FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v ROSS GERI PTY LTD & ORS *[2014] FCCA 959*

Catchwords:
INDUSTRIAL LAW – Failure to accord correct entitlements to employees – breaches of *Fair Work Act 2009* – liability of persons involved in the contraventions – multiple contraventions – whether should be grouped into one contravention of paying a flat rate – whether prosecution prohibited from making submissions on the range of penalty available – steps in assessing penalty – whether it is wrong to compare the facts of the present case with those in a previous case and adjust penalties in the prior case as though they set the range – *Barbaro v The Queen* considered.

Legislation:
Crimes Act 1914, s.4AA(1)
Evidence Act 1995, s.191
Fair Work Act 2009, ss.539(2), 546(1)
Workplace Relations Act 1996, ss.719, 728

Cases cited:
FWO v Garfield Berry Farm Pty Ltd & Anor [2012] FMCA 103
Fair Work Ombudsman v Ghorbani-Palangi [2014] FCCA 447
Fair Work Ombudsman v Mildura Battery Company Pty Ltd & Anor [2014] FCCA 192
Kelly v Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Rojas v Esselte Australia Pty Limited (No.2) [2008] FCA 1585
Barbaro v The Queen; Zirilli v The Queen [2014] HCA 2

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	ROSS GERI PTY LTD (ACN 101 204 657)
Second Respondent:	ROSS IRWIN GERI
Third Respondent:	SHERIE GERI
File Number:	MLG 645 of 2013
Judgment of:	Judge F. Turner

Hearing date:	12 March 2014
Date of Last Submission:	12 March 2014
Delivered at:	Melbourne
Delivered on:	6 June 2014

REPRESENTATION

Counsel for the Applicant:	Mr Tracey
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondents:	Mr Millar
Solicitors for the Respondents:	O'Farrell Robertson McMahon

THE COURT DECLARES THAT:

(1) The first respondent contravened:

(a) Clause 25 of the *Security Employees Victorian Common Rule Award 2005* (the "Pre-Modern Award") and sub-item (2)(1) of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the "Transitional Act") by failing to pay Elizabeth Macreadie and James Pualic a minimum payment of four hours at the appropriate rate for shifts of less than four hours' duration during the period from 21 May 2007 to 31 December 2009;

(b) Section 45 of the *Fair Work Act 2009* (Cth) (the "FW Act") by failing to roster Elizabeth Macreadie, James Pualic and Peter Wells for a minimum shift length of four hours at times on and after 1 January 2010, in contravention of sub-clause 21.2(a)(i) of the *Security Services Industry Award 2010* (the "Modern Award");

(c) Sub-clause 23.2.1 of the Pre-Modern Award and sub-item (2)(1) of the Transitional Act by failing to pay Frank Dankers, Elizabeth Macreadie, James Pualic and Peter Wells overtime rates of pay

for overtime worked on a Monday to Friday during the period from 21 May 2007 to 31 December 2009;

(d) Section 45 of the FW Act by failing to pay Elizabeth Macreadie, James Pualic and Peter Wells overtime rates of pay for overtime worked on a Monday to Friday at times on and after 1 January 2010, in contravention of sub-clause 23.3 of the Modern Award;

(e) Sub-clause 23.2.2 of the Pre-Modern Award and sub-item (2)(1) of the Transitional Act by failing to pay Frank Dankers, Elizabeth Macreadie, James Pualic and Peter Wells overtime rates of pay for overtime worked on a Saturday during the period from 21 May 2007 to 31 December 2009;

(f) Section 45 of the FW Act by failing to pay Elizabeth Macreadie, James Pualic and Peter Wells overtime rates of pay for overtime worked on a Saturday at times on and after 1 January 2010, in contravention of sub-clause 23.3 of the Modern Award;

(g) Sub-clause 23.2.3 of the Pre-Modern Award and sub-item (2)(1) of the Transitional Act by failing to pay Frank Dankers, Elizabeth Macreadie, James Pualic and Peter Wells overtime rates of pay for overtime worked on a Sunday during the period from 21 May 2007 to 31 December 2009;

(h) Section 45 of the FW Act by failing to pay Elizabeth Macreadie, James Pualic and Peter Wells overtime rates of pay for overtime worked on a Sunday at times on and after 1 January 2010, in contravention of sub-clause 23.3 of the Modern Award;

(i) Sub-clause 24.4.1 of the Pre-Modern Award and sub-item (2)(1) of the Transitional Act by failing to pay Frank Dankers, Elizabeth Macreadie, James Pualic and Peter Wells the weekend penalty rates for ordinary hours worked on a Saturday during the period from 21 May 2007 to 31 December 2009;

(j) Section 45 of the FW Act by failing to pay Elizabeth Macreadie, James Pualic and Peter Wells the penalty rates for ordinary hours worked on a Saturday at times on and after 1 January 2010, in contravention of sub-clause 22.3 of the Modern Award;

(k) Sub-clause 24.4.2 of the Pre-Modern Award and sub-item (2)(1) of the Transitional Act by failing to pay Frank Dankers, Elizabeth Macreadie, James Pualic and Peter Wells the weekend penalty rates for ordinary hours worked on a Sunday during the period from 21 May 2007 to 31 December 2009;

(l) Section 45 of the FW Act by failing to pay Elizabeth Macreadie, James Pualic and Peter Wells the penalty rates for ordinary hours worked on a Sunday at times on and after 1 January 2010, in contravention of sub-clause 22.3 of the Modern Award;

(m) Sub-clause 26.7.2 of the Pre-Modern Award and sub-item (2)(1) of the Transitional Act by failing to pay Frank Dankers, Elizabeth Macreadie, James Pualic and Peter Wells the public holiday penalty rates for work performed on a public holiday during the period from 21 May 2007 to 31 December 2009;

(n) Section 45 of the FW Act by failing to pay Frank Dankers, Elizabeth Macreadie, James Pualic and Peter Wells the public holiday penalty rates for work performed on a public holiday at times on and after 1 January 2010, in contravention of sub-clauses A.6.2, A.6.4 and A.7.3 of the Modern Award;

(o) Sub-clause 18.2.1(a) of the Pre-Modern Award and sub-item (2)(1) of the Transitional Act by failing to pay Frank Dankers, Elizabeth Macreadie, James Pualic and Peter Wells the shift work allowance for work performed on an afternoon, night or early morning shift during the period from 21 May 2007 to 31 December 2009;

(p) Section 45 of the FW Act by failing to pay Frank Dankers, Elizabeth Macreadie, James Pualic and Peter Wells the applicable shift loading for work performed on an afternoon, night or early morning shift or within the night shift span at times on and after 1 January 2010, in contravention of sub-clauses A.6.2, A.6.4 and A.7.3 of the Modern Award;

(q) Sub-clause 17.6.5(e) of the Pre-Modern Award and sub-item (2)(1) of the Transitional Act by failing to pay Frank Dankers, Elizabeth Macreadie, James Pualic and Peter Wells a laundry allowance for

each shift worked during the period from 21 May 2007 to 31 December 2009;

(r) Sub-item 2(1) of Schedule 16 of the Transitional Act by failing to pay Frank Dankers, Elizabeth Macreadie, James Pualic and Peter Wells annual leave entitlements on termination of employment in contravention of sub-clause 27.6.1 of the Pre-Modern Award.

(2) The second respondent was involved in each of the contraventions by the first respondent set out in paragraph 1(a) to 1(r) above pursuant to s.728(2)(c) of the *Workplace Relations Act 1996* ("WR Act") and s.550(1) of the FW Act.

(3) The third respondent was involved in each of the contraventions by the first respondent set out in paragraph 1(a) to 1(r) above pursuant to s.728(2)(c) of the WR Act and s.550(1) of the FW Act.

THE COURT ORDERS THAT:

(4) Pursuant to s.719(1) of the WR Act and s.546(1) of the FW Act, the first respondent pay an aggregate penalty in the amount of $110,880.00 for the contraventions set out in the Declarations above.

(5) Pursuant to s.719(1) of the WR Act and s.546(1) of the FW Act, the second respondent pay an aggregate penalty in the amount of $22,176.00 for his involvement in the first respondent's contraventions set out in the Declarations above.

(6) Pursuant to s.719(1) of the WR Act and s.546(1) of the FW Act, the third respondent pay an aggregate penalty in the amount of $14,652.00 for her involvement in the first respondent's contraventions set out in the Declarations above.

(7) Pursuant to s.546(3)(a) of the FW Act, the first, second and third respondents pay their respective penalties to the Commonwealth within 28 days of the date of this order.

(8) The applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 645 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

ROSS GERI PTY LTD (ACN 101 204 657)
First Respondent

ROSS IRWIN GERI
Second Respondent

SHERIE GERI
Third Respondent

REASONS FOR JUDGMENT
(As Corrected)

1. This matter involves an application by the Fair Work Ombudsman (the "FWO") against the respondents resulting from the failure to accord the correct pay and conditions to employees of the first respondent Ross Geri Pty Ltd ("RGPL"). The parties negotiated a Statement of Agreed Facts ("SOAF") which was filed on 24 April 2013. The hearing on 11 March 2014 related to the declarations and penalties sought by the FWO.

2. Mr Tracey appeared for the applicant and Mr Millar for the three respondents. The respondents admit the breaches and full payment has been made to the employees.

Groupings

3. The FWO submits that the 11 contraventions fall into 8 groups as set out in Attachment 'B' to the Applicant's Submissions on Penalty filed 16 August 2013 (the "Applicant's Penalty Submissions").

4. Mr Millar submits that all the breaches fall into one contravention of *"paying a flat rate"*. That concept is in conflict with the decision of Judge Riley in *FWO v Garfield Berry Farm Pty Ltd & Anor* [2012] FMCA 103 at [28] as follows:

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

5. The Court follows that decision. The Court rejects Mr Millar's submission. The Court finds that the flat rate was incorrect because of 11 contraventions of various provisions, and the contraventions do not fall into one group.

6. The Court finds that the contraventions fall into 8 groups as proposed in Attachment B (supra), and attached hereto.

The Third Respondent ("SG")

7. Mr Millar submits that proceedings should never have been initiated against Ms Sherie Geri ("SG") as she is a clerical employee of RGPL. However it is agreed in the SOAF that she was responsible for calculating the rates of employees. The legislation provides for joining as respondents, people *"involved in the contraventions"*. There is

therefore, a deliberate intention in the legislation that such persons may be prosecuted.

8. Section 728 of the *Workplace Relations Act 1996* (the "WR Act") provides:

> *(1)* A *person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.*
>
> *(2)* *For this purpose, a person is* ***involved in*** *a contravention of a civil remedy provision if, and only if, the person:*
>
> *(a)* *has aided, abetted, counselled or procured the contravention; or*
>
> *(b)* *has induced the contravention, whether by threats or promises or otherwise; or*
>
> *(c)* *has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*
>
> *(d)* *has conspired with others to effect the contravention.*

9. The question becomes whether SG has engaged in conduct described in the section? The Court finds that SG was knowingly concerned in or party to the contraventions.

10. Annexure 'SH-1' to the Affidavit of Sam Hills filed 16 August 2013 (the "Hills Affidavit") shows that on 2 December 2008, the second respondent Ross Geri ("RG"), and SG (then Sherie Fishman, now SG) were aware that each employee's Australian Workplace Agreement ("AWA") needed to be signed and lodged.

11. Annexure 'SH-1' to the Hills Affidavit shows that SG was aware on 2 December 2008 of the existence of an Award, and that accrued annual leave had to be paid to casuals (page 1.10).

12. Annexure 'SH-10' to the Further Affidavit of Sam Hills ("the second Hills Affidavit") filed 18 December 2013 shows that RG and SG were aware on or around 23 March 2009 that RGPL was bound by the *Security Employees (Victoria) Award 1998* (Preserved).

13. The proposed Enterprise Agreement (Exhibit R1) shows that it was received by Fair Work Australia ("FWA"), but not filed. RG and SG knew that an individual instrument had to be approved before it had legal effect because of:

- The discussions in December 2008 (Annexure 'SH-1' to the first Hills Affidavit p.1.6); and
- The letter to the respondents ('Annexure 'SH-10' to the second Hill's Affidavit).

14. Mr Millar submits that SG should not have been prosecuted. That is a matter for the FWO. Once a prosecution is launched, the Court must decide on the appropriate result.

15. In giving evidence, SG appeared to have little understanding of employment law, she thought she was doing the right thing, but *'ignorance of the law is no excuse'*.

16. One reason for imposing a penalty on the third respondent is to deter her specifically from acting out of ignorance in the future. A person with a duty to calculate wages and other entitlements must ascertain the applicable provisions.

17. The Court accepts SG as being an honest witness. She acted out of ignorance with no bad intention. A fine should be imposed in the lower quartile of the range.

The Second Respondent ("RG")

18. Mr Millar does not submit that proceedings should not have been brought against RG – he is the sole shareholder and Director of RGPL. Although the wages and entitlements were not calculated by him, he was aware that the employees were being paid pursuant to an AWA – he should have checked to ensure that proper entitlements were being accorded.

Directors Liability for unpaid Employee Entitlements

19. The Court takes the following observations from the article *Directors' Liability for Unpaid Employee Entitlements: Suggestions for Reform Based on their Liabilities for Unremitted Taxes* [2008] SydLawRw 23;

(2008) 30(3) Sydney Law Review 470 by Associate Professor Helen Anderson, Department of Business Law and Taxation, Monash University.

20. Directors are not liable for unpaid employee entitlements because of the requirement to prove a subjective intention to deprive employees (Abstract p.470).

21. The Court finds that here, there is no proof of a subjective intention of RG to deprive employees of entitlements. However as the sole director and shareholder of RGPL, RG had responsibility to oversee the work of SG. By failing to do so, RG was *"involved in"* the breaches by RGPL. Specific and general deterrence of RG therefore become relevant considerations.

> *"Imposing personal responsibility on directors for improper behaviour, therefore, plays an important role in deterring undesirable behaviour and addresses the moral hazard occasioned by the separate legal entity principle. It encourages directors either obey the law or to protect themselves against liability by some other means"* (Ibid p.479).

22. There is no evidence before the Court that RG was not involved in the management of RGPL.

23. The Court finds that as the sole director and shareholder of RGPL, RG should be the subject of higher penalties than SG, who was and still is, an employee of RGPL.

24. During the course of the hearing, the decision of the High Court in *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2 came into issue.

25. The Court refers to notes of a submission to the Civil Penalties Forum on 24 March 2014 [see Australian Government Solicitor, Express Law, *Submissions on penalty ranges – High Court's view and implications for civil regulators* (No.209) (11 March 2014)] to analyse the impact of that decision;

> *"In Barbaro v The Queen; Zirilli v The Queen [2014] HCA 2; (2014) 305 ALR 323 (Barbaro) (12 February 2014) the High Court held that criminal prosecutors should not make submissions to the sentencing judge on the outer bounds of the*

available sentencing range. Does this restrict regulators from making submissions to a court about the appropriate level of pecuniary penalties?

Summary

The High Court has now held by a majority that prosecutors should not make submissions to a sentencing judge on the so-called 'available range' (namely, the upper and lower limits within which a sentence could properly be imposed).

Does this mean that regulators in civil penalty cases can no longer make submissions on appropriate penalty? The better view is that it does not. A submission on an 'appropriate penalty' is different from a submission on the 'available range'. Further, civil penalty proceedings are different in important respects from criminal sentencing proceedings, with the regulator performing a different function from that of a prosecutor.

…

Recent discussion of the decision

The possibility that the principles set out by the High Court in Barbaro may apply equally to the imposition of civil penalties has already been considered. In Commissioner for Consumer Protection v Susilo [2014] WASC 50 (Susilo) (27 February 2014) Beech J noted, but did not need to rule upon, submissions that Barbaro did not apply to a statement by a civil regulator on an appropriate civil penalty….

In Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2014] FCA 160 (Construction, Forestry, Mining and Energy Union) White J, again without needing to decide, noted that Barbaro may require the Federal Court to review the approach taken in civil penalty cases. However, his Honour considered that earlier Full Court decisions supporting the practice of providing submissions on penalty were of considerable persuasive value and should continue to be followed in that case.

Implications for civil regulators

There is obvious scope to argue that the High Court's decision in Barbaro should apply equally to prevent a regulator from providing submissions on the quantum or range of a civil penalty of appropriate deterrent value….

Present practice and authority recognises a clear role for regulators to assist the court through submissions on the appropriate penalty:

> *— Since Trade Practices Commission v CSR Ltd (1991) ATPR 41-076 it has been recognised across most civil penalty regimes that the principal purpose of setting a penalty is to ensure specific and general deterrence and that the court's function is to set a penalty of 'appropriate deterrent value'. As a matter of course, regulators will make submissions about what penalty amount would have appropriate deterrent value.*
>
> *— The Full Court has said that it will be assisted by the 'views of the specialist body set up to protect the public interest' on whether 'a proposed penalty will be sufficient to deter' particular conduct; such views are 'likely to be persuasive': see NW Frozen Foods Pty Ltd v ACCC (1996) 71 FCR 285 (NW Frozen Foods), reinforced in Minister for Industry, Tourism and Resources v Mobil Oil Australia Ltd (2004) ATPR 41-993 (Mobil Oil).*
>
> *— The same line of authority recognises a strong public interest in a regulator and a respondent resolving civil penalty cases through agreement on the submissions to be put to a court about the appropriate penalty….*

How should regulators approach Barbaro?

There are good reasons for regulators to continue to make submissions on the appropriate civil penalty, notwithstanding the decision in Barbaro:

> *— The High Court has not overturned NW Frozen Foods and Mobil Oil: the principles in those cases, which involve regulators making submissions on the appropriate civil penalty, continue to be applicable in the Federal Court.*
>
> *— The practice with which the High Court was concerned was one involving submissions on the 'available range', or the 'outer bounds' of a permissible sentence. A submission on whether a particular civil penalty amount would have 'appropriate deterrent value' is a submission of a different kind. It involves the specialist regulator explaining why a proposed penalty amount would have the necessary deterrent effect within the relevant industry. It does not*

> *involve the regulator stepping into the shoes of the judge to identify the outer limits of a permissible penalty.*
>
> *— The principles governing the imposition of civil penalties differ in many important respects from those involved in sentencing an offender. Likewise, the role of a civil regulator is quite different from the role of a prosecutor….*
>
> *However, as the decisions in Susilo and Construction, Forestry, Mining and Energy Union show, there is likely to be ongoing discussion of these issues until they have been properly resolved by the courts. In the meantime, regulators can properly proceed on the basis that Barbaro does not preclude them from making submissions on what penalty would have appropriate deterrent value in a given case."*

26. The Court determines that it is appropriate for the FWO to indicate what it thinks is the appropriate penalty to be imposed for a breach of the *Fair Work Act 2009* (the "FW Act"). In proposing a range of between $X and $Y the FWO is not making a submission on the maximum penalty that may be imposed; That is done by the FW Act [s.539(2)] and the WR Act [s.719(4)(a)]. As the contraventions were between 2006 and 2011, the amount of a penalty unit at that time was $110 [*Crimes Act 1914* s.4AA(1)].

27. The FWO sets out in Attachment B (supra) the penalties it proposes for each of the contraventions. The Court finds that this does not conflict with the decision in *Barbaro* (supra). That practice is of great assistance to the Court and should continue.

The Applicants' Submissions on Penalty

28. The FWO proposes a 20% discount of the maximum prescribed penalties for all respondents' because of the admissions made by the respondents. The FWO is aware of the degree of cooperation and the benefit of the admissions – the Court finds the 20% discount to be appropriate.

29. The Court has the power to impose penalties for contraventions that occurred prior to 1 July 2009 under s.719(1) of the WR Act, and for those that occurred after that, under s.546(1) of the FW Act.

30. The maximum penalties that can be imposed are 300 penalty units for breaches by a body corporate, and 60 penalty units for breaches by an individual [s.719(4)(a) of the WR Act and s.539(2) of the FW Act]. Therefore the maximum penalty that can be imposed on RGPL for each contravention is $33,000.00 and the maximum penalty for each contravention by RG or SG is $6,600.00 This brings the maximum for RGPL after the 20% discount, to $211,200.00, and for RG and SG, after the 20% discount, to $42,240.00 each.

31. The Court accepts the following Penalty Submission by the FWO:

Principles applicable to determining penalty

(23) The Applicant submits that the following principles should be taken into account in determining the question of appropriate penalty:

(a) the first step for the Court is to identify the separate contraventions involved. Each contravention of an obligation found in the Pre-Modern and Modern Award is a separate contravention;[1]

(b) secondly, the Court should consider whether the contraventions arising in the first step constitute a single course of conduct, such that multiple contraventions should be treated as a single contravention;

(c) thirdly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The Respondent should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the Respondents did.[2] *This*

[1] *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223 (Gibbs); *McIver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J).
[2] *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).

task is distinct from and in addition to the final application of the "totality principle",[3]

(d) *fourthly, determine an appropriate penalty to impose in respect of each contravention (whether a single contravention alone or as part of a course of conduct), having regard to all of the circumstances of the case; and*

(e) *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.*[4] *The Court should apply an "instinctive synthesis" in making this assessment.*[5] *This is known as the "totality principle".*

…

Grouping of Contraventions – Course of conduct and common elements

Course of Conduct

(25) As set out above in paragraph 16 and in the SOAF, the Respondents have admitted to multiple contraventions of a number of terms of the Pre-Modern Award and Modern Award over the duration of the Complainants' employment.

(26) Section 719(2) of the WR Act and section 557(1) of the FW Act respectively provide that where two or more contraventions of a term of an applicable provision or civil remedy provision are committed by the same person, and the contraventions arose out of a course of conduct by the person, the contraventions are taken to constitute a single contravention of the provision.

(27) The Applicant accepts that the Respondents are entitled to the benefit of sections 719(2) of the WR Act and 557 of the FW Act in

---

[3] *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).
[4] 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).
[5] *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).

relation to repeated contraventions of each separate term of the Pre-Modern Award and Modern Award in respect of the multiple Complainants. The Applicant submits that they are so entitled for the reasons that follow and has therefore approached the penalty ranges summarised in Attachment B on this basis.

(28) The Complainants were each employed at different times during the relevant period from June 2006 at the earliest to November 2008. Their employment ceased at different times (SOAF at 16). Notwithstanding this, the Applicant accepts that the Respondents' treatment of these Complainants and the determination of their rates of pay arose from the Respondent's approach to payment of those special rates to employees generally, rather than a series of individual decisions directed to those Complainants in particular at each point in time.

(29) On this basis the Applicant submits that section 719(2) of the WR Act and section 557(1) apply in respect of the contraventions of each provision for the multiple employees and constitute 18 separate courses of conduct.

Common Elements

(30) It is open to the Court to group separate contraventions together where the contraventions may be said to overlap with each other or involve the potential punishment of the Respondents for the same or substantially similar conduct.[6]

(31) The Applicant accepts that some of the 18 contraventions have common elements and that this should be taken into account in considering an appropriate penalty, to ensure that the Respondents are not punished more than once for the same or substantially similar conduct. This is particularly appropriate where legislative change has resulted in multiple contraventions pursuant to different terms, arising from the same course of conduct; as such conduct would otherwise have attracted the application of the statutory course of conduct provisions.

[6] See: *Pearce v R* (1998) 194 CLR 610 at [40], *Johnson v R* (2004) 205 ALR 346 at [27] – [34], *Merringtons*, supra at [46], [72] (Graham J) and [93] (Buchanan J) and *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* [2012] FCA 479 at [24] – [25] (Bromberg J).

(32) *First, the separate contraventions of the Pre-Modern Award and Modern Award relating to a number of the entitlements arose as a result of changes in legislation and/or award coverage. The Applicant submits that the following contraventions are impacted by the history of legislative change and arose out of ongoing courses of conduct by the First Respondent not to pay those award entitlements, which are of the same kind but arising under different instruments. These contraventions should be grouped:*

(a) ***minimum payment of four hours*** *under clause 25 of the Pre-Modern Award, as in operation under the WR Act and subsequently the Transitional Act;*

(b) ***Monday to Friday overtime*** *under clause 23.2.1 of the Pre-Modern Award and clause 23.3 of the Modern Award;*

(c) ***Saturday overtime*** *under clause 23.2.2 of the Pre-Modern Award and clause 23.3 of the Modern Award;*

(d) ***Sunday overtime*** *under clause 23.2.3 of the Pre-Modern Award and clause 23.3 of the Modern Award;*

(e) ***penalty rates for Saturday*** *work under clause 24.4.1 of the Pre-Modern Award and clauses A.6.2, A.6.4 and A.7.3 of the of the Modern Award;*

(f) ***penalty rates for Sunday*** *work under clause 24.4.2 of the Pre-Modern Award and clause 22.3 of the Modern Award;*

(g) ***penalty rates for public holiday*** *work under clause 26.7.2 of the Pre-Modern Award and clauses A.6.2, A.6.4 and A.7.3 of the Modern Award;*

(h) ***shift allowance*** *under clause 18.2.1(a) of the Pre-Modern Award and clauses A.6.2, A.6.4 and A.7.3 of the Modern Award; and*

(i) ***laundry allowance*** *under clause 17.6.5(e) of the Pre-Modern Award, as in operation under the WR Act and subsequently the Transitional Act.*

(33) Furthermore, certain further contraventions bear significant similarity or overlap in factual circumstances, and hence warrant further grouping:

Failure to pay or roster for a minimum of four hours

(34) The obligation in clause 21.2(a)(i) of the Modern Award to roster the Complainants for a minimum four hours per shift is a different entitlement to the entitlement in clause 25 of the Pre-Modern Award to a minimum payment of four hours per shift. However the Applicant accepts that the Modern Award obligation has supplanted the Pre-Modern Award obligation and the contraventions of these provisions arise out the decision of the First Respondent to roster the affected Complainants for less than four hours and therefore should be further grouped together as a single contravention.

Overtime

(35) In respect of the overtime obligations contained in clause 23.2 of the Pre-Modern Award and clause 23.3 of the Modern Award, whilst the obligation to pay different overtime rates for Monday to Friday (first two hours and thereafter), Saturday (first two hours and thereafter) and Sunday (first two hours and thereafter under the Pre-Modern Award) are each separate terms of the awards, the Applicant acknowledges that the different terms impose obligations that substantially overlap or are cumulative.[7] *The overlapping nature of the obligations is evident by the fact that in one shift, an employee could perform overtime under two of the terms of the one clause.*

(36) Accordingly, the Applicant submits that the failure by the Respondents to pay overtime rates to the Complainants may be appropriately grouped.

Remaining Contraventions

(37) The Applicant submits that the Respondents should not benefit from further grouping of the remaining contraventions arising

[7] *Gibbs* supra at [24]; *Blandy v Coverdale NT Pty Ltd (ACN 102 611 423)* [2008] FCA 1533 at [56].

from the decision to pay a flat hourly rate of pay[8] and the failure to afford the Complainants their entitlements to Saturday, Sunday, Public Holiday and shift work loadings. Different rates apply to different types of shifts depending on when the shift is performed. Each of the remaining contraventions are in respect of separate obligations and, save to the extent that they are already grouped to acknowledge changes in legislation in accordance with paragraph 31 above, should be treated as separate contraventions, each attracting an appropriate penalty.

32. The FWO submits at [39] that:

> *(39) It is not inappropriate to consider the maximum penalties that could be imposed on the Respondents, as part of the comparative exercise of assessing where the current contraventions sit.[9]*

33. However, this is in conflict with the decision in *Barbaro* (supra). The Court quotes from the submission to the Civil Penalties Forum (supra) as follows:

> *"The majority in Barbaro also touched upon the question of consistency in sentencing. As there can be confusion about the proper use of earlier decisions, it is worth briefly noting the key principles to be applied.*
>
> *The majority followed the earlier High Court decision of Hili v The Queen (2010) 242 CLR 520 in observing that, while consistency of sentencing is important, the consistency that is sought is 'consistency in the application of relevant legal principles, not numerical equivalence'. It is therefore wrong to determine a sentence by simply comparing the facts of the present case with the facts in earlier cases and making additions or subtractions from the sentences imposed in those earlier cases as though they set the available range.*
>
> *The same principle applies in the civil penalty context; many Full Court decisions emphasise that penalties in earlier cases cannot dictate the penalty in a later case: see for example NW Frozen Foods at 295-6; Singtel Optus v ACCC (2012) 287 ALR 249 at [60]; McDonald v Australian Building and Construction Commissioner (2011) 202 IR 467 at [23]-[30]; Australian*

[8] See *Gibbs*; referred to in *Fair Work Ombudsman v Garfield Berry Farm Pty Ltd & Anor* [2012] FMCA 103 at [28].
[9] *Mornington Inn*, supra at [88] (Stone and Buchanan JJ)

Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560 at [12]-[14], [56]-[57] and [87] and Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357 at [36] and [60].”

34. The FWO submits further:

FACTORS RELEVANT TO PENALTY

(40) A non-exhaustive list of factors relevant to the imposition of a penalty was usefully summarised by Mowbray FM (as he then was) in Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar[10] (Pangaea). Those factors include:

(a) the nature and extent of the conduct which led to the breaches;

(b) the circumstances in which that conduct took place;

(c) the nature and extent of any loss or damage sustained as a result of the breaches;

(d) whether there had been similar previous conduct by the respondent;

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

(f) the size of the business enterprise involved;

(g) whether or not the breaches were deliberate;

(h) whether senior management was involved in the breaches;

(i) whether the party committing the breach had exhibited contrition, taken corrective action and cooperated with the enforcement authorities;

(j) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and

[10] [2007] FMCA 7 at [26]-[59].

(k) the need for specific and general deterrence.

(41) This summary was adopted by Tracey J in Kelly.[11] *While the summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion.*[12]

(42) The factors which the Applicant submits are material to this matter and the question of appropriate penalties are addressed in turn below.

Circumstances in which the conduct took place and nature and extent of the conduct

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

(44) The Applicant only became aware of the contraventions as a result of complaints lodged by the Complainants after they ceased working for the First Respondent (SOAF at 124).

(45) The contravening conduct was, in the Applicant's submission, systemic. It extended over the duration of the Complainants' employment and allowed the First Respondent to enjoy the benefit of engaging the Complainants as casuals (giving them freedom of rostered hours and shifts and limited provision for paid leave), without the burdens of paying the loadings and penalties at rates applicable to casuals.

(46) Further, the evidence before the Court is that the conduct occurred in circumstances where:

---

[11] *Kelly*, supra at [14

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

(a) *the Respondents knew in late 2008 that the Pre-Reform Award entitlements, including annual leave, applied to the employment of employees of the First Respondent (SOAF at 111-112, 114, 118, 122; Affidavit of Sam Hills at 7, 8 and 12);*

(b) *the Second and Third Respondents were expressly told on 2 December 2008 and 12 December 2008 by Inspector Lauren Kelly that the First Respondent could not rely on flat rates of pay in a template 2005 Australian Workplace Agreement (AWA) not lodged and approved for each individual employee (SOAF at 112, 114; Affidavit of Sam Hills at 7), and therefore they could not have been under a mistaken belief that the AWA applied after this time;*

(c) *each of the Complainants were employed by the First Respondent at the time of, and for at least a year after, the issuing of the breach notice in February 2009 (SOAF at 16, 118) and the contravening conduct continued to occur after this time;*

(d) *the First Respondent had access to professional advice, being a member of VECCI during at least 2009 (SOAF 121; Affidavit of Sam Hills at 12(a)), and the Applicant understands that the First Respondent is also a member of the Australian Security Industry Association Limited (ASIAL), the national employer association in the security industry… ; and*

(e) *the Second and Third Respondents told an Inspector in December 2008 that they were in the "stages of putting in place a collective agreement" (Annexure SH-1 to the Affidavit of Sam Hills) and acknowledged this would, like AWAs, require statutory approval (a statement again made in October 2011 by the Second Respondent – see Annexure SH-2 to the Affidavit of Sam Hills).*

(47) *The Applicant submits that the facts set out above are important considerations in this case. It is open for the court to determine that the Respondents were aware of the requirement to pay the Complainants in accordance with the relevant awards; unless*

there was another instrument registered in accordance with legislation that permitted it to lawfully pay a flat rate of pay in lieu of entitlements to penalties, loadings and allowances as they fell due.

The Court makes that finding sought in [47] (supra).

(48) Further, the Respondents either did not seek professional advice from VECCI or ASIAL about the lawfulness of paying flat rates of pay in lieu of each award entitlement, or if they did, they did not implement it. Instead, they just increased the flat hourly rate by $1.03 for Level 1 and $0.53 for Level 3 (SOAF at 30).

(49) The First Respondent had an 'overarching responsibility' as an employer to ensure compliance with employment laws. As this Court recently observed:

> *"…it is incumbent upon employers to make all necessary enquiries to ascertain their employees' proper entitlements and pay their employees at the proper rates."*[13]

Nature and extent of the loss

(50) By structuring its pay arrangements in the manner it did, the First Respondent avoided paying the Complainants their entitlements in respect of minimum engagement periods, overtime rates of pay and penalties for weekend, public holiday or late work. The Complainants received no additional remuneration for working hours well accepted as being unsociable and therefore appropriate to attract a higher rate of pay.

(51) The First Respondent obtained the benefit of the underpayments; the payment of the flat rate of pay effectively reducing their wage costs in a service industry where employment costs would be a significant consideration; thereby advantaging the First Respondent in an industry regarded as highly competitive.[14]

35. The Court notes that as the sole director of RGPL, RG would also have benefited from RGPL's increased competiveness.

---

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

[14] See concluding remarks in section 3.1 of the National Security Industry Campaign 2009 Report at p 9, Annexure SH-4 to the Affidavit of Sam Hills

(52) The Complainants' financial loss was as follows:

(a) Frank Dankers: $10,644.01;

(b) Elizabeth Macreadie: $10,255.78;

(c) James Pualic: $5,964.23; and

(d) Peter Wells: $3,556.94.

(53) Whilst these underpaid amounts were rectified by the First Respondent on or around 1 July 2013 (SOAF at 150), the Complainants were deprived of these amounts for very significant periods of between 22 months and 3 years and 5 months, depending on when they ceased employment (SOAF at 16).

Similar previous conduct

(54) The Respondents have not previously been the subject of proceedings by the Applicant or its predecessors for contraventions of workplace laws.

*(55) The SOAF demonstrates that the First Respondent engaged in substantially similar conduct in 2008, leading to a breach notice being issued in February 2009 (SOAF at 118). Both the Second and Third Respondents were involved in the Workplace Ombudsman's (**WO**) investigation in 2008 and early 2009 (SOAF at 111-122).*

(56) The Applicant submits that the Respondents' previous conduct is relevant and of a similar character to the matters currently before the Court. The letters sent to the Second and Third Respondents, as representatives of the First Respondent, in relation to the previous complaint demonstrate this (SOAF at 118, 122). This similar prior conduct shows that the warning given to the First Respondent in 2009 did not result in sufficient steps being taken to prevent further contraventions[15] – they simply increased the flat rate of pay by a small amount (SOAF at 30). This is also

[15] *Veen v The Queen (No 2)* [1988] HCA 14 at page 477; *Temple v Powell* [2008] FCA 714 at [64] as summarised in *Australian Building & Construction Commissioner v Construction, Forestry, Mining & Energy Union (No 2)* [2010] FCA 977.

despite the First Respondent having access to professional advice at the time (SOAF 121; Affidavit of Sam Hills at paragraph 12).

(57) In the Applicant's submission, whilst the Court may place most weight on a prior finding of a court, the Court may still have regard to the Respondents' prior conduct in determining penalty, particularly where that conduct demonstrates that the Respondents were clearly on notice of their obligations.[16]

Whether the breaches arose out of the one course of conduct

(58) This has been addressed in paragraphs (25) to (27) above.

Size and financial circumstances

(59) The Applicant has been advised that the First Respondent currently employs approximately 30 employees…(The Court notes that Exhibit 'R1' has a note that 44 employees were to be covered by the proposed enterprise agreement)*…This indicates that the First Respondent is not a 'small business'.*

(60) There is presently no evidence before the Court that suggests the Respondents' financial position is an issue relevant to penalty.

(61) Property title and transfer documents do indicate that the Third Respondent is the proprietor of two properties (one purchased recently) and the sole shareholder of a Company incorporated in September 2012 (Annexures SH-5, SH-6 and SH-7 to the Affidavit of Sam Hills).

(62) Should the Respondents put evidence before the Court regarding their respective financial positions, it must be balanced with the weight to be attributed to the objective seriousness and deliberateness of the contravening conduct, and the need to impose a sufficiently meaningful and deterrent penalty.

(63) In Workplace Ombudsman v Saya Cleaning Pty Ltd[17] *Federal Magistrate Simpson (as he then was) provided a summary of the case law in this respect:*

[16] See for example the principles summarised in CFMEU No 2 at [47], [64].
[17] [2009] FMCA 38 at [26] – [27].

'the First Respondent is a small company and, I infer, has very few assets. However as Justice Tracey said in Kelly v Fitzpatrick (supra):

> *'No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction must be imposed at a meaningful level'*[18]

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."*

(64) It is submitted that the Court should impose penalties which take into account the principles set out above, noting that in this case the First Respondent is not a small business, and in the absence of evidence to the contrary, that the Respondents have assets and funds available to them to meet penalties imposed.

Deliberateness of the breaches

(65) As set out above earlier in these submissions, the Respondents were told in 2009 that the flat rate of pay paid by the First Respondent was insufficient to satisfy a particular employee's entitlements under the Pre-Modern Award.

(66) The breach notice issued to the First Respondent, and addressed to the Second and Third Respondents, required the First Respondent to take immediate action to ensure that it met the requirements of the Pre-Modern Award and/or legislation for all existing and former employees (SOAF at 118).

[18] *Ibid* at paragraphs [26]-[30].

(67) Further, in an email to the Third Respondent on 12 December 2008, the Inspector confirmed the advice that annual leave applied to casual employees under the Pre-Modern Award (SOAF at 114).

(68) There is no evidence before the Court that the Respondents took steps to ensure compliance by the First Respondent with its obligations to pay entitlements under the awards as they fell, either in 2009 or subsequently, nor the Respondents' reasons for failing to do so despite having access to professional advice as early as 2009 (see paragraph 46(d) above) and claiming to be in the process of putting a collective agreement in place. The only evidence is that the Respondents increased the flat rate of pay by a marginal amount in February 2009, with the basis for this increase unknown.

(69) The Applicant's office has been provided with evidence of corrective action implemented by the First Respondent effective from 28 May 2013.

(70) The above matters demonstrate that the conduct that goes to the heart of the contraventions only ceased after the Applicant instituted these proceedings, notwithstanding that the Respondents were on notice in 2008 of the potential for contraventions, and again in July 2012 when told of the underpayment of the Complainants (SOAF at 134).

(71) In acting in this way the Applicant submits that the Respondents have acted at the very least with wilful disregard of the First Respondent's obligations under the awards in respect of the Complainants. In light of the warning given to the Respondents in February 2009 it is reasonable for the court to infer that contraventions that continued beyond this date were in fact deliberate.

Involvement of senior management

(72) The Second Respondent is, and was at all relevant times, the sole director, secretary and shareholder of the First Respondent. He is identified as the owner of the business and has admitted that he

was responsible for management and control of the First Respondent, and ultimately responsible for the First Respondent's decisions in relation to employees of the First Respondent (SOAF at 6-9).

(73) The Third Respondent is not a formal office holder of the First Respondent. She admits to being a person with responsibility for the administration of the First Respondent's operations in relation to industrial instruments, arrangements and pay rates and a person who assisted the Second Respondent in decisions (SOAF at 11). There is evidence before the Court that the Third Respondent:

(a) was an active participant in the 2008 investigation (SOAF 111-122);

(b) called the Fair Work Infoline on four occasions (Affidavit of Sam Hills at paragraph 12);

(c) met with the Fair Work Inspector in relation to the complaint by Mr Wells and discussed the First Respondent's practice of paying the flat rate of pay, historical knowledge of the business' practices and the potential implementation of a collective agreement (Annexure SH-2 to the Affidavit of Sam Hills);

(d) draws a wage of around $78,000 which is not an insignificant amount and hence may indicate a level of seniority in the business; and

(e) owns the property which is the principal place of business of the First Respondent (SOAF at 5(e); Annexure SH-6 to the Affidavit of Sam Hills).

(74) The Applicant submits that on this basis the Third Respondent had considerable involvement in the operations of the business with respect to employment matters and should be considered a senior manager of the First Respondent, notwithstanding that she was not the directing mind of the First Respondent.

(75) In recommending an appropriate penalty range in respect of the Third Respondent, the Applicant has reduced the range it seeks to take into account that the Third Respondent was not the person with whom the ultimate decisions rested, but is nonetheless culpable by virtue of her significant degree of involvement, and that involvement warrants a meaningful penalty.

Contrition, corrective action, cooperation with authorities

(76) This factor involves three related, yet separate elements. Each of them is relevant in this case.

Contrition

(77) The Applicant acknowledges that the Respondents have made full admissions in relation to the contraventions at an early stage of the proceedings and fully rectified the underpayments, which demonstrates a degree of acceptance of wrongdoing. However there is no evidence of demonstrated contrition by the Respondents to the Complainants, who were workers reliant on the safety net, for what are substantial underpayments.

(78) The Respondents' co-operation during the Applicant's investigation and steps in ultimately rectifying the underpayments should not be taken to assume that the Respondents are contrite for the contravening conduct and the loss suffered by the Complainants.

(79) Further, these proceedings are on foot due, in part, to the failure of the Respondents to take any corrective action following its prior dealing with the WO which did not deter the Respondents from continuing to maintain the practice that led to the breach notice in that case.

Corrective action

(80) The First Respondent has taken corrective action in the form of rectifying the underpayments to the Complainants in full on or around 1 July 2013 (SOAF at 150).

(81) On 24 July 2013 the Applicant was provided with evidence that the First Respondent has taken steps, effective from 28 May 2013, to apply the Modern Award to its employees.

(82) …

Cooperation

(83) Where Respondents have co-operated and have made admissions early in the course of an investigation, or soon after the commencement of proceedings, it is appropriate to allow a discount of penalty (in the vicinity of up to 25-30%). In considering the application of penalty discount for cooperation, the statements of Stone and Buchanan JJ in Mornington Inn are apposite:

"... the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability: (a) has indicated an acceptance of wrongdoing and a suitable credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice."[19]

36. The Court notes that the FWO proposes a 20% discount. That is approved (supra).

(84) The Applicant submits that a discount of 20% on penalty is appropriate in this case, in recognition for the Respondents' early admissions and co-operation with the Applicant during the investigation, including by responding to a Notice to Produce Documents, and after the commencement of proceedings by entering into the SOAF. In so doing, the Respondents have saved the Court and the parties the resources and costs associated with a liability hearing in this matter. The Applicant has incorporated that discount into the proposed penalty ranges set out in Attachment B.

Ensuring compliance with minimum standards

(85) Compliance with minimum standards is an important consideration in the present case for the following reasons:

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

(a) *one of the stated principal objects of the WR Act and FW Act has been the preservation of an effective safety net for employee entitlements and effective enforcement mechanisms;*[20]

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

(c) *the substantial penalties set by the legislature for contraventions of the WR Act and FW Act reinforce the importance placed on compliance with minimum standards. This is particularly the case in a competitive service industry such as the security industry, in which employment costs are a significant aspect.*

(86) The prolonged and fundamental nature of the contraventions in the present proceedings demonstrates the Respondents' disregard for the First Respondent's statutory obligations and the need for penalties to be imposed on a meaningful level.

Deterrence

(87) It is well-established that the need for specific and general deterrence is a factor that is relevant to the imposition of a civil penalty.[21] *The Applicant notes the comments of Lander J in Ponzio v B & P Caelli Constructions Pty Ltd*[22] *(**Ponzio**), where his Honour said:*

> *"There are three purposes at least for imposing a penalty: punishment; deterrence; and rehabilitation. The punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment: R v Hunter (1984) 36 SASR 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. In*

[20] Section 3 of the WR Act and FW Act
[21] See for example, *Pangaea*, supra at [26]-[59].
[22] [2007] FCAFC 65; (2007) 158 FCR 543 at 559-60 (Lander J).

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

Specific deterrence

(88) The Applicant acknowledges that the (sic "First") Respondent has accepted responsibility for the contraventions identified by the Applicant and taken steps to rectify these contraventions. However the First Respondent continues to operate in the security industry and continues to employ security guards. Further, the Second and Third Respondents continue to operate the First Respondent's business.

(89) The (sic *'first and second'*) *Respondents, through the underpayment of employees have benefitted from their contraventions; which occurred in circumstances where the Respondents were on notice of their obligations. That previous interaction with the regulator clearly did not operate to deter them from contravening in relation to these Complainants.*

(90) In Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union[23] *Gray J observed:*

> *"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*

[23] (2008) 171 FCR 357 at [37].

like remorse and steps taken to ensure that no future breach will occur."

(91) The Applicant submits that the penalties in this case need to be imposed at a level sufficient to make the contravening conduct unprofitable and the prospect of any future contraventions commercially, and personally, undesirable.

General Deterrence

(92) The role of general deterrence in determining the appropriate penalty was illustrated by the comments of Lander J in Ponzio referred to above. Similarly in CPSU v Telstra Corporation Limited[24] *Finkelstein J said:*

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

(93) Employers should be in no doubt that they have a positive obligation to ensure compliance with the obligations they owe to their employees under the law. Recently, in Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2)[25] *Marshall J observed:*

> *It is important to ensure that the protections provided by the Act to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected."* [26]

(94) The contraventions in the current proceedings concern the removal of key employment entitlements by way of applying a flat rate of pay without the legislative protections of a no disadvantage or better off overall test, as applies under the FW Act (and did under the WR Act).

(95) The security industry is highly competitive and there is an industry practice of paying flat hourly rates of pay above the

[24] (2001) 108 IR 228 at 231.
[25] [2012] FCA 557.
[26] *Ibid* at [29].

minimum in the award but that fails to compensate for penalties, overtime, shift and other loadings.[27] *There is a need for general deterrence in the security industry and to send a message to all employers that tough penalties will apply if they contravene the workplace laws.*

(96) As was noted by Magistrate Hawkins in Fair Work Ombudsman v Specialist Security Management Pty Ltd and Specialist Australian Security Group Pty Ltd and Peter Alan Kilfoyle[28]*:*

> *"In an industry where non-compliance with minimum entitlements can bring a significant competitive advantage over the larger, more visible players, there existed a strong motive for adopting a payment structure in the way the Defendants did in this case."*

(97) The Applicant submits that for these reasons general deterrence is important in the present case and the Court should mark its disapproval of the Respondents' conduct and set a penalty which serves as a very real warning to others.[29]

RECOMMENDATIONS AS TO PENALTY

(98) The determination of the correct penalty to be imposed on the respondent is ultimately a matter for the Court.[30]

(99) The Applicant recommends aggregate penalties be imposed on the Respondents for the contraventions within the following ranges:

(a) First Respondent: $110,880 - $132,000;

(b) Second Respondent: $22,176 - $26,400; and

(c) Third Respondent: $14,652 - $18,216.

The calculations of these penalty amounts are set out in the table in Attachment B and take into consideration the discount of 20% as outlined in paragraph 84 above.

---

[27] Annexure SH-4 to the Affidavit of Sam Hills at page 13.
[28] [2009] VMC 46 (26 August 2009) at [79].
[29] See paragraph [25] of *Kelly*, supra, and the cases cited therein.
[30] *Merringtons* at [91] per Buchanan J.

(100)The Applicant has reached these penalties after taking the following factors into consideration:

(a) the significant underpayment for only four employees;

(b) the prior (sic 'non-compliance') compliance history of the First Respondent, and the involvement of both the Second and Third Respondents in the prior investigation;

(c) the First Respondent's access to professional advice and failure to obtain, or implement, such advice;

(d) grouping of the different entitlements to ensure the Respondents will not be punished more than once for each contravention and the penalty is an appropriate response to the conduct;

(e) the need for specific deterrence as the First Respondent continues to trade and employ security guards; and

(f) the need for general deterrence in the security industry.

(101)The penalty ranges sought for individual contraventions reflect either the monetary impact of that contravention as part of the overall underpayment, or the relative seriousness of the contravention on maintaining minimum standards.

(102)By way of example, it is well known among the community that employees reliant on the safety net of wages and entitlements are paid higher rates of pay for work that is overtime, performed late at night, on weekends or on public holidays. If an employer was able to substitute their own determined flat rate of pay for all hours of work, without such rate being subject to a test of better off overall or no disadvantage (such as applies to enterprise agreements approved by the Fair Work Commission), this undermines the community's expectation and confidence that one business does not obtain an unfair advantage over other businesses that do comply with awards, or that put in place lawful arrangements for flat rates of pay that are subject to rigorous statutory processes including employee approval and approval by the regulator.

(103)In respect of the annual leave contravention, the Applicant submits that the penalty range sought is appropriate in light of the evidence that the Respondents were specifically advised that it applied to casual employees and appear to have completely ignored this and made no attempt to comply with the obligation.

Totality

(104)Having fixed an appropriate penalty for each 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, and is not oppressive or crushing.[31]

(105)The Applicant submits that whilst the penalty imposed must not be crushing or oppressive, it must nevertheless bear relativity to the seriousness of the conduct engaged in by the Respondents[32]*.*

(106)The Applicant further submits that imposing an aggregate penalty on each Respondent within the range proposed in paragraph 99 above would be an appropriate response to the contraventions in this matter.

37. Section 191 of the *Evidence Act 1995*, provides:

(1) In this section:

"agreed fact" *means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.*

(2) In a proceeding:

(a) evidence is not required to prove the existence of an agreed fact; and

(b) evidence may not be adduced to contradict or qualify an agreed fact;

unless the court gives leave

(3) Subsection (2) does not apply unless the agreed fact:

[31] see *Kelly*, supra at [30]; *Merringtons*, supra at [23] per Gray J, [71] per Graham J, [102] per Buchanan J
[32] See also: *Fair Work Ombudsman v Promoting U Pty Ltd & Anor* [2012] FMCA 58.

(a) is stated in an agreement in writing signed by the parties or by Australian legal practitioners, legal counsel or prosecutors representing the parties and adduced in evidence in the proceeding; or

(b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.

The Respondents Submissions on Penalty

Deliberateness

38. The respondents submit that the breaches were not deliberate.

39. The respondents had an AWA approved which they thought could be applied to all employees RGPL. Ignorance of the law is no excuse, however the existence of the AWA provides for a rational argument that the respondents thought they were doing the right thing. The third respondent SG gave evidence that she regarded the AWA as the applicable award – when pointing to it in the witness box she said *"that is the award"*. The Court is willing to take that view into account in assessing penalty; not because of the ignorance it demonstrates, but to show a lack of malice.

40. The applicant objects (post) to the respondents seeking to contradict or qualify agreed facts. The Court does not give leave to adduce evidence to contradict or quantify an agreed fact (s.191(2)(b)), therefore submissions based on contradictions of agreed facts will be rejected.

41. The Court refers to the submissions of the respondents filed 1 November 2013 as follows:

(4) By mid-2004 the business had a grown to 7 employees. At that time, Ross instructed an employee of the business the liaise with the Australian Government Office of the Employment Advocate to set up an Australian Workplace Agreement ("the AWA") WITH ITS EMPLOYEES An example agreement. Number A301332471 and approved by the then Office of the Employment Advocate (OEA) on 5 March 2005, see Attachment 1.

(a) The AWA included provision for the business to pay employees a loaded rate.

The loaded rate is defined in the AWA on page 12 as follows:

"Loaded rate is defined as a minimum hourly wage rate that incorporates the ordinary rate (as defined above) plus payment for annual leave, personal leave entitlement allowances. Any annual leave or personal leave accrued and taken under this Agreement shall be unpaid at the time of taking such leave. This rate will be paid for all hours worked between Mon-Sun up to 38 hours."

(b) The AWA also provided in clause 7.2 that overtime is payable where an employee is directed to work additional hours. However, overtime is not payable where an employee volunteers to work additional hours.

(c) The terms of the AWA, including the loaded rate, were used by the business to govern all employee conditions from then on.

(5) In early 2008, the Third Respondent, Sherie Geri nee Fishman, was employed by the business as an administrative assistant. Her role mainly involved assisting Ross with the administration of the business including paying bills, setting up invoices, preparing quotes and banking. Sherie had no prior business experience.

(6) Following the resignation of the employee who over saw the implementation of the AWAs, Sherie assumed this responsibility. Sheire applied the AWA in the erroneous assumption that as the AWA had received formal approval from the OEA, is could apply in respect of all the employees and did not need to be filed with the OEC on each occasion. Sherie's misunderstanding was based on her interpretation of the AWA'S status as a 'framework agreement' (see the explanation at page (i) of the attached example AWA).

(7) In September 2008, the business was contacted by the Workplace Ombudsman in relation to a complaint by a former employee, Mr Robin Sharda ("Sharda Complaint"). Details of this matter are included in paragraphs 109 to 122 of the Statement of Agreed

Facts. The Respondents fully cooperated with the Sharda Complaint.

(8) The Respondents concluded from the Sharda Complaint that the reason for the underpayments was because, unlike the other employees, Mr Sharda only worked weekends and that the loaded rate in the AWA was calculated based on rotating shifts between Monday and Sunday. The Respondents believed that if they distributed shifts throughout the week, the loaded rate in the AWA would be sufficient to cover the other employees' full entitlements.

(9) In or around January 2010 and again in June 2010 the Respondents sought advice from the Fair Work Ombudsman ("FWO") via the Fair Work Infoline in relation to the applicable rates of pay for its employees. On each occasion, the FWO advised the Respondents that its loaded rates were above the minimum hourly rates set out in the modern award, and as long as this continued to be the case the Respondents would remain in compliance with its minimum obligations under the modern award.

(10) In order to ensure that the loaded rates at all times remained well above the minimum hourly rates under the modern award, the Respondents increased the loaded rates in November 2010 and August 2011.

(11) In September 2011 the Respondents were contracted (sic *'contacted'*) *by the FWO in relation to claims by another former employee, Mr Wells, of underpayments ("Wells Complaint"). Details of the Wells Complaint are included in paragraphs 124 to 127 of the Statement of Agreed Facts. After investigating the Wells Complaint, the FWO concluded that Mr Wells had not been financially disadvantaged by receiving the loaded rate from the Respondents.*

(12) In January 2012 the FWO contacted the Respondents regarding the investigation of the underpayments of the first of the Complainants in these proceedings.

(13) Upon notice of the complaints, the Respondents consulted their accountant, Chris Harrington, and did their own investigations as to whether the further complaints were valid.

(14) In or around March 2012 the Respondents contacted the FWO via the Fair Work Infoline regarding the applicable rates of pay. The Respondents were advised that its flat rates of pay were well above the applicable minimum hourly rates under the modern award. Consistent with its conversations with the FWO in January 2010 and June 2010, the Respondents were not advised that that overtime should be paid in addition to the loaded rate of pay, or that the loaded rate was insufficient to cover the employees' overtime.

(15) In or around mid-2012 the Respondents instructed Hall & Wilcox Lawyers to investigate the claims. Hall & Wilcox advised that he (sic *'the'*) *loaded rate being paid by the Respondents was insufficient to cover the minimum obligations under the modern award. Hall & Wilcox billed the Respondents $28,923.40 for their investigation and advice.*

(16) On 25 September 2013 Hall & Wilcox sent a a letter to the FWO on behalf of the Respondents offering to repay the underpayments over a 24 month period on a without prejudice basis….

(17) During 2012 the Respondents also prepared an negotiated an enterprise agreement with its employees. The enterprise agreement was approved by the employees and the Respondents lodged it with Fair Work Australia ("FWA") for approval, however the enterprise agreement was not approved. The Respondents then made further applications to have the enterprise agreement approved, but it was rejected by FWA on each occasion. When the Respondents called FWA for assistance as to why the enterprise agreement was rejected and what was required for approval, FWA would only advise that they would have to re-submit the enterprise agreement.

(18) On 7 May 2013 the Respondents. Through their accountant, Chris Harrington, advised the FWO that they intended to rectify the underpayments.

(19) On 10 May 2013 the Applicant filed a Statement of Claim with the Federal Circuit Court.

(20) On 20 May 2013, following a media released by the FWO, an article was published in the Bendigo Advertiser including details of allegations. No comment was sought by the Advertiser from the Respondents…..

(21) Following the article in the Advertiser, 13 other employee complaints of underpayments have been made to the FWO an (sic *'and'*) *one complaint made directly to he* (sic *'the'*) *Respondents. The article also caused the Respondents reputational damage and the business has since been having trouble securing work,*

(22) As from the pay period 27 May 2013 to 9 June 2013, the company put all employees onto the Federal Award.

(23) On 1 July 2013 the Respondents rectified the underpayments of the Complainants in this matter.

(24) Since 12 August 2013 the Respondents and their accountant, Mr Harrington, have been working with the FWO to try to calculate the amount of the underpayments owed to the other staff and former staff of the business. This amount is yet to be calculated but is expected to be substantial.

(25) On 6 September 2013 the Respondents sought approval from the Applicant to have the matter adjourned to allow time for the other employee underpayments to be calculated. This request was denied by the Applicant…

(26) …

(27) …

Circumstances in which conduct took place and Nature and Extent Of Conduct

(28) The Respondents submit that prior to receiving legal advice from Hall & Wilcox Lawyers in September 2012, it was not evident that the Respondents were underpaying their employees.

(29) Both the Sharda Complaint in 2008 and the Wells Complaint in 2011 discussed above proved inconclusive as to whether the Respondents were underpaying their employees. The Sharda Complaint indicated that the adjustments needed to be made to the roster system and the Wells Complaint indicated that the loaded rate was acceptable. The Respondents proceeded in good faith in the belief that they were satisfying their legal obligations towards the employees.

Nature and Extent of the Loss

(30) The Respondents did not benefit from the underpayments.

The Court rejects this submission. The underpayments gave RGPL a competitive advantage, which RG benefited from.

> *…The Respondents' fee structure was based on what they thought was the correct salary range. This meant that what they charged their clients was less than what they should have been charging them.*

(31) …

(32) In June 2013, as a consequence of this proceeding, the company ensured that its payments to employees were strictly in accordance with the terms of the federal award. Since then, the company has been trading at a loss. Attachment 5 shows the Profit and Loss Statement for the business from July 2013 through September 2013 showing a net loss for the period of $383,496.46.

(33) The Respondents did not intend to deprive the Complainants of their entitlements. It has taken considerable time and expense to calculate the actual underpayments owing. Once the correct figures were finalised, the Respondents made arrangements as fast as possible to rectify the underpayments.

Size and Financial Circumstances

(34) The Respondents is a relatively small, family owned and operated business in a regional town that currently employs 23 casual staff. The consequences of these proceedings are likely to affect the on-

going financial viability of the business, This will affect both the livelihoods of the Ross and Sherie as well as all their employees.

(35) …

(a) Both the properties owned by Sherie referred to in paragraph 61 of the Applicant's Submission are heavily mortgaged. One property is their residential home and the other is used by her 18 year-old autistic child. Attachment 6 is bank statements for the mortgages of Sherie's properties which show current mortgages of $425,150 and $162,313 owing on the properties.

(b) The company referred to in paragraph 61 of the Applicant's Submission is a non-trading trust company set up by their accountant for a family trust.

(c) Ross and Sherie also have personal credit card debt of over $30,000. Attachment 7 is bank statements for Ross and Sherie's credit cards.

(36) There are currently 14 allegations of underpayments being calculated. The amount of these underpayments is expected to be substantial. The Respondents requested consent from the Applicant to have the matter adjourned to allow the figures to be calculated, however this request was denied.

Deliberateness of the Breaches

(37) The Respondents never intended to underpay their employees.

The Court finds that the underpayments were, at least, negligent.

(38) Prior to the conclusive findings of these proceedings, the Respondents believed that they were satisfying their minimum employee entitlements by paying the loaded rate provided in the AWA.

The Court rejects that submission. The respondents were aware of the breaches on 2 December 2008. The SOAF was entered into on 24 July 2014.

(39) Both the Second and Third Respondents worked full time in the business as security guards as well as running the business. These matters are extremely complicated and time consuming and the Respondents have exerted considerable effort in trying to make it right. It has been a difficult process that the Respondents have done their best to resolve as quickly as possible.

Involvement of Senior Management

(40) The Second Respondent, Ross, accepts full responsibility for management and control of the business. It is however, somewhat artificial in a business of this size to consider the involvement of senior management as an aggravating factor – with a large corporation it may be relevant to inquire about the extent of involvement of senior managers, but in a small business where the corporate entity is effectively the alter ego of the director, the issue is of limited significance.

The Court rejects this submission. In a business like this, one senior management is more likely to have direct knowledge of, and involvement in, contraventions.

(41) The Third Respondent, Sherie, was employed in the business in 2008 as an administrative assistant. Sherie was married to Ross in 2010 and assists Ross with the administration of the business.

Contrition, Corrective action, Cooperation with authorities

…

(43) The Respondents have rectified all underpayments for the Complainants in this matter.

(44) …

Cooperation

(45) The Respondents have been highly cooperative with FWO and at all times tried to resolve this issue in a fair and equitable manner.

(46) The Respondents have provided information when requested, including timesheets and payslips showing hourly rates,

superannuation and taxes and financial statements for the business.

(47) The Respondents have also cooperated at every step in having the proceedings resolved by consent.

(48) …

Consequences of Proceedings

(49) The Respondents have already been greatly burdened by this whole experience including financial costs, reputational damage and emotional strain.

The Court notes that the respondents have brought these repercussions onto themselves.

Financial costs

(50) …

(51) As well as the underpayments, the Respondents will incur more than $50,000 in legal and accounting fees in trying to sort this matter out.

(a) The Respondents were previously presented by Hall & Wilcox Lawyers who billed $28,923.40 to review this matter and provide advice.

42. The respondents complain of costs incurred as a result of the proceedings.

43. The Court refers to and applies the judgment in *Fair Work Ombudsman v Ghorbani-Palangi* [2014] FCCA 447, where the following submissions of the applicant were accepted at [39]:

> *"66. The mere fact of the Respondent having incurred costs related to these proceedings ought be of no relevance to the question of penalty. The incurring of some level of legal costs is an inevitable consequence of a respondent choosing (as most will) to obtain legal advice or representation in connection with proceedings brought under the FW Act.*

67. The Applicant submits that it is reasonable and open to the Court to infer that, in setting the maximum penalties applying to contraventions of civil remedy provisions of the FW Act, Parliament would have contemplated that a person facing such a penalty would also be likely to have incurred some level of legal costs, particularly when Parliament has given consideration to how costs would be dealt with in section 570 of the FW Act.

68. To allow a discount on penalty on account of the mere fact of having incurred some costs would in effect to reduce the applicable maximum penalties that have been judged by Parliament to be appropriate.

69. The Applicant further highlights that the Respondent, in his Penalty Submissions, has made only a bare assertion to the effect that costs he has purportedly incurred have had a deterrent impact. The Respondent has provided no evidence regarding the quantum or basis on which costs were incurred, or any other details regarding the costs referred to. The Respondent has also not provided any evidence to support his assertion that specific deterrence has been achieved. As such, the Applicant submits that there is no basis for the Court to make any findings regarding the impact of the Respondent's costs in this matter.

70. Moreover, the Applicant notes that section 570 of the FW Act provides that a party to proceedings in a court exercising jurisdiction under the FW Act may only recover its legal costs in limited circumstances, including where such costs have been incurred by reason of the other party's unreasonable act or omission[33].

71. Having regard to section 570 of the FW Act, the Applicant submits that:

> *(a) there is a clear legislative intention that the jurisdiction be "no costs" unless the very high threshold in subsection 570(2) has been satisfied; and*
>
> *(b) legal costs that arise as an ordinary incidence of litigation conducted in a reasonable manner are to be borne by the Respondents, such costs also being the inevitable result of a respondent being prosecuted for having contravened Commonwealth workplace laws.*

[33] *The threshold set by subsection 570(2) of the FW Act is high, in that the Court's discretion to award costs should only be exercised in a clear case: Saxena v PPF Asset Management Ltd [2011] FCA 395, at [5]-[6]: Construction, Forestry, Mining and Energy Union and Others v Clark 170 FCR 574 at [29].*

72. To obtain a discount on penalty by reason of costs incurred would, in the Applicant's submission, be to circumvent the intention of the legislation that:

(a) the jurisdiction be primarily a "no-costs" jurisdiction; and

(b) a party may only recover its costs where the high threshold set by subsection 570(2) has been satisfied.

73. Further, the consideration of costs as a measure of deterrence would operate to the benefit of those respondents with the means to obtain legal representation, and is not a factor with general application in respect of penalty.

74. The Applicant also submits that any "inconvenience" or "stress" suffered by the Respondent as a result of these proceedings is not relevant in mitigating the penalty to be imposed and are "inevitable consequences" to the Respondent's conduct with respect to his involvement in the Admitted Contraventions.

44. The Court applies that decision.

45. The respondents submit further:

Reputational damage

(52) Following a media release issued by FWO, an article was published in the Bendigo Advertiser on Monday 20 May 2013…. The Bendigo Advertiser is the major newspaper for the region and is widely read. This article has caused the Respondents significant and ongoing personal and business reputational damage.

(53) Being based in a regional town, the on-going consequences of an article like this are more acutely felt than would be in the city. Since the article, the Respondents have not been able to secure any new contracts and have even lost some work due to clients going to larger security companies.

(54) The media release was disappointing for the Respondents given they were doing their best to cooperate with the FWO to have the matter resolved.

(55) The reputational damage also extends to within the business where the strained of these proceedings has permeated through the company.

(56) It is clear on the authorities that this reputational damage is able to be taken into account in the assessment of any penalties. As stated by Smithers J in Eva v Southern Motors Box Hill Pty Ltd (1977) 30 FLR 213, AT 222:

> *66. In assessing appropriate punishment for a crime the court is required to have in mind not only the nature and extent of the offence itself but also a wide variety of associated circumstances. Such circumstances constitute a context in which to view the penalty. Adverse publicity is often one of the inevitable consequences of wrongdoing and in most cases s without influence in the assessment of the appropriate penalty.*
>
> *67. But adverse publicity initiated by the prosecuting authority itself requires special consideration. If the matter is publicized ahead of the trial, and widely, and in terms likely to induce public censure of the parties which from a practical point of view may have the effect of effectuating a cumulative punishment.*

(57) The press release identified the Respondents by names and location. Whilst the press release cannot be subject to the criticism made in Fair Work Ombudsman v New Image Photographics Pty Ltd (No.2) [2013] FCCA 209 at [45] and Fair Work Ombudsman v Revolution Martial Arts Pty Ltd & Anor [2013] FMCA 125 at [49], the embarrassment caused by the publicity courted by the Applicant is a legitimate factor to be taken into account in reduction of penalty (see Fair Work Ombudsman v Cleaners New South Wales Pty Ltd [2009] FMCA 683 at [25] and Fair Work Ombudsman v Revolution Martial Arts Pty Ltd & Anor [2013] FMCA 125 at [51].

46. As to media coverage, the Court refers to the decision of *Fair Work Ombudsman v Mildura Battery Company Pty Ltd & Anor* [2014] FCCA 192, and finds as follows:

62. The respondents complain about media coverage of their breaches in the Sunraysia Daily on 17 June 2013. The Court accepts the applicant's submissions as follows:

> *"124. …the embarrassment suffered as a result of the publicity flowing from enforcement action is one of the prices to pay, or an 'inevitable consequence' of the Respondent's conduct and is therefore not relevant in mitigating the penalty to be imposed.*
>
> *125. …In Fair Work Ombudsman v Cleaners NSW Pty Ltd [2009] FMCA 683, Federal Magistrate Driver (as he then was) stated at [25]:*
>
> > *"…I do not accept the criticisms made by the company of the Fair Work Ombudsman's litigation policy. Actions taken by the Fair Work Ombudsman to enforce compliance with the Workplace Regulations Act are taken in part to create publicity in order to achieve a normative effect upon the behaviour of employers. That is appropriate. That publicity is no doubt an embarrassment to the company and that embarrassment is a penalty in itself. The bringing of proceedings in the court, and the publicity attending those proceedings, are part of a general process for deterring contraventions of the Workplace Relations Act."*
>
> *126. The authorities also indicate that generally the impact of media coverage will only operate to mitigate penalty where the effect of the media coverage has been 'adverse'. The meaning of 'adverse', discussed by the Federal Court in the matter of Eva v Southern Motors Box Hill Pty Ltd 30 FLR 213 (Eva) at 222-223 has been widely adopted by subsequent courts in considering the impact of publicity on civil penalties sought by regulators.*
>
> *127. In Eva, Justice Smithers noted that publicity of such proceedings may be justified, but stated that as 'defendants are regarded as innocent until the contrary is proved, appropriate restraint in tone and content is required.' His Honour further said 'adverse publicity is often one of the inevitable consequences of wrongdoing and in most cases is without influence in the assessment of the appropriate penalty. But adverse publicity initiated by the prosecuting authority itself requires special consideration.*

…

129. The Courts' approach to potential 'adverse' publicity, as a consequence of media releases issued by regulators, is well summarised in the decision of Hansen J in Cousins v Merringtons Pty Ltd (No 2) [2008] VSC 340 (Cousins) at 59-65.

130. At paragraphs [60] – [62] of Cousins, Hansen J cited and adopted a line of authority (including Eva) regarding the relevance of adverse publicity, and stated at [61] that:

> *"The above cases indicated that 'adverse' means unfair or incorrect reporting. They recognise that a prosecutor may issue a media release concerning a case but where that occurs before the trial 'appropriate restraint in tone and content is required' to avoid the defendants suffering damage that would not have occurred had the media release been fair and accurate. Subject to that a reasonably worded, accurate news release serves a useful purpose; without it the media is left to make their own inquiries and compile their own summaries, which carries a risk of inaccuracy.'*

131. Hansen J found there was no unfairness or inaccuracy in the press releases issued in respect of that matter and they 'were appropriate to be published pursuant to the statutory function of informing people of fair trading issues and alerting the media in succinct terms to the commencement of the case and decision on liability"[63].

132. Hansen J further stated, at [65-66] that:

> *"[65] It is also to be borne in mind that publicity of the type complained of is foreseeable as the consequence of conduct such as that engaged in by the defendants. In truth the defendants are the authors of their own misfortune. That* (sic *'they'*) *engaged in the offending conduct and then thumbed their nose at the attempts of the plaintiff to resolve the problems without resort to litigation.*
>
> *[66] In my opinion, also, no reasonable complaint could be made of the newspaper articles, including the industry paper. It was not alleged that they, or indeed the press releases, suffered from any particular*

unfairness or inaccuracy or misleading element. Rather, the submission was that taken together they constituted adverse publicity which ought to be taken account of as a factor mitigating against the grant of relief as the Court may otherwise consider just in the circumstances. I reject the submission. In my view the publicity referred to was the mere and foreseeable consequence of the conduct engaged in. Were it otherwise, the fact of publicity of relevant matters by the moving party in the litigation or the media generally, might have the effect of limiting the exercise of statutory power conferred for the protection of the public.'

133. The Applicant submits that the information released in this matter was fair, accurate, presented the same type of information as releases in relation to the other litigations by the Applicant, and hence was not in any way 'adverse' as contemplated by the Courts.

47. The Court applies that decision and finds that the information in the media release was fair, accurate and not adverse.

48. The respondents submissions continue:

Emotional Strain

(62) The Respondents have been overwhelmed with the emotional toll this matter has placed on them. While still trying to keep the business going, often working 7 days a week, they have had to deal with the pressure of impending legal proceedings and the threat of penalties.

(63) The matter has also thrown into question the on-going viability of the business and the Respondents' livelihood. There are also the staff that the Respondents feel responsible for and want to ensure their jobs are secure. This has caused the Respondents considerable distress including one of the Respondents being treated for depression.

(64) Below is a section of an email from Ross about how this matter has affected him:

> *"Working 7 days a week can be stressful as it is having limited time to spend with family. But the ongoing emotional toll trying to get through the unknown of the Fair Work case has been unbearable at time. It has caused a wedge in my marriage, I'm often unable to spend quality time with my son due to the fact that I need to work 24 hour shift just to get some money back into this business to pay my liabilities. And the insecurity of the ongoing viability of my business causes me so much stress that I am often unable to sleep and I no longer feel relaxed even when I am not working it is always playing on my mind. Shocked how I could have got it wrong, confusion trying to resolve it, embarrassment facing my clients and my employees."*

49. The Court finds that, similar to costs, these consequences are an inevitable result of proceedings under the FW Act, and are of no relevance to the question of penalty.

Applicants written Reply on Penalty filed 18 December 2013

50. The Court refers to the following submissions:

> *(4) By way of general observation, the Applicant submits that having admitted to the facts, contraventions and their respective involvement in those matters, the Respondents in their Submission and affidavits are now attempting to recast, dismiss and traverse the evidence before the Court in the SOAF and First Hills Affidavit.*
>
> *(5) In particular the Respondents' evidence and submission purports to contradict or qualify:*
>
> *(a) the admitted fact that on 2 December 2008 both the Second and Third Respondents were made aware of the application of the pre-modern award and that any Australian Workplace Agreement (**AWA**) would only apply to an employee if it was signed and lodged with the Workplace Authority;[34] and*
>
> *(b) the admitted fact that on 13 February 2009 the First and Second Respondents were issued with a breach notice confirming the application of the pre-modern award,*

[34] SOAF at 112; First Hills Affidavit Annexure SH-1

identifying contraventions of the same provisions of the pre-modern award as are subject to the current proceeding and the requirement to take immediate action to meet the requirements of the pre-modern award and legislation for all employees.[35]

The Applicant objects to paragraphs 5, 6 and 15 of the Respondent Submission on this basis.

(6) The Second and Third Respondents now try to claim the Third Respondent was no more than an Administration Assistant.[36] *This is incorrect; she was and is the Administration Manager.*[37] *The Applicant submits that the Third Respondent cannot rely on the material in paragraphs 1 and 10 of her Affidavit as to her belief that she is an Administration Assistant and was "unfairly targeted" because she is married to the Second Respondent. She has admitted to the nature of her role and functions in the business, her knowledge and her involvement in all of the contraventions*[38]*. She cannot now resile from that in order to mitigate a penalty being imposed on her. The Applicant refers to and repeats paragraphs 73 to 75 of the First Submission.*

51. The Court refers further to the objections (supra):

52. The Court refers to the following further submissions in reply:

*(7) The Respondents also seek to rely on the alleged lodgement of an enterprise agreement as relevant to penalty, it appears as evidence that they allegedly tried to formalise a lawful mechanism for payment of a flat rate of pay. The Second and Third Respondents both depose to the lodgement of an enterprise agreement with Fair Work Australia (now the Fair Work Commission) (**FWC**) on multiple occasions. Neither Respondent produced the enterprise agreement purportedly approved by employees and containing rates of pay. No copies of any supporting documentation have been provided.*[39] *The Applicant*

[35] SOAF at 118; Further Hills Affidavit Annexure SH-9
[36] Mr Geri Affidavit at 8; Mrs Geri Affidavit at 1 and 10.
[37] Further Hills Affidavit at 13-14.
[38] SOAF at 11.
[39] For example an Application (Form F16) and Statutory Declaration of the Employer (Form F17).

has put evidence before the Court that directly contradicts the evidence of the Respondents. It made inquiries with the FWC which confirmed no application was made to it.[40]

53. The Court finds that an unsigned Enterprise Agreement was sent to the Fair Work Commission (Exhibit R1) but was not *"taken to have been filed"* (Exhibit R1 p.6).

54. The FWO, continues and the Court accepts the following submissions:

(8) Further, notwithstanding the Applicant's intervention in 2011 and seeking legal advice in September 2012 from their former lawyers Hall & Wilcox[41]*, the First Respondent did not start correctly applying the minimum entitlements in the Security Services Industry Award 2010 (**Modern Award**) until 27 May 2013. Notably this was after the proceedings were commenced by the Applicant and the Respondents had been invited to demonstrate what corrective action had been taken.*

(9) The Applicant submits that at the heart of this case is that the Respondents took no action to ensure compliance with the applicable instruments or to lawfully implement an arrangement for payment of a flat rate of pay in circumstances where they knew:

(a) the Modern Award applied to them;

(b) the regulator had determined they were not compliant;

(c) there were other forms of industrial instruments available that needed to satisfy statutory tests in order to be applicable to them; and

(d) they had qualified workplace relations advisors.

The conduct of the Respondents resulted in the Admitted Contraventions continuing to occur until the intervention of the Applicant in this matter. They demonstrated a wilful and ongoing

[40] Baillie Affidavit Annexure CB-4, CB-5.
[41] Mr Geri Affidavit at 17.

disregard for their legal obligations. It may be inferred that this conduct would have continued but for the Applicant's actions.

…

(14) In any event the Applicant notes that parties cannot contract out of a statutory obligation other than to confer additional benefits, and an estoppel cannot defeat a statutory guarantee.[42] *The Courts have stated that principles of equitable estoppels do not operate against employees in relation to rights and benefits conferred on them under awards and industrial legislation.*[43]

…

(17) Whilst the Respondents have accepted wrongdoing and have facilitated the efficient conduct of this matter by way of admitting liability and entering into the SOAF, this ought to be weighed against the following relevant facts:

(a) Rectification of the underpayments did not occur until after being advised that the Applicant intended to commence proceedings in May 2013, despite being aware that underpayments had occurred as of July 2012 and seeking legal advice from workplace relations lawyers in or around August 2012.[44]

(b) No suitable and credible expression of contrition has been given by any of the Respondents. No apologies were, or have been, offered to the affected individuals. Whilst the Applicant accepts the Respondents may regret the contraventions, they have not expressed genuine contrition but rather have sought to provide excuses, some of which are not open on the evidence. The Applicant submits that

---

[42] *Williams v Macmahon Mining Services Pty Ltd* [2009] FMCA 511 citing *McLennan v Surveillance Australia Pty Ltd* (2005) 142 FCR 105; *Regional Express Holdings Ltd v Clarke* (2007) 165 IR 251; [2007] FCA 957*; Givoni; Metropolitan Health Service Board v Australian Nursing Federation* (2000) 99 FCR 95; [2000] FCA 784.
[43] *CEPU of Australia v CJ Manfield Pty Ltd* [2011] FMCA 374 citing *Metropolitan Health Service Board* (2000) 99 FCR 95 at 104-106 per French J*;* [2000] FCA 784 FCR at paras 20-22 per French J and *Givoni* at 256-259 per Goldberg J.
[44] SOAF 134-135, 144; Mr Geri Affidavit at 17**.**

the evidence is more consistent with a reaction to being caught than any genuine contrition for what occurred.[45]

…

(21) The Applicant submits there is a great deal of utility in imposing a penalty against the Third Respondent for the reasons set out in paragraph 6 above. The Applicant has recommended a lower penalty range against the Third Respondent to recognise that she was not the ultimate decision maker. It submits that specific deterrence is needed as well as general deterrence; to show that persons who are not office holders but who have responsibility in a business for, and play an active role in dealing with, compliance with workplace laws are not immune from being held accountable. This is particularly pertinent in light of the Third Respondent's culpability arising from her role in the business and her previous contact with the regulator, which warrants a penalty encompassing specific and general deterrence.

Financial Position

First Respondent

(22) Mr Harrington, the Accountant for the First Respondent, deposes to a business loss in the period from July 2013 to September 2013.[46] *Mr Harrington states that the loss is "largely due to an increase in expenses" and goes on to say that it is on the basis of this current assessment of the financial position of the business, that the penalties sought by the Applicant will be oppressive and threaten the ongoing viability of the business.*[47]

(23) The Applicant submits the Court should not accept this evidence. Detailed Profit and Loss Statements for the financial years ending 30 June 2012 and 30 June 2013 are annexed as CB-1 and CB-3 (to the Affidavit of Caitlin Baillee filed 10 December 2013)*. These statements, prepared by Mr Harrington, show the following for the three year period immediately preceding the the* (sic) *period from July 2013 to September 2013:*

[45] *Fair Work Ombudsman v Lay Brothers (Wholesale) Pty Ltd* [2013] FCCA 2015 at [52].
[46] Harrington Affidavit at 8.
[47] Harrington Affidavit at 10.

	Financial Year 2010/11	***Financial Year 2011/12***	***Financial Year 2012/13***
Total Income	*$1,575,049.26*	*$1,835,771.03*	*$2,220,831.02*
Profit before tax	*$122,920.50*	*$150,884.64*	*$206,566.89*
Dividends Paid to Ross Geri	*$65,000.00*	*$106,000.00*	*$220,000.00*
Retained Earnings (after dividend paid)	*$559,568.00*	*$578,373.94*	*$520,400.73*
Net Assets	*$559,578.00*	*$578,383.94*	*$520,410.73*

(24) The Profit and Loss Statement annexed at CH-2 of the Harrington Affidavit records a total income of $553,836.08 in the three months from July to September 2013. If income remains at a similar level, the Applicant submits that the First Respondent will actually earn income in excess of $2.2M in the current financial year.

55. The Court has checked the source of these figures and notes that there was no detailed cross examination of Mr Harrington about the figures. The Court is not in a position to reject or accept the profit forecast, but notes that the business is profitable.

56. The FWO continues:

(26) The Applicant submits that the evidence of Mr Harrington is attempting to paint a poor financial picture that is does not accurately reflect the First Respondents' true financial position. On this basis the Court should give claims of financial difficulty no weight.

Second and Third Respondents

(27) Various assertions are made about the financial capacity of the Second and Third Respondents to pay any penalty. The Applicant

submits that these claims are not properly supported by evidence and should be given no weight. For example:

(a) both the Second and Third Respondents depose to debts; the Third Respondent to having a personal debt of $30,000 and the Second Respondent of $10,000.00. However neither Respondent have provided any particulars or proof of the debts…; and

(b) whilst the Third Respondent also deposes to mortgages over the two properties owned by her, alleged to be worth $500,000 and $425,000 respectively, even assuming this is accurate, on her own evidence the Third Respondent has over $337,000.00 equity in one of the properties.[48]

(28) The Second and Third Respondents have been selective in the information provided to the Court; neither the Second Respondent nor Third Respondent has provided the Court with any evidence of their other assets, available funds or sources of income, nor any information as to their living expenses except for the above debts. The Applicant submits that the Court can infer that this would not have assisted them.

(29) In this regard the Applicant notes that there is some evidence before the Court of income paid to the Second and Third Respondents. The 2012 Tax Return for the First Respondent annexed as Annexure CB-2 of the Baillie Affidavit, shows at page 8 payment of wages to the Second Respondent of $84,292.00 and $78,000.00 to the Third Respondent in the financial year ending 30 June 2012. The Second Respondent was also the recipient of a fully franked dividend of $106,000.00. This represents a combined total income of $268,292.00 paid to the Second and Third Respondents in one financial year.

(30) The Third Respondent has deposed that the entity of which she is the sole shareholder is a "non-trading trust company" with no assets. However as shown in the material annexed at Annexure CB-6 of the Baillie Affidavit, Sherie Ross Pty Ltd took over the

[48] Mrs Geri Affidavit at 6.

business name of the First Respondent in late 2012. Registration of a business name is indicative of carrying on business or trade.

Conclusion on financial position

(31) The Applicant submits that on the evidence before the Court there is no basis for a suggestion that any of the Respondents would be unable to meet penalties in the ranges proposed by the Applicant, and that in fact, the evidence suggests there is capacity to pay.

(32) In any event, even if the Court had evidence before it as to financial difficulty this should not deter the Court from imposing a penalty that is otherwise appropriate.[49]

(33) The Applicant also refers to and repeats the principles set out in paragraph 62 to 64 of the First Submission.

57. The Court further refers to the applicants submission on penalty at [62] to [64] (supra).

58. The Court accepts that the financial position of each respondent does not show that the penalties sought by the FWO would be oppressive.

59. The Court accepts the following submissions by the FWO:

(47) In relation to the costs of rectifying additional underpayments not subject to these proceedings, the Applicant submits that this would be to reward the Respondents for doing no more than meeting their lawful obligations. It is not a relevant factor as to whether the penalty to be imposed in this case is a meaningful response to the contravening conduct admitted in these proceedings.

…

Impact of Proceedings

(50) The Applicant submits that the Court should give no weight at all to the Respondents' assertions in paragraphs 13 and 14 of the Respondent Submission regarding the alleged impact of the

[49] *PKIU and Others v Vista Paper Products Pty Ltd and Another* (1994) 127 ALR 673 Wilcox CJ.

proceedings. To the extent that any purported psychiatric disorder is alleged, this is a matter of expert evidence and the Respondents have provided no evidential basis for their submission. In any event, the Applicant maintains that any such disorder or 'emotional toll' is of no relevance to the determination of penalty in these proceedings.

60. The Court accepts those submissions.

61. The Court refers to the factors in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7.

62. The factors below, were set out in *Mason* (supra) at [26] – [59]. The list is not exhaustive and the Court must fix a penalty which has 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: see *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14]. It is necessary for the Court to give careful consideration to the circumstances in the case before it: *Rojas v Esselte Australia Pty Limited (No.2)* [2008] FCA 1585.

63. The Court has regard to:

- *The financial position of the respondents*
- *Whether the penalty is oppressive having regard to the financial position of the respondents*
- *Any similar previous conduct by the respondents*

There is evidence of previous investigations by the FWO (for instance the "Shandra" investigation.

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

There are 8 groupings.

- *The size of the business involved*

RGPL is not small.

- *Whether the breaches were deliberate*

They were negligent at least.

- *Whether senior management was involved*

Senior management was involved.

- *Whether the party committing the breach has exhibited contrition*

There have been no apologies made to the employees.

- *Whether the party committing the breach has taken corrective action*

Amounts outstanding have been paid.

- *Whether the party committing the breach has cooperated with the enforcement authorities*

There has been cooperation and a discount has been applied.

- *The need to ensure compliance with minimum standards by providing effective means for investigation and enforcement of employee entitlements; and*

- *The need for specific and general deterrence.*

A need for both has been established.

64. The Court finds that specific and general deterrence is required as the Court accepts submissions by the FWO (at [95] of the written submissions) that the security industry has adopted a specific practice of paying that hourly rates that may not compensate for minimum statutory entitlements. As to specific deterrence the Court accepts the submissions by the FWO at [88] to [91] (supra).

65. The Court finds that by RGPL paying below the correct rates, the business has been able to achieve competiveness above that which it could otherwise have achieved. RG has benefited from this as has SG by the level of wages able to be paid to her [see financial analysis (supra)].

66. Taking into account all of the above including relevant factors from *Mason* (supra), the Court finds the following penalties to be

appropriate and not to be oppressive. The aggregate penalty for each respondent is an appropriate response to the conduct that led to the breaches.

67. The first respondent is to pay an aggregate penalty of $110,880.00.

68. The second respondent is to pay an aggregate penalty of $22,176.00.

69. The third respondent is to pay an aggregate penalty of $14,652.00.

70. The Court finds these penalties to be at the lower end of what could be imposed.

71. The Court makes the Declarations and Orders as proposed by the FWO.

I certify that the preceding seventy-one (71) paragraphs are a true copy of the reasons for judgment of Judge F. Turner

Associate:

Date: 6 June 2014

Correction

1. The amount of $18,216.00 in paragraph 69 has been deleted and replaced with the amount of $14,652.00.

ATTACHMENT B

	Column 1	Column 2	Column 3		Column 4		Column 5		
	Description of contravention (after course of conduct and grouping)	Provisions contravened	Maximum penalty		Maximum Penalty Less 20% discount		Applicant's submission on penalty		
			First Respondent	Second and Third Respondent	First Respondent	Second and Third Respondent	First Respondent	Second Respondent	Third Respondent
1.	**Failure to pay or roster for a minimum 4 hours**	Clause 25 of the Pre-Modern Award Section 45 (clause 21.2(a)(i) of the Modern Award)	$33,000	$6,600	$26,400	$5,280	20% - 30% $5,280 - $7,920	20% - 30% $1,056 - $1,584	5% - 10% $264 - $528
2.	**Failure to pay overtime rates of pay for overtime worked on a Monday to Friday, Saturday and Sunday**	Clauses 23.2.1, 23.2.2 and 23.2.3 of the Pre-Modern Award Section 45 (clause 23.3 of the Modern Award)	$33,000	$6,600	$26,400	$5,280	70% - 80% $18,480 - $21,120	70% - 80% $3,696 - $4,224	50% - 60% $2,640 - $3,168
3.	**Failure to pay Saturday penalty rates**	Clause 24.4.1 of the Pre-Modern Award Section 45 (clause	$33,000	$6,600	$26,400	$5,280	60% - 70% $15,840 - $18,480	60% - 70% $3,168 - $3,696	40% - 50% $2,112 - $2,640

		23.3 of the Modern Award)							
4.	**Failure to pay Sunday penalty rates**	Clause 24.4.2 of the Pre-Modern Award Section 45 (clause 23.3 of the Modern Award)					60% - 70% $15,840 - $18,480	60% - 70% $3,168 - $3,696	40% - 50% $2,112 - $2,640
5.	**Failure to pay public holiday penalty rates**	Clause 26.7.2 of the Pre-Modern Award Section 45 (clauses A.6.2, A.6.4 and A.7.3 of the Modern Award)	$33,000	$6,600	$26,400	$5,280	60% - 70% $15,840 - $18,480	60% - 70% $3,168 - $3,696	40% - 50% $2,112 - $2,640
6.	**Failure to pay shift allowances**	Clause 18.2.1(a) of the Pre-Modern Award Section 45 (clauses A.6.2, A.6.4 and A.7.3 of the Modern Award)	$33,000	$6,600	$26,400	$5,280	70% - 80% $18,480 - $21,120	70% - 80% $3,696 - $4,224	50% - 60% $2,640 - $3,168
7.	**Failure to pay laundry**	Clause 17.6.5(e) of the Pre-Modern	$33,000	$6,600	$26,400	$5,280	10% - 20% $2,640 -	10% - 20% $528 -	2.5% - 5% $132 - $264

	allowances	Award					$5,280	$1,056	
8.	**Failure to pay annual leave on termination**	Clause 27.6.1 of the Pre-Modern Award	$33,000	$6,600	$26,400	$5,280	70% - 80% $18,480 - $21,120	70% - 80% $3,696 - $4,224	50% - 60% $2,640 - $3,168
Sub-total			**$264,000**	**$52,800**	**$211,200**	**$42,240**	**$110,880 - $132,000**	**$22,176 - $26,400**	**$14,652 - $18,216**