, the Applicant refers to the comments of Heerey J in Jordan v Mornington Inn Pty Ltd [2007] FCA 1384 at [99]:*
>
> > As to the respondent’s own financial position, however, in considering the size of a penalty, capacity to pay is of less relevance than the objective of general deterrence: Leahy (No 2) at [9]. In any event, to the extent that financial hardship might mitigate what would otherwise be an appropriate penalty, such an argument would need to be based on evidence.
>
> *19. The Zhang Affidavit annexes a BAS statement for the Respondent for the three month period from January to March 2013 (Annexure ZZ-2), the Applicant submits this is of little assistance in demonstrating the financial position of the Respondent or its profitability over time – either at the time of the contraventions or currently. The Respondent has been on notice of these proceedings for some time and has therefore had the opportunity to present any additional documents which may have clarified that position, for instance bank or financial statements.*
>
> *20. Accordingly, the Applicant submits that limited weight should be given to this evidence, which does not provide a full picture of the Respondents’ financial position and does not demonstrate any incapacity to pay penalties in this matter. Mr Zhang and Mr Kojima both depose to deriving income from the profits of the business (paragraph 59 Kojima Affidavit and paragraph 58 Zhang Affidavit).*

> *21. Further, as stated in Fair Work Ombudsman v Promoting U Pty Ltd & Anor:*[25]
>
> …Parliament has set significant penalties for the sort of contraventions that the Respondents engaged in and I do not think it is appropriate for the totality principle to operate simply to ensure that penalties are imposed in suitably insignificant amounts to meet the Respondents' capacity to pay."

52. The applicant and the respondent correctly submitted that regardless of its size the respondent was not absolved of its legal obligations in relation to its employees.

The deliberateness of the breach

53. The applicant submitted:

> *"71. The Directors of the Respondent have respectively obtained business administration and tourism (Mr Kojima) and accounting (Mr Zhang) degrees at the University of Tasmania [Kings Meadows SOAF p.75(a) and p.74(a)] and have acknowledged some awareness of the obligation to pay minimum wages and that they were told they were not paying employees correctly (see paragraph 0 above), yet they failed to take reasonable steps to review the Respondents obligations to its Employees until the Office of the Applicant commenced its investigation in August 2011.*
>
> *72. In acting in this way, the Applicant submits that the Respondent demonstrated a reckless or wilful disregard for its obligations to pay the Employees minimum entitlements in accordance with the law."*

54. The respondent submitted:

> *"34. As noted above, the breaches were the result of ignorance and a failure by Mr Kojima and Mr Zhang to properly understand their obligations and to investigate their obligations over time, in circumstances where they lacked prior experience in running a business (Affidavits of Kazuhiro Kojima and Zhicheng Zhang, 5 July 2013)."*

[25] [2012] FMCA 58 (unreported, Federal Magistrates' Court of Australia, 2 February 2012, Burchardt FM) at [57].

55. I reject the respondent's submissions on this factor. On the material before the Court the admitted contraventions evidence that the respondent displayed a reckless disregard for its obligations.

The involvement of senior management

56. The applicant submitted:

> *"73. As set out in paragraphs 7, 74 and 75 of the Kings Meadows SOAF, the Directors were jointly responsible for engaging staff on behalf of the Respondent and determining their rates of pay."*

57. The respondent submitted:

> *"35. Mr Kojima and Mr Zhang were responsible for day-to-day management, including the hiring of staff, the negotiation of pay rates and conditions with staff, ensuring compliance with Commonwealth workplace relations obligations and were in charge of the business (Affidavits of Kazuhiro Kojima and Zhicheng Zhang, 5 July 2013).*
>
> *36. It is not suggested that any other person was involved in the contraventions."*

58. As the submissions make clear this was not a large business. The owners of the respondent were closely involved in the contravening conduct. There is no indication they acted on their responsibility to ensure they complied with their obligations to employees.

The respondent's contrition, corrective action and cooperation with the enforcement authorities

59. The applicant submitted:

> *"Contrition, corrective action, co-operation with authorities*
>
> *91. This factor involves three related, yet separate elements. Each of them has resonance in this case.*
>
> *Contrition*
>
> *92. On 16 November 2012, the Respondent advised the Office of the Applicant that it was willing to apologise to each*

Employee affected by the contraventions [Kings Meadows SOAF p.85(a)], however the Applicant has not been provided with any evidence to confirm whether this occurred.

93. *The Applicant acknowledges that the Respondent made full admissions in relation to the contraventions at an early stage, demonstrating its acceptance of wrongdoing.*

Corrective action

94. *As noted above, the Respondent progressively rectified the underpayments to the Employees between 10 August 2012 and 2 February 2013 [Kings Meadows SOAF p.39].*

95. *From 22 August 2011, the Respondent:*

    a. *started issuing pay slips to employees; and*

    b. *increased the rate paid to two of the Employees to $17 an hour [Kings Meadows SOAF p.24 (b) and (m)], which remained insufficient to satisfy the minimum rate and casual loading for an introductory level employee ($15.51 + 25% = $19.38).*

96. *On 28 June 2012, the Office of the Applicant was advised that the Respondents had taken steps to ensure the requirements of the FW Act and Modern Award were met in respect of all existing employees. The Applicant has not been provided any evidence to verify the extent of the Respondent's current compliance.*

Co-operation

97. *The Respondent has generally co-operated with the Applicant during the course of the investigation and litigation, including by:*

    a. *both Directors participating in interviews during the investigation of this matter;*

    b. *taking steps to rectify the underpayments to the Employees prior to the commencement of these proceedings; and*

    c. *making full admissions formalised in the Kings Meadows SOAF.*

98. The Applicant acknowledges that these actions have reduced the resources and costs that would otherwise have been required in relation to a contested hearing as to the Respondent's liability.

99. The Applicant notes that where wrong-doers have co-operated and have also made admissions early in the course of an investigation or soon after the commencement of proceedings it is appropriate to allow a discount of penalty where the admissions indicate indicated an acceptance of wrongdoing and a suitable credible expression of regret, and/or a willingness to facilitate the course of justice.[26]*"*

60. The respondent submitted:

"37. The Respondent has accepted responsibility and have acknowledged the contraventions (Affidavit Kazuhiro Kojima, 5 July 2013).

38. In assessing the Respondent's cooperation with authorities, it is necessary to have regard to the circumstances of the investigation and the level of Respondent's compliance, which was very high.

39. The investigation was lengthy and involved interviews with Mr Kojima and Mr Zhang (Kings Meadows SOAF p.71).

40. Mr Kojima and Mr Zhang acknowledged responsibility for the breaches at the early stages of the investigation and were cooperative during the investigation.

41. All monies owed to employees have been repaid to the employees or paid to the Collector of Public Monies.

42. The Respondent's actions have considerably shortened and assisted the litigation process, and reduced costs to the public purse, by admitting liability and reaching agreement about the facts to be placed before the Court."

61. The applicant submitted in reply:

*"**E. CONTRITION – EXPRESSION OF REGRET***

23. Regarding the document annexed to the Affidavit of Kazuhiro Kojima as KK1, although this document appears prima facie to be an apology, Mr Kojima's affidavit does not

[26] *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at 74-76 per Stone and Buchanan JJ.

detail what this document has been used for or where it has been displayed (see paragraph 50 Kojima Affidavit). The document does not appear to be directed to the Employees who were impacted by the underpayments, nor do their affidavits make any direct apology to the Employees; they only express regret that they did not seek advice when establishing their businesses (paragraph 42 Kojima Affidavit and paragraph 40 Zhang Affidavit).

24. The Applicant notes that Annexure KK1 is dated 5 July 2013, the same date that the Respondent filed its penalty materials, so it is open to the Court to consider that this document has been created at this late stage for the purpose of seeking mitigation in penalty rather than out of genuine contrition. In the absence of evidence regarding the circumstances of this document, the Applicant submits that it ought not mitigate penalty."

62. I accept the admissions made by the respondent along with it's co-operation (with the investigation and since the commencement of these proceedings) should be taken into account.

Ensuring compliance with minimum standards

63. The applicant submitted:

"74. A fundamental object of the FW Act is to provide a guaranteed safety net of adequate minimum entitlements for employees.[27] This object has particular force for those employees who are vulnerable or in low income roles, and with respect to providing an 'even playing field' for all employers with regard to employment costs.

75. The substantial penalties set by the legislature for contraventions of the FW Act reinforce the importance placed on compliance with these minimum standards. The Applicant submits that the maintenance of this regime is particularly pertinent in a competitive service industry such as the restaurant industry, in which employment costs are such a significant aspect.

76. In this instance the Respondents failed to comply with many of its obligations to the Employees – thus depriving them of the benefit of the safety net. The reasonable extension of this

[27] FW Act, section 3(b).

is that the Respondent was financially advantaged in comparison with similar businesses which were paying their employees' legal entitlements.

77. Contraventions of these fundamental entitlements undermine the workplace relations regime as a whole.

78. Employers should be in no doubt that they have a positive obligation to ensure compliance with the obligations they owe to their employees under the law. Recently, in Fair Work Ombudsman v Maclean Bay Pty Ltd *(No 2)*[28] *Marshall J observed:*

> *"It is important to ensure that the protections provided by the Act to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected."* [29]

64. The respondent submitted:

> *"4. The Respondent agrees with the submissions made by the Applicant dated 24 May 2013 in relation to the legislative provisions concerning penalties."*

65. As was stated in the applicant's submissions (which I accept):

> *"74. A fundamental object of the FW Act is to provide a guaranteed safety net of adequate minimum entitlements for employees.*[30] *This object has particular force for those employees who are vulnerable or in low income roles, and with respect to providing an 'even playing field' for all employers with regard to employment costs.*
>
> *75. The substantial penalties set by the legislature for contraventions of the FW Act reinforce the importance placed on compliance with these minimum standards. The Applicant submits that the maintenance of this regime is particularly pertinent in a competitive service industry such as the restaurant industry, in which employment costs are such a significant aspect."*

66. This is a significant factor in this case.

---

[28] [2012] FCA 557.
[29] *Ibid* at [29].
[30] FW Act, section 3(b).

Deterrence

67. The applicant submitted:

> *"Specific and general deterrence*
>
> *79. It is well-established that the need for specific and general deterrence is a factor that is relevant to the imposition of a civil penalty. See for example, Mowbray FM in* Pangaea *at [26]-[59].*
>
> *Specific deterrence*
>
> *80. Gray J in* Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union *(2008) 171 FCR 357 observed at [37]:*
>
> *"Specific deterrence focuses on the party on whom the penalty is to be imposed and the likelihood of that party being involved in a similar breach in the future. Much will depend on the attitude expressed by that party as to things like remorse and steps taken to ensure that no future breach will occur".*
>
> *81. The Applicant acknowledges that the Respondent has accepted responsibility for the contraventions identified by the Applicant and taken steps to rectify these contraventions.*
>
> *82. It is relevant to note that however that the Respondent continues to operate, and the Applicant submits that a penalty needs to be imposed of sufficient quantum to make the:*
>
> *a. contravening conduct unprofitable; and*
>
> *b. prospect of any future contraventions commercially undesirable.*
>
> *83. The Respondent should be left in no doubt that the failure to ascertain or implement its obligations in respect of its employees will not be tolerated.*
>
> *General Deterrence*
>
> *84. The role of general deterrence in determining the appropriate penalty is illustrated by the comments of Lander J in* Ponzio v B & P Caelli Constructions Pty Ltd *(2007) 158 FCR 543, [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 it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: *R v Thompson* (1975) 11 SASR 217."

85. *Similarly in* CPSU v Telstra Corporation Limited *(2001) 108 IR 228 at 231 where Finkelstein J said:*

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

86. *The Applicant submits that general deterrence is important in the present case, particularly in view of the industry in which the Respondent operates – the restaurant industry.*

87. *The Federal Court has previously noted that the hospitality industry in which the Respondents operate is an industry notorious for non-compliance with the standards imposed by industrial instruments. It is also an industry in which enforcement of those standards has proved to be notoriously difficult.*[31] *Given these identified concerns, the Court should place weight on the need to deter other employers in the hospitality industry from contravening minimum obligations by imposing appropriate penalties in this case.*

88. *More recently this Court observed, in respect of the restaurant industry, that:*

[31] *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* (2008) 170 FCR 357 at [37] (Gray J).

> There is a significant risk of underpayments in the restaurant industry, and, as the employees in that industry are often vulnerable people, the prospect of detection is not great.[32]

89. The need for general deterrence in the industry is evidenced by the Directors' own admissions that the rates they paid the Employees by the Respondent were determined by reference to the Directors' experience in the industry and what other employers were paying [Kings Meadows SOAF p.74(d) and 75(b)], confirming serious compliance issues are present in the industry.

90. The Applicant submits that the law should mark its disapproval of the conduct engaged in by the Respondent and set a penalty which serves as a warning to others."[33]

68. The respondent submitted:

> "*43. General deterrence is of some significance in the present case involving, as this matter involves underpayments to employees.*
>
> *44. 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 likeminded 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 SASR217.

[32] *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In Liquidation*) [2013] FCCA 52 at [46].

[33] See paragraph [25] of *Kelly*, supra, and the cases cited therein. See also *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at 559-60 [93] (Lander J).

45. The Respondent notes the Applicant's argument that there is a need for general deterrence.

Specific Deterrence

46. The Respondent submits there is no need for specific deterrence. Mr Kojima and Mr Zhang promptly acknowledged the contraventions and have taken steps to remedy them when advised of the contraventions by the Applicant (Kings Meadows SOAF, p39).

47. Mr Kojima and Mr Zhang are remorseful and have acknowledged the contraventions to their staff and customers (Affidavit of Kazuhiro Kojima, 5 July 2013).

48. Mr Kojima and Mr Zhang have taken steps to ensure that the requirements of the FW Act and the Modern Award are met in respect of existing employees (Affidavits of Kazuhiro Kojima and Zhicheng Zhang, 5 July 2013).

49. Mr Kojima and Mr Zhang have sold Bento Devonport and are in the process of selling Wan, Bento Kings Meadows and Bento Box at Morty's."

69. In relation to specific deterrence, Gray J observed in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous* Union (2008) 171 FCR 357; (2008) 177 IR 243; [2008] FCAFC 170 at [37] that:

> *"Specific deterrence focuses on the party on whom the penalty is to be imposed and the likelihood of that party being involved in a similar breach in the future. Much will depend on the attitude expressed by that party as to things like remorse and steps taken to ensure that no future breach will occur."*

70. Contrary to the submissions made on behalf of the respondent there is the need for specific deterrence in this case to ensure that there is no likelihood the respondent will be involved in similar breaches in the future. I accept there is also a need for general deterrence and to ensure employers understand they must take steps to ensure correct employee entitlements are paid and statutory requirements are observed (see Tracey J in *Kelly v Fitzpatrick* [2007] FCA 1080 at paragraph [28]). Recently, Marshall J said in *Fair Work Ombudsman v Maclean Bay Pty Ltd (No.2)* [2012] FCA 557 at [29]:

"It is important to ensure that the protections provided by the Act to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected."

Appropriate penalties

71. The applicant in written submissions filed before the penalty hearing submitted:

"102. In consideration of the above, the Applicant submits that penalties within the following ranges be imposed on the Respondent:

a. a penalty between $23,100 and $29,700 (representing 70% to 90% of the maximum penalty) in respect of the:

i) minimum rate contravention identified in paragraph E.28(a) above; and

ii) casual loading contravention identified in paragraph E.28(b) above;

acknowledging the significant underpayment of these base level entitlements by the Respondents;

b. a penalty of between $19,800 and $26,400 (representing 60% to 80% of the maximum penalty) in respect of the:

(i) Saturday work contravention identified in paragraph E.28(c) above;

(ii) Sunday work contravention identified in paragraph E.28(d) above;

(iii) evening work contravention identified in paragraph E.28(e) above;

acknowledging the Respondents' failure to pay these minimum entitlements;

c. a penalty of between $11,500 and $14,850 (representing 70% to 90% of the maximum penalty) in respect of the record keeping contravention identified in paragraph E.28(f) above, acknowledging the Respondents' failure to make or keep basic records in

relation to the employment of the Employees in a manner readily accessible to an inspector; and

d. a penalty of between $13,200 and $14,850 (representing 80% to 90% of the maximum penalty) in respect of the pay slip contravention identified in paragraph E.28(g) above, acknowledging the Respondents' failure to issue payslips to the Employees prior to 22 August 2011;

as set out in the Summary Table, with the aggregate penalty to be discounted by 20% in acknowledgement of the Respondent's cooperation as outlined in paragraphs 85 to 93 above.

103. Following this approach, it is the Applicant's submission that the aggregate penalty for the Respondent should be within the range of ***$104,280*** *to* ***$134,640****.*

Totality principle and "instinctive synthesis" test

104. Having fixed an appropriate penalty for each contravention or group of contraventions, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches, and is not oppressive or crushing.[34]

105. The Applicant submits that whilst the penalty imposed must not be crushing or oppressive, it must nevertheless bear relativity to the seriousness of the conduct engaged in by the Respondents.

106. The Applicant further submits that imposing an aggregate penalty on each Respondent within the range proposed in paragraph 103 above would be an appropriate response to the contraventions in this matter.

72. In written submissions filed before the penalty hearing the respondent's position was:

"50. The penalties must be just and appropriate and not excessive per Australian Ophthalmic Supplies at [102] per Buchanan J for the total conduct involved (see Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70).

[34] *Kelly v Fitzpatrick* [2007] FCA 1080, [30]; *Merringtons* at [23] per Gray J, [71] per Graham J, [102] per Buchanan J.

51. Proceeding by "instinctive synthesis" (see Australian Ophthalmic Supplies at [27] per Gray J and Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25 at [37]) the Court should have regard to the overall conduct in question.

52. Having fixed the penalty for each contravention, the Respondent submits the proper approach is for the court to consider whether the aggregate penalty is appropriate for all contraventions as a whole[35].

53. The Respondent notes the Applicant submits that the court should not apply a further discount.

54. The Respondent submits that this matter is not a case where it is appropriate for the Court to not apply the totality principle."

73. The applicant in written submissions in reply contended:

> *"22. The Applicant accepts that the totality principle is a matter to which the Court may have regard in all matters involving the imposition of a penalty; in that the Court must take a final look at the penalty to be imposed, and determine whether it is appropriate in all the circumstances. One aspect of that is whether the proposed penalty would be crushing or oppressive, however such a consideration ought only be given weight where there is sufficient evidence before the court to demonstrate that the penalty would have such an effect. The Applicant submits that the Respondent's evidence does not establish this to be the case."*

74. The application of the totality principle is to ensure that any penalty imposed is not oppressive or crushing but appropriate in all the circumstances. The application of the totality principle *does not* mean the penalties arrived at before its application must be reduced. Any penalties imposed should reflect the circumstances and be just and appropriate.

[35] *Ponzio v B & P Caelli Constructions Pty Ltd and Ors* (2007) 158 FCR 543.

Conclusion

75. As noted earlier the applicant submitted that penalties in the mid to high range were appropriate and maintained those were as set out in Exhibit A7 should be imposed. In written submissions the respondent made no submissions as to a particular figure on penalties. In submissions before the Court this position didn't change greatly beyond the acknowledgement on behalf of the respondent that penalties in the mid range were appropriate.

76. In setting appropriate penalties I have borne in mind the nature of admitted contraventions. The admitted contraventions are serious. The respondent underpaid employees as compared to their basic entitlements under the FW Act and failed to comply with minimum record keeping and pay slip obligations. Given the matters set out above there is a need for both specific and general deterrence.

77. In all the circumstances, bearing in mind the maximum penalties applicable, I am of the view that the appropriate penalties for the respondent is:

    a) $29,000.00 for failure to pay minimum wages.

    b) $29,000.00 for failure to pay casual loading.

    c) $23,100.00 for failure to pay transitional penalty rates for Saturdays.

    d) $23,100.00 for failure to pay transitional penalty rates for Sundays.

    e) $23,100.00 for failure to pay transitional penalty rates for evening work.

    f) $13,200.00 for record keeping breaches.

    g) $13,200.00 for pay slip breaches.

78. However, taking into account, amongst other things, the co-operation of the respondent and the resolution of the matter by way of penalty hearing and in all the circumstances of the case there could be a further discount of 20% for this.

79. Given this and in light of the S.O.A.F and submissions of the applicant I consider that the individual penalties for the contraventions referred to at paragraph 77 above should be $23,200.00 for the contraventions at paragraphs 77(a) and (b), $18,480.00 for the contraventions at paragraphs 77(c), (d) and (e) and $10,560.00 for the contraventions at paragraphs 77(f) and (g). This results in a total penalty of $122,960.00 or 62%[36] of the maximum for the admitted contraventions by the respondent. Those penalties are in the aggregate not crushing and an appropriate response to the offending conduct.

80. Therefore, as the Court:

- is directed by the relevant authorities to consider what is appropriate in all the circumstances of this case;[37] and
- in its discretion in relation to penalty is not fettered by a checklist of mandatory criteria;[38] and
- notes the parties have filed the S.O.A.F and agreed on a timetable for payment of any penalty; and
- is satisfied the individual and aggregate penalty for the whole of the contravening conduct is appropriate;

there will be declarations[39] and orders as set out at the beginning of these reasons for decision.

I certify that the preceding eighty (80) paragraphs are a true copy of the reasons for judgment of Judge O'Sullivan

Date: 1 August 2013

[36] As a percentage of the maximum for the agreed contraventions as grouped
[37] see *Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2)* (1999) 94 IR 231
[38] see *Australian Ophthalmic Supplies Pty Limited v McAlary-Smith* [2008] FCAFC 8
[39] for the same reasons as in *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In Liquidation) & Ors* [2013] FCCA 52 at 14

Attachment A: Summary of contraventions and proposed penalties - Bento Kings Meadows Pty Ltd

Provision	Nature of contravention	Maximum penalty	Grouping	Maximum penalty after grouping	Proposed penalty range (% of maximum)		Proposed minimum penalty	Proposed maximum penalty	Employees affected	Loss suffered
					From	To				
s.45 FW Act - MA cl.20.1	Failure to pay minimum wages	$ 33,000.00	Minimum wage	$ 33,000.00	70%	90%	$ 23,100.00	$ 29,700.00	13	$ 3,934.12
s.45 FW Act - MA cl.13.1	Failure to pay casual loading	$ 33,000.00	Casual loading	$ 33,000.00	70%	90%	$ 23,100.00	$ 29,700.00	13	
s.45 FW Act - MA cl.A.7.3 & 34.1	Failure to pay transitional penalty rates - Saturday work	$ 33,000.00	Saturday wok	$ 33,000.00	60%	80%	$ 19,800.00	$ 26,400.00	10	$ 2,605.39
s.45 FW Act - MA cl.A.7.3 & 34.1	Failure to pay transitional penalty rates - Sunday work	$ 33,000.00	Sunday wok	$ 33,000.00	60%	80%	$ 19,800.00	$ 26,400.00	6	$ 2,535.03
s.45 FW Act - MA cl.A.7.3 & 34.2(a)(i)	Failure to pay transitional penalty rates - evening work	$ 33,000.00	Evening work	$ 33,000.00	60%	80%	$ 19,800.00	$ 26,400.00	3	$ 96.57
s.535(1) FW Act - regulation 3.31(1) FW Regulations	Failure to make or keep records in legible form readily accessible to an inspector	$ 16,500.00	Record keeping	$ 16,500.00	70%	90%	$ 11,550.00	$ 14,850.00		
s.535(1) FW Act - regulation 3.32 FW Regulations	Failure to make or keep sufficient records (full employee name x 2), type of employment, date commenced)	$ 16,500.00								
s.535(1) FW Act - regulation 3.33 FW Regulations	Failure to make or keep sufficient records (rate of remuneration, net amounts paid, any deductions, loadings and penalties payable)	$ 16,500.00								
s.536(1) FW Act	Failure to give employees a pay slip within 1 working day of payment	$$ 16,500.00	Pay slips	$ 16,500.00	80%	90%	$ 13,200.00	$ 14,850.00	13	
		$ 231,000.00		**$ 198,000.00**			**$ 130,350.00**	**$ 168,300.00**		**$ 9,171.11**
				20% discount applied for full admissions			**$ 104,280.00**	**$ 134,640.00**		

MA = *Restaurant Industry Award 2010* [MA000119]