FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v CROCMEDIA PTY LTD *[2015] FCCA 140*

Catchwords:
INDUSTRIAL LAW – Fair Work – awarding penalties under the *Fair Work Act 2009* – consideration of factors relevant to the amount of penalty.

Legislation:
Fair Work Act 2009, ss.12, 323(1), 536(1).
Building and Construction Industry Improvement Act 2005

Cases cited:
Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2013] FCA 1014
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8; (2008) 165 FCR 560; (2008) 246 ALR 35; (2008) 60 AILR 100-809
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Fair Work Ombudsman v Bedington [2012] FMCA 1133
Ponzio v B & P Caelli Constructions Pty Ltd [2007] FCAFC 65; (2007) 158 FCR 543; (2007) 162 IR 444; [2007] ALMD 6759; (2007) 59 AILR 100-669
Finance Sector Union v Commonwealth Bank of Australia [2005] FCA 1847; (2005) 224 ALR 467; (2005) 147 IR 462

Stewart & Owens, *Experience Or Exploitation?*, Report for the Fair Work Ombudsman, January 2013.

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	CROCMEDIA PTY LTD (ACN 139 343 196)
File Number:	MLG 861 of 2013
Judgment of:	Judge Riethmuller
Hearing date:	5 March 2014
Date of Last Submission:	7 July 2014
Delivered at:	Melbourne

Delivered on: 29 January 2015

REPRESENTATION

Counsel for the Applicant: Mr Tracey

Solicitors for the Applicant: Office of the Fair Work Ombudsman

Counsel for the Respondent: Mr Champion

Solicitors for the Respondent: Macpherson + Kelley Lawyers

THE COURT DECLARES THAT:

(1) The Respondent breached:

(a) Section 293 of *Fair Work Act 2009*:

(i) in that it failed to pay Mr [W] a rate at least equal to the national minimum wage in accordance with clause 4.3 of the NMWO 2010, the NMWO 2011 and the NMWO 2012, in respect of the period 19 June 2011 to 4 August 2012;

(ii) in that it failed to pay Mr [W] a casual loading at least equal to the applicable casual loading in accordance with clause 5.2 of the NMWO 2010, the NMWO 2011 and the NMWO 2012, in respect of the period 19 June 2011 to 4 August 2012;

(iii) in that it failed to pay Ms [S] a rate at least equal to the special national minimum wage 3 in accordance with clause 8.2 of the NMWO 2012, in respect of the period 11 August 2012 to 26 November 2012;

(iv) in that it failed to pay Ms [S] a casual loading at least equal to the applicable casual loading in accordance with clause 4.3 of the NMWO 2012, in respect of the period 27 November 2012 to 17 February 2013;

(v) in that it failed to pay Ms [S] a casual loading at least equal to the applicable casual loading in accordance with clause 5.2 of the NMWO 2012, in respect of the period in respect of the period 11 August 2012 to 17 February 2013;

(b) Section 323(1) of *Fair Work Act 2009*:

(i) in that it failed to pay Mr [W] amounts payable to him in relation to the performance of his work, in full, in money (in the prescribed manner) and at least monthly;

(ii) in that it failed to pay Ms [S] amounts payable to her in relation to the performance of her work, in full, in money (in the prescribed manner) and at least monthly;

(c) Section 536(1) of *Fair Work Act 2009*:

(i) in that it failed to provide Mr [W] with a pay slip within one working day of payment with respect to work performed by him; and

(ii) in that it failed to provide Ms [S] with a pay slip within one working day of payment with respect to work performed by her.

(2) The Second Respondent and Third Respondent were involved in the breaches by the First Respondent in Declaration 1 herein, pursuant to section 550(1) of *Fair Work Act 2009*.

THE COURT ORDERS THAT:

(1) Pursuant to section 546(1) of the *Fair Work Act 2009*, the Respondent pay into the Consolidated Revenue Fund of the Commonwealth an aggregate penalty of $24,000 for breaching the *Fair Work Act 2009.*

(2) Payment of the pecuniary penalties referred in Orders 1 herein be made within 60 days, unless otherwise ordered.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 861 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

CROCMEDIA PTY LTD (ACN 139 343 196)
Respondent

REASONS FOR JUDGMENT

1. The Respondent, Crocmedia Pty Ltd, carries on business in the sports media and entertainment sector. Crocmedia develops radio and television programs in Victoria, Australia, which it provides to media partners for broadcast. It derives its income from advertisers whose advertisements are placed within the media programs, rather than from the broadcasters. The company has grown quickly since it commenced in 2007. By November 2014 Crocmedia Pty Ltd employed 46 people, 10 of whom were casual employees.

2. These proceedings concern breaches of the *Fair Work Act 2009* with respect to two of Crocmedia's employees, Mr [W] and Ms [S]. Both of the employees commenced working for the Respondent after they had contacted the Respondent seeking work experience in the media industry whilst studying at university.

3. The parties agreed that both employees had performed unpaid work experience for approximately three weeks, following which they were employed on a casual basis. The nature of the duties performed by the

employees is set out in the Amended Statement of Agreed Facts as follows:

> *9. At all relevant times the Employees worked as producers in relation to the Respondent's production of radio programs broadcast on the SEN radio network. The Employees performed one or more of the following duties when performing work for the Respondent:*
>
> > *(a) sourcing and arranging interviews;*
> >
> > *(b) preparing audio for programs;*
> >
> > *(c) cutting of audio from the programs;*
> >
> > *(d) taking calls during the program;*
> >
> > *(e) preparing and delivering on air a sport program;*
> >
> > *(f) preparing run sheets for the program;*
> >
> > *(g) providing information to guests;*
> >
> > *(h) controlling a call screen with live scores, caller details and other relevant details; and*
> >
> > *(i) monitoring relevant social media sites.*
>
> *10. The Employees primarily worked on an ad hoc basis as producers of the "All Night Appetite" radio program, which was regularly broadcast on the SEN network from 12:00 am to 6:00 am (ANA Shifts). The Respondent characterised the Employees as 'volunteers' for all work performed on the ANA shifts.*
>
> *11. Mr [W] also performed work for the Respondent on an ad hoc basis as a producer of other radio programs. The Respondent characterised Mr [W] as a 'contractor' for all work performed on other radio programs.*

4. In this case it is admitted that the failure to pay the employees in accordance with the Award, after their initial period of three weeks work experience, is a breach of the *Fair Work Act 2009*. There is no suggestion in this case that the employees were in fact contractors given the nature of the work, the provision of equipment, and the extent of control by the employer exercised over the arrangements. As a result the employer was bound to ensure that the minimum standards

for employees in Australia with respect to wages and conditions were met.

5. There is an important exception under the *Fair Work Act 2009* with respect to "vocational placement" which forms an exception to key provisions with respect to terms and conditions. Section 12 of the Act defines vocational placement as follows:

> ***vocational placement*** *means a placement that is:*
>
> > *(a) undertaken with an employer for which a person is not entitled to be paid any remuneration; and*
> >
> > *(b) undertaken as a requirement of an education or training course; and*
> >
> > *(c) authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory.*

6. Whilst there may be some uncertainty in this definition in the *Fair Work Act 2009* (see Stewart and Owens, *Experience Or Exploitation?*, Report for the Fair Work Ombudsman, January 2013, Ch.4), the areas of potential uncertainty are not relevant to the facts in this case.

7. At Ch.9 of their Report, Stewart and Owens discuss in some detail the problem of unpaid work experience arrangements, stating that the vocational placement exception is not clearly drafted (see para.9.5). The authors identify factors that may be relevant in determining whether a person is carrying out work experience, referring to information available from the Fair Work website saying:

> *9.16 This approach is in fact broadly in accord with the information that is currently found in the FWO Fact Sheet on 'Internships, Unpaid Work Experience and Vocational Placements', and (in somewhat more detail) on the FWO website. In particular, we would generally agree with the following statements on the website:*
>
> > *Generally, the longer the period of placement, the more likely the person is an employee…*
> >
> > *Although the person may perform some productive activities during the placement, they are less likely to be considered an employee if there is no expectation or requirement of productivity in the workplace…*

The main benefit of a genuine work experience placement or internship should flow to the person doing the placement. If a business is gaining a significant benefit as a result of engaging the person this may indicate an employment relationship has been formed…

Unpaid work experience placements and internships are less likely to involve employment if:

- *they are mainly for the benefit of the person*
- *the periods of the placement are relatively short*
- *the person is not required or expected to do productive work*
- *there is no significant commercial gain or value for the business derived out of the work.*

8. The authors make two important structural arguments with respect to the underlying purpose of the industrial relations and regulatory scheme within Australia saying:

> *9.21 The first is that it seems to us that the situation of most concern ought to be where an organisation appears to be systematically using unpaid interns or job applicants to perform work that would or could otherwise be performed by paid employees. It is this practice, we believe, that most obviously threatens the integrity of the standards and protections established by the Fair Work legislation. We should add that an organisation should be considered to fall into this category even if it has not actively sought to recruit such labour, but has merely been prepared to respond on a regular basis to requests to provide productive but unpaid labour; although the fact that an organisation advertises for unpaid interns may perhaps make it easier to conclude that it is systematically using 'work experience' as a cheap substitute for employment.*
>
> *9.22 The second point relates to the question of vulnerability, a matter on which the FWO typically places some emphasis in deciding whether to investigate or pursue complaints.*[8] *We have already made the point in Chapter 1 that unpaid work experience arrangements tend of their nature to involve the likes of younger workers or visa holders, who may as a class be considered 'vulnerable' in the labour market. In practice, of course, not every person agreeing to undertake unpaid work experience may* in fact *appear (or even be) vulnerable, even if they are young or*

> *in Australia on a temporary visa. Our experience in conducting research for this report leads us to conclude that a significant number of those who agree to work unpaid in order to improve their chances of paid employment, or of a career in their chosen field, or of permanent residence, do so with their eyes open to what is involved. They may understand and accept the risks and consequences of such an arrangement. Indeed they may have initiated it. At an individual level, it may be hard to conclude that they have in any sense been 'exploited'.*
>
> *2.23 However, there is an important point of principle here, which goes back to the reasons for being concerned about the growth of work experience arrangements that are functionally similar to employment, and that cannot be justified by their connection to an authorised course of education or training. Such arrangements do not just undermine the integrity of labour standards. As noted in Chapter 2, they potentially erect barriers to entry to the labour market, or selected portions of it, for those who do not have the means to spend lengthy periods of time in unpaid work. An intelligent and articulate graduate from a wealthy family who opts to do months of unpaid work in order to break into their chosen profession may not seem very vulnerable. They may not seem to be a 'victim' of exploitation. But the point of investigating their situation and (if appropriate) taking action is not necessarily to protect them as an individual. It is to assert a principle – a fair day's pay for a fair day's work – that underpins our system of minimum labour standards. And it is to promote the goal of 'social inclusion' that is expressly made part of the objects of the Fair Work Act, in the opening words to section 3.*

9. The concerns expressed by the report authors are well-founded when one has regard to the prevalence of the arrangements (as discussed in ch.3 of the report), and the review of advertisements for such positions, about which the authors state:

> *3.56 …What is notable about many of them is how similar they are to what might be expected from an advertisement for a paid entry-level position. They give every impression of involving employment without the pay, sometimes (thought not always) to be offset by vague promises of 'training' or of consideration for a paid job.*

10. Remarkably, given the important role of the media in protecting the rights of citizens through publishing articles and reports, Stewart and Owens conclude:

3.58 Of all the industries or sectors that we have had occasion during this study to read or hear about, in terms of unpaid work experience, the one that came up most often by far was the media.

11. Indeed, in some sectors there are now agencies carrying on the business of brokering internships or work experience placements. Stewart and Owens say:

> *3.68 It is apparent that a number of agencies are now operating in Australia to 'broker' unpaid internships or job placements. Besides the agencies that are responsible for delivering the kind of assistance to unemployed or injured workers discussed earlier in the chapter, these include firms that are in business to 'sell' work experience. As Fenella Souter notes:*
>
> > *Commercial intern agencies, like Borch Leeman and Punk Jobs in Melbourne, are cashing in on the trend, targeting graduate jobseekers, mostly former overseas students. These companies charge fees running into the thousands to 'place' graduates into unpaid work with Australian companies. Just to be clear, it's the intern who pays. In the case of Borch Leeman, for instance, a three-month placement costs the applicant at least $2850 (a $550 non-refundable application fee plus a $2300 placement and insurance fee) – money that has to be paid upfront before the placement goes ahead.*
>
> *…*
>
> *3.71 According to the AIIA, which represents a number of such agencies, intermediaries of this type have an important role to play:*
>
> > *[B]y mediating between hosts and interns, providers offer a level of control, in terms of quality, safety and standards of practice, that individual interns negotiating their own placement direct with a host may not receive. Although both providers and hosts are businesses, and as such need to operate as profitable enterprises (charity organisations who host being the exception) the provision of internships is driven by much more than profit. Internships are an important contribution to an individual's learning (as recognised by the increasing emphasis Universities are placing on experiential learning as part of a qualification). International internships are an important contribution to global awareness at both an individual and corporate level.*

12. It is against this background that one must approach the imposition of a penalty in this case.

Background of this case

13. The arrangement that was in place with the employees was for the payment of $75 per shift when the shift on was on Monday to Friday and between $80 and $120 when the shift was on a weekend, with respect to Mr [W] and $75 per shift with respect to Ms [S]. These payments were referred to as reimbursement for expenses. The total amounts received were $13,970 for Mr [W] and $3750 for Ms [S]. The total payments that were due to the two employees, based upon the minimum wage rates, was $22,168.08. As to the payments that were made, they are in a sum equivalent to around 80 per cent of the minimum wage. However, as the payments that were made were characterised as "expenses" and it is accepted by the Respondent that they cannot be offset against wages due and owing, therefore the employees were paid the total amount of $22,168.08, resulting in the employees retaining both the expenses payments and the full wages due and owing. The Respondent made the payments following the investigation of the Fair Work Ombudsman on 29 May 2013.

14. As a result of the arrangement that was in place the Respondent also breached s.323(1) of the *Fair Work Act 2009* as they did not pay the employees their wages monthly, and s.536(1) of the Fair Work Act in failing to give the employees a pay slip. The breaches of ss.323 and 536 in this case occurred in circumstances where the arrangement that was in place meant that there were no wages payments being made.

15. Following the investigation all volunteers had been replaced by casual or part-time employees in the Respondent's business as with those that were categorised as "contractors".

16. It is agreed that the contraventions should be grouped into four groups:

    (a) failure to pay minimum wages;

    (b) failure to pay casual loadings;

    (c) failure to pay in full, at least monthly; and

(d) failure to provide pay slips.

17. I accept the appropriateness of these groupings.

18. In this case the maximum penalties applicable increased towards the end of the period of the contravening conduct. The parties agreed that it is appropriate to look at the maximum penalties prior to the increase that occurred on 29 December 2012, and therefore the maximum penalty with respect to the contraventions concerning payment of wages and loadings is $33,000 for the first three categories and with respect to the contraventions with respect to the pay slips, $16,500. The overall maximum is therefore $115,500.

19. In this case considerable submissions were addressed to the so-called principle of parsimony. In this respect I accept the law as set out by Gordon J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2013] FCA 1014 at para.55 with respect to the *Building and Construction Industry Improvement Act 2005* applies equally under the *Fair Work Act 2009.* Her Honour said:

> *55. The task of the sentencer under the BCII Act is sufficiently described as fixing a penalty that is just in all the circumstances. Separate reference to notions of parsimony has the capacity to mislead if it distracts from the need to fix the just and appropriate penalty. It has the capacity to mislead because the reference to "parsimony" means different things in different contexts. In the current context, the common law principle (the selection of the least severe sentencing option open to a sentencer which achieves the purpose or purposes of punishment in the case and therefore achieves the ultimate aim of protecting society) adds little, if anything, to the task of the sentencer under the BCII Act of fixing a penalty that is just and appropriate in all the circumstances.*

20. I also note the comments made by Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at para.91 where his Honour said:

> *91. … 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.*

21. In my view it is important to take into account in this case that the substantive or underlying act which brought about the breaches was the categorisation of the two employees as trainees or contractors, rather than failures to provide various award payments and pay slips from time to time to the persons the employer recognised as employees. In this sense, the case is somewhat different from a case involving an employee where the employer proceeds upon the basis of an acceptance of the person being in an employment position, but breaches various provisions of the legislative scheme that clearly apply to employees.

22. There are a number of factors that are often relevant, or that are usually relevant to the question of penalty, which were identified by Federal Magistrate Mowbray in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7. These factors have been acknowledged in subsequent cases as providing a convenient checklist, although do not prescribe or restrict matters that may be relevant to take into account in the exercise of the court's discretion.

Matters to take into account

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

23. In this case the Fair Work Ombudsman submits that it is important to have regard to the fact that the employees were both young, one still studying and one a recent graduate, and had agreed to work for free in an effort to gain media experience and to "get established in the industry". The evidence before the Court indicates that journalism students frequently approach employers, such as the Respondent, seeking work experience in order to give them a competitive advantage in searching for employment in the industry.

24. This is entirely consistent with the report by Stewart and Owens. The Fair Work Ombudsman points out that after a period of unpaid work experience the employees were categorised as "volunteers", and that the arrangement continued for one year, in the case of one of the employees, and six months in the case of the other. The Respondent submits that this is a case where an initial work experience

arrangement was allowed to continue when it needed to be reviewed and that the Respondent did not have adequate systems and processes in place to review work experience placements to guard against circumstances as occurred here.

25. In particular, the Respondent relies upon the comments of Federal Magistrate Jarrett (as his Honour then was) in *Fair Work Ombudsman v Bedington* [2012] FMCA 1133 at para.49, where his Honour looked to whether:

> *... there has been defiance of the law by the respondent, or genuine misunderstanding as to its operation.*

26. It is submitted that this misconduct was not a knowing defiance of the law. The characterisation of the two employees as volunteers, rather than work experience students or interns, together with the extensive period of time involved does not weigh in the Respondent's favour.

27. On balance I am not persuaded that the Respondent has been openly defiant of the law, but rather engaged in an arrangement that the Respondent believed avoided the consequences of the minimum wages requirements under the Act. However, the Respondent cannot avoid the proposition that it is, at best, dishonourable to profit from the work of volunteers, and at worst, exploitative.

The nature and extent of the loss

28. Whilst, as a matter of law, the practical loss was around 20 per cent of the entitlements that would have otherwise have been paid, the recompense has been an overall payment that is now greater than that which would have been paid had appropriate arrangements been in place initially. However, it is also important to note that the actual amounts involved in the case were modest and that the employees were persons who were earning very modest incomes.

Similar previous conduct

29. It is not suggested that the Respondent has previously been the subject of proceedings for contraventions of workplace laws, and whilst this investigation uncovered a further employee in a similar position, the

Respondent has fully rectified the underpayment with respect to that employee. I am not persuaded that this is a case where the employees have suffered no loss and damages, as they suffered a period where they did not receive appropriate entitlements. However, this is a case where it is important to acknowledge that the Respondent has made full payments in a timely fashion and that the full rectification that has been made by the Respondent has ensured that, whilst late, the employees' entitlements were not lost. This is a significant mitigating factor.

Size of Business

30. The size of the Respondent's business has been identified above. Whilst the business is not a small company, it is of sufficient size to expect that considerable focus would be placed upon ensuring compliance with workplace laws.

Whether conduct deliberate

31. Unlike many cases, where the breaches arise from a failure to adhere to straightforward provisions of the awards and implement appropriate systems for payments pursuant to awards, this case, in substance, relates to an inappropriate view of the applicability of the Award. It is not suggested that with respect to any of the other employees of the Respondent, that the Respondent pays otherwise than in accordance with the minimum requirements, nor that the Respondent in any way breaches the requirements for record keeping and providing payslips.

32. I am not persuaded that the Respondent engaged in a deliberate strategy to exploit the employees, although it is clear that the Respondent was content to receive the benefits that flowed from the arrangement, and that the arrangement itself, when viewed objectively, was exploitative.

Involvement of senior management

33. In this case there is no evidence that the directors of the company were involved in the arrangement.

Contrition, corrective action and cooperation

34. It is to the Respondent's great credit that corrective action was taken quickly, and that full payments have been made to the employees. Further, the Respondent did not seek to argue that the payments made as "expenses" should be repaid or offset against the payments made to the employees. The effect, in substance, is that this arrangement has cost the Respondent considerably more than would have been the case had minimum wages been paid to employees.

35. The Respondent submits that these arrangements will no longer be entered into and there is nothing to indicate that such submissions should not be accepted.

36. The Respondent cooperated with the investigation and did not challenge the proceedings. The cooperation appears to me to have been at the earliest opportunities and the interactions between the Respondent and the Fair Work Ombudsman appear to have been full and frank.

37. Given the nature of the conduct of the Respondent in its cooperation, early admissions and most importantly, its early and full rectification of the underpayments, it appears to me that this is a case where a discount recognising these matters at the higher end of the range is appropriate. It appears to me that a discount of 30 per cent is appropriate in these circumstances.

Deterrence

38. The proceedings in this case appear to me to have been sufficient deterrence for the Respondent, particularly in the context of the immediate and contrite conduct of the Respondent following the investigation, to show that specific deterrence is not a significant factor in this case. It has clearly been unprofitable for the Respondent, given the amounts that have ultimately been paid and the costs of the proceedings. That is not to say that some factor of deterrence must not be reflected in the penalty.

39. General deterrence is also an important aspect in the imposition of penalties. However, it is important to bear in mind that a penalty

should not be such as to "make an example" of a particular respondent. In this regard, I have regard to the views expressed by Lander J in *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65 at para.93, where his Honour said:

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

40. However, as was identified by Merkel J in *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847, a "light handed approach" is no longer applicable to the imposition of civil penalties for contraventions of the industrial law (see para.72).

Remorse

41. In the overall circumstances of this case I accept that the Respondent has demonstrated genuine remorse.

Conclusion

42. Considering the matter as a whole, I have come to the view that the appropriate penalty for group 1 of the offences is $12,000, having regard to, in particular, the earlier rectification, remorse and full

cooperation, genuine corrective action and lack of any previous breaches.

43. With respect to group 2, the non-payment of casual loadings, it does not appear to be that this should be subsumed within the penalty of group 1. The mitigating factors set out with respect to group 1 apply equally, however the amounts involved were considerably less. In my view, the appropriate penalty is in the sum of $9000.

44. With respect to the penalties for frequency of payment, and payslips offences, the facts of this case are most unusual, in that the primary arrangement for which the Respondent is receiving a penalty necessarily resulted in these provisions not being complied with, nor contemplation of compliance with these provisions. The nature of the conduct is, in this unusual case, quite different to the ordinary case where an employer is paying wages, not award rates, and not paying on time or providing proper payslips. Whilst generally, in my view, these are particularly serious offences, it is important to impose a penalty, having regard to the specific facts of the particular case before me. I am satisfied that in the most unusual circumstances of this case penalties of $2000 and $1000 respectively are appropriate for these groups.

45. The arrangements for work experience interns are a difficult topic within employment systems. This case does not involve circumstances where, at the end of the day, the arrangements could, on any view, be categorised as ongoing work experience or an internship. Profiting from "volunteers" is not acceptable conduct within the industrial relations scheme applicable in Australia. In some industries, and the media sector is a good example, the popular appeal of the industry will lure many young people to seek any opportunity to obtain a toehold in the industry. This, coupled with any ambiguous messages that flow from films and television shows from overseas, may have led some businesses to take advantage of aspiring youth.

46. There is little doubt that this case, and cases like it, will attract considerable media attention, which will have a positive effect in informing and educating employers generally. For this reason there can also be little doubt that the penalties are likely to increase significantly over time as public exposure of the issues in the press will

result in respondents not being in the position of being able to claim that a genuine error of categorisation was made.

I certify that the preceding forty-six (46) paragraphs are a true copy of the reasons for judgment of Judge Riethmuller

Associate:

Date: 29 January 2015