FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Lifestyle SA Pty Ltd [2014] FCA 1151

Citation:	Fair Work Ombudsman v Lifestyle SA Pty Ltd [2014] FCA 1151
Parties:	**FAIR WORK OMBUDSMAN v LIFESTYLE SA PTY LTD**
File number:	SAD 166 of 2012
Judge:	**MANSFIELD J**
Date of judgment:	31 October 2014
Catchwords:	**INDUSTRIAL LAW** – pecuniary penalties – breach of awards – underpayment – breach of the maximum hours of work guarantee – breaches in relation to 46 employees over a period of nearly five years – after application of course of conduct provision, 35 contraventions, falling into 12 categories – admission of contraventions prior to hearing – underpayment rectified – significant loss and damage – breaches were not deliberate – expression of contrition and corrective action taken – general deterrence necessary to alert to the community that lack of care and ignorance of law is no excuse – application of the totality principle – pecuniary penalty imposed not to be disproportionate to contraventions
Legislation:	*Workplace Relations Act 1996* (Cth) *Fair Work Act 2009* (Cth) *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) *Retirement Villages Act 1987* (SA) *Aged Care Award 2010* *Crimes Act 1914* (Cth) *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth)
Cases cited:	*Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3)* [2011] FCA 579 applied *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 applied *McIver v Healey* [2008] FCA 425 applied *Pearce v The Queen* (1998) 194 CLR 10 applied

Johnson v The Queen (2004) 205 ALR 346 cited
Fair Work Ombudsman v Offshore Marine Services Pty Ltd [2012] FCA 498 cited
Construction, Forestry, Mining and Energy Union v Hamberger (2003) 127 FCR 309 cited
Hadgkiss v Sunland Construction (Qld) Pty Ltd [2006] FCA 1566 cited
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550 cited
Australian Ophthalmic Supplies v McAlary-Smith (2008) 165 FCR 560 applied
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Service Union of Australia v QR Limited (No 2) [2010] FCA 652 applied
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285 applied
Fair Work Ombudsman v Saya Cleaning Pty Ltd [2009] FMCA 38 cited
Fair Work Ombudsman v Happy Cabby Pty Ltd [2013] FCCA 397 cited
Salandra v Risborg Services Pty Ltd [2008] FMCA 76
Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (No 2) [2011] FCA 394
Fair Work Ombudsman v Jetstar Airways Ltd [2014] FCA 33 distinguished
BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining and Energy Union [2001] FCA 336 cited
ACE Insurance Limited v Trifunovski (No 2) [2012] FCA 793 applied
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412 cited
Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union (2008) 171 FCR 357 referred to
CPSU v Telstra Corporation Limited (2001) 108 IR 228 referred to
Australian Building & Construction Commissioner v Construction, Forestry, Mining and Energy Union [2011] FCA 810 cited
Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36 applied

Date of hearing:	26 September 2013
Place:	Adelaide
Division:	FAIR WORK DIVISION

Category:	Catchwords
Number of paragraphs:	168
Counsel for the Applicant:	G Walker
Solicitor for the Applicant:	Fair Work Ombudsman
Counsel for the Respondent:	M Abbott QC and J Warren
Solicitor for the Respondent:	Lynch Meyer

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
FAIR WORK DIVISION **SAD 166 of 2012**

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**LIFESTYLE SA PTY LTD** **Respondent**

JUDGE:	**MANSFIELD J**
DATE OF ORDER:	**31 OCTOBER 2014**
WHERE MADE:	**ADELAIDE**

THE COURT DECLARES THAT:

1. The Respondent contravened the following provisions in respect of the employees named in appendix A to these reasons, that is, in their roles as a pager monitor or estate attendant, 35 employees (Susan Andersen to Elizabeth Woodward-Cowley) (Employees) and 11 further employees (Con Argy to Jack Raschella) (Further Employees):

   (a) Subsection 182(3) of the *Workplace Relations Act 2009* (Cth) (WR Act) by failing to pay applicable minimum wages to the Employees and Further Employees employed on and from 27 March 2006 to 31 December 2009 when the WR Act was in effect (Pre-Modern Award Period);

   (b) Subsection 185(2) of the WR Act by failing to pay a casual loading to the Employees and Further Employees employed during the Pre-Modern Award Period;

   (c) Subsection 226(1) of the WR Act by breaching the maximum hours of work guarantee in respect of Catherine Oosthuizen in the period from 21 December 2007 to 1 January 2008;

   (d) Section 45 of the *Fair Work Act 2009* (Cth) (FW Act) by contravening subcll 14 and 10.4(b) of the *Aged Care Award 2010* (Aged Care Award) by failing to pay required minimum wages to the Employees and Further Employees employed on and from 1 January 2010 when the FW Act is in effect (Modern Award Period);

(e) Section 45 of the FW Act by contravening subcl 10.4(b) of the Aged Care Award by failing to pay a casual loading to the Employees and Further Employees employed during the Modern Award Period;

(f) Section 45 of the FW Act by contravening subcl 23.1 of the Aged Care Award Act by failing to pay penalty rates for Saturday and Sunday work to the Employees and Further Employees employed during the Modern Award period;

(g) Section 45 of the FW Act by contravening subcl 29.2(b) of the Aged Care Award by failing to pay penalty rates for work on public holidays to the Employees and Further Employees employed during the Modern Award Period;

(h) Section 45 of the FW Act by contravening subcll 26.1(b), (c) and (d) of the Aged Care Award by failing to pay the applicable shift allowances for the afternoon and night shifts to the Employees and Further Employees employed during the Modern Award Period;

(i) Section 45 of the FW Act by contravening subcl 25.1(b) of the Aged Care Award by failing to pay overtime rates to the Employees and Further Employees employed during the Modern Award Period; and

(j) Section 45 of the FW Act by contravening subcl 22.9 of the Aged Care Award by failing to pay the sleepover shift allowance to the Employees and Further Employees employed during the Modern Award Period.

2. The Respondent contravened the following provisions in respect of Judith Guidotto's Day Role:

(a) Subsection 182(1) of the WR Act, by failing to pay applicable minimum wages to Judith Guidotto during the Pre-Modern Award Period;

(b) Subsection 235(1) of the WR Act, by failing to pay the applicable rates for periods of annual leave to Judith Guidotto during the Pre-Modern Award Period;

(c) Subsection 247 of the WR Act, by failing to pay applicable rates for the periods of personal leave to Judith Guidotto during the Pre-Modern Award Period;

(d) Clause 7.1.6 of the Notional Agreement Preserving the State Award derived from the *Clerks' (South Australia) Award* (Clerks NAPSA) by failing to pay the applicable annual leave loading rate to Judith Guidotto for periods of annual leave during the Pre-Modern Award Period;

(e) Clause 6.7.2 of the Clerks NAPSA, by failing to pay penalty rates for work on public holidays to Judith Guidotto during the Pre-Modern Award Period;

(f) Clauses 6.5 and 6.6 of the Clerks NAPSA, by failing to pay applicable overtime rates to Judith Guidotto during the Pre-Modern Award Period;

(g) Section 45 of the FW Act by contravening cl 14 and subcl 10.3(d) of the Aged Care Award, by failing to pay applicable minimum wages to Judith Guidotto during the Modern Award Period;

(h) Subsection 44(1) of the FW Act by contravening subs 90(1) of the FW Act, by failing to pay the applicable rates for periods of annual leave to Judith Guidotto during the Modern Award Period;

(i) Subsection 44(1) of the FW Act by contravening s 99 of the FW Act, by failing to pay applicable rates for periods of personal leave to Judith Guidotto during the Modern Award Period;

(j) Section 45 of the FW Act by contravening subcl 28.3(a) of the Aged Care Award, by failing to pay the applicable annual leave loading rate to Judith Guidotto for periods of annual leave during the Modern Award Period;

(k) Section 45 of the FW Act by contravening subcl 29.2(b) of the Aged Care Award, by failing to pay penalty rates for work on public holidays to Judith Guidotto during the Modern Award Period; and

(l) Section 45 of the FW Act by contravening subcl 25.1(b) of the Aged Care Award, by failing to pay applicable overtime rates for weekend work to Judith Guidotto during the Modern Award Period.

3. Pursuant to s 719(1) of the WR Act and s 546 of the FW Act the Respondent pay pecuniary penalties for the contraventions of the civil remedy provisions set out in these declarations as follows (and as set out in more detail in the reasons for judgment):

(a) in respect of the contraventions affecting the Employees: pecuniary penalty in the sum of $96,000;

(b) in respect of the contraventions affecting the Further Employees: pecuniary penalty in the sum of $88,000; and

(c) in respect of contraventions affecting Judith Guidotto: pecuniary penalty in the sum of $12,000.

THE COURT ORDERS THAT:

4. Pursuant to s 546(3)(a) of the FW Act and Item 16 of Sch 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) that the pecuniary penalties payable by the Respondent paid into the Consolidated Revenue Fund of the Commonwealth.

5. Any amounts payable by the Respondent be paid within 60 days.

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

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

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
FAIR WORK DIVISION **SAD 166 of 2012**

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**LIFESTYLE SA PTY LTD** **Respondent**

JUDGE:	**MANSFIELD J**
DATE:	**31 OCTOBER 2014**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

INTRODUCTION

1 These proceedings involved *inter alia* allegations that employees were being underpaid whilst working at a company that manages retirement villages in South Australia. It was alleged, and ultimately admitted, that 46 employees were unpaid an aggregate sum of $2,580,883.23, including superannuation obligations, between March 2006 and February 2011.

2 By the time the matter proceeded to hearing, Lifestyle SA Pty Ltd (the Respondent) had admitted to the contraventions alleged and had compensated the employees for the underpayment.

3 There remained a significant dispute between the Fair Work Ombudsman (the Applicant) about the appropriate pecuniary penalties to be imposed for the contraventions. These reasons for judgment explain why I have reached the view that the appropriate pecuniary penalties under s 719(1) of the *Workplace Relations Act 1996* (Cth) (the WR Act) and s 546 of the *Fair Work Act 2009* (Cth) (the FW Act) are as set out in [161] below.

4 The Applicant also seeks declaratory orders in relation to the contraventions. I consider that it is appropriate to make those declaratory orders. They were not opposed. These reasons also address that aspect. The declaratory orders are as set out in [165] and [166] below.

5 There were also some proposed agreed consequential orders. They are set out in [167]-[168] below.

PROCEDURAL HISTORY

6 On 20 July 2012, the Applicant commenced these proceedings against the Respondent. The Applicant sought declarations, pecuniary penalties and other orders for contraventions of the WR Act, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the Transitional Act) and the FW Act, against the Respondent.

7 At the time the proceedings were instituted, allegations of contraventions related to 35 employees of the Respondent (the Employees). On 28 August 2012, the Respondent filed a defence denying all of the alleged contraventions. On 12 September 2012, after filing its defence and after the reply was filed by the Applicant (and following a mediation), the Respondent made open admissions in relation to the majority of the alleged contraventions. On 17 October 2012, the Respondent filed an amended defence containing those admissions.

8 On 15 February 2013, an amended statement of claim was filed, which contained allegations of contraventions relating to a further 11 employees of the Respondent (the Further Employees). The Applicant says the Further Employees approached them once the proceedings gained media attention. On 25 March 2013, a second amended defence was filed, with the Respondent admitting to the majority of the alleged contraventions relating to the Further Employees. Some issues of liability in respect of certain contraventions remained.

9 On 27 June 2013, the parties filed a Statement of Agreed Facts (SOAF). It is a comprehensive and helpful document. The parties then proceeded to file their evidence on the outstanding liability issues, as well as on the appropriate orders on the admitted contraventions. On 15 August 2013, the Applicant filed written submissions addressing the outstanding issues on liability and penalties. On 11 September 2013, the Respondent filed their written submissions and admitted the outstanding issues on liability. Consequently, on 26 September 2013, when the matter was back on hearing, the only issues in dispute were in respect of penalty.

10 As the Respondent admits to committing numerous individual contraventions of the civil remedy provisions of the WR Act and FW Act, I will only address the issues regarding the contraventions insofar as it is relevant for the determination of penalties or other orders agreed upon. I note that, at the hearing, both the Applicant and the Respondent tendered and

relied upon affidavits (or parts of affidavits) of a number of deponents. Again, I will refer to them only to the extent necessary in the course of these reasons.

FACTUAL BACKGROUND

11 The status of the Applicant is uncontested. I record that the applicant is a statutory appointed body pursuant to s 687(1) of the FW Act; a Fair Work inspector by operation of s 701 of the FW Act; and a workplace inspector by operation of s 167(1A) of the WR Act.

12 Accordingly, the Applicant has standing under s 539(2) of the FW Act to apply for orders for contraventions of civil remedy provisions under the FW Act; s 718(1) of the WR Act to apply for penalties and other remedies for breaches of applicable provisions of the WR Act; and under Item 13(1) of Schedule 18 to the Transitional Act to make an application in relation to conduct occurring before 1 July 2009 (WR Act Repeal Day) in contravention of the WR Act; and under Item 16(1) of Schedule 16 to the Transitional Act in relation to conduct which occurred on or after the WR Act Repeal Day in contravention of a continuing provision of the WR Act.

13 The Respondent was incorporated in 2000. It participates in the development and management of modern retirement villages in South Australia. It operated at material times a network of 11 retirement villages across metropolitan Adelaide and Mount Barker, South Australia. It is responsible for the marketing and sales of residential accommodation within each village and acts as the administrating authority of each village, as required under the *Retirement Villages Act 1987* (SA).

14 At the relevant times, the Respondent also provided onsite 24 hour emergency service for its residents. Those onsite services were provided by estate coordinators, estate attendants or pager monitors (together Pager Monitors) and other maintenance workers. The Respondent was responsible for the employment of these employees.

15 During the relevant period, 21 of the 35 Employees were employed part-time, with the remaining 14 Employees being employed on a casual basis. In their role as Pager Monitors, the Employees were to monitor and respond to the Respondent's emergency pager system overnight and on weekends. The Pager Monitors were required to remain on the retirement village premises for the entirety of their shifts. The Pager Monitor was responsible for answering any pagers, assessing the situation and, where required, calling an ambulance to assist the resident in question.

16 The work periods generally extended from 5 pm on Friday night to 5 pm on Sunday night, divided into four shifts as follows:

(1) 5 pm on Friday to 9 am on Saturday (16 hours);

(2) 9 am on Saturday to 5 pm on Saturday (8 hours);

(3) 5 pm on Saturday to 9 am on Sunday (16 hours); and

(4) 9 am on Sunday to 5 pm on Sunday (8 hours).

17 The Employees were paid a $50 flat fee per shift, with an additional $50 per night time emergency call-out. The Respondent only classified a situation as an emergency call-out if the Employee was required to call an ambulance. Thus, even if the pager was activated which required the Pager Monitor to respond, they were not renumerated (other than the flat $50 fee for the shift) unless a call to an ambulance was warranted. The Employees were provided with sleeping facilities for their overnight shifts, comprising a room with ensuite bathroom. They could also use the other facilities of the location.

18 Some of the Employees were also employed to perform cleaning duties. These were performed simultaneously with monitoring the pager. Those Employees performing cleaning duties were paid an hourly rate of $18.50 for 7.5 hours' work, in lieu of one of the weekend flat-fee shift payments.

19 Each of the 11 Further Employees, in addition to being employed as Pager Monitors, was also employed by the Respondent in a separate day-time employment position as an Estate Maintenance Attendant, Estate Coordinator or Sales Assistant. In these proceedings, the day-time role of Mrs Judith Guidotto was the subject of contraventions, as well as the Further Employees role as Pager Monitors.

20 Generally, the Further Employees performed the Pager Monitor role five nights a week from Sunday night to Thursday night. Except in limited circumstances, such as when they performed additional weekend shifts, the Further Employees were generally not paid for their weeknight Pager Monitor duties at all. Instead of payment, the Further Employees were provided with permanent on-site residences. They also could use the other facilities at the location. They were permitted to take time off during their day role to offset time spent as a Pager Monitor actually responding to a pager.

21 The contraventions arise largely from the Respondent's failure to recognise that what the employees in question were doing was to be paid work. Accordingly, the contraventions involve:

(1) significant underpayments of minimum wage obligations;

(2) failure to pay casual and shift loadings, penalty rates and overtime;

(3) failure to pay sleepover allowances;

(4) in respect of one employee, exceeding the maximum permitted weekly hours of work; and

(5) in respect of one part-time employee, failing to pay minimum required rates for periods of annual and personal leave.

22 Of course, it will be necessary to address the particular circumstances of each contravention, having regard to the principles applicable to the fixing of pecuniary penalties.

THE APPLICABLE LEGISLATION

23 The proceedings relate to two distinct periods of time, being:

(a) The period on and from 27 March 2006 to 31 December 2009 (the Pre-Modern Award Period), during which time the Employees and Further Employees were entitled to be paid the federal minimum wage for their work as Pager Monitors; and

(b) The period on and from 1 January 2010 until the termination of each employee's employment (the Modern Award Period), during which time the Employees and Further Employees were covered by the *Aged Care Award 2010* (Aged Care Award).

24 Despite the repeal of the WR Act with effect from 1 July 2009, during the period from 1 July 2009 to 31 December 2009, the relevant provisions of the WR Act continued to have effect pursuant to the Transitional Act. I note that accordingly, these proceedings are brought under:

(a) the WR Act, in respect of the Pre-Modern Award Period, including as it continued to have operation on or after 1 July 2009 by virtue of the transitional legislation; and

(b) the FW Act, in respect of the Modern Award Period.

THE CONTRAVENTIONS

Pre-modern Award Period

25 During the relevant time where the legislation was operative, s 719 of the WR Act authorises the Court to impose a penalty of a contravention of an applicable provision by a person bound by the provision. Relevantly, "applicable provision" was defined to include a term of the "Standard Australian Fair Pay and Conditions" or a term of a collective agreement.

26 It is accepted that the Respondent contravened the following provisions of the WR Act in respect of the Employees and Further Employees' Pager Monitor Roles:

(1) Subsection 182(3) by failing to pay applicable minimum wages to the Employees and Further Employees employed during the Pre-Modern Award period;

(2) Subsection 185(2) by failing to pay a casual loading to the Employees and Further Employees employed during the Pre-Modern Award period; and

(3) Subsection 226(1) by breaching the maximum hours of work guarantee in respect of one of the Employees, Catherine Oosthuizen, in the period from 21 December 2007 to 1 January 2008.

27 In addition, it is accepted that the Respondent contravened the following provisions of the WR Act in respect of one of the Further Employees, namely Judith Guidotto, in her day role:

(1) Subsection 182(1) by failing to pay applicable minimum wages to Judith Guidotto during the Pre-Modern Award period;

(2) Subsection 235(1) by failing to pay applicable rates for periods of annual leave to Judith Guidotto during the Pre-Modern Award period; and

(3) Subsection 247 by failing to pay applicable rates for periods of personal leave to Judith Guidotto during the Pre-Modern Award period.

28 Further, in respect of Judith Guidotto's day role, the Respondent contravened the following provisions of the Notional Agreement Preserving the State Award derived from the *Clerks' (South Australia) Award* (the Clerks NAPSA):

(1) Clause 7.1.6 by failing to pay the applicable annual leave loading rate to Judith Guidotto for periods of annual leave during the Pre-Modern Award period;

(2) Clause 6.7.2 by failing to pay applicable overtime rates to Judith Guidotto during the Pre-Modern Award period; and

(3) Clauses 6.5 and 6.6 by failing to pay applicable overtime rates to Judith Guidotto during the Pre-Modern Award period.

Modern Award Period

29 Similarly, during the time where the FW Act was operative, s 546(1) of that legislation authorises the Court to impose a penalty for contravention of a civil remedy provision. A list of civil remedy provisions is provided for in s 539(2) of the FW Act.

30 It is accepted that the Respondent contravened the following provisions (which fall under those identified in s 539(2)) of the FW Act in respect of the Employees and Further Employees' Pager Monitor Roles:

(1) Section 45 by contravening subcl 10.4(b) and 14 of the Aged Care Award by failing to pay required minimum wages to the Employees and Further Employees employed during the Modern Award period;

(2) Section 45 by contravening subcl 10.4(b) of the Aged Care Award by failing to pay casual loading to the Employees and Further Employees employed during the Modern Award period;

(3) Section 45 by contravening subcl 23.1 of the Aged Care Award by failing to pay penalty rates for Saturday and Sunday work to the Employees and Further Employees employed during the Modern Award period;

(4) Section 45 by contravening subcl 29.2(b) of the Aged Care Award by failing to pay penalty rates for work on public holidays to the Employees and Further Employees employed during the Modern Award period;

(5) Section 45 by contravening subcll 26.1(b), (c) and (d) of the Aged Care Award by failing to pay the applicable shift allowances for afternoon and night shifts to the Employees and Further Employees employed during the Modern Award period;

(6) Section 45 by contravening subcl 25.1(b) of the Aged Care Award by failing to pay overtime rates to the Employees and Further Employees employed during the Modern Award period; and

(7) Section 45 by contravening subcl 22.9 of the Aged Care Award by failing to pay the sleepover shift allowance to the Employees and Further Employees employed during the Modern Award period.

31 In addition, in respect of Judith Guidotto's day role, it is accepted that the Respondent contravened the following provisions of the FW Act:

(1) Section 45 of the FW Act by contravening cl 14 and subcl 10.3(d) of the Aged Care Award by failing to pay the applicable minimum wages to Judith Guidotto during the Modern Award period;

(2) Subsection 44(1) by contravening subs 90(1) of the FW Act, by failing to pay the applicable rates for periods of annual leave to Judith Guidotto during the Modern Award period;

(3) Subsection 44(1) by contravening s 99 of the FW Act by failing to pay the applicable rates for periods of personal leave to Judith Guidotto during the Modern Award period;

(4) Section 45 of the FW Act by contravening subcl 28.3(a) of the Aged Care Award by failing to pay the applicable annual leave loading rate to Judith Guidotto during the Modern Award period;

(5) Section 45 of the FW Act by contravening subcl 29.2(b) of the Aged Care Award by failing to pay penalty rates for work on public holidays to Judith Guidotto during the Modern Award period; and

(6) Section 45 of the FW Act by contravening subcl 25.1(b) of the Aged Care Award by failing to pay applicable overtime rates for weekend work to Judith Guidotto during the Modern Award period.

32 It will therefore be necessary to separately consider the circumstances of Judith Guidotto and to a lesser extent Catherine Oosthuizen.

33 The result is that the Applicant seeks, and the Respondent acquiesces in the making of three separate declarations of contraventions of ss 182(3), 185(2) and 226(1) of the WR Act.

34 The Applicant also seeks, and the Respondent acquiesces in the making of, seven separate declarations of contraventions of s 45 of the FW Act for the separate contraventions of the various specified clauses of the Aged Care Award, again treating the Employees and the Further Employees together.

35 There are also twelve separate declaration sought for contraventions of provisions of the WR Act and of s 45 of the FW Act in relation to Judith Guidotto and for contraventions of specified provisions of the WR Act and of the Aged Care Award (in addition to her being included as one of the Further Employees in respect of whom the general contraventions occurred). Again, the Respondent acquiesces in the making of those declarations.

36 In respect of each of the contraventions, the Applicant also seeks that the Respondent pay pecuniary penalties pursuant to s 719(1) of the WR Act and s 546 of the FW Act, and that the pecuniary penalties be paid to the Commonwealth.

37 The Applicant initially sought the payment by the Respondent to the Employees and the Further Employees of the underpaid amounts and interest, pursuant to s 712(3) of the FW Act. By the time of the hearing, the Respondent had fully reimbursed them.

38 The Respondent, of course, must be given credit for having done so. It was an enormous amount that was underpaid: $2,367,737 and when superannuation obligations are included (as noted above) it increases to $2,580,883.

39 The appendix to the SOAF sets out the names of the Employees and the Further Employees, the periods of their employment, the amount of the underpayment, and the date the underpayment was rectified. That appendix excluding the names of the Employees and the Further Employees, is appended to these reasons for judgment. It shows the periods of underpayment extended from March 2006 to 18 February 2011, and the underpayment varied between relatively small amounts (four were up to $1000) to extremely large amounts (eight were in excess of $100,000 with the largest $264,725). There were twenty-five in the bracket between $10,000 and $99,000, mainly in the lower range of that bracket, and nine in the bracket between $1000 and $9999, again mainly in the lower range of that bracket.

40 Although the Respondent has made that reimbursement voluntarily, the Applicant says that it should not be over-credited with having done so when fixing the appropriate pecuniary penalties. That is because it did not accept the fact of those underpayments until these proceedings were well progressed, despite being informed about the concerns of the Applicant (which the Respondent now accepts were valid ones) in about February 2009, some two years earlier. It did not accept until the latter part of 2012 that it should make those reimbursements to the Employees. The reimbursement to the Employees took place in fact from early March 2013.

41 The Applicant also points out that the underpayments to the Further Employees did not emerge until after media publicity was given in late 2012 to the underpayment of the Employees. The Further Employees then approached the Applicant. Despite their Pager Monitor functions being, in effect, the same as those of the Employees, the Respondent did not itself identify the Further Employees as being underpaid when confronted with the allegations concerning the Employees. The reimbursement to the Further Employees took place on 31 May 2013.

THE PRINCIPLES

42 In *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3)* [2011] FCA 579 (*Kentwood (No 3)*), which involved contraventions of provisions of the WR Act, McKerracher J accepted the submission that there ought to be a four step approach to determining an appropriate penalty at [10]:

> 1. First, each contravention of each separate obligation sourced in the Standard or the NAPSA is a separate contravention of an applicable provision for the purposes of s 719 of the WR Act. However, pursuant to s 719(2), multiple contraventions of the same applicable provision may be treated as a single contravention, if the Court considers them to be part of a single 'course of conduct'. It is necessary to identify the maximum penalty for each separate contravention.
>
> 2. Second, it is necessary then to consider an appropriate penalty to impose in respect of each contravention (whether a single contravention alone or as a part of a course of conduct), having regard to all of the circumstances of the case.
>
> 3. Next, to the extent that two or more contraventions have common elements, this may be taken into account when considering what is an appropriate penalty for each contravention. The respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to the respondents' actions.
>
> 4. Finally, having fixed an appropriate penalty for each separate contravention, group of contraventions or course of conduct, a final review of the aggregate penalty is necessary to determine whether it is an appropriate response to the conduct which led to the contraventions. Put another way, a Court may apply an overall 'instinctive synthesis': *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 (at [55] and [78]) per Graham J. in the same case, Gray J said (at [23]):
>
>> What [is] required [is] to determine an appropriate level of penalty for each contravention, as if it were a separate offence, and then look at the aggregate of those penalties in the light of the overall conduct of the [offender], to form a view as to whether that aggregate [is] out of proportion to that overall conduct.

And (at [27]):

> … Graham J and I proceed by what the High Court has called "instinctive synthesis". See *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at [37], where the majority approved what was said by Gaudron, Gummow and Hayne JJ in *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at [74]-[76].

Buchanan J described it as follows (at [102]):

> The totality principle is a guide to sentencing practice. It must be adapted to the circumstances. It is designed to avoid injustice in the overall result. It is not a principle which suggests that a penalty should necessarily be reduced from an aggregate total fixed for multiple offences. Rather, it involves a final check to ensure that a total or aggregate penalty is not, in all the circumstances, excessive.

43 I respectfully adopt that approach. It is consistent with the submissions of the parties.

44 The issue about how to address a course of conduct involving ongoing and multiple contraventions was also addressed in *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216, which involved contraventions of terms of an award. Gray J observed at 223:

> The object of s 178(2) appears to be that a party bound by an award and pursuing a course of conduct involving repeated acts or omissions, which would ordinarily be regarded as giving rise to a series of separate breaches, should not be punished separately of those breaches. If such a party has pursued a course of conduct which gives rise to breaches 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. This reasoning leads to the conclusion that each in an award is to be regarded as a "term", for the purposes of s 178 of the Act. The ascertainment of what is a term should depend not on matters of form, such as how the award maker has chosen to designate by numbers or letters the various provisions of an award, but on matters of substance, namely the different obligations which can be spelt out. For these reasons, I incline to the view that each separate obligation imposed by an award is to be regarded as a "term", for the purposes of s 178 of the Act. If the different terms impose cumulative obligations or obligations that substantially overlap, it is possible to take into account the substance of the matter by imposing no penalty, or a nominal penalty, in respect of breaches of some terms, but a substantial penalty in respect of others.

45 This view was adopted by Marshall J in *McIver v Healey* [2008] FCA 425 (*McIver*) at [16]:

> Under s 719(2) of the Act, and s 178(2) of the Act as it stood prior to 27 March 2006, where multiple breaches of an award provision arose out of a course of conduct by one person, those breaches, for the purposes of the section, constitute one breach. In *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223, Gray J held that each separate obligation found in an award should be regarded as a term for the purposes of s 178. The same would now apply to s 719.

46 Those remarks are consistent with the approach adopted by McKerracher J in *Kentwood (No 3)*.

47 Consistently with them, and with the submissions of the parties, I consider each contravention of each separate obligation found in the WR Act, Clerks NAPSA, FW Act and Aged Care Award as a separate contravention for the purposes of subs 719(4) of the WR Act and subs 539(2) of the FW Act.

48 However, I note that, for the purposes of considering the imposition of penalties, multiple contraventions of the same civil remedy provisions of the WR Act and FW Act is to be treated as a single contravention. This is outlined in s 557 of the FW Act and ss 719(2)-(3) of the WR Act (the Course of Conduct Provisions).

49 Section 557 of the FW Act relevantly provides:

> (1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:
>
> (a) the contraventions are committed by the same person; and
>
> (b) the contraventions arose out of a course of conduct by the person.
>
> (2) The civil remedy provisions are the following:
>
> (a) subsection 44(1) (which deals with contraventions of the National Employment Standards);
>
> (b) section 45 (which deals with contraventions of modern awards)
>
> …
>
> (3) subsection (1) does not apply to a contravention of a civil remedy provision that is committed by a person after a court has imposed a pecuniary penalty on the person for an earlier contravention of the provision.

50 Similarly, s 719(2)-(3) of the WR Act provides:

> (2) Subject to subsection (3), where:
>
> (a) 2 or more breaches of an applicable provision are committed by the same person; and
>
> (b) the breaches arose out of a course of conduct by the person;
>
> the breaches shall, for the purposes of this section, be taken to constitute a

single breach of the term.

(3) Subsection (2) does not apply to a breach of an applicable provision that is committed by a person after an eligible court has imposed a penalty on the person for an earlier breach of the provision.

APPLYING THE COURSE OF CONDUCT PROVISIONS

51 It is accepted that the Course of Conduct Provisions apply to the contraventions related to Judith Guidotto's day role, to the underpayment of Catherine Oosthuizen, and to the roles of the Employees and Former Employees as Pager Monitors (save for the contravention in regard to the maximum hours guarantee).

52 Consequently, the Applicant and the Respondent are agreed that the potential maximum of the pecuniary penalties is $1,155,000 but when the Course of Conduct provisions are applied that figure reduces to $396,000. That is arrived at in the following way.

53 Firstly, the four step approach explained in *Kentwood (No 3)*, when applied with the Course of Conduct Provisions, should reflect that the Respondent has contravened 21 different civil remedy provisions, on multiple occasions and in respect of multiple employees (other than the day contraventions concerning Judith Guidotto and the maximum hours contravention concerning Catherine Oosthuizen).

54 Hence, for example, although the Respondent contravened s 45 of the FW Act by contravening the overtime provisions in cl 25.1 of the Aged Care Award on more than 600 occasions, for the purposes of considering the imposition of penalties, that should be considered as a single contravention. The rationale of the provision is to ensure that an entity is not excessively penalised for a contravention that resulted from the same course of conduct.

55 Applying that approach, the Applicant maintained and the Respondent accepted that there are 11 contraventions in relation to the Employees, and 11 contraventions in relation to the Further Employees, even though the same provisions of the FW Act and WR Act were contravened in respect of those two groups. As that is not contentious in this matter, I will proceed on that basis. That means the Course of Conduct Provisions apply separately, rather than collectively, to the Employees and to the Further Employees. Each group of employees was engaged and performed their duties in distinctly different circumstances and under

different remuneration schemes. The Employees were engaged to perform weekend pager monitor work and were remunerated $50 per eight hour shift. An additional call-out fee was paid on certain circumstances and the Employees were provided accommodation for nights they were on duty. In comparison, the Further Employees were engaged as Pager Monitors as well as their routine employment in day roles. They generally worked five nights per week without payment and in lieu of a call-out fee, they were instead allowed time off during their day roles. Throughout the course of their employment, the Further Employees generally performed their pager monitor duties at night whilst performing their day roles in between. In essence, the Further Employees occupied two separate employment positions such that they worked continuously for up to five days straight. They were provided with on-site residence at one of the Respondent's villages. On that basis, it is common ground that the contraventions relating to the Employees and those relating to the Further Employees are outside the ambit of the Course of Conduct Provisions and should be treated separately. Although the contraventions fell within the same provisions, they were underpinned by two separate courses of conduct. They are:

(1) the Respondent's decision to use employees who were part of their daytime staff, who lived onsite, to perform Pager Monitor duties overnight during weekdays without additional remuneration; and

(2) the Respondent's decision to pay $50 per shift to weekend relief staff, who occasionally performed cleaning duties during their shift.

56 The Course of Conduct provisions mean that, although the Respondent's failure to pay Judith Guidotto the required minimum rate for periods of annual leave for her day role, pursuant to cl 7.1 of the Clerks NAPSA, resulted in more than 40 contraventions, it will be treated as a single contravention. This results in a total of 12 contraventions in relation to Judith Guidotto's day role.

57 In the case of Catherine Oosthuizen's circumstances, there is a single contravention for the purposes of determining the imposition of penalties.

58 Consequently, I accept that the Course of Conduct provisions mean that the Respondent has committed 35 separate conventions. As I have noted, the Respondent did not contend for any other outcome.

THE POTENTIAL MAXIMUM PENALTIES

59 The next step in the reasoning is to note, in relation to the 35 separate contraventions, that each contravention attracts a maximum penalty of 60 units in the case of an individual: see s 539(2) of the FW Act. As the Respondent is a body corporate, the maximum penalty is five times that number: see s 546(2)(b) of the FW Act. Thus, the maximum number of penalty units applicable to the Respondent for each of the 35 contraventions is 10,500 units.

60 At the relevant time, the s 4AA of the *Crimes Act 1914* (Cth) defined each "penalty unit" to be $110. Hence, the potential maximum penalty is $1,155,000 for 35 contraventions but for the Course of Conduct provisions, particularised as follows:

(1) Contravention of s 182(3) of the WR Act by failing to pay applicable minimum wages to the Employees employed during the Pre-Modern Award period: 300 penalty units which is equivalent to $33,000;

(2) Contravention of s 45 of the FW Act by contravening cl 14 of the Aged Care Award by failing to pay required minimum wages to the Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(3) Contravention of s 185(2) of the WR Act by failing to pay a casual loading to the Employees employed during the Pre-Modern Award period: 300 penalty units which is equivalent to $33,000;

(4) Contravention of s 45 of the FW Act by contravening subcl 10.4(b) of the Aged Care Award by failing to pay a casual loading to the Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(5) Contravention of s 45 of the FW Act by contravening cl 23.1 of the Aged Care Award by failing to pay Saturday and Sunday penalty rates to the Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(6) Contravention of s 45 of the FW Act by contravening cl 29.2 of the Aged Care Award by failing to pay public holiday penalty rates to the Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(7) Contravention of s 45 of the FW Act by contravening cl 26.1(b) of the Aged Care Award by failing to pay allowances for the afternoon shift to the Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(8) Contravention of s 45 of the FW Act by contravening cl 26.1(c) of the Aged Care Award by failing to pay allowances for the evening shift to the Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(9) Contravention of s 45 of the FW Act by contravening cl 26.1(d) of the Aged Care Award by failing to pay allowances for early morning shift to the Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(10) Contravention of s 45 of the FW Act by contravening cl 25.1(b) of the Aged Care Award by failing to pay overtime rates to the Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(11) Contravention of s 45 of the FW Act by contravening cl 22.9 of the Aged Care Award by failing to pay sleepover allowances to the Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(12) Contravention of s 226(1) of the WR Act in relation to Catherine Oosthuizen by breaching the maximum hours of work guarantee during the Pre-Modern Award period: 300 penalty units which is equivalent to $33,000;

(13) Contravention of s 182(3) of the WR Act by failing to pay applicable minimum wages to the Further Employees employed during the Pre-Modern Award period: 300 penalty units which is equivalent to $33,000;

(14) Contravention of s 45 of the FW Act by contravening cl 14 of the Aged Care Award by failing to pay required minimum wages to the Further Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(15) Contravention of s 185(2) of the WR Act by failing to pay a casual loading to the Further Employees employed during the Pre-Modern Award period;

(16) Contravention of s 45 of the FW Act by contravening subcl 10.4(b) of the Aged Care Award by failing to pay a casual loading to the Further Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(17) Contravention of s 45 of the FW Act by contravening cl 23.1 of the Aged Care Award by failing to pay Saturday and Sunday penalty rates to the Further Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(18) Contravention of s 45 of the FW Act by contravening cl 29.2 of the Aged Care Award by failing to pay Public Holiday penalty rates to the Further Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(19) Contravention of s 45 of the FW Act by contravening cl 26.1(b) of the Aged Care Award by failing to pay allowances for the afternoon shift to the Further Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(20) Contravention of s 45 of the FW Act by contravening cl 26.1(c) of the Aged Care Award by failing to pay allowances for the evening shift to the Further Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(21) Contravention of s 45 of the FW Act by contravening cl 26.1(d) of the Aged Care Award by failing to pay allowances for early morning shift to the Further Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(22) Contravention of s 45 of the FW Act by contravening cl 25.1(b) of the Aged Care Award by failing to pay overtime rates to the Further Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(23) Contravention of s 45 of the FW Act by contravening cl 22.9 of the Aged Care Award by failing to pay sleepover allowances to the Further Employees employed during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(24) Contravention of s 182(1) of the WR Act by failing to pay Judith Guidotto her basic periodic rate of pay regarding her day role during the Pre-Modern Award period: 300 penalty units which is equivalent to $33,000;

(25) Contravention of s 45 of the FW Act for contravening cl 14 of the Aged Care Award by failing to pay Judith Guidotto the minimum hourly rate of pay regarding her day role during the Modern Award period: 300 penalty units which is equivalent to $33,000;

(26) Contravention of s 235(1) of the FW Act by failing to pay applicable rates for periods of annual leave to Judith Guidotto during the Pre-Modern Award period: 300 penalty units which is equivalent to $33,000;

(27) Contravention of s 44 by contravening s 90(1) of the FW Act by failing to pay applicable rates for periods of annual leave to Judith Guidotto during the Modern Award period: 300 penalty points which is equivalent to $33,000;

(28) Contravention of cl 7.1.6 of the Clerks NAPSA by failing to pay the applicable annual leave loading rate to Mrs Guidotto for periods of annual leave during the Pre-Modern Award period;

(29) Contravening s 45 of the FW Act by contravening subcl 28.3(a) of the Aged Care Award by failing to pay the applicable annual leave loading rate to Judith Guidotto during the Modern Award period: 300 penalty points which is equivalent to $33,000;

(30) Contravening s 247 of the FW Act by failing to pay applicable rates for periods of personal leave to Judith Guidotto during the Pre-Modern Award period: 300 penalty points which is equivalent to $33,000;

(31) Contravening s 44 by contravening s 99 of the FW Act by failing to pay applicable rates for periods of personal leave to Judith Guidotto during the Modern Award period: : 300 penalty points which is equivalent to $33,000;

(32) Contravening cl 6.7.2 of the Clerks NAPSA by failing to pay Judith Guidotto the applicable rate for work on public holidays regarding her day role during the Pre-Modern Award period: 300 penalty points which is equivalent to $33,000;

(33) Contravening s 45 of the FW Act for contravention of cl 29.2(b) of the Aged Care Award by failing to pay Judith Guidotto the applicable rate for work on public holidays regarding her day role during the Modern Award period: 300 penalty points which is equivalent to $33,000;

(34) Contravening cl 6.5 and 6.6 of the Clerks NAPSA by failing to pay Judith Guidotto the applicable rates for work on Saturdays and Sundays for her day role during the Pre-Modern Award period: 300 penalty points which is equivalent to $33,000; and

(35) Contravening s 45 of the FW Act for contravention of cl 25.1(b) of the Aged Care Award by failing to pay Judith Guidotto the applicable rates for work on Sundays for her day role during the Modern Award period: 300 penalty points which is equivalent to $33,000.

THE GROUPING PRINCIPLE

61 Even in circumstances where the Course of Conduct provisions do not expressly apply, to the extent that the contraventions have common elements, this should be taken into

account when considering what an appropriate penalty for each contravention is: *Kentwood (No 3)* per McKerracher J. This is more commonly known as the "Grouping Principle", which has the same rationale as the Course of Conduct provisions, that the contravener is not penalised more than once for the same conduct and to accommodate some degree of overlap. This is consistent with the High Court in *Pearce v The Queen* (1998) 194 CLR 10 where McHugh, Hayne and Callinan said at 40:

> To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.

62 This was subsequently reaffirmed by the High Court in *Johnson v The Queen* (2004) 205 ALR 346 at [27]-[34].

63 Although the Course of Conduct provisions apply where the WR Act (which applied to the Pre-Modern Award period) and the FW Act (which applied in the Modern Award Period) have mirror provisions, the Grouping Principle applies to those contraventions that relate to the same conduct, regardless of the legislative regime that was operative at the time. Thus, contraventions arising out of materially the same conduct ought to be grouped, such as the failure to pay penalty rates during each period.

64 It is also appropriate to group contraventions based on the type of employee entitlement they relate to.

65 However, I do not group contraventions based on working conditions where there are contraventions affecting both the Employees and the Further Employees. For the reasons already given, they do not arise from the same conduct.

66 That position, and the grouping of contraventions now referred to reflects the submissions of the Applicant with which the Respondent agreed.

67 Accordingly, after applying the Grouping Principle, in my view there are nine contraventions:

(A) Employees:

(1) a group in respect of minimum hourly rates;

(2) a group in respect of casual loading;

(3) a group in respect of penalty rates;

(B) Further Employees:

(4) a group in respect of minimum hourly rates;

(5) a group in respect of the casual loading;

(6) a group in respect of penalty rates;

(C) Judith Guidotto's day role:

(7) a group in respect of minimum hourly rates;

(8) a group in respect of paid leave entitlements; and

(9) a group in respect of penalty rates.

68 The following contraventions do not fall into any grouping because they do not result from the same conduct that resulted in the contraventions referred to above.

(D) Employees:

(10) the sleepover contravention pursuant to cl 22.9 of the Aged Care Award;

(11) the maximum hours of work contravention pursuant to s 226(1) of the WR Act; and

(E) Further Employees:

(12) the sleepover contravention pursuant to cl 22.9 of the Aged Care Award.

69 In totality, I consider there to be twelve contraventions for the purposes of determining the imposition of penalties.

70 The maximum number of penalty units for 12 contraventions is 3600, attracting a maximum penalty of $396,000. That can be particularised as follows, using the grouping of contraventions in [60] above:

(1) Minimum hourly rate of pay grouping relating to the Employees – grouping of contraventions (1)-(2): 300 penalty units which is equivalent to $33,000;

(2) Casual loading grouping relating to the Employees – grouping of contraventions (3)-(4): 300 penalty units which is equivalent to $33,000;

(3) Penalty rates grouping relating to the Employees – grouping of contraventions (5)-(10): 300 penalty units which is equivalent to $33,000;

(4) Sleepover contravention relating to the Employees – contravention (11): 300 penalty units which is equivalent to $33,000;

(5) Maximum hours of work contravention relating to the Employees including Catherine Oosthuizen – contravention (12): 300 penalty units which is equivalent to $33,000;

(6) Minimum hourly rate of pay grouping relating to the Further Employees – grouping of contraventions (13)-(14): 300 penalty units which is equivalent to $33,000;

(7) Casual loading grouping relating to the Further Employees – grouping of contraventions (15)-(16): 300 penalty units which is equivalent to $33,000;

(8) Penalty rates grouping relating to the Further Employees – grouping of contraventions (17)-(22): 300 penalty units which is equivalent to $33,000;

(9) Sleepover contravention relating to the Further Employees – contravention (23): 300 penalty units which is equivalent to $33,000;

(10) Minimum hourly rate of pay grouping relating to Judith Guidotto's day role – grouping of contraventions (24)-(25): 300 penalty units which is equivalent to $33,000;

(11) Leave grouping related to Judith Guidotto's day role – grouping of contraventions (26)-(31): 300 penalty units which is equivalent to $33,000; and

(12) Penalty rates grouping related to Judith Guidotto's day role – grouping of contraventions (32)-(35): 300 penalty units which is equivalent to $33,000.

71 In effect, the five contraventions regarding the Employees attracts a maximum penalty of $165,000, the four contravention relating to the Further Employees attracts a maximum penalty of $132,000, and the three contraventions concerning Judith Guidotto's day role attracts a maximum penalty of $99,000.

THE APPROPRIATE PENALTY FOR EACH CONTRAVENTION

72 The considerations potentially relevant to the fixing of the appropriate penalties are well established. Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14] (*Kelly*) referred to them as follows:

(1) the nature and extent of the conduct which led to the breaches;

(2) the circumstances in which that conduct took place;

(3) the nature and extent of any loss or damage sustained as a result of the breaches;

(4) whether there had been similar previous conduct by the respondent;

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

(6) the size of the business enterprise involved;

(7) whether or not the breaches were deliberate;

(8) whether senior management was involved in the breaches;

(9) whether the party committed the breach had exhibited contrition;

(10) whether the party committing the breach had taken corrective action;

(11) whether the party committing the breach had co-operated with the enforcement authorities;

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

(13) the need for specific and general deterrence.

73 The same factors were adopted by McKerracher J in *Kentwood (No 3)* at [20], and Gilmour J in *Fair Work Ombudsman v Offshore Marine Services Pty Ltd* [2012] FCA 498 (*Offshore Marine Services*) at [11]. Similar lists appear in other authorities: see *Construction, Forestry, Mining and Energy Union v Hamberger* (2003) 127 FCR 309 at [51]; *Hadgkiss v Sunland Construction (Qld) Pty Ltd* [2006] FCA 1566 at [11].

74 That provides a convenient checklist, but it does not restrict matters that may be taken into account in the exercise of judicial discretion: *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11]; *Australian Ophthalmic Supplies v McAlary-Smith* (2008) 165 FCR 560 (*Australian Ophthalmic Supplies*) at [91]; *Offshore Marine Services* at [12]. Nor does it require specific attention to matters which are not relevant or not focused on in submissions. In the exercise of judicial discretion, the Court should not be distracted from paying

"appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain the public confidence in the statutory regime which imposes the obligations": *Australian Ophthalmic Supplies* at [91]; *Offshore Marine Services* at [12]; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Service Union of Australia v QR Limited (No 2)* [2010] FCA 652 at [34]-[35].

75 Further, whilst the factors outlined in those cases are helpful guidelines, it is not appropriate to use the quantum of the penalty ultimately imposed in previous judicial authorities as a yardstick. As Burchett and Kiefel JJ observed in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 295:

> The facts of the instance case should not be compared with a particular reported case in order to derive therefrom the amount of the penalty to be fixed. Cases are authorities for matters of principle; but the penalty found to be appropriate, as a matter of fact, in the circumstances of one case cannot dictate the appropriate penalty in the different circumstances of another case.

76 The Applicant submits the total penalties ought to be between $272,910 to $309,375, which is about 69% to 78% of the maximum penalty of $396,000. The Respondent submits the penalty ought to be $150,000, about 38% of $396,000. Their respective submissions focused on several particular topics which are addressed below.

CONSIDERATION

Nature and extent of the conduct which led to the breaches

77 In essence, the conduct of the Respondent set out above, resulted in underpayment and breach of the maximum hours guarantee under the WR Act and FW Act. The broad ranging nature of the applicable provisions which form the subject of the contraventions is significant. The period in which the contraventions took place, spread over a period of nearly five years, is also significant. The number of employees disadvantaged, some by very large amounts, and the periods over which they were deprived of their entitlement, and the total of the underpayments, are all significant.

78 It is also clear the Respondent may have enjoyed a significant competitive advantage as a result of the contraventions. The magnitude of that advantage is reflected by the size of the underpayments: $2,580,883.23. The breaches may have allowed the Respondent to differentiate itself from its competitors by being in a position to offer lower fees and provide superior services by having a staff member present 24 hours a day. Such factors were

described by Stephen Norris, who was a contracted consultant for the Joint Venture which owns the Respondent, as "an important aspect of retirement village living for residents." On the other hand, the Respondent has pointed out that the residents of its villages pay a recurrent maintenance fee set to reimburse the Respondent's operating costs, including the employment costs of its staff. The payment of the appropriate wages would have led to increased maintenance fees, and so a loss of a competitive advantage (or of the advantage of the 24 hour on-site emergency service). In fact, the residents of the villages operated by the Respondent did elect to abandon the on-site emergency support when given the choice of maintaining it and paying the higher levy or maintenance fees which would have then been required.

Circumstances in which that conduct took place

79 Whether the employees were vulnerable is a factor. The contravention affected 46 employees, many of whom were aged in their 50s or well over at the time of the contraventions. It is quite clear that the underpayments were significant, not simply as an aggregate sum but to the individual employees as well, many of whom were also receiving Centrelink benefits.

80 In *Fair Work Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38 (*Saya Cleaning*), Simpson FM observed at [20]:

> The vulnerability of these employees and the way they were exploited by the respondents is a significant factor when assessing the quantum of penalty: *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140 at [57]-[58]; *Jones v Hanssen Pty Ltd* [2008] FMC 281 at [8].

81 That case concerned exploitation of employees who were newly arrived from another country and had limited experience regarding their employment in Australia and their legal entitlements.

82 In *Kentwood (No 3),* which also involved migrant workers from overseas, McKerracher J recognised at [26]:

> The respondents' conduct concerned employees who were particularly vulnerable. Kentwood and Mr Zhang were aware of their vulnerability. As Subclass 457 visa migrant workers, the employees were highly reliant on Kentwood (and hence Mr Zhang) while in Australia.

83 The Applicant advanced the submission that the employees were vulnerable in this instance by virtue of being older workers. In *Fair Work Ombudsman v Happy Cabby Pty Ltd* [2013] FCCA 397 (*Happy Cabby*), the underpaid employees subject to the contraventions were found to be vulnerable due to their more mature age and because it would be more difficult to find alternative work, especially in a regional area in which the workers were engaged. In *Salandra v Risborg Services Pty Ltd* [2008] FMCA 76, it was recognised that the elderly, along with people with health problems, juveniles, people with intellectual and physical disabilities, could be described as be part of the more vulnerable members of the community.

84 I do not place any real weight on the age range of the underpaid employees, as making them more vulnerable to exploitation. There is no particular evidence to justify doing so. However, it is a possible indication of vulnerability that the workers were willing to accept work conditions in circumstances where they were substantially underpaid.

85 The combination of age and the low-paid positions may have made some of the employees more vulnerable to exploitation. This may be particularly so for the Further Employees, who were provided on-site accommodation by the Respondent. Such circumstances, where employees depended on their employee for accommodation and access to the village facilities may have placed them in a more vulnerable position, where they were less inclined to complain about being denied their entitlements.

86 The Respondent maintained the submission that the employees knowingly agreed to perform the duties they were engaged to do under the conditions that were offered. The Respondent further advanced the submission that if it had known the true legal position regarding the work entitlements, the employees would not have received much, and certainly not all, of the amount underpaid as it would have altered its business operations as it has now done. While that may be true, in my view, that does not detract from the fact that there may have been nevertheless some vulnerable employees who were more likely to endure the conditions that were imposed upon them due to fear of not being able to find alternative employment.

87 However, in the overall picture, that is really somewhat speculative. I do not think it is significant enough in this matter to affect the amount of the appropriate pecuniary penalties in any meaningful way.

Nature and extent of any loss or damage sustained as a result of the breaches

88 In *McIver*, Marshall J observed at [34]:

> The widespread nature of the breaches and their long duration would ordinarily call for a high penalty.

89 As stated previously in these reasons, the contraventions were extensive, occurred over a period of nearly five years and resulted in underpayment of a total of $2,580,883.23 to 46 employees. The underpayments were not only significant on aggregate. The magnitude of the underpayments no doubt had severe effects on the employees' financial position, and may have resulted in indirect adverse effects on their lifestyle decisions, and in some instances quite significantly so. However, there is not direct evidence of the affect of the underpayment on any particular employee or employees, and it is likely that – had the Respondent realised that they were not being paid appropriately, the Pager Monitor roles would have come to an end (as in fact occurred). In the case of Judith Guidotto and to a lesser extent Catherine Oosthuizen, they were simply deprived of their proper entitlements for a lengthy period.

90 It is also relevant that the underpayments only ceased from February 2011, which was two years after the Applicant first raised the issue of underpayments with the Respondent. I note the Respondent admitted to some of the contraventions in October 2012, and started to send cheques rectifying the underpayments from March 2013. The superannuation issues were not resolved until May 2013. The delay no doubt imposed some burden on the employees when their real entitlements were known but not received. In some instances their Centrelink payments were retrospectively adjusted, causing some to incur a Centrelink debt, and also some incurred additional taxation obligations to the Australian Taxation Office.

91 However, as the Respondent has pointed out, it is not hard to understand some delays in rectifying the underpayments. First, details of the employees, many of whom were no longer employed by the Respondent, had to be obtained. Second, although the Respondent admitted to being partly responsible for the delay, it said that the Australian Taxation Office and Centrelink understandably took some time to clarify the Respondent's responsibilities to them as part of the reimbursement process.

92 Third, it is said that the Respondent did not have the cash reserves to rectify the underpayments, and needed time to raise the money to do so. This was asserted in the

Respondent's Outline of Submissions, and is supported by the Respondent's initial proposal in January 2013 where it proposed to pay 50% of the underpayments and the balance to be paid monthly over the course of 12 months. However, in the absence of detailed financial records verifying that proposition, I place little weight on it.

93 Although the Applicant did not seek interest on those underpayments in this matter, it is nevertheless a relevant consideration that on the one hand the Respondent has had the benefit of the underpaid monies until they were repaid, however that is identified, and on the other the employees were not paid monies when they were entitled to them. For example, Judith Guidotto was underpaid $259,241.91 (plus superannuation) over a period of over four years. She was underpaid from when she commenced employment with the Respondent in August 2006 until February 2011. There is no doubt that her lifestyle and financial position were adversely affected as a result. Even now, when that underpayment had been rectified, she did not receive interest on that amount, some of which was due from August 2006. This same applies to the other 45 employees who were underpaid.

94 I have taken those considerations into account, but in the light of the matters referred to, they have not materially affected my views as to the appropriate pecuniary penalties. There are other much more weighty factors in each side of the scales.

Similar previous conduct

95 In *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (No 2)* [2011] FCA 394, which involved the issue of pecuniary penalty due to contravention of freedom of association in the FW Act, Barker J observed at [21]:

> [W]hile the respondent has not acknowledged its contravention at any relevant point, this is the first occasion of a contravention by the respondent of the FW Act freedom of association provisions. I therefore consider that a pecuniary penalty that is significant, but not as significant as it could be in other cases, should be imposed.

96 In *Kentwood (No 3)* at [43], McKerracher J also recognised that being a first offender is a relevant consideration when fixing a penalty: see also *Offshore Marine Services* at [22].

97 In this matter, there is no evidence that the Respondent had a history of non-compliance with laws covering industrial and employment issues, whether relating to pay and conditions of employment or work health and safety. Accordingly, it is a significant factor which favours the Respondent when determining the appropriate penalties.

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

98 I addressed these issues above. For the purposes of the imposition of pecuniary penalties, there are 12 separate contraventions or groups of contraventions, arising from distinct and different courses of conduct.

The size of the business

99 In this case, there is limited evidence as to the size of the Respondent's business, and its financial position. The Respondent operates 11 villages across South Australia, the largest of which has 346 units. It also employs at least an estate coordinator, estate maintenance attendant and a number of cleaners at each village. It is clearly not a small enterprise. It has not provided detailed evidence as to its assets and liabilities or as to its trading or profit and loss statements. There is no reason to think it would be materially impaired in its operations by significant pecuniary penalties.

100 The Respondent's corporate governance seems to comprise people with extensive experience as company directors. Particularly, Stephen Norris deposed to have extensive business experience, including in the retirement village industry, going back to 1980. Stephen Norris stated that the Respondent earns a "marginal" trading profit and that it would have to meet any penalty imposed on it by "further borrowings". That is very vague and imprecise. No financial documents have been produced to show in detail the Respondent's financial position, assets, earnings or expenditure. There is no evidence that the imposition of a meaningful penalty would result in or threaten insolvency or that, if necessary, funding pecuniary penalties by borrowing would impede its routine operations.

101 In *Kelly*, Tracey J observed at [28]:

> 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.

102 Of course, the penalty imposed ought to be proportionate to the contraventions committed. It is relevant, when determining the quantum of the pecuniary penalties, to ensure that they are not oppressive. I address later in these reasons whether the aggregate penalty is an appropriate response to the unlawful conduct. At present, I observe that there is nothing which satisfies me that the penalties I might impose would be oppressive.

Deliberateness of the breaches

103 It is the Respondent's main submission that it always intended to comply with the law, and thought it conducted its business in a lawful manner by relying on the advice received from Business SA as to its employees' legal entitlements. It says it relied on the advice of Business SA in setting the terms and conditions for the employment of the employees, including as to wages. The Respondent acted in the belief that it was complying with general industry standards and market rates. Essentially, the Respondent says it acted in the belief that the employees, when performing their pager monitoring duties, were not performing "work" except when they had to respond to an emergency callout.

104 The Respondent specifically says it accepts responsibility for the underpayments, and does not hide behind the advice of Business SA. Nevertheless the role of Business SA featured significantly in its submissions.

105 It is convenient to set out the business dealings between the Respondent and Business SA.

106 The Business SA file contains correspondence between officers of the Respondent and Business SA and draft employment contracts. It does not contain specific written advice or a record of oral advice on matters which directly concerned the conduct constituting the contraventions in these proceedings. In particular, it did not directly contain advice about whether the Pager Monitors were "at work" at all times during their shifts, or about the appropriate rates of pay applicable to the work as Pager Monitors.

107 According to the Business SA file, from November 2003, the Respondent paid an annual fee to retain Business SA for advice in relation to the employment terms and conditions of its staff. This led to the preparation of letters of appointment, contracts of employment and general industrial advice about working conditions. Some documents prepared by Business SA were subsequently used by Respondent as templates for future contracts of employment.

108 The material shows that Business SA was aware of the nature of the pager monitoring function to be performed by the staff. The employment contracts contained pager monitor duties recording the nature of those duties.

109 There is, as noted, no record of advice as to whether being on-call was considered "work"; nor was there any evidence to suggest that the Respondent enquired whether it was "work". The Respondent did not produce any such written advice from Business SA.

110 In July 2005, Lisa Norris, on behalf of the Respondent, provided Business SA with three existing contracts and requested that they be reviewed to ensure they were "water tight". It appears from the file note that Business SA understood Lisa Norris to mean that the documents should clearly specify the employee's "obligations", "job" and "salary". The notes of the discussion between the Respondent and Business SA set out details of the existing arrangements and what the Respondent's intentions were regarding remuneration and the duties of each position. It was not evident from the file that Business SA was specifically asked to advise on whether the Pager Monitors' remuneration complied with the applicable law, although the discussion can be said to have indicated the payments to be made (or not to be made).

111 The affidavits relied on by the Respondent do not really take the matter further. Stephen Norris from about November 2003 and up to about August 2006 dealt with an officer or officers of Business SA for advice about the terms and conditions of employment of its employees at its villages. In those discussions, I accept that the weeknight and weekend roles of Pager Monitors were discussed. Stephen Norris does not refer to any written advice given during that period, or later, about the applicable wages for such duties. He does not say that specific oral advice was given that the basis of payment adopted by the Respondent was approved by Business SA.

112 I do not accept that, as the Respondent urged, Business SA advised the Respondent that Pager Monitors should receive an allowance of $50 for performing that function and $50 for "responding to each emergency callout". I do not accept that its advice was that Pager Monitors were merely on call and did not need to be paid, or should merely be given time off in lieu from their day jobs for responding to an emergency call.

113 However, on the other hand, I do accept that the Respondent did not deliberately and unscrupulously underpay or not pay its Pager Monitors. The probable situation is that, as a result of discussions with Business SA, Stephen Norris believed that the Pager Monitor arrangements he put in place from at least 2007 were proper, even though the advice he had received from Business SA did not specifically advert to that question. As noted earlier, the Respondent could and did pass on its direct costs in relation to each village to the residents.

As noted, when in 2010 or 2011 it became clear to the Respondent that it had not paid the Employees and the Former Employees properly, it held a meeting of residents at each village and the residents decided only to fund a 24 hour remote emergency service, not directly supported by a non-site resident staff member.

114 In proceeding under that misapprehension, it is also in my view significant that the Respondent did not seek further specific advice from Business SA in the light of the substantial amendments to the WR Act by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices), which was introduced in March 2006, and subsequently the amendments effected by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) and ultimately, the FW Act itself. Those changes which may have had significant ramifications on workplace relations and employee entitlements did not prompt the Respondent to take steps to obtain updated advice from Business SA or any other person to confirm that its employment arrangements, and specifically the terms on which it engaged its Pager Monitors, were compliant with legislation.

115 I note also that the Respondent also received notice from the Applicant raising the legality of those workplace arrangements, as recorded in a file note of February 2009 noting a conversation with an officer of the Respondent in which it is noted that the officer would have to think about the Pager Monitor payment basis as it would appear to him that there may be an hourly rate applicable for the time spent at work "but I would get back to him on this".

116 By letter dated 12 May 2009, the Applicant wrote to the Respondent for the first time and expressed a concluded view that the employees were working whilst performing the pager monitoring function.

117 Throughout the Applicant's investigation, the Respondent's representatives referred on a number of occasions to the duties of a Pager Monitor being limited to responding to emergency pages. For this reason, it was asserted, there was no requirement to pay for other time at work. The secretary of the Respondent at the time, Bill Graham, indicated in a meeting in 2011 that he considered the role to be "social". The Respondent emphasised that Pager Monitors were allowed to watch television, sleep or use village facilities, apparently as justification for not paying all time spent on-site.

118 As I have indicated, I do not proceed on the basis that the Respondent deliberately committed the contraventions. There is also clear evidence that the Respondent from about mid-2009 consistently sought legal advice from time to time after it engaged solicitors for such advice.

119 However, in my view, for the reasons given, I am not persuaded that it received specific advice from Business SA that its Pager Monitor employee arrangements were legal and compliant with the respective workplace regimes. In my view, the Respondent did not carefully pursue the issue about its precise obligations to Pager Monitors at least before 30 June 2009, but it did not set out to pay its Pager Monitors less than its understanding of their entitlements.

120 In those circumstances, this is not a case of deliberate contravention of the relevant legislation. The way the Respondent dealt with Business SA is also relevant to the element of deterrence as discussed below.

Co-operation with the enforcement authorities

121 It is common ground that the Respondent cooperated to a certain extent during the Applicant's investigation, including by providing information about the Pager Monitor arrangements and producing copies of relevant employment records and other relevant documents in response to Notices to Produce which the Applicant had issued.

122 Further, the Respondent participated in mediation, which led to it making substantial admissions and limiting the matters in dispute. Counsel for the Applicant submitted the Respondent's initial unwillingness to admit wrongdoing bore on its level of cooperation. Willingness to cooperate with the investigation process is to be differentiated from reserving its legal position. I accept that its legal advice, at least for a time, was that it had an arguable case that it had not underpaid its Pager Monitors. The initial denial of the alleged contraventions does not equate to a lack of cooperation. However, causing the proceedings and investigation to be unnecessarily protracted and delayed is relevant in assessing the degree of cooperation.

123 The Applicant contends that the Respondent was begrudgingly or belatedly cooperative. On 9 February 2011, the Applicant issued a Notice to Produce seeking records for all persons employed as estate attendants, pager monitors, estate sleepover/cleaners or estate attendant/cleaners, over a defined period of five years. In response, the Respondent

provided records relating to the Employees. Another Notice to Produce was issued on 9 May 2011, using the same descriptor of roles, over a three and a half year period. On 24 May 2011, the Respondent provided a further bundle of documents in response. At this stage, the documents provided by the Respondent did not contain material related to the Further Employees.

124 In July 2011 during a meeting between the Respondent (through their legal representatives) and the Applicant, the Respondent to its credit informed the Applicant about the possible application of the Modern Award. On 20 February 2012, the Applicant issued a fresh notice of contravention, applying the Modern Award for the first time.

125 On 14 August 2012, an article was published in the Adelaide Advertiser covering the first directions hearing in this proceeding on the preceding day. The article referred to the monitoring of the emergency pages and the payment made for that monitoring. Subsequently, the Applicants received complaints from people who are now the Further Employees. The underpayment to the Further Employees amounted to $1.276 million, slightly less than half of the overall underpayments. The Applicant issued a further Notice to Produce in respect of the Further Employees and an explanation why it was not provided earlier. In response, the Respondent provided the relevant documents and explained that they were not provided previously because it considered them to be in a different category to the persons engaged to perform the sleepover pager monitoring function. I do not consider that to be an adequate explanation. Although the Further Employees were engaged to undertake day roles, they also performed Pager Monitor duties. In the documents provided by the Respondent, the role descriptors of the Further Employees included “estate attendant”, “estate sleepover/cleaner” and “estate maintenance attendant”. Such roles were within the descriptor in the initial Notices to Produce issued by the Applicant. In my view, the Respondent did fully cooperate with the investigation in that respect. As appears with regard to the Further Employees, it did not recognise the scope of the potential underpayment and seek to fully rectify it as promptly as it could have done.

126 The Respondent throughout the whole investigation process did not consistently respond in a timely manner to all correspondence from the Applicant, and it did not adhere to all Court deadlines. It is not necessary to refer in detail to those occasions which are addressed in the submissions. On the other hand, the Respondent ultimately cooperated with the Applicant in filing the SOAF, even though the matters agreed upon were limited. The

Respondent was invited to propose additional matters which may have reduced the issues in the dispute and reduce the extent of the evidence required to be filed by the parties. The Respondent's initial position was to only include matters agreed upon in the pleadings in the SOAF, even when it already made numerous admissions. After more delays in responding and further negotiations, the Respondent ultimately agreed to include the matters it already admitted into the Admissions Schedule.

127 Overall, I think it is a case where the Respondent is not shown to have obstructed the investigation, but there are aspects of its conduct which do not mean this factor weighs in a substantial way in its favour.

Contrition

128 The Respondent made admissions of the contraventions progressively throughout the course of these proceedings. At the time of the hearing, the Respondent had admitted to all the contraventions alleged.

129 However, bare admissions and rectification, without more, do not amount to contrition. In *Fair Work Ombudsman v Jetstar Airways Ltd* [2014] FCA 33, Buchanan J observed at [36]-[37]:

> In its written submissions, to answer the argument of the applicant that it had showed no "contrition" or "remorse", the respondents argued that Jetstar Group had done so in a practical and effective way by reimbursing the deducted amounts and by Jetstar Airways waiving the balance of the cost of training before the present proceedings were commenced. I do not regard those actions as probative evidence of contrition or remorse. They appear to have been taken in response to (or at least contemporaneously with) the proceedings commenced by the AFAP and no doubt reflected the assessment then made of the prospects of Jetstar Group successfully defending those proceedings.
>
> In fact, I have no evidence of the attitude of any of the respondents beyond a bare admission that contraventions occurred and penalties should be fixed. There is therefore no basis upon which to conclude that the respondents regret their conduct or intend that it not be repeated. No further statement was made about the matter either during submissions, written or oral. Such matters may not be taken into account to increase any penalty otherwise appropriate. The significance of a lack of evidence showing contrition or remorse is that no occasion arises to consider, on that account, any discount from a penalty otherwise appropriate.

130 In *BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2001] FCA 336, Kiefel J observed:

> Whilst the lack of an apology is not an aggravating circumstance, such as might increase the penalty, the making of an apology can operate to reduce a penalty, at

> least where it can be seen to render it unlikely that the conduct will be repeated in the future.

131 The Respondent conveyed remorse by way of two letters. The first letter, dated 22 January 2013, was written to the Employees and relevantly said:

> The FWO determined that Lifestyle SA had contravened the Workplace Relations Act 1996, the Fairwork Act 2009 and / or the Aged Care Award 2010 which has resulted in an underpayment to you. Lifestyle SA has formally admitted the contravention
>
> Lifestyle SA sincerely regrets and apologises to you for the contravention.

132 The second letter, sent 31 May 2013, was written to the Further Employees and relevant said:

> The FWO determined that Lifestyle SA had contravened the Workplace Relations Act 1996, the Fairwork Act 2009 and / or the Aged Care Award 2010 which has resulted in an underpayment to you.
> …
> Lifestyle SA sincerely regrets and apologises to you for the contravention.

133 The Applicant maintained the submission that a generic, one-line apology, was not a fulsome apology. There was also no explanation or apology for the delay in rectifying the underpayments. The Applicant also noted in its written submissions that the Respondent, through Stephen Norris as its nominated spokesperson in these proceedings, did not take the opportunity to apologise to the employees through his affidavit.

134 Shortly after the Applicant filed its written submissions, Stephen Norris filed his second affidavit in which he deposed:

> I take issue with the suggestion that Lifestyle is not contrite for having underpaid its employees. My understanding of the advice of Business SA (a fully copy of the Business SA file as known to me is annexed hereto) was that in performing the pager monitoring function staff were working when responding to a pager alarm but not otherwise. When the applicant asserted that the staff were working throughout, Lifestyle needed to obtain advice and consider its position because it had based its previous decision making for the period of the underpayments, including the system of monitoring and fees to be paid by residents, on the Business SA advice.
>
> When Lifestyle formed the view that it had underpaid its staff, it admitted its contraventions.
> …
> Lifestyle wrote to each employee acknowledging contravention and underpayment and apologising for the contravention.
> …
> Further, I personally extend my apologies to the underpaid employees.

135 The Respondent therefore has admitted to the committing the contraventions and expressed regret for doing so, and apologised.

136 I agree with the remarks made by Perram J in *ACE Insurance Limited v Trifunovski (No 2)* [2012] FCA 793 at [113]-[114]:

> It is not clear to me how an artificial construct such as a corporation can experience the complex human emotion of contrition made up, as it is, of an amalgam of distinctly human emotions such as regret, shame and sympathy. I do not doubt that a corporation may exhibit signs of regret but it is too much to expect that such an artificial construct can be meaningfully contrite.
>
> For civil penalty cases involving corporations it would be more coherent to ask only whether the corporation has changed its behaviour. Nothing more can be expected; a person who does not literally or physically exist may not wear sackcloth.

137 The Respondent in this matter is a corporation. Whilst the apology amounted to one-line, in my view, there is not much more the Respondent could have done to convey remorse to the underpaid employees. It rectified the underpayments. It implemented mechanisms to ensure the contraventions do not occur in the future.

138 More importantly, the Respondent elected to make underpayments amounting to in excess of $70,000 in respect of five employees whose entitlement would be outside the statutory limitation period of six years: see s 719(9)-(10) of the WR Act; ss 544 and 545(5) of the FW Act. I consider it to be a very practical method of exhibiting contrition.

139 I proceed on that basis that the Respondent is contrite in all the circumstances.

Corrective action

140 The Respondent implemented measures to prevent future contraventions by changing into an off-site monitoring system. However, subject to the next paragraph of these reasons, I do not consider it to be corrective action justifying recognition on penalty. As previously stated in these reasons, the Respondent implemented the new system in its first village in September 2010. By February 2011, all villages had off-site monitoring. The Respondent started to implement these measures prior to making admissions to those contraventions. It was implemented during the time the Applicant was conducting its investigation. I accept the Respondent's submission that it was then done out of an abundance of caution. It was a commercial decision and it addressed the potential consequences of the contraventions. However, during the five month period which it progressively moved into an off-site

monitoring system, the Employees and Further Employees continued to be remunerated under the same contravening conditions.

141 The Respondent has taken corrective action by rectifying the underpayment and superannuation losses. Further, it is to be commended that the amount of rectification included the amount $70,775.25 in relation to five employees for a period which fell outside the limitations period of six years: see s 719(9)-(10) of the WR Act; ss 544 and 545(5) of the FW Act. I consider this to be a genuine attempt to remedy the monetary effect of the contraventions.

142 Although the Applicant agreed that the Respondent did conduct commendable corrective action, it noted that the rectification was belated in relation to the Employees in that:

(1) the corrective action came only after the Applicant commenced these proceedings. It had extensive opportunities to rectify voluntarily prior to the decision to litigate being made;

(2) from February 2010, the Respondent took steps to protect its business from liability by moving away from on-site monitoring to the remote monitoring service, but did not take any steps to remedy the ongoing impact of the contraventions on the Employees or Further Employees, as the staff continued to be employed on the contravening conditions until February 2011;

(3) it took the Respondent five months after the underpayments in relation to the Employees were admitted to make the rectification. After the contraventions regarding the Further Employees were first notified by the Applicant to the Respondent, it took the Respondent six months to make the rectifications;

(4) rectification came after the Respondent was subject to adverse publicity for delaying payments; and

(5) rectification occurred after the Applicant engaged in extensive correspondence and repeatedly requesting the rectification of the admitted underpayments.

143 The delays caused by the Respondent prior to the time it started to admit to those contraventions, in September 2012, are related to its level of cooperation during the investigation. I have already addressed that in these reasons. In my view, the delay caused by

the Respondent after September 2012 is relevant in assessing the degree of corrective action it took to rectify the contraventions.

144 There are two key periods to focus on. The first period is from September 2012, when admissions were first made, to December 2012. The second period is from January 2013 onwards, when the Respondent informed the affected employees that it would "immediately" make payments after receiving relevant details from them.

145 Regarding the first period, the Respondent admits to be partially at fault for the delays, but also said that they were caused by the need to wait for responses from Centrelink and the Australian Taxation Office. During the mediation process after admissions were made, the issues that arose included the consequences to the employees' Centrelink benefits, and it was necessary to make enquiries in relation to the employees' taxation obligations, taxation deductions and superannuation contributions. I think those processes were appropriate to be addressed. It is not clear whether they were addressed as quickly as they could have been by the Respondent. It had an obligation to pay the underpaid employees promptly, but it was legitimate to ensure that any direct payments to be made to Centrelink or to the Australian Taxation Office, should be resolved before full reimbursement. In the circumstances, I am not satisfied this period of delay should adversely impact on the penalties to be paid by the Respondent.

146 The Respondent commenced the rectification process from January 2013. By letter dated 22 January 2013, it wrote to the Employees (not the Further Employees), that it will "immediately" transfer the underpayments as soon as it receives the necessary bank details. The underpayments did not occur until 31 March 2013. During the two month period, there was a significant amount of contact between the Employees and the Respondent. There were occasions where the Employees were told that the Respondent was waiting on information from the Applicant. There was correspondence from the Applicant to the Respondent disputing making those statements and the Applicant cautioned the Respondent against making such representations. Further, during that period, the Respondent also changed its position from making the payments "immediately" to paying "half now and half in 12 months". Ultimately, the Respondent made the full payment. Although such delays were partially caused by the Respondent, in my view, that is a minor and not a substantial aggravating factor in determining the appropriate penalties.

Ensuring compliance

147 One of the principal objects of the WR Act and the FW Act is the maintenance of an effective safety net of employer obligations and effective enforcement mechanisms: see s 3 of the WR Act and s 3 of the FW Act. The substantial penalties set by the legislature for contraventions of such obligations reinforce the importance placed on compliance with the minimums standards. As Gilmour J observed in *Offshore Marine Services* at [41]:

> The Court in a case such as this should give effect to the seriousness of employer obligations under Commonwealth workplace laws, the impact upon individuals whose rights have been compromised, and the integrity of the workplace relations system generally, when assessing an appropriate penalty for a contravention.

148 As previously outlined in these reasons, the Respondent's contraventions were numerous and covered a period of over five years. The contraventions comprised underpayment of hours worked, breaching the maximum hours guarantee, and failure to pay casual loadings, penalty rates and paid leave. Aside from financial losses, maximum hours of work contraventions are geared at protecting employees from working excessive hours. The purpose of such provisions is to prevent adverse health consequences and limit the negative impacts on their personal and family lives.

149 Although I accept that the Respondent did not deliberately commit the contraventions, it failed to adequately consider its proper obligations to its employees, including in the face of significant reforms to the industrial relations system over time. The Respondent accepts that its conduct was wrong but submits the circumstances in this case warrant the appropriate penalty to be in the lower end of the scale. I think this element does weigh to some degree in the scales adversely to the Respondent.

150 In the case of the contraventions concerning the day work of Judith Guidotto, moreover, the contraventions do not appear to have been caused by any understanding of the advice of Business SA but appear to reflect simply inattention to her correct entitlements.

Specific Deterrence

151 Although rectification of the underpayments is relevant to the mitigation of penalty, it does not abrogate the need for sanction and deterrence: see *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [16].

152 In *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* (2008) 171 FCR 357, Gray J observed at [37]:

> 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.

153 Although the on-site emergency pager system which gave rise to the majority of the contraventions in this case is no longer in use by the Respondent, the Respondent still operates a large network of retirement villages. It is likely to continue employing people in the foreseeable future. As I have found the Respondent did not commit the contraventions deliberately and it expressed genuine remorse for its actions and has rectified its wrongdoing, there is no substantial need for specific deterrence. The Respondent does not have a prior or history of non-compliance with laws covering industrial and workplace issues. There has been adverse media publicity concerning the Respondent. Although specific deterrence does not weigh much in the scales adversely to the Respondent in this matter for those reasons, it cannot be entirely overlooked.

General Deterrence

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

> 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… 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.

155 Similar sentiments were expressed by Finklestein J in *CPSU v Telstra Corporation Limited* (2001) 108 IR 228 at 231:

> [E]ven if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and act as a warning to others not to engage in similar conduct.

156 General deterrence is a significant factor in determining an appropriate penalty for contraventions of the WR Act and FW Act, given the principal objects of the legislative schemes. It is important to send a clear signal to the community at large, and specifically to employers, regarding the importance of complying with Australian workplace laws. General

deterrence is necessary to alert to the community that lack of care and ignorance of the law is no excuse, particularly when the impact on the aggrieved employees was large, the contraventions extensive in amount, and the period in which the offending conduct occurred was long.

157 I consider the imposition of a monetary penalty sufficient as to convey the message in terms of general deterrence is desirable, despite noting that adverse media publicity resulting from the bringing of proceedings would itself constitute a degree of general deterrence by itself: see *Australian Building & Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2011] FCA 810 at [117].

THE PECUNIARY PENALTIES

158 As stated previously in these reasons, the maximum penalty of $396 000 could be broken down into three broad groups: the contraventions concerning the Employees (including Catherine Oosthuizen), the contraventions concerning the Further Employees and the contraventions concerning Judith Guidotto.

159 Having regard to the matters to which I have referred, in my view substantial penalties are called for. No one factor is conclusive in the view I have reached. I have endeavoured to identify the factors which have played a greater part than others in reaching my conclusion. I have also approached this task on the basis that it is desirable to impose a pecuniary penalty on each of the 35 contraventions referred to in [60] above. In doing so, however, I have also grouped them as described in [70] above, so I have really allocated the pecuniary penalty applicable to the groups across the several contraventions constituting the group. That has been done to ensure that the appropriate penalty for the group – with the maximum referred to – is the basis for my conclusions. The totality of the proposed penalties therefore also reflects the way the Applicant and the Respondent's submissions were presented. That is, a total figure was arrived at and no point of difference was suggested between particular contraventions within a particular group.

160 In the process, I have also reviewed the pecuniary penalties I have determined upon to ensure that the total penalties are not inappropriate or disproportionate. In *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36, Goldberg J remarked at 53:

> The totality principle is designed to ensure that overall an appropriate sentence or penalty is appropriate and that the sum of the penalties imposed for several

> contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved: *McDonald v R* (1994) 48 FCR 55. But that does not mean that a court should commence by determining an overall penalty and then dividing it among the various contraventions. Rather the totality principle involves a final overall consideration of the sum of the penalties determined.

161 That view was adopted by the Full Federal Court in *Australian Ophthalmic Supplies* at [23], [71] and [97]. See also *Kelly* at [30].

162 For the contraventions referred to as grouped into 12 groups, as identified in [70] above, I consider the appropriate pecuniary penalties are:

(1) each of contraventions 1-5 concerning the Employees: Pecuniary Penalty of $19,200, making a total of $96,000;

(2) each of contraventions 6-9 concerning the Further Employees: Pecuniary Penalty of $22,000, making a total of $88,000; and

(3) each of contraventions 10-12 concerning Judith Guidotto: Pecuniary Penalty of $4,000, making a total of $12,000.

163 The total of $196,000 represents overall a little under 50% of the applicable maxima. Having regard to the amounts involved, and the period of time of the contraventions, and the need for general deterrence and on the other hand the fact that the Respondent did not deliberately commit the contraventions and that it had the general advice of Business SA, that it is penitent, that it has paid to all its affected employees the amounts to which they were in fact entitled (together with the other factors which I have referred to relevant to the assessment of the appropriate penalty), in my view that figure is an appropriate one.

ORDERS

164 I referred above to the undisputed assertion by the Applicant that the declaratory orders it sought should be made. I propose to make declaratory orders in the terms sought.

165 Accordingly, I also declare that the Respondent contravened the following provisions in respect of the Employees and Further Employees Pager Monitor roles:

(a) Subsection 182(3) of the WR Act by failing to pay applicable minimum wages to the Employees and Further Employees employed during the Pre-Modern Award Period;

(b) Subsection 185(2) of the WR Act by failing to pay a casual loading to the Employees and Further Employees employed during the Pre-Modern Award Period;

(c) Subsection 226(1) of the WR Act by breaching the maximum hours of work guarantee in respect of Catherine Oosthuizen in the period from 21 December 2007 to 1 January 2008;

(d) Section 45 of the FW Act by contravening subcll 14 and 10.4(b) of the Aged Care Award by failing to pay required minimum wages to the Employees and Further Employees employed during the Modern Award Period;

(e) Section 45 of the FW Act by contravening subcl 10.4(b) of the Aged Care Award by failing to pay a casual loading to the Employees and Further Employees employed during the Modern Award Period;

(f) Section 45 of the FW Act by contravening subcl 23.1 of the Aged Care Award Act by failing to pay penalty rates for Saturday and Sunday work to the Employees and Further Employees employed during the Modern Award period;

(g) Section 45 of the FW Act by contravening subcl 29.2(b) of the Aged Care Award by failing to pay penalty rates for work on public holidays to the Employees and Further Employees employed during the Modern Award Period;

(h) Section 45 of the FW Act by contravening subcll 26.1(b), (c) and (d) of the Aged Care Award by failing to pay the applicable shift allowances for the afternoon and night shifts to the Employees and Further Employees employed during the Modern Award Period;

(i) Section 45 of the FW Act by contravening subcl 25.1(b) of the Aged Care Award by failing to pay overtime rates to the Employees and Further Employees employed during the Modern Award Period; and

(j) Section 45 of the FW Act by contravening subcl 22.9 of the Aged Care Award by failing to pay the sleepover shift allowance to the Employees and Further Employees employed during the Modern Award Period.

166 I also declare that the Respondent contravened the following provisions in respect of Judith Guidotto's Day Role:

(a) Subsection 182(1) of the WR Act, by failing to pay applicable minimum wages to Judith Guidotto during the Pre-Modern Award Period;

(b) Subsection 235(1) of the WR Act, by failing to pay the applicable rates for periods of annual leave to Judith Guidotto during the Pre-Modern Award Period;

(c) Subsection 247 of the WR Act, by failing to pay applicable rates for the periods of personal leave to Judith Guidotto during the Pre-Modern Award Period;

(d) Clause 7.1.6 of the Notional Agreement Preserving the State Award derived from the Clerks NAPSA by failing to pay the applicable annual leave loading rate to Judith Guidotto for periods of annual leave during the Pre-Modern Award Period;

(e) Clause 6.7.2 of the Clerks NAPSA, by failing to pay penalty rates for work on public holidays to Judith Guidotto during the Pre-Modern Award Period;

(f) Clauses 6.5 and 6.6 of the Clerks NAPSA, by failing to pay applicable overtime rates to Judith Guidotto during the Pre-Modern Award Period;

(g) Section 45 of the FW Act by contravening cl 14 and subcl 10.3(d) of the Aged Care Award, by failing to pay applicable minimum wages to Judith Guidotto during the Modern Award Period;

(h) Subsection 44(1) of the FW Act by contravening subs 90(1) of the FW Act, by failing to pay the applicable rates for periods of annual leave to Judith Guidotto during the Modern Award Period;

(i) Subsection 44(1) of the FW Act by contravening s 99 of the FW Act, by failing to pay applicable rates for periods of personal leave to Judith Guidotto during the Modern Award Period;

(j) Section 45 of the FW Act by contravening subcl 28.3(a) of the Aged Care Award, by failing to pay the applicable annual leave loading rate to Judith Guidotto for periods of annual leave during the Modern Award Period;

(k) Section 45 of the FW Act by contravening subcl 29.2(b) of the Aged Care Award, by failing to pay penalty rates for work on public holidays to Judith Guidotto during the Modern Award Period; and

(l) Section 45 of the FW Act by contravening subcl 25.1(b) of the Aged Care Award, by failing to pay applicable overtime rates for weekend work to Judith Guidotto during the Modern Award Period.

167 I also make orders pursuant to s 719(1) of the WR Act and s 546 of the FW Act that the Respondent pay pecuniary penalties for the contraventions of the civil remedy provisions set out in [162] above.

168 There will also be orders that:

(a) pursuant to s 546(3)(a) of the FW Act and Item 16 of Sch 16 of the Transitional Act that any pecuniary penalties payable by the Respondent be paid into the Consolidated Revenue Fund of the Commonwealth;

(b) any amounts payable by the Respondent be paid within 60 days; and

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

I certify that the preceding one hundred and sixty-eight (168) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 31 October 2014

APPENDIX A

APPENDIX A

Employee	Dates of Employment	Contract of Employment	Underpayment	Rectification
Susan Andersen	On or about 16 March 2007 to on or about 8 May 2007	Dated 22 February 2007 (**Annexure A**)	$2,403.49 (plus superannuation)	- Underpayment rectified on or about 31 May 2013 - Superannuation contributions - $216.27 remitted to ATO on or about 14 June 2013
Avril Arnott	10 July 2009 to on or about 30 December 2009	Dated 10 July 2009 (**Annexure B**)	$11,399.23 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $1,025.91 remitted to ATO on or about 14 June 2013
Gillian Atkins	23 May 2008 to on or about 16 December 2010	Dated 23 May 2008 (**Annexure C**)	$75,204.81 (plus superannuation) - *Less $71.58 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions – $6,768.36 remitted to ATO on or about 30 April 2013

Diane Atkinson	3 October 2008 to 1 July 2009	Dated 24 October 2008 (**Annexure D**)	$12,360.02 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $1,112.40 remitted to ATO on or about 30 April 2013
Leslie Ayris	22 January 2010 to 16 January 2011	Dated 18 January 2010 (**Annexure E**)	$580.75 (plus superannuation) - *Less $6.33 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $52.20 remitted to ATO on or about 30 April 2013
Anthony Bament	25 April 2008 to 10 January 2010	Dated 23 April 2008 (**Annexure F**)	$41,366.68 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $3,722.94 remitted to ATO on or about 30 April 2013

Amanda Binns	7 December 2007 to 15 December 2007	Dated 14 December 2007 (**Annexure G**)	$652.26 (plus superannuation)	- Attempted rectification on or about 5 March 2013 but cheque returned to sender - Rectification of underpayment by way of payment to FWO unclaimed monies on or around 3 May 2013 - Superannuation contributions - $58.68 remitted to ATO on or about 30 April 2013
John Bock	22 April 2009 to 24 October 2009	Dated 22 April 2009 (**Annexure H**)	$19,091.30 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $1,718.19 remitted to ATO on or about 30 April 2013
Gary Brand	On or about 27 June 2007 to on or about 28 August 2007	Dated 28 June 2007 (**Annexure I**)	$2,244.86 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $201.96 remitted to ATO on or about 14 June 2013

Julie Davis	On or about 21 August 2009 to 12 September 2010	Dated 25 August 2009 (**Annexure J**)	$20,459.84 (plus superannuation) - *Less $21.66 if classified as Level 1 under the Aged Care Award*	- Attempted rectification on or about 5 March 2013 but cheque returned to sender - Rectification of underpayment by way of payment to FWO unclaimed monies on or around 3 May 2013 - Superannuation contributions - $1,841.31 remitted to ATO on or about 30 April 2013
Heather Deverson	On or about 12 February 2009 to on or about 18 May 2010		$4,523.36 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $407.07 remitted to ATO on or about 30 April 2013
Pauline Donlon	18 January 2008 to 27 June 2011 *[Work after 6 December 2010 not relevant for purposes of contraventions]*	Dated 18 February 2008 (**Annexure K**)	$75,672.97 (plus superannuation) - *Less $102.53 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $6,810.48 remitted to ATO on or about 30 April 2013

Carolyn Dosetto	15 January 2007 to 3 June 2008		$19,701.26 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $1,773.09 remitted to ATO on or about 30 April 2013
June Elliott	On or about 17 July 2009 to 12 December 2010	Dated 14 July 2009 (**Annexure L**)	$16,752.22 (plus superannuation) - *Less $49.24 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $1,507.68 remitted to ATO on or about 30 April 2013
Michael Elvey	21 April 2009 to 18 March 2010	Dated 21 April 2009 (**Annexure M**)	$40,866.40 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $3,677.94 remitted to ATO on or about 30 April 2013
Jenni Feckner	29 February 2008 to 29 September 2008	Dated 18 February 2008 (**Annexure N**)	$9,189.98 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $827.01 remitted to ATO on or about 30 April 2013

Julie Hawkes	3 March 2009 to 3 December 2010	Dated 2 March 2009 (**Annexure O**)	$40,910.14 (plus superannuation) - *Less $95.37 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $3,681.90 remitted to ATO on or about 30 April 2013
Marilyn Hockley	On or about 11 October 2006 to 6 February 2011	Dated 12 October 2006 (**Annexure P**)	$122,586.92 (plus superannuation) - *Less $212.65 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions – $11,032.74 remitted to ATO on or about 30 April 2013
Johanna Linde	12 October 2007 to 15 January 2008	Dated 16 October 2007 (**Annexure Q**)	$7,743.91 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $696.87 remitted to ATO on or about 30 April 2013
Christine Mostert	26 September 2008 to on or about 28 September 2008	Dated 30 September 2008 (**Annexure R**)	$316.07 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $28.44 remitted to ATO on or about 30 April 2013

Peter Moyle	11 November 2006 to current *[Work after 25 January 2011 not relevant for purposes of contraventions]*	Dated 8 November 2006 (**Annexure S**)	$131,864.64 (plus superannuation) - *Less $219.01 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $11,918.98 remitted to Australian Super on or about 24 April 2013
Bruce Neumann	On or about 19 November 2008 to on or about 6 January 2009	Dated 21 November 2008 (**Annexure T**)	$3,361.54 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $302.49 remitted to ATO on or about 30 April 2013
Catherine Oosthuizen	11 May 2007 to 10 February 2008	Dated 11 May 2007 (**Annexure U**)	$14,864.61 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $1,337.76 remitted to ATO on or about 30 April 2013
David Plant	31 October 2008 to 28 June 2009	Dated 3 November 2008 (**Annexure V**)	$15,270.06 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $1,374.30 remitted to ATO on or about 30 April 2013

Bernard Schoonenberg	10 November 2006 to 7 January 2007	Dated 6 November 2006 (**Annexure W**)	$1,438.59 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $129.42 remitted to ATO on or about 30 April 2013
Madelynn Sia	4 December 2009 to 6 February 2011	Dated 17 December 2009 (**Annexure X**)	$24,638.85 (plus superannuation) - *Less $183.71 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $2,217.42 remitted to ATO on or about 30 April 2013
Janet Taylor	27 June 2007 to on or about 8 August 2010	Dated 14 June 2007 (**Annexure Y**)	$160,584.59 (plus superannuation) - *Less $12.37 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions – $14,452.56 remitted to ATO on or about 30 April 2013

Peter Thiel	6 December 2009 to 2 December 2010	Dated 4 December 2009 (**Annexure Z**)	$26,262.21 (plus superannuation) - *Less $97.60 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $2,363.58 remitted to ATO on or about 30 April 2013
Nicholas Thompson	5 April 2010 to on or about 14 December 2010		$15,739.91 (plus superannuation) - *Less $94.15 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $1,416.51 remitted to ATO on or about 30 April 2013
Bill Tindall	1 December 2008 to on or about 19 April 2009	Dated 1 December 2008 (**Annexure AA**)	$18,453.92 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $1,336.77 remitted to ATO on or about 30 April 2013 and $324.00 remitted to ATO on or about 14 June 2013

Michael Trait	On or about 25 November 2009 to on or about 8 December 2009		$1,573.26 (plus superannuation)	- Rectification of underpayment by way of payment to FWO unclaimed monies on or around 3 May 2013 - Superannuation contributions - $141.59 remitted to ATO on or about 14 June 2013
Robert Tulloch	22 February 2008 to current *[Work after 25 January 2011 not relevant for purposes of contraventions]*	Dated 15 February 2008 (**Annexure BB**)	$99,086.88 (plus superannuation) - *Less $165.53 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $8,917.82 remitted to Australian Super on or about 24 April 2013
Paul Wakefield	17 July 2009 to 14 August 2009	Dated 14 July 2009 (**Annexure CC**)	$1,560.64 (plus superannuation)	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $140.40 remitted to ATO on or about 30 April 2013

John Walkom	On or about 17 May 2005 to 14 April 2009 *[Work prior to 27 March 2006 not relevant for purposes of contraventions]*	Dated on or around 1 June 2005 (**Annexure DD**)	$104,334.27 (plus superannuation)	- Attempted rectification on or about 5 March 2013 but cheque returned to sender - Rectification of underpayment by way of payment to FWO unclaimed monies on or around 3 May 2013 - Superannuation contributions – $9,390.06 remitted to ATO on or about 30 April 2013
Elizabeth Woodward-Cowley	5 January 2009 to on or about 2 September 2010	Dated 5 January 2009 (**Annexure EE**)	$53,591.03 (plus superannuation) - *Less $34.94 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 5 March 2013 - Superannuation contributions - $4,823.19 remitted to ATO on or about 30 April 2013
Con Argy	9 June 2007 to 29 June 2008	Dated 12 October 2007 (**Annexure FF**)	$83,934.70 (plus superannuation)	- Underpayment rectified on or about 31 May 2013 - Superannuation contributions due by 28 July 2013

Geoffrey Body	8 December 2006 to 10 July 2007	1) Dated 8 December 2006 (**Annexure GG**) 2) Dated 26 March 2007 (**Annexure HH**)	$30,235.57 (plus superannuation)	- Rectification of underpayment by way of payment to FWO unclaimed monies on or around 31 May 2013 - Superannuation contributions due by 28 July 2013
Ian Chilton	26 March 2006 to 16 February 2007	Dated 13 November 2006 (**Annexure II**)	$54,819.65 (plus superannuation)	- Attempted rectification on or about 31 May 2013 but cheque sent to incorrect address. - Replacement cheque sent on 14 June 2013 - Superannuation contributions due by 28 July 2013
Jeff Fitzgerald	27 March 2006 to on or about 25 November 2011 *[Work after 17 December 2010 not relevant for purposes of contraventions]*	1) Dated 23 September 2003 (**Annexure JJ**) 2) Dated 13 March 2008 (**Annexure KK**)	$264,725.78 (plus superannuation) - *Less $94.51 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 31 May 2013 - Superannuation contributions due by 28 July 2013

Mark Furga	5 March 2007 to on or about 22 February 2011 *[Work after 18 January 2011 not relevant for purposes of contraventions]*	Dated 5 March 2007 (**Annexure LL**)	$211,963.83 (plus superannuation) - *Less $132.18 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 31 May 2013 - Superannuation contributions due by 28 July 2013
Judith Guidotto	28 August 2006 to 23 May 2011	Dated 14 July 2006 (**Annexure MM**)	$259,241.91 (plus superannuation) - *Reduction of $119.12 if Pager Monitor role classified as Level 1 under the Aged Care Award* - *Day role component of the total alleged underpayment constitutes **$11,889.26** – the classification of the Day role is not admitted.*	- Entire alleged underpayment rectified on or about 31 May 2013 - Superannuation contributions due by 28 July 2013

Paul Guidotto	On or about 4 September 2010 to 30 January 2011	Dated 12 September 2006 (**Annexure NN**)	$870.58 (plus superannuation) - *Less $10.23 if classified as Level 1 under the Aged Care Award*	- Underpayment rectified on or about 31 May 2013 - Superannuation contributions due by 28 July 2013
Richard Houghton	26 June 2006 to 12 September 2008	Dated 20 June 2006 (**Annexure OO**)	$146,396.75 (plus superannuation)	- Underpayment rectified on or about 31 May 2013 - Superannuation contributions due by 28 July 2013
Ian McCourt	26 February 2007 to 7 June 2007	Dated 22 February 2007 (**Annexure PP**)	$17,101.98 (plus superannuation)	- Underpayment rectified by way of payment to FWO unclaimed monies on or around 31 May 2013 - Superannuation contributions due by 28 July 2013
Ian Powell	16 July 2007 to 23 April 2008	Dated 16 July 2007 (**Annexure QQ**)	$52,735.10 (plus superannuation)	- Underpayment rectified on or about 31 May 2013 - Superannuation contributions due by 28 July 2013
Jack Raschella	27 March 2006 to 15 January 2007	Dated 6 October 2005 (**Annexure RR**)	$49,060.80 (plus superannuation)	- Underpayment rectified on or about 31 May 2013 - Superannuation contributions due by 28 July 2013