

FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v BARRY SCOTT
DISTRIBUTORS PTY LTD*

[2014] FCCA 1587

Catchwords:

INDUSTRIAL LAW – Penalty hearing – failure to pay several employees their entitlements – statement of agreed facts in which respondents concede contraventions – imposition of penalty.

Legislation:

Fair Work Act 2009, ss.12, 45, 550, 535, 539, 545, 546, 557, 716

Fair Work Regulations 2009 reg.3.33

Workplace Relations Amendment (Codifying Contempt Offences) Act 2004

Cases cited:

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8

Collis v McPherson (2007) 169 IR 30

Fair Work Ombudsman v Bosen (2011) VMC 81

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

Fair Work Ombudsman v Hungry Jacks Pty Ltd [2011] FMCA 233

Fair Work Ombudsman v Promoting U Pty Ltd & Anor [2012] FMCA 58

Fair Work Ombudsman v Ramsay Food Processing Pty Ltd (No. 2) [2012] FCA 408

Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 261

Kelly v Fitzpatrick (2007) 166 IR 14

Lynch v Buckley Sawmills Pty Ltd [1984] FCA 306; (1984) 3 FCR 503

Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7

Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70

Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543

Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412

R v Thompson (1975) 11 SASR 217

Seymour v Stawell Timber Industries Pty Ltd (1985) 9 FCR 241

Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

Stuart Mahoney v Construction, Forestry, Mining and Energy Union [2008] FCA 1426

Workplace Ombudsman v Saya Cleaning Pty Ltd [2009] FMCA 38

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

Applicant: FAIR WORK OMBUDSMAN
Respondent: BARRY SCOTT DISTRIBUTORS PTY LTD
File Number: SYG 999 of 2013
Judgment of: Judge Altobelli
Hearing date: 17 July 2014
Date of Last Submission: 17 July 2014
Delivered at: Sydney
Delivered on: 31 October 2014

REPRESENTATION

Solicitors for the Applicant: Ms Anderson

The Second Respondent in Person and on behalf of the First Respondent

ORDERS

THE COURT DECLARES THAT:

- (1) The first respondent, Barry Scott Distributors Pty Ltd (ACN 005 002 844) contravened:
 - (a) section 45 of the *Fair Work Act 2009* (**FW Act**) by virtue of failing to pay Amy Renshaw-Dugan, Maree Garratt and Sarah Hage (collectively, the **Employees**) the required penalty for work performed on Sundays in contravention of subclause 26.2(c) and item A.7.3 of Schedule A of the *Fast Food Modern Award 2010* (**Fast Food Modern Award**) during the period from 18 July 2011 to 30 November 2011 (**Pre-amendment Period**) and subclause 26.5(c) and item A.7.3 of Schedule A of the *Fast Food Modern Award* during the period from 1 December 2011 to 19 May 2012 (**Post Amendment Period**);
 - (b) section 45 of the *FW Act* by virtue of failing to pay the Employees the required overtime rates of pay for overtime work in contravention of subclause 26.2 of the *Fast Food Modern Award* during the Pre-amendment Period and subclause 26.1 of the *Fast Food Modern Award* during the Post-amendment Period;
 - (c) section 45 of the *FW Act* by virtue of failing to pay the Employees the required penalty rates for work performed on public holidays in contravention of subclause 30.3 and item A.7.3 of Schedule A to the *Fast Food Modern Award*;
 - (d) section 45 of the *FW Act* by virtue of failing to make superannuation contributions to superannuation funds for the benefits of the Employees in contravention of subclause 21.2 of the *Fast Food Modern Award*; and
 - (e) subsection 535(2) of the *FW Act* by virtue of failing to make and keep records which included details of loadings and penalty rates that the Employees were entitled to, pursuant to subregulation 3.33(3) of the *Fair Work Regulations 2009* (**FW Regulations**).
- (2) The second respondent, Mr Ian Andrews admits that he was involved in (within the meaning of subsection 550(1) of the *FW Act*) the

contraventions of the first respondent referred to in paragraph 1(a) to (d) above.

THE COURT ORDERS THAT:

- (3) An order pursuant to subsection 545(3) of the FW Act that the first respondent pay the amount of \$22,279.78 to Amy Renshaw-Dugan within 28 days plus interest under section 547 of the FW Act.
- (4) An order pursuant to subsection 545(3) of the FW Act that the first respondent pay the amount of \$26,152.86 to Maree Garratt within 28 days plus interest under section 547 of the FW Act.
- (5) An order pursuant to subsection 545(3) of the FW Act that the first respondent pay the amount of \$14,082.18 to Sarah Hage within 28 days plus interest under section 547 of the FW Act.
- (6) An order pursuant to subsection 545(3) of the FW Act that the first respondent make a contribution of \$2,325.01 on behalf of Amy Renshaw-Dugan to her nominated superannuation fund, that being Sunsuper Pty Ltd trading as Sunsuper (account number 700148599) within 28 days.
- (7) An order pursuant to subsection 545(3) of the FW Act that the first respondent make a contribution of \$2,189.10 on behalf of Sarah Hage to her nominated superannuation fund, that being Sunsuper Pty Ltd trading as Sunsuper (account number 900926104) within 28 days.
- (8) An order pursuant to subsection 545(3) of the FW Act that the first respondent make a contribution of \$2,903.47 on behalf of Maree Garratt to her nominated superannuation fund, that being Host-Plus Pty Ltd trading as Host-Plus (account number 103 199 730) within 28 days.
- (9) The first respondent is to pay the following penalties pursuant to subsection 546(1) of the FW Act to a total amount of \$79,942 for the declared contraventions in paragraph 1 above, comprising of:
 - (a) a penalty of \$18,810 in respect of the contravention of section 45 of the FW Act by virtue of failing to pay the Employees the required penalty for work performed on Sundays in contravention

- of subclause 26.2(c) and item A.7.3 of Schedule A of the Fast Food Modern Award during the Pre-amendment Period and subclause 26.5(c) and item A.7.3 of Schedule A of the Fast Food Modern Award during the Post-amendment Period;
- (b) a penalty of \$18,810 in respect of the contravention of section 45 of the FW Act by virtue of failing to pay the Employees the required overtime rates of pay for overtime work in contravention of subclause 26.2 of the Fast Food Modern Award during the Pre-amendment Period and subclause 26.1 of the Fast Food Modern Award during the Post-amendment Period;
 - (c) a penalty of \$18,810 in respect of the contravention of section 45 of the FW Act by virtue of failing to pay the Employees the required penalty rates for work performed on public holidays in contravention of subclause 30.3 and item A.7.3 of Schedule A to the Fast Food Modern Award;
 - (d) a penalty of \$18,810 in respect of the contravention of section 45 of the FW Act by virtue of failing to make superannuation contributions to superannuation funds for the benefits of the Employees in contravention of subclause 21.2 of the Fast Food Modern Award; and
 - (e) a penalty of \$4,702 in respect of the contravention of subsection 535(2) of the FW Act by virtue of failing to make and keep records which included details of loadings and penalty rates that the Employees were entitled to, pursuant to subregulation 3.33(3) of the FW Regulations.
- (10) The second respondent is to pay the following penalties pursuant to subsection 546(1) of the FW Act to a total amount of \$15,048 for the declared contraventions in paragraph 1(a) to (d) and 2 above, comprising:
- (a) a penalty of \$3,762 in respect of his involvement in the first respondent's contravention of section 45 of the FW Act by virtue of the first respondent's failure to pay the Employees the required penalty for work performed on Sundays in contravention of subclause 26.2(c) and item A.7.3 of Schedule A of the Fast Food

Modern Award during the Pre-amendment Period and subclause 26.5(c) and item A.7.3 of Schedule A of the Fast Food Modern Award during the Post-amendment Period;

- (b) a penalty of \$3,762 in respect of his involvement in the first respondent's contravention of section 45 of the FW Act by virtue of the first respondent failing to pay the Employees the required overtime rates of pay for overtime work in contravention of subclause 26.2 of the Fast Food Modern Award during the Pre-amendment Period and subclause 26.1 of the Fast Food Modern Award during the Post-amendment Period;
 - (c) a penalty of \$3,762 in respect of his involvement in the first respondent's contravention of section 45 of the FW Act by virtue of the first respondent failing to pay the Employees the required penalty rates for work performed on public holidays in contravention of subclause 30.3 and item A.7.3 of Schedule A to the Fast Food Modern Award; and
 - (d) a penalty of \$3,762 in respect of his involvement in the first respondent's contravention of section 45 of the FW Act by virtue of the first respondent failing to make superannuation contributions to superannuation funds for the benefits of the Employees in contravention of subclause 21.2 of the Fast Food Modern Award.
- (11) An order pursuant to subsection 546(3) of the FW Act that all pecuniary penalties imposed by the Court be paid to the Consolidated Revenue Fund of the Commonwealth within twenty-eight days of the date of the order.
- (12) The applicant has liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY**

SYG 999 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

BARRY SCOTT DISTRIBUTORS PTY LTD
Respondent

REASONS FOR JUDGMENT

Introduction

1. By way of an Application filed 9 May 2013 the Fair Work Ombudsman (the Applicant) sought orders that were contained in a statement of claim filed on the same date. By the day of the hearing the orders sought had been further refined, and are reproduced in the First Schedule of these reasons. In short, orders were sought against the First Respondent, Barry Scott Distributors Pty Ltd (the First respondent), and the Second Respondent, Ian Andrews (the Second respondent), including declarations that each contravened specified provisions in the *Fair Work Act 2009*, and for the imposition of penalties.
2. Both respondents admitted the contraventions on the basis of facts contained in a document entitled Statement of Agreed Facts signed by the parties and filed 5 December 2013. The Statement of Agreed Facts (called SOAF in these reasons) is reproduced in the Second Schedule to these reasons. As the parties are unable to reach agreement about penalties, the main issue in this case was the imposition of penalties.

3. The First respondent operated a number of businesses, but the relevant one for present purposes was a fish and chip take away store known as Thurgoona Takeaway located at shops 3 and 4, 10 Shuter Ave Thurgoona, which is an outer-suburb of Albury, a regional city in New South Wales. The proceedings only relate to the employment entitlements of 3 former employees of Thurgoona Takeaway. The business ceased trading in May 2012. There is no suggestion that the First respondent is in receivership or liquidation. Indeed the impression gained from comments made by the Second Respondent, who is the sole director of the company, is that the company still conducts a business in the Albury area dealing with waste recycling. The Second Respondent is responsible for the overall direction, management and supervision of the First Respondent, and he made decisions about the First Respondent's employees.
4. As the SOAF demonstrates, the 3 employees were underpaid for agreed periods. Indeed the total underpayment is agreed to be \$62,514.82 including unpaid superannuation entitlements. The employees remain unpaid as at the date of the hearing. The Second Respondent admitted involvement in the contraventions listed in annexure B to the SOAF, and thus pursuant to s 550 of the Fair Work Act he is treated as having contravened the relevant provisions.

Procedural History

5. The matter came before the Court on 7 June 2013, 20 August 2013, 13 September 2013, 13 November 2013, 19 March 2014, 26 May 2014 and 17 July 2014 when it was finally heard. Despite having been given numerous opportunities to file evidence, the only document in respect of which there is any endorsement of either the First or Second Respondents is the SOAF filed 7 March 2014. The Court notes that the Respondents did not avail themselves of the many opportunities given to them to adduce evidence about penalty and their capacity to meet the same.

Penalty Hearing

6. Ms Anderson appeared for the Applicant. The Second Respondent appeared in person and on behalf of the First Respondent. He explained to the Court that he was “not a paperwork person”. He made submissions to the Court as best he could. He gave the impression that he was quite an intelligent, hardworking small business man who struggled with formalities. He was previously represented by a lawyer, significantly at the time the SOAF was agreed to, signed, and filed in court. The Court formed the impression that he struggled to understand how the community might have a different perspective to his as to the matters before the Court.
7. The Applicant relied on the following documents
 - a. Statement of Agreed Facts filed 5 December 2013;
 - b. Applicant’s outline of submissions filed 7 March 2014;
 - c. Proposed Orders document;
 - d. Application filed 9 May 2013;
 - e. Statement of Claim filed 9 May 2013; and
 - f. Affidavit of Darren John Lang filed 14 February 2014.
8. The Respondents filed no relevant documents after the SOAF. Despite being given the opportunity to do so, neither party wished to examine the other.
9. These reasons draw heavily from the very comprehensive outline of submissions prepared for the Applicant, none of which was challenged by the Respondents.

Legislative Provisions Relating to Penalty

10. Subsection 546(1) of the Fair Work Act provides that this Court may order a person to pay a pecuniary penalty if the Court is satisfied that the person has contravened a civil remedy provision. Subsection 539(1)

of the FW Act identifies those provisions that are civil remedy provisions for the purposes of the FW Act, which are those set out in the table at subsection 539(2) of the FW Act. This includes terms of a modern award and the record keeping provisions.

Maximum Penalties

The maximum penalties that may be imposed by this Court under the FW Act are as follows:

Legislation	Maximum Penalty Per Contravention for a Body Corporate ¹	Maximum Penalty Per Contravention for an Individual ²
FW Act - Underpayments ³	300 penalty units (\$33,000)	60 penalty units (\$6,600)
FW Act - Pay Slips ⁴	30 penalty units (\$16,500)	N/A (as the second respondent was not involved in this contravention)

Principles Relevant to Penalty

11. If the Court finds that liability is proven (as agreed by the parties in the SOAF), the applicant submits that the following principles should be taken into account in determining the question of appropriate penalty.
12. The first step for the Court is to identify the separate contraventions involved. Each breach of each separate obligation found in the FW Act in relation to each employee is a separate contravention⁵.
13. Secondly, the Court should consider whether the breaches constitute a single course of conduct. Multiple contraventions of the same provision of the FW Act can be treated as a single contravention if the contraventions:

*are committed by the same person; and
arose out of a course of conduct of the same person⁶.*

¹ Section 12 of the FW Act provides that “penalty unit” has the same meaning as the *Crimes Act 1914 (Cth)*. At the time the admitted contraventions took place, section 4AA of that Act defined “penalty unit” to be \$110.

² See footnote directly above.

³ Item 2 of subsection 539(2) of the FW Act and subsection 546(2) of the FW Act.

⁴ Item 29 and subsection 546(2) of the FW Act.

⁵ *Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216 at 223; McIver v Healey [2008] FCA 425 at [16].*

⁶ Subsection 557(1) of the FW Act.

14. 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 respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the respondents did⁷. This task is distinct from and in addition to the final application of the “totality principle”⁸.
15. Fourthly, the Court should consider the appropriate penalty for the single breaches and, if relevant, each group of contraventions, taking into account all of the relevant circumstances.
16. Finally, the Court should consider whether it is an appropriate response to the conduct which led to the breaches⁹. The Court should apply an “instinctive synthesis” in making this assessment¹⁰. This is known as an application of the “totality principle”.

Application of the Facts to the Law

17. The first respondent has admitted to five contraventions of the FW Act as set out in the SOAF. The second respondent has admitted to four contraventions of the FW Act as set out in the SOAF.

Grouping of Contraventions – Course of Conduct

18. Subsection 557(1) of the FW Act provides that where two or more contraventions of the same civil remedy provision are committed by the same person and arise out of a course of conduct by that person, the contraventions shall be taken to be a single contravention of the provision. The applicant accepts that the respondents have the benefit of these provisions in relation to repeated contraventions of each of the applicable civil remedy provisions. Particularly relevant is whether the breaches arose out of separate acts or decisions of the employer, or out of a single act or decision. The latter case will constitute a course of

⁷ *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 (Merringtons) at [46] (Graham J).

⁸ *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 (Mornington Inn) at [41]-[46] (Stone and Buchanan JJ).

⁹ 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).

¹⁰ Merringtons, supra at [27] (Gray J) and [55] and [78] (Graham J).

conduct but the former will not¹¹. The onus of establishing the benefit of these provisions is on the respondents¹².

19. The applicant accepts that, based on the facts in this case, the respondents have the benefit of section 557 of the FW Act in relation to repeated breaches of each term regarding each of the Employees and multiple pay periods. The Court accepts this. Accordingly, in circumstances where the contraventions listed in Annexures A and B relate to multiple employees and multiple pay periods, the course of conduct provisions in section 557 of the FW Act should be applied, thereby reducing the total number of potential contraventions to five for the first respondent and four for the second respondent.
20. For the reasons set out above, the Court finds that the first respondent engaged in a total of five contraventions for which penalties should be imposed. These contraventions are:
 - a) failure to pay the Employees the required penalty for work performed on Sundays pursuant to subclause 26.2(c) and item A.7.3 of Schedule A to the Fast Food Modern Award during the period from 18 July 2011 to 30 November 2011 (Pre-amendment Period); and subclause 26.5(c) of the Fast Food Modern Award on and from 1 December 2011 (Post Amendment Period);
 - b) failure to pay the Employees the required overtime rates of pay for overtime hours pursuant to subclause 26.2 of the Fast Food Modern Award during the Pre-amendment Period and subclause 26.1 of the Fast Food Modern Award during the Post Amendment Period;
 - c) failure to pay the Employees the required penalty rates for work performed on public holidays pursuant to subclause 30.3 and item A.7.3 of Schedule A to the Fast Food Modern Award;
 - d) failure to make superannuation contributions to superannuation funds for the benefits of the Employees pursuant to subclause 21.2 of the Fast Food Modern Award; and

¹¹ *Seymour v Stawell Timber Industries Pty Ltd (1985) 9 FCR 241* at 266-267 per Gray J (with whom Northrop J agreed at 245).

¹² *Workplace Ombudsman v Securit-E Holdings Pty Ltd (In Liquidation) & Ors [2009] FMCA 700* at [5].

- e) subsection 535(2) of the FW Act by virtue of failing to make and keep records which included details of loadings and penalty rates that the Employees were entitled to pursuant to subregulation 3.33(3) of the FW Regulations.
21. Similarly, the Court finds that the second respondent engaged in four contraventions, namely all of the contraventions set out in the paragraph directly above, except for subparagraph (e) which relates to record keeping.
22. Therefore the applicant submits (and the Court accepts) that the Court should consider that the maximum penalty it could impose on the respondents in this matter is:
- a) the first respondent: \$148,500; and
 - b) the second respondent: \$26,400.

Factors relevant to determining penalties

23. The factors relevant to the imposition of a penalty under the FW Act have been summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 (Pangaea), [26]-[59], as follows:
- a) *the nature and extent of the conduct which led to the breaches;*
 - b) *the circumstances in which that conduct took place;*
 - c) *whether there had been similar previous conduct by the defendant;*
 - d) *whether the breaches were properly distinct or arose out of the one course of conduct;*
 - e) *the size of the business enterprise involved;*
 - f) *whether or not the breaches were deliberate;*
 - g) *whether senior management was involved in the breaches;*

- h) *whether the party committing the breach had exhibited contrition;*
- i) *whether the party committing the breach had taken corrective action;*
- j) *whether the party committing the breach had cooperated with the enforcement authorities;*
- k) *the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and*
- l) *the need for specific and general deterrence.*

24. This summary was adopted by Tracey J in Kelly¹³ and *Stuart Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426¹⁴. 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 discretion¹⁵.

Nature and extent of the conduct and resulting loss

25. The contraventions in this matter represent a failure by the first respondent to provide basic and important entitlements under the FW Act.

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

27. The underpayment contraventions arose due to the first respondent's practice of paying the Employees a flat weekly rate of pay of \$1000 for 50 hours of work per week regardless of the number of hours worked

¹³ Kelly at [14].

¹⁴ *Stuart Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426 at [26] to [59].

¹⁵ *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550, [11]; Merringtons at [91] per Buchanan J.

or when those hours were worked¹⁶. Despite only being engaged to work 50 hours per week, the Employees almost always worked in excess of 50 hours per week¹⁷. During one week, Ms Renshaw-Dugan and Ms Hage worked 112 hours and Ms Garratt worked 105 hours¹⁸. Furthermore, the Employees regularly performed work on Sundays and public holidays but were not paid any loadings or penalties rates to compensate for these occasions¹⁹.

28. The Court finds that the amounts paid to the Employees were significantly below what they were entitled to be paid. By way of example, the rates of pay paid to the Employees were:

a) more than \$7.08 lower than the Employees' entitlements for the first two hours of overtime and over \$16.10 lower than their entitlement for all overtime hours performed after the first two hours;

b) \$8.88 lower than the Employees' entitlements for public holiday rates of pay; and

c) \$1.66 lower than the Employees' entitlements for penalty rates for work performed on Sundays.

29. By paying the Employees as set out above, the first respondent caused the Employees to be significantly underpaid. The Employees were underpaid a total of \$62,514.82 comprised of the following underpayments per Employee:

a) Amy Renshaw-Dugan - \$22,279.7820;

b) Maree Garratt - \$26,152.8621; and

c) Sarah Hage - \$14,082.1822.

30. The quantum of the underpayments is significant. By way of example, the highest individual underpayment (to Ms Garratt) was \$26,152.86. As a matter of context, Ms Garratt's underpayment equates to

¹⁶ ASOF at paragraph 15.

¹⁷ Lang Affidavit at paragraph 23(a).

¹⁸ Lang Affidavit at paragraph 23(b).

¹⁹ ASOF at paragraph 16(a).

²⁰ ASOF at paragraph 51(a).

²¹ ASOF at paragraph 51(b).

²² ASOF at paragraph 51(c).

approximately 34 weeks' pay at her contractual rate of pay (based on a 38 hour week).

31. In addition, the first respondent did not make any superannuation payments for the benefit of the Employees. The underpayment for this contravention is \$7,417.58. Superannuation entitlements are designed to provide employees with security when they retire and are no longer able to earn an income. Given that one of the Employees, Maree Garratt is 60 years old, the Court finds that this contravention is particularly serious.
32. The first respondent has obtained a significant benefit from the underpayment of the Employees over their periods of employment in the form of the cost of labour being at a significantly discounted rate. Given that the underpayments have yet to be rectified, an extraordinary fact given the history of these proceedings, the first respondent continues to receive the benefit of the Employees' unpaid entitlements. In contrast, it is two years since the Employees left the employment of the first respondent and they have been, and continue to be, commensurately deprived of the financial benefits that would flow from the timely payment of their correct entitlements²³.

Circumstances in which the conduct took place

33. These contraventions occurred in the context where the second respondent had been employing staff for approximately 8 years²⁴. The second respondent was responsible for the management, direction and control of the first respondent's operations²⁵. The second respondent was responsible for determining the terms and conditions upon which the Employees were engaged by the first respondent²⁶. The second respondent's conduct was the cause of the first respondent's contraventions of the FW Act.

Similar Previous Conduct

34. There is no evidence of any previous contraventions of the FW Act.

²³ *Fair Work Ombudsman v Hungry Jacks Pty Ltd* [2011] FMCA 233 at [47].

²⁴ ASOF at paragraph 9.

²⁵ ASOF at paragraph 8(b).

²⁶ ASOF at paragraph 8(b).

35. The applicant notes that the first respondent was the subject of another investigation with the applicant with respect to alleged contraventions of the FW Act²⁷.

Size and Financial Circumstances of the Business

36. As set out in paragraph above, on 19 February 2014, the applicant became aware that winding up proceedings had been brought against the first respondent. The applicant is otherwise currently unaware of the exact financial standing of the first respondent however notes that wind up proceedings have been brought against the first respondent on two prior occasions, however it has never been deregistered. Given that the respondents have filed no evidence with respect to their size and financial circumstances, the applicant submits and the Court accepts that the size and financial circumstances of the business should not be of limited relevance to penalty²⁸. This is particularly the case in circumstances where the first respondent operated three separate businesses at the relevant time.
37. Furthermore, even if a sufficient evidentiary basis for the Court to determine that the first respondent is experiencing financial difficulty has been established by the first respondent, the weight the Court ought to give to such evidence would be balanced with the weight to be attributed to the objective seriousness of the contravening conduct. The applicant submitted that the law should mark its disapproval of the conduct in question, and set a penalty which serves as a warning to others²⁹.
38. The applicant relied upon *Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38 at [27] to [28] and the authorities referred to in those paragraphs:

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

²⁷ ASOF at paragraph 64(a).

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

²⁹ Kelly at [28], *FWO v Bosen* 2011 VMC81 at [51].

their size. Such a factor should be of limited relevance to a Court's consideration of penalty."

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

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

Deliberateness of the Contraventions

40. The applicant submitted that the breaches were deliberate, or at the very least reckless. In this respect, the applicant relied on the previous investigation undertaken by the applicant with respect to the employment entitlements of a former employee, Caroline Poole of the Rim and Wheel Diner (Prior Investigation)³⁰. As part of the Prior Investigation, on 6 June 2011 the applicant issued a contravention letter to the first respondent stating that it had determined that the first respondent had not paid Ms Poole her entitlements to minimum rates of pay under the relevant industrial instruments or annual leave under the FW Act³¹. On 4 August 2011, the applicant issued a Compliance Notice to the first respondent pursuant to section 716 of the FW Act, which required the first respondent to rectify the underpayments within 21 days. The first respondent rectified the underpayment to Ms Poole in approximately December 2011.
41. Despite the fact that the applicant made the respondents aware in the contravention letter on 6 June 2011 that it was contravening the FW Act, the first respondent continued to engage in similar conduct by underpaying the Employees for a period of 11 months. Furthermore,

³⁰ ASOF at paragraph 64(a) and 65.

³¹ Lang Affidavit at paragraph 78.

this fact was further communicated to the respondents when the applicant issued the Compliance Notice on 4 August 2011 in the Prior Investigation. Accordingly, the applicant submitted, and the Court accepts, that the respondent's conduct was clearly deliberate, or at the very least reckless and that this should be seen as a significantly aggravating penalty factor.

Involvement of Senior Management

42. A corporation can only act through its officers and agents. The second respondent was a director of the first respondent and was the person responsible for the first respondents overall direction, management and supervision³². The second respondent determined the Employees' terms and conditions of employment³³.
43. The second respondent has admitted that he was involved in the contraventions of the first respondent within the meaning of section 550 of the FW Act³⁴.

Contrition, corrective action and co-operation with authorities: Discount?

44. For the reasons discussed above, the applicant submitted that the respondents should be entitled to a 5% discount for co-operation.
45. The applicant noted that where wrongdoers have cooperated with the relevant authorities and made admissions early in the course of an investigation or soon after the commencement of proceedings that it is appropriate to allow a discount of penalty of up to 25 per cent. However, consistent with the majority decision in *Mornington Inn* (at [74] to [76] per Stone and Buchanan JJ):

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

(a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or

³² ASOF at paragraph 4(b).

³³ ASOF at paragraph 90.

³⁴ ASOF at paragraph 67.

(b) *has indicated a willingness to facilitate the course of justice.*”

46. The Applicant also referred to the following statement of Federal Magistrate Burnett in *Fair Work Ombudsman v Contracting Plus Pty Ltd & Anor*³⁵ at [125] to [127]:

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

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

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

Admissions

47. The respondents agreed to make full admissions in 5 December 2013. This was only after proceedings were commenced on 9 May 2013, and approximately 16 months after the first respondent was notified that the applicant had determined that money was owed to the Employees.

Corrective Practices

48. The respondents have not rectified the underpayments and the amount of \$62,514.82 remains outstanding³⁶.
49. The applicant has sought for the respondents to rectify the underpayments for a period of over 18 months³⁷, however the respondents have failed to do so. Instead the respondents have provided a series of excuses for not making the payments, such as bushfires, illness and issues with overseas bank accounts.

³⁵ *Fair Work Ombudsman v Contracting Plus Pty Ltd & Anor* [2011] FMCA 191.

³⁶ Lang Affidavits at paragraphs 68 to 72.

³⁷ Lang Affidavit at paragraphs 28 to 67.

50. Furthermore, the respondents have not produced any evidence of any further corrective action to demonstrate that it has amended its practices to ensure compliance with the FW Act. To the contrary, the evidence demonstrates that the respondents have engaged in similar conduct with the applicant receiving five new complaints since the contravention letter was issued in these proceedings relating to underpayments. In these circumstances, there is no other conclusion to be reached other than that the respondents have taken no corrective action whatsoever to rectify their contravening conduct

Co-operation with the Authorities

51. The respondents cooperated during the investigation to some extent by providing pay records and responding to requests for information. However, the respondents have been provided with extensive opportunities to rectify the contraventions but failed to do so. Furthermore, the respondents did not elect to participate in a record of interview³⁸ which would have assisted in the applicant resolving the investigation more expeditiously.
52. With respect to the respondents' cooperation during these proceedings, the applicant accepts that the respondents cooperated during court proceedings by admitting to the contraventions and entering into an SOAF. This has spared the parties the cost of a fully contested hearing. However, this cooperation is tarnished by the fact that the respondents have sought to adjourn the penalty hearing twice and failed to file penalty evidence.

Apology

53. The respondents have apologised to the Court for the contravening conduct but only in the broadest of terms. Furthermore, there is no evidence before the Court of any apology being given to the Employees in respect of the respondents' conduct. Little weight is to be given to this apology, it being provided in the "eleventh hour" of the penalty hearing.
54. In the absence of genuine contrition and corrective workplace practices, that the admission of liability may be seen as an acceptance

³⁸ Lang Affidavit at paragraphs 73 to 76.

of the inevitable outcome of the proceedings, and accordingly that the weight to be attributed to the admissions made out to be limited to the consideration of the time and costs impact only.

Conclusion

55. The applicant submitted that in light of the matters set out in above, the respondents should be entitled to a discount of no more than five per cent for their cooperation. This discount is recognition of the fact that the respondents' agreement to resolve the matter by way of admissions has spared further use of the Court's resources and saved the parties the time and costs of a fully contested liability hearing. The Court accepts these submissions.

Ensuring Compliance with Minimum Standards

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

- a) one of the stated principal objects of the FW Act has been the preservation of an effective safety net for employee entitlements and effective enforcement mechanisms (section 3 of the FW Act);
- b) it is vital to ensure compliance with modern awards to create an even playing field and ensure all employees are appropriately remunerated for the work they perform; and
- c) the substantial penalties set by the legislature for contraventions of the FW Act reinforce the importance placed on compliance with minimum standards.

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

Specific Deterrence

58. The applicant submitted and the Court accepts that there is a particularly high need for specific deterrence in these proceedings. Since the respondents received the contravention letters dated 3 August 2012 in the current proceedings, the applicant has received a further

five complaints (Subsequent Complaints) for underpayment of employment entitlements³⁹. Two of the complaints were voluntarily rectified after the respondents made payments to the Employees⁴⁰. The other three complaints resulted in the applicant issuing three more Compliance Notices requiring the underpayments to be rectified⁴¹, however none of the Compliance Notices have been complied with⁴².

59. All of the complaints related to conduct by the respondents which occurred after the applicant put the respondents squarely on notice that it had contravened the FW Act with respect to the Employees. Despite the applicant making the first respondents aware of this fact, it continued to engage in similar conduct by underpaying the employees who lodged the Subsequent Complaints. In these circumstances, the Court accepts that there is an imperative to send a strong message to the respondents that they cannot breach Commonwealth of Australia workplace laws and undercut employment entitlements.
60. Furthermore, to the extent that the respondents submit that there is less need for specific deterrence due to the fact that the first respondent is no longer trading, this submission is not accepted. The evidence demonstrates that the second respondent was a director of two previous companies, Widerange Investments Pty Ltd and Thirteenth Investments Pty Ltd prior to becoming a director of the first respondent⁴³. Furthermore, the first respondent is currently registered despite the fact that it has had three winding up proceedings brought against it. In these circumstances, the applicant submitted, and the Court accepts, that there is a risk that the second respondent will either become a director of a new company in the future, or alternatively that the first respondent will continue trading with the winding up proceedings being unsuccessful or otherwise discontinued.
61. In addition, the applicant submitted, and the Court accepts, that there is a need for specific deterrence in these proceedings because:

a) the respondents have a history of non-compliance with the applicant;

³⁹ Lang Affidavit at paragraphs 81, 84, 86, 88, 93 and 94.

⁴⁰ Lang Affidavit at paragraphs 83 and 85.

⁴¹ Lang Affidavit at paragraph 100.

⁴² Lang Affidavit at paragraph 102.

⁴³ Lang Affidavit at paragraph 17.

- b) the contraventions were deliberate or at the least reckless;
- c) the first respondent continues to be registered and the second respondent continues to be the first respondent's director;
- d) the underpayment of \$62,514.82 is significant; and
- e) no rectification payments were made.

General Deterrence

62. The applicant submitted, and the Court accepts, that there is a strong need for general deterrence in this particular case. One of the main objects of workplace laws is the maintenance of an effective safety net, and effective enforcement mechanisms. Maintaining these minimum standards also seeks to provide an even playing field for employers of a particular industry. The importance of the maintenance of effective minimum terms and conditions of employment and enforcement of industrial instruments is reflected not only in the magnitude of the maximum penalties that may be imposed in respect of any contraventions of an applicable provision, but also in the legislature's increase of those maximum penalties in August 2004⁴⁴ where the maximum penalty for bodies corporate increased from \$10,000 to \$33,000.
63. The role of general deterrence in determining the appropriate penalty is illustrated by the comments of Lander J in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543, [93]:

In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: Yardley v Betts (1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by likeminded persons or organisations. If 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,

⁴⁴ *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004.*

general deterrence will be the paramount factor in fixing the penalty: R v Thompson (1975) 11 SASR 217.

64. The applicant submitted, and the Court accepts, that general deterrence is an important factor in these proceedings. There is a need to send a message to the community, and particularly to employers, that employers must provide their employees with the correct entitlements and steps should be taken to understand and comply with those entitlements.
65. The applicant submitted, and the Court accepts that penalties in this case should be imposed on a meaningful level so as to deter other employers from committing similar contraventions, and to send a message to the community that employers should ascertain and comply with minimum terms and conditions.

Totality Principle

66. Having fixed an appropriate penalty for each contravention or course or 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 contraventions.
67. To the extent that the respondent sought to argue that a penalty would be oppressive or crushing, the applicant referred the Court's attention to the comments of Burchardt FM (as he then was) in *Fair Work Ombudsman v Promoting U Pty Ltd & Anor*⁴⁵ where his Honour stated at [57]:

Turning to the application of the totality principle, given the parlous financial position of the First and Second Respondents, imposition of a penalty at [the level proposed] would be highly likely to be crushing in the sense described by Lander J in Caelli. Nonetheless, the Respondents cannot hope to have their conduct in effect exonerated by the Court merely because they are impecunious. Parliament has set significant penalties for the sort of contraventions that the Respondents engaged in and I do not think it is appropriate for the totality principle to operate simply to ensure that penalties are imposed in

⁴⁵ *Fair Work Ombudsman v Promoting U Pty Ltd & Anor* [2012] FMCA 58.

suitably insignificant amounts to meet the Respondents' capacity to pay.

68. In the absence of any further evidence provided by the respondent as to its financial position, the Court is entitled to treat the respondent as having capacity to pay any penalties the Court considers appropriate and that no further discount should apply by reason of the application of the totality principle.

Accessorial liability

69. The same considerations apply in determining penalty in respect of the conduct of both the first and the second respondent. The second respondent continues to be the director of the first respondent.
70. The applicant submitted, and the Court accepts, that the connection between the first and second respondents should not reduce the amount of penalty. The applicant referred to the decision of Buchanan J in *Fair Work Ombudsman v Ramsay Food Processing Pty Ltd (No. 2)* [2012] FCA 408 at [8]:

*A submission was made by the respondents that some consideration should be given to reducing the amount of the penalty imposed on one or other of the respondents to account for the intimate connection between the actions of the first respondent and the conduct of the second respondent. As I understood the submission, it was that there was a risk of punishing twice for the same conduct – i.e. punishing both the first and second respondents for the conduct of the second respondent. The submission appeared to rely on the judgment of Mansfield J in *Australian Prudential Regulation Authority v Holloway (2000) 45 ATR 278; [2000] FCA 1245*, although I do not understand how it could do so ... in the legislative scheme which his Honour was applying, no distinction was made between the maximum penalty that could be applied to corporations and the maximum penalty that could be applied to individuals. That is not the case here. The present legislative scheme fixes quite different (and much lower) penalties for individuals than for*

corporations. The culpability of each respondent must be assessed individually and in the context set by the maximum penalty prescribed in each case. I reject the suggestion, if that was what was intended, that either or both respondents might have the benefit of any reduction in penalty because they were jointly, as well as individually, culpable.

71. The evidence demonstrates that the second respondent had the knowledge and understanding of workplace laws and awards⁴⁶. Furthermore, the second respondent played a major part in the first respondent's contraventions.
72. The second respondent made the decision to employ the Employees and pay them the fixed weekly rate of pay which was not sufficient to satisfy their entitlements to overtime rates, and Sunday and public holiday loadings. The second respondent has admitted that he was involved in the first respondent's contraventions.
73. The applicant submits that as the active mind of the first respondent and the person responsible for ensuring the first respondent's compliance with the FW Act, the second respondent was directly involved in the deliberate conduct by the first respondent. The Court accepts this.

Conclusions

74. The applicant submitted that, taking into account the objective seriousness of the conduct in this instance, that a penalty in the mid to high range (60 to 70 per cent of the maximum grouped penalties set out in Annexures A and B is appropriate in all of the circumstances) for all of the underpayment contraventions is appropriate for both respondents. With respect to the record keeping contraventions, the applicant is seeking a penalty range of 30% to 40% of the maximum.
75. Further, in recognition of the admissions by the respondents and the rectification payments made, the applicant submitted that a discount of five per cent of the maximum penalty is appropriate.

⁴⁶ As a result of the Poole Investigation.

76. On this basis, the applicant submitted that a penalty range of \$79,942.50 to \$94,050 is appropriate in all of the circumstances for the first respondent, and \$15,048 to \$17,556 for the second respondent.
77. The Court finds, having regard to the evidence and the reasons explained above that a penalty of 60% of the maximum grouped penalties set out in Annexures A and B is appropriate in all the circumstances for the under payment contraventions relating to both respondents, and 30% of the maximum with regards to the record keeping contravention. The Court accepts that a discount of 5% is appropriate.
78. The orders at the beginning of these reasons reflect the determination above.

I certify that the preceding seventy-eight (78) paragraphs are a true copy of the reasons for judgment of Judge Altobelli

Associate:

Date: 30 October 2014

Schedule One

IN THE FEDERAL CIRCUIT COURT OF AUSTRALIA

File

number: SYG999/2013

REGISTRY: SYDNEY

FAIR WORK DIVISION

FAIR WORK OMBUDSMAN

Applicant

BARRY SCOTT DISTRIBUTORS PTY LTD ACN (005 002 844)

First Respondent

IAN ANDREWS

Second Respondent

PROPOSED ORDERS

THE COURT DECLARES THAT:

1. The first respondent, Barry Scott Distributors Pty Ltd (ACN 005 002 844) contravened:
 - (a) section 45 of the *Fair Work Act 2009* (**FW Act**) by virtue of failing to pay Amy Renshaw-Dugan, Maree Garratt and Sarah Hage (collectively, the **Employees**) the required penalty for work performed on Sundays in contravention of subclause 26.2(c) and item A.7.3 of Schedule A of the *Fast Food Modern Award 2010* (**Fast Food Modern Award**) during the period from 18 July 2011 to 30 November 2011 (**Pre-amendment Period**) and subclause 26.5(c) and item A.7.3 of Schedule A of the *Fast Food Modern Award* during the period from 1 December 2011 to 19 May 2012 (**Post Amendment Period**);
 - (b) section 45 of the FW Act by virtue of failing to pay the Employees the required overtime rates of pay for overtime work in contravention of subclause 26.2 of the *Fast Food Modern Award* during the Pre-amendment Period and subclause 26.1 of the *Fast Food Modern Award* during the Post-amendment Period;
 - (c) section 45 of the FW Act by virtue of failing to pay the Employees the required penalty rates for work performed on public holidays in contravention

of subclause 30.3 and item A.7.3 of Schedule A to the Fast Food Modern Award;

(d) section 45 of the FW Act by virtue of failing to make superannuation contributions to superannuation funds for the benefits of the Employees in contravention of subclause 21.2 of the Fast Food Modern Award; and

(e) subsection 535(2) of the FW Act by virtue of failing to make and keep records which included details of loadings and penalty rates that the Employees were entitled to, pursuant to subregulation 3.33(3) of the *Fair Work Regulations 2009 (FW Regulations)*.

2. The second respondent, Mr Ian Andrews admits that he was involved in (within the meaning of subsection 550(1) of the FW Act) the contraventions of the first respondent referred to in paragraph 1(a) to (d) above.

THE COURT ORDERS THAT:

3. An order pursuant to subsection 545(3) of the FW Act that the first respondent pay the amount of \$22,279.78 to Amy Renshaw-Dugan within 28 days plus interest under section 547 of the FW Act.

4. An order pursuant to subsection 545(3) of the FW Act that the first respondent pay the amount of \$26,152.86 to Maree Garratt within 28 days plus interest under section 547 of the FW Act.

5. An order pursuant to subsection 545(3) of the FW Act that the first respondent pay the amount of \$14,082.18 to Sarah Hage within 28 days plus interest under section 547 of the FW Act.

6. An order pursuant to subsection 545(3) of the FW Act that the first respondent make a contribution of \$2,325.01 on behalf of Amy Renshaw-Dugan to her nominated superannuation fund, that being Sunsuper Pty Ltd trading as Sunsuper (account number 700148599) within 28 days.

7. An order pursuant to subsection 545(3) of the FW Act that the first respondent make a contribution of \$2,189.10 on behalf of Sarah Hage to her nominated superannuation fund, that being Sunsuper Pty Ltd trading as Sunsuper (account number 900926104) within 28 days.

8. An order pursuant to subsection 545(3) of the FW Act that the first respondent make a contribution of \$2,903.47 on behalf of Maree Garratt to her nominated superannuation fund, that being Host-Plus Pty Ltd trading as Host-Plus (account number 103 199 730) within 28 days.

9. The first respondent is to pay the following penalties pursuant to subsection 546(1) of the FW Act to a total amount of \$_____ for the declared contraventions in paragraph 1 above, comprising of:
- (a) a penalty of \$_____ in respect of the contravention of section 45 of the FW Act by virtue of failing to pay the Employees the required penalty for work performed on Sundays in contravention of subclause 26.2(c) and item A.7.3 of Schedule A of the Fast Food Modern Award during the Pre-amendment Period and subclause 26.5(c) and item A.7.3 of Schedule A of the Fast Food Modern Award during the Post-amendment Period;
 - (b) a penalty of \$_____ in respect of the contravention of section 45 of the FW Act by virtue of failing to pay the Employees the required overtime rates of pay for overtime work in contravention of subclause 26.2 of the Fast Food Modern Award during the Pre-amendment Period and subclause 26.1 of the Fast Food Modern Award during the Post-amendment Period;
 - (c) a penalty of \$_____ in respect of the contravention of section 45 of the FW Act by virtue of failing to pay the Employees the required penalty rates for work performed on public holidays in contravention of subclause 30.3 and item A.7.3 of Schedule A to the Fast Food Modern Award;
 - (d) a penalty of \$_____ in respect of the contravention of section 45 of the FW Act by virtue of failing to make superannuation contributions to superannuation funds for the benefits of the Employees in contravention of subclause 21.2 of the Fast Food Modern Award; and
 - (e) a penalty of \$_____ in respect of the contravention of subsection 535(2) of the FW Act by virtue of failing to make and keep records which included details of loadings and penalty rates that the Employees were entitled to, pursuant to subregulation 3.33(3) of the FW Regulations.
10. The second respondent is to pay the following penalties pursuant to subsection 546(1) of the FW Act to a total amount of \$_____ for the declared contraventions in paragraph 1(a) to (d) and 2 above, comprising:
- (a) a penalty of \$_____ in respect of his involvement in the first respondent's contravention of section 45 of the FW Act by virtue of the first respondent's failure to pay the Employees the required penalty for work performed on Sundays in contravention of subclause 26.2(c) and item A.7.3 of Schedule A of the Fast Food Modern Award during the Pre-amendment Period and subclause 26.5(c) and item A.7.3 of Schedule A of the Fast Food Modern Award during the Post-amendment Period;

- (b) a penalty of \$_____ in respect of his involvement in the first respondent's contravention of section 45 of the FW Act by virtue of the first respondent failing to pay the Employees the required overtime rates of pay for overtime work in contravention of subclause 26.2 of the Fast Food Modern Award during the Pre-amendment Period and subclause 26.1 of the Fast Food Modern Award during the Post-amendment Period;
 - (c) a penalty of \$_____ in respect of his involvement in the first respondent's contravention of section 45 of the FW Act by virtue of the first respondent failing to pay the Employees the required penalty rates for work performed on public holidays in contravention of subclause 30.3 and item A.7.3 of Schedule A to the Fast Food Modern Award; and
 - (d) a penalty of \$_____ in respect of his involvement in the first respondent's contravention of section 45 of the FW Act by virtue of the first respondent failing to make superannuation contributions to superannuation funds for the benefits of the Employees in contravention of subclause 21.2 of the Fast Food Modern Award.
11. An order pursuant to subsection 546(3) of the FW Act that all pecuniary penalties imposed by the Court be paid to the Consolidated Revenue Fund of the Commonwealth within twenty-eight days of the date of the order.
 12. The applicant has liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

Schedule two

IN THE FEDERAL CIRCUIT COURT OF AUSTRALIA

File number:

SYG999 of 2013

REGISTRY: SYDNEY

FAIR WORK DIVISION

FAIR WORK OMBUDSMAN

Applicant

BARRY SCOTT DISTRIBUTORS PTY LTD (ACN 005 002 844)

First Respondent

MR IAN ANDREWS

Second Respondent

STATEMENT OF AGREED FACTS

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

The applicant and the respondents agree as set out below.

The Applicant

1. The Fair Work Ombudsman (**FWO**) has standing and authority to bring these proceedings and to apply for orders in respect of the respondents' contraventions (as set out in paragraphs 32 to 49 and 53 to 61 below).

The First Respondent

2. On 11 July 1973, Barry Scott Distributors Pty Ltd (ACN 005 002 844), (**Barry Scott**) was registered as a proprietary company incorporated under the *Corporations Act 2001 (Cth)*.
3. Barry Scott is capable of being sued in and by its corporate name and style.
4. During the period from 18 July 2011 to 20 May 2012 (**Underpayment Periods**), Barry Scott operated a business of a takeaway fish and chip store, trading as Thurgoona Takeaway which was conducted from Shops 3 and 4, 10 Shuter Avenue, Thurgoona, New South Wales (**Business**).

5. Barry Scott employed Amy Renshaw–Dugan (**Ms Renshaw-Dugan**), Maree Garratt (**Ms Garratt**) and Sarah Hage (**Ms Hage**) (collectively, **Employees**) to work in the Business during the periods set out in the table below:

Employee	Commencement Date	Termination Date
Amy Renshaw-Dugan	18 July 2011	29 March 2012
Maree Garratt	18 July 2011	19 March 2013
Sarah Hage	18 July 2011	29 March 2012

6. The Business ceased operations on or around 19 March 2013.
7. In addition to operating the Business, Barry Scott operates a business of a diner trading as Rim and Wheel Diner conducted from inside a petrol station located at 575 Wagga Road Lavington, New South Wales (**Restaurant Business**).

The Second Respondent

8. During the Underpayment Period, Mr Ian Andrews was:
- (a) the sole director of the first respondent;
 - (b) principally responsible for the overall direction, management and supervision of Barry Scott's operations in relation to industrial instruments and arrangements, setting and adjusting pay rates and determining wages and conditions of employment; and
 - (c) responsible in a practical sense for ensuring that Barry Scott complied with its legal obligations to its employees under the *Fair Work Act 2009* (**FW Act**).
9. Mr Andrews has been employing staff since 2006.

The Employees

10. At all relevant times during the Underpayment Periods:
- (a) Ms Renshaw-Dugan and Ms Garratt were employed as managers on a full time basis; and
 - (b) Ms Hage was employed as an assistant manager on a full time basis.
11. Throughout her period of employment with Barry Scott, Ms Renshaw-Dugan performed the following duties on a day to day basis:
- (a) ordering and purchasing products;
 - (b) supervising between five to twelve staff members;

- (c) delivering and picking up goods;
 - (d) serving customers;
 - (e) cooking;
 - (f) menu planning;
 - (g) opening and closing the Business;
 - (h) counting the takings of the Business;
 - (i) preparing rosters; and
 - (j) cleaning.
12. Throughout her period of employment with Barry Scott, Ms Garratt performed the following duties on a day to day basis:
- (a) supervising up to four staff members;
 - (b) serving customers;
 - (c) counting the takings of the business;
 - (d) cooking;
 - (e) menu planning;
 - (f) opening and closing the Business;
 - (g) preparing rosters; and
 - (h) cleaning.
13. During the period that Ms Hage was employed by Barry Scott, Ms Hage's primary duty was baking baked goods at the premises of the Business which were sold to the general public at the premises of the Rim and Wheel Diner as part of the operations of the Restaurant Business.
14. In addition to the duty referred to in the paragraph directly above, Ms Hage also performed the following duties on a day to day basis for the first respondent:
- (a) serving customers;
 - (b) menu planning;
 - (c) delivering and picking up goods to and from the Restaurant Business; and
 - (d) cleaning.

Terms and Conditions of Employment

15. The Employees were engaged by Barry Scott to work 50 hours per week for a flat weekly rate of pay of \$1000 per week (**Flat Weekly Rate of Pay**).
16. During the Underpayment Periods:
 - (a) the employees regularly worked in excess of 50 hours per week, including on Saturdays, Sundays and public holidays and on occasions worked seven days per week; and
 - (b) were paid the Flat Weekly Rate of Pay regardless of the number of hours worked, or when those hours were worked.

Relevant Legislation

17. At all relevant times on and from 18 July 2011, Barry Scott fell within the scope of the FW Act and was required to comply with the FW Act with respect to the employment of the Employees.

Relevant Industrial Instrument

18. At all relevant times during the Underpayment Periods, Barry Scott was covered by the *Fast Food Industry Award 2010* (**Fast Food Modern Award**) with respect to the employment of the Employees.
19. At all relevant times during the Underpayment Periods, the Employees fell within the classifications of the Fast Food Modern Award, set out in the table below.

Employee	Classification
Ms Renshaw-Dugan	Fast Food Employee Level 3
Ms Garratt	Fast Food Employee Level 3
Ms Hage	Fast Food Employee Level 2

20. At all relevant times during the Underpayment Periods, Barry Scott was required to pay the Employees in accordance with the transitional arrangements under Schedule A of the Fast Food Modern Award, calculated with reference to the relevant transitional minimum wage instrument, namely the Australian Pay and Classification Scale (**Pay Scale**) derived from the *Shop Employees (State) Award* (AN120499) (**Shop Employees Pay Scale**).
21. At all relevant times during the Underpayment Periods, the Employees fell within the classifications of the Shop Employees Pay Scale set out in the table below:

Employee	Classification
Ms Renshaw-Dugan	Group 4 Shop Assistant in charge with the duty of buying (5 – 12 assistants)
Ms Garratt	Group 4 Shop assistant in charge without the duty of buying (0- 4 assistants)
Ms Hage	Group 1 cooking or preparation of shop provisions

The Investigation

22. Between 26 March 2012 to 28 March 2012, the Employees each lodged complaints with the FWO about their employment conditions with Barry Scott. After the FWO received the Employees' complaints it conducted an investigation into the employment conditions provided to the Employees by Barry Scott.
23. After the FWO commenced the Investigation, the FWO contacted Barry Scott and informed it of the Complaints and the Investigation.
24. On 11 May 2012, the FWO issued Barry Scott with a Notice to Produce seeking records in relation to the Employees. On 28 May 2012, Barry Scott produced timesheets and payslips for each of the Employees in response to the Notice to Produce.
25. The FWO reviewed the timesheets and pay slips provided by Barry Scott pursuant to the Notice to Produce and prepared calculations showing the hours each of the Employees worked, what they were paid by Barry Scott, what they should have been paid for the work they performed and the amount of the underpayment for each of the Employees. This information was used to produce the Schedules to this Statement of Agreed Facts (**SOAF**).
26. On 18 February 2013, the FWO invited Mr Andrews to participate in a Record of Interview (**ROI**) to discuss the Complaints. Mr Andrews elected not to participate in the ROI.
27. The FWO's calculations and the Investigation revealed that Barry Scott contravened:
 - (a) subclause 26.2(c) and item A.7.3 of Schedule A of the Fast Food Modern Award during the period from 18 July 2011 to 30 November 2011 (**Pre-amendment Period**) and subclause 26.5(c) and item A.7.3 of Schedule A to the Fast Food Modern Award on and from 1 December 2011 (**Post-amendment Period**) (collectively, **Sunday Loading Clause**) by failing to pay the Employees their entitlement to Sunday Loadings;

- (b) subclause 26.2 of the Fast Food Modern Award during the Pre-amendment Period and subclause 26 of the Fast Food Modern Award during the Post-amendment Period (collectively, **Overtime Clause**) by failing to pay the Employees their entitlement to overtime rates of pay;
 - (c) subclause 30.3 and item A.7.3 of Schedule A of the Fast Food Modern Award by failing to pay the Employees public holiday penalty rates;
 - (d) subclause 21.2 of the Fast Food Modern Award, in failing to make superannuation contributions to superannuation funds for the benefit of the Employees; and
 - (e) subsection 535(2) of the FW Act, by failing to keep records which included details of loadings and penalty rates the Employees were entitled to be paid.
28. The FWO also determined in the Investigation that Mr Andrews was involved in each of Barry Scott's contraventions within the meaning of subsection 550(2) of the FW Act.
29. On or around 3 August 2012, the FWO issued three contravention letters to Barry Scott stating that it had identified that Barry Scott had underpaid the Employees in contravention of the provisions set out in paragraph 27 above. The contravention letters stated that Barry Scott was required to rectify the underpayments to the Employees.
30. During the period from 3 August 2012 to 24 December 2012, the FWO and Barry Scott communicated about Barry Scott's requirement to rectify the underpayments to the Employees.
31. On 9 May 2013, these proceedings were commenced against Barry Scott and Mr Andrews.

UNDERPAYMENT CONTRAVENTIONS

Contravention 1: Failure to pay Sunday Loadings

32. During the Underpayment Periods, Barry Scott was required to pay the Employees for all work performed on a Sunday:
- (a) the weekly wages prescribed by clause 17 and item A.2.5 of Schedule A to the Fast Food Modern Award (**Weekly Wage**); and
 - (b) a loading of 20% in addition to the Weekly Wage pursuant to the Sunday Loading Clause and item A.7.3 of Schedule A of the Fast Food Modern Award.
- (collectively, **Sunday Rate of Pay**).

33. The Sunday Rate of Pay payable to each of the Employees is set out in the table below:

Employee	Weekly Wage	Hourly Rate (Weekly Wage divided by 38)	Sunday Loading	Sunday Rate of Pay
Ms Renshaw-Dugan	\$685.90	\$18.05	20%	\$21.66
Ms Garratt	\$679.44	\$17.88	20%	\$21.45
Ms Hage	\$664.62	\$17.49	20%	\$20.99

34. During the Underpayment Periods, the Employees regularly performed hours of work on Sundays.
35. During the Underpayment Periods, Barry Scott paid the Employees the Flat Weekly Rate of Pay which equated to approximately \$20, regardless of whether or not those hours were performed on a Sunday.
36. During the Underpayment Periods, the amount paid to the Employees for work performed on Sundays was insufficient to satisfy their entitlement to Sunday loadings causing them to be underpaid the amount of \$782.73 as set out in Table 1 of Schedule A to this SOAF.
37. Barry Scott:
- (a) contravened a term of the Fast Food Modern Award being the Sunday Loading Clause and item A.7.3 of Schedule A of the Fast Food Modern Award during the Underpayment Periods; and
 - (b) thereby contravened section 45 of the FW Act, which is a civil remedy provision pursuant to subsection 539(2) of the FW Act.

Contravention 2: Failure to Pay Overtime Rates of Pay

38. During the Pre-amendment Period, pursuant to subclause 26.2 of the Fast Food Modern Award as it applied during the Pre-amendment Period, Barry Scott was required to pay the Employees overtime rates of pay for hours worked in excess of 38 hours per week.
39. During the Post-amendment Period, pursuant to clause 26 of the Fast Food Modern Award as it applied during the Post-amendment Period, Barry Scott was required to pay the Employees overtime rates of pay for all hours of work performed in the following circumstances:

- (a) hours in excess of 38 hours per week;
- (b) hours performed on any day in excess of five days per week;
- (c) hours performed in excess of eleven hours on any one day;
- (d) before the Employee's regular commencing time on any one day;
- (e) before the Employee's prescribed ceasing time on any one day; or
- (f) outside the ordinary hours of work.

40. The overtime rates of pay payable to the Employees are set out in the table below:

Employee	Rounded Base Rate	Overtime Rates for first 2 hours	Overtime Rates thereafter
Ms Renshaw-Dugan	\$18.05	\$27.08	\$36.10
Ms Garratt	\$17.88	\$26.82	\$35.76
Ms Hage	\$17.49	\$26.24	\$34.99

- 41. During the Underpayment Periods, the Employees regularly performed overtime hours.
- 42. During the Underpayment Periods, Barry Scott paid the Employees the Flat Weekly Rate of Pay regardless of the number of hours worked by the Employees or when those hours were worked.
- 43. During the Underpayment Periods, the amount paid to the Employees for overtime work was insufficient to satisfy their entitlement to overtime rates of pay causing them to be underpaid \$59,588.31 as set out in Table 2 of Schedule A to this SOAF.
- 44. Barry Scott:
 - (a) contravened a term of the Fast Food Modern Award, being the Overtime Clause during the Underpayment Periods; and
 - (b) thereby contravened section 45 of the FW Act, which is a civil remedy provision pursuant to subsection 539(2) of the FW Act.

Contravention 3: Failure to pay Public Holiday Rates

- 45. During the Underpayment Periods, pursuant to subclause 30.3 and item A.7.3 of Schedule A of the Fast Food Modern Award, Barry Scott was required to pay the

Employees the pay rates set out in the table below for all work performed on a public holiday:

Employee	Rounded Base Rate	Public Holiday Loading	Public Holiday Rate of Pay
Ms Renshaw-Dugan	\$18.05	60%	\$28.88
Ms Garratt	\$17.88	60%	\$28.60
Ms Hage	\$17.49	60%	\$27.99

46. During the Underpayment Periods, on occasions the Employees performed work on public holidays.
47. During the Underpayment Periods, Barry Scott paid the Employees the Flat Weekly Rate of Pay, which equated to approximately \$20, regardless of whether or not those hours were performed on public holidays.
48. The amount paid to the Employees for public holiday loadings during the Underpayment Periods was insufficient to satisfy their entitlement to public holiday loadings under the Fast Food Modern Award, causing them to be underpaid the total amount of \$2,143.78 as set out in Table 3 of Schedule A to this SOAF.
49. Barry Scott:
 - (a) contravened a term of the Fast Food Modern Award, being subclause 30.3 and item A.7.3 of Schedule A of the Fast Food Modern Award during the Underpayments Periods; and
 - (b) thereby contravened section 45 of the FW Act, which is a civil remedy provision pursuant to subsection 539(2) of the FW Act.

TOTAL UNDERPAYMENT

50. Mr Andrews admits that by reason of the contraventions admitted in paragraphs 32 to 49 above, Barry Scott caused the Employees to be underpaid the total amount of \$62,514.82, which is attributable to the Employees in the amounts set out Schedules A and B to the SOAF.
51. As set out in Schedule B to this SOAF, the Employees were underpaid the amounts set out below:
 - (a) Amy Renshaw-Dugan – the amount of \$22,279.78 (as set out in Schedule B to this SOAF);
 - (b) Maree Garratt – the amount of \$26,152.86 (as set out in Schedule B to this SOAF); and

(c) Sarah Hage – the amount of \$14,082.18 (as set out in Schedule B to this SOAF).

52. No rectification payments have been paid to the Employees as at the date of filing this SOAF.

NON UNDERPAYMENT CONTRAVENTIONS

Contravention 4: Failure to Make Superannuation Contributions

53. During the Underpayment Periods, Barry Scott was required by subclause 21.2 of the Fast Food Modern Award, to make superannuation contributions to superannuation funds for the benefit of the Employees at the rate of 9% of the Employees' ordinary time earnings.

54. The amount of superannuation contributions Barry Scott was required to make are set out in the table below:

Employee	Ordinary Time Earnings	Rate	Superannuation Contribution
Ms Renshaw-Dugan	\$25,833.41	9%	\$2,325.01
Sarah Hage	\$24,323.34	9%	\$2,189.10
Maree Garratt	\$32,260.82	9%	\$2,903.47
TOTAL			\$7,417.58

55. During the Underpayment Periods, Barry Scott failed to make any superannuation contributions to superannuation funds for the benefit of the Employees.

56. Barry Scott:

- (a) contravened a term of the Fast Food Modern Award, being subclause 21.2 of the Fast Food Modern Award; and
- (b) thereby contravened section 45 of the FW Act, which is a civil remedy provision pursuant to section 539(2) of the FW Act.

Contravention 5: Failure to Keep Records Which Included Information Prescribed by the Fair Work Regulations

57. During the Underpayment Periods, pursuant to subsection 535(2) of the FW Act, Barry Scott was required to make and keep for seven years employee records which included certain information prescribed by the *Fair Work Regulations 2009* (**FW Regulations**) with respect to each of the Employees.

58. Pursuant to subregulation 3.33(3) of the FW Regulations, during the Underpayment Periods, the records referred to in the paragraph directly above were required to include details of any loadings or penalty rates if the Employees were entitled to be paid those entitlements.
59. During the Underpayment Periods, the Employees were entitled to be paid Sunday loadings for hours of work performed on Sundays, and public holiday rates of pay for hours of work performed on public holidays.
60. During the Underpayment Periods, Barry Scott failed to make and keep records which included information about the Employees' entitlements to Sunday loadings and public holiday pay.
61. Barry Scott:
 - (a) contravened subsection 535(2) of the FW Act by failing to keep records which included the information specified by subregulation 3.33(3) of the FW Regulations; and
 - (b) thereby contravened a civil remedy provision pursuant to subsection 539(2) of the FW Act.

ACCESSORIAL LIABILITY

62. At all relevant times, Mr Andrews was:
 - (a) the controlling mind of Barry Scott;
 - (b) the person who made decisions on behalf of Barry Scott, or who was ultimately responsible for Barry Scott's decisions in relation to:
 - (i) the recruitment or engagement of employees of Barry Scott;
 - (ii) the terms and conditions upon which persons would be engaged;
 - (iii) payments made to the persons engaged to perform work; and
 - (iv) the work to be performed.
63. At all relevant times, Mr Andrews:
 - (a) was aware that Barry Scott was required to comply with Commonwealth workplace relations legislation and industrial instruments;
 - (b) was aware that Barry Scott was required to pay the Employees Sunday and public holiday loadings, overtime rates and superannuation;
 - (c) was aware that the Employees were working an average of 50 hours per week;

- (d) was aware that Employees each worked one out of every three Sundays; and
 - (e) made a decision that Barry Scott would not pay the Employees Sunday and public holiday loadings, overtime rates or superannuation but instead pay the Employees the Flat Weekly Rate of Pay instead.
64. Mr Andrews was a person with whom the FWO communicated with during the course of the investigation into the Complaints and investigations in relation to other employees of Barry Scott (**Separate Investigations**), including:
- (a) Caroline Anne Poole (during the period from approximately December 2010 to December 2011); and
 - (b) Leanne Margaret Turton (in the period from approximately October 2011 to March 2012);
65. During the Separate Investigations, the FWO informed Mr Andrews that:
- (a) Barry Scott was required to comply with industrial instruments and Commonwealth workplace relations legislation; and
 - (b) Barry Scott had failed to provide the employees listed in paragraph 64 above with their entitlements in contravention of the applicable industrial instruments and Commonwealth workplace relations legislation.

ADMISSIONS

66. Barry Scott admits that it contravened the following civil remedy provisions:
- (f) section 45 of the FW Act (by virtue of contravening subclause 26.2(c) and item A.7.3 of Schedule A of the Fast Food Modern Award during the Pre-amendment Period and subclause 26.5(c) and item A.7.3 of Schedule A of the Fast Food Modern Award during the Post-amendment Period) in failing to pay the Employees the required penalty for work performed on Sundays;
 - (g) section 45 of the FW Act (by virtue of contravening subclause 26.2 of the Fast Food Modern Award during the Pre-amendment Period and subclause 26.1 of the Fast Food Modern Award during the Post-amendment Period) in failing to pay the Employees the required overtime rates of pay for work performed as overtime;
 - (h) section 45 of the FW Act (by virtue of contravening subclause 30.3 and item A.7.3 of Schedule A to the Fast Food Modern Award) in failing to pay the Employees the required penalty rates for work performed on public holidays;

- (i) section 45 of the FW Act (by virtue of contravening subclause 21.2 of the Fast Food Modern Award) in failing to make superannuation contributions to superannuation funds for the benefits of the Employees; and
- (j) subsection 535(2) of the FW Act by virtue of failing to make and keep records which included details of loadings and penalty rates that the Employees were entitled to, pursuant to subregulation 3.33(3) of the FW Regulations.

67. Mr Andrews admits that he was involved in (within the meaning of subsection 550(1) of the FW Act) the underpayment contraventions of Barry Scott referred to in paragraph 66 above.

Signature:

Signature:

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.....

Graham Robinson

Legal representatives for the respondents

Fair Work Ombudsman

Legal practitioner employed by the applicant

SCHEDULE A

Table 1

Failure to Pay Sunday Loadings

Table 1								
Contravention: Failure to Pay Sunday Loadings*								
Employee	Base rate of Pay	Rounded Base Rate of Pay	Sunday Loading	Sunday Rate**	Hours	Award Entitlement**	Amount Paid	Amount Owed**
Amy Renshaw -	\$18.052001	\$18.05	20%	\$21.66	192.10	\$4,161.35	\$3,842.00	\$319.35

Dugan								
Maree Garratt	\$17.8780 01	\$17.88	20%	\$21.4 5	170.2 5	\$3,688.02	\$3,405. 00	\$283.0 2
Sarah Hage	\$17.4945 27	\$17.49	20%	\$20.9 9	181.5 5	\$3,811.36	\$3,631. 00	\$180.3 6
	TOTAL							\$782.7 3

*All calculations performed to the nearest 6 decimal places

** Rounded to two decimal places.

Annexure A

IDENTIFIED CONTRAVENTIONS AND PROPOSED PENALTIES FOR THE FIRST RESPONDENT

No	Provision Contravened	Description of Contravention	Groupings	Maximum Grouped Penalty	Maximum Penalty After 5% Discount	Applicant's Proposed Penalty Range of Discounted Rate	Applicant's Proposed Penalty
1.	Section 45 of the FW Act by virtue of contravening: (a) subclause 26.2(c) of the Fast Food Modern Award as it applied during the period from 18 July 2011 to 30 November 2011 (Pre-amendment Period); and (b) subclause 26.5(c) of the Fast Food Modern Award on and from 1 December 2011 (Post Amendment Period).	Sunday Loading	Sunday Loadings	\$33,000	\$31,350	60% to 70%	\$18,810 to \$21,945
2.	Section 45 of the FW Act by virtue of contravening: (a) subclause 26.2 of the Fast Food Modern Award during the Pre-amendment Period; and (b) subclause 26.1 of the Fast Food Modern Award during the Post Amendment Period.	Overtime	Overtime	\$33,000	\$31,350	60% to 70%	\$18,810 to \$21,945
3.	Section 45 of the FW Act by virtue of contravening subclause 30.3 and item A.7.3 of Schedule A to the	Public Holiday Penalty Rates	Public Holiday Penalty Rates	\$33,000	\$31,350	60% to 70%	\$18,810 to \$21,945

	Fast Food Modern Award						
4.	Section 45 of the FW Act by virtue of contravening subclause 21.2 of the Fast Food Modern Award	Superannuation	Superannuation	\$33,000	\$31,350	60% to 70%	\$18,810 to \$21,945
5.	Subsection 535(2) of the FW Act by virtue of contravening subregulation 3.33(3) of the FW Regulations	Record Keeping	Record Keeping	\$16,500	\$15,675	30% to 40%	\$4,702.50 to \$6,270
TOTAL							\$79,942.50 to \$94,050

Annexure B

IDENTIFIED CONTRAVENTIONS AND PROPOSED PENALTIES FOR THE SECOND RESPONDENT

No	Provision Contravened	Description of Contravention	Groupings	Maximum Grouped Penalty	Maximum Penalty After 5% Discount	Applicant's Proposed Penalty Range of Discounted Rate	Applicant's Proposed Penalty
1.	Section 45 of the FW Act by virtue of contravening: subclause 26.2(c) of the Fast Food Modern Award as it applied during the period from 18 July 2011 to 30 November 2011 (Pre-amendment Period); and subclause 26.5(c) of the Fast Food Modern Award on and from 1 December 2011 (Post Amendment Period).	Sunday Loading	Sunday Loadings	\$6,600	\$6,270	60% to 70%	\$3,762 to \$4,389
2.	Section 45 of the FW Act by virtue of contravening: (c) subclause 26.2 of the Fast Food Modern Award during the Pre-amendment Period; and (d) subclause 26.1 of the Fast Food Modern Award during the Post Amendment Period.	Overtime	Overtime	\$6,600	\$6,270	60% to 70%	\$3,762 to \$4,389
3.	Section 45 of the FW Act by virtue of contravening subclause 30.3 and item A.7.3 of Schedule A to the Fast Food Modern Award	Public Holiday Penalty Rates	Public Holiday Penalty Rates	\$6,600	\$6,270	60% to 70%	\$3,762 to \$4,389
4.	Section 45 of the FW Act by virtue of contravening subclause 21.2 of the Fast Food Modern Award	Superannuation	Superannuation	\$6,600	\$6,270	60% to 70%	\$3,762 to \$4,389
TOTAL							\$15,048 to \$17,556