

# FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v INVIVO GROUP PTY LTD & ORS* [2015] FCCA 1914

Catchwords:

INDUSTRIAL LAW – Contraventions of the *Fair Work Act 2009* – s.323: failure to pay employees in full and at least monthly – s.535: failure to keep proper records – s.536: failure to give employees payslips within one working day of payment – declarations on admissions – penalties.

Legislation:

*Corporations Act 2001*, s.471B

*Fair Work Act 2009*, ss.12, 14, 323, 535, 536, 539, 546, 550, 701, 712

*Fair Work Regulations 2009*, regs.3.32, 3.33

*Manufacturing and Associated Industries and Occupations Award 2010*, cls. B.3.4, 14.1, 36.2, 40.7

Cases cited:

*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560; (2008) 246 ALR 35; [2008] FCAFC 8

*Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) ACSR 403; [2015] FCAFC 59

*Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080

*Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7

Applicant:	FAIR WORK OMBUDSMAN
First respondent:	INVIVO GROUP PTY LTD (IN LIQ) (ACN 159 703 492)
Second respondent:	JONATHAN PAUL WILLIAM STIELOW
Third respondent:	CLAUDIO SALVADOR LOCASO
File number:	MLG 934 of 2013
Judgment of:	Judge Riley
Hearing date:	12 June 2015

Date of last submission: 12 June 2015

Delivered at: Melbourne

Delivered on: 15 July 2015

## **REPRESENTATION**

Counsel for the applicant: Mr McKenna

Solicitors for the applicant: Office of the Fair Work Ombudsman

Counsel for the first respondent: The first respondent did not appear

Solicitors for the first respondent: The first respondent was not represented

Counsel for the second respondent: The second respondent did not appear

Solicitors for the second respondent: The second respondent was not represented

Counsel for the third respondent: The third respondent appeared in person

Solicitors for the third respondent: The third respondent was not represented

## **DECLARATION:**

(1) Based on the admissions made by the second respondent in the statement of agreed facts filed on 31 October 2014 and the admissions made by the third respondent in the statement of agreed facts filed on 23 December 2014, the court declares that the second and third respondents each contravened:

(a) s.323(1) of the *Fair Work Act 2009*, in that they were each involved within the meaning of s.550(1) of the *Fair Work Act 2009* in the first respondent's failure to pay in full at least monthly:

(i) Tim Amor;

(ii) Johnny Byrne;

(iii) Lorraine Murphy;

- (iv) Maik Mylius;
  - (v) Edoardo Sangiorgio;
  - (vi) Marie-Isabell Schafhaupt;
  - (vii) Thomas Spengler;
  - (viii) Sarah Walsh; and
- (b) s.535(1) of the *Fair Work Act 2009*, in that they were each involved within the meaning of s.550(1) of the *Fair Work Act 2009* in the first respondent's failure to keep records as prescribed by reg.3.32 and reg.3.33 of the *Fair Work Regulations 2009* for:
- (i) Tim Amor;
  - (ii) Rachel Blomeyer;
  - (iii) Johnny Byrne;
  - (iv) Jonathan Dowey;
  - (v) Lukas Martin;
  - (vi) Lorraine Murphy;
  - (vii) Maik Mylius;
  - (viii) Romain Poyet;
  - (ix) Edoardo Sangiorgio;
  - (x) Marie-Isabell Schafhaupt;
  - (xi) Thomas Spengler; and
  - (xii) Sarah Walsh; and
- (c) s.536(1) of the *Fair Work Act 2009*, in that they were each involved within the meaning of s.550(1) of the *Fair Work Act 2009* in the first respondent's failure to give a pay slip within one working day of payment to:
- (i) Rachel Blomeyer;
  - (ii) Jonathan Dowey;
  - (iii) Lukas Martin;
  - (iv) Romain Poyet; and

- (v) Edoardo Sangiorgio.  
("the contraventions").

**ORDERS:**

- (2) Pursuant to s.546(1) of the *Fair Work Act 2009*, the second respondent pay pecuniary penalties of \$11,880 in respect of the contraventions.
- (3) Pursuant to s.546(1) of the *Fair Work Act 2009*, the third respondent pay pecuniary penalties of \$11,880 in respect of the contraventions.
- (4) Pursuant to s.546(3)(a) and (c) of the *Fair Work Act 2009*, the pecuniary penalties payable by the second and third respondents be paid to the applicant for distribution as follows:
- (a) to Tim Amor, the sum of \$2,333.84;
  - (b) to Johnny Byrne, the sum of \$2,403.66;
  - (c) to Lorraine Murphy, the sum of \$1,356.42;
  - (d) to Maik Mylius, the sum of \$1,024.52;
  - (e) to Edoardo Sangiorgio, the sum of \$2,222.05;
  - (f) to Marie-Isabell Schafhaupt, the sum of \$2,647.11;
  - (g) to Thomas Spengler, the sum of \$1,769.62;
  - (h) to Sarah Walsh, the sum of \$1,206.82; and
  - (i) to the Consolidated Revenue Fund of the Commonwealth, the balance, including any amount payable to any of the above mentioned employees who the applicant cannot locate after reasonable enquiry.
- (5) The second and third respondents pay the pecuniary penalties within 28 days.
- (6) The applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

**FEDERAL CIRCUIT COURT  
OF AUSTRALIA  
AT MELBOURNE**

**MLG 934 of 2013**

**FAIR WORK OMBUDSMAN**

Applicant

And

**INVIVO GROUP PTY LTD (IN LIQ) (ACN 159 703 492)**

First respondent

**JONATHAN PAUL WILLIAM STIELOW**

Second respondent

**CLAUDIO SALVADOR LOCASO**

Third respondent

**REASONS FOR JUDGMENT**

**Introduction**

1. This matter concerns the declarations to be made and the penalties to be imposed on the second and third respondents for their admitted involvement in certain contraventions of the *Fair Work Act 2009*. The proceedings against the first respondent were stayed pursuant to s.417B of the *Corporations Act 2001* as the first respondent is in liquidation. The applicant and the second respondent filed one statement of agreed facts (“SOAF”), and the applicant and the third respondent filed another. The two SOAFs were almost identical. The SOAF filed in relation to the second respondent is set out verbatim in paragraphs 2 to 57 of these reasons, except that the differences in the SOAF filed in relation to the third respondent are also set out. In brief summary, the first respondent did not give pay slips to 12 employees or keep proper records in relation to them, did

not pay eight of them the correct amounts and did not pay eight of them at least monthly. The second and third respondents were directors of the first respondent and were involved in the breaches.

## **Statements of agreed facts**

2. On 27 June 2013, the applicant filed an application and statement of claim in this court against the respondents (**statement of claim**), in respect of a total underpayment of **\$35,408.45** by the first respondent to the following employees:

- a) Tim Amor (**Amor**);
- b) Rachel Blomeyer (**Blomeyer**);
- c) Johnny Byrne (**Byrne**);
- d) Jonathan Dowey (**Dowey**);
- e) Lukas Martin (**Martin**);
- f) Lorraine Murphy (**Murphy**);
- g) Maik Mylius (**Mylius**);
- h) Romain Poyet (**Poyet**);
- i) Edoardo Sangiorgio (**Sangiorgio**);
- j) Marie-Isabell Schafhaupt (**Schafhaupt**);
- k) Thomas Spengler (**Spengler**); and
- l) Sarah Walsh (**Walsh**).

(collectively, the **employees**).

## **ADMITTED CONTRAVENTIONS**

3. On 21 March 2014, in an extraordinary general meeting, the first respondent passed a special resolution that it be wound up voluntarily and that liquidators would be appointed for the purpose of that winding up.

4. By reason of the liquidation described in paragraph 3 above, the proceeding is stayed against the first respondent (subsequently referred to as the **liquidated company**) by operation of s 471B of the *Corporations Act 2001* (Cth).
5. The second respondent (in the third respondent's SOAF, the third respondent) expressly admits to the liquidated company contravening the following provisions, and to his involvement in those contraventions:
  - a) section 323(1) of the *Fair Work Act 2009* (Cth) (**FW Act**), by failing to pay amounts payable in relation to the performance of work to each of the following employees in full and at least monthly:
    - i) Amor;
    - ii) Byrne;
    - iii) Murphy;
    - iv) Mylius;
    - v) Sangiorgio;
    - vi) Schafhaupt;
    - vii) Spengler; and
    - viii) Walsh(together, the s.323 employees);
  - b) subsection 535(1) of the FW Act, by failing to keep records for each of the employees, as prescribed by regs.3.32 and 3.33 of the *Fair Work Regulations 2009* (Cth) (**FW Regulations**); and
  - c) subsection 536(1) of the FW Act, by failing to give each of the employees a pay slip within one working day of payment,(collectively, the **admitted contraventions**).

## **UNDERPAYMENT AMOUNT**

6. The second respondent (in the third respondent's SOAF, the third respondent) agrees that the admitted contraventions resulted in underpayments to the s.323 employees in the aggregate amount of **\$14,964.04**.

## **PARTIES AND EMPLOYEES**

### **The Applicant**

7. The applicant is and was at all times material to this proceeding:
- a) a statutory appointee of the Commonwealth appointed by the Governor-General by written instrument pursuant to division 2 of part 5-2 of the FW Act;
  - b) a Fair Work inspector by force of s.701 of the FW Act; and
  - c) a person with standing under subsection 539(2) of the FW Act to apply for orders in respect of contraventions of civil remedy provisions under the FW Act.

### **The Liquidated Company**

8. The liquidated company was at all relevant times:
- a) a corporation registered in accordance with the *Corporations Act 2001* (Cth);
  - b) capable of being sued in its corporate name;
  - c) a constitutional corporation within the meaning of s.12 of the FW Act;
  - d) a national system employer within the meaning of s.14 of the FW Act;
  - e) contracted by Energy Efficient Technologies Pty Ltd (**EETech**) to install power boards in homes throughout Victoria as part of the Victorian Government's Victorian Energy Efficiency Target Scheme (**VEET Scheme**);

- f) a business which operated from 135 Chestnut Street, Cremorne Victoria (**business**); and
- g) the employer of the employees during the following periods, which spanned 6 August 2012 to 19 February 2013:
  - i) Amor: 21 November 2012 to 7 December 2012;
  - ii) Blomeyer: 21 November 2012 to 7 December 2012;
  - iii) Byrne: 26 November 2012 to 15 December 2012;
  - iv) Dowey: 6 August 2012 to 15 December 2012;
  - v) Martin: 7 January 2013 to 26 January 2013;
  - vi) Murphy: 20 December 2012 to 4 January 2013;
  - vii) Mylius: 19 January 2013 to 26 January 2013;
  - viii) Poyet: 26 November 2012 to 22 December 2012;
  - ix) Sangiorgio: 1 February 2013 to 19 February 2013;
  - x) Schafhaupt: 31 January 2013 to 19 February 2013;
  - xi) Spengler: 3 December 2012 to 20 December 2012; and
  - xii) Walsh: 21 December 2012 to 4 January 2013,(collectively, the **employment period**).

**THE SECOND RESPONDENT** (in the third respondent's SOAF, the third respondent)

- 9. The second respondent (in the third respondent's SOAF, the third respondent) at all relevant times:
  - a) is and was a natural person capable of being sued;
  - b) was, with the third respondent, (in the third respondent's SOAF, the second respondent) the sole directors and shareholders of the liquidated company;

- c) was a manager of the liquidated company with joint responsibility for the day to day running of the liquidated company's operations;
- d) knew that the employees were engaged by the liquidated company as power board installers during the employment period;
- e) knew of the payment arrangements that the liquidated company applied with respect to the work performed by the employees;
- f) knew that legislative minima imposed obligations on the liquidated company to pay employees hourly rates of pay within specified timeframes, and to provide other monetary and non-monetary benefits;
- g) was, with the third respondent, (in the third respondent's SOAF, the second respondent) responsible for payments to be made to the employees for work performed by the employees;
- h) was, with the third respondent, (in the third respondent's SOAF, the second respondent) responsible for ensuring that pay slips were issued to the employees on behalf of the liquidated company;
- i) knew that the employees were not issued any pay slips by the liquidated company;
- j) was, with the third respondent, (in the third respondent's SOAF, the second respondent) responsible for the making and keeping of records on behalf of the liquidated company in relation to the employees; and
- k) knew how, and the extent to which, records were kept by the liquidated company in respect of the employees.

10. In addition to the matters alleged in paragraph 9 above, the second respondent (in the third respondent's SOAF, the third respondent):

- a) knew of, and was responsible for, setting and adjusting payments made to the employees on behalf of the liquidated company;

- b) knew of the hours worked by the employees for the liquidated company;
  - c) knew of the amounts paid to the employees by the liquidated company; and
  - d) knew when amounts were paid to the employees by the liquidated company.
11. By reason of facts agreed in paragraphs 9 and 10 above, the second respondent (in the third respondent's SOAF, the third respondent):
- a) was, with the third respondent, (in the third respondent's SOAF, the second respondent) responsible in a practical sense for ensuring that the liquidated company complied with its legal obligations to its employees under the FW Act;
  - b) had actual knowledge of the factual matters which comprise the admitted contraventions; and
  - c) was, with the third respondent, (in the third respondent's SOAF, the second respondent) a participant in the factual matters which comprise the admitted contraventions.
12. The second respondent (in the third respondent's SOAF, the third respondent) admits that at all material times he was involved in the admitted contraventions, because he:
- a) aided, abetted, counselled or procured the admitted contraventions; and/or (in the third respondent's SOAF, paragraph 12(a) is omitted)
  - b) has been, by his acts or omissions, directly or indirectly, knowingly concerned in or a party to each of the admitted contraventions,

and is therefore to be treated as having himself contravened each of the provisions set out in paragraph 5 above and detailed in paragraphs 20 to 37 below, in accordance with s.550(1) of the FW Act.

## **THE EMPLOYEES**

13. At all material times, during the employment period, the liquidated company employed each of the employees on a casual basis. (In the third respondent's SOAF, this paragraph reads: "During the employment period, the employees were casual employees of the liquidated company.")
14. The employees were employed by the liquidated company to install powerboards free of charge in homes throughout Victoria as part of the liquidated company's contract with EETech and performed duties (under supervision), including:
  - a) attending households on a door-to-door basis offering the free powerboards and installation;
  - b) upon obtaining the householders' agreement, installing powerboards by plugging them into a powerpoint socket and in turn plugging electronic appliances (such as televisions and dvd players) into the powerboard;
  - c) taking photos of installed powerboards for auditing purposes; and
  - d) collecting customer information and authorisation for installation.
15. At all material times, the s.323 employees:
  - a) were 21 years of age or older: Amor, Byrne, Murphy, Sangiorgio and Walsh (**adult employees**); or
  - b) were under 21 years of age: Mylius (19 years old); Schafhaupt (20 years old) and Spengler (19 years old) (**junior employees**).

## **APPLICATION OF THE MODERN AWARD**

16. By reason of the matters set out in paragraphs 13 and 14 above, the *Manufacturing and Associated Industries and Occupations Award 2010* (**Modern Award**) covered and applied to the liquidated company and employees.
17. By reason of their duties and responsibilities, the s.323 employees were at all relevant times classified within the Engineering/Manufacturing

Employee – Level I (C14) classification under cl.B.3.4 of the Modern Award.

18. At all material times, pursuant to cl.14.1 of the Modern Award, the liquidated company was required to pay each of the s.323 employees his or her ordinary base rate of pay plus a casual loading of 25% for work performed Mondays to Fridays, resulting in an ordinary casual hourly rate of:
  - a) \$19.95 per hour for the adult employees;
  - b) \$16.93 per hour for Mylius and Spengler (as 19 year old employees); and
  - c) \$20.05 per hour for Schafhaupt (as 20 year old employees). (error in original).
  
19. At all material times, pursuant to cl.40.7 of the Modern Award, the liquidated company was required to pay each of the s.323 employees time and a half for the first three hours and double time thereafter for overtime worked on Saturdays, resulting in a Saturday overtime casual hourly rate of:
  - a) for the adult employees:
    - i) \$29.92 per hour for the first three hours; and
    - ii) \$39.89 per hour thereafter;
  - b) for the 19 year old junior employees:
    - i) \$25.40 per hour for the first three hours; and
    - ii) \$33.87 per hour thereafter; and
  - c) for the 20 year old junior employees:
    - i) \$30.08 per hour for the first three hours; and
    - ii) \$40.11 per hour thereafter.

## ADMITTED CONTRAVENTIONS

### *Contravention of subsection 323(1) of the FW Act (frequency of payment)*

20. At all material times, pursuant to subsection 323(1) of the FW Act, the liquidated company was required to pay the s.323 employees amounts payable to them in relation to the performance of work:
  - a) in full;
  - b) in money; and
  - c) at least monthly.
  
21. During the employment period, the s.323 employees worked various hours for the liquidated company:
  - a) on Mondays to Fridays as listed in column B of annexure A; and
  - b) as overtime hours on Saturdays as listed in column D of annexure A.
  
22. The liquidated company was required to pay the s.323 employees an aggregate entitlement of \$15,375.04 in respect of the hours worked during the employment period, as set out in column G of annexure A, being comprised of:
  - a) \$11,346.22 in respect of the ordinary casual hourly rate, as set out in column C of annexure A; and
  - b) \$4,028.82 in respect of the overtime hours worked, as set out in column E of annexure A.
  
23. The liquidated company paid Edoardo Sangiorgio an aggregate amount of \$411 in respect of all of the hours that he worked during the employment period, being 1 February 2013 to 19 February 2013, as follows:
  - a) \$200 on 2 April 2013;
  - b) \$123 on 5 April 2013; and
  - c) \$88 on 15 April 2013.

24. The liquidated company made no payments to any of the remaining seven s.323 employees in respect of any of the hours that they worked during their respective employment periods.
25. By reason of the matters agreed in paragraphs 8(g) and 16 to 24 above, the liquidated company failed to pay the s.323 employees in full at least monthly.
26. By reason of the matters agreed in paragraph 25 above, the liquidated company contravened subsection 323(1) of the FW Act (**failure to pay contravention**).

### **TOTAL OUTSTANDING AMOUNT**

27. By reason of the failure to pay contravention, the liquidated company underpaid the s.323 employees the amounts set out at column I of annexure A of this statement of agreed facts, totalling \$14,964.04 (**total outstanding amount**).
28. There has been no rectification of any of the total outstanding amount as at the date of filing this statement of agreed facts.

### ***Contravention of s.535 of the FW Act (record-keeping)***

29. At all material times, pursuant to subsection 535(1) of the FW Act, the liquidated company was required to make and keep for seven years, employee records which are prescribed by the FW Regulations.
30. At all material times, pursuant to reg.3.32 of the FW Regulations, the liquidated company was required to make and keep employee records that specified:
  - a) the name of the liquidated company and the names of the employees;
  - b) whether the employees' employment was full-time, part-time, permanent, temporary or casual;
  - c) the date on which the employees' employment began; and
  - d) the Australian Business Number of the liquidated company.

31. At all material times, pursuant to reg.3.33 of the FW Regulations, the liquidated company was required to make and keep employee records that specified:
- a) the rate of remuneration paid to the employees;
  - b) the gross and net amounts paid to the employees;
  - c) any deductions made from the gross amount paid to the employees;
  - d) the hours worked by the employees; and
  - e) the details of the employees' entitlements to loadings and penalty rates.
32. The liquidated company failed to keep any records of the kind required by regs.3.32 and 3.33 of the FW Regulations.
33. By reason of the matters agreed in paragraphs 29 to 32 above, the liquidated company contravened subsection 535(1) of the FW Act.

***Contravention of s.536 of the FW Act (pay slips)***

34. At all material times, pursuant to subsection 536(1) of the FW Act, the liquidated company was required to give each of the employees a pay slip within one working day of payment with respect to work performed by the employees.
35. The liquidated company made payments to the employees from time to time during the employment period as follows:
- a) Blomeyer: one payment of \$314 in the last week of December 2012;
  - b) Dowey: weekly payments of \$300 save for the first week of his employment, in which he received no payment;
  - c) Martin: one payment of \$1,320 on 4 February 2013;
  - d) Poyet: one payment of \$360 in the last week of December 2012;

- e) Sangiorgio: three payments as described in paragraph 23 above; and
  - f) the remaining employees: nothing at all.
36. The liquidated company failed to give any of the employees any pay slips during the employment period.
37. By reason of the matters agreed in paragraphs 21 and 34 to 36 above, the liquidated company contravened subsection 536(1) of the FW Act.

### **INVESTIGATION AND INSTITUTION OF PROCEEDINGS**

38. Between 6 February 2013 and 29 April 2013, the applicant received complaints from the employees regarding their employment with the liquidated company (**complaints**).
39. The complaints included allegations relating to failures by the liquidated company to pay sufficient or any wages for time worked, for misclassification by the liquidated company of the employees' employment relationships as independent contracting arrangements and for unlawful deduction of wages.
40. On 5 March 2013, Senior Fair Work Inspector Brodie Smith (**FW Inspector Smith**) telephoned the second respondent and third respondent to inform them of the complaints.
41. In the period from 6 March 2013 to 30 May 2013, the applicant conducted a full investigation into the complaints.
42. During the course of the applicant's investigation:
- a) the second and third respondents participated in formal records of interview with the applicant; and
  - b) in response to a notice to produce records or documents issued by FW Inspector Smith pursuant to s.712 of the FW Act on 14 March 2014, the liquidated company produced to the applicant copies of documents relating to the employees' employment, including agreements, individual detail forms and policies and procedures.

43. On 31 May 2013, FW Inspector Smith sent a “contravention letter” to the liquidated company, care of the second respondent and third respondent, which:
- a) advised that the applicant had determined that the liquidated company had contravened the Modern Award and the FW Act in respect of the employees, resulting in underpayments to the employees, and that the second and third respondents were involved in each of the contraventions;
  - b) stated the correct rates of pay required to be paid to the employees;
  - c) required that the liquidated company:
    - i) review its records and, within 14 days, advise FW Inspector Smith of the quantum of the underpayments owed to the employees based on the contraventions and correct rates of pay identified in the contravention letter; and
    - ii) rectify the underpayments and outstanding superannuation contributions calculated by the liquidated company; and
    - iii) provide evidence to FW Inspector Smith of such rectification; or
    - iv) otherwise provide details and evidence within 14 days of any dispute as to the applicant’s determinations of contravention, and notify the applicant of any such dispute within seven days; and
  - d) confirmed that the applicant may initiate litigation in respect of the contraventions identified in the contravention letter, including against the second and third respondents personally on the basis of their involvement in the liquidated company’s contraventions.
44. The liquidated company did not quantify or rectify the identified underpayments as required by the applicant.
45. On 20 June 2013, the applicant wrote to the liquidated company, second and third respondents to notify them that the applicant intended

to commence proceedings against each of them in respect of the complaints.

46. On 27 June 2013, the applicant commenced proceedings in this court against the first respondent (which was at that time not in liquidation), second respondent and third respondent seeking declarations and penalties.
47. On 19 September 2013, the question of whether the first respondent (which was at that time not in liquidation) could defend the proceeding otherwise than by a lawyer was reserved by the court until after defences had been filed and the matter had been subject to mediation.
48. On 18 October 2013, the second respondent and third respondent each filed a defence within the timeframe required by orders of the court, although the applicant indicated to each in writing that it considered the defences were not compliant with the rules of the court. The first respondent (which was at that time not in liquidation) did not file any response or defence.
49. On 28 November 2013, the first mediation of the proceeding was held. The parties agreed to a further mediation on 24 January 2014 in order that the respondents could obtain legal representation.
50. On 23 January 2014, Mr Cavanagh of Cavanagh Legal filed notices of address for service indicating that he was the legal representative on record for each of the respondents.
51. On 24 January 2014, a further mediation of the proceeding was held. The parties agreed to a short further mediation by telephone on 18 February 2014.
52. On 18 February 2014, the parties reached an in principle agreement regarding the future conduct of the proceeding, on a without prejudice basis.
53. On 6 March 2014, the first respondent (which was at that time not in liquidation), second respondent and third respondent agreed in open correspondence to admit liability as alleged in the statement of claim (save for the alleged contravention of cl.36.2(f) of the Modern Award

described in paragraphs 19 to 24 of the statement of claim) and enter into a statement of agreed facts.

54. On 1 September 2014, the matter was the subject of further directions as a result of the parties being unable to reach agreement on a form of statement of agreed facts. The court made orders requiring each of the second and third respondents to file amended defences by 3 October 2014, and relisting the matter for further directions on 10 October 2014.
55. Neither the second nor the third respondent filed an amended defence by 3 October 2014. (In the third respondent's SOAF, this paragraph was omitted.)
56. On 10 October 2014, the court made orders extending the time for the second and third respondent to file an amended defence to 24 October 2014. (In the third respondent's SOAF, this paragraph was omitted.)
57. The statements of agreed facts included an underpayment summary, which is set out as annexure A to these reasons.

### **Affidavit evidence**

58. In addition to the statements of agreed facts, the applicant relied upon the affidavits of:
  - a) Timothy Heath Amor sworn on 22 January 2015;
  - b) Lorraine Noreen Murphy affirmed on 21 January 2015;
  - c) Brodie Janelle Smith affirmed on 20 January 2015; and
  - d) Claudio Salvador Locaso sworn or affirmed on 4 December 2014.
59. There was no cross examination of any of the deponents. I accept all of the affidavit evidence.

## Approach to determining penalty

60. The proper approach to determining penalty in cases such as this is as follows.
61. The first step for the court is to identify each separate contravention involved.
62. Where there are multiple contraventions, the second step is to consider whether any of the various contraventions constituted a single course of conduct, such that multiple breaches should be treated as a single breach.
63. The third step is for the court to consider the extent, if any, to which two or more contraventions have common elements. A person should not be penalised more than once for the same conduct. The penalty imposed by the court should be an appropriate response to the contravenor's conduct.<sup>1</sup> This is a separate process from the application of the totality principle.<sup>2</sup>
64. The fourth step is for the court to consider the appropriate penalty for each breach, treating multiple breaches arising from a course of conduct as a single breach, and taking into account all of the relevant circumstances.
65. The fifth step is for the court to apply the totality principle. This requires the court to consider the aggregate penalty overall, and determine whether it is an appropriate response to the conduct which resulted in the breaches.<sup>3</sup> The court in this step makes an "instinctive synthesis".<sup>4</sup>
66. It should also be noted at this point that the second respondent did not attend the hearing before this court. The third respondent did attend the hearing without the benefit of legal representation. He made very

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<sup>1</sup> *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [46] (Graham J) (unreported, Full Court of the Federal Court of Australia, 20 February 2008, Gray, Graham and Buchanan JJ).

<sup>2</sup> *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [41]-[46] (Stone and Buchanan JJ) (unreported, Full Court of the Federal Court of Australia, 7 May 2008, Gyles, Stone and Buchanan JJ)

<sup>3</sup> See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (Kelly); *Ophthalmic*, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).

<sup>4</sup> *Ophthalmic*, supra at [27] (Gray J) and [55] and [78] (Graham J).

brief oral submissions. Neither the second nor the third respondent filed written submissions.

67. The applicant filed a written submission on penalty on 6 May 2015. However, in view of the decision of the Full Court of the Federal Court in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) ACSR 403; [2015] FCAFC 59, I ordered that those submissions be removed from the court file and returned to the applicant. I also ordered that the applicant file a fresh submission on penalty by 4pm on 12 June 2015. That was done. The applicant's new submissions omitted any statement about the appropriate range of penalty, and any agreed penalty and any specific outcome. Unfortunately, they also omitted the identification of any comparable cases.

### **Step 1: identifying the breaches**

68. Based on the admissions contained in the SOAFs, I am satisfied that the second and third respondents each contravened:
- a) s.323(1) of the *Fair Work Act 2009*, in that they were each involved within the meaning of s.550(1) of the *Fair Work Act 2009* in the first respondent's failure to pay in full at least monthly:
    - i) Tim Amor;
    - ii) Johnny Byrne;
    - iii) Lorraine Murphy;
    - iv) Maik Mylius;
    - v) Edoardo Sangiorgio;
    - vi) Marie-Isabell Schafhaupt;
    - vii) Thomas Spengler; and
    - viii) Sarah Walsh;

- b) s.535(1) of the *Fair Work Act 2009*, in that they were each involved within the meaning of s.550(1) of the *Fair Work Act 2009* in the first respondent's failure to keep records as prescribed by reg.3.32 and reg.3.33 of the *Fair Work Regulations 2009* for:
- i) Tim Amor;
  - ii) Rachel Blomeyer;
  - iii) Johnny Byrne;
  - iv) Jonathan Dowey;
  - v) Lukas Martin;
  - vi) Lorraine Murphy;
  - vii) Maik Mylius;
  - viii) Romain Poyet;
  - ix) Edoardo Sangiorgio;
  - x) Marie-Isabell Schafhaupt;
  - xi) Thomas Spengler; and
  - xii) Sarah Walsh; and
- c) s.536(1) of the *Fair Work Act 2009*, in that they were each involved within the meaning of s.550(1) of the *Fair Work Act 2009* in the first respondent's failure to give a pay slip within one working day of payment to:
- i) Rachel Blomeyer;
  - ii) Jonathan Dowey;
  - iii) Lukas Martin;
  - iv) Romain Poyet; and
  - v) Edoardo Sangiorgio.

## Step 2: single course of conduct

69. The various contraventions in respect of each employee extended over various periods of time. Nevertheless, the applicant said in her written submissions that:
32. *As set out above in paragraphs 4 and 31, the Second and Third Respondents have admitted to engaging in multiple contraventions of a number of terms of the FW Act and FW Regulations over the duration of the Employees' employment.*
  33. *Section 557(1) of the FW Act provides that where two or more contraventions of a term of an applicable provision or civil remedy provision are committed by the same person, and the contraventions arose out of a course of conduct by the person, the contraventions are taken to constitute a single contravention of the provision.<sup>5</sup> Each of the Admitted Contraventions is within the scope of section 557.*
  34. *The Applicant accepts that the Second and Third Respondents are entitled to the benefit of the course of conduct provision in relation to repeated breaches of each of the relevant provisions of the FW Act. It is accepted that the separate record keeping contraventions of FW Regulations 3.32 and 3.33 arise out of a single course of conduct by the Second and Third Respondents. Consequently, the Applicant accepts that there are three separate contraventions, namely:
    - (a) *frequency of payment (including non-payment contraventions) (s.323(1));*
    - (b) *record keeping (s.535(1)); and*
    - (c) *pay slips (s.536(1)).**

70. The third respondent made no submissions about this issue.

71. In view of the applicant's concession in relation to the course of conduct consideration, I am prepared to proceed on the basis that all of the contraventions should resolve down to the three contraventions identified by the applicant.

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<sup>5</sup> Regulation 14.5 of the WR Regulations applies in similar terms in respect of contraventions of a civil remedy provision of the WR Regulations.

72. However, it should be noted that this was a significant concession on the applicant's part. It would have been open, in my view, to consider that there was a single course of conduct in relation to each relevant employee for the payment contraventions, the payslip contraventions and the record keeping contraventions. The result would have been, on my count, 25 contraventions rather than three. Ultimately, however, it might have made no difference, in view of the grouping that may be undertaken in the next step.

### **Step 3: grouped breaches**

73. The applicant said in her written submissions in relation to this point that:

35. *It is open to the Court to group separate contraventions together where the contraventions may be said to overlap with each other or involve the potential punishment of the Second and Third Respondents for the same or substantially similar conduct.*<sup>6</sup>

36. *In light of the distinct nature of the three contraventions listed in [34] above, it is the Applicant's submission that the Court should not further group the contraventions.*

74. The third respondent made no submissions about this issue.
75. I accept the applicant's submission that it is not appropriate to further group the contraventions.

### **Step 4: the appropriate penalty for the breaches**

76. A convenient checklist of the factors that the court might consider in determining penalty include the matters that were identified by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [26]-[59] and adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 at [14]. That list is as follows, (with paragraph letters inserted):

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<sup>6</sup> See: *Pearce v R* (1998) 194 CLR 610 at [40], *Johnson v R* (2004) 205 ALR 346 at [27] – [34], *Merringtons*, supra at [46], [72] (Graham J) and [93] (Buchanan J) and *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* [2012] FCA 479 at [24] – [25] (Bromberg J).

- (a) *The nature and extent of the conduct which led to the breaches.*
- (b) *The circumstances in which that conduct took place.*
- (c) *The nature and extent of any loss or damage sustained as a result of the breaches.*
- (d) *Whether there had been similar previous conduct by the respondent.*
- (e) *Whether the breaches were properly distinct or arose out of the one course of conduct.*
- (f) *The size of the business enterprise involved.*
- (g) *Whether or not the breaches were deliberate.*
- (h) *Whether senior management was involved in the breaches.*
- (i) *Whether the party committing the breach had exhibited contrition.*
- (j) *Whether the party committing the breach had taken corrective action.*
- (k) *Whether the party committing the breach had cooperated with the enforcement authorities.*
- (l) *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements.*
- (m) *The need for specific and general deterrence.*

77. The court must of course be mindful of the caution expressed by Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560; (2008) 246 ALR 35; [2008] FCAFC 8 at [91] as follows:

*Checklists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.*

78. The court will consider the circumstances of the case under the various headings suggested by Mowbray FM, and then consider whether any other matters are relevant.

**The nature and extent of the conduct which led to the breach and the circumstances in which that conduct took place**

79. The applicant addressed these two factors together in her written submissions, as follows:

42. *The Employees were Australian and foreign nationals. 10 of the 12 Employees were in Australia performing work pursuant to subclass 417 working holiday visas, and two were Australian university students performing work during the Christmas semester break period.*<sup>7</sup>
43. *The evidence shows that the demographic of the Liquidated Company's workforce was in large part young, inexperienced workers, often university students or travellers.*<sup>8</sup> *The business appears to have been aimed at recruiting backpackers and young workers.*<sup>9</sup> *Employees were only engaged for short duration, most being engaged for less than a month.*<sup>10</sup> *These circumstances facilitated the easy exploitation of workers who were more likely to have little or no understanding of their workplace rights.*
44. *Mr Amor and Ms Murphy depose in some detail in their affidavit material the nature of the work that they performed whilst employed by Invivo, which involved long hours, occasionally in hot conditions, and periods of time spent away from home.*<sup>11</sup>
45. *The Applicant submits that the failure to pay contraventions are particularly serious. Of the eight Section 323 Employees, seven were not paid at all for any of the work completed and one received 16% of his lawful entitlement.*<sup>12</sup> *The extent of the loss is described in some detail below. As such, the Applicant submits that the conduct which led to those contraventions were common practice in the business.*

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<sup>7</sup> Smith Affidavit [9], Annexure BJS 2; Amor Affidavit [4] and [45].

<sup>8</sup> Murphy Affidavit [13]; Amor Affidavit [20].

<sup>9</sup> Murphy Affidavit [7].

<sup>10</sup> SOAF [8](g).

<sup>11</sup> Murphy Affidavit [13]; [19] to [20]; [23] to [28]; Amor Affidavit [19] to [31].

<sup>12</sup> Annexure A of the SOAFs.

46. *In the same period as the Admitted Contraventions were occurring, Invivo invoiced its supplier of powerboards a total of \$623,329.93 in respect of installations carried out by employees of Invivo. According to the Profit and Loss Statement annexed to the sworn affidavit of Mr Locaso, for the period July 2012 through May 2013 the Second and Third Respondents paid themselves:*

*(a) in respect of Mr Stielow, a wage of \$244,829.20 and superannuation contributions of \$22,050; and*

*(b) in respect of Mr Locaso, a wage of \$205,283.06 and superannuation contributions of \$18,450.<sup>13</sup>*

47. *The severity of the underpayment contraventions was also aggravated by the Respondents' record keeping practices. Invivo failed to make and keep records of the Employees' hours and pay as required by the FW Regulations and the FW Act. On the occasions that Invivo did make a payment to its employees, it also failed to issue them with written pay slips in accordance with the the FW Act. In the absence of payslips or proper records of his installation work, Mr Amor felt "powerless" to vindicate his right to payment in discussions with Mr Stielow and his managers or to argue about what amount he ought to be paid.<sup>14</sup>*

48. *Contravention of these fundamental entitlements undermines the workplace relations regime as a whole and displays a disregard by the Second and Third Respondents of their statutory obligations.*

80. The third respondent told the court that the respondents did not have the correct paperwork because they engaged the employees as contractors, in accordance with industry practice. He said the employees were not paid because the respondents "paid by installs".

81. Obviously, the employees should not have been paid as contractors because they were, on the admissions, employees.

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<sup>13</sup> Locaso Affidavit.

<sup>14</sup> Amor Affidavit [44].

## **The nature and extent of any loss or damage sustained as a result of the breaches**

82. The applicant addressed this factor in her written submissions as follows:

49. *The Applicant submits that the nature and extent of the loss suffered by the Employees is significant.*
50. *The underpayments to Section 323 Employees represent a serious breach of the Respondents' obligations. Of the twelve Employees involved in this matter, the eight Section 323 Employees were underpaid a total of \$14,964.04.<sup>15</sup> Seven employees (Amor, Byrne, Murphy, Mylius, Schafhaupt, Sprengler and Walsh) were underpaid a total of \$12,741.99, being 100% of their entitlements whilst employed by Invivo. They were not paid at all in respect of any work they performed.<sup>16</sup> The remaining Section 323 Employee, Sangiorgio, received three payments totalling \$411.<sup>17</sup> An amount of \$2,222.05 remains outstanding to him.<sup>18</sup> This outstanding amount represents 84% of his full entitlement.*
51. *In the absence of proper time and wage records, the Applicant adopted a conservative approach to calculating the underpayments.<sup>19</sup> Consequently, the underpayment amounts may have been higher if proper records had been kept.*
52. *The Admitted Contraventions had a significant impact on the Employees. For each individual employee the amounts were not large, being less than \$3,000, but the impact of those underpayments was significant. Mr Amor felt stressed and disempowered.<sup>20</sup> As a student, Mr Amor had to borrow money from his mother to be able to afford a short holiday to Bali following a long year of study and hard work.<sup>21</sup> He also had to get an advance from Centrelink which he repaid over the course of the year. These repayments placed him*

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<sup>15</sup> Annexure A of SOAFs.

<sup>16</sup> SOAFs [24].

<sup>17</sup> SOAFs [23].

<sup>18</sup> Annexure A of SOAFs.

<sup>19</sup> Underpayments calculated on the basis of witness evidence that employees worked 7.5 hours per week day, and 10am to 5pm on Saturdays.

<sup>20</sup> Amor Affidavit [43]

<sup>21</sup> Amor Affidavit [45]

*under additional financial pressure for some time following the contraventions.<sup>22</sup>*

53. *Ms Murphy intended to use her position at the First Respondent to tide her over financially until she was able to find work in her chosen profession.<sup>23</sup> She felt that she was being taken advantage of because she was a backpacker on a working holiday visa.<sup>24</sup> Her experience of working with the First Respondent left her with a great deal of uncertainty about her financial situation. She also had to borrow money from family as a result of not being paid.<sup>25</sup>*
54. *By contrast, in the period July 2012 to May 2013, the single greatest business expense for Invivo was the wages and super paid to Mr Stielow and Mr Locaso, being a combined total of \$490,612.26 (or 70% of the total business expenses). In that period, Invivo reported:*
  - (a) *total revenue of \$756,760.75;*
  - (b) *a gross profit of \$313,199.82;*
  - (c) *total expenses of \$694,931.38; and*
  - (d) *a net operating loss of \$381,731.56.<sup>26</sup>*
55. *It is noted that once the Respondents' wages and superannuation contributions are omitted, Invivo would have incurred total expenses of \$204,319.12 for that period and reported a net profit of \$108,880.70.*
56. *The Section 323 Employees were deprived, and remain deprived, of the above amounts. The Applicant acknowledges that the obligation to rectify the underpayments sits with Invivo, and to that end there is no prospect of the Section 323 Employees recovering what they are owed. Unfortunately it was not open to employees to attempt to recover their entitlements through the the Fair Entitlement Guarantee (FEG) as it took the Respondents more than a year to place Invivo into voluntary liquidation from the time it ceased trading. In any event, foreign nationals on short term working visas employed by Invivo*

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<sup>22</sup> Amor Affidavit [45]

<sup>23</sup> Murphy Affidavit [36]

<sup>24</sup> Murphy Affidavit [39]

<sup>25</sup> Murphy Affidavit [38]

<sup>26</sup> Locaso Affidavit

*would not have been eligible to recover any amount under that scheme.*<sup>27</sup>

83. The third respondent did not make any submissions about this factor.

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

84. The applicant conceded in her written submissions that:

*The Second and Third Respondent's (sic) have not previously been the subject of proceedings by the Applicant or its predecessors for contraventions of workplace laws.*

85. The third respondent did not make any submissions about this factor.

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

86. This point has already been addressed.

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

87. The applicant addressed this factor in her written submissions as follows:

59. *From the evidence available before the Court, Invivo was not a particularly small operation in terms of the number of staff [or] the size of the annual turnover, notwithstanding it does not appear to have operated with any level of particular sophistication. From the invoicing and financial statement evidence, it is submitted that the business could not rely of a lack of cash flow for an excuse as to why it chose not to pay its Section 323 Employees.*

60. *In any event, the Courts have previously found that sanctions should be imposed on a meaningful level regardless of the employer's size or financial position. In Kelly v Fitzpatrick,<sup>28</sup> Tracey J stated:*

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<sup>27</sup> See section 10(1)(g) of the *Fair Entitlements Guarantee Act 2012* (Cth), which makes a general condition of eligibility for an advance pursuant to the statutory scheme the requirement that when the employment ended, a person "was an Australian citizen or, under the *Migration Act 1958*, the holder of a permanent visa or a special category visa".

<sup>28</sup> [2007] FCA 1080 at [28]

“No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction “must be imposed at a meaningful level”: see *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd* [2001] ATPR 41-815 at [13].”

61. *The Applicant also relies on the decision in FWO v Bosen Pty Ltd*<sup>29</sup> where the Court stated:

“There is a need to send a message to the community at large, and small employers particularly, that the correct entitlements for employees must be paid and that steps must be taken by employers (of all sizes) to ascertain and comply with minimum entitlements (as opposed to ignoring those obligations). Compliance should not be seen as the bastion of the large employer, with human resources staff and advisory consultants (accountants, consultants, lawyers) behind them.”

88. The third respondent did not make any submissions about this factor.

### **Whether or not the breaches were deliberate**

89. The applicant addressed this factor in her written submissions as follows:

62. *The Second and Third Respondent have admitted to knowing:*

- (a) *legislative minima imposed obligations on the Liquidated Company to pay employees hourly rates of pay within specified timeframes, and to provide other monetary and non-monetary benefits;*
- (b) *the employees were not issued any payslips by the Liquidated Company; and*
- (c) *how, and the extent to which, records were kept by the Liquidated Company in respect of the Employees.*<sup>30</sup>

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<sup>29</sup> [2011] VMC 81 at [51].

63. *Both Ms Murphy and Mr Amor have described in their affidavits the extent to which they sought to question Invivo (and particularly Mr Stielow) about their lawful entitlements and to seek to get payment for the work that they performed.<sup>31</sup> Mr Stielow's response appeared to be either to deny the entitlements, to suggest that Invivo was entitled to withhold those entitlements on the ground that the Employees had amassed "trouble tickets", justifying such withholding; or to represent that payment would be made (which was not subsequently made).*

64. *In the circumstances, the Court can be satisfied that the conduct of the Respondents was engaged in either deliberately or at least with reckless disregard for their obligations as directors of the company.*

90. The third respondent did not make any submissions about this factor.

### **Whether senior management was involved in the breach**

91. The applicant addressed this factor in her written submissions as follows:

65. *The Respondents were the sole directors and shareholders of Invivo.<sup>32</sup> Together, they were the managers of Invivo and had joint responsibility for the day to day running of the business.<sup>33</sup> They were responsible for paying employees for work performed,<sup>34</sup> ensuring payslips were issued to employees<sup>35</sup> and making and keeping employee records.<sup>36</sup> As noted in paragraph 51, both have admitted to knowing the extent of the contraventions and their responsibility for them taking place.*

66. *Witness evidence suggests a greater involvement by Mr Stielow than Mr Locaso in the day-to-day management of the business.<sup>37</sup> Mr Stielow gave directions to lower levels of*

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<sup>30</sup> SOAFs at [9](f), (i) and (k).

<sup>31</sup> Murphy Affidavit [24] to [35]; Amor Affidavit [32] to [42].

<sup>32</sup> SOAFs at [9].

<sup>33</sup> SOAFs [9](c).

<sup>34</sup> SOAFs [9](g).

<sup>35</sup> SOAFs [9](h).

<sup>36</sup> SOAFs [9](j).

<sup>37</sup> Amor Affidavit [7], Murphy Affidavit [14]

*management and dealt with employees when they raised concerns regarding their pay and termination.*<sup>38</sup>

92. The third respondent did not make any submissions about this factor.

**Whether the party committing the breach has exhibited contrition, corrective action and co-operation with the authorities**

93. The applicant addressed this factor in her written submissions as follows:

67. *There is no evidence that either Mr Stielow or Mr Locaso has made any apology to the Employees, or expressed any regret or genuine remorse.*

68. *As noted above, liability for the underpayments lies with Invivo, not its directors. As a result of the business not being placed into liquidation until March 2014, the two employees who may have been eligible to apply for the FEG Scheme, were not able to because the 12 month time limit had passed.*

69. *Further there is no evidence before the Court of any steps taken by the Second or Third Respondent to prevent contraventions in any potential future business dealings.*

70. *The Second and Third Respondent gave a limited degree of cooperation during the Applicant's investigation by:*

(a) *participating in formal records of interview with the Applicant;*

(b) *producing to the Applicant copies of documents relating to the Employees' employment in response to a Notice to Produce Records or Documents issued by a Fair Work Inspector pursuant to s.712 of the FW Act;<sup>39</sup> and*

(c) *signing the SOAFs.*

71. *During the course of this proceeding the Second and Third Respondents have offered some cooperation in that they have made admissions and taken some steps to comply with*

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<sup>38</sup> Amor Affidavit [7], Murphy Affidavit [14], [31]-[34]

<sup>39</sup> SOAFs [42]

*Court orders, including by executing minutes of consent orders from time to time upon request.*

72. *Where respondents co-operate and make admissions early in the course of an investigation or soon after the commencement of proceedings, it is appropriate to allow a discount of penalty.<sup>40</sup> In considering the application of a penalty discount for co-operation and contrition, the statements of Stone and Buchanan JJ in Mornington Inn are apposite:*

“...a discount should not be available simply because a respondent has spared the community the cost of a contested trial. Rather, the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability:

- (a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or
- (b) has indicated a willingness to facilitate the course of justice.”

73. *It is noted that the Respondents’ admissions came some 16 months after the proceedings were commenced, and after orders were made requiring the Respondents to file amended defences and the parties to file evidence on which they seek to rely on the issue of liability. The Applicant questions the extent to which the admissions fit the description of Stone and Buchanan JJ as set out immediately above.*

94. The third respondent told the court that he had cooperated with Fair Work Australia. He also said that he had hired someone to try to “fix it up”. He did not provide evidence of that, however, and I am unable to take that submissions into account. On the other hand, I do accept that the third respondent cooperated with the applicant as described in the applicant’s submissions.

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<sup>40</sup> *Mornington Inn* at [75] per Stone and Buchanan JJ.

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

95. The applicant addressed this factor in her written submissions as follows:

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

(a) *one of the stated principal objects of the FW Act has been the preservation of an effective safety net for employee entitlements and effective enforcement mechanisms;*<sup>41</sup>

(b) *it is vital to ensure compliance with the safety-net of awards to create an even playing field and ensure all employees are appropriately remunerated for the work they perform; and*

(c) *the substantial penalties set by the legislature for contraventions of the FW Act reinforce the importance placed on compliance with minimum standards.*

75. *The fundamental nature of the contraventions in the present proceedings, involving in large part a complete failure to make any payment, demonstrates the Respondents' disregard for their statutory obligations.*

76. *The need to ensure compliance with minimum standards is particularly relevant taking into account the demographic of the employees affected. They were primarily young and unskilled. Most were not Australian citizens and were in a position where it was more difficult to ascertain their workplace rights.*

77. *Regarding the failure to pay minimum entitlements, the Applicant submits the Court should have regard to the Federal Court decision of Fair Work Ombudsman v A Dalley Holdings Pty Ltd*<sup>42</sup>:

“In imposing a penalty, it is imperative for the Court to impose a penalty that reinforces the fundamental importance of compliance with the safety net of

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<sup>41</sup> Section 3 of the FW Act.

<sup>42</sup> [2013] FCA 509 at [19].

entitlements specified by the National Employment Standards and the general protection provisions of the FW Act.”

78. *Further, record keeping obligations play a vital role in the capacity of the regulator to monitor and enforce compliance with minimum employment standards. As noted by this Court in Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd:*

“Whilst the record keeping obligation with respect to pay slips only appears in the Regulations, its central importance in industrial matters cannot be underestimated. Proper pay slips allow employees to understand how their pay is calculated and therefore can easily obtain advice. Pay slips provide the most practical check on false record keeping and underpayments, and allow for genuine mistakes or misunderstandings to be quickly identified. Without proper pay slips employees are significantly disempowered, creating a structure within which breaches of the industrial laws can easily be perpetrated.”<sup>43</sup>

96. The third respondent did not make any submissions about this factor.

### **The need for general deterrence**

97. The applicant addressed this factor in her written submissions as follows:

79. *It is well-established that “the need for specific and general deterrence” is a factor that is relevant to the imposition of a penalty. See for example, the comments of Mowbray FM in Pangaea.*<sup>44</sup>
80. *The role of general deterrence in determining the appropriate penalty is illustrated by the comments of Lander J in Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543, [93]:*

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<sup>43</sup> [2012] FWCA 258 at [67] and cited with approval in *Fair Work Ombudsman v Bundaberg Security Pty Ltd* [2014] FCCA 592 at [26]; *Director of the Fair Work Building Industry Inspectorate v Zion Tiling Pty Ltd* (No. 2) FCCA 1288 at [38]; and *Fair Work Ombudsman v Bento Kings Meadows Pty Ltd* [2013] FCCA 977 at [34].

<sup>44</sup> *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 at [26]-[59].

“In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: *Yardley v Betts* (1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: *R v Thompson* (1975) 11 SASR 217.”

81. *Employers should be in no doubt that they have a positive obligation to ensure compliance with the obligations they owe to their employees under the law. In Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2)*<sup>45</sup>, *Marshall J observed:*

“It is important to ensure that the protections provided by the [FW Act] to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected.”

82. *The VEET Scheme for which the employees were employed in this matter is widespread and ongoing. The Applicant submits that the imposition of a penalty in this matter will assist in ensuring other providers operating within that scheme are aware of and compliant with their employment obligations.*

98. The third respondent did not make any submissions about this factor.

### **The need for specific deterrence**

99. The applicant addressed this factor in her written submissions as follows:

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<sup>45</sup> [2012] FCA 557 at [29].

83. *The Applicant submits that there is also a high need for specific deterrence. In Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union*<sup>46</sup> *Gray J observed:*

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

84. *The Applicant relies on the following principles to support the submission that the penalty imposed on the Respondent should ensure the specific deterrence effect is high:*

*Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor*<sup>47</sup>:

“As there has been no demonstration of contrition or remorse on behalf of either respondent the need for specific deterrence is high.”

*Ponzio v B & P Caelli Constructions Pty Ltd*<sup>48</sup>:

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

85. *Although Invivo is no longer an operational business, both Respondents remain directors of other companies.*<sup>49</sup>

86. *Mr Locaso continues to conduct a similar business under the name The Syndicate Group Pty Ltd (Syndicate Group), also engaging employees to install powerboards throughout Victoria by EETech, in accordance with the VEET Scheme.*<sup>50</sup> *The Applicant has received complaints from employees of*

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<sup>46</sup> (2008) 171 FCR 357 at [37].

<sup>47</sup> [2009] FMCA 38 at [41]; citing *Australian Ophthalmic Supplies Pty Ltd* [17]; *Fryer v Yoga Tandoori House Pty Limited* [2008] FMCA 288 [35].

<sup>48</sup> [2007] FCAFC 65 at [93].

<sup>49</sup> Smith Affidavit [13].

<sup>50</sup> Smith Affidavit [14] and [16]

*Syndicate Group alleging similar contraventions as those Admitted Contraventions in this proceeding.*<sup>51</sup>

87. *On 12 September 2014 the Applicant issued to Sydnicate Group a compliance notice pursuant to section 716(2) of the FW Act requiring it to pay outstanding amounts owed to employees being a total of \$4,743.62. The compliance notice was personally served on Mr Locaso.*<sup>52</sup>
88. *The Applicant has now commenced proceedings against Syndicate Group and Mr Locaso alleging that the Syndicate Group failed to comply with the complaince notice and that Mr Locaso was involved in that failure to comply within the meaning of section 550 of the FW Act.*
89. *The Applicant submits that it is appropriate for the Court to take note of Syndicate Group allegations, notwithstanding it is accepted that the matter has yet to be resolved. In particular, we draw the Court's attention to the similarity between the conduct of Mr Locaso complained of in the Syndicate Group compliance notice and proceeding, and the Admitted Contraventions in this proceeding, in considering the need for specific deterrence.*

100. The third respondent did not make any submissions about this factor.

### **Other issues**

101. The applicant submitted at [92] of her written submissions that the following factors deserve particular attention:
  - (a) *that Mr Stielow was apparently more involved than Mr Locaso in the day to day operation of the business; but*
  - (b) *that Mr Locaso is apparently at greater need to be specifically deterred from engaging in similar conduct in future, in light of the Syndicate Proceedings currently before the Court;*
  - (c) *the underpayment of eight young and international employees was a significant amount of money, in the context of the short duration of their employment and award reliant status;*

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<sup>51</sup> Smith Affidavit [15]-[16]

<sup>52</sup> Smith Affidavit [18]

- (d) *the underpayment has not been rectified either in part or full, and the employees are unlikely to ever recover their entitlements;*
- (e) *the fact that the Respondents' conduct was deliberate or at the very least reckless; and*
- (f) *the need for general and specific deterrence.*

102. The third respondent did not identify any other matters requiring consideration.
103. I do not consider that it would be proper to take into account the third respondent's involvement in the Syndicate Proceedings as they have not yet been resolved. In other words, it has not yet been established that the third respondent did anything wrong in relation to the Syndicate Proceedings.
104. It was submitted that the employees are unlikely to ever recover their entitlements. However, that presumably does not take account of the effect of these proceedings.

### **Maximum penalties**

105. In view of the way in which the course of conduct issue has been resolved, each respondent has contravened three provisions.
106. The applicant said in her written submissions that:
- 25. *Sections 539(2) and 546(2)(a) of the FW Act prescribe the maximum penalties that may be imposed by this Court for contraventions of civil penalty provisions, by reference to "penalty units" within the meaning of section 4AA of the Crimes Act 1912 (Cth) (Crimes Act).<sup>53</sup>*
  - 26. *From 28 December 2012 (**Increase Date**), the Crimes Legislation Amendment (Serious Drugs, Identify Crime and Other Measures) Act 2012 (Cth) increased the amount of a penalty unit in section 4AA of the Crimes Act from \$110 to \$170.*

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<sup>53</sup> Section 539(2) of the FW Act prescribes the maximum penalty that may be imposed by this Court for a contravention of each of the civil penalty provisions specified in the table in that section. Section 546(2) of the FW Act prescribes that a pecuniary penalty imposed by this Court must not be more than the amount referred to in section 539(2) in respect of an individual. Section 12 of the FW Act provides that "penalty unit" has the same meaning as section 4AA of the Crimes Act.

27. *In this proceeding, the majority of the Second and Third Respondents' contravening conduct occurred either entirely prior to the Increase Date, or commenced prior to that date and continued unchanged beyond it.*
28. *The frequency of pay contraventions occurred in respect of five of the Section 323 Employees wholly before the Increase Date, or commenced before and continued after the Increase Date. Only in respect of employees Mylius, Sangiorgio and Schafhaupt did the contraventions occur entirely after the Increase Date. Similarly, the majority of the payslip and recordkeeping contraventions occurred prior to the Increase Date.*
29. *In circumstances where the decisions which led to the contraventions were made prior to the Increase Date, and consistent with previous approaches of the Court,<sup>54</sup> the Applicant submits that the lower value of penalty unit ought to be applied to the contraventions as a whole.*
107. The third respondent made no submissions about this issue.
108. I accept the submissions of the applicant about this issue. Consequently, the maximum penalty for the contravention of:
- a) s.323 of the *Fair Work Act 2009*, for the failure to pay wages in full and at least monthly to eight employees, is \$6,600;
  - b) s.535(1) of the *Fair Work Act 2009*, for the failure to keep proper records for 12 employees, is \$3,300; and
  - c) s.536(1) of the *Fair Work Act 2009*, for the failure to issue to five employees payslips within one working day of payment, is \$3,300.
109. That makes a total maximum penalty of \$13,200 for each of the second and third respondents.
110. I accept the applicant's and the third respondent's submissions as set out above except where otherwise stated.
111. Taking into account all of the aforementioned matters, I consider that the appropriate penalty for each of the second and third respondents is

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<sup>54</sup>*Murrihy v Betezy.com.au Pty Ltd* (No. 2) [2013] FCA 1146 at [6] to [28].

90% of the maximum penalty for each offence. That works out to \$5,940 for the s.323 offence and \$2,970 for each of the s.535 and s.536 offences. That makes a total of \$11,880 for each respondent, and \$23,760 for the two of them together.

112. That level of penalty reflects the gravity of the serious exploitation of young and vulnerable workers, including students and foreign backpackers. The exploitation extended to paying some employees nothing at all.
113. It is noteworthy that, while the first respondent, with the knowledge of the second and third respondents, were paying some employees nothing at all, they were paying themselves salaries that totalled almost \$500,000.
114. The failure to keep proper records and promptly provide payslips are significant breaches because they make it harder for workers' proper entitlements to be ascertained and provided.
115. The second and third respondents did eventually cooperate with the authorities by providing a statement of agreed facts. However, it was a very long and drawn out process. The end result was no doubt a significant expense to the public purse.
116. It is also important that there be both general and specific deterrence. It is not appropriate to take into account the Syndicate proceedings. However, it can be said that both the second and third respondents may well conduct businesses in the future and have employees. As such, it is important that they are under no misapprehensions about the consequences for them of not complying with legal requirements in relation to their workforce.
117. There were some differences of in the conduct of the second and third respondents. However, overall, the differences were trifling. I do not consider that those differences should lead to any differences in penalty.

## **Step 5: the totality principle**

118. The applicant said in her written submissions in relation to this issue:

90. *Having fixed an appropriate penalty for each course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches, and is not oppressive or crushing.*<sup>55</sup>

91. *The Applicant submits that whilst the penalty imposed must not be crushing or oppressive, it must nevertheless bear relativity to the seriousness of the conduct engaged in by the Second and Third Respondent.*<sup>56</sup>

119. The third respondent made no submissions about this issue.

120. In relation to the check that is required by the totality principle, I consider that the aggregate penalties indicated above are appropriate for the whole of the contravening conduct engaged in by each of the respondents.

121. There will be orders accordingly.

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**I certify that the preceding one hundred and twenty one (121) paragraphs are a true copy of the reasons for judgment of Judge Riley**

Associate:

Date: 15 July 2015

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<sup>55</sup> See *Kelly* at [30]; *Merringtons* at [23] per Gray J, [71] per Graham J, [102] per Buchanan J.

<sup>56</sup> See also: *Fair Work Ombudsman v Promoting U Pty Ltd & Anor* [2012] FMCA 58.

## ANNEXURE A: UNDERPAYMENT SUMMARY

Employer: **Invivo Group Pty Ltd (in liq)**  
 Industrial Instrument: *Manufacturing and Associated Industries and Occupations Award 2010*

COLUMN A	COLUMN B	COLUMN C	COLUMN D	COLUMN E	COLUMN F	COLUMN G	COLUMN H	COLUMN I
Employee Name	Ordinary Hours	Ordinary Hours Entitlement	Overtime Hours	Overtime Hours Entitlement	Total Hours	Total Entitlement	Total Paid	Total Underpayment
Tim Amor	82.50	\$1,645.66	19.50	\$688.18	102.00	\$2,333.84	\$0.00	\$2,333.84
Johnny Byrne	97.50	\$1,944.87	13.00	\$458.79	110.50	\$2,403.66	\$0.00	\$2,403.66
Lorraine Murphy	45.00	\$897.63	13.00	\$458.79	58.00	\$1,356.42	\$0.00	\$1,356.42
Maik Mylius	37.50	\$635.03	13.00	\$389.49	50.50	\$1,024.52	\$0.00	\$1,024.52
Edoardo Sangiorgio	97.50	\$1,944.87	19.50	\$688.18	117.00	\$2,633.05	\$411.00	\$2,222.05
Marie-Isabell Schafhaupt	97.50	\$1,955.25	19.50	\$691.86	117.00	\$2,647.11	\$0.00	\$2,647.11
Thomas Spengler	93.00	\$1,574.88	6.50	\$194.74	99.50	\$1,769.62	\$0.00	\$1,769.62
Sarah Walsh	37.50	\$748.03	13.00	\$458.79	50.50	\$1,206.82	\$0.00	\$1,206.82
<b>Total</b>	<b>588.00</b>	<b>\$11,346.22</b>	<b>117.00</b>	<b>\$4,028.82</b>	<b>705.00</b>	<b>\$15,375.04</b>	<b>\$411.00</b>	<b>\$14,964.04</b>

Note 1: all calculations were performed to the nearest 6 decimal places.

Note 2: figures in this Annexure and the Statement of Claim have been rounded to two decimal places.