FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v GRANDCITY (GW) TRAVEL & TOUR PTY LTD & ANOR [2015] FCCA 1759

Catchwords:
INDUSTRIAL LAW – Penalty hearing – contraventions of *Fair Work Act* – sham contracting – underpayment of wages and superannuation – failure to keep records and provide pay slips – second respondent involved in contraventions – statement of agreed facts – appropriate penalty.

Legislation:
Fair Work Act 2009 (Cth), ss.12, 45, 323, 536, 539, 545, 546, 546, 547, 557, 701
Evidence Act 1995 (Cth), s.191
Crimes Act 1914 (Cth), s.4AA

Cases cited:
Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCAFC 59.
Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd [2015] FCA 492
Comcare v Transpacific Industries Pty Ltd [2015] FCA 500
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Kelly v Fitzpatrick (2007) 166 IR 14
Australian Ophthalmic Supplies Pty Ltd v Mc Alary-Smith [2008] FCAFC 8
Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor [2010] FMCA 599
Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (No 2) [2013] FCA 582
Australian Building and Construction Commissioner v CFMEU (No 2) [2010] FCA 977
Workplace Ombudsman v Saya Cleaning Pty Ltd [2009] FMCA 38
Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258
Fair Work Ombudsman v Orwill Pty Ltd & Anor [2011] FMCA 730
Fair Work Ombudsman v Happy Cabby Pty Ltd & Anor [2013] FCCA 397
Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union (2008) 171 FCR 357
Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2) [2012] FCA 557
Australian Building and Construction Commissioner v Inner Strength Steel Fixing Pty Ltd [2012] FCA 499
Fair Work Ombudsman v Crocmedia Pty Ltd [2015] FCCA 140
Fair Work Ombudsman v AJR Nominees Pty Ltd (No 2) [2014] FCA 128

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	GRANDCITY (GW) TRAVEL & TOUR PTY LTD
Second Respondent:	NA XU
File Number:	(P)MLG 1181 of 2014
Judgment of:	Judge O'Sullivan
Hearing date:	15 June 2015
Date of Last Submission:	15 June 2015
Delivered at:	Melbourne
Delivered on:	26 June 2015

REPRESENTATION

Counsel for the Applicant:	Ms Forsyth
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the First Respondent:	Mr Rinaldi
Solicitors for the First Respondent:	AHL Legal
Counsel for the Second Respondents:	Mr Rinaldi
Solicitors for the Second Respondents:	AHL Legal

ORDERS

THE COURT DECLARES THAT:

(1) The First Respondent contravened:

(a) subsection 357(1) of the Fair Work Act 2009 (Cth) (FW Act) by representing to Ms Kate Zhang (Employee) that the contract of employment under which she was employed by the First Respondent was a contract for services under which the Employee performed work as an independent contractor;

(b) section 45 of the FW Act by failing to pay the Employee at least the applicable minimum hourly rate of pay during the period from on or about 17 January 2013 until on or about 5 September 2013 (Employment Period), in contravention of clauses A.2.5 and A.2.6 of Schedule A of the General Retail Industry Award 2010 (Award);

(c) section 45 of the FW Act by failing to pay the Employee a casual loading during the Employment Period, in contravention of clauses A.5.4 and A.6.4 of Schedule A of the Award;

(d) section 45 of the FW Act by failing to pay the Employee a loading for Saturday work during the Employment Period, in contravention of clause A.7.3 of Schedule A of the Award;

(e) section 45 of the FW Act by failing to pay the Employee a loading for Sunday work during the Employment Period, in contravention of clause A.7.3 of Schedule A of the Award;

(f) section 45 of the FW Act by failing to pay the Employee a loading for Public Holiday work during the Employment Period, in contravention of clause A.7.3 of Schedule A of the Award;

(g) section 45 of the FW Act by failing to make superannuation contributions to a superannuation fund for the benefit of the Employee as would avoid the First Respondent being required to pay the superannuation guarantee charge under superannuation legislation, in contravention of clause 22 of the Award;

(h) subsection 536(1) of the FW Act by failing to provide the Employee with payslips within one working day of payment with respect to work performed by the Employee;

(i) subsection 535(1) of the FW Act by failing to make and keep a record containing the following details:

(i) the employer's name, in contravention of regulation 3.32 of the Fair Work Regulations 2009 (Cth) (FW Regulations);

(ii) the employer's Australian Business Number, in contravention of regulation 3.32 of the FW Regulations; and

(iii) the rate of remuneration paid to the Employee, in contravention of regulation 3.33 of the FW Regulations.

(2) The Second Respondent was involved in each of the contraventions by the First Respondent set out in paragraph 1(a) to (h) above pursuant to section 550(1) of the FW Act.

THE COURT ORDERS THAT:

(3) Pursuant to section 546(1) of the FW Act, the First Respondent pay $192,840 in respect of the contraventions set out in the Declarations in 1(a) to 1(i) above.

(4) Pursuant to section 546(1) of the FW Act, the Second Respondent pay $35,496 in respect of the contraventions set out in the Declarations in 1(a) to 1(h) above.

(5) Pursuant to subsection 546(3)(a) of the FW Act, the First and Second Respondents pay their respective penalty amounts to the Commonwealth, within 28 days of this order.

(6) An order that the Applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 1181 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

GRANDCITY (GW) TRAVEL & TOUR PTY LTD
(ACN 160 584 038)
First Respondent

NA XU
Second Respondent

REASONS FOR JUDGMENT

1. In 2013 workers at a travel agency in suburban Melbourne received a notice which said;

> *"…Remember in this commercial world, only the fit/the strongest/the most skillful*(sic)*/ most knowledgeable/ most diligent can survive. Recently you might have seen people coming into our office to submit resumes in person. Please be altert*(sic)*, those are all the potential candidates that can replace one of you…*
>
> *So please stop bargaining for a better shift at the cost of hurting the other consultants, stop complaining about your wages. Really, this is not a charity organisation, this is a for profit company whereas the boss pays you to do the work and not to negotiate any work terms and conditions…When you are drowned in this world full of Chinese speaking people, please open your eyes to see what's happening in the English speaking world."*[1]

This case concerns one of the workers who received that notice.

[1] See annexure K2-1 to Zhang affidavit.

2. Before the Court are proceedings commenced by the Fair Work Ombudsman ("the applicant") against Grandcity (GW) Travel & Tour Pty Ltd ("the first respondent") and Na Xu ("the second respondent") for contraventions of the *Fair Work Act 2009* (Cth) ("the FW Act") alleged to have occurred between January and September 2013.

3. The respondents subsequently made full admissions in relation to the contraventions of the FW Act and as a result the proceedings now concern the appropriate penalty that should be imposed on each of the respondents by the Court for the admitted contraventions.

4. These proceedings were commenced by application filed on 16 June 2014. On 9 July 2014 orders were made vacating the directions hearing, providing for the respondents to each file a defence, referring the matter to a mediation and adjourning the matter to a further directions hearing on 27 October 2014.

5. Following a mediation, on 6 October 2014 orders were made for the parties to file a Statement of Agreed Facts, directions for the filing of material and the matter was listed for a penalty hearing on 15 June 2015.

6. The timetable for filing material was adjusted by consent on 26 November 2014 and on 10 December 2014 the parties filed a Statement of Agreed Facts ("S.O.A.F") which is Annexure A to these reasons.[2] Further adjustments were made to the timetable by consent on 23 February 2015.

7. At the penalty hearing, the applicant was represented by Ms Forsyth of Counsel and Mr Rinaldi of Counsel appeared on behalf of the respondents.

Background

8. The following is drawn from the S.O.A.F. filed by the parties and summarises the background to the admitted contraventions of the FW Act.

9. The applicant is a Fair Work Inspector by force of section 701 of the FW Act and can apply for orders in respect of contraventions of civil remedy provisions under the FW Act.

[2] See s.191 *Evidence Act 1995* (Cth).

10. The first respondent operates a retail travel agency business at 70 Kingsway Glen Waverley. The first respondent arranges and sells airline flights, accommodation and holiday tours. The second respondent is a director of the first respondent and responsible for the overall direction, management and supervision of the business. Ms Kate Zhang was employed by the first respondent from January until September 2013.

11. Ms Zhang was 24 years of age at the time she commenced employment. Ms Zhang who is from a non-English speaking background, worked as a travel consultant for the first respondent.

12. Ms Zhang was notified of her rostered hours by email sent by her manager to all of the travel consultants working for the first respondent.

13. Ms Zhang performed work for the first respondent on a casual basis, with weekly hours, working days and pattern of work varying from week to week.

14. The first respondent required Ms Zhang to sign a contractor agreement and paid her flat hourly rates between $9 and $11 for the work she performed between January and September 2013.

15. Ms Zhang was in fact and in law an employee for the first respondent and her employment was covered by the *General Retail Industry Award 2010.*

16. Ms Zhang was underpaid a total of $16,756 over an eight-month period as a result of being underpaid her minimum hourly rate, casual loadings and weekend and public holiday penalty rates. There are also breaches of superannuation, record keeping and pay slip obligations by the first respondent.

17. The applicant had received previous employee complaints in relation to businesses operated by the second respondent who in this case was involved in the contraventions by the first respondent.

The hearing

18. These proceedings had been listed for penalty hearing before the decision of the Full Court in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union*

[2015] FCAFC 59. That decision and its impact on civil penalty cases has itself been considered in subsequent decisions of judges of the Federal Court at first instance in *Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd* [2015] FCA 492 per Flick J at paragraphs [19] to [24] and [30] to [31] and also *Comcare v Transpacific Industries Pty Ltd* [2015] FCA 500 per Barker J at [225] to [234].

19. In light of the decision of the Full Court the applicant expressly disclaimed reliance on identified parts of the submissions that had already been made and submitted to the extent the respondents' submissions contained similar material they should also be disregarded. The respondents didn't take issue with this.

20. Subject to the issue referred to above the applicant relied on the following documents:

    a) the applicant's submissions dated 16 March 2015;

    b) the applicant's submissions in reply dated 8 May 2015;

    c) affidavit of Ms Zhang sworn 6 March 2015;

    d) affidavit of Mr Stella affirmed 12 March 2015;

    e) statement of agreed facts filed by the applicant dated 10 December 2014; and

    f) minute of proposed orders sought dated June 2015.

21. Subject to the issue referred to earlier the respondent relied on the following document:

    a) the respondents' submissions dated 13 April 2015.

22. At the penalty hearing Mr Stella was cross examined and both parties had the opportunity to make submissions on what penalties ought be imposed on the respondents for the admitted contraventions of the FW Act.

The legal framework

23. These proceedings concern admitted contraventions of the FW Act which are contraventions of civil remedy provisions of the FW Act.

24. The applicant is a Fair Work Inspector pursuant to s.701 of the FW Act and a person with standing under s.539 of the FW Act to commence these proceedings.

25. Section 546 of the FW Act enables a Court to impose a penalty upon a person who has contravened a civil remedy provision.

26. The maximum penalties with respect to the admitted sham contracting and underpayment contraventions is $51,000 for the first respondent and $10,200 for the second respondent referred to in the S.O.A.F. The maximum penalties with respect to the admitted record keeping and payslip breaches are $25,500 for the first respondent and $5,100 for the second respondent.

27. Section 12 of the FW Act provides that *"penalty unit"* has the same meaning as in the *Crimes Act 1914* (Cth). Section 4AA of the *Crimes Act 1914* defined *"penalty unit"* to be $170 at the time the admitted contraventions occurred.[3]

28. Section 557(1) of the FW Act provides that where two or more breaches are committed by the same person, the Court should consider whether the breaches arose out of a course of conduct by the person, such as to be taken to constitute a single breach of the term.

Approach to penalty proceedings

29. The factors which may be taken into account in the assessment of penalty are well established. The factors relevant to the imposition of a penalty were summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 [26]-[59], as follows:

> *"a. the nature and extent of the conduct which led to the breaches;*

[3] See *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth) which amended the value of a penalty unit for offences after 28 December 2012.

b. the circumstances in which that conduct took place;

c. the nature and extent of any loss or damage sustained as a result of the breaches;

d. whether there had been similar previous conduct by the respondent;

e. whether the breaches were properly distinct or arose out of the one course of conduct;

f. the size of the business enterprise involved;

g. whether or not the breaches were deliberate;

h. whether senior management was involved in the breaches;

i. whether the party committing the breach had exhibited contrition;

j. whether the party committing the breach had taken corrective action;

k. whether the party committing the breach had cooperated with the enforcement authorities;

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

m. the need for specific and general deterrence."

30. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14. In *Australian Ophthalmic Supplies Pty Ltd v Mc Alary-Smith* [2008] FCAFC 8 Buchanan J after referring to the decision in *Kelly v Fitzpatrick* (supra) said at [9]:

> *"9. Checklists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations…"*

31. In *Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor* [2010] FMCA 599 Driver FM summarised the approach the Court should follow in these sorts of proceedings at [22] to [26] as follows:

> *"22. The first step for the Court is to identify the separate contraventions involved. Each breach of each separate obligation found in the AFPCS, the NAPSA is a separate contravention of a term of an applicable provision for the purposes of s.719.*[4]
>
> *23. However, s.719(2) provides for treating multiple breaches, involved in a course of conduct, as a single breach.*
>
> *24. Secondly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the respondent did.*[5] *This task is distinct from and in addition to the final application of the "totality principle".*[6]
>
> *25. Thirdly, the Court will then consider an appropriate penalty to impose in respect of each course of conduct, having regard to all of the circumstances of the case.*
>
> *26. Fourthly and finally, having fixed an appropriate penalty for each group of contraventions or course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches.*[7] *The Court should apply an "instinctive synthesis" in making this assessment.*[8] *This is what is known as an application of the 'totality principle'."*

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4 *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J).

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

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

7 See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (*Kelly*); *Merringtons*, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).

8 *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).

Admitted contraventions

32. The S.O.A.F. set out the admitted contraventions, which include;

a) subsection 357(1) of the FW Act by representing to Ms Zhang that the contract of employment under which she was employed by the First Respondent was a contract for services under which Ms Zhang performed work as an independent contractor;

b) section 45 of the FW Act by failing to pay Ms Zhang at least the applicable minimum hourly rate of pay;

c) section 45 of the FW Act by failing to pay Ms Zhang a casual loading;

d) section 45 of the FW Act by failing to pay Ms Zhang a loading for Saturday work;

e) section 45 of the FW Act by failing to pay Ms Zhang a loading for Sunday work;

f) section 45 of the FW Act by failing to pay Ms Zhang a loading for Public Holiday work;

g) section 45 of the FW Act by failing to make superannuation contributions;

h) subsection 536(1) of the FW Act by failing to provide Ms Zhang with payslips;

i) subsection 535(1) of the FW Act by failing to make and keep records.

33. The applicant properly accepts that the respondents are entitled to the benefit of section 557 of the FW Act in relation to repeated contraventions of each separate provision set out above.

34. Having regard to the principles with respect to grouping multiple contraventions that arise out of a single course of conduct, I accept there are eight groups of contraventions for the first respondent and seven groups of contraventions for the second respondent.

35. Accordingly, the maximum penalty for the admitted contraventions is $357,000 with respect to the first respondent and $66,300 with respect to the second respondent.

Considerations

36. In submissions upon which it relied the applicant addressed the Court on the relevant considerations when fixing penalties. It was submitted in this case that they include:

a) the nature and extent of the offending conduct;

b) the circumstances in which the conduct took place;

c) the nature and extent of any loss or damage;

d) any similar previous conduct;

e) whether the breaches were properly distinct or arose out of one course of conduct;

f) the size of the respondent's business;

g) the deliberateness of the breach;

h) the involvement of senior management;

i) the respondents contrition, corrective action and cooperation with the enforcement authorities;

j) ensuring compliance with minimum standards; and

k) deterrence.

The nature and extent of the offending conduct

37. The applicant submitted:

> *"26. The Admitted Contraventions represent a failure to provide Ms Zhang with basic and important conditions and entitlements under the FW Act- the right to be properly engaged as an employee and paid in accordance with minimum award conditions. The purpose of the FW Act is to*

provide a safety net of minimum entitlements for employees. The legislation is also designed to provide an 'even playing field' for all employers with regard to employment costs. Contravention of these fundamental entitlements by engaging Ms Zhang as a contractor and failing to pay her in accordance with minimum award safety net entitlements undermines the workplace relations regime as a whole and displays a disregard for an employer's statutory obligations.

27. *It is clear on the evidence that Ms Zhang was an employee and not an independent contractor. Ms Zhang had no control over her working hours and the work she performed. She did not run her own business, was unable to delegate work and worked under strict control and direction from her managers. She worked alongside, and performed the same duties as, travel consultants engaged as employees. This is not a case where the distinction between contractor and employee is unclear or finely balanced.*

28. *The First Respondent has also contravened record keeping obligations under the FW Act, and failed to provide Ms Zhang with payslips. The keeping of proper employment records is of paramount importance to the capacity of the regulator to monitor and enforce compliance with minimum employment standards. The First Respondent's failure to properly record the name of the employing entity, its Australian Business Number, and the rate of remuneration paid to Ms Zhang, made it more difficult for the Applicant to identify contraventions and calculate underpayments.*

29. *Whilst the Admitted Contraventions relate to one employee, the evidence suggests that the engagement of Ms Zhang as an independent contractor was part of a more widespread business practice of the Second Respondent across the Grandcity Group. The Second Respondent has admitted that she engages some travel consultants as independent contractors and some as employees, and that they perform similar duties.*[9] *She has admitted that she knows the difference between an independent contractor and an employee. She has been involved in two previous investigations by the Applicant relating to travel consultants engaged as independent contractors by a different entity in the Grandcity Group.*[10]

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[9] SOAF at paragraph 95(c).

[10] Stella affidavit at paragraphs 26- 30 and 34-37.

30. The evidence also shows that the Second Respondent effectively runs the various travel agency branches as one business, despite the fact that the different agencies are owned by different corporate entities. For example, when Ms Zhang met with the Second Respondent for her job interview, she attended the Grandcity travel agency in the QV Building in Lonsdale Street.[11] *In addition, while Ms Zhang primarily worked at the Glen Waverley branch of Grandcity Travel & Tours operated by the First Respondent, she also worked some shifts at the Box Hill branch, which is operated by Grandcity (Australia) Pty Ltd (**Grandcity Australia**)*[12].

31. There is no evidence before the court to suggest that the First or Second Respondents have taken steps to review or modify their employment practices since these proceedings were commenced.

32. The total underpayment to Ms Zhang as a result of the contraventions was $16,756.47 in wages and $2,810.66. This may at first glance appear to be a relatively moderate amount in the context of other matters which come before this Court. However, it is important to consider this amount in the context of the relatively short period of employment (less than eight months) and also the total amount actually paid to Ms Zhang during the Employment Period, which was $14,186.04. Considered in this context, it is apparent that the underpayment was significant in that Ms Zhang was actually paid less than half of her total entitlements.

33. The minimum rates of pay contravention arose as a result of the First Respondent paying Ms Zhang flat hourly rates of pay of $9.05 to $11.40 per hour, which were substantially below both the minimum rate prescribed by the Award of between $17.40-$17.92 per hour during the Employment Period, and also below the applicable casual hourly rate of pay that Ms Zhang was entitled to[13]*."*

38. The respondent's submitted:

"10. The respondents accept that the contraventions are of a serious nature and concern a failure to provide Ms Zhang with important terms and conditions of employment in

[11] Zhang Affidavit, paragraph 14.

[12] Zhang Affidavit, paragraph 27.

[13] The applicable casual hourly rate of pay was $21.40 during the period from 17 January until 7 July 2014 and $21.70 during the period from 8 July 2014 until 5 September 2013.

*accordance with her entitlements under the General Retail Industry Award 2010 (**the Award**).*

11. *However, the respondents note that the contraventions involve a single employee of the first respondent. No other employee is the subject of this proceeding. Nor has any other proceeding been brought by the applicant against either of the respondents (or any other company within the Grandcity group of companies) in respect of any other employee currently employed, or employed during Ms Zhang's employment.*

12. *The submission at paragraph 29 of the applicant's Submission that "the engagement of Ms Zhang as an independent contractor was part of a more widespread business practice of the second respondent across the Grandcity Group" should be rejected by the Court, as:*

    (a) *the alleged "practice" within the Grandcity group of companies is irrelevant. Of the various companies within the Grandcity group, proceedings have only been brought against one company – the first respondent;*

    (b) *the alleged "practice" is based upon this proceeding and two previous investigations by the applicant. In respect of the first investigation, concerning a Mr Gao Wa Cheng and Grandcity (Australia) Travel and Tours Pty Ltd (which is not a party to this proceeding), that company and the second respondent received a caution.*[14] *In respect of the second investigation, concerning a Mr Clement Yu, on the material before the Court, the investigation was brief and the result of the investigation is unknown.*[15] *Given that the Grandcity group of companies operate eight travel agencies in Australia, this proceeding and two other investigations does not support a finding of a "widespread business practice"; and*

    (c) *the second respondents' admission that she has engaged some travel consultants as independent contractors is unremarkable. Those consultants may, for all the Court knows, be properly regarded at law as independent contractors. In the absence of any*

[14] Stella affidavit, pars. 26-32.
[15] Stella affidavit, pars. 34-37.

material before the Court about the circumstances of those engagements, the Court should not make the findings sought by the applicant. The fact that Ms Zhang was engaged as an independent contractor when in fact, at law, she was an employee, does not mean that other independent contractors engaged by the second respondent were also employees.

13. *The purpose of the applicant's submission at paragraph 30 of the applicant's Submission regarding the second respondent allegedly running the various travel agency branches as "one business" is unclear. It is of no relevance or assistance to the Court. Across the various travel agencies operated by the Grandcity group of companies, there have been three investigations, one resulting in a caution and one resulting in this proceeding.*

14. *The respondents acknowledge that the total underpayment to Ms Zhang was a substantial amount. It also notes that shortly after they agreed to enter into the SOAF, the total underpayments were rectified.*[16] *"*

39. In submissions in reply the applicant submitted:

*"12. The First Submission sets out the evidence that establishes that the engagement of Ms Zhang as an independent contractor was part of a more widespread business practice of the Second Respondent across the Grandcity Travel & Tours business (**Grandcity Group**).*[17] *This includes admissions made by the Second Respondent about her use of contractors.*[18] *The Respondents' Submission attempts to diminish the significance of the admission made by the Second Respondent that she engaged some travel consultants as employees and some as independent contractors, and that they perform similar duties. The Respondents submit that these other consultants "may be properly regarded at law as independent contractors" but have not filed any evidence to support this supposition. Furthermore, the Second Respondent's justification for engaging one of her workers as an independent contractor was the high cost of engaging employees and the lack of experience of the worker*[19]*. These are not factors which point to a genuine independent*

[16] SOAF paragraph 89.
[17] First Submission, paragraphs 29-30.
[18] SOAF paragraph 94.
[19] Stella Affidavit, paragraph 30(g).

> *contracting arrangement.*[20] *In the absence of any evidence produced by the Respondents to suggest that genuine independent contractor arrangements existed, and taking into account the evidence that is before the Court, and in particular the nature of the work performed and the statements made by the Second Respondent, the Court is entitled to draw an inference that the Second Respondent engaged in a practice of engaging employees as independent contractors that was more widespread than the Admitted Contraventions relating to Ms Zhang."*

40. In submissions before the Court, Counsel for the respondents sought to characterise the conduct behind the admitted contraventions as "*a relatively low key one off incident with one employee*".

41. The most egregious offending conduct in this case involved the sham contracting. The results of sham contracting can be far-reaching. As Barnes FM (as Her Honour then was) said in *Darlaston v Risetop Construction Pty Ltd* [2011] FMCA 220 at [48]:

> *"The indirect avoidance of entitlements by sham contracting cannot be measured in monetary terms. As pointed out, a contractor does not have recourse to paid sick leave. It can be inferred that such a person may be more likely to work when not well than an employee who has the protection of regulated standards of paid sick leave. Matters such as maximum weekly hours, requests for flexible working arrangements, parental leave and related entitlements, annual leave, personal carers' leave and compassionate leave, community service leave, long service leave, public holidays and notice of termination and redundancy pay may be similarly "devalued" and even effectively negated by such sham contractual arrangements. The Award which would have applied to the workers as employees is in evidence before the court. It contains such protections. It may be that other rights that employees have or may have recourse to (such as protections for unfair dismissal) are negated and avoided by such arrangements…"*

42. As was said in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (No 2) [2013] FCA 582 at [1.1.2]:

[20] The legal test for whether a worker is properly characterised at common law as an employee or an independent contractor is summarised in *FWO v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37 per North and Bromberg JJ at [176]-[186]. Recent case law has emphasised that the focus of this test is whether the worker is carrying on a business of their own.

"The vice of this conduct is that it unfairly deprives workers of the benefits of employment and undermines the effective operation of the system established by the Fair Work Act 2009 (Cth) (the FW Act) and other industrial legislation. Additionally, it arguably distorts competition to the disadvantage of employers who honour their statutory obligations. It constitutes an offence under the FW Act."

Circumstances in which the conduct took place

43. The applicant submitted:

> *"34. Ms Zhang was a vulnerable young worker from a non-English speaking background. She migrated to Australia in 2006 when she was 17 years of age. She learned English as a second language on her arrival in Australia. She was 24 years of age when she commenced working for the First Respondent. The evidence indicates that she had limited knowledge of Australian workplace laws. For example, Ms Zhang's evidence is that when she was told by the Second Respondent that she would need to provide an ABN she did not know what this was and thought that it was the same as a tax file number.*[21]
>
> *35. In contrast to the vulnerability of Ms Zhang, the Second Respondent is an experienced businessperson who operates a large travel and tour company and has been an employer in Australia for at least 20 years. The Second Respondent has admitted that she was the person responsible for making decisions on behalf of the First Respondent about whether workers would be engaged as employees or independent contractors and the terms and conditions that would apply and determining the time, method and manner of payment to persons engaged to perform work for the First Respondent.*[22] *The evidence also shows that the Second Respondent:*
>
> *(a) knew that the Award applied to employees engaged to perform sales work in travel agencies*[23]*;*
>
> *(b) knew that the minimum base rate of pay under the Award is approximately $18 per hour*[24]

[21] Zhang Affidavit at paragraph 16.

[22] SOAF paragraph 80.

[23] SOAF paragraph 85.

(c) does not assert that she did not know that the contract with Ms Zhang was a contract of employment[25];

(d) thinks that the minimum rate of pay in Australia is "crazy"[26]; and

(e) paid Ms Zhang a little bit more than 50% of the minimum wage of $18 per hour.

36. Notwithstanding her significant experience operating a business and employing workers in Australia, and her admitted knowledge of the workplace relations regime, the Second Respondent herself made the representations to Ms Zhang that she was an independent contractor and determined that the First Respondent would pay Ms Zhang a flat hourly rate of pay of between $9 and $11.40.

37. This disparity in bargaining positions between the Respondents and Ms Zhang was further compounded by the workplace environment, in which workers were under constant video surveillance and were actively discouraged from raising queries or concerns about the conditions of employment. For example, Ms Zhang's evidence is that she was denied the opportunity to seek advice about the Contractor Agreement before signing it, and she was not provided with a copy of the document. Furthermore, the email sent to all of the travel consultants at the Glen Waverley branch in August 2013, entitled "FW: Regarding today's important notice from Sheena"[27] advised the workers to "stop bargaining for a better shift, stop complaining about your wages… the boss pays you to do the work and not to negotiate any work terms and conditions".

38. Ms Zhang's evidence is that she was scared about asking the Second Respondent to be paid more and didn't do so because she thought it would impact on her ongoing employment.[28]

39. It is submitted that these circumstances in which the conduct took place is an aggravating factor with respect to penalty."

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[24] SOAF paragraph 85.

[25] SOAF paragraph 84.

[26] Stella Affidavit at paragraph 16(c).

[27] Zhang Affidavit, Annexure KZ-1.

[28] Zhang Affidavit paragraph 37.

44. The respondent submitted:

> *"15. The respondents acknowledge that Ms Zhang is of a non-English speaking background. However, it notes that the first respondent is a Chinese travel agent.*[29] *The Court may infer that the second respondent, given her name and the fact that she was born in Guangzhou, China, is also of a non-English speaking background.*[30] *In these circumstances, the applicant could have raised any issues she wished with the respondents in her native language. Her non-English speaking background was not a disability in the particular circumstances of her employment with the first respondent.*
>
> *16. Further, at the time she worked for the first respondent, Ms Zhang was 24 years old. She was an adult. To describe her as a "young worker" (paragraph 34 of the applicant's Submission) is wide of the mark – a worker who is aged between 16 to 20 years of age and receiving junior rates of pay is what is commonly understood as a "young worker", not a 24 year old woman.*
>
> *17. In these circumstances, the Court should not accept the applicant's characterisation of Ms Zhang as a "vulnerable young worker" and should not have any regard to this characterisation in assessing penalty.*
>
> *18. In relation to the second respondent's comment regarding minimum rates of pay in Australia (paragraph 35(d) of the applicant's Submission), the comment is irrelevant as it had no bearing upon the circumstances in which the conduct took place. It is not a relevant matter to be taken into account by the Court. If, however, the Court believes the comment is relevant, it should consider the entirety of what the second respondent said, being:*
>
> > This minimum rate is crazy – triple the USA – just crazy.[31]
>
> *19. Properly understood, the second respondent was observing that in the context of the Australian minimum rate of pay being three times that in the United States, the minimum rate of pay is "crazy". In that context, her comment was unremarkable.*

[29] Stella affidavit, Annexure DS-1.
[30] Stella affidavit, Annexure DS-1 at page 2 of Company Extract of the first respondent.
[31] Stella affidavit, paragraph 16(c).

20. In respect of the applicant's submissions regarding the working environment (paragraph 37 of the applicant's Submission), the Court should carefully analyse Ms Zhang's affidavit on this point, as it does not bear out the applicant's submissions. In particular:

(a) The submission that Ms Zhang was denied the opportunity to seek advice about the Contractor Agreement presupposes there was an actual denial by the respondents. However, Ms Zhang has deposed that she asked the second respondent if she could take the document home and ask for some advice about it and the second respondent replied, "If you don't sign this document I have many other people waiting for an interview and you might lose the job".[32] *The second respondent did not deny Ms Zhang the opportunity to seek advice. Nor did the second respondent demand that Ms Zhang sign the document forthwith;*

(b) True it is that Ms Zhang was not given a copy of the Contractor Agreement. However, there is no evidence before the Court that she requested a copy, or that any such request was refused.

(c) Any similar previous conduct"

45. In submissions in reply the applicant submitted:

"13. At paragraphs 18 and 19 of their Submission the Respondents submit that the comment made by the Second Respondent that the minimum rate of pay in Australia is "crazy" must be considered in the context of the entirety of what she said. The Applicant agrees and notes that the Second Respondent also said during this discussion "why [I] have to obey Australian Government Law?"[33]*. This comment, in conjunction with the comment made that the minimum base rate of pay in Australia is "crazy", indicates a reluctance by the Second Respondent to comply with Australian laws. The Second Respondent had an opportunity to give evidence of the reasons why she made these statements and elected not to. The Court can and should infer from this evidence that the Second Respondent engaged in a practice of deliberately engaging employees,*

[32] Zang affidavit, paragraph 18.
[33] Stella Affidavit, paragraph 16(a).

such as Ms Zhang, as independent contractors in an attempt to avoid the application of Australian workplace laws.

14. *Paragraph 37 of the First Submission summarises the evidence before the Court about the working environment at the First Respondent, in which workers were discouraged from raising queries or concerns about the conditions of their employment. Even at her job interview, Ms Zhang was discouraged from seeking advice about the contractor agreement she was offered.. The clear implication of the Second Respondent's comment to her was that if she did not sign the agreement on the spot she was likely to lose the job offer. This intimidating behaviour was consistent with the general workplace environment[34]. The Respondents' Submission (at paragraph 20(a)) about the meaning and effect of this comment is implausible and the Respondents have not filed any evidence to support this submission. The Applicant's submission is supported by the evidence and should be preferred.*

15. *The Applicant repeats its submissions at paragraph 29 to 30 of its First Submission and says that there is sufficient evidence for the Court to find that the unlawful engagement of Ms Zhang as an independent contractor was not a "one off" aberration or anything that could be characterised as a mistake. The Second Respondent did not operate the different Grandcity entities in the Grandcity Group as independent businesses- the Grandcity Group represents itself as "the largest Chinese Australian real tourism company"[35] and the different entities are referred to as "branches" with a Head Office in Melbourne CBD. The Second Respondent promotes herself as the head of the Grandcity Group[36]. When Ms Zhang worked for the First Respondent she was interviewed at a different branch in the CBD, and performed work at the Box Hill branch, which was operated by a different entity. The Second Respondent has admitted that she decides whether to engage workers as employees or contractors. The Second Respondent's evidence from a previous investigation by the Applicant was that her reasons for characterising a worker as an independent contractor related to the cost to the Second Respondent's business of paying regular wages and the lack*

[34] First Submission, paragraph 37-38.
[35] Stella Affidavit, Annexure DS-1.
[36] Stella Affidavit, paragraphs 9 and 30(a) and (c).

of experience of the worker[37], not because the worker was a genuine independent contractor. In the same interview she also complained about the cost of doing business in Australia and said that the hourly wages in Australia are the highest in the world.[38] All of this evidence is relevant as it points to a more widespread practice of the use of sham contracting by the Second Respondent across the Grandcity Group. This is relevant to specific deterrence and also culpability (particularly given the letter of caution given to the Second Respondent).

Vulnerability

16. *At paragraphs 15 to 17 of the Respondents' Submission, the Respondents reject the characterisation of Ms Zhang as a young and vulnerable worker, and submit that her non-English speaking background was not a disability. Ms Zhang is not fluent in English and required the use of an interpreter in order to affirm her affidavit[39]. Her evidence shows that she had a very limited understanding of Australia's employment laws and did not understand the implications of the contractual engagement proposed by the Respondents[40]. The Contractor Agreement presented to her to sign was written in English. Ms Zhang sought the opportunity to take the document home but did not do so as the Second Respondent made clear to her that she was likely to lose the job offer if she did. Her limited English was a disability because it restricted her ability to understand the arrangements under which she was engaged and her entitlements under Commonwealth workplace laws.*

17. *Furthermore, as noted at paragraph 37 of the First Submission, the disparity in bargaining positions between the Respondents and Ms Zhang was further compounded by the hostile workplace environment. Ms Zhang worked in an environment where workers were actively discouraged from raising concerns about their entitlements. It is of note that the Respondents have not filed any evidence from the Second Respondent or the manager of the Glen Waverley branch nor made any submission in relation to the email to*

[37] Stella Affidavit, paragraph 30(e)- (h).
[38] Stella Affidavit, paragraph 30(i) and Annexure DS-9 at page 126.
[39] Zhang Affidavit, paragraph 10.
[40] Zhang Affidavit, paragraphs 16-18.

workers, including Ms Zhang, advising them to 'stop complaining'.[41]*"*

46. The applicant submits that Ms Zhang was vulnerable by reason of her age and background. I accept that young age and ethnic or cultural background may go towards establishing that an employee is potentially vulnerable to improper practices by their employer. Previous cases demonstrate that those characteristics mean that a particular employee concerned might be of a vulnerable class.[42]

47. The question is whether the respondents exploited Ms Zhang's vulnerability. That question can be answered by any direct evidence that bears upon that issue and any inferences reasonably available from the evidence otherwise before the Court. In this case on the affidavit evidence of Ms Zhang before the Court I am satisfied that is the case.

Nature and extent of any loss or damage

48. The admitted contraventions resulted in an underpayment of $16,756.47 in wages and $2,810.56 in superannuation to one worker who had been knowingly and deliberately engaged as an independent contractor when she was properly an employee.

Any similar previous conduct

49. The applicant submitted:

> *"40. The Respondents have not previously been the subject of proceedings by the Applicant or its predecessors for contraventions of workplace laws.*
>
> *41. However, as set out in the SOAF and the Stella Affidavit, the Applicant has previously investigated another entity in the Grandcity Group, Grandcity Australia, in respect of similar allegations of sham contracting and failure to pay minimum award entitlements. Both of those investigations resulted from complaints made to the Applicant by persons engaged as independent contractors to perform work as travel*

[41] Annexure KZ-1 to Zhang Affidavit at page 10.
[42] See for example, *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd* (2012) FMCA 258; *Fair Work Ombudsman v Orwill Pty Ltd* (2011) FMCA 730; *Fair Work Ombudsman v Sanada Investments Pty Ltd* [2010] FMCA 401 at [60].

consultants in retail travel agencies operated under the Grandcity Travel and Tour business name[43].

42. *The Second Respondent is a director and company secretary of Grandcity Australia and holds 100 per cent of the shares in that company*[44]*. She was the main contact for the Applicant during its previous investigations of Grandcity Australia.*

43. *In May 2013 the Applicant issued a letter of caution to the Second Respondent and Grandcity Australia in respect of one of the other complaints received,*[45] *which, amongst other things, recommended corrective action with respect to the practice of engaging independent contractors, including by seeking advice in relation to this practice. There is no evidence before the Court that any action was taken by the Second Respondent as a result of the letter of caution.*

44. *The Applicant submits that these other complaints against Grandcity Australia, and the Second Respondent's involvement in that conduct, are of a similar character to the matters currently before the Court and are relevant because:*

    (a) *they demonstrate that the Admitted Contraventions were part of a broader business practice of sham contracting engaged in by the Second Respondent on behalf of the First Respondent, the Second Respondent and the Grandcity Group;*

    (b) *they establish that the Second Respondent, as the controlling mind of the First Respondent, has previously been provided with educative material about sham contracting, cautioned and advised to seek advice about the manner in which she engaged workers;*

    (c) *they raise the question of what, if any, steps have been taken by the First or Second Respondents to change their business practices. There is no evidence that any such steps have been taken.*

45. *For these reasons it is submitted that the evidence about these similar complaints can be taken into account when determining the appropriate penalty.*[46] *Whilst the Court may*

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[43] Stella Affidavit at paragraphs 26 and 34.

[44] Stella Affidavit at paragraph 12.

[45] Stella Affidavit at paragraphs 32-33 and Annexure DS-10.

[46] *Australian Building & Construction Commissioner v Construction, Forestry, Mining & Energy Union (No 2)* [2010] FCA 977 at [47], [64].

place most weight on a prior finding of a court, the Court may have regard to this similar prior conduct in determining penalty. This is particularly so where that conduct demonstrates that the Respondents were on notice of their obligations to comply with applicable laws and industrial instruments."

50. The respondents submitted:

> *"21. The respondents have not previously been the subject of proceedings for contraventions of workplace laws.*[47] *There is no evidence before the Court that any other companies within the Grandcity group of companies have been the subject of such proceedings.*
>
> *22. As noted at paragraph 12(b) above, the evidence is that another company in the Grandcity group of companies (not the first respondent) has been investigated by the applicant twice, with a caution being administered in one of those investigations. That is a long way short of the contraventions in this proceeding being part of "a broader business practice of sham contracting engaged in by the second respondent", as alleged at paragraph 44(a) of the applicant's Submission.*
>
> *23. Ultimately, while the respondents acknowledge the caution previously provided to the second respondent, the fact remains that prior to this proceeding, she has not been the subject of any proceedings. The Courts have traditionally had regard only to prior convictions.*[48]
>
> *24. Accordingly, contrary to the applicant's Submission, the Court should have little regard (if any) to what is, ultimately, a single caution. The respondents have a clean record. This supports a diminution of any penalties imposed."*

51. In its submissions in reply the applicant's submissions were:

> *"18. The Respondents submit that the Courts have traditionally had regard only to prior convictions and refer to the decision of* Australian Building and Construction Commissioner v CFMEU (No 2).[49] *That decision is authority for the principle that prior contravening conduct is more cogent if it has been the subject of conviction but*

[47] SOAF paragraph 98.
[48] *Australian Building & Construction Commissioner v CFMEU (No 2)* [2010] FCA 977 at [47(4)].
[49] [2010] FCA 977.

> *that, "if not, prior conduct is still relevant but perhaps of less weight"[50]. The Applicant submits that the investigation by the Applicant of two similar allegations of sham contracting and underpayments, and the letter of caution and educative material sent to the Second Respondent, are highly relevant. The Second Respondent is the key player in this matter. She admits that she was the person responsible for hiring workers, deciding whether to characterise them as employees or contractors[51], and deciding how much, when and how they will be paid. Her knowledge of the legal obligations with respect to employment, her conduct in relation to other workers in other entities within the Grandcity Group, and the caution given to her by the Applicant in relation to sham contracting are directly relevant to the consideration of penalty."*

52. The respondents' position on appropriate penalties asked the Court to take into account not only their full co-operation and rectification but that the contraventions concerned just one employee and that this was the first time the respondents' had been the subject of penalty proceedings.

53. This is a case where there has been previous conduct that resulted in intervention by the applicant. Whilst there has not been a previous imposition of penalty, that intervention should have left the second respondent (and through her other companies she controls including the first respondent) well aware of their obligations.

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

54. The applicant's submissions on this factor have already been set out above. The respondents' submissions on this factor were that the contraventions in respect of a number of the different contraventions arose out of the same or similar courses of conduct.

55. The findings in light of the parties' submissions on this factor have been set out earlier.

[50] Supra, at [47].
[51] SOAF at paragraph 80.

The size of the respondent's business

56. The applicant submitted:

> *"47. As set out above, the evidence before the Court is that the Second Respondent is the managing director of a travel and tour business which has been operating since 1994 and which now consists of eight travel agencies in Australia, in addition to various other business ventures such as a tour bus business, a car and bus hire business and a public relations company. It is submitted that the First Respondent is part of a much larger business operation.*
>
> *48. There is no evidence before the Court relating to the First Respondent's financial position. In the absence of such evidence the Court is entitled to assume that there is no issue as to financial incapacity.*
>
> *49. There is no indication that the Respondents contend that the contraventions were the result of any financial difficulty; rather it was the result of their misclassification of Ms Zhang and failure to pay her as an employee.*
>
> *50. In any event, regardless of the size of the business or its financial structures or position, the Applicant submits that an employer cannot be absolved of its legal responsibility to comply with the law in relation to the employment of its employees.*
>
> *51. In* Workplace Ombudsman v Saya Cleaning Pty Ltd[52] *Federal Magistrate Simpson (as he then was) provided a summary of the case law in this respect:*
>
> > 'the First Respondent is a small company and, I infer, has very few assets. However as Justice Tracey said in Kelly v Fitzpatrick:
> >
> > No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction must be imposed at a meaningful level.'"

[52] [2009] FMCA 38 at [26]-[30].

57. The respondents submissions on this factor were:

> *"26. The first respondent is the operator of a single travel agency business in Glen Waverley.*[53] *While the Grandcity group of companies may operate travel agencies in Australia and other business ventures, there is no affidavit material before the Court indicating that the first respondent has any interest in those agencies and ventures. While the first respondent may be part of a much larger business operation (paragraph 47 of the applicant's Submission), its part of that business is relatively small and distinct.*
>
> *27. The Court, in imposing penalties, should regard the first respondent as a small business. In assessing what is a "meaningful" penalty (to paraphrase the observation of Justice Tracey in* Kelly v Fitzpatrick *[2007] FCA 1080 at [28]), a lesser penalty upon a smaller employer will be as meaningful to that employer as a larger penalty upon a larger employer."*

58. I do not accept the exculpatory submissions that were sought to be made on behalf of the second respondent in that regard. The obligations to comply with workplace laws apply to all businesses, regardless of their size.

The deliberateness of the breach

59. The applicant submitted:

> *"52. The Applicant submits that the Court may be satisfied on the evidence that the Respondents' conduct was deliberate because:*
>
> *(a) The Respondents appear to have put in place a business model of engaging employees as independent contractors in an attempt to avoid minimum award entitlements.*
>
> *(b) The Second Respondent, as the controlling mind of the First Respondent, has previously stated to the Applicant that it is her view that wages in Australia are "crazy"*[54] *and "the highest in the world"*[55]*. She*

[53] SOAF at paragraph 5(e).

[54] Stella Affidavit, paragraph 16(c).

[55] Stella Affidavit, paragraph 30(i).

has also queried why she has to obey Australian laws.[56] *It is open for the Court to find that it engaged Ms Zhang as an independent contractor in an attempt to avoid the application of Australia's workplace laws.*

(c) The Respondents knew that the Award applied to employees who perform sales work in travel agencies, and knew that the minimum base rate of pay under the Award was approximately $18 per hour. The Respondents did not engage all of its workers as independent contractors; some were engaged as employees. It is admitted that the employee and contractor travel consultants performed similar duties[57]*. It is open for the Court to find that some workers were characterised as contractors in an attempt to reduce wages costs and avoid the application of the Award. There is no evidence of any other reason for adopting this practice.*

(d) The Second Respondent has stated to the Applicant that she engaged a previous worker (Ms Cheng) as a subcontractor because she could not afford to engage her as an employee and pay her with regular wages and that before she could become an employee she must show her ability to contribute to revenue[58]*.*

(e) The Respondents do not assert that they did not know or that they were not reckless as to whether the contract under which Ms Zhang was engaged was a contract of employment rather than a contract for services.

53. The Applicant submits that the Court should find that the breaches were deliberate and this is an important factor in favour of penalties in the high range."

60. In submissions before the Court, Counsel for the respondents did not cavil with the submissions of the applicant and acknowledged the conduct that led to the admitted contraventions was "*knowing and in that sense it's deliberate*".

[56] Stella Affidavit, paragraph 16(a).

[57] SOAF. at paragraph 94(c).

[58] Stella Affidavit, Paragraph 30(g) and Annexure DS-9.

61. In this case the contraventions by the first and second respondents must be considered to be deliberate.

The involvement of senior management

62. The applicant submitted:

> *"54. The Second Respondent is, and was at all relevant times, the sole director and majority shareholder of the First Respondent. She was the controlling mind of the company. She has admitted her involvement in all of the contraventions except for the record-keeping contraventions.*[59]
>
> *55. There is no evidence that responsibility for the contraventions was shared by anyone else.*
>
> *56. The Second Respondent was the person responsible for the First Respondent's compliance with workplace laws. She apparently failed to obtain any advice about her business' obligations to its employees, despite being on notice of the requirement to comply with these obligations through interactions with the Applicant."*

63. The respondents submissions were that:

> *"29. The respondents acknowledge that the second respondent, a director of the first respondent, was involved in the contraventions. She has made admissions in respect of all the contraventions, with the exception of those relating to record keeping."*

64. The submissions speak for themselves and I take into account the admitted involvement of the second respondent in the contraventions.

The respondent's contrition, corrective action and cooperation with the enforcement authorities

65. The applicant submitted:

> ***"Contrition***
>
> *57. There is no evidence of contrition or remorse on the part of the Respondents.*

[59] SOAF at paragraph 3.

58. *Throughout the Applicant's investigation, the Respondents maintained that Ms Zhang was an independent contractor and not an employee*[60].

59. *There is no evidence that the Respondents have apologised to Ms Zhang.*

60. *The absence of any genuine remorse is further demonstrated by the threats made to Ms Zhang in May 2014. On 22 May 2014, the Applicant sent letters to each of the First and Second Respondents which advised that the Applicant had determined that Ms Zhang was properly characterised as an employee and not an independent contractor, that this had resulted in contraventions of the Award and the FW Act and in underpayments, and that the Applicant intended to commence proceedings in this Court. Two days later, on 24 May 2014, Ms Zhang received a telephone call from a director of the First Respondent, Kevin Xu, the Second Respondent's brother. Mr Xu attempted to persuade Ms Zhang to withdraw her complaint by threatening that there would be trouble for her if she didn't do so.*[61] *Ms Zhang's evidence is that she was so scared by the telephone call from Kevin Xu that she sought the assistance of Fair Work Inspector Stella and of the Police*[62].

61. *Ms Zhang also states that in October 2014 she received a call on her mobile telephone from the Second Respondent*[63].

62. *These attempts to persuade Ms Zhang from participating in these proceedings are wholly unacceptable, and should be viewed by the Court as aggravating factors with respect to penalty. Such behaviour is not consistent with any genuine contrition or remorse on the part of the Respondents and suggests that there is no genuine acceptance of responsibility for the Respondents' conduct.*

Corrective action

63. *There is no evidence of any steps that have been taken by the Respondents to ensure future compliance with workplace laws, to avoid any further misclassification of employees as*

[60] Stella Affidavit, paragraph 16(b).

[61] Zhang Affidavit, paragraph 45-50.

[62] Zhang Affidavit, paragraph 51-53.

[63] Zhang Affidavit, paragraph 55.

contractors, and to prevent further possible contraventions of the Award and the FW Act.

64. As set out at paragraph 0 above, the evidence shows that the decision to engage Ms Zhang as a contractor and pay her a low flat hourly rate of pay was part of a broader business practice put in place by the Second Respondent within the First Respondent and other Grandcity Group entities. It is submitted that the Court cannot be satisfied that the Respondents are currently complying with their obligations.

65. The Second Respondent has been on notice of the Applicant's concerns with respect to sham contracting and failure to comply with Award entitlements since at least May 2013, when she was sent a letter of caution, a fact sheet about sham contracting, and encouraged to seek advice. There is no evidence before the Court of any action taken by the Second Respondent to address these concerns.

66. In the absence of any evidence of corrective action, the Applicant submits that the Court must consider that there a real potential for future similar contraventions, particularly in light of the Respondents' established business model and lack of clear contrition in this matter.

Rectification of Underpayments

67. The First Respondent rectified the underpayments to Ms Zhang in October 2014, after these proceedings had been commenced.

Co-operation with the enforcement authorities

68. The Applicant accepts that the First Respondents was generally co-operative during the investigation which preceded these proceedings. Further, the Applicant acknowledges that the Second Respondent co-operated in the investigation by participating in a formal record of interview.

69. However, it is also noted that the actions of Kevin Xu, a director of the First Respondent, by threatening Ms Zhang to withdraw her complaint, were incompatible with a truly co-operative approach."

66. The respondents submissions on these factors were:

"(h) Contrition

30. *Actions speak louder than words. Approximately three and a half months after the proceeding was issued, the respondents agreed to admit liability and to enter into the SOAF.*[64] *By doing so, the respondents have saved the Commonwealth considerable time and expense.*

31. *Further, approximately four months after the proceeding was issued, the respondents paid Ms Zhang the amounts involved in the contraventions.*[65]

32. *The actions of the respondents are a clear display of contrition on their part. The respondents have accepted responsibility for their wrongdoing and sincerely attempted to remedy that wrongdoing.*

33. *In relation to the submission regarding the telephone call by Mr Kevin Xu and the telephone call by the second respondent (paragraphs 60 – 63 of the applicant's Submission), the respondents submit:*

    (a) *Apart from Ms Zhang's comment in her affidavit that she spoke with Mr Xu on several occasions about her work duties, there is no material before the Court to support a finding that Mr Xu had any active involvement in the first respondent's business.*[66] *Further, there is no material before the Court showing that the respondents were either aware of, or authorised, Mr Xu telephoning Ms Zhang;*

    (b) *While the respondents do not dispute that Ms Zhang perceived the telephone call from Mr Xu as a threat, they submit that the words he used to Ms Zhang were not threatening. His first comment refers to the possible "ruin" of the first respondent and the impact on its reputation of the investigation. His second comment, referring to "trouble" if Ms Zhang does not withdraw her complaint, in the context of the comment that preceded it, is clearly a reference to the possibility of trouble for the first respondent. Mr Xu did not refer to there being "trouble" for Ms Zhang. There was no threat, either express or implied;*

    (c) *The Court may infer that ultimately, the purpose of Mr Xu's phone call to Ms Zhang was to explore the*

[64] SOAF at paragraph 97.
[65] SOAF at paragraph 89.
[66] Zhang affidavit at paragraph 43.

possibility of a commercial settlement.[67] *This is not a threat; and*

(d) The Court should have no regard to the fact that the second respondent telephoned Ms Zhang on October 2014. By that time, the respondents had agreed to admit the contraventions and to enter into the SOAF. The Court does not know what the purpose of the phone call was. In any event, the second respondent and Ms Zhang did not speak.

34. Contrary to the submission at paragraph 62 of the applicant's Submission, the Court should have no regard to the telephone discussion between Mr Xu and Ms Zhang, and the second respondent's telephone call to Ms Zhang, in assessing penalty.

(i) Corrective action

35. As noted above at paragraph 31, all outstanding amounts were paid to Ms Zhang in October 2014. The first respondent has taken corrective action.

36. The applicant repeats its earlier submission that Ms Zhang's engagement as a contractor was "part of a broader business practice" put in place by the second respondent within the first respondent and other companies in the Grandcity group. For the reasons outlined in paragraph 12 above, the Court should reject this submission. It is unreasonable for the applicant to expect that the respondents take "corrective action" in respect of an alleged practice when there is insufficient material before the Court to ground a finding that any such practice exists.

37. This proceeding (and the investigation which preceded it) were initiated after Ms Zhang ceased working for the first respondent. The respondents could not take corrective action in respect of the working relationship as by that time, it had ceased.

38. The fact of the matter is that notwithstanding its investigation, the applicant launched this proceeding in respect of one employee and one employee alone – Ms Zhang. No other proceedings in respect of other employees have been commenced against the respondents. In those

[67] See paragraph 45, Zhang affidavit.

circumstances, the Court should reject the applicant's submissions on this point.

(j) Rectification of underpayments

39. As noted above at paragraph 31, the underpayments to Ms Zhang were rectified in October 2014. This supports a reduction in penalties.

(k) Co-operation with enforcement authorities

40. From the outset, the respondents have co-operated fully with the applicant. The material before the Court shows that:

(a) when Fair Work inspectors attended the first respondent's premises on 18 November 2013, at the commencement of the investigation which gave rise to this proceeding, the respondents voluntarily provided copies of time cards recording the hours worked by Ms Zhang;[68]

(b) the first respondent complied with a Notice to Produce dated 18 November 2013 and produced various records to the applicant;[69] *and*

(c) despite not being obliged to do so, the second respondent attended a formal record of interview with the applicant on behalf of the first respondent on 28 February 2014.[70] *At that time, the second respondent replied to the questions put to her honestly and in a forthright manner; indeed, making admissions which facilitated the applicant's conduct of this proceeding.*

41. The respondents have cooperated fully with the applicant at all stages of this proceeding. As noted above, they have not contested the proceeding and made full admissions regarding the contraventions and the amounts in issue. At an early stage, they made full admissions regarding liability and quantum and entered into the SOAF.

42. The Court should have no regard to the submission that Mr Xu's telephone call was incompatible with a co-operative approach (paragraph 69, applicant's Submission), for the reasons outlined in paragraph 33 above.

[68] SOAF at paragraph 93(a).
[69] SOAF at paragraph 93(b).
[70] SOAF at paragraph 93(c).

43. The respondents' full cooperation should be uppermost in the Court's mind in assessing the quantum of any penalties to be imposed upon the respondents."

67. In submissions in reply the applicant submitted:

"19. Whilst the Respondents have accepted wrongdoing and have facilitated the efficient conduct of this matter by way of admitting liability and entering into the SOAF, this ought to be weighed against the following relevant facts:

(a) Rectification of the underpayments to Ms Zhang did not occur until October 2014, several months after the proceedings were commenced, despite being notified of the underpayment amount on 22 May 2014.

(b) No expressions of contrition have been given by the Respondents. No apologies were, or have been, offered to Ms Zhang.

(c) While the Respondents' Submission states that 'actions speak louder than words", the Courts have recognised the importance of apologising and "a suitable credible expression of regret".[71] In any event, the actions of the First Respondent in relation to Ms Zhang in this matter are of serious concern. On being notified of the Applicant's intention to issue legal proceedings, rather than promptly rectifying the underpayment to Ms Zhang, a director of the First Respondent attempted to dissuade Ms Zhang from participating in the proceedings by making threats to her and then calling her multiple times until he was advised by a Constable from the Victoria Police to cease calling her.[72] This behaviour is not consistent with genuine remorse or contrition.

20. The Respondent's Submission at paragraph 33 regarding the telephone calls made by Mr Kevin Xu to Ms Zhang is implausible and not supported by the evidence. Mr Xu has not been called by the Respondents to give evidence to support their submissions about the nature and intent of the phone call made to Ms Zhang. It is noteworthy and highly relevant that Mr Xu was at the relevant time a director of the First Respondent.[73] For the purposes of section 793 of the Fair Work Act 2009 conduct engaged in by Mr Xu, as an

[71] *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [74]-[76] per Stone and Buchanan JJ.
[72] Zhang Affidavit, paragraphs 42-51 and Stella Affidavit, paragraphs 18-24.
[73] Stella Affidavit, Annexure DS-2.

officer of the First Respondent, was within the scope of his actual or apparent authority and can be taken to have been engaged in by the First Respondent. In any event the Respondent's Submission is inconsistent: on the one hand it draws into question Mr Xu's authority to act on behalf of the First Respondent, while on the other hand it suggests that Mr Xu called Ms Zhang to explore the possibility of a commercial settlement (which presumably he could only do if he had authority to act on behalf of the Respondents).

21. *The Respondents' Submission at paragraph 33(b) that Mr Xu's comment was "clearly a reference to the possibility of trouble for the first respondent" ignores the evidence and contemporaneous file notes of Fair Work Inspector Stella that Mr Xu said to Ms Zhang that "trouble would come her way".*[74]

22. *Furthermore, the Applicant relies not only on the words spoken to Ms Zhang but her evidence that Mr Xu called her on multiple occasions on the 27 and 28 May 2014 and that she was so scared that she sought the assistance of Fair Work Inspectors from the Applicant, and then ultimately the police. It was only after the police directed Mr Xu to stop calling Ms Zhang that he did stop. In these circumstances, the evidence of Ms Zhang and Mr Stella and the submission made the Applicant*[75] *in relation to the relevance of this threatening conduct by Mr Xu should be preferred over the Respondents' Submission.*

23. *The Applicant submits that the overall evidence before the Court is more consistent with a reaction to being caught than any genuine contrition for what occurred*[76]*.*

24. *In relation to corrective action, for the reasons set out at 0 and 0 above, the Applicant submits there is sufficient evidence before the Court to infer that the Respondents' use of sham contracting arrangements is more widespread than a single employee. The Second Respondent has previously been cautioned in relation to sham contracting and misclassification. The Respondents have not put any evidence before the Court in relation to steps taken by the Respondents to ensure their compliance with Commonwealth workplace laws or to ensure that the First Respondent is correctly classifying and paying employees as*

[74] Stella Affidavit, paragraph 18 and Annexure 5.
[75] First Submission, paragraphs 60-62.
[76] *Fair Work Ombudsman v Lay Brothers (Wholesale) Pty Ltd* [2013] FCCA 2015 at [52].

employees. The Applicant merely expects that the Respondents comply with the law where they have admitted that they have failed to do so previously. The Respondents' failure to provide any evidence of corrective action is of concern and the Court is entitled to take this absence of evidence of corrective action into account in the determination of penalty."

68. As was noted by the parties in their written submissions and submissions before the Court the respondents have co-operated with the applicant, made full admissions, rectified the underpayments and saved public resources that would have been spent at any contested liability hearing but beyond this there is no evidence of corrective action. I was unable to make a finding on the evidence about the alleged phone call from Mr Xu.

Ensuring compliance with minimum standards

69. The applicant submitted:

> *"70. The Respondents' contraventions of the Award and the FW Act involved significant failures to adhere to the minimum standards required. A principal object of the FW Act is the preservation of an effective safety net for employee entitlements and effective enforcement mechanisms.*[77] *Compliance with minimum standards is also vital to creating an even playing field for employers within the same industry as the Respondents who do comply with workplace laws.*
>
> *71. It is important to recognise the seriousness of record-keeping and payslip contraventions. The First Respondent has admitted to three failures to comply with record-keeping obligations and both the First and Second Respondents have admitted to failing to provide payslips. As stated in Fair Work Ombudsman v Bound For Glory Enterprises & Anor*[78]*:*
>
> 'Ensuring compliance with minimum standards is an important consideration in this case. One of the principal objects of the FW Act is the maintenance of an effective safety net of employer obligations, and effective enforcement mechanisms. The failure to keep records by the respondents which is admitted arguably undermines and frustrates the attainment of that object. There is also the

[77] Section 3 of the FW Act.

[78] [2014] FCCA 432.

issue that the failure to keep the records themselves and the vice that conduct gives rise to. As was identified in Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258 and Fair Work Ombudsman v Orwill Pty Ltd & Anor [2011] FMCA 730 the problem where employers don't keep proper records is that it creates a structure within which breaches of the industrial laws can easily be perpetrated.'"

70. The respondents submissions on this factor were:

> *"44. The respondents acknowledge that this is an important consideration. The penalty ranges proposed by the respondents are significant amounts, and pay due regard to it."*

71. Ensuring compliance with minimum standards is a very important consideration in this case. The respondents have demonstrated a complete disregard for the minimum standards contained in the FW Act and the second respondent's personal interpretation of minimum standards under workplace laws as *"just crazy"* reinforces the need to demonstrate that compliance with minimum standards is not optional, it's the law.

Deterrence

72. The applicant submitted:

> *"Specific and general deterrence*
>
> *72. It is well-established that the need for specific and general deterrence is a factor that is relevant to the imposition of a civil penalty.*[79]
>
> *Specific deterrence*
>
> *73. The Applicant submits that specific deterrence is of considerable significance in these proceedings because:*
>
> *(a) the First Respondent continues to trade and employ workers and the Second Respondent remains in control of the business;*

[79] See for example, *Pangaea*, supra at [26]-[59] and *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65; (2007) 158 FCR 543 at 559-60 (Lander J).

(b) *the Applicant's submission is that the contraventions were deliberate and were part of a broader business practice of engaging employees as contractors and paying them flat rates of pay that were significantly less than their award entitlements;*

(c) *Ms Zhang was threatened that there would be trouble if she did not withdraw her complaint to the Applicant; and*

(d) *there is no evidence of contrition or corrective action, save for rectification.*

74. *In* Fair Work Ombudsman v Happy Cabby Pty Ltd & Anor,[80] *Judge Driver considered the need for specific deterrence in respect of sham contracting arrangements put in place by the Respondent and stated that "there is a need to emphasise that the Court will not countenance attempts to disguise employment relationships and thus deny employees their required minimum entitlements".*

75. *The Applicant notes the comments of Gray J in* Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union *where his Honour observed in relation to specific deterrence that:*

"[m]uch will depend on the attitude expressed by that party as to things like remorse and steps taken to ensure that no future breach will occur".[81]

76. *The Applicant submits that Justice Gray's comments are particularly relevant to these proceedings, where there have been no expressions of remorse and there is no evidence of any steps being taken to ensure that no future breach will occur. It is submitted that only penalties imposed at the high end are likely to make the contravening conduct unprofitable and the prospect of any future contraventions commercially, and personally, undesirable.*

General Deterrence

77. *The need for general deterrence in the present case is equally important and the law should mark its disapproval of the Respondents' conduct by setting a penalty which serves as a warning to others.*[82]

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[80] *Fair Work Ombudsman v Happy Cabby Pty Ltd & Anor* [2013] FCCA 397 at [88].

[81] (2008) 171 FCR 357 at 369.

[82] (2007) 166 IR 14 at [25].

78. In particular, the Courts have consistently recognised the strong need for general deterrence in respect of sham contracting. For example, in Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2)[83]:

"It is important to ensure that the protections provided by the Act to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected. Employers need to understand that they cannot, with impunity, treat their employees the way Maclean Bay treated Mrs Williams. I agree, with respect, with the recent observations of Gilmour J about the need for general deterrence in sham contracting matters; see *Australian Building and Construction Commissioner v Inner Strength Steel Fixing Pty Ltd* [2012] FCA 499 at [13] to [15] and especially at [30]. Specific deterrence is also relevant. Given the blatant breaches of the Act engaged in by the respondents, the need for such conduct not to be repeated by them must be strongly emphasised."[84]

79. Ms Zhang was a member of a vulnerable group of workers, namely workers from a non-English speaking background, and the Respondents exploited that vulnerability. It is therefore appropriate that the penalty imposed by this Court send a message to employers and the community generally, that underpayment of wages to and exploitation of these workers will not be tolerated."

73. The respondents submissions addressing these factors were:

"(k) Specific and general deterrence

45. The respondents acknowledge that specific and general deterrence are important considerations in assessing the quantum of any penalties to be imposed upon them. The range of penalties proposed by the respondents involve very significant amounts of money, bearing in mind that the proceeding involves a single employee and the underpayment involved was the total sum of $19,567.13.

…

[83] [2012] FCA 557 at [29].

[84] See also *Fair Work Ombudsman v EA Fuller & Sons Pty Ltd & Anor* [2013] FCCA 5 and Director, Fair Work Building Industry Inspectorate v Supernova Contractors Pty Ltd [2012] FMCA 935.

47. To the extent possible, the Court should endeavour to adopt a consistent approach in imposing penalties upon employers which have contravened provisions of the Act. In this regard, the respondents note that in Fair Work Ombudsman v Happy Cabby Pty Ltd & Anor*, a total penalty of $252,120 was imposed upon the employer, and $47,784.00 was imposed upon the relevant director. These amounts are only slightly above the range of penalties sought by the applicant in this proceeding. However, the facts of that case were far different to those presently before the Court. In that case:*

(a) seven employees were subject of the contravention of the "sham contracting" provisions of the Act. Here, one employee is involved; and

(b) there was a long history of the employer having disputed the status of the relevant persons as either employees or independent contractors, including determinations by the Australian Tax Office, a decision of the Administrative Appeals Tribunal, an unfair dismissal proceeding, two other complaints by former employees and action by the Fair Work Ombudsman.[85] *There is no such history here.*

48. In Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2) *[2012] FCA 557, a total penalty of $280,500.00 was imposed upon the employer. However, that case was far different to the one presently before the Court. There, the employer had dismissed two employees and then attempted to re-engage them as independent contractors, in addition to representing to four other employees that contracts of employment were in fact contracts for services, in contravention of the "sham contracting" provisions. Again, it is submitted that on the scale of culpability, the conduct of the respondents in this case is not of that nature."*

74. In its submissions in reply the applicant submitted:

"25. At paragraphs 46-48 of the Respondents' Submission refers to two previous sham contracting matters before the Courts. The Respondents have not adequately explained why these two cases are appropriate as comparators (as compared to other sham contracting cases). In the FWBC Decision the Court acknowledged that prior decisions may be used in the process of instinctive synthesis but that it is necessary that the Court

[85] *Fair Work Ombudsman v Happy Cabby Pty Ltd & Anor* [2013] FCCA 397 at [62]-64]

have details of the case in order to enable a comparison between the circumstances of earlier decisions and those of the case under consideration.[86] *There is insufficient detail before the Court to enable a proper and useful comparison between the factual circumstances of these earlier decisions and those in consideration in this matter.*

26. Furthermore it is noted that in both of the decisions referred to by the Respondents the maximum penalties were substantially less than those that now apply[87]*. The maximum possible penalties for the First Respondent in this matter are $459,000; whereas the maximum for the same contraventions prior to 28 December 2012 would have been $369,000. As noted in* Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith,[88] *"there have been too many changes to the level of the maximum penalty over a relatively short period, the changes have been of too great a magnitude, and there have been too few cases decided, for it to be said that there is an appropriate range established… Two cases, both judgments of the same Federal Magistrate, are not a sufficiently large sample to establish an accepted range of penalties for contraventions of awards, or for contraventions of any particular type."*

27. It is submitted that the Respondents' Submissions with respect to comparator cases should be given no weight.

28. It is also important to emphasise the relevance of general deterrence to determining the appropriate penalty. In Fair Work Ombudsman v Crocmedia Pty Ltd[89]*, Riethmuller J commented, in relation to the appropriate penalty to apply in that case (involving unpaid work), 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 a position of being able to claim that a genuine error of categorisation was made.'"

75. In relation to specific deterrence, Gray J observed in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357; (2008) 177 IR 243; [2008] FCAFC 170 at [37] that:

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[86] Supra, at [253]. See also *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* 165 FCR 560 at [12]-[13].
[87] The definition of penalty unit in section 4AA of the *Crimes Act* 1914 (Cth) was amended with effect from 28 December 2012 so that the dollar value of a penalty unit increased from $110 to $170.
[88] 165 FCR 560 at 14.
[89] [2015] FCCA 140 at [46].

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

76. The issue of specific deterrence in respect of the respondents looms large in this proceeding. The second respondent continues to be involved in a number of businesses in the travel industry. Notwithstanding the submissions made on her behalf I am not satisfied she has shown remorse. There is no evidence she has taken steps to ensure that no further breaches will occur. I also accept there is also a need for general deterrence and to ensure employers understand the consequences of seeking to avoid their obligations under the FW Act. As, Marshall J said in *Fair Work Ombudsman v Maclean Bay Pty Ltd (No.2)* [2012] FCA 557 at [29]:

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

Consideration of appropriate penalties

77. The failure to keep proper records is a significant contravention. The requirement for employers to keep proper records is fundamental to the proper enforcement of rights and obligations under the FW Act. The failure to provide pay slips should also warrant severe sanction as it undermines the proper operation of the FW Act and limits the ability of employees to understand and ensure they are receiving their correct entitlements. Both contraventions warrant a penalty at the mid to upper range.

78. The failure to make super contributions, pay holiday, weekend and casual loadings as well as the failure to pay the correct minimum scale are contraventions that warrant a penalty at the mid range.

79. As indicated earlier the most serious contravention was in relation to sham contracting and for the reasons set out in *Australian Building & Construction Commissioner v Inner Strength Steel Fixing Pty Ltd* [2012] FCA 499 at [14] to [15] and *Fair Work Ombudsman v Quest*

South Perth Holdings Pty Ltd (No 2) [2013] FCA 582 at [2] warrants a penalty at the upper end of the range.

80. It is important to note the respondents' cooperation and that their admission of culpability has facilitated the administration of justice and saved the time and cost of a contested hearing on liability. There is also the issue that the respondents' haven't been dealt with before for contravening the FW Act and only one employee was involved. In all the circumstances a discount of 20% for these factors is appropriate.

81. In respect to the eight ground contraventions by the first respondent and seven grouped contraventions by the second respondent the total penalty that could be imposed is $357,000 for the first respondent and $66,300 for the second respondent. Therefore given the above, the appropriate penalties are:

	Description of contravention	First Respondent	Second Respondent
1	Failure to make and keep records	$14,820	N/A
2	Failure to provide payslips	$14,820	$2,856
3	Failure to make superannuation contributions	$28,560	$5,712
4	Failure to pay public holiday loading	$24,480	$4,896
5	Failure to pay weekend loadings	$24,480	$4,896
6	Failure to pay casual loadings	$24,480	$4,896
7	Failure to pay minimum hourly rate	$24,480	$4,896
8	Sham contracting	$36,720	$7,344

82. This results in a total penalty of $192,840 or around 54% of the maximum for the admitted contraventions by the first respondent and $35,496 or around 54% of the maximum for the second respondent.

83. Having fixed an appropriate penalty for each contravention or group of contraventions, consistent with the authorities as set out above, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches, and is not oppressive or crushing.[90]

[90] *Kelly v Fitzpatrick* [2007] FCA 1080, [30]; *Merringtons* at [23] per Gray J, [71] per Graham J, [102] per Buchanan J.

84. The application of the totality principle does not mean the penalties arrived at before its application must be reduced. Any penalties imposed should reflect the circumstances and be just and appropriate. There is no evidence that the aggregate penalty would be oppressive or crushing in this case. The application at this stage of what is called the totality principle does not mean that the penalties arrived at before its application must be reduced and I am not satisfied they should.

85. Submissions made on behalf of the second respondent urged the Court to consider suspension of the penalty on her. However as Gilmour J at [72] to [78] of *Fair Work Ombudsman v AJR Nominees Pty Ltd (No 2)* [2014] FCA 128 made clear suspension will only be available in very unusual circumstances. I do not think that this case is such an instance.

86. Therefore, as the Court:

- is directed by the relevant authorities to consider what is appropriate in all the circumstances of this case;[91] and
- in its discretion in relation to penalty is not fettered by a checklist of mandatory criteria;[92] and
- notes the parties have filed a S.O.A.F; and
- is satisfied the individual and aggregate penalty for the whole of the contravening conduct is appropriate.

I make the declarations and orders as set out at the beginning of these reasons.

I certify that the preceding eighty-six (86) paragraphs are a true copy of the reasons for judgment of Judge O'Sullivan

Associate:
Date: 26 June 2015

[91] See *Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2)* (1999) 94 IR 231.
[92] See *Australian Ophthalmic Supplies Pty Limited v McAlary-Smith* [2008] FCAFC 8.

ANNEXURE A
STATEMENT OF AGREED FACTS

This Statement of Agreed Facts is an agreed document of the Applicant and the First and Second Respondents (collectively, the **Respondents**) made in these proceedings for the purposes of section 191 of the *Evidence Act 1995* (Cth).

ADMITTED CONTRAVENTIONS

1. The First Respondent admits that it contravened the following civil remedy provisions:

   (a) subsection 357(1) of the *Fair Work Act* 2009 (Cth) (**FW Act**) by representing to Ms Kate Zhang (**Employee**) that the contract of employment under which she was employed by the First Respondent was a contract for services under which the Employee performed work as an independent contractor;

   (b) section 45 of the FW Act by failing to pay the Employee at least the applicable minimum hourly rate of pay during the period from on or about 17 January 2013 until on or about 5 September 2013 (**Employment Period**), in contravention of clauses A.2.5 and A.2.6 of Schedule A of the General Retail Industry Award 2010 (**Award**);

   (c) section 45 of the FW Act by failing to pay the Employee a casual loading during the Employment Period, in contravention of clauses A.5.4 and A.6.4 of Schedule A of the Award;

   (d) section 45 of the FW Act by failing to pay the Employee a loading for Saturday work during the Employment Period, in contravention of clause A.7.3 of Schedule A of the Award;

   (e) section 45 of the FW Act by failing to pay the Employee a loading for Sunday work during the Employment Period, in contravention of clause A.7.3 of Schedule A of the Award;

(f) section 45 of the FW Act by failing to pay the Employee a loading for Public Holiday work during the Employment Period, in contravention of clause A.7.3 of Schedule A of the Award;

(g) section 45 of the FW Act by failing to make superannuation contributions to a superannuation fund for the benefit of the Employee as would avoid the First Respondent being required to pay the superannuation guarantee charge under superannuation legislation, in contravention of clause 22 of the Award;

(h) subsection 536(1) of the FW Act by failing to provide the Employee with payslips within one working day of payment with respect to work performed by the Employee;

(i) subsection 535(1) of the FW Act by failing to make and keep a record containing the following details:

(i) the employer's name, in contravention of regulation 3.32 of the Fair Work Regulations 2009 (Cth) (**FW Regulations**);

(ii) the employer's Australian Business Number, in contravention of regulation 3.32 of the FW Regulations; and

(iii) the rate of remuneration paid to the Employee, in contravention of regulation 3.33 of the FW Regulations.

(collectively, the **Admitted Contraventions**).

2. The Second Respondent admits that she was involved in each of the Admitted Contraventions set out in paragraph 1(a) to 1(h) above, pursuant to subsection 550(1)(a) and (b) of the FW Act, and is therefore to be treated as having herself contravened each of the provisions set out in paragraph 1(a) to 1(h) above.

3. The Respondents admit that the Admitted Contraventions resulted in the Employee being underpaid a total of $16,756.47 in wages (**Wages Underpayment**), in addition to an underpayment of $2810.66 in respect of

superannuation, (which includes both superannuation calculated on the basis of amounts paid to the Employee during the Employment Period and superannuation calculated on the basis of the Wages Underpayment).

AGREED FACTS

The Applicant

4. The Applicant is and was at all times material to this proceeding:

   (a) a statutory appointee of the Commonwealth appointed by the Governor-General by written instrument pursuant to Division 2 of Part 5-2 of the FW Act;

   (b) a Fair Work Inspector by force of section 701 of the FW Act; and

   (c) a person with standing under subsection 539(2) of the FW Act to apply for orders in respect of contraventions of civil remedy provisions under the FW Act.

The First Respondent

5. The First Respondent is and was at all material times:

   (a) since 2 October 2012, a company incorporated under the provisions of the *Corporations Act 2001* (Cth);

   (b) capable of being sued in its corporate name;

   (c) a constitutional corporation within the meaning of section 12 of the FW Act;

   (d) a national system employer within the meaning of section 14 of the FW Act;

   (e) the operator of a retail travel agency business with a principal place of business at 70 Kingsway Glen Waverley in the State of Victoria offering services including arranging and selling airline flights,

accommodation and holiday tours for retail customers (**Business**); and

(f) the entity that employed the Employee during the Employment Period.

The Second Respondent

6. The Second Respondent is and was at all material times a director of the First Respondent.

7. The Second Respondent has at all material times been the person responsible for the overall direction, management and supervision of the Business.

The Employee

8. The Employee:

(a) was 24 years of age at the time that she commenced employment with the First Respondent;

(b) is from a non-English speaking background; and

(c) was engaged by the First Respondent to perform work for the Business during the Employment Period.

9. At all material times the Employee performed work as a travel consultant whose primary duties involved providing information, advice and assistance to retail customers, arranging and selling airline flights, accommodation and holiday tours to retail customers, receiving, arranging and making payments for the products purchased and keeping records of sales made (**the Duties**).

Employment Relationship

10. During the Employment Period, when performing the Duties at the Business, the Employee was supervised and managed by an employee or agent of the First Respondent.

11. The Employee was provided with an email address to use whilst performing the Duties at the Business. The email address was set up by and provided to the Employee by her manager.

12. During the Employment Period, the Employee performed the Duties at the Business as and when required by the First Respondent, in the following manner:

    (a) the Employee was notified of her fortnightly rostered hours by the circulation of a roster which was sent by email by her manager to all of the travel consultants working for the First Respondent;

    (b) the roster included start and finish times; and

    (c) the Employee was required to use a clock card system when commencing work, taking breaks and finishing work each day.

13. If the Employee was not available to work at the Business she was required to seek permission from her manager.

14. Her manager, on behalf of the First Respondent, imposed requirements on the Employee in relation to conduct during working hours. One such requirement was that the Employee was not permitted to make or receive personal telephone calls during her working hours.

15. The conduct of the Employee's manager in supervising and managing the performance of work by the Employee and the times at which work was performed as referred to in paragraphs 10 to 14 was conduct engaged in by her within her actual or apparent authority on behalf of the First Respondent, and is taken to be conduct engaged in by the First Respondent pursuant to section 793(1)(a) of the FW Act.

16. On occasions during the Employment Period the Second Respondent would also communicate with the Employee in relation to the performance of the Duties, usually by telephone to the Employee's office phone when at the Business.

17. During the Employment Period the Employee was paid each fortnight.

18. The remuneration paid to the Employee for the performance of work during the Employment Period was determined by the First Respondent, in the following manner:

(a) the Employee's initial rate of pay was $9.00 an hour;

(b) on occasions during the Employment Period the Second Respondent would communicate with the Employee in relation to her rate of pay, usually by telephone to the Employee's office phone when at the Business;

(c) the amounts paid to the Employee were determined by the First Respondent according to time worked by the Employee recorded on the clock card system; and

(d) the clock card information was entered into a spreadsheet and sent to "head office" who arranged payment to the Employee.

19. During the Employment Period the Employee:

(a) did not submit or provide invoices to the First Respondent or any other person in relation to the performance of the Duties by her; and

(b) was never told by the Respondents that she was required to submit or provide invoices to the First Respondent or any other person in relation to the performance of the Duties by her.

20. At all times during the Employment Period the Employee personally performed the Duties for the First Respondent.

21. During the Employment Period:

(a) the Employee did not supply any capital or equipment relating to or connected with the performance of the Duties; and

(b) the First Respondent provided all the equipment relating to or connected with the performance of the Duties by the Employee,

including a computer, desk, telephone and computer software necessary to undertake the Duties.

22. The Employee performed work for the First Respondent on a casual basis, as follows:

(a) the Employee worked in accordance with a roster provided to her by the First Respondent each fortnight;
(b) the number of weekly hours, working days and pattern of work for the Employee varied from week to week;
(c) the Employee was paid a flat hourly rate for each hour that she worked; and
(d) the Employee did not receive or accrue any paid leave entitlements.

Rates of Pay received

23. During the period 17 January 2013 to 3 March 2013, the Employee was paid a flat hourly rate of pay, which fluctuated from fortnight to fortnight, in the range of $9.03 to $9.05 for each hour that she performed work for the First Respondent.

24. During the period 4 March 2013 to 17 March 2013, the Employee was paid a flat hourly rate of pay of $9.61 for each hour that she performed work for the First Respondent.

25. During the period 18 March 2013 to 7 July 2013, the Employee was paid a flat hourly rate of pay, which fluctuated from fortnight to fortnight, in the range of $10.50 to $10.57 for each hour that she performed work for the First Respondent.

26. During the period 8 July 2013 to 1 September 2013, the Employee was paid a flat hourly rate of pay, which fluctuated from fortnight to fortnight, in the range of $11.01 to $11.09 for each hour that she performed work for the First Respondent.

27. During the period 2 September 2013 to 5 September 2013, the Employee was paid a flat hourly rate of pay of $11.40 for each hour that she performed work for the First Respondent.

28. The total amount paid to the Employee by the First Respondent for the work that she performed during the Employment Period was $14,186.04.

Applicable Legislative Instruments

29. At all relevant times the First Respondent was bound in respect of the employment of the Employee by the FW Act.

30. At all relevant times the First Respondent was bound, in respect of the employment of the Employee, by the Award, because:

(a) the First Respondent was an employer in the "general retail industry" as defined in clause 3 of the Award; and

(b) the Business fell within the industry, incidence and application of the Award.

31. At all relevant times, the Duties performed by the Employee were of a kind covered by the Award and fell within the classification of Retail Employee Level 1 as set out in Schedule B of the Award.

ADMITTED CONTRAVENTIONS

Contravention 1: Sham Contracting – Representing an employment contract as a contract for service (Contravention of sub-section 357(1) of the FW Act)

32. By reason of the facts set out at paragraphs 10 to 22 above, at all material times from the commencement of the Employment Period, the Employee was an employee of the First Respondent engaged pursuant to a contract of employment.

33. On 16 January 2013 the Employee attended a job interview with the Second Respondent. At the interview, the Second Respondent provided the Employee with a document entitled "Independent Contractor and

Confidentiality Agreement" (**Contractor Agreement**) on behalf of the First Respondent.

34. The Contractor Agreement included terms that provided, inter alia, that:

(a) the Employee agreed and acknowledged that she was an independent contractor;

(b) she would provide an Australian Business Number (**ABN**) to the Company and take full responsibility for tax;

(c) no employer and employee relationship was created; and

(d) she agreed not to work or be a contractor for another business in the same industry for three (3) months after the termination of the Contractor Agreement.

35. At the time of providing the Contractor Agreement to the Employee the Second Respondent made a statement to the Employee to the effect that she needed to provide an ABN.

36. The Second Respondent was at all relevant times an officer of the First Respondent. The Second Respondent's conduct in:

(a) providing the Employee with the Contractor Agreement; and

(b) making the statement admitted in paragraph 35

was conduct engaged in by her on behalf of the First Respondent.

37. The First Respondent did not withhold income tax from payments made to the Employee during the Employment Period.

38. The First Respondent did not make superannuation guarantee payments in relation to the performance of work by the Employee.

39. By engaging in the conduct described in paragraphs 33 to 38 above, the First Respondent contravened section 357(1) of the FW Act in that it represented to the Employee that the contract of employment under which the Employee

was employed by the First Respondent was a contract for services under which the Employee performed work as an independent contractor.

Contravention 2: Failure to pay base hourly rate of pay (Clauses A.2.5 and A.2.6 of Schedule A of the Award)

40. Pursuant to clause A.2.5 and A.2.6 of Schedule A of the Award, the First Respondent was required to pay the Employee the following minimum hourly rate of pay in respect of all ordinary hours worked by the Employee:

    (a) for the period from 17 January 2013 until 7 July 2013: $17.40 per hour; and

    (b) for the period from 8 July 2013 until 5 September 2013: $17.92 per hour.

41. During the Employment Period, the First Respondent paid the Employee for each hour worked at the rates admitted to in paragraphs 23 to 28 above.

42. The Employee worked the following number of ordinary hours for the First Respondent during the Employment Period:

    (a) from 17 January 2013 until 7 July 2013: 1029.13 hours; and

    (b) from 8 July 2013 until 5 September 2013: 346.45 hours.

43. By reason of the matters admitted in paragraphs 40 to 42 above, the First Respondent contravened section 45 of the FW Act by paying the Employee less than the minimum hourly rate of pay payable under clause A.2.5 and A.2.6 of Schedule A of the Award for each ordinary hour that she worked during the Employment Period.

44. By reason of the contravention admitted in paragraph 43 above, the First Respondent underpaid the Employee $9,929.20.

Contravention 3: Failure to pay casual loading (Clauses A.5.4 and A.6.4 of Schedule A of the Award)

45. Pursuant to clause A.5.4 of Schedule A of the Award, the First Respondent was required to pay the Employee the following casual loading in respect of each hour worked by the Employee during the Employment Period (with the

exception of hours worked by the Employee on a Sunday) (**Casual Loading**):

(a) for the period from 17 January 2013 until 7 July 2013: a casual loading of $4.00 per hour; and

(b) for the period from 8 July 2013 until 5 September 2013: a casual loading of $4.30 per hour.

46. During the Employment Period, the Employee worked the following number of hours for the First Respondent for which the Casual Loading was payable:

(a) from 17 January 2013 until 7 July 2013: 946.4 hours; and

(b) from 8 July 2013 until 5 September 2013: 346.45 hours.

47. Pursuant to clause A.6.4 of Schedule A of the Award, the First Respondent was required to pay the Employee the following casual loading in respect of each hour worked by the Employee on a Sunday during the Employment Period (**Sunday Casual Loading**):

(a) for the period from 17 January 2013 until 7 July 2013: a Sunday Casual Loading of $1.39 per hour; and

(b) for the period from 8 July 2013 until 5 September 2013: a Sunday Casual Loading of $0.72 per hour.

48. In the period from 17 January to 7 July 2013 the Employee worked a total of 82.73 hours on Sundays for the First Respondent.

49. Throughout the Employment Period the First Respondent did not pay the Employee any Casual Loading or any Sunday Casual Loading.

50. By reason of the matters admitted in paragraphs 45 to 49 above, the First Respondent contravened section 45 of the FW Act by failing to pay the employee:

(a) the Casual Loading payable under clause A.5.4 of Schedule A of the Award for each hour that she worked during the Employment Period; and

(b) the Sunday Casual Loading payable under clause A.6.4 of the Award for each hour that she worked on a Sunday during the Employment Period.

51. By reason of the contravention admitted in paragraph 50 above, the First Respondent underpaid the Employee $5,275.34 in respect of the Casual Loading and $114.99 in respect of the Sunday Casual Loading.

Contravention 4: Failure to pay Saturday Penalty Rate (Clause A.7.3 of Schedule A of the Award)

52. Pursuant to clause A.7.3 of Schedule A of the Award, the First Respondent was required to pay the Employee the following penalty in respect of work performed between 7.00am and 6.00pm on a Saturday during the Employment Period:

(a) for the period from 17 January 2013 until 7 July 2013: an additional $1.04 per hour; and

(b) for the period from 8 July 2013 until 5 September 2013: an additional $1.43 per hour.

53. The Employee worked the following number of hours on Saturdays for the First Respondent during the Employment Period:

(a) from 17 January 2013 until 7 July 2013: 124.51 hours; and

(b) from 8 July 2013 until 5 September 2013: 47.82 hours

54. Throughout the Employment Period, the First Respondent did not pay any penalty rate to the Employee on the occasions that she performed work on a Saturday.

55. By reason of the matters admitted in paragraphs 52 to 54 above, the First Respondent contravened section 45 of the FW Act by failing to pay a Saturday penalty payable under clause A.7.3 of the Award.

56. By reason of the contravention admitted in paragraph 55 above, the First Respondent underpaid the Employee $197.87.

Contravention 5: Failure to Pay Sunday Penalty Rate (Clause A.7.3 of Schedule A of the Award)

57. Pursuant to clause A.7.3 of Schedule A of the Award, the First Respondent was required to pay the Employee the following penalty in respect of work performed on a Sunday during the Employment Period:

(a) for the period from 17 January 2013 until 7 July 2013: an additional $10.44 per hour; and

(b) for the period from 8 July 2013 until 5 September 2013: an additional $14.33 per hour.

58. In the period from 17 January to 7 June 2013 the Employee worked a total of 82.73 hours on Sundays for the First Respondent.

59. Throughout the Employment Period, the First Respondent did not pay any penalty rate to the Employee on the occasions that she was engaged to perform work on a Sunday.

60. By reason of the matters admitted in paragraphs 57 to 59 above, the First Respondent contravened section 45 of the FW Act by failing to pay the Employee the Sunday penalty rates payable under clause A.7.4 of the Award.

61. By reason of the contravention admitted in paragraph 60 above, the First Respondent underpaid the Employee $863.70.

Contravention 6: Failure to Pay Public Holiday Penalty Rate (Clause A.7.3 of Schedule A of the Award)

62. Pursuant to clause A.7.3 of Schedule A of the Award, the First Respondent was required to pay the Employee the following penalty in respect of work performed on a public holiday during the Employment Period:

(a) for the period from 17 January 2013 until 7 July 2013: an additional $15.66 per hour; and

(b) for the period from 8 July 2013 until 5 September 2013: an additional $21.50 per hour.

63. In the period from 17 January to 7 July 2013 the Employee worked a total of 23.97 hours on public holidays for the First Respondent.

64. Throughout the Employment Period the First Respondent did not pay any Public Holiday penalty rates to the Employee on the occasions that she performed work on a public holiday.

65. By reason of the matters admitted in paragraphs 62 to 64 above, the First Respondent contravened section 45 of the FW Act by failing to pay the Employee the Public Holiday penalty as required by clause A.7.4 of the Award.

66. By reason of the contravention admitted in paragraph 65 above, the First Respondent underpaid the Employee $375.37.

Contravention 7: Failure to Make Superannuation Contributions (Clause 22 of the Award)

67. The First Respondent was required to make such superannuation contributions to a superannuation fund for the benefit of the Employee as would avoid the First Respondent being required to pay the superannuation guarantee charge under superannuation legislation with respect to the Employee, as required by clause 22.2 of the Award.

68. At all material times clause 22 of the Award required that the First Respondent make superannuation contributions for the benefit of the Employee as prescribed by the *Superannuation Guarantee (Administration) Act* 1992 (Cth) at the following rate

(a) in relation to wages paid the Employee on or prior to 30 June 2013: 9% of the Employee's ordinary time earnings; and

(b) in relation to wages paid the Employee on or after 1 July 2013: 9.25% of the Employee's ordinary time earnings.

69. The First Respondent did not make any superannuation contributions to a superannuation fund for the benefit of the Employee.

70. By reason of the matters admitted in paragraphs 67 to 69 above, the First Respondent contravened section 45 of the FW Act by failing to make

superannuation contributions for the benefit of the Employee as required by clause 22.2 of the Award.

71. By reason of the contravention admitted in paragraph 70 above, the First Respondent underpaid the Employee $2810.66 in superannuation contributions (which includes superannuation calculated on the basis of amounts paid to the Employee during the Employment Period and superannuation calculated on the basis of the Wages Underpayment (**the Superannuation Underpayment**)).

Contravention 8: Failure to give Employee payslips (subsection 536(1) of the FW Act)

72. At all material times the First Respondent was required by subsection 536(1) of the FW Act to provide employees with a payslip within one working day of payment being made to an employee in relation to the performance of work.

73. By reason of the matters admitted in paragraph 32 above, the First Respondent was required to provide the Employee with payslips within one day of making the fortnightly payments to her in respect of her performance of the Duties.

74. The First Respondent failed to give the Employee any payslips during the Employment Period.

75. By reason of the matters admitted in paragraphs 72 and 75 above, and by acting as admitted in paragraph 74, the First Respondent contravened subsection 536(1) of the FW Act.

Contravention 9: Failure to comply with record keeping obligations (subsection 535(1) of the FW Act)

76. During the Employment Period, pursuant to subsection 535(1) of the FW Act, the First Respondent was required to make, and keep for 7 years, employee records of the kind prescribed by the FW Regulations which included the following information:

(a) the employer's name (regulation 3.32(a));

(b) the Australian Business Number of the employer (regulation 3.32(f)); and

(c) the rate of remuneration paid to the employee (regulation 3.33(1)(a)).

77. By reason of the matters admitted in paragraph 32 above, the First Respondent was required to make and keep records in respect of the Employee.

78. The First Respondent did not make or keep records that included the information required by the FW Regulations as set out in paragraph 76(a) to 76(c) above.

79. By reason of the matters admitted in paragraph 76 and 77 above, and by acting as admitted in paragraph 78, the First Respondent contravened subsection 535(1) of the FW Act.

Second Respondent's Involvement in the Contraventions

80. The Second Respondent was, at all material times, the person responsible for:

(a) making decisions on behalf of the First Respondent about whether workers would be engaged as employees or independent contractors;

(b) engagement of employees and independent contractors by the First Respondent;

(c) making decisions on behalf of the First Respondent about what terms and conditions would apply to persons engaged to perform work for the First Respondent; and

(d) determining the time, method and manner of payment to persons engaged to perform work for the First Respondent.

81. By reason of the matters admitted in paragraphs 6, 7 and 80 above, the Second Respondent was responsible for ensuring that the First Respondent complied with its legal obligations under the FW Act.

82. The Second Respondent had actual knowledge of the making of the representations referred to in paragraphs 33, 34 and 35.

83. The Second Respondent knew, at all material times:

(a) that the Employee performed the Duties personally;

(b) the rate of pay that would be paid to the Employee (which varied from time to time) for the work she performed for the First Respondent;

(c) that the Employee's manager would, on behalf of the First Respondent:

(i) issue rosters to the Employee specifying the days on which she was required to attend work and the times at which she would work;

(ii) manage and supervise the Employee's work performance and conduct during working hours;

(d) that the Employee performed some of her duties for the First Respondent on weekends and public holidays; and

(e) that the First Respondent supplied the Employee with all necessary equipment required to perform her duties.

84. The Respondents do not assert that they did not know or that they were not reckless as to whether the contract was a contract of employment rather than a contract for services, and acknowledge that the defence in section 357(2) of the FW Act is not available to them.

85. The Second Respondent knew that:

(a) the Award applied to employees engaged to perform sales work in travel agencies;

(b) the Award sets out minimum rates of pay; and

(c) the minimum base rate of pay under the Award is approximately $18 per hour.

86. The Second Respondent knew that:

(a) the First Respondent did not make any superannuation contributions on behalf of the Employee; and

(b) the First Respondent did not give the Employee any payslips in relation to the performance of work.

87. By reason of the matters admitted in paragraphs 6, 7, and 80 to 86 above, the Second Respondent, by way of her acts or omissions:

(a) aided, abetted, counselled or procured the contraventions admitted by the First Respondent set out at paragraphs 1(a) to 1(h) above; and

(b) was directly or indirectly, knowingly concerned in or a party to each of the contraventions admitted by the First Respondent in paragraphs 1(a) to 1(h) above.

88. Pursuant to subsection 550(1) of the FW Act, and by reason of her involvement set out in paragraph 87 above, the Second Respondent is treated as having herself personally contravened each of the provisions that the First Respondent admits to have contravened at paragraphs 1(a) to 1(h) above.

RECTIFICATION OF UNDERPAYMENTS

89. The First Respondent, at the direction of the Second Respondent, has:

(a) rectified the Wages Underpayment by paying the Employee the amount of $16,756.47 on 21 October 2014; and

(b) rectified the Superannuation Underpayment by paying the amount of $2,810.66 in superannuation contributions to a superannuation fund nominated by the Employee for the benefit of the Employee on 27 October 2014.

INVESTIGATION AND PROCEEDINGS

90. On 28 October 2013 the Applicant received a complaint from the Employee in relation to the First Respondent.

91. On 6 November 2013 a Fair Work Inspector employed by the Applicant, Kristen Walsh, contacted the Second Complainant by telephone to inform her of the Employee's complaint and that it would be referred for investigation.

92. In the period from November 2013 until May 2014 the Applicant conducted an investigation into the Employee's complaint.

93. During the course of the Applicant's investigation:

(a) Fair Work Inspectors engaged by the Applicant conducted a site visit at the premises of the First Respondent on 18 November 2013 and obtained copies of time cards to record the hours worked by the Employee;

(b) in response to a Notice to Produce issued by the Applicant on 18 November 2013 the First Respondent produced to the Applicant copies of documents relating to the Employee including the Contractor Agreement, a record of amounts paid to the Employee during the Employment Period, rosters, a statement of duties and a position description for the Employee's role; and

(c) the Second Respondent was given the opportunity to participate in a formal record of interview with the Applicant, and agreed to attend an interview on 28 February 2014.

94. In a recorded interview with officers of the Applicant on 28 February 2014 the Second Respondent said words to the effect that:

(a) she knows the difference between an employee and an independent contractor;

(b) an independent contractor needs to provide an ABN and pay his or her own tax, is doing his or her own business, and has flexibility in terms of when he/she likes to work;

(c) she has some travel consultants who are employees and some who are engaged as independent contractors, and that they perform similar duties; and

(d) the Employee was paid a little bit more than one half, a little bit more than 50% of the minimum wage of $18 per hour.

95. On 22 May 2014 the Applicant sent letters to each of the First and Second Respondents which advised that:

(a) the Applicant had determined that the Employee was properly characterised as an employee and not an independent contractor;

(b) the First Respondent had contravened the Award and the FW Act in respect of the Employee, including contravention of section 357(1) of the FW Act;

(c) the contraventions resulted in an underpayment of wages to the Employee;

(d) the Second Respondent was an accessory to the First Respondent's contraventions pursuant to section 550 of the FW Act;

(e) the First Respondent was encouraged to rectify the identified underpayments and take other corrective action to ensure that the requirements of the relevant industrial instruments are (or have been) met in respect of all existing and former employees; and

(f) the Applicant intended to commence proceedings against the First and Second Respondents in the Federal Circuit Court of Australia.

96. On 16 June 2014 the Applicant commenced proceedings in this Court against the First and Second Respondents seeking declarations and penalties in respect of the Admitted Contraventions.

97. On 3 October 2014 the Respondents agreed to admit liability and enter into a Statement of Agreed Facts.

98. Neither of the Respondents have previously had legal proceedings commenced against them by the Applicant or its predecessor agencies for contraventions of Commonwealth workplace laws.

APPENDIX A – DECLARATIONS AND ORDERS SOUGHT BY AGREEMENT

Declarations

1. Declarations that the First Respondent contravened:

   (a) subsection 357(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) by representing to Ms Kate Zhang (**Employee**) that the contract of employment under which she was employed by the First Respondent was a contract for services under which the Employee performed work as an independent contractor;

   (b) section 45 of the FW Act by failing to pay the Employee at least the applicable minimum hourly rate of pay during the period from on or about 17 January 2013 until on or about 5 September 2013 (**Employment Period**), in contravention of clauses A.2.5 and A.2.6 of Schedule A of the General Retail Industry Award 2010 (**Award**);

   (c) section 45 of the FW Act by failing to pay the Employee a casual loading during the Employment Period, in contravention of clause A.5.4 and A.6.4 of Schedule A of the Award;

   (d) section 45 of the FW Act by failing to pay the Employee a loading for Saturday work during the Employment Period, in contravention of clause A.7.3 of Schedule A of the Award;

   (e) section 45 of the FW Act by failing to pay the Employee a loading for Sunday work during the Employment Period, in contravention of clause A.7.3 of Schedule A of the Award;

   (f) section 45 of the FW Act by failing to pay the Employee a loading for Public holiday work during the Employment Period, in contravention of clause A.7.3 of Schedule A of the Award;

   (g) section 45 of the FW Act by failing to make superannuation contributions to a superannuation fund for the benefit of the Employee

as would avoid the First Respondent being required to pay the superannuation guarantee charge under superannuation legislation, in contravention of clause 22 of the Award;

(h) subsection 536(1) of the FW Act by failing to provide the Employee with payslips within one working day of payment with respect to work performed by the Employee; and

(i) subsection 535(1) of the FW Act by failing to make and keep a record containing the following details:

(i) the employer's name, in contravention of regulation 3.32 of the Fair Work Regulations 2009 (Cth) (**FW Regulations**);

(ii) the employer's Australian Business Number, in contravention of regulation 3.32 of the FW Regulations; and

(iii) the rate of remuneration paid to the Employee, in contravention of regulation 3.33 of the FW Regulations.

2. A declaration that the Second Respondent was involved in each of the contraventions by the First Respondent set out in paragraph 1(a) to 1(h) above, pursuant to subsection 550(1) of the FW Act.

3. Orders that the First Respondent pay penalties pursuant to subsection 546(1) of the FW Act for the contraventions set out at paragraph 1 above.

4. Orders that the Second Respondent pay penalties pursuant to subsection 546(1) of the FW Act for the contraventions set out at paragraph 1(a) to 1(h) above.

5. Orders pursuant to subsection 546(3)(a) of the FW Act requiring the First Respondent and Second Respondent to pay their respective penalty amounts to the Commonwealth, within 28 days of this order.

6. An order that the Applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.