

# FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v IWOOD AUSTRALIA PTY LTD (IN LIQUIDATION) & ANOR* [2014] FCCA 286

## Catchwords:

INDUSTRIAL LAW – Penalty hearing – contraventions of Fair Work Act – first respondent insolvent – second respondent involved in contraventions – statement of agreed facts – appropriate penalty.

## Legislation:

*Fair Work Act 2009* (Cth), ss.12, 45, 323, 536, 539, 545, 546, 546, 547, 557, 701  
*Corporations Act 2001* (Cth), s.471B  
*Evidence Act 1995* (Cth), s.191  
*Crimes Act 1914* (Cth), s.4AA

## Cases cited:

*Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7  
*Kelly v Fitzpatrick* (2007) 166 IR 14  
*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8  
*Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor* [2010] FMCA 599  
*Ponzio v B & P Caelli Construction Pty Ltd* (2007) 158 FCR 543  
*Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70  
*Cotis v Macpherson* [2007] FMCA 2060  
*Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412  
*Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2)* (1999) 94 IR 231  
*Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38  
*McIver v Healey* [2008] FCA 425  
*Gibbs v Mayor Councillors and Citizens of City of Altona* (1992) 37 FCR 216  
*Lynch v Buckley Sawmills Pty Ltd* (1985) 3 FCR 503  
*Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* [2008] 171 FCR 357  
*Fair Work Ombudsman v Maclean Bay Pty Ltd (No.2)* [2012] FCA 557  
*Barbaro v The Queen* [2014] HCA 2  
*Fair Work Ombudsman v Tiger Telco Pty Ltd (In Liquidation)* [2012] FCA 479  
*Blandy v Cloverdale NT Pty Ltd* [2008] FCA 1553  
*Fair Work Ombudsman v A Dalley Holdings Pty Ltd* [2013] FCA 509  
*Fair Work Ombudsman v Manning* [2013] FCCA 1443  
*Fair Work Ombudsman v Bosen Pty Ltd* [2011] VMC 81  
*Workplace Ombudsman v Securit-E Holdings Pty (In Liquidation)* [2009] FMCA 700  
*Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241

Applicant: FAIR WORK OMBUDSMAN

First Respondent: IWOOD AUSTRALIA PTY LTD  
(IN LIQUIDATION) (ACN 105 396 405)

Second Respondent: SIU KIT CHAN

File Number: MLG 1347 of 2013

Judgment of: Judge O'Sullivan

Hearing date: 18 February 2014

Date of Last Submission: 18 February 2014

Delivered at: Melbourne

Delivered on: 18 February 2014

## **REPRESENTATION**

Counsel for the Applicant: Mr Fetter

Solicitors for the Applicant: Fair Work Ombudsman

Counsel for the First Respondent: No appearance

Solicitors for the First Respondent: No appearance

Counsel for the First and Second Respondents: Mr Cooper

Solicitors for the First and Second Respondents: Peter Cooper Lawyer

## **ORDERS**

### **THE COURT DECLARES THAT:**

- (1) The Second Respondent, Siu Kit Chan, was involved in each of the contraventions committed by the First Respondent (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 virtue of contravening clause 16 of the Clerks – Private Sector Award 2010 MA000002 (“Clerks Modern Award”) by failing to pay Ms Pek Teh her minimum hourly rate of pay;
- (b) section 45 of the FW Act by virtue of contravening subclause 15.1 of the Storage Services and Wholesale Award 2010 (MA000084) (“Storage Modern Award”) by failing to pay Mr Ahmed Mahdy his minimum hourly rate of pay;
- (c) section 45 of the FW Act by underpaying Ms Pek Teh her entitlement to a casual loading under subclause 12.2 of the Clerks Modern Award;
- (d) section 45 of the FW Act by underpaying Ms Pek Teh her entitlement to the applicable overtime penalty rate under subclause 27.1(a) of the Clerks Modern Award;
- (e) subsection 44(1) and section 116 of the FW Act by failing to pay Ms Pek Teh an amount sufficient to meet her entitlement to her base rate of pay for ordinary hours while absent on a public holiday;
- (f) section 45 of the FW Act by underpaying Ms Pek Teh her entitlement to a Sunday penalty rate under subclause 27.2(b) of the Clerks Modern Award;
- (g) subsection 44(1) and subsection 90(1) of the FW Act by underpaying Ms Pek Teh her base rate of pay for annual leave taken;
- (h) subsection 44(1) and subsection 90(2) of the FW Act by failing to pay Ms Pek Teh and Mr Ahmed Mahdy annual leave entitlements on termination of employment;
- (i) section 45 of the FW Act by failing to pay Ms Pek Teh annual leave loading on annual leave taken and annual leave on termination of employment, as required under subclause 29.3(b)(i) of the Clerks Modern Award;

- (j) section 45 of the FW Act by failing to pay Mr Ahmed Mahdy annual leave loading on annual leave on termination of employment, as required under subclause 26.4(a) of the Storage Modern Award;
- (k) subsection 44(1) and section 99 of the FW Act by underpaying Ms Pek Teh her entitlement to personal/carer's leave.

**THE COURT ORDERS THAT:**

- (2) The Second Respondent is to pay penalties pursuant to subsection 546(1) of the FW Act to a total amount of \$28,512.00 in respect of the contraventions listed in paragraph 1 above, which is made up of:
  - (a) a penalty of \$3,696.00 be imposed on the Second Respondent, in respect of his involvement in the contravention set out in paragraph 1(a);
  - (b) a penalty of \$3,696.00 be imposed on the Second Respondent, in respect of his involvement in the contravention set out in paragraph 1(b);
  - (c) a penalty of \$2,640.00 be imposed on the Second Respondent, in respect of his involvement in the contravention set out in paragraph 1(c),
  - (d) a penalty of \$2,640.00 be imposed on the Second Respondent, in respect of his involvement in the contravention set out in paragraph 1(d);
  - (e) a penalty of \$2,112.00 be imposed on the Second Respondent, in respect of his involvement in the contravention set out in paragraph 1(e);
  - (f) a penalty of \$2,112.00 be imposed on the Second Respondent, in respect of his involvement in the contravention set out in paragraph 1(f);
  - (g) a penalty of \$1,584.00 be imposed on the Second Respondent, in respect of his involvement in the contravention set out in paragraph 1(g);

- (h) a penalty of \$3,696.00 be imposed on the Second Respondent, in respect of his involvement in the contravention set out in paragraph 1(h);
  - (i) a penalty of \$2,112.00 be imposed on the Second Respondent, in respect of his involvement in the contravention set out in paragraph 1(i);
  - (j) a penalty of \$2,112.00 be imposed on the Second Respondent, in respect of his involvement in the contravention set out in paragraph 1(j);
  - (k) a penalty of \$2,112.00 be imposed on the Second Respondent, in respect of his involvement in the contravention set out in paragraph 1(k).
- (3) The Second Respondent pay the penalty amounts specified at Order 2 pursuant to subsection 546(3)(c) of the FW Act in the following manner:
- (a) if the total amount of the penalties is equal to or less than the total outstanding underpayment to Ms Pek Teh and Mr Ahmed Mahdy (\$11,104.83), plus interest of \$388.67 on that amount (the Total Liability), that the penalty amount be paid to Ms Pek Teh and Mr Ahmed Mahdy in amounts proportionate to the loss suffered as a result of the contraventions.
  - (b) if the total amount of the penalties exceeds the Total Liability referred to in Order 3(a) above, then any additional amount, being the difference between the Total Liability and the total of all penalties awarded, is to be paid to the Consolidated Revenue Fund of the Commonwealth pursuant to subsection 559(1) of the FW Act.
- (4) If the Second Respondent is unable to locate any employee to pay the amount set out in Order 3(a) the Second Respondent is to pay any such amount to the Consolidated Revenue Fund of the Commonwealth pursuant to subsection 559(1) of the FW Act.
- (5) The payments referred to in Orders 3 and 4 are required to be made within 28 days of the date of these Orders.

**FEDERAL CIRCUIT COURT  
OF AUSTRALIA  
AT MELBOURNE**

**MLG 1347 of 2013**

**FAIR WORK OMBUDSMAN**

Applicant

And

**IWOOD AUSTRALIA PTY LTD (IN LIQUIDATION)**

**(ACN 105 396 405)**

First Respondent

**SIU KIT CHAN**

Second Respondent

**REASONS FOR JUDGMENT**

**(Revised from transcript)**

1. Before the Court today are proceedings commenced by the Fair Work Ombudsman (“the applicant”) for declarations and other orders against Mr Kit Sui Chan (“the second respondent”) for contraventions of the *Fair Work Act 2009* (Cth) (“the FW Act”) alleged to have occurred between 2010 and 2011.
2. Subsequently by order of the Federal Court of Australia, Iwood Australia Pty Ltd (“the first respondent”) went into insolvency. As a result and pursuant to s.471B of the *Corporations Act 2001* (Cth) these proceedings are stayed as against the first respondent.
3. However the second respondent has made certain admissions in relation to the contraventions of the FW Act. As the applicant does not seek leave to continue proceedings against the first respondent the proceedings now concern the question of what penalties should be imposed on the second respondent for the admitted contraventions.

## The proceedings

4. By way of background these proceedings were commenced by application filed on 22 August 2013.
5. On 18 September 2013 the following orders were made:

*“THE COURT ORDERS THAT:*

1. *The First and Second Respondents are each to file and serve a notice of address for service in accordance with Rule 6.01 of the Federal Circuit Court Rules 2001 (“the Rules”) by 25 September 2013.*
2. *The First and Second Respondents are each to file and serve a response and defence by 9 October 2013 and in the event the First and Second Respondents fail to comply with this order the applicant will file an application for default judgment.*
3. *The proceedings be adjourned for a further directions hearing on 18 October 2013 at the Federal Circuit Court of Australia at Melbourne commencing at 10.00 am.*
4. *The parties have liberty to apply.*
5. *The Applicant serve the First and Second Respondents with a sealed copy of these orders by 23 September 2013.*

*AND THE COURT NOTES:*

- A. *The Affidavit of Mr Holland deposed to service on the First and Second Respondents on 30 August 2013.*
- B. *The First and Second Respondents failed to attend Court this day or file a proper application for an adjournment.*
- C. *In the event of non-compliance by any party with the orders, directions, Rules or Regulations of this Court relating to:*
  - i. *the filing of documents;*
  - ii. *the payment of any applicable filing, setting down, mediation or enforcement fee or fees; and/or*
  - iii. *any other procedural issues,*

*the application may be struck out, the proceedings may be directed to proceed undefended or the trial date may be vacated and the Court may direct that a further date not be fixed until all parties have complied with the said orders, directions, Rules and Regulations.*

*D. To the extent that it is or may be practicable to do so, a compliance check is to be carried out by an Associate or Deputy Associate of the trial Judge, or by another appropriate court officer, shortly prior to the final hearing date.”*

6. On 17 October 2013 the following orders were made:

*“BY CONSENT THE COURT ORDERS THAT:*

- 1. Pursuant to rule 16.05(2)(f) of the Federal Circuit Court Rules 2001 the Orders of 18 September 2013 be set aside.*
- 2. The proceedings against the First Respondent be stayed pursuant to section 471B of the Corporations Act 2001 (Cth).*
- 3. The parties are to file a Statement of Agreed Facts by 4:00 pm on 15 November 2013.*
- 4. The Second Respondent is to file and serve any evidence on which he seeks to rely on the issue of penalty by 4:00 pm on 29 November 2013.*
- 5. The Applicant is to file and serve any evidence on which it seeks to rely on the issue of penalty by 4:00 pm on 13 December 2013.*
- 6. The Applicant is to file and serve its submissions on the issue of penalty by 4:00 pm on 3 January 2014.*
- 7. The Second Respondent is to file and serve its submissions on the issue of penalty by 4:00 pm on 24 January 2014.*
- 8. The Applicant must file and serve any reply submissions by 4:00 pm on 7 February 2014.*
- 9. The application is adjourned for a penalty hearing on Tuesday, 18 February 2014 in the Federal Circuit Court of Australia sitting at Melbourne commencing at 10.00 am.*
- 10. The parties have liberty to apply.”*



7. On 15 November 2013 the parties filed a Statement of Agreed Facts (“S.O.A.F”) which are Annexure A to these reasons.

## **Background**

8. The following is drawn from the S.O.A.F. filed by the parties and summarises the background to the admitted contraventions of the FW Act.
9. The first respondent was a furniture importation and furniture wholesale business based in Montmorency.
10. The second respondent has been the sole director of the first respondent since June 2007 and responsible for the first respondent’s decisions regarding staff and ensuring it complied with the FW Act.
11. Ms Pek Teh (“Ms Teh”) was employed by the first respondent from approximately 8 April 2010 to 16 June 2011 as an accounts and administration assistant.
12. Ms Teh was employed on a casual basis from 8 April 2010 to 1 June 2010 (the first period of engagement) and on a full time basis from 2 August 2010 to 16 June 2011 (the second period of engagement).
13. Mr Ahmad Mahdy (“Mr Mahdy”) was employed by the first respondent from approximately January 2006 until July 2012 as a warehouse employee. Mr Mahdy was employed on a full time basis from January 2006 to February 2012 and on a part time basis from 6 February 2012 until 11 July 2012.
14. The underpayments in relation to Ms Teh, to which the second respondent made admissions, arose because she was not paid in accordance with relevant award, did not receive annual leave or annual leave loading on the termination of her employment, and was not paid personal/carer’s leave.
15. The underpayments in relation to Mr Mahdy arose because he was not paid at all for some of the work performed and he was not paid annual leave or annual leave loading on the termination of his employment.<sup>1</sup>

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<sup>1</sup> SOAF at para [42]

16. The second respondent made admissions, and it is agreed that the employees were underpaid a total of \$12,704.83.<sup>2</sup>
17. In early 2012 the applicant received complaints from Ms Teh and Mr Mahdy arising from their employment with the first respondent and commenced these proceedings in 2013.

## **The hearing**

18. At the penalty hearing today, the applicant was represented by Mr Fetter of Counsel. As mentioned above, as the proceedings were stayed against the first respondent there was no appearance by or on behalf of the first respondent and Mr Cooper, Solicitor appeared on behalf of the second respondent.
19. The applicant relied on the following documents:
  - a) Affidavit of Roslyn Brear filed 12 December 2013 marked exhibit A1;
  - b) Affidavit of Kez Ma filed 12 December 2013 marked exhibit A2;
  - c) Affidavit of Reshma Bargon filed 12 December 2013 marked exhibit A3;
  - d) Affidavit of Karen Burton filed 14 January 2014 marked exhibit A4;
  - e) Affidavit of Reshma Bargon filed 12 May 2013 marked exhibit A6;
  - f) S.O.A.F filed 15 November 2013 marked exhibit A6;
  - g) Outline of submissions filed 17 January 2014 marked exhibit A7; and
  - h) Minute of proposed orders marked exhibit A8.
20. Despite the orders and directions to do so, the second respondent has not filed any material in these proceedings save for the S.O.A.F.
21. At the penalty hearing today both parties had to opportunity to make submissions on what penalties ought be imposed on the second respondent for the admitted contraventions of the FW Act.

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<sup>2</sup> SOAF at para [100]

## The legal framework

22. These proceedings concern admitted contraventions of the FW Act which are contraventions of civil remedy provisions of the FW Act.
23. The applicant is a Fair Work Inspector pursuant to s.701 of the FW Act and a person with standing under s.539 of the FW Act to commence these proceedings.
24. Section 546 of the FW Act enables a Court to impose a penalty upon a person who has contravened a civil remedy provision.
25. Pursuant to ss.539(2) and 546(2)(b) of the FW Act, the maximum penalty that may be imposed by this Court on the second respondent for the admitted contraventions is 60 penalty units.
26. Section 12 of the FW Act provides that “*penalty unit*” has the same meaning as in the *Crimes Act 1914* (Cth). Section 4AA of the *Crimes Act 1914* defined “*penalty unit*” to be \$110 at the time the admitted contraventions occurred.<sup>3</sup>
27. Section 557(1) of the FW Act provides that where two or more breaches are committed by the same person, the Court should consider whether the breaches arose out of a course of conduct by the person, such as to be taken to constitute a single breach of the term.

## Approach to penalty proceedings

28. The factors which may be taken into account is the assessment of penalty are well established. The factors relevant to the imposition of a penalty were summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, [26]-[59], as follows:

- a. *the nature and extent of the conduct which led to the breaches;*
- b. *the circumstances in which that conduct took place;*
- c. *the nature and extent of any loss or damage sustained as a result of the breaches;*

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<sup>3</sup> see *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth) which amended the value of a penalty unit for offences after 28 December 2012.

- d. *whether there had been similar previous conduct by the respondent;*
- e. *whether the breaches were properly distinct or arose out of the one course of conduct;*
- f. *the size of the business enterprise involved;*
- g. *whether or not the breaches were deliberate;*
- h. *whether senior management was involved in the breaches;*
- i. *whether the party committing the breach had exhibited contrition;*
- j. *whether the party committing the breach had taken corrective action;*
- k. *whether the party committing the breach had cooperated with the enforcement authorities;*
- l. *the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and*
- m. *the need for specific and general deterrence.”*

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

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

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

“22. *The first step for the Court is to identify the separate contraventions involved. Each breach of each separate*

*obligation found in the AFPCS, the NAPSA is a separate contravention of a term of an applicable provision for the purposes of s.719.<sup>4</sup>*

23. *However, s.719(2) provides for treating multiple breaches, involved in a course of conduct, as a single breach.*
24. *Secondly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the respondent did.<sup>5</sup> This task is distinct from and in addition to the final application of the “totality principle”.<sup>6</sup>*
25. *Thirdly, the Court will then consider an appropriate penalty to impose in respect of each course of conduct, having regard to all of the circumstances of the case.*
26. *Fourthly and finally, having fixed an appropriate penalty for each group of contraventions or course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches.<sup>7</sup> The Court should apply an “instinctive synthesis” in making this assessment.<sup>8</sup> This is what is known as an application of the ‘totality principle’.”*

## **Admitted contraventions**

31. The S.O.A.F at paragraph 107 set out the admitted contraventions. It was agreed for the purposes of assessing penalty there were eleven different groups of contraventions.

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

<sup>5</sup> *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [46] (Graham J) (unreported, Full Court of the Federal Court of Australia, 20 February 2008, Gray, Graham and Buchanan JJ) (*Merringtons*).

<sup>6</sup> *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [41]-[46] (Stone and Buchanan JJ) (unreported, Full Court of the Federal Court of Australia, 7 May 2008, Gyles, Stone and Buchanan JJ) (*Mornington Inn*).

<sup>7</sup> see *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (*Kelly*); *Merringtons*, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).

<sup>8</sup> *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).

	<b>Provision</b>	<b>Description of contravention</b>
1.	Section 45 of the FW Act	Underpaying Ms Teh the minimum rate of pay required by clause 16 of the Clerks Modern Award
2.	Section 45 of the FW Act	Failing to pay Mr Mahdy his minimum rate of pay for all ordinary hours worked, as required by subclause 15.1 of the Storage Modern Award
3.	Section 45 of the FW Act	Underpaying Ms Teh her entitlement to a casual loading under subclause 12.2 of the Clerks Modern Award
4.	Section 45 of the FW Act	Underpaying Ms Teh the applicable overtime penalty rate payable under subclause 27.1(a) of the Clerks Modern Award
5.	Subsection 44(1) and section 116 of the FW Act	Failing to pay Ms Teh an amount sufficient to meet her entitlement to her base rate of pay for ordinary hours while absent on a public holiday
6.	Section 45 of the Fair Work Act	Underpaying Ms Teh the Sunday penalty rate payable under subclause 27.2(b) of the Clerks Modern Award
7.	Subsection 44(1) and subsection 90(1) of the FW Act	Underpaying Ms Teh her base rate of pay for annual leave taken
8.	Subsection 44(1) and subsection 90(2) of the FW Act	Failing to pay the Employees their annual leave entitlements on termination of their employment
9.	Section 45 of the FW Act	Failing to pay Ms Teh annual leave loading on annual leave taken and annual leave on termination of employment, as required under subclause 29.3(b)(i) of the Clerks Modern Award
10.	Section 45 of the FW Act	Failing to pay Mr Mahdy annual leave loading on annual leave on termination of employment, as required under subclause 26.4(a) of the Storage Modern Award
11.	Subsection 44(1) and section 99 of	Underpaying Ms Teh her personal/carer's leave

## Considerations

32. In submissions upon which it relied the applicant addressed the Court on the relevant considerations when fixing penalties. It was submitted in this case they include:
- a) the nature and extent of the offending conduct;
  - b) the circumstances in which the conduct took place;
  - c) the nature and extent of any loss or damage;
  - d) any similar previous conduct;
  - e) whether the breaches were properly distinct or arose out of one course of conduct;
  - f) the size of the respondent's business;
  - g) the deliberateness of the breach;
  - h) the involvement of senior management;
  - i) the second respondent's contrition, corrective action and cooperation with the enforcement authorities;
  - j) ensuring compliance with minimum standards; and
  - k) deterrence.

## The nature and extent of the offending conduct

33. The applicant submitted:

*“8. The underpayments in relation to Ms Teh arose because Iwood adopted a payment structure that was not referable to the Clerks Modern Award, did not pay Ms Teh annual leave or annual leave loading on the termination of her employment, and did not pay Ms Teh personal/carer's leave.*

*During the employment of Ms Teh, Iwood applied the following payment structure:<sup>9</sup>*

- (a) for work performed on 8 April 2010 and 9 April 2010, Iwood paid Ms Teh \$50 per day worked;*
- (b) for work performed from 10 April 2010 to 12 June 2010, Iwood paid Ms Teh \$60 per day worked;*
- (c) for work performed from 13 June 2010 to 1 August 2010, Iwood paid Ms Teh \$110 per day worked;*
- (d) for work performed from 2 August 2010 to 11 June 2011, Iwood paid Ms Teh an hourly rate of \$16.19; and*
- (e) for work performed from 14 June 2011 to 16 June 2011, Iwood did not pay Ms Teh any wages.*

...

10. *The underpayments in relation to Mr Mahdy arose because Iwood did not pay Mr Mahdy at all for a total of 94.95 hours of work performed in the period from 23 April 2012 to 30 June 2012, and did not pay Mr Mahdy annual leave or annual leave loading on the termination of his employment.<sup>10</sup>*

11. *As a result of the failure to make sufficient payments, Iwood caused the Employees to be underpaid a total of \$12,704.83.<sup>11</sup>*

...

13. *Mr Chan's admissions as to involvement in the contraventions and the underlying facts are set out in the SOAF.<sup>12</sup> In particular, Mr Chan admits that at all material times, he knew that Iwood was not paying or providing the Employees with their award entitlements.<sup>13</sup>*

34. The admitted contraventions are set out as follows:

	<b>Provision</b>	<b>Description of contravention</b>
1.	Section 45 of	Underpaying Ms Teh the minimum rate of

<sup>9</sup> SOAF at para [42]

<sup>10</sup> SOAF at para [42]

<sup>11</sup> SOAF at para [100]

<sup>12</sup> SOAF at para [107]

<sup>13</sup> SOAF at para [106]



	the FW Act	pay required by clause 16 of the Clerks Modern Award
2.	Section 45 of the FW Act	Failing to pay Mr Mahdy his minimum rate of pay for all ordinary hours worked, as required by subclause 15.1 of the Storage Modern Award
3.	Section 45 of the FW Act	Underpaying Ms Teh her entitlement to a casual loading under subclause 12.2 of the Clerks Modern Award
4.	Section 45 of the FW Act	Underpaying Ms Teh the applicable overtime penalty rate payable under subclause 27.1(a) of the Clerks Modern Award
5.	Subsection 44(1) and section 116 of the FW Act	Failing to pay Ms Teh an amount sufficient to meet her entitlement to her base rate of pay for ordinary hours while absent on a public holiday
6.	Section 45 of the Fair Work Act	Underpaying Ms Teh the Sunday penalty rate payable under subclause 27.2(b) of the Clerks Modern Award
7.	Subsection 44(1) and subsection 90(1) of the FW Act	Underpaying Ms Teh her base rate of pay for annual leave taken
8.	Subsection 44(1) and subsection 90(2) of the FW Act	Failing to pay the Employees their annual leave entitlements on termination of their employment
9.	Section 45 of the FW Act	Failing to pay Ms Teh annual leave loading on annual leave taken and annual leave on termination of employment, as required under subclause 29.3(b)(i) of the Clerks Modern Award
10.	Section 45 of the FW Act	Failing to pay Mr Mahdy annual leave loading on annual leave on termination of employment, as required under subclause 26.4(a) of the Storage Modern Award
11.	Subsection 44(1) and section 99 of the FW Act	Underpaying Ms Teh her personal/carer's leave

35. I accept having regard to the following those contraventions have taken into account the provisions of s.557 of the FW Act as set out in the applicant's submissions as follows:

*“Course of Conduct*

31. *Section 557 of the FW Act provides that multiple breaches of particular provisions may, depending upon the particular circumstances, attract the operation of the course of conduct provisions. The onus of establishing the benefit of section 557 of the FW Act is on the Respondent.<sup>14</sup> Particularly relevant is whether the breaches arose out of separate acts or decisions of the employer, or out of a single act or decision. The latter case will constitute a course of conduct but the former will not.<sup>15</sup>*
32. *Pursuant to subsection 557(2)(a) of the FW Act, the FWO accepts that the course of conduct provisions in subsection 557(1) of the FW Act apply in relation to repeated breaches of the National Employment Standards in respect of multiple employees. Accordingly, the failure of Mr Chan to pay the Employees their accrued annual leave entitlements on termination of their employment, as per contravention 8 in paragraph 12 above, should be treated as one contravention and not two.<sup>16</sup>*

*Common Element*

33. *It is open to the Court to group contraventions where they overlap with each other or involve the potential punishment of Mr Chan for the same or substantially similar conduct.<sup>17</sup>*
34. *The FWO submits that Iwood's breach of the Clerks Modern Award in failing to pay Ms Teh annual leave loading on annual leave taken, and Iwood's breach of the Clerks Modern Award in failing to pay Ms Teh annual leave loading on annual leave on termination of employment have a common element. In each case, Iwood failed to pay Ms Teh her 25% annual leave*

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<sup>14</sup> *Workplace Ombudsman v Securit-E Holdings Pty Ltd (In Liquidation)* [2009] FMCA 700 at [5].

<sup>15</sup> *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 266-267 per Gray J (with whom Northrop J agreed at 245).

<sup>16</sup> *Ramsey* at [2]-[4]

<sup>17</sup> *Mornington Inn* at [88], per Stone and Buchanan JJ, *Merringtons* at [23], [55], [93] and [102]; *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* [2012] FCA 479 at [24].

*loading. The FWO submits that they should be treated as one contravention in respect of penalty.”*

36. There were no submissions by the second respondent on this issue. The conduct in these proceedings involved admitted breaches of the FW Act and the applicable industrial instruments which resulted in an underpayment to the employees concerned in excess of \$12,000. The applicant’s submissions are that the maximum penalty that could be imposed for those admitted contraventions by the second respondent is in excess of \$70,000.

### **Circumstances in which the conduct took place**

37. The applicant submitted:

*“39. The contraventions in these proceedings concern underpayment of a range of minimum entitlements under the FW Act and applicable modern awards including minimum wages, casual loading, personal leave entitlements, annual leave and annual leave loading on termination of employment. Mr Chan failed to ensure that Iwood paid Ms Teh her minimum rate of pay for a period of approximately 14 months. Mr Chan failed to ensure that Iwood paid Mr Mahdy at all for a total of 94.95 hours worked over a period of approximately two months.*

*40. Mr Chan was the sole director of Iwood from 25 June 2007.<sup>18</sup> He was the person responsible for directing and authorising the payment of wages to the Employees.<sup>19</sup> Mr Chan’s failure to ensure that Iwood paid Ms Teh her full entitlements occurred over a significant period.*

*41. In engaging in this conduct, Mr Chan undermined one of the fundamental purposes of the legislation, which include ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions.<sup>20</sup>”*

38. I note the second respondent made no submissions in relation to this particular factor. I accept the applicant’s submissions that the conduct that the second respondent admitted to being involved in resulted in one of the fundamental purposes of the FW Act being undermined.

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<sup>18</sup>SOAF, [6]

<sup>19</sup>SOAF at para [105]

<sup>20</sup> s.3 of the FW Act.

This purpose is providing a guaranteed safety net of fair and enforceable minimum terms and conditions.

### **Nature and extent of any loss or damage**

39. The applicant submitted:

“42. *The nature and extent of the loss suffered was significant to the Employees, neither of whom was highly paid, and warrants the imposition of a significant penalty because:*

*(a) it involves contraventions of minimum standards of the most fundamental kind; namely, the payment of wages and entitlements; and*

*(b) the amount of underpayment was significant, \$12,704.83, with Ms Teh underpaid \$9,459.19 and Mr Madhy underpaid \$3,245.64.<sup>21</sup>*

43. *The Employees were denied their accrued annual leave entitlements. Strong public policy grounds underpin the entitlement to annual leave payments set by the legislature.<sup>22</sup>*

44. *Further, as Iwood is now in liquidation, and Mr Chan has not supplied any evidence to FWO that the latest two instalments of the payment plan set out below in paragraphs 0 to 0 below have been paid, the Employees are not likely to recover these entitlements.”*

40. There were no submissions made by the second respondent in relation to this factor. I accept in this case the loss for the two employees concerned is, in their particular circumstances, significant. I also accept, as was implicit in the submissions made on behalf of the applicant that there has been no payment made to those employees (notwithstanding the payment plan agreed to between the parties as referred to in the S.O.A.F) since November 2013. The applicant was fairly circumspect about there being any likelihood that the second respondent is going to make good on that payment plan. The second respondent did not cavil with this submission.

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<sup>21</sup>SOAF at para [100]

<sup>22</sup>*Fair Work Ombudsman v Manning* [2013] FCCA 1443 at para [22]

## **Any similar previous conduct**

41. The applicant submitted:

*“45. There is evidence that Mr Chan has engaged in similar conduct in respect of other employees of Iwood. Between 19 December 2011 and 19 April 2013, eight complaints were lodged with the FWO by employees / former employees of Iwood alleging underpayment of wages and/or entitlements.<sup>23</sup> These included the complaints of Ms Teh and Mr Mahdy. Two of these complaints were not pursued as the complainants could not be located subsequent to lodging complaints. In respect of the other complainants, the FWO gave Iwood and Mr Chan the opportunity to address the non-compliance voluntarily and did not pursue civil penalty action.<sup>24</sup>*

*46. This conduct occurred despite the fact that Iwood had previously been provided with information from the FWO about the FW Act and the modern awards applying to Iwood including the Storage Modern Award.<sup>25</sup> As discussed further below, the fact that the contraventions occurred despite this knowledge of Iwood’s obligations reinforces that in respect of some contraventions at least, the Respondents deliberately preferred the interests of the business over those of the Employees.”*

42. I note the second respondent made no submissions in relation to this factor. I accept the thrust of the applicant’s submissions that the information on the evidence before the Court would suggest that this is not the first time the respondents have come to the attention of the applicant. This is a factor to weigh in determining an appropriate penalty.

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

43. The applicant submitted:

*“Course of Conduct*

*31. Section 557 of the FW Act provides that multiple breaches of particular provisions may, depending upon the particular*

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<sup>23</sup> Burton Affidavit at [15] and Annexure “KB-3”; Brear Affidavit at [26]

<sup>24</sup> See reference to the complaints of Ms Teh, Mr Mahdy, Anthony de Francesco and Sophie Bubis in the Brear Affidavit, and the complaints of Ms Teh, Mr Mahdy and Anthony De Francesco in the Ma Affidavit.

<sup>25</sup> Burton Affidavit, [11 ]-[14]

*circumstances, attract the operation of the course of conduct provisions. The onus of establishing the benefit of section 557 of the FW Act is on the Respondent.<sup>26</sup> Particularly relevant is whether the breaches arose out of separate acts or decisions of the employer, or out of a single act or decision. The latter case will constitute a course of conduct but the former will not.<sup>27</sup>*

32. *Pursuant to subsection 557(2)(a) of the FW Act, the FWO accepts that the course of conduct provisions in subsection 557(1) of the FW Act apply in relation to repeated breaches of the National Employment Standards in respect of multiple employees. Accordingly, the failure of Mr Chan to pay the Employees their accrued annual leave entitlements on termination of their employment, as per contravention 8 in paragraph 12 should be treated as one contravention and not two.<sup>28</sup>*

#### *Common Element*

33. *It is open to the Court to group contraventions where they overlap with each other or involve the potential punishment of Mr Chan for the same or substantially similar conduct.<sup>29</sup>*
34. *The FWO submits that Iwood's breach of the Clerks Modern Award in failing to pay Ms Teh annual leave loading on annual leave taken, and Iwood's breach of the Clerks Modern Award in failing to pay Ms Teh annual leave loading on annual leave on termination of employment have a common element. In each case, Iwood failed to pay Ms Teh her 25% annual leave loading. The FWO submits that they should be treated as one contravention in respect of penalty.*
35. *Other than as already identified at paragraphs 0 to 0 above, the FWO submits that, because the contraventions arose out of separate acts or decisions and there are no overlapping contraventions,<sup>30</sup> each should be treated as a separate contravention. Therefore, by application of the course of conduct and common element principles, the admitted contraventions set out at paragraph 12 above, should be grouped into 11 contraventions."*

<sup>26</sup> *Workplace Ombudsman v Securit-E Holdings Pty Ltd (In Liquidation)* [2009] FMCA 700 at [5].

<sup>27</sup> *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 266-267 per Gray J (with whom Northrop J agreed at 245).

<sup>28</sup> *Ramsey* at [2]-[4].

<sup>29</sup> *Mornington Inn* at [88], per Stone and Buchanan JJ, *Merringtons* at [23], [55], [93] and [102]; *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* [2012] FCA 479 at [24].

<sup>30</sup> *Gibbs v Mayor, Councillors and Citizens of the City of Altona* [1992] FCA 374 at [24]; *Blandy v Coverdale NT Pty Ltd* ACN 102 611 423 [2008] FCA 1533 at [56].

44. I accept the agreement of the parties in relation to the course of conduct provisions of the FW Act. Further, I accept the applicant's submissions that the provisions set out above are accurately reflected in the table referred to earlier in these reasons.

### **The size of the respondent's business**

45. The applicant submitted:

“48. *Prior to 20 September 2013, Iwood was not a large business. On 20 September 2013, Iwood was placed in liquidation. While it may be the case that the business was and is in financial difficulty, Mr Chan has not filed any evidence relating to his personal financial circumstances.*

49. *Even if Mr Chan is considered to be in financial difficulty, of which there is no evidence, the FWO submits that the Courts have previously found that sanctions should be imposed on a meaningful level<sup>31</sup> regardless of an employer's size or financial position. By way of example, the FWO refers to Workplace Ombudsman v Saya Cleaning Pty Ltd [2009] FMCA 38 at [27]-[28] and the authorities referred to in those paragraphs, where Simpson FM (as his Honour then was) said:*

“27. *In Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412 at paras 27 to 29 it was said:*

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

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

*“In this connection it is important that the respondent – and other employers bound by the award or by other awards under the Act – understand the importance of complying with an award and it follows that any*

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<sup>31</sup> *Kelly* at [28]

*decision taken by them which is regarded as affecting their obligation to comply with particular provisions of the award or the award generally should only be taken after careful consideration. They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed.”*

50. *The FWO also relies on the decision in FWO v Bosen Pty Ltd [2011] VMC 81 where the Court stated at [51]:*

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

51. *Further, the FWO submits that any sanction should be imposed at a meaningful level<sup>32</sup> and insolvency, personal or corporate, is not a refuge from such sanction.<sup>33</sup>”*

46. In submissions in relation to this matter (and I note there is no evidence filed on behalf of the second respondent), the Court was asked to (somewhat obliquely) divine that because the second respondent was a sole director somehow the provisions of the FW Act presented a bewildering array of obligations. However there was no articulated reason as to why the second respondent found himself unable (or probably more likely, on the material before the Court unwilling) to comply with these obligations.

47. I do not accept the exculpatory submissions that were sought to be made on behalf of the second respondent in that regard. The obligations in workplace laws apply to all businesses, regardless of their size.

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<sup>32</sup> *Kelly* at [28]

<sup>33</sup> *Cotis v Mcpherson* [2007] FMCA 2060 at [12]



## The deliberateness of the breach

48. The applicant submitted:

“52. *The FWO submits that the contraventions set out at paragraph 12 occurred in circumstances where Mr Chan was or should have been aware of his obligations under the FW Act and applicable awards. Mr Chan has admitted that at all material times, he knew that Iwood was not paying or providing the Employees with their award entitlements as employees.*<sup>34</sup>

53. *Mr Chan has admitted that he was involved in the contraventions of Iwood as set out in paragraph 12 above, within the meaning of section 550(2) of the FW Act. To the extent that Mr Chan’s involvement in Iwood’s contraventions relates to involvement in Iwood’s contraventions of the National Employment Standards of the FW Act, namely contraventions 5, 7, 8 and 11, the FWO submits that the contraventions, if not deliberate, were at the very least reckless.*

54. *The issue of whether a contravention is reckless was considered by Driver FM (as his Honour then was) in Cotis v Mcpherson [2007] FMCA 2060 at paragraph [17]:*

*“In issue in this matter is whether the identified breaches were deliberate. I do not think that they were deliberate in the sense of Mr Macpherson setting out with an intention to breach the Workplace Relations Act. However, the facts compel the conclusion that Mr Macpherson was at least reckless in relation to the responsibilities of his company and himself as an employer. Mr Macpherson was made aware of some of the breaches by employees whilst the business was still in operation. He also acknowledged the breaches to the inspector following the closure of the business. Mr Macpherson has no contest with the evidence provided by Ms Cotis.”*

55. *The conduct of Mr Chan with respect to the payment of wages and entitlements of the Employees was at the very least reckless because:*

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<sup>34</sup> SOAF, [106]

- (a) *Mr Chan had been the sole director of Iwood since 25 June 2007. He had overall responsibility for determining employees' working conditions and authorising wage payments.<sup>35</sup> The FWO submits that Mr Chan would have some awareness of minimum pay rates and concepts such as overtime loadings and penalty rates and annual leave entitlements;*
- (b) *a representative of Iwood had contacted the Fair Work Infoline operated by the FWO and its predecessor, the Workplace Infoline, on a number of occasions prior to and during the periods of employment of the Employees. These interactions between the FWO and Iwood are set out in a document entitled "Interaction Summary – Fair Work Infoline and Iwood Australia" that is Annexure KB-3 to the Burton Affidavit.<sup>36</sup> That document records that the Infolines provided Iwood with information about, inter alia, award rates of pay, statutory entitlement to annual leave and the obligation to pay out annual leave on termination of employment. While there is no evidence that the caller was Mr Chan nor that the information provided was relayed directly to Mr Chan, Mr Chan ought to have been aware of these matters by reason of his overall responsibility for determining employees' working conditions and authorising wage payments;*
- (c) *Mr Chan was issued with a letter from the FWO on 20 April 2012,<sup>37</sup> notifying him of the nature of the complaints made by Ms Teh and Mr Mahdy. Therefore, from 20 April 2012, Mr Chan was aware that Iwood was not paying the Employees their full employment entitlements and of the exact nature of those entitlements;*
- (d) *Mr Chan was (and continues to be) a director of three other entities, Global Distribution Enterprises Pty Limited, Goldenhome Kitchen & Living Pty Limited and Triwood Pacific Pty Limited,<sup>38</sup> and should therefore have been aware of his obligations under workplace relations instruments and laws. Mr Chan is an experienced business operator and employer.*

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<sup>35</sup> SOAF at para [105]

<sup>36</sup> Burton Affidavit, [11] – [14] and Annexure "KB-3"

<sup>37</sup> Ma Affidavit, Annexure "KM-2"

<sup>38</sup> Burton Affidavit, [16]-[18] & Annexures "KB-5" – "KB-8"

56. *For the reasons set out above in paragraphs 0 to 0 above, the FWO submits that, based on the evidence, Mr Chan was at the very least recklessly indifferent to his statutory obligations and based on his admissions, may quite properly be concluded to have had a higher level of culpability in respect of Iwood’s obligations to pay and provide the Employees with their modern award entitlements.*

57. *The FWO submits that the conduct of Mr Chan with respect to Contravention 2 in paragraph 12 indicates a higher level of culpability than recklessness, namely, deliberateness. The letter of 20 April 2012 specifically notified Mr Chan that Mr Mahdy had complained that he was not being paid for time worked, yet from 23 April 2012 to 30 June 2012, Iwood failed to pay Mr Mahdy at all for 94.95 hours worked.”*

49. I accept the applicant’s submission that in light of the history of this matter, the second respondent was at best reckless as to the risk of breaching the FW Act.

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

50. The applicant submitted:

“58. *A corporate entity can only act through its authorised officers and agents. Mr Chan was at all relevant times the director of Iwood and its “directing mind and will”.<sup>39</sup> Mr Chan has admitted that he was involved in each of the contraventions by Iwood.<sup>40</sup>*

59. *In admitting his involvement in Iwood’s contraventions, Mr Chan has agreed that he was:*

(a) *principally responsible for the overall direction, management and supervision of Iwood’s operations in relation to industrial instruments and arrangements, setting and adjusting pay rates, and determining wages and conditions of employment;<sup>41</sup>*

(b) *the person who authorised decisions regarding Iwood’s operations including decisions regarding the*

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<sup>39</sup> SOAF, [7], [105]

<sup>40</sup> SOAF, [107]

<sup>41</sup> SOAF, [7]

*employment of staff and the payment of employee wages and entitlements;*<sup>42</sup> and

(c) *responsible in a practical sense for ensuring that Iwood complied with its legal obligations to its employees under the FW Act.*<sup>43</sup>

51. The second respondent in this case, as I already noted, was the directing mind of the business in this case and he has admitted that he was involved in the decisions which led to the admitted contraventions.

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

52. The applicant submitted:

*“Cooperation with authorities*

60. *Mr Chan has generally demonstrated a co-operative attitude throughout the FWO's investigation. In particular:*

(a) *Mr Chan produced records and documents to the FWO during its investigation when requested;*

(b) *Mr Chan participated in a record of interview during the investigation;*<sup>44</sup> and

(c) *the matter has ultimately proceeded by way of the SOAF, entered into by Mr Chan after these proceedings were commenced, with Mr Chan admitting to all of the contraventions alleged by the FWO. This has saved a considerable cost to the public purse by avoiding the need for a fully contested hearing and providing a more efficient use of Court resources.*

61. *However, the FWO does note that Mr Chan did not enter an appearance at the first directions hearing in this matter on 18 September 2013 and has failed to file any evidence in these proceedings.*

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<sup>42</sup> SOAF, [7]

<sup>43</sup> SOAF, [7]

<sup>44</sup> Brear Affidavit, [14]

62. *The FWO submits that Mr Chan should be afforded a 20% discount on penalty for his early admissions and co-operation with the FWO.*

*Corrective action*

63. *After the end of their employment (on 16 June 2011 for Ms Teh and on 11 July 2012 for Mr Mahdy), the Employees received no payment from Iwood or Mr Chan for over a year.*

64. *It was only on 16 August 2013, two days after the FWO sent a copy of a letter to Mr Chan notifying him that the FWO was to commence proceedings against Iwood and Mr Chan, that Mr Chan contacted the FWO offering to enter into a payment plan to rectify the underpayment to Ms Teh and Mr Mahdy. Mr Chan offered to pay \$500 per month to Ms Teh and \$300 per month to Mr Mahdy, until the underpayment was repaid.<sup>45</sup> Under the proposed payment plan, it was to take 19 months to rectify the underpayments.<sup>46</sup>*

65. *To date, however, only a total of \$1600 has been paid to the Employees as follows:<sup>47</sup>*

*(a) to Ms Teh:*

*(i) \$500 on 2 September 2013;*

*(ii) \$500 on 15 October 2013; and*

*(b) to Mr Mahdy:*

*(i) \$300 on 3 September 2013;*

*(ii) \$300 on 15 October 2013.*

66. *A total of \$11,104.83 remains outstanding to the Employees, with \$8,459.19 outstanding to Ms Teh and \$2,645.64 outstanding to Mr Mahdy.*

67. *On 18 November 2013, Ms Teh sent an email to the FWO stating that she had not yet received any rectification payment in November 2013. On 2 December 2013, Mr Mahdy sent an email to the FWO stating that he had not yet been paid any rectification payment in November 2013*

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<sup>45</sup> SOAF at para [101]

<sup>46</sup> Bargon Affidavit, [3]-[4]

<sup>47</sup> Brear Affidavit, [22]-[23]

*or December 2013.*<sup>48</sup> *To date, no evidence has been provided by Mr Chan that either of Ms Teh or Mr Mahdy has been paid any further amounts towards rectification in November 2013 or December 2013. Given the liquidation of Iwood, it appears unlikely that any further corrective action will take place.*

#### *Contrition*

68. *The FWO is not aware of any statement of regret or remorse by Mr Chan to the Employees.”*
53. It was submitted the second respondent regrets this situation. It is true that the second respondent has cooperated with the applicant. The second respondent has cooperated by filing a statement of agreed facts, ensuring the matter can proceed to penalty hearing.
54. However the cooperation could be described as being at the eleventh hour or death bed conversion which the second respondent has apparently subsequently recanted or has resiled from if the failure to rectify the underpayments is any indication.

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

55. The applicant submitted:
- “69. *One of the principal objects of the FW Act is the maintenance of an effective safety net, and effective enforcement mechanisms. The substantial penalties set by the legislature for breaches of such minimum entitlements reinforce the importance placed on compliance with minimum standards.*
70. *The penalties set in this case should, similarly, reflect the importance of the obligations that have been breached. There are few more fundamental breaches than failing to pay employees for entire pay periods or failing to pay the minimum rate of pay or entitlements set by applicable modern awards and the National Employment Standards. The integrity of the modern award and FW Act minimum wage provisions is undermined if those minimum wages are not consistently paid on time. It is vital to ensure compliance with modern awards to create an even playing field and*

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<sup>48</sup> Brear Affidavit, [24]-[25] & Annexures “RB16” and “RB17”

*ensure all employees are appropriately remunerated for the work they perform.*

71. *The Court should have regard to Fair Work Ombudsman v A Dalley Holdings Pty Ltd [2013] FCA 509 where the Federal Court stated at [19]:*

*“In imposing a penalty, it is imperative for the Court to impose a penalty that reinforces the fundamental importance of compliance with the safety net of entitlements specified by the National Employment Standards and the general protection provisions of the FW Act.”*

72. *The fundamental nature of the contraventions in the present proceedings demonstrates Mr Chan’s disregard for his statutory obligations and the need for penalties to be imposed on a meaningful level.”*

56. The importance in these proceedings of ensuring that the need to have all businesses, regardless of their size, regardless of their financial circumstances, understand that the law requires them to comply with the minimum standards set out in the FW Act is a factor which will be weighed in the balance in arriving at appropriate penalties.

## **Deterrence**

57. The applicant submitted:

“73. *It is well-established that “the need for specific and general deterrence” is a factor that is relevant to the imposition of a penalty under the FW Act.*<sup>49</sup>

74. *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 likeminded persons or organisations. If*

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<sup>49</sup> See for example, Mowbray FM in *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 (*Pangaea*) at [26]-[59].

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.”

75. *The contraventions in the current proceedings concern the removal of key employment entitlements including annual leave and leave loading on termination of employment and minimum rates of pay for a period of approximately 14 months for Ms Teh and over a period of approximately two months for Mr Mahdy. The penalties in this case should be imposed at a meaningful level so as to deter other employers from committing similar contraventions, especially in circumstances where a company is insolvent and there will be a decreased chance of employee entitlements being recovered. However, the penalty imposed must still be proportionate having regard to the impact of any penalty on Mr Chan.*

#### *Specific deterrence*

76. *Specific deterrence is relevant to this application. Although Iwood is in liquidation and no longer employs any employees, Mr Chan is a director of three other companies that remain registered (although there is no evidence regarding their present business activities). Mr Chan is an experienced business operator and employer.<sup>50</sup> In this context, the FWO submits that the Court should proceed on the basis that there is at least a real possibility that Mr Chan currently participates and will in the future participate in the management of businesses and the employment of employees.*
77. *The FWO relies on the following principles set down by Lander J in Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543 to support the submission that the penalty imposed on Mr Chan should be meaningful to ensure that the specific deterrence effect is high:*

“[93] There are three purposes at least for imposing a penalty: punishment; deterrence; and rehabilitation.

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<sup>50</sup> Burton Affidavit, [10] & [16] – [18]



The punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment: *R v Hunter* (1984) 36 SARC 101 at 103. Therefore the circumstances of the offence or contravention are especially important. The penalty must recognise the need for deterrence, both personal and general. In regard to personal deterrence, an assessment must be made of the risk of re-offending.”

78. *The FWO accepts that Mr Chan cooperated during the investigation and admitted the contraventions early in these proceedings. However, Mr Chan did not take steps to ensure that Iwood was complying with its legal obligations to pay its employees during the employment of the Employees and in particular, even after Mr Chan received a letter from the FWO on 20 April 2012 informing him of the allegations against Iwood.<sup>51</sup> Mr Chan should therefore be left in no doubt that failing to comply with minimum obligations will not be tolerated by the Court.”*

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

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

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

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

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<sup>51</sup> Ma affidavit, [8] “KM-2”

## Consideration of appropriate penalties

60. In this matter 11 breaches have been identified and, in respect of each breach, the maximum penalty that could be awarded is \$6,600, leading to a total potential liability of \$72,600. The applicant has submitted that given the number of breaches and the circumstances of them, and that only partial corrective action has been taken, substantial penalties should be awarded.
61. I have had the benefit of Counsel for the applicant drawing to the Court's attention recent authority concerning criminal sentencing procedures.<sup>52</sup> As a model litigant, Counsel for the applicant has properly drawn to the attention of the Court all relevant authorities before the Court and has sought to explain written submissions filed earlier in light of recent authority.
62. I accept that all contraventions are serious and the first respondent is insolvent. Whilst the Court has been told (and there is no evidence of this) the second respondent is suffering financially, there is no reason to conclude that he will not employ people in the future. Given the matters set out above and that his participation in the filing of a statement of agreed facts may be no more than a recognition that the evidence against him was overwhelming means there is a need for specific deterrence as well as a measure of general deterrence.
63. In this case I am not persuaded that the breaches were deliberate but I am persuaded they were the product of recklessness. Therefore, in my view, bearing in mind the maximum penalties of \$72,000 the appropriate penalties are:

Provision contravened		Description of contravention	
1	Section 45 of the FW Act	Failure to pay the correct minimum hourly rate under clause 16 of the Clerks Modern Award	\$4,620

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<sup>52</sup> see *Barbaro v The Queen* [2014] HCA 2

2	Section 45 of the FW Act	Failure to pay the correct minimum hourly rate under clause 15.1 of the Storage Modern Award	\$4,620
3	Section 45 of the FW Act	Failure to pay the correct casual loading under clause 12.2 of the Clerks Modern Award	\$3,300
4	Section 45 of the FW Act	Failure to pay overtime under subclause 27.1(a) of the Clerks Modern Award	\$3,300
5	Subsection 44(1) and section 116 of the FW Act	Failure to pay ordinary pay on a public holiday	\$2,640
6	Section 45 of the FW Act	Failure to pay Sunday penalties under subclause 27.2(b) of the Clerks Modern Award	\$2,640
7	Subsection 44(1) and section 90(1) of the FW Act	Underpayment of annual leave taken	\$1,980
8	Subsection 44(1) and section 90(2) of the FW Act	Underpayment of annual leave on termination of employment	\$4,620
9	Section 45 of the FW Act and subsection 90(2) of the FW Act	Failure to pay annual leave loading under subclause 29.3(b)(i) of the Clerks Modern Award	\$2,640
10	Section 45 of the FW Act	Failure to pay annual leave loading under subclause 26.4(a) of the Storage Modern Award	\$2,640
11	Subsection 44(1) and section 99 of the FW Act	Failure to pay personal/carers leave	\$2,640

64. However taking into account the co-operation of the second respondent and the resolution of the proceedings at a penalty hearing there should be a discount of 20%. This results in a penalty against the second respondent as follows:

<b>Provision contravened</b>		<b>Description of contravention</b>	
1	Section 45 of the FW Act	Failure to pay the correct minimum hourly rate under clause 16 of the Clerks Modern Award	\$3,696
2	Section 45 of the FW Act	Failure to pay the correct minimum hourly rate under clause 15.1 of the Storage Modern Award	\$3,696
3	Section 45 of the FW Act	Failure to pay the correct casual loading under clause 12.2 of the Clerks Modern Award	\$2,640
4	Section 45 of the FW Act	Failure to pay overtime under subclause 27.1(a) of the Clerks Modern Award	\$2,640
5	Subsection 44(1) and section 116 of the FW Act	Failure to pay ordinary pay on a public holiday	\$2,112
6	Section 45 of the FW Act	Failure to pay Sunday penalties under subclause 27.2(b) of the Clerks Modern Award	\$2,112
7	Subsection 44(1) and section 90(1) of the FW Act	Underpayment of annual leave taken	\$1,584
8	Subsection 44(1) and section 90(2) of the FW Act	Underpayment of annual leave on termination of employment	\$3,696
9	Section 45 of the FW Act and subsection 90(2) of the FW Act	Failure to pay annual leave loading under subclause 29.3(b)(i) of the Clerks Modern Award	\$2,112
10	Section 45 of the FW Act	Failure to pay annual leave loading under subclause 26.4(a) of the Storage Modern Award	\$2,112
11	Subsection 44(1) and section 99 of the FW Act	Failure to pay personal/carers leave	\$2,112

65. This result in a total penalty of \$28,512.00 or around 39% of the maximum for the admitted contraventions.
66. Having fixed an appropriate penalty for each contravention or group of contraventions, consistent with the authorities as set out above, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches, and is not oppressive or crushing.<sup>53</sup>
67. The application of the totality principle does not mean the penalties arrived at before its application must be reduced. Any penalties imposed should reflect the circumstances and be just and appropriate. There is no evidence that the aggregate penalty would be oppressive or crushing in this case. The application at this stage of what is called the totality principle does not mean that the penalties arrived at before its application must be reduced.
68. Having regard to s.547 of the FW Act, good cause has not been shown as to why interest ought not be awarded on the monies outstanding<sup>54</sup> to the employees and interest will be so ordered in the amount of \$388.67. The applicant submitted that it would be appropriate in this case to order the penalty be paid to the employees first to meet the outstanding monies they were owed and the balance into Consolidated Revenue. That course is permitted pursuant to s.546(3)(c) of the FW Act. Therefore, as the Court:
- is directed by the relevant authorities to consider what is appropriate in all the circumstances of this case;<sup>55</sup> and
  - in its discretion in relation to penalty is not fettered by a checklist of mandatory criteria;<sup>56</sup> and
  - notes the parties have file S.O.A.F and there is no reason not to make the orders for payment of the penalty; and

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<sup>53</sup>*Kelly v Fitzpatrick* [2007] FCA 1080, [30]; *Merringtons* at [23] per Gray J, [71] per Graham J, [102] per Buchanan J.

<sup>54</sup> FW Act s.547(2) & (3)

<sup>55</sup> see *Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2)* (1999) 94 IR 231

<sup>56</sup> see *Australian Ophthalmic Supplies Pty Limited v McAlary-Smith* [2008] FCAFC 8

- is satisfied the individual and aggregate penalty for the whole of the contravening conduct is appropriate.

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

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**I certify that the preceding sixty-eight (68) paragraphs are a true copy of the reasons for judgment of Judge O'Sullivan**

Date: 18 February 2014

**ANNEXURE A**  
**STATEMENT OF AGREED FACTS**

This Statement of Agreed Facts is an agreed document of the Applicant and the Second Respondent and is made for the purposes of section 191 of the *Evidence Act 1995* (Cth). The admissions are only made for the purposes of these proceedings. 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 respondents' contraventions (as set out in paragraphs 43 to 99 below).

**THE FIRST RESPONDENT**

2. On 3 July 2003 Iwood Australia Pty Ltd (**Company**) incorporated as a proprietary company incorporated under the *Corporations Act 2001* (Cth).
3. On 20 September 2013, the Company was placed under external administration.
4. The Company was at all material times:
  - (a) predominantly in the business of furniture importation and furniture wholesale (**Business**);
  - (b) operating out of the State of Victoria, with the final registered office being Unit 3, 415 Main Road Montmorency, Victoria; and
5. The Company was the entity that employed the following two persons:
  - (a) Ms Pek Teh (**Ms Teh**) (employed during the period set out in paragraphs 8 to 10 below); and
  - (b) Mr Ahmad Mahdy (**Mr Mahdy**) (employed during the period set out in paragraph 12 below).

(collectively, **Employees**)

## **THE SECOND RESPONDENT**

6. The second respondent, Mr Kit Sui Chan (**Mr Chan**) was the director of the Company for the period from 3 July 2003 to 24 January 2007 and the sole director from 25 June 2007 ongoing.
7. The second respondent was at all material times from January 2006 to 11 July 2012:
  - (a) principally responsible for the overall direction, management and supervision of the Company's operations in relation to industrial instruments and arrangements, setting and adjusting pay rates, and determining wages and conditions of employment;
  - (b) a person who authorised decisions regarding the Company's operations including decisions regarding the employment of staff and employee entitlements; and
  - (c) responsible in a practical sense for ensuring that the Company complied with its legal obligations to its employees under the *Fair Work Act 2009* (*Cth*) (**FW Act**) (as set out in paragraphs 105 to 106 below).

## **THE EMPLOYEES**

### **Employment of Ms Teh**

8. During the period from approximately 8 April 2010 to 16 June 2011, Ms Teh was employed by the Company as an accounts and administrative assistant.
9. During the period from approximately 8 April 2010 to 1 August 2010 (**the first period of engagement**) Ms Teh was employed on a casual basis.
10. During the period from approximately 2 August 2010 to 16 June 2011 (**the second period of engagement**), Ms Teh was employed on a full time basis.



11. Throughout her employment with the Company, Ms Teh performed the following duties on a day to day basis:
- (a) answering telephone calls;
  - (b) filing;
  - (c) processing sales orders;
  - (d) debt collection;
  - (e) organising delivery of orders;
  - (f) banking;
  - (g) general administration; and
  - (h) liaising with clients.

**Employment of Mr Mahdy**

12. During the period from approximately January 2006 until 11 July 2012 Mr Mahdy was employed by the Company as a warehouse employee.
13. Throughout his employment with the Company, Mr Mahdy performed the following duties on a day to day basis:
- (a) receiving goods from overseas and checking off invoices;
  - (b) dispatching goods;
  - (c) booking a courier to collect goods;
  - (d) delivering small orders;
  - (e) driving a forklift;
  - (f) stocktaking; and
  - (g) assembling and oiling furniture.

14. From approximately June 2006 to December 2009, Mr Mahdy supervised up to 3 people from time to time, as required by the Company.
15. Mr Mahdy held a Worksafe Licence to Perform High Risk Work, licence number 000130204601.
16. During the period from approximately January 2006 to 5 February 2012 Mr Mahdy was employed on a full time basis.
17. During the period from approximately 6 February 2012 until 11 July 2012 Mr Mahdy was employed on a part time basis.

### **RELEVANT LEGISLATION**

18. At all material times on and from 1 July 2009, the Company fell within the scope of the FW Act and was required to comply with the FW Act in respect of the employment of the Employees.

### **RELEVANT INDUSTRIAL INSTRUMENTS**

#### **Clerks Modern Award**

19. At all material times on and from 8 April 2010 the Clerks – Private Sector Award 2010 MA000002 (**Clerks Modern Award**) applied to the employment of Ms Teh.
20. Ms Teh obtained 12 months experience as a clerical assistant prior to her employment with the Company.
21. Ms Teh performed duties falling within the scope of the classification structure provided in Schedule B.2 and clause 15 of the Clerks Modern Award in the classification of Level 2 as follows:
  - (a) from 8 April 2010 to 7 April 2011: Level 2, Year 1; and
  - (b) from 8 April 2011 to 16 June 2011: Level 2, Year 2.
22. At all material times on and from 8 April 2010, the Company was required to pay Ms Teh in accordance with the transitional arrangements under Schedule A of the Clerks Modern Award, being transitional pay rates calculated with

reference to the relevant transitional minimum wages instrument, namely the Australian Pay and Classification Scale (**Pay Scale**) derived from the Clerical and Administrative Employees (Victoria) Award 1999 (**Clerical Pay Scale**).

23. By reason of the matters pleaded in paragraphs 8 to 11 and 19 above, the work performed by Ms Teh fell within the classification of “*Grade 2 clerical officer*” pursuant to subclause 16.2.2 of the Clerical Pay Scale as follows:
- (a) from 8 April 2010 to 7 October 2010; First 6 month experience at this Grade;
  - (b) from 8 October 2010 to 7 April 2011: More than 6 months and less than 12 months’ experience at this Grade; and
  - (c) from 8 April 2011 to 16 June 2011: After 12 months’ experience at this Grade.

#### **Storage Modern Award**

24. At all material times on and from 1 January 2010 the Storage Services and Wholesale Award 2010 MA000084 (**Storage Modern Award**) applied to the employment of Mr Mahdy.
25. By reason of the matters pleaded at paragraphs 12 to 15 Mr Mahdy performed duties that fell within the classification structure of “*Storeworker Grade 2*” pursuant to subclause B.2.2 of Schedule B and clause 14 of the Storage Modern Award.
26. At all material times on and from 1 January 2010, the Company was required to pay Mr Mahdy in accordance with the transitional arrangements under Schedule A of the Storage Modern Award, being transitional pay rates calculated with reference to the relevant transitional minimum wage instrument, namely the Pay Scale derived from the Storage Services-General Award 1999 (**Storage Pay Scale**).
27. By reason of the matters pleaded at paragraphs 11, 12 and 13, the work performed by Mr Mahdy fell within the classification of “*Warehousing Employee Level 2*” pursuant to subclause 18.2.2 of the Storage Pay Scale.

## **INVESTIGATION INTO THE RESPONDENT**

28. On 15 February 2012 the FWO received a complaint from Ms Teh in regards to her former employment with the Company. On 22 March 2012, the FWO received a complaint from Mr Mahdy in regards to his employment with the Company.
29. Following receipt of these complaints, the FWO contacted the Company and informed the Company of the complaints and the investigation. During the period from 5 June 2012 to 20 December 2012, the FWO issued the Company with four Notices to Produce (**NTP**) in relation to complaint received from Mr Mahdy. The Company answered the NTP's and provided the FWO with employment documentation including timesheets, payslips and leave records.
30. Mr Chan participated in a Record of Interview (**ROI**) with the FWO on 1 March 2013. Mr Chan provided further documents relating to the employment of Ms Teh and Mr Mahdy in his ROI.
31. Ms Teh participated in a Record of Conversation (**ROC**) with FWO on 13 May 2013 and Mr Mahdy participated in a Record of Conversation with the FWO on 16 May 2013.
32. The FWO reviewed the employment documentation provided by the Company and prepared calculations showing the amounts the Employees were entitled to be paid by the Company for work performed, the amounts the Employees were paid by the Company and the amount of the underpayment for each employee. These calculations are set out in Schedule 1 to this Statement of Agreed Facts (**SOAF**).
33. The FWO's calculations and investigations revealed that the Company failed to pay the Employees their minimum entitlements for the work they performed for the Company and in doing so the Company contravened the provisions set out in paragraphs 34 and 35 below.

## Ms Teh

34. The FWO's calculations and investigations revealed that the Company failed to pay Ms Teh her minimum entitlements under the Clerks Modern Award and the FW Act, loadings and penalty rates for the work she performed for the Company and in doing so the Company contravened the following provisions:
- (a) clause 16 of the Clerks Modern Award – by underpaying Ms Teh \$3,482.65 for her minimum hourly rate in relation to the first period of engagement;
  - (b) clause 16 Clerks Modern Award – by underpaying Ms Teh \$2,463.62 for her minimum hourly rate in relation to the second period of engagement;
  - (c) subclause 12.2 of the Clerks Modern Award – by underpaying Ms Teh \$870.69 for her casual loading in relation to the first period of engagement;
  - (d) subclause 27.1(a) of the Clerks Modern Award – by underpaying Ms Teh \$168.81 for her applicable overtime rate in relation to the first period of engagement;
  - (e) subclause 27.1(a) of the Clerks Modern Award – by underpaying Ms Teh \$1,039.38 for her applicable overtime rate in relation to the second period of engagement;
  - (f) section 116 of the FW Act – by underpaying Ms Teh \$180.78 for her ordinary hours on a public holiday in relation to the second period of engagement;
  - (g) subclause 27.2(b) of the Clerks Modern Award – by underpaying Ms Teh \$152.15 for her Sunday penalty rate in relation to the second period of engagement;
  - (h) subsection 44(1) of the FW Act – by underpaying Ms Teh \$110.40 for her annual leave taken in relation to the second period of engagement;

- (i) subclause 29.3(b)(i) of the Clerks Modern Award – by underpaying Ms Teh \$207.49 for her annual leave loading in relation to the second period of engagement;
- (j) section 99 of the FW Act – by underpaying Ms Teh \$42.65 for her personal/carer’s leave taken in relation to the second period of engagement;
- (k) subsection 90(2) of the FW Act – by underpaying Ms Teh \$574.78 for her accrued untaken annual leave on termination of her employment;
- (l) subsection 90(2) of the FW Act and subclause 29.3(b)(i) of the Clerks Modern Award – by underpaying Ms Teh \$165.79 for her annual leave loading on her accrued untaken annual leave on termination of her employment.

**Mr Mahdy**

35. The FWO’s calculations and investigations revealed that the Company failed to pay Mr Mahdy his minimum entitlements under the Storage Modern Award and the FW Act for the work he performed for the Company and in doing so the Company contravened the following provisions:

- (a) clause 15.1 of the Storage Modern Award – by underpaying Mr Mahdy \$1,627.44 for his minimum hourly rate;
- (b) subsection 90(2) of the FW Act – by underpaying Mr Mahdy \$1,377.19 for his accrued untaken annual leave on termination of her employment;
- (c) subsection 90(2) of the FW Act and subclause 26.4(a) of the Storage Modern Award – by underpaying Mr Mahdy \$241.01 for his annual leave loading on his accrued untaken annual leave on termination of his employment.

**CORRESPONDENCE BETWEEN THE COMPANY AND FWO**

36. On 20 April 2012, FWO sent a letter to the Company, informing the Company of the complaints of Ms Teh and Mr Mahdy.

37. Between 20 April 2012 and 24 April 2013, FWO has exchanged correspondence with the Company including:
- (a) The Determination of Contravention letter written to the Company on 5 June 2012 by the FWO regarding the complaint of Ms Pek Teh;
  - (b) The Final Contravention letter written to the Company on 13 July 2012 regarding the complaint of Ms Pek Teh;
  - (c) The four Notices to Produce Records issued during the period from 5 June 2012 to 20 December 2012;
38. On 24 April 2013, FWO issued a Determination of Contravention letter to the Company.
39. On 14 August 2013, FWO sent a letter to Mr Chan and a letter to the Company notifying that FWO intended to commence proceedings against the Company and against Mr Chan personally for the contraventions.
40. On 16 August 2013, Mr Chan contacted FWO via email and offered to enter into a payment plan to rectify the underpayment to Mr Mahdy and Ms Teh.

### **THESE PROCEEDINGS**

41. On 22 August 2013, these proceedings were commenced.

### **THE PAYMENT STRUCTURE**

42. During the Employment Period, the Company applied the following payment structure:

#### *Ms Teh*

- (a) For work performed on 8 April 2010 and 9 April 2010 the Company paid Ms Teh \$50 per day worked;
- (b) For work performed from 10 April 2010 to 12 June 2010, the Company paid Ms Teh \$60 per day worked;

- (c) For work performed from 13 June 2010 to 1 August 2010, the Company paid Ms Teh \$110 per day worked.
- (d) For work performed from 2 August 2010 to 11 June 2011, the Company paid Ms Teh an hourly rate of \$16.19; and
- (e) For work performed from 14 June 2011 to 16 June 2011, the Company did not pay Ms Teh.

*Mr Mahdy*

- (f) The Company did not pay Mr Mahdy for a total of 94.95 hours of work performed from 23 April 2012 to 30 June 2012.

## **CONTRAVENTIONS**

### **Contravention 1: Underpayment of the minimum hourly rate under the Clerks Modern Award**

43. During the first period of engagement, pursuant to clause 16 of the Clerks Modern Award as modified by item A.2 of Schedule A, the Company was required to pay Ms Teh a minimum phased hourly rate for all ordinary hours worked as follows:

<b>Time Period</b>	<b>Phased Hourly Rate of Pay</b>
8 April 2010 to 30 June 2010	\$16.13
1 July 2010 to 1 August 2010	\$16.94

44. During the second period of engagement, pursuant to clause 16 of the Clerks Modern Award as modified by item A.2 of Schedule A, the Company was required to pay Ms Teh a minimum phased hourly rate for all ordinary hours worked as follows:

<b>Time Period</b>	<b>Phased Hourly Rate of Pay</b>
2 August 2010 to 7 October 2010	\$16.94
8 October 2010 to 7 April 2011	\$17.05
8 April 2011 to 16 June 2011	\$17.23



45. During the first period of engagement, the Company did not pay the full minimum phased hourly rate to which Ms Teh was entitled for ordinary hours of work performed and thereby caused Ms Teh to be underpaid \$3,482.65 as set out in Table 1 of Schedule 1.
46. During the second period of engagement, the Company did not pay the full minimum phased hourly rate to which Ms Teh was entitled for ordinary hours of work performed and thereby caused Ms Teh to be underpaid \$2,463.62 as set out in Table 2 of Schedule 1.
47. The Company underpaid Ms Teh a total of \$5,946.27 for ordinary hours of work performed.
48. The Company contravened clause 16 of the Clerks Modern Award, and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

**Contravention 2: Failure to pay the minimum hourly rate under the Storage Modern Award**

49. During the period from 23 April 2012 to 11 July 2012, pursuant to clause 15.1 of the Storage Modern Award as modified by item A.2 of Schedule A, the Company was required to pay Mr Mahdy a minimum phased hourly rate for all ordinary hours worked as follows:

<b>Time Period</b>	<b>Phased Hourly Rate of Pay</b>
23 April 2012 to 30 June 2012	\$17.14
1 July 2012 to 11 July 2012	\$17.63

50. During the period from 23 April 2012 to 2 July 2012, the Company failed to pay the minimum phased hourly rate to which Mr Mahdy was entitled for 94.95 ordinary hours of work performed and thereby caused Mr Mahdy to be underpaid \$1,627.44 as set out in Table 3 of Schedule 1.
51. The Company contravened clause 15.1 of the Storage Modern Award, and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

**Contravention 3: Underpayment of the casual loading under the Clerks Modern Award**

52. During the first period of engagement, pursuant to clause 12.2 of the Clerks Modern Award, the Company was required to pay Ms Teh a casual loading of 25% on her base hourly rate of pay for all ordinary hours worked as follows:

<b>Time Period</b>	<b>Casual Loading</b>
8 April 2010 to 30 June 2010	\$4.03
1 July 2010 to 1 August 2010	\$4.24

53. During the first period of engagement, the Company did not pay the full casual loading to which Ms Teh was entitled for ordinary hours of work performed and thereby caused Ms Teh to be underpaid \$870.69 as set out in Table 4 of Schedule 1.
54. The Company contravened clause 12.2 of the Clerks Modern Award, and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

**Contravention 4: Underpayment of overtime under the Clerks Modern Award**

55. At all relevant times during Ms Teh's employment, pursuant to subclause 27.1(a) of the Clerks Modern Award, the Company was required to pay Ms Teh for hours worked in excess of 38 hours per week:

- (a) first two hours – time and a half;
- (b) thereafter – double time.

56. For the period of the first engagement, the Company was therefore to pay Ms Teh for hours worked in excess of 38 hours per week:

<b>8 April 2010 to 30 June 2010</b>	<b>Hourly pay rate under Clerks Modern Award</b>
First two hours of overtime at time and a half	\$28.23
<b>1 July 2010 to 1 August 2010</b>	<b>Hourly pay rate under Clerks Modern Award</b>
First two hours of overtime at time and a half	\$29.65

57. For the period of the second engagement, the Company was therefore required to pay Ms Teh for hours worked in excess of 38 hours per week:

<b>2 August 2010 to 7 October 2010</b>	<b>Hourly pay rate under Clerks Modern Award</b>
First two hours of overtime at time and a half	\$25.42
Thereafter at double time	\$33.89
<b>8 October 2010 to 7 April 2011</b>	<b>Hourly pay rate under Clerks Modern Award</b>
First two hours of overtime at time and a half	\$25.57
Thereafter at double time	\$34.10
<b>8 April 2011 to 16 June 2011</b>	<b>Hourly pay rate under Clerks Modern Award</b>
First two hours of overtime at time and a half	\$25.84
Thereafter at double time	\$34.45

58. During the first period of engagement, the Company did not pay the full overtime loading to which Ms Teh was entitled for overtime work performed and thereby caused Ms Teh to be underpaid \$168.81, as set out in Table 5 of Schedule 1.
59. During the second period of engagement, the Company did not pay the full overtime loading to which Ms Teh was entitled for overtime work performed and thereby caused Ms Teh to be underpaid \$1,039.38, as set out in Table 6 of Schedule 1.
60. The Company underpaid Ms Teh a total of \$1,208.19 for overtime work performed.
61. The Company contravened subclause 27.1(a) of the Clerks Modern Award, and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

**Contravention 5: Underpayment of ordinary hours on a public holiday under the FW Act**

62. During the second period of engagement, pursuant to section 116 of the FW Act, the Company was required to pay Ms Teh her base rate of pay for ordinary hours absent on a day that was a public holiday.
63. During the second period of engagement, Ms Teh was absent from work for 4 public holidays for a total of 30.4 ordinary hours as set out in the table below:

<b>Public Holiday (7.6 hours each)</b>	<b>Entitlement under the FW Act</b>	<b>Amount Paid by the Company</b>
2 November 2010 (Melbourne Cup Day)	\$129.56	\$99.64
28 December 2010 (substituted Christmas Day)	\$129.56	\$123.08
29 December 2010 (substituted Boxing Day)	\$129.56	\$123.07
3 January 2011 (substituted New Years Day)	\$129.56	\$122.59
<b>Total</b>	<b>\$649.16</b>	<b>\$468.38</b>

64. During the second period of engagement, the Company did not pay the full amount to which Ms Teh was entitled to receive in relation to her ordinary hours absent on a public holiday and thereby caused Ms Teh to be underpaid by \$180.78, as set out in Table 7 in Schedule 1.
65. The Company contravened section 116 of the FW Act, and by doing so contravened section 44 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

**Contravention 6: Underpayment of Sunday penalties under the Clerks Modern Award**

66. During the second period of engagement, pursuant to subclause 27.2(b) of the Clerks Modern Award, the Company was required to pay Ms Teh a penalty rate of double time for all work performed on a Sunday as set out in the table below:

<b>Date</b>	<b>Hourly pay rate under Clerks Modern Award</b>
<b>8 October 2010 to 7 April 2011</b>	\$34.10

67. The Company paid Ms Teh the following rates of pay for work performed on Sunday 31 October 2013, as set out in the table below:

<b>Date</b>	<b>Hourly Rate Paid by the Company</b>
31 October 2010	\$13.11

68. During the second period of engagement, the Company did not pay the full amount to which Ms Teh was entitled for work performed on a Sunday and thereby caused Ms Teh to be underpaid \$152.15, as set out in Table 8 of Schedule 1.
69. The Company contravened subclause 27.2(b) of the Clerks Modern Award, and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

**Contravention 7: Underpayment of annual leave under section 90(1) of the FW Act**

70. During the second period of engagement, pursuant to section 90(1) of the FW Act, the Company was required to pay Ms Teh her base rate of pay for her ordinary hours of work when she was absent from work due to annual leave.
71. During the second period of engagement, Ms Teh took a total of 69.55 hours of annual leave and was entitled to be paid as set out in the table below:

<b>Week Ending</b>	<b>Hourly Rate of Pay</b>	<b>Entitlement under the FW Act</b>
5 November 2010 (7.6 hours)	\$17.05	\$129.56
12 November 2010 (15.2 hours)	\$17.05	\$259.13
24 December 2010 (7.6 hours)	\$17.05	\$129.56
31 December 2010 (22.8 hours)	\$17.05	\$388.69
18 February 2011 (9.85 hours)	\$17.05	\$167.92
4 March 2011 (3.00 hours)	\$17.05	\$51.14
1 April 2011 (3.50 hours)	\$17.05	\$59.67
<b>Total</b>		<b>\$1,185.67</b>

72. The Company paid Ms Teh a total of \$1,075.27 for time absent from work due to annual leave.
73. The amount paid by the Company to Ms Teh was insufficient to meet her entitlement to be paid for annual leave taken and caused Ms Teh to be underpaid \$110.40, as set out in Table 9 of Schedule 1.
74. The Company contravened section 90(1) of the FW Act, and in doing so contravened section 44 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

## **Contravention 8: Underpayment of annual leave under section 90(2) of the FW Act**

### *Ms Teh*

75. When the employment of Ms Teh ended on 16 June 2011, pursuant to section 90(2) of the FW Act, the Company was required to pay Ms Teh her untaken annual leave at the rate she would have been paid had she taken the annual leave.
76. As of 16 June 2011, Ms Teh had an outstanding annual leave balance of 55.00 hours of annual leave.
77. The Company paid Ms Teh a total of \$372.61 for untaken annual leave on the termination of her employment on 16 June 2011.
78. The amount paid by the Company to Ms Teh was insufficient to meet her entitlement to be paid for annual leave on termination of employment and caused Ms Teh to be underpaid \$574.78, as set out in Table 10 of Schedule 1.

### *Mr Mahdy*

79. When the employment of Mr Mahdy ended on 11 July 2012, pursuant to section 90(2) of the FW Act, the Company was required to pay Mr Mahdy his untaken annual leave at the rate he would have been paid had he taken the annual leave.
80. As of 11 July 2012, Mr Mahdy had an outstanding annual leave balance of 60.83 hours of annual leave.
81. The Company did not pay any untaken annual leave on termination and thereby caused Mr Mahdy to be underpaid \$1,377.19, as set out in Table 11 of Schedule 1.

### *Total Underpayment in relation to annual leave on termination of employment*

82. The Employees were underpaid a total of \$1951.97 by the Company in relation to annual leave on termination of employment.

83. The Company contravened section 90(2) of the FW Act, and in doing so contravened subsection 44(1) of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

**Contravention 9: Failure to pay annual leave loading under the Clerks Modern Award**

*Annual Leave Loading on Annual Leave Taken*

84. During the second period of engagement, pursuant to subclause 29.3(b)(i) of the Clerks Modern Award, the Company was required to pay Ms Teh annual leave loading of 17.5% of her base rate of pay when she was absent from work due to annual leave as set out in the table below:

<b>Week Ending</b>	<b>Annual Leave Loading Entitlement</b>
5 November 2010 (7.6 hours)	\$22.67
12 November 2010 (15.2 hours)	\$45.35
24 December 2010 (7.6 hours)	\$22.67
31 December 2010 (22.8 hours)	\$68.02
18 February 2011 (9.85 hours)	\$29.39
4 March 2011 (3.00 hours)	\$8.95
1 April 2011 (3.50 hours)	\$10.44
<b>Total</b>	<b>\$207.49</b>

85. During the second period of engagement, the Company did not pay Ms Teh any annual leave loading on annual leave taken, and thereby caused Ms Teh to be underpaid \$207.49, as set out in Table 12 of Schedule 1.

*Annual Leave Loading on Untaken Annual Leave on Termination*

86. When the employment of Ms Teh ended on 16 June 2011, pursuant to subclause 29.3(b)(i) of the Clerks Modern Award and section 90(2) of the FW Act, the Company was required to pay Ms Teh annual leave loading of 17.5% of her base rate of pay on her untaken annual leave on termination.



87. As of 16 June 2011, Ms Teh had an outstanding annual leave balance of 55.00 hours of annual leave totalling \$947.39 and Ms Teh was therefore entitled to be paid 17.5% of \$947.39.
88. The Company did not pay any annual leave loading on untaken annual leave on termination to Ms Teh and thereby caused Ms Teh to be underpaid \$165.79, as set out in Table 13 of Schedule 1.

*Total underpayment in relation to annual leave loading on termination of employment under the Clerks Modern Award*

89. Ms Teh was underpaid a total of \$373.28 by the Company in relation to annual leave loading.
90. The Company contravened subclause 29.3(b) of the Clerks Modern Award and section 90(2) of the FW Act, and in doing so contravened section 44 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

**Contravention 10: Failure to pay annual leave loading under the Storage Modern Award**

91. When the employment of Mr Mahdy ended on 11 July 2012, pursuant to subclause 26.4(a) of the Storage Modern Award and section 90(2) of the FW Act, the Company was required to pay annual leave loading of 17.5% of his base rate of pay on his untaken annual leave on termination.
92. As of 11 July 2012, Mr Mahdy had an outstanding annual leave balance of 60.83 hours of annual leave, totalling \$1,377.19 and Mr Mahdy was therefore entitled to be paid 17.5% of \$1,377.19.
93. The Company did not pay any annual leave loading on untaken annual leave on termination and thereby caused Mr Mahdy to be underpaid \$241.01, as set out in Table 14 of Schedule 1.
94. The Company contravened subclause 26.4(a) of the Storage Modern Award and section 90(2) of the FW Act, and in doing so contravened section 44 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

### **Contravention 11: Underpayment of personal/carers leave under the FW Act**

95. During the second period of engagement, pursuant to section 99 of the FW Act, the Company was required to pay Ms Teh her base rate of pay for her ordinary hours of work when she was absent from work due to personal/carers leave.
96. During the second period of engagement, Ms Teh took a total of 37.26 hours of personal/carers leave and was entitled to be paid as set out in the table below:

<b>Week Ending</b>	<b>Hourly Rate of Pay</b>	<b>Entitlement</b>
27 August 2010 (5.47 hours)	\$16.94	\$92.68
15 October 2010 (7.6 hours)	\$17.05	\$129.56
5 November 2010 (6.99 hours)	\$17.05	\$119.17
3 December 2010 (2.00 hours)	\$17.05	\$34.10
28 January 2011 (2.50 hours)	\$17.05	\$42.62
25 March 2011 (7.6 hours)	\$17.05	\$129.56
8 April 2011 (5.10 hours)	\$17.23	\$87.85
<b>Total</b>		<b>\$635.54</b>

97. The Company paid Ms Teh a total of \$592.89 for time absent from work due to personal/carers leave.
98. During the second period of engagement, the Company did not pay the correct amount for time absent from work due to personal/carers leave and thereby caused Ms Teh to be underpaid \$42.65, as set out in Table 15 of Schedule 1.
99. The Company contravened section 99 of the FW Act, and in doing so contravened subsection 44(1) of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

## TOTAL UNDERPAYMENT

100. By reason of the contraventions admitted in paragraphs 43 to 99 above, the Company caused the Employees to be underpaid a total of \$12,704.83 as set out below:

<b>Entitlement of Ms Teh</b>	<b>Underpayment</b>
Underpayment of the base hourly rate of pay	\$5,946.27
Underpayment of casual loading	\$870.69
Underpayment of overtime for hours in excess of 38 hours per week	\$1,208.19
Underpayment of ordinary hours on a public holiday	\$180.78
Underpayment of penalty rates for time worked on a Sunday	\$152.15
Underpayment of annual leave taken	\$110.40
Failure to pay annual leave loading on annual leave taken	\$207.49
Underpayment of personal /carers leave	\$42.65
Underpayment of annual leave on termination of employment	\$574.78
Failure to pay annual leave loading on termination of employment	\$165.79
<b>Total underpayments for Ms Teh</b>	<b>\$9,459.19</b>
<b>Entitlement of Mr Mahdy</b>	<b>Underpayment</b>
Failure to pay ordinary hours	\$1,627.44
Failure to pay annual leave on termination of employment	\$1,377.19
Failure to pay annual leave loading	\$241.01
<b>Total underpayments for Mr Mahdy</b>	<b>\$3,245.64</b>

## **RECTIFICATION**

101. On 16 August 2013, Mr Chan contacted the FWO via email and offered to enter into a payment plan to rectify the underpayment to Mr Mahdy and Ms Teh in relation to their employment with the Company. Mr Chan offered to pay \$500 per month to Ms Teh and \$300 per month to Mr Mahdy, until the underpayment was repaid.
102. To date, a total of \$1600 has been paid to the Employees, in rectification of the underpayment by the Company.
103. The Company has made the following rectification payments to the Employees:
- (a) Ms Teh:
    - (i) \$500 on 2 September 2013;
    - (ii) \$500 on 15 October 2013;
  - (b) Mr Mahdy:
    - (i) \$300 on 3 September 2013;
    - (ii) \$300 on 15 October 2013.
104. A total of \$11,104.83 remains outstanding to the Employees, with \$8,459.19 outstanding to Ms Teh and \$2,645.64 outstanding to Mr Mahdy.

## **ACCESSORIAL LIABILITY**

105. At all material times, Mr Chan was:
- (a) the controlling mind of the Company;
  - (b) the person who made decisions on behalf of the Company, or who was ultimately responsible for the Company's decisions, in relation to:
    - (i) the recruitment or engagement of employees of the Company;
    - (ii) the terms and conditions upon which persons would be engaged;

- (iii) payments made to the persons engaged to perform work; and
- (iv) the work to be performed;

106. At all material times, Mr Chan knew that the Company was not paying or providing the Employees with their award entitlements as employees.

### **ADMISSIONS**

107. Mr Chan admits that he was involved in (within the meaning of subsection 550(1) of the FW Act) the Company's contraventions of the FW Act as follows:

- (a) section 45 of the FW Act by virtue of contravening clause 16 and subclause A.2 of the Clerks Modern Award by failing to pay Ms Teh her minimum hourly rate of pay for all ordinary hours worked;
- (b) section 45 of the FW Act by virtue of contravening 15.1 of the Storage Modern Award by failing to pay Mr Mahdy his minimum hourly rate of pay for all ordinary hours worked;
- (c) section 45 of the FW Act by virtue of contravening subclause 12.2 and schedule A of the Clerks Modern Award by failing to pay Ms Teh a casual loading;
- (d) section 45 of the FW Act by virtue of contravening subclause 27(a)(i) of the Clerks Modern Award by failing to pay Ms Teh overtime rates for time worked in excess of 38 hours per week;
- (e) section 44 of the FW Act by virtue of contravening section 116 of the FW Act by failing to pay Ms Teh at her minimum hourly rate of pay for ordinary hours on a public holiday;
- (f) section 45 of the FW Act by virtue of contravening subclause 27.2(b) of the Clerks Modern Award by failing to pay Ms Teh overtime rates for time worked on a Sunday;

- (g) section 44 of the FW Act by virtue of contravening section 90(1) of the FW Act by failing to pay Ms Teh at her minimum hourly rate of pay for annual leave taken during her employment;
- (h) section 45 of the FW Act by virtue of contravening subclause 29.3(b)(i) of the Clerks Modern Award by failing to pay Ms Teh annual leave loading for annual leave taken during her employment;
- (i) section 44 of the FW Act by virtue of contravening section 99 of the FW Act by failing to pay Ms Teh at her minimum hourly rate of pay for personal/carers leave taken during her employment; and
- (j) section 44 of the FW Act by virtue of contravening section 90 of the FW Act by:
  - (i) failing to pay Ms Teh annual leave on the termination of her employment;
  - (ii) failing to pay Ms Teh annual leave loading on the termination of her employment pursuant to subclause 29.3(b)(i) of the Clerks Modern Award;
  - (iii) failing to pay Mr Madhy annual leave on the termination of his employment;
  - (iv) failing to pay Mr Mahdy annual leave loading on the termination of his employment pursuant to subclause 26.4(a) of the Storage Modern Award.

## Schedule 1: Calculation of underpayments

### Contravention 1: Underpayment of the minimum hourly rate under the Clerks MA

<b>Table 1: Underpayment of Ms Teh's minimum hourly rate of pay during the period of the first engagement*</b>					
<b>Timeframe (calculated to immediately prior to first full pay period at which next pay rate was due to apply)</b>	<b>Ordinary hours worked</b>	<b>Pay rate under the Clerks Modern Award (exclusive of the casual loading)</b>	<b>Award Entitlement</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
8 April 2010 to 2 July 2010	344.94	\$16.13	\$5,563.91	\$2,760.00	\$2,803.91
3 July 2010 to 1 August 2010	143.93	\$16.94	\$2,438.74	\$1,760.00	\$678.74
<b>Total</b>	<b>488.87</b>		<b>\$8,002.65</b>	<b>\$4,520.00</b>	<b>\$3,482.65</b>

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.

<b>Table 2: Underpayment of Ms Teh's minimum hourly rate of pay during the period of the second engagement*</b>					
<b>Timeframe (calculated to immediately prior to first full pay period at which next pay rate was due to apply)</b>	<b>Ordinary hours worked</b>	<b>Pay rate under the Clerks Modern Award</b>	<b>Award Entitlement</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
2 August 2010 to 7 October 2010	326.8	\$16.94	\$5,537.28	\$4,949.56	\$587.72
8 October 2010 to 7 April 2011	851.11	\$17.05	\$14,509.67	\$13,303.34	\$1,206.33
8 April 2011 to 16 June 2011	291.30	\$17.23	\$5,017.72	\$4,348.15	\$669.57
<b>Total</b>	<b>1469.21</b>		<b>\$25,064.67</b>	<b>\$22,601.05</b>	<b>\$2,463.62</b>

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.

**Contravention 2: Failure to pay the minimum hourly rate under the Storage MA**

**Table 3: Underpayment of Mr Mahdy's minimum hourly rate of pay during the period from 23 April 2012 to 2 July 2012 \***

<b>Timeframe (calculated to immediately prior to first full pay period at which next pay rate was due to apply)</b>	<b>Unpaid ordinary hours worked</b>	<b>Pay rate under the Clerks Modern Award</b>	<b>Award Entitlement</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
23 April 2012 to 2 July 2012	94.95	\$17.14	\$1,627.44	0	\$1,627.44

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.

**Contravention 3: Underpayment of the casual loading under the Clerks MA**

**Table 4: Underpayment of Ms Teh's casual loading during the period of the first engagement\***

<b>Timeframe (calculated to immediately prior to first full pay period at which next pay rate was due to apply)</b>	<b>Ordinary hours worked</b>	<b>Casual loading of 25% expressed as a dollar amount per hour</b>	<b>Award Entitlement</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
8 April 2010 to 2 July 2010	344.94	\$4.03	\$1,390.99	\$690.00	\$700.99
3 July 2010 to 1 August 2010	143.93	\$4.24	\$609.70	\$440.00	\$169.70
<b>Total</b>	<b>488.87</b>		<b>\$2,000.69</b>	<b>\$1,130.00</b>	<b>\$870.69.</b>

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.



#### Contravention 4: Underpayment of overtime under the Clerks MA

<b>Table 5: Failure to pay Ms Teh overtime during the period of the first engagement*</b>					
<b>Timeframe (calculated to immediately prior to first full pay period at which next pay rate was due to apply)</b>	<b>Overtime hours worked</b>	<b>Overtime Rate of Pay for a casual employee under the Clerks Modern Award</b>	<b>Award Entitlement</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
8 April 2010 to 2 July 2010	1.4	\$28.23 (time and a half)	\$39.52	0	\$39.52
3 July 2010 to 1 August 2010	4.36	\$29.65 (time and a half)	\$129.29	0	\$129.29
<b>Total</b>	<b>5.76</b>		<b>\$168.81</b>	<b>0</b>	<b>\$168.81</b>

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.

<b>Table 6: Underpayment of Ms Teh's overtime during the period of the second engagement*</b>					
<b>Timeframe (calculated to immediately prior to first full pay period at which next pay rate was due to apply)</b>	<b>Overtime hours worked</b>	<b>Overtime Rate of Pay under the Clerks Modern Award</b>	<b>Award Entitlement</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
2 August 2010 to 7 October 2010	30.49	\$25.42 (time and a half)	\$774.93	\$431.48	\$343.45
	3.10	\$33.89 (double time)	\$105.05	\$40.22	\$64.83
8 October 2010 to 7 April 2011	50.73	\$25.57 (time and a half)	\$1,297.27	\$733.01	\$564.26
	3.4	\$34.10 (double time)	\$115.94	\$49.10	\$66.84
<b>Total</b>	<b>87.72</b>		<b>\$2,293.19</b>	<b>\$1,253.81</b>	<b>\$1,039.38</b>

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.

**Contravention 4: Underpayment of ordinary hours on a public holiday under the FW Act**

<b>Table 7: Underpayment of ordinary hours on a public holiday for Ms Teh during the period of the second engagement*</b>					
<b>Timeframe (calculated to immediately prior to first full pay period at which next pay rate was due to apply)</b>	<b>Ordinary hours absent</b>	<b>Pay rate under the Clerks Modern Award</b>	<b>Entitlement</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
8 October 2010 to 7 April 2011	30.4	\$17.05	\$518.25	\$468.38	\$49.87
8 April 2011 to 16 June 2011	7.6	\$17.23	\$130.91	0	\$130.91
<b>Total</b>	<b>38</b>		<b>\$649.16</b>	<b>\$468.38</b>	<b>\$180.78</b>

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.

**Contravention 6: Underpayment of Sunday penalties under the Clerks MA**

<b>Table 8: Underpayment of penalty rates on a Sunday for Ms Teh during the period of the second engagement*</b>					
<b>Timeframe (calculated to immediately prior to first full pay period at which next pay rate was due to apply)</b>	<b>Ordinary hours worked</b>	<b>Pay rate under the Clerks Modern Award (double time)</b>	<b>Entitlement</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
8 October 2010 to 7 April 2011	7.25	\$34.45	\$247.20	\$95.05	\$152.15

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.

**Contravention 7: Underpayment of annual leave under section 90(1) of the FW Act**

<b>Table 9: Underpayment of annual leave taken by Ms Teh during the period of the second engagement*</b>					
<b>Timeframe (calculated to immediately prior to first full pay period at which next pay rate was due to apply)</b>	<b>Annual leave taken (hours)</b>	<b>Pay rate under the Clerks Modern Award</b>	<b>Entitlement</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
8 October 2010 to 7 April 2011	69.55	\$17.05	\$1,185.67	\$1,075.27	\$110.40

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.

**Contravention 8: Underpayment of annual leave under section 90(2) of the FW Act**

<b>Table 10: Underpayment of untaken annual leave on the termination of Ms Teh's employment*</b>					
<b>Date of termination of employment</b>	<b>Untaken annual leave (hours)</b>	<b>Pay rate under the Clerks Modern Award</b>	<b>Entitlement to annual leave</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
16 June 2011	55.00	\$17.23	\$947.39	\$372.61	\$574.78

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.

**Table 11: Underpayment of untaken annual leave on the termination of Mr Mahdy's employment\***

<b>Date of termination of employment</b>	<b>Untaken annual leave (hours)</b>	<b>Base rate of pay to which Mr Mahdy was entitled</b>	<b>Entitlement to annual leave</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
11 July 2012	60.83	\$22.64	\$1,377.19	0	\$1,377.19

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.

**Contravention 9: Failure to pay annual leave loading under the Clerks MA**

**Table 12: Failure to pay Ms Teh's annual leave loading for annual leave taken during the period of the second engagement\***

<b>Timeframe (calculated to immediately prior to first full pay period at which next pay rate was due to apply)</b>	<b>Annual leave taken (Hours)</b>	<b>Pay rate under the Clerks Modern Award</b>	<b>Entitlement to annual leave loading</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
8 October 2010 to 7 April 2011	69.55	\$17.05	\$207.49	0	\$207.49

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.

**Table 13: Failure to pay annual leave loading on Ms Teh's untaken annual leave on the termination of her employment\***

<b>Date of termination of employment</b>	<b>Untaken annual leave (hours)</b>	<b>Pay rate under the Clerks Modern Award</b>	<b>Entitlement to annual leave loading</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
16 June 2011	55.00	\$17.23	\$165.79	0	\$165.79

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.

**Contravention 10: Failure to pay annual leave loading under the Storage MA**

**Table 14: Failure to pay annual leave loading on Mr Mahdy's untaken annual leave on the termination of her employment\***

<b>Date of termination of employment</b>	<b>Untaken annual leave (hours)</b>	<b>Base rate of pay to which Mr Mahdy was entitled</b>	<b>Entitlement to annual leave loading</b>	<b>First Respondent Paid</b>	<b>Underpayment**</b>
11 July 2012	60.83	\$22.64	\$241.01	0	\$241.01

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.

**Contravention 11: Underpayment of personal/carers leave under the FW Act**

**Table 15: Underpayments of Ms Teh's personal/carers leave during the period of the second engagement\***

<b>Timeframe (calculated to immediately prior to first full pay period at which next pay rate was due to apply)</b>	<b>Ordinary hours worked</b>	<b>Pay rate under the Clerks Modern Award</b>	<b>Entitlement</b>	<b>First Respondent Paid</b>	<b>Difference**</b>
2 August 2010 to 7 October 2010	5.47	\$16.94	\$92.68	\$117.16	-\$24.48
8 October 2010 to 7 April 2011	26.69	\$17.05	\$455.01	\$393.14	\$61.87
8 April 2011 to 16 June 2011	5.1	\$17.23	\$87.85	\$82.59	\$5.26
<b>Total Underpayment</b>	<b>37.26</b>		<b>\$635.54</b>	<b>\$592.89</b>	<b>\$42.65</b>

\*All calculations performed to the nearest 6 decimal places

\*\* Rounded to two decimal places.