FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v LONGRIDGE GROUP PTY LTD *[2015] FCCA 129*

Catchwords:
INDUSTRIAL LAW – Breach of terms of modern award – failure to pay minimum wage, casual loading and penalties for work on weekends and public holidays – failure to keep employment records – two employees affected – seven contraventions falling into three categories – failure to pay related to period of around seventeen months – breaches admitted by respondent concerned – pecuniary penalties – admission of contravention made prior to hearing – underpayment rectified in full – breaches found not to be deliberate – respondent has taken steps to ensure future compliance with industrial law – matters to be considered in calculating penalty – grouping of offences – totality principle.

Legislation:
*Fair Work Act 2009, ss:*3(b), 45, 134, 143(7), 323(1), 535(1), 539(2), 546(1), 546(2)(b), 546(3), 557(1), 701, 719(2)
Acts Interpretation Act (1901) (Cth), ss: 15AB(1)(b)
Evidence Act (1995) (Cth), ss: 191
Fair Work Regulations (2009): r: 3.32(2)

Cases cited:
Fair Work Ombudsman v Kentwood Industries Pty Ltd (No3) [2011] FCA 579
Fair Work Ombudsman v Lifestyle SA Pty Ltd [2014] FCA 1151
Australian Opthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
Attorney-General (SA) v Tichy (1982) 30 SASR 84
Johnson v R (2004) 78 ALJR 616
Mornington Inn v Jordan (2008) 168 FCR 383
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Kelly v Fitzpatrick [2007] 166 IR 14
Blandy v Coverdale NT Pty Ltd [2008] FCA 1533
Veen v R (No 2) (1988) 164 CLR 465
Award Modernisation – Decision – re Stage 4 modern awards [2009] AIRCFB 945
Rocky Holdings Pty Ltd & Anor v Fair Work Ombudsman [2014] FCAFC 62
Blandy v Coverdale NT Pty Ltd [2008] FCA 1533
FWO v Ramsey Food Processing Pty Ltd (No 2) [2012] FCA 408
FWO v Lifestyle SA Pty Ltd [2014] FCA 1151
FWO v Orwill Pty Ltd & Ors [2011] FMCA 730
ACE Insurance Limited v Trifunovski (No 2) [2012] FCA 793

Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Plancor Pty Ltd v Liquor Hospitality & Miscellaneous Union (2008) 171 FCR 357

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	LONGRIDGE GROUP PTY LTD
File Number:	ADG 185 of 2013
Judgment of:	Judge Brown
Hearing date:	17 November 2014
Date of Last Submission:	17 November 2014
Delivered at:	Adelaide
Delivered on:	28 January 2015

REPRESENTATION

Counsel for the Applicant:	Ms Walker
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondent:	Mr Manos
Solicitors for the Respondent:	EMA Legal

THE COURT DECLARES THAT:

A. The Respondent contravened the following provisions of the *Fair Work Act (2009)* (Cth) (hereinafter referred to as "the FWA") as follows:

(a) section 45 of the FWA by contravening clause 14 of the *Miscellaneous Award 2010* by failing to pay its employees Geoffrey Moore (hereinafter referred to as "Moore") and Regan Ware (hereinafter referred to as "Ware") the stipulated minimum hourly rate of pay;

(b) section 45 of the FWA by contravening clause 10.4 of the *Miscellaneous Award 2010* by failing to pay its employees Moore and Ware a casual loading in respect of all hours worked by them;

(c) section 45 of the FWA by contravening clause 22.2(c) of the *Miscellaneous Award 2010* by failing to pay its employees Moore and Ware the required penalty rate for all hours worked by them on Saturdays;

(d) section 45 of the FWA by contravening clause 22.2(d) of the *Miscellaneous Award 2010* by failing to pay its employees Moore and Ware the required penalty rate for all hours worked by them on Sundays;

(e) section 45 of the FWA by contravening clause 22.2(e) of the *Miscellaneous Award 2010* by failing to pay its employees Moore and Ware the required penalty rate for all hours worked by them on Public Holidays;

(f) section 323(1) of the FWA by failing to pay its employees Moore and Ware the amounts payable to them for the performance of work in full and at least monthly; and

(g) section 535(1) of the FWA by failing to keep records of the hours worked by Moore and Ware as required by item 3.32(2) of the *Fair Work Regulations (2009)* (Cth).

THE COURT ORDERS THAT:

1. Pursuant to section 546(1) of the FWA that the respondent pay a total pecuniary penalty, in respect of the civil remedy provisions set out in order (1) hereof, fixed in the amount of $29,790.00.

2. Pursuant to section 546(3) of the FWA that the pecuniary penalty specified in order (2) hereof be paid into the Consolidated Revenue Fund of the Commonwealth with sixty days of the date of these orders.

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

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT ADELAIDE

ADG 185 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

LONGRIDGE GROUP PTY LTD
Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant in these proceedings, the Fair Work Ombudsman "the FWO" seeks the making of declarations that the Longridge Group Pty Ltd "the respondent" or "Longridge" breached a number of provisions of the *Fair Work Act 2009* (Cth) "the Act" or "the FWA".

2. As a consequence of those declarations, the FWO seeks the imposition of monetary penalties, on the respondent, in respect of potentially thirteen contraventions of the Act. Although it is conceded by it that it is appropriate that these be grouped so that there are, in effect, seven actual breaches and these should be grouped into three distinct categories, to which the actual pecuniary penalties imposed should attach.

3. For its part, Longridge admits that it breached the Act, in respect of the underpayment of two of its former employees, Geoffrey John Moore and Regan Ware; by necessary implication that it failed to pay Mr Moore and Mr Ware, at least monthly, in breach of section 323(1) of the Act; and that it failed to keep proper employee records in contravention of section 535(1). As such, Longridge acknowledges

that the appropriate declarations should be made and penalties imposed upon it by the court.

4. Accordingly, it is convenient to refer to these proceedings as a penalty hearing. Where the parties differ is in the overall culpability of Longridge. As a consequence of this disagreement, the parties have a fundamentally different view as to the appropriate quantum of the penalty to be imposed.

5. The maximum penalty, which could be applied, on the basis that there should not be a separate set of contraventions in respect of Mr Moore and Mr Ware is one of $214,500.00. The FWO however contends that there should be a grouping of the offences into three distinct categories, reducing the maximum penalty to one of $82,500.00.

6. The FWO would characterise the various breaches in question as being serious in nature and so deserving of a penalty of between 63% and 47% of the maximum penalty available under the Act, after a discount of 10% relating to the admissions made by the respondent and its payment to the employees concerned of their entitlements.

7. On the other hand, Longridge would characterise the breaches concerned as being marked by inadvertence, on its part, rather than by deliberation and therefore not of a nature to require a stern response from the court. In these circumstances, it contends that a penalty in a range of between 15% and 25% is appropriate.

8. The respondent also takes a different view, to the FWO, to how the various breaches are to be grouped. It argues that there should only be two groups of offence. It also contends that the discount for its cooperation should be one of 20%. On its view of the facts applicable in the case, the maximum penalty applicable is one of $49,500.00.

9. The underpayment of Mr Moore and Mr Ware related to a failure by Longridge to pay them the minimum award wage, a loading relating to their status as casual employees, as well as penalty rates for employment on weekends and on public holidays.

10. It is the contention of the FWO that the minimum wage/casual loading contraventions and the penalty rates contraventions are separate offences, which should not be grouped together. It is also submitted that there should be a further offence penalised, arising from the failure to keep employment records.

11. On the other hand, Longridge contends that the total underpayment of Mr Moore and Mr Ware related to the same course of conduct, on its part, and therefore one penalty should be imposed on both sets of contraventions. It is conceded that the record keeping violation is distinct.

12. In purely dollar terms, the difference can be expressed as follows. The FWO seeks the imposition of a total penalty of between $39,352.50 and $51,975.00. On the other hand, Longridge submits that a penalty falling somewhere between $5,940.00 and $9,900.00 is the appropriate one. These proceedings are intended to resolve this controversy between the parties.

Background

13. The parties have filed a statement of agreed facts.[1] It is a helpful document. Pursuant to section 191 of the *Evidence Act (1995)* (Cth) the matters agreed to in this document are taken not to be in dispute.

14. The FWO relies on an affidavit deposed to by Sarah Krins, a solicitor employed in its office, who has the conduct of these proceedings. Ms Krins deposes to the circumstances surrounding the compilation of the statement of agreed facts and the date on which Longridge formally agreed to them.

15. The FWO has also provided me with affidavits deposed to by Mr Regan and Mr Moore, which set out their respective experience of employment, with Longridge and their own personal experience and qualifications.[2]

[1] Statement of agreed facts filed 15 October 2014
[2] Affidavits of Geoffrey John Moore and Regan Ware both filed 16 April 2014

16. In addition, the respondent has provided me with affidavits from Andrew Lindsay[3] and Paul Neighbour.[4] Mr Lindsay and Mr Neighbour are respectively the general manager and managing director of Longridge.

17. As a consequence of these various documents, I provide the following background to the contravention proceedings. At the outset, there is no controversy that the FWO has the statutory authority to bring these proceedings under the Act.[5]

18. Pursuant to section 701 of the Act, the FWO is also a fair work inspector. As such, the FWO has standing to seek penalties against an employer, who has breached a provision of either a modern award or the Act itself.[6]

19. The FWO commenced these proceedings on 28 June 2013. The matter was originally allocated to the docket of Judge Lindsay, who has resigned his commission with the court and, as a consequence, ceased hearing cases from early 2014 onwards.

20. Longridge filed a defence on 26 July 2013, in which it took issue with many of the allegations raised by the FWO, in its statement of claim. Following an inconclusive mediation, in late 2013, Judge Lindsay fixed the matter for a hearing, in August of 2014, in respect of whether Longridge was liable in respect of the allegations made by the FWO that it had breached provisions of the relevant award and the Act.

21. Due to the resignation of Judge Lindsay, this hearing did not take place and was re-allocated to me to take place for three days in mid-November of 2014. Ms Krins has deposed that, in anticipation of the August hearing, she attended to the filing of the affidavit evidence on which the FWO proposed to rely in mid-April of 2014.

22. Ms Krins further deposes that she was formally advised on 5 August 2014 that the respondent wished to make admissions in respect of liability and would agree to a statement of agreed facts to facilitate such admissions.

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[3] Affidavit of Andrew Lindsay filed 23 October 2014
[4] Affidavit of Paul Neighbour filed 24 October 2014
[5] See FWA at section 687
[6] See FWA at section 539(2)

23. Accordingly, the three day hearing was not needed. The penalty hearing occupied the morning of 11 November 2014. Undoubtedly the actions of Longridge resulted in the saving of a great deal of court time and, in the case of the FWO, some significant savings in respect of legal costs.

24. Longridge concedes that it as a constitutional corporation, capable of being sued in its own name and is to be categorised as a *national systems employer.* As such, it is amenable to proceedings under the Act in respect of breaches of any applicable modern award.

25. It is agreed that Mr Moore was employed, as a casual sales consultant, by Longridge, between 12 April 2011 and 26 February 2012. It is further agreed that Mr Ware was employed, in the same capacity, between 3 February 2012 and 13 August 2012.

26. The business of Longridge is the construction and sale of new residential homes, under a number of trading names or brands, including *Sarah Homes* and *Atlas Living*. Mr Moore and Mr Ware were employed by Longridge to sell those homes on a commission basis. The commission agreed upon was to be 2.4% of the price of a completed Sarah Home and 2% of a completed Atlas Living Home.

27. During the period of each of their respective employments, with Longridge, neither Mr Moore nor Mr Ware was paid any sums, by way of remuneration, other than by commission. Mr Moore and Mr Ware each countersigned a letter, under the hand of Richmond Tuhou, the then sales manager of Longridge, to this effect, which indicated that *"your payment is commission based"*. There is no dispute that this document represented a contract of employment.

28. The arrangement was that any commission would be paid in two parts, the first portion on the signing of a building contract, with the balance to be paid, when planning approval was granted in respect of the relevant home.

29. It is now conceded by Longridge that, at all material times, both Mr Moore and Mr Regan's employment was covered by the provisions of the *Miscellaneous Award 2010* "the Award", which is a modern award as defined by the Act.

30. Pursuant to this award, both were entitled to be paid a minimum wage, with a loading to reflect their casual status, at all times during their employment with Longridge. In addition, each was entitled to be paid a further penalty rate in respect of work performed on Saturdays, Sundays and on Public Holidays.

31. The terms of the Award varied during the periods in question, as it was amended, from time to time. The minimum hourly rate varied between $15.00 and $16.64. The additional casual loading varied between a further 21% and 23% of the minimum hourly rate.

32. The Saturday loading varied between 125% and 135% of the minimum hourly rate; the Sunday loading between 131% and 153%; and the public holiday rate between 146% and 172%. It is agreed that both Mr Moore and Mr Ware were employed by Longridge on both weekdays; weekends; and public holidays.

33. Attached to the statement of agreed facts, is a schedule of the dates and hours worked by both Mr Moore and Mr Ware, which are categorised into weekdays, weekends and public holidays. As a consequence, a calculation has been performed in regards to what each has been underpaid.

34. In Mr Moore's case, the total amount underpaid is $20,013.60; in Mr Ware's case, the total amount underpaid is $11,646.97. These sums have now been paid in full to Mr Moore and Mr Ware, by Longridge, but not in one lump sum.

35. During the contravention period, Mr Moore was paid the sum of $6,704.61 by way of commission on homes sold by him. This has been deducted from the monies otherwise due to him. Mr Ware did not sell any homes and received no payments whatsoever during this period.

36. Longridge paid the monies due to both Mr Moore and Mr Ware in two instalments, which were made on 2 May 2013 and 1 October 2014 respectively.

37. These proceedings are concerned with what penalties should be imposed upon Longridge in respect of these various breaches of the award. As previously indicated the FWO contends that Longridge has

engaged in one course of illegal conduct,[7] as a consequence of its breaches of the FWA, in respect of its employment of Mr Moore and Mr Ware, who were engaged on the same terms and whose employment attracted identical provisions of the applicable award.

38. For obvious reasons, Longridge does not disagree with this approach. However, as previously indicated, the parties vigorously disagree as to how these breaches are to be grouped for the purpose of calculation of penalty and what that total penalty should be.

The applicable provisions of the legislation and the relevant award

39. It is agreed by both the FWO and Longridge that the award which applied to the employment of both Mr Moore and Mr Ware was the *Miscellaneous Award 2010*, which commenced on 1 January 2010. The award has a broad coverage. Essentially, it covers all employees who are not otherwise covered by another modern award.

40. The objects of the *Fair Work Act* are set out in section 3. Amongst these is the following:

> *"ensuring a guaranteed safety net of fair, relevant and enforceable minimum wages and conditions through the National Employment Standards, modern awards and national minimum wage orders;"* [FWA section 3(b)]

41. This object contains the gravamen of the FWO's submissions regarding the overall seriousness of the offending, by Longridge, in this matter. It contends that the respondent comprehensively failed in its obligations to Mr Moore and Mr Ware to provide to them the legislatively sanctioned safety net of the minimum wage, whilst knowing full well that neither, particularly Mr Ware, was earning anything approaching a subsistence income, over a not inconsiderable period of time.

[7] See FWA at section 557

42. The above objective is taken up by a specific objective, in respect of the implementation of a system of modern awards, which is contained in section 134 of the Act. It is to ensure a *fair and relevant minimum safety net* in terms of the provision of conditions relevant to employment. Amongst other things, it is to ensure additional remuneration for overtime; work on weekends; and public holidays [section 134(1) (da)].

43. It is important to note that there are a number of exclusions from the Award, the most significant of which is contained in clause 4.2. It reads as follows:

> *"The award does not cover those classes of employees who, because of the nature and seniority of their role, have not traditionally between covered by awards including managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists."*

44. Longridge, in a formal sense, admits that both Mr Moore and Mr Ware's employment, with the respondent, does not fall within the exclusion contained within clause 4.2. However, it is submitted, on behalf of Longridge, that there was some level of ambiguity or uncertainty about the application of what it would categorise as a non-specific generic award, of some novelty and the exclusion provision it contained to the circumstances of both employees, which should mitigate the pecuniary penalty to be applied to it.

45. Other clauses, relevant to these proceedings, are respectively clause 14, which provides a minimum level of adult wages; clause 10.4, which requires an employer to pay its casual employees a specified percentage loading in addition to the relevant minimum wage.

46. Clause 22.2(c) which requires an employer to pay its casual employees a specified percentage loading in respect of work (other than overtime) which is performed on a Saturday; clause 22(d) which is analogous in respect of work done on a Sunday; and clause 22 (e) which relates to public holidays.

47. The parties in the present proceedings agree that the amounts due to Mr Moore and Mr Were, in respect of each such clause of the award are as follows:

Award Provision	Mr Moore	Mr Ware
Minimum Wage	$11,632.56	$6,091.14
Casual Loading	$2,531.51	$1,353.11
Saturday	$2,695.00	$1,944.73
Sunday	$2,397.86	$2,097.93
Public Holidays	$756.67	$160.06
TOTAL	**$20,013.60**	**$11,646.97**

48. Section 45 is the machinery section of the Act which applies to these contraventions. It reads as follows:

> *"A person must not contravene a term of a modern award."*

49. A note to the section indicates that this is a *civil remedy provision*. Accordingly section 539 (2) prescribes the maximum penalty for each of these offences, which is 60 penalty units. However, pursuant to the provisions of section 546(2)(b) of the Act, if the person who has committed the offence in question is a body corporate, the maximum penalty is to be multiplied by five. At relevant times, a penalty unit amounted to $110.00

50. Accordingly, the maximum penalty for each of the award contraventions, in this case, is $33,000.00. As previously indicated, the FWO does not contend that separate penalties should be imposed in respect of the non-payment of both Mr Moore and Mr Ware. Accordingly, at this stage, there are potentially five counts relevant, with a total maximum penalty of $165,000.00.

51. Longridge also admits that it has breached the provisions of section 323(1) of the Act. The section requires that an employer must pay its employees the wages due to them, in full, at least monthly. Given the circumstances of this case, where Longridge failed to pay Mr Moore and Mr Ware the wages to which they were entitled over a period of ten months and six months respectively, it is axiomatic that this provision has been contravened.

52. The maximum penalty applicable in respect of this offence is again $33,000.00. The FWO seeks that it be grouped with the failure to pay the minimum award/loading matters. Longridge contends that this contravention forms part of the same course of conduct arising from its failure to pay Mr Moore and Mr Ware there proper entitlements.

53. Finally, Longridge admits that it has contravened the provisions of section 535(1) of the FWA, which requires an employer to make and keep prescribed records in respect of its employment of all its employees. These records relate to rates of pay, hours worked and the like.

54. In this case, pursuant to regulation 3.32 (2) of the *Fair Work Regulations (2009)* an employer is required to keep a record of all the hours worked by an employee, in casual employment, where that employee is *guaranteed a rate of pay by reference to a period of time worked.*

55. The maximum penalty, in respect of this contravention, is $16,500.00. Both parties accept that this matter constitutes a separate count, which should be penalised separately. As previously indicated, if the court adopts the approach of the FWO the maximum penalty applicable is one of $82,500.00. If it adopts the approach advocated by Longridge, the maximum penalty would be $49,500.00.

56. The legislative provisions relating to how contraventions arising under the FWA are to be grouped for the purposes of calculation of penalty are contained in section 557(1) of the FWA, which reads as follows:

> *"(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."

57. In this case, there is no controversy that the various contraventions concerned were committed by the same person. However, there is significant dispute as to whether they are to be taken as arising out of the one course of conduct.

58. The approach, which the court is required to take in respect of these contravention proceedings, is not controversial so far as the parties are concerned. It has been delineated in a number of decisions of the Federal Court[8] and described as a four step process, which I will summarise as follows:

- Firstly, the court should identify each separate contravention arising from a breach of either the applicable award or the FWA and determine whether any of these arise in a single *course of conduct* within the terms envisaged by section 557(1);

- Secondly, determine what is the appropriate penalty to be imposed (whether in terms of a single episode of contravention or as part of a course of conduct), having regard to all the circumstances of the case;

- Thirdly, give consideration to whether any of these contraventions contain common elements and factor this into considering what is an appropriate penalty, in all the circumstance, for each contravention;

- Fourthly, apply the totality principle. This final step constitutes a review of the aggregate penalty thus far calculated and a consideration of whether such a penalty is an appropriate response to the conduct which led to the various contraventions. This step has been categorised as a process of *instinctive synthesis.*[9]

[8] See *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No3)* [2011] FCA 579 per McKerracher J applied in *Fair Work Ombudsman v Lifestyle SA Pty Ltd* [2014] FCA 1151 at [42] per Mansfield J

[9] *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [55] per Graham J

59. The third and fourth steps are to be distinguished from one another. In the context of the former, the following comments, approved by Gleeson CJ in *Johnson v R*, are apposite, although arising in the context of actual criminal proceedings:

> *"Where there are truly two or more incursions into criminal conduct, consecutive sentences will generally be appropriate. Where, whatever the number of technically identifiable offences committed, the prisoner was truly engaged upon one multi-faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient."* [10]

60. The totality principle arises when a court is called upon to sentence an individual, as here, in respect of a number of identifiable offences. It is directed to a review of the penalties imposed, in total, in respect of individual offences to determine whether those penalties, in aggregate, constitute a just and appropriate penalty, in all the circumstances arising. As indicated earlier, it has been characterised as a process of intuitive synthesis best summarised in the well-known line from *The Mikado* "*the punishment must fit the crime."*

61. Gray J in *Australian Opthalmic Supplies Pty Ltd* said as follows:

> *"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."*[11]

62. Regardless of these considerations, the fundamental task, for the court, is to determine, from all the factual circumstances arising, the gravity or seriousness of the offending, which it is called upon to penalise. Again there is general agreement between the parties as to the considerations relevant to this task, which has been delineated in a number of decisions of both this court and the Federal Court.[12]

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[10] See *Attorney-General (SA) v Tichy* (1982) 30 SASR 84 at 92-93 per Wells J; cited with approval by Gleeson CJ in *Johnson v R* (2004) 78 ALJR 616; and followed by Stone and Buchan JJ in *Mornington Inn v Jordan* (2008) 168 FCR 383 at 397

[11] *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* (supra) at [23]

[12] See *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7; *Kelly v Fitzpatrick* [2007] 166 IR 14 at [14]; *Blandy v Coverdale NT Pty Ltd* [2008] FCA 1533 at [23]

63. The considerations are as follows:

- The nature and extent of the conduct which led to the breaches;
- The circumstances in which the conduct took place;
- The nature and extent of any loss or damage sustained as a result of the breaches;
- Whether there has been similar previous conduct by the respondent;
- Whether the breaches were properly distinct or arose out of the one course of conduct;
- The size of the business enterprise involved;
- Whether or not the breaches were deliberate;
- Whether senior management was involved in the breaches;
- Whether the party committing the breaches has exhibited contrition;
- Whether the party committing the breaches has taken corrective action;
- Whether the party committing the breaches has cooperated with the enforcement authorities;
- The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- The need for specific and general deterrence.

64. However the court needs to be careful not to apply a formulaic approach to the imposition of penalties or attempt to extrapolate the penalties imposed in one case to the circumstances of another. Each case involving the imposition of a civil penalty warrants an idiosyncratic approach and a careful analysis of all relevant circumstances. As was stated in *Australian Opthalmic Supplies:*

> *"Penalties are not a matter of precedent. The choice of penalty must be dictated by the individual circumstances of a case, not by a line by line comparison with another case."*[13]

65. Clearly the check-list, as enumerated above, is useful. It is not, however, to be regarded as an exhaustive list of factors to be considered. The *ultimate control* on any sentence is that it must be proportionate to the offence committed. A court is not permitted to impose a sentence greater than is warranted by the objective circumstances of the offending.[14]

66. Before turning to these various considerations in more detail, it is now necessary to summarise the agreed position of all of the parties concerned and set out their particular perspectives on the case.

The evidence of Mr Moore and Mr Ware

67. Mr Moore is fifty nine years of age. Prior to working for Longridge, he had a twenty-two year career in commercial sales and marketing, principally in the oil and lubricants industry, holding managerial positions. He has tertiary qualifications, specifically an MBA in sales and marketing. Mr Moore did not have actual experience or qualifications in building design prior to his relationship with Longridge. His understanding was that he was to be a salesperson, which was consistent with his prior experience.

68. Mr Moore responded to an advertisement placed in the Adelaide Advertiser newspaper which sought applications for *New Homes Sales Consultants Various Display Home Locations.* The successful applicant for the position was described as *a natural people person* with a *proven track record of sales achievement.* The advertisement promised *an earning structure that doesn't limit earnings -120k++*.

69. Following an interview with Mr Tuhou, Mr Moore obtained the position and executed the appointment letter, to which reference has previously been made, which stipulated the commission that he was to be paid in respect of each sale of a home made by him. The tenor of his evidence is that he was given to understand he would be able to achieve a reasonable income from the position.

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[13] *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* (supra) at [12]
[14] See *Veen v R (No 2)* (1988) 164 CLR 465 at 472

70. Prior to beginning his employment, Mr Moore was provided with a sales manual by Mr Tuhou detailing the various types of homes offered by the respondent and how they could be customised according to the requirements of the individual client concerned and how much each design and its various permutations cost.

71. The manual also dealt with matters arising once a contract for the construction of a home had been signed by a customer, such as how council planning approval and building certification was to be obtained. This, I take it, reflects the two stage payment of the commission envisaged in Mr Moore's employment with Longridge.

72. Whilst working for Longridge, for the period of around 10.5 months, Mr Moore worked 6 to 7 days per week. He was rostered to attend at the company's display villages for 12 to 13 days per month. On days he did not attend at a display village, he met with clients; attended on relevant local council officers; attended sales meetings; and liaised with head office about the preparation of housing plans.

73. In general terms, Mr Moore's responsibilities were as follows:

- Attending at display villages, as directed, to field general inquiries about Longridge's products and following up on these inquiries;
- Attending sales meetings at head office;
- Completing customer enquiry forms for future reference in respect of potential customers;
- Discussing with potential customers their individual needs and how Longridge's various homes could be customised and the implications of this for council building requirements;
- Chasing up potential sales leads received, either via the internet or telephone and directly at a display village;
- Liaising with customers regarding the cost of specifications sought to the company's pre-designed plans;
- Following the execution of a building contract, liaison with the relevant council and some site visits.

74. Mr Moore deposes that he had no managerial responsibilities and no authority to vary the price of any product offered by Longridge. It being the responsibility of the sales manager to sign off on plans and prices. In addition, he was not responsible for the supervision of any other member of staff. Rather, he was responsible for finding and following up his own sales leads and bringing them to fruition.

75. Mr Moore does not dispute that the understanding between him and Longridge was that he would be paid on the basis of commission only, which would be paid in two stages –firstly on execution of a building contract; and secondly, on receipt of required council approval.

76. Mr Moore attests that he received around 6 to 10 new leads each weekend and up to 3 on weekdays. However, he was only able to sign up four of his customers to building contracts, earning a total commission of $6,704.61. His last commission was received in late November of 2011.

77. By late February of 2012, Mr Moore reached the unavoidable conclusion that he was not going to earn enough money to support himself, if he remained employed by Longridge. Prior to this time, he had been financially supported by his wife, who is employed as a teacher. In these circumstances, he tendered his resignation.

78. Mr Ware is thirty two years of age. He has qualifications in real estate and a certificate in building and construction. These qualifications relate to administrative aspects of the building industry, rather than technical ones. He has experience, with another builder, as a sales consultant and as a contract administrator.

79. He responded to a similar advertisement to the one which caused the recruitment of Mr Moore and went through a similar interview and induction process with Mr Tuhou. It is Mr Ware's evidence that he was given to understand he would be able to earn between $70,000.00 and $80,000.00 per annum from selling Longridge's homes.

80. Mr Ware describes his employment responsibilities in similar terms to those provided by Mr Moore. However, unlike Mr Moore, he was not able to sell any homes during his period of employment with the respondent. He resigned from the respondent in August of 2012. Prior to this time, he had been financially supported by his wife, who is a personal trainer.

81. In all these circumstances, the respondent formally admits the following:

- Mr Moore and Mr Ware's employment was covered by the *Miscellaneous Award* as:
  - No other modern award is applicable;
  - Their work is not *traditionally covered* by another award, by virtue of its nature or seniority. Their roles were in *sales;*
  - They were not involved in an industry, specifically on-site building, engineering or civil construction. They were in *sales.*
  - They did not carry out responsibilities requiring a trade or equivalent qualification.[15]

Investigations conducted by the FWO

82. Following his resignation from Longridge, Mr Ware made a complaint to the FWO in respect of his employment with the respondent. Initially, a fair work inspector, Ms Clark was appointed to investigate the complaint. Upon her resignation from the FWO, the investigation was taken over by Mr Elston. The investigation took place between September 2012 and June of 2013.[16]

83. It is formally admitted by the FWO that the respondent *assisted and cooperated with* it during the relevant inquiries.[17] It is further agreed that during the period of the investigation Longridge indicated to the relevant officers of the FWO that it was of the view the award in

[15] See Agreed Facts at paragraph 35
[16] See affidavit of Ryan Elston filed on 16 April 2014
[17] See Statement of Agreed Facts at paragraph 40

question did not apply to Mr Moore and Mr Ware, as their employment was *award free*.[18]

84. However, notwithstanding this view, the respondent paid Mr Moore the sum of $8,384.54 and Mr Ware the sum of $8,216.16 on 2 May 2013, whilst the investigation remained on foot. It is Mr Lindsay's evidence that this was done as an act of good faith on Longridge's part and as a demonstration that it was not an irresponsible employer and wished, if at all possible, to resolve the issue with the FWO without recourse to litigation.

85. The FWO did not accept the submissions of Longridge that the award did not apply to Mr Moore and Mr Ware. As a consequence, these proceedings were commenced on 28 June 2013. The relevant statement of claim included a calculation of the amount the FWO asserted was and had been owed to the two employees concerned.[19]

86. As previously indicated, it was on 5 August 2014 that Longridge formally admitted that it had breached the award in the terms as alleged by the FWO. Thereafter, on 1 October 2014, it paid the remaining monies owed to Mr Moore and Mr Ware, as had been calculated by the FWO in the statement of claim.

The evidence of Longridge

87. Mr Neighbour has been involved in the construction industry since 1981. In particular, he has been involved in the provision of residential housing, in South Australia, since 1986. He is a member of the Housing Industry Association "the HIA"; the Master Builders Association; and the Urban Development Institute of Australia. Mr Neighbour has held executive positions on the HIA.

88. Mr Neighbour formed Longridge in 2001. Its principle business is the construction of new residential homes. It currently employs forty-two persons, including two sales managers, an operations manager and a construction manager. Longridge itself is a member of the HIA, which is the national peak body for the housing industry.

[18] See Annexure AL 3 to the affidavit of Mr Lindsay filed 23 October 2013
[19] See Appendix C to Statement of Claim

89. Historically, Longridge has employed a number of individuals as sales consultants. At relevant times, there were fourteen such consultants. Their role is to negotiate contracts for the sale of residential properties, to be constructed by Longridge, for members of the general public.

90. Historically, Longridge has paid a commission to its sales consultants, which is paid firstly, when contracts for the construction of homes are made and secondly, when construction actually commences. It did not pay these consultants any remuneration, other than commission, prior to the involvement of the FWO in its business.

91. Longridge operates a number of display villages, throughout suburban Adelaide and at Victor Harbour, at which prototypes of the various homes available to be constructed by it are displayed for the public. Sales consultants are expected to attend at the display village and answer queries from prospective customers, about these prototypes and how they can be modified and at what cost.

92. It is Mr Neighbour's evidence that, prior to these proceedings, it was his belief and understanding, arising from his involvement with the HIA, that sales consultants, employed in the housing industry, were not covered by an award. As such, it is his understanding that the industry practice is to pay sales consultants by way of commission.[20]

93. Mr Neighbour further deposes that his view of the industry practice was confirmed in discussions he held with the Regional Director of the HIA. It is also his evidence that he viewed both Mr Moore and Mr Were, by virtue of their experience, to be employees in roles of seniority, which put them outside of the scope of any industry or occupational modern award.[21]

94. In this context, it remains the position of Longridge that it was not unreasonable for it to consider that there was at least some level of ambiguity or uncertainty concerning the application of the award to the circumstances of Mr Moore and Mr Ware given current industry practice. In these circumstances, it is Mr Neighbour's evidence that the respondent gave earnest consideration as to viability of it seeking a definitive ruling from the court regarding the issue.

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[20] See affidavit of Paul Neighbour filed 24 October 2014 at paragraphs 9-11
[21] Ibid at paragraph 12

95. This included seeking detailed legal advice and guidance from the HIA. Whilst Longridge sought this advice, Mr Neighbour confirms that the respondent cooperated fully with the FWO's investigation. As such, it is the submission of the respondent that it has not acted in a cavalier or blasé fashion.

96. Mr Lindsay provides corroborative evidence to Mr Neighbour. He has been general manager of Longridge since 2006. He shares Mr Neighbour's understanding that sales consultants, in the housing industry, are not regarded, within the industry, as being covered by an award and have historically been paid by means of commission.

97. Mr Lindsay regards the various sales consultants, employed by Longridge, as being senior employees, who enjoy a high degree of autonomy. Given the prior sales experience of both Mr Moore and Mr Ware, he regarded them as having such seniority.

98. In this context, Mr Lindsay deposes that for the financial year ending 30 June 2013, Longridge's highest paid sales consultant earned $122,000.00, with the mean earnings of all consultants being $72,000.00. In the financial year ending 30 June 2014, the highest paid consultant earned $173,000.00, with the mean earnings being $69,000.00.[22]

99. Mr Lindsay arranged for this information to be provided to the FWO together with the respondent's view that, in these circumstances, it did not consider that the award in question applied to Mr Moore and Mr Ware. This was done in October and December of 2012.

100. In the latter correspondence, Mr Lindsay made a detailed submission as to why Longridge was of the opinion that the *Miscellaneous Award* did not apply to its sales consultants, who were engaged in selling new homes. In the main, these submissions centred on the view that such sales consultants were to be regarded as senior employees, who had not been traditionally covered by awards.

[22] See affidavit of Andrew Lindsay filed 23 October 2014 at paragraph 17

101. In his submission, Mr Lindsay provided the procedural history to the award, which was created by the Full Bench of the Industrial Relations Commission on 4 December 2009, following a request from the Minister for Workplace Relations made on 28 March 2008.[23]

102. The Minister's request was for the creation of a modern award, which did not cover employees covered by another award but who performed work, which had been *historically regulated by awards (including State awards).* The Commission was directed not to cover "*those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have not traditionally been covered by awards."*[24]

103. In this context, the Full Bench made reference, in its deliberations, to section 143(7) of the FWA, which reads as follows:

> *Employees not traditionally covered by awards etc.*
>
> *(7) A modern award must not be expressed to cover classes of employees:*
>
> *(a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or*
>
> *(b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.*
>
> *Note: For example, in some industries, managerial employees have traditionally not been covered by awards.*

104. In his submission, Mr Lindsay emphasised the expressed intention to exclude senior employees from the award, whose duties had not hitherto been subject to the coverage of awards. Mr Lindsay wrote as follows:

> *"In our view, the role performed by our sales consultants is not covered by any other modern award. Further, to the best of our knowledge, the role performed by sales consultants has never been regulated by an industrial award in South Australia. These positions have historically been award free. It is also important*

[23] See *Award Modernisation – Decision – re Stage 4 modern awards* [2009] AIRCFB 945
[24] Ibid at [146]

to note that these positions have existed for decades and have not recently emerged as part of a new industry or new occupation."[25]

105. It was at this stage that Mr Lindsay arranged for the first payments to be made to Mr Moore and Mr Ware, on the basis that liability for breaching the award was denied. In this context, Mr Lindsay has deposed that, on behalf of Longridge, he does not believe that the respondent was attempting to be difficult or to avoid its industrial responsibilities.

106. Rather Longridge believed that it had a legitimate argument regarding the application of the award to the employees concerned and prior to the involvement of the FWO genuinely believed that it did not. Mr Lindsay deposed as follows:

> *"Until recently, I did not believe that the Miscellaneous Award 2010 covered sales consultants employed by the Longridge Group…the classifications in the Miscellaneous Award did not seem to describe the type of work carried out by sales consultants…"*[26]

107. Mr Lindsay further emphasises that there was no deception, at relevant times, on the part of the respondent, that payment for sales consultants would be other than by way of commission. He deposes that in his experience the payment of commission did enable a sales consultant to be *"handsomely renumerated – well in excess of the Miscellaneous Award."*[27]

108. The central theme of Mr Lindsay's evidence is that he did not consider the position of a sales consultant in respect of the sale of new homes was one which was covered by an award. Given the admission of liability, by Longridge and the tender of the statement of agreed facts, his evidence and the similar evidence of Mr Neighbour, has not been tested through any process of cross-examination.

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[25] See Annexure AL 3 to the affidavit of Andrew Lindsay (supra)
[26] Ibid at paragraph 23
[27] Ibid at paragraph 34

109. However, the FWO has not formally objected to the tender of the affidavits deposed to by either Mr Neighbour or Mr Lindsay. In this context, Ms Walker, counsel for the FWO indicated as follows, in respect of the correspondence passing between Longridge and the FWO:

> *"The Ombudsman accepts that there was no authority relating to the interpretation or coverage of this award, and it's clear that there was a considered disagreement – considered opinions by each party as to its application."*[28]

110. From this, I take it, the FWO does not contend the opinions of either Mr Lindsay or Mr Neighbour, in respect of the employment situation of Mr Moore and Mr Ware, can be described as being either capricious or disingenuous.

111. However, in fairness to Ms Walker, she also submits that there is no evidence to indicate that Longridge sought any specific advice, regarding the application of the Fair Work legislation, particularly the introduction of minimum entitlements in the National Employment Standard, to its overall business.

112. Ms Walker describes the legislation as a *major issue* in the 2007 federal election and afterwards. The implication being that it was naïve of Longridge to consider that it could simply keep on doing what it had always done, given the widespread publicity generated by the legislation in question. Clearly Longridge has a different view about the publicity surrounding the introduction of the award, which Mr Manos, counsel for Longridge, describes as being *generic* in nature. I will return to this issue in due course.

113. In his affidavit, Mr Neighbour has expressed his "*sincere regret that Mr Moore and Mr Ware were underpaid* [by Longridge]." [29] He further states that he endeavours to ensure that the respondent is subject to a high standard of governance, particularly in terms of its adherence to applicable legal obligations and responsibilities.

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[28] See transcript of proceedings at page 10
[29] See affidavit of Mr Neighbour (supra) at paragraph 22

114. It is his evidence that the underpayment of both Mr Moore and Mr Ware was unintentional and has now been fully rectified. He further deposes that, in the *vast majority of cases* the respondent remunerated its sales consultants at a rate well above the minimum wage safety net. As such, he categories the respondent's conduct as being marked by inadvertence, which reduces its overall culpability.

115. Mr Neighbour indicates that Longridge has now put in place systems to ensure that all its sales consultants are paid in accordance with the award and the appropriate employment records are kept. The respondent has further undertaken an independent audit of its systems to ensure that they are all fully compliant with industrial laws.

116. It is Mr Neighbour's view that the misapprehension of Longridge that the award did not apply to its sales consultants is a wide-spread one within the building industry. As a consequence, Mr Neighbour has formally written to the HIA to advise it of these proceedings, particularly that sales consultants of new homes are to be regarded as award-covered employees. The implication of this evidence being that Longridge is to be regarded as a responsible corporate citizen in its industry.

Consideration

(a) Grouping of offences

117. To recapitulate, the FWO contends that there should be three groups of offences, for the purposes of calculating penalty. Firstly, the underpayment of the wages; failure to add casual loading; and failure to pay, at least monthly. Secondly, the failure to pay penalty rates for Saturday, Sunday and Public Holidays. Thirdly, the failure to keep proper records. As previously indicated, this approach would create a maximum penalty of $82,500.00.

118. On the other hand, Longridge contends that there should be two groups of offences. Firstly, the failure to pay wages to Mr Moore and Mr Ware, under the award, should be grouped together. Secondly, the record keeping account. This would create a maximum penalty of $49,500.00.

119. Mr Manos, counsel for Longridge, submits that the failure to pay Mr Moore and Mr Ware their due entitlements, under the award, arose from one course of conduct, in the sense envisaged by section 557(1) of the Act, namely that the respondent honestly but fallaciously considered that their employment was award free.

120. The logic of the submission being that the evidence, which the respondent has mustered, indicates that it has not chosen knowingly to comply with some items of the award and ignore others for some occult but nefarious reason of its own. Rather, it is submitted that it must be axiomatic that the respondent's total ignorance of the application of the award, in itself, has caused it to breach the six specific terms of the award vis-à-vis Mr Moore and Mr Ware and, as such, there is *one course of conduct*.

121. Essentially, it is contended that the episode constitutes one multi-faceted episode of offending on the part of Longridge. In my view, there is some logic to the submission. If Longridge had known the award applied, it seems unlikely that it would have chosen to pay, by way of example, the minimum award, but not the casual loading or the public holiday penalty. In this context, I accept that the relevant officers of Longridge were ignorant of the application of the award.

122. However, that is not an end to the matter. The court is required to consider the overall legislative intent of the section in question, section 557(1) of the FWA. The nature of the section has recently been closely considered by the Full Court of the Federal Court in *Rocky Holdings Pty Ltd & Anor v Fair Work Ombudsman.*[30]

123. That was a case broadly analogous to the current one in the sense that the appellant employer concerned had admitted numerous breaches of a modern award in respect of such things as the payment of penalty rates for work on Saturdays and Public Holidays in contravention of section 45 of the FWA.

124. In *Rocky Holdings* the Full Court rejected the analysis propounded by the respondent for a number of specified reasons, significant ones of which can be summarised as follows:

[30] *Rocky Holdings Pty Ltd & Anor v Fair Work Ombudsman* [2014] FCAFC 62

- The key legislative intent of the FWA is to ensure, through an effective penalty regime, compliance with the minimum terms of relevant modern awards, not to reduce the number of contraventions of civil penalty provisions; see [12].

- It is the provision of the Act, set out in subsection 557 (2), which is relevant to the course of conduct delineated in subsection (1); see [13].

- Subsections (1) and (2) are ambiguous. They are capable of referring to the existence of the identified provision or the substance of the identified provision. As such, it is acceptable to have regard to the relevant Explanatory Memorandum, in resolving the ambiguity.[31] The Explanatory Memorandum to the FWA, in respect of section 557(1), does not support Longridge's analysis; see [14].

- The object and purpose of section 557 is to ensure that an offender is not punished twice for what is essentially the same criminality. What is or is not *the same criminality* is an exercise requiring close consideration. However *bare identity of motive* is seldom sufficient to establish the same criminality in separate and distinct acts of offending; see [18].

- It is wrong to characterise the various contraventions of the modern award in question as being merely particulars of an overall breach of section 45; see [24].

- It potentially confusing to apply principles dealing with the punishment and sentencing of criminal offences to the application of civil penalties; see [25].

- Such an analysis has the prospect of leading to arbitrary and capricious outcomes. By way of example an employer who had contravened a wide range of award provisions, leading to widespread underpayment of a number of employees would be subject to the same maximum penalty as an employer who had contravened one award provision, in respect of one employee on one occasion. This is counter-intuitive; see [26].

[31] See *Acts Interpretation Act (1901)* (Cth) at section 15AB(1)(b)

125. Of these reasons, in my view, the last one is the one most applicable to the circumstances of the current case. The court must beware of groupings of offences, which lead to capricious or artificial outcomes, bearing in mind that each contravention relates to a separate and distinct breach of a term of the FWA.

126. In any event, no matter how the various counts are ultimately cut and diced, the court's fundamental obligation is to impose a penalty in keeping with the overall seriousness of the offending in question. In this context, the possible acceptance, by the court, that the respondent's action followed from one collective episode of inadvertence may be relevant to such an assessment, but should not dictate the grouping of contraventions.

127. In this context, what was said by Reeves J in *Blandy v Coverdale NT Pty Ltd* is relevant:

> *"In Gibbs v City of Altona* Gray J *made a number of observation about the operation of section 178(2), which I consider apply equally to the similar provisions of section 719(2). First, each separate obligation found in an award is to be regarded as a separate 'term'; secondly, whether, whether a separate obligation is a separate term is determined by whether it is in substance a different obligation; and thirdly, where different terms impose cumulative obligations or obligations that substantially overlap, that may be taken into account by imposing a nominal (or no) penalty for some breaches and a substantial penalty for others…"* (Citations removed)[32]

128. The court is required to give recognition to the distinct legal nature of each breach arising under section 45 of the Act. Section 557 operates to allow groupings of contraventions of the same obligation or term of an industrial instrument, not the entire range of terms breached under that one instrument.

129. In *FWO v Ramsey Food Processing Pty Ltd (No 2)* Buchanan J considered the application of section 719(2) of the *Workplace Relations Act*, the legislative predecessor of section 557. He said as follows:

[32] *Blandy v Coverdale NT Pty Ltd* [2008] FCA 1533 at [56]

> *"On one view, the failure to make any of the required payments arose from a single course of conduct. They all arose from a determination by the respondents that no payment would be made upon the termination of employment of any of the employees, or the employees as a group. However, this approach gives insufficient attention to the separate legal character of the three forms of obligation earlier identified. I am satisfied that each of those forms of obligation requires separate recognition. I am not, however, satisfied that each individual example of defiance of an obligation is permitted separate recognition. In my view the individual examples, constituted by the failure to make payments to particular individual employees, arise out of a course of conduct in each of the three instances. Any penalty must be assessed taking that into account."*[33]

130. In all these circumstances, I propose to adopt the grouping of contravention advocated by the FWO. The commonality in the first group being that it relates to a failure to pay the minimum wage; the second group relates to work performed out of hours; the third group to record keeping. In my view, this grouping recognises the separate legal quality of the obligations breached by Longridge.

(b) Discount for admission and cooperation

131. It is common ground that, by its admission of culpability, Longridge has saved a significant amount of court time and avoided a significant expenditure of public monies. I also accept that the respondent provided full disclosure of the documents, which it had, to the relevant investigators employed by the FWO.

132. As such, it did not obstruct the investigation in any way, although, throughout the investigative process, it held a fundamentally different view, to the FWO, of the application of the award in question to the circumstances of Mr Moore and Mr Ware. Neither I nor the FWO is in a position to argue that, throughout the investigatory process, Longridge believed, on appropriate legal advice, that it had a defence to the charges against it. As such, I accept that it was neither being capricious or difficult for the sake of being difficult. Rather, as it was entitled to do, it carefully considered its position and sought appropriate advice.

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[33] *FWO v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408 at [2] The passage was approved by the Full Court in *Rocky Holdings* (supra) at [18]

133. The FWO contends that the admission of wrongdoing, made by Longridge came belatedly, after it had been put to the expense of filing its evidence in chief and after its initial proposal for the tender of a statement of agreed facts had been rebuffed by the respondent. This is so. It was only in August of 2014, around the time of the aborted first trial, that the admission of liability was made.

134. However, in May of 2013, the respondent, in an act of good faith, paid a significant component of the monies due to the two employees in question, although it continued to maintain it was not legally liable for breaching the award. It has since paid all the monies due to the gentlemen concerned. As such, Longridge would wish for the court not to regard it as a callous or irresponsible employer, so far as its industrial obligations are concerned.

135. As Mansfield J pointed out in *FWO v Lifestyle SA Pty Ltd* *"[w]illingness to cooperate with the investigation process is to be differentiated form reserving its legal position…[an] initial denial…does not equate to a lack of cooperation."*[34]

136. In all these circumstances, in my view, the respondent is entitled to a significant discount on the penalty, which would otherwise be levied against it. This discount should not be as great as that sought by the respondent (20%) given that the admission of liability came after the prosecution case had largely been prepared.

137. In my view, a discount in the dimension proposed by the FWO (10%) appears about right. However, I should not fail to give proper weight to the fact that Mr Moore and Mr Ware were spared the trauma of giving evidence; they each have been fully recompensed, although somewhat belatedly and in instalments; and by tender of agreed facts, court time and legal costs have been saved.

(c) Nature and Extent of the conduct in question

138. The parties have a fundamentally different view of the overall gravity of the offending in question. From the respondent's perspective, the application of the award to the circumstances of Mr Moore and Mr Ware was unclear. It would characterise the role of the two employees

[34] *FWO v Lifestyle SA Pty Ltd* [2014] FCA 1151 at [122]

as having a senior managerial quality. It also places reliance on the fact that, prior to the creation of the award, sales consultants, in the housing industry, in South Australia, did not have award coverage.

139. One of the consequences of the award modernisation process, inaugurated by the FWA, was to reduce the number of operative awards from 1500 to 122 modern awards. In this context, I accept that the *Miscellaneous Award* is generic in nature. Given the title of the award and the former history of sales consultants, in the housing industry in South Australia, there were no obvious signposts that the award applied.

140. In these circumstances, I also accept that, in the period from 1 January 2010 onwards, the application of the award, to the situation of Mr Moore and Mr Ware, was an issue about which informed minds might easily disagree, given the absence of any published decisions about the issue. In addition, it is relevant to the question of overall culpability that the HIA itself was unaware of the change and did not advise its members about it.

141. As such, I accept that the respondents did not turn a blind eye to the application of the award or conduct itself with wilful blindness towards the circumstances of Mr Moore and Mr Ware vis-à-vis the application of the award. However, Longridge must have been aware that neither gentleman was performing particularly well in the role allocated to them respectively and each was certainly falling far short of the average level of wages enjoyed by other sales consultants employed by it, described by Mr Lindsay.

142. In my view, this undercuts, to a significant degree, the assertion that Mr Moore and Mr Ware were to be regarded as senior employees. Mr Ware earned nothing. Mr Moore earned significantly less than the minimum award. Senior employees do not ordinarily find themselves in such a position. The aim of modern awards, such as the *Miscellaneous Award* is to provide a safety net for vulnerable employees.

143. Notwithstanding the level of their previous respective experience, in my view, both Mr Moore and Mr Ware, by dint of their lack of aptitude to sell the respondent's various products, are to be regarded as

vulnerable employees. Their mutual vulnerability was demonstrated over a period of months rather than weeks. In addition, I accept the submission of the FWO that neither Mr Moore nor Mr Ware can be described as having a managerial role at Longridge. They were employed in sales.

144. In this capacity both Mr Moore and Mr Ware worked long and incommodious hours, including at weekends and on public holidays. As previously indicated, one of the objects of modern awards, is to ensure proper recompense for the disruption caused by such hours. It is largely for this reason, that it is appropriate that there be two groups of offences, for the purposes of penalty,

145. Mr Moore and Mr Ware provided services for Longridge, for which they were not remunerated. They manned the respondent's display villages; they fielded inquiries from the general public; they acted as the public face of Longridge. They were not at home awaiting a call from a prospective purchaser and so able to do other things.

146. Rather, they were captives to their employment and, as such, provided a valuable service for Longridge. In all these circumstances, in my view, the respondent had some level of responsibility to its under-performing employees, which it failed to discharge during the period in question.

147. It is not an answer to these criticisms for Longridge to assert that other of its sales consultants prospered under the commission system. The objective of the modern award system is that all employees should have available to them an appropriate safety net of minimum employment standards.

148. Nor is it an answer for the respondent to assert that there was no overt or particular exploitation of the employees in question, because, from Longridge's perspective, no (or few) homes were sold and it did not benefit, in material terms, from the employment of Mr Moore and Mr Ware. For the reasons provided above, notwithstanding the lack of sales, Longridge did benefit from its employment of Mr Moore and Mr Ware.

149. However, I also accept that neither gentleman can be described as being newly arrived in Australia or having limited experience of employment. To the contrary, both have tertiary qualifications and have previously been successful in their chosen careers. This is not a case were an employer has wantonly exploited the vulnerability of a person, who is significantly disadvantaged by way of language or background.

150. Without doubt both Longridge, on the one hand and Mr Moore and Mr Ware on the other hoped that they had entered into a mutually beneficial arrangement, which would see as many homes as possible being sold and the maximum amount of commission paid. As such, I do not accept that Longridge went out of its way to get *something for nothing* from either Mr Moore or Mr Ware. Rather it seems to me the employment relationship did not work out, as either party had intended.

151. It seems to me to be an unavoidable inference, arising from the extent of time that both Mr Moore and Mr Ware were willing to *stick out* their employment with Longridge and that both hoped, in time, things would turn around for them and they would begin to make some headway in their sales careers.

152. The circumstances of this case are idiosyncratic and can be distinguished from other examples of underpayment involving highly vulnerable workers, such as cleaners; hospitality staff; fruit pickers; or shop attendants in convenience stores; to name a few. Very often such employees are recently arrived migrants to this country, who lack skills. As such, they are particularly vulnerable to exploitation by the unscrupulous.

153. These factors must be balanced against each other, as does my acceptance of Longridge's submission that the failure to pay the award was the result of one piece of inadvertence on its part. In the overall scheme of things, the sums of money, of which Mr Moore and Mr Ware were deprived, are not huge amounts of money. Nor have a large number of employees been affected by the respondent's conduct. As such, the harm done has been able to be remedied.

154. However, this is something of a simplistic reduction because, from the personal perspective of both Mr Moore and Mr Ware, given their mutual financial dependence on their spouses in the period in question, the sum owed to each of them is to be regarded as significant.

155. As such, these cannot be regarded as being trivial breaches nor is the period of time involved a short one – in total it is around nineteen months. The gentlemen in question worked for periods of months, rather than of weeks or days, before they each *threw in the towel* with Longridge and sought alternative employment.

156. In all these circumstances, I have come to the conclusion that the breaches of the award, in respect of non-payment, should be regarded as neither trivial nor breaches of a more significant level of seriousness. They should fall within the middle range and, in the imposition of penalty, it should be recognised that although the non-payment and penalty breaches are distinct in nature, there is a significant overlap between them.

157. The failure to keep proper records falls into a discrete category of its own. I accept that it is a serious breach as the keeping of proper records is integral to the protection of employees and the maintenance of the objectives of the FWA. The keeping of proper and accurate employment records enables regulators, such as the FWO, to carry out their statutory obligations effectively.[35]

158. Longridge admits that its record keeping was not compliant with the applicable legal regime. It concedes that there is no reasonable excuse for its conduct, but by way of explanation indicates that it did not have a dedicated human resources employee at relevant times. In my view, it is a significant breach of the applicable legislation.

159. The respondent describes it as a *"victimless error"* by which I conclude it is submitted that the proper entitlements of Mr Moore and Mr Ware have been able to be properly calculated. It is also submitted that steps have been taken to ensure that the appropriate records are maintained in future.

[35] See *FWO v Orwill Pty Ltd & Ors* [2011] FMCA 730 at [21]

160. The FWO contends that an appropriate penalty, for this offence, is somewhere between 35% and 45% of the statutory maximum (after a discount for cooperation). The respondent contends the range is between 15% and 25%, again after a discount for cooperation.

161. In my view, given the seriousness of the offence and its importance to overall administration of industrial law in this country, it is not appropriate for the court to regard it as a trivial matter or one deserving a significant level of leniency. It is, however, a first offence and there is no evidence to indicate that it was committed by the respondent with the aim of defeating or concealing its obligations to either the regulator or the employees in question.

(d) Similar Conduct

162. The respondent is entitled to be treated as a person with no history of having breached any industrial instruments or awards in the past. As such, I regard the respondent as being hitherto a good corporate citizen.

(e) Size of the business concerned

163. I have scant evidence regarding the extent of the respondent's business, other than it employs forty-two employees. It is not a public company and does not trade outside of South Australia. As such, it is not to be regarded as some form of corporate behemoth, which should be held to a greater standard of accountability because of its size and the extent of its geographical reach.

164. But, in this context, I must also bear in mind that small business enterprises employ a large number of persons in this country. The employees of small enterprises are equally deserving of protection as those of multi-national companies. What is important is for the court to impose a penalty at a *"meaningful level"*.[36]

(f) Deliberateness of the breaches

165. The FWO accepts that Longridge did not set out deliberately to underpay Mr Moore and Mr Ware. It contends, however, that its conduct was more than inadvertence. On the other hand, Longridge

[36] See *Kelly v Fitzpatrick* (supra) at [28]

contends that it fell into error in respect of an *evolving and complicated area of the law.*

166. By its plea, Longridge acknowledges that it has transgressed the applicable provisions of the FWA. It has done so after closely considering its position. It is entitled to credit as a consequence of its previous good record as a responsible employer. In this context, in my view, it is significant that, prior to the period of the advent of modern awards, sales consultants in the new home industry were habitually paid by way of commission.

167. In my view, this factor significantly mitigates the seriousness of the various breaches in question. I also accept that the application of the award was not well known within the building industry post January 2010 and although there was a great deal of publicity about the inauguration of a new system of industrial regulation in Australia at the time, there was no specific *trigger,* in the title of the award in question, to indicate its application to the building industry and the situation of sales consultants in particular.

(g) Involvement of senior management

168. Longridge is not a large concern. The respondent's managing director and general manager must assume responsibility for concluding that the employment of Mr Moore and Mr Ware was award free. In the context of this case, this is not a significant factor.

(h) Contrition

169. Contrition, regret and remorse are human emotions. The concept of remorse, as a mitigating factor in the imposition of penalty on sentencing is a concept borrowed from the criminal law. In *ACE Insurance Limited v Trifunovski (No 2)*[37] Perram J said as follows:

> *"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*

[37] *ACE Insurance Limited v Trifunovski (No 2)* [2012] FCA 793 at [113] – [114] approved by Mansfield J in *Lifestyle SA* (supra) at [136]

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."

170. In this context, it is relevant to consider any corrective action taken by Longridge and its level of cooperation with the process of investigation. For the reasons already outlined, I accept that Longridge did cooperate with the investigation into this matter. More importantly, I accept that it has changed its behaviour. The monies due to Mr Moore and Mr Ware have been paid and the respondent has put in place steps to ensure that no other of its employees is underpaid in future.

171. I accept that Longridge had engaged an external consultant to conduct an audit of its employment practices to ensure that they are compliant with applicable industrial legislation. It has also taken steps to ensure it keeps proper employment records and its employees are paid at least monthly.

172. In addition, Mr Neighbour has taken steps to inform others, in his industry, of the application of the award to sales consultants engaged to sell new homes, by means of his letter to the HIA. I agree with Mansfield J's view that these are *very practical methods* by which a corporation may exhibit contrition.

173. In addition Mr Neighbour has publically expressed regret, for Longridge's behaviour, in his affidavit material filed in court. He and other senior members of the respondent attended at court to *face the music.* True it is that no actual apology has been made to Mr Moore and Mr Ware but I approach the case on the basis that the respondent is contrite.

(i) General deterrence

174. One of the central purposes of imposing a civil penalty, in proceedings such as these, is to deter other employers from embarking on a similar course of conduct to that engaged upon by the transgressing employer. The role of general deterrence in fixing appropriate penalty is

demonstrated by what Lander J said in *Ponzio v B & P Caelli Constructions Pty Ltd*[38] namely:

> *"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. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty...* "(citations removed)

175. It is important to deter other employers from not paying the minimum wage safety net or paying employees the required loadings arising from work performed on weekends or on public holidays. These are two of the principles objectives of the FWA and the system of modern awards it inaugurated. A warning to others, in this regard, must be issued by the court.

176. However, I must also observe the idiosyncratic features of this case and not impose a crushing penalty on Longridge. The penalty must be sufficient to convey the message to other employers of the importance of adherence to applicable modern awards in their payment of employees.

(j) Specific deterrence

177. Considerations relevant to specific deterrence focus on the individual circumstances of the offender concerned and require some degree of prognostication as to the likelihood of re-offending. The most reliable tool for such prognostication is usually the attitude expressed by the party in question.[39]

178. In this case, given the corrective action taken by the respondent, in my view, there is not a substantial need for specific deterrence. This is

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[38] *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [93] approved by Mansfield J in *Lifestyle SA* (supra) at [154]

[39] See *Plancor Pty Ltd v Liquor Hospitality & Miscellaneous Union* (2008) 171 FCR 357 at [37] per Gray J

particularly so given that I accept that Longridge did not deliberately set out to underpay any of its employees. The respondent also does not have a prior history of non-compliance with industrial regulations.

Conclusions

179. As previously indicated, the maximum penalty available for the three sets of breaches, as I have grouped them, is one of $82,500.00. The FWO seeks a penalty between $39,352.50 and $51,975.00. In arithmetical terms, a penalty of between 48% and 63% of the maximum. The respondent proposes a much lesser penalty, primarily on the basis that the breaches were not calculated; it has a good record; and it has made amends and cooperated with the regulator.

180. It has been said that the task of sentencing is one of the hardest judicial tasks, as it requires the synthesis of competing consideration to arrive at a penalty, which is just and appropriate. Necessarily it is a process of intuitive synthesis. It is useful to think in terms of percentages, but sentencing is not a purely arithmetical process.

181. I have come to the conclusion that the group of offences relating to the failure to pay the minimum award; the casual loading; and to pay in monthly instalments should attract a penalty of $16,500.00, which is 50% of the maximum penalty.

182. The second group of offences, relating to the failure to pay penalty rates arising from work performed on Saturdays, Sundays and Public Holidays are separate from the first group, but related in the sense that they arose because of the ignorance of Longridge regarding the application of the entire award to the employment of Mr Moore and Mr Ware.

183. In these circumstances, a lesser penalty is appropriate to this group. I have come to the conclusion that a penalty of $10,000.00 is appropriate, which is around 30% of the maximum penalty, is an appropriate one.

184. The failure to keep proper records is a stand-alone offence and is a significant one. The requirement to keep proper records is central to the enforcement of employee's rights under the FWA. I consider a penalty of $6,600.00 is an appropriate one, which is 40% of the maximum.

185. These amounts total $33,100.00. To this sum, I would apply a discount of 10% to reflect cooperation and the admission of facts. With the application of the discount, the penalty so calculated amounts to $29,790.00.

186. Having fixed this penalty, the final task for the court is to step back and consider whether, in aggregate, the penalty imposed represents an appropriate response to the conduct, which led to the various breaches in question.

187. In this regard, I note the lack of deliberation on the part of Longridge and the fact that two employees were involved and the amount of their underpayment was around $30,000.00, which has now been paid to each of them in full.

188. I also note the respondent's cooperation with the investigation process and ultimately admitted its culpability. This admission was belated, but I accept that there was some level of uncertainty about the application of the award in question and different minds might well have reached different conclusions about the issue.

189. Although, is unlikely that the respondent will offend again, there is a need for general deterrence. In all these circumstances, I am satisfied that the penalty, so calculated, is an appropriate one and cannot be regarded as crushing.

190. Pursuant to section 546(3)(a) of the FWA the sum is to be into the Consolidated Revenue Fund of the Commonwealth of Australia. It is also appropriate that the declaratory orders sought by the FWO are made. I will allow sixty days to pay the penalty.

191. For all these reasons, the orders of the court will be as set out at the commencement of these reasons for judgment.

I certify that the preceding one hundred and ninety-one (191) paragraphs are a true copy of the reasons for judgment of Judge Brown

Associate:

Date: 28 January 2015