

FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v DOBLE

[2014] FCCA 1077

Catchwords:

INDUSTRIAL LAW – Admitted contraventions of the *Fair Work Act 2009* (Cth) – respondent’s involvement as a director in a failure by the company to pay shift loadings pursuant to the Modern Award – respondent’s involvement as a director in a failure by the company to pay overtime rates pursuant to the Modern Award – respondent’s involvement as a director in a failure by the company to pay public holiday rates pursuant to the Modern Award – respondent’s involvement as a director in a failure by the company to pay travel allowances pursuant to the Modern Award – respondent’s involvement as a director in a failure by the company to pay annual holidays loading pursuant to the Modern Award – respondent’s involvement as a director in a failure by the company to pay accrued annual leave on termination pursuant to s.90 of the *Fair Work Act 2009* (Cth) – appropriate civil penalty to be paid by the respondent.

Legislation:

Fair Work Act 2009 (Cth), ss.90, 535
Workplace Relations Act 1996 (Cth)

Cases cited:

Lynch v Buckley Sawmills Pty Ltd (1984) 3 FCR 503
Potter v Fair Work Ombudsman [2014] FCA 187
Cousins v Merringtons Pty Ltd (No.2) [2008] VSC 340
Kelly v Fitzpatrick (2007) 166 IR 14
Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd (2006) 236 ALR 665
Fair Work Ombudsman v Kentwood Industries Pty Ltd (No.2) [2010] FCA 1156
Gibbs v Mayor, Counsellors and Citizens of the City of Altona [1992] FCA 374
Blandy v Coverdale NT Pty Ltd [2008] FCA 1533

Applicant: FAIR WORK OMBUDSMAN

Respondent: GRAEME DOBLE

File Number: SYG 831 of 2013

Judgment of: Judge Emmett

Hearing date: 14 April 2014

Date of Last Submission: 14 April 2014

Delivered at: Sydney

Delivered on: 26 May 2014

REPRESENTATION

Solicitor for the Applicant: Mr Eric Leahy
(Fair Work Ombudsman)

The respondent appeared in person

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY**

SYG 831 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

GRAEME DOBLE
Respondent

REASONS FOR JUDGMENT

1. By way of Statement of Claim filed on 22 April 2013, the applicant sought various orders against the first respondent, Doble Express Transport Pty Ltd (“**Doble Express**”) and its director, Mr Graeme Doble, the second respondent (“**the Respondent**”), in the nature of declarations, compensation, and civil penalties pursuant to alleged contraventions of the FWA and the *Workplace Relations Act 1996* (Cth) arising from a failure of Doble Express to pay certain named employees their full entitlements due under the Transport Modern Award.
2. On 26 June 2013, a Deed of Company Arrangement was executed in relation to Doble Express, and, on 11 February 2014, the applicant discontinued its proceeding against the first respondent.
3. Doble Express operated a transport / trucking service that provided an express freight service across regional New South Wales.
4. On 26 May 2014, the applicant filed in Court a Second Amended Statement of Agreed Facts in respect of employees Ms Bernadette Dean and Colin McIntosh (“**the Employees**”), which the Respondent admitted liability for his involvement in the contraventions by Doble

Express of various industrial legislation and Awards (“**the Industrial Instruments**”) The Employees are Mr Colin McIntosh, Ms Bernadette Dean, and Ms Kathleen McGregor.

5. I make finding in accordance with the Second Amended Statement of Agreed Facts. The Second Amended Statement of Agreed Facts is as follows:

“SECOND AMENDED STATEMENT OF AGREED FACTS

This **Second Amended** Statement of Agreed Facts is an agreed document of the Applicant and the Respondent and is made for the purpose of section 191 of the *Evidence Act 1995* (Cth).

The parties agree as set out below.

THE APPLICANT

1. The Fair Work Ombudsman (**FWO**) has standing and authority to bring these proceedings and to pursue civil remedy penalties in relation to the ~~Second~~ Respondent’s contraventions (as set out in paragraph 185 below).

THE FIRST RESPONDENT DOBLE EXPRESS TRANSPORT PTY LTD

2. Doble Express Transport Pty Ltd (ACN 002 751 751) (~~First Respondent~~ **Doble Express**) is and was at all relevant times:
- (a) a company incorporated under the *Corporations Act 2001* (Cth);
 - (b) able to be sued in and by its corporate name;
 - (c) 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**);
 - (d) 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;
 - (e) the operator of a transport/trucking business that provides an express freight service across regional NSW;

- (f) was an employer without a specialist human resources department or officer; and
 - (g) the employer of Colin McIntosh (deceased), Kathleen McGregor and Bernadette Dean (**Employees**).
- 2A. On 1 May 2013, the ~~First Respondent~~ **Doble Express** was placed under external administration.
- 2B. On 26 June 2013, the ~~First Respondent~~ **Doble Express** executed a Deed of Company Arrangement (**DOCA**). It was a term of the DOCA that the ~~Second Respondent~~, Mr Graeme Doble, (~~Second Respondent~~) pay to two Deed Funds a total of \$225,000 over 18 months. The Deed Funds have been established to pay dividends to no more than 25 creditors, including payment of employee entitlements to 6 employees of **Doble Express**~~the First Respondent~~, including to the Employees.
- 2C. As at the date of this Agreed Statement of Facts, **the Respondent** ~~Mr Doble~~ is continuing to make payments into the Deed Funds in accordance with the DOCA, and as at ~~25 February~~ **9 April** 2014, has paid a total of \$95,000~~105,000~~, being \$47,500 **52,500** into each Deed Fund.
- 2D. As at ~~25 February~~ **9 April** 2014, the Administrator has not paid any dividends from the DOCA to any of the creditors, including the Employees in this matter.
- 2E. On 11 February 2014, the Applicant discontinued proceedings against **Doble Express** ~~the First Respondent~~ due to ~~the First Respondent~~ **Doble Express** being under external administration.

THE SECOND RESPONDENT

3. The ~~Second Respondent~~ is and was at all material times:
- (a) a natural person capable of being sued;
 - (b) a company director of **Doble Express**~~the First Respondent~~;
 - (c) a shareholder of **Doble Express**~~the First Respondent~~;
 - (d) ultimately responsible for the overall direction and management of **Doble Express**~~the First Respondent~~; and

- (e) the person who gave final authorisation to decisions regarding **Doble Express**’ the First Respondent’s operations including decisions regarding the employment of staff and employee entitlements but generally acted on recommendations by other managers of ~~the First Respondent~~. **Doble Express**.

THE EMPLOYEES

Employment of Colin McIntosh

4. From 12 July 2005 to 12 September 2012, Colin McIntosh was employed by ~~the First Respondent~~ **Doble Express** as a full time truck driver based at ~~the First Respondent’s~~ **Doble Express**’ depot in Dubbo, New South Wales.
5. During his employment with ~~the First Respondent~~ **Doble Express**, Colin McIntosh drove a two-axle rigid vehicle transporting mail between Australia Post Mail Centres in Dubbo and Bathurst on what was known within the operations of ~~the First Respondent~~ **Doble Express** as the “Dubbo – Bathurst Late Mail Run” (**DBLM Run**).
6. During 22 April 2007 to 12 September 2012, his employment, Colin McIntosh was required to perform the following hours for the DBLM Run pursuant to a contract between Australia Post and ~~the First Respondent~~ **Doble Express**:

Tuesday	Dubbo	5:15pm	8:55pm	Bathurst
Wednesday	Bathurst	3:15am	7:25am	Dubbo
Wednesday	Dubbo	5:15pm	8:55pm	Bathurst
Thursday	Bathurst	3:15am	7:25am	Dubbo
Thursday	Dubbo	5:15pm	8:55pm	Bathurst
Friday	Bathurst	3:15am	7:25am	Dubbo
Friday	Dubbo	5:15pm	8:55pm	Bathurst
Saturday	Bathurst	12.15am	3.35am	Dubbo

7. The time sheets and log books kept by Colin McIntosh as a record of his hours worked however indicate the following general pattern of hours:

Tuesday	Dubbo	4:15pm	9:15pm	Bathurst
Wednesday	Bathurst	2:00am	7:00am	Dubbo
Wednesday	Dubbo	4:15pm	9:15pm	Bathurst
Thursday	Bathurst	2:00am	7:00am	Dubbo
Thursday	Dubbo	4:15pm	9:15pm	Bathurst
Friday	Bathurst	2:00am	7:00am	Dubbo
Friday	Dubbo	4:15pm	9:15pm	Bathurst
Saturday	Bathurst	2:00am	7:00am	Dubbo

8. The parties acknowledge that there are inconsistencies between the hours Colin McIntosh was required to work under the Australia Post contract and the hours of work kept by Colin McIntosh in his time sheets and log books **provided to the FWO by Doble Express**. No other records of hours worked were kept ~~by the first respondent~~. **Doble Express, at the time the work was performed and Doble Express paid Mr McIntosh according to the hours set out in the contract between Australia Post and Doble Express.**
9. By reason of **the inconsistencies referred to in** paragraph 8 above, the underpayments set out in paragraphs 32 to 88 below have been calculated by the FWO on a combination of the Tuesday to Friday hours set out in paragraph 7 and the contracted Saturday hours as set out in paragraph 6:

Tuesday	Dubbo	4:15pm	9:15pm	Bathurst
Wednesday	Bathurst	2:00am	7:00am	Dubbo
Wednesday	Dubbo	4:15pm	9:15pm	Bathurst
Thursday	Bathurst	2:00am	7:00am	Dubbo

Thursday	Dubbo	4:15pm	9:15pm	Bathurst
Friday	Bathurst	2:00am	7:00am	Dubbo
Friday	Dubbo	4:15pm	9:15pm	Bathurst
Saturday	Bathurst	12.15am	3.35am	Dubbo

10. Colin McIntosh was on a period of workers compensation from 27 June 2012 until his death on 12 September 2012. Colin McIntosh continued to be employed by ~~the First Respondent~~ **Doble Express** during this period.
11. Except for the failure to pay annual leave on termination, no underpayments occurred during Colin McIntosh's period of workers compensation.

Employment of Kathleen McGregor

12. From 24 June 2009 to 29 June 2012, Kathleen McGregor was employed by ~~the First Respondent~~ **Doble Express** as an administration officer at ~~the First Respondent's~~ **Doble Express**' depot in Orange, New South Wales.
13. Kathleen McGregor was first engaged by ~~the First Respondent~~ **Doble Express** as a casual employee and then as a full time employee from 19 January 2011 until the end of her employment on 29 June 2012.
14. Kathleen McGregor performed general administrative and clerical duties relating to the operations of the Orange depot which included but was not limited to:
 - (a) entering consignment notes;
 - (b) downloading and sorting paperwork;
 - (c) printing spread sheets;
 - (d) completing reports and run sheets;
 - (e) answering phones;
 - (f) data entry; and
 - (g) updating payroll records (including time sheets).

15. Kathleen McGregor states that her standard hours of work were from 2.00am to 12 noon, Monday to Friday and that from time to time, Kathleen McGregor worked extra hours and would finish her shift after 12 noon.
16. There are only limited business records kept by ~~the first respondent~~ **Doble Express** of the start and finish times of the hours worked by Kathleen McGregor. The FWO relies upon payslips and wages books in respect of the total weekly hours worked by Kathleen McGregor.

Employment of Bernadette Dean

17. From 30 September 2007 to 13 February 2013, Bernadette Dean was employed by ~~the First Respondent~~ **Doble Express**.
18. Bernadette Dean was first engaged by ~~the First Respondent~~ **Doble Express** as a casual employee and then as a full time employee from 18 February 2009 until the end of her employment on 13 February 2013.
19. During her employment with ~~the First Respondent~~ **Doble Express**, Bernadette Dean was employed:
 - (a) from 30 September 2007 to 15 June 2008 as a truck driver;
 - (b) from 24 March 2008 to 15 June 2008, as:
 - (i) an administration officer from Mondays to Fridays;
 - (ii) a truck driver on Saturdays and Sundays; and
 - (c) from 16 June 2008 to 13 February 2013 as an administration officer.
20. When Bernadette Dean worked for ~~the First Respondent~~ **Doble Express** as a truck driver (**Driving Work**) she was required to drive a van and/or light truck making deliveries in and around the Dubbo and Orange regions;
21. When Bernadette Dean worked for ~~the First Respondent~~ **Doble Express** as an administration officer (**Clerical Work**):
 - (a) she performed general administrative and clerical duties relating to the operations of ~~the First Respondent's~~ **Doble Express**' Dubbo depot which included the duties also performed by Kathleen McGregor as set out in paragraph 14(a) to 14(g); and

(b) she states that her standard hours of work were from 2.00am to 12 noon, Monday to Friday and that from time to time she worked extra hours and would finish her shift after 12 noon.

22. Except for between 22 January 2013 and the end of Bernadette Dean's employment on 13 February 2013, ~~the first respondent~~ **Doble Express** did not keep any records of the start and finish times of hours worked by Bernadette Dean. The FWO relies upon payslips and wages books in respect of the total weekly hours worked by Bernadette Dean and the start and finish times recorded in the personal diaries of Bernadette Dean.

RELEVANT LEGISLATION

23. At all relevant times prior to 1 July 2009, the WR Act applied to ~~the First Respondent~~. **Doble Express**.

24. At all relevant times on and from 1 July 2009 to 31 December 2009, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**) applied to ~~the First Respondent~~. **Doble Express**.

25. At all relevant times on and from 1 July 2009, the FW Act applied to ~~the First Respondent~~. **Doble Express**.

COVERAGE OF INDUSTRIAL INSTRUMENTS – DRIVING WORK

26. From 27 March 2006 to 31 December 2009, ~~the First Respondent~~ **Doble Express** was bound by the Notional Agreement Preserving a State Award (**NAPSA**) derived from the *Transport Industry (State) Award* [AN120594] (**Transport NAPSA**) with respect to the employment of Colin McIntosh and Bernadette Dean (when Bernadette Dean was performing Driving Work).

27. From 27 March 2006 to 31 December 2009 ~~the First Respondent~~ **Doble Express** was bound, in relation to the employment of Colin McIntosh and Bernadette Dean (when Bernadette Dean performed Driving Work), by the Australian Pay and Classifications Scale derived from the *Transport Industry (State) Award* (**Transport APCS**).

28. On and from 1 January 2010 ~~the First Respondent~~ **Doble Express** was covered by the *Road Transport and Distribution Award 2010* [MA000038]

(**Transport Modern Award**) with respect to the terms and conditions of employment of Colin McIntosh.

**COVERAGE OF INDUSTRIAL INSTRUMENTS –
ADMINISTRATION/CLERICAL WORK**

29. From 27 March 2006 to 31 December 2009, ~~the First Respondent~~ **Doble Express** was bound by the NAPSA derived from the *Clerical and Administrative Employees (State) Award* [AN120664] (**Clerical NAPSA**) with respect to the terms and conditions of employment of Kathleen McGregor and Bernadette Dean (when Bernadette Dean performed Clerical Work).
30. From 27 March 2006 to 31 December 2009, ~~the First Respondent~~ **Doble Express** was bound in relation to the employment of Kathleen McGregor and Bernadette Dean (when Bernadette Dean performed Clerical Work) by the Australian Pay and Classification Scale derived from the *Clerical and Administrative Employees (State) Award* (**Clerical APCS**).
31. On and from 1 January 2010, ~~the First Respondent~~ **Doble Express** was covered by the *Clerks – Private Sector Award 2010* [MA000002] (**Clerical Modern Award**) with respect to the terms and conditions of employment of Kathleen McGregor and Bernadette Dean (when Bernadette Dean performed Clerical Work).

CONTRAVENTIONS – COLIN MCINTOSH

Contravention 1 - failure to pay night shift loading due under the Transport NAPSA

32. During the period from 22 April 2007 to 31 December 2009, pursuant to subclause 4.3.1.3 of the Transport NAPSA, ~~the First Respondent~~ **Doble Express** was required to pay Colin McIntosh a loading of 30% for all hours worked on permanent night shift (being a shift which commences after 4.00pm and before 4.00am) (**Night Shift**) in addition to his ordinary rate.
33. From 22 April 2007 to 31 December 2009, Colin McIntosh worked 3,379.50 hours which fell within the definition of Night Shift under the Transport

NAPSA. These hours have been calculated on the basis of the hours referred to in paragraph 9 above.

34. The rates required to be paid under the Transport NAPSA for hours worked as Night Shift were:

Pay period on and from	Saturday rate due under the Transport NAPSA
22 April 2007	\$21.16
1 October 2007	\$21.52
1 October 2008	\$22.26

35. ~~The First Respondent~~ **Doble Express** paid Colin McIntosh a flat hourly rate of pay for all hours worked, regardless of when those hours were worked. Based on the hours set out in paragraph 9, the flat hourly rate of pay was:

- (a) 22 April 2007 to 17 October 2007 - \$17.00 per hour;
- (b) 18 October 2007 to 28 April 2009 - \$18.00 per hour;
- (c) 29 April 2009 to 31 December 2009 - \$200 per DBLM Run which equated to approximately \$18.00 per hour.

(McIntosh Flat Hourly Rates).

36. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Colin McIntosh's entitlement to the night shift rate under the Transport NAPSA causing Colin McIntosh to be underpaid \$11,497.84.
37. ~~The First Respondent~~ **Doble Express** contravened clause 4.3.1.4 of the Transport NAPSA and thereby contravened clause 43 of Schedule 8 of the WR Act which is a civil remedy provision under subitems 2(1) and 16 of Schedule 16 of the Transitional Act.

Contravention 2 - failure to pay night shift loading due under the Transport Modern Award

38. On and from 1 January 2010, pursuant to subclause 24.3 and subclauses A.4 and A.6 of Schedule A of the Transport Modern Award, ~~the First Respondent~~ **Doble Express** was required to pay Colin McIntosh the following loading and hourly rates for all work he performed on Night Shift:

Pay period on and from	Night shift rate due under the Transport MA
1 January 2010	\$22.26
1 July 2010	\$22.80
1 July 2011	\$23.19

39. From 1 January 2010 to 26 June 2012, Colin McIntosh performed 1,913.50 hours which fell within the definition of Night Shift under the Transport Modern Award. These hours have been calculated on the basis of the hours referred to in paragraph 9 above.
40. Regardless of when the hours were worked, ~~the First Respondent~~ **Doble Express** paid Colin McIntosh \$200 per DBLM Run which equated to approximately \$18.00 per hour.
41. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Colin McIntosh's entitlement to the night shift rate under the Transport Modern Award causing Colin McIntosh to be underpaid \$4,026.31.
42. ~~The First Respondent~~ **Doble Express** contravened subclause 24.3 of the Transport Modern Award in respect of night shift payments and thereby contravened section 45 of the FW Act, which is a civil remedy provision pursuant to section 539(2) of the FW Act.

Contravention 3 - failure to pay afternoon shift loading due under the Transport Modern Award

43. On and from 1 January 2010, pursuant to subclause 24.3 and subclauses A.4 and A.6 of Schedule A of the Transport Modern Award, ~~the First Respondent~~ **Doble Express** was required to pay Colin McIntosh the following loading and hourly rates for all work he performed on afternoon shift:

Pay period on and from	Afternoon shift rate due under the Transport MA
1 July 2010	\$20.61
1 July 2011	\$20.87

44. From 1 July 2010 to 26 June 2012, Colin McIntosh performed 1,392.67 hours which fell within the definition of afternoon shift under the Transport Modern Award. These hours have been calculated on the basis of the hours referred to in paragraph 9 above.
45. Regardless of when the hours were worked, ~~the First Respondent~~ **Doble Express** paid Colin McIntosh \$200 per DBLM Run which equated to approximately \$18.00 per hour.
46. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Colin McIntosh’s entitlement to the afternoon shift allowance under the Transport Modern Award causing Colin McIntosh to be underpaid \$2,496.89.
47. ~~The First Respondent~~ **Doble Express** contravened subclause 24.3 of the Transport Modern Award in respect of afternoon shift payments and thereby contravened section 45 of the FW Act, which is a civil remedy provision pursuant to section 539(2) of the FW Act.

Contravention 4 - failure to pay Saturday penalties due under the Transport NAPSA

48. During the period from 22 April 2007 to 31 December 2009, pursuant to subclause 4.3.2.1 of the Transport NAPSA, ~~the First Respondent~~ **Doble Express** was required to pay Colin McIntosh a loading of 50% for all hours worked on Saturdays in addition to his ordinary rate.

49. From 22 April 2007 to 31 December 2009, Colin McIntosh performed 323.50 hours which fell within the definition of Saturday shift under the Transport NAPSA. These hours have been calculated on the basis of the hours referred to in paragraph 9 above.
50. The rates required to be paid under the Transport NAPSA for hours worked on Saturdays were:

Pay period on and from	Saturday rate due under the Transport NAPSA
22 April 2007	\$24.42
1 October 2007	\$24.83
1 October 2008	\$25.68

51. ~~The First Respondent~~ **Doble Express** paid Colin McIntosh the McIntosh Flat Hourly Rates for all hours worked, regardless of when those hours were worked.
52. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Colin McIntosh's entitlement to Saturday loadings under the Transport NAPSA causing Colin McIntosh to be underpaid \$1,940.66.
53. ~~The First Respondent~~ **Doble Express** contravened subclause 4.3.2.1 of the Transport NAPSA and thereby contravened clause 43 of Schedule 8 of the WR Act which is a civil remedy provision under subitems 2(1) and 16 of Schedule 16 of the Transitional Act.

Contravention 5 - failure to pay Saturday shift loading due under the Transport Modern Award

54. On and from 1 January 2010, pursuant to subclause 24.8(a) of the Transport Modern Award, ~~the First Respondent~~ **Doble Express** was required to pay Colin McIntosh the following loading and hourly rates for all work he performed on Saturdays where the major portion of his shift was performed on a Saturday:

Pay period on and from	Saturday rate due under the Transport MA
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1 January 2010	\$25.68
1 July 2010	\$26.31
1 July 2011	\$26.76

55. From 1 January 2010 to 26 June 2012, Colin McIntosh performed 358.33 hours which fell within the definition of Saturday shift under the Transport Modern Award. These hours have been calculated on the basis of the hours referred to in paragraph 9 above.
56. Regardless of when the hours were worked, ~~the First Respondent~~ **Doble Express** paid Colin McIntosh \$200 per DBLM Run which equated to approximately \$18.00 per hour.
57. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Colin McIntosh's entitlement to Saturday loadings under the Transport Modern Award causing Colin McIntosh to be underpaid \$1,974.41.
58. ~~The First Respondent~~ **Doble Express** contravened subclause 24.8(a) of the Transport Modern Award in respect of Saturday loadings and thereby contravened section 45 of the FW Act, which is a civil remedy provision pursuant to section 539(2) of the FW Act.

Contravention 6 - failure to pay overtime rates due under the Transport NAPSA

59. During the period from 22 April 2007 to 31 December 2009, pursuant to subclause 4.4 of the Transport NAPSA, ~~the First Respondent~~ **Doble Express** was required to pay Colin McIntosh the following overtime rates for any hours worked outside or in excess of ordinary shift hours:

Pay period on and from	Overtime rates for first 2 hours (150%)	Overtime rates thereafter (200%)
22 April 2007	\$24.42	\$32.56
1 October 2007	\$24.83	\$33.10
1 October 2008	\$25.68	\$34.24

60. From 22 April 2007 to 31 December 2009, Colin McIntosh worked 1,199 hours of overtime as defined under the Transport NAPSA. These hours have been calculated on the basis of the hours referred to in paragraph 9 above.
61. ~~The First Respondent~~ **Doble Express** paid Colin McIntosh the McIntosh Flat Hourly Rates for all hours worked, regardless of how many hours he worked.
62. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Colin McIntosh's entitlement to overtime rates under the Transport NAPSA causing Colin McIntosh to be underpaid \$15,594.52.
63. ~~The First Respondent~~ **Doble Express** contravened subclause 4.4 of the Transport NAPSA and thereby contravened clause 43 of Schedule 8 of the WR Act which is a civil remedy provision under subitems 2(1) and 16 of Schedule 16 of the Transitional Act.

Contravention 7 - failure to pay overtime rates due under the Transport Modern Award

64. On and from 1 January 2010, pursuant to subclause 24.5 of the Transport Modern Award, ~~the First Respondent~~ **Doble Express** was required to pay Colin McIntosh the following overtime rates for all work he performed outside or in excess of the ordinary shift hours:

Pay period on and from	Overtime rates for first 2 hours (150%)	Overtime rates thereafter (200%)
22 April 2007	\$24.42	\$32.56
1 October 2007	\$24.83	\$33.10
1 October 2008	\$25.68	\$34.24

65. From 1 January 2010 to 26 June 2012, Colin McIntosh worked 582.64 hours of overtime as defined under the Transport Modern Award. These hours have been calculated on the basis of the hours referred to in paragraph 9 above.
66. Regardless of the number of hours worked, ~~the First Respondent~~ **Doble Express** paid Colin McIntosh \$200 per DBLM Run which equated to approximately \$18.00 per hour.

67. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Colin McIntosh's entitlement to overtime rates under the Transport Modern Award causing Colin McIntosh to be underpaid \$6,679.81.
68. ~~The First Respondent~~ **Doble Express** contravened subclause 24.5 of the Transport Modern Award and thereby contravened section 45 of the FW Act which is a civil remedy provision pursuant to section 539(2) of the FW Act.

Contravention 8 - failure to pay public holiday rates due under the Transport Modern Award

69. On and from 1 January 2010, pursuant to subclause 24.8 of the Transport Modern Award, ~~the First Respondent~~ **Doble Express** was required to pay Colin McIntosh at the rate of double time and a half for work performed on a shift, the major portion of which was performed on a public holiday.
70. Colin McIntosh worked on the Good Friday public holidays as follows:
- (a) 5 hours between 2.00am to 7.00am on 2 April 2010; and
 - (b) 5 hours between 2.00am to 7.00am on 22 April 2011.
71. Colin McIntosh was entitled to be paid a total of \$433.27 for the hours he worked on Good Friday in 2010 and 2011 but was only paid \$321.98. The amount paid by ~~the First Respondent~~ **Doble Express** was insufficient to meet Colin McIntosh's entitlement to the public holiday rate of pay causing Colin McIntosh to be underpaid \$111.29.
72. ~~The First Respondent~~ **Doble Express** contravened subclause 24.8 of the Transport Modern Award and thereby contravened section 45 of the FW Act which is a civil remedy provision pursuant to section 539(2) of the FW Act.

Contravention 9 - failure to pay travel allowance due under the Transport NAPSA

73. Pursuant to subclause 7.4 of the Transport NAPSA, ~~the First Respondent~~ **Doble Express** was required to pay Colin McIntosh an amount of \$37.20 as specified in item 1 of Table 8 of Part B of the Transport NAPSA during the period from 22 April 2007 to 31 December 2009 for each occasion he was unable to return home to cover expenses incurred in obtaining accommodation for the night and meals.

74. At the relevant time, the ~~second~~ Respondent was not aware that the travel allowance under subclause 7.4 of the Transport NAPSAs applied to Colin McIntosh.
75. From 22 April 2007 to 31 December 2009, the hours worked by Colin McIntosh precluded him from reaching his home at 4 Mitchell Street, Geurie NSW 2818, approximately 30 kilometres from Dubbo, on 581 occasions. ~~The First Respondent~~ **Doble Express** made no payments to Colin McIntosh to compensate him for expenses incurred while travelling away from home.
76. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Colin McIntosh's entitlement to travel allowance under the Transport NAPSAs causing Colin McIntosh to be underpaid \$21,613.20.
77. ~~The First Respondent~~ **Doble Express** contravened subclause 7.4.3 of the Transport NAPSAs and thereby contravened clause 43 of the Schedule 8 of the WR Act which is a civil remedy provision under subitem 2(1) of Schedule 16 of the Transitional Act.

Contravention 10 - failure to pay travelling allowance due under the Transport Modern Award

78. On and from 1 January 2010, pursuant to subclause 16.1(f) of the Transport Modern Award, ~~the First Respondent~~ **Doble Express** was required to pay Colin McIntosh an allowance of at least \$30.56 per day for personal expenses reasonably incurred in travelling away from home.
79. At the relevant time, the ~~second~~ Respondent was not aware that the travel allowance under subclause 16.1(f) of the Transport Modern Award applied to Colin McIntosh.
80. From 1 January 2010 to 26 June 2012, the hours worked by Colin McIntosh resulted in him being unable to return home at night on 492 occasions. ~~The First Respondent~~ **Doble Express** made no payments to Colin McIntosh to compensate him for expenses incurred while travelling away from home.
81. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Colin McIntosh's entitlement to the travelling allowance under the

Transport Modern Award causing Colin McIntosh to be underpaid \$15,035.52.

82. ~~the First Respondent~~ **Doble Express** contravened subclause 16.1(f) of the Transport Modern Award and thereby contravened section 45 of the FW Act which is a civil remedy provision pursuant to section 539(2) of the FW Act.

Contravention 11 - failure to pay accrued annual leave upon termination

83. Pursuant to subsection 87(1) of the FW Act, an employee is entitled to 4 weeks' paid annual leave for each year of service.
84. For the period of his employment from 12 July 2005 to 12 September 2012, Colin McIntosh worked approximately 13,794 ordinary hours and as a result was entitled to accrue approximately 1,1032.74 hours of annual leave.
85. During the period from 12 July 2005 to 12 September 2012, Colin McIntosh took and was paid for approximately 496 hours of annual leave and upon his termination of employment on 12 September 2012, Colin McIntosh had an outstanding accrual of approximately 563.74 hours of accrued but untaken annual leave.
86. Upon his termination of employment on the date of his death, Colin McIntosh's estate was entitled to receive his accrued annual leave paid at the rate that would have been payable to Mr McIntosh had he taken the leave pursuant to subsection 90(2) of the FW Act, being:

Hourly rate payable/hour of annual leave (incl. leave loading)	Hours accrued annual leave outstanding	Total value of annual leave payable
\$21.23	563.74	\$11,968.20 <u>\$11,968.19</u>

87. ~~The First Respondent~~ **Doble Express** did not make any payment of annual leave upon termination to the estate of Colin McIntosh and underpaid Colin McIntosh ~~\$11,968.20~~ **\$11,968.19**.
88. ~~The First Respondent~~ **Doble Express** contravened subsection 90(2) of the FW Act and thereby contravened section 44 of the FW Act which is a civil remedy provision pursuant to section 539(2) of the FW Act.

CONTRAVENTIONS – BERNADETTE DEAN – DRIVING WORK

Contravention 12 - failure to pay night shift loading due under the Transport NAPSA

89. From 30 September 2007 to 7 March 2008 during which Bernadette Dean performed Driving Work at night, subclause 4.3.1.3 of the Transport NAPSA required ~~the First Respondent~~ **Doble Express** to pay Bernadette Dean a loading of 30% for all hours performed as Driving Work on permanent night shift in addition to her casual rate.
90. From 30 September 2007 to 7 March 2008, Bernadette Dean worked 407 hours which fell within the definition of Night Shift under the Transport NAPSA.
91. When Bernadette Dean was employed as a casual employee performing Driving Work, ~~the First Respondent~~ **Doble Express** was required to pay the following rate of pay for night shift:

Pay period	Total hourly rate due for night shift
On 30 September 2007	\$24.69
1 October 2007 to 7 March 2008	\$25.10

92. ~~The First Respondent~~ **Doble Express** paid Bernadette Dean a flat hourly rate of \$19.00 for all hours worked, regardless of when those hours were worked.
93. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Bernadette Dean's entitlement to the night shift rate as a casual employee under the Transport NAPSA causing Bernadette Dean to be underpaid \$3,611.80.
94. ~~The First Respondent~~ **Doble Express** contravened subclause 4.3.1.3 of the Transport NAPSA and thereby contravened clause 43 of Schedule 8 of the WR Act which is a civil remedy provision under subitems 2(1) and 16 of Schedule 16 of the Transitional Act.

Contravention 13 - failure to pay Sunday loadings due under the Transport NAPSA

95. During the period from 8 March 2008 to 15 June 2008 during which Bernadette Dean performed Driving Work on a Sunday, subclause 4.3.2 of the Transport NAPSA required ~~the First Respondent~~ **Doble Express** to pay Bernadette Dean loadings in addition to her casual rate for all hours worked on Sundays where the major portion of those hours fell on a Sunday.
96. From 8 March 2008 to 15 June 2008, Bernadette Dean worked 139.5 hours which fell within the definition of Sunday Shift under the Transport NAPSA.
97. The rate required to be paid under the Transport NAPSA for hours worked on Sundays was \$36.47 per hour.
98. ~~The First Respondent~~ **Doble Express** paid Bernadette Dean a flat hourly rate of \$19.00 for all hours worked, regardless of when those hours were worked.
99. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Bernadette Dean's entitlement to Sunday rates as a casual employee under the Transport NAPSA causing Bernadette Dean to be underpaid \$4,973.02.
100. ~~The First Respondent~~ **Doble Express** contravened subclause 4.3.2 of the Transport NAPSA and thereby contravened clause 43 of Schedule 8 of the WR Act which is a civil remedy provision under subitems 2(1) and 16 of Schedule 16 of the Transitional Act.

CONTRAVENTIONS – BERNADETTE DEAN – CLERICAL WORK

Contravention 14 - failure to pay 1/12th annual leave loading to casuals under the Clerical NAPSA

101. From 24 March 2008 to 17 February 2009, ~~the First Respondent~~ **Doble Express** was required to pay Bernadette Dean, when she performed Clerical Work, the following as part of her hourly rate:
 - (a) pursuant to subsection 182(1) of the WR Act, a basic periodic rate of pay at least equal to the APCS derived from the *Clerical and Administrative Employees (State) Award (Clerical Base Periodic Rate)*;

- (b) pursuant to subsection 185(2) of the WR Act and subclause 5.3 of the APCS derived from the *Clerical and Administrative Employees (State) Award*, a guaranteed casual loading of 15% (**Clerical Casual Loading**); and
- (c) pursuant to subclause 14.1.1 of the *Clerical and Administrative Employees (State) Award* and subsection 4(3) of the *Annual Holidays Act*, an annual holidays loading (**Clerical Annual Holidays Loading**) calculated at one twelfth of the casually loaded rate.

(collectively the amounts in (a) to (c) above are referred to as the **Clerical Casual Rate**)

102. From 24 March 2008 to 17 February 2009, during which Bernadette Dean performed Clerical Work, ~~the First Respondent~~ **Doble Express** was required to pay her the following Clerical Casual Rate for all ordinary hours worked:

Pay period	Clerical Casual Rate due
24 March 2008 to 30 September 2008	\$19.91
1 October 2008 to 17 February 2009	\$20.66

103. ~~The First Respondent~~ **Doble Express** paid Bernadette Dean a flat hourly rate of \$19.00 for all hours worked.
104. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Bernadette Dean’s entitlement to annual leave loading derived from subsection 4(3) of the *Annual Holidays Act* as required pursuant to subclause 14.1. of the Clerical NAPSA causing Bernadette Dean to be underpaid \$1,398.25.
105. ~~The First Respondent~~ **Doble Express** contravened subclause 14.1.1 of the Clerical NAPSA and thereby contravened clause 43 of Schedule 8 of the WR Act which is a civil remedy provision under subitems 2(1) and 16 of Schedule 16 of the Transitional Act.

Contravention 15 - failure to pay night shift loading due under the Clerical NAPSA

106. From 24 March 2007 to 31 December during which Bernadette Dean performed Clerical Work, subclause 10.3.3 of the Clerical NAPSA required ~~the First Respondent~~ **Doble Express** to pay Bernadette Dean a loading of 26% of her ordinary rate for all hours worked on permanent night shift in addition to her ordinary rate.
107. From 24 March 2008 to 31 December 2009, Bernadette Dean worked 2,510.5 hours which fell within the definition of Night Shift under the Clerical NAPSA, being any shift which starts at or after 11.00pm and at or before 4.00am or finishes after 11.00pm and at or before 6.00am (**Night Shift**).
108. The rates required to be paid under the Clerical NAPSA for hours worked as Night Shift were:

Pay period	Employment status	Night shift rate due
24 March 2008 to 30 September 2008	Casual	\$23.89
1 October 2008 to 17 February 2009	Casual	\$24.79
18 February 2009 to 31 December 2009	Full time	\$20.02

109. ~~The First Respondent~~ **Doble Express** paid Bernadette Dean a flat hourly rate of \$19.00 for all hours worked, regardless of when those hours were worked.
110. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Bernadette Dean's entitlement to the night shift rate under subclause 10.3.3 of the Clerical NAPSA causing Bernadette Dean to be underpaid \$12,362.26.
111. ~~The First Respondent~~ **Doble Express** contravened subclause 10.3.3 of the Clerical NAPSA and thereby contravened clause 43 of Schedule 8 of the WR Act which is a civil remedy provision under subitems 2(1) and 16 of Schedule 16 of the Transitional Act.

Contravention 16 - failure to pay overtime rates due under the Clerical NAPSA

112. From 24 March 2008 to 31 December 2009 during which Bernadette Dean performed Clerical Work, subclause 10.4.1 of the Clerical NAPSA required ~~the First Respondent~~ **Doble Express** to pay Bernadette Dean overtime rates for any hours worked outside or in excess of ordinary shift hours (8 hours per day or 40 hours per week).

113. The rates required to be paid under the Clerical NAPSA for hours worked as overtime for the first 2 hours were:

Pay period	Employment status	Overtime for first 2 hours
24 March 2008 to 30 September 2008	Casual	\$26.04
1 October 2008 to 17 February 2009	Casual	\$27.01
18 February 2009 to 31 December 2009	Full time	\$23.83

114. The rates required to be paid under the Clerical NAPSA for hours worked as overtime after the first 2 hours were:

Pay period	Employment status	Overtime after first 2 hours
24 March 2008 to 30 September 2008	Casual	\$33.70
1 October 2008 to 17 February 2009	Casual	\$34.96
18 February 2009 to 31 December 2009	Full time	\$31.78

115. From 24 March 2008 to 31 December 2009, Bernadette Dean worked 1,207.08 hours of overtime as defined under the Clerical NAPSA.

116. ~~The First Respondent~~ **Doble Express** paid Bernadette Dean a flat hourly rate of \$19.00 for all hours worked, regardless of how many hours were worked.

117. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Bernadette Dean’s entitlement to overtime rates under subclause

10.4.1 of the Clerical NAPSA causing Bernadette Dean to be underpaid \$14,527.45.

118. ~~The First Respondent~~ **Doble Express** contravened subclause 10.4.1 of the Clerical NAPSA and thereby contravened clause 43 of Schedule 8 of the WR Act which is a civil remedy provision under subitems 2(1) and 16 of Schedule 16 of the Transitional Act.

Contravention 17 - failure to pay overtime rates due under the Clerical Modern Award

119. On and from 1 January 2010, pursuant to subclause 27.1(a) of the Clerical Modern Award, ~~the First Respondent~~ **Doble Express** was required to pay Bernadette Dean overtime rates for all Clerical Work she performed outside or in excess of ordinary hours (an average of 38 hours per week but not exceeding 152 hours in 28 days).
120. From 1 January 2010 to 13 February 2013 the hourly rates required to be paid under the Clerical Modern Award for hours worked as overtime were:

Pay period on and from	Overtime rates for first 2 hours (150%)	Overtime rates thereafter (200%)
1 January 2010	\$23.83	\$31.78
1 July 2010	\$25.22	\$33.63
1 July 2011	\$26.49	\$35.33
1 July 2012	\$27.66	\$36.88

121. During the period from 1 January 2010 to 13 February 2013, Bernadette Dean worked 3,048.75 hours of overtime as defined under the Clerical Modern Award.
122. ~~The First Respondent~~ **Doble Express** was also required to pay Bernadette Dean overtime rates for all hours worked by Bernadette Dean prior to 7.00am as such hours fall outside the ordinary hours defined in subclause 25.1(b) of

the Clerical Modern Award as Bernadette Dean is not defined as a shiftworker under the Clerical Modern Award.

123. From 1 January 2010 to 13 February 2013, ~~the First Respondent~~ **Doble Express** paid Bernadette Dean a flat rate of pay for all hours worked, regardless of when and how many hours she worked. The rate of pay paid to Bernadette Dean was:
- (a) \$19.00 per hour from 1 January 2010 to 26 April 2011;
 - (b) \$1,000 per week which equated to approximately \$20.00 per hour from 27 April 2011 until 13 February 2013.
124. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Bernadette Dean's entitlement to overtime rates under the Clerical Modern Award causing Bernadette Dean to be underpaid \$45,698.32.
125. ~~The First Respondent~~ **Doble Express** contravened subclause 27.1(a)(ii) of the Clerical Modern Award in respect of overtime rates and thereby contravened section 45 of the FW Act which is a civil remedy provision pursuant to section 539(2) of the FW Act.

Contravention 18 - failure to pay meal allowance due under the Clerical NAPSA

126. From 24 March 2008 to 31 December 2009, ~~the First Respondent~~ **Doble Express** was required to pay a meal allowance of \$10.85 for each occasion Bernadette Dean worked overtime in excess of 1 hour on any shift where she performed Clerical Work, pursuant to subclause 13.1 of the Clerical NAPSA.
127. Bernadette Dean worked overtime in excess of 1 hour per shift during the period from 24 March 2008 to 31 December 2009 and a meal allowance was payable to Bernadette Dean on 345 occasions.
128. ~~The First Respondent~~ **Doble Express** paid Bernadette Dean a flat hourly rate of \$19.00 for all hours worked and no extra allowances were paid.
129. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Bernadette Dean's entitlement to the meal allowance under subclause 13.1 of the Clerical NAPSA causing Bernadette Dean to be underpaid \$3,743.25.

130. ~~The First Respondent~~ **Doble Express** contravened subclause 13.1 of the Clerical NAPSA and thereby contravened clause 43 of Schedule 8 of the WR Act which is a civil remedy provision under subitems 2(1) and 16 of Schedule 16 of the Transitional Act.

ALLEGED CONTRAVENTIONS – KATHLEEN MCGREGOR

Contravention 19 - failure to pay casual hourly rate due under the Clerical Modern Award

131. During the period from 1 January 2010 to 24 January 2011, ~~the First Respondent~~ **Doble Express** was required to pay Kathleen McGregor:
- (a) pursuant to clause 16 and Schedule A of the Clerical Modern Award, an ordinary hourly rate at least equal to the transitional rate of pay; and
 - (b) pursuant to subclause 12.2 and Schedule A of the Clerical Modern Award, a guaranteed casual loading.
132. From 1 January 2010 to 24 January 2011, Kathleen McGregor worked 1,355.6 hours for which she was entitled to be paid the casual hourly rate due under the Clerical Modern Award.
133. Pursuant to subclauses A.5.2, A.5.3 and A.5.4 of Schedule A of the Clerical Modern Award, ~~the First Respondent~~ **Doble Express** was required to pay Kathleen McGregor at least the following loadings and hourly rates for every hour worked as a casual employee:

Pay period on and from	Casual rate due under the Clerical MA
1 January 2010	\$19.07
1 July 2010	\$20.34

134. ~~The First Respondent~~ **Doble Express** paid Kathleen McGregor a flat hourly rate of \$18.00 for all hours worked.
135. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Kathleen McGregor’s entitlement to a minimum casual rate as required under subclause 12.2 and Schedule A of the Clerical Modern Award causing Kathleen McGregor to be underpaid \$11,155.27.

136. ~~The First Respondent~~ **Doble Express** contravened subclause 12.2 and Schedule A of the Clerical Modern Award and thereby contravened section 45 of the FW Act which is a civil remedy provision pursuant to section 539(2) of the FW Act.

Contravention 20 - failure to pay night shift loading due under the Clerical NAPSA

137. From 24 June 2009 to 31 December 2009, pursuant to subclause 10.3.3 of the Clerical NAPSA, ~~the First Respondent~~ **Doble Express** was required to pay Kathleen McGregor a loading of 26% for all hours worked on permanent night shift in addition to her ordinary rate.

138. From 24 June 2009 to 31 December 2009, Kathleen McGregor worked 1,048 hours which fell within the definition of Night Shift under the Clerical NAPSA.

139. From 24 June 2009 to 31 December 2009, the rates required to be paid under the Clerical Modern Award for hours worked as Night Shift were:

Pay period	Night shift rate due under the Clerical NAPSA
24 June 2009 to 31 December 2009	\$24.79

140. ~~The First Respondent~~ **Doble Express** paid Kathleen McGregor a flat hourly rate of \$18.00 for all hours worked, regardless of when those hours were worked.

141. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Kathleen McGregor's entitlement to the night shift rate under subclause 10.3.3 of the Clerical NAPSA causing Kathleen McGregor to be underpaid \$7,114.24.

142. ~~The First Respondent~~ **Doble Express** contravened subclause 10.3.3 of the Clerical NAPSA and thereby contravened clause 43 of Schedule 8 of the WR Act which is a civil remedy provision under subitems 2(1) and 16 of Schedule 16 of the Transitional Act.

Contravention 21 - failure to pay overtime rates due under the Clerical NAPSA

143. From 24 June 2009 to 31 December 2009, pursuant to subclause 10.4.1 of the Clerical NAPSA, ~~the First Respondent~~ **Doble Express** was required to pay Kathleen McGregor overtime rates for any hours worked outside or in excess of ordinary shift hours.
144. From 24 June 2009 to 31 December 2009, Kathleen McGregor worked 137.25 hours of overtime as defined under the Clerical NAPSA.
145. The hourly rates required to be paid under the Clerical NAPSA for hours worked as overtime for the first 2 hours were:

Pay period	Total overtime for first 2 hours
24 June 2009 to 31 December 2009	\$27.01

146. The hourly rates required to be paid under the Clerical NAPSA for hours worked as overtime after the first 2 hours were:

Pay period	Total overtime after first 2 hours
24 June 2009 to 31 December 2009	\$34.69

147. ~~The First Respondent~~ **Doble Express** paid Kathleen McGregor a flat hourly rate of \$18.00 for all hours worked, regardless of how many hours were worked.
148. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Kathleen McGregor's entitlement to overtime rates under subclause 10.4.1 of the Clerical NAPSA causing Kathleen McGregor to be underpaid \$1,282.44.
149. ~~The First Respondent~~ **Doble Express** contravened subclause 10.4.1 of the Clerical NAPSA and thereby contravened clause 43 of Schedule 8 of the WR Act which is a civil remedy provision under subitems 2(1) and 16 of Schedule 16 of the Transitional Act.

Contravention 22 - failure to pay overtime rates due under the Clerical Modern Award

150. On and from 1 January 2010, pursuant to subclause 27.1(a) of the Clerical Modern Award, ~~the First Respondent~~ **Doble Express** was required to pay Kathleen McGregor overtime rates for all work she performed outside or in excess of ordinary hours.
151. During the period from 1 January 2010 to 29 June 2012, Kathleen McGregor worked 3,005.2 of overtime as defined under the Clerical Modern Award.
152. ~~The First Respondent~~ **Doble Express** was also required to pay Kathleen McGregor overtime rates for all hours worked prior to 7.00am.
153. The rates required to be paid under the Clerical Modern Award for hours worked as overtime for the first 2 hours were:

Pay period	Employment status	Total overtime for first two hours
1 January 2010 to 30 June 2010	Casual	\$27.01
1 July 2010 to 24 January 2011	Casual	\$29.41
25 January 2011 to 30 June 2011	Full time	\$25.22
1 July 2011 to 29 June 2012	Full time	\$26.39

154. The rates required to be paid under the Clerical Modern Award for hours worked as overtime after the first 2 hours were:

Pay period	Employment status	Total overtime after first two hours
1 January 2010 to 30 June 2010	Casual	\$34.96
1 July 2010 to 24 January 2011	Casual	\$37.82
25 January 2011 to 30 June 2011	Full time	\$33.62
1 July 2011 to 29 June 2012	Full time	\$35.33

155. ~~The First Respondent~~ **Doble Express** paid Kathleen McGregor a flat rate of pay for all hours worked, regardless of when and how many hours she worked. The rate of pay paid to Kathleen McGregor was:
- (a) \$18.00 per hour from 1 January 2010 to 10 May 2011; and
 - (b) \$1,000 per week which equated to approximately \$20.00 per hour from 11 May 2011 until 29 June 2012.
156. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Kathleen McGregor's entitlement to overtime rates under the Clerical Modern Award causing Kathleen McGregor to be underpaid \$39,702.20.
157. ~~The First Respondent~~ **Doble Express** contravened subclause 27.1(a)(ii) of the Clerical Modern Award in respect of overtime rates and thereby contravened section 45 of the FW Act which is a civil remedy provision pursuant to section 539(2) of the FW Act.

Contravention 23 - failure to pay meal allowance due under the Clerical NAPSA

158. From 24 June 2009 to 31 December 2009, ~~the First Respondent~~ **Doble Express** was required to pay Kathleen McGregor a meal allowance of \$10.85 for each occasion she was required to work overtime in excess of 1 hour on any shift pursuant to subclause 13.1 of the Clerical NAPSA.
159. From 24 June 2009 to 31 December 2009, a meal allowance was payable to Kathleen McGregor on 79 occasions.

160. ~~The First Respondent~~ **Doble Express** paid Kathleen McGregor a flat hourly rate of \$18.00 for all hours worked and no extra allowances were paid.
161. The amounts paid by ~~the First Respondent~~ **Doble Express** were insufficient to meet Kathleen McGregor's entitlement to meal allowances under subclause 10.3.3 of the Clerical NAPSA causing Kathleen McGregor to be underpaid \$857.15.
162. ~~The First Respondent~~ **Doble Express** contravened subclause 13.1 of the Clerical NAPSA and thereby contravened clause 43 of Schedule 8 of the WR Act which is a civil remedy provision under subitems 2(1) and 16 of Schedule 16 of the Transitional Act.

RECORD-KEEPING CONTRAVENTIONS

Contravention 24 - failure to record hours worked by casual employees

163. Prior to 1 July 2009, subregulation 19.11(2) of the *Workplace Relations Regulation 2006* (**WR Regulations**) required ~~the First Respondent~~ **Doble Express** to make and keep a record in relation to a casual employee that set out the hours worked by that employee.
164. ~~The First Respondent~~ **Doble Express** contravened subregulation 19.11(2) of the WR Regulations by failing to make and keep records prior to 1 July 2009 with respect to the casual employees, Bernadette Dean and Kathleen McGregor, which set out the hours worked by those employees as casual employees.
165. On and from 1 July 2010, subregulation 3.33(2) of the *Fair Work Regulations 2009* (**FW Regulations**) required ~~the First Respondent~~ **Doble Express** to make and keep a record in relation to a casual employee that set out the hours worked by that employee.
166. ~~The First Respondent~~ **Doble Express** contravened subregulation 3.33(2) of the FW Regulations and section 535(1) of the FW Act by failing to make and keep records on and from 1 July 2010 with respect to Kathleen McGregor that set out the hours that she worked when she was a casual employee.

Contravention 25 - failure to record overtime hours worked by all employees

- 167. Prior to 1 July 2009, subregulation 19.9(1) of the WR Regulations required ~~the First Respondent~~ **Doble Express** to make and keep a record in relation to an employee that specified the number of overtime hours worked and the start and finish times of any overtime hours worked.
- 168. ~~The First Respondent~~ **Doble Express** contravened subregulation 19.1(1) of the WR Regulations by failing to make and keep records prior to 1 July 2009 with respect to Colin McIntosh, Bernadette Dean and Kathleen McGregor that set out the overtime hours worked by those employees and the start and finish times of any overtime hours worked.
- 169. On and from 1 July 2009, regulation 3.34 of the FW Regulations required ~~the First Respondent~~ **Doble Express** to make and keep a record in relation to an employee that specified the number of overtime hours worked and the start and finish times of any overtime hours worked.
- 170. ~~The First Respondent~~ **Doble Express** contravened regulation 3.34 of the FW Regulations and section 535(1) of the FW Act by failing to make and keep records on and from 1 July 2009 with respect to Colin McIntosh, Bernadette Dean and Kathleen McGregor that set out the overtime hours worked by those employees and the start and finish times of any overtime hours worked.

UNDERPAYMENTS

- 171. By reason of the contraventions set out at paragraphs 32 to 162 above, ~~the First Respondent~~ **Doble Express** caused the Employees to be underpaid a total amount of ~~\$248,981.86~~ **\$239,364.29** made up as follows:

Employee	Underpayment
Colin McIntosh	\$102,556.21 <u>\$92,938.64</u>
Bernadette Dean	\$86,314.35
Kathleen McGregor	\$60,111.30
TOTAL	\$248,981.86 <u>\$239,364.29</u>

INVOLVEMENT OF THE ~~SECOND~~ RESPONDENT

172. The Applicant repeats the matters set out at paragraphs 3(a) to (e) above.
173. The ~~Second~~ Respondent was one of two persons who had signed a contract on behalf of ~~the First Respondent~~ **Doble Express** with Australia Post for the DBLM Run (**Australia Post Contract**) which was performed by Colin McIntosh during his employment with ~~the First Respondent~~ **Doble Express**.
174. The ~~Second~~ Respondent at all material times knew:
- (a) that the Employees were employed by ~~the First Respondent~~ **Doble Express**;
 - (b) that Colin McIntosh performed driving duties between Dubbo and Bathurst in undertaking the DBLM Run;
 - (c) the timetable and hours required to perform the DBLM Run by reason that it formed part of the Australia Post Contract;
 - (d) that Bernadette Dean and Kathleen McGregor were receiving a flat hourly rate for every hour that they worked; and
 - (e) that Bernadette Dean and Kathleen McGregor commenced their clerical shifts early in the morning.
175. The Respondent:
- (a) **in or around January 2011:**
 - (i) **was informed by an employee of Doble Express, Rebecca Stevenson that the Transport Modern Award applied to the Company and its employees who performed work under that award;**
 - (ii) **knew that the Transport Modern Award applied to Colin McIntosh's employment;**
 - (iii) **knew that Colin McIntosh was receiving a flat hourly rate of pay for every hour that he worked or a flat amount of money which resulted in underpayment of employment entitlements;**

- (b) **knew that Colin McIntosh's estate was not paid Colin McIntosh's accrued entitlement to annual leave on termination;**
- (c) **was informed by letter from the Fair Work Ombudsman dated 4 October 2012 that:**
 - (i) **Bernadette Dean's employment was governed by the Clerical Modern Award; and**
 - (ii) **Ms Bernadette Dean was being underpaid.**

176. By reason of the matters agreed to in paragraphs 172 to 175 above, pursuant to ~~section 728 of the WR Act and~~ section 550 of the FW Act, the ~~Second~~ Respondent by way of his acts or omissions, was directly or indirectly knowingly concerned in or a party to ~~each of the~~ **following** contraventions **by the First Respondent Doble Express:** affecting the Employees Colin McIntosh: in paragraphs 32 to 170 above:

- (i) Section 45 of the FW Act by failing to pay night shift under clause 24.3 of the Transport Modern Award;**
- (ii) Section 45 of the FW Act by failing to pay afternoon shift under clause 24.3 of the Transport Modern Award;**
- (iii) Section 45 of the FW Act by failing to pay overtime rates under clause 24.5 of the Transport Modern Award;**
- (iv) Section 45 of the FW Act by failing to pay public holiday rates under clause 24.8 of the Transport Modern Award;**
- (v) Section 45 of the FW Act by failing to pay travelling allowance under clause 16.1(f) of the Transport Modern Award; and**
- (vi) Section 45 of the FW Act by failing to pay overtime rates under clause 27.1(a) of the Clerical Modern Award; and**
- (vii) Section 44 of the FW Act by failing to pay annual leave on termination under section 90(2) of the FW Act**

177. By reason of the matters set out in paragraphs 172 to 175 above and pursuant to ~~subsection 728(2) of the WR Act and~~ subsection 550(1) of the FW Act, the ~~Second~~ Respondent was involved in and is therefore treated as having

himself contravened ~~each of~~ the provisions set out in paragraph 176 above ~~the First Respondent~~ Doble Express is herein alleged to have contravened.

INVESTIGATION AND PROCEEDINGS

178. The FWO conducted an investigation into ~~the First Respondent~~ Doble Express following the receipt of complaints from the 3 Employees between December 2011 and July 2012.
179. Following the receipt of the complaints, the FWO contacted ~~the First~~ Doble Express and ~~Second the~~ Respondent and informed them of the complaints and the investigation. During the period from February 2012 to December 2012, the FWO issued four Notices to Produce Records and Documents (NTPs) upon ~~the First Respondent~~ Doble Express regarding the complaints received from the Employees. ~~The First Respondent~~ Doble Express answered the NTPs and provided the FWO with payslips, log books, time sheets and other documents for the Employees, which were used by the FWO to determine the contraventions and underpayments owing to the Employees.
180. On 7 March 2013, the ~~Second~~ Respondent participated in a Record of Interview (ROI) to discuss the complaints received.
181. The ~~Second~~ Respondent filed a response and defence in these proceedings however now admits his involvement in relation to a number of the contraventions affecting Colin McIntosh and Bernadette Dean and has entered into this amended agreed statement of facts.

MITIGATION

182. The ~~Second~~ Respondent has accepted his liability prior to the matter being listed for a liability hearing.
183. The ~~Second~~ Respondent expressed contrition for the contraventions.
184. The ~~Second~~ Respondent cooperated with FWO during the course of the investigation and the proceedings by attending voluntary interviews with representatives of FWO.
185. The ~~Second~~ Respondent has not previously been the subject of complaint to, or investigation by, the FWO.

ADMISSIONS

186. The ~~Second~~ Respondent admits that he was involved, within the meaning of ~~section 728 of the WR Act and section 550 of the FW Act~~, in the following contraventions by the ~~First Respondent~~ **Doble Express**:

- (a) ~~subclause 4.3.1.3 of the Transport NAPSA by failing to pay Colin McIntosh and Bernadette Dean the required shift loading for all hours worked on permanent night shift prior to 1 January 2010;~~
- (b) ~~subclause 4.3.2 of the Transport NAPSA by failing to pay Colin McIntosh the required shift loading for all hours worked on Saturdays prior to 1 January 2010;~~
- (c) ~~subclause 4.3.2 of the Transport NAPSA by failing to pay Bernadette Dean the required shift loading for all hours worked on Sundays prior to 1 January 2010;~~
- (d) ~~subclause 4.4 of the Transport NAPSA by failing to pay Colin McIntosh the required overtime rates for all hours worked outside or in excess of ordinary hours prior to 1 January 2010;~~
- (e) ~~subclause 7.4 of the Transport NAPSA by failing to pay Colin McIntosh the required travel allowance for expenses incurred in obtaining accommodation for the night and meals when away from home on shifts prior to 1 January 2010;~~
- (f) ~~subclause 14.1.1 of the Clerical NAPSA by failing to pay Bernadette Dean and Kathleen McGregor a 1/12th annual holidays loading pursuant to subsection 4(3) of the *Annual Holidays Act* prior to 1 January 2010;~~
- (g) ~~subsection 10.3.3 of the Clerical NAPSA by failing to pay Bernadette Dean and Kathleen McGregor the required shift loading for all hours worked on permanent night shift prior to 1 January 2010;~~
- (h) ~~subclause 10.4.1 of the Clerical NAPSA by failing to pay Bernadette Dean and Kathleen McGregor the required overtime rates for all hours worked outside or in excess of ordinary hours prior to 1 January 2010;~~
- (i) ~~subclause 13.1 of the Clerical NAPSA by failing to pay Bernadette Dean and Kathleen McGregor the required meal allowance when they were~~

~~required to work overtime in excess of 1 hour on any shift prior to 1 January 2010;~~

- ~~(j) subsection 185(2) of the WR Act by failing to pay the required casual loadings to Kathleen McGregor for every hour worked prior to 1 January 2010;~~
- (k) section 45 of the FW Act, by failing to pay Colin McIntosh the required shift loading for all hours worked on night shifts ~~on and~~ from 1 February 2011 ~~January 2010~~ in contravention of subclause 24.3 of the Transport Modern Award;
- (l) section 45 of the FW Act by failing to pay Colin McIntosh the required shift loading for all hours worked on afternoon shifts ~~on and~~ from 1 February 2011 ~~January 2010~~ in contravention of subclause 24.3 of the Transport Modern Award;
- (m) section 45 of the FW Act by failing to pay Colin McIntosh the required overtime rates for all hours worked outside or in excess of ordinary ~~on and~~ from 1 February 2011 ~~January 2010~~ in contravention of subclause 24.5 of the Transport Modern Award;
- (n) section 45 of the FW Act by failing to pay Colin McIntosh the required public holiday rates for all hours worked on public holidays ~~on and~~ from 1 February 2011 ~~January 2010~~ in contravention of subclause 24.8 of the Transport Modern Award;
- (o) section 45 of the FW Act by failing to pay Colin McIntosh the required travel allowance for personal expenses reasonably incurred in travelling away from home on shifts ~~on and~~ from 1 February 2011 ~~January 2010~~ in contravention of subclause 16.1(f) of the Transport Modern Award;
- ~~(p)~~ section 45 of the FW Act by failing to pay Bernadette Dean ~~and Kathleen McGregor~~ the required overtime rates for all hours worked outside or in excess of ordinary hours on and from 1 ~~January 2010~~ 4 October ~~2010~~ 2012 in contravention of subclause 27.1(a) of the Clerical Modern Award; **and**

- ~~(q) — section 45 of the FW Act by failing to pay Kathleen McGregor the minimum casual rate for every hour worked from 1 January 2010 to 24 January 2011 in contravention of subclause 12.2 of the Clerical Modern Award;~~
- (r) section 44 of the FW Act by failing to pay Colin McIntosh his accrued annual leave upon termination at the rate required under subsection 90(2) of the FW Act;
- ~~(s) — subregulation 19.11(2) of the WR Regulations by failing to make and keep records of hours worked by casual employees prior to 1 July 2009;~~
- ~~(t) — subregulation 19.(1) of the WR Regulations by failing to make and keep records of overtime hours worked by all employees prior to 1 July 2009;~~
- ~~(u) — subsection 535(1) of the FW Act by failing to make and keep records of hours worked by casual employees on and from 1 July 2009 in contravention of regulation 3.33(2) of the FW Regulations; and~~
- ~~(v) — subsection 535(1) of the FW Act by failing to make and keep records of overtime hours worked by all employees on and from 1 July 2009 in contravention of regulation 3.34 of the FW Regulations.~~

PARTIES' SUBMISSIONS REGARDING PENALTIES

187. In light of the admissions made by the ~~Second~~ Respondent as well as the facts and circumstances outlined above, the parties will each make separate submissions as to the appropriate level of penalties to be imposed.”
6. On 14 April 2014, the applicant filed in Court Further Amended Submissions, which, inter alia, summarise the relevant legislative provisions. Those submissions are as follows:

“FW Act

Pursuant to section 546 of the FW Act, the Court has the power to impose pecuniary penalties in respect of the contraventions of the FW Act. Section 546 of the FW Act provides that an eligible court (which includes this Court) can impose a penalty if the court is satisfied that the person

has contravened a civil remedy provision, which includes sections 44 and 45 of the FW Act.¹

Maximum penalties under the FW Act

The FW Act provides that the maximum penalty that may be imposed by this Court is 60 penalty units in the case of an individual for contraventions of sections 45 and 44 of the FW Act.²

The Act³ provides that “penalty unit” has the same meaning as in the Crimes Act 1914 (Cth) (Crimes Act). For the majority of the time of the Respondent's admitted contraventions, section 4AA of the Crimes Act defined “penalty unit” to be \$110.

Accordingly, the maximum penalty that could therefore be imposed by the Court for each breach by the Respondent is \$6,600 for each breach of sections 44 and 45 of the FW Act.”

7. The applicant also provided a summary of the principles relevant to determining penalty which I accept. The principles are as follows:

“Principles Relevant to Determining Penalty

There are established principles which should be taken into account by the Court in determining the question of appropriate penalty.

The first step for the Court is to identify the separate contraventions involved. Each breach of each separate obligation is a separate contravention.⁴

Secondly, the Court should consider whether the breaches arising in the first step constitute a single course of conduct.⁵

Thirdly, 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 Second Respondent

¹ Section 45 of the FW Act is a civil remedy provision by virtue of section 539 of the FW Act.

² Items 2 and 11 of section 539(2) of the FW Act; section 546(2) of the FW Act.

³ Section 12 of the FW Act.

⁴ *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223; *Mclver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J).

⁵ Subsection 719(2)(b) of the WR Act, regulation 14.5 of the WR Regulations and subsection 557(1) of the FW Act.

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.⁶ This task is distinct from and in addition to the final application of the “totality principle”.⁷

Fourthly, the Court should consider the appropriate penalty for the single breaches and, if relevant, each group of contraventions, taking into account all of the relevant circumstances.

Finally, the Court should consider whether it is an appropriate response to the conduct which led to the breaches.⁸ The Court should apply an “instinctive synthesis” in making this assessment.⁹ This is known as an application of the “totality principle.””

8. The parties have identified the following contraventions set out in the table set out below:

	Provision	Description of contravention
1.	Section 45 of the FW Act by contravening subclause 24.3 of the Transport Modern Award	By failing to pay Colin McIntosh the required shift loading for all hours worked on night shifts on and from 1 February 2011
2.	Section 45 of the FW Act by contravening subclause 24.3 of the Transport Modern Award	By failing to pay Colin McIntosh the required overtime rates for all hours worked on afternoon shifts on and from 1 February 2011
3.	Section 45 by contravening subclause 24.5 of the Transport Modern Award	By failing to pay Colin McIntosh the required overtime rates for all hours worked outside or in excess of ordinary hours on and from 1 February 2011
4.	Section 45 by contravening subclause 24.8 of the Transport Modern Award	By failing to pay Colin McIntosh the required public holiday rates for all hours worked on public holidays on and from 1 February 2011

⁶ *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) *Cousins v Merringtons Pty Ltd (No 2)* [2008] VSC 340 (**Merringtons**).

⁷ *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**).

⁸ 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).

⁹ *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).

5.	Section 45 of the FW Act by contravening subclause 16.1(f) of the Transport Modern Award	By failing to pay Colin McIntosh the required travel allowance for personal expenses reasonably incurred in travelling away from home on shifts on and from 1 February 2011
6.	Section 45 of the FW Act by contravening subclause 27.1(a) of the Clerical Modern Award	By failing to pay Bernadette Dean the required overtime rates for all hours worked outside or in excess of ordinary hours from 4 October 2012
7.	Section 44 of the FW Act by contravening subsection 90(2) of the FW Act	By failing to pay Colin McIntosh his accrued annual leave upon termination at the required rate.

9. Originally the applicant identified 22 contraventions, which were later reduced to seven. I accept the applicant’s submission on the principles on the course of conduct and common elements as having the effect of reducing the identified contraventions by the parties to six for the purposes of penalty. The applicant’s further amended submissions are as follows:

“Course of Conduct

The FW Act sets out that multiple breaches of particular provisions may, depending upon the particular circumstances, attract the operation of the course of conduct provisions contained in section 557 of the FW Act.

Section 557 of the FW Act provides that two or more contraventions of a specific civil penalty provision (listed in subsection 557(2) of the FW Act) are taken to constitute a single contravention if the contraventions are committed by the same person and the contraventions arose out of a course of conduct by the person.

The Company and the Respondent has the benefit of course of conduct provisions in relation to repeated breaches of the same provision. Accordingly, in circumstances where there were repeated breaches of the same provision, the Applicant submits that the course of conduct provisions should be applied.

Grouping of Contraventions

The parties agree and the Applicant submits that the penalties arising from the failure to pay afternoon shift and night shift loadings under the Transport Modern Award should be grouped under the principles of common element because:

a) these breaches occurred as a result of the decision to pay a flat hourly rate of pay or flat amount of pay for work performed; and

b) both breaches concern the pay failure to pay shift loadings.

It is open to the Court to group contraventions where they overlap with each other or involve the potential punishment of the respondent for the same or substantially similar conduct.

As Justice Jarrett observed in Fair Work Ombudsman v Total Project Marketing [2014] FCCA 451 at [84], grouping contraventions according to course of conduct is not the end of the matter as “there is also a discretion to further aggregate the contraventions to the extent that two or more contraventions have common elements.”

His Honour referred to the decision of Federal Magistrate Smith (as he then was) in Fair Work Ombudsman v Kensington Management Services Pty Ltd (No 2) [2012] FMCA 586:

“The mere presence of a ‘course of conduct’ for the purposes of the statutory aggregation of contraventions repeated over a period of time usually does not necessarily lead to a further aggregation under this principle, and there is a need to identify something which justifies it. The authorities clearly hold that the adoption of a further grouping or aggregation of penalties is discretionary (cf. Mornington Inn (supra) at [58]). In Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39, Middleton and Gordon JJ said:

*“[39] 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.

(emphasis of Justice Jarrett).”

10. I accept the applicant’s submission that all remaining contraventions are distinct and separate obligations and there are no overlapping contraventions (see: *Gibbs v Mayor, Counsellors and Citizens of the City of Altona* [1992] FCA 374 at [24]; *Blandy v Coverdale NT Pty Ltd* [2008] FCA 1533 at [56]).
11. I further accept that a useful checklist of factors relevant to the imposition of a penalty under the FWA is accurately set out in the applicant’s submissions, as follows:

“Factors relevant to determining penalties

The factors relevant to the imposition of a penalty under the FW Act have been summarised by Mowbray FM in Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7 (Pangaea), [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 defendant;*
- (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.

This summary was adopted by Tracey J in Kelly¹⁰ and Stuart-Mahoney v Construction, Forestry, Mining and Energy Union.¹¹ While the summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion.¹²

a), b) & c) The nature and extent of conduct leading to the breaches, circumstances in which conduct took place and nature and extent of loss as a result of breaches.

12. The total loss suffered by the three named employees was \$239,364.29. That is a significant loss to the Employees. The loss arose from the failure by Doble Express to provide the Employees under the relevant Industrial Instruments and the Respondent's involvement in that failure.
13. The contraventions involved a failure to pay the Employees the correct hourly rate for regular hours worked, overtime, shift loadings, public holiday rates and allowances, due under the relevant Industrial Instruments.
14. Doble Express employed Colin McIntosh as a full-time truck driver, based at the depot in Dubbo NSW from 12 July 2005 to 12 September 2012. Doble Express employed Bernadette Dean on a casual basis from

¹⁰ At [14].

¹¹ [2008] FCA 1426 at [14]

¹² *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11]; *Merringtons* at [91] per Buchanan J.

13 September 2007 to 17 February 2009 and on a full-time basis 18 February 2009 until 13 February 2013.

15. The applicant submitted that the Employees were working in Dubbo and Orange where employment prospects are likely to be more limited than in metropolitan areas. However, there was no evidence to support such a submission in relation to the capacity in which these Employees were employed. Accordingly, I place no weight on such a submission.
16. I accept that the underpayments remain outstanding.
17. The Respondent has made payments into two Deed Funds in accordance with the Deed of Company Arrangement in respect of Doble Express and, as at 25 February 2014, has paid a total of \$105,000 into the two Deed Funds. As at 14 April 2014, there have been no further payments into either of the two Deed Funds. The two Deed Funds are of \$112,500 each and one of the Funds is in respect of the employees of Doble Express, including the Employees.
18. I also note that as at 26 May 2014, no dividends have been paid to any of the creditors, including the Employees.

d) Similar previous conduct

19. There is no evidence to suggest that the Respondent has engaged in similar previous conduct.

e) Whether breaches arose from one course of conduct

20. See my reasons above at paragraph 9.

f) Size and financial circumstances of Respondent's business

21. As stated above, Doble Express is currently in administration. There is no evidence before this Court of the financial circumstances of the Respondent. I accept the applicant's submission that in times of financial difficulty, employers cannot breach an award within impunity or in the belief that no substantial penalty will be imposed in respect of a breach found to have been committed (see *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503 at 508 per Keeley J).

g) Deliberateness of breaches

22. The Respondent has been a director of Doble Express since 1984 and has had lengthy experience in the transport industry. I accept the applicant's submission that the Respondent should have had some awareness, at the very least, of entitlements due to his employees. Further, I accept the applicant's submission that the Respondent failed to take any steps as to whether the flat hourly rate paid to the Employees was sufficient to cover all their entitlements under the Industrial Awards.
23. I also note that the contravening conduct in respect of one of the employees, Ms Dean, continued for at least three months after the applicant issued a contravention letter.

h) Involvement of senior management

24. As stated above, the Respondent was at all relevant times a director of the Doble Express and responsible for the overall direction and management of Doble Express. The Respondent has accepted his responsibility for failing to ensure that proper entitlements were paid to his employees.

i), j) & k) Contrition, corrective action and cooperation with authorities.

25. The Respondent has cooperated with the applicant's investigation and his admissions have saved considerable cost to the public purse by avoiding the need for a fully contested hearing.
26. As stated above, there is, as yet, no compensation to any of the employees arising from the contraventions. However, as stated above, I note that the Respondent has paid a total of \$105,000 in respect of the Deed of Company Arrangement to be available for creditors, including employees as at 26 May 2014.
27. The applicant accepts that the Respondent has been prevented from directing Doble Express to rectify the outstanding underpayments during the course of the proceedings.

28. However, the Respondent has not made any other payments, ex gratia or otherwise, to the Employees to mitigate the losses they have incurred by reason of the contraventions.
29. There is no evidence to identify what payment any of the Employees will ultimately receive from the Deed Funds.
30. However, as stated above, the Respondent has been cooperative with the authorities insofar as he has legally been required to do so.

l) Need to ensure compliance with minimum standards

31. I accept the submission of the applicant in respect of the importance of the Respondent and all employers of complying with at least minimum standards in respect of their employees as required pursuant to the relevant Industrial Instruments. That submission is as follows:

“The underpayments relate primarily to penalty rates, loadings and allowances payable to the Employees by virtue of the fact that the work they performed was performed largely at irregular and unsociable hours. In the case of Colin McIntosh, it was also work performed away from home. The failure to provide the Employees with their entitlements means they were not adequately compensated for working those hours.”

m) General deterrence and specific deterrence

32. I accept the applicant’s submissions in relation to general deterrence. They are as follows:

“General Deterrence

It is indisputable that the most fundamental purpose of a civil penalty is to ensure compliance with the law. The setting of a penalty in respect of contravening conduct deliberately marks the seriousness with which the public regards such compliance, and naturally is designed to act as a deterrent, both by encouraging compliance in the first instance and also by imposing serious financial consequences for non-compliance.

*The primacy of deterrence in the determination of penalty was emphasised by French CJ (as he then was) in *Re Trade Practices Commission v CSR Ltd* [1990] FCA 762, in which he stated:*

“Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt. IV. Nor, if it be necessary to say so, is there any compensatory element in the penalty fixing process - *Trade Practices Commission v. Mobil Oil Australia Ltd* [1984] FCA 363; (1984) 4 FCR 296 at 298 (Toohey J.). The principal, and I think probably the only, object of the penalties imposed by s.76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.”¹³

His Honour confirmed at [42] that “the assessment of a penalty of appropriate deterrent value will have regard to a number of factors which have been canvassed in the cases”. The factors referred to by His Honour were those relevant to the trade practices jurisdiction, but closely mirror the factors later adopted in Pangaea, and discussed above.

The role of general deterrence in determining the appropriate penalty is illustrated by the comments of Lander J in Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543, [93]:

“In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: *Yardley v Betts* (1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: *R v Thompson* (1975) 11 SASR 217.”

The contraventions relate to failure to pay minimum entitlements in an industry where employees are often required to work long,

¹³ At [40].

unsociable and irregular hours and as such are entitled to overtime and shift loadings.

The penalties in this case should be imposed at such a level so as to deter other employers in the industry from committing similar contraventions.”

33. In relation to **specific deterrence**, I am satisfied that the cooperative conduct of the Respondent in relation to his assistance to authorities and his acceptance of his legal responsibilities in respect of his employees and the fact that he has not engaged in such conduct before diminishes the need for specific deterrence.
34. I do not accept the applicant’s submission that specific deterrence should be imposed on the Respondent because his wife now operates a similar business. There is no evidence whatsoever to support the applicant’s submission that the Respondent is involved in his wife’s business.

Penalty

35. The maximum penalty the Court could impose on the Respondent is \$39,600. I accept that the penalty should pay appropriate regard to the circumstances in which the contraventions occurred and in light of the need to sustain public confidence in the statutory regime imposing the obligations (see: *Cousins v Merringtons Pty Ltd (No.2)* [2008] VSC 340 at [91] (“*Merringtons*”)).
36. The applicant properly directed the Court’s attention to *Potter v Fair Work Ombudsman* [2014] FCA 187 per Cowdroy J, which was delivered following the filing of the Statement of Agreed Facts. I accept the applicant’s submission that this decision has no bearing on the liability of the Respondent in circumstances where liability has been admitted.
37. In all the circumstances, the penalty imposed by the Court is as follows:

Penalty to be imposed for each contravention of the respondent			
	Description of Contravention	Maximum Penalty	Penalty Imposed
Transport Modern Award Contraventions			

1.	Failure to pay afternoon and night shift loadings (subclause 24.3 of the Transport Modern Award)	\$6,600	\$2,200
2.	Failure to pay overtime rates (subclause 24.5 of the Transport Modern Award)	\$6,600	\$2,200
3.	Failure to pay public holiday rates (subclause 24.8 of the Transport Modern Award)	\$6,600	\$2,200
4.	Failure to pay travel allowance (subclause 16.1(f) of the Transport Modern Award)	\$6,600	\$2,200
Clerical Modern Award Contravention			
5.	Failure to pay overtime rates (subclause 27.1(a) of the Clerical Modern Award)	\$6,600	\$2,200
FW Act Contravention			
6.	Failure to pay accrued annual leave on termination (subsection 90(2) of the FW Act)	\$6,600	\$2,200
Totals		\$39,600	\$13,200

Totality

38. Having fixed appropriate penalties for each course of conduct, I have considered the aggregate penalty in determining whether it is an appropriate response to the conduct which led to the breaches and is not crushing or oppressive (see *Kelly v Fitzpatrick (2007) 166 IR 14* at [30] and *Merringtons* at [23] per Gray J, [71] per Graham J, and [102] per Buchanan J). I am satisfied that a total penalty of \$13,200 is appropriate in the circumstances.

Attribution of Penalty

39. The applicant submits that the penalty should be ordered to be paid to the Employees in their relevant percentages on the basis that Doble Express is in administration and there is no indication that the Respondent otherwise intends to meet the underpayment amount.
40. Whilst a maximum of \$105,000 has been paid into the Deed Funds, as at 26 May 2014, there is no evidence before me as to the priority of any other creditors. However, the last payment received from the Respondent was \$10,000 on 25 February 2014. The Respondent's obligation was to pay \$10,000 per month until the total of \$225,000 is paid into the two Deed Funds. No dividend will be payable to any of the creditors, including the Employees, until such time as the total amount due under the Deed of Company Arrangement is paid. In the circumstances, while there is a prospect that the Employees may receive their outstanding entitlements, they also may not.
41. Accordingly, the penalty should be paid to the Employees in their relevant percentages as part payment to them of unpaid entitlements.

Declarations

42. The applicant sought the following declarations:

"1. The Respondent, Mr Graeme John Doble, was involved in the contraventions committed by Doble Express Transport Pty Ltd (in external administration) (ACN 002 751 751) (Doble Express) within the meaning of subsection 550(1) of the Fair Work Act 2009 (Cth) (FW Act) as set out below:

a) section 45 of the FW Act, by failing to pay Colin McIntosh the required shift loading for all hours worked on night shifts on and from 1 February 2011 in contravention of subclause 24.3 of the Road Transport and Distribution Award 2010 (Transport Modern Award);

b) section 45 of the FW Act by failing to pay Colin McIntosh the required shift loading for all hours worked on afternoon shifts on and from 1 February 2011 in contravention of subclause 24.3 of the Transport Modern Award;

c) section 45 of the FW Act by failing to pay Colin McIntosh the required overtime rates for all hours worked outside or in excess of ordinary hours on and from 1 February 2011 in contravention of subclause 24.5 of the Transport Modern Award;

d) section 45 of the FW Act by failing to pay Colin McIntosh the required public holiday rates for all hours worked on public holidays on and from 1 February 2011 in contravention of subclause 24.8 of the Transport Modern Award;

e) section 45 of the FW Act by failing to pay Colin McIntosh the required travel allowance for personal expenses reasonably incurred in travelling away from home on shifts on and from 1 February 2011 in contravention of subclause 16.1(f) of the Transport Modern Award;

f) section 45 of the FW Act by failing to pay Bernadette Dean the required overtime rates for all hours worked outside or in excess of ordinary hours from 4 October 2012; and

g) section 44 of the FW Act by failing to pay Colin McIntosh his accrued annual leave upon termination at the rate required under subsection 90(2) of the FW Act.”

43. In *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* (2006) 236 ALR 665, in relation to the public interest in the making of declarations involving the protection of consumers, Kiefel J at [56]-[59] stated as follows:

“56. In Sung Li Holdings Ltd v Medicom Finance Pty Ltd (1995) 13 ACLC 955 Young J observed that the courts are always particularly careful, when making declaratory orders, not to make the order merely on admissions because otherwise the agreement between the parties will assume the dignity of the solemn adjudication by the Court. His Honour said:

*‘The reason for this is that even if the declaration only binds the parties as a matter of *res judicata*, other members of the community may consider that it is the view of the court and the declaration “will have effects on the community that extend far*

beyond the interests of the original plaintiff and defendant’.

57. In the present case the first mentioned difficulty is not present. Submissions have been made as to the declarations sought. The question is whether declarations should be made on deemed admissions, given that there has been no adjudication by the Court on the facts and the declarations may give the impression that there has.

58. The power to grant declarations (s.21 Federal Court of Australia Act 1976 (Cth)) is unconfined. Order 35A itself imposes no constraints upon the relief sought. Refusals to make declarations in cases of default are based upon a practice, not a rule of law. The practice is one of long standing and might be seen as derived from views about litigation which pre-date more recent concerns expressed by the courts as to the costs of unnecessary litigation, the management of cases and efficiency overall. Views expressed in older cases may not take account of the increase in the use made of declaratory orders in developing areas of law which may involve matters of public interest. A caution with respect to the use of older authority is made in the White Book Service 2003 to the English Civil Procedure Rules 1998 (40.20.2).

*59. It may no longer be correct to have a practice which operates as a prohibition in every case of default and preferable to consider the circumstances pertaining to the particular case and the purpose and effect of the declaration. Millett J made declaratory orders in Patten v Burke Publishing Co Ltd [1991] 1 WLR 541 where justice to the plaintiff required it. The order however operated principally inter partes and it might be doubted whether it would be of interest to other persons. **Cases such as this, involving the protection of consumers, are of public interest. Declarations are often utilised in such cases to identify for the public what conduct contributes to a contravention and to make apparent that it is considered to warrant an order recognising its seriousness. It is however important that there be no misunderstanding as to the basis upon which they are made. This could be overcome***

by a statement, preceding the declarations, that orders are made ‘upon admissions which [the respondent in question] is taken to have made, consequent upon non-compliance with orders of the Court’.” (emphasis added)

44. In relation to the public interest in granting the declaratory relief sought, I accept that the proceeding is brought by a regulator in order to record the seriousness of a contravention and to explain the basis for the imposition of pecuniary penalty and other relief. In *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2)* [2010] FCA 1156 at [210], McKerracher J stated as follows:

“210. There may be a public interest in the granting of declaratory relief in regulatory proceedings to record the contraventions’ seriousness and to explain the basis for the imposition of pecuniary penalties and other relief. A declaration in this case may indicate the importance of compliance with statutory standards, particularly in the employment of low paid and/or vulnerable employees.”

45. In my view, in the circumstances of this case, I am not persuaded that the public interest is served by the making of declarations in the terms sought by the applicant.

Orders

46. The following orders should be made:
1. The Respondent is to pay penalties pursuant to subsection 546(1) of the FW Act in a total amount of \$13,200 in respect of the Respondent’s involvement in the following contraventions:
 - (a) section 45 of the FW Act, by failing to pay Colin McIntosh the required shift loading for all hours worked on night shifts on and from 1 February 2011 in contravention of subclause 24.3 of the Road Transport and Distribution Award 2010 (Transport Modern Award);
 - (b) section 45 of the FW Act by failing to pay Colin McIntosh the required shift loading for all hours worked on

afternoon shifts on and from 1 February 2011 in contravention of subclause 24.3 of the Transport Modern Award;

(c) section 45 of the FW Act by failing to pay Colin McIntosh the required overtime rates for all hours worked outside or in excess of ordinary hours on and from 1 February 2011 in contravention of subclause 24.5 of the Transport Modern Award;

(d) section 45 of the FW Act by failing to pay Colin McIntosh the required public holiday rates for all hours worked on public holidays on and from 1 February 2011 in contravention of subclause 24.8 of the Transport Modern Award;

(e) section 45 of the FW Act by failing to pay Colin McIntosh the required travel allowance for personal expenses reasonably incurred in travelling away from home on shifts on and from 1 February 2011 in contravention of subclause 16.1(f) of the Transport Modern Award;

(f) section 45 of the FW Act by failing to pay Bernadette Dean the required overtime rates for all hours worked outside or in excess of ordinary hours from 4 October 2012; and

(g) section 44 of the FW Act by failing to pay Colin McIntosh his accrued annual leave upon termination at the rate required under subsection 90(2) of the FW Act.

in the following amounts:

(i) a penalty of \$2,200 be imposed on the Respondent, in respect of his involvement in the contraventions set out in paragraphs 1(a) and (b);

(ii) a penalty of \$2,200 be imposed on the Respondent, in respect of his involvement in the contraventions set out in paragraphs 1(c);

(iii) a penalty of \$2,200 be imposed on the Respondent, in respect of his involvement in the contravention set out in paragraph 1(d);

(iv) a penalty of \$2,200 be imposed on the Respondent, in respect of his involvement in the contravention set out in paragraph 1(e);

(v) a penalty of \$2,200 be imposed on the Respondent, in respect of his involvement in the contravention set out in paragraph 1(f); and

(vi) a penalty of \$2,200 be imposed on the Respondent, in respect of his involvement in the contravention set out in paragraph 1(g).

2. Pursuant to subsection 546(3)(c) of the FW Act the penalty amounts specified at Order 1 above are to be paid by the Respondent to the Consolidated Revenue Fund of the Commonwealth of Australia.

3. Any monies paid to the Consolidated Revenue Fund pursuant to Order 2 above are to be disbursed by the Applicant, to the following former employees of Doble Express in the amounts below which are proportionate to the total loss suffered by the employees as a result of the contraventions by Doble Express:

(a) Estate of Mr Colin McIntosh – 38.83% of total penalties imposed;

(b) Bernadette Dean – 36.06% of total penalties imposed; and

(c) Kathleen McGregor – 25.11% of total penalties imposed.

4. Otherwise, the proceeding before this Court should be dismissed.

I certify that the preceding forty-six (46) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Associate:

Date: 26 May 2014