

# FEDERAL COURT OF AUSTRALIA

## Fair Work Ombudsman v Al Hilfi [2016] FCA 193

File numbers: SAD 27 of 2012  
SAD 109 of 2012

Judge: **BESANKO J**

Date of judgment: 4 March 2016

Catchwords: **INDUSTRIAL LAW** – penalty hearing – where respondents involved in contravention of civil remedy provision – where failure to pay minimum wages and entitlements prescribed by *Fair Work Act 2009* (Cth) and *Cleaning Services Award 2010* – where failure to provide pay slips and maintain employment records – where default judgment entered against respondents – consideration of relevant factors in determining level of penalty – where contraventions are serious – where industry low paid – where workers vulnerable – where underpayments significant – consideration of effect of bankruptcy on imposition of pecuniary penalties.

Legislation: *Bankruptcy Act 1966* (Cth) ss 58, 60, 82  
*Corporations Act 2001* (Cth)  
*Fair Work Act 2009* (Cth) ss 3, 44, 45, 90, 535, 536, 539, 546, 550, 557  
*Fair Work Regulations 2009* (Cth)

Cases cited: *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36  
*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560  
*Cotis v MacPherson* (2007) 169 IR 30  
*Fair Work Ombudsman v Al Hilfi* [2015] FCA 313  
*Fair Work Ombudsman v Bundy Market Meats Pty Ltd* (2009) 190 IR 180  
*Kelly v Fitpatrick* [2007] FCA 1080; (2007) 166 IR 14  
*Mathers and Another v Commonwealth* (2004) 134 FCR 135

Date of hearing: 3 July 2015

Registry: South Australia

Division:	Fair Work Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	88
Counsel for the Applicant:	Mr N Healy
Solicitor for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the First Respondent SAD 27 of 2012:	The First Respondent did not appear
Counsel for the First Respondent SAD 109 of 2012:	The First Respondent did not appear
Counsel for the Second and Third Respondents:	The Second and Third Respondents did not appear

## ORDERS

SAD 27 of 2012

**BETWEEN:**           **FAIR WORK OMBUDSMAN**  
Applicant

**AND:**               **AHMAD HAMID MOHAMMED AL HILFI**  
First Respondent

**NIDAL ALBAROUKI**  
Second Respondent

**CLENCY FERRIERE**  
Third Respondent

**JUDGE:**           **BESANKO J**

**DATE OF ORDER:**   **4 MARCH 2016**

### **THE COURT ORDERS THAT:**

1. Pursuant to section 546(1) of the *Fair Work Act 2009* (Cth) (“FW Act”), the second respondent pay pecuniary penalties in the total amount of \$44,550 in respect of the following contraventions:
  - (a) pursuant to section 550 of the FW Act, contraventions of section 45 of the FW Act by failing to pay:
    - (i) minimum weekly wages to the Employees for work performed during ordinary hours pursuant to clause 16.1 of the Cleaning Services Award 2010 (Modern Award) (penalty \$4,950);
    - (ii) a part time loading to Ramnik Singh and Bhola Singh pursuant to clause 12.4(b) of the Modern Award (penalty \$4,950);
    - (iii) shiftwork penalty rates to the Employees pursuant to clause 27.1 of the Modern Award (penalty \$4,950);
    - (iv) weekend penalty rates to the Employees pursuant to clause 27.2 of the Modern Award (penalty \$4,950);
    - (v) penalty rates on public holidays to the Employees pursuant to clause 27.3 of the Modern Award (penalty \$4,950);

- (vi) overtime rates to the Employees pursuant to clause 28 of the Modern Award (penalty \$4,950);
  - (b) pursuant to section 550 of the FW Act, a contravention of section 45 of the FW Act by failing to make superannuation contributions to the Employees pursuant to clause 23.2 of the Modern Award (penalty \$4,950);
  - (c) pursuant to section 550 of the FW Act, a contravention of sub-section 44(1) of the FW Act by failing to pay annual leave entitlements to the Employees in relation to sub-section 90(2) of the FW Act and clause 29.4(a) of the Modern Award (penalty \$4,950);
  - (d) pursuant to section 550 of the FW Act, a contravention of sub-section 536(1) of the FW Act by failing to provide pay slips to the Employees (penalty \$2,475);
  - (e) pursuant to section 550 of the FW Act, a contravention of sub-section 535(1) of the FW Act by failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 of Part 3-6 of the *Fair Work Regulations 2009* (Cth) (“Regulations”) in relation to the Employees (penalty \$2,475).
2. Pursuant to section 546(1) of the FW Act, the third respondent pay pecuniary penalties in the total amount of \$44,550 in respect of the following contraventions:
- (a) pursuant to section 550 of the FW Act, contraventions of section 45 of the FW Act by failing to pay:
    - (i) minimum weekly wages to the Employees for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award (penalty \$4,950);
    - (ii) a part time loading to Ramnik Singh and Bhola Singh pursuant to clause 12.4(b) of the Modern Award (penalty \$4,950);
    - (iii) shiftwork penalty rates to the Employees pursuant to clause 27.1 of the Modern Award (penalty \$4,950);
    - (iv) weekend penalty rates to the Employees pursuant to clause 27.2 of the Modern Award (penalty \$4,950);
    - (v) penalty rates on public holidays to the Employees pursuant to clause 27.3 of the Modern Award (penalty \$4,950);

- (vi) overtime rates to the Employees pursuant to clause 28 of the Modern Award (penalty \$4,950);
  - (b) pursuant to section 550 of the FW Act, a contravention of section 45 of the FW Act by failing to make superannuation contributions to the Employees in relation to clause 23.2 of the Modern Award (penalty \$4,950);
  - (c) pursuant to section 550 of the FW Act, a contravention of sub-section 44(1) of the FW Act by failing to pay annual leave entitlements to the Employees in relation to sub-section 90(2) of the FW Act and clause 29.4(a) of the Modern Award (penalty \$4,950);
  - (d) pursuant to section 550 of the FW Act, a contravention of sub-section 536(1) of the FW Act by failing to provide pay slips to the Employees (penalty \$2,475);
  - (e) pursuant to section 550 of the FW Act, a contravention of sub-section 535(1) of the FW Act by failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 of Part 3-6 of the Regulations in relation to the Employees (penalty \$2,475).
3. Pursuant to subsection 546(3)(a) of the FW Act, the second and third respondents pay their respective penalty amounts to the Commonwealth, within 28 days of this order.
  4. The applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## ORDERS

SAD 109 of 2012

**BETWEEN:**           **FAIR WORK OMBUDSMAN**  
Applicant

**AND:**               **AYAM RAHMAH AL BASRY**  
First Respondent

**NIDAL ALBAROUKI**  
Second Respondent

**CLENCY FERRIERE**  
Third Respondent

**JUDGE:**             **BESANKO J**

**DATE OF ORDER:**  **4 MARCH 2016**

### **THE COURT ORDERS THAT:**

1. Pursuant to section 546(1) of the *Fair Work Act 2009* (Cth) (“FW Act”), the second respondent pay pecuniary penalties in the total amount of \$49,500 in respect of the following contraventions:
  - (a) pursuant to section 550 of the FW Act, contraventions of section 45 of the FW Act by failing to pay:
    - (i) minimum weekly wages to the Employees for work performed during ordinary hours pursuant to clause 16.1 of the Cleaning Services Award 2010 (Modern Award) (penalty \$4,950);
    - (ii) shiftwork penalty rates to the Employees pursuant to clause 27.1 of the Modern Award (penalty \$4,950);
    - (iii) weekend penalty rates to Tajinder Singh, Iqbal Singh, Sikander Singh, Sandeep Singh and Gurwinder Singh pursuant to clause 27.2 of the Modern Award (penalty \$4,950);
    - (iv) penalty rates on public holidays to Tajinder Singh, Iqbal Singh, Sikander Singh, Sandeep Singh and Gurwinder Singh pursuant to clause 27.3 of the Modern Award (penalty \$4,950);

- (v) overtime rates to Tajinder Singh, Iqbal Singh, Sikander Singh, Sandeep Singh and Gurwinder Singh pursuant to clause 28 of the Modern Award (penalty \$4,950);
  - (vi) a casual loading to Namtej Singh pursuant to clause 12.5(a) of the Modern Award (penalty \$4,950);
  - (b) pursuant to section 550 of the FW Act, a contravention of section 45 of the FW Act by failing to make superannuation contributions to Tajinder Singh, Iqbal Singh, Sikander Singh, Sandeep Singh and Gurwinder Singh pursuant to clause 23.2 of the Modern Award (penalty \$4,950);
  - (c) pursuant to section 550 of the FW Act, section 45 of the FW Act by failing to inform Sikander Singh, Namtej Singh and Gurwinder Singh about the terms of engagement in accordance with clause 12.2 of the Modern Award (penalty \$4,950);
  - (d) pursuant to section 550 of the FW Act, a contravention of sub-section 44(1) of the FW Act by failing to pay Tajinder Singh, Iqbal Singh, Sikander Singh, Sandeep Singh and Gurwinder Singh annual leave entitlements in relation to sub-section 90(2) of the FW Act and clause 29.4(a) of the Modern Award (penalty \$4,950);
  - (e) pursuant to section 550 of the FW Act, a contravention of sub-section 536(1) of the FW Act by failing to provide the Employees with pay slips (penalty \$2,475);
  - (f) pursuant to section 550 of the FW Act, a contravention of sub-section 535(1) of the FW Act by failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 of Part 3-6 of the *Fair Work Regulations 2009* (Cth) (“Regulations”) (penalty \$2,475).
2. Pursuant to section 546(1) of the FW Act, the third respondent pay pecuniary penalties in the total amount of \$49,500 in respect of the following contraventions:
- (a) pursuant to section 550 of the FW Act, contraventions of section 45 of the FW Act by failing to pay:
    - (i) minimum weekly wages to the Employees for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award (penalty \$4,950);

- (ii) shiftwork penalty rates to the Employees pursuant to clause 27.1 of the Modern Award (penalty \$4,950);
- (iii) weekend penalty rates to Tajinder Singh, Iqbal Singh, Sikander Singh, Sandeep Singh and Gurwinder Singh pursuant to clause 27.2 of the Modern Award (penalty \$4,950);
- (iv) penalty rates on public holidays to Tajinder Singh, Iqbal Singh, Sikander Singh, Sandeep Singh and Gurwinder Singh pursuant to clause 27.3 of the Modern Award (penalty \$4,950);
- (v) overtime rates to Tajinder Singh, Iqbal Singh, Sikander Singh, Sandeep Singh and Gurwinder Singh pursuant to clause 28 of the Modern Award (penalty \$4,950);
- (vi) a casual loading to Namtej Singh pursuant to clause 12.5(a) of the Modern Award (penalty \$4,950);
- (b) pursuant to section 550 of the FW Act, a contravention of section 45 of the FW Act by failing to make superannuation contributions to Tajinder Singh, Iqbal Singh, Sikander Singh, Sandeep Singh and Gurwinder Singh pursuant to clause 23.2 of the Modern Award (penalty \$4,950);
- (c) pursuant to section 550 of the FW Act, section 45 of the FW Act by failing to inform Sikander Singh, Namtej Singh and Gurwinder Singh about the terms of engagement in accordance with clause 12.2 of the Modern Award (penalty \$4,950);
- (d) pursuant to section 550 of the FW Act, a contravention of sub-section 44(1) of the FW Act by failing to pay Tajinder Singh, Iqbal Singh, Sikander Singh, Sandeep Singh and Gurwinder Singh annual leave entitlements in relation to sub-section 90(2) of the FW Act and clause 29.4(a) of the Modern Award (penalty \$4,950);
- (e) pursuant to section 550 of the FW Act, a contravention of sub-section 536(1) of the FW Act by failing to provide the Employees with pay slips (penalty \$2,475);
- (f) pursuant to section 550 of the FW Act, a contravention of sub-section 535(1) of the FW Act by failing to make and keep records of the kind prescribed by



Subdivision 1 of Division 3 of Part 3-6 of the Regulations in relation to the Employees (penalty \$2,475).

3. Pursuant to subsection 546(3)(a) of the FW Act, the second and third respondents pay their respective penalty amounts to the Commonwealth, within 28 days of this order.
4. The applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## REASONS FOR JUDGMENT

### BESANKO J:

#### INTRODUCTION

- 1 In proceeding SAD 27 of 2012, the Fair Work Ombudsman (“FWO”) claimed relief against Ahmad Hamid Mohammed Al Hilfi, Nidal Albarouki, Clency Ferriere and Coles Supermarkets Australia Pty Ltd (“Coles Supermarkets”) in relation to alleged contraventions of the *Fair Work Act 2009* (Cth) (“FW Act”) (“Al Hilfi proceeding”). Mr Al Hilfi was alleged to be the primary contravener and the other respondents were alleged to be contraveners by reason of the fact that they were *involved in* contraventions (s 550 of the FW Act). The proceedings between the FWO and Coles Supermarkets were resolved. Declarations were made against Mr Al Hilfi and the proceedings against him have been finalised.
- 2 On 2 April 2015, a default judgment was entered against Mr Albarouki and a default judgment was entered against Mr Ferriere. The default judgments involved a number of declarations of contraventions. The declarations made in relation to Mr Albarouki were in the following terms:

#### With Respect to the Employment of Bhupinder Singh

1. Pursuant to section 550 of the *Fair Work Act 2009* (Cth) (Fair Work Act), Mr Nidal Albarouki (second respondent), during the period from 1 January 2010 to 30 July 2011, contravened section 45 of the Fair Work Act by Mr Ahmad Hamid Mohammed Al Hilfi (Al Hilfi) failing to pay Bhupinder Singh:
  - (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Cleaning Services Award 2010 (Modern Award);
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (c) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award;  
and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.
2. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 1 January 2010 to 30 July 2011, contravened:

- (a) section 45 of the Fair Work Act by Al Hilfi failing to make superannuation contributions on behalf of Bhupinder Singh pursuant to clause 23.2 of the Modern Award;
- (b) sub-section 44(1) of the Fair Work Act by Al Hilfi failing to pay Bhupinder Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
- (c) sub-section 536(1) of the Fair Work Act by Al Hilfi failing to provide Bhupinder Singh with pay slips; and
- (d) sub-section 535(1) of the Fair Work Act by Al Hilfi failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Fair Work Regulations 2009 (Regulations) in relation to Bhupinder Singh.

With Respect to the Employment of Gurpreet Sekhon

- 3. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 1 January 2010 to 15 April 2010, contravened section 45 of the Fair Work Act by Al Hilfi failing to pay Gurpreet Sekhon:
  - (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (c) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award; and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.
- 4. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 1 January 2010 to 15 April 2010, contravened:
  - (a) section 45 of the Fair Work Act by Al Hilfi failing to make superannuation contributions on behalf of Gurpreet Sekhon pursuant to clause 23.2 of the Modern Award;
  - (b) sub-section 44(1) of the Fair Work Act by Al Hilfi failing to pay Gurpreet Sekhon annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
  - (c) sub-section 536(1) of the Fair Work Act by Al Hilfi failing to provide Gurpreet Sekhon with pay slips; and

- (d) sub-section 535(1) of the Fair Work Act by Al Hilfi failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Regulations in relation to Gurpreet Sekhon.

With Respect to the Employment of Ramnik Singh

- 5. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the periods from 1 January 2010 to 17 June 2010 and 15 July 2010 to 15 August 2010, contravened section 45 of the Fair Work Act by Al Hilfi failing to pay Ramnik Singh:
  - (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) a part time loading pursuant to clause 12.4(b) of the Modern Award;
  - (c) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (d) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (e) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award; and
  - (f) overtime rates pursuant to clause 28 of the Modern Award.
- 6. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the periods from 1 January 2010 to 17 June 2010 and 15 July 2010 to 15 August 2010, contravened:
  - (a) section 45 of the Fair Work Act by Al Hilfi failing to make superannuation contributions on behalf of Ramnik Singh pursuant to clause 23.2 of the Modern Award;
  - (b) sub-section 44(1) of the Fair Work Act by Al Hilfi failing to pay Ramnik Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
  - (c) sub-section 536(1) of the Fair Work Act by Al Hilfi failing to provide Ramnik Singh with pay slips; and
  - (d) sub-section 535(1) of the Fair Work Act by Al Hilfi failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Regulations in relation to Ramnik Singh.

With Respect to the Employment of Bhola Singh

7. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 18 June 2010 to 14 July 2010, contravened section 45 of the Fair Work Act by Al Hilfi failing to pay Bhola Singh:
  - (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) a part time loading pursuant to clause 12.4(b) of the Modern Award;
  - (c) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (d) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (e) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award;  
and
  - (f) overtime rates pursuant to clause 28 of the Modern Award.
8. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 18 June 2010 to 14 July 2010, contravened:
  - (a) section 45 of the Fair Work Act by Al Hilfi failing to make superannuation contributions on behalf of Bhola Singh pursuant to clause 23.2 of the Modern Award;
  - (b) sub-section 44(1) of the Fair Work Act by Al Hilfi failing to pay Bhola Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
  - (c) sub-section 536(1) of the Fair Work Act by Al Hilfi failing to provide Bhola Singh with pay slips; and
  - (d) sub-section 535(1) of the Fair Work Act by Al Hilfi failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Regulations in relation to Bhola Singh.

The declarations made in relation to Mr Ferriere were in the following terms:

With Respect to the Employment of Bhupinder Singh

9. Pursuant to section 550 of the *Fair Work Act 2009* (Cth) (Fair Work Act), Mr Clency Ferriere (third respondent), during the period from 1 January 2010 to 30 July 2011, contravened section 45 of the Fair Work Act by Mr Ahmad Hamid Mohammed Al Hilfi (Al Hilfi) failing to pay Bhupinder Singh:

- (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Cleaning Services Award 2010 (Modern Award);
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (c) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award;  
and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.
10. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 1 January 2010 to 30 July 2011, contravened:
- (a) section 45 of the Fair Work Act by Al Hilfi failing to make superannuation contributions on behalf of Bhupinder Singh pursuant to clause 23.2 of the Modern Award;
  - (b) sub-section 44(1) of the Fair Work Act by Al Hilfi failing to pay Bhupinder Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
  - (c) sub-section 536(1) of the Fair Work Act by Al Hilfi failing to provide Bhupinder Singh with pay slips; and
  - (d) sub-section 535(1) of the Fair Work Act by Al Hilfi failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Fair Work Regulations 2009 (Regulations) in relation to Bhupinder Singh.

With Respect to the Employment of Gurpreet Sekhon

11. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 1 January 2010 to 15 April 2010, contravened section 45 of the Fair Work Act by Al Hilfi failing to pay Gurpreet Sekhon:
- (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (c) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award;  
and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.

12. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 1 January 2010 to 15 April 2010, contravened:
- (a) section 45 of the Fair Work Act by Al Hilfi failing to make superannuation contributions on behalf of Gurpreet Sekhon pursuant to clause 23.2 of the Modern Award;
  - (b) sub-section 44(1) of the Fair Work Act by Al Hilfi failing to pay Gurpreet Sekhon annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
  - (c) sub-section 536(1) of the Fair Work Act by Al Hilfi failing to provide Gurpreet Sekhon with pay slips; and
  - (d) sub-section 535(1) of the Fair Work Act by Al Hilfi failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Regulations in relation to Gurpreet Sekhon.

With Respect to the Employment of Ramnik Singh

13. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the periods from 1 January 2010 to 17 June 2010 and 15 July 2010 to 15 August 2010, contravened section 45 of the Fair Work Act by Al Hilfi failing to pay Ramnik Singh:
- (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) a part time loading pursuant to clause 12.4(b) of the Modern Award;
  - (c) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (d) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (e) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award; and
  - (f) overtime rates pursuant to clause 28 of the Modern Award.
14. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the periods from 1 January 2010 to 17 June 2010 and 15 July 2010 to 15 August 2010, contravened:
- (a) section 45 of the Fair Work Act by Al Hilfi failing to make superannuation contributions on behalf of Ramnik Singh pursuant to clause 23.2 of the Modern Award;

- (b) sub-section 44(1) of the Fair Work Act by Al Hilfi failing to pay Ramnik Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
- (c) sub-section 536(1) of the Fair Work Act by Al Hilfi failing to provide Ramnik Singh with pay slips; and
- (d) sub-section 535(1) of the Fair Work Act by Al Hilfi failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Regulations in relation to Ramnik Singh.

With Respect to the Employment of Bhola Singh

15. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 18 June 2010 to 14 July 2010, contravened section 45 of the Fair Work Act by Al Hilfi failing to pay Bhola Singh:
- (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) a part time loading pursuant to clause 12.4(b) of the Modern Award;
  - (c) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (d) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (e) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award; and
  - (f) overtime rates pursuant to clause 28 of the Modern Award.
16. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 18 June 2010 to 14 July 2010, contravened:
- (a) section 45 of the Fair Work Act by Al Hilfi failing to make superannuation contributions on behalf of Bhola Singh pursuant to clause 23.2 of the Modern Award;
  - (b) sub-section 44(1) of the Fair Work Act by Al Hilfi failing to pay Bhola Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
  - (c) sub-section 536(1) of the Fair Work Act by Al Hilfi failing to provide Bhola Singh with pay slips; and



- (d) sub-section 535(1) of the Fair Work Act by Al Hilfi failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Regulations in relation to Bhola Singh.

3 Orders were made requiring service of the default judgment on each of Mr Albarouki and Mr Ferriere. The contraventions involved the contravention of civil remedy provisions as that term is defined in s 539 of the FW Act. The FWO now seeks the imposition of pecuniary penalties against Mr Albarouki and Mr Ferriere in relation to the contraventions (s 546 of the FW Act).

4 Mr Albarouki took no part in the proceedings after 4 April 2014. Mr Ferriere did not file an address for service or appear at any hearing held in the proceedings. Neither of them took any part in the proceedings in relation to the imposition of pecuniary penalties.

5 The background and circumstances of the proceedings are set out in my reasons for entering a default judgment against Mr Albarouki and Mr Ferriere (*Fair Work Ombudsman v Al Hilfi* [2015] FCA 313). These reasons should be read with those reasons.

6 In proceeding SAD 109 of 2012, the FWO brought similar claims against Ayam Rahmah Al Basry, Nidal Albarouki, Clency Ferriere and Coles Supermarkets (“Al Basry proceeding”). The proceedings between the FWO and Coles Supermarkets were resolved. Declarations were made against Mr Al Basry and the proceedings against him have been finalised.

7 On 2 April 2015, a default judgment was entered against Mr Albarouki and a default judgment was entered against Mr Ferriere. The default judgments involved a number of declarations of contraventions. The declarations made in relation to Mr Albarouki were in the following terms:

With Respect to the Employment of Tajinder Singh

1. Pursuant to section 550 of the *Fair Work Act 2009* (Cth ) (Fair Work Act), Mr Nidal Albarouki (second respondent), during the period from 1 January 2010 to 30 April 2010, contravened section 45 of the Fair Work Act 2009 by Ayam Rahmah Al Basry (Al Basry) failing to pay Tajinder Singh:

- (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Cleaning Services Award 2010 (Modern Award);
- (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;

- (c) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award;  
and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.
2. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 1 January 2010 to 30 April 2010, contravened:
- (a) section 45 of the Fair Work Act by Al Basry failing to make superannuation contributions on behalf of Tajinder Singh pursuant to clause 23.2 of the Modern Award
  - (b) sub-section 44(1) of the Fair Work Act by Al Basry failing to pay Tajinder Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
  - (c) sub-section 536(1) of the Fair Work Act by Al Basry failing to provide Tajinder Singh with pay slips; and
  - (d) sub-section 535(1) of the Fair Work Act by Al Basry failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Fair Work Regulations 2009 (Regulations) in relation to Tajinder Singh.

With Respect to the Employment of Iqbal Singh

3. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 1 January 2010 to 30 October 2010, contravened section 45 of the Fair Work Act by Al Basry failing to pay Iqbal Singh:
- (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (c) weekend penalty rates provided under clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award;  
and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.
4. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 1 January 2010 to 30 October 2010, contravened:

- (a) section 45 of the Fair Work Act by Al Basry failing to make superannuation contributions on behalf of Iqbal Singh pursuant to clause 23.2 of the Modern Award;
- (b) sub-section 44(1) of Fair Work Act by Al Basry failing to pay Iqbal Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
- (c) sub-section 536(1) of the Fair Work Act by Al Basry failing to provide Iqbal Singh with pay slips; and
- (d) sub-section 535(1) of the Fair Work Act by Al Basry failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Fair Work Regulations 2009 in relation to Iqbal Singh.

With Respect to the Employment of Sikander Singh

- 5. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 1 January 2010 to 28 February 2010, contravened section 45 of the Fair Work Act by Al Basry failing to pay Sikander Singh
  - (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (c) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award; and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.
- 6. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 1 January 2010 to 28 February 2010, contravened:
  - (a) section 45 of the Fair Work Act by Al Basry failing to make superannuation contributions on behalf of Sikander Singh pursuant to clause 23.2 of the Modern Award;
  - (b) section 45 of the Fair Work Act by Al Basry failing to inform Sikander Singh of the terms of his engagement in accordance with clause 12.2 of the Modern Award;

- (c) sub-section 44(1) of the Fair Work Act by Al Basry failing to pay Sikander Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
- (d) sub-section 536(1) of the Fair Work Act by Al Basry failing to provide Sikander Singh with pay slips; and
- (e) sub-section 535(1) of the Fair Work Act by Al Basry failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Regulations in relation to Sikander Singh.

With Respect to the Employment of Namtej Singh

- 7. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), in respect of two shifts worked between 6pm and 9pm on weekdays during 2010 (Namtej Singh Employment Period), contravened section 45 of the Fair Work Act by Al Basry failing to pay Namtej Singh:
  - (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award; and
  - (c) a casual loading pursuant to clause 12.5(a) of the Modern Award.
- 8. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the Namtej Singh Employment Period, contravened:
  - (a) section 45 of the Fair Work Act by Al Basry failing to inform Namtej Singh of the terms of his engagement in accordance with clause 12.2 of the Modern Award;
  - (b) sub-section 536(1) of the Fair Work Act by Al Basry failing to provide Namtej Singh with pay slips; and
  - (c) sub-section 535(1) of the Fair Work Act by Al Basry failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Fair Work Regulations 2009 in relation to Namtej Singh.

With Respect to the Employment of Sandeep Singh

- 9. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 1 January 2010 to 30 June 2010, contravened section 45 of the Fair Work Act by Al Basry failing to pay Sandeep Singh:

- (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (c) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award;  
and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.
10. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 1 January 2010 to 30 June 2010, contravened:
- (a) section 45 of the Fair Work Act by Al Basry failing to make superannuation contributions on behalf of Sandeep Singh pursuant to clause 23.2 of the Modern Award;
  - (b) sub-section 44(1) of the Fair Work Act by Al Basry failing to pay Sandeep Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
  - (c) sub-section 536(1) of the Fair Work Act by Al Basry failing to provide Sandeep Singh with pay slips; and
  - (d) sub-section 535(1) of the Fair Work Act by Al Basry failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Regulations in relation to Sandeep Singh.

With Respect to the Employment of Gurwinder Singh

11. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 1 April 2010 to 30 June 2010, contravened section 45 of the Fair Work Act by Al Basry failing to pay Gurwinder Singh:
- (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (c) weekend penalty rates provided pursuant to clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award;  
and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.

12. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), on and from 1 April 2010, contravened section 45 of the Fair Work Act by Al Basry failing to inform Gurwinder Singh of the terms of his engagement in accordance with clause 12.2 of the Modern Award.
13. Pursuant to section 550 of the Fair Work Act, Mr Nidal Albarouki (second respondent), during the period from 1 April 2010 to 30 June 2010, contravened:
  - (a) section 45 of the Fair Work Act by Al Basry failing to make superannuation contributions on behalf of Gurwinder Singh pursuant to clause 23.2 of the Modern Award;
  - (b) sub-section 44(1) of the Fair Work Act by Al Basry failing to pay Gurwinder Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
  - (c) sub-section 536(1) of the Fair Work Act by Al Basry failing to provide Gurwinder Singh with pay slips; and
  - (d) sub-section 535(1) of the Fair Work Act by Al Basry failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Regulations in relation to Gurwinder Singh.

The declarations made in relation to Mr Ferriere were in the following terms:

With Respect to the Employment of Tajinder Singh

14. Pursuant to section 550 of the Fair Work Act 2009 (Cth ) (Fair Work Act), Mr Clency Ferriere (third respondent), during the period from 1 January 2010 to 30 April 2010, contravened section 45 of the Fair Work Act 2009 by Ayam Rahmah Al Basry (Al Basry) failing to pay Tajinder Singh:
  - (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Cleaning Services Award 2010 (Modern Award);
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (c) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award; and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.

15. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 1 January 2010 to 30 April 2010, contravened:
- (a) section 45 of the Fair Work Act by Al Basry failing to make superannuation contributions on behalf of Tajinder Singh pursuant to clause 23.2 of the Modern Award
  - (b) sub-section 44(1) of the Fair Work Act by Al Basry failing to pay Tajinder Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
  - (c) sub-section 536(1) of the Fair Work Act by Al Basry failing to provide Tajinder Singh with pay slips; and
  - (d) sub-section 535(1) of the Fair Work Act by Al Basry failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Fair Work Regulations 2009 (Regulations) in relation to Tajinder Singh.

With Respect to the Employment of Iqbal Singh

16. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 1 January 2010 to 30 October 2010, contravened section 45 of the Fair Work Act by Al Basry failing to pay Iqbal Singh:
- (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (c) weekend penalty rates provided under clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award; and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.
17. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 1 January 2010 to 30 October 2010, contravened:
- (a) section 45 of the Fair Work Act by Al Basry failing to make superannuation contributions on behalf of Iqbal Singh pursuant to clause 23.2 of the Modern Award;
  - (b) sub-section 44(1) of Fair Work Act by Al Basry failing to pay Iqbal Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;

- (c) sub-section 536(1) of the Fair Work Act by Al Basry failing to provide Iqbal Singh with pay slips; and
- (d) sub-section 535(1) of the Fair Work Act by Al Basry failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Fair Work Regulations 2009 in relation to Iqbal Singh.

With Respect to the Employment of Sikander Singh

- 18. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 1 January 2010 to 28 February 2010, contravened section 45 of the Fair Work Act by Al Basry failing to pay Sikander Singh
  - (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (c) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award; and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.
- 19. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 1 January 2010 to 28 February 2010, contravened:
  - (a) section 45 of the Fair Work Act by Al Basry failing to make superannuation contributions on behalf of Sikander Singh pursuant to clause 23.2 of the Modern Award;
  - (b) section 45 of the Fair Work Act by Al Basry failing to inform Sikander Singh of the terms of his engagement in accordance with clause 12.2 of the Modern Award;
  - (c) sub-section 44(1) of the Fair Work Act by Al Basry failing to pay Sikander Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
  - (d) sub-section 536(1) of the Fair Work Act by Al Basry failing to provide Sikander Singh with pay slips; and
  - (e) sub-section 535(1) of the Fair Work Act by Al Basry failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Regulations in relation to Sikander Singh.



With Respect to the Employment of Namtej Singh

20. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), in respect of two shifts worked between 6pm and 9pm on weekdays during 2010 (Namtej Singh Employment Period), contravened section 45 of the Fair Work Act by Al Basry failing to pay Namtej Singh:
- (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award; and
  - (c) a casual loading pursuant to clause 12.5(a) of the Modern Award.
21. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the Namtej Singh Employment Period, contravened:
- (a) section 45 of the Fair Work Act by Al Basry failing to inform Namtej Singh of the terms of his engagement in accordance with clause 12.2 of the Modern Award;
  - (b) sub-section 536(1) of the Fair Work Act by Al Basry failing to provide Namtej Singh with pay slips; and
  - (c) sub-section 535(1) of the Fair Work Act by Al Basry failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Fair Work Regulations 2009 in relation to Namtej Singh.

With Respect to the Employment of Sandeep Singh

22. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 1 January 2010 to 30 June 2010, contravened section 45 of the Fair Work Act by Al Basry failing to pay Sandeep Singh:
- (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (c) weekend penalty rates pursuant to clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award; and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.

23. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 1 January 2010 to 30 June 2010, contravened:
- (a) section 45 of the Fair Work Act by Al Basry failing to make superannuation contributions on behalf of Sandeep Singh pursuant to clause 23.2 of the Modern Award;
  - (b) sub-section 44(1) of the Fair Work Act by Al Basry failing to pay Sandeep Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
  - (c) sub-section 536(1) of the Fair Work Act by Al Basry failing to provide Sandeep Singh with pay slips; and
  - (d) sub-section 535(1) of the Fair Work Act by Al Basry failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Regulations in relation to Sandeep Singh.

With Respect to the Employment of Gurwinder Singh

24. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 1 April 2010 to 30 June 2010, contravened section 45 of the Fair Work Act by Al Basry failing to pay Gurwinder Singh:
- (a) minimum weekly wages for work performed during ordinary hours pursuant to clause 16.1 of the Modern Award;
  - (b) shiftwork penalty rates pursuant to clause 27.1 of the Modern Award;
  - (c) weekend penalty rates provided pursuant to clause 27.2 of the Modern Award;
  - (d) penalty rates on public holidays pursuant to clause 27.3 of the Modern Award; and
  - (e) overtime rates pursuant to clause 28 of the Modern Award.
25. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), on and from 1 April 2010, contravened section 45 of the Fair Work Act by Al Basry failing to inform Gurwinder Singh of the terms of his engagement in accordance with clause 12.2 of the Modern Award.
26. Pursuant to section 550 of the Fair Work Act, Mr Clency Ferriere (third respondent), during the period from 1 April 2010 to 30 June 2010, contravened:

- (a) section 45 of the Fair Work Act by Al Basry failing to make superannuation contributions on behalf of Gurwinder Singh pursuant to clause 23.2 of the Modern Award;
- (b) sub-section 44(1) of the Fair Work Act by Al Basry failing to pay Gurwinder Singh annual leave entitlements pursuant to sub-section 90(2) of the Fair Work Act and clause 29.4(a) of the Modern Award;
- (c) sub-section 536(1) of the Fair Work Act by Al Basry failing to provide Gurwinder Singh with pay slips; and
- (d) sub-section 535(1) of the Fair Work Act by Al Basry failing to make and keep records of the kind prescribed by Subdivision 1 of Division 3 Part 3-6 of the Regulations in relation to Gurwinder Singh.

8 As with the Al Hilfi proceeding, orders were made requiring service of the default judgment on each of Mr Albarouki and Mr Ferriere. The contraventions involved the contravention of civil remedy provisions as defined in s 539 of the FW Act and, as with the Al Hilfi proceeding, the FWO seeks the imposition of pecuniary penalties against Mr Albarouki and Mr Ferriere in relation to the contraventions. As with the Al Hilfi proceeding, Mr Albarouki and Mr Ferriere have played no part in the hearing with respect to the imposition of pecuniary penalties.

#### **THE AL HILFI PROCEEDING**

9 Mr Albarouki was the sole director, company secretary and beneficial owner of all the shares in Starlink International Group Pty Ltd (“Starlink”) and Starlink Operations Pty Ltd (“Starlink Operations”). Mr Ferriere was the general manager of Starlink and Starlink Operations. Mr Ferriere, together with Mr Albarouki, had the principal management and control of the business of Starlink and Starlink Operations in relation to the dealings between those companies and Coles Supermarkets, and in relation to the subcontractors engaged by Starlink Operations in relation to the provision of trolley collection services.

10 Mr Al Hilfi was responsible for providing trolley collection services at a Coles supermarket in West Lakes, South Australia. He employed, relevantly, four employees (“Employees”) to carry out those services. The Employees and their periods of employment were as follows:

- (1) Bhupinder Singh on or about 1 October 2009 to 30 July 2011;
- (2) Gurpreet Sekhon 1 October 2009 to on or about 15 April 2010;

(3) Ramnik Singh 1 October 2009 to on or about 17 June 2010, and on or about 15 July 2010 to on or about 15 August 2010; and

(4) Bhola Singh on or about 18 June 2010 to on or about 14 July 2010.

11 Mr Al Hilfi was responsible for providing the trolley collection services pursuant to a contract with Starlink Operations. Starlink Operations engaged Mr Al Hilfi on behalf of its related entity, Starlink. In March 2009, Starlink entered into a contract with Coles Supermarkets to provide trolley collection services at the West Lakes site and, in September 2009, Starlink Operations, on behalf of Starlink, subcontracted the provision of those services to Mr Al Hilfi.

12 Bhupinder Singh and Gurpreet Sekhon were employed on a full time basis, and Ramnik Singh and Bhola Singh were employed on a part time basis.

13 Mr Al Hilfi was required to pay each Employee the minimum wages and entitlements prescribed by the FW Act and the Cleaning Services Award (2010) (“the Modern Award”). Mr Al Hilfi failed to pay the Employees the following entitlements:

- (1) the minimum weekly wage for ordinary hours of work;
- (2) penalty rates for shift work, weekend work and work on public holidays;
- (3) rates for overtime work;
- (4) superannuation contributions;
- (5) in respect of Ramnik Singh and Bhola Singh, a part time loading; and
- (6) paid annual leave (including leave loading) and/or payment of accrued, untaken annual leave (including leave loading) upon the termination of employment.

14 In addition, Mr Al Hilfi failed to provide the Employees with pay slips in accordance with the FW Act and to maintain employment records as required by the FW Act and the *Fair Work Regulations 2009* (Cth) (“FW Regulations”).

15 As I have said, Mr Al Hilfi admitted the contraventions and the Court has made declarations that he contravened the FW Act and the FW Regulations.

16 Mr Albarouki and Mr Ferriere were held to be involved in the contraventions under s 550 of the FW Act. The reasons they were held to be liable are set out in my previous reasons at [24]-[33] and [41]-[43].

17 Section 557(1) of the FW Act provides as follows:

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.

18 The FWO submits that I should approach the imposition of penalties on the basis that there are 10 contraventions and they have summarised their submissions in the following table:

<b>Contravention</b>	<b>Number of Employees affected by each contravention</b>	<b>Maximum penalty (per respondent)</b>
Minimum hourly rate of pay (Section 45 of the FW Act by virtue of a contravention of clause 16.1 of the Modern Award)	All Employees	\$6,600
Part time loading (Section 45 of the FW Act by virtue of a contravention of clause 12.4(b) of the Modern Award)	Ramnik and Bhola	\$6,600
Shiftwork penalty rates (Section 45 of the FW Act by virtue of a contravention of clause 27.1 of the Modern Award)	All Employees	\$6,600
Weekend penalty rates (Section 45 of the FW Act by virtue of a contravention of clause 27.2 of the Modern Award)	All Employees	\$6,600
Public holiday penalty rates (Section 45 of the FW Act by virtue of a contravention of clause 27.3 of the Modern Award)	All Employees	\$6,600
Overtime rates (Section 45 of the FW Act by virtue of a contravention of clause 28 of the Modern Award)	All Employees	\$6,600
Superannuation contributions (Section 45 of the FW Act by virtue of a contravention of clause 23.2 of the Modern Award)	All Employees	\$6,600
Annual leave entitlements (Section 44(1) of the	All Employees	\$6,600

FW Act by virtue of a contravention of section 90(2) of the FW Act and clause 29.2(a) of the Modern Award)		
Pay slips (Section 536(1) of the FW Act)	All Employees	\$3,300
Record keeping (Section 535(1) of the FW Act)	All Employees	\$3,300

19 The FWO submits that in circumstances where the identified contraventions relate to multiple employees, the course of conduct provisions in s 557 of the FW Act should be applied thereby reducing the total number of potential contraventions from 38 to 10. The effect of this approach is that the maximum penalty that could be imposed on each of Mr Albarouki and Mr Ferriere is the sum of \$59,400. I agree that the approach put forward by the FWO is appropriate.

20 The relevant considerations for the imposition of pecuniary penalties include the following:

- 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 suffered 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 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;
- the need for general and specific deterrence.

*Kelly v Fitpatrick* [2007] FCA 1080; (2007) 166 IR 14; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 (“*Australian Ophthalmic Supplies v McAlary-Smith*”).

**Mr Albarouki**

***The nature and extent of the conduct which led to the breaches, and the nature and extent of the loss or damage sustained as a result of the breaches***

21 It is convenient to deal with these two considerations together.

22 The aggregate underpayment to the Employees was \$128,408.03 in wages and entitlements (other than superannuation). The individual underpayments owing to the Employees were as follows:

- (1) Bhupinder Singh: \$89,665.82
- (2) Gurpreet Sekhon: \$24,795.94
- (3) Ramnik Singh: \$12,623.58
- (4) Bholu Singh: \$1,322.69

23 Each employee's underpayment exceeded the amount that he was actually paid. The largest underpayment was that owed to Bhupinder Singh who did not receive 65% of his total wages entitlement. Gurpreet Sekhon did not receive 78.6% of his total wages entitlement.

24 In addition to the wage underpayments, no superannuation contributions were paid on behalf of the Employees. In respect of the wages that were actually paid, the Employees did not receive the benefit of \$5,914.74 in superannuation. In respect of the wages the Employees should have been paid, they would have been entitled to a further amount (aggregated) of \$924.96 in superannuation.

25 The Employees were working seven days a week in a low paid industry. They were unskilled and vulnerable workers with limited language skills. One of the Employees was 20 years of age when he started working as a trolley collector. In that context, and indeed, in any context, the amount of the underpayments is substantial.

***The circumstances in which the conduct took place***

26 The circumstances in which the conduct took place are set out in my previous reasons. In those reasons I said:

27. The second and third respondents were in effective control of the two Starlink companies. Mr Al Hilfi was dependent upon those companies for his business. The pay rates that Mr Al Hilfi was able to pay were a function of the fees that Starlink Operations paid under the subcontract. Starlink had entered into its agreement with Coles Supermarkets on the basis that it was in a position to monitor and control, and would monitor and control, the manner

in which its subcontractors paid employees who were used to provide the services and the keeping of employee records by the subcontractors. Mr Al Hilfi was not a sophisticated businessman and, in relation to the manner in which he conducted his business, including the wage rates he paid the trolley collectors, he was subject to the direction of the second and third respondents. In the circumstances, the second and third respondents had the capacity to control, direct or influence (or all of these) the conduct of Mr Al Hilfi in relation to the wages and conditions that he paid and accorded to his employees, and the practices that Mr Al Hilfi adopted with respect to the issuing of payslips and the keeping of employee records in relation to the employees.

28. The second and third respondents were responsible for making the contract between Starlink Operations and Mr Al Hilfi, and negotiating the rates Starlink paid to Mr Al Hilfi under the contract. The second and third respondents were each familiar with the basis and rates upon which Mr Al Hilfi employed trolley collectors at the West Lakes site. Starlink and Starlink Operations employed supervisors in South Australia who reported to the second and third respondents as to the manner in which Mr Al Hilfi employed trolley collectors at the West Lakes site. It may be inferred from these matters that, at all times prior to 1 January 2010 and after that date, the second and third respondents knew that Mr Al Hilfi was paying the employees either fixed or lump sum amounts per week for their services, not based on hourly rates of pay, or rates of pay determined only by Mr Al Hilfi, but rather based on the fees that Starlink Operations paid to Mr Al Hilfi under the subcontract, and that those amounts or rates were not calculated having regard to the rates and conditions of employment prescribed by any award.
29. The second and third respondents were senior officers of Starlink and Starlink Operations, and those companies carried on the business of providing trolley collection services to Coles Supermarkets, including by way of subcontracting that work to other persons. In the course of carrying out such a business, they were required to and, as a matter of course, did acquire detailed knowledge of the incidents of award coverage of employees performing trolley collection work, and of workplace laws regulating employees in the trolley collection business. The award modernisation process was well-known and it was well-known that, as part of that process, a federal award regulating the rates and conditions of trolley collectors had been made in 2009, that it would come into effect on 1 January 2010, and that it would apply to all employers in South Australia. The second and third respondents knew that the SA Cleaners Award applied in that manner before 1 January 2010 as they were informed of this by a memorandum of legal advice dated 12 May 2008 from Mallesons Stephen Jacques to Starlink. In the circumstances, the second and third respondents each knew for some time before 1 January 2010 that from that date the wage rates and conditions of the employees would be regulated by a federal award, and that from that date Mr Al Hilfi would be obliged to comply with the provisions of the Act in relation to the issuing of payslips and the keeping of employee records. Furthermore, they knew on 1 January 2010, and at all material times after that, that the wage rates and conditions of the employees were regulated by a federal award, and that Mr Al Hilfi was obliged to comply with the provisions of the Act in relation to the issuing of payslips and the keeping of employee records.
30. The observance by Mr Al Hilfi of the increased wages and conditions



prescribed by the federal award would have had a substantial impact upon the profitability of his business and entailed a renegotiation of the rates under the subcontract. Neither Starlink Operations nor the second and third respondents received any request by Mr Al Hilfi after 1 January 2010 for an increase in the rates under the subcontract. Neither the second respondent nor the third respondent made any inquiry or took any step to ascertain whether Mr Al Hilfi, after 1 January 2010, was paying and according the employees the rates and conditions prescribed by the federal award, or observing the provisions of the Act in relation to issuing of payslips and keeping employee records. In the circumstances, the second and third respondents each knew that the wage rates and conditions that Mr Al Hilfi applied in relation to the trolley collectors after 1 January 2010 were less beneficial than those that Mr Al Hilfi was required to observe by the applicable award, and Mr Al Hilfi was not issuing payslips and not keeping employee records in accordance with the Act.

31. Despite having the knowledge referred to above, the second and third respondents each omitted to take any, or any effective action, either before or after 1 January 2010 to ensure that, after 1 January 2010, Mr Al Hilfi complied with the federal award regulating the wage rates and conditions of the employees from that date, or that he complied with the provisions of the Act in relation to the issuing of payslips and the keeping of employee records from that date. By omitting to take any, or any effective action, they induced Mr Al Hilfi into the belief that neither they nor Starlink Operations required him, on and from 1 January 2010, to comply with award regulated wages and conditions in relation to his employment of the employees, or to comply with the provisions of the Act in relation to the issuing of payslips and the keeping of employee records, and that the continuation of the subcontract was not dependent upon Mr Al Hilfi complying with award regulated wages and conditions in relation to his employment of the employees, or to comply with the provisions of the Act in relation to the issuing of payslips and the keeping of employee records, and that the employment arrangements that Mr Al Hilfi had in place with the employees were acceptable to the second and third respondents.
32. By reason of all of the foregoing matters, the second and third respondents brought about, encouraged, or facilitated (or all of these), Mr Al Hilfi's conduct in paying the employees wage rates and according the employees conditions after 1 January 2010 that were less beneficial than those regulated by the applicable award, and in failing to comply with the provisions of the Act in relation to the issuing of payslips and the keeping of employee records, associated themselves with Mr Al Hilfi's conduct in that regard, or rendered Mr Al Hilfi's conduct in that regard more likely.

27 There are three additional points to be made. First, Mr Al Hilfi's primary spoken language is Arabic and he has a limited ability to speak English. He described his ability to read the English language as "very low". He described his ability to write in English in the same way. Secondly, Mr Al Hilfi, for a time, worked for Starlink as a trolley collector. Finally, Mr Al Hilfi raised with Mr Albarouki his concern about how much was being paid to the trolley collectors and was told by Mr Albarouki that he did not care how much Mr Al Hilfi was paying his trolley collectors.

***Whether there had been similar previous conduct by the respondent***

28 The FWO said that she was not aware of any previous findings by a court that Mr Albarouki had contravened Commonwealth workplace laws.

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

29 I have already dealt with this consideration.

***The size of the business enterprise involved***

30 Mr Albarouki has not appeared and he has not put forward any evidence of the financial circumstances of either Starlink or Starlink Operations or of himself. The FWO told me that on 21 December 2011, and prior to the commencement of these proceedings, Starlink and Starlink Operations were placed into liquidation by a creditor's voluntary winding up under the *Corporations Act 2001* (Cth). The FWO submits, correctly in my view, that the poor financial circumstances of Starlink and Starlink Operations did not excuse Mr Albarouki in terms of his involvement in Mr Al Hilfi's contraventions in failing to pay the Employees their required minimum entitlements. The same may be said of Mr Albarouki's own circumstances whether or not he himself was in financial difficulties.

***Whether the breaches were deliberate***

31 Mr Albarouki as the sole director of Starlink and Starlink Operations is taken to be aware of the contract between Starlink and Coles Myer Ltd. The term of the contract was from 1 September 2005 to 31 July 2008. The contract provided that:

- (1) Starlink must comply with all applicable laws, and industrial awards of any kind in relation to Starlink and persons employed by Starlink (cl 3.6).
- (2) Starlink was responsible for the good and proper conduct of all persons engaged to provide the services (cl 8.1).
- (3) The subcontracting of any part of the agreement did not relieve Starlink from any responsibility or liability under the agreement (cl 9.2).
- (4) Starlink must pay its employees relevant award wages and observe legislated working conditions (cl 15.1(d)).

32 In the contract between Coles Supermarkets and Starlink for the term commencing on 16 March 2009 and terminated on 15 March 2012, Starlink was required to comply with applicable industry standards and all laws and regulations, including industrial awards and

requirements of any relevant government authorities that may relate to the provision of services (cl 3.2). In addition, Starlink represented and warranted to Coles Supermarkets that it had complied with all industrial awards, applicable standards laws and regulations, and any relevant requirements of government authorities relevant to providing the services to Coles Supermarkets (cl 11.2).

33 Under the trolley subcontract agreement between Starlink Operations and Mr Al Hilfi which commenced on 18 September 2009 and terminated on 18 September 2011, Starlink Operations required Mr Al Hilfi to comply with all relevant State and Commonwealth laws, including workplace occupational health and safety laws, industrial laws and agreements, and superannuation laws (cl 8.1).

34 As I found in my previous reasons, Mr Albarouki knew that Mr Al Hilfi was not paying the Employees in accordance with the FW Act and the Modern Award (at [30]). I also conclude that, as a result of a memorandum of legal advice dated 12 May 2008 to Starlink from Mallesons Stephen Jacques, Mr Albarouki was aware of the applicable legislation that applied to federal employers who employ trolley collectors.

***Whether senior management were involved in the breaches***

35 Mr Albarouki was, as I have said, the sole director, company secretary and sole beneficial owner of the shares in Starlink and Starlink Operations.

***Whether the party committing the breaches has exhibited contrition, whether the party committing the breaches has taken corrective action, and whether the party committing the breaches has cooperated with the enforcement authorities***

36 Mr Albarouki has not appeared and there is no evidence of contrition, corrective action or cooperation with the relevant authorities. As the FWO points out, Mr Albarouki has had the opportunity to appear at every stage of the proceeding.

***The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements***

37 The FWO submits, correctly in my view, that this is an important consideration in the present case. One of the objects of the FW Act as set out in s 3 is to ensure “a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders”.

***The need for general deterrence***

38 I accept the FWO's submission that the trolley collection industry often attracts unskilled labour and is more likely to attract young, low paid and vulnerable workers. I accept that the need for general deterrence is particularly high in industries which attract these types of workers and where the scope for exploitation is high. I also accept the evidence advanced by the FWO in the affidavit affirmed by Inspector Brodie Janelle Smith. She states:

15. The FWO has a Strategic Research, Reporting and Analysis Team with responsibility for, amongst other things, analysis of the number and types of complaints received by the FWO. On 17 April 2015, Jean Brysland, Assistant Director of the Strategic Research, Analysis and Reporting Team, completed an analysis of the workplace complaints made to the FWO relating to the trolley collection industry. This analysis identified the FWO received 110 complaints in relation to trolley collectors in the period from 1 July 2011 to 31 March 2015.
16. The analysis also revealed that:
  - (a) 50.0% of the complainants were engaged on a casual basis; and
  - (b) 27.0% of the complainants were employed under a visa.
17. Ms Brysland also undertook an analysis of the nature of employees working in the trolley collection industry using data from the 2011 Census. This analysis revealed that:
  - (a) over a third (34%) of workers in this industry were under the age of 20 and almost half (49%) of the workers were under the age of 25;
  - (b) 29% of workers in the trolley collection industry were born outside of Australia and 24% of those were born in a non-English speaking country; and
  - (c) 17% of workers in this industry have attained an education level of year 9 or lower and 40% of workers have attained an education level of year 10 or lower. This figure is much higher than the level of 17% attained by the total workforce.

***The need for specific deterrence***

39 Ms Smith has caused a search to be conducted of the data base for information held by the Australian Securities and Investments Commission in respect of Mr Albarouki. That search reveals that he is a current director and sole shareholder of the following companies:

- (1) Starlink Corporation Group Pty Ltd;
- (2) RNA Property Holdings Pty Ltd; and
- (3) Esteem Group Pty Ltd.

40 The FWO submits, again correctly in my view, that the fact that Mr Albarouki continues to be a company office holder for multiple companies means that there is a risk that he will run a business or employ people again in the future.

41 The final matter which I must consider is the totality of any penalties I propose to impose. In *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 53, Goldberg J said:

The totality principle is designed to ensure that overall an appropriate sentence or penalty is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved: *McDonald v R* (1994) 48 FCR 555; 120 ALR 629. But that does not mean that a court should commence by determining an overall penalty and then dividing it amongst the various contraventions. Rather the totality principle involves a final overall consideration of the sum of the penalties determined. In *Mill v R* (1988) 166 CLR 59; 83 ALR 1 the High Court accepted the following statement as correctly describing the totality principle:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is “just and appropriate”. The principle has been stated many times in various forms: “when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong”; “when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences”.

42 This approach to totality was followed in *Australian Ophthalmic Supplies v McAlary-Smith* (at 567 [23] per Gray J; at 576 [71] per Graham J; and at 582 [97] per Buchanan J). The totality principle is applied after I have determined the appropriate penalty for each contravention and it requires me to look at the aggregate penalty to see if it is an appropriate response to the conduct which led to the breaches and is not oppressive or crushing.

43 On 3 June 2015, Mr Albarouki was declared bankrupt by the Federal Circuit Court in proceedings ADG52/2015. That circumstance raises two issues. First, there is an issue as to whether Mr Albarouki’s bankruptcy prevents the imposition of pecuniary penalties on him. Secondly, there is an issue as to whether Mr Albarouki’s bankruptcy reflects a circumstance about his financial position which should be taken into account in the imposition of pecuniary penalties on him.

44 As to the first matter, s 58(3) of the *Bankruptcy Act 1966* (Cth) provides as follows:

- (3) Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:
  - (a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or
  - (b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.

45 This subsection does not act as a bar to the imposition of pecuniary penalties in this proceeding. The FWO is not a creditor of Mr Albarouki and the proceedings do not concern a provable debt owed by Mr Albarouki.

46 Section 60(1) of the *Bankruptcy Act* permits the Court to stay legal proceedings in certain circumstances. It provides as follows:

- (1) The Court may, at any time after the presentation of a petition, upon such terms and conditions as it thinks fit:

...

- (b) stay any legal process, whether civil or criminal and whether instituted before or after the commencement of this subsection, against the person or property of the debtor:
  - (i) in respect of the non-payment of a provable debt or of a pecuniary penalty payable in consequence of the non-payment of a provable debt; or
  - (ii) in consequence of his or her refusal or failure to comply with an order of a court, whether made in civil or criminal proceedings, for the payment of a provable debt;

and, in a case where the debtor is imprisoned or otherwise held in custody in consequence of the non-payment of a provable debt or of a pecuniary penalty referred to subparagraph (i) or in consequence of his or her refusal or failure to comply with an order referred to in subparagraph (ii), discharge the debtor out of custody.

47 Neither Mr Albarouki nor his controlling trustees in bankruptcy have applied to the Court for a stay of this proceeding under s 60(1) of the *Bankruptcy Act*. As the FWO submits, in any event, this subsection has no application to the proceedings because the proceedings do not relate to the non-payment of a provable debt owed by Mr Albarouki or a penalty payable in consequence of the non-payment of a provable debt owed by him. In the circumstances, there is no need for the Court to consider staying the proceedings of its own motion. The pecuniary penalties in this case are in respect of Mr Albarouki's alleged involvement in

contraventions of Commonwealth workplace laws by Mr Al Hilfi. The remedy sought against Mr Albarouki is not, and does not concern, debts provable in the bankruptcy.

48 Section 82 of the Bankruptcy Act provides for debts provable in bankruptcy and, relevantly, is to the following effect:

(1) Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy.

...

(3) Penalties or fines imposed by a court in respect of an offence against a law, whether a law of the Commonwealth or not, are not provable in bankruptcy.

49 The pecuniary penalties that may be imposed in this case under s 546 of the FW Act fall within the terms of s 82(3) of the Bankruptcy Act and are not debts provable in the bankruptcy: *Mathers and Another v Commonwealth* (2004) 134 FCR 135; *Cotis v MacPherson* (2007) 169 IR 30; *Fair Work Ombudsman v Bundy Market Meats Pty Ltd* (2009) 190 IR 180.

50 I accept the FWO's submission that the pecuniary penalties sought in this case are not provable against Mr Albarouki in bankruptcy and s 60(1) of the Bankruptcy Act has no application to this proceeding.

51 As to the second issue, the FWO put forward evidence of the circumstances in which Mr Albarouki went into bankruptcy.

52 On 3 February 2012, Starlink commenced proceedings against, among others, Mr Albarouki in the District Court of South Australia (Action No. 0196 of 2012). On 12 June 2014, judgment was entered against Mr Albarouki in the proceeding in the District Court in the sum of \$748,828.26. On 16 September 2014, Starlink applied for a Bankruptcy Notice, and Bankruptcy Notice No. 175064 was issued against Mr Albarouki. On 9 February 2015, Mr Albarouki failed to comply with the Bankruptcy Notice based on a judgment debt in the amount of \$748,828.26. By Creditors Petition dated 13 February 2015 and Amended Creditors Petition dated 22 April 2015, Starlink sought a sequestration order against Mr Albarouki. As at 2 June 2015, the judgment debt of \$748,828.26 remained outstanding, and on 3 June 2015 Mr Albarouki was declared bankrupt.

53 By 20 March 2015, Mr Albarouki had transferred three properties previously owned by him. The details are as follows:

- (1) a transfer without monetary consideration registered against a property at 205 Denham Court Road, Denham Court, New South Wales, 2565 (“Denham Court property”);
- (2) a transfer registered against a property located at 2 Carbasse Crescent, St Helens Park, New South Wales, 2560; and
- (3) a transfer without monetary consideration registered against a property located at 125 Fox Valley Road, Denham Court, New South Wales, 2565.

54 Two of the above properties were transferred without monetary consideration. The transfer of the Denham Court property on 3 April 2013 was to Mr Albarouki’s ex-wife pursuant to a Binding Financial Agreement. According to a listing on the Raine & Horne website, this property was listed as having a price guide of over \$2 million. The precise figure is not legible on the documents before the Court.

55 I accept the submission of the FWO that Mr Albarouki was intentionally divesting himself of assets when it was likely that the District Court proceedings and these proceedings would cause him to have financial commitments.

56 From 14 March 2014 until 6 October 2014, Mr Albarouki was represented in the District Court proceedings by Ms Jacqueline Saldaneri of Saldaneri and Associates. The evidence establishes that even during the period when Mr Albarouki was represented, the District Court was frequently informed that he was overseas in Syria. Mr Albarouki ceased participating in the bankruptcy proceedings and Starlink was required to obtain orders for substituted service in respect of the Bankruptcy Notice. On 10 February 2015, Starlink’s solicitors were informed by Ms Saldaneri that she did not act for Mr Albarouki and had not heard from him for quite some time.

57 I accept that the evidence in the bankruptcy proceedings demonstrates that Mr Albarouki frequently travelled overseas. Documents produced by the Department of Immigration and Border Protection show that since the commencement of the bankruptcy proceedings, Mr Albarouki took nine trips overseas and was away from Australia for periods varying from between 11 days and 286 days at a time. Mr Albarouki is an Australian citizen and his departure cards show that he considered himself an ordinary resident of Australia and at all



times stated that he was departing Australia on a temporary basis. As with the current proceedings, the bankruptcy proceedings demonstrate that Mr Albarouki once again ceased participating in proceedings and attempted to avoid his legal obligations.

58 I accept the submission of the FWO that Mr Albarouki's bankruptcy arises, in part, as a result of his own conduct and that the proceeding should not result in a lower penalty being imposed by the Court.

59 I have had regard to all the circumstances. I think that the contraventions fall within the serious category, having regard to the low paid nature of the industry, the vulnerability of the workers and, in particular, the extent of the underpayments. I see no reason to distinguish between the various contraventions. The Legislature has already done that insofar as the provision of pay slips and record keeping contraventions may be considered less significant than the other contraventions. I will impose a penalty of 75% of the maximum with respect to each contravention.

#### **Mr Ferriere**

60 Save that Mr Ferriere did not have an equivalent conversation with Mr Al Hilfi to that which took place between Mr Al Hilfi and Mr Albarouki (see [27] above), the considerations relevant to Mr Ferriere are very similar to those relevant to Mr Albarouki. There are no differences based on personal circumstances that I should take into account because I do not have any evidence of the personal circumstances of either man. The FWO told me that, as far as she is aware, Mr Ferriere is not a current director or shareholder of any company. However, I do not think that fact and the absence of an equivalent conversation are sufficiently material to lead to a different penalty in the case of Mr Ferriere and I will impose the same penalties on him as I have in the case of Mr Albarouki.

61 Mr Ferriere was declared bankrupt on 8 February 2012, and an official trustee in bankruptcy was appointed. On 9 February 2015, the bankruptcy was discharged. I accept the submission of the FWO that she is not prevented from proceeding against Mr Ferriere because he was previously bankrupt. As a matter of law, the FWO was not prevented from seeking the imposition of a civil penalty against Mr Ferriere even if he was a bankrupt which, in fact, is no longer the case. Pecuniary penalties may be imposed under s 546 of the FW Act because they fall within the exception in s 82(3) of the Bankruptcy Act and the debts are, therefore, not debts provable in bankruptcy.

## **THE AL BASRY PROCEEDING**

62 The Al Basry proceeding, at least as far as Mr Albarouki and Mr Ferriere are concerned, is very similar to the Al Hilfi proceeding. I do not need to repeat the legal principles and, as far as the facts are concerned, I can concentrate on the differences.

63 Mr Al Basry was responsible for providing trolley collection services at Coles supermarkets in Elizabeth, Munno Para and Gawler, South Australia. He employed, relevantly, six employees (“Employees”) to carry out those services. The Employees and their periods of employment were as follows:

- (1) Tajinder Singh 1 December 2009 to 30 April 2010;
- (2) Iqbal Singh 18 September 2009 to 30 October 2010;
- (3) Sikander Singh 30 October 2009 to 28 February 2010;
- (4) Namtej Singh a week some time in 2010;
- (5) Sandeep Singh 1 December 2009 to 30 June 2010; and
- (6) Gurwinder Singh 1 April 2010 to 30 June 2010.

64 Mr Al Basry was responsible for providing those services pursuant to a contract with Starlink Operations. Starlink Operations engaged Mr Al Basry on behalf of its related entity, Starlink. In March 2009, Starlink entered into a contract with Coles Supermarkets to provide trolley collection services at the Elizabeth, Munno Para and Gawler sites, and in September 2009, Starlink Operations, on behalf of Starlink, subcontracted the provision of those services to Mr Al Basry.

65 Tajinder, Iqbal, Sikander, Sandeep and Gurwinder Singh were employed on a full time basis, and Namtej Singh was employed on a casual basis. Mr Al Basry was required to pay each employee the minimum wages and entitlements prescribed by the FW Act and the Modern Award. Mr Al Basry failed to pay the Employees the following entitlements:

- (1) the minimum weekly wage for ordinary hours of work;
- (2) penalty rates for shift work, weekend work and work on public holidays;
- (3) rates for overtime work;
- (4) superannuation contributions;

- (5) in respect of all Employees other than Namtej Singh, paid annual leave (including leave loading) and/or payment of accrued, untaken annual leave (including leave loading) upon the termination of employment; and
- (6) in respect of Namtej Singh, a casual loading.

66 In addition, Mr Al Basry failed to provide the Employees with pay slips in accordance with the FW Act and to maintain employment records as required by the FW Act and the FW Regulations.

67 As I have said, Mr Al Basry admitted the contraventions, and the Court has made declarations that he contravened the FW Act and the FW Regulations.

68 By reason of the contractual relationship between Starlink Operations and Mr Al Basry, Mr Albarouki and Mr Ferriere had the capacity to control and direct Mr Al Basry's conduct in respect of the wages and conditions paid by Mr Al Basry to his employees and his practices in respect of record keeping and pay slips. Mr Albarouki and Mr Ferriere knew that Mr Al Basry was affording his employees less beneficial wages and conditions than were required by the Modern Award and that he was not issuing pay slips or keeping records as required by the FW Act. They failed to take effective action to ensure that Mr Al Basry complied with the requirements of the FW Act, and in doing so, they facilitated, encouraged and associated themselves with Mr Al Basry's contraventions under the FW Act.

69 I have referred to s 557(1) of the FW Act and the relevant authorities in my reasons dealing with the Al Hilfi proceeding.

70 The FWO submits that I should conclude that there were 11 contraventions by each of Mr Albarouki and Mr Ferriere. The following table reflects the approach advanced by the FWO:

<b>Contravention</b>	<b>Number of Employees affected by each contravention</b>	<b>Maximum penalty (per respondent)</b>
Minimum hourly rate of pay (Section 45 of the FW Act by virtue of a contravention of clause 16.1 of the Modern Award)	All Employees	\$6,600
Shiftwork penalty rates (Section 45 of the FW Act by virtue of a contravention of clause 27.1)	All Employees	\$6,600

of the Modern Award)		
Weekend penalty rates (Section 45 of the FW Act by virtue of a contravention of clause 27.2 of the Modern Award)	Tajinder, Iqbal, Sikander, Sandeep and Gurwinder	\$6,600
Casual loading (Section 45 of the FW Act by virtue of a contravention of clause 12.5(a) of the Modern Award)	Nomej	\$6,600
Public holiday penalty rates (Section 45 of the FW Act by virtue of a contravention of clause 27.3 of the Modern Award)	Tajinder, Iqbal, Sikander, Sandeep and Gurwinder	\$6,600
Overtime rates (Section 45 of the FW Act by virtue of a contravention of clause 28 of the Modern Award)	Tajinder, Iqbal, Sikander, Sandeep and Gurwinder	\$6,600
Failing to inform employee of terms of engagement (Section 45 of the FW Act by virtue of a contravention of clause 12.2 of the Modern Award)	Nomej, Sikander, Gurwinder	\$6,600
Superannuation contributions (Section 45 of the FW Act by virtue of a contravention of clause 23.2 of the Modern Award)	Tajinder, Iqbal, Sikander, Sandeep and Gurwinder	\$6,600
Annual leave entitlements (Section 44(1) of the FW Act by virtue of a contravention of section 90(2) of the FW Act and clause 29.2(a) of the Modern Award)	Tajinder, Iqbal, Sikander, Sandeep and Gurwinder	\$6,600
Pay slips (Section 536(1) of the FW Act)	All Employees	\$3,300
Record keeping (Section 535(1) of the FW Act)	All Employees	\$3,300

71 I agree that the approach put forward by the FWO is appropriate.

**Mr Albarouki**

*The nature and extent of the conduct which led to the breaches, and the nature and extent of the loss or damage sustained as a result of the breaches*

72 Again, it is convenient to deal with these two matters together.

73 The aggregate underpayment to the Employees was \$91,766.66 in wages and entitlements (other than superannuation). The individual underpayments owing to the Employees were as follows:

- (1) Iqbal Singh: \$30,708.59
- (2) Tajinder Singh: \$23,595.10
- (3) Sandeep Singh: \$18,064.70
- (4) Gurwinder Singh: \$13,239.51
- (5) Sikander Singh: \$6,129.94
- (6) Namtej Singh: \$28.82

74 Tajinder Singh was underpaid by an average of \$1,387.95 per week over a period of 17 weeks. Gurwinder Singh was underpaid by an average of \$1,018.42 per week over a period of 13 weeks. Each full time Employee, other than Iqbal Singh, was underpaid by an amount that exceeded the amount they were paid. Namtej Singh, who worked only two shifts, was underpaid by \$28.82 which was 22% of his total entitlement. In addition to the underpaid wages, no superannuation contributions were paid on behalf of the Employees. In respect of the wages that were paid, the Employees did not receive the benefit of \$6,144.47 in unpaid superannuation. In respect of the wages the Employees should have been paid, they would have been entitled to a further amount (aggregated) of \$609.66 in superannuation.

75 As in the Al Hilfi proceeding, the Employees in this case were working in a low paid industry and they were unskilled and vulnerable workers with limited language skills.

***Circumstances in which the conduct took place***

76 The rates that Mr Al Basry was able to pay the Employees was a function of the fees that Starlink Operations paid pursuant to the subcontract and this fee was set by Starlink. During the terms of the subcontracts, there were a number of changes to coverage hours and the associated fee payable by Starlink Operations to Mr Al Basry. Mr Al Basry said, and I accept, that he was not able to negotiate any changes to coverage hours or the fees payable to him and was told by Starlink that if he did not like it they would get someone else to take over. Mr Al Basry said, and I accept, that after the trolley collectors working for him complained about the low level of pay that they were receiving, he attempted to raise the pay rates with Mr Albarouki but he was told if he did not like it he could leave.

77 Before entering into a subcontract with Starlink Operations to provide the trolley collection services, Mr Al Basry was himself employed by Starlink or Starlink Operations as a trolley collector. Mr Al Basry said, and I accept, that he had only a limited ability to speak English, and his ability to write and read in the English language was “very low”. He said that the subcontract agreements he entered into with Starlink Operations were not translated into Arabic. Despite Mr Al Basry’s limited English abilities, neither Mr Albarouki nor anyone else from the Starlink companies provided Mr Al Basry with any information regarding the minimum rates of pay or the industrial instrument applying to trolley collection work. Furthermore, neither Mr Albarouki nor anyone else from the Starlink companies provided him with any information regarding the requirements of the FW Act to issue pay slips and keep employee records.

78 Mr Albarouki knew that Mr Al Basry paid the Employees fixed weekly sums derived from the contract fee rather than hourly rates calculated by reference to the Modern Award. He also knew that the amounts paid by Mr Al Basry to the Employees were less beneficial than the terms and conditions prescribed by the Modern Award and the FW Act. He knew that Mr Al Basry did not issue pay slips or keep employee records in accordance with the FW Act. By not taking action to ensure that Mr Al Basry complied with the terms of the Modern Award and the FW Act, Mr Albarouki induced in Mr Al Basry the belief that non-compliance was acceptable.

***Whether there had been similar previous conduct by the respondent***

79 The FWO said that she was not aware of any previous findings by a court that Mr Albarouki had contravened Commonwealth workplace laws.

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

80 I have already dealt with this consideration.

***The size of the business enterprise involved***

81 In relation to Starlink, Starlink Operations and Mr Albarouki, I have dealt with this in my reasons dealing with the Al Hilfi proceeding.

***Whether the breaches were deliberate***

82 I repeat paragraphs 31 and 32 above.

83 Under the trolley subcontract agreements between Starlink Operations and Mr Al Basry for the three different sites which agreements commenced on 18 September 2009 and terminated on 18 September 2011 in the case of the Elizabeth and Gawler sites, and which agreement commenced on 15 March 2010 and terminated on 15 March 2012 in the case of the Munno Para site, Starlink Operations required Mr Al Basry to comply with all relevant State and Commonwealth laws, including industrial laws and agreements.

84 I repeat paragraph 77 above and the second sentence in paragraph 34.

85 As to the remaining relevant considerations, it is sufficient for me to repeat the matters in paragraphs 35 to 42 above.

86 It is true that there are more employees involved in the Al Basry proceeding than the Al Hilfi proceeding. At the same time, the total of the underpayments is higher in the case of the Al Hilfi proceeding. Despite these differences, the conduct is relevantly similar and I propose to take the same approach to penalty. I will impose a penalty of 75% of the maximum penalty for all contraventions. That results in a total penalty of \$49,500. That is not an oppressive or crushing penalty, even taking into account the penalty I impose in the Al Hilfi proceeding.

**Mr Ferriere**

87 For the reasons I have given in the Al Hilfi proceeding, I see no reason to take a different approach in the case of Mr Ferriere, and I will impose the same penalties on him.

**ORDERS**

88 I will impose the pecuniary penalties which I have identified in these reasons. I will order that the penalties be paid to the Commonwealth within 28 days. I will give the applicant liberty to apply.

I certify that the preceding eighty-eight (88) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate:

Dated: 4 March 2016