

# FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v AUSTRALIA  
CHINA TRADING INVESTMENT  
CONSULTANCY GROUP PTY LTD & ANOR*

[2014] FCCA 407

## Catchwords:

INDUSTRIAL LAW – Penalty hearing – contraventions of WR Act, Transitional Act and FW Act – contraventions admitted – statement of agreed facts – consideration of matters relevant to penalty – grouping of contraventions – whether employees are vulnerable – payment of penalty.

## Legislation:

*Workplace Relations Act 1996* (Cth) ss.182(1), 235(1), 536(1), 719(2), (4), 728  
*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), Sch.16  
*Fair Work Act 2009* (Cth) ss.44, 45, 90(1), (2), 99, 116, 535, 536, 546, 550  
*Federal Circuit Court Rules 2001* (Cth)  
*Evidence Act 1995* (Cth) s.191

## Cases cited:

*Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7  
*Kelly v Fitzpatrick* (2007) 166 IR 14  
*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8  
*Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor* [2010] FMCA 599  
*Fair Work Ombudsman v Ultra Tune Australia Pty Ltd* [2012] FMCA 560  
*Hanssen Pty Ltd v Jones* [2009] FCA 192  
*Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39  
*Construction, Forestry, Mining and Energy Union v Williams* [2009] FCAFC 171  
*Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241  
*Olsen v Sterling Crown Pty Ltd* (2008) 117 IR 337  
*Plancor Pty Ltd v Liquor Hospital and Miscellaneous Union* (2008) 171 FCR 357  
*CPSU v Telstra Corporation Limited* (2001) 108 IR 228  
*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  
*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  
*Fair Work Ombudsman v Maclean Bay Pty Ltd (No.2)* [2012] FCA 557  
*Fair Work Ombudsman v Mildura Battery Company Pty Ltd & Anor* [2014]

FCCA 192

*Fair Work Ombudsman v MMP Management Services Pty Ltd & Anor* [2012] FMCA 207

*Workplace Ombudsman v Securit-E Holdings Pty Ltd (In Liquidation) & Ors* [2009] FMCA 700

*Fair Work Ombudsman v Bosen Pty Ltd* [2011] VMC 81

*Fair Work Ombudsman v Contracting Plus Pty Ltd & Anor* [2011] FMCA 191

*Australia Competition and Consumer Commission v ABB Transmission and Distribution Limited (No.2)* (2002) 190 ALR 169

*Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 160

*Fair Work Ombudsman v Gisela Bottcher & Anor* [2010] FMCA 956

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	AUSTRALIA CHINA TRADING INVESTMENT CONSULTANCY GROUP PTY LTD (ACN 067 632 508)
Second Respondent:	LIU MING PAN
File Number:	MLG 922 of 2013
Judgment of:	Judge O'Sullivan
Hearing date:	21 February 2014
Date of Last Submission:	14 March 2014
Delivered at:	Melbourne
Delivered on:	20 March 2014

## **REPRESENTATION**

Counsel for the Applicant: Ms Anderson

Solicitors for the Applicant: Office of the Fair Work Ombudsman

Counsel for the First and Second Respondent: Mr Galbraith

Solicitors for the First and Second Respondents: Lewis Holdway Lawyers

## ORDERS

### THE COURT DECLARES THAT:

- (1) The first respondent, Australia China Trading Investment Consultancy Group Pty Ltd (ACN 067 632 508) contravened:
  - (a) subsection 182(1) of the *Workplace Relations Act 1996* (“WR Act”) by failing to pay two employees, Yanna Gu and Xuan Yue, the basic periodic rate of pay prescribed by subclause 16.2.2 of the Australian Pay and Classification Scale derived from the *Clerical and Administrative Employees Victorian Common Rule Award 1999* (“Clerical Pay Scale”) in the period prior to 1 July 2009 (“WR Act Period”);
  - (b) item 5 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (“Transitional Act”) in failing to pay Yanna Gu and Xuan Yue the basic periodic rate of pay prescribed by subclause 16.2.2 of the Clerical Pay Scale during the period from 1 July 2009 to 31 December 2009 (“Transitional Period”) in contravention of subsection 182(1) of the WR Act;
  - (c) section 45 of the *Fair Work Act 2009* (“FW Act”) in failing to pay five employees, Yanna Gu, Xuan Yue, Yue Lu, Hui Ren and Caihong Wang (collectively, the Employees) the rate of pay prescribed by clause 15.1 of the *Clerks Private Sector Modern Award* (“Clerks Modern Award”) on and from 1 January 2010 (“FW Act Period”);
  - (d) item 6 of Schedule 16 of the Transitional Act in failing to pay Xuan Yue for annual leave taken during the Transitional Period in contravention of subsection 235(1) of the WR Act;
  - (e) section 44 of the FW Act in failing to pay four of the Employees, Yanna Gu, Xuan Yue, Yue Lu and Hui Ren (collectively, “Annual Leave Employees”), for annual leave taken during the FW Act Period in contravention of subsection 90(1) of the FW Act;

- (f) section 45 of the FW Act in failing to pay the Annual Leave Employees the annual leave loading prescribed by subclauses 29.3(a) and (b)(i) of the Clerks Modern Award for annual leave taken during the FW Act Period;
  - (g) section 44 of the FW Act in failing to pay the Employees their accrued annual leave entitlements upon termination of their employment in contravention of subsection 90(2) of the FW Act during the FW Act Period;
  - (h) item 6 of Schedule 16 of the Transitional Act in failing to pay Yanna Gu for personal leave taken during the Transitional Period in contravention of section 247 of the WR Act;
  - (i) section 44 of the FW Act in failing to pay the Employees for personal leave taken during the FW Act Period in contravention of section 99 of the FW Act;
  - (j) section 44 of the FW Act by virtue of failing to pay the Employees for absences on public holidays during the FW Act Period in contravention of section 116 of the FW Act;
  - (k) section 45 of the FW Act by virtue of failing to pay Xuan Yue for overtime hours worked during the FW Act Period in contravention of subclause 27.1(a) of the Clerks Modern Award; and
  - (l) section 536(1) of the FW Act by virtue of failing to give the Employees written pay slips in relation to each payment made to the Employees within one working day of paying an amount to the Employees in relation to the performance of work.
- (2) The second respondent, Mr Liu Ming Pan was involved in each of the contraventions set out in paragraph 1(a) to (k) above.

**THE COURT ORDERS THAT:**

- (3) The first respondent is to pay the following penalties pursuant to subsection 546(1) of the FW Act to a total amount of \$118,711.25 for the declared contraventions in order 1 above, comprising of:

- (a) a penalty of \$18,232.50 in respect of the contraventions in order 1(a), (b) and (c);
  - (b) a penalty of \$18,232.50 in respect of the contraventions in order 1(d) and (e);
  - (c) a penalty of \$18,232.50 in respect of the contravention in order 1(f);
  - (d) a penalty of \$18,232.50 in respect of the contravention in order 1(g);
  - (e) a penalty of \$18,232.50 in respect of the contraventions in order 1(h) and (i);
  - (f) a penalty of \$18,232.50 in respect of the contravention in order 1(j);
  - (g) a penalty of \$200.00 in respect of the contravention in order 1(k);  
and
  - (h) a penalty of \$9,116.25 in respect of the contravention in order 1(l).
- (4) The second respondent is to pay the following penalties pursuant to subsection 546(1) of the FW Act to a total amount of \$22,079.00 for the declared contraventions in paragraph 1(a) to (k) above, comprising:
- (a) a penalty of \$3,646.50 in respect of his involvement in the contraventions in order 1(a), (b) and (c);
  - (b) a penalty of \$3,646.50 in respect of his involvement in the contraventions in order 1(d) and (e);
  - (c) a penalty of \$3,646.50 in respect of his involvement in the contravention in order 1(f);
  - (d) a penalty of \$3,646.50 in respect of his involvement in the contravention in order 1(g);
  - (e) a penalty of \$3,646.50 in respect of his involvement in the contraventions in order 1(h) and (i);
  - (f) a penalty of \$3,646.50 in respect of his involvement in the contravention in order 1(j); and

- (g) a penalty of \$200.00 in respect of his involvement in the contravention in order 1(k).
  
- (5) An order pursuant to subsection 546(3) of the FW Act that all pecuniary penalties imposed by the Court in orders 3 and 4 be paid to the Consolidated Revenue Fund of the Commonwealth within 3 months of the date of the order.
  
- (6) The applicant has liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

**FEDERAL CIRCUIT COURT  
OF AUSTRALIA  
AT MELBOURNE**

**MLG 922 of 2013**

**FAIR WORK OMBUDSMAN**  
Applicant

And

**AUSTRALIA CHINA TRADING INVESTMENT CONSULTANCY  
GROUP PTY LTD**  
**(ACN 067 632 508)**  
First Respondent

And

**LIU MING PAN**  
Second Respondent

**REASONS FOR JUDGMENT**

**Introduction**

1. The Australian Chinese Centre for International Education is a migration agency which offers services to international students seeking visas and entry into Australian educational institutions. This case concerns the penalties that should be imposed because five young Chinese immigrants who worked for the organisation that ran the agency were underpaid over \$70,000 between 2009 and 2013.



2. These proceedings were commenced by the Fair Work Ombudsman (“the applicant”) for declarations and other orders against Australia China Trading Investment Consultancy Group Pty Ltd (“the first respondent”) which operated the agency and Liu Ming Pan, (“the second respondent”) who was a director of the first respondent for contraventions of the *Workplace Relations Act 1996* (Cth) (“the WR Act”) and the *Fair Work Act 2009* (Cth) (“the FW Act”).
3. Subsequently both the first and second respondents made certain admissions in relation to the allegations made against them. As a result the proceedings now concern the penalties and orders for the payment of same in respect of admitted contraventions by both the respondents of the WR Act, Transitional Act and the FW Act.
4. The proceedings were commenced in June 2013. Before the first Court date, and after solicitors had gone on the record for both respondents, the following orders were made by consent on 17 September 2013:

*“BY CONSENT THE COURT ORDERS THAT:*

- (1) The directions hearing listed for 18 September 2013 be vacated.*
- (2) The respondents to file a response by 25 September 2013.*
- (3) The parties to file an agreed statement of facts by 30 October 2013.*
- (4) The respondents to file and serve any evidence relevant to penalty by 29 November 2013.*
- (5) The applicant to file and serve any evidence relevant to penalty by 7 January 2014.*
- (6) The respondents to file and serve any penalty evidence in reply by 17 January 2014.*
- (7) The applicant to file and serve an outline of submissions with respect to penalty and a list of authorities at least 21 days before the hearing.*
- (8) The respondent to file and serve an outline of submissions with respect to penalty and a list of authorities at least 14 days before the hearing.*

(9) *The applicant to file and serve any submissions in reply at least 7 days before the hearing.*

(10) *The matter be listed for a penalty hearing on 21 February 2014.*

(11) *The parties have liberty to apply on 3 days' notice."*

5. The respondents filed a response on 26 September 2013. On 1 November 2013 and 13 December 2013 there were consent orders adjusting the timetable for the penalty hearing on 21 February 2014. Also on 13 December 2013 the parties filed an amended Statement of Agreed Facts (S.O.A.F.) which is attached to these reasons and marked Annexure A.
6. On 16 December 2013 the respondents filed an affidavit of Liu Ming Pan. On 22 January 2014 the applicant filed an affidavit of Kim Nhu Chum. The respondents then filed a further affidavit of Liu Ming Pan on 3 February 2014. On 11 February 2014 the applicant filed an amended outline of submissions. The respondents filed submissions in reply on 17 February 2014.

## **The penalty hearing**

7. At the penalty hearing on 21 February 2014 the applicant, was represented by Ms Anderson and the respondents were represented by Mr Galbraith.
8. The applicant relied on:
  - a) the application and statement of claim both filed on 26 June 2013 which were marked exhibit A1;
  - b) the affidavit of Kim Nhu Chum filed on 22 February 2014 which was marked exhibit A2;
  - c) the amended Statement of Agreed Facts (S.O.A.F.) filed on 13 December 2013 which was marked exhibit A3; and
  - d) the amended submissions filed on 11 February 2014 which were marked exhibit A4.
9. The respondents relied on:

- a) the amended Statement of Agreed Facts (S.O.A.F.) filed on 13 December 2013 which was marked exhibit A3;
  - b) the affidavit of Liu Ming Pan filed 16 December 2013 marked as exhibit R1;
  - c) the further affidavit of Liu Ming Pan filed 3 February 2014 marked as exhibit R2; and
  - d) the outline of submissions filed 17 February 2014 marked as exhibit R3.
10. Following the penalty hearing, on 28 February 2014 the Court made the following orders:
- “1. *The Applicant shall file and serve a minute of proposed declarations and orders sought by not later than 4.00 pm on 3 March 2014.*
  2. *The Respondents shall file and serve any submissions in reply including any changes to proposed minutes by not later than 4.00 pm on 5 March 2014.*”
11. On 3 March 2014 the applicant filed a minute of proposed orders and declarations. On 5 March 2015 the respondents filed submissions requesting time to make payment of any penalty but otherwise did not take issue with the declarations and orders sought by the applicant. Finally on 6 March 2014 the applicant noted there was no documentary evidence to support the respondents’ submissions regarding either time for or capacity to pay any penalty.<sup>1</sup>

## **Background**

12. The following background is drawn from the S.O.A.F. filed by the parties on 13 December 2013:<sup>2</sup>

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<sup>1</sup> The respondents also purported to file further submissions on 12 March 2014 withdrawing those submissions made on 5 March 2014 and in support of a submission seeking 18 months to pay any penalty relying on the decision of *Fair Work Ombudsman v Gisela Bottcher & Anor* [2010] FMCA 956

<sup>2</sup> see s.191 of the *Evidence Act 1995* (Cth)

13. The first respondent, Australia China Trading Investment Consultancy Group Pty Ltd (ACN 067 632 508), ran the Australian Chinese Centre for International Education and was a corporation within the meaning of the *Corporations Act 2001* (Cth) (“the Corporations Act”).
14. The first respondent was also a constitutional corporation within the meaning of section 4 of the WR Act, from 1 July 2009, a constitutional corporation within the meaning of section 12 of the FW Act and an “*employer*” within the meaning of section 6 of the WR Act and, from 1 July 2009, a “*national system employer*” within the meaning of section 14 of the FW Act.
15. The second respondent, was at all relevant times the sole director of the first respondent who was responsible for its overall direction, management and principally responsible for the overall direction, management and supervision of the terms and conditions of employment of employees of the agency.
16. Prior to 1 July 2009, the first respondent fell within the scope of the WR Act and was required to comply with the WR Act in respect of the employment of the employees who were employed during the relevant period.
17. From 1 July 2009 to 31 December 2009, the first respondent continued to be bound in respect of the employees by the WR Act as it continued to apply by reason of the Transitional Act.
18. At all relevant times on and from 1 July 2009, the first respondent fell within the scope of the FW Act and was required to comply with the FW Act in respect of the employment of the employees who were employed during the relevant period.
19. Five employees worked for the migration agency run by the respondents during the periods set out in the table below:

<i>Employee</i>	<i>Underpayment Period</i>
<i>Yanna Gu</i>	<i>6 April 2009 to 2 June 2012</i>
<i>Xuan Yue</i>	<i>14 April 2009 to 2 June 2011</i>
<i>Yue Lu</i>	<i>29 March 2010 to 27 May 2011</i>
<i>Hui Ren</i>	<i>5 December 2011 to 1 March 2013</i>
<i>Caihong Wang</i>	<i>December 2011 to 24 February 2013</i>

20. The employees were all Chinese nationals who did not speak English as their first language and were permanent residents of Australia. The employees duties included data entry, answering telephones, responding to customer enquiries, preparing visa application forms and supporting documents, liaising with educational institutions, research and translation of English into Chinese and vice versa.
21. These employees were engaged full time by the first respondent on a “*Trial and Training*” basis in the periods set out in the table below. Four of the employees were paid a flat rate of approximately \$9.00 per hour and the fifth a flat rate of \$10.00 per hour. All were paid in cash.

<i>Employee</i>	<i>Trial and Training Period</i>
<i>Yanna Gu</i>	<i>6 April 2009 to 2 August 2009</i>
<i>Xuan Yue</i>	<i>14 April 2009 to 31 July 2009</i>
<i>Yue Lu</i>	<i>29 March 2010 to 1 August 2010</i>
<i>Hui Ren</i>	<i>5 December 2011 to 2 March 2012</i>
<i>Caihong Wang</i>	<i>19 December 2011 to 2 March 2012</i>

22. The employees were then engaged on what purported to be “*fixed 12 month term contracts*” over the periods set out below. The rates of pay they were paid during those periods are also set out in the table below:

		<i>Pay</i>
<i>Yanna Gu</i>	<i>3 August 2009 to 2 June 2012</i>	<i>\$15.00</i>
<i>Xuan Yue</i>	<i>3 August 2009 to 2 June 2011</i>	<i>\$13.74</i>
<i>Yue Lu</i>	<i>2 August 2010 to 27 May 2011</i>	<i>\$13.74</i>
<i>Hui Ren</i>	<i>5 March 2012 to 1 March 2013</i>	<i>\$16.00</i>
<i>Caihong Wang</i>	<i>5 March 2012 to 1 February 2013</i>	<i>\$16.00</i>

23. Under the so called “*fixed 12 month term contracts*” the employees were to receive a lump sum payment upon the expiry of each term contract, in lieu of entitlements to annual leave, personal leave and public holidays, along with an additional amount for commission.
24. During the period of the so called “*fixed 12 month term contracts*” the employees did not receive any payment for annual leave, personal leave or for absences on public holidays, at the time which that leave was taken.

25. On or about 23 July 2012, one of the employees lodged a complaint with the applicant with respect to her employment entitlements with the first respondent. This complaint resulted in the applicant issuing a contravention letter to the first respondent.
26. During the period from approximately February 2013 to March 2013, four other employees lodged complaints with the applicant with respect to their employment entitlements with the first respondent. These complaints resulted in the applicant issuing a second contravention letter to the first respondent.
27. On 18 June 2013, the applicant sent a letter to the respondents stating that it intended to commence proceedings against them. During the period from 20 June 2013 to 25 June 2013, the respondents rectified the underpayments to the employees in full.
28. The applicant commenced these proceedings later that month.

## **The legal framework**

29. These proceedings concern admitted contraventions of the WR Act, Transitional Act and the FW Act.
30. On 1 July 2009 the WR Act was repealed by the provisions of the FW Act. In respect of breaches occurring prior to 1 July 2009, s.11 of Schedule 2 of the Transitional Act provides that the WR Act continues to apply on or after 1 July 2009 in relation to conduct that occurred before that date.
31. The applicant (the Fair Work Ombudsman) is a “Fair Work Inspector” pursuant to s.701 of the FW Act who can bring proceedings under s.589(2) of the FW Act for conduct after 1 July 2009.
32. A Fair Work Inspector may bring proceedings relating to conduct that occurred before the repeal of the WR Act pursuant to sub item 13(1) of Part 3 to Schedule 18 of the Transitional Act.
33. Section 719(1) of the WR Act and s.546 of the FW Act enables a Court to impose a penalty upon a person who has contravened a civil remedy provision.

34. Section 719(4) of the WR Act and s.546(2) of the FW Act provide that the maximum penalty that may be imposed by the Court for each contravention committed by a body corporate is 300 penalty units and by a natural person is 60 penalty units. At the time the contraventions occurred a penalty unit was \$110. Given the period over which the admitted contraventions occurred the following table prepared by the applicant conveniently sets out the relevant maximum penalties:

Legislation	Maximum Penalty Per Contravention for a Body Corporate <sup>3</sup>	Maximum Penalty Per Contravention for an Individual <sup>4</sup>
WR Act <sup>5</sup>	300 penalty units (\$33,000)	60 penalty units (\$6,600)
Transitional Act <sup>6</sup>	300 penalty units (\$33,000)	60 penalty units (\$6,600)
FW Act <sup>7</sup>	300 penalty units (\$33,000)	60 penalty units (\$6,600)
Pay Slips <sup>8</sup>	30 penalty units (\$16,500)	N/A (as the second respondent was not involved in this contravention)

35. Subsection 719(2) of the WR Act and s.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.
36. Section 728 of the WR Act and section 550 of the FW Act provide that a person who is involved in a contravention of a civil remedy provision is treated as having contravened the civil remedy provision.

<sup>3</sup> Section 4 of the WR Act and section 12 of the FW Act provide that “penalty unit” has the same meaning as the *Crimes Act 1914* (Cth). At the time the admitted contraventions took place, section 4AA of that Act defined “penalty unit” to be \$110.

<sup>4</sup> See footnote directly above.

<sup>5</sup> Subsection 719(4)(a) of the WR Act.

<sup>6</sup> By virtue of subitem 16(1) of the Transitional Act.

<sup>7</sup> Item 2 of subsection 539(2) of the FW Act and subsection 546(2) of the FW Act.

<sup>8</sup> Item 29 and subsection 546(2) of the FW Act.

## Approach to penalty proceedings

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

- “a. the nature and extent of the conduct which led to the breaches;*
- b. the circumstances in which that conduct took place;*
- c. the nature and extent of any loss or damage sustained as a result of the breaches;*
- d. whether there had been similar previous conduct by the respondent;*
- e. whether the breaches were properly distinct or arose out of the one course of conduct;*
- f. the size of the business enterprise involved;*
- g. whether or not the breaches were deliberate;*
- 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.”*

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



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

39. In *Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor* [2010] FMCA 599 Driver FM as His Honour was then, 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.*<sup>9</sup>

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 respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the respondent did.*<sup>10</sup> *This task is distinct from and in addition to the final application of the “totality principle”.*<sup>11</sup>

25. *Thirdly, the Court will then consider an appropriate penalty to impose in respect of each course of conduct, having regard to all of the circumstances of the case.*

26. *Fourthly and finally, having fixed an appropriate penalty for each group of contraventions or course of conduct, the Court should take a final look at the aggregate penalty, to*

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<sup>9</sup> *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).

<sup>10</sup> *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*).

<sup>11</sup> *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*).

*determine whether it is an appropriate response to the conduct which led to the breaches.<sup>12</sup> The Court should apply an “instinctive synthesis” in making this assessment.<sup>13</sup> This is what is known as an application of the ‘totality principle’.*”

## **Admitted contraventions**

40. The S.O.A.F set out a summary of the admitted contraventions. These were:

- “(a) subsection 182(1) of the WR Act by failing to pay Yanna Gu and Xuan Yue the basic periodic rate of pay prescribed by subclause 16.2.2 of the Clerical Pay Scale during the WR Act Period;*
- (b) item 5 of Schedule 16 of the Transitional Act in failing to pay Yanna Gu and Xuan Yue the basic periodic rate of pay prescribed by subclause 16.2.2 of the Clerical Pay Scale during the Transitional Period in contravention of subsection 182(1) of the WR Act;*
- (c) section 45 of the FW Act in failing to pay the Employees the rate of pay prescribed by clauses 15.1 of the Clerks Modern Award during the FW Act Period;*
- (d) item 6 of Schedule 16 of the Transitional Act in failing to pay Xuan Yue for annual leave taken during the Transitional Period in contravention of subsection 235(1) of the WR Act;*
- (e) section 44 of the FW Act in failing to pay the Annual Leave Employees for annual leave taken during the FW Act Period in contravention of subsection 90(1) of the FW Act;*
- (f) section 45 of the FW Act in failing to pay the Annual Leave Employees the annual leave loading prescribed by subclause 29.3(a) and (b)(i) of the Clerks Modern Award for annual leave taken during the FW Act Period;*
- (g) section 44 of the FW Act in failing to pay the Employees their accrued annual leave entitlements upon termination of their employment in contravention of subsection 90(2) of the FW Act;*

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<sup>12</sup> 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).

<sup>13</sup> *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).

- (h) *item 6 of Schedule 16 of the Transitional Act in failing to pay Yanna Gu for personal leave taken during the Transitional Period in contravention of section 247 of the WR Act;*
- (i) *section 44 of the FW Act in failing to pay the Employees for personal leave taken during the FW Act Period in contravention of section 99 of the FW Act;*
- (j) *section 44 of the FW Act by virtue of failing to pay the Employees for absences on public holidays during the FW Act Period in contravention of section 116 of the FW Act;*
- (k) *section 45 of the FW Act by virtue of failing to pay Xuan Yue for overtime hours worked during the FW Act Period in contravention of subclause 27.1(a) of the Clerks Modern Award; and*
- (l) *section 536(1) by virtue of failing to give the Employees written pay slips in relation to each payment made to the Employees within one working day of paying an amount to the Employees in relation to the performance of work.”*

41. The second respondent admits to his involvement, within the meaning of section 728(1) of the WR Act and section 550(1) of the FW Act, in each of the above contraventions (save for that referred to at subparagraph 40(1) above).

42. The respondents admit that the contraventions resulted in underpayments in wages and entitlements to the employees totalling \$76,186.74.<sup>14</sup>

## **Considerations**

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

- a) the nature and extent of the offending conduct;
- b) the circumstances in which the conduct took place;
- c) any similar previous conduct;

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<sup>14</sup>see S.O.A.F

- d) whether the breaches were properly distinct or arose out of one course of conduct;
- e) the size of the respondents' business;
- f) the deliberateness of the contraventions;
- g) the involvement of senior management;
- h) the respondents contrition, corrective action and cooperation with the enforcement authorities;
- i) ensuring compliance with minimum standards; and
- j) deterrence.

### **The nature and extent of the conduct**

44. The applicant submitted:

*“44. The contraventions in this matter represent a failure by the first respondent to provide basic and important entitlements under Commonwealth Workplace Laws.*

*45. One purpose of Commonwealth Workplace Laws is to provide a safety net which ensures that employees are paid adequate minimum entitlements. The laws also ensure that there is an even playing field in the industry for all employers regarding employment costs. Contraventions of these important entitlements undermine the workplace relations regime as a whole and demonstrate a disregard for the first respondent's legal obligations.*

*46. The underpayment contraventions arose due to the first respondent's practice of paying the Employees flat hourly rates of pay, below the minimum rate of pay derived from the Clerical Pay Scale and the Clerks Modern Award (and up to \$7.13 per hour below the minimum entitlement during the period the Employees were placed on trial periods).*

*47. With respect to the annual leave, personal leave and public holiday contraventions, these arose as a result of the first respondent failing to pay the Employees anything at the time which the leave was taken, but instead making lump sum payments to the Employees upon the expiry of each*

*Fixed Term Contract. The parties have deducted these lump sum payments from the underpayments to the Employees, however these payments fell well short of the entitlements owed to the Employees.*

48. *Similarly, the annual leave on termination contraventions arose as a result of the first respondent only making the lump sum payments upon the expiry of Each Fixed Term Contract, which was below the Employees' entitlement to accrued annual leave on termination.*
49. *With respect to the overtime contravention, this occurred as a result of one employee performing a total of three overtime hours (comprised of 1 ½ hours on two occasions)<sup>15</sup>. The amount paid to this Employee was below the overtime rates of pay prescribed by the Clerks Modern Award.*
50. *By paying the Employees as set out in paragraphs 0 to 0 above, the first respondent caused the Employees to be significantly underpaid. The Employees were underpaid a total of \$76,186.74, comprised of the following underpayments per entitlement:*
  - (a) *failure to pay minimum wages: \$55,133.82;*
  - (b) *failure to pay annual leave: \$15,133.95;*
  - (c) *failure to pay annual leave loading: \$2,221.62;*
  - (d) *failure to pay annual leave on termination: \$6,396.51;*
  - (e) *failure to pay personal leave: \$5,943.42;*
  - (f) *failure to pay public holidays: \$10,582.91; and*
  - (g) *failure to pay overtime rates of pay: \$50.06.*
51. *The quantum of the underpayments is significant. By way of example the average underpayment per Employee was \$15,237.35 and the highest individual underpayment (to Ms Gu) was \$24,202.28. As a matter of context, Ms Gu's underpayment equates to approximately 40 weeks pay at the correct rate of pay pursuant to the Clerical Pay Scale or Clerks Modern Award.*

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<sup>15</sup> ASOF at paragraph 81.

52. *The applicant acknowledges that the respondents rectified the underpayments during the period 20 June 2013 to 25 June 2013. However, given that some of the Employees' employment was terminated in May or June 2011,<sup>16</sup> the respondents have received the benefit of the underpayment by deferring payment for approximately two years. In contrast, the Employees were, and continue to be, commensurately deprived of the financial benefits that would flow from the timely payment of their correct entitlements.*<sup>17</sup>

45. The respondents submitted:

“44. *The central element of the penalty assessment process requires the Court to ensure that the penalty is appropriate to the objective seriousness of the contravention. As such, the nature and extent of the contravening conduct and the circumstances in which the conduct took place are important considerations.*

45. *The Underpayment is \$76,186.74 and occurred over a period of April 2009 to February 2014. The quantum of the Underpayment is not insignificant but it is not at the higher level which often comes before the Court.*

46. *The admitted contraventions relate to 5 employees. However, each employee was not a victim of each of the 12 admitted contraventions.*

47. *The failure to pay minimum wages contraventions arose out of ACCIE paying flat rates which fell below the rates determined by the applicable industrial instrument(s).*

48. *In relation to the annual leave<sup>18</sup>, personal leave and public holidays contraventions, they arose from a decision to make payment in respect of those entitlements upon the expiry, and in accordance with the terms, of the fixed term contracts executed between ACCIE and the Employees. While it is acknowledged that payment did not occur at the time when the leave was taken, there was not a complete failure on the part of the respondents to recognise the leave entitlements.*

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<sup>16</sup> ASOF at paragraph 5.

<sup>17</sup> *Fair Work Ombudsman v Hungry Jacks Pty Ltd* [2011] FMCA 233 at [47].

<sup>18</sup> Note: Caihong Wang was not a victim of the contravention involving a failure to pay annual leave taken during employment;

49. *The annual leave upon termination contravention arose from a decision to make payment in respect of those entitlements upon the expiry, and in accordance with the terms, of the fixed term contracts executed between ACCIE and the Employees. While it is acknowledged that the payment of the accrued annual leave entitlements upon termination fell short, there was not a complete failure on the part of the respondents to recognise the obligation and/or an accrued entitlement.*
50. *The overtime contravention relates to a failure to pay a total of 3 overtime hours to Xuan Yue during a total employment which spanned almost 2 years. The total value of the unpaid overtime was only \$50.06. None of the other Employees were victims of the overtime contravention.*
51. *The payslip contravention did not arise from a complete failure to provide payslips.”*
46. I accept that the admitted contraventions in this matter represent a failure “*to provide basic and important entitlements under Commonwealth Workplace Law[s].*”<sup>19</sup> The arrangements applied by the first respondent (which the second respondent has admitted involvement in) to the employees did not comply with the minimum safety net and as such exhibits conduct which “*undermine[s] the workplace relations regime as a whole.*”<sup>20</sup>

### **The circumstances in which the conduct took place**

47. The applicant submitted:

- “53. *The Employees were all Chinese nationals and from a non-English speaking background. Two of the Employees required a translator to assist during Records of Conversation with the applicant.*”<sup>21</sup>
54. *The second respondent was responsible for the management, direction and control of the first respondent’s operations*<sup>22</sup>. *The second respondent was responsible for determining the terms and conditions upon which the*

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<sup>19</sup> Applicant’s submissions at paragraphs [44] and [45]

<sup>20</sup> Ibid

<sup>21</sup> Chum Affidavit at paragraphs 13 and 17.

<sup>22</sup> ASOF at paragraph 4(b) and (c).

*Employees were engaged by the first respondent<sup>23</sup>. The second respondent's conduct was the cause of the first respondents' contraventions of the WR Act, Transitional Act and FW Act."*

48. The respondents submitted:

*"52. At paragraph 53 of the Applicant's Submission it is suggested that the Employees were vulnerable by reason of their national extraction and English language skills.*

*53. It is not open for this Court to assume that because an employee belongs to a general class of persons, such as foreign nationals, young persons (who are not minors), lowly paid or itinerant workers or non-English speakers, that they are more vulnerable than any other employee or were in fact actually exploited on that basis.<sup>24</sup>*

*54. The nature of ACCIE's business and Mr Pan's involvement is referred to at paragraphs 16 to 20 above and at [3] to [13] of the SOAF. Ultimately, the Employees were paid in accordance with their employment contracts."<sup>25</sup>*

49. In submissions made at the penalty hearing the respondents' position was that the Court could not and should not make a finding that the employees were vulnerable.

50. The respondents referred to the decision of Federal Magistrate Lucev, (as His Honour then was), in *Fair Work Ombudsman v Ultra Tune Australia Pty Ltd* [2012] FMCA 560 which was as follows:

*"14. There is no evidence that Mr Colis was unfamiliar with Australia's labour practices. There is no statement to that effect in the Agreed Statement, and the FW Ombudsman filed no affidavit evidence and led no oral evidence. The Court cannot simply assume that because an employee is a foreign national, that the employee is unfamiliar with Australia's labour practices, or more vulnerable to underpayment or exploitation than any other employee."<sup>26</sup>*

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<sup>23</sup> ASOF at paragraph 4(c)

<sup>24</sup> See: *Fair Work Ombudsman v Ultra Tune Australia Pty Ltd* [2012] FMCA 560 at 14, per Lucev FM; *Hanssen Pty Ltd v Jones* [2009] FCA 192 at 55-56 and 60 per Siopis J; (2009) 179 IR 57 at 66-68 per Siopis J

<sup>25</sup> First Pan Affidavit at [6]

<sup>26</sup> *Hanssen Pty Ltd v Jones* (2009) 179 IR 57 at 66-67 per Siopis J; [2009] FCA 192 at paras.55-56 and 60 per Siopis J.



51. In that decision His Honour cited the decision in *Hanssen Pty Ltd v Jones* [2009] FCA 192 where the Federal Court said:

*“54. As to the second limb of this ground of appeal, the appellant’s contention is that the Federal Magistrate erred in finding that the appellant had exploited the vulnerability of the employees, and in failing to find that none of the employees suffered any material disadvantage.*

*55. The appellant accepted that the employees were, by reason of their immigration status, vulnerable to exploitation. However, said the appellant, there was no evidence that the terms of the AWAs which the appellant had entered into with each of the employees was harsh or unfair. Nor, said the appellant, had the respondent so contended at the hearing. There was, said the appellant, no evidence to support a finding that the appellant had exploited the vulnerability of the employees.*

*56. It is apparent from his reasons [see [35] above], that the Federal Magistrate applied the finding that there had been an exploitation of the vulnerable employees in determining the appropriate penalty in respect of the contraventions both of s337 and s341. The difficulty with the Federal Magistrate’s approach is that he did not make explicit findings as to the manner in which Mr Hanssen had exploited the vulnerability of the employees affected by the contraventions of s337 or those employees the subject of the contraventions of s341.*

*57. The primary finding of the Federal Magistrate in respect of the exploitation of the vulnerability of the employees is found at [8] of his reasons (see [20]-[21] above). There, the Federal Magistrate referred to the fact that Mr Hanssen said in his interview that the employees would “sign anything”. The Federal Magistrate then went on to find that Mr Hanssen knew that the employees were vulnerable and that he “exploited his perception of these employees as being malleable to the wishes” of the appellant. However, as already mentioned, the Federal Magistrate did not go on to make specific findings as to the form that the exploitation took. Nor did he refer to the detriment suffered by the employees by reason of the exploitation by the appellant.*

58. *The finding of exploitation appears to be based on Mr Hanssen's statement that the employees would "sign anything". The evidence of Mr Hanssen that the employees would "sign anything" supports the finding of the Federal Magistrate that Mr Hanssen knew the employees were vulnerable. It does not support the finding that because they were willing to "sign anything" the appellant exploited that willingness to the disadvantage of the employees.*
59. *In my view, in making a finding that there was exploitation by the appellant of vulnerable workers, and in treating that finding as an adverse circumstance affecting penalty, it was incumbent upon the Federal Magistrate to make specific findings in relation to the detrimental impact, if any, on the employees affected. This is because that finding and the treatment of that finding as an adverse factor, carried the implication that there had been such a detrimental effect. In any event, for the reasons expressed below, it was a relevant consideration in relation to any finding that there was exploitation of the employees' vulnerability.*
60. *In my view, the Federal Magistrate erred in failing to recognise that there was no evidence that the contraventions had led to the employees entering into AWAs which were disadvantageous when compared to AWAs entered into by other employees. The Parliamentary intention behind this part of the Act is to prescribe a process which gives an employee enough time to consider the terms of the proposed AWA and, thereby, prevent the situation from arising where the employee is pressured to enter into an unfair contract because of an unfair process. In other words, the objective of the process is to preclude, so far as possible, an employer from exploiting the ignorance of an employee as to the terms of a proposed AWA, to pressure or cajole that employee into entering into an unfair contract. In considering the penalty, it was relevant to consider whether the conduct comprising the contraventions amounted to the very mischief to which the Act was directed.*
61. *The respondent contended that the Federal Magistrate did not err in taking into account the exploitation of the vulnerability of the employees as a factor adverse to the appellant, because the appellant was incorrectly focusing on the indirect consequences of the contraventions of the*

*Act. The detriment to the employees, said the respondent, flowed directly from the breach, namely, the employees did not receive the statutory benefits. In my view, this fact alone would not justify the Federal Magistrate treating “the exploitation of the vulnerability” of the employees as a specific adverse factor. The detriment identified in the respondent’s submissions, namely, the denial of the statutory benefits, was no greater than, and of no different a character from that suffered by any non-vulnerable employee who had been denied the statutory benefits provided for under s337 or s341. In this case, there does not appear to have been any other additional material detriment suffered by these employees by reason of their vulnerability than would otherwise have been the case.*

62. *In my view, the appellant is correct in its submission that the Federal Magistrate placed too much emphasis on the mere fact of the vulnerability of the employees, rather than articulating the actual detriment suffered by the employees beyond the denial of the statutory benefits...*”

52. It will be clear from the above extract that the Federal Court was concerned with the link between the vulnerability of the employees (which was accepted) and the risk of exploitation. In this case, as is clear from the S.O.A.F, the employees were not only immigrants whose first language was not English but the practical consequences for them of the conduct the respondents have now admitted is they were required to do “*Trial and Training Periods*” by the first respondent during which they were paid cash in hand. They then had to submit to so called fixed 12 month term contracts over successive 12 month periods. The employees were denied their statutory entitlements for an extended period and were only paid correctly when the applicant threatened to commence these proceedings. The conduct engaged in by the respondents (in breach of the WR and FW Acts) as against the employees over such an extended period illustrates the very disadvantage in dealing with the respondents and how vulnerable they were to such unlawful conduct.

## **The nature and extent of any loss or damage**

53. The applicant submitted:

*“8. During the period from approximately 6 April 2009 to 1 March 2013, the Employees were underpaid a total amount of \$76,186.74. The underpayments arose as a result of the first respondent initially engaging the Employees on trial periods of approximately three to four months during which:*

*(a) the Employees (apart from Yue Lu) were paid a flat rate of pay of \$9 per hour, which was paid cash in hand; and*

*(b) Yue Lu was paid a flat rate of pay of \$10 per hour, which was also paid cash in hand.*

*After the Employees completed the trial periods, they were engaged under fixed 12 month term contracts (Contracts of Employment), pursuant to which they were paid flat rates of pay ranging from \$13.74 to \$16.00 per hour.*

*9. By paying the Employees the rates of pay set out in the paragraph directly above, the first respondent underpaid the Employees the minimum rates of pay prescribed by the Clerical Pay Scale and the Clerks Private Sector Modern Award, and up to \$7.13 per hour lower than the minimum rates with respect to the rates of pay paid during the trial periods.*

*10. In addition, during the periods that they were employed by the first respondent, the Employees were not paid anything for annual leave, annual leave loading, personal leave, absences on public holidays at the time which that leave was taken.*

*11. Upon the expiry of each Contract of Employment, the Employees each received a lump sum payment from the first respondent, which pursuant to the Contracts of Employment covered the Employees' entitlements to untaken annual leave, personal leave and public holiday pay, with any additional money to be accounted as commissions. These lump sum payments were insufficient to satisfy the Employee's entitlements and no monies were paid for commissions.*

54. The respondents submitted:

*“55. The admitted contraventions have resulted in a total underpayment of \$76,186.74.*

*56. While the relevant Employees have been deprived of the benefit of the underpaid amounts, there is no evidence before the Court as to the effect of the contraventions on the individual Employees. The Court simply cannot know what, if any, particular hardship was entailed in the respondents’ failure to pay the Employees correctly.”*

55. The admitted contraventions and underpayments concern 5 employees and amount to over \$70,000. The offending conduct was as result of the arrangements implemented by the respondents which resulted in the employees missing out on statutory minima, which they would be entitled to expect, would be met over an extended period.

### **Any similar previous conduct**

56. The applicant submitted:

*“55. The applicant is not aware of any previous contraventions which have been proven by the Court.*

*56. The applicant notes that the first respondent was the subject of another investigation with the applicant with respect to alleged contraventions of Commonwealth Workplace Laws<sup>27</sup>. Further details of this investigation are set out in paragraphs 63 and 64 below.*

...

*63. Furthermore, the respondents previously engaged in similar conduct, by failing to pay another employee, Ms Sanshan Li, her employment entitlements in strikingly similar circumstances. Specifically, the first respondent underpaid Ms Li her entitlements to minimum rates of pay, annual leave, annual leave loading and public holiday pay in contravention of Commonwealth Workplace Laws and the Clerks Modern Award.*

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<sup>27</sup> ASOF at paragraph 93.

64. *The applicant brought the contraventions with respect to Ms Li to the respondents' attention on 30 April 2012 in a Contravention Letter sent to the respondents which made the respondents aware of the requirement to comply with Commonwealth Workplace Laws, including the Clerks Modern Award. Despite the fact that the respondents rectified the underpayment to Ms Li, the first respondent continued to engage in the same conduct by underpaying the Employees their entitlements for nearly a year during the period from 30 April 2012 until 1 March 2013.*"

57. The respondents submitted:

"57. *There is no evidence of any previous contraventions which have been proved by the Court or any court.*

58. *At paragraph 56 of the Applicant's Submissions there is a reference to another investigation with respect to alleged contraventions of workplace laws. The issue of that investigation is dealt with at paragraphs 75 to 77 below.*

59. *In the premises, the respondents are entitled to be considered to be, and to be treated as, first time contraveners for penalty purposes.*

...

75. *Further, the FWO seeks to rely upon the alleged failure to pay another employee, Sanshan Li. Sanshan Li was employed by ACCIE from 19 December 2011 to 14 May 2012 which employment overlaps with a number of the Employees. The alleged contraventions involving Sanshan Li come within the course of conduct which is the subject of this proceeding and would be grouped accordingly. Mr Pan was not informed that ACCIE was required to comply with the Clerks Modern Award until it received a determination of contravention letter issued on 30 April 2012 which is:*

- (a) after Xuan Yue's employment ceased on 2 June 2011;*
- (b) after Yue Lu's employment ceased on 27 May 2011;*
- (c) after the remaining Employees had commenced employment.*

76. *The underpayments to Sanshan Li were rectified by ACCIE.*

77. *It cannot be fairly stated that the contraventions were deliberate in the circumstances of this case. It might be said that the respondents were careless in their failure to ensure compliance with the Clerks Modern Award but only after receipt of the determination of contravention letter issued on 30 April 2012 and not before.*”

58. Whilst the respondents’ submission that there is no evidence of any previous contraventions which have been proved by the Court or any court may be accepted, there is evidence of the conduct which is now admitted having occurred previously and the respondents having notice of their obligations yet conduct in breach thereof continuing.

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

59. The applicant submitted:

“32. *Subsection 719(2) of the WR Act, item 16(1) of the Transitional Act and subsection 557(1) of the FW Act provide that where two or more contraventions of the same civil remedy provision are committed by the same person, and arise out of a course of conduct by that person, the contraventions shall be taken to be a single contravention of the provision. The applicant accepts that the respondents have the benefit of these provisions in relation to repeated contraventions of each of the applicable civil remedy provisions. Particularly relevant is whether the breaches arose out of separate acts or decisions of the employer, or out of a single act or decision. The latter case will constitute a course of conduct but the former will not*<sup>28</sup>. *The onus of establishing the benefit of these provisions is on the respondents.*<sup>29</sup>”

33. *In addition to the course of conduct provisions set out above, the applicant accepts that some of the contraventions have common elements and this should be taken into account when considering an appropriate penalty to ensure that the respondents are not punished more than once for the same or substantially similar conduct.*

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<sup>28</sup> *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 266-267 per Gray J (with whom Northrop J agreed at 245).

<sup>29</sup> *Workplace Ombudsman v Securit-E Holdings Pty Ltd (In Liquidation) & Ors* [2009] FMCA 700 at [5].

34. *The applicant accepts that, based on the facts in this case, the respondents have the benefit of subsection 719(2) of the WR Act, and section 557 of the FW Act in relation to repeated breaches of each term regarding each of the Employees. Accordingly, in circumstances where the contraventions listed in Annexure A above relate to multiple employees, the course of conduct provisions in subsection 719(2) of the WR Act and section 557 of the FW Act should be applied, thereby reducing the total number of potential contraventions to 12.*
35. *In addition to reducing the number of contraventions as set out in the paragraph directly above, it is submitted that where a legislative change, or a change in industrial instrument coverage, has meant that separate contraventions have been alleged under different legislation or different instruments (that is, the WR Act, Transitional Act and FW Act, or arising from contraventions of the Clerical Pay Scale and the Clerks Modern Award) it is necessary for the Court to consider whether there was in fact a single course of conduct or a common element straddling the contravention periods for the purpose of determining penalty.*
36. *The applicant submits that the respondents should not be penalised more than once for the same conduct arising out of these legislative changes. The applicant submits that this should apply to:*
- (a) the failure to pay the correct minimum rates prescribed by the Clerical Pay Scale and the Clerks Modern Award during the WR Act Period, Transitional Period and the FW Act Period (items 1 to 3 of the table at Annexure A) which arose out of the one decision by the first respondent not to pay the Employees the correct minimum rates of pay;*
  - (b) the failure to pay the Employees for annual leave taken during the Transitional Period and the FW Act Period (items 4 and 5 of the table at Annexure A) which arose out of the one decision by the first respondent not to pay the Employees for annual leave taken; and*
  - (c) the failure to pay the Employees for personal leave taken during the Transitional Period and the FW Act Period (items 8 and 9 of the table at Annexure A)*



*which arose out of the one decision by the first respondent not to pay the Employees for personal leave taken;*

37. *Other than as outlined in paragraphs to 32 to 36 above, the applicant submits that the course of conduct or common element provisions do not otherwise reduce the number of contraventions.*
38. *For the reasons set out above, it is submitted that the Court should find that the first respondent engaged in a total of eight contraventions for which penalties should be imposed. These contraventions are:*
  - (a) *failure to pay minimum wages (as prescribed by subclause 16.2.2 of the Clerical Pay Scale and subclause 15.1 of the Clerks Modern Award);*
  - (b) *failure to pay annual leave (as prescribed by subsection 235(1) of the WR Act, item 6 of Schedule 16 of the Transitional Act and subsection 90(1) of the FW Act);*
  - (c) *failure to pay annual leave loading (as prescribed by subclauses 29.3(a) and (b)(i) of the Clerks Modern Award);*
  - (d) *failure to pay accrued annual leave entitlements on termination (as prescribed by subsection 90(2) of the FW Act);*
  - (e) *failure to pay personal leave (as prescribed by section 247 of the WR Act and section 99 of the FW Act);*
  - (f) *failure to pay for absences on public holidays (as prescribed by section 116 of the FW Act);*
  - (g) *failure to pay overtime (as prescribed by subclause 27.1(a) of the Clerks Modern Award); and*
  - (h) *failure to give pay slips (as prescribed by subsection 536(1) of the FW Act).*
39. *Similarly, the Court should find that the second respondent engaged in seven contraventions (namely, all of the contraventions set out in the paragraph directly above, except for subparagraph 38(h) which relates to pay slips).*

40. *Therefore the applicant submits that the Court should consider that the maximum penalty it could impose on the respondents in this matter is:*

*(a) first respondent: \$264,000; and*

*(b) second respondent: \$46,200.”*

60. The respondents submitted:

“25. *As noted above, ACCIE has admitted to 12 contraventions and Mr Pan has admitted to being involved in 11 of those contraventions.*<sup>30</sup>

26. *The FWO accepts that the respondents have the benefit of the course of conduct provisions (i.e. subsection 719(2) of the WR Act, item 16(1) of the Transitional Act and subsection 557(1) of the FW Act) in relation to repeated breaches of each term regarding each of the Employees.*<sup>31</sup>

27. *The Court has a discretion to further aggregate the contraventions to the extent that two or more contraventions have common elements that should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention or course of conduct. It is open to the Court to group separate contraventions together where those various contraventions may be said to overlap with each other and involve potential punishment of the respondents for the same or similar conduct. A discretion to do this has been said to arise:*

*“...where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise”*<sup>32</sup>

28. *In Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39, Middleton and Gordon JJ said at [39]:*

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<sup>30</sup> SOAF at 36 – 86, 95 & 96

<sup>31</sup> Applicant’s Submissions at [34]

<sup>32</sup> See: *Construction, Forestry, Mining and Energy Union v Williams* (2009) 262 ALR 417, [2009] FCAFC 171 at [15], quoting Lord Diplock in *Director of Public Prosecutions v Merriman* [1973] AC 584 at 607

“As the passages in *Williams* [2009] FCAFC 171; 262 ALR 417 explain, a “course of conduct” or the “one transaction principle” is not a concept peculiar to the industrial context. It is a concept which arises in the criminal context generally and one which may be relevant to the proper exercise of the sentencing discretion. The principle recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is “the same criminality” and that is necessarily a factually specific enquiry. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions.”

29. *Their honours continued at [41]:*

“... the principle recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, the Court must ensure that the offender is not punished twice for the same conduct. In other words, where two offences arise as a result of the same or related conduct that is not a disentitling factor to the application of the single course of conduct principle but a reason why a Court may have regard to that principle, as one of the applicable sentencing principles, to guide it in the exercise of the sentencing discretion: *Johnson v The Queen* [2004] HCA 15; (2004) 205 ALR 346 at [3] – [4] and [34] and *Attorney-General v Tichy* (1982) 30 SASR 84 at 92 – 93. ...”

30. *To the extent that there is commonality or overlap between contraventions, it is possible to take into account the substance of the matter “by imposing no penalty, or a nominal penalty, in respect of breaches of some terms, but a substantial penalty in respect of others”.*<sup>33</sup>

31. *Consistent with the authorities referred to in paragraphs 27 to 29 above, the FWO also accepts that some of the contraventions have common elements and this should be taken into account when considering an appropriate*

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<sup>33</sup> *Gibbs v Mayor, Councillors and Citizens of the City of Altona* (above) at 223, per Gray J; See also *Kelly v Fitzpatrick* [2007] 166 IR 14 at 17

*penalty to ensure that the respondents are not punished more than once for the same or substantially similar conduct.*<sup>34</sup>

32. *For the avoidance of doubt, the respondents agree with the FWO's contention that they should not be punished more than once for the same course of conduct arising out of legislative changes.*<sup>35</sup>
33. *The FWO contends that the Court should find that ACCIE engaged in a total of 8 contraventions<sup>36</sup> as follows:*
- (a) Failure to pay minimum wages (being the contraventions listed at subparagraphs 10(a), 10(b) and 10(c) above);*
  - (b) Failure to pay annual leave (being the contraventions listed at subparagraphs 10(d) and 10(e) above);*
  - (c) Failure to pay annual leave loading;*
  - (d) Failure to pay accrued annual leave entitlements;*
  - (e) Failure to pay personal leave (being the contraventions listed at subparagraphs 10(h) and 10(i) above);*
  - (f) Failure to pay for absences on public holidays;*
  - (g) Failure to pay overtime;*
  - (h) Failure to give any payslips.*
34. *The respondents disagree with the FWO's suggested grouping of contraventions.*
35. *Each of the Employees was engaged pursuant to fixed 12 month term contracts<sup>37</sup>. Pursuant to the fixed term contracts, the Employees who were employed during the relevant period were entitled to receive a lump sum payment upon the expiry of each fixed term contract, which covered the Employees' entitlements to annual leave, personal leave and public holidays<sup>38</sup>. Mr Pan was responsible for determining the terms and conditions upon*

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<sup>34</sup> Applicant's Submissions at [33]

<sup>35</sup> Applicant's Submissions at [35] & [36]

<sup>36</sup> Applicant's Submissions at [38]

<sup>37</sup> SOAF at 11

<sup>38</sup> SOAF at 12

*which the Employees were engaged by ACCIE<sup>39</sup>. The Employees were each paid according to their employment contracts.<sup>40</sup>*

36. *The contraventions concerning the failure to pay annual leave, personal leave and for absences on public holidays taken during employment to the Employees who were employed during the relevant period (being the contraventions listed at subparagraphs 10(d), 10(e), 10(h), 10(i) and 10(j) above) therefore arose out of a single decision at the commencement of the contractual relationship to pay those entitlements upon the cessation of the fixed term contracts in accordance with their terms and conditions. Relevantly, the applicable civil remedy provision is the same for each of those contraventions. In the premises, properly characterised they arise out of a course of conduct by ACCIE (which Mr Pan was involved in within the meaning of section 728 of the WR Act and section 550 of the FW Act) and should be grouped together for the purposes of penalty in accordance with the course of conduct provisions.*
37. *Further or alternatively, for the reasons advanced in paragraphs 35 and 36 above, the respondents submit that there is an interrelationship between the legal and factual elements of the contraventions involving a failure to pay annual leave, personal leave and for absences on public holidays taken during employment (being the contraventions listed at subparagraphs 10(d), 10(e), 10(h), 10(i) and 10(j) above), and/or they arise as a result of the same or related conduct, and that that should be taken into account when considering an appropriate penalty to ensure that the respondents are not punished more than once for that same or substantially similar conduct.*
38. *Further or alternatively, the respondents maintain that the contravention involving the failure to pay annual leave loading to the Employees employed during the relevant period (being the contravention listed at subparagraph 10(f) above) has a sufficient interrelationship with the legal and factual elements of the contravention involving the failure to pay annual leave taken during employment (being the contraventions listed at subparagraphs 10(d) and 10(e) above) in that it:*

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<sup>39</sup> SOAF at 4(c)

<sup>40</sup> First Pan Affidavit at [6]

- (a) *arose out of the same decision at the commencement of the contractual relationship to pay annual leave entitlements upon the cessation of the fixed term contracts in accordance with their terms and conditions;*
- (b) *the entitlement to annual leave loading arises when an employee proceeds on annual leave;*

*and that that should be taken into account when considering an appropriate penalty to ensure that the respondents are not punished more than once for the same or substantially similar conduct.*

39. *Accordingly, the respondents submit that the contraventions should be grouped for the purposes of penalty as follows:*

- (a) *Failure to pay minimum wages (being the contraventions listed at subparagraphs 10(a), 10(b) and 10(c) above);*
- (b) *Failure to pay annual leave (including annual leave loading), personal leave and for absences on public holidays taken during employment (being the contraventions listed at subparagraphs 10(d), 10(e), 10(f), 10(h), 10(i) and 10(j) above);*
- (c) *Failure to pay accrued annual leave entitlements on termination;*
- (d) *Failure to pay overtime;*
- (e) *Failure to give payslips.*

40. *Similarly, the Court should find that Mr Pan engaged in 4 contraventions (namely, each of the contraventions set out in paragraph 39 above, except for subparagraph 39(e) which related to pay slips).*

41. *Therefore, the respondents submit that the Court should consider that the maximum penalty it could impose on the respondents in this matter is:*

- (a) *ACCIE: \$165,000;*
- (b) *Mr Pan: \$26,400.”*

61. The relevant principles on the question of whether two alleged contraventions should be treated as a “single course of conduct” are set out in *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 269 ALR 1 at [35]-[47]. Justices Middleton and Gordon observed at [39]:

*“...The principle recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is “the same criminality” and that is necessarily a factually specific enquiry. **Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions.**”(emphasis added)*

62. In relation to the course of conduct provisions the applicant submitted the admitted contraventions should be grouped in such a way that there were 8 contraventions for the first respondent and 7 contraventions for the second respondent. The respondents however submitted that the course of conduct provisions should be applied in such a way that there were 5 separate contraventions for the first respondent and 4 separate contraventions for the second respondent.
63. Given the principles set out above in my view, the approach urged on the Court by the respondents is flawed. I accept that the course of conduct provisions have application in relation to repeated breaches of a term and in regard to each of the employees, those provisions operate only in relation to two or more breaches of the same term.
64. There is a discretion to further aggregate the contraventions to the extent that two or more contraventions have common elements that should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention or course of conduct and if necessary the Court will do so. However given the above I accept the submissions made on behalf of the applicant on this issue. 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.”*

65. Having regard to the commonality between the contraventions and the substance of the conduct involved, the applicant submits, and I am satisfied, that the contraventions fall into the following categories:

**IDENTIFIED CONTRAVENTIONS FOR THE FIRST RESPONDENT**

No	Provision Contravened	Description of Contravention	Groupings	Maximum Grouped Penalty
1.	S 182(1) WR Act by contravening subclause 16.2.2 of Clerical Pay Scale under WR Act	Minimum Wages under WR Act	Minimum Wages	\$33,000
	Item 5 of Schedule 16 of Transitional Act by contravening subclause 16.2.2 Clerical Pay Scale under Transitional Act	Minimum Wages under Transitional Act		
	S.45 FW Act by contravening subclause 15.1 Clerks Modern Award	Minimum Wages under FW Act		
2.	Item 6 of Schedule 16 of Transitional Act by contravening s235(1) WR Act	Annual Leave under Transitional Act	Annual Leave	\$33,000
	S.45 FW Act by contravening s90(1) FW Act	Annual Leave under FW Act		
3.	S.45 FW Act by contravening subclause 29.3(a) and (b)(i) Clerks Modern Award	Annual Leave Loading under the FW Act	Annual Leave Loading	\$33,000
4.	S.44 FW Act by contravening s90(2) FW Act	Annual Leave on Termination	Annual Leave on Termination	\$33,000
5.	Item 6 of Schedule 16 of Transitional Act by contravening s247 WR Act	Personal Leave under Transitional Act	Personal Leave	\$33,000
	S.44 FW Act by contravening s99 FW Act	Personal Leave under FW Act		
6.	S.44 FW Act by contravening s99 FW Act	Payment for absences on public holidays under FW Act	Public Holidays	\$33,000
7.	S.45 of FW Act by contravening subclause 27.1(a) of Clerks Modern Award	Overtime	Overtime	\$33,000
8.	Subsection 536(1) of the FW Act	Pay Slips	Pay Slips	\$16,500



## IDENTIFIED CONTRAVENTIONS FOR THE SECOND RESPONDENT

No	Provision Contravened	Description of Contravention	Groupings	Maximum Grouped Penalty
1.	S182(1)WR Act by contravening subclause 16.2.2 Clerical Pay Scale under WR Act	Minimum Wages under WR Act	Minimum Wages	\$6,600
	Item 5 of Schedule 16 of Transitional Act by contravening subclause 16.2.2 of Clerical Pay Scale under Transitional Act	Minimum Wages under Transitional Act		
	S45 of FW Act by contravening subclause 15.1 of Clerks Modern Award	Minimum Wages under FW Act		
2.	Item 6 of Schedule 16 of Transitional Act by contravening s235(1) WR Act	Annual Leave under Transitional Act	Annual Leave	\$6,600
	S.45 of FW Act by contravening s90(1) FW Act	Annual Leave under FW Act		
3.	S45 of FW Act by contravening subclause 29.3(a) and (b)(i) of Clerks Modern Award	Annual Leave Loading under FW Act	Annual Leave Loading	\$6,600
4.	S44 of FW Act by contravening s90(2) FW Act	Annual Leave on Termination	Annual Leave on Termination	\$6,600
5.	Item 6 of Schedule 16 of Transitional Act by contravening s247 WR Act	Personal Leave under Transitional Act	Personal Leave	\$6,600
	S44 of FW Act by contravening s99 FW Act	Personal Leave under FW Act		
6.	S44 of FW Act by contravening s99 FW Act	Payment for absences on public holidays under FW Act	Public Holidays	\$6,600
7.	S45 of FW Act by contravening subclause 27.1(a) of Clerks Modern Award	Overtime	Overtime	\$6,600

### The size of the respondents business

66. The applicant submitted:

*“58. In the First Pan Affidavit, the second respondent states that the first respondent is a small proprietary company, and does not have a dedicated Human Resources Section<sup>41</sup>. The respondents have not produced any documentary evidence to support these statements and accordingly the applicant submits that the Court should place little weight on these statements.*

*59. Furthermore, the applicant submits that the size of the business or the employer’s financial position at the time of*

<sup>41</sup> First Pan Affidavit at paragraphs 3 and 4.

*the contraventions are matters that are not very relevant to the question of penalty*<sup>42</sup>. The applicant relies upon Workplace Ombudsman v Saya Cleaning Pty Ltd [2009] FMCA at [27] to [28] and the authorities referred to in those paragraphs:

27. In *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at paras.27 to 29 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.”*

28. Notwithstanding financial hardship that an employer may be experiencing in *Lynch v Buckley Sawmills Pty Ltd* [1984] FCA 306; (1984) 3 FCR 503, 508 Keely J said:

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

60. *Notwithstanding the respondents’ financial circumstances and the first respondent’s size, the applicant submits that the law should mark its disapproval of the conduct in question, and set a penalty which serves as a warning to others.*<sup>43</sup>

67. The respondents submitted:

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<sup>42</sup> *Cotis v McPherson* (2007) 169 IR 30 [16] (*Cotis*) and Kelly, supra at [28].

<sup>43</sup> Kelly at [28], *FWO v Bosen* 2011 VMC81 at [51].

“61. ACCIE is properly characterised as a very small private business and it does not benefit from dedicated human resources personnel or expertise.<sup>44</sup>

62. Whilst the size and financial resources of the respondents does not abrogate their obligations to comply with industrial relations laws, the size and financial resources of the respondents are relevant to the imposition of penalty.

63. In *Fair Work Ombudsman v MMP Management Services Pty Ltd & Anor*<sup>45</sup> Lucev FM held:

“Properly evidenced, and for proper reasons, incapacity to pay may afford some relief by way of mitigation of penalty.<sup>46</sup>

...

In *Kelly v Fitzpatrick*<sup>47</sup> the Federal Court did not disavow size as a factor to be considered in relation to penalty. What the Federal Court there said was:

- (a) regardless of size, corporate employers are obliged to meet minimum employment standards;
- (b) when corporate employers do not meet minimum employment standards it will be normal to impose an “appropriate” monetary sanction; and
- (c) the sanction must be at a meaningful level.<sup>48</sup>

The size of the employer is relevant to a consideration of what the “appropriate” sanction is, and whether that sanction is at a meaningful level. Whether any reduction ought to be afforded to an employer by reason of the size of the corporation concerned is a matter for consideration having regard to the particular circumstances of each case. In *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No. 2)*<sup>49</sup> the Federal Court in imposing penalties in relation to

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<sup>44</sup> First Pan Affidavit at [3] & [4]

<sup>45</sup> [2012] FMCA 207; (2012) 219 IR 397;

<sup>46</sup> *Workplace Ombudsman v KSN Engineering Pty Ltd* [2009] FMCA 538; (2009) 185 IR 316 at 322-323 per Lucev FM; [2009] FMCA 538 at paras.10 and 13 per Lucev FM. See also the extensive treatment of the issue in *Sterling Crown* IR at 352-356 per Lucev FM; FMCA at paras.58-76 per Lucev FM, and the various authorities referred to therein, including Federal Court authorities on penalties in trade practices and workplace relations cases

<sup>47</sup> (2007)166 IR 14; [2007] FCA 1080 (“*Kelly*”)

<sup>48</sup> *Kelly* IR at 21 per Tracey J; FCA at para.28 per Tracey J

<sup>49</sup> (2002) 190 ALR 169; [2002] FCA 559 (“*ABB Transmission (No. 2)*”)

contraventions of ss.45 and 45A of the *Trade Practices Act 1974* (Cth), specifically took account of:

- (a) the difference in size and scale of the operations of the offending corporations;
- (b) the fact that shares were tightly held in two of the companies which were private, whilst the third was a subsidiary of a large international public company; and
- (c) the size of the parent company of the subsidiary company, in determining the penalties to be imposed.<sup>50,51</sup>

64. *After considering a number of applicable authorities, Lucev FM continued at [49]:*

“In *Sterling Crown*, this Court having reviewed Federal Court authorities with respect to the payment of penalties in trade practices and workplace relations cases, some of which have been cited above, as well as the judgments of this Court concerning the size of the employer and capacity to pay a penalty, concluded that:

*“It therefore appears that the size and financial resources of a contravener are factors to be considered, and the impact of those factors upon the setting of penalty is in each case a matter for consideration of the particular circumstances of the size and financial resources of the contravener, plus the other factors which are relevant.<sup>52</sup>”*

65. *Contrary to the submissions advanced by the FWO, the respondents submit that the size of ACCIE and the financial position of the respondents are relevant considerations in accordance with the above cited authorities.*

66. *In the event the penalties imposed by the Court are too high, ACCIE will be forced into insolvency and Mr Pan may be forced into bankruptcy<sup>53</sup>. It is respectfully submitted that*

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<sup>50</sup> *ABB Transmission (No. 2)* ALR at 180-181 per Finkelstein J; FCA at para.40 per Finkelstein J

<sup>51</sup> *Fair Work Ombudsman v MMP Management Services Pty Ltd & Anor* [2012] FMCA 207 at 39, 41-42; (2012) 219 IR 397 at 421

<sup>52</sup> *Olsen v Sterling Crown Pty Ltd* (2008) 177 IR 337 at 356 per Lucev FM; [2008] FMCA 1392 at 76 per Lucev FM

<sup>53</sup> First Pan Affidavit at [8] & [9]

*these matters inform upon the appropriate penalty to be imposed in this case.”*

68. Whilst the second respondent did make the statements referred to in submissions in his affidavit filed in December 2013 those statements were just bare assertions and no financial or other documentary material was provided to buttress the claims made about the financial viability of the respondents. In any event threat of insolvency, whether personal or corporate, should not be a way to avoid a penalty (see *Cotis v MacPherson* (2007) 169 IR 30 at [12]).

### **The deliberateness of the breach**

69. The applicant submitted:

*“61. The applicant submits that the breaches were deliberate, or at the very least reckless. The evidence demonstrates that the second respondent contacted the Fair Work Infoline on at least seven occasions in order to obtain advice about employment entitlements<sup>54</sup>. During these occasions, the applicant informed the second respondent that:*

- (a) the first respondent was bound by the Clerks Modern Award;*
- (b) the first respondent was required to pay the minimum rates of pay prescribed by the Clerks Modern Award;*
- (c) what the minimum rates of pay prescribed by the Clerks Modern Award at the relevant time were;*
- (d) the first respondent was required to pay accrued annual leave entitlements on termination of employment; and*
- (e) the first respondent was required to pay the employees for absences on public holidays.*

*62. Despite the applicant informing the second respondent of the matters set out in the paragraph directly above, the second respondent continued to underpay the Employees.*

*63. Furthermore, the respondents previously engaged in similar conduct, by failing to pay another employee, Ms*

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<sup>54</sup> ASOF at paragraphs 21 to 27.

*Sanshan Li, her employment entitlements in strikingly similar circumstances.<sup>55</sup> Specifically, the first respondent underpaid Ms Li her entitlements to minimum rates of pay, annual leave, annual leave loading and public holiday pay in contravention of Commonwealth Workplace Laws and the Clerks Modern Award.*

64. *The applicant brought the contraventions with respect to Ms Li to the respondents' attention on 30 April 2012 in a Contravention Letter sent to the respondents which made the respondents aware of the requirement to comply with Commonwealth Workplace Laws, including the Clerks Modern Award<sup>56</sup>. Despite the fact that the respondents rectified the underpayment to Ms Li, the first respondent continued to engage in the same conduct by underpaying the Employees their entitlements for nearly a year during the period from 30 April 2012 until 1 March 2013.*

65. *In light of the matters set out in paragraphs 0 to 0 above, the applicant submits that the respondents' conduct was deliberate. There is no evidence to suggest that the second respondent would have ceased underpaying the Employees or future employees were it not for these proceedings."*

70. The respondents submitted:

*"67. This is one of the areas in which the parties have differing views.*

*68. The FWO maintains that the admitted contraventions were deliberate, or at the least reckless<sup>57</sup>. In support of its contention the FWO relies upon alleged telephone contact by Mr Pan with the Fair Work Infoline and another investigation into alleged contraventions involving another employee, Sanshan Li.*

*69. The respondents maintain that such a submission is disingenuous for the reasons advanced below.*

*70. There is no definitive evidence that Mr Pan made the alleged telephone calls.*

*71. At no time during the telephone calls is it determined that the Clerks Modern Award applied to any of the Employees.*

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<sup>55</sup> ASOF at paragraph 93.

<sup>56</sup> ASOF at paragraph 93(b).

<sup>57</sup> Applicant's Submissions at [61]

*It is not until the final telephone call on 27 December 2012 when the coverage of the Clerks Modern Award is acknowledged which is:*

- (a) after Yanna Gu's employment ceased on 2 June 2012;*
  - (b) after Xuan Yue's employment ceased on 2 June 2011;*
  - (c) after Yue Lu's employment ceased on 27 May 2011;*
  - (d) over 12 months after Hui Ren commenced employment on 5 December 2011;*
  - (e) over 12 months after Caihong Wang commenced employment on 19 December 2011.*
72. *At no time during the telephone calls are minimum rates of pay prescribed by the Clerks Modern Award detailed.*
73. *The requirement to pay for absences on public holidays was not raised until the telephone call made on 17 January 2012 which is:*
- (a) after Xuan Yue's employment ceased on 2 June 2011;*
  - (b) after Yue Lu's employment ceased on 27 May 2011;*
  - (c) after the remaining Employees had already worked a number of public holidays.*
74. *While the requirement to pay accrued annual leave on termination was discussed in the telephone call made at 3:16pm on 8 December 2011, it was discussed primarily in the context of serious misconduct and authorised contractual deductions. In any event, ACCIE made lump sum payments to the Employees on the cessation of the fixed term contracts which payments accounted for, inter alia, accrued but untaken annual leave.<sup>58</sup>*
75. *Further, the FWO seeks to rely upon the alleged failure to pay another employee, Sanshan Li. Sanshan Li was employed by ACCIE from 19 December 2011 to 14 May 2012<sup>59</sup> which employment overlaps with a number of the Employees<sup>60</sup>. The alleged contraventions involving Sanshan Li come within the course of conduct which is the*

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<sup>58</sup> SOAF at 12

<sup>59</sup> SOAF at 93(a)

<sup>60</sup> First Pan Affidavit at [7]

*subject of this proceeding and would be grouped accordingly. Mr Pan was not informed that ACCIE was required to comply with the Clerks Modern Award until it received a determination of contravention letter issued on 30 April 2012 which is:*

- (a) after Xuan Yue’s employment ceased on 2 June 2011;*
- (b) after Yue Lu’s employment ceased on 27 May 2011;*
- (c) after the remaining Employees had commenced employment.*

76. *The underpayments to Sanshan Li were rectified by ACCIE.<sup>61</sup>*

77. *It cannot be fairly stated that the contraventions were deliberate in the circumstances of this case. It might be said that the respondents were careless in their failure to ensure compliance with the Clerks Modern Award but only after receipt of the determination of contravention letter issued on 30 April 2012 and not before.”*

71. As noted above whilst the applicant submitted the Court should find the breaches were deliberate, the respondents contended it could not be “*fairly stated*” they were deliberate. The applicant had relied on the decision of Judge Turner in *Fair Work Ombudsman v Mildura Battery Company Pty Ltd & Anor* [2014] FCCA 192 at paragraphs [37]-[39] as follows:

*“37. Ignorance of the law is no excuse: see Fair Work Ombudsman v Access Embroidery (Australia) Pty Ltd & Anor [2012] FMCA 835 at [40] – [49]. It is incumbent on employers to make all necessary enquiries to ascertain their employees’ proper entitlements and pay their employee at the proper rates: Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In Liquidation) & Ors [2013] FCCA 52 at [35].*

*38. The contraventions were not deliberate (prior to the investigation) but were careless (as admitted in the respondent’s written submissions at [37]), and by Mr Biviano at the hearing (T p.49, l.30). After the respondents were advised on 24 September 2012 that Mr Sutherland was being underpaid (Marquick Affidavit at [19]), the*

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<sup>61</sup> SOAF at 93(d)



*minimum wage and overtime contraventions continued (SOAF at [75]). Those continuing contraventions were deliberate or negligent in the extreme.*

39. *The evidence shows that the second respondent turned his mind to the question of whether Mr Sutherland could continue on at his old rate of pay after he completed his training, and whether an annual leave loading would be payable. There is an obligation on an employer to obtain accurate reliable advice from an appropriate source. The first respondent was aware of the issues but failed to seek authoritative advice. Further, the second respondent made an enquiry with his accountant 14 years before the breach and made no effort to update or check the advice (T p.12 [5]).”*

72. As His Honour observed in the above extract by reference to previous decisions, it is incumbent on employers to make all necessary enquiries to ascertain their employees’ proper entitlements and pay their employees at the proper rates. There is no evidence the respondents sought to do so. There is however, evidence that they were aware of previous contraventions. Given this I do not accept the respondents’ submissions they were “careless”. Overall I accept the applicant’s submission that the respondents were reckless and this is an aggravating factor.

### **The involvement of senior management**

73. The applicant submitted:

“66. *A corporation can only act through its officers and agents. The second respondent was a director of the first respondent and was the person responsible for the first respondents overall direction, management and supervision*<sup>62</sup>. *The second respondent determined the Employees’ terms and conditions of employment.*<sup>63</sup>”

67. *The second respondent has admitted that he was involved in the contraventions of the first respondent within the meaning of section 550 of the FW Act.”*

74. The respondents submitted:

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<sup>62</sup> ASOF at paragraph 4(b).

<sup>63</sup> ASOF at paragraph 90.

“78. *It is clear that ACCIE does not have a large or complex management structure.*

79. *Mr Pan is the sole director of ACCIE<sup>64</sup> and the only manager engaged in the business. In a company of such a small size it is practically inevitable that senior management will be involved in the breaches.*

80. *It is respectfully submitted that the respondents ought not be punished for the involvement of senior management in the same way a larger corporation with sophisticated management structures and hierarchies would be. Accordingly, this factor is not aggravating or of great weight in the consideration of penalty in this matter.”*

75. As the submissions make clear this was not a large business. The controlling mind of the first respondent was closely involved in the contravening conduct. Whilst it can be accepted that a small business does not have the “*sophisticated management structures*” of a larger corporation as was *Fair Work Ombudsman v Bosen Pty Ltd* [2011] VMC 81 at paragraph [51]:

*“There is a need to send a message to the community at large, and small employers particularly, that the correct entitlements for employees must be paid and that steps must be taken by employers (of all sizes) to ascertain and comply with minimum entitlements (as opposed to ignoring those obligations). Compliance should not be seen as the bastion of the large employer, with human resources staff and advisory consultants (accountants, consultants, lawyers) behind them.”*

### **The respondents contrition, corrective action and cooperation with the enforcement authorities**

76. The applicant submitted:

“68. *For the reasons discussed at paragraphs 84 to 95 of these submissions, the applicant submits that the respondents should be entitled to a 10% discount for co-operation.*

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<sup>64</sup> Chum Affidavit at [42] & Tab 31

84. *The applicant notes that where wrongdoers have cooperated with the relevant authorities and made admissions early in the course of an investigation or soon after the commencement of proceedings that it is appropriate to allow a discount of penalty of up to 25 per cent. However, consistent with the majority decision in Mornington Inn (at [74] to [76] per Stone and Buchanan JJ):*

“...the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability:

- (a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or
- (b) has indicated a willingness to facilitate the course of justice.”

85. *The Applicant also refers to the following statement of Federal Magistrate Burnett in Fair Work Ombudsman v Contracting Plus Pty Ltd & Anor at [125] to [127]:*

“Although the applicant concedes that the respondents have admitted liability and could be said to have cooperated by partaking in the investigation, at least in a limitation fashion particularly by engaging in the record of interview process; by providing some necessary records and, by signing the agreed statement of facts, although that itself was only agreed on the day of the trial and, of course, only after some delay, the Applicant says the Court should not be too anxious to afford the Respondent a significant discount for its admission of conduct.”

86. *His Honour then referred to the passage of Mornington Inn and continued:*

“In my view, this is a case where neither of those qualities can be demonstrated and, accordingly, I do not consider that any discount ought to be provided in this instance on this basis.”

#### *Admissions*

87. *The respondents agreed to make full admissions in September 2013. The applicant notes that this was only after proceedings were commenced on 26 June 2013 and approximately nine months after the first respondent was*

*notified that the applicant had determined that monies were owed to Yue Lu on 21 January 2013 .*

#### *Corrective Practices*

88. *During the period from 20 June 2013 to 25 June 2013, the respondents rectified the underpayment to the Employees in full .*
89. *In the First Pan Affidavit, the second respondent has also stated that he has engaged in corrective practices by:*
- (a) reading the Clerks Modern Award and National Employment Standards, in order for him to understand his obligations to employees, specifically the clauses relating to payment of wages, payment of leave entitlements and ensuring that pay slips are delivered on time ;*
  - (b) reading information provided by the applicant ;*
  - (c) ensuring that employment contracts align with the FW Act and any relevant awards.*

*The second respondent has not provided any documentary evidence to substantiate these statements, such as documents recording the rates of pay now paid to employees or revised contracts of employment. The applicant submits that little weight should be attributed to these statements regarding corrective practice, in the absence of robust evidence substantiating the allegations.*

#### *Co-operation with Authorities*

90. *The respondents co-operated to some extent with the relevant fair work inspectors through the majority of the investigation, by providing limited pay records and responding to requests for information. However, the respondents disputed the FWO's determinations on the basis that:*
- (a) unsigned contracts were not valid ;*
  - (b) information provided verbally was not valid ;*
  - (c) the applicant was not entitled to rely on photocopied documents as evidence ; and*

91. *The second respondent also declined to participate in a Record of Interview with the applicant, which would have assisted the FWO in making its determinations.*
92. *Finally, the respondents also sought to place blame on the Employees for the contraventions on the basis that:*
  - (a) *personal leave taken by one of the Employees was not genuine (despite the fact the employee provided medical certificates);*
  - (b) *one of the Employees engaged in trespass and coercion;*
  - (c) *one of the Employees engaged in theft by stealing company files; and*
  - (d) *the Employees spent time at work on non-related work activities which they were not entitled to be paid for.*

#### *Apology*

93. *The second respondent has apologised to the Court for the contravening conduct in the First Pan Affidavit . However this apology came almost six months after the initial determinations were made by the applicant regarding the underpayments to the Employees. Further, there is no evidence before the Court of any apology being given to the Employees in respect of the respondents' conduct.*
94. *It is the applicant's submission that any contrition showed by the respondents demonstrates an acceptance of the inevitability of these proceedings, rather than an acceptance of wrongdoing or a suitable expression of regret.*

#### *Conclusion*

95. *It is the applicant's submission that in light of the matters set out in paragraphs 84 to 94 above, the respondents should be entitled to a discount of no more than ten per cent for their cooperation. This discount is in recognition of the fact that the respondents' agreement to resolve the matter by way of admissions and make full rectification payments has spared further use of the Court's resources and saved the parties time and costs."*

77. The respondents submitted:

- “81. *Mr Pan is deeply sorry for not paying the Employees the correct amount.<sup>65</sup> He is sorry that his misconduct has caused public funds to be expended.<sup>66</sup>*
82. *The respondents have cooperated with the FWO<sup>67</sup> including in the preparation of the SOAF.*
83. *In Ponzio v B & P Caelli Constructions Pty Ltd,<sup>68</sup> Lander J stated that the fact that the respondent in that case had not previously breached that part of the WR Act and cooperated from an early stage of the proceeding was evidence of remorse and contrition. Similarly, in Fair Work Ombudsman v Drivecam Pty Ltd & Ors,<sup>69</sup> Emmett FM had regard to the fact that the respondents in that case had cooperated with the applicant and did not resist the application as well as the fact that they were first time contraveners. This conduct was described as being evidence of remorse and contrition and was considered by the Federal Magistrate to be a mitigating factor.*
84. *In the premises, the respondents have exhibited contrition for which they should receive appropriate recognition.*

***Whether the party committing the breach had taken corrective action***

85. *During the period from 20 June 2013 to 25 June 2013 the respondents rectified the underpayments to the Employees in full.<sup>70</sup>*
86. *The underpayments were rectified before these proceedings were commenced on 26 June 2013.<sup>71</sup>*
87. *The underpayment amounts stated in the FWO’s letter dated 17 June 2013 were different to the amounts required by the underpayment assessment sheets that came with the earlier contravention letters.<sup>72</sup>*
88. *On 19 June 2013 Mr Pan received an email from the FWO with amended assessment sheets explaining the difference*

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<sup>65</sup> First Pan Affidavit at [10]

<sup>66</sup> First Pan Affidavit at [11]

<sup>67</sup> SOAF at 35

<sup>68</sup> (2007) 158 FCR 453

<sup>69</sup> [2011] FMCA 600 at 77

<sup>70</sup> SOAF at 33; Second Pan Affidavit at [4]

<sup>71</sup> SOAF at 34

<sup>72</sup> Second Pan Affidavit at [3], Exhibit “LMP-1”

*and making further corrections to the alleged underpayments.*<sup>73</sup>

89. *Accordingly, the underpayments were rectified in full within 1 week of the FWO determining the correct amount of the underpayments. This is a factor which weighs heavily in the respondents favour.*
90. *Furthermore, the respondents submit that they have taken corrective action commensurate with a business of ACCIE's size. Mr Pan has taken the time to read and review the Clerks Modern Award and the National Employment Standards to enable him to properly understand his obligations to employees including in relation to the payment of wages, payment of leave entitlements and pay slips.*<sup>74</sup>
91. *Mr Pan has also spent considerable time reading through information provided by the FWO and will ensure employment contracts align with the FW Act and any relevant awards.*<sup>75</sup>

***Whether the party committing the breach had cooperated with the enforcement authorities***

92. *Mr Pan has cooperated with the FWO to the best of his ability to ensure that the cost of pursuing these matters was minimised.*<sup>76</sup>
93. *Since the commencement of the proceedings, the respondents have cooperated with the FWO<sup>77</sup>. The cooperation includes an acceptance of responsibility and the preparation of the SOAF.*<sup>78</sup>
94. *While the respondents raised some issues with respect to the evidentiary basis of the investigation as it progressed, it seems that objection was not in vain. The FWO had repeatedly asserted a larger underpayment and only revised its position on 19 June 2013<sup>79</sup>. In the circumstances, it would be inequitable and undeserved to*

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<sup>73</sup> Second Pan Affidavit at [4], Exhibit "LMP-2"

<sup>74</sup> First Pan Affidavit at [12]

<sup>75</sup> First Pan Affidavit at [13] & [14]

<sup>76</sup> First Pan Affidavit at [15]; Second Pan Affidavit at [5]

<sup>77</sup> SOAF at 35

<sup>78</sup> Second Pan Affidavit at [5]

<sup>79</sup> Second Pan Affidavit at [4], Exhibit "LMP-2"

*punish the respondents for doubting the veracity of the FWO's investigation.*

95. *It is important to consider the proper weight and acknowledgement that should be given to the admission of culpability which obviously assisted the case to be determined expediently and at a minimum of cost and inconvenience to everyone concerned.*
96. *The cooperation and admissions of the respondents are sufficiently significant for the Court to be able to infer that they have resulted in significant monetary and resource expenditure savings for both the FWO and the Court. In this case it is a credible expression of regret and indicates a willingness to facilitate the course of justice.*
97. *The cooperation and admissions of the respondents warrant a significant reduction in overall penalty.*
98. *The respondents have indicated an acceptance of wrongdoing, a suitable and credible expression of regret and a willingness to facilitate the course of justice.*
99. *Accordingly, it is appropriate to allow a discount of penalty of no less than 25% on account of their admissions, contrition and corrective action.<sup>80</sup>*

78. I accept the respondents' agreement to resolve the matter by way of admissions and make full rectification payments has spared further use of the Court's resources and saved the parties (and the community) time and costs. However contrary to the submissions of the respondents the factors set out above do not in my view warrant a discount of "no less than 25%".

### **Ensuring compliance with minimum standards**

79. The applicant submitted:

*"69. Compliance with minimum standards is an important consideration in the present case for the following reasons:*

- (a) one of the stated principal objects of the FW Act has been the preservation of an effective safety net for*

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<sup>80</sup> See: *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70;(2008) 168 FCR 383



*employee entitlements and effective enforcement mechanisms (section 3 of the FW Act);*

*(b) it is vital to ensure compliance with modern awards to create an even playing field and ensure all employees are appropriately remunerated for the work they perform; and*

*(c) the substantial penalties set by the legislature for contraventions of the FW Act reinforce the importance placed on compliance with minimum standards.*

*70. The fundamental nature of the contraventions in the present proceedings demonstrates the respondents' disregard for its statutory obligations and the need for penalties to be imposed on a meaningful level."*

80. The respondents submitted:

*"100. The respondents do not dispute the FWO's submissions regarding this consideration.*

*101. However, the factors relevant to this consideration must be balanced against the gravity of the contravening conduct and according to prevailing standards."*

81. One of the principal objects of the WR Act and FW Act has been the maintenance of an effective safety net, and effective enforcement mechanisms. The substantial penalties set by Parliament for breaches of such minimum entitlements reinforce the importance placed on compliance with minimum standards.

## **Deterrence**

82. The applicant submitted:

### ***"Specific Deterrence***

*71. The applicant submits that there is a particularly high need for specific deterrence in these proceedings because:*

*(a) the respondents have a history of non-compliance with the applicant (see paragraph 0 and 0 above);*

- (b) *it is the applicant's submission that the contraventions were deliberate (see paragraphs 0 to 0 above in this regard);*
- (c) *the first respondent is continuing to trade and the second respondent continues to be the first respondent's director;*
- (d) *the first respondent still employs employees.<sup>81</sup> Those employees need to be paid the correct rates of pay, provided with their correct entitlements and pay slips;*
- (e) *the hourly rates of pay paid by the first respondent to the Employees were in some cases significantly lower than the required minimum rates under the industrial instruments (particularly during the trial periods);*
- (f) *the underpayment of \$76,186.74 is significant; and*
- (g) *despite the fact the underpayments were rectified, these rectification payments were only made at a very late stage.*

### **General Deterrence**

- 72. *The applicant submits that there is a strong need for general deterrence in this particular case. One of the principal objects of workplace laws is the maintenance of an effective safety net, and effective enforcement mechanisms. Maintaining these minimum standards also seeks to provide an even playing field for employers of a particular industry. The importance of the maintenance of effective minimum terms and conditions of employment and enforcement of industrial instruments is reflected not only in the magnitude of the maximum penalties that may be imposed in respect of any contraventions of an applicable provision, but also in the legislature's increase of those maximum penalties in August 2004<sup>82</sup> where the maximum penalty for bodies corporate increased from \$10,000 to \$33,000.*
- 73. *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]:*

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<sup>81</sup> In Paragraph 3 of the First Pan Affidavit, the second respondent states that the first respondent normally employs one or two employees.

<sup>82</sup> *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004.*

“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”.

74. *The applicant submits that general deterrence is an important factor in these proceedings. There is a need to send a message to the community, and particularly employers, that employers must provide their employees with the correct entitlements and steps should be taken to understand and comply with those entitlements.*

75. *The applicant submits that penalties in this case should be imposed on a meaningful level so as to deter other employers from committing similar contraventions, and to send a message to the community that employers should ascertain and comply with minimum terms and conditions.”*

83. The respondents submitted:

***“The need for specific and general deterrence***

102. *It is well established that the need for specific and general deterrence is a factor that is relevant to the imposition of a penalty under workplace relations laws.*

***Specific deterrence***

103. *Gray J in Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union (2008) 171 FCR 357 at [37] said 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.”

104. *There has been contrition on the part of the respondents and the rectification of the underpayments in full.*
105. *The respondents have implemented other corrective practices.*
106. *The respondents have taken steps to change their practices so that the harm will not occur again.*
107. *Mr Pan has expressed genuine remorse for the contraventions.*
108. *The contraventions were not deliberate.*
109. *The respondents submit that the need for specific deterrence is not at the higher end of the scale in this case as proposed by the FWO.*

#### ***General deterrence***

110. *This case does not involve blatantly deliberate conduct which justifies public denouncement of the respondents.*
111. *Whilst it is important that clear messages must be sent to the public that contraventions of workplace laws are serious matters, any such message must be regulated by the nature of the contravening conduct.*
112. *General deterrence is an important and relevant consideration in assessing penalty, in order to mark the disapproval of the conduct in question and to act as a warning to other employers.*
113. *However, no penalties imposed by way of general deterrence should be so crushing as to force someone out of business, and its employees out of employment. Such a circumstance would obviously be inconsistent with the objectives of workplace relations legislation in this country.*
114. *General deterrence in this case must entail a proper consideration of all of the circumstances including the lack of deliberateness relating to the contraventions.*
115. *Any employer deliberately contemplating similar contraventions to those alleged in this proceeding would*

*understand that a higher penalty would likely be imposed for such deliberate conduct.*

116. *Accordingly, the penalty to be imposed should take account of the requirement of general deterrence, but a lower level of general deterrence given the circumstances of these contraventions.”*

84. Contrary to (and even allowing for the matters raised in) the submission of the respondents given they are still operating and in light of the matters raised by the applicant I accept there is a need for a measure of specific deterrence in this matter having regard to the amount of underpayments involved and the period over which they occurred.

85. I also accept the applicant’s submission that 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. As Tracey J stated in *Kelly v Fitzpatrick* [2007] FCA 1080 (at paragraph [28]):

*“[28] ...Specific deterrence does not, therefore, loom large as a consideration in determining penalty. It does not follow that the need for general deterrence may be disregarded. As Finkelstein J said in CPSU v Telstra Corporation Limited (2001) 108 IR 228 at 231: “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 to act as a warning to others not to engage in similar conduct...” 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 [13].” (emphasis added)*

86. The comments by Marshall J in *Fair Work Ombudsman v Maclean Bay Pty Ltd* (No.2) [2012] FCA 557 illustrate the need for general deterrence where His Honour said 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.”*

### **Submissions on possible penalty range/s**

87. Before turning to the matter of penalties it is appropriate to say something about the position of the parties on the appropriate penalty in light of recent developments. Counsel for the applicant, given the written submissions of the parties, drew the Court’s attention to recent authority concerning criminal sentencing procedures.<sup>83</sup>
88. In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 160 White J on 5 March 2014 said:

*“26. The parties in this case made their submissions on 31 January 2014. On 12 February 2014, while judgment was reserved, the High Court delivered judgment in Barbaro v The Queen [2014] HCA 2. The majority of the Court held in Barbaro that the prosecution should not be permitted to make a submission to a sentencing judge as to the specific penalty, or the range of penalties, which would be appropriate in the case.*

*27. Although the decision in Barbaro concerned sentencing in the criminal courts, the reasons of the High Court appear also to have relevance to the imposition of civil penalties. They may require this Court to review the approach set out in NW Frozen Foods and Mobil Oil.*

*28. However, I consider that such a review is neither necessary nor appropriate presently. In the first place, the decisions of the Full Court, even if not strictly binding, are of considerable persuasive value and should, in my opinion, be followed in the circumstances of this case.*

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<sup>83</sup> see *Barbaro v The Queen* [2014] HCA 2

29. *Secondly, the parties have not made any submissions as to the effect of Barbaro in the present context.*
30. *Thirdly, the submissions as to the agreed penalties have been made. There are practical difficulties in the submissions being withdrawn. They could be ignored and the parties then given the opportunity to be heard further. However, that is unnecessary because, as will be seen, I consider that penalties of the order proposed by the parties are, in any event, appropriate.*
31. *This means that the implications of the decision in Barbaro in relation to the imposition of civil penalties need not be addressed presently.”*

89. These proceedings concern the imposition of civil not criminal penalties. Many Full Court decisions emphasise that penalties in earlier cases cannot dictate the penalty in a later case.<sup>84</sup>

90. Given the approach of White J referred to above, that the parties submissions in these proceedings recognised that the task of the Court in this case was to arrive at an appropriate penalty for the particular circumstances of this matter, the Full Court decisions in the context of civil penalty proceedings referred to above and that there was no suggestion this recent authority precludes the parties from making submissions on penalty the matter proceeded on that basis.

## **Appropriate penalties**

91. In this matter 8 contraventions have been identified for the first respondent and 7 contraventions for the second respondent leading to a total potential liability of \$247,500 for the first respondent and \$46,200 for the second respondent.

92. The applicant has submitted that by reason of the matters set out above substantial penalties should be awarded. Whilst the Court has been told (and there is no financial evidence of this) the respondents may suffer financially, there is no reason to conclude that they will not employ

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<sup>84</sup> see for example *NW Frozen Foods* at 295-6; *Singtel Optus v ACCC* (2012) 287 ALR 249 at [60]; *McDonald v Australian Building and Construction Commissioner* (2011) 202 IR 467 at [23]-[30]; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [12]-[14], [56]-[57] and [87] and *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at [36] and [60].

people in the future. As the admitted conduct which occurred over such a long time is serious and there is the need for both specific and general deterrence significant penalties in the mid to high range are warranted.

93. However taking into account the corrective action, contrition and co-operation of the respondents and the resolution of the proceedings at a penalty hearing there should be a discount of 15%. To recognise that there is commonality or overlap between some of the contraventions, this will be taken into account in the substance of the matter “*by imposing no penalty, or a nominal penalty, in respect of breaches of some terms, but a substantial penalty in respect of others.*”<sup>85</sup> The reduction will apply with respect to the overtime contravention.

94. This results in penalties against the respondents as follows:

**IDENTIFIED CONTRAVENTIONS & PENALTIES FOR THE FIRST RESPONDENT**

No	Provision Contravened	Description of Contravention	Groupings	Penalty
1.	S 182(1) WR Act by contravening subclause 16.2.2 of Clerical Pay Scale under WR Act	Minimum Wages under WR Act	Minimum Wages	\$18,232.50
	Item 5 of Schedule 16 of Transitional Act by contravening subclause 16.2.2 Clerical Pay Scale under Transitional Act	Minimum Wages under Transitional Act		
	S.45 FW Act by contravening subclause 15.1 Clerks Modern Award	Minimum Wages under FW Act		
2.	Item 6 of Schedule 16 of Transitional Act by contravening s235(1) WR Act	Annual Leave under Transitional Act	Annual Leave	\$18,232.50
	S.45 FW Act by contravening s90(1) FW Act	Annual Leave under FW Act		
3.	S.45 FW Act by contravening subclause 29.3(a) and (b)(i) Clerks Modern Award	Annual Leave Loading under the FW Act	Annual Leave Loading	\$18,232.50
4.	S.44 FW Act by contravening s90(2) FW Act	Annual Leave on Termination	Annual Leave on Termination	\$18,232.50
5.	Item 6 of Schedule 16 of Transitional Act by contravening s247 WR Act	Personal Leave under Transitional Act	Personal Leave	\$18,232.50
	S.44 FW Act by contravening s99 FW Act	Personal Leave under FW Act		
6.	S.44 FW Act by contravening s99 FW Act	Payment for absences on public holidays under FW Act	Public Holidays	\$18,232.50
7.	S.45 of FW Act by contravening subclause 27.1(a) of Clerks Modern Award	Overtime	Overtime	\$200.00
8.	Subsection 536(1) of the FW Act	Pay Slips	Pay Slips	\$9,116.25
<b>TOTAL</b>				<b>\$118,711.25</b>

<sup>85</sup> per Gray J in *Gibbs v Mayor, Councillors and Citizens of the City of Altona* (above) at 223; see also *Kelly v Fitzpatrick* [2007] 166 IR 14 at 17.



**IDENTIFIED CONTRAVENTIONS & PENALTIES FOR THE SECOND RESPONDENT**

No	Provision Contravened	Description of Contravention	Groupings	Penalty
1.	S182(1)WR Act by contravening subclause 16.2.2 Clerical Pay Scale under WR Act	Minimum Wages under WR Act	Minimum Wages	\$3,646.50
	Item 5 of Schedule 16 of Transitional Act by contravening subclause 16.2.2 of Clerical Pay Scale under Transitional Act	Minimum Wages under Transitional Act		
	S45 of FW Act by contravening subclause 15.1 of Clerks Modern Award	Minimum Wages under FW Act		
2.	Item 6 of Schedule 16 of Transitional Act by contravening s235(1) WR Act	Annual Leave under Transitional Act	Annual Leave	\$3,646.50
	S.45 of FW Act by contravening s90(1) FW Act	Annual Leave under FW Act		
3.	S45 of FW Act by contravening subclause 29.3(a) and (b)(i) of Clerks Modern Award	Annual Leave Loading under FW Act	Annual Leave Loading	\$3,646.50
4.	S44 of FW Act by contravening s90(2) FW Act	Annual Leave on Termination	Annual Leave on Termination	\$3,646.50
5.	Item 6 of Schedule 16 of Transitional Act by contravening s247 WR Act	Personal Leave under Transitional Act	Personal Leave	\$3,646.50
	S44 of FW Act by contravening s99 FW Act	Personal Leave under FW Act		
6.	S44 of FW Act by contravening s99 FW Act	Payment for absences on public holidays under FW Act	Public Holidays	\$3,646.50
7.	S45 of FW Act by contravening subclause 27.1(a) of Clerks Modern Award	Overtime	Overtime	\$200.00
<b>TOTAL</b>				<b>\$22,079.00</b>

95. In relation to the first respondent this results in aggregate penalties that are 48% of the maximum for the admitted conduct having regard to the penalties as grouped. For the second respondent the result is also 48% of the maximum for his involvement in admitted conduct having regard to the parties as grouped.

**Totality principle**

96. Having fixed an appropriate penalty for each contravention or group of contraventions, consistent with the authorities as set out above, 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.<sup>86</sup>

97. 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. There is no financial evidence before the Court that the any aggregate penalty would be oppressive or crushing in this case. The application of the totality principle does not mean that the penalties arrived at before its application must be reduced.
98. In considering the penalties at this stage, I am mindful that the penalty should be appropriate given the gravity of the circumstances but are not crushing or oppressive. The respondents have made claims the first respondent may be forced into insolvency or the second respondent may find himself bankrupt. What evidence there is on the respondent's financial position is insufficient to satisfy me there should be a reduction on this basis at this stage. The penalties individually and in the aggregate are an appropriate response to the whole of the conduct.

### **Time for payment of penalty**

99. In submissions filed after the penalty hearing, the respondent's initial position was:
- “4. *There are numerous decisions made by this Honourable Court that set out different time periods for payment of the debt.*
  5. *The Respondents respectfully submit that the apparent ordinary practice of this Honourable Court is to order the Respondents in this type of proceeding to pay penalty orders within 30 days of the orders being made.*
  6. *The Respondents note that in a number of decisions, the Court has deviated from that position. In Fair Work Ombudsman v Lay Brothers (Wholesale) Pty Ltd and Fair Work Ombudsman v Thomas, the Court gave the Respondents sixty days to make payment of the penalties into the Commonwealth Consolidated Fund (“Fund”).*

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<sup>86</sup>*Kelly v Fitzpatrick* [2007] FCA 1080, [30]; *Merringtons* at [23] per Gray J, [71] per Graham J, [102] per Buchanan J.

7. *The Respondent further notes that in Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd & Ors, the Court gave the Respondents ninety days to pay the penalties into the Fund.*
8. *Notably, in the decision of Fair Work Ombudsman v Alarcop Pty Ltd and Anor, the Honourable Judge Raphael made orders allowing the Respondents to pay the penalties into the Fund, in six equal instalments, because the learned Judge had determined that:*  
  
*“it was appropriate given what I have been told about the financial circumstances of the respondents.”*
9. *The First and Second Respondents have previously stated on the Affidavit material of Mr Lui Ming Pan and in their Outline of Submissions that a penalty that is too harsh may force the First Respondent into liquidation, and the Second Respondent into bankruptcy.*
10. *The Respondents make this submission not as a threat to this Honourable Court, but as a statement of the financial reality of the Respondents’ position should the penalty ordered by the Court be required to be paid into the Fund or to another party within such a short timeframe that the Respondents cannot pay the full amount.*
11. *As set out in the Outline of the Respondents’ submissions and the Affidavit of Liu Ming Pan sworn 16 December 2013, the First Respondent is a small propriety limited company that ordinarily employs one or two employees.*
12. *The Respondents respectfully submit that they do not wish to back down from their obligations to pay the penalties orders made by this Honourable Court and believe that it is not in the interests of justice and the public at large that companies and individuals subjected to these penalties be placed in a such an onerous position where they are unable to make payment of the penalty Orders within the required time and are forced into liquidation and/or bankruptcy respectively.*
13. *The Respondents submit that an instalment period of at least twelve (12) months would enable any penalty to be paid fully in the circumstances.*

### *Conclusion*

14. *In conclusion, the Respondents submit that the Court should grant the Respondents the opportunity to pay the penalty orders in instalments because it is in the interests of justice, the First Respondent is a small company and the potential effect that it could have on the Respondents financial position.*”

100. On 12 March 2014 the respondents filed further submissions (that purported to withdraw the submissions referred to immediately above). In support of a submission seeking 18 months to pay any penalty the respondents cited the decision of *Fair Work Ombudsman v Gisela Bottcher & Anor*.<sup>87</sup> The orders made for the timeframe of payment of penalty in that case were made by agreement of the parties.<sup>88</sup> There is no such agreement in this case. As stated in *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503 at [508] that:

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

101. The applicant has correctly identified the absence of financial information from the respondent to ground the statements made in the affidavit material and submissions made before the Court on this issue. As the applicant has left the matter to the Court and any penalty will be payable to the Commonwealth, I am prepared to allow at least some time for the payment to be made. In the circumstances, it is appropriate that payment of all penalties shall be made within 3 months.

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<sup>87</sup> The applicant in correspondence received on 14 March reiterated its submission there was no financial information from the respondents but was content to leave the issue of time to pay to the Court.

<sup>88</sup> see *Fair Work Ombudsman v Gisela Bottcher & Anor* [2010] FMCA 956 at paragraph 97 & fn43

## Conclusion

102. Therefore, as the Court:

- is directed by the relevant authorities to consider what is appropriate in all the circumstances of this case;<sup>89</sup> and
- in its discretion in relation to penalty is not fettered by a checklist of mandatory criteria;<sup>90</sup> and
- notes the parties have file S.O.A.F; and
- is satisfied the individual and aggregate penalty for the whole of the contravening conduct is not crushing nor oppressive and is appropriate in the circumstances;

I make the declarations and orders as set out at the beginning of these reasons.

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**I certify that the one hundred and two (102) paragraphs are a true copy of the reasons for judgment of Judge O’Sullivan**

Date: 20 March 2014

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<sup>89</sup> see *Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2)* (1999) 94 IR 231

<sup>90</sup> see *Australian Ophthalmic Supplies Pty Limited v McAlary-Smith* [2008] FCAFC 8

## ANNEXURE A

### STATEMENT OF AGREED FACTS

This Statement of Agreed Facts is an agreed document between the applicant and the respondents and is made for the purposes of section 191 of the *Evidence Act 1995 (Cth)*.

The parties agree as set out below.

#### **The Applicant**

1. The applicant, the Fair Work Ombudsman (**FWO**) has standing and authority to bring these proceedings and to apply for orders in respect of the respondents' contraventions (as set out in paragraphs ).

#### **The First Respondent**

2. The first respondent, Australia China Trading Investment Consultancy Group Pty Ltd (ACN 067 632 508), trading as the Australian Chinese Centre for International Education (**ACCIE**):
  - (a) is a corporation within the meaning of the *Corporations Act 2001 (Cth)* (**Corporations Act**); and
  - (b) was registered as an incorporated entity on 22 December 1994.
3. At all relevant times, ACCIE was:
  - (a) able to be sued in and by its corporate name and style;
  - (b) a constitutional corporation within the meaning of section 4 of the *Workplace Relations Act 1996 (Cth)* (**WR Act**) and from 1 July 2009, a constitutional corporation within the meaning of section 12 of the *Fair Work Act 2009 (Cth)* (**FW Act**);
  - (c) an "employer" within the meaning of section 6 of the WR Act and, from 1 July 2009, a "national system employer" within the meaning of section 14 of the FW Act; and
  - (d) an entity operating as a migration agency which provides services to international students by assisting them in applying for Australian visas and obtaining entry into educational institutions.

## The Second Respondent

4. The second respondent, Mr Liu Ming Pan (**Mr Pan**), is and was at all relevant times:
- (a) the sole director of the first respondent;
  - (b) principally responsible for the overall direction, management and supervision of ACCIE's operations; and
  - (c) principally responsible for the overall direction, management and supervision of the terms and conditions of employment of employees of ACCIE, including in relation to industrial and Training instruments and arrangements, setting and adjusting pay rates, and determining wages and conditions of employment.

## The Employees

5. The proceedings relate to five employees (collectively, **Employees**) who worked for ACCIE during the periods set out in the table below (**Underpayment Periods**):

Employee	Underpayment Period
Yanna Gu	6 April 2009 to 2 June 2012
Xuan Yue	14 April 2009 to 2 June 2011
Yue Lu	29 March 2010 to 27 May 2011
Hui Ren	5 December 2011 to 1 March 2013
Caihong Wang	19 December 2011 to 24 February 2013

6. At all relevant times, each of the Employees were:
- (a) Chinese nationals;
  - (b) did not speak English as their first language; and
  - (c) were permanent residents of Australia.
7. At all relevant times during the Underpayment Periods, the Employees were engaged to perform duties which included the following:
- (a) data entry;

- (b) answering telephones;
- (c) responding to customer enquiries;
- (d) preparing visa application forms and supporting documents;
- (e) liaising with educational institutions;
- (f) research; and
- (g) translation of English into Chinese and vice versa.

8. Each of the Employees were employed by ACCIE on a full time basis.

**Employment of the Employees**

9. Each of the Employees was engaged by the first respondent on a Trial and Training basis in the periods set out in the table below (**Trial and Training Periods**):

Employee	Trial and Training and Training Period
Yanna Gu	6 April 2009 to 2 August 2009
Xuan Yue	14 April 2009 to 31 July 2009
Yuee Lu	29 March 2010 to 1 August 2010
Hui Ren	5 December 2011 to 2 March 2012
Caihong Wang	19 December 2011 to 2 March 2012

10. During the Trial and Training Periods:

- (a) Yanna Gu, Xuan Yue, Hui Ren and Caihong Wang were paid a flat rate of pay of approximately \$9.00 per hour, which was paid in cash; and
- (b) Yue Lu was paid a flat rate of pay of approximately \$10.00 per hour, which was paid in cash.

11. After the Employees completed the Trial and Training Periods, each of the Employees were engaged pursuant to fixed 12 month term contracts (**Fixed Term Contract**). The periods which the Employees were employed pursuant to the Contracts of Employment and the rates of pay they were paid during those periods are set out in the table below:



<b>Employee</b>	<b>Contract Period</b>	<b>Rate of Pay</b>
Yanna Gu	3 August 2009 to 2 June 2012	\$15.00
Xuan Yue	3 August 2009 to 2 June 2011	\$13.74
Yue Lu	2 August 2010 to 27 May 2011	\$13.74
Hui Ren	5 March 2012 to 1 March 2013	\$16.00
Caihong Wang	5 March 2012 to 1 February 2013	\$16.00

12. Pursuant to the Fixed Term Contracts, the Employees who were employed during the relevant period were entitled to receive a lump sum payment upon the expiry of each Fixed Term Contract, which covered the Employees' entitlements to annual leave, personal leave and public holidays, with any additional amount being attributed to commissions for successful visa applications or enrolments into educational facilities.
13. During the periods that they were employed by ACCIE, the Employees did not receive any payment for annual leave or personal leave or for absences on public holidays, at the time which the leave was taken.

#### **Relevant Legislation**

14. Prior to 1 July 2009 (**WR Act Period**), the Company fell within the scope of the WR Act and was required to comply with the WR Act in respect of the employment of the Employees **who were employed during the relevant period**.
15. From 1 July 2009 to 31 December 2009 (**Transitional Period**), the Company was bound in respect of the Employees by the WR Act as it continued to apply by reason of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (**Transitional Act**).
16. At all relevant times on and from 1 July 2009 (**FW Act Period**), the Company fell within the scope of the FW Act and was required to comply with the FW Act in respect of the employment of the Employees **who were employed during the relevant period**.

#### **Relevant Industrial and Training Instruments**

17. During the period from approximately 6 April 2009 to 31 December 2009, the Australian Pay and Classification Scale (**Clerical Pay Scale**) derived from the Clerical and Administrative Employees Victorian Common Rule Award 1999 (**Pre-reform Award**) applied to the employment of the Employees with ACCIE.

18. At all relevant times during the WR Act Period, the Employees were classified within the Grade – 2 Clerical Officer classification pursuant to subclause 16.2.2(a) of the Clerical Pay Scale.
19. On and from 1 January 2010, ACCIE was covered by the Clerks Private Sector Modern Award 2010 (**Clerks Modern Award**) with respect to the employment of the Employees.
20. At all relevant times during the Underpayment Periods, the Employees were classified within the “Level 2” classification pursuant to item B.2 of Schedule B to the Clerks Modern Award.
21. During the period from 1 January 2010 to 1 March 2013, ACCIE was required to pay the Employees in accordance with the transitional arrangements under Schedule A of the Clerks Modern Award, being transitional pay rates calculated with reference to the relevant transitional minimum wage instruments, namely the Clerical Pay Scale.

### **The Investigation**

22. On or about 23 July 2012, Yue Lu lodged a complaint with the FWO with respect to her employment entitlements with ACCIE.
23. On or about 2 November 2012, Fair Work Inspector Kim Chum (**Inspector Chum**) served a Notice to Produce pursuant to section 712 of the FW Act on ACCIE (**First NTP**). The First NTP sought for ACCIE to produce documents with respect to the employment of Yue Lu within 15 days.
24. On or about 15 November 2012, Mr Pan sent an email to Inspector Chum stating that ACCIE had lost all of the records sought in the First NTP due to a hard drive malfunction.
25. On or about 21 January 2013, Inspector Chum issued a determination of contravention letter on ACCIE in respect of Yue Lu’s employment (**First Contravention Letter**). The First Contravention Letter:
  - (a) identified contraventions of the relevant indus and Training instruments during the period from 29 March 2010 to 27 May 2011;
  - (b) advised of an underpayment to Yue Lu; and
  - (c) sought a response by 5 February 2012.
26. On or about 23 January 2013, Mr Pan sent Inspector Chum an email disputing the evidence provided by Yue Lu.

27. During the period from approximately 25 February 2013 to 28 March 2013, Caihong Wang, Hui Ren, Xuan Yue and Yanna Gu lodged complaints with the FWO with respect to their employment entitlements with ACCIE.
28. On 30 April 2013, the FWO invited Mr Pan to participate in a Record of Interview to discuss the allegations that had been made against him by the Employees. Mr Pan elected not to participate in the Record of Interview.
29. On or about 13 May 2013, Inspector Chum served a Notice to Produce pursuant to section 712 of the FW Act on ACCIE (**Second NTP**). The Second NTP sought for ACCIE to produce documents with respect to the employment of Caihong Wang, Hui Ren, Xuan Yue and Yanna Gu by 28 May 2013.
30. On 28 May 2012, Mr Pan emailed Inspector Chum providing a response to the Second NTP on behalf of ACCIE. Pursuant to the Second Notice to Produce, ACCIE only produced a sample of payslips for two of the Employees, Caihong Wang and Hui Ren (**Pay Slips**) stating that he no longer had possession to records for the other Employees due to a computer malfunction. Mr Pan also produced a statement responding to the allegations in which he disputed the contraventions alleged by the Employees.
31. On or about 3 June 2013, Inspector Chum issued a determination of contravention letter to ACCIE in respect of all of the Employees (**Second Contravention Letter**). The Second Contravention Letter:
  - (a) identified contraventions of the relevant industrial and Training instruments;
  - (b) advised of underpayments to the Employees; and
  - (c) sought a response by 14 June 2013.
32. On 18 June 2013, the FWO sent a letter to the respondents stating that it intended to commence proceedings against them without further notice and that it was providing the respondents with a final opportunity to rectify the contraventions before proceedings being commenced.
33. During the period from 20 June 2013 to 25 June 2013, the respondents rectified the underpayments to the Employees in full.
34. These proceedings were commenced on 26 June 2013.
35. Since the commencement on proceedings, the respondents have co-operated with the FWO.

## CONTRAVENTIONS

### **Contravention 1: Minimum Rates of Pay During the WR Act Period**

36. Pursuant to subsection 182(1) of the WR Act, during the period from 6 April 2009 to 30 June 2009, ACCIE was required to pay Yanna Gu and Xuan Yue a basic periodic rate of pay for each of their guaranteed hours that was at least equal to the basic periodic rate of pay prescribed by the Clerical Pay Scale.
37. Pursuant to subclause 16.2.2 of the Clerical Pay Scale, the basic periodic rate of pay owed to Yanna Gu and Xuan Yue during the WR Act Period was \$16.13 per hour.
38. During the WR Act Period Yanna Gu and Xuan Yue were engaged on Trial and Training Periods pursuant to which they were paid a rate of pay of \$9 per hour. This rate was below their entitlement to minimum rates of pay pursuant to subclause 16.2.2 of the Clerical Pay Scale, causing them to be underpaid the amount of \$9,012.18 as set out in Table 1 of Schedule A.
39. ACCIE contravened subsection 182(1) of the WR Act with respect to Yanna Gu and Xuan Yue.

### **Contravention 2: Minimum Rates of Pay During the Transitional Period**

40. Pursuant to subsection 182(1) of the WR Act and item 5 of Schedule 16 of the Transitional Act, during the period from 1 July 2009 to 31 December 2009, ACCIE was required to pay Yanna Gu and Xuan Yue a basic periodic rate of pay for each of their guaranteed hours at least equal to the guaranteed basic periodic rate of pay prescribed by the Clerical Pay Scale.
41. During the Transitional Period, the basic periodic rate of pay prescribed by subclause 16.2.2 of the Clerical Pay Scale payable to Yanna Gu and Xuan Yue are set out in the table below.

Employee	Period	Pay Rate
Yanna Gu	1 July 2009 to 5 October 2009	\$16.13
	6 October 2009 to 31 December 2009	\$16.26
Xuan Yue	1 July 2009 to 13 October 2009	\$16.13
	14 October 2009 to 31 December 2009	\$16.26

42. During the Transitional Period, ACCIE paid Yanna Gu a rate of pay of \$15 per hour and

Xuan Yue rate of pay of \$13.74 per hour. These rates were below the basic periodic rate of pay prescribed by subclause 16.2.2 of the Clerical Pay Scale, causing Yanna Gu and Xuan Yue to be underpaid the total amount of \$4,129.03, as set out in Table 2 of Schedule A.

43. ACCIE contravened item 5 of Schedule 16 of the Transitional Act by virtue of contravening subsection 182(1) of the WR Act in relation to Yanna Gu and Xuan Yue.

### **Contravention 3: Minimum Rates of Pay During the FW Act Period**

44. Pursuant to subclause 15.1 of the Clerks Modern Award, during the FW Act Period, ACCIE was required to pay the Employees a base rate of pay at least equal to the rates of pay prescribed by clause 16 of the Clerks Modern Award.
45. During the FW Act Period, pursuant to clause 16 and items A.2.3 and A.2.5 of the Clerks Modern Award, the rates of pay prescribed by clause 16 of the Clerks Modern Award payable to each of the Employees were those which are set out in Table 3 of Schedule A.
46. During the FW Act Period, ACCIE paid the Employees the flat rates of pay set out in paragraph 22 above. These rates were below the rates payable to the employees pursuant subclause 15.1 of the Clerks Modern Award, causing them to be underpaid the total amount of \$41,992.61 as set out in Table 4 of Schedule A.
47. ACCIE contravened subclause 15.1 of the Clerks Modern Award and by doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(1) of the FW Act.

### **Contravention 4: Annual Leave Taken By Xuan Yue during the Transitional Period**

48. Pursuant to subsection 235(1) of the WR Act, during the Transitional Period, ACCIE was required to pay Xuan Yue for any annual leave taken at her basic periodic rate of pay prescribed by the Clerical Pay Scale.
49. Xuan Yue took 20 days of annual leave during the period from approximately 23 November 2009 to 18 December 2009.
50. ACCIE did not pay Xuan Yue for the annual leave she took during the Transitional Period.
51. ACCIE failed to provide Xuan Yue with her entitlement to payment for annual leave taken during the Transitional Period causing her to be underpaid the amount of \$2,439.00 as set out in Table 1 of Schedule B.
52. ACCIE contravened subsection 235(1) of the WR Act with respect to the annual leave taken

by Xuan Yue during the Transitional Period and by doing so contravened item 6 of Schedule 16 of the Transitional Act.

#### **Contravention 5: Annual Leave Taken During the FW Act Period**

53. Pursuant to subsection 90(1) of the FW Act, ACCIE was required to pay the Employees for any annual leave taken during the FW Act Period, at the Employees' base rate of pay prescribed by the Clerks Modern Award.
54. During the FW Act Period, Yanna Gu, Xuan Yue, Yue Lu and Hui Ren (the **Annual Leave Employees**) each took annual leave at various times with the amount of annual leave taken by the Annual Leave Employees being set out in Table 2 of Schedule B.
55. ACCIE did not pay the Annual Leave Employees for the annual leave they took during the FW Act Period, causing them to be underpaid the total amount of \$12,694.95 as set out in Table 2 of Schedule B.
56. ACCIE contravened subsection 90(1) of the FW Act with respect to annual leave taken by the Annual Leave Employees during the FW Act Period, and thereby contravened section 44 of the FW Act (which is a civil remedy provision pursuant to subsection 539(1) of the FW Act).

#### **Contravention 6: Annual Leave Loading During the FW Act Period**

57. Pursuant to subclauses 29.3(a) and (b)(i) of the Clerks Modern Award, ACCIE was required to pay the Annual Leave Employees a loading of 17.5% on the base rate of pay payable to them prescribed by the Clerks Modern Award for annual leave taken during the FW Act Period.
58. ACCIE did not pay the Annual Leave Employees' any annual leave loading for annual leave taken during the FW Act Period.
59. By reason of the matters pleaded in paragraphs 57 to 58 above, ACCIE failed to pay the Annual Leave Employees their entitlement to annual leave loading pursuant to subclauses 29.3(a) and (b)(i) of the Clerks Modern Award during the FW Act Period, causing them to be underpaid the total amount of \$2,221.62 as set out in Table 3 of Schedule B.
60. ACCIE contravened subclauses 29.3(a) and (b)(i) of the Clerks Modern Award and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(1) of the FW Act.

### **Contravention 7: Annual Leave on Termination**

61. Pursuant to subsection 90(2) of the FW Act, ACCIE was required to pay the Employees their accrued annual leave entitlements upon their termination of employment at the rate that they would have been paid had they taken that period of annual leave. Pursuant to subclauses 29.3(a) and (b)(i) of the Clerks Modern Award, the Employees were entitled to be paid a loading of 17.5% in addition to their accrued annual leave entitlements on termination.
62. At the time of the termination of their employment with the first respondent, the Employees had the amount (in hours) of accrued annual leave entitlements set out in Table 4 of Schedule B.
63. Upon the expiry of each Fixed Term Contract, ACCIE made a lump sum payment to each of the Employees, which pursuant to the Schedule in the Fixed Term Contracts included the Employees' entitlements to annual leave on termination. These amounts were less than the Employees' correct entitlements to accrued annual leave on termination pursuant to subsection 90(2) of the FW Act, causing the Employees to be underpaid the total amount of \$6,396.51 as set out in Table 4 of Schedule B.
64. ACCIE contravened a provision of the National Employment Standards under the FW Act, being subsection 90(2) of the FW Act and in doing so contravened section 44 of the FW Act.

### **Contravention 8: Personal Leave Taken During the Transitional Period**

65. Pursuant to section 247 of the WR Act (as that provision continued to apply pursuant to item 2 of Part 2 of Schedule 4 of the Transitional Act) during the Transitional Period, ACCIE was required to pay Yanna Gu for each hour of any personal leave taken at the basic periodic rate of pay prescribed by the Clerical Pay Scale
66. Yanna Gu took 7.5 hours of personal leave on 27 October 2009 (**Yanna Gu Personal Leave**).
67. The first respondent did not pay Yanna Gu at all for the Gu Personal Leave, thereby causing her to be underpaid in the amount of \$121.95 as set out in Table 1 of Schedule C.
68. ACCIE contravened item 6 of Schedule 16 of the Transitional Act by virtue of contravening section 247 of the WR Act with respect to the Yanna Gu Personal Leave.

### **Contravention 9: Personal Leave Taken During the FW Act Period**

69. Pursuant to section 99 of the FW Act, during the FW Act Period, ACCIE was required to pay the Employees for any personal leave taken at the Employees' base rate of pay for their ordinary hours of work.
70. The Employees each took personal carers/leave at various times during the FW Act Period, with the amount of personal leave taken in hours being set out in Table 2 of Schedule C.
71. During the FW Act Period, ACCIE did not pay the Employees for any personal leave taken causing them to be underpaid the total amount of \$5,821.47 as set out in Table 2 of Schedule C.
72. ACCIE contravened a provision of the NES under the FW Act, being section 99 of the FW Act; and in doing so contravened section 44 of the FW Act.

### **Contravention 10: Failure to Pay Public Holidays During the FW Act Period**

73. During the FW Act Period, the Employees were entitled to be absent from their employment on a day or part day that was a public holiday pursuant to subsection 114(1) of the FW Act.
74. Pursuant to section 116 of the FW Act, ACCIE was required to pay the Employees for absences from work on public holidays, at the base rate of pay prescribed by the Clerks Modern Award for their ordinary hours of work
75. During the FW Act Period, the Employees ordinary working hours fell on a public holiday on the occasions set out in Table 1 of Schedule D.
76. During the FW Act period, ACCIE did not require the Employees to work on the occasions referred to in the paragraph directly above.
77. During the FW Act Period, ACCIE did not pay the Employees at all for any absences from work on public holidays, causing them to be underpaid the total amount of \$10,582.91 as set out in Table 2 in Schedule D.
78. ACCIE contravened a provision of the NES under the FW Act, being section 116 of the FW Act and thereby contravened section 44 of the FW Act.

### **Contravention 11: Failure to Pay Overtime**

79. Pursuant to subclauses 27.1(a) and 25(1)(b) of the Clerks Modern Award, during the FW



Act Period, the first respondent was required to pay Xuan Yue overtime rates of pay for all hours of work performed after 7 pm on Mondays to Fridays.

80. Pursuant to subclause 27.1(a) of the Clerks Modern Award, the overtime rates of pay payable to Xuan Yue were time and a half for the first two hours and double time thereafter.
81. During the FW Act Period, Xuan Yue worked three overtime hours during the FW Act Period as set out in the table below:

<b>Date</b>	<b>Hours Worked</b>	<b>Number of Overtime Hours</b>
14 July 2010	10:00 am to 8:30 pm	1.50
12 July 2010	10:00 am to 8:30 pm	1.50
<b>TOTAL</b>		<b>3.00</b>

82. During the FW Act Period, ACCIE paid Xuan Yue \$27.48 with respect to overtime hours that she performed on 14 July 2010 and 12 July 2010, which was insufficient to meet her entitlement to overtime rates of pay pursuant to subclause 27.1(a)(ii) of the Clerks Modern Award, causing her to be underpaid in the amount of \$50.06 as set out in Table 1 of Schedule E.
83. ACCIE contravened a provision of a modern award, being subclause 27.1(a)(ii) of the Clerks Modern Award and thereby contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(1) of the FW Act.

#### **Contravention 12: Failure to Issue Pay Slips**

84. Pursuant to section 536(1) of the FW Act, ACCIE was required to give the Employees written pay slips within one working day of paying an amount to the Employees in relation to the performance of work.
85. During the Underpayment Periods, ACCIE regularly failed to provide pay slips to the Employees in respect of the pay periods in which the Employees worked.
86. ACCIE contravened section 536(1) of the FW Act, which is a civil remedy provision pursuant to subsection 539(1) of the FW Act.

## **TOTAL UNDERPAYMENTS**

87. By reason of the matters alleged in paragraphs 36 to 83 above, ACCIE caused the Employees to be underpaid the total of \$95,462.29 as set out in Schedule F.
88. Pursuant to the Contracts of Employment, ACCIE paid each of the Employees, except Caihong Wang, the lump sum payments referred to in paragraph 23 above. The total amount of the lump sum payments which were paid to the Employees amounted to \$19,275.55 as set out in Schedule F. The parties have offset this amount against the total underpayment referred to in paragraph 87 above, and accordingly the total underpayment to the Employees was \$76,186.74.
89. As a result of ACCIE making the rectification payments referred to in paragraph 27 above, there is no outstanding underpayment to the Employees.

## **ACCESSORIAL LIABILITY**

90. At all relevant times Mr Pan was:
- (a) was the controlling mind of ACCIE; and
  - (b) was the person who made decisions on behalf of ACCIE, or who was ultimately responsible for ACCIE's decisions in relation to:
    - (i) the recruitment and engagement of the Employees;
    - (ii) the terms and conditions of the Employees' employment;
    - (iii) the payments made to the Employees; and
    - (iv) the work to be performed.
91. Mr Pan:
- (a) knew the number of hours worked by the Employees and when the Employees worked those hours;
  - (b) was aware of the occasions on which the Employees took annual leave and personal leave, and authorised that leave;
  - (c) was the person who authorised payments to be made to the Employees' bank accounts.

92. Mr Pan was the person with whom the FWO dealt with during the course of the investigation made into the complaints made by the Employees.
93. Mr Pan:
- (a) was the person with whom the FWO dealt during the course of the investigation into a complaint lodged with the applicant by another former employee, Ms Sanshan Li, during the period from 19 December 2011 to 14 May 2012 (**Li Complaint**);
  - (b) was informed by the FWO in a determination of contravention letter issued on 30 April 2012 (**Li Contravention Letter**) that ACCIE was required to comply with Commonwealth workplace relations legislation and the Clerks Modern Award;
  - (c) was informed by the FWO in the Li Contravention Letter that ACCIE had failed to provide Sanshan Li with her entitlements to minimum rates of pay, annual leave, annual leave loading and public holiday pay in contravention of Commonwealth workplace relations legislation and the Clerks Modern Award; and
  - (d) rectified the underpayments to Sanshan Li arising from the contraventions in paragraph (c) above.
94. As a result of the Investigation conducted by the FWO referred to in paragraph 93 above, Mr Pan was aware that ACCIE was required to comply with Commonwealth workplace relations legislation and Industrial and Training instruments and provide its' employees with the entitlements referred to in paragraphs 25 to 83 above.

## **ADMISSIONS**

95. ACCIE admits that it contravened the following provisions:
- (a) subsection 182(1) of the WR Act by failing to pay Yanna Gu and Xuan Yue the basic periodic rate of pay prescribed by subclause 16.2.2 of the Clerical Pay Scale during the WR Act Period;
  - (b) item 5 of Schedule 16 of the Transitional Act in failing to pay Yanna Gu and Xuan Yue the basic periodic rate of pay prescribed by subclause 16.2.2 of the Clerical Pay Scale during the Transitional Period in contravention of subsection 182(1) of the WR Act;
  - (c) section 45 of the FW Act in failing to pay the Employees the rate of pay prescribed by clauses 15.1 of the Clerks Modern Award during the FW Act Period;

- (d) item 6 of Schedule 16 of the Transitional Act in failing to pay Xuan Yue for annual leave taken during the Transitional Period in contravention of subsection 235(1) of the WR Act;
  - (e) section 44 of the FW Act in failing to pay the Annual Leave Employees for annual leave taken during the FW Act Period in contravention of subsection 90(1) of the FW Act;
  - (f) section 45 of the FW Act in failing to pay the Annual Leave Employees the annual leave loading prescribed by subclause 29.3(a) and (b)(i) of the Clerks Modern Award for annual leave taken during the FW Act Period;
  - (g) section 44 of the FW Act in failing to pay the Employees their accrued annual leave entitlements upon termination of their employment in contravention of subsection 90(2) of the FW Act;
  - (h) item 6 of Schedule 16 of the Transitional Act in failing to pay Yanna Gu for personal leave taken during the Transitional Period in contravention of section 247 of the WR Act;
  - (i) section 44 of the FW Act in failing to pay the Employees for personal leave taken during the FW Act Period in contravention of section 99 of the FW Act;
  - (j) section 44 of the FW Act by virtue of failing to pay the Employees for absences on public holidays during the FW Act Period in contravention of section 116 of the FW Act;
  - (k) section 45 of the FW Act by virtue of failing to pay Xuan Yue for overtime hours worked during the FW Act Period in contravention of subclause 27.1(a) of the Clerks Modern Award; and
  - (l) section 536(1) by virtue of failing to give the Employees written pay slips in relation to each payment made to the Employees within one working day of paying an amount to the Employees in relation to the performance of work.
96. Mr Pan admits that he was involved in ACCIE's contraventions referred to in paragraph 95(a) to (k) above within the meaning of sections 728 of the WR Act and 550 of the FW Act.