61. During the Claim Period, pursuant to clause 27.1(a) of the Modern Award, Jay Group was required to pay the Employees penalty rates for shifts worked on Mondays to Fridays which commenced before 6.00am or finished after 6.00pm as follows:

Period	***Adult shiftwork hourly rate***	***Junior shiftwork hourly rate***
21 July 2011 to 31 July 2011	*$20.71*	*$16.57*

62. During the Claim Period, each of the shifts worked by the Employees between Mondays and Fridays finished after 6.00pm as set out in Schedule A to the Statement of Claim.

63. During the Claim Period, Jay Group did not pay the Employees at all for work performed and thereby failed to pay the applicable penalty rates to which the Employees were entitled to receive for all shift work performed between Mondays and Fridays, causing them to be underpaid $377.80.

64. Jay Group contravened clause 27.1(a) of the Modern Award, and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

Contravention 6: Underpayment of overtime rates

65. At all relevant times during the Claim period, the Employees' ordinary hours of work were defined under clause 24.2(a) of the Modern Award as being 7.6 hours per day on not more than 5 days per week, Monday to Sunday inclusive.

66. Pursuant to clause 28 of the Modern Award, employees who perform hours in excess of their ordinary hours are entitled to receive overtime at the following rates:

> *(a) midnight Sunday to midnight Saturday – at the rate of time and a half for the first 2 hours and double time thereafter; and*
>
> *(b) Sunday – at the rate of double time.*

66. During the Claim Period, pursuant to clause 28 of the Modern Award, Jay Group was required to pay the Employees overtime rates for all work performed in excess of ordinary hours as follows:

Period	***Adult overtime – first 2 hours***	***Adult overtime – after first 2 hours and on Sundays***
21 July 2011 to 31 July 2011	*$24.86*	*$33.14*

Period	***Junior overtime – first 2 hours***	***Junior overtime – after first 2 hours and on Sundays***
21 July 2011 to 31 July 2011	*$19.89*	*$26.52*

67. During the Claim Period, the Employees worked overtime hours as set out in Schedule A to the Statement of Claim.

68. During the Claim Period, Jay Group did not pay the Employees at all for work performed and thereby failed to pay the applicable overtime rates to which the Employees were entitled to receive for all hours worked in excess of ordinary hours causing them to be underpaid $4,773.15.

70. Jay Group contravened clause 28 of the Modern Award, and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

Contravention 7: Failure to keep records

71. At all times during the Claim Period, Jay Group was:

> *(a) required by sub-section 535(1) of the FW Act to make, and keep for 7 years, employee records of the kind prescribed by the* Fair Work Regulations 2009 *(Cth) (**FW Regulations**) in relation to each of the Employees;*
>
> *(b) required by the employee record provisions in Subdivision 1 of Division 3 Part 3-6 of the FW Regulations, to make and keep records in relation to each of the Employees that specify:*
>
> *(c) the employer's name; the employee's name; whether the employee's employment is full-time or part-time; whether the employee's employment is permanent, temporary or casual; the date on which the employee's employment began;*

and the Australian Business Number of the Employer (regulation 3.32 of the FW Regulations);

(d) the rate of remuneration paid to the employee; the gross and net amounts paid to the employee; and any deductions from the gross amount paid to the employee (sub-regulation 3.33(1) of the FW Regulations);

(e) if the employee is a casual or irregular part-time employee, the hours worked by the employee (sub-regulation 3.33(2) of the FW Regulations);

(f) details of penalty rates and allowances the employee is entitled to be paid (sub-regulation 3.33(3) of the FW Regulations); and

(g) the number of overtime hours worked by the employee during each day, or when the employee started and ceased working overtime hours (regulation 3.34 of the FW Regulations)

72. During the Claim Period, no records were made in relation to the Employees, or caused to be made, and kept in accordance with regulations 3.32, 3.33 and 3.34 of the FW Regulations.

73. By failing to make and keep records in accordance with the FW Regulations as set out above, Jay Group contravened subsection 535(1) of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

TOTAL UNDERPAYMENT

74. By reason of the contraventions admitted in paragraphs 45 to 73 above, Jay Group caused the Employees to be underpaid a total of $27,284.26.

75. Pursuant to Order 7 of the Orders made by the Court on 20 December 2013, Jay Group is required to repay the underpayments to the Employees within 90 days of the date of the Orders, being 20 March 2014.

76. The underpayments are yet to be rectified as at the date of this Statement of Agreed Facts.

INVOLVEMENT OF MR SINGH IN THE CONTRAVENTIONS

77. Further to the matters agreed at paragraph 8 above, at all material times Mr Singh:

(a) knew that the trolley collection services at the Costco Site covered by the Costco Sub-Contract were to be performed by persons engaged by Jay Group;

(b) signed one of the documents constituting the Costco Subcontract and knew the terms of the Costco Sub-Contract;

(c) knew that the Employees had been engaged to perform the work pursuant to the Costco Sub-Contract;

(d) knew the approximate number of employees and the number of hours required to be worked in order to fulfil Jay Group's obligations under the Costco Sub-Contract;

(e) knew that the terms and conditions of employment of employees performing work collecting trolleys at the Costco Site would be regulated by a modern award under the FW Act;

(f) knew or ought to have known that the amount invoiced by Jay Group to ESS on 1 August 2011 would not be sufficient to meet the minimum wage obligations payable to the Employees;

(g) knew that the Employees were not paid for time worked during the Claim Period;

(h) notwithstanding paragraph 77(g) above, Mr Singh rendered a tax invoice to ESS on behalf of Jay Group on 1 August 2011 declaring that all remuneration had been paid to the Employees for work performed during the Claim Period; and

(i) knew that no employee records were made or kept by Jay Group.

78. At all material times, Mr Singh was, by act or omission, directly or indirectly knowingly concerned in Jay Group's contraventions (as listed in paragraphs 45 to 73 above).

ADMISSIONS

79. Jay Group admits to being the Employer of the Employees listed in paragraph 7 above during the period 21 July 2011 to 31 July 2011.

80. Jay Group admits that it contravened the following civil penalty provisions during the period 21 July 2011 to 31 July 2011:

(a) section 45 of the FW Act by failing to pay each of the Employees the minimum weekly wages for work performed during ordinary hours in contravention of subclause 16.1 of the Modern Award;

(b) section 45 of the FW Act by failing to pay the Employees the casual loading prescribed for all hours worked in contravention of subclause 12.5(a) of the Modern Award;

(c) section 45 of the FW Act by failing to pay the Employees the penalty rates prescribed for all hours worked on a Saturday in contravention of subclause 27.2(a) of the Modern Award;

(d) section 45 of the FW Act by failing to pay the Employees the penalty rates prescribed for all hours worked on a Sunday in contravention of subclause 27.2(b) of the Modern Award;

(e) section 45 of the FW Act by failing to pay the Employees the shift work penalty rates prescribed for shifts worked on Monday to Friday starting before 6:00am or finishing after 6:00pm in contravention of subclause 27.1(a) of the Modern Award;

(f) section 45 of the FW Act, by failing to pay the Employees overtime rates for the overtime work they performed in contravention of subclause 28 of the Modern Award; and

(g) sub-section 535(1) of the FW Act, by failing to make, and keep for 7 years, employee records of the kind prescribed by the FW Regulations in relation to each of the Employees.

81. Mr Singh admits that he was involved in (within the meaning of subsection 550(1) of the FW Act) Jay Group's contraventions of the FW Act as set out at paragraph 81 above.

Annexure "B"

AGREED STATEMENT OF FACTS

*This Statement of Agreed Facts is an agreed document between the applicant and the fourth respondent, Nick Iksidis (**Iksidis**), and is made for the purposes of section 191 of the* Evidence Act 1995 *(Cth). The admissions are only made for the purposes of these proceedings.*

The applicant and Iksidis agree as set out below.

THE APPLICANT

*1. The Fair Work Ombudsman (**FWO**) has standing and authority to bring these proceedings and to pursue civil remedy penalties in relation to Iksidis' involvement in the contraventions (as set out in paragraphs 40(a) to (f) below).*

THE APPLICATION

*2. On 11 January 2013, the applicant filed an Application and Statement of Claim in this Court against the respondents in respect of non-payment of wages contraventions under the Cleaning Services Award 2010 [MA000022] (**Modern Award**), and record keeping contraventions under the Fair Work Act 2009 (Cth) (**FW Act**).*

*3. The contraventions related to 12 employees (referred to in paragraph 8 below) (**Employees**) who were employed as trolley collectors at the Costco Site located at Parramatta Road, Lidcombe, New South Wales (**Costco Site**), during the period 21 July 2011 to 31 July 2011 (**Claim Period**).*

THE SECOND RESPONDENT

*4. Iksidis is the sole director of the second respondent, Xidis Aust Pty Ltd trading as Effective Supermarket Services (**ESS**).*

5. The second respondent was placed into external administration on 27 March 2013, after the commencement of these proceedings.

6. ESS was at all material times:

> *(a) a proprietary company incorporated under the Corporations Act;*
>
> *(b) capable of being sued in and by its corporate name and style;*

(c) a constitutional corporation within the meaning of section 12 of the FW Act;

(d) a "national system employer" within the meaning of section 14 of the FW Act; and

(e) an entity carrying on a trolley collecting business operating at various sites in Victoria and New South Wales.

THE FOURTH RESPONDENT

7. Iksidis is and was at all material times:

(a) a person capable of being sued;

(b) the sole director of ESS;

(c) the sole secretary of ESS;

(d)the beneficial holder of all the issued shares in ESS;

(e) aware of the day to day activities of ESS and the effective controller of ESS;

(f) involved from time to time with the operations of the Costco Contract as defined in paragraph 10 below;

*(g) a person who exercised management and control over the business of ESS insofar as it had business dealings with Costco Wholesale Pty Ltd (**Costco**), Woolworths Limited and Jay Group Services Pty Ltd (**Jay Group**); and*

(h) for the purposes of sub-section 793(1) of the FW Act, a person whose conduct referred to in the applicant's statement of claim was conduct engaged in on behalf of ESS within the scope of his actual or apparent authority.

THE EMPLOYEES

*8. During the Claim Period, the following 12 persons were engaged as trolley collectors (collectively, the "**Employees**"):*

	Name of Employee	***Period of Employment***
1.	*ByoungJoon Jang (**Jang**)*	*21 July 2011 to 28 July 2011*
2.	*Seong Bae Jeon (**Jeon**)*	*23 July 2011 to 31 July 2011*
3.	*Ingu Baek (**Baek**)*	*21 July 2011 to 31 July 2011*

4.	*Donggun Kim (**Kim**)*	*21 July 2011 to 27 July 2011*
5.	*Min Woo Kim (**Min Woo**)*	*21 July 2011 to 31 July 2011*
6.	*Gimim Kim (**Gimim**)*	*23 July 2011 to 31 July 2011*
7.	*Suyong Lim (**Lim**)*	*21 July 2011 to 31 July 2011*
8.	*Inwoo Baek (**Inwoo**)*	*21 July 2011 to 27 July 2011*
9.	*Joon Eok Park (**Park**)*	*23 July 2011 to 31 July 2011*
10.	*Seung Taek Oh (**Oh**)*	*21 July 2011 to 31 July 2011*
11.	*Taheo Cho (**Cho**)*	*21 July 2011 to 27 July 2011*
12.	*Abbas Vahdani (**Vahdani**)*	*21 July 2011 to 31 July 2011*

9. At all material times the Employees were:

(a) employed to perform trolley collection services in the State of New South Wales at the Costco Site.

(b) engaged on a casual basis;

(c) not employees with disabilities;

(d) all from a non-English speaking background; and

(e) not employees to whom training arrangements applied.

COSTCO SITE TROLLEY COLLECTIONS: CONTRACTUAL ARRANGEMENTS

Head Contract

*10. On or about 21 June 2011, ESS entered into a contract with Costco (**Costco Contract**) pursuant to which ESS agreed to provide trolley collecting services at the Costco Site, from 21 July 2011.*

11. The Costco Contract is in writing and constituted by a written agreement signed by Costco and Iksidis on 21 June 2011.

12. It was agreed that Costco would pay ESS $34,633.85 for trolley collecting services at the Costco Site for the period from 21 July 2011 to 31 July 2011.

13. On or about 25 July 2011, ESS invoiced Costco in respect of the trolley collection services undertaken during the Claim Period at the Costco Site for the total amount of $34,633.85.

Sub-Contract

14. In late June 2011, Iksidis approached Jatinder Singh (who was the Operations Manager of Jay Group and also known as Jim Gill) and offered to subcontract the provision of trolley collection services under the Costco Contract to Jay Group.

15. ESS had previously worked with Jay Group in May 2011 when ESS subcontracted trolley collection services to Jay Group at the Woolworths store located in Newington, New South Wales.

*16. On or about 5 July 2011, ESS made an agreement with Jay Group for Jay Group to carry out the trolley collecting services under the Costco Contract at the Costco Site during the period from 21 July 2011 to 18 September 2011 (**Costco Sub-Contract**).*

17. The Costco Sub-Contract is in writing and constituted by:

> *(a) a written agreement dated 5 July 2011 signed by the third respondent, Jim Gill (who later became known to the FWO as Jatinder Singh); and*
>
> *(b) a written document entitled "Trolley Services Contractor Terms and Conditions of Trade" prepared by ESS dated 20 July 2011.*

18. It was a term of the Costco Sub-Contract that ESS would pay to Jay Group the amount of $14,300 plus GST for the period 21 July 2011 to 31 July 2011, and $8,500 plus GST each week thereafter.

19. The terms of the Costco Sub-Contract (amongst other things) stated that Jay Group was to provide:

(a) 1 utility with a tow bar; and

(b) the following numbers of trolley collectors:

(i) 14 collectors on 21 July 2011;

(ii) 10 collectors on "standby" on 21 July 2011; and

(11) 10 collectors after 24 July 2011.

20. Clause 3(a) of the "Trolley Services Contractor Terms and Conditions of Trade" provided that Jay Group was required to provide personnel who were employees of Jay Group to perform trolley collection services.

21. Clause 3(c) of the "Trolley Services Contractor Terms and Conditions of Trade" provided that Jay Group was required to arrange insurance in accordance with workers compensation legislation and public liability insurance.

22. On or about 1 August 2011, ESS received an invoice from Jay Group in respect of the trolley collection services undertaken during the Claim Period at the Costco Site, in the amount of $15,730 ($14,300 plus GST).

23. On or about 11 January 2012, ESS paid Jay Group $14,800 in respect of the trolley collection services undertaken during the Claim Period at the Costco Site.

24. Iksidis at all times believed that Jay Group was the employer of the Employees.

Orientation Meeting on 20 July 2011

*25. On or about 11.30am on 20 July 2011, in preparation for performing the trolley collection services at the Costco Site, Iksidis and Tejinder Singh Sandhu had a meeting with some of the Employees at the Costco Site (**Meeting**).*

26. At the Meeting, Iksidis spoke to the Employees in attendance about the work to be performed during the Claim Period, and distributed high visibility vests bearing the ESS logo as well as trolley straps.

Hours worked by the Employees during the Claim Period

27. The hours worked by the Employees as stated in Schedule A to the applicant's statement of claim correspond approximately with the coverage hours required to be worked in order to fulfil ESS' obligations under the Costco Contract.

Termination of Costco Contract

28. On or about 26 July 2011, Iksidis received a telephone call from John Angelkov, assistant warehouse manager at Costco, and was informed that the Costco Contract was to be terminated on 31 July 2011.

29. On or about 31 July 2011, Iksidis received a telephone call from Jatinder Singh regarding the Costco Contract. During the telephone call, Iksidis advised Jatinder Singh that the Costco Contract had been terminated, effective immediately.

RELEVANT LEGISLATION

30. At all relevant times during the Claim Period, the Employees' employment was covered by the FW Act.

RELEVANT INDUSTRIAL INSTRUMENT

*31. At all material times during the Claim Period, the Employees' employment was also covered by the Cleaning Services Award 2010 [MA000022] (**Modern Award**) because the work performed by the Employees as trolley collectors was of a kind covered by the classification CSE1 in clause D.1 of Schedule D to the Modern Award.*

32. Under clause D.1.1 of the Modern Award, the tasks which an employee at the level of CSE1 may perform on a daily or periodic basis include collecting, servicing and maintaining shopping and/or luggage trolleys.

33. Each of the Employees' tasks performed on a daily basis involved collecting shopping trolleys.

34. In accordance with the Modern Award and section 45 of the FW Act, each of the Employees were required to be paid the minimum wages, casual loadings, Saturday penalty rates, Sunday penalty rates, shift work penalty rates and overtime rates as set out below:

Entitlement	***Adult hourly rate payable***	***Junior hourly rate payable***
Minimum wages	*$16.57*	*$13.26*
Casual loading of 19%	*$19.72*	*$15.77*
Saturday penalty rate	*$23.03*	*$18.43*
Sunday penalty rate	*$26.35*	*$21.08*
Shift work rate	*$20.71*	*$16.57*
Overtime rates – first 2 hours	*$24.86*	*$19.89*

Overtime rates – after 2 hours and on Sundays	*$33.14*	*$26.52*

INVESTIGATION FINDINGS

35. On or about 2 September 2011, the applicant received workplace complaints from the Employees.

36. The applicant conducted an investigation into the claims raised by each of the Employees. The main issue raised in each of the workplace complaints was the non-payment of wages.

37. As part of the investigation the applicant compiled a set of underpayment calculations for each of the Employees based on the information provided by them in their workplace complaints, interviews and correspondence.

38. The FWO's calculations and investigations revealed that the Employees were not paid their minimum entitlements, loadings, penalty rates and overtime under the Modern Award for the work they performed as trolley collectors.

39. Section 45 of the FW Act provides that a person must not contravene a term of a modern award.

*40. Contrary to section 45 of the FW Act, the FWO identified that the following contraventions of the Modern Award had occurred (**Contraventions**):*

> *(a) subclause 16.1 of the Modern Award which resulted in the Employees being underpaid $16,990.88 for their minimum rates of pay;*
>
> *(b) subclause 12.5(a) of the Modern Award which resulted in the Employees being underpaid $3,228.27 for their casual loadings;*
>
> *(c) subclause 27.2(a) of the Modern Award which resulted in the Employees being underpaid $601.16 for their Saturday penalty rates;*
>
> *(d) subclause 27.2(b) of the Modern Award which resulted in the Employees being underpaid $1,313.01 for their Sunday penalty rates;*
>
> *(e) subclause 27.1(a) of the Modern Award which resulted in the Employees being underpaid $377.80 for their shift work penalty rates; and*

(f) subclause 28 of the Modern Award which resulted in the Employees being underpaid $4,773.15 for their overtime rates.

41. At the conclusion of the investigation the applicant determined that the Employees had been underpaid a total of $27,284.26.

42. On 13 December 2012, the applicant issued a "Completion of Investigation" letter to ESS, Iksidis and the other respondents. This letter also enclosed a copy of a Contravention Letter dated 13 December 2012 sent to Jay Group by the applicant on the same day.

43. In the Completion of Investigation letter, the FWO indicated that it had also determined that the second to fifth respondents were involved in the contraventions identified in the Contravention Letter.

INSTITUTION OF PROCEEDINGS

44. On 4 January 2013, the applicant sent a letter to ESS, Iksidis and the other respondents, informing that the applicant intended to commence litigation in 7 days, and enclosed a draft of the statement of claim filed in these proceedings.

45. On 11 January 2013, the applicant commenced these proceedings.

INVOLVEMENT OF IKSIDIS IN THE CONTRAVENTIONS

46. Further to the matters agreed at paragraph 7 above, at all material times Iksidis:

(a) knew that employees would be required to perform work collecting trolleys at the Costco Site in order to fulfil ESS's obligations under the Costco Contract;

(b) knew the approximate number of employees and the number of hours required to be worked in order to fulfil ESS's obligations under the Costco Contract;

(c) knew that the terms and conditions of employment of employees performing work collecting trolleys at the Costco Site would be regulated by the Modern Award;

(d) was involved in making the Costco Sub-Contract between ESS and Jay Group;

(e) was involved in determining the rates payable by ESS to Jay Group under the Costco Sub-Contract;

(f) failed to ensure that the consideration to be paid by ESS to Jay Group pursuant to the Costco Sub-Contract was sufficient to meet the minimum wage obligations payable to the Employees in respect of work performed at the Costco Site during the Claim Period;

(g) only took steps to ascertain whether Jay Group had in fact paid the Employees for their time worked during the Claim Period after he was notified by the FWO that the Employees had not been paid.

(h) failed to ensure that full payment was made by ESS to Jay Group within a reasonable time as required under the Costco Sub-Contract; and

(i) failed to ensure that payment was made to the Employees for work performed providing trolley collection service at the Costco Site during the Claim Period.

ADMISSIONS

47. On the basis of the facts set out above, Iksidis admits to being involved, within the meaning of section 550(2) of the FW Act, in the contraventions referred to in paragraphs 40(a) to (f) above, namely:

(a) section 45 of the FW Act, by virtue of each of the Employees failing to receive the minimum weekly wages for work performed during ordinary hours (exclusive of penalties and allowances) as prescribed by clause 16.1 of the Modern Award;

(b) section 45 of the FW Act, by virtue of each of the Employees failing to receive the casual loading prescribed for all hours worked in accordance with clause 12.5(a) of the Modern Award;

(c) section 45 of the FW Act, by virtue of each of the Employees failing to receive the penalty rate prescribed for all hours worked on a Saturday in accordance with clause 27.2(a) of the Modern Award;

(d) section 45 of the FW Act, by virtue of each of the Employees failing to receive the penalty rate prescribed for

all hours worked on a Sunday in accordance with clause 27.2(b) of the Modern Award;

(e) section 45 of the FW Act, by virtue of each of the Employees failing to receive the shift work penalty rate prescribed for shifts worked on Monday to Friday and starting before 6:00am or finishing after 6:00pm in accordance with clause 27.1(a) of the Modern Award; and

(f) section 45 of the FW Act, by virtue of each of the Employees failing to receive overtime rates for the overtime work they performed as prescribed by clause 28 of the Modern Award.

48. By operation of sub-section 550(1) of the FW Act, Iksidis is taken to have committed those contraventions.

Annexure "C"

FACTORS RELATING TO PENALTY FOR THE FIRST AND THIRD RESPONDENT

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

41. The contraventions in these proceedings represent a failure by Jay Group to provide twelve Employees their basic minimum entitlements for the entirety of their employment, albeit for a short period of time. This conduct warrants the imposition of a significant because it involves contraventions of minimum standards of the most fundamental kind, being the complete non-payment of wages and entitlements.

42. In engaging in this conduct, Jay Group has breached a fundamental purpose of the FW Act, which includes ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions (section 3 of the FW Act). The safety net is particularly important for those employees who are vulnerable or in low income roles.

43. Eleven of the Employees were from South Korea and the majority of them had limited English Skills. While Mr Vahdani had a competent understanding of English, he had only recently arrived from Iran and the job at the Costco Site was his first experience of working in Australia. Riethmuller FM (as he then was) observed in Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd ([2012] FMCA 258) at [42] that an employee who lacks competency in English may have difficulty in

understanding and therefore enforcing their rights under the relevant industrial instruments. The Applicant submits that the Employees could be characterised as vulnerable employees, which is a relevant factor in assessing the quantum of penalty of penalty to be imposed (Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor [2009] FMCA 38 at [20]).

44. Further, the contraventions in this case occurred within a chain of purported subcontracting arrangements (Jay Group SOAF at [10] to [25]) between Costco, Xidis Aust, Jay Group and Mr Sandhu. These subcontracting arrangements often result in situations where workers are unaware of who their employer actually is. This can result in employees encountering difficulties enforcing their entitlements in circumstances where they have been paid well below minimum wage, or as in this case, not at all. Subcontracting is common in the cleaning and trolley collection industry and there is a risk that such arrangements can be exploited by employers in an attempt to avoid responsibilities for breaches of workplace laws.

Nature and extent of any loss or damage

45. The underpayment of $27,284.26 is significant, particularly taking into account that the Employees only worked for Jay Group for approximately 11 days during the period 21 July 2011 and 31 July 2011. The majority of the Employees were also working in Australia on short-term working-holiday visas and therefore only had a limited amount of time in which to earn money under the restrictions of their visas.

46. Jay Group received $14,800 from Xidis Aust for the worked performed by the Employees (Jay Group SOAF at [22]). While the evidence (Singh Penalty Affidavit at [16]) appears to indicate that more than half of this amount was then paid to Mr Sandhu with the intention that it would be passed onto the Employees (although it is not entirely clear whether all of the monies paid to Mr Sandhu was for the trolley collection work performed at the Costco Site), Mr Singh was aware that the Employees never received any payment for the work performed (Jay Group SOAF at [77(g)]) and Jay Group made no attempts to ensure that the money was eventually paid to the Employees.

47. Jay Group has therefore received the benefit of a portion of the Employees' underpayments by deferring payment for approximately two and a half years and will continue to receive the benefit until the underpayments are rectified. The Employees have been, and continue to be, commensurately deprived of the

financial benefits that would flow from the timely payment of their correct entitlements (Fair Work Ombudsman v Hungry Jacks Pty Ltd [2001] FMCA 233 at [47]).

Similar previous conduct

48. In addition to the claims lodged with the FWO by the Employees, the FWO's records indicate that there have been 7 further complaints lodged against Jay Group for the underpayment of minimum entitlements (Lang Penalty Affidavit at [27]). Three of the 7 complaints were unable to be further investigated due to a lack of evidence and the FWO acknowledges that the remaining 4 of the 7 complaints were voluntarily rectified by Jay Group. One of the complaints was closed due to lack of evidence, however the complaint indicates a similar pattern of behaviour of non-payment and purported subcontracting arrangements between Jay Group, Mr Singh and Mr Sandhu (Lang Penalty Affidavit at [29] and annexure "DL-10")

Whether the breaches arose out of the one course of conduct

49. The Employees did not receive any payment at all for work performed which resulted in contraventions of a number of provisions of the Modern Award and FW Act. As was noted by Gray J in City of Altona:

> *"If such a party has pursued a course of conduct which gives rise to beaches of several different obligations, there is no reason why it should be treated as immune in respect of its breach of one obligation, merely because it has acted in breach of another." ((1992) 37 FCR 216 at [223])*

50. The Applicant submits that in light of these comments, and in line with the recent decision of this court in FWO v Garfield Barry Farm Pty Ltd & Anor ([2012] FMCA 103) at [28] that it would be "fundamentally at odds without system of workplace entitlements to treat a breach of several obligations as if it were a breach of only one…".

51. The Applicant submits that the contraventions have been appropriately grouped as outlined… and that the Respondent has already had the benefit of the course of conduct provisions of subsection 557(2) of the FW Act… Accordingly, the Applicant submits that no further discount should be available to Jay Group or Mr Singh in relation to the courses of conduct engaged in.

Size and financial circumstance of the business

52. The Applicant submits that the size of a business or an employer's financial position at the time of the contraventions, are matters that are not particularly relevant to the question of penalty (See Cotis v McPherson (2007) 169 IR 30 [16] (Cotis) and Kelly supra at [28]).

In Kelly at [28], Tracey J stated:

> *"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."*

54. Further, in Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412, the Court stated at [27]:

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

55. Neither Jay Group or Mr Singh have filed any evidence in relation to the size of Jay Group or its financial circumstances, except for brief evidence stating that the company incurred legal expenses in recouping monies from Xidis Aust (Singh Penalty Affidavit at [30]). Mr Singh has also not filed any evidence in relation to his personal financial circumstances.

56. The Applicant is not aware of the number of employees of Jay Group during the period to which these proceedings relate or subsequently and the Applicant is not in possession of material to make an assessment of the financial position of Jay Group at the time of the contraventions.

57. In the absence of further evidence from Jay Group or Mr Singh concerning their respective financial positions, the Applicant submits that no reduction in penalties should be afforded to Jay Group or Mr Singh on this basis.

Deliberateness of the breaches

58. There is no evidence to suggest that Jay Group and Mr Singh's contraventions constituted a deliberate attempt to break

the law. However, the FWO is not aware of any steps taken by Jay Group, or Mr Singh as the Operations Manager, to determine the minimum lawful entitlements the company was required to pay the Employees.

59. At the very least, Jay Group and Mr Singh would have known that an employee is entitled to be paid for work performed given the past operations of Jay Group in the cleaning industry. Mr Singh has now admitted that he knew that the terms and conditions of the Employees would have been covered by an award (Jay Group SOAF at [77(e)]) and that he knew, or ought to have known, that the amount of $15,730 invoiced by Jay Group to Xidis Aust trading as ESS (Jay Group SOAF at [21]) would not be sufficient to meet the minimum wage obligations payable to the Employees (Jay Group SOAF at [77(g)].

60. FWO submits that the breaches occurred in circumstances where Jay Group and Mr Singh were at least reckless in relation to their obligations.

Involvement of senior management

61. Mr Singh was the Operation Manager of Jay Group and exercised management and control over the business of the company insofar as it had business dealings with Xidis Aust in relation to the provision of trolley collection services (Jay Group SOAF at [8]).

62. Mr Singh has admitted that he was involved in Jay Group's contraventions within the meaning of section 550 of the FW Act (Jay Group SOAF at [81]).

Ensuring Compliance with Minimum Standards

63. 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 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 legislation for contraventions of the FW Act reinforce the importance placed on compliance with minimum standards.

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

General deterrence

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

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

> *"Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt, IV. Nor, if it be necessary to say do, is there any compensatory element in the penalty fixing process – Trade Practices Commission v. Mobil Oil Australia Ltd [1984] FCA 363; (1984) 4 FCR 296 at 298 (Toohey J.). The principal, and I think probably the only, object of the penalties imposed by s.76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act (at [40]).*

67. His Honour confirmed that "the assessment of a penalty of appropriate deterrent value will have regard to a number of factors which have been canvassed in the cases" (at [42]). The factors referred to be His Honour were those relevant to the trade practices jurisdiction, but closely mirror the factors later adopted in Pangaea…

68. 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 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: R v Thompson (1975) 11 SASR 217."*

69. The contraventions in the current proceedings concern the removal of key employment entitlements by way of a failure to pay employees for work performed during the Claim Period. The penalties in this case should be imposed on a meaningful level so as to deter other employers from committing similar contraventions, especially in industries and circumstances where the employees are vulnerable (Lang Penalty Affidavit at [36] to [46]) and may have less awareness of their entitlements. Directors and managers of such companies should be under no misapprehension that a decision to rely on employees' unpaid labour particularly in circumstance of vulnerable employees will not be met with significant penalties.

Specific deterrence

70. As Justice Gray in Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union ([2008] FCAFC 170; (2008) 171 FCR 357) at [37] observed:

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

71. The need for specific deterrence is significant in this case as Jay Group continues to operate a cleaning business (Lang Penalty Affidavit at [10(a)] and [10(c)]) and may continue to employ employees (although no evidence of this has been filed). The cleaning industry is known for high levels on non-compliance (See the FWO's National Cleaning Services Campaign 2010-2011 Final Report at http://www.fairwork.gov.au/ArticleDocuments/714/national-cleaning-services-campaign-final-report.pdf.aspx, Fair Work Ombudsman v Jooine (Investment) Pty Ltd & Anor [2013] FCCA 2144; Fair Work Ombudsman v Glad Group Pty Ltd [2011] FMCA 233; Fair Work Ombudsman v Cleaners New South Wales [2009] FMCA 683). As outlined at paragraph 48 above, Jay Group also has a history of non-compliance (similar previous conduct)(Lang Penalty Affidavit at [27] to [28]).

72. Where a business continues to operate, this will be an important consideration for specific deterrence, as referred to in Fair Work Ombudsman v Fortcrest Investments Pty Ltd ([2010] FMCA 18 at [96]):

> *"The respondent continues in business and it is important that a penalty be imposed at a sufficient level to deter the respondent from acting so recklessly in the future when it comes to properly acquainting itself with its obligations as an employer."*

73. There is no evidence of any systems, processes or other measures adopted by Jay Group to ensure compliance in the future. Driver FM, as he was at the time, referred to this consideration in Fair Work Ombudsman v Roselands Fruit Market & Anor ([2010] FMCA 599), where he stated (at [75]):

> *"...I am not persuaded that the respondents have put in place systems to prevent a recurrence of the breaches and accordingly, specific deterrence plays an important factor."*

74. Mr Singh is still currently employed as the Operations Manager for Jay Group (Singh Penalty Affidavit at [2]) and may therefore have some involvement in engaging employees and have some responsibility for determining their terms and conditions of employment.

75. Further… the penalty evidence filed by Mr Singh indicates no real contrition (Singh Penalty Affidavit at [30]) for the contraventions that have occurred.

Totality principle

76. Having fixed an appropriate penalty for each course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches, and is not oppressive or crushing (see Kelly at [203]; Merringtons at [23] per Gray J, [71] per Graham J, [102] per Buchanan J).

77. Neither Jay Group nor Mr Singh have filed any evidence as to their financial circumstances. To the extent that they seek to argue that a penalty would be oppressive or crushing, the Applicant draws the Court's attention to the comments of Burchardt FM (as he then was) in Fair Work Ombudsman v Promoting U Pty Ltd & Anor ([2012] FMCA 58), where his Honour states 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 that level 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 suitably insignificant amounts to meet the Respondents' capacity to pay."*

78. It is submitted that in the absence of any evidence provided by Jay Group or Mr Singh as to their respective financial positions, the Court is entitled to treat them 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.

Annexure "D"

FACTORS RELATING TO PENALTY FOR THE FOURTH RESPONDENT

79. As noted above, the Fourth Respondent, Mr Nick Iksidis, was at all relevant times the director and secretary of Xidis Aust trading as ESS. Xidis Aust was laced into external administration on 27 March 2013 and the Applicant is therefore not seeking any pecuniary penalties against the company.

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

80. Mr Iksidis has admitted (Iksidis SOAF at [47]) that he was involved in Jay Group's contraventions which resulted in the failure to provide twelve Employees their basic minimum entitlements, including the minimum rate of pay, for the entirety of the Claim Period.

81. Mr Iksidis was involved in breaching a fundamental purpose of the FW Act, which includes ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions (s.3 of the FW Act).

82. Mr Iksidis appears to have operated the trolley collection business known as "Effective Supermarket Services" since at least 25 June 2001 (Lang Penalty Affidavit at [11]) and is an experienced businessman in the trolley collection industry. With two previous legal proceedings commenced against him for the underpayment of trolley collectors (Lang Penalty Affidavit at [31]), Mr Iksidis is well aware of the vulnerable nature of employees in the trolley collection industry generally and the obligation to provide employees with their minimum entitlements.

83. Jay Group's contraventions occurred within the context of subcontracting arrangements… Mr Iksidis played a crucial role in the negotiation of both the contract with Costco and the subcontract with Jay Group. Mr Iksidis was closely involved in determining the rate payable by his company Xidis Aust to Jay Group (Iksidis SOAF at [46(e)]) and failed to ensure that the consideration paid to Jay Group under the subcontract was sufficient to meet the minimum wage obligations payable to the Employees (Iksidis SOAF at [46(f)]). Further, Xidis Aust only made full payment of the contract to Jay Group after Jay Group commenced legal proceedings against Xidis Aust (Singh Penalty Affidavit at [17] to [18]). This conduct may have presumably

caused difficulties for Jay Group in meeting its own obligations towards the Employees.

Nature and extent of the loss

84. The Applicant repeats the submissions… in relation to the effect of the underpayments of the Employees.

85. Mr Iksidis' company, Xidis Aust invoiced and received $34,633.85 from Costco in respect of the trolley collection services undertaken by the Employees during the Claim Period in or around late July/August 2011 (Iksidis SOAF at [12] and [13]). Mr Iksidis did not authorise the company to pay any monies to Jay Group until legal proceedings instituted by Jay Group were settled out of court in January 2012 (Singh Penalty Affidavit at [18]) and therefore failed to ensure that full payment was made to Jay Group within a reasonable time. Xidis Aust accordingly received the benefit of not paying Jay Group by deferring payment for approximately 6 months.

Similar previous conduct

86. Mr Iksidis is well known to the FWO from two previous proceedings commenced by the FWO's predecessor agency, the Workplace Ombudsman, in relation to the underpayment of trolley collection workers (Lang Penalty Affidavit at [30] to [31]).

87. In Inspector Dekic v Xidis Pty Ltd and Nick Iksidis (See Annexure DL-11 to the Lang Penalty Affidavit), Magistrate Hawkins of the Magistrate's Court of Victoria found that Mr Iksidis was involved in his company's contravention of failing to pay $3,523.98 in minimum wages and annual leave entitlements under the Workplace Relations Act 1996 (Cth) to three trolley collection workers employed in Victoria in 2006 to 2007. The Magistrate's Court imposed a penalty of $12,500 against Xidis Pty Ltd and $12,500 against Mr Iksidis.

88. In Inspector Lang v Xidis Pty Ltd and Nick Iksidis [2008] FMCA 1009 (See Annexure DL-12 to the Lang Penalty Affidavit), Burchardt FM (as he then was) found that Mr Iksidis was involved in the underpayment of 42 trolley collection workers employed by Xidis Pty Ltd in NSW in 2007. The underpayments in this case were more than $100,000 and a number of employees were disabled and considered vulnerable by the Court (Inspector Lang v Xidis Pty Ltd and Nick Iksidis [2008] FMCA 1009 at [23]). The Court imposed a penalty of $120,000 against the company for its conduct. While no penalty was imposed upon Mr

Iksidis this was only on the bases that the Court found it likely that Mr Iksidis would pay the company's penalty personally.

89. The Applicant submits that Mr Iksidis' strong history of non-compliance with workplace laws is given significant weight in the Court's approach to determining an appropriate penalty in this case.

Whether the breaches arose out of the one course of conduct

90. The Applicant adopts the submissions in relation to the First and Third Respondents…

Size and financial circumstance of the business

91. Mr Iksidis' legal representatives have provided correspondence to the Court dated between 28 October 2013 and 5 December 2013 alleging that Mr Iksidis has limited income, has lost his business and family home and is currently unemployed. While the Applicant acknowledges these as submissions (at their very highest), as there is no formal evidence before the court supporting these propositions or any further evidence of Mr Iksidis' current financial position, the Applicant submits that such submissions should only be given little weight.

92. Even if Mr Iksidis is experiencing financial difficulty, of which there is no evidence, the Applicant submits that the Courts have previously found that sanctions should be imposed on a meaningful level (Kelly at [28]) regardless of size or financial position. Submissions or relevant case law on this point have already been addressed…

93. Further, Mr Iksidis is currently the director of 7 corporations (Lang Penalty Affidavit at [13]). As the director he is likely to draw some income from these businesses and has produced no evidence of the financial return from these businesses. In addition, there is some indication from other employers in the trolley collection industry that Mr Iksidis is actively seeking work again in the industry (Lang Penalty Affidavit at [33] to [35]).

94. In light of the above, the Applicant submits that any sanction should be imposed at a meaningful level (Kelly at [28]) and even insolvency, personal or corporate, is not a refuge from such sanction (Cotis at [12]).

Deliberateness of the breaches

95. The Applicant submits that the breaches occurred in circumstances where Mr Iksidis was well aware of the industry minimums in which he was operating and chose not, for whatever reason, to make timely payments to Jay Group whilst receiving a financial benefit arising from the Employees' work.

96. At the very least, Mr Iksidis was reckless in his involvement in Jay Group's contraventions – he negotiated the initial contract with Costco (Iksidis SOAF at [10]), received from Costco more than double in consideration eventually paid to Jay Group and was aware of obligations to pay minimum entitlements via previous legal proceedings.

Involvement of senior management

97. A corporate entity can only act through its authorised officers and agents. Mr Iksidis was at all relevant times the sole director of Xidis Aust and the person who exercised management and control over the business of Xidis Aust insofar as it had business dealings with Costco and Jay Group (Iksidis SOAF at [7]).

Ensuring compliance with minimum standards

98. This factor has been dealt with… and the Applicant relies on its submissions therein.

General deterrence

99. Again, the principles of general deterrence are set out… above and the Applicant relies on the submissions made above.

Specific Deterrence

100. The Applicant submits that the penalty imposed on Mr Iksidis should be significant to ensure that the specific deterrence effect is high. The need for specific deterrence is particularly significant in this case given the previous court findings and poor compliance history of Mr Iksidis and the fact that he continues to act as director of 7 entities, including one entity known as Trolley Solutions Pty Ltd, the name of which indicates that it may operate in the trolley collection industry.

101. Although Mr Iksidis' legal representatives have made representations that Mr Iksidis is no longer in the trolley collecting industry and there is no prospect whatsoever of repeat offending, the Applicant has recently received information that indicates that Mr Iksidis is actively seeking to re-enter the industry (Lang Penalty Affidavit at [33]to [34]).

102. In Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543, it was stated:

> *"93. There are three purposes at least for imposing a penalty: punishment; deterrence; and rehabilitation. The punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment: R v Hunter (1984) 36 SASR 101 at 103. Therefore the circumstances of the offence or contravention are especially important. The penalty must recognise the need for deterrence, both personal and general. In regard to personal deterrence, an assessment must be made of the risk of re-offending…"*

103. The Applicant accepts that Mr Iksidis cooperated during the investigation and admitted the contraventions prior to the liability hearing, However, Mr Iksidis should be left in no doubt that failing to comply with minimum obligations will not be tolerated by the Court, particularly in circumstances where there is a history of non-compliance and a strong risk of repeat offending.

Totality

104. The Applicant repeats the submissions with respect to the totality principle made… above and on the basis that no formal evidence has been filed by Mr Iksidis as to his financial position, the Applicant submits that the submissions made by Mr Iksidis' lawyers in their correspondence to the court only be given little weight and that there is no convincing evidence that the penalty range proposed in Schedule D would have an oppressive or crushing effect.

Annexure "E"

FACTORS RELATING TO PENALTY FOR THE FIFTH RESPONDENT

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

105. The evidence indicates that Mr Sandhu assisted Jay Group with the management of the Employees performing trolley work at the Costco Site (Jay Group SOAF at [24]) and was the contact person within Jay Group for a number of the Employees (Lang Penalty Affidavit at [18]).

106. In the Orders dated 20 December 2013, the Court determined that that Mr Sandhu was involved in Jay group's contraventions which resulted in the failure to provide twelve Employees their basic minimum entitlements, including the minimum rate of pay, for the entirety of the Claim Period.

107. Mr Sandhu was involved in breaching a fundamental purpose of the FW Act, which includes ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions (s.3 of the FW Act).

Nature and extent of the loss of damage.

108. The Applicant repeats the submissions… in relation to the effect of the underpayments of the Employees.

109. More than $9,000 was purportedly transferred from Jay Group to Mr Sandhu as payment for trolley collection work (Singh Penalty Affidavit at [16] and [19]). It is not clear whether this payment was limited to the work performed at the Costco Site. What is clear however is that none of this money transferred to Mr Sandhu was ever paid to the Employees. Like Mr Iksidis and Mr Singh before him, Mr Sandhu received the benefit of the Employees' underpayment. The Employees have been, and continue to be, commensurately deprived of the financial benefited that would flow from the timely payment of their correct entitlements (Fair Work Ombudsman v Hungry Jacks Pty Ltd [2001] FMCA 233 at [47]).

Similar previous conduct

110. While the Applicant has not made any determination concerning similar previous conduct engaged in by Mr Sandhu, the Applicant is aware that one of the complaints against Jay Group referred to, appears to involve Mr Sandhu in a supervisory capacity.

Whether the breaches arose out of the one course of conduct

111. The Applicant adopts the submissions in relation to the First and Third Respondents…

Size and financial circumstances

112. As Mr Sandhu has not participated in the proceedings to date (Madden Affidavit at [9] to [21]), no evidence has been filed in relation to his personal financial circumstances.

113. The Applicant adopts the submissions above in relation to this consideration and in the absence of any evidence from Mr Sandhu concerning his financial position, the Applicant submits that no reduction in penalties should be afforded to him.

Deliberateness of the breaches

114. The Applicant submits that the breach occurred in circumstances where Mr Sandhu was at least reckless in relation to his obligation. Without further evidence surrounding the payment of monies to Mr Sandhu, the Applicant is not in a position to make further submissions on this point.

Ensuring compliance with minimum standards

115. This factor has been dealt with… above and the Applicant relies on its submissions therein.

General deterrence

116. The FWO adopts the submission relation to the principles of general deterrence…

Specific deterrence

117. There is a need for specific deterrence in this case as although Mr Sandhu no longer resides in Australia (Lang Penalty Affidavit at [21] to [24]), there is a need to demonstrate that obligations under the FW Act cannot be avoided merely be leaving the jurisdiction and a failure to comply with obligation will continue to be pursued. Given Mr Sandhu's location overseas however, the Applicant accepts that the likelihood of Mr Sandhu re-offending is remote.

Totality

118. As Mr Sandhu has not participated in the proceedings at all, there is no evidence that the penalty range proposed in Schedule E would have an oppressive or crushing effect.