FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v QUINCOLLI PTY LTD & ANOR [2013] FMCA 17

INDUSTRIAL LAW – Breaches of the *Workplace Relations Act 1996* (Cth) and the *Fair Work Act 2009* (Cth) and a State award – consideration of issues of penalty.

Fair Work Act 2009 (Cth), ss.12, 539, 546, 547, 550, 557, 559, 712
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)
Workplace Relations Act 1996 (Cth), ss.4, 182, 713, 717, 719, 722, 726, 728, 841

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Blandy v Coverdale NT Pty Ltd [2008] FCA 1533
Department of Health and Ageing v Pagasa Australia Pty Ltd [2008] FCA 1545
Fair Work Ombudsman v Gavin Francis Sheehan trading as Greenvale Rose Farm [2012] FMCA 344
Fair Work Ombudsman v Orwill Pty Ltd & Ors [2011] FMCA 730
Fair Work Ombudsman v Quincolli Pty Ltd & Anor [2011] FMCA 139
Fair Work Ombudsman v Quincolli Pty Ltd & Anor [2012] FMCA 712
Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2) [2012] FCA 408
Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216
Kelly v Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd trading as Pangaea Restaurant & Bar [2007] FMCA 7
McIver v Healey [2008] FCA 425
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70
Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union [2008] FCAFC 170
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor [2009] FMCA 38

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	QUINCOLLI PTY LTD
Second Respondent:	JUDITH MADGE POTTER

File Number:	SYG1898 of 2010
Judgment of:	Driver FM
Hearing date:	6 September 2012
Delivered at:	Sydney
Delivered on:	18 February 2013

REPRESENTATION

Counsel for the Applicant:	Ms C Howell
Solicitors for the Applicant:	Fair Work Ombudsman

The Second Respondent appeared in person and on behalf of the First Respondent

ORDERS

(1) The first respondent pay Linda Jean Albany $3,545.67 made up as follows:

(a) $1,161.23 representing underpaid basic rate of pay pursuant to s.182(1) of the *Workplace Relations Act 1996* (Cth) (Workplace Relations Act);

(b) $770.56 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the *Clerical and Administrative Employees (State) Award* [AN120664] (Clerical NAPSA);

(c) $738.93 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $218.85 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(e) $656.10 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(2) The first respondent pay Melanie Rachel Barry $6,367.72 made up as follows:

(a) $2,105.15 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $83.63 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $1,737.33 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $964.11 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $393.93 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $1,083.57 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(3) The first respondent pay Wendy Buck $41.87 made up as follows:

(a) $22.80 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act; and

(b) $19.07 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(4) The first respondent pay Karen Maree Defries $1,400.12 made up as follows:

(a) $597.69 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $1.70 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $216.72 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $246.31 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(e) $337.70 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(5) The first respondent pay Theresa Johanna Duits $12,191.20 made up as follows:

a) $2,967.28 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

b) $175.40 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

c) $3,329.61 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

d) $3,293.49 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

e) $501.65 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

f) $90.14 representing non payment of overtime pursuant to clause 10.4.1 of the Clerical NAPSA; and

g) $1,833.63 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(6) The first respondent pay Amy Rose Farnham $2,403.82 made up as follows:

(a) $647.50 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $411.84 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(c) $885.97 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(d) $458.51 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(7) The first respondent pay Fiona Maree Fehrenbach $247.62 made up as follows:

(a) $185.64 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act; and

(b) $61.98 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(8) The first respondent pay Maria Assunta Gambone $7,050.05 made up as follows:

(a) $2,106.54 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $211.83 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $1,494.79 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $1,220.92 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $817.04 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $1,198.93 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(9) The first respondent pay Jillianne Fay Garratty $14,160.14 made up as follows:

(a) $2,689.52 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $240.85 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $3,716.97 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $4,468.64 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $1,627.93 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $1,416.23 representing annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(10) The first respondent pay Maureen Mary Heron $6,061.11 made up as follows:

(a) $1,745.79 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $54.05 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $1,507.45 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $1,315.33 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $525.24 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $913.25 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(11) The first respondent pay Janel Maree Hyam $16,119.91 made up as follows:

(a) $3,002.76 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $1,113.13 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $4,523.80 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $3,778.67 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $1,026.35 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(f) $631.82 representing non payment of overtime pursuant to clause 10.4.1 of the Clerical NAPSA; and

(g) $2,043.38 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(12) The first respondent pay Naomi Hyam $1,303.16 made up as follows:

(a) $271.24 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $107.72 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $263.11 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $437.92 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(e) $223.17 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(13) The first respondent pay Sarah Jane Irvine $14,692.90 made up as follows:

(a) $3,803.13 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $554.75 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $2,929.10 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $3,501.28 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $1,775.26 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $2,129.38 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(14) The first respondent pay Luseane Kanongata'a $3,649.73 made up as follows:

(a) $1,140.19 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $104.93 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $1,055.63 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $523.44 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $202.16 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $623.38 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(15) The first respondent pay Megan Kelly $76.76 made up as follows:

(a) $41.80 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act; and

(b) $34.96 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(16) The first respondent pay Christine Mary Kiely $11,124.57 made up as follows:

(a) $2,427.52 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $438.12 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $2,659.75 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $2,465.90 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $1,128.91 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $2,004.37 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(17) The first respondent pay Leanne Karen Laverty $2,986.11 made up as follows:

(a) $1,744.90 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $5.36 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA; and

(c) $1,235.85 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(18) The first respondent pay Jade Leece $1,661.99 made up as follows:

(a) $708.51 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $313.04 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(c) $84.45 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $175.08 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(e) $380.91 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(19) The first respondent pay Jo-Ann Lewis $8,462.93 made up as follows:

(a) $3,026.88 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $1,442.16 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(c) $1,492.70 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $891.57 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(e) $1,609.62 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(20) The first respondent pay Nadine Wendy Maguire $43.61 made up as follows:

(a) $23.75 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act; and

(b) $19.86 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(21) The first respondent pay Tina Lee Malady $8,306.74 made up as follows:

(a) $1,718.03 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $165.53 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $2,082.91 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $2,610.87 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $758.68 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $970.72 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(22) The first respondent pay Christopher Rene Martens $5,454.58 made up as follows:

(a) $1,751.48 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $10.03 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $1,127.20 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $203.68 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $1,146.48 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $1,215.71 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(23) The first respondent pay Barbara Ann Maybury $3,784.03 made up as follows:

(a) $1,291.91 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $2.56 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $710.36 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $830.42 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $218.85 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $729.93 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(24) The first respondent pay Paul Vincent Meagher $9,401.13 made up as follows:

(a) $3,806.76 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $806.60 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $243.83 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $925.44 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $1,171.14 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $2,447.36 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(25) The first respondent pay Tania Morandini $961.40 made up as follows:

(a) $497.78 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $1.52 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $199.77 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $73.22 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(e) $189.11 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(26) The first respondent pay Anne Patricia Nute $835.89 made up as follows:

(a) $255.07 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $187.83 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(c) $67.11 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $112.53 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(e) $213.35 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(27) The first respondent pay Belinda Michelle Oxford $5,652.12 made up as follows:

(a) $1,966.84 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $23.05 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $1,571.21 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $1,020.42 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $100.72 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $969.88 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(28) The first respondent pay Leanne Toni Perry $1,060.61 made up as follows:

(a) $400.88 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $0.76 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $250.44 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $73.22 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(e) $335.31 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(29) The first respondent pay Lynette Richardson $17,467.04 made up as follows:

(a) $4,640.29 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $440.10 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $4,257.00 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $4,395.32 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $1,270.96 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $2,463.37 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(30) The first respondent pay Susan Carol Roy $10,695.70 made up as follows:

(a) $2,861.55 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $66.54 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $2,639.73 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $2,491.25 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $1,019.88 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $1,616.75 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(31) The first respondent pay Diane Margaret Sprott $150.03 made up as follows:

(a) $81.70 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act; and

(b) $68.33 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(32) The first respondent pay Tracy Kaye Walsh $12,291.99 made up as follows:

(a) $2,009.97 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $799.59 representing underpayment of shift loading pursuant to clause 10.3.3 of the Clerical NAPSA;

(c) $2,682.65 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $3,531.51 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(e) $1,324.31 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(f) $1,943.96 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

(33) The first respondent pay Kane Wilkins $3,767.11 made up as follows:

(a) $1,073.57 representing underpaid basic rate of pay pursuant to s.182(1) of the Workplace Relations Act;

(b) $667.32 representing underpayment of Saturday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(c) $749.05 representing underpayment of Sunday loading pursuant to clause 10.3.6 of the Clerical NAPSA;

(d) $758.67 representing underpayment of Public Holiday loading pursuant to clause 10.3.6 of the Clerical NAPSA; and

(e) $518.50 representing non payment of annual leave loading pursuant to clause 14.1.1 of the Clerical NAPSA.

Penalties – first respondent

(34) Pursuant to s.719(1) of the Workplace Relations Act (for contraventions prior to 1 July 2009) and s.546(1) of the *Fair Work Act*

2009 (Cth) (Fair Work Act) (for contraventions on and from 1 July 2009), a penalty of $15,000 be imposed on the first respondent in respect of its contraventions of s.182(1) of the Workplace Relations Act.

(35) Pursuant to s.719(1) of the Workplace Relations Act (for contraventions prior to 1 July 2009) and s.546(1) of the Fair Work Act (for contraventions on and from 1 July 2009), a penalty of $12,000 be imposed on the first respondent in respect of its breach of subclause 10.3.3 of the Clerical NAPSA.

(36) Pursuant to s.719(1) of the Workplace Relations Act (for contraventions prior to 1 July 2009) and s.546(1) of the Fair Work Act (for contraventions on and from 1 July 2009), a penalty of $12,000 be imposed on the first respondent in respect of its breach of subclause 10.3.6 (Saturday, Sunday and public holiday shifts) of the Clerical NAPSA.

(37) Pursuant to s.719(1) of the Workplace Relations Act (for contraventions prior to 1 July 2009) and s.546(1) of the Fair Work Act (for contraventions on and from 1 July 2009), a penalty of $12,000 be imposed on the first respondent in respect of its breach of subclause 10.4.1 of the Clerical NAPSA.

(38) Pursuant to s.719(1) of the Workplace Relations Act (for contraventions prior to 1 July 2009) and s.546(1) of the Fair Work Act (for contraventions on and from 1 July 2009), a penalty of $12,000 be imposed on the first respondent in respect of its breach of subclause 14.1.1 of the Clerical NAPSA.

(39) Pursuant to s.719(1) of the Workplace Relations Act (for contraventions prior to 1 July 2009) and s.546(1) of the Fair Work Act (for contraventions on and from 1 July 2009), a penalty of $18,000 be imposed on the first respondent in respect of its contravention of s.712(3) of the Fair Work Act.

Penalties – second respondent

(40) Pursuant to s.719(1) of the Workplace Relations Act (for contraventions prior to 1 July 2009) and s.546(1) of the Fair Work Act

(for contraventions on and from 1 July 2009), a penalty of $5,000 be imposed on the second respondent in respect of her involvement in contraventions of s.182(1) of the Workplace Relations Act.

(41) Pursuant to s.719(1) of the Workplace Relations Act (for contraventions prior to 1 July 2009) and s.546(1) of the Fair Work Act (for contraventions on and from 1 July 2009), a penalty of $4,000 be imposed on the second respondent in respect of her involvement in breach of subclause 10.3.3 of the Clerical NAPSA.

(42) Pursuant to s.719(1) of the Workplace Relations Act (for contraventions prior to 1 July 2009) and s.546(1) of the Fair Work Act (for contraventions on and from 1 July 2009), a penalty of $4,000 be imposed on the second respondent in respect of her involvement in breach of subclause 10.3.6 (Saturday, Sunday and public holiday shifts) of the Clerical NAPSA.

(43) Pursuant to s.719(1) of the Workplace Relations Act (for contraventions prior to 1 July 2009) and s.546(1) of the Fair Work Act (for contraventions on and from 1 July 2009), a penalty of $4,000 be imposed on the second respondent in respect of her involvement in breach of subclause 10.4.1 of the Clerical NAPSA.

(44) Pursuant to s.719(1) of the Workplace Relations Act (for contraventions prior to 1 July 2009) and s.546(1) of the Fair Work Act (for contraventions on and from 1 July 2009), a penalty of $4,000 be imposed on the second respondent in respect of her involvement in breach of subclause 14.1.1 of the Clerical NAPSA.

(45) Pursuant to s.719(1) of the Workplace Relations Act (for contraventions prior to 1 July 2009) and s.546(1) of the Fair Work Act (for contraventions on and from 1 July 2009), a penalty of $5,500 be imposed on the second respondent in respect of her involvement in contravention of s.712(3) of the Fair Work Act.

Ancillary orders

(46) The payments referred to in Orders (1) – (33) above be paid within 60 days of the making of this order.

(47) Pursuant to s.722 of the Workplace Relations Act and s.547 of the Fair Work Act that the first respondent pay interest on the amounts payable pursuant to orders (1) – (33) above.

(48) Pursuant to s.726 of the Workplace Relations Act and s.559(1) of the Fair Work Act, if the first respondent is unable to locate any employee for the purpose of making any payment pursuant to order (1) - (33) above, the amount is be paid by the first respondent into the Consolidated Revenue Fund of the Commonwealth within 60 days of the making of this order.

(49) Pursuant to s.841(a) of the Workplace Relations Act and s.546(3)(a) of the Fair Work Act that the penalties imposed on the first and second respondents be paid into the Consolidated Revenue Fund of the Commonwealth.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG1898 of 2010

FAIR WORK OMBUDSMAN
Applicant

And

QUINCOLLI PTY LTD
First Respondent

JUDITH MADGE POTTER
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

2. I have given two previous judgments in these proceedings. In the first judgment[1], I found that the first respondent (Quincolli) had breached provisions of the *Clerical and Administrative Employees (State Award)* (Clerical NAPSA), s.182(1) of the *Workplace Relations Act 1996* (Cth) (Workplace Relations Act) and s.712(3) of the *Fair Work Act 2009* (Cth) (Fair Work Act). I made declarations in relation to those contraventions. I also made a declaration that the second respondent (Mrs Potter) was involved in the contraventions by Quincolli.

3. In the second judgment[2], I refused an Application in a Case by the respondents to re-open the case in relation to liability based upon asserted new evidence. I subsequently refused an oral application by

[1] *Fair Work Ombudsman v Quincolli Pty Ltd & Anor* [2011] FMCA 139.
[2] *Fair Work Ombudsman v Quincolli Pty Ltd & Anor* [2012] FMCA 712.

the respondents that I recuse myself from further involvement in the proceedings on the grounds of asserted apprehended bias.

4. This judgment deals with the remaining question of penalty in relation to the breaches identified in the first judgment and also the question of moneys due to identified employees of Quincolli who I found in the first judgment had been underpaid.

5. Background facts were dealt with in the first judgment. Briefly, Quincolli, at the relevant time, operated a contract telephone call centre in Nowra, New South Wales. The call centre provides a live answering service for overflow and after hours contacts for a range of clients including a number of local government bodies. Mrs Potter was, at the relevant time, the managing director and 50 per cent shareholder of Quincolli. Quincolli employed 33 employees at the call centre who are affected by these proceedings.

6. In my first judgment I found that Quincolli failed to pay the employees the correct rates of pay in accordance with the Clerical NAPSA and that Mrs Potter was involved in the contraventions.

7. The applicant Fair Work Ombudsman (Fair Work Ombudsman) has calculated the total value of the underpayments due to the employees identified in the further amended statement of claim at $193,419.36[3]. The amounts due to the employees have not yet been paid.

The evidence and submissions

8. The evidence received in relation to the issue of liability remains before me. I received additional affidavit evidence from the parties bearing upon the Application in a Case to re-open the issue of liability and also as to penalties.

9. The parties have made written and oral submissions in relation to penalties.

[3] The specific underpayments were detailed in Schedule B to the Fair Work Ombudsman's submissions on liability, and have been revised slightly down.

Consideration

The employees' entitlements

10. I accept the Fair Work Ombudsman's calculations as to the underpayments due to the affected employees. Those underpayments are the consequence of my findings on the application of the Clerical NAPSA and the breaches by Quincolli (and Mrs Potter) of it. The respondents continue to dispute their liability to make good those underpayments but that is because they dispute the findings of the Court in relation to liability in the first judgment.

11. I find that the amounts calculated by the Fair Work Ombudsman are due to the affected employees. There is no reason to withhold those payments from the employees. I will make the orders sought by the Fair Work Ombudsman in relation to the payment of the underpayments identified.

12. The remaining issue is what, if any, penalty should be imposed in addition to the orders for the monetary payments to the employees.

13. In my first judgment at [85]-[94] I made general observations in relation to the basic principles that the Court would apply to fixing penalties under the legislation. I adhere to those views. In addition, I accept the Fair Work Ombudsman's submissions relating to the applicable legislative provisions relating to penalty and the general principles to be applied.

Legislative provisions relating to penalty

14. The following provisions are relevant to the imposition of penalties.

Workplace Relations Act

15. Whilst the Workplace Relations Act was repealed on 1 July 2009, the relevant Workplace Relations Act contraventions pleaded in these proceedings continue to operate after the repeal date pursuant to Item 13 of Part 3 of Schedule 18 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Transitional Act).

16. The power to impose a penalty in respect of contraventions of ss.182 and 728 of the Workplace Relations Act arises from s.719(1) of the Workplace Relations Act. Subsection 719(1) of the Workplace Relations Act provides that an eligible court (which includes this Court) can impose a penalty in respect of a contravention of an "applicable provision" by a person bound by that provision. Subsection 717(a)(ii) of the Workplace Relations Act defines "applicable provision" as including a term of the Australian Fair Pay and Conditions Standard, which relevantly includes s.182 of the Workplace Relations Act.

17. The power to impose a penalty in respect of contraventions of clauses 10.3.3, 10.3.6, 10.4.1 and 14.1.18 the NAPSA also arises from s.719(1) of the Workplace Relations Act. Clause 43, Schedule 8 of the Workplace Relations Regulations provides that a Notional Agreement Preserving a State Award may be enforced as if it were a collective agreement. Subsection 717(a)(iv) of the Workplace Relations Act defines "applicable provision" as including a term of a collective agreement[4].

Fair Work Act

18. Section 712(3) of the Fair Work Act provides that a person served with a notice to produce must not fail to comply with the notice.

19. The power to impose a penalty in respect of contraventions of s.712(3) of the Fair Work Act arises from s.546 of the Fair Work Act. Section 546 of the Fair Work Act provides that an eligible court (which includes this Court) can impose a penalty if the court is satisfied that the person has contravened a civil remedy provision, which includes s.712(3) of the Fair Work Act.[5]

Accessorial liability under the Workplace Relations Act and Fair Work Act

20. Section 728 of the Workplace Relations Act and s.550 of the Fair Work Act provide that involvement in a contravention is treated in the same

[4] Item 3, s.717 of the Workplace Relations Act.
[5] Section 712(3) of the Fair Work Act is a civil remedy provision by virtue of s.539 of the Fair Work Act.

way as an actual contravention. The provisions referred to above apply to the imposition of penalties in respect of accessorial liability under s.728 of the Workplace Relations Act and s.550 of the Fair Work Act.

Maximum penalties under the Workplace Relations Act and the Fair Work Act

21. Section 719(4) of the Workplace Relations Act and s.539(2) of the Fair Work Act (by virtue of s.546(2)) prescribe the maximum penalties that may be imposed by this Court for each contravention of the Workplace Relations Act and the Fair Work Act, to be, in the case of an individual, 60 penalty units and the case of a body corporate, 300 penalty units[6].

22. Section 4(1) of the Workplace Relations Act and s.12 of the Fair Work Act provide that "penalty unit" has the same meaning as in the *Crimes Act 1914* (Cth) (Crimes Act). Section 4AA(1) of the Crimes Act defines "penalty unit" to be $110.

23. The effect of these provisions is that the maximum penalty that may be imposed by the Court for each contravention found is:

    a) $33,000.00 for each contravention of an applicable provision or civil remedy provision by Quincolli (as a body corporate); and

    b) $6,600.00 for each contravention of an applicable provision or civil remedy provision by Mrs Potter (as an individual).

Principles Relevant to determining penalty

24. The Fair Work Ombudsman submits and I accept that the following principles should be taken into account in determining the question of appropriate penalty.

[6] Section 546(2) of the Fair Work Act.

25. First, the Court should identify the separate contraventions involved. Each breach of each separate obligation found in the Workplace Relations Act and Fair Work Act is a separate contravention[7].

26. Secondly, the Court should consider whether any of the breaches taken together constitute a single course of conduct such that multiple contraventions should be treated as a single contravention[8].

27. Thirdly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the respondents did[9]. This task is distinct from and in addition to the final application of the "totality principle" [10].

28. Fourthly, consider the appropriate penalty for the single breaches and, if relevant, each group of contraventions, taking into account all of the relevant circumstances.

29. Finally, consider whether it is an appropriate response to the conduct which led to the breaches[11]. The Court should apply an "instinctive synthesis" in making this assessment[12]. This is known as an application of the "totality principle".

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

[8] Subsection 719(2) of the Workplace Relations Act and s.557(1) of the Fair Work Act.

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

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

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

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

Course of conduct provisions under the Workplace Relations Act and the Fair Work Act.

30. Both the Workplace Relations Act and the Fair Work Act provide that multiple breaches of particular provisions may in certain circumstances be treated as a single contravention.

31. Subsection 719(2) of the Workplace Relations Act provides that where the same person commits two or more breaches of an "applicable provision" and the breaches arise out of the same course of conduct by that person, the breaches are taken to constitute a single breach.

32. Section 557 of the Fair Work Act provides that two or more contraventions of a specific civil penalty provision (listed in s.557(2) of the Fair Work Act) are taken to constitute a single contravention if the contraventions are committed by the same person and the contraventions arose out of a course of conduct by the person.

33. The parties are in dispute as to the extent to which the identified contraventions should be treated as a single course of conduct. The Fair Work Ombudsman's submissions correctly identify the relevant authorities.

34. As set out above, multiple breaches of particular provisions may be treated as a single contravention by operation of s.719(2) of the Workplace Relations Act and s.557 of the Fair Work Act. The predecessor to s.719(2) of the Workplace Relations Act was discussed by Gray J in *Gibbs*[13] at [24] as:

> *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 for each 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 separate obligation found 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*

[13] *Gibbs v Mayor, Councillors and Citizens of the City of Altona* [1992] FCA 374.

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."

35. In *Blandy v Coverdale NT Pty Ltd*[14] Reeves J said at [56]:

> *In* Gibbs v City of Altona *[1992] FCA 374 ('Gibbs') at 223, Gray J made a number of observations about the operation of s 178(2), which I consider apply equally to the similar provisions of s 719(2). First, each separate obligation found in an award is to be regarded as a separate "term"; secondly, 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 ...*

36. I accept that the respondents should have the benefit of the course of conduct provisions in s.719(2) of the Workplace Relations Act and s.557(2) of the Fair Work Act in relation to multiple breaches of a provision of the legislation or the Clerical NAPSA in respect of multiple employees.

37. The Fair Work Ombudsman contends that the contraventions of clause 10.3.6 of the Clerical NAPSA relating to Saturday, Sunday and public holiday rates should be treated as separate contraventions. The Fair Work Ombudsman relies upon the decision of the Full Federal Court in *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union*[15] at [33]:

> *… By its specific terms, s 719(2)(a) relates to two or more breaches "of an applicable provision". An applicable provision is defined relevantly in s 717(a)(iv) as being "a term" of a collective agreement. This meaning is confirmed by the concluding words of s 719(2), which signify that the multiple breaches must "be taken to constitute a single breach of the term." It is only multiple breaches of a single term, arising from a course of conduct, that are required to be treated as a single breach of that term. In particular cases, there might be a dispute as to what amounts to a "term" of an instrument, particularly when provisions are*

[14] [2008] FCA 1533.
[15] [2008] FCAFC 170.

segmented by means of numbering and lettering. There can be no such argument in the present case. The terms of the Award on which the Union relied clearly imposed separate obligations. When reference was made in the claim to two separate provisions in the clause numbered 38, the industrial magistrate chose to treat them as a single breach. Whether or not s 719(2) obliged him to do so, it was open to him to do so, as the magistrate had done in Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith *[2008] FCAFC 8 (2008) 165 FCR 560.*

38. The issue is debatable but, in my view, clause 10.3.6 of the Clerical NAPSA is a single clause dealing with the single issue of penalty rates for weekends and public holidays. The penalty rates vary but the obligation is to pay whatever penalty rate applies to the particular day. The breaches of that clause should be treated as a single course of conduct.

39. There are, accordingly, the following contraventions to consider:

Provision contravened	**Description of contravention**	**Number of Contraventions for Quincolli**	**Number of Contraventions for Mrs Potter**
Section 182 of the Workplace Relations Act; item 5, Schedule 16 of the Transitional Act	Failure to pay employees the basic guaranteed periodic pay	**1** Max penalty $33,000	**1** Max penalty $6,600.00
Section 719(1) and 719(6) of the Workplace Relations Act, by virtue of breaching clause 10.3.3 of the Clerical NAPSA; sub-item 2(1) of	Failure to pay a shift allowance	**1** Max penalty $33,000	**1** Max penalty $6,600.00

Schedule 16 of the Transitional Act			
Sections 719(1) and 719(6) of the Workplace Relations Act, by virtue of breaching clause 10.3.6 of the Clerical NAPSA; sub-item 2(1) of Schedule 16 of the Transitional Act	Failure to pay time and one-half for work performed on a Saturday or on a public holiday, and time and three-quarters for work performed on a Sunday	**1** Max penalty $33,000	**1** Max penalty $6,600.00
Sections 719(1) and 719(6) of the Workplace Relations Act, by virtue of breaching clause 10.4.1 of the Clerical NAPSA; sub-item 2(1) of Schedule 16 of the Transitional Act	Failure to pay overtime rates	**1** Max penalty $33,000	**1** Max penalty $6,600.00
Sections 719(1) and 719(6) of the Workplace Relations Act, by virtue of breaching clause 14.1.1 of the	Annual Leave loading	**1** Max penalty $33,000	**1** Max penalty $6,600.00

Clerical NAPSA; sub-item 2(1) of Schedule 16 of the Transitional Act			
Section 712(3) of the Fair Work Act	Failure to pay produce documents	**1** Max penalty $33,000	**1** Max penalty $6,600.00
Total Contraventions		**6**	**6**
Total Maximum Penalty		**$198,000.00**	**$39,600.00**

Factors relevant to determining penalties

40. The parties are in dispute concerning the extent to which criticism levelled by the respondents at the Fair Work Ombudsman over its investigation of the then asserted breaches is relevant. I dealt with that issue in the first judgment at [24]-[29]. I did not regard the asserted maladministration in the office of the Fair Work Ombudsman as relevant to the outcome of the proceedings in relation to liability but conceded that those allegations might be relevant in relation to penalty.

41. The Fair Work Ombudsman conducted two investigations into a complaint made by a confidential complainant. The first investigation was flawed and had to be repeated. The investigation generated significant interest on the part of the United Services Union, which made representations to the then Minister for Employment and Workplace Relations. This was, apparently, the first investigation carried out by the Fair Work Ombudsman following the Fair Work amendments to the Workplace Relations Act and, as I noted in my first judgment, the investigation generated considerable heat. It was conducted in an atmosphere of hostility between the confidential complainant and the union, and the respondents. Mr and Mrs Potter believed then, and still believe now, that they were treated unfairly, even maliciously. I have seen no evidence of malice on the part of the Fair Work Ombudsman. However, the atmosphere of hostility, and the

understandable defensive attitude taken by Quincolli and Mrs Potter are, in my view, relevant matters to take into account in considering the assessment of quantum of penalty.

42. I will now consider the issues in relation to Quincolli and Mrs Potter.

Circumstances and nature and extent of the conduct

43. I accept the Fair Work Ombudsman's submission that the underpayment contraventions represent a failure to provide basic and important conditions and entitlements under the legislation. The purpose of that legislation is to provide a safety net which ensures adequate minimum entitlements to employees, particularly those who are vulnerable or are on low income rates. The legislation is also designed to provide an even playing field for all employers with regard to employment costs. That policy has an extremely long and important history. In his second reading speech on the *Conciliation and Arbitration Bill 1903* former Prime Minister Alfred Deakin said[16]:

> *Our object is to see that, where other circumstances are equal, one and all shall pay the same and that a fair rate of wage for the same services; that competition, which is the life-blood of trade, shall not drain the life-blood of men, may not be pushed to that extreme, and that the advantage of the employer on the one side shall not be gained over the employer on the other, at the expense of the men, women and children whom he employs. Equality of treatment in each business is the first end which is sought to be attained. Traders, investors, and capitalists, as between each other should fight fairly.*

44. Contraventions of these basic entitlements need to be taken seriously. In the present case those contraventions involved more than 30 employees.

45. I accept that Mrs Potter believed (incorrectly) that the Clerical NAPSA did not apply. She had attempted to contract out of the relevant award provisions through the use of Australian Workplace Agreements (AWAs) but her efforts were not effective. Mrs Potter received advice from the Australian Industry Group (which she found unhelpful) but I

[16] Australia, House of Representatives, *Parliamentary Debates* (22 March 1904) p 18,764 (Prime Minister Alfred Deakin, Second Reading Speech on the *Conciliation and Arbitration Bill*).

do not think that that advice is relevant. As this Court found in *Fair Work Ombudsman v Gavin Francis Sheehan trading as Greenvale Rose Farm*[17] at [41] an employer cannot escape liability for contraventions of admittedly complex legislation by claiming reliance on advice provided to them by others. On the same basis of reasoning, a failure to follow advice (which may or may not be right) in relation to these complex provisions should not increase liability.

46. I also take into account that Quincolli was operating in an industry in which there is significant overseas competition and where overseas competitors have a cost advantage. As I observed in my first judgment, Quincolli sought to structure its own business on a low cost, competitive basis.

Nature and extent of the loss

47. The amount involved is almost $200,000. As I have already noted, the underpayments relate to important minimum standards.

Similar previous conduct

48. The Fair Work Ombudsman concedes that there is no evidence that Quincolli or Mrs Potter have previously engaged in similar conduct.

Whether the breaches arose out of one course of conduct

49. As set out above, I have identified six breaches. The respondents' liability has been reduced by the grouping of multiple contraventions in reliance upon s.719(2) of the Workplace Relations Act and s.557 of the Fair Work Act.

Size and financial circumstances of the business

50. The Fair Work Ombudsman claims that Quincolli's business is a substantial one and it is a medium sized employer. The respondents present Quincolli's business as a small business. The issue is complicated by the fact that Mr and Mrs Potter operate several

[17] [2012] FMCA 344.

companies providing a range of call centre services, including overseas.

51. Over the relevant period the call centre at Nowra employed between 30-40 employees within the local area. The business has been growing. Whether the business, which currently services some 320 clients, is a small or medium business is not, in my view, of great significance. As the Federal Court said in *Kelly v Fitzpatrick* 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.*

52. I do not have any reliable evidence before me about Quincolli's capacity to pay either the amounts due to the employees or penalties. It appears that, as a result of a company restructure, the business is now conducted by another entity, but I do not know what funds are available to Quincolli. Neither is there any evidence that Mrs Potter would be unable to pay the penalties payable by an individual.

53. I accept the Fair Work Ombudsman's submission that, regardless of the size or financial circumstances of the employer, sanctions should be imposed at a meaningful level. As this Court observed in *Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor*[18] at [28]:

> *Notwithstanding financial hardship that an employer may be experiencing,* [in] Lynch v Buckley Sawmills Pty Ltd *(1984) 3 FCR 503, 508 Keely J said:*
>
> > "In this connection it is important that the respondent – and other employers bound by the award or by other awards under the Act – understand the importance of complying with an award and it follows that any decision taken by them which is regarded as affecting their obligations to comply with particular provisions of the award or the award generally should only be taken after careful consideration. They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial

[18] [2009] FMCA 38.

> penalty will be imposed in respect of a breach found by a court to have been committed."

Deliberateness of the breaches

54. The respondents were aware as a result of the Fair Work Ombudsman's investigation that there was an issue concerning the application of the Clerical NAPSA. They took the view that the Clerical NAPSA did not apply, either because of its terms or because they relied upon the purported AWAs they had attempted to put in place. The Fair Work Ombudsman submits that the respondents must be taken to have known by July 2009 that the Clerical NAPSA applied. It is certainly true that they knew by then that there was a serious issue concerning the application of the Clerical NAPSA. The issue was, however, not resolved until my first judgment. The issue is not a simple one.

55. The respondents submit that they are now paying their employees in accordance with the *Contract Call Centres Award 2010* (Modern Call Centre Award). I have no evidence to the contrary.

Involvement of senior management

56. I accept the Fair Work Ombudsman's submission that Mrs Potter, who was a director, secretary and manager of the Well Done Group at all relevant times, was responsible for the determination of terms and conditions of employment to apply to the employees. I accept that Mrs Potter had relevant knowledge of the circumstances relating to the contraventions. I maintain the view I expressed in my first judgment concerning the knowledge and conduct of Mrs Potter.

Contrition, corrective action and co-operation with authorities

57. The Fair Work Ombudsman concedes that the respondents have co-operated with it during its investigation. However, Quincolli did not comply with the Notice to Produce issued by the Fair Work Ombudsman. That is a contravention in its own right and I do not think it would be appropriate to use that contravention against the respondents in relation to other contraventions.

58. It is relevant that the underpayments identified in the first judgment have not been rectified.

59. I accept the Fair Work Ombudsman's submission that Quincolli has not provided any evidence pointing to any element of contrition. The respondents maintain that there is no liability and reserve their rights of appeal.

Ensuring compliance with minimum standards

60. I have already referred to the importance of the relevant conditions of service.

General deterrence

61. I accept that the need for general deterrence is a relevant factor[19]. Lander J in *Ponzio v B & P Caelli Constructions Pty Ltd*[20] at [93] said:

> *There are three purposes at least for imposing a penalty: punishment; deterrence; and rehabilitation. The punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment:* R v Hunter *(1984) 36 SASR 101 at 103. Therefore the circumstances of the offence or contravention are especially important. The penalty must recognise the need for deterrence, both personal and general. In regard to personal deterrence, an assessment must be made of the risk of re-offending. In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend:* Yardley v Betts *(1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty:* R v Thompson *(1975) 11 SASR 217. In some cases, although hardly in this type of contravention, rehabilitation is an important factor.*

[19] See *Mason v Harrington Corporation Pty Ltd trading as Pangaea Restaurant & Bar* [2007] FMCA 7 at [26]-[59].
[20] (2007) 158 FCR 543.

62. I have already found that penalties should be imposed at a meaningful level. One reason for that is to provide the element of deterrence.

Specific deterrence

63. I do not accept the Fair Work Ombudsman's submission that there is a high need for specific deterrence. The Clerical NAPSA has now been replaced by the Modern Call Centre Award and I have no reason to believe that current employees of the business are not being paid in accordance with the provisions of that Award.

Totality

64. I have concluded that penalties should be imposed against Quincolli in the mid range. The Fair Work Ombudsman submits that there should be no discounting of penalties on the basis of the totality principle. I agree. The circumstances of the contraventions, to which I have already referred, are relevant and a further discount under the totality heading would involve duplication of the consideration of those issues.

The Notice to Produce contravention

65. I accept the Fair Work Ombudsman's submissions in relation to this aspect of the case.

66. Quincolli failed to comply with a notice to produce documents and records (NTP) issued pursuant to s.712(1) of the Fair Work Act.

67. NTPs are a key aspect of the investigative power vested in Fair Work Inspectors by the Fair Work Act. Non-compliance with NTPs has the capacity to frustrate the effectiveness of the exercise of those powers and consequently, the Fair Work Ombudsman's capacity to enforce rights and obligations arising under the Fair Work Act[21].

68. In this case, the Fair Work Ombudsman demonstrated reasonable attempts to secure voluntary co-operation from the respondents, including by the provision of a fair opportunity to produce relevant

[21] Cf *Fair Work Ombudsman v Orwill Pty Ltd & Ors* [2011] FMCA 730 at [21]; *Department of Health and Ageing v Pagasa Australia Pty Ltd* [2008] FCA 1545 at [56].

documentation and records. Notwithstanding those efforts, the respondents failed to comply with the NTP[22].

69. The NTP was issued on 5 July 2010 and no challenge was raised or made as to its validity. The NTP required the documents specified to be produced by 19 July 2010.[23] Without prior explanation or reasonable excuse the respondents failed to comply with the NTP and by letter dated 16 July 2010 (received on 20 July 2010) Mrs Potter stated that she would not comply with the NTP[24]. That letter was an expression of defiance.

70. Quincolli then indicated in a further letter that it did not have the resources to respond to the NTP or the documents requested were not available[25]. That was an attempt to provide after the fact justification for the non compliance. I do not find that letter at all persuasive.

71. The respondents have asserted in their submissions on penalty that the reason for non compliance with the NTP was fear of self-incrimination[26]. This submission is unsupported by evidence and would not be relevant to penalty, given particularly the terms of s.713(1) of the Fair Work Act.

72. It may be that the respondents in their written submissions seek to establish that there was a "reasonable excuse" for non compliance[27]. To the extent that this submission is directed to s.712(4) of the Fair Work Act, a respondent is not permitted to raise this issue in a penalty hearing once liability has been established.

73. The Fair Work Ombudsman relies upon [82] of the first judgment to support the conclusion that the contravention was deliberate, with the intention of frustrating the applicant's investigation.

74. The failure to comply with the Notice to Produce was intentional and deliberate. There are no mitigating factors. Quincolli treated its obligations in this regard as entirely optional or discretionary. The need

[22] This matter is dealt with at [71]–[82] of the first judgment.
[23] Affidavit of Darren Lang sworn on 4 November 2010 at [43], [45] and tab 22.
[24] Affidavit of Darren Lang sworn on 4 November 2010 at tab 25.
[25] Affidavit of Darren Lang sworn on 4 November 2010 at tab 28
[26] Respondents Penalty Submissions filed on 2 July 2012 tab 17, page 1 at [7]
[27] Respondents Penalty Submissions filed on 2 July 2012 tab 17 page 1-3

for both general and specific deterrence in respect of this contravention is high.

The accessorial liability contraventions

75. Mrs Potter was centrally involved in the running of the business and had the capacity to set and adjust the remuneration of the employees. I accept that she was the controlling mind behind the contraventions of Quincolli. It is appropriate in the circumstances that penalties should be imposed on her as well as on the company. I reject her contention that this involves "double jeopardy". As the Federal Court said in *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)*[28] at [8]:

> *A submission was made by the respondents that some consideration should be given to reducing the amount of the penalty imposed on one or other of the respondents to account for the intimate connection between the actions of the first respondent and the conduct of the second respondent. As I understood the submission, it was that there was a risk of punishing twice for the same conduct – i.e. punishing both the first and second respondents for the conduct of the second respondent. The submission appeared to rely on the judgment of Mansfield J in* Australian Prudential Regulation Authority v Holloway *(2000) 45 ATR 278; [2000] FCA 1245, although I do not understand how it could do so. In that judgment Mansfield J fixed lesser penalties on Mr Holloway, the "alter ego" of Holloway & Co, than on Holloway & Co. In the legislative scheme which his Honour was applying no distinction was made between the maximum penalty that could be applied to corporations and the maximum penalty that could be applied to individuals. That is not the case here. The present legislative scheme fixes quite different (and much lower) penalties for individuals than for corporations. The culpability of each respondent must be assessed individually and in the context set by the maximum penalty prescribed in each case. I reject the suggestion, if this was what was intended, that either or both respondents might have the benefit of any reduction in penalty because they were jointly, as well as individually, culpable.*

76. I accept the Fair Work Ombudsman's submission that Mrs Potter's culpability is high. I conclude that penalties should be imposed upon her at the mid to high range.

[28] [2012] FCA 408

Conclusion

77. I have concluded that orders should be made for the payment of the amounts due to the affected employees and, in addition, that Quincolli should pay penalties totalling $81,000 and Mrs Potter should pay penalties totalling $26,500. I will make the orders sought by the Fair Work Ombudsman in somewhat modified form.

78. Any application for costs or any other ancillary orders should be made within 28 days of the orders that I make today.

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

Associate:

Date: 18 February 2013