

FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v MYLES

[2015] FCCA 1392

Catchwords:

INDUSTRIAL LAW – Underpayments of employees over three legislative regimes, the *Workplace Relations Act 1996*, the *Fair Work Act 2009* (“FW Act”) and the FW Act bridging period from 1 July 2009 to 31 December 2009 – adverse action under the FW Act – pecuniary penalties – relevant considerations – appropriate approach to quantification of penalty when there is a course of conduct over three legislative regimes.

Legislation:

Workplace Relations Act 1996, ss.171, 182, 185, 208, 232, 235, 717, 719, 728, 836, 841, 846

Fair Work Act 2009, ss.44, 45, 61, 87, 90, 323, 340, 341, 342, 360, 361, 535, 536, 539, 545, 546, 550, 557

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, items 7 and 11 of sch.2, items 2 and 6 of sch.4, items 5 and 11 of sch.9, items 5, 6 and 16 of sch.16

Corporations Act 2001, s.471B

Crimes Act 1914, s.4AA

Workplace Relations Regulations 2006, regs.14.4, 19.4, 19.12, 19.20

Fair Work Regulations 2009, reg.3.36

Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009, reg.5.07

Cases cited:

Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining & Energy Union [2015] FCAFC 59

Kelly v Fitzpatrick (2007) 166 IR 14

Mason v Harrington Corporation Pty Ltd [2007] FMCA 7

Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Carlton Sheet Metal Pty Ltd [2011] FMCA 536

CPSU, Community and Public Sector Union v Telstra Corporation Limited (2001) 108 IR 228

Finance Sector Union v Commonwealth Bank of Australia (2005) 147 IR 462

Murrihy v Betezy.com.au Pty Ltd (No.2) (2013) 221 FCR 118

Applicant:

FAIR WORK OMBUDSMAN

Respondent:

MARK EDWARD MYLES

File Number: SYG 1710 of 2014
Judgment of: Judge Cameron
Hearing date: 14 April 2015
Date of Last Submission: 20 May 2015
Delivered at: Sydney
Delivered on: 5 June 2015

REPRESENTATION

Counsel for the Applicant: Ms V. McWilliam
Solicitors for the Applicant: Fair Work Ombudsman

The Respondent appeared in person

WITH REGARD TO THE RESPONDENT'S ADMISSIONS MADE IN THE STATEMENT OF AGREED FACTS THE COURT DECLARES THAT:

- (1) In relation to Casey Anger, Skye Cassidy, Kelly Cooper, Robyn Dickson, Jessica Doyle, Janine Evans, Joanne Foster, Tanya Holmes, Alissa Kruger, Kristi Neuner, Joanne Ogorman, Cheryl Pianko-Worsely, Lisa Pickard, Caitlin Selby, Cassandra Way and Janet Zorzo ("Employees"), Bollygum Childcare Centre Pty Ltd contravened:
 - (a) subsection 182(1) of the *Workplace Relations Act 1996* ("WR Act"), in that from 30 June 2008 to 30 June 2009 it failed to pay the Employees a rate at least equal to the basic periodic rate of pay payable to them under the preserved Australian Pay and Classification Scales ("APCS") derived from the Miscellaneous Workers' – Kindergartens and Child Care Centres, &c. (State) Award ("Child Care Pay Scale") and the Miscellaneous Workers'

– Kindergartens and Child Care Centres, &c. (State) Training Wage Award (“Trainee Pay Scale”);

(b) item 5 of schedule 16 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (“FW (TPCA) Act”), in that from 1 July 2009 to 31 December 2009 it failed to pay the Employees a rate at least equal to the basic periodic rate of pay payable to them under the Child Care and Trainee Pay Scales, in contravention of subsection 182(1) of the WR Act, as it continued to apply under the FW (TPCA) Act;

(c) section 45 of the *Fair Work Act 2009* (“FW Act”), in that from 1 January 2010 to 3 May 2013 it contravened the Children’s Services Award 2010 (“Modern Award”) by failing to pay the Employees not employed as trainees their minimum wages as prescribed by:

(i) clause A.2.3;

(ii) clause A.2.5; and

(iii) clause A.3.7

of the Modern Award (as transitioned from the Child Care Pay Scale) and by failing to pay the Employees employed as trainees their minimum wages as prescribed by:

(i) clause A.2.3;

(ii) clause A.2.5; and

(iii) clause D.5.2

of the Modern Award (as transitioned from the Trainee Pay Scale);

(d) subsection 185(2) of the WR Act, in that from 30 June 2008 to 30 June 2009 it failed to pay those Employees engaged as casual employees a casual loading that was at least equal to the guaranteed casual loading percentage payable to them under the Child Care Pay Scale;

(e) item 5 of schedule 16 to the FW (TPCA) Act, in that from 1 July 2009 to 31 December 2009 it failed to pay those Employees engaged as casual employees a casual loading that was at least

equal to the guaranteed casual loading percentage payable to them under the Child Care Pay Scale, in contravention of subsection 185(2) of the WR Act as it continued to apply under the FW (TPCA) Act;

- (f) section 45 of the FW Act, in that from 1 January 2010 to 3 May 2013 it failed to pay those Employees engaged as casual employees a casual loading that was at least equal to the casual loading prescribed by clauses A.5.2 and A.5.4 of the Modern Award;
- (g) section 45 of the FW Act, in that from 1 January 2010 to 3 May 2013 it failed to pay the Employees' overtime rates of pay as prescribed by clause 23.1 of the Modern Award;
- (h) subsection 235(1) of the WR Act, in that from 30 June 2008 to 30 June 2009 it failed to pay the Employees a rate of pay for each hour of annual leave taken that was no less than the basic periodic rate of pay;
- (i) item 6(1) of schedule 16 to the FW (TPCA) Act, in that from 1 July 2009 to 31 December 2009 it failed to pay the Employees a rate of pay for each hour of annual leave taken that was no less than the basic periodic rate of pay pursuant to section 235(1) of the WR Act, as it continued to apply under the FW (TPCA) Act;
- (j) section 44 of the FW Act, in that from 1 January 2010 to 3 May 2013 it failed to pay the Employees their base rate of pay for their ordinary hours of work during periods of paid annual leave as prescribed by subsection 90(1) of the FW Act;
- (k) section 45 of the FW Act, in that from 1 January 2010 to 3 May 2013 it failed to pay the Employees an amount of annual leave loading as prescribed by clause 24.3 of the Modern Award;
- (l) section 45 of the FW Act, in that from 1 January 2010 to 3 May 2013 it failed to pay the Employees a laundry allowance as prescribed by subclause 15.2(b) of the Modern Award;
- (m) subregulations 19.4(1) and 19.12(1) of the *Workplace Relations Regulations 2006* ("WR Regulations"), in that from 30 June 2008

to 30 June 2009 it failed to make, or cause to be made, records of leave taken and the balance of the Employees' entitlements to leave from time to time, as prescribed by the WR Regulations;

- (n) subsection 535(1) of the FW Act, in that from 1 July 2009 to 3 May 2013 it failed to make and keep a record containing details of leave taken and the balance of the Employees' entitlements to leave from time to time, as required by regulation 3.36 of the *Fair Work Regulations 2009*;
 - (o) subregulation 19.20(2) of the WR Regulations, in that from 30 June 2008 to 30 June 2009 it failed to issue written pay slips to the Employees within one day of the payment to which the pay slip related being made;
 - (p) subsection 536(1) of the FW Act, in that 1 July 2009 to 3 May 2013 it failed to issue pay slips to the Employees within one working day of paying an amount in relation to the performance of work; and
 - (q) subsection 340(1) of the FW Act, in that it took adverse action against employee Cassandra Way because she had a workplace right or because she exercised a workplace right or because she had a workplace right and exercised it.
- (2) The Respondent was involved, pursuant to subsection 728(1) of the WR Act and subsection 550(1) of the FW Act, in each of the contraventions by Bollygum Childcare Centre Pty Ltd set out in declaration 1 ("Admitted Contraventions").

THE COURT ORDERS THAT:

- (1) Pursuant to subsection 719(1) of the WR Act and subsection 546(1) of the FW Act, the Respondent pay pecuniary penalties totalling \$28,900 in respect of his involvement in the Admitted Contraventions.
- (2) Pursuant to paragraph 841(b) of the WR Act and subsection 546(3)(c) of the FW Act, all pecuniary penalties imposed on the Respondent be paid to the Employees in amounts proportionate to their outstanding underpayments as follows:

- (a) Casey Anger: \$2,439.16;
 - (b) Skye Cassidy: \$1,182.01;
 - (c) Kelly Cooper: \$3,872.60;
 - (d) Robyn Dickson: \$1,777.35;
 - (e) Jessica Doyle: \$2,670.36;
 - (f) Janine Evans: \$3,988.20;
 - (g) Joanne Foster: \$777.41;
 - (h) Tanya Holmes: \$2,398.70;
 - (i) Alissa Kruger: \$924.80;
 - (j) Kristi Neuner: \$1,982.54;
 - (k) Joanne Ogorman: \$572.22;
 - (l) Cheryl Pianko-Worsely: \$968.15;
 - (m) Lisa Pickard: \$1,340.96;
 - (n) Cassandra Way: \$3,167.44; and
 - (o) Janet Zorzo: \$838.10.
- (3) The penalties be paid to the Employees within twenty-eight days.
- (4) In the event that any amounts are unable to be paid to the Employees within the twenty-eight day period, the amounts be paid to the Consolidated Revenue Fund of the Commonwealth.
- (5) The parties have liberty to apply on seven days' notice.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY**

SYG 1710 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

MARK EDWARD MYLES
Respondent

REASONS FOR JUDGMENT

(As Corrected)

INTRODUCTION

1. The respondent, Mr Myles, was the sole shareholder and director of Bollygum Childcare Centre Pty Ltd (“Bollygum”), a company which operated three childcare centres in Sydney. On 4 June 2013 Bollygum was placed in external administration and on 10 July 2014 it went into voluntary liquidation. On 24 June 2014 the Fair Work Ombudsman (“Ombudsman”) commenced this proceeding under the *Workplace Relations Act 1996* (“WR Act”) and the *Fair Work Act 2009* (“FW Act”). The Ombudsman seeks the imposition of pecuniary penalties against Mr Myles by reason of his involvement in Bollygum’s failure to pay certain entitlements to sixteen of its employees in the period between 30 June 2008 and 3 May 2013 and its related contraventions of other provisions of the WR Act and the FW Act. By virtue of s.471B of the *Corporations Act 2001*, due to Bollygum’s liquidation the Ombudsman could not bring proceedings against it.

STATEMENT OF AGREED FACTS

2. The parties filed a statement of agreed facts. Relevant agreed facts are summarised below.

Background

3. The conduct the subject of this proceeding occurred between 30 June 2008 and 3 May 2013 (“the relevant period”). During that period Bollygum relevantly employed the following sixteen employees (“the Employees”) at its South Penrith, West Hoxton and Lethbridge Park childcare centres:

Name	Relevant period of employment
Casey Anger	18 June 2010 to 3 May 2013
Skye Cassidy	9 September 2011 to 3 May 2013
Kelly Cooper	2 March 2009 to 3 May 2013
Robyn Dickson	4 April 2011 to 3 May 2013
Jessica Doyle	30 June 2008 to 3 May 2013
Janine Evans	14 July 2008 to 3 May 2013
Joanne Foster	6 May 2011 to 3 May 2013
Tanya Holmes	2 April 2010 to 3 May 2013
Alissa Kruger	1 July 2011 to 3 May 2013
Kristi Neuner	30 June 2008 to 3 May 2013
Joanne Ogorman	6 June 2011 to 3 May 2013
Cheryl Pianko-Worsely	29 August 2011 to 3 May 2013
Lisa Pickard	7 February 2011 to 3 May 2013
Caitlin Selby	20 February 2012 to 3 May 2013
Cassandra Way	30 June 2008 to 3 May 2013
Janet Zorzo	22 August 2008 to 3 May 2013

4. At various points in the relevant period Casey Anger, Kelly Cooper, Jessica Doyle, Tanya Holmes, Alissa Kruger, Joanne Ogorman and Caitlin Selby were employed as trainees. Also at various points during the relevant period, the Employees' employment changed between casual, part-time and full-time. Apart from Casey Anger, Alissa Kruger and Caitlin Selby, the Employees were each employed on a casual basis at some point in the relevant period.
5. Bollygum was bound by the following instruments:
 - a) relevantly, from 30 June 2008 to 30 June 2009 and pursuant to the WR Act, the preserved Australian Pay and Classification Scale ("APCS") derived from the Miscellaneous Workers' – Kindergartens and Child Care Centres, &c. (State) Award ("Child Care Pay Scale") and the Miscellaneous Workers' – Kindergartens and Child Care Centres, &c. (State) Training Wage Award ("Trainee Pay Scale");
 - b) from 1 July 2009 to 31 December 2009, the Child Care and Trainee Pay Scales pursuant to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* ("FW (TPCA) Act"); and
 - c) from 1 January 2010 to 3 May 2013, the Children's Services Award 2010 ("Modern Award") pursuant to the FW Act.

Minimum rates of pay and casual loading

6. From 30 June 2008 to the first pay period on or after 1 January 2010 the Employees, other than those employed as trainees, were entitled to be paid hourly rates of pay set out in the Child Care Pay Scale. Those employed as trainees were entitled to the hourly rates of pay set out in the Trainee Pay Scale. On and from the first pay period after 1 January 2010 Bollygum was required to pay the Employees who were not employed as trainees at least the hourly rates of pay prescribed by cls.A.2.3, A.2.5 and A.3.7 of sch.A to the Modern Award. On and from the first pay period after 1 January 2010 Bollygum was also required to pay the Employees who were employed as trainees at least the hourly rates of pay prescribed by cls.A.2.3 and A.2.5 of sch.A and cl.D.5.2 of sch.D to the Modern Award.

7. Bollygum was also required by the Child Care and Trainee Pay Scales and the Modern Award to pay each of the Employees employed on a casual basis a casual loading of 15%.
8. During the relevant period Bollygum paid the Employees hourly rates of pay which did not meet their minimum rates of pay and failed to pay any amounts in respect of casual loading. Bollygum's underpayments in relation to minimum rates of pay and casual loading were as follows:

Name	Ordinary base rate underpayment	Casual loading underpayment
Casey Anger	\$25,599.85	Not applicable
Skye Cassidy	\$4,746.93	\$8,231.69
Kelly Cooper	\$40,216.55	\$5,252.65
Robyn Dickson	\$9,689.24	\$11,530.23
Jessica Doyle	\$15,803.63	\$15,597.98
Janine Evans	\$27,447.42	\$14,732.47
Joanne Foster	\$7,577.01	\$1,402.08
Tanya Holmes	\$26,656.73	\$1,052.15
Alissa Kruger	\$10,744.53	Not applicable
Kristi Neuner	\$12,065.03	\$11,810.71
Joanne Ogorman	\$4,656.31	\$2,073.59
Cheryl Pianko-Worsely	\$7,189.83	\$4,510.70
Lisa Pickard	\$13,988.42	\$585.74
Caitlin Selby	\$2,367.57	Not applicable
Cassandra Way	\$29,061.49	\$6,012.14
Janet Zorzo	\$9,580.90	\$450.65
Total	\$247,391.44	\$83,242.78

9. By failing to pay the Employees, including the trainees, the rates of pay to which they were entitled, Bollygum contravened s.182(1) of the WR Act, item 5 of sch.16 to the FW (TPCA) Act and s.45 of the FW Act. It

also contravened s.185(2) of the WR Act, item 5 of sch.16 to the FW (TPCA) Act and s.45 of the FW Act by failing to pay a casual loading to the thirteen Employees who were employed on a casual basis.

Overtime

10. From 1 January 2010 to 3 May 2013 Bollygum was required by cl.23.1 of the Modern Award to pay the Employees for all work done outside their ordinary hours of work at a rate of time and half for the first two hours and double time thereafter. Bollygum breached that clause, and thereby contravened s.45 of the FW Act, by underpaying fourteen of the Employees their overtime entitlements in the following amounts:

Name	Overtime underpayment
Casey Anger	\$2,657.90
Skye Cassidy	\$1,344.30
Kelly Cooper	\$757.71
Robyn Dickson	\$468.34
Jessica Doyle	\$979.33
Janine Evans	\$4,137.35
Joanne Foster	\$31.50
Tanya Holmes	\$476.24
Alissa Kruger	\$68.34
Joanne Ogorman	\$93.63
Lisa Pickard	\$322.19
Caitlin Selby	\$249.58
Cassandra Way	\$1,047.93
Janet Zorzo	\$24.86
Total	\$12,659.20

Annual leave and annual leave loading

11. From 30 June 2008 to 31 December 2009 Bollygum was required to pay the Employees their basic periodic rates of pay for each hour of annual leave they took. From 1 January 2010 it was required by s.90(1) of the FW Act to pay the Employees their base rate of pay for their ordinary hours of work for each hour of annual leave they took. From 1 January 2010 Bollygum was also required by the Modern Award to pay those Employees who took annual leave an annual leave loading of 17.5%.
12. Bollygum contravened s.235(1) of the WR Act, item 6(1) of sch.16 to the FW (TPCA) Act and s.44 of the FW Act by paying eleven of the Employees rates of pay which did not meet their applicable base rate of pay during periods they took annual leave. It also contravened s.45 of the FW Act by failing to pay them any annual leave loading. Those underpayments were as follows:

Name	Annual leave underpayment	Annual leave loading underpayment
Casey Anger	\$1,396.51	\$335.30
Kelly Cooper	\$557.59	\$230.72
Jessica Doyle	\$126.37	\$26.77
Janine Evans	\$1,431.20	\$1,112.36
Joanne Foster	\$197.92	\$148.52
Tanya Holmes	\$820.28	\$367.03
Alissa Kruger	\$19.36	\$276.53
Kristi Neuner	\$190.03	\$70.46
Lisa Pickard	\$657.25	\$659.62
Caitlin Selby	\$59.18	\$41.84
Cassandra Way	\$1,369.82	\$1,133.85
Total	\$6,825.51	\$4,403.00

Laundry allowance

13. From 1 January 2010 cl.15.2(b) of the Modern Award provided that Bollygum was to pay the Employees a weekly or daily laundry allowance because it required them to wear a particular uniform which had to be laundered. The laundry allowance set out in the award, for clothing which did not require ironing, was \$5.98 a week or \$1.20 a day.
14. Bollygum did not pay any of the Employees a laundry allowance. It breached cl.15(2)(b) of the Modern Award, thereby contravening s.45 of the FW Act, by failing to pay the following amounts in respect of laundry allowance:

Name	Laundry allowance underpayment
Casey Anger	\$298.26
Skye Cassidy	\$347.52
Kelly Cooper	\$1,068.61
Robyn Dickson	\$402.42
Jessica Doyle	\$656.98
Janine Evans	\$672.44
Joanne Foster	\$283.06
Tanya Holmes	\$426.20
Alissa Kruger	\$384.38
Kristi Neuner	\$478.84
Joanne Ogorman	\$282.84
Cheryl Pianko-Worsely	\$315.48
Lisa Pickard	\$445.54
Caitlin Selby	\$296.76
Cassandra Way	\$724.94
Janet Zorzo	\$348.84

Total	\$7,433.11
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Failure to make and keep records

15. Bollygum was required by regs.19.4(1) and 19.12(1) of ch.2 of the *Workplace Relations Regulations 2006* (“WR Regulations”), s.535(1) of the FW Act and reg.3.36 of the *Fair Work Regulations 2009* (“FW Regulations”) to make and keep a record of leave taken and the balance of each of the Employees’ leave entitlements. It contravened those provisions by failing to make or keep the required records.

Failure to give pay slips within the required time

16. Bollygum was also required by reg.19.20(2) of ch.2 of the WR Regulations and s.536(1) of the FW Act to issue pay slips to the Employees within one day or one working day respectively of paying them their wages. Bollygum contravened those provisions by at times failing to issue pay slips and at times failing to issue pay slips within one day or one working day of paying the Employees.

Adverse action

17. On 16 October 2012 one of the Employees, Cassandra Way, lodged a workplace complaint with the Ombudsman. On 31 October 2012 Mr Myles wrote to Ms Way agreeing to pay her \$10,268.40 in unpaid wages and \$1,076.92 for unpaid leave loading and to increase her ordinary rate of pay to \$23.59 per hour by 27 November 2012.
18. On 30 November 2012, Janine Evans, acting on behalf of Bollygum and Mr Myles, notified Ms Way by telephone that her hours of work had been reduced from five days a week to two or three days a week, depending on the workload of each week. Shortly before 30 November 2012, Ms Way had ceased a period of authorised unpaid leave during which she worked for Bollygum for two days a week and took three days a week unpaid leave to work as an organiser for the union United Voice. At that time Ms Way was due to return to her ordinary full-time work hours. Following the conversation, Ms Way’s hours of work were reduced to two to three days a week, thereby altering her employment status from full-time to part-time.

19. The parties agreed that by reducing Ms Way's ordinary work hours, which also resulted in a reduction in her remuneration, and by altering her employment from full-time to part-time, Bollygum had injured Ms Way in her employment and altered her position to her prejudice within the meaning of s.342(1) of the FW Act. They agreed that that conduct amounted to adverse action within the meaning of s.340(1) of the FW Act and that the adverse action was taken because Ms Way had been entitled to the benefit of minimum rates of pay and annual leave loading under the Modern Award and had exercised her workplace rights by making a complaint to the Ombudsman.

Accessorial liability

20. Mr Myles admitted that Bollygum had contravened the following provisions:

Wages, casual loading and overtime

WR Act

- a) s.182(1) of the WR Act by failing to pay the Employees a rate at least equal to the basic periodic rate of pay payable to them under the Child Care and Trainee Pay Scales in the period between 30 June 2008 to 30 June 2009;
- b) s.185(2) of the WR Act by failing to pay the Employees engaged as casual employees a casual loading that was at least equal to the guaranteed casual loading percentage under the Child Care Pay Scale in the period between 30 June 2008 to 30 June 2009;

Bridging period

- c) item 5 of sch.16 to the FW (TPCA) Act by failing, in the period between 1 July 2009 to 31 December 2009, to:
 - i) pay the Employees a rate at least equal to the basic periodic rate of pay payable to them under the Child Care and Trainee Pay Scales; and
 - ii) pay the Employees engaged as casual employees a casual loading that was at least equal to the guaranteed casual loading percentage under the Child Care Pay Scale;

FW Act

- d) s.45 of the FW Act by failing, during the period between 1 January 2010 to 3 May 2013, to:
 - i) pay the Employees, who were qualified, minimum wages as prescribed by cls.A.2.3, A.2.5 and A.3.7 of sch.A to the Modern Award; and
 - ii) pay the Employees employed as trainees minimum wages as prescribed by cls.A.2.3 and A.2.5 of sch.A and cl.D.5.2 of sch.D to the Modern Award;
- e) s.45 of the FW Act by failing to pay the Employees engaged as casual employees a casual loading that was at least equal to the casual loading prescribed by cls.A.5.2 and A.5.4 of sch.A to the Modern Award;
- f) s.45 of the FW Act by failing to pay the Employees overtime rates of pay as prescribed by cl.23.1 of the Modern Award;

Annual leave and leave loading

WR Act

- g) s.235(1) of the WR Act by failing to pay the Employees a rate of pay for each hour of annual leave taken that was no less than the basic periodic rate of pay;

Bridging period

- h) item 6(1) of sch.16 to the FW (TPCA) Act by failing to pay the Employees a rate of pay for each hour of annual leave taken that was no less than the basic periodic rate of pay;

FW Act

- i) s.44 of the FW Act by failing to pay the Employees their base rate of pay for their ordinary hours of work during periods of paid annual leave as prescribed by s.90(1) of the FW Act;
- j) s.45 of the FW Act by failing to pay the Employees an amount of annual leave loading as prescribed by cl.24.3 of the Modern Award;

Laundry allowance

- k) s.45 of the FW Act by failing to pay the Employees a laundry allowance as prescribed by cl.15.2(b) of the Modern Award;

Record keeping

WR Act

- l) regs.19.4(1) and 19.12(1) of the WR Regulations by failing to make, or cause to be made, records of leave taken and the balance of the Employees' entitlements to leave from time to time;

Bridging period and FW Act

- m) s.535(1) of the FW Act by failing to make and keep a record containing details of leave taken and the balance of the Employees' entitlements to leave from time to time, as required by reg.3.36 of the FW Regulations;

Pay slips

WR Act

- n) reg.19.20(2) of the WR Regulations by failing to issue written pay slips to the Employees within one day of the payment to which the pay slip related was made;

Bridging period and FW Act

- o) s.536(1) of the FW Act by failing to issue pay slips to the Employees within one working day of paying an amount in relation to the performance of work; and

Adverse action

- p) s.340(1) of the FW Act by taking adverse action against Ms Way because she had a workplace right and/or because she exercised a workplace right.

21. Mr Myles admitted that he had been involved in those contraventions within the meaning of s.728(1) of the WR Act and s.550(1) of the FW Act because he had:

- a) aided, abetted, counselled or procured the contraventions; and

- b) had been, by his acts and omissions, directly or indirectly, knowingly concerned in or a party to each of the contraventions.

He also accepted that, because of his involvement in the contraventions, he is treated as having contravened the provisions the subject of the contraventions.

- 22. Mr Myles admitted that the contraventions had resulted in underpayments to the Employees totalling \$361,955.04.

Prior compliance history

- 23. Between 14 March 2013 and 7 May 2013 the Ombudsman received complaints from the Employees and the investigation into those complaints led to the commencement of this proceeding. Prior to receiving those complaints, the Ombudsman and her predecessor, the Workplace Ombudsman, had also received the following other complaints from Bollygum's employees:

- a) on 11 December 2007, a complaint from Natasha Giles in relation to alleged underpayments of her hourly rate of pay and failures by Bollygum to provide pay slips and meal breaks. A breach notice was issued by the Workplace Ombudsman on 6 March 2008 concerning the failure to provide pay slips and to pay the minimum rates of pay required by the Miscellaneous Workers' – Kindergartens and Child Care Centres, &c. (State) Award. Mr Myles, on behalf of Bollygum, co-operated with the investigation and the complaint was finalised after Bollygum rectified the underpayment of \$407.60;
- b) on 13 March 2012, a complaint from Amanda Grima alleging that she had been dismissed without proper notice and had not been paid annual leave loading. Mr Myles, on behalf of Bollygum, co-operated with the investigation and the complaint was finalised after Mr Myles made a payment to Ms Grima in lieu of notice of termination;
- c) on 19 March 2012, a complaint from Vicki Phillips alleging that she did not know her classification, did not receive casual loading or "pro-rata entitlements" and was underpaid. Mr Myles, on behalf of Bollygum, co-operated with the investigation and the

complaint was finalised after Mr Myles made a payment of \$12,172.63 gross to rectify the underpayment of wages and entitlements;

- d) on 23 August 2012, a complaint from Marlee Gowans alleging that she had not been paid for annual leave which she had taken during her employment. That complaint was resolved by agreement without a formal investigation after Bollygum made a voluntary payment to Ms Gowans in settlement of her complaint; and
- e) on 16 October 2012, the complaint from Ms Way which resulted in the reduction of her working hours.

24. Two other complaints were referred to in the statement of agreed facts but as those complaints were not made out they have no relevance to this proceeding.

RELEVANT LEGISLATION

30 June 2008 - 30 June 2009 – Workplace Relations Act

25. The provisions of the WR Act relevant to these proceedings were repealed by sch.1 to the FW (TPCA) Act effective 1 July 2009. Nevertheless, item 11 of sch.2 to the FW (TPCA) Act provides that the WR Act continues to apply on and after its repeal in relation to conduct that occurred before the repeal. Consequently, the WR Act continues to apply to the causes of action arising under that Act alleged in this proceeding.

Minimum rates of pay and casual loading

26. Prior to the enactment of the WR Act, Bollygum was bound by the Miscellaneous Workers’ – Kindergartens and Child Care Centres, &c. (State) Award and the Miscellaneous Workers’ – Kindergartens and Child Care Centres, &c. (State) Training Wage Award. To the extent that those awards provided for wage rates, casual loadings and classifications, by virtue of s.208 of the WR Act, they were preserved APCs. At the relevant time s.182(1) of the WR Act provided:

(1) If:

(a) *the employment of an employee is covered by an APCS;
and*

(b) *the employee is not an APCS piece rate employee;*

*the employee must be paid a basic periodic rate of pay for each of the employee's guaranteed hours (pro-rated for part hours) that is at least equal to the basic periodic rate of pay (the **guaranteed basic periodic rate of pay**) that is payable to the employee under the APCS.*

27. Section 185 relevantly provided:

185 The guarantee

(1) *This section applies to a casual employee for whom, under section 182, there is a guaranteed basic periodic rate of pay, ...*

(2) *The casual employee must be paid, in addition to his or her actual basic periodic rate of pay, a casual loading that is at least equal to the guaranteed casual loading percentage of that actual basic periodic rate of pay.*

28. Sections 182, 185 and 208 were found in pt.7 of the WR Act, the Australian Fair Pay and Conditions Standard (“AFPCS”), which set out key minimum entitlements of employment related to, among other things, basic rates of pay, casual loadings and annual leave. The Child Care and Trainee Pay Scales were part of the AFPCS: s.171(3) of the WR Act.

Annual leave

29. Sub-division B of div.4 of pt.7 of the WR Act, which was entitled “Guarantee of annual leave”, was also part of the AFPCS. It contained s.232 which relevantly provided:

(2) *An employee is entitled to accrue an amount of paid annual leave, for each completed 4 week period of continuous service with an employer, of $\frac{1}{13}$ of the number of nominal hours worked by the employee for the employer during that 4 week period.*

30. Section 235 relevantly provided:

235 Annual leave—payment rules

- (1) *If an employee takes annual leave during a period, the employee must be paid a rate for each hour (pro-rated for part hours) of annual leave taken that is no less than the rate that, immediately before the period begins, is the employee's basic periodic rate of pay (expressed as an hourly rate).*

Employee records

31. Section 836 of the WR Act provided:

836 Records relating to employees

- (1) *The regulations may make provision in relation to:*
 - (a) *the making and retention by employers of records relating to the employment of employees; and*
 - (b) *the inspection of such records.*
- (2) *The regulations may require employers of employees to issue pay slips to those employees at such times, and containing such particulars, as are prescribed.*

32. Part 19 of ch.2 of the WR Regulations prescribed matters for the purpose of s.836 of the WR Act. Of particular relevance for this matter, the WR Regulations provided:

19.4 Obligation to make and keep records relating to employees

- (1) *An employer who employs an employee must make, or cause to be made, a record in accordance with Divisions 3 and 4 relating to the employee.*
- (2) *Subject to regulation 19.15, an employer must keep, or cause to be kept, an entry in a record:*
 - (a) *in the case of a matter of a kind mentioned in regulation 19.8 or paragraph 19.13(1)(e) — for a continuous period of 7 years after the date on which:*
 - (i) *the entry is changed; or*
 - (ii) *the employee's employment with the employer is terminated;*

whichever happens first; or

- (b) *in any other case — for a continuous period of 7 years after the date on which the entry is made.*
- (3) *Strict liability applies to the physical elements in subregulations (1) and (2).*
- (4) *Subregulations (1) and (2) are civil remedy provisions.*

...

19.12 Contents of records — leave

- (1) *If the employee is entitled to leave, the record relating to the employee must contain the following details:*
 - (a) *the accrual of that leave;*
 - (b) *any leave taken by the employee;*
 - (c) *the balance of the employee's entitlement to that leave from time to time.*

...

- (3) *Strict liability applies to the physical elements in subregulations (1) and (2).*
- (4) *Subregulations (1) and (2) are civil remedy provisions.*

Pay slips

- 33. Regulation 19.20 of ch.2 of the WR Regulations dealt with the giving of pay slips. It provided:

19.20 Pay slips

- (1) *An employer who employs an employee must issue to the employee a written pay slip relating to each payment by the employer of an amount to the employee as remuneration.*
- (2) *The pay slip:*
 - (a) *must be issued within 1 day of the payment to which the pay slip relates being made to the employee; and*
 - (b) *may be issued in electronic form or as hard copy.*
- (3) *The employer must include on a pay slip particulars specified in regulation 19.21.*

- (4) *Strict liability applies to the physical elements in subregulations (1) to (3).*
- (5) *Subregulations (1) to (3) are civil remedy provisions.*

Accessorial liability

34. Section 728 of the WR Act provided:

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

Penalties and compensation

35. Section 719 was the provision of the WR Act relevant to the breaches of that Act alleged in these proceedings and it relevantly provided:

719 Imposition and recovery of penalties

- (1) *An eligible court may impose a penalty in accordance with this Division on a person if:*
 - (a) *the person is bound by an applicable provision; and*
 - (b) *the person breaches the provision.*
- (2) *Subject to subsection (3), where:*
 - (a) *2 or more breaches of an applicable provision are committed by the same person; and*
 - (b) *the breaches arose out of a course of conduct by the person;*

the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term.

...

(4) *The maximum penalty that may be imposed under subsection (1) for a breach of an applicable provision is:*

(a) *60 penalty units for an individual; ...*

...

36. Section 717 of the WR Act relevantly provided:

In this Part:

applicable provision, in relation to a person, means:

(a) *a term of one of these that applies to the person:*

...

(ii) *the Australian Fair Pay and Conditions Standard...*

37. In combination, reg.14.4 of ch.2 of the WR Regulations and s.846(2)(g) of the WR Act provided that the maximum pecuniary penalty for contravention of regs.19.4, 19.12 and 19.20 was 10 penalty units for an individual.

38. At the time of the alleged breaches of the WR Act a penalty unit was worth \$110: s.4AA *Crimes Act 1914*.

Fair Work Act

1 July 2009 onwards

Employee records

39. Section 535(1) of the FW Act provides that an employer must make, and keep for seven years, employee records in relation to each of its employees. Amongst other things, pt.3-6 of the FW Regulations sets out employer obligations in relation to employee records. Of that part, reg.3.36 is of particular relevance to this matter:

3.36 Records—leave

(1) *For subsection 535(1) of the Act, if an employee is entitled to leave, a kind of employee record that the employer must make and keep is a record that sets out:*

(a) *any leave that the employee takes; and*

(b) *the balance (if any) of the employee's entitlement to that leave from time to time.*

...

Pay slips

40. Section 536(1) provides that an employer must give a pay slip to each of its employees within one working day of a wage or salary payment.

Accessorial liability

41. Section 550 of the FW Act states:

550 Involvement in contravention treated in same way as actual contravention

(1) *A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.*

(2) *A person is **involved in** a contravention of a civil remedy provision if, and only if, the person:*

(a) *has aided, abetted, counselled or procured the contravention; or*

(b) *has induced the contravention, whether by threats or promises or otherwise; or*

(c) *has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*

(d) *has conspired with others to effect the contravention.*

Course of conduct

42. Section 557 of the FW Act provides:

557 Course of conduct

- (1) *For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:*
 - (a) *the contraventions are committed by the same person; and*
 - (b) *the contraventions arose out of a course of conduct by the person.*
- (2) *The civil remedy provisions are the following:*
 - (a) *subsection 44(1) (which deals with contraventions of the National Employment Standards);*
 - (b) *section 45 (which deals with contraventions of modern awards);*
 - ...
 - (n) *subsections 535(1) and (2) (which deal with employer obligations in relation to employee records);*
 - (o) *subsections 536(1) and (2) (which deal with employer obligations in relation to pay slips);*
 - ...

1 July 2009 – 31 December 2009, FW Act bridging period

43. The FW Act commenced on 1 July 2009 but modern awards and the National Employment Standards (“NES”) did not commence until 1 January 2010, the “FW (safety net provisions) commencement day”. While many provisions of the FW Act, including ss.535 and 536, applied on and from 1 July 2009, as far as minimum employment standards and industrial instruments were concerned it was also a transitional (“bridging”) period during which pre-FW Act provisions continued to apply until the FW (safety net provisions) commencement day.

Minimum rates of pay and casual loading

44. Upon the repeal of the WR Act on 1 July 2009, the Child Care and Trainee Pay Scales became transitional APCSs referred to in item 5(3)(a) of sch.9 to the FW (TPCA) Act and continued in force until the

commencement of the Modern Award on 1 January 2010: item 11 of sch.9 to the FW (TPCA) Act.

Annual leave

45. Upon the repeal of the WR Act on 1 July 2009, the leave provisions of the AFPCS, relevantly ss.232 and 235 of the WR Act, continued to apply during the bridging period: item 2 of sch.4 to the FW (TPCA) Act.
46. Item 6 of sch.4 to the FW (TPCA) Act relevantly provides in respect of any annual leave entitlements accrued under the WR Act:

6 Accruing entitlements: leave accrued immediately before the FW (safety net provisions) commencement day

- (1) *This item applies if, immediately before the FW (safety net provisions) commencement day, an employee has an accrued entitlement to an amount of paid annual leave or paid personal/carer's leave, whether the leave accrued under Part 7 of the WR Act, a transitional instrument or otherwise.*
- (2) *The provisions of the National Employment Standards relating to taking that kind of leave (including rates of pay while taking leave), or cashing-out that kind of leave, apply, as a minimum standard, to the accrued leave as if it had accrued under the National Employment Standards.*

Penalties and compensation

47. Item 5 of sch.16 to the FW (TPCA) Act provides that a person must not contravene ss.182 (wage rates) and 185 (casual loading) of the WR Act as they continued to apply under item 5 of sch.9. Item 6(1)(a) of sch.16 to the FW (TPCA) Act relevantly provides that a person must not contravene the provisions in div.4 of pt.7 of the WR Act, of which ss.232 (accrual of annual leave) and 235 (payment of annual leave) were part, as they continued to apply under item 2 of sch.4.
48. Item 16 of sch.16 to the FW (TPCA) Act provides that pt.4-1 of the FW Act, which includes ss.539 (civil remedy orders), 545 (orders that courts may make) and 550 (accessorial liability), applies to items 5 and 6 of sch.16 to the FW (TPCA) Act as if those items were part of the FW Act.

49. In combination, ss.539(2) and 546(2) of the FW Act, as affected by item 16 of sch.16 to the FW (TPCA) Act, provide that the maximum pecuniary penalty for a contravention by Mr Myles of items 5 and 6(1)(a) of sch.16 to the FW (TPCA) Act is 60 penalty units. At the time of the alleged breaches a penalty unit was worth \$110: s.4AA *Crimes Act 1914*.

Course of conduct

50. Item 7 of sch.2 to the FW (TPCA) Act provides that regulations made under that Act may, amongst other things, provide for the application of provisions of the FW Act to matters to which they would not otherwise apply.
51. Regulation 5.07 of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* provides that s.557 of the FW Act is taken to apply to a transitional civil penalty provision as if that provision were included in s.557(2) of the FW Act.

1 January 2010 onwards – operation of modern awards and NES

Minimum rates of pay and casual loading

52. Section 45 of the FW Act provides that a person must not contravene a term of a modern award.
53. Division 2 of pt.2-9 of the FW Act contains provisions dealing with the payment of wages. Relevantly, s.323 provides:

323 Method and frequency of payment

(1) *An employer must pay an employee amounts payable to the employee in relation to the performance of work:*

(a) *in full ... ; and*

(b) *in money by one, or a combination, of the methods referred to in subsection (2); and*

(c) *at least monthly.*

...

Annual leave

54. Section 87 of the FW Act relevantly provides that for each year of service with his or her employer, an employee is entitled to four weeks of paid annual leave which accrues progressively during a year of service according to the employee's ordinary hours of work.
55. Section 90 of the FW Act provides:

90 Payment for annual leave

- (1) *If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.*

Penalties and compensation

56. By virtue of s.61(3) of the FW Act, ss.87 and 90 are provisions of the NES. Section 44(1) provides that an employer must not contravene a provision of the NES. Section 539 provides that ss.44(1), 45, 323(1), 535(1) and 536(1) are civil remedy provisions.
57. Sections 539(2) and 546(2) of the FW Act provide that the maximum pecuniary penalty for a contravention of ss.44(1) and 323(1) of the FW Act and, by virtue of s.45, of individual clauses of the Modern Award is 60 penalty units for an individual. For a contravention of ss.535(1) and 536(1), ss.539(2) and 546(2) provide for maximum penalties of 30 penalty units for an individual.
58. Until 27 December 2012 a penalty unit was worth \$110. From 28 December 2012 a penalty unit was worth \$170: s.4AA *Crimes Act*.

Adverse action

59. Part 3-1 of ch.3 of the FW Act provides for employees' general protections. Division 3 of pt.3-1 provides for the protection of workplace rights and for the exercise of those rights. Sections 340 to 342 of the FW Act are found in div.3 of pt.3-1 and relevantly provide:

340 Protection

- (1) *A person must not take adverse action against another person:*

- (a) *because the other person:*
 - (i) *has a workplace right; or*
 - (ii) *has, or has not, exercised a workplace right; or*
 - (iii) *proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or*
- (b) *to prevent the exercise of a workplace right by the other person. ...*

341 Meaning of workplace right

Meaning of workplace right

- (1) *A person has a **workplace right** if the person:*
 - (a) *is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or*
 - b) *is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or*
 - (c) *is able to make a complaint or inquiry:*
 - (i) *to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or*
 - (ii) *if the person is an employee—in relation to his or her employment.*

...

342 Meaning of adverse action

- (1) *The following table sets out circumstances in which a person takes **adverse action** against another person.*

<i>Meaning of adverse action</i>		
<i>Item</i>	<i>Column 1</i>	<i>Column 2</i>
	<i>Adverse action is taken by ...</i>	<i>if ...</i>
<i>1</i>	<i>an employer against an employee</i>	<i>the employer:</i> <i>(a) dismisses the employee; or</i>

<i>Meaning of adverse action</i>	
<i>Item</i>	<i>Column 1</i>
	<i>Adverse action is taken by ...</i>
	<i>Column 2</i>
	<i>if ...</i>
	(b) injures the employee in his or her employment; or
	(c) alters the position of the employee to the employee's prejudice; or
	(d) discriminates between the employee and other employees of the employer.

...

60. Section 361 of the FW Act is concerned with proof of the reason for action alleged to be contrary to a provision of pt.3-1 of the FW Act. At all relevant times it provided:

361 Reason for action to be presumed unless proved otherwise

(1) *If:*

(a) *in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and*

(b) *taking that action for that reason or with that intent would constitute a contravention of this Part;*

it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

...

61. Section 360 provides:

360 Multiple reasons for action

For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

Penalties and compensation

62. Section 539 provides that s.340 is a civil remedy provision. Sections 539(2) and 546(2) of the FW Act provide that the maximum pecuniary penalty for a contravention of s.340 is 60 penalty units for an

individual. At the time the contravention of s.340 occurred, a penalty unit was worth \$110: s.4AA *Crimes Act*.

Modern Award

63. Clause 15.2 of the Modern Award relevantly provides:

15.2 Clothing and equipment allowance

(a) *Where the employer requires an employee to wear any special clothing or articles of clothing the employer must reimburse the employee for the cost of purchasing such clothing. The provisions of this clause do not apply where the employer pays for the clothing required to be worn by the employee.*

(b) *Where an employee is required to launder any clothing referred to in clause 15.2(a) the employee will be paid an allowance of \$9.49 per week or \$1.90 per day, or where the uniform does not require ironing, \$5.98 per week or \$1.20 per day.*

64. Clause 23 is related to overtime and relevantly provides:

23.1 Entitlement to overtime rates

(a) *A full-time employee is paid at overtime rates for any work performed outside of their ordinary hours of work.*

...

23.2 Overtime rates

(a) *Overtime will be paid at the rate of time and a half for the first two hours and double time thereafter. In calculating overtime, each day's work will stand alone.*

...

65. Clause 24 relevantly provides:

24.1 Annual leave is provided for in the NES.

...

24.3 Annual leave loading

In addition to the payment provided for by the NES an employer is required to pay leave loading of 17.5% of that payment.

66. Schedule A to the Modern Award made transitional provisions for minimum rates of pay and casual loading. The relevant clauses of sch.A provided:

A.2 *Minimum wages – existing minimum wage lower*

A.2.1 *The following transitional arrangements apply to an employer which, immediately prior to 1 January 2010:*

- (a) was obliged,*
- (b) but for the operation of an agreement-based transitional instrument or an enterprise agreement would have been obliged, or*
- (c) if it had been an employer in the industry or of the occupations covered by this award would have been obliged*

by a transitional minimum wage instrument and/or an award-based transitional instrument to pay a minimum wage lower than that in this award for any classification of employee.

A.2.2 *In this clause minimum wage includes:*

- (a) a minimum wage for a junior employee, an employee to whom training arrangements apply and an employee with a disability;*
- (b) a piecework rate; and*
- (c) any applicable industry allowance.*

A.2.3 *Prior to the first full pay period on or after 1 July 2010 the employer must pay no less than the minimum wage in the relevant transitional minimum wage instrument and/or award-based transitional instrument for the classification concerned.*

A.2.4 *The difference between the minimum wage for the classification in this award and the minimum wage in clause A.2.3 is referred to as the transitional amount.*

A.2.5 *From the following dates the employer must pay no less than the minimum wage for the classification in this award minus the specified proportion of the transitional amount:*

<i>First full pay period on or after</i>	
<i>1 July 2010</i>	<i>80%</i>
<i>1 July 2011</i>	<i>60%</i>
<i>1 July 2012</i>	<i>40%</i>
<i>1 July 2013</i>	<i>20%</i>

...

A.3.7 *New South Wales, Western Australia and Tasmania – Other than Division 2B State award employers*

The following transitional arrangements apply to an employer in New South Wales, Western Australia and Tasmania which, immediately prior to 1 January 2010:

- (a) was obliged,*
- (b) but for the operation of an agreement-based transitional instrument or an enterprise agreement would have been obliged, or*
- (c) if it had been an employer in the industry or of the occupations covered by this award would have been obliged*

by a transitional minimum wage instrument and/or an award-based transitional instrument to pay a minimum wage higher than that in this award for an employee engaged in a classification lower than Children's Services Employee Level 3.1 and all classifications of Support Worker in Tasmania and Western Australia, and for all classifications in New South Wales.

The employer must:

- (i) continue to pay no less than the minimum wage in the transitional minimum wage instrument and/or award-based transitional instrument; and*
- (ii) apply any increase in minimum wages in this award resulting from an annual wage review.*

...

A.5 Loadings and penalty rates – existing loading or penalty rate lower

A.5.1 *The following transitional arrangements apply to an employer which, immediately prior to 1 January 2010:*

- (a) was obliged,*
- (b) but for the operation of an agreement-based transitional instrument or an enterprise agreement would have been obliged, or*
- (c) if it had been an employer in the industry or of the occupations covered by this award would have been obliged*

by the terms of a transitional minimum wage instrument or an award-based transitional instrument to pay a particular loading or penalty at a lower rate than the equivalent loading or penalty in this award for any classification of employee.

A.5.2 *Prior to the first full pay period on or after 1 July 2010 the employer must pay no less than the loading or penalty in the relevant transitional minimum wage instrument or award-based transitional instrument for the classification concerned.*

A.5.3 *The difference between the loading or penalty in this award and the rate in clause A.5.2 is referred to as the transitional percentage.*

A.5.4 *From the following dates the employer must pay no less than the loading or penalty in this award minus the specified proportion of the transitional percentage:*

<i>First full pay period on or after</i>	
<i>1 July 2010</i>	<i>80%</i>
<i>1 July 2011</i>	<i>60%</i>
<i>1 July 2012</i>	<i>40%</i>
<i>1 July 2013</i>	<i>20%</i>

67. Clause D.5.2 of sch.D to the Modern Award set out the minimum wages for trainees.

EVIDENCE

Janine Evans

68. Ms Evans was employed by Bollygum in July 2008 as the “Out of School Hours” coordinator at the South Penrith service. In April 2011 she became the area manager on a full-time basis, managing the long day care services in South Penrith, Lethbridge Park and West Hoxton and the Out of School Hours service in South Penrith. Ms Evans deposed that even though she was effectively running the Bollygum centres on a day to day basis, she had to consult with Mr Myles “every step of the way” and could not make any decisions without his approval.
69. Ms Evans deposed that Mr Myles determined all of Bollygum’s employees’ rates of pay. She deposed that she did not know what rates Mr Myles applied or where he found them and, because staff did not receive pay slips, she could not backtrack to find out. Ms Evans deposed that it was only after staff members started looking very carefully at what they were being paid that she realised that there were discrepancies in the hourly rates paid to different staff members for the same work. She deposed that she questioned Mr Myles on numerous occasions about the employees’ pay rates and communicated to him what she believed were the correct rates of pay, which he disputed. Ms Evans said that she and other staff members had tried to give Mr Myles the wage rates relevant to them and that it had been his responsibility to implement them. She deposed that Mr Myles occasionally changed people’s rates without telling them or herself where the rate had come from.
70. Ms Evans deposed that pay slips were provided sporadically and that, when employees did receive them, it was in bulk with up to three or fourth months’ pay slips at a time.
71. Ms Evans deposed that many of her later communications with Mr Myles involved her passing on her concerns and the concerns of the other staff that they were not being paid at the correct rate or that they had not received their pay on time or at all. Ms Evans deposed that by 2012 she was calling, texting and emailing Mr Myles at least once a week about pay related issues or issues concerning the lack of

resources at the childcare centres. She deposed that the workplace became tense as a result of these issues.

72. Ms Evans deposed that at a meeting on 7 January 2013 Mr Myles advised her that the staff would receive all of their back pay by 2 February 2013. However, when he failed to make good on his promise, Ms Evans asked Ms Way to email Mr Myles the Ombudsman complaint forms which had been prepared by many of the staff. In that email, Mr Myles was advised that the staff would be happy to call off the investigations upon payment of their entitlements. In his reply of the same date, Mr Myles stated:

Staff need to consider waiting for any back pay until Michelle [his estranged wife] and I settle. ...

... The last thing I want is the company to go into liquidation. It will only prolong any payments owed to staff, including superannuation. ...

If Fair Work become involved it will necessitate liquidation.

73. Ms Evans deposed that she continued to communicate with Mr Myles about the employees' complaints until later in 2013 when Bollygum was placed into liquidation.
74. Ms Evans deposed that the working environment at the centres was very stressful for a long time. She deposed that on several occasions the water, electricity and phones were cut off because bills had not been paid. She deposed that she spent some of her own money buying basic resources for the centres such as toilet paper, toys, paints and groceries. She spoke to Mr Myles about these expenses but was not reimbursed.
75. Ms Evans deposed that the entire situation had had a negative impact on her family life. The hours of work, plus after hours counselling of staff, union emails and Ombudsman phone calls meant that she had less time to give to her children and her marriage, which suffered as a consequence.

Cassandra Way

76. Ms Way was employed by Bollygum in July 2007 as a certificate III childcare worker. She deposed that in February 2010 she became the authorised supervisor at the Lethbridge Park centre. At the same time, she also held significant administrative responsibilities within Bollygum including rostering, staff training, accounts, interacting with parents and managing the centre's accreditation.
77. Ms Way deposed that in April 2011 she became responsible for the client accounts at Bollygum's Lethbridge Park, South Penrith and West Hoxton centres, as well as the Out of School Hours Care service within the South Penrith building. Those accounts had to be submitted to the government on a weekly basis and had a direct effect on the childcare benefits paid to Bollygum and on parental rebates. Ms Way deposed that because the software required to complete this task was not compatible with the computers at the childcare centre, it had to be installed on her personal computer as a temporary solution. She deposed that this meant that there were occasions when she had to complete the accounts while she was on leave.
78. Ms Way deposed that when she started working at Bollygum she knew almost nothing about her pay entitlements and simply accepted that Mr Myles was paying her correctly. She said that from an unidentified point of time she sent Mr Myles pay rates for new employees and that he generally acted on her recommendations.
79. Ms Way deposed that she was provided with pay slips sporadically; she received about half a dozen pay slips in 2012, did not receive a pay slip in 2013 until May and, if she asked Mr Myles enough times, would receive several fortnights' pay slips at one time. Ms Way deposed that when staff informed her that they needed pay slips to apply for a bank loan or rent a house or for reporting to Centrelink, she would write a letter on company letterhead verifying that the particular staff member was employed by Bollygum, the hours they worked and the rate they were paid.
80. Ms Way deposed that in October 2012 she lodged a complaint with the Ombudsman relating to unpaid wages, annual leave loading, overtime and superannuation. As a result of her complaint and the negotiations

that followed, Mr Myles back-paid her more than \$10,000 in unpaid wages and leave loading and increased her hourly rate of pay.

81. Ms Way deposed that in October 2012 she commenced five weeks' part-time work with United Voice, working two days a week at Bollygum and taking the other three days off as unpaid leave. Ms Way deposed that on 30 November 2012, at the end of her five week period at United Voice, Janine Evans advised her that Mr Myles had reduced her roster to two days per week but expected her to carry out the same amount of duties as when she had been working full-time, including all of the administration, rostering and government reporting work. She deposed that in January 2013 Mr Myles increased her days to three days per week.
82. Ms Way said that as at 7 January 2013 three employees at Lethbridge Park were owed pay.

Jessica Doyle

83. Ms Doyle deposed that she commenced employment as a certificate III trainee with Bollygum in May 2008, when she was eighteen years old. She deposed that once she completed the certificate III, she continued to work for Bollygum as a qualified employee.
84. Ms Doyle deposed that she would receive a few weeks' pay slips every couple of months, although there would often be one or two pay slips missing. She deposed that this made it difficult for her to calculate her pay and keep track of her superannuation. She deposed that some pay slips also incorrectly listed her job classification as she progressed from trainee to adult work.
85. Ms Doyle deposed that she spoke to Mr Myles on a number of occasions about the rate of pay she thought she was entitled to receive but her rates were never increased and she was forced to seek financial assistance from others in order to pay her bills. Ms Doyle deposed that there were also several occasions where, because her pay had been withheld, delayed or was incorrect, she had not been able to pay her rent and utilities unassisted.
86. Ms Doyle deposed that, as an eighteen year old entering the childcare sector for the first time, she had placed her trust in Mr Myles and

Bollygum. She deposed that she had found the experience difficult, disappointing and stressful.

Skye Cassidy

87. Ms Cassidy was employed by Bollygum in September 2011 as an early childhood teacher. She deposed that during her employment with Bollygum she often sent text messages to Mr Myles asking him to rectify what she believed were underpayments in her pay. She deposed that she could not recall Mr Myles ever responding to any of her messages.
88. Ms Cassidy deposed that her pay was delayed on many occasions, including when Mr Myles travelled overseas, and that this sometimes resulted in her not being able to pay her rent on time. She also deposed that she had had difficulties applying for an Austudy allowance as she did not usually receive pay slips and had not been able to provide Centrelink with the information it required.
89. Ms Cassidy deposed that she sometimes purchased things like paint and craft supplies with her own money because Bollygum did not have enough resources at its centres. She deposed that she had never been reimbursed for those expenditures.

Lara Evans

90. Ms Evans is a Fair Work Inspector who was involved in the investigation relating to the Employees. Annexed to her affidavit were copies of searches of the Australian Securities and Investment Commission and National Personal Insolvency Index databases, copies of records of all calls and text messages made by Mr Myles between 1 July 2007 and 30 June 2013 and records of all calls and text messages made or sent by Janine Evans to Mr Myles.
91. Ms Evans also referred to an analysis of those text messages which revealed that Mr Myles communicated by voice call or text message with the mobile telephone belonging to Janine Evans on 2,447 occasions and that from 2 May 2011 to 10 August 2012 Ms Evans communicated by voice call or text message with the mobile telephone belonging to Mr Myles on 1,028 occasions.

92. Ms Evans also deposed that 29% of childcare workers are twenty-four years or younger, 53% are thirty-four years or younger and 96% are female. A document supporting that statement was annexed to her affidavit.

Mark Myles

93. Mr Myles agreed that he had been lazy and sloppy with pay slips and that they had been late.

94. Mr Myles also conceded that he had micro-managed the business in its early days. However, he said that in mid-2012 he had agreed without admission to his former wife's application for an apprehended violence order against him, which prevented him from attending her place of work, namely Bollygum. He said that for a period his former wife, Michelle Keen, had worked as manager at Bollygum but had mismanaged the business. In that period he communicated with Janine Evans on many occasions, saying that he was trying to save the company which "was being destroyed".

95. Mr Myles said that he had derived no financial gain from Bollygum and had lost all his assets, apparently also partly as a result of his divorce from Ms Keen.

96. Mr Myles said that at some point in early 2013 Ms Keen had taken \$60,000-\$65,000 from Bollygum's account, which meant that he could not pay staff and the power had been cut off to one or more of the childcare centres. He said that as Ms Keen was guarantor of Bollygum's loans he was unable to seek further finance from his bank.

97. Following the 7 January 2013 meeting referred to in Janine Evans's evidence, Mr Myles took his children to Disneyland on holiday. He said that at that time he thought that there was only \$6,000 owing to staff members and that he made certain payments for the business while he was overseas. He said it was not until he returned from holiday that he discovered that Ms Keen had removed the \$60,000-\$65,000 and realised the seriousness of Bollygum's situation. He said that for two fortnights he had paid the staff from his own funds.

98. Mr Myles said that Ms Way would send him the wage rates applicable to individuals and he considered it one of her duties to do so.

Todd Shepard

99. Mr Shepard is a friend and colleague of Mr Myles and attended the 7 January 2013 meeting. He said that his understanding from that meeting was that three employees had been underpaid.
100. Mr Shepard spoke of Ms Keen's aggressive and unco-operative behaviour towards Mr Myles and how she used to say that she was in charge of the business.

CONSIDERATION

Introduction

101. Judgment in this matter was reserved on 14 April 2015. In her original submissions the Ombudsman propounded a penalty range for the Court's consideration. However, following the decision of the Full Court of the Federal Court on 1 May 2015 in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining & Energy Union* [2015] FCAFC 59, the matter was relisted and the Ombudsman filed amended written submissions on penalty withdrawing the passages in the original written submissions which had suggested a penalty range.

Relevant considerations

102. As Tracey J said in *Kelly v Fitzpatrick* (2007) 166 IR 14 at 18-19 [14], in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 Mowbray FM identified "a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty". Tracey J adopted those considerations, describing them as follows:
 - *The nature and extent of the conduct which led to the breaches.*
 - *The circumstances in which that conduct took place.*
 - *The nature and extent of any loss or damage sustained as a result of the breaches.*
 - *Whether there had been similar previous conduct by the respondent.*

- *Whether the breaches were properly distinct or arose out of the one course of conduct.*
- *The size of the business enterprise involved.*
- *Whether or not the breaches were deliberate.*
- *Whether senior management was involved in the breaches.*
- *Whether the party committing the breach had exhibited contrition.*
- *Whether the party committing the breach had taken corrective action.*
- *Whether the party committing the breach had cooperated with the enforcement authorities.*
- *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*
- *The need for specific and general deterrence.*

103. Considerations relevant to this case are:

- a) the circumstances in which the conduct took place and the nature and extent of the conduct;
- b) the nature and extent of any loss or damage sustained as a result of the breaches;
- c) whether there had been similar previous conduct by the respondent;
- 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) the deliberateness of the breaches;
- g) contrition, corrective action and co-operation with the enforcement authorities;
- h) compliance with minimum standards; and

- i) the need for specific and general deterrence.

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

104. Notwithstanding Mr Myles's evidence and submissions concerning the responsibilities of certain staff members and the actions and attitudes of his former wife, I find that Bollygum's underpayment of its employees was of long standing and that he had responsibility for it. As sole director and shareholder Mr Myles had ultimate responsibility to determine what Bollygum's employees' proper entitlements were and to make sure that they received them. Importantly, from at least March 2008, because of the complaint by Ms Giles, Mr Myles was aware of the existence of the Miscellaneous Workers' – Kindergartens and Child Care Centres, &c. (State) Award.
105. The impression which Mr Myles sought to give in his evidence was that his role as a school principal was his real job and that the childcare centres were an additional interest which were meant, in significant respects, to look after themselves. However, as earlier complaints revealed that Bollygum's approach to pay rates was deficient to a considerable degree and significant corrective payments had to be made to underpaid employees, it is a matter of concern that employees continued to be underpaid in the period the subject of this proceeding. The office administration of Bollygum and the attention Mr Myles gave to it were deficient and led to the contraventions which have been admitted.
106. I also infer that the perpetuation of the underpayments was facilitated, even if not purposefully, by Bollygum's long-term failure to provide pay slips as required by statute and regulations.
107. It is a matter of particular concern that when Ms Way made her complaint to the Ombudsman, and because she made that complaint, Bollygum reduced her hours even though, on her uncontested evidence, she had demonstrated considerable devotion to her job, to the extent of working remotely while on holidays. The action taken towards Ms Way is indicative of either a culpable ignorance of employees' rights or a contumacious disregard of them. It also revealed a wrongful hostility to the exercise of such rights.

108. Mr Myles did not suggest that anyone other than he had responsibility for paying staff wages, and thus for their underpayment, or for the adverse action taken against Ms Way.

Nature and extent of the loss

109. The sixteen employees in question were underpaid a total amount of \$361,955.04 and the amounts owed to individual employees were very large considering the comparatively low pay earned by childcare workers. The total underpayments in respect of each employee were:

Name	Total underpayment
Casey Anger	\$30,287.82
Skye Cassidy	\$14,670.44
Kelly Cooper	\$48,083.83
Robyn Dickson	\$22,090.23
Jessica Doyle	\$33,191.06
Janine Evans	\$49,533.24
Joanne Foster	\$9,640.09
Tanya Holmes	\$29,798.63
Alissa Kruger	\$11,493.14
Kristi Neuner	\$24,615.07
Joanne Ogorman	\$7,106.37
Cheryl Pianko-Worsely	\$12,016.01
Lisa Pickard	\$16,658.76
Caitlin Selby	\$3,014.93
Cassandra Way	\$39,350.17
Janet Zorzo	\$10,405.25
Total	\$361,955.04

110. The significance of those amounts was made apparent by the following evidence which the Ombudsman summarised in her submissions:

- (a) *Ms Cassidy on three or four occasions was forced to request from her campus manager that her rental obligations be placed temporarily on hold, as she was unable to pay her rent as it fell due as the result of late payments by her Employer;*
- (b) *Ms Cassidy had difficulties obtaining an Austudy Centrelink Allowance due to the lack of payslips that she received from the Employer;*
- (c) *Ms Doyle was forced to seek financial assistance from her family to assist her to meet her own rent obligations;*
- (d) *Ms Way was obliged to rely on her partner's assistance from time to time to pay her bills, particularly around the Christmas period; and*
- (e) *Ms Way was obliged as office administrator to write letters on behalf of the Employer to verify employees' income and employment details, to assist them to make application for bank loans or Centrelink reporting obligations in the absence of proper payslips.*

In addition, each of the Employees who have sworn or affirmed affidavits have given evidence of what they variously describe as strain, stress and anxiety, including pressures on their immediate families, as the result of their experiences with the Employer.

Similar previous conduct

111. As noted earlier in these reasons, in 2007 and 2012 the Workplace Ombudsman and the Ombudsman received complaints of underpayments from some of Bollygum's employees. The majority of those complaints raised issues similar to the conduct admitted in this proceeding.

Whether the breaches arose out of one course of conduct

112. The Ombudsman submitted that Mr Myles's treatment of Bollygum's employees arose from an overall approach to the setting of its pay rates generally, rather than from a series of individual decisions directed to the Employees in particular at any point in time. The Ombudsman also accepted that some of the contraventions had common elements and that this should be taken into account when considering an appropriate

penalty observing that, as a result of changes in legislation and/or award coverage, Bollygum engaged in separate contraventions involving essentially similar conduct and that various contraventions were of the same kind but arose under different instruments.

113. I agree with that submission. In *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Carlton Sheet Metal Pty Ltd* [2011] FMCA 536 I said:

... by an accident of history, the legislative regime changed on 1 July 2009. That change appears unavoidably to create the artificial situation in this case that, in two instances, what would otherwise be a single course of conduct is one course of conduct under the WRA and another course of conduct under the FWA. Those instances are Industry Access's failure, first in June 2009 and then in July 2009, to pay superannuation pursuant to the Superannuation Award and sums in lieu of notice pursuant to the Award. These failures attract penalties under the WRA and further penalties under the FWA.

...

In this case I am satisfied that, whatever the number of technically identifiable contraventions, Industry Access's failure to comply with its obligations under the Superannuation Award was a single course of conduct which commenced under the WRA and continued under the FWA. I am of the same view in relation to its failure, under the WRA and the FWA and in breach of the Award, to pay sums in lieu of notice. Consequently, although contraventions of both Acts should be found in respect of each of these two courses of conduct and it is appropriate to impose separate penalties under each Act to reflect this, it would also be appropriate to quantify the penalties for those breaches on the basis that they were each single courses of conduct. (at [80] and [92])

114. The Ombudsman classified the contraventions which occurred under more than one statutory regime as follows:

- (a) ***basic minimum rate of pay under section 182(1) of the WR Act; item 5, schedule 16 of the Transitional Act and section 45 of the FW Act (clauses A.2.3, A.2.5 and A.3.7 Modern Award);***
- (b) ***basic minimum rate of pay (trainee) under section 182(1) of the WR Act; item 5, schedule 16 of the Transitional Act***

and section 45 of the FW Act (clauses A.2.3, A.2.5 and D.5.2 Modern Award);

- (c) casual loading under section 185(2) of the WR Act; item 5, schedule 16 of the Transitional Act and section 45 of the FW Act (clauses A.5.2 and A.5.4 Modern Award);*
- (d) annual leave under section 235(1) of the WR Act; Item 6(1), Schedule 16 of the Transitional Act and section 44 of the FW Act (section 90(1) FW Act);*
- (e) record keeping obligations under regulation 19.4(1), 19.12(1) of the WR Regulations and section 535(1) of the FW Act by reference to regulation 3.36 of the FW Regulations;*
- (f) failing to issue payslips within the appropriate time under regulation 19.20(2) of the WR Regulations and section 536(1) of the FW Act.*

115. The Ombudsman also submitted that the contraventions in relation to overtime, annual leave loading, laundry allowance and the adverse action against Ms Way presented separate and distinct courses of conduct which ought to be treated separately and penalised accordingly. I also agree with that submission.

Size and financial circumstances of the business

116. The payment of employees' wages and entitlements is a basic function of any business enterprise and the enterprise's size and sophistication, or lack of it, should have no impact on the discharge of that obligation. It is likely that the administrative deficiencies which manifested in the contraventions arose out of inadequate time and effort having been devoted to the discharge of this fundamental obligation.

117. Further, apart from his evidence concerning the withdrawal by his former wife of \$60,000-\$65,000 from the business's account in early 2013, Mr Myles did not adduce evidence relating to the financial circumstances of the business during the contravention period which suggested that financial difficulties might have contributed to the contraventions. Although I am prepared to accept that Ms Keen's behaviour in removing funds aggravated whatever difficulties might

have been being experienced by Bollygum, it can have had no effect on the contraventions committed before its occurrence.

Deliberateness of the breaches

118. With the exception of the adverse action against Ms Way, there is no direct evidence that the contraventions were calculated. However, neither does the evidence support a conclusion that Bollygum or Mr Myles conscientiously attempted to discharge their obligations to Bollygum's employees, or even to understand what they were. For instance, Mr Myles did not adduce evidence which suggested that he had read the relevant awards and legislation, had sought advice on them or had done anything more than rely on staff members whose qualifications to advise him on such matters were far from apparent.

Contrition, corrective action and co-operation with authorities

119. In his submissions to the Court at the hearing of this matter, Mr Myles expressed his regret to his former staff for the underpayments saying that he did not intentionally try to underpay them and had not understood the significance of the underpayments. I accept the genuineness of Mr Myles's acceptance of his wrong-doing. However, he did not appear to me to have much subjective appreciation of the seriousness and magnitude of the contraventions in which he was involved. His principal submission seemed to be that he had been punished enough, asking the Court to not impose a penalty which was crushing.
120. The only action of a corrective sort identified by Mr Myles was his payment of two fortnights of staff salaries from his own funds. However, no further steps of that sort were taken and it appears that no corrective action was taken by Bollygum prior to its winding up, thereby leaving the Employees to obtain what redress they can from Bollygum's successor in business at the childcare centres.
121. The evidence persuades me that Mr Myles offered little co-operation to the Ombudsman until proceedings were foreshadowed. However, since that time I accept that he has co-operated in the efficient disposal of this proceeding, most particularly by entering into the statement of

agreed facts and conceding the contraventions and his involvement in them.

122. The co-operation which Mr Myles demonstrated once this proceeding was foreshadowed is deserving of some recognition because it involved an admission of culpability and detailed agreement on relevant facts contended by the Ombudsman.

Ensuring compliance with minimum standards

123. The purpose of Parliament in providing for contravening conduct to be penalised is to aid the enforcement of minimum terms and conditions of employment and the enforcement of obligations imposed by awards and other industrial instruments: *Kelly v Fitzpatrick* at 20-21 [27]. Consequently, when considering the imposition of penalties in this case it is necessary to have regard to reinforcing the need for compliance with the schemes and protections put in place by legislation from time to time.

Deterrence

124. I pay particular attention to the following submission made by the Ombudsman:

The child care industry is known to the Applicant as one with many young workers. Information obtained by the Applicant based on the 2011 census data revealed that 29% of workers in the childcare industry were 24 years or younger, more than half of all childcare workers are under the age of 35 and 96% of all employees in the industry are female. The Employees in this proceeding as a cohort are quite consistent with this industry average, all 16 of whom are female and with an average age of approximately 32 years (taken as at the commencement of each Employee's employment). An analysis undertaken by the Applicant revealed that between 1 July 2012 and 30 June 2014, the Applicant received 640 complaints relating to the childcare industry. Many of those complaints related to workers who were apprentices, trainees or workers under the age of 25.

The data referred to above, while not determinative, tends to suggest that there is a need for general deterrence in the child care industry and to send a message to all employers that tough penalties will apply if they contravene the workplace laws. (references omitted)

125. General deterrence needs to be considered in order that the law's disapproval of the conduct in question is marked and the penalty imposed serve as a warning to others not to engage in similar conduct: *CPSU, Community and Public Sector Union v Telstra Corporation Limited* (2001) 108 IR 228 at 230-231 [9]. For a penalty to have the desired effect it must be imposed at a meaningful level: *Finance Sector Union v Commonwealth Bank of Australia* (2005) 147 IR 462 at 475 [41].
126. Although the Ombudsman submitted that an element for specific deterrence should also be included in such penalties, I have concluded that Mr Myles has already been subjected to considerable loss and embarrassment in relation to what ultimately became the failure of the Bollygum childcare centres. I suspect that the penalties which will be imposed will have a sufficiently deterrent effect as far as he is concerned that they need not contain an additional element for specific deterrence.

Penalties

127. I find that in relation to the Employees, Bollygum contravened:
- a) s.182(1) of the WR Act, in that from 30 June 2008 to 30 June 2009 it failed to pay the Employees a rate at least equal to the basic periodic rate of pay payable to them under the Child Care and Trainee Pay Scales;
 - b) item 5 of sch.16 to the FW (TPCA) Act, in that from 1 July 2009 to 31 December 2009 it failed to pay the Employees a rate at least equal to the basic periodic rate of pay payable to them under the Child Care and Trainee Pay Scales, in contravention of s.182(1) of the WR Act, as it continued to apply under the FW (TPCA) Act;
 - c) s.45 of the FW Act, in that from 1 January 2010 to 3 May 2013 it contravened the Modern Award by failing to pay the Employees not employed as trainees their minimum wages as prescribed by:
 - i) cl.A.2.3;
 - ii) cl.A.2.5; and

iii) cl.A.3.7

of the Modern Award (as transitioned from the Child Care Pay Scale) and by failing to pay the Employees employed as trainees their minimum wages as prescribed by:

i) cl.A.2.3;

ii) cl.A.2.5; and

iii) cl.D.5.2

of the Modern Award (as transitioned from the Trainee Pay Scale);

- d) s.185(2) of the WR Act, in that from 30 June 2008 to 30 June 2009 it failed to pay those Employees engaged as casual employees a casual loading that was at least equal to the guaranteed casual loading percentage payable to them under the Child Care Pay Scale;
- e) item 5 of sch.16 to the FW (TPCA) Act, in that from 1 July 2009 to 31 December 2009 it failed to pay those Employees engaged as casual employees a casual loading that was at least equal to the guaranteed casual loading percentage payable to them under the Child Care Pay Scale, in contravention of s.185(2) of the WR Act as it continued to apply under the FW (TPCA) Act;
- f) s.45 of the FW Act, in that from 1 January 2010 to 3 May 2013 it failed to pay those Employees engaged as casual employees a casual loading that was at least equal to the casual loading prescribed by cls.A.5.2 and A.5.4 of the Modern Award;
- g) s.45 of the FW Act, in that from 1 January 2010 to 3 May 2013 it failed to pay the Employees' overtime rates of pay as prescribed by cl.23.1 of the Modern Award;
- h) s.235(1) of the WR Act, in that from 30 June 2008 to 30 June 2009 it failed to pay the Employees a rate of pay for each hour of annual leave taken that was no less than the basic periodic rate of pay;

- i) item 6(1) of sch.16 to the FW (TPCA) Act, in that from 1 July 2009 to 31 December 2009 it failed to pay the Employees a rate of pay for each hour of annual leave taken that was no less than the basic periodic rate of pay pursuant to s.235(1) of the WR Act, as it continued to apply under the FW (TPCA) Act;
- j) s.44 of the FW Act, in that from 1 January 2010 to 3 May 2013 it failed to pay the Employees their base rate of pay for their ordinary hours of work during periods of paid annual leave as prescribed by s.90(1) of the FW Act;
- k) s.45 of the FW Act, in that from 1 January 2010 to 3 May 2013 it failed to pay the Employees an amount of annual leave loading as prescribed by cl.24.3 of the Modern Award;
- l) s.45 of the FW Act, in that from 1 January 2010 to 3 May 2013 it failed to pay the Employees a laundry allowance as prescribed by cl.15.2(b) of the Modern Award;
- m) regs.19.4(1) and 19.12(1) of the WR Regulations, in that from 30 June 2008 to 30 June 2009 it failed to make, or cause to be made, records of leave taken and the balance of the Employees' entitlements to leave from time to time, as prescribed by the WR Regulations;
- n) s.535(1) of the FW Act, in that from 1 July 2009 to 3 May 2013 it failed to make and keep a record containing details of leave taken and the balance of the Employees' entitlements to leave from time to time, as required by reg.3.36 of the FW Regulations;
- o) reg.19.20(2) of the WR Regulations, in that from 30 June 2008 to 30 June 2009 it failed to issue written pay slips to the Employees within one day of the payment to which the pay slip related being made;
- p) s.536(1) of the FW Act, in that 1 July 2009 to 3 May 2013 it failed to issue pay slips to the Employees within one working day of paying an amount in relation to the performance of work; and
- q) s.340(1) of the FW Act, in that it took adverse action against Ms Way because she had a workplace right or because she

exercised a workplace right or because she had a workplace right and exercised it.

128. I find that, pursuant to s.728(1) of the WR Act and s.550(1) of the FW Act, Mr Myles was involved in those contraventions by Bollygum.
129. As sought by the Ombudsman, there will be declarations to the effect of the findings set out at [127] and [128].
130. I further find that the:
 - a) failure over time to pay the Employees, who were qualified, their basic periodic or minimum rates of pay, in breach of s.182(1) of the WR Act, item 5 of sch.16 to the FW (TPCA) Act and s.45 of the FW Act, was one course of conduct and for the purposes of quantification of penalty should be treated as one contravention, even though contraventions of three statutes have been proved;
 - b) failure over time to pay the Employees, who were trainees, their basic periodic or minimum rates of pay, in breach of s.182(1) of the WR Act, item 5 of sch.16 to the FW (TPCA) Act and s.45 of the FW Act, was one course of conduct and for the purposes of quantification of penalty should be treated as one contravention, even though contraventions of three statutes have been proved;
 - c) failure over time to pay the Employees casual loadings, in breach of s.185(2) of the WR Act, item 5 of sch.16 to the FW (TPCA) Act and s.45 of the FW Act, was one course of conduct and for the purposes of quantification of penalty should be treated as one contravention, even though contraventions of three statutes have been proved;
 - d) failure, in breach of s.45 of the FW Act, to pay the Employees overtime pay as prescribed by cl.23.1 of the Modern Award was one course of conduct and should be treated as one contravention;
 - e) failure to pay the Employees their basic periodic or minimum rates of pay while they were on annual leave, in breach of s.235(1) of the WR Act, item 6(1) to sch.16 of the FW (TPCA) Act and s.44 of the FW Act was one course of conduct and for the purposes of quantification of penalty should be treated as one

contravention, even though contraventions of three statutes have been proved;

- f) failure, in breach of s.45 of the FW Act, to pay the Employees annual leave loading as prescribed by cl.24.3 of the Modern Award was one course of conduct and for the purposes of quantification of penalty should be treated as one contravention;
- g) failure, in breach of s.45 of the FW Act, to pay the Employees a laundry allowance as prescribed by cl.15.2(b) of the Modern Award was one course of conduct and for the purposes of quantification of penalty should be treated as one contravention;
- h) failure to make or keep records of leave taken and accrued leave entitlements in breach of regs.19.4(1) and 19.12(1) of the WR Regulations and s.535(1) of the FW Act was one course of conduct and for the purposes of quantification of penalty should be treated as one contravention, even though contraventions of two regulations and one statute have been proved; and
- i) failure to issue pay slips on time, as required by reg.19.20(2) of the WR Regulations and s.536(1) of the FW Act, in contravention of those provisions, was one course of conduct and for the purposes of quantification of penalty should be treated as one contravention, even though contraventions of one regulation and one statute have been proved.

131. The increase in the value of a penalty unit from \$110 to \$170 on 28 December 2012 did not have retrospective effect or apply to contraventions which occurred before that date: *Murrihy v Betezy.com.au Pty Ltd (No.2)* (2013) 221 FCR 118. Nevertheless, all but one of the contraventions in this case involved a course of conduct which was still on foot in 2013 and so could attract the higher penalty unit value. Even so, in this case, as almost all of the conduct constituting the contraventions occurred before 28 December 2012, I consider that the related penalties should be based on the lesser penalty unit value.

132. Separately from the increase in the value of penalty units, on 1 July 2009 the maximum penalty which can be imposed on an individual for

the record keeping and pay slip contraventions admitted in this case rose from 10 penalty units under the WR Regulations to 30 penalty units under the FW Act. Most of the conduct in contravention of Bollygum's record keeping and pay slip obligations occurred after 1 July 2009 and so I consider that the related penalties should be based on the FW Act's penalty range. Additionally, the failure to issue pay slips facilitated the other contraventions and will be penalised more heavily as a consequence.

133. I have taken into account the matters considered above when arriving at my decision as to the penalties to be imposed on Mr Myles. In the circumstances, I consider the appropriate penalties to be imposed on Mr Myles to be:

- a) \$4,000 for his involvement in Bollygum's failure over time to pay the Employees, who were qualified, their basic periodic or minimum rates of pay, in breach of s.182(1) of the WR Act, item 5 of sch.16 to the FW (TPCA) Act and s.45 of the FW Act;
- b) \$4,000 for his involvement in Bollygum's failure over time to pay the Employees, who were trainees, their basic periodic or minimum rates of pay, in breach of s.182(1) of the WR Act, item 5 of sch.16 to the FW (TPCA) Act and s.45 of the FW Act;
- c) \$3,500 for his involvement in Bollygum's failure over time to pay the Employees casual loadings, in breach of s.185(2) of the WR Act, item 5 of sch.16 to the FW (TPCA) Act and s.45 of the FW Act;
- d) \$3,500 for his involvement in Bollygum's failure, in breach of s.45 of the FW Act, to pay the Employees overtime pay as prescribed by cl.23.1 of the Modern Award;
- e) \$3,500 for his involvement in Bollygum's failure to pay the Employees their basic periodic or minimum rates of pay while they were on annual leave, in breach of s.235(1) of the WR Act, item 6(1) of sch.16 to the FW (TPCA) Act and s.44 of the FW Act;
- f) \$3,000 for his involvement in Bollygum's failure, in breach of s.45 of the FW Act, to pay the Employees annual leave loading as prescribed by cl.24.3 of the Modern Award;

- g) \$2,000 for his involvement in Bollygum's failure, in breach of s.45 of the FW Act, to pay the Employees a laundry allowance as prescribed by cl.15.2(b) of the Modern Award;
- h) \$2,000 for his involvement in Bollygum's failure to make or keep records of leave taken and accrued leave entitlements in breach of regs.19.4(1) and 19.12(1) of the WR Regulations and s.535(1) of the FW Act;
- i) \$3,000 for his involvement in Bollygum's failure to issue pay slips on time, as required by reg.19.20(2) of the WR Regulations and s.536(1) of the FW Act, in contravention of those provisions; and
- j) \$5,500 for his involvement in Bollygum's contravention of s.340(1) of the FW Act in taking adverse action against Ms Way.

134. The total penalty before the reduction which will be given for cooperation is therefore \$34,000. I am satisfied that this is a just and appropriate amount as an aggregate figure. After a reduction of 15% for cooperation, the total penalty is \$28,900.

135. Advising that Caitlin Selby had been fully paid her entitlements, the Ombudsman sought orders that the penalties be paid to the remaining Employees and the amount be divided between them proportionately in accordance with the amounts they were underpaid. I accept that submission. Consequently, there will be an order pursuant to s.841(b) of the WR Act and s.546(3)(c) of the FW Act that the total pecuniary penalty ordered in [134] above be paid as follows, to:

- a) Casey Anger: 8.44% of the total penalty ordered, namely \$2,439.16;
- b) Skye Cassidy: 4.09% of the total penalty ordered, namely \$1,182.01;
- c) Kelly Cooper: 13.40% of the total penalty ordered, namely \$3,872.60;
- d) Robyn Dickson: 6.15% of the total penalty ordered, namely \$1,777.35;
- e) Jessica Doyle: 9.24% of the total penalty ordered, namely \$2,670.36;

- f) Janine Evans: 13.80% of the total penalty ordered, namely \$3,988.20;
- g) Joanne Foster: 2.69% of the total penalty ordered, namely \$777.41;
- h) Tanya Holmes: 8.30% of the total penalty ordered, namely \$2,398.70;
- i) Alissa Kruger: 3.20% of the total penalty ordered, namely \$924.80;
- j) Kristi Neuner: 6.86% of the total penalty ordered, namely \$1,982.54;
- k) Joanne Ogorman: 1.98% of the total penalty ordered, namely \$572.22;
- l) Cheryl Pianko-Worsely: 3.35% of the total penalty ordered, namely \$968.15;
- m) Lisa Pickard: 4.64% of the total penalty ordered, namely \$1,340.96;
- n) Cassandra Way: 10.96% of the total penalty ordered, namely \$3,167.44; and
- o) Janet Zorzo: 2.90% of the total penalty ordered, namely \$838.10.

136. The Ombudsman also sought orders concerning the time within which those payments are to be made and to whom any amounts unpaid in such a period should be paid. There will be orders that the amounts ordered in [135] above be paid to the identified persons within twenty-eight days and, in default, to the Commonwealth. Further, in the event that there is any difficulty in giving effect to the orders of the Court, there will be liberty to apply.

I certify that the preceding one hundred and thirty-six (136) paragraphs are a true copy of the reasons for judgment of Judge Cameron

Associate:

Date: 5 June 2015

CORRECTIONS

1. Paragraph 133(h) line 4 – delete “and”.
2. After paragraph 135 – insert “The Ombudsman also sought orders concerning the time within which those payments are to be made and to whom any amounts unpaid in such a period should be paid. There will be orders that the amounts ordered in [135] above be paid to the identified persons within twenty-eight days and, in default, to the Commonwealth. Further, in the event that there is any difficulty in giving effect to the orders of the Court, there will be liberty to apply.”