

FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v KLEEN GROUP
PTY LTD & ANOR*

[2016] FCCA 278

Catchwords:

INDUSTRIAL LAW – Determination of penalty pursuant to s.546 of the *Fair Work Act 2009* (Cth) – failure by the First Respondent to comply with a Notice to Produce issued under s.712 of the *Fair Work Act 2009* (Cth) – involvement of Second Respondent in the contravention by the First Respondent pursuant to s.550 of the *Fair Work Act 2009* (Cth) – whether an order should be made pursuant to s.545 of the *Fair Work Act 2009* (Cth) requiring the First Respondent to comply with the Notice to Produce – whether A pecuniary penalty should be imposed on the First Respondent for breach of s.712 of the *Fair Work Act 2009* (Cth) – whether A pecuniary penalty should be imposed on the Second Respondent for his involvement in the contravention by the First Respondent.

Legislation:

Fair Work Act 2009 (Cth), ss.545, 546, 550, 712
Fair Work Regulations 2009 (Cth)

Cases Cited:

Independent Education Union of Australia v Australian International Academy of Education Inc [2012] FCA 1512

Fair Work Ombudsman v Nerd Group Australia Pty Ltd & Anor (No. 2) [2012] FMCA 6

Fair Work Ombudsman v Quincolli Pty Ltd & Anor (No. 2) [2013] FMCA 17

Mason v Harrington Corporation Pty Ltd [2007] FMCA 7

Kelly v Fitzpatrick [2007] FCA 1080

Stuart-Mahoney v Construction, Forestry, Mining and Energy Union [2008] FCA 1426

Fair Work Ombudsman v VS Investment Group Pty Ltd & Anor [2013] FCCA 208

Fair Work Ombudsman v Nerd Group Australian Pty Ltd & Anor (No.3) [2012] FMCA 891

Fair Work Ombudsman v Jaycee Trading Pty Ltd & Anor (No. 2) [2013] FCCA 2128

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

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

Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2) [2012] FCA 408

Commonwealth of Australia v Director, Fair Work building Industry

Inspectorate & Ors [2015] HCA 46

Applicant: FAIR WORK OMBUDSMAN

First Respondent: KLEEN GROUP PTY LTD (ACN 137 890 101)

Second Respondent: HENRY ANDREW NICKOLLS

File Number: SYG 3353 of 2014

Judgment of: Judge Emmett

Hearing date: 10 November 2015

Date of Last Submission: 18 December 2015

Delivered at: Sydney

Delivered on: 23 February 2016

REPRESENTATION

Solicitor for the Applicant: Mr Eric Leahy
(Fair Work Ombudsman)

No appearance by or on behalf of the Respondents.

**FEDERAL CIRCUIT
COURT OF AUSTRALIA AT
SYDNEY**

SYG 3353 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

KLEEN GROUP PTY LTD
(ACN 137 890 101)
First Respondent

HENRY ANDREW NICKOLLS
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application by the Fair Work Ombudsman (“**the FWO**”) for an order requiring the First Respondent to produce certain documents in accordance with a notice to produce dated 1 September 2014 (“**the Notice to Produce**”), and orders for pecuniary penalties against both the First Respondent and the Second Respondent in respect of the First Respondent’s failure to comply with the Notice to Produce and the Second Respondent’s involvement in that failure.

2. The FWO relied upon the following documents in support of the application:

“(a) Application and Statement of Claim, both filed on 2 December 2014;

(b) Affidavit of Stephanie Clayden filed 21 April 2015 (First Clayden Affidavit);

(c) Affidavit of Stephanie Clayden filed 22 April 2015 (Second Clayden Affidavit);

(d) Affidavit of Stephanie Clayden filed 19 June 2015 (Third Clayden Affidavit);

(e) Affidavit of Jason Lam filed 22 April 2015 (First Lam Affidavit);

(f) Affidavit of Jason Lam filed 31 July 2015 (Second Lam Affidavit);

(g) Affidavit of Jodi Gribben filed 31 July 2015 (Gribben Affidavit).”

Findings of fact

3. On 18 December 2015, the FWO filed a Statement of Relevant Facts, which referred to relevant factual assertions based on the affidavit evidence.
4. In light of the evidence before me, I make findings in accordance with the Statement of Relevant Facts, as follows:

“A. THE APPLICANT

1. The Applicant is and was at all relevant times:

(a) a statutory appointee of the Commonwealth appointed by the Governor General by written instrument pursuant to section 687(1) of the Fair Work Act 2009 (Cth) (FW Act);

(b) a Fair Work Inspector pursuant to section 701 of the FW Act; and

(c) a person with standing to bring these proceedings, in accordance with subsection 539(2) of the FW Act.

B. THE INSPECTOR

2. Mr Jason Lam (**Inspector Lam**) is and was at all relevant times a Fair Work Inspector appointed by the Applicant under section 700 of the FW Act (**Fair Work Inspector**).

C. THE FIRST RESPONDENT

3. The First Respondent is and was at all relevant times:

(a) a company incorporated under the Corporations Act 2001 (Cth);

(b) a “constitutional corporation” within the meaning of section 12 of the FW Act; and

(c) a business operating in the cleaning industry.

D. THE SECOND RESPONDENT

4. The Second Respondent is and was at all relevant times:

(a) the sole director of the First Respondent;

(b) the sole shareholder of the First Respondent;

(c) the person responsible for ensuring that the First Respondent complied with the Notice to Produce Documents and Records referred to in paragraph E.10 below; and

(d) a director of Kleen Group NT, a related entity of the First Respondent.

E. THE NOTICE TO PRODUCE

5. On 8 August 2014, an employee of the First Respondent, Mr Aris Giannopoulos (**Mr Giannopoulos**), lodged a workplace complaint form (**Complaint Form**) with the Applicant.

6. In the Complaint Form, Mr Giannopoulos, the former Operations Manager/Building Manager of the First Respondent alleged, amongst other things, that First Respondent had failed to provide him with all of his annual leave entitlement, his last fortnight's wages, group certificates and that he was owed three years of superannuation entitlements.

7. On 13 August 2014, the Applicant commenced an investigation through Inspector Lam in relation to the matters contained in the Complaint Form (**Investigation**).

8. *Between 14 August 2014 and 4 September 2014, Inspector Lam corresponded with Mr Giannopoulos to obtain further details on the allegations contained in the Complaint Form including the following:*

(a) on 14 August 2014, Inspector Lam sent an email to Mr Giannopoulos seeking further details to support the complaint;

(b) on 16 August 2014, Inspector Lam received an email from Mr Giannopoulos providing further information; and

(c) between 19 August 2014 and 4 September 2014, Inspector Lam exchanged emails with Mr Giannopoulos to obtain further information from Mr Giannopoulos regarding his employment with the First Respondent and the allegations contained in the Complaint Form, and he received certain information from Mr Giannopoulos.

9. *Inspector Lam also took the following steps:*

(a) on 20 August 2014, Inspector Lam wrote to the First Respondent advising it that the Applicant had commenced an investigation into alleged contraventions of the Commonwealth workplace laws by the First Respondent; and

(b) on 21 August 2014, Inspector Lam issued a notice to produce to the First Respondent (this notice was not pressed as it was not served correctly).

10. *On 1 September 2014, Inspector Lam issued a notice to produce pursuant to section 712 of the FW Act to the First Respondent to provide documents relating to the subject matter of Mr Giannopoulos' employment (**Notice to Produce**).*

11. *The Notice to Produce sought the production of specified documents and records relating to Mr Giannopoulos' employment with the First Respondent by 19 September 2014. The documents and records sought under the Notice to Produce included, amongst other things:*

(a) employment contracts/letters of offer;

(b) the pay received by Mr Giannopoulos; and

(c) Mr Giannopoulos' leave entitlements.

12. *The Notice to Produce stated, amongst other things, in bold:*

“Failure to comply with this Notice without reasonable excuse is a contravention of subsection 712(3) of the Act and may attract a maximum penalty of \$51,000 in respect of a body corporate or \$10,200 in respect of an individual.”

13. *The Notice to Produce was served on the registered office of the First Respondent.*

14. *The Notice to Produce was also sent to the Second Respondent by email to andrewn@kleengroup.com (this email address was subsequently approved as a method of service in these proceedings). An automatically generated delivery receipt was received by Inspector Lam.*

15. *Subsequent to issuing the Notice to Produce, Inspector Lam took the following steps to contact the Second Respondent regarding the Notice to Produce:*

(a) telephone call on 1 September 2014 — Inspector Lam left his phone number;

(b) telephone call on 1 September 2014 — 'engaged' dial tone;

(c) telephone call on 4 September 2014 — Inspector Lam left a message;

(d) telephone call on 27 August 2014 — Inspector Lam left a message;

(e) email to the Second Respondent on 4 September 2014. An automatically generated delivery receipt was received by Inspector Lam;

(f) email to the Second Respondent on 25 September 2014. In that email Inspector Lam asked the Second Respondent to provide information or advice to the Applicant if the First Respondent had a reasonable excuse for non-compliance. A read receipt was received by Inspector Lam.

16. *On 3 October 2014, the Second Respondent emailed Inspector Lam and stated that he had not responded as he had been overseas. He further stated in the email that he was “going into hospital for an operation today” and asked for 14 days to provide the documents.*

17. *On 8 October 2014, Inspector Lam emailed the Second Respondent and asked for evidence to substantiate the above reasons for non-compliance. The Second Respondent did not provide the evidence requested.*

18. *On 9 October 2014, Inspector Lam emailed the Second Respondent and asked for details regarding the delay to produce the documents and records sought.*

19. *On 20 October 2014, the Second Respondent wrote to Inspector Lam by email and stated that his health issues had interrupted his work and that he would provide the information by “Friday week”.*

20. *On 20 October 2014, Inspector Lam again asked in an email for evidence to substantiate the above reasons for non-compliance. The Second Respondent did not provide this information.*

21. *On 2 December 2015 the Applicant commenced proceedings by Application and Statement of Claim.*

22. *On 25 June 2015, at the hearing of the Applicant's default judgment application, this Court made the following orders:*

(a) an order for default judgment against the First Respondent and the Second Respondent;

(b) a declaration that, based on the admissions which the First Respondent is deemed to have made by reason of its default, the First Respondent had contravened subsection 712(3) of the FW Act by failing to comply with a notice to produce; and

(c) a declaration that, based on the admissions which he was deemed to have made by reason of his default, the Second Respondent was involved in the First Respondent's contravention of subsection 712(3) of the FW Act.

23. *The Court also ordered that the parties to file evidence and submissions in advance of a penalty hearing.*

24. *Neither the First Respondent nor the Second Respondent have participated in the current proceedings. In this regard, neither Respondent has:*

(a) attended Court when the matter has been listed for hearing; or

(b) filed evidence or written submissions in the proceedings.

25. The First Respondent continues to trade, with ongoing contracts in Sydney and Canberra, and employ staff.

F. PRIOR INTERACTIONS BETWEEN THE APPLICANT AND THE RESPONDENTS REGARDING NOTICES TO PRODUCE ISSUED UNDER SECTION 712 OF THE FW ACT

26. In July 2011 the Applicant received a complaint from an employee of the First Respondent regarding the First Respondent's alleged non-payment of wages and failure to issue payslips. The Applicant issued a notice to produce to the First Respondent to obtain payslips. The person with whom the Applicant dealt with in relation to this complaint was the Second Respondent who acted on behalf of the First Respondent. The Notice to Produce was not complied with and the payslips were not produced. The Applicant closed its investigation into this complaint and the Fair Work inspector was unable to make contact with the First Respondent or the Second Respondent.

27. In August 2012 the Applicant received a complaint from a worker engaged by the First Respondent regarding the alleged non-payment of invoices. The Applicant made attempts to contact the Second Respondent and a notice to produce was issued to the First Respondent. The First Respondent, through the Second Respondent, provided some documents but the notice to produce was not fully complied with. The Fair Work Inspector decided to close the matter on the basis that she was unable to obtain sufficient information from the complainant and the First Respondent to determine the complaint.

28. In May 2014 the Applicant received a complaint from an employee of Kleen Group NT regarding the alleged non-payment of wages and the alleged failure to issue payslips. The Applicant issued a notice to produce to Kleen Group NT seeking copies of payslips. Kleen Group NT produced some but not all of the documents requested by the Notice to Produce and the Applicant received confirmation that the employee had been paid. The Applicant issued a letter of caution dated 2 September 2014 addressed to the Second Respondent regarding the failure of Kleen Group NT to fully comply with two notices to produce. The Fair Work Inspector then closed the matter.

G. CURRENT COMPLAINTS BEING INVESTIGATED BY THE APPLICANT RELATING TO, OR INVOLVING, THE FIRST AND/OR SECOND RESPONDENT

29. *In June 2015 the Applicant received another workplace complaint from an employee of the First Respondent.*”

Whether an order should be made that the First Respondent comply with the Notice to Produce

5. On 25 June 2015, the Court declared that the First Respondent had contravened s.712(3) of the *Fair Work Act 2009* (Cth) (“**the Act**”), by failing to comply with the Notice to Produce.

6. Relevantly, s.545 of the Act states as follows:

“Orders that can be made by particular courts

(1)The Federal Court or the Federal Magistrates Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.

(2)Without limiting subsection (1), orders the Federal Court or Federal Magistrates Court may make include the following:

*(a) an order granting an injunction, or interim injunction, to prevent, stop or **remedy the effects of a contravention.**”*

(Emphasis added.)

7. *Inter alia*, the FWO seeks an order that the First Respondent comply with the Notice to Produce issued on 1 September 2014. The FWO relies particularly on s.545(2)(a) of the Act as bestowing jurisdiction on the Court to make such an order, in circumstances where such an order would remedy the effect of the contravention.

8. In support, the FWO referred to *Independent Education Union of Australia v Australian International Academy of Education Inc* [2012] FCA 1512 at [12] and [15], per Gray J:

“[12] Section 545 of the Fair Work Act 2009 (Cth) (‘the Fair Work Act’) gives the Court wide powers. Subsection (1) provides that the Court may make any order the Court considers appropriate, if the Court is satisfied that a person has contravened or proposes to contravene a civil remedy provision.

It can be taken that a contravention of the terms of a modern award, of which the award is one, is a contravention of a civil remedy provision. Subsection (2) of s 545 gives some examples of orders the Court may make, which are specifically said not to limit the breadth of subs (1). Those orders include in para (a) an order granting an injunction or interim injunction to prevent, stop or remedy the effects of a contravention.

[15]...as Katzmann J said in Construction, Forestry Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No. 3) [2012] FCA 697 at [186], 'The section confers the broadest of discretions on the Court.'

9. The FWO also referred to *Fair Work Ombudsman v Nerd Group Australia Pty Ltd (No. 2)* [2012] FMCA 6 (“**FWO v Nerd Group**”) and *Fair Work Ombudsman v Quincolli Pty Ltd & Anor (No. 2)* [2013] FMCA 17 in support of the proposition that non-compliance with a properly issued notice to produce under the Act has the capacity to frustrate the effective exercise of the powers of the FWO, particularly the investigative power of FWO inspectors. In *FWO v Nerd Group*, Lucev FM (as he was then), stated at [118]:

“A number of conclusions, may be drawn from the objects in s 3 (and especially s 3(b)) of the FW Act, and the enactment of provisions relevant to the Office of the FW Ombudsman, its functions, and the powers of FW Inspectors, including the following:

a) ensuring a guaranteed safety net of fair and enforceable minimum terms and conditions, through, amongst other things, National Employment Standards, is one of the most important objects of the FW Act;

b) the functions, particularly the investigatory function, supports the conclusion that the guaranteed safety net is a most important object of the FW Act, as do the purposes for which an FW Inspector's powers may be exercised, and an FW Inspector's power to require the production of records or documents;

c) the FW Ombudsman's 'advice' function is one which, generally speaking, precedes investigation and enforcement. However, in an ongoing dispute between the FW Ombudsman and an employer 'advice' must, at some stage determinable in the discretion of an FW Inspector, give way to the task of investigating, or ensuring compliance with, a

guaranteed safety net of minimum terms and conditions, and often the first step, or an essential step, in that task is to issue a notice requesting the production of records and documents; and

d) finally, the removal of the privilege against self-incrimination and exposure to penalty in relation to the production of records or documents under s 712(1) of the FW Act manifests the importance the Parliament perceives in an FW Inspector having access to records or documents for the purposes of investigations directed towards ensuring a guaranteed safety net of fair and enforceable minimum terms and conditions. That is reinforced by the fact that any record or document produced, the producing of the record or document, or any information, document or thing obtained as a direct or indirect consequence of producing the record or document, is inadmissible in evidence against an individual in criminal proceedings.

It is clear that, subject to any reasonable excuse, Parliament intended that the FW Ombudsman be able to require a person, particularly an employer, to produce documents and records, for without them the FW Ombudsman may not be able to properly fulfil the statutory remit to ensure compliance with guaranteed minimum standards by means of inquiry, investigation and the commencing of court proceedings. It is, therefore, abundantly clear that the requirement to produce records or documents is critical to the effectiveness of the means of ensuring one of the FW Act's most important objects.”

10. Based on the evidence before me, I am satisfied that the Notice to Produce was properly issued in accordance with the Act.
11. I accept the FWO's submission that the First Respondent's failure to comply with the properly issued Notice to Produce has frustrated the effective exercise of Inspector Lam's investigative powers.
12. Further, I accept the submissions of the FWO that, in the circumstances, it is appropriate to make an order that the First Respondent be required to produce the documents or records sought in the Notice to Produce to the FWO within 28 days. I accept the reasons provided by the FWO and rely upon them as follows:

“(a) it is not sufficient that the consequence of a failure to comply with a Notice to Produce is limited to a penalty; Notices to Produce must be complied with;

(b) the First Respondent never indicated that it did not have the documents or records sought under the Notice to Produce. Rather, the Second Respondent, acting on behalf of the First Respondent, offered to provide the documents to Inspector Lam, but failed to do so;

(c) production of the documents would assist Inspector Lam to finalise his investigation into the Giannopoulos Complaint. It would assist him in carrying out his duties to monitor compliance with the FW Act as authorised under section 706 of the FW Act;

(d) if the First Respondent is not required to produce the records and documents sought, with the consequence that an investigation is unable to be completed, it sends a message to other employers that they too may seek to avoid their workplace obligations, or frustrate investigations conducted by the FWO, by not producing documents sought under a Notice to Produce to the FWO;

(e) there is evidence of previous FWO investigations into complaints made by employees of the First Respondent in which the FWO has issued Notices to Produce, the FWO has not received some or all of the documents sought and, as a consequence, the FWO has not been able to conclude its investigations. It is in this context, and against the background of the First Respondent's previous pattern of conduct, that it is all the more important that the Court order production of the records and documents so that the investigation may be concluded. Otherwise, the FWO's investigation of Mr Giannopoulos' complaint will be thwarted;

(f) the Court has not excused (nor has it been asked by the First Respondent to excuse) production of the documents required by the Notice to Produce; and

(g) the Respondents have failed to give a reasonable excuse for production, despite being given the opportunity to do so by Inspector Lam.”

Submissions on penalties

13. Section 546(1) of the Act provides that the Court may order the payment of a pecuniary penalty where the contravention is of a civil remedy provision. Section 712(3) of the Act is a civil remedy provision, thereby making the First Respondent eligible to a pecuniary penalty for breach of s.712 of the Act, and similarly, the Second Respondent for his involvement in the First Respondent's breach.
14. I accept as accurate the FWO's submissions on the factors relevant to determining appropriate penalties. Those submissions are as follows:

“26. The factors relevant to the imposition of a penalty under the FW Act have been summarised by Mowbray FM in Mason v Harrington Corporation Pty Ltd [2007] FMCA 7 (Mason v Harrington), [26]–[59], as follows:

(a) the nature and extent of the conduct which led to the breach;

(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 breach;

(d) whether there had been similar previous conduct by the defendant;

(e) whether the breach was properly distinct or arose out of the one course of conduct;

(f) the size of the business enterprise involved;

(g) whether or not the breach was deliberate;

(h) whether senior management was involved in the breach;

(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;

(I) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and

(m) the need for specific and general deterrence.

27. *This summary was adopted by Tracey J in s v Fitzpatrick (2007) 166 IR 14; [2007] FCA 1080 (Kelly v Fitzpatrick) at [14] and Stuart-Mahoney v Construction, Forestry, Mining and Energy Union [2008] FCA 1426 at [40].”*

15. In light of the factual circumstances of this case, the following factors are relevant to penalty:
- (a) circumstances in which the conduct took place;
 - (b) similar previous conduct;
 - (c) deliberateness of the breach;
 - (d) cooperation;
 - (e) contrition;
 - (f) general deterrence; and
 - (g) specific deterrence.

(a) Circumstances in which the conduct took place

16. I accept the FWO’s submissions in relation to the “*circumstances in which the conduct took place*”. Those submissions are as follows:

“31. The circumstances in which the conduct took place are set out in paragraphs 5 to 20 of the Statement of Relevant Facts. Inspector Lam's investigation into the complaint made by Mr Giannopoulos was muted by the First Respondent's disregard of its responsibilities under the FW Act. Inspector Lam has been unable to determine the extent of any alleged loss suffered by Mr Giannopoulos.

32. Prior to issuing the Notice to Produce, Inspector Lam:

(a) Exchanged emails with Mr Giannopoulos regarding the nature of his complaint;

(b) sought copies of documents from Mr Giannopoulos to support the nature of the claims made in the Complaint Form; and

(c) obtained some documents from Mr Giannopoulos;

33. Some of the documents sought by the Notice to Produce are documents and records that First Respondent was required to make and/or keep; for example documents and records relating to:

*(a) the pay Mr Giannopoulos received for a specified period (employers are required to keep records relating to pay, Fair Work Regulations 2009 (Cth) (**FW Regulations**), regulation 3.33); and*

(b) Mr Giannopoulos' leave entitlements (employers are required to keep records relating to pay, FW Regulations, regulation 3.36).

34. The documents and records were not ones which would be in Mr Giannopoulos' possession unless they had been provided to him by the First Respondent.

35. It is critical that employers make available the records they are required to keep at law to the Applicant so that the Applicant may conduct investigations into complaints made by the public.

36. The failure to provide such records can have the effect of preventing the Applicant from ensuring that workplace laws are complied with. This may have the effect of undermining employees' lawful entitlements and giving employers who are non-compliant an unfair advantage over employers who are complying with workplace laws and are doing the right thing.”

(b) Similar previous conduct

17. I accept the FWO's submissions in relation to the similar previous conduct of the respondents, and that such conduct should be taken into account when determining an appropriate penalty. Those submissions are as follows:

“37. At paragraphs 43 to 56 and 94 to 97 of the Second Lam Affidavit, Inspector Lam has outlined the FWO's previous dealings with the First Respondent, Kleen Group NT and the Second Respondent (as a director of both the First Respondent and Kleen Group NT). In particular, there have been three separate earlier occasions where the Applicant has served a

Notice to Produce on the First Respondent (two occasions) or Kleen Group NT (one occasion) and the First Respondent and Kleen Group NT, as the case may be, have not complied with those Notices to Produce. On each of those three occasions, the Second Respondent acted on behalf of the First Respondent and Kleen Group NT.

38. *The Applicant submits that these three earlier occasions, two of which concerned the First Respondent, and all of which involved the Second Respondent, are of a similar character to the matter currently before the Court and are relevant because:*

(a) they demonstrate lack of cooperation by the First Respondent and the Second Respondent with the Applicant and its Fair Work Inspectors;

(b) they show that from May 2014 the Respondents were on notice and had been educated by the Applicant about their obligations to comply with workplace laws;

(c) the complaints raise the question of what, if any, steps have been taken by the First Respondent to change its business practices to ensure compliance with the FW Act. There is no evidence that any such steps to improve compliance have been taken.”

(c) Deliberateness of the breach

18. I accept the FWO’s submissions in relation to the deliberateness of the respondents’ breach of s.712 of the Act, and that such conduct is significant in assessing an appropriate penalty. Those submissions are as follows:

“40. The First Respondent was provided with ample opportunities to provide the documents and records sought by the Notice to Produce.

41. The First and Second Respondents were warned of the consequences of non-compliance. In spite of the warning given, the First Respondent did not comply with the Notice to Produce.

42. The Applicant submits that the failure to comply with the Notice to Produce was, at best, done by the Respondents with reckless disregard for their obligations.

43. The Second Respondent acknowledged receipt of the Notice to Produce, agreed to provide documents and then failed to do so.”

19. Based on the evidence before me, I find that the First Respondent deliberately failed to comply with the Notice to Produce. Further, I accept the FWO's submissions that significant penalties should be issued based on the deliberate inaction by the First Respondent and the Second Respondent.

(d) Cooperation

20. I accept the FWO's submission that the First Respondent and the Second Respondent did not cooperate in any meaningful way with the FWO during its investigation, and that the Notice to Produce remains unanswered.
21. Further, the respondents have not participated in this proceeding in any meaningful way, beyond agreeing to an initial timetable with which they failed to comply. In fact, at no point did the respondents file and serve a Notice of Appearance on behalf of the First Respondent, or a Notice of Address for Service on behalf of the Second Respondent, despite having being ordered by the Court to do so.
22. Moreover, on 23 April 2015, it was necessary to make orders for substituted service upon the Second Respondent at his email address.
23. I accept that by their conduct, including the failure to comply with orders of the Court, the respondents have increased the costs incurred by the FWO in this proceeding.

(e) Contrition

24. I accept the FWO's submission that there is no evidence that either the First Respondent or the Second Respondent have shown any contrition. The non-compliance of the respondents with the Court's order to file a Notice of Appearance and a Notice of Address for Service, and the necessity for the Court to make an order for substituted service in respect of the Second Respondent, shows their disregard for the Court. Further, such conduct demonstrates an inability to accept any wrongdoing on the part of either respondent.

(f) General deterrence

25. I accept the FWO's submissions on the importance of general deterrence in relation to non-compliance with properly issued notices to produce, in circumstances where doing so thwarts the investigative powers conferred on the FWO as a statutory regulatory authority. Those submissions are as follows:

“51. It is well established that ‘the need for specific and general deterrence’ is a factor that is relevant to the imposition of a penalty under the FW Act. See for example Mason v Harrington at [26]-[59].

52. It is submitted that the Court should take the failure to comply with the Notice to Produce seriously. In the Fair Work Ombudsman v VS Investment Group Pty Ltd & Anor [2013] FCCA 208, Judge Jarrett held (in ordering a penalty of 50%):

‘The failure to comply with a notice properly issued by the applicant in the course of its investigations and the discharge of its statutory functions is serious. Recipients of such notices should be left under no misapprehension about their obligations to comply with those notices.’

53. In Fair Work Ombudsman v Nerd Group Australian Pty Ltd & Anor (No.3), a case also relating to failing to comply with a Notice to Produce, Lucev FM held that:

‘This is an appropriate case for a meaningful measure of general deterrence insofar as employers ought not to be impressed with the idea they can:

- a) avoid the requirement to produce documents upon request by FW Ombudsman; or*
- b) fail to co-operate with FW Inspectors lawfully exercising powers under the FW Act.’*

54. The Applicant also relies on Fair Work Ombudsman v Jaycee Trading Pty Ltd & Anor (No. 2) [2013] FCCA 2128 (FWO v Jaycee Trading), where your Honour stated:

‘I accept that employers must provide their employees with their correct entitlement and take steps to respond to correspondence and notices issued by government regulators such as the applicant.’”

(g) Specific deterrence

26. I accept the FWO’s submissions in relation to the need for specific deterrence in this case. Those submissions are as follows:

“56. The need for specific deterrence is significant in this case as the First Respondent continues to operate and employ. The Second Respondent has been educated about employers’ obligations by the FWO and yet failed to comply with these obligations.

57. The Applicant currently has three live investigations relating to the First Respondent and Kleen Group NT, including Mr Giannopoulos’ complaint. The First Respondent is the subject of a current workplace complaint to the Applicant.

58. The Applicant relies on the following principles to support the submission that the penalty imposed on the First Respondent and the Second Respondent should be significant to ensure that the specific deterrence effect is high:

(a) Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor [2009] FMCA 38:

‘[41] As there has been no demonstration of contrition or remorse on behalf of either respondent the need for specific deterrence is high.’

(b) Ponzio v B & P Caelli Constructions Pty Ltd [2007] FCAFC 65:

‘[93] There are three purposes at least for imposing a penalty: punishment; deterrence; and rehabilitation. The punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment: R v Hunter (1984) 36 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.’”

Accessorial Liability

27. At all relevant times, the Second Respondent was the director and manager of the First Respondent, and as such, was instrumental in the contravention of the First Respondent. The Second Respondent remains the sole director of the First Respondent.
28. On 25 June 2015, this Court declared that the Second Respondent was involved in the First Respondent's contravention of the Act in failing to comply with the Notice to Produce.
29. I accept the submission of the FWO that it is appropriate that each respondent be penalised separately (see *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408 at [8] per Buchanan J).

Penalty

30. Below is a table identifying the maximum penalty, the range of the penalty sought, and the quantum of the penalty sought by the FWO in respect of the First Respondent and the Second Respondent:

	<i>Maximum penalty units-First Respondent</i>	<i>Penalty Amount (\$)</i>	<i>Range of penalty sought (%)</i>	<i>Quantum Range (\$)</i>
<i>First Respondent (s.546(2)(b))</i>	300	51,000	<i>Medium to High (60-70%)</i>	30,600 - 35,700
<i>Second Respondent (s.546(2)(a))</i>	60	10,200	<i>Medium to High (60-70%)</i>	6,120 - 7,140

31. This table was provided by the FWO in light of the decision of the High Court of Australia in *Commonwealth of Australia v Director, Fair Work building Industry Inspectorate & Ors* [2015] HCA 46. In that case, the High Court of Australia held that it was open to a regulator to make submissions on an appropriate penalty to be imposed, and to reach an agreed position as to penalty with respondents.
32. Penalties should be awarded against the First Respondent and the Second Respondent based on the following factors:
- a) The Notice to Produce sought documents which were required to be kept by an employer under the *Fair Work Regulations 2009* (Cth).
 - b) The fact that the respondents' conduct was deliberate.
 - c) The frustration of the FWO's investigation of the complaint made by Mr Giannopoulos, through non-compliance with the Notice to Produce.
 - d) The need for specific deterrence as the respondents continue to operate the business and the Second Respondent continues to be the sole director of the First Respondent. Moreover, the FWO has received a further complaint in relation to the First Respondent.
 - e) The need for general deterrence.
 - f) Similar previous conduct as referred to in paragraph 17 above.
33. There is no evidence before me as to the ability or inability of either respondent to pay the penalties sought by the FWO. In the circumstances, the Court is not able to assess whether any such penalty imposed is manifestly excessive in the particular circumstances of each of the respondents, both of whom were directed to file and serve submissions on penalty. However, both failed to do so.
34. It is imperative that employers do their utmost to comply with notices to produce properly issued in accordance with the Act. Notices to produce are fundamental to the progress of any investigation of an allegation of contravention, or non-compliance, with the Act by the FWO, being the body statutorily charged with that responsibility.

35. The Notice to Produce issued pursuant to the Act seeks documents that an employer is required to maintain by law. The production of those documents ought not to be an onerous burden for a properly organised employer, who maintains proper records of the business. Employees should be able to rely on their employers to keep proper records of employment as required by law. It is completely unacceptable for an employer to do otherwise.
36. In all the circumstances, appropriate penalties for each respondent lie in the mid-range. In respect of the First Respondent, I find that to be 40% of the maximum. In respect of the Second Respondent, I find that to be 45% of the maximum. In reaching this determination, I have also had regard to the fact that I propose to order the First Respondent to comply with the Notice to Produce in accordance with s.545 of the Act, which is a further sanction upon the First Respondent.
37. Accordingly, the penalties that I impose are as follows:
- a) First Respondent: \$20,400;
 - b) Second Respondent: \$4,590.
38. The following orders should be made:
- i) Pursuant to ss.545(1) and 545(2)(a) of the *Fair Work Act 2009* (Cth) (“**the Act**”), the First Respondent be required to produce to the Applicant, within 28 days, the documents or records sought in the Notice to Produce dated 1 September 2014, a copy of which should be annexed to the Order and marked “A”.
 - ii) Pursuant to s.546(1) of the Act, the First Respondent pay a pecuniary penalty for its contravention of s.712(3) the Act, in the amount of \$20,400.
 - iii) Pursuant to s.546(1) of the Act, the Second Respondent pay a pecuniary penalty for his involvement (within the meaning of s.550(2) of the Act) in the First Respondent’s contravention of s.712(3) the Act, in the amount of \$4,590.

- iv) Pursuant to s.546(3)(a) of the Act, the penalties imposed in orders (ii) and (iii) above be paid to the Consolidated Revenue Fund of the Commonwealth within 28 days;
- v) The proceeding otherwise be dismissed.

I certify that the preceding thirty-eight (38) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Date: 23 February 2016