FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v KAZUHIRO KOJIMA & ANOR *[2013] FCCA 976*

INDUSTRIAL LAW – Penalty hearing – contravention of Fair Work Act – underpayment of wages – penalty rates – casual loadings – failure to keep records or 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 (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)
Fair Work Regulations 2009 (Cth)
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
Stephen Gibbs v The Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216
Fair Work Ombudsman v Go Yo Trading Pty Limited & Anor [2012] FMCA 865
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
First Respondents:	KAZUHIRO KOJIMA
Second Respondents:	ZHICHENG ZHANG
File Number:	(P)LNG50 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 first and Second Respondents:	Mr C. Green
Solicitors for the first and Second Respondents:	Page Seager Lawyers

ORDERS

THE COURT DECLARES THAT:

(1) Kazuhiro Kojima ("the first respondent") and Zhicheng Zhang ("the second respondent") contravened:

(a) sub-item 4A(1) of Schedule 16 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**)from 1 January 2010 to 31 December 2010 by failing to pay:

(i) Ivy;

(ii) Masako Matsumoto'

(iii) Ching Wen Tien (Cody);

(iv) Michiru Kojima;

(v) Megumi Yamagishi;

(vi) Ernest;

(vii) Ric;

(viii) Clark;

(ix) Isaac;

(x) Audi;

(xi) Minori Mori (Mino);

(xii) Yoo Soo Eung (Soon);

(xiii) Naiying Ning (Naing);

(xiv) Peddy; and

(xv) Melvin Lim Chih Chun;

minimum hourly rates of pay in accordance with clause 8 of the *Restaurant Keepers Award* (Tas) [RA170086] (**Division 2B Award**);

(b) sub-item 4A(1) of Schedule 16 to the Transitional Act from 1 January 2010 to 31 December 2010 by failing to pay:

(i) Ivy;

(ii) Masako Matsumoto;

(iii) Michiru Kojima;

(iv) Megumi Yamagishi;

(v) Ernest;

(vi) Ric;

(vii) Clark;

(viii) Isaac;

(ix) Audi;

(x) Minori Mori (Mino);

(xi) Yoo Soo Eung (Soon);

(xii) Naiying Ning (Naing);

(xiii) Peddy;

(xiv) Melvin Lim Chih Chun; and

(xv) Charlie;

a 25% casual loading in addition to the minimum hourly rate of pay for work performed on weekdays in accordance with clause 14(a)(i) of the Division 2B Award;

(c) sub-item 4A(1) of Schedule 16 to the Transitional Act from 1 January 2010 to 31 December 2010 by failing to pay Ivy a 50% loading in addition to the minimum hourly rate of pay for work performed on Saturdays in accordance with clause 14(a)(ii) of the Division 2B Award;

(d) sub-item 4A(1) of Schedule 16 to the Transitional Act from 1 January 2010 to 31 December 2010 by failing to pay Ivy and Megumi Yamagishi a 75% loading in addition to the minimum hourly rate of pay for work performed on Sundays in accordance with clause 14(a)(iii) of the Division 2B Award;

(e) sub-item 4A(1) of Schedule 16 to the Transitional Act between 1 January 2010 and 31 December 2010 by failing to pay Ivy and Megumi Yamagishi a 150% loading in addition to the minimum

hourly rate of pay for work performed on a public holiday in accordance with clause 14(a)(iv) of the Division 2B Award;

(f) sub-item 4A(1) of Schedule 16 to the Transitional Act from 1 January 2010 to 31 December 2010 by failing to pay Ivy an additional amount for work performed between 7pm and 7am on weekdays in accordance with clause 24(g) of the Division 2B Award;

(g) section 45 of the *Fair Work Act 2009* (**FW Act**) from 1 January 2011 until the end of the pay period commencing before 1 February 2011 by failing to pay:

(i) Shanki Ho;

(ii) Ivy;

(iii) Suguru Arakawa;

(iv) Masako Matsumoto;

(v) Ching Wen Tien (Cody);

(vi) Michiru Kojima;

(vii) Ernest;

(viii) Isaac;

(ix) Audi;

(x) Minori Mori (Mino);

(xi) Yoo Soo Eung (Soon);

(xii) Naiying Ning (Naing); and

(xiii) Peddy;

minimum hourly rates of pay in accordance with clause A.8.2 of the *Restaurant Industry Award 2010* [MA000119] (**Modern Award**) and clause 8 of the Division 2B Award;

(h) section 45 of the FW Act from 1 January 2011 until the end of the pay period commencing before 1 February 2011 by failing to pay:

(i) Shanki Ho;

(ii) Ivy;

(iii) Suguru Arakawa;

(iv) Masako Matsumoto;

(v) Michiru Kojima;

(vi) Ernest;

(vii) Isaac;

(viii) Audi;

(ix) Minori Mori (Mino);

(x) Yoo Soo Eung (Soon);

(xi) Naiying Ning (Naing);

(xii) Peddy; and

(xiii) Charlie;

a 25% casual loading in addition to the minimum hourly rate of pay for work performed on weekdays in accordance with clause A.8.2 of the Modern Award and clause 14(a)(i) of the Division 2B Award;

(i) section 45 of the FW Act from 1 January 2011 until the end of the pay period commencing before 1 February 2011 by failing to pay:

(i) Shanki Ho;

(ii) Suguru Arakawa; and

(iii) Masako Matsumoto;

a 50% loading in addition to the minimum hourly rate of pay for work performed on Saturdays in accordance with clause A.8.2 of the Modern Award and clause 14(a)(ii) of the Division 2B Award;

(j) section 45 of the FW Act from 1 January 2011 until the end of the pay period commencing before 1 February 2011 by failing to pay:

(i) Shanki Ho;

(ii) Suguru Arakawa; and

(iii) Masako Matsumoto;

a 75% loading in addition to the minimum hourly rate of pay for work performed on Sundays during in accordance with clause

A.8.2 of the Modern Award and clause 14(a)(iii) of the Division 2B Award;

(k) section 45 of the FW Act between 1 January 2011 and the end of the pay period commencing before 1 February 2011 by failing to pay Suguru Arakawa a 150% loading in addition to the minimum hourly rate of pay for work performed on a public holiday in accordance with clause A.8.2 of the Modern Award and clause 14(a)(iv) of the Div 2B Award;

(l) section 45 of the FW Act from 1 January 2011 until the end of the pay period commencing before 1 February 2011 by failing to pay:

(i) Shanki Ho;

(ii) Ivy;

(iii) Suguru Arakawa; and

(iv) Masako Matsumoto;

a penalty rate for time worked between 7pm and 7am on weekdays in accordance with clause A.8.2 of the Modern Award and clause 24(g) of the Division 2B Award;

(m) section 45 of the FW Act between the first full pay period commencing on or after 1 February 2011 and 23 September 2011 by failing to pay:

(i) SK;

(ii) Shanki Ho;

(iii) Yuta Kodo;

(iv) Chika Im Evans;

(v) Ivy;

(vi) CK;

(vii) Suguru Arakawa;

(viii) Masako Matsumoto;

(ix) Ching Wen Tien (Cody);

(x) Yoko Jones;

(xi) Erina Maruyama;

(xii) Michiru Kojima;

(xiii) Hideharu Nakano;

(xiv) Ernest;

(xv) Isaac;

(xvi) Audi;

(xvii) Jin;

(xviii) Ronan;

(xix) Michael;

(xx) Zihan Zhang (Meggie);

(xxi) Sihui Wu (Betty);

(xxii) Rick;

(xxiii) Leo;

(xxiv) Minori Mori (Mino);

(xxv) Jun Seo Kang;

(xxvi) Yoo Soo Eung (Soon);

(xxvii) Tina;

(xxviii) Peddy;

(xxix) Han Gao;

(xxx) Sabrina Chen;

(xxxi) Hiro; and

(xxxii) Kate;

minimum wages for work performed on weekdays in accordance with clause 20.1 of the Modern Award;

(n) section 45 of the FW Act from 12 July 2011 to 23 September 2011 by failing to pay Mana Nashano a transitional minimum wage in accordance with clause A.3.5 of the Modern Award;

(o) section 45 of the FW Act between the first full pay period commencing on or after 1 February 2011 and 23 September 2011 by failing to pay:

(i) SK;

(ii) Shanki Ho;

(iii) Yuta Kodo;

(iv) Chika Im Evans;

(v) Ivy;

(vi) CK;

(vii) Suguru Arakawa;

(viii) Masako Matsumoto;

(ix) Yoko Jones;

(x) Erina Maruyama;

(xi) Michiru Kojima;

(xii) Hideharu Nakano;

(xiii) Ernest;

(xiv) Isaac;

(xv) Audi;

(xvi) Jin;

(xvii) Ronan;

(xviii) Michael;

(xix) Zihan Zhang (Meggie);

(xx) Sihui Wu (Betty);

(xxi) Rick;

(xxii) Leo;

(xxiii) Minori Mori (Mino);

(xxiv) Jun Seo Kang;

(xxv) Yoo Soo Eung (Soon);

(xxvi) Tina;

(xxvii) Peddy;

(xxviii) Han Gao;

(xxix) Sabrina Chen;

(xxx) Hiro;

(xxxi) Kate;

(xxxii) Mana Nishano; and

(xxxiii) Charlie;

a 25% casual loading in addition to the minimum hourly wage for work performed on weekdays in accordance with clause 13.1 of the Modern Award;

(p) section 45 of the FW Act between the first full pay period commencing on or after 1 February 2011 and 23 September 2011 by failing to pay:

(i) SK;

(ii) Shanki Ho;

(iii) Yuta Kodo;

(iv) Ivy;

(v) CK;

(vi) Suguru Arakawa;

(vii) Masako Matsumoto;

(viii) Erina Maruyama;

(ix) Michiru Kojima; and

(x) Mana Nishano;

penalty rates for worked performed on Saturdays, Sundays and public holidays in accordance with clause 34.1 of the Modern Award;

(q) section 45 of the FW Act between the first full pay period commencing on or after 1 February 2011 and 23 September 2011 by failing to pay:

(i) SK;

(ii) Shanki Ho;

(iii) Yuta Kodo;

(iv) Chika Im Evans;

(v) Ivy;

(vi) CK;

(vii) Suguru Arakawa;

(viii) Masako Matsumoto;

(ix) Mana Nishano; and

(x) Yoko Jones;

a transitional penalty rate for work performed between 7pm and midnight on weekdays in accordance with clause A.6.4 of the Modern Award and clause 25(g) of the Notional Agreement Preserving State Awards derived from the *Restaurant Keepers Award* (Tas) [RA170086];

(r) section 45 of the FW Act between the first full pay period commencing on or after 1 February 2011 and 23 September 2011 by failing to pay:

(i) SK;

(ii) Shanki Ho;

(iii) Yuta Kodo;

(iv) Ivy;

(v) CK;

(vi) Suguru Arakawa; and

(vii) Masako Matsumoto;

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

(s) subsection 535(1) of the FW Act between 1 January 2010 and 21 August 2011 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**) Regulations;

(t) 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) SK;

(b) Ivy;

(c) CK;

(d) Ernest;

(e) Ric;

(f) Clark;

(g) Charlie;

(h) Isaac;

(i) Audi;

(j) Jin;

(k) Ronan;

(l) Michael;

(m) Rick;

(n) Leo;

(o) Tina;

(p) Peddy;

(q) Hiro; and

(r) Kate.

(ii) whether each of the following employees' employment was full-time, part-time, permanent, temporary or casual during the Relevant Period:

(a) SK;

(b) Shanki Ho;

(c) Yuta Kodo;

(d) Chika Im Evans;

(e) Ivy;

(f) CK;

(g) Suguru Arakawa;

(h) Masako Matsumoto;

(i) Ching Wen Tien (Cody);

(j) Mana Nishano;

(k) Yoko Jones;

(l) Erina Maruyama;

(m) Michiru Kojima;

(n) Megumi Yamagishi;

(o) Hideharu Nakano;

(p) Ernest;

(q) Ric;

(r) Clark;

(s) Charlie;

(t) Isaac;

(u) Audi;

(v) Jin;

(w) Ronan;

(x) Michael;

(y) Zihan Zhang (Meggie);

(z) Sihui Wu (Betty);

(aa) Rick;

(bb) Leo;

(cc) Minori Mori (Mino);

(dd) Jun Seo Kang;

(ee) Yoo Soo Eung (Soon);

(ff) Tina;

(gg) Naiying Ning (Naing);

(hh) Melvin Lim Chih Chun;

(ii) Peddy;

(jj) Han Gao;

(kk) Sabrina Chen;

(ll) Hiro; and

(mm) Kate;

(collectively, the **Employees**)

the date on which each Employees' employment began;

in accordance with regulation 3.32 of the Regulations;

(u) subsection 535(1) of the FW Act between 1 January 2010 and 21 August 2011 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;

(iv) the hours worked each day by the following casual employees:

a) Ernest;

b) Ric;

c) Clark;

d) Charlie;

e) Isaac;

f) Audi;

g) Jin;

h) Ronan;

i) Michael;

j) Zihan Zhang (Meggie);

k) Sihui Wu (Betty)

l) Minori Mori (Mino);

m) Jun Seo Kang;

n) Yoo Soo Eung (Soon);

o) Tina;

p) Naiying Ning (Naing);

q) Melvin Lim Chih Chun;

r) Peddy;

s) Han Gao;

t) Sabrina Chen

u) Hiro; and

v) Kate;

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

(vi) in accordance with regulation 3.33 of the Regulations; and

(v) subsection 536(1) of the FW Act between 1 January 2010 and 21 August 2011 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 First Respondent pay an aggregate penalty of $27,984.00 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) The Second Respondent pay an aggregate penalty of $27,984.00 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.

(4) Under subsection 546(3)(a) of the FW Act that the penalties referred to in Orders 2 and 3 be paid to the Commonwealth.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

(P)LNG50 of 2012

FAIR WORK OMBUDSMAN
Applicant

And

KAZUHIRO KOJIMA
First Respondent

And

ZHICHENG ZHANG
Second 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 Kazuhiro Kojima and Zhicheng Zhang ("the respondents") for contraventions of *inter alia* the *Fair Work Act 2009* (Cth) ("the FW Act").

[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.

3. The respondents have since made certain admissions in relation to the allegations against them. As a result the proceedings now concern the question of what penalties should be imposed for the admitted contraventions by the respondents of the FW Act and associated legislation. The parties are however not agreed on the penalties that should be imposed for the admitted contraventions by the respondents.

4. The applicant contends that the maximum penalty applicable in the particular circumstances for this matter is a penalty of $145,200.00 on each respondent. However the applicant submits that an appropriate penalty in all the circumstances is a penalty of between $24,024.00 and $31,152.00 on each respondent.

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

6. The proceedings were commenced in December 2012. There were orders by consent made on 7 February 2013 and 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 respondents filed submissions on 5 July 2013. The applicant filed submissions 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 respondents were 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;

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

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

d) submissions in relation to Penalty filed 8 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) submission filed 5 July 2013 and marked Exhibit R4; and

e) statement of Agreed Facts filed 9 May 2013 and marked Exhibit A2.

Background

11. The respondents operated "*Bento Box"* restaurants (a Japanese restaurant) in Launceston and Devonport and the Wan Japanese Restaurant in Launceston.

12. The respondents commenced operating their first restaurant (Bento Launceston) in or around October 2007, and a second restaurant (Wan) in Launceston from February 2009. The respondents commenced operating a third restaurant (Bento Devonport) from on or around 16 August 2010.

13. The respondents employed at least 39 (mostly casual) employees between 1 January 2010 and 23 September 2011 at the three restaurants. The respondents 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.

14. During the abovementioned period the respondents adopted a practice of paying employees a set rate of pay for all hours worked (for some as little as $5 an hour for trial shifts) and many employees were paid just $10 an hour for part or all of their period of employment.

15. In 2011 the applicant commenced an investigation that ultimately led to the commencement of these proceedings against the respondents.

16. It is agreed between 2010 and 2011, 39 employees were underpaid a total of $96,567.08 as a result of the respondents' failure to pay to pay the minimum rates, casual loading, Saturday, Sunday, public holiday and evening work penalties prescribed by the relevant industrial and fair work instruments. The underpayments to individual employees varied between approximately $90 to over $12,000, with the underpayments averaging approximately $2,475 per employee.

17. It is also agreed that there have been multiple contraventions by the respondent's of the record keeping and payslip provisions of the FW Act and FW Regulations.

The legal framework

18. These proceedings concern admitted contraventions of *inter alia* the FW Act which it is agreed occurred between January 2010 and September 2011 and are contraventions of civil remedy provisions of the FW Act and associated legislation.

19. During that period the employment of employees by the respondents was regulated by the FW Act, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* ("the Transitional Act") along with a transitional and modern award.

20. The applicant is a "*Fair Work Inspector"* pursuant to s.701 of the FW Act and can bring proceedings for contravention of civil remedy provisions of the FW Act.

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

22. Pursuant to subsections 539(2) and 546(2)(a) of the FW Act and item 16(1) of Schedule 16 to the Transitional Act, the maximum penalty that may be imposed by this Court for contraventions of item 4A(1) of Schedule 16 to the Transitional Act[3] and section 45 of the FW Act[4] by an individual is 60 penalty units.

23. Pursuant to subsections 539(2) and 546(2)(a) 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] subsection 536(1) of the FW Act[6] by an individual is 30 penalty units.

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

25. Therefore, the maximum penalty that may be imposed by the Court on each respondent in respect of each contravention of item 4A(1) of Schedule 16 to the Transitional Act and section 45 of the FW Act is $6,600.

26. The maximum penalty that may be imposed by the Court on each respondent in respect of each contravention of subsections 535(1) and 536(1) of the FW Act is $3,300.

27. 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.

[3] Compliance with Division 2B State instruments
[4] Contravening a Modern Award
[5] Employer obligations in relation to employee records
[6] Employer obligations in relation to pay slips
[7] See *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth) amended the value of a penalty unit for offences after 28 December 2012

Approach to penalty proceedings

28. The factors which may be taken into account in the assessment of penalty are well established. These weren't in dispute between the parties.[8] 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 respondents;*
>
> *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."*

29. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14. In *Australian Ophthalmic Supplies Pty Ltd v Mc Alary-*

[8] see paragraphs 28-30 of applicant's submissions and paragraphs 13-16 of respondents submissions.

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…"*

30. 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.*[9]
>
> *23. However, s.719(2) provides for treating multiple breaches, involved in a course of conduct, as a single breach.*
>
> *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 respondentss 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 respondents did.*[10] *This task is distinct from and in addition to the final application of the "totality principle".*[11]
>
> *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.*

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9 *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).

10 *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*).

11 *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*).

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.[12] *The Court should apply an "instinctive synthesis" in making this assessment.*[13] *This is what is known as an application of the 'totality principle'."*

Admitted contraventions

31. The S.O.A.F set out the admitted contraventions.[14] It was agreed for the purposes of assessing penalty there were eight different groups of contraventions by the respondents. Attachment A to these reasons sets out the summary of admitted contraventions and the maximum penalties. These can be further summarised as:

> *"a.* ***minimum wage contravention****, comprising the contravention of:*
>
> *i. item 4A(1) of Schedule 16 to the Transitional Act by failing to pay minimum hourly rates of pay in accordance with clause 8 of the Division 2B Award from 1 January 2010 to 31 December 2010;*
>
> *ii. section 45 of the FW Act by failing to pay minimum hourly rates of pay in accordance with clause A.8.2 of the Modern Award and clause 8 of the Division 2B Award from 1 January to 6 February 2011;*
>
> *iii. section 45 of the FW Act by failing to pay minimum wages to adult employees for work performed on weekdays between 7 February 2011 and 23 September 2011 in accordance with clause 20.1 of the Modern Award;*
>
> *iv. contravention of section 45 of the FW Act by failing to pay a 19 year old employee a transitional minimum wage from 12 July 2011 to 23 September 2011 in accordance with clause A.3.5 of the Modern Award;*

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12 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).
13 *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).
14 S.O.A.F at paragraph 3.

b. ***casual loading contravention****, comprising the contravention of:*

i. sub-item 4A(1) of Schedule 16 to the Transitional Act by failing to pay casual employees a 25% loading in addition to the minimum hourly rate of pay from 1 January 2010 to 31 December 2010 in accordance with clause 14(a)(i) of the Division 2B Award;

ii. section 45 of the FW Act by failing to pay casual employees a 25% loading in addition to the minimum hourly rate of pay from 1 January 2011 to 6 February 2011 in accordance with clause A.8.2 of the Modern Award and clause 14(a)(i) of the Division 2B Award;

iii. section 45 of the FW Act by failing to pay casual employees a 25% loading in addition to the minimum hourly rate of pay between 7 February 2011 and 23 September 2011 in accordance with clause 13.1 of the Modern Award;

c. ***Saturday work contravention****, comprising the contravention of:*

i. sub-item 4A(1) of Schedule 16 to the Transitional Act by failing to pay a 50% loading for work performed on Saturdays from 1 January 2010 to 31 December 2010 in accordance with clause 14(a)(ii) of the Division 2B Award;

ii. section 45 of the FW Act by failing to pay a 50% loading in addition to the minimum hourly rate of pay for work performed on Saturdays from 1 January 2011 to 6 February 2011 in accordance with clause A.8.2 of the Modern Award and clause 14(a)(ii) of the Division 2B Award;

iii. section 45 of the FW Act by failing to pay 150% of the applicable minimum rate for work performed on Saturdays between 7 February 2011 and 23 September 2011 in accordance with clause 34.1 of the Modern Award;

d. ***Sunday work contravention****, comprising the contravention of:*

i. sub-item 4A(1) of Schedule 16 to the Transitional Act by failing to pay a 75% loading for work performed on

Sundays from 1 January 2010 to 31 December 2010 in accordance with clause 14(a)(iii) of the Division 2B Award;

ii. *section 45 of the FW Act by failing to pay a 75% loading in addition to the minimum hourly rate of pay for work performed on Sundays from 1 January 2011 to 6 February 2011 in accordance with clause A.8.2 of the Modern Award and clause 14(a)(iii) of the Division 2B Award;*

iii. *section 45 of the FW Act by failing to pay 175% of the applicable minimum rate for work performed on Sundays between 7 February 2011 and 23 September 2011 in accordance with clause 34.1 of the Modern Award;*

e. ***public holiday work contravention***, *comprising the contravention of:*

i. *sub-item 4A(1) of Schedule 16 to the Transitional Act by failing to pay a 150% loading for work performed on public holidays from 1 January 2010 to 31 December 2010 in accordance with clause 14(a)(iv) of the Division 2B Award;*

ii. *section 45 of the FW Act by failing to pay a 150% loading in addition to the minimum hourly rate of pay for work performed on public holidays from 1 January 2011 to 6 February 2011 in accordance with clause A.8.2 of the Modern Award and clause 14(a)(iv) of the Division 2B Award;*

iii. *section 45 of the FW Act by failing to pay 175% of the applicable minimum rate for work performed on public holidays between 7 February 2011 and 23 September 2011 in accordance with clause 34.1 of the Modern Award;*

f. ***evening work contravention***, *comprising the contravention of:*

i. *sub-item 4A(1) of Schedule 16 to the Transitional Act by failing to pay an additional amount for work performed between 7pm and 7am on weekdays from 1 January 2010 to 31 December 2010 in accordance with clause 24(g) of the Division 2B Award;*

ii. *section 45 of the FW Act by failing to pay an additional amount for work performed between 7pm and 7am on weekdays from 1 January 2011 to 6 February 2011 in accordance with clause A.8.2 of the Modern Award and clause 24(g) of the Division 2B Award;*

iii. *contravention of section 45 of the FW Act by failing to pay a transitional penalty rate for work between 7pm and midnight on weekdays from 7 February 2011 to 23 September 2011 in accordance with clause A.6.4 of the Modern Award and clause 25(g) of the NAPSA;*

iv. *contravention of section 45 of the FW Act by failing to pay a transitional penalty rate for work between 10pm and midnight on weekdays between 7 February 2011 and 23 September 2011 in accordance with clauses A.7.3 and 34.2(a)(i) of the Modern Award;*

g. ***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 all employees, whether their employment was full-time, part-time, permanent, temporary or casual, and the date on which their 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, the hours worked each day by 22 casual employees, and the details of the loadings and penalties payable to the Employees in accordance with regulation 3.33 of the FW Regulations;*

h. ***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 1 January 2010 and 21 August 2011."*

Considerations

32. In submissions upon which it relied the applicant contended[15] the relevant factors 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 respondents business;

g) the deliberateness of the breach;

h) the involvement of senior management;

i) the respondents 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

33. The applicant submitted:

"31. The Parties have agreed that 39 Employees were underpaid a total of $96,567.08 [Partnership SOAF p.91], as a result of the Respondents' failure to pay to pay the minimum rates,

[15] The respondent largely agreed with those submissions

casual loading, Saturday, Sunday, public holiday and evening work penalties prescribed by the Division 2B Award and Modern Award.

32. *The underpayment contraventions occurred between 1 January 2010, when the Respondents became covered by the national workplace relations system, and 23 September 2011, around which time the Office of the Applicant conducted an audit of the Respondents' compliance with their obligations as a national system employer.*

33. *The Respondents had a business practice of paying the Employees a set rate of pay for all hours worked [Partnership SOAF 128(c)]. The set rate of pay failed to satisfy the minimum wage rate which applied to 38 of the Employees, let alone the casual loading or penalty rate entitlements owing to the Employees.*

34. *Some Employees (Yuta Kodo and Mana Nishano) were paid as little as $5 an hour for trial shifts [Partnership SOAF p.65(c) and 69(a)] and many employees were paid just $10 an hour for part or all of their period of employment [see 'Hourly rate paid' column of Attachment B to the Partnership SOAF], with wages increasing (generally by a dollar an hour) at the discretion of the Respondents as an Employee gained experience [Partnership SOAF p.127(f) and 'Hourly rate paid' column of Attachment B to the Partnership SOAF].*

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

36. *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 18 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. the hours worked each day by 22 casual employees, as a result of which any entitlement to penalty rates could not be assessed; and

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

along with a failure to keep records in a legible form easily accessible to an inspector [Partnership SOAF p.97], which prolonged the assessment of the Respondents' compliance with their obligations.

37. The Respondents have made rectification payments to the Collector of Public Monies in respect of four 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 these employees makes it more difficult to locate these employees to repay the amounts owed to them as a result of the underpayment contraventions.

38. Additionally, the Respondents failed to issue any pay slips to the Employees between 1 January 2010 and 21 August 2011, as a result of which the Employees were denied proof of their employment and income or the ability to check and seek advice about their entitlements.

39. The Respondents have 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."

40. *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."*

41. *The Applicant submits that the 24 admitted contraventions represent a failure to provide basic and important conditions and entitlements under the Fair Work legislation. 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 Respondents' statutory obligations."*

34. The respondents submitted:

> *"17. The Respondents relied on their own experience when determining the wages of their employees but increased their wages as employees gained experience (Company SOAF, p.127(d) and (e) and p.128(b)), Affidavits of Kazuhiro Kojima and Zhicheng Zhang, 5 July 2013).*
>
> *18. The Respondents acknowledge the seriousness of the contraventions in relation to pay slips and record keeping and agree that recording keeping obligations are pivotal in*

monitoring compliance with the relevant industrial instruments."

35. The nature and extent of the conduct involved in this case includes the failure to provide a basic level of entitlements to what on any description would be described as vulnerable employees. In *Fair Work Ombudsman v Go Yo Trading Pty Limited & Anor* [2012] FMCA 865 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."*

36. I accept the nature and extent of the offending conduct represents a significant failure on the part of the respondents to comply with the minimum employment obligations which are a safety net for all employees. The offending conduct also including repeated breaches of the pay slip and record keeping obligations which made the investigation and establishment of the employee's entitlements more difficult. The period over (and circumstances in) which the whole of the conduct occurred make clear the offending conduct was serious.

The circumstances in which the conduct took place

37. The applicant submitted:

> *"42. The Respondents are both graduates of the University of Tasmania, with the First Respondent completing a degree in business administration and tourism [Partnership SOAF p.128(a)], and the Second Respondent completing an accounting degree [Partnership SOAF p.127(b)].*

43. *The Respondents commenced operating their first restaurant (Bento Launceston) in or around October 2007, and a second restaurant (Wan) in Launceston from February 2009. The Respondents commenced operating a third restaurant (Bento Devonport) from on or around 16 August 2010.*

44. *The Applicant has not been furnished with any detailed information about the financial position of the Respondents, however the agreed facts indicate that the Respondents were in a process of business expansion during the period in which the contraventions occurred [Partnership SOAF p.5 and 110]*.

45. *The Respondents employed at least 39 (mostly casual) employees between 1 January 2010 and 23 September 2011 at the three restaurants [Partnership SOAF p.11-12 and 14]*.

46. *The Respondents 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 [Partnership SOAF p.13]*. *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]."[16]

47. *The First Respondent has acknowledged having some awareness of minimum rates of pay [Partnership SOAF*

[16] *Ibid* at [15].

p.111] and both respondents acknowledge being put on notice by their accountant that they were paying wages incorrectly [Partnership SOAF p.110]. The Applicant submits that, despite this awareness, the Respondents failed to take reasonable steps 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.

48. The Respondents' had an 'overarching responsibility'[17] as an employer to ensure compliance with employment laws, and it is the Applicant's submission that the Respondents neglected this duty in favour of the pursuit of their own business interests.

49. 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."[18]

38. The respondents 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 (Affidavits 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 with pay slips (Affidavits of Kazuhiro Kojima and Zhicheng Zhang, 5 July 2013).

22. Neither Mr Kojima nor Mr Zhang were aware of correct rates of pay or the obligations of employees such as the requirements to keep time and wage records (Affidavits of Kazuhiro Kojima and Zhicheng Zhang, 5 July 2013).

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

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 (Affidavits of Kazuhiro Kojima and Zhicheng Zhang, 5 July 2013).

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)."

39. The applicant submitted in reply:

"***C. Circumstances of Contraventions***

12. The Respondents submit that they were not aware of the correct rates of pay or the requirements to keep time and wage records (paragraph 22 of Respondents' Submissions), although they have acknowledged being advised that they were not paying wages correctly and that minimum rates applied (paragraphs 110(c) and 111 of the Partnership SOAF).

13. To the extent that the Respondents lacked of knowledge of their precise obligations as an employer, the Applicant notes that (as is well established) ignorance of the law is no excuse.[19] *Further, such ignorance is attributable to the Respondents' own conduct in failing to take steps to ascertain or seek advice about their obligations at any stage prior to the investigation conducted by the Applicant (see paragraph 36 Kojima Affidavit, paragraph 26 Zhang Affidavit), despite their demonstrated capacity to establish and expand their business operations and meet other regulatory requirements (see paragraphs 5, 7 and 8 of the Partnership SOAF, paragraph 26 Kojima and Zhang Affidavits).*

14. The Respondents have acknowledged that they focussed on the expansion of their business at the expense of attending to their obligations as an employer (paragraphs 39 and 42 Zhang Affidavit and paragraphs 41 and 44 Kojima

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

Affidavit), which the Applicant submits is a matter of serious concern and, as held by Mowbray FM in Flattery v The Italian Eatery t/as Zeffirelli's Pizza Restaurant[20] *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.

15. The Respondents 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."

40. The respondents' submissions on this issue effectively amounted to a plea of ignorance or an assertion that they were so ignorant they didn't know any better. I accept the gravamen of the applicant's submission on this factor. I note the authorities referred to and reiterate by reference to those authorities the seriousness with which the Courts should treat offending conduct involving vulnerable employees such as those concerned in this case.

Nature and extent of any loss or damage

41. The applicant submitted:

"50. The Applicant submits that total amount of the underpayment, $96,567.08 is significant in a number of respects.

51. The underpayment is an exceptionally large sum, comprised by underpayments to 39 employees in a period of approximately 21 months. The underpayments to individual employees varied between approximately $90 to over $12,000, with the underpayments averaging approximately $2,475 per Employee. The Respondents had the benefit of this money until the underpayments were rectified between 2 July 2012 and 4 April 2013.

52. As far as the Applicant is aware, only the amount of $1998.80 now remains outstanding to Yuta Kodo.

53. The Applicant submits that the underpayments represent a significant amount of money to a group of low paid workers,

[20] (2007) 163 IR 14; [2007] FMCA 9.

who were, on average, paid less than 60% of their minimum entitlements during the relevant period."

42. The respondents submitted:

> *"26. The Respondents accept that the underpayment occurred and have accepted responsibility for the underpayment (Company SOAF p.3)*
>
> *27. The Respondents note the quantum of underpayment and the number of employees affected is significant."*

43. I accept the applicant's submission that the total amount of the underpayment is significant.

Any similar previous conduct

44. The applicant submitted:

> *"The Applicant is not aware of any previous contraventions of workplace laws by the Respondents."*

45. The respondents submitted:

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

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

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

47. The applicant submitted:

> *"55. 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 in particular periods (as specified in the column titled 'Hourly rate paid' in Attachment B to the Partnership SOAF).*

56. *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 only $6,600.*

57. *The Respondents have 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 p.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.**

58. *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…".*

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

60. *The Applicant submits that the remaining contraventions, as set out in the paragraphs above, are distinct and should be treated as such for the purposes of determining penalty.*

48. The respondents 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.

30. Rates increased based upon an assessment of employees.

31. There is a substantial overlap in contraventions and it is submitted this should be reflected in the penalties imposed."

49. The applicant submitted in reply:

*"**B. Course of Conduct***

2. The Respondents submit 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 Respondents' 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 Respondents' decision to pay a flat rate of pay to the Employees (as defined in paragraph 3(t)(ii). on page 11 of the Statement of Agreed Facts filed on 9 May 2013 (**Partnership 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 Respondents concerning what records would be made and how they would be kept; and

b. the complete failure of the Respondents to issue payslips to employees prior to the pay period ending on 28 August 2011.

6. Further to paragraphs 36 to 40 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 Respondents would be punished twice for the same conduct. Rather, these contraventions respectively relate to the Respondents' 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 six separate and distinct courses of conduct: minimum wage, casual loading, Saturday work, Sunday work, public holiday work and evening work contraventions.

8. The Applicant refers to the submissions made in paragraphs 55 to 60 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[21] *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 Respondents' 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 Respondents denied the Employees a range of

[21] [2012] FMCA 103 (unreported, Federal Magistrates' Court of Australia, 24 February 2012, Riley FM).

distinct entitlements (being minimum rates, casual loadings, Saturday work penalties, Sunday work penalties, public holiday 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.[22] *The 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 Respondents accept (at paragraph 12 of the Respondents' Submissions) the Applicant's submission that the obligations which were contravened can be grouped into eight groups, as proposed by the Applicant in paragraph 23 of the Applicant's submissions filed on 24 May 2013, being minimum rate, casual loading, Saturday work, Sunday work, public holiday work, evening work, record keeping and pay slip contraventions."

50. I accept the submissions made on behalf of the applicant on this issue. The respondents' submission ignores the separate and distinct nature of the obligations in each of the eight different grouped contraventions. The answer to the respondents' submission 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 respondents business

51. The applicant submitted:

[22] 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].

"*61. The evidence with respect to the size of the business at particular points in time is limited, although the Applicant understands that the First Respondent was not a large employer.*

62. 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.

63. 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.'

64. 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.'

65. 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.

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

52. The respondents 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 Respondents were a small employer.

33. The Respondents note, 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]."

53. The applicant in submissions in reply:

"16. To the extent that the Respondents may seek to advance an argument that the penalties should be determined by reference to their 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.

17. The Respondents state that they:

a. each receive "payment of approximately $50,000 per annum gross from the profits of the business" (paragraph 60 of Zhang and Kojima Affidavits);

b. receive a "royalty fee from Bento Devonport of 5% of sales, which is approximately $350.00 per week"

(paragraph 54 Zhang Affidavit, paragraph 57 Kojima Affidavit)

c. *are in the process of selling Wan, Bento Kings Meadows and Bento Launceston (paragraph 49 Zhang Affidavit, paragraph 52 Kojima Affidavit).*

18. *The Applicant submits that the Respondents' evidence does not:*

a. *confirm whether they are in receipt of any other income;*

b. *demonstrate the asset position of each Respondent; or*

c. *annex financial statements or other documents to substantiate each Respondent's financial position.*

19. *The Zhang Affidavit annexes BAS statements for Wan, Bento Launceston and Bento Devonport for the three month period from January to March 2013 (Annexures ZZ-2, ZZ-3 and ZZ-4), however the Applicant submits this is of little assistance in demonstrating the financial position of the Partnership or the annual income generated by each business operated by the Partnership - either at the time of the contraventions or currently. The Respondents have been on notice of these proceedings for some time and have therefore had the opportunity to present any additional documents which may have clarified that position.*

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.*

21. *Further, as stated in Fair Work Ombudsman v Promoting U Pty Ltd & Anor:*[23]

…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."

[23] [2012] FMCA 58 (unreported, Federal Magistrates' Court of Australia, 2 February 2012, Burchardt FM) at [57].

54. The applicant correctly submitted that regardless of its size the respondents business was not absolved of its legal obligations in relation to the employees.

The deliberateness of the breach

55. The applicant submitted:

> *"67. The First and Second Respondents have respectively obtained business administration and accounting degrees at the University of Tasmania [Partnership SOAF p.128(a) and p.127(b)] 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 their obligations to their Employees until the Office of the Applicant commenced its investigation in August 2011.*
>
> *68. In acting in this way, the Applicant submits that the Respondents conduct was deliberate and, at the very least, demonstrated a reckless or wilful disregard for their obligations to pay the Employees minimum entitlements in accordance with the law."*

56. The respondents 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)."*

57. The respondents were both involved in the contravening conduct. The submissions on which they relied to explain their conduct made that much plain. However I accept the applicant's submission that when it suited their interests, the respondents were able to obtain licences and expand their business yet not able to take steps to ensure they complied with their obligations to employees.

58. On the material before the Court the admitted contraventions evidence that the respondents displayed a reckless disregard for their obligations.

The involvement of senior management

59. The applicant submitted:

> *"69. As set out in paragraphs 5, 127 and 128 of the Partnership SOAF, the Respondents operated in partnership, and were jointly responsible for engaging staff and determining their rates of pay."*

60. The respondents 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.*
>
> *36. It is not suggested that any other person was involved in the contraventions."*

61. As the submission makes clear, whilst this was not a large business the respondents were responsible for ensuring compliance with minimum standards and culpable for the decisions and mistakes they made. There is no indication they acted on their responsibility to ensure they complied with their legal obligations to employees.

The respondents contrition, corrective action and co-operation

62. 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 Respondents advised the Office of the Applicant that they were willing to apologise to each Employee affected by the contraventions [Partnership SOAF p.138(a)], however the Applicant has not been provided with any evidence to confirm whether this occurred.*

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

Corrective action

94. As noted above, the Respondents progressively rectified the underpayments to the Employees between 2 July 2012 and 4 April 2013, aside from $1998.80 which remains outstanding to Yuta Kodo [Partnership SOAF p.92 and 94].

95. From 22 August 2011, the Respondents:

a. started issuing pay slips to employees;

b. increased the rate paid to adult Employees for work performed on Saturdays to $18.50 per hour [Partnership SOAF p.65(g), (k) and (l)], which remained insufficient to satisfy the minimum rate and casual loading for an introductory level employee ($15.51 + 25% = $19.38), let alone cover the Saturday penalty;

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 Respondents have generally co-operated with the Applicant during the course of the investigation and litigation, including by:

a. 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 Partnership 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 Respondents' 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."[24]

63. The respondents submitted:

"37. The Respondents have accepted responsibility and have acknowledged the contraventions to staff and customers (Affidavit of Kazuhiro Kojima, 5 July 2013).

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

39. The investigation was lengthy and involved interviews with Mr Kojima and Mr Zhang.

40. Mr Kojima and Mr Zhang acknowledged responsibility for the breaches at the early stages of the investigation and were cooperative during the investigation (Company SOAF, p92).

41. All monies owed to employees have been repaid to the employees or paid to the Collector of Public Monies except Yuta Kodo. The amount outstanding to Yuta Koda will be paid to the Collector of Public Monies within 7 days (Affidavit of Kazuhiro Kojima, 5 July 2013).

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."

64. I accept the admissions made by the respondents along with their co-operation, with the investigation and since the commencement of these proceedings, should be taken into account.

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

Ensuring compliance with minimum standards

65. The applicant submitted:

> *"70. A fundamental object of the FW Act is to provide a guaranteed safety net of adequate minimum entitlements for employees.*[25] *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.*
>
> *71. 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.*
>
> *72. 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 is that the Respondent was financially advantaged in comparison with similar businesses which were paying their employees' legal entitlements.*
>
> *73. Contraventions of these fundamental entitlements undermine the workplace relations regime as a whole.*
>
> *74. 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)[26] *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." [27]

66. The respondents submitted:

[25] FW Act, section 3(b).
[26] [2012] FCA 557.
[27] *Ibid* at [29].

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

67. As was stated in the applicant's submission (which I accept):

> *"70. A fundamental object of the FW Act is to provide a guaranteed safety net of adequate minimum entitlements for employees.[28] 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.*
>
> *71. 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."*

68. This is a significant factor in this case.

Deterrence

69. The applicant submitted:

> *"75. 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*
>
> *76. 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".

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

77. The Applicant acknowledges that the Respondents have accepted responsibility for the contraventions identified by the Applicant and have taken steps to rectify these contraventions.

78. The Applicant has not however been provided with any evidence by which the current state of compliance by the Respondents can be determined.

79. It is also relevant to note that the Respondents continue to operate the business and have a range of other business interests.

80. Annexure LRH-1 to the Hillier Affidavit shows that the First Respondent is presently a director of:

a. MK Commercial Pty Ltd (ACN 163665834) since 8 May 3013;

b. Bento Devonport Pty Ltd (ACN 150101929) since 28 March 2011, and company secretary for the same period;

c. Bento Franchising Pty Ltd (ACN 157886185) since 19 April 2012;

d. Bento Kings Meadows Pty Ltd (ACN 150101438) since 28 March 2011, and company secretary for the same period;

e. Bento Tasmania Pty Ltd (ACN 153520168) since 30 September 2011.

81. Annexure LRH-2 to the Hillier Affidavit shows that the Second Respondent is presently a director of:

a. Bento Devonport Pty Ltd (ACN 150101929) since 28 March 2011;

b. Bento Franchising Pty Ltd (ACN 157886185) since 19 April 2012, and company secretary for the same period;

c. Bento Kings Meadows Pty Ltd (ACN 150101438) since 28 March 2011; and

d. Bento Tasmania Pty Ltd (ACN 153520168) since 30 September 2011, and company secretary for the same period;

e. NZ Trading Pty Ltd (ACN 163663643) since 8 May 2013.

82. In light of the continued business interests held by each of the Respondents, the Applicant submits that a penalty needs to be imposed on each Respondent of sufficient quantum to make the:

a. contravening conduct unprofitable; and

b. prospect of any future contraventions commercially undesirable.

83. The Respondents should be left in no doubt that the failure to ascertain or implement their obligations in respect of their 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 Respondents operate – the hospitality and 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.[29] *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:

> 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.[30]

89. The need for general deterrence in the industry is evidenced by Respondents' own admissions that the rates they paid the Employees were determined by reference to their experience in the industry and what other employers were paying [Partnership SOAF p.127(e) and 128(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 Respondents and set a penalty which serves as a warning to others."[31]

70. The respondents submitted:

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

---

[29] *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* (2008) 170 FCR 357 at [37] (Gray J).
[30] *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In Liquidation*) [2013] FCCA 52 at [46].
[31] 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).

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.

45. *The Respondents note the Applicant's argument that there is a need for general deterrence.*

Specific Deterrence

46. *The Respondents submit there is no need for specific deterrence in this matter.*

47. *Mr Kojima and Mr Zhang promptly acknowledged the contraventions and have taken steps to remedy them when advised of the contraventions by the Applicant (Company SOAF, p92).*

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

49. *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).*

50. *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 (Affidavits of Kazuhiro Kojima and Zhicheng Zhang, 5 July 2013)."*

71. 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."*

72. Contrary to the submissions made on behalf of the respondents there is the need for specific deterrence in this case. I accept the applicants submission there is a need to ensure the respondents do not engage in this sort of conduct again. I also accept there is 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 *Kelly v Fitzpatrick* [2007] FCA 1080 at paragraph [28]).

73. 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 penalty

74. 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 each of the Respondents:*
>
> *a. a penalty between $4,620 and $5,940 (representing 70% to 90% of the maximum penalty) in respect of the:*
>
> *i. minimum rate contravention identified in paragraph E.23(a) above; and*
>
> *ii. casual loading contravention identified in paragraph E.23(b) above;*

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

b. *a penalty of between $3,960 and $5,280 (representing 60% to 80% of the maximum penalty) in respect of the:*

   i. *Saturday work contravention identified in paragraph E.23(c) above;*

   ii. *Sunday work contravention identified in paragraph E.23(d) above;*

   iii. *public holiday work contravention identified in paragraph E.23(e) above;*

   iv. *evening work contravention identified in paragraph E.23(f) above;*

   acknowledging the Respondents' failure to pay these minimum entitlements;

c. *a penalty of between $2,310 and $2,970 (representing 70% to 90% of the maximum penalty) in respect of the record keeping contravention identified in paragraph E.23(g) 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 $2,640 and $2,970 (representing 80% to 90% of the maximum penalty) in respect of the pay slip contravention identified in paragraph E.23(h) above, acknowledging the Respondents' failure to issue payslips to the Employees from 1 January 2010 to 21 August 2011;*

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

103. *Following this approach, it is the Applicant's submission that the aggregate penalty for each of the Respondents should be within the range of* ***$24,024*** *to* ***$31,152****.*

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.[32]

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."

75. The respondents submitted:

"51. 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).

52. 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.

53. Having fixed the penalty for each contravention, the Respondents submit the proper approach is for the court to consider whether the aggregate penalty is appropriate for all contraventions as a whole.[33]

54. The Respondents note the Applicant submits that the Court should not apply a further discount.

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

76. The applicant submitted in reply:

"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

[32] *Kelly v Fitzpatrick* [2007] FCA 1080, [30]; *Merringtons* at [23] per Gray J, [71] per Graham J, [102] per Buchanan J.
[33] *Ponzio v B & P Caelli Constructions Pty Ltd and Ors* (2007) 158 FCR 543

> *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 Respondents' evidence does not establish this to be the case."*

77. 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.

Conclusion

78. As noted earlier the applicant submitted that penalties in the mid to high range were appropriate and maintained that those were as set out in Exhibit A7 should be imposed. In written submissions the respondents 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 respondents that penalties in the mid range were appropriate.

79. In setting appropriate penalties I have borne in mind the nature of admitted contraventions. The admitted contraventions are serious. The respondents repeatedly underpaid employees as compared to their basic entitlements under the FW Act and associated legislation and the other contraventions made the applicant's investigation and the establishment of the employees correct entitlements more difficult. Given the matters set out above there is a need for both specific and general deterrence.

80. In my view bearing in mind the maximum penalties the appropriate penalties for each respondent are:

a) failure to pay minimum wages - $5,280.00;

b) failure to pay casual loading - $5,280.00;

c) failure to pay correct Saturday rate - $4,620.00;

d) failure to pay correct Sunday rate - $4,620.00;

e) failure to pay correct rate for public holidays - $4,620.00;

f) failure to pay correct rate for evenings - $4,620.00;

g) record keeping breaches - $2,970.00;[34]

h) pay slip breaches - $2,970.00;[35]

81. However, taking into account, amongst other things, the co-operation of the respondents 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%.

82. 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 above as grouped at paragraph 80 above should be for those at paragraphs 80(a) and (b) $4,224.00 each, for those at paragraphs 80(c), (d), (e) and (f) $3,696.00 each and for those at paragraphs 80(g) and (h) $2,376.00 each.

83. This results in a total penalty of $27,984.00 for each respondent or 61%[36] of the maximum for the admitted contraventions by the respondents. Those penalties are in the aggregate not crushing and an appropriate response to the offending conduct.

84. 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

[34] The higher figure is appropriate because of the length of time over which the conduct occurred in light of the above factors.
[35] The higher figure is appropriate because of the length of time over which the conduct occurred in light of the above factors.
[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

- 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-four (84) paragraphs are a true copy of the reasons for judgment of Judge O'Sullivan

Date: 1 August 2013

[39] for 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 - Kojima and Zhang

	Provision	Nature of contravention	Maximum penalty (**per Respondent**)	Grouping	Maximum penalty after grouping (**per Respondent**)	Proposed penalty range (% of maximum) From	To	Proposed minimum penalty (**per Respondent**)	Proposed maximum penalty (**per Respondent**)	**Employees affected**	**Period**	**Loss suffered**
1	item 4A(1) of Schedule 16 to Transitional Act - Div 2B Award cl. 8	Failure to pay minimum hourly rate	$ 6,600.00	Minimum wage	$ 6,600.00	70%	90%	$ 4,620.00	$ 5,940.00	38	01.01.2010 - 31.12.2010	$ 60,719.93
2	s.45 FW Act - MA cl. A.8.2; Div 2B Award cl.8	Failure to pay minimum hourly rate	$ 6,600.00								01.01.2011 - 06.02.2011	
3	s.45 FW Act - MA cl. 20.1	Failure to pay minimum hourly rate - adult employees	$ 6,600.00								07.02.2011 - 23.09.2011	
4	s.45 FW Act - MA cl. A.3.5	Failure to pay transitional minimum wage - 19 year old employee	$ 6,600.00								12.07.2011 - 23.09.2011	
5	item 4A(1) of Schedule 16 to Transitional Act - Div 2B Award cl. 14(a)(i)	Failure to pay casual loading	$ 6,600.00	Casual loading	$ 6,600.00	70%	90%	$ 4,620.00	$ 5,940.00	36	01.01.2010 - 31.12.2010	
6	s.45 FW Act - MA cl. A.8.2; Div 2B Award cl. 14(a)(i)	Failure to pay casual loading	$ 6,600.00								01.01.2011 - 06.02.2011	
7	s.45 FW Act - MA cl. 13.1	Failure to pay casual loading	$ 6,600.00								07.02.2011 - 23.09.2011	
8	item 4A(1) of Schedule 16 to Transitional Act - Div 2B Award cl. 14(a)(ii)	Failure to pay Saturday rate	$ 6,600.00	Saturday work	$ 6,600.00	60%	80%	$ 3,960.00	$ 5,280.00	10	01.01.2010 - 31.12.2010	$ 13,132.14
9	s.45 FW Act - MA cl. A.8.2; Div 2B Award cl. 14(a)(ii)	Failure to pay Saturday rate	$ 6,600.00								01.01.2011 - 06.02.2011	
10	s.45 FW Act - MA cl. 34.1	Failure to pay Saturday rate	$ 6,600.00								07.02.2011 - 23.09.2011	
11	item 4A(1) of Schedule 16 to Transitional Act - Div 2B Award cl. 14(a)(iii)	Failure to pay Sunday rate	$ 6,600.00	Sunday work	$ 6,600.00	60%	80%	$ 3,960.00	$ 5,280.00	8	1.01.10 - 31.12.10	$ 5,962.04
12	s.45 FW Act - MA cl. A.8.2; Div 2B Award cl. 14(a)(iii)	Failure to pay Sunday rate	$ 6,600.00								01.01.2011 - 06.02.2011	
13	s.45 FW Act - MA cl. 34.1	Failure to pay Sunday rate	$ 6,600.00								07.02.2011 - 23.09.2011	
14	item 4A(1) of Schedule 16 to Transitional Act - Div 2B Award cl. 14(a)(iv)	Failure to pay Public Holiday rate	$ 6,600.00	Public holiday work	$ 6,600.00	60%	80%	$ 3,960.00	$ 5,280.00	4	1.01.10 - 31.12.10	$ 1,507.39
15	s.45 FW Act - MA cl. A.8.2; Div 2B Award cl. 14(a)(iv)	Failure to pay Public Holiday rate	$ 6,600.00								01.01.2011 - 06.02.2011	
16	s.45 FW Act - MA cl. 34.1	Failure to pay Public Holiday rate	$ 6,600.00								07.02.2011 - 23.09.2011	
17	item 4A(1) of Schedule 16 to Transitional Act - Div 2B Award cl. 24(g)	Failure to pay additional amount for evening work	$ 6,600.00	Evening work	$ 6,600.00	60%	80%	$ 3,960.00	$ 5,280.00	10	1.01.10 - 31.12.10	$ 15,245.58
18	s.45 FW Act - MA cl. A.8.2; Div 2B Award cl. 24(g)	Failure to pay additional amount for evening work	$ 6,600.00								01.01.2011 - 06.02.2011	
19	s.45 FW Act - MA cl. A.6.4	Failure to pay transitional penalty for evening work	$ 6,600.00								07.02.2011 - 23.09.2011	
20	s.45 FW Act - MA cl. A.7.3 and 34.2(a)(i)	Failure to pay transitional penalty for evening work	$ 6,600.00								07.02.2011 - 23.09.2011	
21	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	$ 3,300.00	Record keeping	$ 3,300.00	70%	90%	$ 2,310.00	$ 2,970.00		01.01.2010 - 23.09.2011	
22	s.535(1) FW Act - regulation 3.32 FW Regulations	Failure to make or keep sufficient records (full employee name x 18), type of employment, date commenced)	$ 3,300.00									
23	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, hours worked each day by 22 employees, loadings and penalties payable)	$ 3,300.00									
24	s.536(1) FW Act	Failure to give employees a pay slip within 1 working day of payment	$ 3,300.00	Pay slips	$ 3,300.00	80%	90%	$ 2,640.00	$ 2,970.00	All	01.01.2010 - 21.08.2011	
			$ 145,200.00		$ 46,200.00			$ 30,030.00	$ 38,940.00			**$ 96,567.08**

Div 2B Award = *Restaurant Keepers Award* (Tas) [RA170086]

MA = *Restaurant Industry Award 2010* [MA000119]

20% discount applied for full admissions **$ 24,024.00** **$ 31,152.00** **PER RESPONDENT**