

FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v ECFE PTY LTD & ORS [2014] FCCA 2996

Catchwords:

INDUSTRIAL LAW – Fair work – pecuniary penalties – breaches of award – agreed statement of facts – declarations made as agreed by parties – consideration of matters relevant to penalty.

Legislation:

Evidence Act 1995 (Cth), s.191

Fair Work Act 2009 (Cth), ss.535(1), 536(1), 557(1)

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)

Workplace Relations Act 2006 (Cth), s.719(2)

Cases cited:

Kelly v Fitzpatrick [2007] FCA 1080

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

Ponzio v B & P Caelli Constructions Pty Ltd [2007] FCAFC 65

Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

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

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	ECFF PTY LTD (ACN 086 302 301)
Second Respondent:	PRISCILLA LI PENG LAM
Third Respondent:	DAVID WING LEONG LAM
File Number:	LNG 18 of 2013
Judgment of:	Judge Hartnett
Hearing date:	20 October 2014
Orders made:	20 October 2014 and 24 December 2014
Delivered at:	Melbourne
Delivered on:	24 December 2014

REPRESENTATION

Senior Counsel for the Applicant: Ms Richards
Counsel for the Applicant: Mr McKenna
Solicitors for the Applicant: Office of the Fair Work Ombudsman
Counsel for the Respondents: Mr Champion
Solicitors for the Respondents: APAC Legal

DECLARATIONS MADE ON 20 OCTOBER 2014:

- (1) The First Respondent has contravened:
 - (a) section 182(1) of the *Workplace Relations Act 1996* (Cth) ('WR Act'), which was a term of the Australian Fair Pay and Conditions Standard, by failing to pay Mr Wang at least the basic periodic rate of pay under the Australian Pay and Classification Scale ('APCS') derived from the *Restaurant Keepers Award* ('Pay Scale') in the period 25 March 2008 to 30 June 2009;
 - (b) item 5 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ('Transitional Act'), by failing to pay Mr Wang at least the basic periodic rate of pay under the Pay Scale in the period 1 July 2009 to 31 December 2009, in contravention of s.182(1) of the WR Act;
 - (c) section 45 of the *Fair Work Act 2009* (Cth) ('FW Act') by failing to pay Mr Wang no less than the minimum wage for Mr Wang's classification in the *Fast Food Industry Award 2010* ('Modern Award') in the period 1 January 2010 to 4 December 2011, in contravention of cl.A.2.3 and cl.A.2.5 of the Modern Award;
 - (d) section 45 of the FW Act by failing to pay Mr Wang a loading of 10% for ordinary hours worked between 9.00 pm and midnight on a weekday in the period 1 July 2010 to 4 December 2011, in contravention of cl.26.5(a)(i) of the Modern Award;
 - (e) clause 25(c)(i) of the *Restaurant Keepers Award* ('Pre-Modern Award') and item 2(1) of Schedule 16 of the Transitional Act by

failing to pay Mr Wang the Saturday penalty rate of pay for ordinary hours he worked on a Saturday in the period 25 March 2008 to 31 December 2009;

- (f) clause 25(a) of the Pre-Modern Award and item 2(1) of Schedule 16 of the Transitional Act by failing to pay Mr Wang at the rate of time and half for the first two hours and double time thereafter for overtime worked Monday to Friday in the period 25 March 2008 to 31 December 2009;
- (g) clause 25(h)(i) of the Pre-Modern Award and item 2(1) of the Transitional Act by failing to pay Mr Wang at the rate of time and three quarters and double time thereafter for overtime worked on a Saturday in the period 25 March 2008 to 31 December 2009;
- (h) clause 25(h)(ii) of the Pre-Modern Award and item 2(1) of Schedule 16 of the Transitional Act by failing to pay Mr Wang at the rate of double time for overtime worked on a Sunday in the period 25 March 2008 to 31 December 2009;
- (i) section 45 of the FW Act by failing to pay Mr Wang at the rate of time and half for the first two hours and double time thereafter for overtime worked Monday to Friday and on a Saturday in the period 1 January 2010 to 4 December 2011, in contravention of cl.26 of the Modern Award;
- (j) section 45 of the FW Act, by failing to pay Mr Wang at the rate of double time thereafter for overtime worked on a Sunday in the period 1 January 2010 to 4 December 2011, in contravention of cl. 26 of the Modern Award;
- (k) clause 25(d) of the Pre-Modern Award and item 2(1) of Schedule 16 of the Transitional Act, by failing to pay Mr Wang at the rate of double time and a half for work performed on public holidays in the period 25 March 2008 to 31 December 2009;
- (l) section 45 of the FW Act, by failing to pay Mr Wang at the rate of double time and a half thereafter for work performed on public holidays in the period 1 January 2010 to 4 December 2011, in contravention of cl.30.3 of the Modern Award;

- (m) clause 9(f)(i) of the Pre-Modern Award and item 2(1) of Schedule 16 of the Transitional Act, by failing to pay Mr Wang annual leave loading for periods of annual leave taken by him in the period 25 March 2008 to 31 December 2009;
- (n) section 45 of the FW Act, by failing to pay Mr Wang annual leave loading for periods of annual leave taken by him during the period 1 January 2010 to 23 December 2011, in contravention of cl. 28.3(b)(i) of the Modern Award;
- (o) regulation 19.9(1) of the *Workplace Relations Regulations 2006* ('WR Regulations'), by failing to make or cause to be made a record stating the number of overtime hours worked by Mr Wang during each day, or when Mr Wang started and ceased working overtime hours, in the period 25 March 2008 to 30 June 2009;
- (p) section 535(1) of the FW Act, by failing to make and keep a record stating the number of overtime hours worked by Mr Wang during each day, or when Mr Wang started and ceased working overtime hours during the period 1 July 2009 to 23 December 2011, in contravention of reg.3.34 of the *Fair Work Regulations 2009* ('FW Regulations');
- (q) regulation 19.12(1) of the WR Regulations, by failing to make or cause to be made a record relating to Mr Wang containing details of the accrual of leave, any leave taken by Mr Wang and the balance of Mr Wang's entitlement to that leave from time to time, in the period 25 March 2008 to 30 June 2009;
- (r) section 535(1) of the FW Act, by failing to make and keep a record containing details of the accrual of leave, any leave taken by Mr Wang and the balance of Mr Wang's entitlement to that leave from time to time in the period 1 July 2009 to 23 December 2011, in contravention of reg.3.36(1) of the FW Regulations;
- (s) regulation 19.20(1) of the WR Regulations, by failing to issue Mr Wang with a written pay slip each week relating to each payment by the First Respondent of an amount of remuneration to Mr Wang in the period 25 March 2008 to 30 June 2009;

- (t) section 536(1) of the FW Act by failing to give Mr Wang a payslip within one working day of paying an amount to Mr Wang in relation to the performance of work in the period 1 July 2009 to 23 December 2011;
 - (u) regulation 19.17 of the WR Regulations, by knowingly making false or misleading records misrepresenting Mr Wang's hours of work and overtime hours, in the period 25 March 2008 to 30 June 2009;
 - (v) regulation 3.44(1) of the FW Regulations by knowingly making false or misleading records misrepresenting Mr Wang's hours of work and overtime hours, in the period 1 July 2009 to 4 December 2011; and
 - (w) regulation 3.44(6) of the FW Regulations by knowingly making use of a false or misleading record on 12 June 2012.
- (2) The Second Respondent was involved in each of the contraventions by the First Respondent set out in paragraph 1(a) to (v) above.
 - (3) The Third Respondent was involved in each of the contraventions by the First Respondent set out in paragraph 1(a) to (v) above.

ORDERS MADE ON 20 OCTOBER 2014:

- (1) Pursuant to s.719(6) of the WR Act and s.545(2) of the FW Act that the First Respondent pay the total outstanding underpayment amount of \$36,118.09 to Mr Wang within 60 days of this order.
- (2) Pursuant to s.722(1) of the WR Act and s.547(2) of the FW Act that the First Respondent pay Mr Wang interest at the applicable pre-judgment rate on the amount of \$36,118.09 within 60 days of this order.

ORDERS MADE ON 24 DECEMBER 2014:

- (1) The First Respondent pay a penalty in the amount of \$70,000 pursuant to s.719(1) of the *Workplace Relations Act 1996* (Cth) ('WR Act'), and s.546(1) of the *Fair Work Act 2009* (Cth) ('FW Act') for the contraventions set out in the declarations made on 20 October 2014.

- (2) Each of the Second and Third Respondents pay penalties in the amount of \$15,000 pursuant to s.719(1) of the WR Act and s.546(1) of the FW Act for the contraventions set out in the declarations made on 20 October 2014.
- (3) Pursuant to s.841(a) of the WR Act and s.546(3)(a) of the FW Act, the First, Second and Third Respondents pay their respective penalty amount to the Commonwealth.
- (4) The proceedings are otherwise dismissed.
- (5) 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**

LNG 18 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

ECFF PTY LTD
(ACN 086 302 301)
First Respondent

PRISCILLA LI PENG LAM
Second Respondent

DAVID WING LEONG LAM
Third Respondent

REASONS FOR JUDGMENT

1. In this litigation, a civil penalty proceeding for contravention of industrial instruments, the parties filed a Statement of Agreed Facts. In addition, on the penalty hearing, the Second and Third Respondents gave evidence and were cross-examined by Senior Counsel for the Applicant.
2. The Applicant relies upon the following in support of the Applicant's Submissions filed 22 September 2014 and the Applicant's Reply Submission on Penalty filed 17 October 2014:-
 - a) Application and Statement of Claim filed on 31 May 2013;
 - b) Notice to Admit dated 21 May 2014;
 - c) Statement of Agreed Facts filed on 22 August 2014;

- d) Affidavit of Brodie Janelle Smith affirmed on 18 September 2014;
 - e) Affidavit of Mitchell Brennan affirmed on 18 September 2014;
 - f) Affidavit of Brodie Janelle Smith affirmed on 17 October 2014;
and
 - g) Affidavit of Mitchell Brennan affirmed on 17 October 2014.
3. The Respondents rely upon an Affidavit of the Third Respondent affirmed on 16 October 2014 and an Affidavit of the Second Respondent sworn on 15 October 2014 (save as to those parts of the affidavits that have been struck out). In support of the affidavits, the Respondents also rely upon their Submissions filed on 14 October 2014.
4. The Applicant seeks the imposition of pecuniary penalties on the Respondents in relation to contraventions of the *Workplace Relations Act 2006* (Cth) ('the WR Act'), the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ('the Transitional Act') and the *Fair Work Act 2009* (Cth) ('the FW Act') and the Regulations made under the legislation.
5. The contraventions concern the employment by the First Respondent of Xuli Wang ('the employee') as a chef in its take away food business in Launceston ('the business'), between 25 March 2008 and 23 December 2011. In summary, during the employee's employment the First Respondent did not pay him:-
- a) the minimum hourly rate of pay provided in the Australian Pay and Classification Scale derived from the *Restaurant Keepers Award* ('the Pre-Modern Award') and, from 1 January 2010, the *Fast Food Industry Award 2010* ('Modern Award');
 - b) penalty rates for evening work, weekend work and work on public holidays;
 - c) overtime rates for overtime worked by him; and
 - d) annual leave loading.

In addition, the First Respondent did not provide the employee with pay slips; did not keep overtime or leave records in relation to his employment; and kept and made use of false and misleading records of his hours of work.

6. The contraventions resulted in the employee being underpaid a total of \$86,118.09 over the period of his employment by the First Respondent. On 9 and 10 October 2014, being a time shortly prior to this hearing, \$50,000 of that amount was paid by the First Respondent to the employee.
7. At all material times, the Second and Third Respondents (a married couple) were the directors and shareholders of the First Respondent. In practical terms, they were the business owners. Recently, the Second Respondent has resigned as a director of the First Respondent because of ill-health.
8. Commencing on or about 25 March 2008 until 23 December 2011, the First Respondent employed the employee as a chef in the business. The employee worked in the business full-time. He ordered food and kitchen supplies, undertook food preparation, and was engaged in the cooking of Chinese food. He worked under limited supervision.
9. The First Respondent employed the employee pursuant to a written contract of employment. The letter of offer and the employment contract are attached to Brodie Smith's Affidavit affirmed on 17 October 2014. In short, the First Respondent agreed to pay the employee an annual salary of \$41,850.00 for his work. The contract provided for him to work 38 hours per week. In fact, he worked a 60 hour, six day week. He worked a daily 10 hour shift between 10.00am and 9.30pm. He had a break of 90 minutes per day, usually from 2.00pm to 3.30pm.
10. Most of the contraventions of the First Respondent's minimum employment obligations arose, because despite working those very significant extra hours, the employee was not paid in respect of them.
11. There were incremental increases to the employee's annual salary over the period of his employment. By August 2010, the First Respondent had increased the employee's annual salary from \$41,850.00 per

annum (\$804.80 weekly) to \$47,481.20 per annum (\$913 .10) weekly. It remained at that level through to 23 December 2011. These increases were insufficient however, to meet minimum workplace obligations in respect of the employee, for the very long hours he worked. His pay was a fixed weekly rate, regardless of hours worked.

12. A Statement of Agreed Facts was filed by the Applicant and the Respondents in these proceedings for the purposes of s.191 of the *Evidence Act 1995* (Cth). The Respondents, by agreement, accepted that Declarations of contraventions of the FW Act would be made and there would be an order for payment of the balance of the underpayment. The Second and Third Respondents admitted accessory liability. They each had actual knowledge of the factual matters which comprised the contraventions admitted by the First Respondent.
13. The Applicant's Submissions on Penalty filed on 22 September 2014 argued that the contraventions were deliberate; had not been (now fully) rectified; and were likely to be repeated unless meaningful penalties were imposed. For these reasons, the Applicant submitted that penalties approaching the maximum were appropriate and the Court should impose aggregate penalties within the following ranges:-
 - a) for the First Respondent: \$182,558 to \$209,000;
 - b) for the Second Respondent: \$34,485 - \$39,530; and
 - c) for the Third respondent : \$33,554.50 to \$38,589.50.

The penalty ranges proposed included a 5 per cent discount in recognition of the admissions made by the Respondents.

14. The Respondents conduct is admitted to have resulted in multiple contraventions of the WR Act, *Workplace Relations Regulations 1996* (Cth) ('the WR Regulations'), the FW Act, the *Restaurant Keepers Award* ('the Pre-Modern Award') and the Transitional Act.
15. Section 719(2) of the WR Act and s.557(1) of the FW Act provide for two or more contraventions of a term of a civil remedy provision that arise out of a course of conduct to be taken to constitute a single contravention of the provision. The Applicant accepts that the

Respondents are entitled to the benefit of these provisions in relation to repeated contraventions of each separate term of the Pre-Modern Award, the Modern Award and s.535(1) of the FW Act. Applying these provisions, there are 23 separate contraventions admitted by the Respondents. If the Court were to adopt the grouping proposed by the Applicant in relation to the determination of penalty, the admitted contraventions would be grouped into 11 groups of contraventions. That would give rise to a maximum penalty that could be imposed on the First Respondent of \$286,000 and on each of the Second and Third Respondents of \$55,000.

16. If the Court were to adopt the grouping proposed by the Respondents, there would be nine groups of contravention. Those groupings would be:-
 - a) failure to pay the minimum rate of pay;
 - b) failure to pay evening work loading;
 - c) failure to pay Saturday penalty;
 - d) failure to pay overtime;
 - e) failure to pay public holiday penalty rates;
 - f) failure to pay annual leave loading;
 - g) failure to make or keep records;
 - h) failure to issue payslips; and
 - i) making and use of false records.
17. The penalties proposed by the Respondents are for the First Respondent the sum of \$45,555 to \$61,895; for the Second Respondent, the sum of \$10,311 to \$13,979; and for the Third Respondent, the sum of \$10,311 to \$13,979.
18. Grouping is a discretionary exercise by the Court. There is a single contravening conduct by a failure to pay overtime. There is further a single contravening conduct as to the records. False records existed prior to their production as required pursuant to a Notice to Produce.

The Court accepts the grouping proposed by the Respondents. This grouping gives rise to a maximum penalty that could be imposed on the First Respondent of \$242,000 and on each of the Second and Third Respondents of \$48,400.

Factors relevant to penalty

19. 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*.¹ 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 Respondents;
 - 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 co-operated 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
 - k) the need for specific and general deterrence.

¹ [2007] FMCA 7 at [26] to [59].

20. This summary was adopted by Tracey J in *Kelly v Fitzpatrick*.² 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.³ The discretion remains at large.
21. The factors which are material to this matter and the question of appropriate penalties are addressed below. What the Court needs to determine is an appropriate penalty proportionate to the gravity of the contravention.

Nature, extent and circumstances of the contravening conduct

22. The employee is a Chinese national. On about 1 October 2007, the First Respondent offered him employment as a chef on a full-time basis. He moved to Australia in around March 2008 pursuant to a Temporary Work (Skilled) Subclass 457 visa, sponsored by the First Respondent. The employee became a permanent resident of Australia on about 3 February 2011 pursuant to a Regional Sponsored Migration Scheme Subclass 857 visa.
23. During the entire period of his employment, other than when rostered to be on leave, the employee was rostered and required to work 60 hours per week, made up of the following pattern:-
- a) six days per week, including Saturday and Sunday;
 - b) one rostered weekday off per week, which was usually a Tuesday and later a Wednesday of each week;
 - c) shifts of 10 hours per day worked between 10.00am and 3.30pm; and
 - d) a break of 90 minutes per day, usually from 2.00pm to 3.30pm.
24. During this entire period, the employee was paid a flat weekly rate, based on an annualised salary that was specified from time to time in contracts of employment between the employee and the First Respondent for ordinary working hours of 38 hours per week.

² [2007] FCA 1080 at [14].

³ *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550.

25. The employee was underpaid a total of \$86,118.09 over a period of roughly three years and nine months. This amounts to a very substantial underpayment of basic entitlements over an extended period of time.
26. The severity of the underpayment contraventions was also significantly aggravated by the Respondents' record keeping practices. The First Respondent failed to make and keep records of the employee's overtime hours or leave accrual in accordance with the WR Regulations, the FW Regulations and the FW Act. The First Respondent also failed to issue the employee with pay slips in accordance with the WR Regulations and s.536(1) or the FW Act.
27. Not only did the First Respondent fail to keep records that it was obliged to keep, it created false time and wages books, which it produced in answer to a Notice to Produce, issued to the First Respondent by the Applicant on 22 May 2012, recording the employee's hours of work as 38 hours per week. The employee was directed by the Second and Third Respondents to sign those time and wages books at intervals of around three to four months on the basis that they were needed for immigration purposes.
28. It is submitted by the Applicant that this conduct occurred in circumstances where the employee was a vulnerable person. The employee was employed pursuant to a Temporary Work (Skilled) Subclass 457 visa for much of the underpayment period, and accordingly was highly reliant on the Respondents to remain in Australia. English is not the employee's first language, and even after nearly four years working in Australia he still needed an interpreter to make his complaint to the Applicant. During his employment he was not well placed to inform himself about his minimum legal entitlements or to pursue them. As such, I accept the employee was vulnerable but also accept that he was not treated in any different or singled out way, as a result of this by the Respondents. There was no intention by them to exploit the employee.
29. Each of the First and Second Respondents were aware of and responsible for ensuring that the First Respondent complied with its legal obligations to the employee under applicable instruments in relation to his work at the business. When applying to be approved as a

business sponsor, the Second Respondent undertook, on behalf of the First Respondent, to comply with laws relating to workplace relations that were applicable to the business.

30. It is significant there has been a partial rectification of the underpayment but I note the total underpayment was not repaid in full at the time of the civil proceedings penalty hearing. The First Respondent paid the employee the partial rectification sum out of borrowed funds, having no capacity to do so out of trading profits. Such partial payment, I accept, was an acknowledgment of responsibility.

Similar previous conduct

31. The Respondents' have not previously been the subject of proceedings by the Applicant or its predecessors for contraventions of workplace laws. They have each admitted the contraventions, saving court time in the Applicant's establishing of liability, albeit such admissions were made after considerable work was undertaken by the Applicant. The delay in making such admissions reduces the discount available to the Respondents but I would fix it at 10 per cent and not five per cent as proposed by the Applicant. In my view, a discount of 10 per cent remains a modest one.

Size and financial circumstances

32. *In Workplace Ombudsman v Saya Cleaning Pty Ltd*, Simpson FM (as he then was) provided a summary of the case law in this respect:-

“[26] ... as Justice Tracey said in *Kelly v Fitzpatrick* (above):

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.”⁴

⁴ *Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38.

I bear this authority in mind when fixing penalties in this matter, the First Respondent operating a small business, but nevertheless requiring a “meaningful” penalty to be imposed.

Deterrence

33. 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.⁵ In *Ponzio v B & P Caelli Constructions Pty Ltd* Lander J. said:-

*“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 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.”*⁶

34. In respect of specific deterrence, I think the imposition of a penalty will of itself be highly likely to deter the Respondents from any further contraventions. Given the First Respondent’s trading profits, the imposition of penalties, and requirement to rectify the underpayment in full, together with interest, will have a significant and sufficiently adverse economic effect on the Respondents.
35. It is necessary for there to be a penalty sum that operates as a general deterrence in the industry in which the Respondents operate, and in the circumstances of the employment of this particular employee. In addition, the creation of false time and wage books by the Respondents was particularly disturbing behaviour, worthy of significant reprimand.
36. I accept the Respondents have altered their business practices to prevent a recurrence of such offences. They now have put in place

⁵ *Workplace Relations Act 1996* (Cth), s.3, *Fair Work Act 2009* (Cth), s.3.

⁶ [2007] FCAFC 65 at [93].

systems to ensure the payments of their employees in accordance with workplace laws. Proper records are kept. The Second and Third Respondents' apology I also accept as genuine, and indicative of acceptance of their responsibility.

Totality

37. It is important for the Court to 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.⁷ Is, as a matter of intuitive synthesis, the penalty appropriate.
38. The penalties proposed by the Applicant would be “crushing” for the Respondents. The First Respondent is a small business with modest profits and assets where the loan liabilities are close to the value of the real properties it holds. For the corporate Respondent to meet the penalty which this Court shall impose, it shall be necessary for a transfer to it of personal funds from the Second and Third Respondents who will already be confronting very significant personal penalties by virtue of their accessorial liability. The penalties should be meaningful but not “crushing”.
39. A higher penalty range is appropriate as to overtime than for a failure to pay minimum hours in the facts of this case. The Court otherwise accepts the Respondents submissions that there should be varying reduction in the applicable penalty ranges for each of the respective groupings.
40. Taking into account the above matters, an appropriate level of penalty, in the exercise of my discretion, is \$15,000 in respect of each of the Second and Third Respondents and \$70,000 in respect of the First Respondent.

I certify that the preceding forty (40) paragraphs are a true copy of the reasons for judgment of Judge Hartnett

Associate:

Date: 24 December 2014

⁷ See *Kelly v Fitzpatrick* [2007] FCA 1080 at [30], *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 246 ALR 35.