FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v JAY GROUP SERVICES PTY LTD & ORS [2014] FCCA 2869

Catchwords:
INDUSTRIAL LAW – Determination of penalties to be imposed in relation to admitted or undisputed contraventions of *Fair Work Act 2009* (Cth) – totality principle – non-payment and underpayment of employees – agreed statements of facts prepared by most respondents – relevant principles.

Legislation:
Fair Work Act 2009, ss.45, 535, 536, 546, 550(2), 557

Cases cited:
Australasian Meat Industry Employees Union v Meneling Station Pty Ltd (1987) 16 IR 245
Australian Competition and Consumer Commission v Energy Australia Pty Ltd [2014] FCA 336
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
Barbaro v R (2014) 305 ALR 323
Blandy v Coverdale NT Pty Ltd (ACN 102 611 423) (2008) 178 IR 150
Cousins v Merringtons Pty Ltd (No.2) [2008] VSC 340
Cussen & Ors v Sultan & Ors [2009] NSWSC 1114
Deputy Commissioner of Taxation (Superannuation) v Graham Family Superannuation Pty Ltd [2014] FCA 1101
Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (2014) 140 ALD 337
Director of the Fair Work Building Industry Inspectorate v Luka Tippers & Excavation Pty Ltd & Anor [2014] FCCA 1459
DP World Sydney Ltd v Maritime Union of Australia (No.2) [2014] FCA 596
Fair Work Ombudsman v ACN 146 435 118 Pty Ltd (No.2) [2013] FCCA 1270
Fair Work Ombudsman v Al Hilfi [2012] FCA 1166
Fair Work Ombudsman v Bento Kings Meadows Pty Ltd [2013] FCCA 977
Fair Work Ombudsman v Contracting Plus Pty Ltd & Anor (2011) 205 IR 281
Fair Work Ombudsman v Cuts Only The Original Barber Pty Ltd & Ors [2014] FCCA 2381
Fair Work Ombudsman v Happy Cabby Pty Ltd & Anor [2013] FCCA 397
Fair Work Ombudsman v Promoting U Pty Ltd & Anor [2012] FMCA 58
Fair Work Ombudsman v Ross Geri Pty Ltd & Ors [2014] FCCA 959
Fair Work Ombudsman v South Jin Pty Ltd & Ors [2013] FCCA 1057
Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258

Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq.) [2012] FCA 479
Fair Work Ombudsman v Tuscan Landscape Company Pty Ltd & Ors [2014] FCCA 1421
Gibbs v Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216
Ibrahim v Pham [2007] NSWCA 215
Inspector Trundle (Workplace Ombudsman) v M & K Angelopoulos Pty Ltd [2009] FMCA 37
Karl Suleman Enterprizes Pty Ltd (in liquidation) v Philip Viet Dzung Pham [2012] NSWSC 645
Kelly v Fitzpatrick (2007) 166 IR 14
Lang v Xidis Pty Ltd t/as Effective Supermarket Services & Anor [2008] FMCA 1009
Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant and Bar [2007] FMCA 7
McIver v Healey [2008] FCA 425
Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72
Mornington Inn Pty Ltd (ACN 116 830 703) v Jordan (2008) 168 FCR 383
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285
Salandra v Risborg Services Pty Ltd & Ors [2008] FMCA 76
Seymour v Stawell Timber Industries Pty Ltd (1985) 9 FCR 241
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550
Stuart-Mahoney v Construction, Forestry, Mining and Energy Union (2008) 177 IR 61
Workplace Ombudsman v Securit-E Holdings Pty Ltd (in liquidation) & Ors (2009) 187 IR 330

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	JAY GROUP SERVICES PTY LTD (ACN 143 615 972)
Second Respondent:	XIDIS AUST PTY LTD (ACN 128 635 905)
Third Respondent:	JATINDER SINGH
Fourth Respondent:	NICK IKSIDIS
Fifth Respondent:	TEJINDER SINGH SANDHU
File Number:	SYG 38 of 2013

Judgment of:	Judge Lloyd-Jones
Hearing date:	12 March 2014
Delivered at:	Sydney
Delivered on:	19 December 2014

REPRESENTATION

Solicitors for the Applicant:	Ms L Madden of Fair Work Ombudsman
Counsel for the First and Third Respondents:	Mr Maddox
The Second, Fourth and Fifth Respondents:	There were no appearances by the second, fourth or fifth respondents at the hearing.

THE COURT NOTES:

(1) On 20 December 2013, the Court made a number of declarations in relation to the current proceedings.

ORDERS

(2) Pursuant to sub-section 545(2) of the *Fair Work Act 2009* (Cth) (the "FW Act"), Jay Group Services Pty Ltd ACN 143 615 972 ("Jay Group") pay compensation to;

(a) Byoung Joon Jang in the amount of $1,979.77;

(b) Seong Bae Jeon in the amount of $2,120.63;

(c) In Gu Baek in the amount of $2,830.57;

(d) Donggun Kim in the amount of $1,994.25;

(e) Min Woo Kim in the amount of $2,635.87;

(f) Gimim Kim in the amount of $1,829.48;

(g) Suyong Lim in the amount of $2,830.57;

(h) Inwoo Baek in the amount of $2,187.21;

(i) Joon Eok Park in the amount of $1,829.48;

(j) Seung Taek Oh in the amount of $2,688.57; and

(k) Taheo Cho in the amount of $1,844.21.

(Collectively, the "Employees")

(3) Pursuant to sub-section 547(2) of the FW Act, interest be paid by Jay Group on the underpayment amounts referred to in Order 1(a)-(k) for the following period:

Name of Employee	**Interest Paid on underpayment amounts**
Byoung Joon Jang	28 July 2011 to date of judgment
Seong Bae Jeon	31 July 2011 to date of judgment
Ingu Baek	31 July 2011 to date of judgment
Donggun Kim	27 July 2011 to date of judgment
Min Woo Kim	31 July 2011 to date of judgment
Gimim Kim	31 July 2011 to date of judgment
Suyong Lim	31 July 2011 to date of judgment
Inwoo Baek	27 July 2011 to date of judgment
Joon Eok Park	31 July 2011 to date of judgment
Seung Taek Oh	31 July 2011 to date of judgment
Taheo Cho	27 July 2011 to date of judgment
Abbas Vahdani	31 July 2011 to 11 March 2014

(4) Pursuant to sub-section 546(1) of the FW Act, a pecuniary penalty of $109,725.00 on Jay Group in respect of the following contraventions:

(a) Section 45 of the FW Act, by virtue of failing to pay each of the Employees the minimum weekly wages for work performed during ordinary hours, as prescribed by clause 16.1 of the Modern Award;

(b) Section 45 of the FW Act, by virtue of failing to pay each of the Employees the casual loading prescribed for all hours worked, as prescribed by clause 12.5(a) of the Modern Award;

(c) Section 45 of the FW Act, by virtue of failing to pay the Employees the penalty rate for all hours worked on a Saturday, as prescribed by clause 27.2(a) of the Modern Award;

(d) Section 45 of the FW Act, by virtue of failing to pay the Employees the penalty rate for all hours worked on a Sunday, as prescribed by clause 27.2(b) of the Modern Award;

(e) Section 45 of the FW Act, by virtue of failing to pay the Employees the shift work penalty rate for shifts worked on Monday to Friday and starting before 6:00am or finishing after 6:00pm, as prescribed by clause 27.1(a) of the Modern Award;

(f) Section 45 of the FW Act, by virtue of failing to pay the Employees overtime rates for the overtime worked they performed, as prescribed by clause 28 of the Modern Award;

(g) Section 45 of the FW Act, by virtue of failing to make superannuation contributions for the benefit of the Employees, as prescribed by clause 23.2 of the Modern Award; and

(h) Section 535 of the FW Act, by virtue of failing to make, and keep for 7 years, employee records in relation to the Employees, as prescribed by the *Fair Work Regulations 2009* (Cth).

(5) Pursuant to sub-section 546(1) of the FW Act, a pecuniary penalty of $23,760 on Mr Jatinder Singh for his involvement (within the meaning of sub-section 550(2) of the FW Act) in Jay Group's non-payment of wages and record keeping contraventions outlined in Order 3(a)-(h) above.

(6) Pursuant to sub-section 546(1) of the FW Act, a pecuniary penalty of $39,600 on Mr Nick Iksidis for his involvement (within the meaning of sub-section 550(2) of the FW Act) in Jay Group's non-payment of wages and contravention outlines in Order 3(a)-(h) above.

(7) Pursuant to sub-section 546(1) of the FW Act a pecuniary penalty of $17,160 on Tejinder Singh Sandhu for his involvement (within the meaning of sub-section 550(2) of the FW Act) in Jay Group's non-payment of wages and contravention outlined in Order 3(a)-(h) above.

(8) Pursuant to sub-section 546(3) of the FW Act that all pecuniary penalties imposed, be paid into the Consolidated Revenue Fund of the Commonwealth.

(9) That any penalties imposed by the Court and the payment of any unpaid monies and interest to the employees be paid within 30 days of these orders.

(10) That any unpaid monies and interest owing to employees who cannot be located be paid into the Consolidated Revenue Fund of the Commonwealth.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 38 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

JAY GROUP SERVICES PTY LTD (ACN 143 615 972)
First Respondent

XIDIS AUST PTY LTD (ACN 128 635 905)
Second Respondent

JATINDER SINGH
Third Respondent

NICK IKSIDIS
Fourth Respondent

TEJINDER SINGH SANDHU
Fifth Respondent

REASONS FOR JUDGMENT

Introduction

1. These proceedings concern a determination of penalties in respect of the five respondents' to this proceeding contraventions of the *Fair Work Act 2009* (Cth) (the "FW Act"). Broadly put, the proceeding relates to the underpayment of 12 employees (the "Employees") who worked for the first respondent as shopping trolley collectors at the Lidcombe, NSW site of Costco Australia. Over 11 days in July 2011 the employees received no payment at all for work performed and were underpaid more than $27,000 during that time.

2. The first respondent is Jay Group Services Pty Ltd (ACN 143 615 972) ("Jay Group"), a corporation which primarily carries on a cleaning business in New South Wales and the Australian Capital Territory. From time to time, Jay Group contracted with the second respondent, Xidis Aust Pty Ltd (ACN 128 635 905) ("Xidis"), to undertake trolley collection for various supermarkets and retail stores. Jay Group has admitted to being the employer of the employees. The second respondent, which is in administration, was a company that carried on a trolley collection business. The third respondent is Mr Jatinder Singh (also known as Jim Gill) ("Mr Singh") who was, at the relevant time, the General Operations Manager of Jay Group and has been working with that company since 2010. The fourth respondent is Mr Nick Iksidis ("Mr Iksidis") who is currently the director of the second respondent, Xidis (currently in administration). He has carried on a trolley collection business known as "*Effective Supermarket Services*" or "*ESS*" for a number of years. The fifth respondent is Mr Tejinder Singh Sandhu ("Mr Sandhu") who was engaged by Jay Group to assist in the recruitment and supervision of work by Jay Group's employees.

3. The application before the Court concerns the underpayment of 12 employees of Jay Group for eleven days during July 2011. Jay Group has been operating since 2010. The employees performed trolley collection work at the Costco site located at Lidcombe in Sydney. Their duties involved locating and collecting shopping trolleys in and around the Costco site and returning them to trolley bays within the store and in the store's car park. The contraventions in this matter occurred within a context of a chain of some contracting arrangements between the different respondents. Costco entered into a contract with Xidis for trolley collection work. This was then subcontracted down to Jay Group and on behalf of Jay Group, Mr Singh engaged the assistance of Mr Sandhu. It has been agreed in the Agreed Statement of Facts filed on 3 February 2014 in respect of Jay Group and Mr Singh (the "ASOF 1 & 3") that the *Cleaning Services Award 2010* [MA000022] (the "Modern Award") applied to the work performed by the employees and this by virtue their classification in Schedule D to the Modern Award covers employees who may perform collecting, servicing and maintain shopping and/or luggage trolleys.

4. Jay Group has admitted that it failed to ensure that the employees received their minimum entitlements which included the failure to pay, not only the base rates of pay and casual loadings, but also payments for weekend penalty rates, afternoon shift work and overtime. The employees were verbally promised cash payments of between $10 and $12 per hour, but never received any payment at all for work they performed. Jay Group has made admissions that it failed to make and keep records.

5. It is agreed between the parties that the Employees were underpaid a total of $27,284.26.

6. The argument advanced by the applicant in this proceeding, the Fair Work Ombudsman ("FWO"), is that the conduct of the respondents warrants the imposition of significant penalties because it involves contraventions of minimum standards of the most fundamental kind, being the complete non-payment of wages and entitlements. Eleven of the twelve Employees were from South Korea, had limited English skills and were in Australia on short term working holiday visas. The other employee, Mr Abbas Vahdani, had recently arrived in Australia from Iran and, while Mr Vahdani was competent in English, he had never before worked in Australia and this was his first experience in the labour market. The South Korean employees in particular could be characterised as vulnerable as they would have great difficulty in understanding and enforcing their rights in Australia. The matter is further complicated by the fact that the contraventions arose within a purported sub-contracting arrangement which can result in circumstances where it is difficult for the employee to be aware of who their employer actually is.

7. The application is advanced on the basis that the nature of the contraventions and the extent of the loss suffered by the employees was serious. The employees were vulnerable to exploitation by each of the respondents, and the contraventions were not technical, but arguably involved a key basic entitlement being a right to receive pay for work performed which is the focal point of the workplace law provided under the FW Act.

Procedural History

8. The Application and Statement of Claim was filed by FWO on 11 January 2013. Consent orders were made on 8 February 2013 in the following form:

> *1. The Applicant file any application for substituted service on the fifth respondent by 15 February 2013.*
>
> *2. The Respondents are to file and serve any request for further and better particulars on or before 4.00pm on 22 February 2013.*
>
> *3. Applicant file and serve a response to the request for further and better particulars on or before 4.00pm on or before 8 March 2013.*
>
> *4. Respondents file and serve a Defence on or before 4.00pm on 22 March 2013.*
>
> *5. The Applicant file and serve any Reply on or before 4.00pm on 5 April 2013.*
>
> *6. The matter is referred to a Registrar in Sydney for mediation on a date to be fixed by the Registrar pursuant to Part 27 of the Federal Magistrates Court Rules 2001 (Cth).*
>
> *7. Liberty to apply for further directions*

9. On 20 February 2013, the following orders were made by the Court:

> *1. That pursuant to Rule 6.14 of the Federal Magistrates Court Rules 2001 (FMC Rules), service by hand on the Fifth Respondnet of the Application and Statement of Claim dated and filed on 11 January 2013 (collectively, the Documents) in these proceedings be dispensed with, and that in leiu thereof the Documents be served on the Fifth Respondent by:*
>
> > *a) Emailing a copy of the Documents to the email addresses tejinder_sandhu74@yahoo.com and essngeetej@yahoo.com.au; and*
> >
> > *b) Sending a text message to the mobile telephone number 0406 859 962 advising that the Documents have now been served and that they can be collected from the Applicant.*
>
> *2. That pursuant to Rule 6.14 of the FMC Rules, that until further order, or until a Notice of Address for Services is filed by the Fifth Respondent, that service by hand on the Fifth Respondent of all*

documents in these proceedings be dispensed with, and that in lieu thereof all documents be served in the manner outlined in Order 1.

3. The Fifth Respondent file and serve a Notice of Address for Service within 14 days of service of the documents referred to in Order 1.

4. Liberty to apply.

10. From correspondence on the Court file furnished by FWO, the Court was advised that since the making of the Orders noted directly above on 8 February 2013, the parties had discussions in an effort to resolve the matter:

a) On 24 April 2013, FWO attended a mediation with the first and third respondents before Registrar Hannigan; and

b) On 17 May 2013, FWO met with the second and fourth respondents in Melbourne (as they were unable to attend the mediation in Sydney).

Unfortunately, no admissions were forthcoming from any party and the matters in dispute were not able to be resolved. Accordingly, pursuant to Order 7 of the Court's Orders dated 8 February 2013 a directions hearing was requested so that a date could be set for a liability hearing and so that the timetable could be put in place for the filing of evidence and submissions.

11. On 6 June 2013, the Court made the following orders:

1. This matter be set down for hearing on liability on 12 and 13 December 2013 at 10.15am for hearing with an estimate of 1 to 2 days.

2. The fifth respondent is to file a Defence by 4.00pm on 21 June 2013.

3. All evidence in chief shall be given by way of affidavits, subject to further directions of the Court.

4. The applicant is to file and serve all affidavits relied upon in relation to liability on or before 4.00pm on 9 August 2013.

5. The respondents are to each file and serve all affidavits relied upon in relation to liability on or before 27 September 2013.

6. The applicant is to file and serve any affidavits in reply on 4.00pm on or before 11 October 2013.

7. The applicant is to file and serve an outline of submissions and a list of authorities 14 days before the hearing.

8. The respondents are to each file an outline of written submissions and a list of authorities 7 days before the hearing.

9. Liberty to apply for further directions.

12. The matter was listed for a liability hearing on 12 and 13 December 2013, however, at the commencement of the hearing, the parties requested a brief adjournment for the parties to endeavour to resolve the issues. On resumption, the Court was advised that Jay Group admitted being the employer of the employees referred to at [10] in the Statement of Claim. Jay Group also admitted liability in to the contraventions which were set out at [40] in the Statement of Claim. Mr Singh admitted to being involved in the contraventions referred to in [40] of the Statement of Claim, within the meaning of s.550(2) of the FW Act. The parties subsequently filed ASOF 1 & 3 ("Annexure 'A'" to these reasons).

13. The parties, FWO, Jay Group and Mr Singh consented to the orders set out at [68] (except for [68(g)]), [70], [73] and [74] of the Statement of Claim. Consequently, the matter then needed to be listed for a penalty hearing. The Court notes that the second respondent, Xidis, was in external administration and the applicant sought no orders in respect of that party. Mr Iksidis had made admissions on 27 November 2013 and has not sought to be represented in the liability proceedings. The parties have filed an agreed statement of facts with respect to Mr Iksidis (Annexure "B") which does include specific admissions as to liability. Mr Iksidis makes express admissions as to involvement within the meaning of s.550(2) in the contraventions which are set out in [40] of the Statement of Claim. Consequently, FWO sought declarations from [71] of the Statement of Claim and to proceed to a penalty hearing.

14. In respect of Mr Sandhu, he was offshore on the last occasion the matter was before the Court, having departed Australia on 3 February 2013. Mr Sandhu was in Australia on a temporary visa and does not have any right to residency. The Department of Immigration and Citizenship records indicate that Mr Sandhu departed on a Bridging visa and was listed as unlawful for an extended period whilst onshore, and therefore, non-compliance will be subject to an exclusion period in regard to being able to apply for a visa to re-enter Australia (Madden Affidavit, Annexure "LM-3"). Orders were sought in accordance with [72] of the Statement of Claim, subject to amendment as a consequence of Mr Sandhu's new immigration status. The parties were required to prepare draft orders.

15. On 20 December 2013, the Court made the following declarations:

> *1. The first respondent, Jay Group Services Pty Ltd, contravened the following provisions:*
>
> > *a) 45 of the Fair Work Act 2009 (Cth) (**FW Act**), by failing to pay the Employees the minimum weekly wages for work performed during ordinary hours during the period 21 July 2011 to 31 July 2011 in contravention of clause 16.1 of the Cleaning Services Award (**Modern Award**);*
> >
> > *b) section 45 of the FW Act by failing to pay the Employees the casual loading prescribed for all hours worked during the period 21 July 2011 to 31 July 2011 in contravention of clause 12.5(a) of the Modern Award.*
> >
> > *c) section 45 of the FW Act by failing to pay the Employees the penalty rate for all hours worked on a Saturday during the period 21 July 2011 to 31 July 2011 in contravention of clause 27.2(a) of the Modern Award.*
> >
> > *d) 45 of the FW Act by failing to pay the Employees the penalty rate for all hours worked on a Sunday during the period 21 July 2011 to 31 July 2011 in contravention of clause 27.2(b) of the Modern Award.*
> >
> > *e) section 45 of the FW Act by failing to pay the Employees the applicable shift work penalty rate for shifts starting before 6.00am or finishing after 6.00pm during the period 21 July 2011 to 31 July 2011 in contravention of clause 27.1(a) of the Modern Award.*

f) section 45 of the FW Act by failing to pay the Employees overtime rates for overtime work performed during the period 21 July 2011 to 31 July 2011 in contravention of clause 28 of the Modern Award.

*g) section 45 of the FW Act by failing to make, and keep for 7 years, employee records in relation to the Employees as prescribed under regulation 3.32, 3.33 and 3.34 of the Fair Work Regulations 2009 (Cth) (**FW Regulations**).*

2. The third respondent, Mr Jatinder Singh, was involved in each of the contraventions committed by the first respondent (within the meaning of subsection 550(1) of the FW Act) as set out at paragraph 1 above.

3. The fourth respondent, Mr Nick Iksidis, was involved in each of the contraventions committed by the first respondent (within the meaning of subsection 550(1) of the FW Act) as set out at paragraph 1 above.

4. The fifth respondent, Mr Tejinder Singh Sandhu, was involved in each of the contraventions committed by the first respondent (within the meaning of subsection 550(1) of the FW Act) as set out at paragraph 1 above.

Penalties sought and documents relied upon

16. FWO now seeks the imposition of penalties on each of the respondents in respect of the admitted contraventions. FWO relies upon the following documents in support of its submissions:

a) The Application and Statement Claim both filed 11 January 2013;

b) Affidavit of Lucy Madden sworn 11 December 2013 (the "Madden Affidavit");

c) Iksidis Agreed Statement of Facts (Annexure "C") filed on 27 November 2013;

d) Jay Group Agreed Statement of Facts (Annexure "B") filed on 3 February 2014; and

e) Affidavit of Darren John Lang sworn on 21 February 2014 (the "Lang Penalty Affidavit");

17. As set out below and at Schedules "B", "C" and "D", all of which are attached to these reasons, FWO is seeking significant penalties against the respondents. FWO submits that these penalties are appropriate because of:

a) The vulnerability of the Employees by reason of their non-English speaking backgrounds and, for the majority of them, status as short-term visa holders;

b) The serious nature of non-payment of wages and failing to pay minimum entitlements;

c) The significant quantum of underpayments over a short period of time;

d) The need for specific deterrence in light of the compliance history of the respondents and the possibility of ongoing operations; and

e) The need for general deterrence in the trolley collection industry, an industry known for exploiting its vulnerable workforce.

Legislative Provisions Relating to Penalty

18. Pursuant to s.546 of the FW Act, the Court has the power to impose pecuniary penalties in respect of the contraventions of the FW Act. Section 546 of the FW Act provides that an eligible court (which includes this Court) can impose a penalty if the Court is satisfied that the person has contravened a civil remedy provision, which includes ss.45 and 535 of the FW Act.

19. The maximum penalties that may be imposed by this Court for each contravention under the FW Act (as at the time the contraventions occurred) are as follows:

Legislation	Maximum Penalty per Contravention for a Body Corporate	Maximum Penalty Per Contravention for an Individual
s.45 of the FW Act (Modern Award contraventions)	300 penalty units ($33,000)	60 penalty units ($6,600)

s.536 of the FW Act (Record keeping contraventions)	150 penalty units ($16,500)	30 penalty units ($3,300)

Principles Relevant to Determining Penalty

20. In the submissions prepared by FWO, the approach to determining penalty has been prepared, and I partially adopt that format because it has been established in numerous cases before this Court: *Director of the Fair Work Building Industry Inspectorate v Luka Tippers & Excavation Pty Ltd & Anor* [2014] FCCA 1459; *Fair Work Ombudsman v Ross Geri Pty Ltd & Ors* [2014] FCCA 959; *Fair Work Ombudsman v Cuts Only The Original Barber Pty Ltd & Ors* [2014] FCCA 2381; *Fair Work Ombudsman v Happy Cabby Pty Ltd & Anor* [2013] FCCA 397; *Fair Work Ombudsman v Tuscan Landscape Company Pty Ltd & Ors* [2014] FCCA 1421, that these steps are appropriate in determining the penalty to be imposed:

    a) Identify the separate contraventions involved with each breach of separate obligations found in the FW Act is a separate contravention: *Gibbs v Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16]. Each breach of a term of a workplace instrument such as the Modern Award is a separate contravention;

    b) Consider whether the breaches arising in (a) above, constitute a single course of conduct s.557(1) of the FW Act provide for treating multiple contraventions of the same provision of the FW Act as a single contravention if the contraventions:

        i) Are committed by the same person; and

        ii) Arose out of the course of conduct of the same person.

    c) 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 of the circumstances for each contravention. The respondents should not be penalised more than once for the same conduct. The penalty imposed should be

an appropriate response to what the respondents did: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 per Graham J at [46]; *Cousins v Merringtons Pty Ltd (No. 2)* [2008] VSC 340. This task is distinct from and in addition to the final application of the "*totality principle*": *Mornington Inn Pty Ltd (ACN 116 830 703) v Jordan* (2008) 168 FCR 383 per Stone and Buchanan JJ at [41]-[46];

d) Then consider an appropriate penalty to impose in respect of each contravention (whether as a single contravention alone or as part of a course of conduct), apply the "*totality principle"* having regard to all of the circumstances of the case; and

e) Having fixed an appropriate penalty for each group of contraventions or course of conduct, view the aggregate penalty to determine whether it is an appropriate response to the conduct which has led to the breaches: *Kelly v Fitzpatrick* (2007) 116 IR 14 per Tracey J at [30]; *Cousins v Merringtons* (supra) per Gray J at 23, Graham J at [71], and Buchanan J at [102]. An "*instinctive censuses*" should be applied in making this assessment: *Cousins v Merringtons* (supra) per Gray J at [27] and Graham J at [55] and [78].

Identified and Admitted Contraventions

21. The written submissions prepared by FWO, as prepared from the material and evidence available, have identified and admitted contraventions by the various respondents in this proceeding as follows:

a) Jay Group and Mr Singh have admitted to contravening or being "involved in" the contraventions of seven civil remedy provisions of the FW Act set out in Schedule "B" and "C" to this judgment, namely;

i) Failure to pay minimum weekly wages for ordinary hours of work;

ii) Failure to pay casual loadings;

iii) Failure to pay penalty rates for all hours work on a Saturday;

iv) Failure to pay penalty rates for all hours worked on a Sunday;

v) Failure to pay shift penalty rates;

vi) Failure to pay overtime rates; and

vii) Failure to make and keep employee records.

b) Mr Iksidis and Mr Sandhu have also admitted to being involved in all of the above contraventions expect for the obligation to make and keep employee records (by virtue of the admissions made by Jay Group that it was the employer).

Grouping Contraventions

22. Section 557 of the FW Act sets out that multiple breaches of particular provisions may, depending upon the particular circumstances; attract the operation of the course of conduct provisions. The onus of establishing the benefit of s.557 of the FW Act is on the respondents: *Workplace Ombudsman v Securit-E Holdings Pty Ltd (in liquidation) & Ors* (2009) 187 IR 330 at [5]; *Australasian Meat Industry Employees' Union v Meneling Station Pty Ltd* (1987) 16 IR 245 per Emmett J at [257]. Particularly relevant is whether the breaches arose out of separate acts or decisions of the employer, or out of a single act or decision. The latter case will constitute a course of conduct but the former will not: *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 per Gray J at 266-267 (with whom Northrop J agreed at 245).

23. The respondents have the benefit of the course of conduct provisions in s.557(2) of the FW Act in relation to repeated breaches of the provisions of the Modern Award and the FW Act in respect of the 12 employees. Accordingly, where the identified contraventions listed in [21(a)] and [21(b)] above relate to multiple employees, the course of conduct provisions in s.557 of the FW Act should be applied. It is open to group contraventions where they overlap with each other or involve the potential punishment of the respondent for the same or substantially similar conduct: *Mornington Inn Pty Ltd v Jordan* (supra) per Stone and Buchanan JJ at [88]; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (supra) at [23], [55], [93] and [102]; *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq.)* [2012] FCA 479 at [24].

24. I agree and accept the submissions made on behalf of FWO that there are no overlapping contraventions in this case as each of the contraventions involved distinct and separate obligations under the Modern Award and the FW Act: *Gibbs v Mayor, Councillors and Citizens of the City of Altona* (supra) at [24] and *Blandy v Coverdale NT Pty Ltd ACN 102 611 423* (2008) 178 IR 150 at [56]. The contraventions arose from Jay Group's failure to pay any wages at all to the employees. The issue of minimum wages, casual loadings, Saturday, Sunday and shift work penalties, overtime rates and record keeping are each distinctive elements for a separate period of time, and each should be treated as a separate contravention. By applying the course of conduct and common element principle, the contraventions set out [21(a)] and [21(b)] could be grouped into:

    a) Seven contraventions by Jay Group and Mr Singh; and

    b) Six contraventions by Mr Iksidis and Mr Sandhu.

25. I agree with the applicant's written submissions that the maximum penalties that could be imposed on each of the respondent's is as follows:

    a) Jay Group – seven contraventions – maximum penalty $214,500;

    b) Mr Singh – seven contraventions – maximum penalty $42,900;

    c) Mr Iksidis – six contraventions – maximum penalty $39,600; and

    d) Mr Sandhu – six contraventions – maximum penalty $39,600.

Factors Relevant to Determining Penalties

26. The factors relevant to the imposition of a penalty under the FW Act have been summarised in *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant and Bar* [2007] FMCA 7 per Mowbray FM at [26]-[59] as follows:

    a) The nature and extent of the conduct which led to the breaches;

    b) The circumstances in which that conduct took place;

c) The nature and extent of any loss or damage sustained as the result of the breaches;

d) Whether there has 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 that committed the breach has exhibited contrition;

j) Whether the party that committed the breach has taken corrective action;

k) Whether the party committing the breached has 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.

27. In *Kelly v Fitzpatrick* (supra) per Tracey J at [14], his Honour stated:

> *14. In Mason v Harrington Corporation Pty Ltd [2007] FMCA 7 Mowbray FM identified "a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty". Those considerations were derived from a number of decisions of this Court. I gratefully adopt, as potentially relevant and applicable, the various considerations identified by him…*

28. In *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* (2008) 177 IR 61 per Tracey J, his Honour stated at [39]:

> *39. In Kelly v Fitzpatrick (2007) 166 IR 14 I set out a non-exhaustive range of considerations to which regard may be had in determining whether conduct calls for a penalty, and if so, the amount of such penalty. These considerations were derived from a number of decisions of this Court including Trade Practices Commission v CSR Ltd [1991] ATPR 52,135 (41-076) (which concerned contraventions of the* Trade Practices Act 1974 *(Cth)) and Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd (No 2) (1999) 94 IR 231 (which concerned contraventions of Part XA of the WR Act).*

29. While this summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion: *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 per Gyles J at [7] and [11]; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (supra) at [91] per Buchanan J.

Factors Relating to Penalty

30. The written submissions prepared by FWO contained a detailed analysis of the relevant factors to the imposition of a penalty based on the approach in *Mason v Harrington Corporation* (supra) and adopted in *Kelly v Fitzpatrick* (supra). This analysis has been reproduced as follows;

    a) Annexure "C" - first and third respondent;

    b) Annexure "D" – fourth respondent; and

    c) Annexure "E" – fifth respondent.

Legal Principles in Respect of Discounts for Admissions, Contrition and Corrective Action

31. In circumstances where the wrongdoer has cooperated with the relevant authorities and has made admissions early in the course of an investigation, or soon after the commencement of proceedings, it is appropriate to allow a discount of up to 25 per cent. However, the scope for applying this discount was addressed in *Mornington Inn Pty Ltd v Jordan* (supra) per Stone and Buchanan JJ at [74]-[76] where their Honours stated:

74. It is important to note that it is not a sufficient basis for a discount that the plea has saved the cost of a contested hearing – that would discriminate against a person who exercised a right to contest the allegations. A discount may be justified, however, if the plea is properly to be seen as willingness to facilitate the course of justice. Remorse and an acceptance of responsibility also merit consideration where they are shown.

75. A conventional consideration in assessing a discount in a criminal case for a plea of guilty is the stage in the proceedings at which the plea is entered. Normally, the maximum discount for this factor, sometimes thought to be 25%, is reserved for a plea made at the first reasonable opportunity although, as was indicated in Cameron (at [23] – [24]) there is no obligation to make an early plea to a charge which wrongly particularises the substance to which the charge relates.

76. As Branson J has pointed out (see Alfred v Walter Construction Group Limited [2005] FCA 497) the rationale for providing a discount for an early plea of guilty in a criminal case does not apply neatly to a case, such as the present, where a civil penalty is sought and the case proceeds on pleadings. Nevertheless, in our view, it should be accepted, for the same reasons as given in Cameron, that a discount should not be available simply because a respondent has spared the community the cost of a contested trial. Rather, the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability: (a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice.

32. In *Fair Work Ombudsman v Contracting Plus Pty Ltd & Anor* (2011) 205 IR 281 per Burnett FM (as he was then), his Honour stated at [125]-[127]:

125. Although the applicant concedes that the respondents have admitted liability and could be said to have cooperated by partaking in the investigation, at least in a limited fashion; particularly by engaging in the record of interview process; by providing some necessary records and, by signing the agreed statement of facts, although that itself was only agreed on the day of trial and, of course, only after some delay, the applicant says that the Court should not be too anxious to afford the respondent a significant discount for its admission and conduct.

126. In considering whether or not a discount should be applied, I have regard to the observations of Branson J in Mornington Inn Pty Ltd v Jordan, where her Honour said:

> *"The rationale for providing a discount for early plea of guilty in a criminal case does not apply neatly to a case such as the present, where a civil penalty is sought and the case proceeds on pleadings. Nevertheless, in our view, it should be accepted, for the same reasons as given in Cameron, that a discount should not be available simply because a respondent has spared the community the cost of a contested trial. Rather the benefit of such a discount should be reserved for cases where it can fairly be said an admission of liability (a) has indicated an acceptance of wrongdoing and suitable and credible expression of regret and/or (b) has indicated a willingness to facilitate the course of justice."*

127. In my view, this is a case where neither of those qualities can be demonstrated and, accordingly, I do not consider that any discount ought to be provided in this instance on this basis.

Admissions

33. Jay Group and Mr Singh only made admissions at the last possible moment, being on the morning of the schedule liability hearing. Any savings to the public purse by avoiding the need for a fully contested hearing were minimal, as the full preparation including briefing of Counsel had already been undertaken and two days had been scheduled for the hearing. Jay Group and Mr Singh filed their defence denying all contraventions and failed to make any admissions after the Court ordered mediation in April 2013. The submission made by FWO claims that the Jay Group and Mr Singh should therefore only be afforded a minimal discount on penalty in the range of 5-10 per cent for their admissions and cooperation with FWO.

34. A document dated 10 March 2014, being an amended statement prepared by Mr Singh, was forwarded to the Court but not formally filed by the duty registrar. The contents of that document have been brought to the Court's attention. At [4]-[5] therein Mr Singh stated:

> *4. My earnings depend on how much work they company does, and I estimate that I earn around $45,000 per year.*

> *5. I am renting my house. My main liability is the rent of $2760 per month, of which I pay half as I live my brother. My wife lives with me. She does not work, we have a boy who is aged eight months old.*

Mr Singh has not produced any documentary evidence to substantiate his financial position or any evidence as to Jay Group's financial position. Accordingly, I give no weight to these statements in respect of his financial capacity to pay.

35. Mr Iksidis admitted all of the alleged contraventions against him and filed, with FWO's assistance, an Agreed Statement Of Facts ("ASOF 4") on 27 November 2013, several weeks prior to the listed liability on 12 and 13 December 2013. The argument advanced on behalf of FWO is that had all respondents made admissions in this timeframe, there would have been considerable savings by avoiding the need for a fully contested hearing, allowing for more efficient use of the Court's resources. FWO acknowledges that the admissions made by Mr Iksidis did somewhat reduce the time spent by FWO and its Counsel in preparing for the liability hearing. However, FWO notes the observations of their Honours Stone and Buchanan JJ in *Mornington Inn v Jordan* (supra) in respect to a plea made solely for the purposes for saving the costs of a contested hearing: *Mornington Inn v Jordan* (supra) at [74]-[76] (extracted above at [31]).

36. In *Fair Work Ombudsman v Promoting U Pty Ltd & Anor* [2012] FMCA 58 per Burchardt FM (as he was then), his Honour considered a case where an agreed statement of facts had been filed. He made the following observation at [45] therein where he stated:

> *45. The pattern of persistent contravening behaviour asserted by the Applicant, and in my view made out on the materials, has continued in the face of multiple complaints, investigations and determinations by the Applicant. While it is true that the Respondents have agreed a SOAF, this is not in the scheme of the circumstances in this case an overwhelming factor.*

37. The argument advanced by FWO is that Mr Iksidis should only be afforded a fifteen percent discount on penalty for his admissions and cooperation with FWO.

38. On the day prior to the penalty hearing, the firm Tisher Liner FC Law forwarded correspondence to the Court on behalf of Mr Iksidis stating that their client did not have the financial means to attend the hearing. However, their client had prepared an affidavit addressing the matters of penalty and requested that the affidavit be forwarded to the Court for filing, and be considered as a form of submissions in respect of any penalty to be imposed against their client. As there was no objection to the affidavit, it was read. Mr Iksidis' affidavit includes a number of statements that claim that he has limited income, lost his business and family home and was unemployed up until two week prior to the hearing. In respect of this statement, he has not produced any documentary evidence to substantiate his financial position. Mr Iksidis at [8] of his Affidavit states that he has always run small sized operations. However, the submissions advanced by FWO are that in previous legal proceedings against Mr Iksidis, there are decisions relating to a business operated by him employing approximately 80 employees and a second proceedings relating to a business also operated by him that was employing approximately 80-100 people. Consequently, the statement by Mr Iksidis that he always runs small businesses is simply untrue and, accordingly, I give no weight to that statement.

39. In respect of any evidence and submissions advanced by Mr Iksidis or his legal representatives going to the size of his business operations and his financial capacity to pay, none of these excuse Mr Iksidis' involvement in these contraventions. Further, the authorities show that he cannot hide behind the size or financial circumstances of his business in order to limiting any penalties imposed on him. Out of all of the respondents, given Mr Iksidis' involvement in past legal proceedings brought by FWO, Mr Iksidis was very likely aware of his obligations that all employers have towards their employees. To the extent that Mr Iksidis also claims in his Affidavit at [4]-[5] that he has experienced financial difficulty as a result of losing trolley collection contracts over the years. These losses may have arisen because of his previous involvement in contraventions of workplace law which has resulted in both personal and financial damages from previous proceedings in which penalties have been imposed, however, again do not provide any basis for a reduction in penalty against him.

40. In Mr Iksidis' Affidavit at [10] it states that he only received $28,000 in respect of trolley collections services, but this information contradicts ASOF 4 where he states he invoiced Costco for $34,000. Of the $34,000, Mr Iksidis claims that $6,000 went towards travel to Sydney and other expenses incurred during the Costco trolley collection contract. I am not satisfied that this contention can be sustained as these expenses were incurred by Mr Iksidis in securing the contract, being a cost to him for doing business.

41. In the Affidavit of Mr Iksidis at [25], Mr Iksidis acknowledges that workers in the trolley collection industry are vulnerable and he goes on to say that he has always done his best to offer people who chose to perform trolley collection work the best opportunity. The Court's attention is drawn to the decision in *Lang v Xidis Pty Ltd t/as Effective Supermarket Services & Anor* [2008] FMCA 1009 per Burchardt FM (as he was then), which is the second set of legal proceedings against Mr Iksidis referred to above at [38]. His Honour made comments in respect of the treatment of trolley workers, who were previously employed by Mr Iksidis' company and stated at [23]:

> *23… All the employees involved in this sort of work were likely to be vulnerable to a greater or lesser extent. Supermarket trolley return is, after all, scarcely at the top of the employment pecking order. It is reasonable to suppose that those doing this work were desperate for the employment. They were given deliberately confusing contracts of employment and bullied if they stood up for their rights.*

42. I acknowledge that the above circumstances do not necessarily apply to the particular facts of the matter before this Court, however, they do indicate Mr Iksidis' likely approach to compliance with workplace laws.

43. Mr Sandhu did not participate at all in the proceedings and has not made any made any admissions, and consequently, no discount on penalty should be afforded to Mr Sandhu. In support of this view Mr Sandhu only provided limited information to FWO. He arranged to attend an interview with FWO, but failed to appear. As indicated elsewhere in the reasons Mr Sandhu has departed Australia and does not hold any right to re-enter (Madden Affidavit, Annexure "LM-2").

Corrective Practice

44. On the material before the Court I agree with the submissions made on behalf of FWO that there is no evidence of any attempt to implement any corrective practice by any of the respondents. There is no evidence of any corrective action in respect of the underpayments by Jay Group. It was bought to the Court's attention that as at the time of the hearing, the 90 days allowed for compliance with the orders made by the Court on 20 December 2013 to pay the outstanding amounts to the employees had not yet lapsed. However, the absence of evidence of payment or clear intention to pay these amounts, FWO submits that it cannot be included that corrective action will be taken. The applicant informs the Court that it is currently only in contact with less than half of the employees as most have returned to Korea and it is unlikely that the underpayments will be fully rectified, in any event.

Cooperation with Authority

45. The legal representatives for FWO informed the Court that Jay Group and Mr Singh have generally demonstrated a cooperative attitude throughout the investigation. In particular:

    a) Jay Group produced some records and documents to FWO during its investigation, generally, when requested (however, three Notices to Produce, served on 21 November 2011, 21 February 2012 and 12 October 2012 were only partially complied with) (Lang Penalty Affidavit at [10(h)]);

    b) Mr Singh participated in a record of interview during the investigation; and

    c) The matter ultimately proceeded by way of ASOF 1 & 3, with Jay Group and Mr Singh admitting to all of the alleged contraventions just before the liability hearing.

46. The Court is informed that Mr Iksidis has generally demonstrated a cooperative attitude towards FWO's investigation. In particular:

    a) Mr Iksidis produced records and documents to FWO during its investigation when requested;

b) Mr Iksidis participated in a record of interview during the investigation; and

c) The matter ultimately proceeded by way of ASOF 4 and Mr Iksidis admitted all of the alleged contraventions prior to the listed hearing, saving considerable public expense by avoiding the need for a fully contested hearting and providing a more efficient use of the Court's resources.

47. Mr Sandhu provided FWO with limited information in relation to the business of Jay Group at the outset of the investigations (Lang Penalty Affidavit at [17]-[20]). Mr Sandhu has not cooperated any further with FWO's investigation or in respect of these proceedings. The Court was informed that Mr Sandhu had arranged to attend an interview with FWO, but failed to attend with no explanation given for this failure.

Contrition

48. The Court is informed that FWO is not aware of any statement of regret or remorse by the respondents. In a statement of Mr Singh, forwarded to the Court on 11 March 2014, it states at [7]:

> *In July 2011 I believed that Tejinder Singh Sandhu had paid all the workers wages. However, I know believe that I should have been more careful in checking that all of the workers wages had been paid.*

Mr Singh, on behalf of Jay Group, maintains that despite admitting liability, their liability to pay employees was negligible and liability was accepted only to finalise the matter (Singh Penalty Affidavit at [30]). In the Affidavit of Mr Iksidis sworn 11 March 2014 at [7] he states:

> *I have always been remorseful for my errors.*

Then at [29]-[30], he states:

> *29. I accept that I have failed and I am sincerely remorseful. I accept responsibility for that failure.*
>
> *30. I apologise to the Court and it can be ensured that I will not make any further mistake and there is no chance of repeat offending.*

49. This statement comes very late in the proceedings and is an expression of remorse rather than any solid demonstration of it.

Summary in Respect of Discount

50. FWO submits that the steps undertaken by Jay Group, Mr Singh and Mr Iksidis demonstrate an acceptance of the inevitability of these proceedings rather than acceptance of wrongdoing and a suitable expression of regret. FWO contends that the submissions in respect of discounts at [31]-[32] above should be a recognition of the fact that there was by the respondents, who were still in Australia, agreement to resolve the matter by way of admissions, and that had spared further use of the Court resources and saved the parties time and costs.

Consideration

51. Ms Madden, on behalf of FWO, in oral submissions indicated that she wished to raise for consideration the High Court's decision in *Barbaro v R* (2014) 305 ALR 323. In that case the High Court found that, in criminal sentencing, the prosecution should not put to the Court the sentencing range and the majority held that when put, such a range is opinion only and not a submission of law. It is submitted that while it's the Court's decision whether or not to follow *Barbaro* (supra) in civil proceedings, it is FWO's current position that regulators should continue to make submissions on appropriate set of penalties. This was advanced on the basis that because the decision in *Barbaro* (supra) concerned submissions regarding the available range or the outer bounds of a particular sentence, whereas particular civil remedies are appropriate as they are a different submission and essentially involve the regulator explaining why a particular penalty would have the necessary deterrent effect.

52. The principle regarding the imposition in civil actions differ from those involved in sentencing an offender in criminal proceedings and the role of a regulator differs from that of a prosecutor. In any event, the penalty ranges submitted to this Court are simply FWO's recommendation and not an agreed penalty range. It is open to the Court to impose a penalty appropriate, either at a higher or lower level, than what is proposed by FWO.

53. The issue raised buy FWO has already been considered *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2014) 140 ALD 337 per White J on 5 March 2014. For the reasons set at [26]-[31] his Honour declined to depart from the approach to such submissions set out in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72. The decision in *Barbaro* has also been considered in *Australian Competition and Consumer Commission v Energy Australia Pty Ltd* [2014] FCA 336. In that decision Middleton J considered the issue presented by *Barbaro* for civil penalty proceedings at [130]-[152]. Importantly, Middleton J stated at [150]:

> *150. In light of the above observations, I do not consider that the High Court intended to exclude, in a civil context, the making of submissions (joint or otherwise) by the parties as to appropriate orders to make (not just as to penalty, but also as to injunctions and disqualification orders). Without specific mention and consideration, I do not conclude that the High Court implicitly overruled the earlier Full Court decisions of NW Frozen Foods and Mobil Oil.*

54. In *DP World Sydney Ltd v Maritime Union of Australia (No.2)* [2014] FCA 596, Flick J made the following observations at [22]-[24]:

> *22. The guidance that these considerations provide in respect to the approach of the Court when dealing with the imposition of penalties for contraventions of industrial legislation is well accepted: e.g., General Manager of Fair Work Australia v Health Services Union [2013] FCA 1306 at [17] to [29] per Middleton J; Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2014] FCA 126 at [41] to [42] per Gilmour J; Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union[2014] FCA 160 at [23] to [24] per White J.*
>
> *23. It is respectfully further concluded that the decision of the High Court in Barbaro v The Queen [2014] HCA 2, (2014) 88 ALJR 372 does not require any departure from the approach formerly applied by this Court. Barbaro, supra, was a case about criminal custodial sentencing. In Australian Competition and Consumer Commission v Energy Australia Pty Ltd [2014] FCA 336, Middleton J, however, noted the potential impact of Barbaro,*

supra, upon cases involving the imposition of civil penalties as follows:

> *114. However, it is appropriate that I make mention of the recent decision of the High Court of Australia in Barbaro... having the benefit of submissions from the ACCC on the impact of that decision, and having reached my own conclusions on its application to civil penalty proceedings of the type now before me. I appreciate that there is no contradictor.*
>
> *115. On a broad reading of the majority reasoning in Barbaro, and taking in isolation some of the comments made, it might be thought that the Court should not take into account the submissions of the parties as to the 'agreed' penalty amount in civil penalty proceedings. However, I do not consider the decision goes that far or that it implicitly overrules Full Court authority applied on numerous occasions in this Court.*

His Honour then proceeded to review the differences between "sentencing principles" applicable to criminal proceedings and the principles to be applied when imposing a civil penalty and continued:

> *130. Then, it is to be recalled in the situation confronting me, I have not just been provided with a "bare" statement of range of penalties, or specific penalty, which tells the judge nothing of the conclusions or assumptions upon which the proposed penalty depends (a problem referred to in Barbaro). I have the advantage of submissions of law and an agreed statement of facts (which I regard as sufficient for my task), which go beyond the mere bare expression of opinion by a prosecutor.*
>
> *131. Further, there is still binding Full Court authority in the civil penalty context which supports the practice of civil regulators making submissions as to penalty amount, based upon agreed statement of facts and joint legal submissions from the parties indicating an 'agreed' penalty.*
>
> *132. In NW Frozen Foods Burchett and Kiefel JJ surveyed authorities on agreed penalties and concluded that a regulator and respondent could jointly propose specific penalty amounts to the Court. Their Honours emphasised that (provided the Court was satisfied that the proposed amount was appropriate) there was a strong public interest*

in imposing that penalty, even if the Court may otherwise have selected a different figure for itself.

133. The effect of NW Frozen Foods was given further consideration by the Full Court in Mobil Oil, where Branson, Sackville & Gyles JJ surveyed the relevant authorities, including several which had criticised the reasoning in NW Frozen Foods. Their Honours went on to uphold the approach outlined in NW Frozen Foods and to explain and support the reasons for that approach.

134. The principles in NW Frozen Foods and Mobil Oil have been followed and applied in subsequent civil penalty cases in the Federal Court.

His Honour ultimately concluded:

150. In light of the above observations, I do not consider that the High Court intended to exclude, in a civil context, the making of submissions (joint or otherwise) by the parties as to appropriate orders to make (not just as to penalty, but also as to injunctions and disqualification orders). Without specific mention and consideration, I do not conclude that the High Court implicitly overruled the earlier Full Court decisions of NW Frozen Foods and Mobil Oil.

The parties to the present proceeding jointly submitted that his Honour's decision should be followed. That submission is accepted. Gratitude is expressed to his Honour for his careful and detailed exposition of the authorities and principles. His decision, with respect, is clearly correct.

24. Notwithstanding the criticism expressed by the Victorian Court of Appeal in Australian Securities and Investments Commission v Ingelby [2013] VSCA 49, (2013) 275 FLR 171, the principles set forth in NW Frozen Foods, supra, and Mobil Oil, supra, remain the principles to be applied in the present case.

55. In *Deputy Commissioner of Taxation (Superannuation) v Graham Family Superannuation Pty* [2014] FCA 1101 per Buchanan J (delivered on 15 October 2014), his Honour stated at [41]:

41. Finally, the applicant drew attention to the decision of the High Court in Barbaro v The Queen; Zirilli v The Queen [2014] HCA 2 ("Barbaro"). On the present state of authority in this Court I think it appropriate to follow the view expressed by Middleton J in Australian Competition and Consumer

Commission v Energy Australia Pty Ltd [2014] FCA 336, that Barbaro does not prevent an agreed approach, such as was reached in the present case, or its endorsement by the Court.

56. I accept the broad intention of FWO's submission that the penalties sought in this matter could be substantial because of the serious nature of failing to pay not only the minimum entitlements, but any entitlements at all, the vulnerability of the employees, the extent of the loss between them, the likelihood that the majority of the employees will never be repaid, the need for specific deterrence in a matter given Mr Iksidis' history of non-compliance in particular and the ongoing operation of Jay Group. Further, there is a need for deterrence in the trolley collection industry which is generally a low-skilled industry that often uses sub-contracting arrangements to avoid obligations under workplace law.

57. This Court on a number of occasions has addressed the issue of organisations operating shopping trolley collection businesses breaching provisions of workplace law, particularly in respect of under and non-payment of various wage entitlements: *Salandra v Risborg Services Pty Ltd & Anor* [2008] FMCA 76; *Lang v Xidis Pty Ltd t/as Effective Supermarket Services & Anor* (supra); *Inspector Trundle (Workplace Ombudsman) v M & K Angelopoulos Pty Ltd* [2009] FMCA 37; *Fair Work Ombudsman v South Jin Pty Ltd & Ors* [2013] FCCA 1057. Similarly, there are numerous cases before the Federal Court concerning breaches of the workplace laws concerning trolley collection: see, for example, *Fair Work Ombudsman v Al Hilfi* [2012] FCA 1166.

58. There are also a number of proceedings concerning the business arrangements of Mr Karl Suleman who controlled a corporation in the name of Karl Suleman Enterprises Pty Ltd ("KSE") that operated a supermarket trolley collection business. During the period of this operation of this corporation, 2164 contracts of this kind were entered into. Administrators were appointed to KSE on 12 November 2001 and liquidators on 7 December 2001. The operation of this organisation raised a considerable amount of public interest, including in the following decisions: *Cussen & Ors v Sultan & Ors* [2009] NSWSC 1114; *Karl Suleman Enterprizes Pty Ltd (in liquidation) v Philip Viet*

Dzung Pham [2012] NSWSC 645; *Ibrahim v Pham* [2007] NSWCA 215.

59. In *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (supra) his Honour Buchanan J considered the approach to the task of assessing the penalties to be imposed by giving attention to "*a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty*", with particular reference to the factors identified by Mowbray FM in *Mason v Harrington Corporation* (supra) and a number of decisions that followed Mowbray FM's approach. At [91] in *Australian Ophthalmic Supplies v McAlary-Smith* (supra) Buchanan J stated:

> *91. Check lists 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. There is no suggestion in the present case that the learned Magistrate made any relevant error in her identification of the matters which she should consider in fixing penalties.*

60. The issues in this matter are simply put in that these reasons form a determination of penalties in respect of the respondents' contraventions of the FW Act, which related to the underpayment of 12 employees who were employed by the first respondent, Jay Group, as shopping trolley collectors at the Lidcombe site of Costco Australia. For a period of eleven days in July 2011 the twelve employees received no payment at all for work performed and were underpaid more than $27,000 during that time. Eleven of the employees were South Korean nationals in Australia on short-term working visas, most presumably with a limited understanding of the English language and the nature of employment conditions within Australia. All of these employees have since returned to South Korea. Only one of the employees remains in Australia, and he is an Iranian citizen with limited English language skills and no previous employment experience within Australia.

61. All of these employees can be categorised as vulnerable in respect of employment relationships. This situation is similar to the decision in *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty*

Ltd & Anor [2012] FMCA 258 where his Honour, Riethmuller FM (as he was then) observed at [42] that an employee who lacks competency in English may have difficulty understanding and therefore enforcing their rights under the relevant industrial instrument. Similarly in *Fair Work Ombudsman v ACN 146 435 118 Pty Ltd (No.2)* [2013] FCCA 1270 per Judge Lucev, where his Honour stated at [42]:

> *42. The FW Ombudsman cited and relied on Fair Work Ombudsman v Go Yo Trading Pty Ltd63 where a number of authorities were cited accepting the proposition that foreign nationals holding a visa fall into a class of vulnerable workers:*
>
> > *Foreign nationals working in Australia on visas, be they 417 visas or 457 visas or some other form of visa, in my view, represent a particular class of employee who are potentially vulnerable to improper practices by their employer. The cases demonstrate that those characteristics mean that a particular employee concerned is of a vulnerable class: 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].*
>
> (footnote omitted)

62. In *Fair Work Ombudsman v Bento Kings Meadows Pty Ltd* [2013] FCCA 977, his Honour Judge O'Sullivan at [33] stated:

> *33. In Fair Work Ombudsman v Go Yo Trading Pty Ltd [2012] FMCA865 at [15]–[16] it was said:*
>
> > *15. Foreign nationals working in Australia on visas, be they 417 visas or 457 visas or some other form of visa, in my view, represent a particular class of employee who are potentially vulnerable to improper practices by their employer. The cases demonstrate that those characteristics mean that a particular employee concerned is of a vulnerable class: 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].*
>
> > *16. It is important, in my view, that employees in such a potentially vulnerable position have their entitlements met,*

and that employers understand very clearly that such employees are not available for exploitation.

63. On the other hand, the respondents to these proceedings are not inhibited or disadvantaged in relation to the employment of individuals to undertake the business operations of their respective interests. The first respondent, Jay Group, is a corporation which primarily carries on a cleaning business operating in the ACT and NSW, and has contracts with other corporations, including the second respondent, to provide trolley collecting services for large wholesale and retail outlets. The second respondent has been placed in external administration and the applicant is stayed from proceeding against that company. The third respondent was employed as the operations manager for Jay Group from 2010. The fourth respondent was the sole director of the second respondent, which carried out a trolley collection business, operated a various sites in Victoria and NSW. The fifth respondent was contracted by Jay Group to allocate and supervise the work to be performed by the twelve employees referred to above.

64. Any suggestion that the above respondents were new to the business environment, naïve in respect of the requirements of employing staff or the general tenets of employment law are completely unsustainable. The Lang Penalty Affidavit has a section headed "*Compliance history of the First and Third Respondent*" that states the following at [25]-[29]:

> *25. On 17 February 2014, in preparation of this affidavit, I conducted a search of the FWO's Internal case management system. This records all complaints received by the FWO.*
>
> *26. I searched for all complaints lodged against "Jay Group Services Pty Ltd" and discovered that 7 complaints have been lodged against the first respondent, in addition to the twelve complaints lodged by the Employees listed…*
>
> *27. I received the electronic file for each of the 7 complaints and saw that:*
>
> > *(a) 3 of the matters concerned the alleged underpayment of labourers but these matters were closed due to insufficient evidence being available to the FWO;*

(b) 3 of the matter involved underpayments of employees employed as cleaners and were resolved through the FWO's voluntary compliance mechanisms; and

(c) 1 of the matters involved underpayments of an employee employed as a carwasher and was resolved through the FWO's voluntary compliance mechanisms.

28. In relation to one of the matters … that were closed due insufficient evidence, I saw from the "Case Decision Record" dated 11 July 2012 (CDR) on the file that the FWO issued a Notice to Produce to the third respondent which was not complied with. I also saw that a Record of Interview was offered to the third respondent but the offer was not accepted.

29. The CDR also indicated that there were purported subcontracting arrangements in place between the first, third and fifth respondents similar to those in the current proceedings…

65. Also contained in the Lang Penalty Affidavit is the "*Compliance History of the Fourth Respondent and his related companies"* which states at [30]-[35]:

30. I am aware that the current proceedings are the third set of legal proceedings brought by the FWO and its predecessors against the fourth respondent. I am aware of this because I was one of the inspectors involved in an earlier investigation into the activities of the fourth respondent and his previous company Xidis Pty Ltd.

31. The FWO's predecessor agencies have undertaken the following proceedings against the fourth respondent and his previous company Xidis Pty Ltd (which also traded as Effective Supermarket Services):

(a) Inspector Dekic v Xidis Pty Ltd & Nick Iksidis (2007) in which the Melbourne Magistrates Court imposed a penalty of $12,500 against Xidis Pty Ltd and $12,500 against Nick Iksidis for the underpayment of trolley collection workers in Victoria…

(b) Inspector Lang v Xidis Pty Ltd & Nick Iksidis [2008] FMCA 1009 in which the Federal Magistrates Court imposed a penalty of $120,000 against Xidis Pty Ltd for the underpayment of trolley collection workers in NSW and Victoria. No penalty was imposed against Nick Iksidis as he undertook to personally pay the penalty of Xidis Pty Ltd…

32. I currently have carriage of a number of other trolley collection investigations and compliance activities in the trolley collection industry.

33. On or about 12 February 2014, I received a phone call from an employer in the trolley collection industry in relation to another trolley collection investigation of which I have carriage. During the conversation, the employers said to me words to the following effect:

> *"Nick Iksidis rang me the other day looking for trolley collection work."*

34. On or about 18 February 2014, I received a further telephone call from the employer referred to in the paragraph immediately above in relation to another trolley collection investigation. During the conversation, the employer said to me words to the following effect:

> *"There was a tender for a trolley collection contract at Aldi's North Sydney last week. One of my contacts at Aldi's told me that Nick Iksidis has put a tender in."*

35. As a result of the above conversations and the fourth respondent's compliance history, it is my understanding that the fourth respondent may still be operating in the trolley collection industry or may seek to in the near future.

66. I further note the submissions made by FWO under the heading "*Factors Relating to Penalty for the First and Third Respondent - Deliberateness of the Breaches"* using the approach in *Mason v Harrington Corporation* (supra), states:

59. At the very least, Jay Group and Mr Singh would have known that an employee is entitled to be paid for worked performed given the past operations of Jay Group in the cleaning industry. Mr Singh has now admitted that he knew that the terms and conditions of the Employees would have been covered by an award (Jay Group SOAF at [77(e)] and that he knew, or ought to have known, that the amount of $15,730 invoiced by Jay Group to Xidis Aust trading as ESS (Jay Group SOAF at [21]) would not be sufficient to meet the minimum wage obligations payable to the Employees (Jay Group SOAF at [77(g)]).

60. FWO submits that the breaches occurred in circumstances where Jay Group and Mr Singh were at least reckless in relation to their obligations.

67. This logically leads to the issue of deterrence. I accept the submissions of FWO in respect of "*Factors Relating to Penalty for the First and Third Respondents – General deterrence",* which state at [65] and [69]:

> *65. It is indisputable that the most fundamental purpose of a civil penalty is to ensure compliance with the law. The setting of a penalty in respect of contravening conduct deliberately marks the seriousness with which the public regards such compliance, and naturally is designed to act as a deterrent, both by encouraging compliance in the first instance and also by imposing serious financial consequences for non-compliance.*
>
> *…*
>
> *69. The contraventions in the current proceedings concern the removal of key employment entitlements by way of a failure to pay employees for work performed during the Claim Period. The penalties in this case should be imposed on a meaning level so as to deter other employers from committing similar contraventions, especially in industries and circumstances where the employees are vulnerable (Lang Penalty Affidavit at [36] to [46]) and may have less awareness of their entitlements. Directors and managers of such companies should be under no misapprehension that a decision to rely on employees' unpaid labour, particularly in circumstances of vulnerable employees will not be met with significant penalties.*

68. Based on material before the Court, I believe the significantly more important issue concerns specific deterrence. The nature of the contraventions is not in the category of business operators who undertake the venture where they inadvertently and unintentionally breach the law due to lack of familiarity or experience in a particular aspect of the venture. In this matter it was more than a miscalculation or misunderstanding of an award requirement, but rather, a total failure to meet minimum standards of the most fundamental kind being a complete non-payment of wages and entitlements. Consequently, I believe this places greater emphasis on submissions made by FWO in respect *"Factors relating to penalty for the first and third respondent – Specific Deterrence*", which state at [70]-[71]:

> *70. As Justice Gray in Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union ([2008] FCAFC 170) at [37] observed:*

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

71. The need for specific deterrence is significant in this case as Jay Group continues to operate a cleaning business (Lang Penalty Affidavit at [10(a)] and [10(c)]) and may continue to employ employees (although no evidence of this has been filed). The cleaning industry is known for high levels on non-compliance (See the FWO's National Cleaning Services Campaign 2010-2011 Final Report at http://www.fairwork.gov.au/ArticleDocuments/714/national-cleaning-services-campaign-final-report.pdf.aspx, Fair Work Ombudsman v Jooine (Investment) Pty Ltd & Anor [2013] FCCA 2144; Fair Work Ombudsman v Glad Group Pty Ltd [2011] FMCA 233; Fair Work Ombudsman v Cleaners New South Wales [2009] FMCA 683). As outlined… Jay Group also has a history of non-compliance (similar previous conduct)(Lang Penalty Affidavit at [27] to [28]).

72. Where a business continues to operate, this will be an important consideration for specific deterrence, as referred to in Fair Work Ombudsman v Fortcrest Investments Pty Ltd ([2010] FMCA 18 at [96]):

> *"The respondent continues in business and it is important that a penalty be imposed at a sufficient level to deter the respondent from acting so recklessly in the future when it comes to properly acquainting itself with its obligations as an employer."*

73. There is no evidence of any systems, processes or other measures adopted by Jay Group to ensure compliance in the future. Driver FM, as he was at the time, referred to this consideration in Fair Work Ombudsman v Roselands Fruit Market & Anor ([2010] FMCA 599), where he stated (at [75]):

> *"…I am not persuaded that the respondents have put in place systems to prevent a recurrence of the breaches and accordingly, specific deterrence plays an important factor."*

74. Mr Singh is still currently employed as the Operations Manager for Jay Group (Singh Penalty Affidavit at [2]) and may therefore have some involvement in engaging employees and have

some responsibility for determining their terms and conditions of employment.

75. Further… the penalty evidence filed by Mr Singh indicates no real contrition (Singh Penalty Affidavit at [30]) for the contraventions that have occurred.

The First Respondent – Jay Group

69. In the case of Jay Group, the maximum penalty is $214,500 for these contraventions with FWO making a recommendation that a mid-range penalty of 40-60% of the maximum being applied. Turning to Schedule "B" of FWO's submissions, I believe the higher end of the range should be applied for all of the seven contraventions. As indicated elsewhere in this judgment, none of these contraventions are technical in nature, nor, would they be in any way obscure in their application. A company employing a workforce in this or an allied field would be expected to be conversant of each of these requirements and do not warrant any form of discount on the basis that there may not have been a clear requirement of any normal employment relationship within this industrial sphere.

The Third Respondent – Jatinder Singh

70. I now turn to the third respondent, Mr Singh and note the recommendations made by FWO at Schedule "C" of FWO's submissions. I disagree with FWO's approach to the extent that I believe that Mr Singh should have applied to him, a similar approach that applied to Jay Group. Taking the maximum penalty per contravention and applying the upper level of mid-range and a 5% discount for admission, the penalty to be applied to Mr Singh is $23,760 in total.

The Fourth Respondent – Mr Iksidis

71. In respect of the factors relating to the penalty for Mr Iksidis (the fourth respondent) I again return to the categorisation used by Mowbray FM in *Mason v Harrington Corporation* (supra) and the written submissions prepared by FWO pressing these issues. In respect "*Factors relating to the penalty for the fourth respondent – Circumstances in which the conduct took place and nature and extent of the conduct*" provides the following analysis at [80]-[83]:

80. Mr Iksidis has admitted (Iksidis SOAF at [47]) that he was involved in Jay Group's contraventions which resulted in the

failure to provide twelve Employees their basic minimum entitlements, including the minimum rate of pay, for the entirety of the Claim Period.

81. Mr Iksidis was involved in breaching a fundamental purpose of the FW Act, which includes ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions (s.3 of the FW Act).

82. Mr Iksidis appears to have operated the trolley collection business known as "Effective Supermarket Services" since at least 25 June 2001 (Lang Penalty Affidavit at [11]) and is an experienced businessman in the trolley collection industry. With two previous legal proceedings commenced against him for the underpayment of trolley collectors (Lang Penalty Affidavit at [31]), Mr Iksidis is well aware of the vulnerable nature of employees in the trolley collection industry generally and the obligation to provide employees with their minimum entitlements.

83. Jay Group's contraventions occurred within the context of subcontracting arrangements… Mr Iksidis played a crucial role in the negotiation of both the contract with Costco and the subcontract with Jay Group. Mr Iksidis was closely involved in determining the rate payable by his company Xidis Aust to Jay Group (Iksidis SOAF at [46(e)]) and failed to ensure that the consideration paid to Jay Group under the subcontract was sufficient to meet the minimum wage obligations payable to the Employees (Iksidis SOAF at [46(f)]). Further, Xidis Aust only made full payment of the contract to Jay Group after Jay Group commenced legal proceedings against Xidis Aust (Singh Penalty Affidavit at [17] to [18]). This conduct may have presumably caused difficulties for Jay Group in meeting its own obligations towards the Employees.

72. Then in FWO's analysis under the heading "*Factors relating to the penalty for the fourth respondent – Nature and extent of the loss*" it states at [85]:

85. Mr Iksidis' company, Xidis Aust invoiced and received $34,633.85 from Costco in respect of the trolley collection services undertaken by the Employees during the Claim Period in or around late July/August 2011 (Iksidis SOAF at [12] and [13]). Mr Iksidis did not authorise the company to pay any monies to Jay Group until legal proceedings instituted by Jay Group were settled out of court in January 2012 (Singh Penalty Affidavit at [18]) and therefore failed to ensure that full payment was made to

Jay Group within a reasonable time. Xidis Aust accordingly received the benefit of not paying Jay Group by deferring payment for approximately 6 months.

73. The most important aspect of FWO's analysis appears under the heading "*Factors relating to the penalty for the fourth respondent – Similar previous conduct*", which states at [86]-[89]:

> *86. Mr Iksidis is well known to the FWO from two previous proceedings commenced by the FWO's predecessor agency, the Workplace Ombudsman, in relation to the underpayment of trolley collection workers (Lang Penalty Affidavit at [30] to [31]).*
>
> *87. In Inspector Dekic v Xidis Pty Ltd and Nick Iksidis (See Annexure DL-11 to the Lang Penalty Affidavit), Magistrate Hawkins of the Magistrate's Court of Victoria found that Mr Iksidis was involved in his company's contravention of failing to pay $3,523.98 in minimum wages and annual leave entitlements under the Workplace Relations Act 1996 (Cth) to three trolley collection workers employed in Victoria in 2006 to 2007. The Magistrate's Court imposed a penalty of $12,500 against Xidis Pty Ltd and $12,500 against Mr Iksidis.*
>
> *88. In Inspector Lang v Xidis Pty Ltd and Nick Iksidis [2008] FMCA 1009 (See Annexure DL-12 to the Lang Penalty Affidavit), Burchardt FM (as he then was) found that Mr Iksidis was involved in the underpayment of 42 trolley collection workers employed by Xidis Pty Ltd in NSW in 2007. The underpayments in this case were more than $100,000 and a number of employees were disabled and considered vulnerable by the Court (Inspector Lang v Xidis Pty Ltd and Nick Iksidis [2008] FMCA 1009 at [23]). The Court imposed a penalty of $120,000 against the company for its conduct. While no penalty was imposed upon Mr Iksidis this was only on the bases that the Court found it likely that Mr Iksidis would pay the company's penalty personally.*
>
> *89. The Applicant submits that Mr Iksidis' strong history of non-compliance with workplace laws is given significant weight in the Court's approach to determining an appropriate penalty in this case.*

74. The other significant issue in respect of Mr Iksidis appears in FWO's analysis under the heading "*Factors relating to the penalty for the fourth respondent – Specific Deterrence"* which states at [100]-[103]:

100. The Applicant submits that the penalty imposed on Mr Iksidis should be significant to ensure that the specific deterrence effect is high. The need for specific deterrence is particularly significant in this case given the previous court findings and poor compliance history of Mr Iksidis and the fact that he continues to act as director of 7 entities, including one entity known as Trolley Solutions Pty Ltd, the name of which indicates that it may operate in the trolley collection industry.

101. Although Mr Iksidis' legal representatives have made representations that Mr Iksidis is no longer in the trolley collecting industry and there is no prospect whatsoever of repeat offending, the Applicant has recently received information that indicates that Mr Iksidis is actively seeking to re-enter the industry (Lang Penalty Affidavit at [33]to [34]).

102. In Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543, it was stated:

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

103. The Applicant accepts that Mr Iksidis cooperated during the investigation and admitted the contraventions prior to the liability hearing, However, Mr Iksidis should be left in no doubt that failing to comply with minimum obligations will not be tolerated by the Court, particularly in circumstances where there is a history of non-compliance and a strong risk of repeat offending.

75. Turning to Schedule "D", this is FWO's recommended calculation of penalty for Mr Iksidis and I acknowledge that it is proposed that the penalty should be in the higher range (80-90%) of the maximum penalty, with a discount of 15% due to the earlier admission of liability; however, I believe that the penalty should be the maximum without any discount. The material before the Court indicates that Mr Iksidis has been found guilty of a number of contraventions of the FW Act on several occasions prior to this proceeding. I am not satisfied that there

is any evidence to support the view that Mr Iksidis admitted liability with any view of saving FWO or this Court in respect of this matter, but rather, the recognition of the inevitability of the outcome based on his previous experiences with FWO and subsequent enforcement proceedings. Amongst individuals involved in the matter currently before this Court the person who should have been the best informed and appropriately the most cautious in respect of the appropriate remuneration of employees was Mr Iksidis. Consequently, I believe that the maximum penalty for each contravention should be imposed.

The Fifth Respondent – Mr Sandhu

76. I finally turn to Mr Sandhu (fifth respondent) who did not appear or have representation in these proceedings and did not participate in the preparation of an agreed statement of facts and appears to have left the jurisdiction. In the analysis and written submissions prepared by FWO in respect to Mr Sandhu, the following sections are significant where it states at [105]-[110]:

> ***Circumstances in which the conduct took place and the nature and extent of the conduct.***
>
> *105. The evidence indicates that Mr Sandhu assisted Jay Group with the management of the Employees performing trolley work at the Costco Site (Jay Group SOAF at [24]) and was the contact person within Jay Group for a number of the Employees (Lang Penalty Affidavit at [18]).*
>
> *106. In the Orders dated 20 December 2013, the Court determined that that Mr Sandhu was involved in Jay Group's contraventions which resulted in the failure to provide twelve Employees their basic minimum entitlements, including the minimum rate of pay, for the entirety of the Claim Period.*
>
> *107. Mr Sandhu was involved in breaching a fundamental purpose of the FW Act, which includes ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions (s.3 of the FW Act).*
>
> ***Nature and extent of the loss of damage.***
>
> *108. The Applicant repeats the submissions… in relation to the effect of the underpayments of the Employees.*

109. More than $9,000 was purportedly transferred from Jay Group to Mr Sandhu as payment for trolley collection work (Singh Penalty Affidavit at [16] and [19]). It is not clear whether this payment was limited to the work performed at the Costco Site. What is clear however is that none of this money transferred to Mr Sandhu was ever paid to the Employees. Like Mr Iksidis and Mr Singh before him, Mr Sandhu received the benefit of the Employees' underpayment. The Employees have been, and continue to be, commensurately deprived of the financial benefit that would flow from the timely payment of their correct entitlements (Fair Work Ombudsman v Hungry Jacks Pty Ltd [2001] FMCA 233 at [47]).

Similar previous conduct

110. While the Applicant has not made any determination concerning similar previous conduct engaged in by Mr Sandhu, the Applicant is aware that one of the complaints against Jay Group referred to, appears to involve Mr Sandhu in a supervisory capacity.

77. That then takes me to the penalty calculations prepared by FWO in Schedule "E" – Fifth Respondent – Tejinder Singh Sandhu. In the circumstances and on the material before the Court, I am satisfied that those calculations should be adopted and a penalty of $17,160 be applied to Mr Sandhu.

Conclusion

78. For the reasons stated above, orders should be made for compensation to be paid by Jay Group to the twelve former Employees, with interest. Further, Jay Group, Mr Singh, Mr Iksidis and Mr Sandhu should be ordered to pay penalties to the Commonwealth in respect of their breaches of the FW Act in the amounts noted in the orders made today.

I certify that the preceding seventy-eight (78) paragraphs are a true copy of the reasons for judgment of Judge Lloyd-Jones

Associate:

Date: 19 December 2014

Schedule "B"

First Respondent – Jay Group Services Pty Ltd

No.	Description/ grouping of contraventions	Maximum penalty per contravention	Discount for admission	Proposed penalty range in % (after discount)	Lowest end of range (at 10% discount)	Highest end of range (at 5% discount
1.	Failure to pay the minimum weekly wage under the *Cleaning Services Modern Award*	$33,000	5-10%	Mid-range (50% to 60%)	$14,850	$18,810
2.	Failure to pay causal loading under the Modern Award	$33,000	5-10%	Mid-range (50% to 60%)	$14,850	$18,810
3.	Failure to pay Saturday penalty rates under the Modern Award	$33,000	5-10%	Mid-range (50%)	$14,850	$15,675
4.	Failure to pay Sunday penalty rates under the Modern Award	$33,000	5-10%	Mid-range (50%)	$14,850	$15,675
5.	Failure to pay shift work penalty rates under the Modern Award	$33,000	5-10%	Low end of Mid-range (40%)	$11,880	$12,540
6.	Failure to pay overtime rates under the Modern Award	$33,000	5-10%	Mid-range (50% to 60%)	$14,850	$15,675
7.	Failure to make and keep records	$16,500	5-10%	Mid-range (40% to 60%)	$5,940	$6,270
TOTALS		**$214,500**		**Midrange**	**$92,070**	**$109,725**

Schedule "C"

Third Respondent – Jatinder Singh

No.	Description/ grouping of contraventions	Maximum penalty per contravention	Discount for admission	Proposed penalty range in % (after discount)	Lowest end of range (at 10% discount)	Highest end of range (at 5% discount
1.	Failure to pay the minimum weekly wage under the *Cleaning Services Modern Award*	$6,600	5-10%	Low end of Mid-range (40% to 50%)	$2,376	$3,135
2.	Failure to pay causal loading under the Modern Award	$6,600	5-10%	Low end of Mid-range (40% to 50%)	$2,376	$3,135
3.	Failure to pay Saturday penalty rates under the Modern Award	$6,600	5-10%	Low end of Mid-range (40%)	$2,376	$2,508
4.	Failure to pay Sunday penalty rates under the Modern Award	$6,600	5-10%	Low end of Mid-range (40%)	$2,376	$2,508
5.	Failure to pay shift work penalty rates under the Modern Award	$6,600	5-10%	Low end of Mid-range (30%)	$1,782	$1,881
6.	Failure to pay overtime rates under the Modern Award	$6,600	5-10%	Low end of Mid-range (40% to 50%)	$2,376	$3,135
7.	Failure to make and keep records	$3,300	5-10%	Low end of Mid-range (40% to 50%)	$1,188	$1,568
TOTALS		**$42,900**		**Low mid of mid-range**	**$14,850**	**$20,378**

Schedule "D"

Fourth Respondent – Nick Iksidis

No.	Description/ grouping of contraventions	Maximum penalty per contravention	Discount for admission	Proposed penalty range in % (after discount)	Lowest end of range (at 15% discount)	Highest end of range (at 15% discount
1.	Failure to pay the minimum weekly wage under the *Cleaning Services Modern Award*	$6,600	15%	High range (80% to 90%)	$4,488	$5,049
2.	Failure to pay causal loading under the Modern Award	$6,600	15%	High range (80% to 90%)	$4,488	$5,049
3.	Failure to pay Saturday penalty rates under the Modern Award	$6,600	15%	High range (80%)	$4,488	$4,488
4.	Failure to pay Sunday penalty rates under the Modern Award	$6,600	15%	High range (80%)	$4,488	$4,488
5.	Failure to pay shift work penalty rates under the Modern Award	$6,600	15%	High range (70%)	$3,927	$3,927
6.	Failure to pay overtime rates under the Modern Award	$6,600	15%	High range (80%-90%)	$4,488	$5,049
TOTALS		**$39,600**		**High range**	**$26,367**	**$28,050**

Schedule "E"

Fifth Respondent – Tejinder Singh Sandhu

No.	Description/ grouping of contraventions	Maximum penalty per contravention	Proposed penalty range in % (no discount)	Lowest end of range	Highest end of range
1.	Failure to pay the minimum weekly wage under the *Cleaning Services Modern Award*	$6,600	Low end of Mid-range (40% to 50%)	$2,640	$3,300
2.	Failure to pay causal loading under the Modern Award	$6,600	Low end of Mid-range (40% to 50%)	$2,640	$3,300
3.	Failure to pay Saturday penalty rates under the Modern Award	$6,600	Low end of Mid-range (40%)	$2,640	$2,640
4.	Failure to pay Sunday penalty rates under the Modern Award	$6,600	Low end of Mid-range (40%)	$2,640	$2,640
5.	Failure to pay shift work penalty rates under the Modern Award	$6,600	Low end of Mid-range (30%)	$1,980	$1,980
6.	Failure to pay overtime rates under the Modern Award	$6,600	Low end of Mid-range (40% to 50%)	$2,640	$3,300
TOTALS		**$39,600**	**Low end of Mid-range**	**$15,180**	**$17,160**

Annexure "A"

AGREED STATEMENT OF FACTS

*This Statement of Agreed Facts is an agreed document between the applicant and the first and third respondents, Jay Group Services Pty Ltd (**Jay Group**) and Mr Jatinder Singh (**Mr Singh**), and is made for the purposes of section 191 of the* Evidence Act 1995 *(Cth). The admissions are only made for the purposes of these proceedings.*

The applicant, Jay Group and Mr Singh agree as set out below.

THE APPLICANT

*1. The Fair Work Ombudsman (**FWO**) has standing and authority to bring these proceedings and to pursue civil remedy penalties in relation to Jay Group's contraventions and Mr Singh's involvement in those contraventions (as set out in paragraphs 46 to 77 below.*

THE APPLICATION

2. On 11 January 2013, the applicant filed an Application and Statement of Claim in this Court against the respondents in respect of non-payment of wages contraventions under the Cleaning Services Award 2010 *[MA000022] (**Modern Award**), and record keeping contraventions under the* Fair Work Act 2009 *(Cth) (**FW Act**).*

*3. The contraventions related to 12 employees (referred to in paragraph 7 below) from non-English speaking backgrounds who were employed as trolley collectors at the Costco Site located at Parramatta Road, Lidcombe, New South Wales (**Costco Site**), during the period 21 July 2011 to 31 July 2011 (**Claim Period**).*

THE FIRST RESPONDENT

4. On 12 May 2010, Jay Group incorporated as a proprietary company incorporated under the Corporations Act 2001 *(Cth).*

5. Jay Group is capable of being sued in and by its corporate name and style.

6. Jay Group is and was at all material times:

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

(b) a "national system employer" within the meaning of section 14 of the FW Act; and

*(c) an entity primarily carrying on a cleaning business operating in the Australian Capital Territory and New South Wales but from time to time was also engaged in providing trolley collection services to Costco Wholesale Pty Ltd (**Costco**) and Woolworths Limited via subcontracting arrangements with the Second Respondent, being Xidis Aust Pty Ltd trading as Effective Supermarket Services (**ESS**).*

*7. At all relevant times during the Claim Period, Jay Group was the employer of the following 12 Employees (**Employees**) who performed work as trolley collectors at the Costco Site:*

	Name of Employee	*Period of Employment*
1.	*ByoungJoon Jang (Jang)*	*21 July 2011 to 28 July 2011*
2.	*Seong Bae Jeon (Jeon)*	*23 July 2011 to 31 July 2011*
3.	*Ingu Baek (Baek)*	*21 July 2011 to 31 July 2011*
4.	*Donggun Kim (Kim)*	*21 July 2011 to 27 July 2011*
5.	*Min Woo Kim (Min Woo)*	*21 July 2011 to 31 July 2011*
6.	*Gimim Kim (Gimim)*	*23 July 2011 to 31 July 2011*
7.	*Suyong Lim (Lim)*	*21 July 2011 to 31 July 2011*
8.	*Inwoo Baek (Inwoo)*	*21 July 2011 to 27 July 2011*
9.	*Joon Eok Park (Park)*	*23 July 2011 to 31 July 2011*
10.	*Seung Taek Oh (Oh)*	*21 July 2011 to 31 July 2011*
11.	*Taheo Cho (Cho)*	*21 July 2011 to 27 July 2011*
12.	*Abbas Vahdani (Vahdani)*	*21 July 2011 to 31 July 2011*

THE THIRD RESPONDENT

8. The Third Respondent, Mr Singh, also known as Jim Gill, is and was at all material times:

(a) a person capable of being sued;

(b) employed as the Operations Manager of Jay Group;

(c) a person who exercised management and control over the business of Jay Group insofar as it had business dealings with ESS in relation to the provision of trolley collection services; and

(d) for the purposes of sub-section 793(1) of the FW Act, a person whose conduct referred to in this statement of agreed facts was conduct engaged in on behalf of Jay Group within the scope of his actual or apparent authority.

THE EMPLOYEES

9. At all material times the Employees were:

(a) employed to perform trolley collection services in the State of New South Wales at the Costco Site.

(b) engaged on a casual basis;

(c) not employees with disabilities;

(d) all from a non-English speaking background; and

(e) not employees to whom training arrangements applied.

COSTCO SITE TROLLEY COLLECTIONS: CONTRACTUAL ARRANGEMENTS

Head Contract between Costco and ESS

*10. On or about 21 June 2011, ESS entered into a contract with Costco (**Costco Contract**) pursuant to which ESS agreed to provide trolley collecting services at the Costco Site, from 21 July 2011.*

*11. The Costco Contract is in writing and constituted by a written agreement signed on 21 June 2011 by Costco and the fourth respondent, Mr Nick Iksidis (**Mr Iksidis**), as director of ESS.*

Sub-Contract between ESS and Jay Group

*12. In late June 2011, the fourth respondent and director of ESS, Mr Nick Iksidis (**Mr Iksidis**) approached Mr Singh and offered to subcontract the provision of trolley collection services under the Costco Contract to Jay Group.*

13. Jay Group had previously worked with ESS in May 2011 when Jay Group subcontracted from ESS to provide trolley collection services at the Woolworths store located in Newington, New South Wales.

*14. On or about 5 July 2011, Jay Group entered into an agreement with ESS for Jay Group to carry out the trolley collection services under the Costco Contract at the Costco Site during the period from 21 July 2011 to 18 September 2011 (**Costco Sub-Contract**).*

15. The Costco Sub-Contract is in writing and constituted by:

> *(a) a written agreement dated 5 July 2011 signed by Mr Singh on behalf of Jay Group;*
>
> *(b) a written document entitled "Trolley Services Contractor Terms and Conditions of Trade" prepared by ESS and signed by the fifth respondent, Mr Tejinder Singh Sandhu (**Mr Sandhu**) on 20 July 2011.*

16. It was a term of the Costco Sub-Contract that ESS would pay to Jay Group the amount of $14,300 plus GST for the period 21 July 2011 to 31 July 2011, and $8,500 plus GST each week thereafter.

17. The terms of the Costco Sub-Contract (amongst other things) stated that Jay Group was to provide:

> *(a) 1 utility with a tow bar; and*
>
> *(b) the following numbers of trolley collectors:*
>
> > *(i)14 collectors on 21 July 2011;*
> >
> > *(ii) 10 collectors on "standby" on 21 July 2011; and*
> >
> > *(iii) 10 collectors after 24 July 2011.*

18. The hours worked by the Employees as stated in Schedule A to the applicant's statement of claim correspond approximately with the coverage hours required to be worked in order to fulfil Jay Group's obligations under the Costco Sub-Contract.

19. Clause 3(a) of the "Trolley Services Contractor Terms and Conditions of Trade" provided that the contractor (being Jay Group) was required to provide personnel who were employees to perform trolley collection services.

20. Clause 3(c) of the "Trolley Services Contractor Terms and Conditions of Trade" provided that the contractor (being Jay Group) was required to arrange insurance in accordance with workers compensation legislation and public liability insurance.

21. On or about 1 August 2011, Jay Group invoiced ESS in respect of the trolley collection services undertaken by the Employees during the Claim Period at the Costco Site, in the amount of $15,730 ($14,300 plus GST).

22. On or about 11 January 2012, Jay Group received $14,800 from ESS in respect of the trolley collection services undertaken by the Employees during the Claim Period at the Costco Site.

23. On or around the end of July 2011, Mr Singh attended the Costco Site to check on the work being performed by the Employees.

Termination of Costco Contract and Costco Sub-Contract

24. On or about 31 July 2011, Mr Singh received a telephone call from Mr Sandhu advising him that Costco had terminated the Costco Contract.

25. On or about 31 July 2011, Mr Singh telephoned Mr Iksidis to confirm whether the Costco Contract had been terminated. Mr Iksidis advised Mr Singh that the Costco Contract had been terminated and that the subcontract between ESS and Jay Group was therefore also terminated.

RELEVANT LEGISLATION

26. At all relevant times during the Claim Period, the Employees' employment was covered by the FW Act.

RELEVANT INDUSTRIAL INSTRUMENT

27. At all material times during the Claim Period, the Employees' employment was also covered by the Cleaning Services Award 2010 *[MA000022] (**Modern Award**) because the work performed by the Employees as trolley collectors was of a kind covered by the classification CSE1 in clause D.1 of Schedule D to the Modern Award.*

28. Under clause D.1.1 of the Modern Award, the tasks which an employee at the level of CSE1 may perform on a daily or periodic basis include collecting, servicing and maintaining shopping and/or luggage trolleys.

29. Each of the Employees' tasks performed on a daily basis involved collecting shopping trolleys and returning them to trolley bays at the Costco Site.

30. During the Claim Period, each of the Employees performed work on each of the following days:

(a) Saturday;

(b) Sunday; and

(c) Monday to Friday finishing after 6.00pm;

as set out in Schedule A to the statement of claim.

31. During the Claim Period, each of the Employees performed work in excess of 7.6 hours per day, five days per week or 38 hours in any week, as set out in Schedule A to the statement of claim.

32. In accordance with the Modern Award and section 45 of the FW Act, each of the Employees were required to be paid the minimum wages, casual loadings, Saturday penalty rates, Sunday penalty rates, shift work penalty rates and overtime rates as set out below:

Entitlement	***Adult hourly rate payable***	***Junior hourly rate payable***
Minimum wages	*$16.57*	*$13.26*
Casual loading of 19%	*$19.72*	*$15.77*
Saturday penalty rate	*$23.03*	*$18.43*
Sunday penalty rate	*$26.35*	*$21.08*
Shift work rate	*$20.71*	*$16.57*
Overtime rates – first 2 hours	*$24.86*	*$19.89*
Overtime rates – after 2 hours and on Sundays	*$33.14*	*$26.52*

33. None of the Employees received any payment at all for their work performed during the Claim Period.

FWO INVESTIGATION FINDINGS

34. On or about 2 September 2011, the applicant received workplace complaints from the Employees.

35. The applicant conducted an investigation into the claims raised by each of the Employees. The main issue raised in each of the workplace complaints was the non-payment of wages.

36. As part of the investigation the applicant compiled a set of underpayment calculations for each of the Employees based on the information provided by them in their workplace complaints, interviews and correspondence.

37. The FWO's calculations and investigations revealed that the Employees were not paid their minimum entitlements, loadings, penalty rates and overtime under the Modern Award for the work they performed as trolley collectors.

38. Section 45 of the FW Act provides that a person must not contravene a term of a modern award.

*39. Contrary to section 45 of the FW Act, the FWO identified that the following contraventions of the Modern Award had occurred (**Contraventions**):*

> *(a) subclause 16.1 of the Modern Award which resulted in the Employees being underpaid $16,990.88 for their minimum rates of pay;*
>
> *(b) subclause 12.5(a) of the Modern Award which resulted in the Employees being underpaid $3,228.27 for their casual loadings;*
>
> *(c) subclause 27.2(a) of the Modern Award which resulted in the Employees being underpaid $601.16 for their Saturday penalty rates;*
>
> *(d) subclause 27.2(b) of the Modern Award which resulted in the Employees being underpaid $1,313.01 for their Sunday penalty rates;*
>
> *(e) subclause 27.1(a) of the Modern Award which resulted in the Employees being underpaid $377.80 for their shift work penalty rates; and*

(f) subclause 28 of the Modern Award which resulted in the Employees being underpaid $4,773.15 for their overtime rates.

40. At the conclusion of the investigation the applicant determined that the Employees had been underpaid a total of $27,284.26.

*41. On 13 December 2012, the applicant issued a "Determination of Contravention" letter (**Contravention Letter**) to Jay Group requiring the company to rectify the Employees' underpayments.*

42. On 13 December 2012, the applicant also issued a "Completion of Investigation" letter to Mr Singh and the other respondents, enclosing a copy of the Contravention Letter sent to Jay Group. In the "Completion of Investigation" letter, the applicant indicated that it had also determined that each of the respondents were involved in Jay Group's contraventions identified in the Contravention Letter.

INSTITUTION OF PROCEEDINGS

43. On 4 January 2013, the applicant sent a letter to Jay Group, Mr Singh and the other respondents, informing that the applicant intended to commence litigation in 7 days, and enclosed a draft of the statement of claim filed in these proceedings.

44. On 11 January 2013, the applicant commenced these proceedings.

CONTRAVENTIONS

Contravention 1: Underpayment of the minimum weekly wage

45. During the Claim Period, pursuant to clause 16.1 of the Modern Award, Jay Group was required to pay the Employees a minimum wage for all ordinary hours worked as follows:

Period	***Adult hourly rate***	***Junior hourly rate***
21 July 2011 to 31 July 2011	*$16.57*	*$13.26*

46. During the Claim Period, the Employees worked the ordinary hours set out in Schedule A to the Statement of Claim.

47. During the Claim Period, Jay Group did not pay the Employees at all for work performed and thereby failed to pay the minimum rate of pay to which the Employees were entitled to receive for all ordinary hours worked, causing them to be underpaid $16,990.88.

48. Jay Group contravened clause 16.1 of the Modern Award, and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

Contravention 2: Underpayment of casual loadings

49. During the Claim Period, pursuant to clause 12.5(a) of the Modern Award, Jay Group was required to pay the Employees a casual loading in addition to their minimum wage for all ordinary hours worked as follows:

Period	***Adult casual loading***	***Total Adult casual hourly rate***
21 July 2011 to 31 July 2011	*$3.15*	*$19.72*

Period	***Junior casual loading***	***Total Junior casual hourly rate***
21 July 2011 to 31 July 2011	*$2.51*	*$15.77*

50. During the Claim Period, the Employees worked the ordinary hours set out in Schedule A to the Statement of Claim.

51. During the Claim Period, Jay Group did not pay the Employees at all for work performed and thereby failed to pay the applicable casual loading to which the Employees were entitled to receive for all ordinary hours worked, causing them to be underpaid $3,228.27.

52. Jay Group contravened clause 12.5(a) of the Modern Award, and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

Contravention 3: Underpayment of Saturday penalty rates

53. During the Claim Period, pursuant to clause 27.2(a) of the Modern Award, Jay Group was required to pay the Employees penalty rates for all work performed on Saturdays as follows:

Period	***Adult Saturday hourly rate***	***Junior Saturday hourly rate***
21 July 2011 to 31 July 2011	*$23.03*	*$18.43*

54. During the Claim Period, the Employees worked hours on Saturdays as set out in Schedule A to the Statement of Claim.

55. During the Claim Period, Jay Group did not pay the Employees at all for work performed and thereby failed to pay the applicable penalty rates to which the Employees were entitled to receive for all hours worked on Saturdays, causing them to be underpaid $601.16.

56. Jay Group contravened clause 27.2(a) of the Modern Award, and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

Contravention 4: Underpayment of Sunday penalty rates

57. During the Claim Period, pursuant to clause 27.2(b) of the Modern Award, Jay Group was required to pay the Employees penalty rates for all work performed on Sundays as follows:

Period	***Adult Sunday hourly rate***	***Junior Sunday hourly rate***
21 July 2011 to 31 July 2011	*$26.35*	*$21.08*

58. During the Claim Period, the Employees worked hours on Sundays as set out in Schedule A to the Statement of Claim.

59. During the Claim Period, Jay Group did not pay the Employees at all for work performed and thereby failed to pay the applicable penalty rates to which the Employees were entitled to receive for all hours worked on Sundays, causing them to be underpaid $1,313.01.

60. Jay Group contravened clause 27.2(b) of the Modern Award, and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

Contravention 5: Underpayment of shift work penalty rates

61. During the Claim Period, pursuant to clause 27.1(a) of the Modern Award, Jay Group was required to pay the Employees penalty rates for shifts worked on Mondays to Fridays which commenced before 6.00am or finished after 6.00pm as follows:

Period	***Adult shiftwork hourly rate***	***Junior shiftwork hourly rate***
21 July 2011 to 31 July 2011	*$20.71*	*$16.57*

62. During the Claim Period, each of the shifts worked by the Employees between Mondays and Fridays finished after 6.00pm as set out in Schedule A to the Statement of Claim.

63. During the Claim Period, Jay Group did not pay the Employees at all for work performed and thereby failed to pay the applicable penalty rates to which the Employees were entitled to receive for all shift work performed between Mondays and Fridays, causing them to be underpaid $377.80.

64. Jay Group contravened clause 27.1(a) of the Modern Award, and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

Contravention 6: Underpayment of overtime rates

65. At all relevant times during the Claim period, the Employees' ordinary hours of work were defined under clause 24.2(a) of the Modern Award as being 7.6 hours per day on not more than 5 days per week, Monday to Sunday inclusive.

66. Pursuant to clause 28 of the Modern Award, employees who perform hours in excess of their ordinary hours are entitled to receive overtime at the following rates:

> *(a) midnight Sunday to midnight Saturday – at the rate of time and a half for the first 2 hours and double time thereafter; and*
>
> *(b) Sunday – at the rate of double time.*

66. During the Claim Period, pursuant to clause 28 of the Modern Award, Jay Group was required to pay the Employees overtime rates for all work performed in excess of ordinary hours as follows:

Period	***Adult overtime – first 2 hours***	***Adult overtime – after first 2 hours and on Sundays***
21 July 2011 to 31 July 2011	*$24.86*	*$33.14*

Period	***Junior overtime – first 2 hours***	***Junior overtime – after first 2 hours and on Sundays***
21 July 2011 to 31 July 2011	*$19.89*	*$26.52*

67. During the Claim Period, the Employees worked overtime hours as set out in Schedule A to the Statement of Claim.

68. During the Claim Period, Jay Group did not pay the Employees at all for work performed and thereby failed to pay the applicable overtime rates to which the Employees were entitled to receive for all hours worked in excess of ordinary hours causing them to be underpaid $4,773.15.

70. Jay Group contravened clause 28 of the Modern Award, and in doing so contravened section 45 of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

Contravention 7: Failure to keep records

71. At all times during the Claim Period, Jay Group was:

> *(a) required by sub-section 535(1) of the FW Act to make, and keep for 7 years, employee records of the kind prescribed by the* Fair Work Regulations 2009 *(Cth) (**FW Regulations**) in relation to each of the Employees;*
>
> *(b) required by the employee record provisions in Subdivision 1 of Division 3 Part 3-6 of the FW Regulations, to make and keep records in relation to each of the Employees that specify:*
>
> *(c) the employer's name; the employee's name; whether the employee's employment is full-time or part-time; whether the employee's employment is permanent, temporary or casual; the date on which the employee's employment began;*

and the Australian Business Number of the Employer (regulation 3.32 of the FW Regulations);

(d) the rate of remuneration paid to the employee; the gross and net amounts paid to the employee; and any deductions from the gross amount paid to the employee (sub-regulation 3.33(1) of the FW Regulations);

(e) if the employee is a casual or irregular part-time employee, the hours worked by the employee (sub-regulation 3.33(2) of the FW Regulations);

(f) details of penalty rates and allowances the employee is entitled to be paid (sub-regulation 3.33(3) of the FW Regulations); and

(g) the number of overtime hours worked by the employee during each day, or when the employee started and ceased working overtime hours (regulation 3.34 of the FW Regulations)

72. During the Claim Period, no records were made in relation to the Employees, or caused to be made, and kept in accordance with regulations 3.32, 3.33 and 3.34 of the FW Regulations.

73. By failing to make and keep records in accordance with the FW Regulations as set out above, Jay Group contravened subsection 535(1) of the FW Act, which is a civil remedy provision under subsection 539(2) of the FW Act.

TOTAL UNDERPAYMENT

74. By reason of the contraventions admitted in paragraphs 45 to 73 above, Jay Group caused the Employees to be underpaid a total of $27,284.26.

75. Pursuant to Order 7 of the Orders made by the Court on 20 December 2013, Jay Group is required to repay the underpayments to the Employees within 90 days of the date of the Orders, being 20 March 2014.

76. The underpayments are yet to be rectified as at the date of this Statement of Agreed Facts.

INVOLVEMENT OF MR SINGH IN THE CONTRAVENTIONS

77. Further to the matters agreed at paragraph 8 above, at all material times Mr Singh:

(a) knew that the trolley collection services at the Costco Site covered by the Costco Sub-Contract were to be performed by persons engaged by Jay Group;

(b) signed one of the documents constituting the Costco Subcontract and knew the terms of the Costco Sub-Contract;

(c) knew that the Employees had been engaged to perform the work pursuant to the Costco Sub-Contract;

(d) knew the approximate number of employees and the number of hours required to be worked in order to fulfil Jay Group's obligations under the Costco Sub-Contract;

(e) knew that the terms and conditions of employment of employees performing work collecting trolleys at the Costco Site would be regulated by a modern award under the FW Act;

(f) knew or ought to have known that the amount invoiced by Jay Group to ESS on 1 August 2011 would not be sufficient to meet the minimum wage obligations payable to the Employees;

(g) knew that the Employees were not paid for time worked during the Claim Period;

(h) notwithstanding paragraph 77(g) above, Mr Singh rendered a tax invoice to ESS on behalf of Jay Group on 1 August 2011 declaring that all remuneration had been paid to the Employees for work performed during the Claim Period; and

(i) knew that no employee records were made or kept by Jay Group.

78. At all material times, Mr Singh was, by act or omission, directly or indirectly knowingly concerned in Jay Group's contraventions (as listed in paragraphs 45 to 73 above).

ADMISSIONS

79. Jay Group admits to being the Employer of the Employees listed in paragraph 7 above during the period 21 July 2011 to 31 July 2011.

80. Jay Group admits that it contravened the following civil penalty provisions during the period 21 July 2011 to 31 July 2011:

(a) section 45 of the FW Act by failing to pay each of the Employees the minimum weekly wages for work performed during ordinary hours in contravention of subclause 16.1 of the Modern Award;

(b) section 45 of the FW Act by failing to pay the Employees the casual loading prescribed for all hours worked in contravention of subclause 12.5(a) of the Modern Award;

(c) section 45 of the FW Act by failing to pay the Employees the penalty rates prescribed for all hours worked on a Saturday in contravention of subclause 27.2(a) of the Modern Award;

(d) section 45 of the FW Act by failing to pay the Employees the penalty rates prescribed for all hours worked on a Sunday in contravention of subclause 27.2(b) of the Modern Award;

(e) section 45 of the FW Act by failing to pay the Employees the shift work penalty rates prescribed for shifts worked on Monday to Friday starting before 6:00am or finishing after 6:00pm in contravention of subclause 27.1(a) of the Modern Award;

(f) section 45 of the FW Act, by failing to pay the Employees overtime rates for the overtime work they performed in contravention of subclause 28 of the Modern Award; and

(g) sub-section 535(1) of the FW Act, by failing to make, and keep for 7 years, employee records of the kind prescribed by the FW Regulations in relation to each of the Employees.

81. Mr Singh admits that he was involved in (within the meaning of subsection 550(1) of the FW Act) Jay Group's contraventions of the FW Act as set out at paragraph 81 above.

Annexure "B"

AGREED STATEMENT OF FACTS

*This Statement of Agreed Facts is an agreed document between the applicant and the fourth respondent, Nick Iksidis (**Iksidis**), and is made for the purposes of section 191 of the* Evidence Act 1995 *(Cth). The admissions are only made for the purposes of these proceedings.*

The applicant and Iksidis agree as set out below.

THE APPLICANT

*1. The Fair Work Ombudsman (**FWO**) has standing and authority to bring these proceedings and to pursue civil remedy penalties in relation to Iksidis' involvement in the contraventions (as set out in paragraphs 40(a) to (f) below).*

THE APPLICATION

*2. On 11 January 2013, the applicant filed an Application and Statement of Claim in this Court against the respondents in respect of non-payment of wages contraventions under the Cleaning Services Award 2010 [MA000022] (**Modern Award**), and record keeping contraventions under the Fair Work Act 2009 (Cth) (**FW Act**).*

*3. The contraventions related to 12 employees (referred to in paragraph 8 below) (**Employees**) who were employed as trolley collectors at the Costco Site located at Parramatta Road, Lidcombe, New South Wales (**Costco Site**), during the period 21 July 2011 to 31 July 2011 (**Claim Period**).*

THE SECOND RESPONDENT

*4. Iksidis is the sole director of the second respondent, Xidis Aust Pty Ltd trading as Effective Supermarket Services (**ESS**).*

5. The second respondent was placed into external administration on 27 March 2013, after the commencement of these proceedings.

6. ESS was at all material times:

> *(a) a proprietary company incorporated under the Corporations Act;*
>
> *(b) capable of being sued in and by its corporate name and style;*

(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; and

(e) an entity carrying on a trolley collecting business operating at various sites in Victoria and New South Wales.

THE FOURTH RESPONDENT

7. Iksidis is and was at all material times:

(a) a person capable of being sued;

(b) the sole director of ESS;

(c) the sole secretary of ESS;

(d)the beneficial holder of all the issued shares in ESS;

(e) aware of the day to day activities of ESS and the effective controller of ESS;

(f) involved from time to time with the operations of the Costco Contract as defined in paragraph 10 below;

*(g) a person who exercised management and control over the business of ESS insofar as it had business dealings with Costco Wholesale Pty Ltd (**Costco**), Woolworths Limited and Jay Group Services Pty Ltd (**Jay Group**); and*

(h) for the purposes of sub-section 793(1) of the FW Act, a person whose conduct referred to in the applicant's statement of claim was conduct engaged in on behalf of ESS within the scope of his actual or apparent authority.

THE EMPLOYEES

*8. During the Claim Period, the following 12 persons were engaged as trolley collectors (collectively, the "**Employees**"):*

	Name of Employee	***Period of Employment***
1.	*ByoungJoon Jang (**Jang**)*	*21 July 2011 to 28 July 2011*
2.	*Seong Bae Jeon (**Jeon**)*	*23 July 2011 to 31 July 2011*
3.	*Ingu Baek (**Baek**)*	*21 July 2011 to 31 July 2011*

4.	*Donggun Kim (**Kim**)*	*21 July 2011 to 27 July 2011*
5.	*Min Woo Kim (**Min Woo**)*	*21 July 2011 to 31 July 2011*
6.	*Gimim Kim (**Gimim**)*	*23 July 2011 to 31 July 2011*
7.	*Suyong Lim (**Lim**)*	*21 July 2011 to 31 July 2011*
8.	*Inwoo Baek (**Inwoo**)*	*21 July 2011 to 27 July 2011*
9.	*Joon Eok Park (**Park**)*	*23 July 2011 to 31 July 2011*
10.	*Seung Taek Oh (**Oh**)*	*21 July 2011 to 31 July 2011*
11.	*Taheo Cho (**Cho**)*	*21 July 2011 to 27 July 2011*
12.	*Abbas Vahdani (**Vahdani**)*	*21 July 2011 to 31 July 2011*

9. At all material times the Employees were:

(a) employed to perform trolley collection services in the State of New South Wales at the Costco Site.

(b) engaged on a casual basis;

(c) not employees with disabilities;

(d) all from a non-English speaking background; and

(e) not employees to whom training arrangements applied.

COSTCO SITE TROLLEY COLLECTIONS: CONTRACTUAL ARRANGEMENTS

Head Contract

*10. On or about 21 June 2011, ESS entered into a contract with Costco (**Costco Contract**) pursuant to which ESS agreed to provide trolley collecting services at the Costco Site, from 21 July 2011.*

11. The Costco Contract is in writing and constituted by a written agreement signed by Costco and Iksidis on 21 June 2011.

12. It was agreed that Costco would pay ESS $34,633.85 for trolley collecting services at the Costco Site for the period from 21 July 2011 to 31 July 2011.

13. On or about 25 July 2011, ESS invoiced Costco in respect of the trolley collection services undertaken during the Claim Period at the Costco Site for the total amount of $34,633.85.

Sub-Contract

14. In late June 2011, Iksidis approached Jatinder Singh (who was the Operations Manager of Jay Group and also known as Jim Gill) and offered to subcontract the provision of trolley collection services under the Costco Contract to Jay Group.

15. ESS had previously worked with Jay Group in May 2011 when ESS subcontracted trolley collection services to Jay Group at the Woolworths store located in Newington, New South Wales.

*16. On or about 5 July 2011, ESS made an agreement with Jay Group for Jay Group to carry out the trolley collecting services under the Costco Contract at the Costco Site during the period from 21 July 2011 to 18 September 2011 (**Costco Sub-Contract**).*

17. The Costco Sub-Contract is in writing and constituted by:

> *(a) a written agreement dated 5 July 2011 signed by the third respondent, Jim Gill (who later became known to the FWO as Jatinder Singh); and*
>
> *(b) a written document entitled "Trolley Services Contractor Terms and Conditions of Trade" prepared by ESS dated 20 July 2011.*

18. It was a term of the Costco Sub-Contract that ESS would pay to Jay Group the amount of $14,300 plus GST for the period 21 July 2011 to 31 July 2011, and $8,500 plus GST each week thereafter.

19. The terms of the Costco Sub-Contract (amongst other things) stated that Jay Group was to provide:

(a) 1 utility with a tow bar; and

(b) the following numbers of trolley collectors:

(i) 14 collectors on 21 July 2011;

(ii) 10 collectors on "standby" on 21 July 2011; and

(11) 10 collectors after 24 July 2011.

20. Clause 3(a) of the "Trolley Services Contractor Terms and Conditions of Trade" provided that Jay Group was required to provide personnel who were employees of Jay Group to perform trolley collection services.

21. Clause 3(c) of the "Trolley Services Contractor Terms and Conditions of Trade" provided that Jay Group was required to arrange insurance in accordance with workers compensation legislation and public liability insurance.

22. On or about 1 August 2011, ESS received an invoice from Jay Group in respect of the trolley collection services undertaken during the Claim Period at the Costco Site, in the amount of $15,730 ($14,300 plus GST).

23. On or about 11 January 2012, ESS paid Jay Group $14,800 in respect of the trolley collection services undertaken during the Claim Period at the Costco Site.

24. Iksidis at all times believed that Jay Group was the employer of the Employees.

Orientation Meeting on 20 July 2011

*25. On or about 11.30am on 20 July 2011, in preparation for performing the trolley collection services at the Costco Site, Iksidis and Tejinder Singh Sandhu had a meeting with some of the Employees at the Costco Site (**Meeting**).*

26. At the Meeting, Iksidis spoke to the Employees in attendance about the work to be performed during the Claim Period, and distributed high visibility vests bearing the ESS logo as well as trolley straps.

Hours worked by the Employees during the Claim Period

27. The hours worked by the Employees as stated in Schedule A to the applicant's statement of claim correspond approximately with the coverage hours required to be worked in order to fulfil ESS' obligations under the Costco Contract.

Termination of Costco Contract

28. On or about 26 July 2011, Iksidis received a telephone call from John Angelkov, assistant warehouse manager at Costco, and was informed that the Costco Contract was to be terminated on 31 July 2011.

29. On or about 31 July 2011, Iksidis received a telephone call from Jatinder Singh regarding the Costco Contract. During the telephone call, Iksidis advised Jatinder Singh that the Costco Contract had been terminated, effective immediately.

RELEVANT LEGISLATION

30. At all relevant times during the Claim Period, the Employees' employment was covered by the FW Act.

RELEVANT INDUSTRIAL INSTRUMENT

*31. At all material times during the Claim Period, the Employees' employment was also covered by the Cleaning Services Award 2010 [MA000022] (**Modern Award**) because the work performed by the Employees as trolley collectors was of a kind covered by the classification CSE1 in clause D.1 of Schedule D to the Modern Award.*

32. Under clause D.1.1 of the Modern Award, the tasks which an employee at the level of CSE1 may perform on a daily or periodic basis include collecting, servicing and maintaining shopping and/or luggage trolleys.

33. Each of the Employees' tasks performed on a daily basis involved collecting shopping trolleys.

34. In accordance with the Modern Award and section 45 of the FW Act, each of the Employees were required to be paid the minimum wages, casual loadings, Saturday penalty rates, Sunday penalty rates, shift work penalty rates and overtime rates as set out below:

Entitlement	***Adult hourly rate payable***	***Junior hourly rate payable***
Minimum wages	*$16.57*	*$13.26*
Casual loading of 19%	*$19.72*	*$15.77*
Saturday penalty rate	*$23.03*	*$18.43*
Sunday penalty rate	*$26.35*	*$21.08*
Shift work rate	*$20.71*	*$16.57*
Overtime rates – first 2 hours	*$24.86*	*$19.89*

Overtime rates – after 2 hours and on Sundays	*$33.14*	*$26.52*

INVESTIGATION FINDINGS

35. On or about 2 September 2011, the applicant received workplace complaints from the Employees.

36. The applicant conducted an investigation into the claims raised by each of the Employees. The main issue raised in each of the workplace complaints was the non-payment of wages.

37. As part of the investigation the applicant compiled a set of underpayment calculations for each of the Employees based on the information provided by them in their workplace complaints, interviews and correspondence.

38. The FWO's calculations and investigations revealed that the Employees were not paid their minimum entitlements, loadings, penalty rates and overtime under the Modern Award for the work they performed as trolley collectors.

39. Section 45 of the FW Act provides that a person must not contravene a term of a modern award.

*40. Contrary to section 45 of the FW Act, the FWO identified that the following contraventions of the Modern Award had occurred (**Contraventions**):*

> *(a) subclause 16.1 of the Modern Award which resulted in the Employees being underpaid $16,990.88 for their minimum rates of pay;*
>
> *(b) subclause 12.5(a) of the Modern Award which resulted in the Employees being underpaid $3,228.27 for their casual loadings;*
>
> *(c) subclause 27.2(a) of the Modern Award which resulted in the Employees being underpaid $601.16 for their Saturday penalty rates;*
>
> *(d) subclause 27.2(b) of the Modern Award which resulted in the Employees being underpaid $1,313.01 for their Sunday penalty rates;*
>
> *(e) subclause 27.1(a) of the Modern Award which resulted in the Employees being underpaid $377.80 for their shift work penalty rates; and*

(f) subclause 28 of the Modern Award which resulted in the Employees being underpaid $4,773.15 for their overtime rates.

41. At the conclusion of the investigation the applicant determined that the Employees had been underpaid a total of $27,284.26.

42. On 13 December 2012, the applicant issued a "Completion of Investigation" letter to ESS, Iksidis and the other respondents. This letter also enclosed a copy of a Contravention Letter dated 13 December 2012 sent to Jay Group by the applicant on the same day.

43. In the Completion of Investigation letter, the FWO indicated that it had also determined that the second to fifth respondents were involved in the contraventions identified in the Contravention Letter.

INSTITUTION OF PROCEEDINGS

44. On 4 January 2013, the applicant sent a letter to ESS, Iksidis and the other respondents, informing that the applicant intended to commence litigation in 7 days, and enclosed a draft of the statement of claim filed in these proceedings.

45. On 11 January 2013, the applicant commenced these proceedings.

INVOLVEMENT OF IKSIDIS IN THE CONTRAVENTIONS

46. Further to the matters agreed at paragraph 7 above, at all material times Iksidis:

(a) knew that employees would be required to perform work collecting trolleys at the Costco Site in order to fulfil ESS's obligations under the Costco Contract;

(b) knew the approximate number of employees and the number of hours required to be worked in order to fulfil ESS's obligations under the Costco Contract;

(c) knew that the terms and conditions of employment of employees performing work collecting trolleys at the Costco Site would be regulated by the Modern Award;

(d) was involved in making the Costco Sub-Contract between ESS and Jay Group;

(e) was involved in determining the rates payable by ESS to Jay Group under the Costco Sub-Contract;

(f) failed to ensure that the consideration to be paid by ESS to Jay Group pursuant to the Costco Sub-Contract was sufficient to meet the minimum wage obligations payable to the Employees in respect of work performed at the Costco Site during the Claim Period;

(g) only took steps to ascertain whether Jay Group had in fact paid the Employees for their time worked during the Claim Period after he was notified by the FWO that the Employees had not been paid.

(h) failed to ensure that full payment was made by ESS to Jay Group within a reasonable time as required under the Costco Sub-Contract; and

(i) failed to ensure that payment was made to the Employees for work performed providing trolley collection service at the Costco Site during the Claim Period.

ADMISSIONS

47. On the basis of the facts set out above, Iksidis admits to being involved, within the meaning of section 550(2) of the FW Act, in the contraventions referred to in paragraphs 40(a) to (f) above, namely:

(a) section 45 of the FW Act, by virtue of each of the Employees failing to receive the minimum weekly wages for work performed during ordinary hours (exclusive of penalties and allowances) as prescribed by clause 16.1 of the Modern Award;

(b) section 45 of the FW Act, by virtue of each of the Employees failing to receive the casual loading prescribed for all hours worked in accordance with clause 12.5(a) of the Modern Award;

(c) section 45 of the FW Act, by virtue of each of the Employees failing to receive the penalty rate prescribed for all hours worked on a Saturday in accordance with clause 27.2(a) of the Modern Award;

(d) section 45 of the FW Act, by virtue of each of the Employees failing to receive the penalty rate prescribed for

all hours worked on a Sunday in accordance with clause 27.2(b) of the Modern Award;

(e) section 45 of the FW Act, by virtue of each of the Employees failing to receive the shift work penalty rate prescribed for shifts worked on Monday to Friday and starting before 6:00am or finishing after 6:00pm in accordance with clause 27.1(a) of the Modern Award; and

(f) section 45 of the FW Act, by virtue of each of the Employees failing to receive overtime rates for the overtime work they performed as prescribed by clause 28 of the Modern Award.

48. By operation of sub-section 550(1) of the FW Act, Iksidis is taken to have committed those contraventions.

Annexure "C"

FACTORS RELATING TO PENALTY FOR THE FIRST AND THIRD RESPONDENT

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

41. The contraventions in these proceedings represent a failure by Jay Group to provide twelve Employees their basic minimum entitlements for the entirety of their employment, albeit for a short period of time. This conduct warrants the imposition of a significant because it involves contraventions of minimum standards of the most fundamental kind, being the complete non-payment of wages and entitlements.

42. In engaging in this conduct, Jay Group has breached a fundamental purpose of the FW Act, which includes ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions (section 3 of the FW Act). The safety net is particularly important for those employees who are vulnerable or in low income roles.

43. Eleven of the Employees were from South Korea and the majority of them had limited English Skills. While Mr Vahdani had a competent understanding of English, he had only recently arrived from Iran and the job at the Costco Site was his first experience of working in Australia. Riethmuller FM (as he then was) observed in Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd ([2012] FMCA 258) at [42] that an employee who lacks competency in English may have difficulty in

understanding and therefore enforcing their rights under the relevant industrial instruments. The Applicant submits that the Employees could be characterised as vulnerable employees, which is a relevant factor in assessing the quantum of penalty of penalty to be imposed (Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor [2009] FMCA 38 at [20]).

44. Further, the contraventions in this case occurred within a chain of purported subcontracting arrangements (Jay Group SOAF at [10] to [25]) between Costco, Xidis Aust, Jay Group and Mr Sandhu. These subcontracting arrangements often result in situations where workers are unaware of who their employer actually is. This can result in employees encountering difficulties enforcing their entitlements in circumstances where they have been paid well below minimum wage, or as in this case, not at all. Subcontracting is common in the cleaning and trolley collection industry and there is a risk that such arrangements can be exploited by employers in an attempt to avoid responsibilities for breaches of workplace laws.

Nature and extent of any loss or damage

45. The underpayment of $27,284.26 is significant, particularly taking into account that the Employees only worked for Jay Group for approximately 11 days during the period 21 July 2011 and 31 July 2011. The majority of the Employees were also working in Australia on short-term working-holiday visas and therefore only had a limited amount of time in which to earn money under the restrictions of their visas.

46. Jay Group received $14,800 from Xidis Aust for the worked performed by the Employees (Jay Group SOAF at [22]). While the evidence (Singh Penalty Affidavit at [16]) appears to indicate that more than half of this amount was then paid to Mr Sandhu with the intention that it would be passed onto the Employees (although it is not entirely clear whether all of the monies paid to Mr Sandhu was for the trolley collection work performed at the Costco Site), Mr Singh was aware that the Employees never received any payment for the work performed (Jay Group SOAF at [77(g)]) and Jay Group made no attempts to ensure that the money was eventually paid to the Employees.

47. Jay Group has therefore received the benefit of a portion of the Employees' underpayments by deferring payment for approximately two and a half years and will continue to receive the benefit until the underpayments are rectified. The Employees have been, and continue to be, commensurately deprived of the

financial benefits that would flow from the timely payment of their correct entitlements (Fair Work Ombudsman v Hungry Jacks Pty Ltd [2001] FMCA 233 at [47]).

Similar previous conduct

48. In addition to the claims lodged with the FWO by the Employees, the FWO's records indicate that there have been 7 further complaints lodged against Jay Group for the underpayment of minimum entitlements (Lang Penalty Affidavit at [27]). Three of the 7 complaints were unable to be further investigated due to a lack of evidence and the FWO acknowledges that the remaining 4 of the 7 complaints were voluntarily rectified by Jay Group. One of the complaints was closed due to lack of evidence, however the complaint indicates a similar pattern of behaviour of non-payment and purported subcontracting arrangements between Jay Group, Mr Singh and Mr Sandhu (Lang Penalty Affidavit at [29] and annexure "DL-10")

Whether the breaches arose out of the one course of conduct

49. The Employees did not receive any payment at all for work performed which resulted in contraventions of a number of provisions of the Modern Award and FW Act. As was noted by Gray J in City of Altona:

> *"If such a party has pursued a course of conduct which gives rise to beaches of several different obligations, there is no reason why it should be treated as immune in respect of its breach of one obligation, merely because it has acted in breach of another." ((1992) 37 FCR 216 at [223])*

50. The Applicant submits that in light of these comments, and in line with the recent decision of this court in FWO v Garfield Barry Farm Pty Ltd & Anor ([2012] FMCA 103) at [28] that it would be "fundamentally at odds without system of workplace entitlements to treat a breach of several obligations as if it were a breach of only one…".

51. The Applicant submits that the contraventions have been appropriately grouped as outlined… and that the Respondent has already had the benefit of the course of conduct provisions of subsection 557(2) of the FW Act… Accordingly, the Applicant submits that no further discount should be available to Jay Group or Mr Singh in relation to the courses of conduct engaged in.

Size and financial circumstance of the business

52. The Applicant submits that the size of a business or an employer's financial position at the time of the contraventions, are matters that are not particularly relevant to the question of penalty (See Cotis v McPherson (2007) 169 IR 30 [16] (Cotis) and Kelly supra at [28]).

In Kelly at [28], Tracey J stated:

> *"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."*

54. Further, in Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412, the Court stated at [27]:

> *"Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevance to a Court's consideration of penalty."*

55. Neither Jay Group or Mr Singh have filed any evidence in relation to the size of Jay Group or its financial circumstances, except for brief evidence stating that the company incurred legal expenses in recouping monies from Xidis Aust (Singh Penalty Affidavit at [30]). Mr Singh has also not filed any evidence in relation to his personal financial circumstances.

56. The Applicant is not aware of the number of employees of Jay Group during the period to which these proceedings relate or subsequently and the Applicant is not in possession of material to make an assessment of the financial position of Jay Group at the time of the contraventions.

57. In the absence of further evidence from Jay Group or Mr Singh concerning their respective financial positions, the Applicant submits that no reduction in penalties should be afforded to Jay Group or Mr Singh on this basis.

Deliberateness of the breaches

58. There is no evidence to suggest that Jay Group and Mr Singh's contraventions constituted a deliberate attempt to break

the law. However, the FWO is not aware of any steps taken by Jay Group, or Mr Singh as the Operations Manager, to determine the minimum lawful entitlements the company was required to pay the Employees.

59. At the very least, Jay Group and Mr Singh would have known that an employee is entitled to be paid for work performed given the past operations of Jay Group in the cleaning industry. Mr Singh has now admitted that he knew that the terms and conditions of the Employees would have been covered by an award (Jay Group SOAF at [77(e)]) and that he knew, or ought to have known, that the amount of $15,730 invoiced by Jay Group to Xidis Aust trading as ESS (Jay Group SOAF at [21]) would not be sufficient to meet the minimum wage obligations payable to the Employees (Jay Group SOAF at [77(g)].

60. FWO submits that the breaches occurred in circumstances where Jay Group and Mr Singh were at least reckless in relation to their obligations.

Involvement of senior management

61. Mr Singh was the Operation Manager of Jay Group and exercised management and control over the business of the company insofar as it had business dealings with Xidis Aust in relation to the provision of trolley collection services (Jay Group SOAF at [8]).

62. Mr Singh has admitted that he was involved in Jay Group's contraventions within the meaning of section 550 of the FW Act (Jay Group SOAF at [81]).

Ensuring Compliance with Minimum Standards

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

> *(a) one of the stated principal objects of the FW Act has been the preservation of an effective safety net for employee entitlements and effective mechanisms (section 3 of the FW Act);*
>
> *(b) it is vital to ensure compliance with modern awards to create an even playing field and ensure all employees are appropriately remunerated for the work they perform; and*

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

64. The fundamental nature of the contraventions in the present proceedings demonstrates the respondents' disregard for their statutory obligations and the need for penalties to be imposed on a meaningful level.

General deterrence

65. It is indisputable that the most fundamental purpose of a civil penalty is to nurse compliance with the law. The setting of a penalty in respect of contravening conduct deliberately marks the seriousness with which the public regards such compliance, and naturally is designed to act as a deterrent, both by encouraging compliance in the first instance and also by imposing serious financial consequences for non-compliance.

66. The primacy of deterrence in the determination of penalty was emphasised by French CJ (as he then was) in Re Trade Practices Commission v CSR Ltd ([1990] FCA 762) in which he stated:

> *"Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt, IV. Nor, if it be necessary to say do, is there any compensatory element in the penalty fixing process – Trade Practices Commission v. Mobil Oil Australia Ltd [1984] FCA 363; (1984) 4 FCR 296 at 298 (Toohey J.). The principal, and I think probably the only, object of the penalties imposed by s.76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act (at [40]).*

67. His Honour confirmed that "the assessment of a penalty of appropriate deterrent value will have regard to a number of factors which have been canvassed in the cases" (at [42]). The factors referred to be His Honour were those relevant to the trade practices jurisdiction, but closely mirror the factors later adopted in Pangaea…

68. The role of general deterrence in determining the appropriate penalty is illustrated by the comments of Lander J in Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543, [93]:

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

69. The contraventions in the current proceedings concern the removal of key employment entitlements by way of a failure to pay employees for work performed during the Claim Period. The penalties in this case should be imposed on a meaningful level so as to deter other employers from committing similar contraventions, especially in industries and circumstances where the employees are vulnerable (Lang Penalty Affidavit at [36] to [46]) and may have less awareness of their entitlements. Directors and managers of such companies should be under no misapprehension that a decision to rely on employees' unpaid labour particularly in circumstance of vulnerable employees will not be met with significant penalties.

Specific deterrence

70. As Justice Gray in Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union ([2008] FCAFC 170; (2008) 171 FCR 357) at [37] observed:

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

71. The need for specific deterrence is significant in this case as Jay Group continues to operate a cleaning business (Lang Penalty Affidavit at [10(a)] and [10(c)]) and may continue to employ employees (although no evidence of this has been filed). The cleaning industry is known for high levels on non-compliance (See the FWO's National Cleaning Services Campaign 2010-2011 Final Report at http://www.fairwork.gov.au/ArticleDocuments/714/national-cleaning-services-campaign-final-report.pdf.aspx, Fair Work Ombudsman v Jooine (Investment) Pty Ltd & Anor [2013] FCCA 2144; Fair Work Ombudsman v Glad Group Pty Ltd [2011] FMCA 233; Fair Work Ombudsman v Cleaners New South Wales [2009] FMCA 683). As outlined at paragraph 48 above, Jay Group also has a history of non-compliance (similar previous conduct)(Lang Penalty Affidavit at [27] to [28]).

72. Where a business continues to operate, this will be an important consideration for specific deterrence, as referred to in Fair Work Ombudsman v Fortcrest Investments Pty Ltd ([2010] FMCA 18 at [96]):

> *"The respondent continues in business and it is important that a penalty be imposed at a sufficient level to deter the respondent from acting so recklessly in the future when it comes to properly acquainting itself with its obligations as an employer."*

73. There is no evidence of any systems, processes or other measures adopted by Jay Group to ensure compliance in the future. Driver FM, as he was at the time, referred to this consideration in Fair Work Ombudsman v Roselands Fruit Market & Anor ([2010] FMCA 599), where he stated (at [75]):

> *"...I am not persuaded that the respondents have put in place systems to prevent a recurrence of the breaches and accordingly, specific deterrence plays an important factor."*

74. Mr Singh is still currently employed as the Operations Manager for Jay Group (Singh Penalty Affidavit at [2]) and may therefore have some involvement in engaging employees and have some responsibility for determining their terms and conditions of employment.

75. Further… the penalty evidence filed by Mr Singh indicates no real contrition (Singh Penalty Affidavit at [30]) for the contraventions that have occurred.

Totality principle

76. Having fixed an appropriate penalty for each course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches, and is not oppressive or crushing (see Kelly at [203]; Merringtons at [23] per Gray J, [71] per Graham J, [102] per Buchanan J).

77. Neither Jay Group nor Mr Singh have filed any evidence as to their financial circumstances. To the extent that they seek to argue that a penalty would be oppressive or crushing, the Applicant draws the Court's attention to the comments of Burchardt FM (as he then was) in Fair Work Ombudsman v Promoting U Pty Ltd & Anor ([2012] FMCA 58), where his Honour states at [57]:

> *"Turning to the application of the totality principle, given the parlous financial position of the First and Second Respondents, imposition of a penalty at that level would be highly likely to be crushing in the sense described by Lander J in Caelli. Nonetheless, the Respondents cannot hope to have their conduct in effect exonerated by the Court merely because they are impecunious. Parliament has set significant penalties for the sort of contraventions that the Respondents engaged in and I do not think it is appropriate for the totality principle to operate simply to ensure that penalties are imposed in suitably insignificant amounts to meet the Respondents' capacity to pay."*

78. It is submitted that in the absence of any evidence provided by Jay Group or Mr Singh as to their respective financial positions, the Court is entitled to treat them as having capacity to pay any penalties the Court considers appropriate and that no further discount should apply by reason of the application of the totality principle.

Annexure "D"

FACTORS RELATING TO PENALTY FOR THE FOURTH RESPONDENT

79. As noted above, the Fourth Respondent, Mr Nick Iksidis, was at all relevant times the director and secretary of Xidis Aust trading as ESS. Xidis Aust was laced into external administration on 27 March 2013 and the Applicant is therefore not seeking any pecuniary penalties against the company.

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

80. Mr Iksidis has admitted (Iksidis SOAF at [47]) that he was involved in Jay Group's contraventions which resulted in the failure to provide twelve Employees their basic minimum entitlements, including the minimum rate of pay, for the entirety of the Claim Period.

81. Mr Iksidis was involved in breaching a fundamental purpose of the FW Act, which includes ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions (s.3 of the FW Act).

82. Mr Iksidis appears to have operated the trolley collection business known as "Effective Supermarket Services" since at least 25 June 2001 (Lang Penalty Affidavit at [11]) and is an experienced businessman in the trolley collection industry. With two previous legal proceedings commenced against him for the underpayment of trolley collectors (Lang Penalty Affidavit at [31]), Mr Iksidis is well aware of the vulnerable nature of employees in the trolley collection industry generally and the obligation to provide employees with their minimum entitlements.

83. Jay Group's contraventions occurred within the context of subcontracting arrangements… Mr Iksidis played a crucial role in the negotiation of both the contract with Costco and the subcontract with Jay Group. Mr Iksidis was closely involved in determining the rate payable by his company Xidis Aust to Jay Group (Iksidis SOAF at [46(e)]) and failed to ensure that the consideration paid to Jay Group under the subcontract was sufficient to meet the minimum wage obligations payable to the Employees (Iksidis SOAF at [46(f)]). Further, Xidis Aust only made full payment of the contract to Jay Group after Jay Group commenced legal proceedings against Xidis Aust (Singh Penalty Affidavit at [17] to [18]). This conduct may have presumably

caused difficulties for Jay Group in meeting its own obligations towards the Employees.

Nature and extent of the loss

84. The Applicant repeats the submissions… in relation to the effect of the underpayments of the Employees.

85. Mr Iksidis' company, Xidis Aust invoiced and received $34,633.85 from Costco in respect of the trolley collection services undertaken by the Employees during the Claim Period in or around late July/August 2011 (Iksidis SOAF at [12] and [13]). Mr Iksidis did not authorise the company to pay any monies to Jay Group until legal proceedings instituted by Jay Group were settled out of court in January 2012 (Singh Penalty Affidavit at [18]) and therefore failed to ensure that full payment was made to Jay Group within a reasonable time. Xidis Aust accordingly received the benefit of not paying Jay Group by deferring payment for approximately 6 months.

Similar previous conduct

86. Mr Iksidis is well known to the FWO from two previous proceedings commenced by the FWO's predecessor agency, the Workplace Ombudsman, in relation to the underpayment of trolley collection workers (Lang Penalty Affidavit at [30] to [31]).

87. In Inspector Dekic v Xidis Pty Ltd and Nick Iksidis (See Annexure DL-11 to the Lang Penalty Affidavit), Magistrate Hawkins of the Magistrate's Court of Victoria found that Mr Iksidis was involved in his company's contravention of failing to pay $3,523.98 in minimum wages and annual leave entitlements under the Workplace Relations Act 1996 (Cth) to three trolley collection workers employed in Victoria in 2006 to 2007. The Magistrate's Court imposed a penalty of $12,500 against Xidis Pty Ltd and $12,500 against Mr Iksidis.

88. In Inspector Lang v Xidis Pty Ltd and Nick Iksidis [2008] FMCA 1009 (See Annexure DL-12 to the Lang Penalty Affidavit), Burchardt FM (as he then was) found that Mr Iksidis was involved in the underpayment of 42 trolley collection workers employed by Xidis Pty Ltd in NSW in 2007. The underpayments in this case were more than $100,000 and a number of employees were disabled and considered vulnerable by the Court (Inspector Lang v Xidis Pty Ltd and Nick Iksidis [2008] FMCA 1009 at [23]). The Court imposed a penalty of $120,000 against the company for its conduct. While no penalty was imposed upon Mr

Iksidis this was only on the bases that the Court found it likely that Mr Iksidis would pay the company's penalty personally.

89. The Applicant submits that Mr Iksidis' strong history of non-compliance with workplace laws is given significant weight in the Court's approach to determining an appropriate penalty in this case.

Whether the breaches arose out of the one course of conduct

90. The Applicant adopts the submissions in relation to the First and Third Respondents…

Size and financial circumstance of the business

91. Mr Iksidis' legal representatives have provided correspondence to the Court dated between 28 October 2013 and 5 December 2013 alleging that Mr Iksidis has limited income, has lost his business and family home and is currently unemployed. While the Applicant acknowledges these as submissions (at their very highest), as there is no formal evidence before the court supporting these propositions or any further evidence of Mr Iksidis' current financial position, the Applicant submits that such submissions should only be given little weight.

92. Even if Mr Iksidis is experiencing financial difficulty, of which there is no evidence, the Applicant submits that the Courts have previously found that sanctions should be imposed on a meaningful level (Kelly at [28]) regardless of size or financial position. Submissions or relevant case law on this point have already been addressed…

93. Further, Mr Iksidis is currently the director of 7 corporations (Lang Penalty Affidavit at [13]). As the director he is likely to draw some income from these businesses and has produced no evidence of the financial return from these businesses. In addition, there is some indication from other employers in the trolley collection industry that Mr Iksidis is actively seeking work again in the industry (Lang Penalty Affidavit at [33] to [35]).

94. In light of the above, the Applicant submits that any sanction should be imposed at a meaningful level (Kelly at [28]) and even insolvency, personal or corporate, is not a refuge from such sanction (Cotis at [12]).

Deliberateness of the breaches

95. The Applicant submits that the breaches occurred in circumstances where Mr Iksidis was well aware of the industry minimums in which he was operating and chose not, for whatever reason, to make timely payments to Jay Group whilst receiving a financial benefit arising from the Employees' work.

96. At the very least, Mr Iksidis was reckless in his involvement in Jay Group's contraventions – he negotiated the initial contract with Costco (Iksidis SOAF at [10]), received from Costco more than double in consideration eventually paid to Jay Group and was aware of obligations to pay minimum entitlements via previous legal proceedings.

Involvement of senior management

97. A corporate entity can only act through its authorised officers and agents. Mr Iksidis was at all relevant times the sole director of Xidis Aust and the person who exercised management and control over the business of Xidis Aust insofar as it had business dealings with Costco and Jay Group (Iksidis SOAF at [7]).

Ensuring compliance with minimum standards

98. This factor has been dealt with… and the Applicant relies on its submissions therein.

General deterrence

99. Again, the principles of general deterrence are set out… above and the Applicant relies on the submissions made above.

Specific Deterrence

100. The Applicant submits that the penalty imposed on Mr Iksidis should be significant to ensure that the specific deterrence effect is high. The need for specific deterrence is particularly significant in this case given the previous court findings and poor compliance history of Mr Iksidis and the fact that he continues to act as director of 7 entities, including one entity known as Trolley Solutions Pty Ltd, the name of which indicates that it may operate in the trolley collection industry.

101. Although Mr Iksidis' legal representatives have made representations that Mr Iksidis is no longer in the trolley collecting industry and there is no prospect whatsoever of repeat offending, the Applicant has recently received information that indicates that Mr Iksidis is actively seeking to re-enter the industry (Lang Penalty Affidavit at [33]to [34]).

102. In Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543, it was stated:

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

103. The Applicant accepts that Mr Iksidis cooperated during the investigation and admitted the contraventions prior to the liability hearing, However, Mr Iksidis should be left in no doubt that failing to comply with minimum obligations will not be tolerated by the Court, particularly in circumstances where there is a history of non-compliance and a strong risk of repeat offending.

Totality

104. The Applicant repeats the submissions with respect to the totality principle made… above and on the basis that no formal evidence has been filed by Mr Iksidis as to his financial position, the Applicant submits that the submissions made by Mr Iksidis' lawyers in their correspondence to the court only be given little weight and that there is no convincing evidence that the penalty range proposed in Schedule D would have an oppressive or crushing effect.

Annexure "E"

FACTORS RELATING TO PENALTY FOR THE FIFTH RESPONDENT

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

105. The evidence indicates that Mr Sandhu assisted Jay Group with the management of the Employees performing trolley work at the Costco Site (Jay Group SOAF at [24]) and was the contact person within Jay Group for a number of the Employees (Lang Penalty Affidavit at [18]).

106. In the Orders dated 20 December 2013, the Court determined that that Mr Sandhu was involved in Jay group's contraventions which resulted in the failure to provide twelve Employees their basic minimum entitlements, including the minimum rate of pay, for the entirety of the Claim Period.

107. Mr Sandhu was involved in breaching a fundamental purpose of the FW Act, which includes ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions (s.3 of the FW Act).

Nature and extent of the loss of damage.

108. The Applicant repeats the submissions… in relation to the effect of the underpayments of the Employees.

109. More than $9,000 was purportedly transferred from Jay Group to Mr Sandhu as payment for trolley collection work (Singh Penalty Affidavit at [16] and [19]). It is not clear whether this payment was limited to the work performed at the Costco Site. What is clear however is that none of this money transferred to Mr Sandhu was ever paid to the Employees. Like Mr Iksidis and Mr Singh before him, Mr Sandhu received the benefit of the Employees' underpayment. The Employees have been, and continue to be, commensurately deprived of the financial benefited that would flow from the timely payment of their correct entitlements (Fair Work Ombudsman v Hungry Jacks Pty Ltd [2001] FMCA 233 at [47]).

Similar previous conduct

110. While the Applicant has not made any determination concerning similar previous conduct engaged in by Mr Sandhu, the Applicant is aware that one of the complaints against Jay Group referred to, appears to involve Mr Sandhu in a supervisory capacity.

Whether the breaches arose out of the one course of conduct

111. The Applicant adopts the submissions in relation to the First and Third Respondents…

Size and financial circumstances

112. As Mr Sandhu has not participated in the proceedings to date (Madden Affidavit at [9] to [21]), no evidence has been filed in relation to his personal financial circumstances.

113. The Applicant adopts the submissions above in relation to this consideration and in the absence of any evidence from Mr Sandhu concerning his financial position, the Applicant submits that no reduction in penalties should be afforded to him.

Deliberateness of the breaches

114. The Applicant submits that the breach occurred in circumstances where Mr Sandhu was at least reckless in relation to his obligation. Without further evidence surrounding the payment of monies to Mr Sandhu, the Applicant is not in a position to make further submissions on this point.

Ensuring compliance with minimum standards

115. This factor has been dealt with… above and the Applicant relies on its submissions therein.

General deterrence

116. The FWO adopts the submission relation to the principles of general deterrence…

Specific deterrence

117. There is a need for specific deterrence in this case as although Mr Sandhu no longer resides in Australia (Lang Penalty Affidavit at [21] to [24]), there is a need to demonstrate that obligations under the FW Act cannot be avoided merely be leaving the jurisdiction and a failure to comply with obligation will continue to be pursued. Given Mr Sandhu's location overseas however, the Applicant accepts that the likelihood of Mr Sandhu re-offending is remote.

Totality

118. As Mr Sandhu has not participated in the proceedings at all, there is no evidence that the penalty range proposed in Schedule E would have an oppressive or crushing effect.