

# FEDERAL COURT OF AUSTRALIA

## **Fair Work Ombudsman v Crystal Carwash Cafe Pty Ltd (No 2) [2014] FCA 827**

Citation: Fair Work Ombudsman v Crystal Carwash Cafe Pty Ltd (No 2) [2014] FCA 827

Parties: **FAIR WORK OMBUDSMAN v CRYSTAL CARWASH CAFE PTY LTD (ACN 060 916 770), ANTHONY SAHADE, PETER KHOURI, BADDINGTON PTY LTD (ACN 137 049 560), SEEKTON PTY LTD (ACN 137 049 579), OZREST PTY LTD (ACN 137 219 820), SCHATRY PTY LTD ACN (137 219 802), COOLJAM PTY LTD (ACN 141 762 352), OZRUN PTY LTD (ACN 141 762 389), TUSHAR INVESTMENTS PTY LTD (ACN 141 758 045), LUCKY HORIZONS PTY LTD (ACN 144 648 975), PEPPER STONE PTY LTD (ACN 144 649 427) and OAK MINK PTY LTD (ACN 145 471 941)**

File number(s): NSD 1585 of 2012

Judge(s): **BUCHANAN J**

Date of judgment: 7 August 2014

Catchwords: **INDUSTRIAL LAW** – civil penalty proceedings – contraventions of *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (“the Award”) – underpayment of minimum rates of pay under the Award – underpayment of overtime entitlements under the Award – contravention of requirement to keep adequate records – whether contraventions were serious and part of a pattern of conduct – whether high range penalty is justified in the circumstances

Legislation: *Evidence Act 1995* (Cth), s 135  
*Fair Work Act 2009* (Cth), ss 45, 535(2), 539(2), 539(2)(Item 2), 539(2)(Item 29), 546, 546(2), 546(3), 550, 550(1), 570, 687, 712  
*Vehicle Manufacturing, Repair, Services and Retail Award 2010*

Cases cited: *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2014] FCA 336  
*Fair Work Ombudsman v Crystal Carwash Cafe Pty Ltd* [2013] FCA 1396  
*Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408

*Tax Practitioners Board v Su* [2014] FCA 731

Date of hearing:	4 July 2014
Place:	Sydney
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	54
Counsel for the Applicant:	Mr Y Shariff
Solicitor for the Applicant:	Fair Work Ombudsman
Counsel for the Respondents:	Mr M Sahade
Solicitor for the Respondents:	Trinity Legal

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
FAIR WORK DIVISION**

**NSD 1585 of 2012**

**BETWEEN:           FAIR WORK OMBUDSMAN  
Applicant**

**AND:               CRYSTAL CARWASH CAFE PTY LTD (ACN 060 916 770)  
First Respondent**

**ANTHONY SAHADE  
Second Respondent**

**PETER KHOURI  
Third Respondent**

**BADDINGTON PTY LTD (ACN 137 049 560)  
Fourth Respondent**

**SEEKTON PTY LTD (ACN 137 049 579)  
Fifth Respondent**

**OZREST PTY LTD (ACN 137 219 820)  
Sixth Respondent**

**SCHATRY PTY LTD (ACN 137 219 802)  
Seventh Respondent**

**COOLJAM PTY LTD (ACN 141 762 352)  
Eighth Respondent**

**OZRUN PTY LTD (ACN 141 762 389)  
Ninth Respondent**

**TUSHAR INVESTMENTS PTY LTD (ACN 141 758 045)  
Tenth Respondent**

**LUCKY HORIZONS PTY LTD (ACN 144 648 975)  
Eleventh Respondent**

**PEPPER STONE PTY LTD (ACN 144 649 427)  
Twelfth Respondent**

**OAK MINK PTY LTD (ACN 145 471 941)  
Thirteenth Respondent**

**JUDGE:           BUCHANAN J**

**DATE OF ORDER: 7 AUGUST 2014**

**WHERE MADE: SYDNEY**

**THE COURT DECLARES THAT:**

1. The first respondent, Crystal Carwash Cafe Pty Ltd (ACN 060 916 770) ("Crystal Carwash"), contravened the following provisions:
  - (a) s 45 of the *Fair Work Act 2009* (Cth) ("FW Act"), by virtue of failing to pay or causing to be paid the 78 Minimum Rates of Pay Employees the minimum rates of pay prescribed by subcl 33.4 and item A.2.5 of the *Vehicle, Manufacturing, Repair, Services and Retail Modern Award 2010* ("the Award");
  - (b) s 45 of the FW Act, by virtue of failing to pay or causing to be paid the 144 Overtime Employees the overtime rates of pay prescribed by subcl 28.2(c) of the *Vehicle Modern Award*; and
  - (c) s 535(2) of the FW Act, by virtue of failing to make and keep for 7 years employee records which contained the information prescribed by the *Fair Work Regulations 2009* (Cth).
2. The second respondent, Mr Anthony Sahade, was (within the meaning of s 550(1) of the FW Act) involved in Crystal Carwash's contraventions of the provisions recorded in declarations 1(a) and (b) above.
3. The third respondent, Mr Peter Khouri, was (within the meaning of s 550(1) of the FW Act) involved in Crystal Carwash's contraventions of the provisions recorded in declarations 1(a) and (b) above.

**THE COURT ORDERS THAT:**

4. A penalty of \$30,000 is imposed on the first respondent, Crystal Carwash, pursuant to s 546 of the FW Act for the contravention recorded in declaration 1(a) above.
5. A penalty of \$30,000 is imposed on the first respondent, Crystal Carwash, pursuant to s 546 of the FW Act for the contravention recorded in declaration 1(b) above.
6. A penalty of \$10,000 is imposed on the first respondent, Crystal Carwash, pursuant to s 546 of the FW Act for the contravention recorded in declaration 1(c) above.

7. A penalty of \$5,000 is imposed on the second respondent, Mr Anthony Sahade, pursuant to s 546 of the FW Act for his involvement (within the meaning of s 550(1) of the FW Act) in Crystal Carwash's contravention recorded in declaration 1(a) above.
8. A penalty of \$5,000 is imposed on the second respondent, Mr Anthony Sahade, pursuant to s 546 of the FW Act for his involvement (within the meaning of s 550(1) of the FW Act) in Crystal Carwash's contravention recorded in declaration 1(b) above.
9. A penalty of \$5,000 is imposed on the third respondent, Mr Peter Khouri, pursuant to s 546 of the FW Act for his involvement (within the meaning of s 550(1) of the FW Act) in Crystal Carwash's contravention recorded in declaration 1(a) above.
10. A penalty of \$5,000 is imposed on the third respondent, Mr Peter Khouri, pursuant to s 546 of the FW Act for his involvement (within the meaning of s 550(1) of the FW Act) in Crystal Carwash's contravention recorded in declaration 1(b) above.
11. Pursuant to s 546(3) of the FW Act all pecuniary penalties imposed under the above orders be paid into the Consolidated Revenue Fund of the Commonwealth within twenty-eight days of the date of order for payment.
12. The balance of the statement of claim be dismissed.
13. The cross claim be dismissed.

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

**IN THE FEDERAL COURT OF AUSTRALIA  
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**NSD 1585 of 2012**

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**AND:               CRYSTAL CARWASH CAFE PTY LTD (ACN 060 916 770)  
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**PETER KHOURI  
Third Respondent**

**BADDINGTON PTY LTD (ACN 137 049 560)  
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Eleventh Respondent**

**PEPPER STONE PTY LTD (ACN 144 649 427)  
Twelfth Respondent**

**OAK MINK PTY LTD (ACN 145 471 941)  
Thirteenth Respondent**

**JUDGE:            BUCHANAN J**

**DATE: 7 AUGUST 2014**  
**PLACE: SYDNEY**

## **REASONS FOR JUDGMENT**

**BUCHANAN J:**

### **Procedural background**

1 The applicant, the Fair Work Ombudsman, is a statutory appointee under s 687 of the *Fair Work Act 2009* (Cth) (“the FW Act”) who has standing to commence proceedings under the FW Act. The Fair Work Ombudsman commenced these proceedings against the thirteen respondents by application and statement of claim on 15 October 2012.

2 The first respondent is a company that operates a car washing business across several sites in Sydney. The second respondent is the sole director and secretary of the first respondent. The third respondent is employed by the first respondent as a senior manager of its business. The fourth to thirteenth respondents are supposed labour hire companies which purported to employ the employees in the first respondent’s car washing business across different sites in Sydney.

### **The allegations against the respondents**

3 The statement of claim made a number of allegations. It primarily alleged that the first respondent contravened the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (“the Award”) by not paying its employees minimum rates of pay or overtime entitlements under the Award and that it failed to maintain proper records with respect to employee overtime. The allegations concerning the underpayment contraventions were that from the period 1 January 2010 to 18 September 2010 a significant number of the 359 employees employed by the first respondent were paid less than the applicable award wages and/or not paid overtime entitlements. These allegations presumed that the first respondent was the true employer of the carwash employees and alleged that the use of labour hire companies such as the fourth to thirteenth respondents was a sham. The respondents initially maintained that the labour hire companies were the true employers of the carwash employees and denied that the Award applied to them or their employees, contending that their activities were not covered under the terms of the Award.

4           The statement of claim contended also that the use of labour hire companies, such as the fourth to thirteenth respondents, constituted part of an avoidance system designed to hide the true identity of the employer of the carwash employees and avoid liability under workplace laws. The system was alleged to involve the setting up of labour hire companies at the direction of the second and third respondents, where an employee of the first respondent's carwash business who did not have any experience as a director of a company would purport to be the sole director of the labour hire company. On a weekly, fortnightly or monthly basis the labour hire company would pay the wages of its supposed employees and invoice the first respondent for roughly the same amount. The invoices were prepared by a representative of the first respondent. It is an agreed fact in these proceedings that the first respondent received all of the profits and takings generated by the operations of the labour hire entities. It was also alleged that certain labour hire entities would be liquidated from time to time and their supposed role as employers would be transferred to newly-created labour hire entities.

5           The respondents denied the allegation that the arrangements were a sham or otherwise uncommercial. However, it was later admitted by the respondents (for the purpose of these proceedings only) that the first respondent was the true employer of the employees.

6           That admission makes it unnecessary to examine the labour hire arrangements in any depth. However, in my view, it follows from the admission that the establishment of the supposed labour hire arrangements concealed the true position and rendered enforcement of award obligations more difficult. Those are matters which are relevant to an assessment of the seriousness of the conduct of the first, second and third respondents.

### **Application of the Award**

7           At the request of the parties I decided a preliminary question concerning whether the Award applied to the work done by persons in the first respondent's businesses. I decided that the Award did apply (*Fair Work Ombudsman v Crystal Carwash Cafe Pty Ltd* [2013] FCA 1396).

8           It was a feature of the parties' agreement to the determination of the preliminary question that the respondents accepted (subject to any ultimate rights of appeal) that if the Award applied (as I found it did) then the first respondent was in breach of the Award and the second and third respondents were "involved in" the breaches (FW Act, s 550).

### **The penalty proceedings**

9           In due course the parties reached a further agreed statement of facts for the penalty proceedings and provided written submissions. The parties also provided a statement identifying the facts that remained in dispute in the penalty proceedings. The remaining disputed facts relate to the respondents' use of purported labour hire entities, and the alleged knowledge of the second respondent of applicable workplace laws.

10           The parties made short oral submissions but, with one minor exception, they were content for the issue of penalty to be determined principally on the papers. The one exception related to the weight to be given to parts of an affidavit relied upon by the applicant in the penalty proceedings. That affidavit addressed some matters not covered by agreed facts.

### **Agreed facts in the penalty proceedings**

11           On the question of penalty, the parties provided agreed facts which included the following:

#### **PART A: CRYSTAL CARWASH**

...

2. Crystal Carwash conducts the business of operating eleven carwashes and cafes trading as "Crystal Carwash Cafe" (**Carwash Business**) at the eleven addresses listed below:
  - (a) 57 Curlewis Street, Bondi Beach, New South Wales (**Bondi Beach Site**);
  - (b) 460 Parramatta Road, Strathfield, New South Wales (**Strathfield Site**);
  - (c) 612 Military Road, Mosman, New South Wales (**Mosman Site**);
  - (d) 2 – 6 Bream Street, Coogee, New South Wales (**Coogee Site**);
  - (e) 559 Pittwater Road, Brookvale, New South Wales (**Brookvale Site**);
  - (f) 312 Victoria Road, Gladesville, New South Wales (**Gladesville Site**);
  - (g) 185 Pitt Street, Merrylands, New South Wales (**Merrylands Site**);
  - (h) 67 New South Head Road, Rushcutters Bay, New South Wales (**Rushcutters Bay Site**);
  - (i) 315 Victoria Avenue, Chatswood, New South Wales (**Chatswood**

**Site);**

- (j) 777 New South Head Road, Rose Bay, New South Wales (**Rose Bay Site**); and
  - (k) 75 Sailors Bay, Northbridge, New South Wales (**Northbridge Site**);
- (collectively, **Carwash Sites**).

...

#### **PART B: THE CARWASH ENTITIES**

- 4. In the period from 1 January 2010 to 18 September 2010 (**Underpayment Period**), the 359 individuals listed in **Annexure A** performed car washing and detailing duties for the Carwash Business at the Carwash Sites on either a full time or a part time basis (**Carwash Employees**).

...

#### **PART C: PURPORTED LABOUR HIRE ENTITIES**

- 6. In the period from approximately 1999 to approximately 2007, Crystal Carwash was directly employing individuals to work as car washers at some or all of the Carwash Sites.
- 7. In the period from 12 May 2009 to 28 July 2010, Crystal Carwash established the following ten labour hire companies to purport to directly employ individuals performing car washing work at the Carwash Sites:
  - (a) Baddington Pty Ltd (ACN 137 049 560) (**Baddington**);
  - (b) Seekton Pty Ltd (ACN 137 049 579) (**Seekton**);
  - (c) Ozrest Pty Ltd (ACN 137 219 820) (**Ozrest**);
  - (d) Schatry Pty Ltd (ACN 137 219 802) (**Schatry**);
  - (e) Cooljam Pty Ltd (ACN 141 762 352) (**Cooljam**);
  - (f) Ozrun Pty Ltd (ACN 141 762 389) (**Ozrun**);
  - (g) Tushar Investments Pty Ltd (ACN 141 758 045) (**Tushar Investments**);
  - (h) Lucky Horizons Pty Ltd (ACN 144 648 975) (**Lucky Horizons**);
  - (i) Pepper Stone Pty Ltd (ACN 144 649 427) (in administration) (**Pepper Stone**);
  - (j) Oak Mink Pty Ltd Pty Ltd [sic] (ACN 145 471 941) (**Oak Mink**); and

(collectively, **Labour Hire Entities**). The names of the Labour Hire Entities, their dates of incorporation, and other relevant details are set out in

**Annexure B.**

8. Throughout the Underpayment Period, Crystal Carwash claimed that the Labour Hire Entities, and not Crystal Carwash were the employers of the Carwash Employees.

**PART D: THE PURPORTED LABOUR HIRE ARRANGEMENTS**

9. Pursuant to the purported labour hire arrangements between Crystal Carwash and the Labour Hire Entities, the Labour Hire Entities contracted with Crystal Carwash to operate the Carwash Business at the Carwash Sites, including by employing employees to perform carwashing duties at the Carwash Sites.
10. On a weekly, fortnightly or monthly basis, a representative of Crystal Carwash prepared an invoice on behalf of each Labour Hire Entity in order for the invoice to be issued to Crystal Carwash.
11. Approximately one to two days after each Labour Hire Entity issued the invoices to Crystal Carwash, Crystal Carwash made a payment to each Labour Hire Entity which was approximately equal to the amount of total wages that each of the Labour Hire Entities paid to the Carwash Employees for that particular period.
12. Crystal Carwash received all of the profits and takings generated from the operation of the Carwash Business at each of the Carwash Sites.
13. On 22 July 2013, Crystal Carwash admitted, for the purposes of these proceedings only, that it was the true employer of the Carwash Employees.

**PART E: THE EMPLOYMENT ARRANGEMENTS**

14. The majority of the Carwash Employees were from a non-English speaking background.
15. The wages of the Carwash Employees was paid by one or more of the Labour Hire Entities.
16. During the Underpayment Period, the Labour Hire Entities paid the Carwash Employees either \$13, \$14 or \$15 per hour. ...
17. The wage rates referred to in paragraph 16 above were determined by Mr Sahade, Mr Khouri and/or other persons acting on the instructions or directions that were ultimately given by Mr Sahade or Mr Khouri.

**PART F: CONTRAVENTIONS**

...

20. Pursuant to subclause 33.4 and item A.2.5 of the Vehicle Modern Award, during the period from 1 January 2010 to 30 June 2010, the minimum rate of pay payable to the Carwash Employees was \$14.31.
21. Pursuant to subclause 33.4 and item A.2.4 of the Vehicle Modern Award, during the period from 1 July 2010 to 18 September 2010, the minimum rate

of pay payable to the Carwash Employees was \$15.00.

(Emphasis in original.)

12           The parties accepted that there were three contraventions arising out of three distinct courses of conduct by the first respondent and two contraventions arising out of the involvement of the second and third respondents in those courses of conduct. The contraventions by the first respondent were the failure to provide minimum rates of pay under the Award, the failure to pay overtime entitlements under the Award, and the failure to keep records with respect to employee overtime. The contraventions for the second and third respondents related to the failure by the first respondent to provide minimum rates of pay under the Award as well as the failure to pay overtime entitlements under the Award.

13           In addition to the agreed facts, the applicant provided an affidavit dealing with remaining facts in dispute, which principally related to the use of labour hire entities and to the past conduct of the second respondent and his alleged knowledge of applicable workplace laws at the time of the contraventions. The applicant through this evidence sought to show that there was a pattern of conduct by the respondents of attempting to avoid liabilities under workplace laws.

### **The applicable penalties**

14           Penalties for the underpayment contraventions are imposed under Item 2 of s 539(2) and s 546 of the FW Act. For the record keeping contravention, penalties are imposed under Item 29 of s 539(2) and s 546 of the FW Act.

15           The maximum total penalties under the FW Act for the contraventions by the first, second and third respondents are:

- a)       \$82,500 for the first respondent
- b)       \$13,200 for the second respondent
- c)       \$13,200 for the third respondent

16           As a body corporate, s 546(2)(b) of the FW Act applies to the first respondent. Section 546(2)(b) of the FW Act has the effect that the maximum penalty for a body corporate is five times the maximum for an individual, as recorded in column 4 of the relevant item in s 539(2) of the FW Act. The maximum penalties in respect of the first

respondent comprise \$33,000 for each of the two underpayment contraventions (FW Act, Item 2, s 539(2)) and \$16,500 for the record keeping contravention (FW Act, Item 29, s 539(2)). The maximum penalty for the three contraventions by the first respondent total \$82,500.

17 In respect of the second and third respondents, the penalties for each comprise the two underpayment contraventions, the maximum penalty for which is \$6,600 per contravention (FW Act, Item 2, s 539(2)). The maximum penalties for the two contraventions of each of the second and third respondents total \$13,200 for each respondent.

18 Based on the agreed and asserted facts the applicant submitted that a penalty close to the maximum allowed under the FW Act for such contraventions should be imposed.

19 The respondents contended that only modest penalties (i.e. low range) were required or justified in the present case. The respondents emphasised the need to fix penalties based on the circumstances of the present case (rather than for past conduct), criticised the applicant's additional affidavit evidence as hearsay and irrelevant (although without formal objection) and claimed the benefit of co-operation and proper admissions avoiding the need for a full, contested hearing.

20 In support of its contention for penalties near the maximum allowed (\$70,000, \$10,000 and \$10,000 respectively), the applicant provided the following summary in its written submissions:

5. The applicant submits that the penalties set out in the paragraph directly above are appropriate because of the following factors:
  - (a) the significant amount of the total underpayment over a short period of time;
  - (b) the serious nature of the contraventions, being the underpayment of minimum wages and award entitlements;
  - (c) the vulnerability of the employees in that they performed low skilled work and were from non-English speaking backgrounds;
  - (d) the respondents' pattern of conduct of systematically establishing companies in order to purport to employ employees which were then successively placed into liquidation with new companies being established to replace the liquidated entities;
  - (e) the lack of contrition displayed by the respondents;
  - (f) the fact that the respondents' conduct was deliberate;

- (g) the involvement of senior management;
- (h) the need for specific deterrence, given Crystal Carwash's history of non-compliance and that it continues to operate and employ staff; and
- (i) the need for general deterrence in the car washing industry.

21 I propose to briefly consider each of those matters.

### **Submissions 5(a) and (b) – Nature and extent of the contraventions**

22 The contraventions fall into two main categories. The first category relates to underpayment of minimum rates of pay and overtime under the Award. The second category concerns the failure of the respondents to keep proper records.

23 In respect of the underpayments it was agreed that the first respondent paid a significant number of its employees a flat hourly rate of \$13.00 per hour, which was below the Award rate. The flat rate was also applied to employees who worked overtime, but who were actually entitled to overtime rates of pay under the Award, which accounted for the majority of the total underpayment of \$177,077.59. The total underpayments comprised \$12,416.61 in underpayment of minimum Award rates and \$164,660.98 in underpayment of overtime entitlements under the Award.

24 The respondents' primary line of defence to minimise the significance of its conduct was to argue that it made good all underpayments before proceedings commenced. I give that circumstance little weight. The payments were only made after the applicant had commenced to investigate and when it must have been apparent that resistance was probably futile.

25 The record keeping contraventions relate to a failure to keep records for the employees of the first respondent, particularly in respect of overtime worked. It was submitted by the applicant that this may have hindered it from uncovering the full extent of underpayment of overtime entitlements.

26 I consider all the contraventions to be serious. The applicant is correct to point out that the underpayment of wages is particularly significant given the number of employees (359), their relatively low minimum rate of pay under the Award to begin with (\$14.31 per hour to 30 June 2010 and \$15.00 per hour to 18 September 2010), and the overall amount of

underpaid wages in a relatively short period (1 January 2010 to 18 September 2010). Additionally, the requirement under the FW Act to keep proper records serves to aid the statutory objectives of the FW Act and the functions of the Fair Work Ombudsman. Although it cannot be conclusively determined that properly kept records would have revealed further evidence of underpayment, it is nonetheless a significant factor in considering the appropriate penalty.

**Submission 5(c) – The vulnerability of the employees**

27           The applicant has sought to place particular emphasis on the fact that a majority of the carwash employees were low skilled and from non-English speaking backgrounds. Further, the applicant contended that the use of the labour hire entities such as the fourth to thirteenth respondents created additional confusion among the non-English speaking employees who may have been confused when attempting to enforce their employment entitlements by not being sure of who their true employer was. The fact that a majority of the employees came from non-English speaking backgrounds was admitted by the respondent and it did not offer any direct submission on this point in the penalty proceedings. It did not seek to contest the assertion made by the applicant that the business conducted by the second and third respondents is a sophisticated one. In my view, the employees concerned were particularly vulnerable given the asymmetrical bargaining power that existed between them and the respondents. The respondents took advantage of that circumstance.

28           That is a matter which is relevant to bring to account in considering the objective seriousness of the offences.

**Submission 5(d) – Pattern of conduct involving labour hire entities**

29           The applicant made the following submission regarding the respondents' pattern of conduct:

12.     In addition, the respondents had a pattern of conduct of:
  - (a)     establishing companies (**Carwash Entities**) which had directors who were not independent businessmen but drawn from the ranks of employees working as car washers;
  - (b)     purporting to enter into arrangements with the Carwash Entities whereby the Carwash Entities purported to operate the Carwash Business at the Carwash Sites, including by employing car washers to work for the Carwash Business;
  - (c)     successively placing the Carwash Entities into voluntary liquidation

or administration;

- (d) establishing new entities to replace the Carwash Entities to operate the Carwash Business at the Carwash Sites, including by transferring the employment of car washers to the replacement Carwash Entity.

(Footnotes omitted)

- 13. Since 2007, the respondents have established at least 24 of these Carwash Entities and at least 13 Carwash Entities have been placed in voluntary liquidation or administration, by one or more of the following people or entities who were connected to the Carwash Business, including Anthony Sahade, his wife, Rita Sahade, Crystal Carwash's legal representatives, Crystal Carwash's accountants, the Carwash Entities or directors of the Carwash Entities.

30 As previously mentioned, an additional affidavit was filed by the applicant to support these, and other, contentions. Counsel for the respondents submitted that very little weight should be given to the affidavit which contained a good deal of hearsay material.

31 The affidavit referred to a number of complaints contained in earlier file notes taken by employees of the Fair Work Ombudsman and its predecessor organisations. It also referred to documents used in previous court cases involving the second respondent concerning similar complaints.

32 Based on the affidavit, and the history of complaints against the first and second respondents, the applicant submitted that a heavy penalty was called for.

33 One difficulty about this material was that the evidence of previous complaints was obviously hearsay, and untested. I am not able to give this material any particular weight. In any event, its possible prejudice outweighs any probative value it might have (*Evidence Act 1995* (Cth), s 135).

34 Material referring to the outcome of earlier proceedings in a court, adverse to the respondents, is relevant to dispel any claim to a previously unblemished record, but no such claim was made by the respondents in the present case.

35 However, the business practice revealed directly in the present case of setting up supposed labour hire companies (to which the affidavit material gave additional colour, but not extra weight) deserves censure and reflection in the penalties I fix. It can have no legitimate purpose (at least none was suggested) and is an aggravating aspect for which each of the first, second and third respondents must bear responsibility.

**Submission 5(e) – Co-operation and contrition**

36           The respondents submitted that their co-operation in the proceedings has saved the Court time and resources, which should be taken into account to mitigate any penalty. I give little weight to this submission. The conduct of the respondents in agreeing facts in these proceedings and not requiring a trial was clearly also in their interest. It was not done purely for the purpose of facilitating the resolution of these proceedings or to rectify the contraventions but also to help the respondents avoid the risks and further costs associated with a trial.

37           I note the parties' explicit agreement that the respondents were unco-operative during the Fair Work Ombudsman investigation. According to the agreed statement of facts, the respondents denied access to premises and refused to produce certain records sought by Fair Work Inspectors pursuant to a Notice to Produce issued under s 712 of the FW Act. The second respondent also declined to participate in a Record of Interview with a Fair Work Inspector.

38           I do not overlook the fact that the respondents have contributed to the avoidance of the public (as well as private) inconvenience of a potentially lengthy hearing. However, I see no basis upon which to discount from any penalty otherwise appropriate. In my view, the respondents have acted principally from self-interest rather than from any particular desire to assist the administration of justice. I see no evidence of contrition.

**Submission 5(f) – Deliberateness of the contraventions**

39           The applicant contends the underpayment contraventions were deliberate and should be considered more serious as a result. No answering submissions were made on this point by the respondents.

40           On the basis of the agreed facts I am satisfied that the conduct of the first, second and third respondents to make payment of a flat rate amount to employees regardless of Award entitlements, particularly overtime entitlements, was deliberate and calculated.

**Submission 5(g) – Involvement of senior management**

41           Based on the statement of agreed facts the applicant made the following submissions in relation to the second and third respondents:

8.       Mr Sahade is the sole director and secretary of Crystal Carwash. Mr Sahade is responsible for the overall operation, directions and control of Crystal

Carwash. Mr Sahade was a person with responsibility for setting the terms and conditions of the employment of the Carwash Employees.

9. Mr Khouri was employed by Crystal Carwash as a manager and along with Mr Sahade, also had responsibility for setting the terms and conditions of employment of the Carwash Employees.

42 I accept those submissions. The second and third respondents were closely involved in the creation of the labour hire entities and the subsequent underpayments that took place. The third respondent was a director of one of the liquidated entities that previously purported to employ the carwash employees.

43 In *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408, I said at [8]:

[t]he present legislative scheme fixes quite different (and much lower) penalties for individuals than for corporations. The culpability of each respondent must be assessed individually and in the context set by the maximum penalty prescribed in each case. ...

44 In the present case, I am satisfied that each of the second and third respondents bear direct and major responsibility for the breaches by the first respondent. I see no basis upon which to extend any particular lenience to either of them.

#### **Submission 5(h) and (i) – Specific and general deterrence**

45 Considering all the circumstances, the present is a case where objectives of general and specific deterrence should play a significant role. The particular contraventions and the circumstances surrounding the respondents' role in them are serious matters.

46 I have accepted that the contraventions were deliberate and part of a pattern of conduct designed to avoid liability under workplace laws. I have also accepted that the respondents have shown a lack of remorse or contrition.

47 On the question of general deterrence I accept the applicant's submission that the penalties should mark the Court's disapproval of the respondents' conduct and endeavour to ensure compliance with the law and deter non-compliance.

48 In the present case, I accept that individual penalties should not be disproportionate to an offender's actual conduct. That said, in my view the present case is one in which specific deterrence is directly relevant. A penalty should be fixed with a view to discouraging the

respondents from further conduct of the same kind, so far as the available range of penalties might do that.

### **The appropriate penalty**

49 I reject the notion that contraventions and conduct of the nature that took place in this case are appropriate for a lower range penalty. The offences are serious ones and a penalty should be fixed which marks the Court's disapproval.

50 I accept the submission of the applicant that penalties approaching the maximum should be imposed. I consider the specific penalties suggested by the applicant to be ones which are prima facie appropriate in the present case. Having considered the respondents' submissions, I see no basis to reduce the penalties proposed by the applicant. Those proposed penalties do not exceed those which I would, in any event, have fixed unassisted by the applicant's proposals. I have taken into account the totality principle and see no need to adjust the penalties by reference to it.

51 I note that the parties have each made specific submissions about civil penalties. I have found those submissions to be of assistance (see also *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2014] FCA 336 at [114]-[152]; *Tax Practitioners Board v Su* [2014] FCA 731).

### **Orders**

52 I will make the declarations concerning the contraventions sought by the applicant (which were accepted by the respondents) and will order payment of the following penalties:

1. First respondent: \$30,000 for each of the two underpayment contraventions (FW Act, Item 2, s 539(2) and s 546(2)(b)); \$10,000 for the record keeping contravention (FW Act, Item 29, s 539(2) and s 546(2)(b)) – total \$70,000.
2. Second respondent: \$5,000 for each of the two underpayment contraventions (FW Act, Item 2, s 539(2)) – total \$10,000.
3. Third respondent: \$5,000 for each of the two underpayment contraventions (FW Act, Item 2, s 539(2)) – total \$10,000.

53 As the proceedings were brought under the FW Act, there would normally be no order as to costs except in the particular circumstances identified in s 570 of the FW Act. No party

suggested that any order about costs should be made and accordingly there will be no such order.

54           The parties agreed that I might grant the applicant liberty to apply on seven days notice in the event that any of the orders that were made were not complied with. I do not regard such an order to be necessary. Non-compliance with any of the orders would be a serious matter for which other procedures would be available.

I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated:     7 August 2014