FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v RAINBOW PARADISE PRESCHOOL & ANOR *[2015] FCCA 1652*

Catchwords:
INDUSTRIAL LAW – Application by Fair Work Ombudsman relating to conceded breaches of *Fair Work Act 2009* and *Workplace Relations Act 1996* in relation to underpayment of wages and other minimum entitlements – Respondent company a kindergarten and day care centre for disadvantaged children – Statement of Agreed Facts filed but contents disputed – imposition of penalties – relevant considerations.

Legislation:

Fair Work Act 2009 (Cth), ss.12. 14, 44(1), 45,87(2), 90, 117, 323(1), 535, 536(1), 546(1), 551, 557(1), 682, 712(3), 729
Workplace Relations Act 1996 (Cth), ss.4, 6, 182(1), 234, 235, 547, 551, 719(1), 719 719(6), 729, 841

Cases cited:
Australian Competition and Consumer Commission v Eternal Beauty Products Pty Ltd [2012] FCA 1124
Australian Competition and Competition Commission v Leahy Petroleum Pty Ltd & Ors (No. 3) (2005) 215 ALR 301
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
Briginshaw v Briginshaw (1938) 60 CLR 336
Brobbel v S & C Mack Pty Ltd [2008] FMCA 1355
Browne v Dunn (1893) 6 R 67 (HL)
Commissioner of Patents v Sherman (2008) 172 FCR 394
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission (2007) 162 FCR 466
Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd (2010) 186 FCR 88
Cousins v Merringtons Pty Ltd (No. 2) [2008] VSC 340
Director of the Fair Work Building Industry Inspectorate v Luka Tippers & Excavation Pty Ltd & Anor [2014] FCCA 1459
Environment Protection Authority v Ramsey Food Processing Pty Ltd [2009] NSWLEC 152
Fair Work Ombudsman v Bosen Pty Ltd [2011] VMC 81
Fair Work Ombudsman v Contracting Plus Pty Ltd & Anor (2011) 205 IR 281
Fair Work Ombudsman v Cuts Only The Original Barber Pty Ltd [2014] FCCA

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Fair Work Ombudsman v Happy Cabby Pty Ltd & Anor [2013] FCCA 397
Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (in liq.) & Ors [2013] FCCA 52
Fair Work Ombudsman v La Kosta Childcare Centre and Kindergarten Pty Ltd & Ors [2012] FMCA 551
Fair Work Ombudsman v Maclean Bay Pty Ltd (2012) 200 FCR 57
Fair Work Ombudsman v Mildura Battery Co Pty Ltd & Anor [2014] FCCA 192
Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (No. 2) [2013] FCA 582
Fair Work Ombudsman v Ross Geri Pty Ltd & Ors [2014] FCCA 959
Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq.) & Anor [2012] FCA 479
Fair Work Ombudsman v Tuscan Landscape Co Pty Ltd & Ors [2014] FCCA 1421
Gibbs v Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216
Hoare v R (1989) 167 CLR 348
Kelly v Fitzpatrick (2007) 166 IR 14
Lawlor v Personal Hire Pty Ltd (2009) 179 IR 91
Lynch v Buckley Sawmills Pty Ltd (1984) 3 FCR 503
Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant and Bar [2007] FMCA 7
McIver v Healey [2008] FCA 425
Mornington Inn Pty Ltd (ACN 116 830 703) v Jordan (2008) 168 FCR 383
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd & Ors (1992) 110 ALR 449
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285
Qantas Airways Ltd v Gama (2008) 167 FCR 537
R v Valentini (1980) 48 FLR 416
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Rocky Holdings Pty Ltd v Fair Work Ombudsman (2014) 221 FCR 153
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550
Stuart v Construction, Forestry, Mining and Energy Union & Anor (2010) 185 FCR 308
Stuart-Mahoney v Construction, Forestry, Mining and Energy Union (2008) 177 IR 61
Trade Practices Commission v CSR Ltd (1991) ATPR 41-076
Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd (1978) ATPR 40-091
Veen v R (1979) 143 CLR 458
Veen v R (No.2) (1988) 164 CLR 465
Walden v Hensler (1987) 163 CLR 561
Workplace Ombudsman v Saya Cleaning Pty Ltd (No. 2) (2009) 179 IR 358
Workplace Ombudsman v Securit-E Holdings Pty Ltd (in liq.) & Ors (2009) 187 IR 330

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	RAINBOW PARADISE PRESCHOOL CHILDHOOD DEVELOPMENT AND EDUCATION LONG DAY CARE CENTRE PTY LTD (ACN 114 319 907)
Second Respondent:	GINA MOELAU
File Number:	SYG 1418 of 2012
Judgment of:	Judge Lloyd-Jones
Hearing dates:	11 March 2014, 22, 23 July 2014
Date of Last Submission:	7 October 2014
Delivered at:	Sydney
Delivered on:	19 June 2015

REPRESENTATION

Counsel for the Applicant:	Ms E Raper
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the Respondents:	Ms D Dinnen
Solicitors for the Respondents:	MBS Lawyers

ORDERS

THE COURT DECLARES THAT:

(1) The First Respondent, Rainbow Paradise Preschool Childhood Development and Education Long Day Care Centre Pty Ltd (ACN 114 319 907, contravened:

(a) subsection 182(1) of the *Workplace Relations Act 1996* (Cth) (the "WR Act**"**) (as it continued to apply pursuant to item 5 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the "Transitional Act")) by failing to pay Jessica Kathleen Austin ("Austin") and Sarah Louise Kidd ("Kidd") their basic periodic rate of pay under the Australian Pay and Classification Scale derived from the New South Wales *Miscellaneous Workers' – Kindergartens and Child Care Centres, &c. (State) Award* (the "Child Care Pay Scale") for each of their guaranteed hours, during the following periods:

(i) 3 July 2009 to 18 December 2009, in respect of Austin; and

(ii) 10 August 2009 to 21 August 2009, in respect of Kidd.

(b) section 45 of the *Fair Work Act 2009* (Cth) (the "FW Act") by failing to provide Austin with paid rest pauses as required by clause 22.2 of the Modern Award on 18-22 and 25-29 January 2010, and 1-5 and 9-11 February 2010.

(c) subsection 44(1) of the FW Act, by failing to provide Austin and Lilet Minasmasihi ("Minasmasihi") with notice of termination or payment in lieu thereof, as required by section 117 of the FW Act, on the following dates:

(i) 12 February 2010, in respect of Austin; and

(ii) 2 December 2011, in respect of Minasmasihi.

(d) sections 234 and 235 of the WR Act (as they continued to apply by reason of sub-item 6(1) of Schedule 16 to the Transitional Act) by failing to accrue annual leave to Kidd, and pay accrued annual leave to Kidd on termination of her employment, in the period from 10 to 21 August 2009.

subsection 44(1) of the FW Act, by:

(i) failing to accrue annual leave to Minasmasihi, as required by section 87 of the FW Act, in the period from 11 November 2011 to 2 December 2011; and

(ii) failing to pay accrued annual leave upon termination to Austin and Minasmasihi, as required by subsection 90(2) of the FW Act, on the following dates:

(i) 12 February 2010, in respect of Austin; and

(ii) 2 December 2011, in respect of Minasmasihi.

(e) section 45 of the FW Act, by failing to pay Minasmasihi annual leave loading on leave paid out on termination of her employment, as required by clause 24.3 of the Modern Award, on 2 December 2011.

(f) subsection 323(1) of the FW Act by failing to pay Austin and Kidd all amounts payable to them in relation to the performance of work in full and at least monthly, on the following dates:

(i) 3 to 9 July 2009, in respect of Austin; and

(ii) 10 to 21 August 2009, in respect of Kidd.

(g) subsection 536(1) of the FW Act by failing to provide Minasmasihi with a payslip within one working day of paying an amount to her in relation to the performance of work, on or about 17 January 2012.

(h) subsection 712(3) of the FW Act by failing to comply, without a reasonable excuse, with a notice to produce records or documents issued under section 712 of the FW Act by Fair Work Inspector Jason Lam ("Inspector Lam") on 16 November 2011.

(i) subsection 712(3) of the FW Act by failing to comply, without a reasonable excuse, with a notice to produce records or documents issued under section 712 of the FW Act by Inspector Lam on 6 February 2012.

(2) The Second Respondent, Gina Moelau, was involved in each of the contraventions committed by the First Respondent (within the meaning

of subsection 728(1) of the WR Act and subsection 550(1) of the FW Act) as set out in declaration (1) above.

THE COURT ORDERS THAT:

(3) The First and Second Respondents jointly are to pay penalties, pursuant to subsection 719(1) of the WR Act and subsection 546(1) of the FW Act, in the total amount of $14,083 in respect of the Respondents' contraventions in declarations 1 and 2 above.

(4) The First and Second Respondents are to pay the penalty amount set out in Order 3 to the Consolidated Revenue Fund of the Commonwealth pursuant to section 841 of the WR Act and subsection 546(3)(a) if the FW Act.

(5) The payment ordered in Order 3 is to be paid within 90 days of the date of these orders .

(6) Under sections 719(6) of the WR act and 545(2)(b) of the FW Act, the First Respondent is to pay a total of $3,146.96 to Kidd and Minasmasihi if, at the time of these orders come into effect the amount remains unpaid, being the amounts outstanding to them as a result of the First Respondent's contraventions of the WR Act and FW Act within 28 days of the date of these orders coming into effect, made up of:

(a) $1,165.97 to Kidd; and

(b) $1,980.99 to Miniasmasihi.

(7) Under sections 722 of the WR Act and 547 of the FW Act, the First Respondent is to pay interest on the amounts ordered under Order 6 above.

(8) The Applicant has liberty to apply to the Duty Judge on seven days' notice in the event that any of the preceding orders are not complied with.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 1418 of 2012

FAIR WORK OMBUDSMAN
Applicant

And

RAINBOW PARADISE PRESCHOOL CHILDHOOD DEVELOPMENT AND EDUCATION LONG DAY CARE CENTRE PTY LTD (ACN 114 319 907)
First Respondent

GINA MOELAU
Second Respondent

REASONS FOR JUDGMENT

Overview

1. The applicant, the Fair Work Ombudsman (the "FWO"), has brought civil remedy proceedings against the first respondent, Rainbow Paradise Preschool Childhood Development And Education Long Day Care Centre Pty Ltd (ACN 114 319 907) ("Rainbow Paradise"), and the second respondent, Gina Moelau ("Moelau") for breaches of the former *Workplace Relations Act 1996* (Cth) ("WR Act") and the *Fair Work Act 2009* (Cth) ("FW Act").

2. I rely on the FWO's outline of submissions and the Chronology contained in Annexure "A" which effectively set out the background material in respect to these proceedings.

3. Rainbow Paradise operates as an accredited childcare centre. It is a constitutional corporation within the meaning of s.4 of the WR Act and, from 1 July 2009, a constitutional corporation within the meaning of

s.12 of the FW Act. It is an *employer* within the meaning of s.6 of the WR Act and, from 1 July 2009, a *national system employer* within the meaning of s.14 of the FW Act. Further, it is an entity operating as an accredited childcare centre, specialising in long day care for special needs children, at 36 Tullock Street, Blacktown in New South Wales ("Rainbow Paradise Premises").

4. Moelau was and is;

   a) The sole company director and shareholder of Rainbow Paradise;

   b) Responsible for the overall direction, management and supervision of Rainbow Paradise's operations in relation to industrial instruments and arrangements, setting pay rates, wages and conditions of employees; and

   c) The person responsible for ensuring that Rainbow Paradise complied with its legal obligations under the WR Act, the *Fair Work (Transitional Provisions and Consequent Amendments) Act 2009* (Cth) (the "Transitional Act") and FW Act.

5. The FWO claims, and the respondents by and large accept, that they have breached the industrial legislation by failing to pay three of their former employees their minimum entitlements. By virtue of the admissions contained in the Statement of Agreed Facts ("SOAF"), filed 24 February 2014, the liability issues in dispute are confined to the following:

   a) On the question of liability, there are three remaining contraventions which are disputed;

   b) On the question of monetary amounts arising from the alleged contraventions, there is a dispute as to some of the factual matters underpinning the monetary amounts owed; and

   c) On the question of penalty, the parties do not make a joint submission. Certain relevant factual matters are disputed including the state of the respondents' knowledge of the contraventions at the time they were made.

Mediation

6. At a directions hearing before his Honour Smith FM on 7 September 2012, the following order was made:

> *10. The matter is referred to the District Registrar to arrange meditation or conciliation pursuant to ss.26 and 34 of the Federal Magistrates Act 1999 (Cth) and Parts 27 and 45, Division 45.4A of the Federal Magistrates Court Rules 2001 (Cth) to be conducted by a Registrar or by a FWA member nominated under Rule 45.13B (2). Primary dispute resolution must be completed before 28 February 2013.*

7. The Court Registry advised the parties that mediation would occur on 11 October 2012 with Registrar Morgan conducting the mediation. That scheduled mediation occurred, but the matter was not resolved. Consequently the matter was returned for further directions establishing a timetable for hearing.

Scope and Conduct of these Proceedings

8. Rainbow Paradise is a small business and, at the time of the contraventions, employed a few people. As a result of the investigations into its operations and the subsequent proceedings, only family members of Moelau are now employed. The submissions filed on behalf of the respondents on 10 March 2014 indicate that Rainbow Paradise is a preschool which was established by Moelau and her husband, Mark Moelau, in 2006 in Blacktown, New South Wales. Rainbow Paradise provides a service to children from two to six years old and due to the demographics of the area, most of these children come from a disadvantaged socio-economic background. Specifically:

    a) 75% of the children come from an indigenous background;

    b) 90% of the children are referred to the centre by the Department of Family and Community Services;

    c) 60% of the children have behavioural issues including ADHD, autism, developmental mental delays and other psychological problems due to abuse and neglect; and

d) Some of these children also have problems with speech and other physical impairments.

9. Most of the children attending Rainbow Paradise come from one or more of the following groups:

a) Refugees mostly from Africa or Indigenous;

b) Single parent families;

c) From a family were the sole source of income is Centrelink payments;

d) Where the child in care has been removed from parents by the Department of Family and Community Services; and/or

e) From homes where the parents drop out of school before school certificate level.

10. Rainbow Paradise is regularly asked by the NSW Department of Family and Community Services to enrol the children into the preschool who have been put into the Department's care. Most of the fees collected from children enrolled in Rainbow Paradise are obtained by way of government subsidies. However, families are expected to make co-contribution payments depending upon their individual financial circumstances. Notwithstanding, many of the families do not pay this co-contribution. It is a policy of Rainbow Paradise not to exclude children if their parents fail to make a co-contribution payment, unless there are exceptional reasons to do so.

11. As at the end of the financial year in 2012, Rainbow Paradise had a net profit of $28,187. Profits are funnelled back into Rainbow Paradise's operating costs. Neither Moelau nor her husband draws a wage from Rainbow Paradise. Both spend a significant amount of time and their own money funding and maintaining the business. As a result of this litigation and other problems with obtaining and retaining reliable staff, Moelau ceased employing anyone outside her immediate family in 2013.

12. Elsewhere in this decision, details in respect of the initiation and progress of these proceedings are detailed. When the application was

filed on 28 June 2012, the FWO sought civil remedies against Rainbow Paradise and Moelau for breaches of the WR Act and the FW Act. The original case management was approached on the basis that there would be proceedings to determine liability and the consequential penalty hearing. The liability hearing was set down for 12, 13, 14 and 19 November 2013. On 17 October 2013, the Court was advised by the parties that they had reached agreement to file the SOAF and requested that the liability hearing be vacated. Orders to this effect were made on 21 October 2013 which included the listing of the hearing to determine penalty on 11 March 2014 for a half day. It was not until 24 October 2013 that the SOAF was filed. That document listed the facts which were agreed to for the contraventions that were admitted, facts which were agreed for contraventions that were not admitted and the facts disputed in the proceedings.

13. At the commencement of the hearing, the Court was advised that the respondents sought to cross-examine four witnesses. Similarly, the FWO required four witnesses for cross-examination. No orders had been sought for the allocation of further hearing dates to accommodate calling and examination of eight witnesses. At the time of the opening addresses the parties were unable to advise the Court of the likely duration of the various cross-examinations.

14. Examination of the witnesses occupied three hearing days being 11 March 2014 and 22, 23 July 2014. The transcript of the evidence exceeds 340 pages.

15. The following documents were submitted by the parties to the Court;

    a) FWO's Outline of Submissions, filed on 28 February 2014, being 39 pages in length;

    b) The respondents' filed Submissions on Penalty on 10 March 2014, being 30 pages in length;

    c) FWO's Final Submissions on Liability and Penalty filed on 28 August 2014, being 43 pages in length; and

    d) The respondents' Final Closing Submissions filed 19 September 2014, being 15 pages in length.

e) FWO's Submissions in Reply on Liability and Penalty, filed 7 October 2014, being 20 pages in length;

The Court also requested the parties file submissions in respect of s.682 of the FW Act.

f) The FWO filed Submissions on 22 October 2014 being 12 pages in length; and

g) The respondents' filed Submissions on 15 July 2014, being 5 pages in length.

16. At the conclusion of the hearing on 23 July 2013, a timetable was set down for the filing of written submissions and the parties were asked to avoid filing voluminous submissions. I accept that this has been done, however, the bulk of the submissions address the issue of liability in respect of the disputed contraventions and subsidiary issues not directly focused on the issue of penalty.

17. I raise the above issues because of my concerns with the disparity between the size of Rainbow Paradise and the nature of their contraventions, compared with the resources that have been applied in pursuing these proceedings by the FWO. I will address this concern in various parts of the judgment which I believe are contrary to the objectives of the FW Act which are partly expressed in s.682, and the overall utilisation of resources that have been applied to this prosecution. I raise this concern because of the frequency of proceedings being brought against small operators with the ultimate result being the business closing and the express claim of pursuing these prosecutions to warn other operators of the consequences of failing to satisfy the requirements of the FW Act acting to destroy the operation.

Employees Involved in these Proceedings

18. The proceedings related to three former junior employees of Rainbow Paradise:

a) Jessica Kathleen Austin ("Austin") was employed by Rainbow Paradise between 3 July 2009 and 12 February 2010. She was qualified with a Certificate III in Children's Services

and had completed a 12 month traineeship with SK & S Enterprises Pty Ltd, Trading as "*Another World 4 Kids Kindergarten/ Preschool*". She was properly classified;

i) As a "childcare worker – step 5", under the Australian Pay and Condition Scale derived from the Miscellaneous Workers Kindergarten and Childcare Centres, & C (State) Award (Childcare APCS) in the period from 3 July 2009 until 31 December 2009; and

ii) As a "Children's Service Employee, Level 3.2- After 1 year" under the Children Services Award 2010 (Modern Award) in the period from 1 January 2010 until 12 February 2010 (SOAF at [4]-[5]);

b) Sarah Louise Kidd ("Kidd") was employed by Rainbow Paradise between 10 and 21 August 2009. She was properly classified as "*Childcare Worker – Step 1*" under APCS derived from the Childcare Award during her employment (SOAF at [4], [6]); and

c) Lilet Minasmasihi ("Minasmasihi") commenced employment with Rainbow Paradise on 11 November 2011. There is a dispute about when her employment ceased. She was properly classified as a "*Support Worker – Level 1.1 – On Commencement*" under the Modern Award during her employment (SOAF at [4], [7]).

Prior Complaints

19. In the FWO's Final Submissions on Liability and Penalty, it was brought to the Court's attention that within a year of Rainbow Paradise commencing operation, the Preschool became the subject of complaints from employees about the non-payment or underpayment of wages and conduct which mirrored the offending conduct which is the subject of these proceedings. As a result of these prior complaints, the respondents have had extensive dealings with the FWO, which, in the FWO's submissions, demonstrates a heightened level of understanding on the respondents' behalf of their obligations and to the consequences for them if they breached these obligations. Despite this knowledge,

the FWO submits that the respondents behaved in a manner which was at least in wilful disregard for their obligations, but in fact where it is open to the Court to find that they deliberately avoided their industrial obligations.

20. In respect of this submission, the Court notes that Moelau gave evidence in re-examination that each of the alleged former complainants' complaints were resolved at the investigation stage. No proceedings were commenced in relation to those complaints. No evidence was put on from the alleged complainants and, as submitted at hearing, the probative value was therefore significantly outweighed by the unnecessary prejudice to the respondents.

Admitted Contraventions

21. By way of an amended defence, filed on 11 November 2013 ("Amended Defence") and the SOAF, the respondents have admitted liability for contraventions of the WR Act, the Transitional Act and the FW Act for failing to do the following;

    a) Pay the appropriate base periodic rate of pay of minimum wages to Austin, Kidd and Minasmasihi;

    b) Provide notice of termination, or pay in lieu thereof, to Austin;

    c) Accrue and pay annual leave to Austin, Kidd and Minasmasihi;

    d) Pay annual leave loading to Minasmasihi;

    e) Provide Austin with rest pauses;

    f) Comply with frequent pay obligations in relation to Austin and Kidd; and

    g) Provide Minasmasihi with a payslip (SOAF [98]).

22. Moelau admits that she was involved in the above contraventions by Rainbow Paradise (SOAF at [99]).

23. As a result of the above admissions, the FWO is seeking penalties against Rainbow Paradise and Moelau. The FWO submits that these penalties are appropriate because of the following factors:

a) Respondents lack of cooperation with the FWO during the investigations;

b) The need for specific deterrence, given the failure of previous voluntary compliance;

c) The need for general deterrence and a need to send a message to the industry in which the respondents operate;

d) The vulnerability of the employees by reason of their age and experience;

e) The respondents contravened workplace relations law, despite receiving extensive information (through the previous investigations by the FWO and calls to the Workplace InfoLine and the Fair Work InfoLine) about their obligations to provide particular entitlements, information which was ignored;

f) In the case of the respondents' failure to provide Minasmasihi with a payslip, the fact that Rainbow Paradise had previously singed a Compliance Agreement Form agreeing to comply with the payslip obligation – which was subsequently ignored.

24. The FWO is also seeking declarations that Rainbow Paradise contravened the relevant provisions of the FW Act and that Moelau was involved in those contraventions.

Disputed Contraventions

25. In addition to the admitted contraventions, the FWO alleges that ;

a) Rainbow Paradise failed to provide notice of termination, or pay in lieu thereof, to Minasmasihi (SOAF at [100]-[101], [125]-[128]);

b) Rainbow Paradise failed to comply with two Notices to Produce, issued under s.712 of the FW Act (SOAF at [102]-[106], [129]-[130]); and

c) Moelau was involved in the above contraventions (SOAF at [107]-[110], [133]-[134]).

Dispute in respect of Standard of Proof

26. The parties have made contradictory submissions as to the correct standard of proof to be applied in these proceedings. The issue first arises in the FWO's Final Submissions on Liability and Penalty, filed 25 August 2014, under the heading *Civil Proceedings*, where it states that these are civil proceedings and a court hearing a proceeding involving a civil penalty or civil remedy must apply the rules of evidence and procedures for civil matter which are required by s.551 of the FW Act and s.729 of the WR Act. The standard of evidence for civil matters is set out in s.140 of the *Evidence Act 1995* (Cth) ("Evidence Act") and provides:

> ***Civil proceedings: standard of proof***
>
> *(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.*
>
> *(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:*
>
> *(a) the nature of the cause of action or defence; and*
>
> *(b) the nature of the subject-matter of the proceeding; and*
>
> *(c) the gravity of the matters alleged.*

27. In the respondents' Final Closing Submissions (filed 19 September 2014), the contention advanced is that, contrary to the applicant's submissions, it is not the case that the simple civil standard of proof, being "*on the balance of probabilities*" which applies to these proceedings for civil penalties. As noted in *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* (2010) 186 FCR 88.

The Court noted that the correct approach is to consider at [110] where it stated:

> *110. …[W]hether the alleged contraventions had been proved by reference to a civil standard of proof but paying due regard, as s 140(2) of the* Evidence Act 1995 *(Cth) required, to the nature of the cause of action or defence; the nature of the subject matter of the proceeding; and the gravity of the matters alleged. As his Honour's associated reference to* Briginshaw v Briginshaw *[1938] HCA 34; (1938) 60 CLR 336 attests, this subsection of the Evidence Act is a restatement of a well known passage (at 362) in the judgment of Dixon J (as his Honour then was) in that case, "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences."*

28. It is submitted on behalf of the respondents that the prosecutorial manner in which these proceedings were conducted, and the penalties sought by the FWO, indicated that the correct standard of proof to be applied is the standard set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336.

29. In the FWO's Submissions in Reply on Liability and Penalty, filed 7 October 2014, it is submitted that this submission is incorrect, for the following reasons:

    a) The *Briginshaw* test does not create a third standard of proof (*Qantas Airways Ltd v Gama* (2008) 167 FCR 537 per French and Jacobson JJ at [110]), rather, it reflects a conventional perception that members of our society do not ordinarily engage in fraudulent/criminal conduct and the strength of evidence necessary to establish a fact or facts on the balance of probabilities may vary accordingly to the nature of what it sought to prove. In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd & Ors* (1992) 110 ALR 449 at 449-450 the High Court held:

> *The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud… On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct…*
>
> (footnotes omitted)

b) The respondents ignore the fact that the standard of proof in this matter is governed by the Evidence Act. Section 140(2) of the Evidence Act, cited in [10] of the FWO's Final Submissions, dated 25 August 2014 was intended to reflect the common law position as to the strength of the evidence necessary to establish satisfaction on the balance of probabilities: *Commissioner of Patents v Sherman* (2008) 172 FCR 394 per Heerey, Kenny and Middleton JJ at [16]; and

c) Section 551 of the FW Act provides that "*a Court must apply the rules of evidence and procedure for civil matters when hearing procedures relating to a contravention or proposed contravention, of a civil remedy provision*". Section 729 of the WR Act was in identical terms. To the extent that s.4(3) of the Evidence Act would invite the Court to disregard the rules of evidence, s.551 of the FW Act and s.729 of the WR Act would be directly inconsistent with that provision and therefore would prevail over s.4(3) of the Evidence Act.

30. In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (No. 2)* [2013] FCA 582 , his Honour McKerracher J considered the issue of standard of proof and referred to the decision of Marshall J in *Fair Work Ombudsman v Maclean Bay Pty Ltd* (2012) 200 FCR 57 at [7]-[8]. McKerracher J stated:

> ***STANDARD OF PROOF***
>
> *7. In examining each aspect of this proceeding the Court proceeds on the basis that it is dealing with a civil proceeding in which civil penalties are sought for contraventions of provisions of the WR Act and of the NAPSA. In accordance with s 140 of the Evidence Act 1995 (Cth) the applicant is required to make out his case on the balance of probabilities. In deciding whether the Court is satisfied that any aspect of the applicant's case is made out on the balance of probabilities the Court will take into account the nature of each cause of action and the defence to it. It will also take into account the nature of the subject matter of each aspect of the proceeding and the gravity of the matters alleged; see s 140(2) of the Evidence Act.*
>
> *8. For reasons which follow, I am satisfied that all the allegations made by the applicant against the respondents are made out on the evidence before the Court. Apart from those alleging breaches of the NAPSA, the allegations are particularly serious ones. Nonetheless, the evidence in support of each such contravention is strong and in many aspects uncontradicted. This approach is consistent with that approved of by the Full Court in Qantas Airways v Gama [2008] FCAFC 69; (2008) 167 FCR 537; see at [110] where French and Jacobson JJ said:*
>
> > *The so-called Briginshaw test does not create any third standard of proof between the civil and the criminal. The standard of proof remains the same, that is proof on the balance of probabilities. The degree of satisfaction that is required in determining that that standard has been discharged may vary according to the seriousness of the allegations of misconduct that are made. In our opinion, however, there was no indication in his Honour's reasons that the application of the Briginshaw test made any difference, adverse to Mr Gama, in his conclusions. We agree generally with what her Honour Branson J has to say about the Briginshaw test in her separate reasons for judgment. We would add that the observations of the New South Wales Court of Appeal in Amalgamated TV Services Pty Ltd v Marsden [2002] NSWCA 419 at[54]-[61],*

concerning the application of s 140(2)(c) of the Evidence Act are consistent with her Honour's reasons.

See also at [139] where Branson J said:

As I have already indicated, I agree with the conclusion of French and Jacobson JJ that the federal magistrate's reasons for judgment do not disclose any error in the application of the applicable standard of proof to Mr Gama's allegations. However, in my view, for the reasons given above, references to, for example, "the Briginshaw standard" or "the onerous Briginshaw test" and, in that context, to racial discrimination being a serious matter not lightly to be inferred, have a tendency to lead a trier of facts into error. The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s 140 of the Evidence Act provides. It is an approach which recognises, adopting the language of the High Court in Neat Holdings [1992] HCA 66; 67 ALJR 170; 110 ALR 449, that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved — and, I would add, the circumstances in which it is sought to be proved.

31. These are civil proceedings. The civil standard of proof applies. Section 140 of the Evidence Act addresses considerations to be taken into account: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 per Weinberg, Bennett and Rares JJ in respect of the standard of proof, where at [29]-[31] the Court stated:

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29. It follows that proceedings for recovery of pecuniary penalties under the Act are civil proceedings. Accordingly, s 140 of the Evidence Act 1995 (Cth) requires the Court in such proceedings to apply the civil standard of proof on the balance of probabilities. In arriving at a conclusion of satisfaction that a case has been proved on the balance of probabilities, s 140(2) of the Evidence Act provides:

'(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

(a) the nature of the cause of action or defence; and

(b) the nature of the subject-matter of the proceeding; and

(c) the gravity of the matters alleged.'

30. The mandatory considerations which s 140(2) specifies reflect a legislative intention that a court must be mindful of the forensic context in forming an opinion as to its satisfaction about matters in evidence. Ordinarily, the more serious the consequences of what is contested in the litigation, the more a court will have regard to the strength and weakness of evidence before it in coming to a conclusion.

31. Even though he spoke of the common law position, Dixon J's classic discussion in Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 at 361-363 of how the civil standard of proof operates appositely expresses the considerations which s 140(2) of the Evidence Act now requires a court to take into account. Dixon J emphasised that when the law requires proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. He pointed out that a mere mechanical comparison of probabilities independent of any belief in its reality, cannot justify the finding of a fact. But he recognised that:

> *'No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.' (Briginshaw 60 CLR at 361-362)*

Documents Relied Upon by FWO

32. In chief, the FWO relies on the evidence of 11 separate witnesses;

a) Fair Work Inspector Jason Lam ("Inspector Lam"):

i) Affidavit of Jason Hoang Nam Lam affirmed 8 November 2012 and Exhibit "JL1" to that affidavit (the "First Lam Affidavit");

ii) Affidavit of Jason Hoang Nam Lam affirmed 19 April 2013 and Exhibits "JL2" and "JL3" to that affidavit (the "Second Lam Affidavit");

b) Fair Work Inspector Narelle Northwood ("Inspector Northwood"):

i) Affidavit of Narelle Northwood affirmed 9 November 2012 (the "Northwood Affidavit");

c) Fair Work Inspector Sundararajan Rajagopalan ("Inspector Rajagopalan"):

i) Affidavit of Sundararajan Rajagopalan affirmed 9 November 2012 (the "Rajagopalan Affidavit");

d) Fair Work Inspector Skye-Anne Steedman ("Inspector Steedman"):

i) Affidavit of Skye-Anne Steedman affirmed 13 November 2012 (the "Steedman Affidavit");

e) James Robertson:

i) Affidavit of James Gregory Robertson sworn 19 April 2013 (the "Robertson Affidavit");

f) Jessica Austin:

i) Affidavit of Jessica Kathleen Austin affirmed 14 November 2012 (the "First Austin Affidavit");

ii) Affidavit of Jessica Kathleen Austin affirmed 19 April 2013 (the "Second Austin Affidavit");

g) Maree Austin:

i) Affidavit of Maree Austin affirmed 15 November 2012 (the "First Maree Austin Affidavit");

ii) Affidavit of Maree Austin affirmed 22 April 2013 (the "Second Maree Austin Affidavit");

h) Sarah Kidd:

i) Affidavit of Sarah Louise Kidd affirmed 13 November 2012 (the "First Kidd Affidavit");

ii) Affidavit of Sarah Louise Kidd affirmed 19 April 2013 (the "Second Kidd Affidavit");

i) Lilit Minasmasihi:

i) Affidavit of Lilit Minasmasihi affirmed 9 November 2012 (the "First Minasmasihi Affidavit");

ii) Affidavit of Lilit Minasmasihi affirmed 18 April 2013 (the "Second Minasmasihi Affidavit");

iii) Affidavit of Lilit Minasmasihi affirmed 25 February 2014 (the "Third Minasmasihi Affidavit"):

j) Lilian Minasmasihi:

i) Affidavit of Lilian Minasmasihi affirmed 9 November 2012 (the "First Lilian Minasmasihi Affidavit");

ii) Affidavit of Lilian Minasmasihi affirmed 19 April 2013 (the "Second Lilian Minasmasihi Affidavit");

k) Valia Parya:

i) Affidavit of Valia Parya affirmed 9 November 2012 (the "First Parya Affidavit");

ii) Affidavit of Valia Parya affirmed 18 April 2013 (the "Second Parya Affidavit"); and

l) Cathy Sharpe:

i) Affidavit of Cathy Sharpe in reply, affirmed 18 July 2014 (the "Sharpe Affidavit").

Exhibits

33. The Exhibits tendered to the Court by the FWO, are as follows:

a) Exhibit "A1" – Copy of the FWO's reply to an affidavit of Margaret Pavey;

b) Exhibit "A2" – Notice to Produce, 7 March 2014;

c) Exhibit "A3" – Email sent from David Pesino to Sally Dennington and from Sally Dennington to Jason Lam on 20 March 2012;

d) Exhibit "A4" – Email from Moelau (Gina Stratis) to Jason Lam dated 29 November 2011 and his reply, dated 29 November 2011;

e) Exhibit "A5" – Wildon Attendance Records in December 2011;

f) Exhibit "A6" – Policy Documents provided to employees;

g) Exhibit "A7" – Employment Contract;

h) MFI – "A8" – Extract from the Visitor's Register Book 2011;

i) "MFI-1" – Objections of the respondents; and

j) Exhibit "A9" – Form F32 – Application for a Bargaining Order.

Documents Relied Upon by Respondents

34. The respondents relied upon the following documents:

a) Fawaz Ismail:

i) Affidavit of Fawaz Ismail, sworn 26 March 2013 (the "Ismail Affidavit");

b) Lynette Gardiner-Cole:

i) Affidavit of Lynette Gardiner-Cole, sworn 26 March 2013 (the "Gardiner-Cole Affidavit");

c) Mark Moelau:

i) Affidavit of Mark Moelau sworn 28 February 2013 the "Mark Moelau Affidavit");

d) Gina Moelau:

i) Affidavit of Gina Moelau, sworn 28 February 2013 (the "First Moelau Affidavit");

ii) Affidavit of Gina Moelau, sworn 11 March 2014 (the Second Moelau Affidavit"); and

e) Margaret Anne Pavey:

i) Affidavit of Margaret Anne Pavey, sworn 10 March 2014 (the "Pavey Affidavit" ([11] and [12] struck out)).

Witnesses called to give evidence

35. The respondents required four of the FWO's eleven witnesses for cross-examination, being the former employee Minasmasihi, her sister Lilian Minasmasihi, her mother Valia Parya and Inspector Lam. Those four witnesses were required because their evidence related to matters remaining in dispute, being the employment and termination of Minasmasihi, the production of documents to Inspector Lam and, for the purposes of penalty submissions, the conduct and circumstances on the investigation and prosecution by the FWO.

36. The FWO called the following witnesses to give evidence;

a) Minasmasihi:

i) Evidence in Chief – Transcript of Proceedings 11 March 2014, pp.15-17;

ii) Cross-examination – Transcript of Proceedings, 11 March 2014, pp.17-33;

iii) The respondents argue that Minasmasihi had the incentive to obtain further pay from the respondents if the FWO's case in relation to her employment (i.e. that she was a full-time employee whose employment was terminated) is accepted. This incentive is not minor in circumstances where the amount calculated outstanding on the FWO's case in an additional $1,980, where on the respondents case she was only entitled to $791 gross for her employment for less than two weeks duration, and which was paid in January 2012 (SOAF, Annexure "C1" and "C2"). In cross-examination it became clear that Minasmasihi, her sister and her mother blamed the respondents for Minasmasihi's failure to obtain the position or traineeship as a childcare worker. This was despite Minasmasihi's evidence that she had no qualifications when she interviewed for employment at Rainbow Paradise and had no relevant or appropriate experience in childcare, had not obtained any further training or qualifications in the industry since her employment with Rainbow Paradise and had in fact been travelling overseas on a "gap year" in the interim;

iv) The respondents submit that Minasmasihi's evidence was vague, emotional, contradictory and confused. She seemed at times to not understand the questions being asked of her, or the contents of her written statement. Her evidence demonstrates that she was still very upset that she had been unable to obtain work as a childcare worker, and she was very upset at being told by the respondents that she was "*slow*", having been told that she was slow "*her entire life*" (Transcript, 11 March 2014, p.29);

v) The respondents contend that in the First Minasmasihi Affidavit and throughout the proceedings, it has been the position of Minasmasihi that Moelau told her that she would be working full-time and doing a traineeship at Rainbow Paradise. However, under cross-examination when asked if

Moelau told her that she would be on a full-time traineeship after she finished training, Minasmasihi responded "*I actually can't remember, because this has been two, three years ago and I have a fuzzy memory now*" (Transcript 11 March 2014, p.19.9). Under cross-examination, when asked if it was possible that Moelau told Minasmasihi that she would be starting off with some training part-time and then if all went well then she would be put to full-time training in order to get her certificate, Minasmasihi responded "*yes, I don't remember, as I said*" (Transcript, 11 March 2014, p.19.16);

vi) In relation to her second week of employment at Rainbow Paradise, it was put to Minasmasihi if it was possible that she was rostered on for two or three days the following week, but was asked by Moelau whether or not she could come in for some extra days Minasmasihi responded with "*I don't remember. All I remember is that she called me in for the second week and just told me 'come on Wednesday and Thursday'*" (Transcript, p.20.15);

vii) The FWO claims that the information that Minasmasihi could not recall actual relates to the exact words she was told by Moelau. Relevantly, Minasmasihi stated in cross-examination:

Ms Dinnen: [Moelau] told you, didn't she, that you would be full-time traineeship after you finish training?

Minasmasihi: I – I actually can't remember, because this has been two, three years ago and I have a fuzzy memory now.

Ms Dinnen: Well, it's a long time ago?

Minasmasihi: Yes

Ms Dinnen: So it possible, isn't it that she said, "look, we will start you off with some training part-time and you know, if everything goes well, we will put you on full time training so you can get your certificate?

Minasmasihi: Yes, I don't remember as I said.

viii) The FWO responds that in circumstances where Minasmasihi's cross-examination took place approximately two and a half years after the interview took place and one and a half years after she swore the First Minasmasihi Affidavit, it is entirely reasonable that she did not remember exactly what words were said. The alternative position put to Minasmasihi (that her position was part-time initially and would only become full-time if she was successful in obtaining a traineeship) does not appear anywhere in the respondents' written evidence. The First Moelau Affidavit does not mention any possible change to full-time employment at all and the Second Moelau Affidavit states only that "*it was my intention to employ Ms Minasmasihi on a full-time basis if and when the need arose*" (First Moelau Affidavit). Although Moelau tried to make this argument in cross-examination (Transcript, 23 July 2014, p.276), it occurred after Minasmasihi had given her evidence and in circumstances where Moelau was present in Court during that time.

ix) The issue in dispute is whether Minasmasihi's employment was on a full-time or part-time basis. Minasmasihi's evidence was very clear that she was not told at the interview that her employment would be part-time. Relevantly, in cross-examination Minasmasihi stated:

Ms Dinnen: And you were told at the meeting that you would be part-time, weren't you?

Minasmasihi: Yes, I was told that I was going to be full-time.

Dinnen: So you were told that you were going to be full-time or you were told that you were going to be part-time?

Minasmasihi: No she told me that I was going to be full-time traineeship.

(Transcript, p.19.1-6)

x) The FWO submits and it was suggested that Minasmasihi's evidence in relation to the days she worked was unclear, However, Minasmasihi's evidence was quite clear when Ms

Dinnen later sought to clarify when Minasmasihi was rostered to work and what she was told:

Ms Dinnen: You said before that you were rostered for two to three days but then [Moelau] would tell you?

Minasmasihi: No, the first week I was rostered on for a week, and then she – on the Friday, told me to go home and wait for her to call me and then tell me when to come in.

Ms Dinnen: So you weren't rostered on for two to three days at the beginning?

Minasmasihi: No.

Ms Dinnen: And then given extra days?

Minasmasihi: No, for the first week, I was rostered on for a week, from Monday to Friday.

Ms Dinnen: And where was that roster?

Minasmasihi: I never saw the roster. I only – the time I would go into work there was a sign in booklet where you signed in your name and the date and your signature.

Ms Dinnen: So you say that you were rostered on for seven days, but you never saw the roster?

Minasmasihi: No.

Ms Dinnen: So?

Minasmasihi: I was just told when to come in and when to go.

Ms Dinnen: Okay. So Gina told you when to come in and when not to come in?

Minasmasihi: Yes.

(Transcript, 11 March 2014, p.24.10-29)

xi) The respondents submit that when Minasmasihi was asked under cross-examination if she had any idea why when Moelau paid her wages it bounced back a number of times. Minasmasihi responded with "*yes. I don't know with that situation like I think banks just – I don't know because I*

have my card for a long time, and the numbers usually get rubbed off or, you, know, haven't printed the numbers just…". When Minasmasihi was asked "*Did you give [Moelau] the numbers from your card, or was it from some other numbers?*" (Transcript, 11 March 2014, p.21.16), Minasmasihi responded with "*yes it was, - I don't know if you know it. They usually give you – from the banks, they give you the right card with numbers on it.*" She then agreed when it was put to her that the bank account details could have been read out incorrectly (Transcript, 11 March 2014, p.21.23);

xii) The FWO accepts it is suggested that Minasmasihi's evidence is supportive of the respondents' position because she was unable to explain clearly why payments made to her bounced back. However, Minasmasihi was not a bank employee or someone with specialist knowledge such that she would be expected to know why the transactions bounced. In any case, the FWO questions how relevant Minasmasihi's evidence on this issue can be to the disputed contraventions. The respondents' own evidence shows that their first attempt to make payments was on 8 December 2011 (First Lam Affidavit, Annexure "JL-1", Tab 48, p.195-196), in circumstances where payments were made to employees on a fortnightly basis. If Minasmasihi's employment had truly ended on 24 November 2011 (as the respondents contend), she should have been paid on 25 November 2011 (but was not);

b) Valia Parya;

i) Evidence in Chief – Transcript of Proceedings, 11 March 2014, p.35;

ii) Cross-examination – Transcript of Proceedings, 11 March 2014, pp.35-49;

iii) Re-examination - Transcript of Proceedings, 11 March 2014, p.49;

iv) In the respondents' submissions it contends that Ms Parya was the epitome of a non-independent witness. Her evidence demonstrated her desire to advocate for Minasmasihi and thereby to support the FWO's case and its claims for her. Ms Parya, the mother of Minasmasihi, was a defensive witness who sought to boost her daughter's position by whatever means possible. When it was put to Ms Parya that Minasmasihi "*said in Court that she had been told all of her life that she was slow*" (Transcript, 11 March 2014, p.36.18), Ms Parya replied "*No.*" This was a direct contradiction to her daughter's evidence and supports the submission that Ms Parya was not an honest witness;

v) The FWO submits that the criticism that Ms Parya was a "*defensive witness who sought to boost her daughter's position by whatever means possible*" is without foundation. The only example the respondents cite to infer that she "*was not an honest witness*" is to state that Ms Parya denied that her daughter had been told all her life that she was slow. However, the answer given by Ms Parya was in response to the question "*Lilet said when we had her in Court earlier that she had been told that she was slow all of her life. Do you know anything about this?*" (Transcript, 11 March 2014, p.36.12-13). That Ms Parya did not know anything about Minasmasihi's statement was a believable explanation and certainly does not infer that she was dishonest witness. No other statements were given in support of the respondents' allegations and they should be rejected;

c) Lilian Minasmasihi;

i) Evidence in Chief – Transcript of Proceedings, 11 March 2014, pp.49-50;

ii) Cross-examination – Transcript of Proceedings, 11 March 2014, pp.50-61;

iii) The respondents' submission in respect to this witness is in similar terms to that referring to Ms Parya in that Lilian Minasmasihi was also the epitome of a non-independent

witness, that she demonstrated a desire to advocate for her sister and, therefore, supported the FWO's case. Lilian Minasmasihi gave clear evidence of collusion between them:

Ms Dinnen: So what I'm saying is – I'm not suggesting that anything untoward happened, but what I'm saying is you knew that that occurred on 21 November 2011?

Lilian Minasmasihi: Yes. Because we tried to – because they told us try and remember as much as we can, so we tried to go back and see that – we knew what date that Lilet stated – at least an estimate – and then we tried to go back and backdate the – the times, the weeks, roughly.

Ms Dinnen: But you just said before that you couldn't remember exactly what time she had started working at Rainbow Paradise?

Lilian Minasmasihi: I can't give you an exact date right now.

Ms Dinnen: Yes?

Lilian Minasmasihi: Especially under the circumstances but yes. That's right.

Ms Dinnen: But you can give me an exact date of 21 November?

Lilian Minasmasihi: In what sense?

Ms Dinnen: So at paragraph 3 you say "21 November 2011". You can give me an exact date for that?

Lilian Minasmasihi: Yes. Because, as I said, we back dated. We looked at the calendars when we were writing the statement to see what dates.

Ms Dinnen: So when you say that, "we looked at calendars and we backdated and we were", you know whose "we"?

Lilian Minasmasihi: Me and my family and I.

Ms Dinnen: So you and your family and I discussed it together?

Lilian Minasmasihi: No. I mean, when – not my particular report because as we were told we were not allowed, so –

but, of course, we are family and we were all in the same situation and we all knew what had happened.

Ms Dinnen: So you discussed your recollections off what had happened-, together, and then you wrote your own statement?

Lilian Minasmasihi: No. What I mean is I wrote my own statement but during many things was happening and all the things that happened with Lilet with work of course – she was upset and, you know, things that happened so, of course, we all discussed – we are family. We – we support each other.

Ms Dinnen: But in writing the affidavit, you've said that, "we looked at all the calendars and we backdated and we figured out what was happening when"?

Lilian Minasmasihi: Not when we were writing it, when the – when we first called the Fair – Fair Work Trading, they would ask us, like, what happened, what date it was, and things like that, and that's when – yes, we- we looked.

Ms Dinnen: You all discussed it?

Lilian Minasmasihi: Yes.

iv) The FWO submits in respect of the respondents' claim that the passage quoted immediately above supports the allegation that Minasmasihi, Lilian Minasmasihi and Ms Parya colluded in giving their evidence, this does not illustrate that point. Lilian Minasmasihi specifically rejected that she had colluded with her family members when she wrote her affidavit. Rather, she said only that she and her family had worked out the dates of Minasmasihi's employment at the time the complaint was made to the FWO (an action which was entirely reasonable, given that Minasmasihi was making a serious complaint about her former employer to the FWO). The continuation of the extract from Lilian Minasmasihi's cross-examination confirms that this was what was being discussed:

Ms Dinnen: And when you first called the Fair Work Ombudsman that was in January 2012 or December of 2011. Do you recall when?

Lilian Minasmasihi: No.

Ms Dinnen: But it was a while ago?

Lilian Minasmasihi: Yes.

Ms Dinnen: Ok. So at that time, back whenever it was that you made a complaint to the Fair Work Ombudsman, could you or could you not remember the exact date you, yourself, without assistance. Ok – I withdraw that question. When the complaint was made by your family or by your mother who made the complaint to the Fair Work Ombudsman, could you – you – or could you not remember the exact date that it all these things happened?

Lilian Minasmasihi: I don't understand sorry.

Ms Dinnen: Do you have your own recollection, your own memory, of the date of when these things happened, or is it something that?

Lilian Minasmasihi: Yes.

Ms Dinnen: So you do?

Lilian Minasmasihi: Like roughly I would, yes, have an idea.

Ms Dinnen: Roughly. So you know that it was November?

Lilian Minasmasihi: Yes. Because we looked back on dates.

Ms Dinnen: Because you – but without looking back, you couldn't remember what date it was?

Lilian Minasmasihi: Not – I couldn't give the exact date of when it happened, no.

Ms Dinnen: Ok, so you looked back after the fact to figure out what date it was that it happened?

Lilian Minasmasihi: Yes. Because they wanted us to give the exact dates.

(Transcript, 11 March 2014, p.53.15-44)

v) The FWO submits that Minasmasihi's complaint was made to the FWO in January 2012. The First Minasmasihi Affidavit, the First Lilian Minasmasihi and the First Parya

Affidavit were made on 9 November 2012 (11 months later) and the Second Minasmasihi Affidavit, the Second Lilian Minasmasihi and the Second Parya Affidavit on 19 April 2013 (15 months later) (with the Third Minasmasihi Affidavit sworn on 25 February 2014, 25 months later). The FWO contends that there is no evidence that these witnesses colluded and any suggestions as such should be rejected;

d) Inspector Lam;

i) Evidence in Chief – Transcript of Proceedings, 11 March 2014, pp.61-63;

ii) Cross –examination - Transcript of Proceedings, 11 March 2014, pp.63-92;

iii) Re-examination - Transcript of Proceedings, 11 March 2014, pp.93-95.

iv) The respondents submit that Inspector Lam's evidence demonstrates that his attitude towards the respondents during the course of the investigation was intransigent and belligerent, and he did not fulfil his duties as a Fair Work Inspector who was obliged to not only enforce and investigate, but assist in compliance, promote harmonious, productive and cooperative workplace relations, offer people a single point of contact for them to get accurate and timely information about Australia's workplace relations system, and educate people working in Australia about fair work practices, rights and obligations.

v) The respondents claim that Inspector Lam, when pressed on his obligations, was evasive and sought to absolve himself of responsibility for the FWO's actions. He "*couldn't recall*" providing education to the respondents (Transcript, 11 March 2014, p.64.43, 65.3) as "*the proceedings have been a long time ago*". He "*couldn't recall*" being told by Ms Gardiner-Cole that she didn't want him to call her again, that she was being paid correctly and she did not want him

to pursue anything against her employers (Transcript, 11 March 2014, p.74.28);

vi) The respondents contend that in cross-examination, Inspector Lam was forced to admit that he had not provided the respondents with any "*education*" despite saying that he had (Transcript, 11 March 2014, p.64; 65), and that his only meeting and discussion with them had been in the context of threatening prosecution. Inspector Lam admitted that he did not actually speak to the respondents about their compliance, instead only looked for persons who would make complaints against them (Transcript, 11 March 2014, p.77.39). Inspector Lam also admitted in evidence that he had referred to Moelau throughout his investigations as "*AWD*", meaning "the alleged wrong doer", which indicates the preconceived approach the FWO had to the conduct of its investigations. This approach manifests itself in and an aggressive and unhealthy manner in which the FWO dealt with the respondents;

vii) The respondents submit that Inspector Lam admitted in cross-examination that:

(a) He had directed Moelau to contact the FWO InfoLine to ascertain the correct pay rates;

(b) He did not know what information was provided over InfoLine to the respondents or whether it was correct;

(c) He knew that the respondents relied on the InfoLine to identify the correct pay rates and wages for employees;

(d) Despite agreeing that it was the employers job to classify the employees, he never asked Moelau for the classifications of her employees;

(e) He could not recall when he had calculated the underpayments owing to the respondents;

(f) That the contravention letter, issued to the respondents in June 2012, was the first time the FWO had identified their contended "*correct*" classification of the respondents employees;

(g) That the contravention notice did not contain a total amount alleged to be underpaid;

(h) That the contravention letter identified different amounts owing to those alleged in his affidavit; and

(i) That he did not include any of the correspondence with the respondents, the amount said to be owed to each individual employee, the basis of which it was calculated or the calculations done by him;

viii) The respondents contend that Inspector Lam was aggressive and overzealous in his handling of the respondents' investigation. He sought out aggrieved employees to make complaints, rather than speaking directly to the respondents to ascertain and assist with their compliance. Inspector Lam's role was not one where he was attempting to assist the respondents to correct the breaches, but was merely to penalise the respondents. The respondents submit that Inspector Lam was not interested in ensuring that the respondents understood and rectified their errors (regarding calculation of wages), but was only interested in strengthening its case in the prosecution of the respondents; and

ix) The FWO refutes these claims made against Inspector Lam. In respect to Inspector Lam being able to recall providing education to the respondents, the FWO argues that in an investigation that he had dealt with for 18 months, no adverse finding should be made against his failure to recall exact dates in providing education. The complaint is that Inspector Lam could not recall the exact words which Ms Gardiner-Cole was alleged to have said to Inspector Lam when she called him on 29 November 2011, which was approximately two and a half years prior to the date of his

cross-examination. In these circumstances no adverse finding should be made against Inspector Lam in relation to these issues.

37. The respondents relied on the evidence of Fawaz Ismail, Lynette Gardiner-Cole, Mark Moelau and Moelau. All four witnesses were subjected to extensive cross-examination by the FWO. The following witnesses were called by the respondents;

a) Fawaz Ismail:

i) Evidence in Chief – Transcript of Proceedings, 22 July 2014, p.120;

ii) Cross-examination – Transcript of Proceedings, 22 July 2014, pp.121-160;

iii) Re-examination – Transcript of Proceedings, 22 July 2014, pp.160-162;

iv) The respondents contend that Mr Ismail had "*limited involvement in the factual matters giving rise to the disputed contraventions*", and gave evidence in the Ismail Affidavit at [21]-[22] in relation to the respondents' compliance with the Notice to Produce issued by the FWO, but did not ask him any questions in cross-examination in relation to that evidence. According to the rule in *Browne v Dunn* (1893) 6 R 67 (HL) Mr Ismail's evidence in relation to compliance with the Notice to Produce must therefore be accepted. That evidence included that "*…at all times every endeavour was made to comply with all Notices to Produce served on Rainbow Paradise Preschool…*";

v) The Ismail Affidavit included evidence of the non-disputed contraventions, for the purposes of supporting the respondents' submission on relevant penalty considerations. The respondents contend that Mr Ismail's cross-examination was entirely focused on [9]-[12] and [23]-[31] of the Ismail Affidavit regarding the respondents' procedure of sending pay rates and his involvement in the FWO's investigation in relation to Austin's underpayment. His evidence under

cross-examination was consistent with that affidavit evidence. Mr Ismail's evidence was that he the respondents were "*simply seeking an explanation for the amount the Fair Work Ombudsman alleged to be underpaid*" (Ismail Affidavit at [29]). In evidence in chief, Ms Dinnen asked him "*why is it now 18.23?*" This question was asked in the context of being advised in January 2010 of a rate of $18.23 per hour where Inspector Northwood had advised the lower rate of $17.95 in the September 2010 contravention notices. The respondents have disputed the calculation made by the FWO, not the actual rate of pay;

vi) The respondents submit that Mr Ismail's evidence in cross-examination supports the respondents' submissions that there was no wilful or intentional underpayment of employees, and there was no refusal to cooperate with the investigation. Rather, the respondents received contrary and conflicting advice from the FWO in relation to the correct rates of pay and were not provided with an explanation for the change of advice or the calculations underpinning alleged underpayments. His evidence also supported the respondents' submission that once the calculations were provided to the respondents, the amounts were paid. The remainder of Mr Ismail's evidence regarding the interview and recruitment of staff including the two-week trial period contended by the respondents as supporting their position in relation to Minasmasihi's employment, was uncontested. Similarly, his evidence in relation to the provisions of induction, rest breaks and meal breaks was uncontested. His statement regarding Minasmasihi was also uncontested and further supports the respondents' position in relation to Minasmasihi's credibility as a witness;

vii) The FWO acknowledges that while Mr Ismail gave evidence that "*every endeavour was made to comply with all notices to produce*", Ms Dinnen informed the Court that the respondents did not intend to rely on this statement to argue that they ultimately did comply with the November and

February Notices to Produce, but only that attempts were made (Transcript, 11 March 2014, p.110.38-41). The FWO submits that Mr Ismail's evidence, in any case, focused on compliance at the time of the investigation into Austin in 2010 and does not dispute the respondents' compliance with the Notice to Produce issued in June 2010. The better evidence on compliance with the November and February Notices to Produce came from Moelau and the FWO relies on that evidence to show that no genuine attempt was made to comply; and

viii) The FWO argues that the respondents cannot rely on Mr Ismail's evidence (summarised at [34(a)] above) that he was confused about the rate of pay to justify underpaying Austin. Mr Ismail conceded that he had received advice from the InfoLine in January 2010 that Austin should be paid $18.23 per hour (Transcript, 11 March 2014, p.155.30-34) and that he passed on that information to Moelau, in circumstances where he had no authority to make the decision about the rate of pay (Transcript, 11 March 2014, p.146.14-25). The respondents have admitted in the SOAF that Austin was paid an average of $11.27 between July and December 2009 and an average of $13.41 between January and February 2010 (SOAF at [29]-[30]) and that they only made rectification payment to Austin in July 2012 (SOAF, [74]). The evidence shows that there was no confusion as the respondents had made no attempt before these proceedings were commenced to pay Austin any more than they had initially paid her, let alone the correct rate of $18.23;

b) Lynette Gardiner-Cole;

i) Evidence in Chief – Transcript of Proceedings, 22 July 2014, p.163;

ii) Cross–examination - Transcript of Proceedings, 22 July 2014, pp.165-177;

iii) Re-examination - Transcript of Proceedings, 22 July 2014, p.177;

iv) The respondents contend that the FWO made no adverse comments regarding Ms Gardiner-Cole's evidence, therefore it should be accepted. Her evidence supported the respondents' position in relation to the nature of Minasmasihi's employment and the cessation of her employment. Ms Gardiner-Cole's evidence was that Minasmasihi had taken over her part-time position at Rainbow Paradise (Transcript, 11 March 2014, 164.21-29), but the FWO takes issue with this evidence not being included in the Gardiner-Cole Affidavit. Nevertheless, she gave that evidence in chief at the hearing and was not cross-examined on that statement. Therefore, it should be accepted, especially in circumstances where Minasmasihi's evidence as to whether she employed on a full-time or part time basis is contradictory under cross-examination;

v) The FWO relies upon Ms Gardiner-Cole acknowledging in evidence that "*she did not have an independent recollection of Lilet saying 'I'm leaving' in her presence*" (Transcript, 11 March 2014, p.174.28-32; p.173.38-41). To the contrary, Ms Gardiner-Cole clarified in re-examination shortly thereafter at that hearing that she did not understand what the term "*independent recollection*" meant, but that she did have her own memory of Minasmasihi saying "*I want to leave*". Relevantly, she stated in cross-examination:

Ms Dinnen: you were asked a question by Ms Raper and it referred to your independent recollection?

Ms Gardiner-Cole: Yes

Ms Dinnen: Do you know what an independent recollection is?

Ms Gardiner-Cole: No.

Ms Dinnen: Can I ask, then, do you recall, from you own memory Lilet saying "I'm leaving"?

Ms Gardiner-Cole: She was crying and then she said, "I want to leave". And then she was speaking to Mark and – that's about it at the moment. And then it sort of…

Ms Dinnen: so do you recall that conversation from your own memory, or was it from the discussion you had with Mark a couple of weeks later?

Ms Gardiner-Cole: No. I remember her crying and saying she wants to leave ,"I want to leave", and then one of the kids sort of started crying and that, so I sort of – I can remember walking away. That's from my own memory.

(Transcript, p.175.31-44)

vi) The respondents submit that while Ms Gardiner-Cole did state that she was "*not a big person on remembering days and dates*", as contended by the FWO, Ms Gardiner-Cole was quite firm in her memory that Minasmasihi left on Thursday (Transcript, 11 March 2014, p.176.1-11, confirmed at p.177). According to the undisputed evidence Minasmasihi commenced employment on Friday 11 November and her last day at Rainbow Paradise was 24 November. The only Thursdays in that time period were 17 November and 24 November. The undisputed evidence from the FWO is that Minasmasihi called in sick on 17 November because she was attending a pre-arranged medical appointment, so the Court should accept the respondents' submission, supported by evidence, that the conversation happened on Thursday 24 November after which Minasmasihi walked out of the centre "between our morning tea and lunch break", so it would have been between 10am and 12pm (Transcript, 11 March 2014, p.164.36-37). This is supported by the Wildon time records for the date 24 November 2011, which shows the notation that Minasmasihi walked out at 10.45am (Exhibit "A5");

vii) The FWO submits that the citation given below in re-examination was a question asked in response to the last question asked of Ms Gardiner-Cole by FWO's Counsel. Ms Gardiner-Cole had in fact been asked earlier in her cross-examination whether she had been told (other than by Mark Moelau) whether Minasmasihi had said she was leaving, and she gave a very similar, but slightly different evidence at that time to the passage cited above:

Ms Raper: Well, its Mark that has told you after the event that Lilet said she's leaving. You don't have an independent recollection of that yourself, do you?

Ms Gardiner-Cole: No, she… all I can remember is she had that conversation with Mark and she was very upset and she said that she wanted to come and supervise the children.

(Transcript, p.172.28-32)

viii) The FWO submits that it is also notable in any case that neither in Ms Gardiner-Cole's written or oral evidence did she give evidence of seeing Minasmasihi leave herself. Her only account of Minasmasihi leaving came from what Mark Moelau allegedly told her (Transcript, 11 March 2014, p.164.39-43);

c) Mark Moelau;

i) Evidence in Chief – Transcript of Proceedings, 22 July 2014, p.183;

ii) Cross–examination – Transcript of Proceedings, 22 July 2014, pp.184-192;

iii) Re-examination – Transcript of Proceedings, 22 July 2014, p.192; and

d) Gina Moelau:

i) Evidence in Chief – Transcript of Proceedings, 23 July 2014, pp.210-212.

ii) Cross–examination – Transcript of Proceedings, 23 July 2014, pp.212-318;

iii) Re-examination – Transcript of Proceedings, 23 July 2014, pp.318-329.

iv) The respondents submit that Moelau's evidence was consistent with the Response filed on 11 November 2013 and previous submissions. Her evidence was that she relied heavily on the Fair Work InfoLine to provide her with the

necessary industrial information to conduct Rainbow Paradise as an employer, but that advice and therefore her conduct fell short. Her evidence was supported by the evidence of Inspector Lam;

v) The FWO submits that Moelau's evidence in relation to the agreed contravention contradicted the SOAF and needs to be viewed again with reference to the respondents' submissions that Moelau did not believe at the time that the actions were conducted that she was engaged in those contraventions. Her evidence supports the submission that she did not have any intention to deliberately contravene any act in the manner in the alleged and now agreed and therefore goes towards the respondents' submissions on penalty. In relation to the disputed contraventions, Moelau's evidence at hearing also demonstrated that, with respect to the Notice to Produce, she was confused as to what documents were required when and had considered that all the necessary documents requested had been provided. Her evidence of her priorities and circumstances at the time the investigation was being conducted supports the respondents' submission that there was a reasonable excuse for failing to comply with the Notice to Produce. That several explanations are given by her in relation to those reasonable excuses does not denigrate on the veracity of her defence because there was not one sole or single reason for non-compliance, but rather a combination of reasons and circumstances;

vi) Moelau's evidence in relation to Minasmasihi's employment was truthful. She was not present at Rainbow Paradise at the time that Minasmasihi left, but was informed that she had done so. She did not and had no intention of terminating Minasmasihi's employment and denies entirely the FWO's version of events in relation to the alleged terminating phone call (Transcript, pp.314-315). Moelau's evidence in relation to those disputed contraventions is unwavering and should be preferred. As a result of the inconsistent, deluded, advocating evidence provided by

Minasmasihi and Ms Parya, Moelau's version of events should be preferred; and

vii) The FWO submits that Inspector Lam's evidence does not support Moelau's argument that she was not provided with the necessary industrial information to run Rainbow Paradise Preschool or that such information fell short. The FWO's evidence shows that the respondents received significant information from both Inspector Lam and others, but ignored it (and this was made clear in Moelau's cross-examination). The FWO refers to its s.682 submissions at [81]-[96] below.

Scope of the Statement of Agreed Facts ("SOAF")

38. On 24 February 2014 the FWO filed a SOAF which includes the following:

a) Part A – (pp.1-13) sets out the facts which were agreed to for the contraventions that were admitted;

b) Part B – (p.14) – sets out the facts which were agreed for contraventions that were not admitted; and

c) Part C (pp.15-18) – sets out which facts were disputed in the proceedings.

39. The contention advanced on behalf of the respondents was that the SOAF does not contain only those facts upon which the parties agree. It includes, in addition, an identification of the matters in dispute between the parties and was intended to assist the Court, rather than to provide a binding document upon which the Court should rely in precedence over the actual pleadings and evidence. The argument advanced on behalf of the FWO is that despite entering into the SOAF, the respondents have continued to rely on evidence that contradicted the SOAF and Moelau gave evidence, in cross-examination, in which she denied that she had engaged in contraventions previously admitted. The FWO submits that such evidence should not be accepted in accordance with s.191(2)(b) of the Evidence Act.

40. The FWO identifies these inconsistencies between the SOAF and the respondents evidence go to Austin's classification, Kidd's classification, the termination of Austin's employment, and to provisions of the pay slip to Minasmasihi. The FWO submitted that the respondents' conflict in evidence should not be accepted (in accordance with s.191(2)(b) of the Evidence Act) and that the respondents' conduct in this regard is a clear demonstration of the fact that they have not accepted responsibility for their actions, are not contrite and higher penalties (such as those in the range sort by the FWO) should be imposed to specifically deter them.

41. The FWO contends that the respondents cannot be allowed to resile from the SOAF or rely on contradictory evidence from Moelau for any purpose (whether for liability or penalty). To allow such evidence, or give it any weight would be contrary to the Evidence Act. Section 191(2)(b) of the Evidence Act provides that:

> ***Agreements as to facts***
>
> *(2) In a proceeding:*
>
> *...*
>
> *(b) evidence may not be adduced to contradict or qualify an agreed fact;*
>
> *unless the court gives leave.*

42. The FWO submits that as no leave has been sought, and as the Courts are reluctant to grant leave to depart from agreed statements of facts: *Environment Protection Authority v Ramsey Food Processing Pty Ltd* [2009] NSWLEC 152 per Biscoe J. It is also claimed that to allow this course would prejudice the FWO, because it ran its case assuming that all contraventions (except the alleged failures to provide notice of termination to Minasmasihi and the alleged failure to comply with the November and February Notice to Produce) and their underlying facts were admitted.

43. The FWO submits that the respondents voluntarily entered into the SOAF with the benefit of legal representation, after a period of consultation between the parties, and with the knowledge of the facts agreed upon and the manner in which those facts were expressed. The

respondents made a choice not to call most of the FWO's witnesses for cross-examination and therefore allowed that evidence in unopposed. In doing so, they were aware that they could not thereafter rely upon contradictory evidence given by their own witnesses (whether for matters relating to liability or penalty).

44. The FWO maintains that the SOAF should be read as it appears, and the FWO's evidence from witnesses who were not called should be accepted. The respondents contradictory evidence and submissions in reliance on such evidence should be disregarded, except to the extent that it demonstrates that a lack of contrition and acceptance of wrong-doing.

45. On behalf of the respondents the s.191(2)(b) of the Evidence Act application stated that the SOAF was only agreed to in the form filed for the purpose of shortening proceedings by attempting to assist the Court to identify matters remaining in issue. Counsel for the respondents, Ms Dinnen, identifies these as:

    a) Whether or not Minasmasihi was terminated or whether she resigned;

    b) Whether Minasmasihi was a full-time or part-time employee; and

    c) Whether the Notices to Produce were complied with, or whether the respondents had a reasonable excuse for failing to do so.

46. The Court notes that during the hearing on 22 and 23 July 2014, the FWO raised objection to the respondents' evidence on the basis that it traversed matters which had been agreed, thereby qualifying an agreed fact. The FWO submitted that the evidence of the respondents contradicted an agreed fact.

47. Ms Dinnen contends that the evidence of their witnesses was not inconsistent with the specific statements which were agreed in the SOAF. In the case of Austin, Kidd and Minasmasihi the SOAF states that their duties "*enabled*" each of them "*to be classified*" at a certain level (SOAF at [5], [6] and [7]). During the hearing (at Transcript, pp.199.45-201.2) the respondents agreed, in hindsight, that the

employees were suitably classified at the level pleaded by the FWO, but at the time that they were hired, they were not classified at that level and so were therefore paid at a different classification level. It was submitted that if the SOAF expressed that the employees' duties and tasks meant that they "*were classified*" at a particular level, there would be no inconsistency with evidence that a different classification was applied and that the language used in the SOAF was intended to avoid such inconsistency. The contention is that while this explanation requires a careful and technical examination of the facts which were actually agreed in the SOAF, it was the basis upon which the respondents were willing to agree to the filing of that document.

48. Ms Dinnen contends that the pleading in respect of contraventions was properly contained in the Response, filed 11 November 2013 and not in the SOAF. The Response sets out in precise terms exactly what allegations identified in the FWO's Statement of Claim are admitted or denied.

49. Ms Dinnen argues to the extent that evidence was adduced which fell outside the facts supporting or disputing the necessary elements of each contravention, that evidence is provided for the purposes of identifying circumstances relevant to the determination of appropriate penalties.

50. Ms Dinnen contends that the admissions to contraventions previously admitted are maintained and were maintained at the hearing. The evidence is not inconsistent with the SOAF and is entirely consistent with the Response filed.

51. Both parties prepared and filed detailed written submissions in respect of the identified inconsistencies between the SOAF and the evidence relied on by the respondents.

Austin's Classification

52. In the SOAF at [5] the parties agreed that Austin was qualified with a Certificate III in Children's Services, having completed a 12 month traineeship with SK & S Enterprises Pty Ltd, Trading As "Another World 4 Kids Kindergarten Preschool", and performed duties which enabled her to be properly classified as a childcare worker, step 5 under the APCS, derived from the Childcare Award, and a Children Services

Employee, level 3.2 – after one year under the Modern Award. These are essential elements of the admitted contravention of s.182(1) of the WR Act and cl.A 2.3 of the Modern Award (SOAF at [98](a)-(c)).

53. The respondents rely on the First Moelau Affidavit at [28] states that Austin was employed as a support worker and in in the Second Moelau Affidavit at [33] that Austin "*was not properly classified as a Certificate III in Children's Services*". In cross-examination, Moelau asserted that Austin was properly a support worker because she had not provided Rainbow Paradise with a copy of her Certificate III, and because she needed re-training and was not properly a childcare worker, step 5 under the Modern Award (T.253.25-37; T. 267.41-268.46).

54. Ms Dinnen maintains that Austin failed to provide her Certificate III at the time the classification was imposed, at the commencement of her employment which resulted in the respondents classifying her differently. It is argued that this is not inconsistent with their admission that they now accept that she was properly classified at a higher level and any failure by Moelau to pay the appropriate rate to Austin arose as a result of incorrect or inconsistent advice being given to Moelau by the FWO and by Moelau's inability to incorrectly interpret the relevant award. Further, Moelau's evidence was consistent with the Defence.

55. Counsel for the FWO, Ms Raper, submits that Austin was not required for cross-examination and that her unchallenged evidence is consistent with her being classified as a childcare worker, step 5 (First Austin Affidavit at [3], [10]).

Kidd's Classification

56. In the SOAF at [6] the parties agreed that Kidd performed duties which enabled her to be properly classified as a childcare worker, step 1 under the APCS, derived from the Childcare Award. This fact is an essential element of the admitted contravention of s.182(1) of the WR Act (SOAF at [98](a)). The respondents relied on the First Moelau Affidavit at [92] states that Kidd was interviewed for the "*Position of Full time support worker*". The First Moelau Affidavit at [94]-[96] denied that Kidd supervised children and asserts that Kidd only performed "*OH&S duties – cleaning and assisting with the preparation*

of food for children". Under cross-examination, Moelau maintains that Kidd did not supervise children and was not properly a childcare worker (Transcript, pp.240.8-241.32).

57. Ms Dinnen contends that despite requests, Kidd did not provide any certification of her qualifications or references to prove that she had attained the required qualifications. Moelau believed that Kidd was not a childcare worker, step 1, according to the relevant award as she undertook duties as a cleaner. Further, any failure to correctly classify Kidd arose as a result of Moelau's inability to correctly interpret the relevant award.

58. Ms Raper submits that Kidd was not required for cross-examination and her unchallenged evidence is consistent with her being classified as being a childcare worker, step 1 (First Kidd Affidavit at [4], [6]).

Termination of Austin's Employment

59. In the SOAF at [45]-[50] the parties agreed that on 12 February 2010, Rainbow Paradise terminated Austin's employment (including by reason of a telephone conversation between Moelau and Austin on that date). These facts are essential elements of the admitted contravention under s.44 of the FW Act (SOAF at [98](f)). The respondents rely upon the Second Moelau Affidavit at [28]-[32] which states that Moelau "*gave [Austin] the option to leave*" and "*it was never my intention to terminate her employment*". Under cross-examination Moelau maintained that "*she wasn't terminated actually*" and "*she decided to leave because her mother wanted her to go*" (Transcript, pp.316.45-318.8; p.318.19-33).

60. Ms Dinnen submits that the evidence from Moelau was that at the time Austin ceased working for Rainbow Paradise, she considered that Austin had "*abandoned her employment*". Further, it is argued that it is not inconsistent to admit four years after the event that the effect of a conversation she had with Austin resulted in Austin's belief that she had had her employment terminated. Ms Dinnen argued that Austin's belief, as described in the Austin Affidavit could be accepted as reason why she was not called for cross-examination and Moelau's evidence with respect to this contravention simply goes towards the events for the purposes of penalty.

61. Ms Raper contends that Austin and her mother, Maree Austin, were not required for cross-examination and their evidence should be accepted in its entirety. Both Austin and her mother put on clear, consistent evidence as to the circumstances in which Moelau terminated Austin's employment (First Austin Affidavit at [30]-[46]; Second Austin Affidavit at [30]-[32]; First Maree Austin Affidavit at [2]-[9]; Second Maree Austin Affidavit at [4]-[6]). Ms Raper argues that the respondents cannot seek to challenge Austin's evidence when they did not call Austin or her mother for cross-examination and the SOAF admits the contravention. The respondents' oral and written submissions state that they do not challenge the FWO's allegations.

Failure to provide Minasmasihi with a pay slip

62. In the SOAF at [87]-[90], the parties agree that Rainbow Paradise had failed to provide Minasmasihi with a pay slip within one day of making a payment to her on 17 January 2012. These facts are essential elements of the admitted contravention of s.536(1) of the FW Act (SOAF at [98](k)).

63. Under cross-examination, Moelau maintained that she had provided Minasmasihi with a pay slip, as follows:

> *Ms Raper: And it's the case, isn't it, that you accept – don't you that Ms Minasmasihi did not receive a pay slip within a day of being paid?*
>
> *Ms Moelau: That's not true. I sent – I posted her payslip.*
>
> *Ms Raper: Well, there's no record of you posting it, is there?*
>
> *Ms Moelau: How would I record it? I just go and post.*
>
> *Ms Raper: Well – you didn't – you haven't?*
>
> *Ms Moelau: How – well…*
>
> *Ms Raper: you haven't recorded the fact of it being sent anywhere?*
>
> *Ms Moelau: I just went to the post next to the preschool in the street and posted it in the box.*
>
> *Ms Raper: Well, you accept, don't you, that this didn't happen?*

Ms Moelau: That's not true. I posted it. And I posted her taxation declaration and group certificate as well.

64. Ms Dinnen contends that the agreed contravention was that Rainbow Paradise had failed to provide Minasmasihi with a payslip. The evidence shows that a pay slip was sent by regular post. Moelau could not, and does not give evidence that the pay slip was indeed received by Minasmasihi and that, therefore, she was "provided" with it. In admitting the contravention, the respondents have specifically not argued that posting the payslip constituted service within the meaning of the *Acts Interpretation Act 1901* (Cth) as they accept that it was possible that Minasmasihi did not receive it. In the Response, the respondents admit that the pay slip was not provided but "*save further that all reasonable steps were taken to provide Minasmasihi with a payslip as required*". It is submitted that the respondents' position has been maintained since the filing of the Response.

65. Ms Raper contends that the evidence given by Moelau is directly inconsistent with the SOAF and should not be accepted into evidence in accordance with s.191(2)(b) of the Evidence Act.

Consideration of SOAF and the operation of s.191 of the Evidence Act

66. These proceedings were originally filed in this Court on 28 June 2012 and were referred to the docket of Federal Magistrate Smith, who made the various orders for the management of the proceedings. On the retirement of his Honour Smith FM, the matter was transferred to my docket in early 2013. In orders made on 8 May 2013, the matter was listed for hearing on the issue of liability on 12, 13, 14 and 15 November 2013. On 17 October 2013 the parties filed proposed short minutes of order seeking the previous orders for the hearing regarding liability be vacated, that a statement of agreed facts was to be filed and served on 20 January 2014 and seeking a hearing in respect to penalty be heard on 11 May 2014.

67. On 24 February 2014, the document identified as "*Parties Statement Identifying Facts Agreed To and Facts Disputed*" was filed and served, pursuant to Order 1 made by the Court on 16 December 2013. On p.18 of that document, it has been executed by both parties on 24 February 2014.

68. Throughout the hearing, disputes have arisen in respect to the contents of affidavits and questions during examinations as to whether they should be permitted because of apparent conflicts in respect of the SOAF. In this respect, the operation s.191 of the Evidence Act has arisen. Relevantly, s.191 of the Evidence Act states:

> ***Agreements as to facts***
>
> *(1) In this section:*
>
> ***"agreed fact"*** *means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.*
>
> *(2) In a proceeding:*
>
> *(a) evidence is not required to prove the existence of an agreed fact; and*
>
> *(b) evidence may not be adduced to contradict or qualify an agreed fact;*
>
> *unless the court gives leave.*
>
> *(3) Subsection (2) does not apply unless the agreed fact:*
>
> *(a) is stated in an agreement in writing signed by the parties or by Australian legal practitioners, legal counsel or prosecutors representing the parties and adduced in evidence in the proceeding; or*
>
> *(b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.*

69. The learned author Steven Ogdens in his book *Uniform Evidence Act (11th ed.),* Thompson Reuters at [1.5.700] indicates that:

> *A party to civil proceedings may, in proceedings or in answer to a Notice to Admit, formally admit facts for the purposes of the proceedings. Similarly question, s.184 permits a defendant in criminal proceedings to make formal admissions. However, the formal admissions does not preclude evidence on the fact admitted being adduced: R v Smith [1981] I NSWLR 193; R v JGW [1999] NSWCCA 116 at 42-44 per Wood CJ at CL; Foreign Media v Konstantinidis [2003] NSWCA 161 at [10]-[11]. But if the parties make an agreement as to facts under s.191 evidence may not be adduced to contradict or qualify an agreed fact unless the Court leave: See s.191(2). Evidence that merely supplements*

or elaborates upon an agreement does not "contradict or qualify an agreed fact: FV v Queen [2006] NSWCCA 237 at [42]-[44].

The fat that "evidence is not required to prove the existence of an agreed fact" might suggest that the Court is required to find the existence of an agreed fact proved. However, s.191(2)(a) is the subject of words "unless the Court gives leave". A Court may "give leave" with the consequence that evidence is required to prove the existence of an agreed fact. In Minister for Environment, Heritage & the Arts v PGP Developments Pty Ltd [2010] FCA 58 per Stone J at [35].

70. The issue predominately arose during the raising of objections to the respondents' evidence and resulted in Ms Dinnen making the following submission:

Ms Dinnen: I have a serious concern with the submissions that the applicant is now putting with respect to the statement of agreed facts. The statement of agreed facts which were proposed by the applicant was only agreed to in the form that is before your Honour on the basis that those are the facts that are agreed. If there were going to be submissions made that the respondent could not provide its own evidence in relation to facts which were not agreed, which the applicant seems to be saying now, wrapping them up in submissions referring to a qualification of those agreed facts, with respect, your Honour, those statement of agreed facts would never have been agreed to by the respondents, and if that is a position that is going to be pressed the respondents at this stage would resile from their agreement to that statement of agreed facts.

The statement of agreed facts was put forward and the response was filed late last year for the purpose of shortening these proceedings so that the respondents would admit to the majority of the contraventions and leave only a few minor issues in play. Those minor issues being whether or not Ms Minasmasihi was terminated or whether she resigned, whether she was full time or part-time, and whether the notices to produce were actually complied with or whether the respondents had a reasonable excuse.

…

Ms Raper: … What has happened here is that the Fair Work Ombudsman has sought agreement from the respondents with respect to whether they agree to certain of the contraventions. We came here understanding, as at 24 February, that certain of the

contraventions have been agreed. But at the same time the respondents would like to… to qualify and put on and rely on evidence which is inconsistent with that statement. That is a course that the respondents have taken and are choosing to take of their own volition…

…

Ms Dinnen: 191 of the Evidence Act refers to a statement of agreed facts or agreement as to facts which are tendered before the court as evidence and signed by the legal parties, and -or with the leave of court are stated by a party to the proceeding before the court to be an agreement between the parties. This statement of agreed facts has not been tendered to your Honour as a statement of agreed facts for those purposes in relation to – in the same way that a statement of agreed facts is tendered in criminal proceedings for the purpose of identifying the facts, which are necessary for the contravention to be found.

This is a statement of agreed facts which is provided to the court to assist your Honour in identifying what is agreed and disagreed between the parties having read the defence and the response to the statement of claim. Further, section 192 identifies that:

> *Leave can be granted by the court to depart from the statement of agreed facts or to qualify those facts – on such terms as the court thinks fit and without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction. It is to take into account the extent to which to do so would be likely to add unduly to or to shorten the length of a hearing, and the extent to which to do so would be unfair to a party or to a witness, the nature of a proceeding, the importance of the evidence and the power of the court to adjourn the hearing or to give a direction in relation to the evidence.*

…in these circumstances, where the applicant is submitting that the facts that my witnesses are putting before your Honour qualify the facts in the statement of agreed facts, your Honour should grant leave that those facts be allowed in… Your Honour should take into account the purpose of the agreed facts and the purpose of the response provided by my client, which was to shorten the proceedings by admitting to contravention and only to – the only facts which should be in dispute are those which are necessary for the purpose of finding the contravention.

…

…Section 191 should not apply but if it does apply your Honour should grant leave that those facts that my witnesses wish to put forward which seek to qualify or add or subtract from the statement of facts should not be excluded on the basis that it's for the purpose of ensuring that the hearing proceeds and is concluded as quickly as possible so it doesn't prejudice my client any further, and also for the fact that those facts are relevant for the purposes of penalty, not for the purposes of liability.

Ms Raper: … The purpose of the statement of agreed facts is so that your Honour understands what facts are relevant for the purpose of liability and penalty. We came to these proceedings on the basis that we understood that the statement of agreed facts was filed and could be relied upon by your Honour in the determination of firstly, whether on the facts that are agreed and on the facts that are disputed, if they're found out, the contraventions are made out. That is something your Honour has to determine and has to determine it on the basis of the evidence that is before you, both in the statement of agreed facts and in the filed evidence.

…

… the contravention concerning Ms Austin and the failure to provide notice of termination… at paragraph 45 that in the statement of agreed facts… it says:

> *On 12 February 2010 Moelau and Austin had a telephone conversation in which Rainbow Paradise terminated Ms Austin's employment.*

…depending on who terminates the employment, whether it's at the volition of the employee or at the volition of the employer, it then determines whether the employer is required to provide notice and payment of notice… we understand that for the purpose of these proceedings that your Honour can make that finding – i.e., can make that finding that Ms Moelau terminated Ms Austin's employment on that day by virtue of the clear words that are contained in that paragraph.

… Ms Austin gives evidence to the effect, "Yes, she was terminated by Ms Moelau during a conversation on 12 February 2010."

…

… Now… Mr Ismail, he gives evidence directly contrary to this evidence. He says he had a conversation with Ms Austin's mother

in which Ms Austin says: "Jessica is not coming back." And he is asking why she hasn't turned up. So directly contrary to the statement of agreed facts that we've come – which we understood which was before you, and directly contrary to that he says, "When he qualified with Ms Austin whether she was coming back or not, she said she was not because Gina was a horrible person." ... this is the very circumstance in which section 191 exists where a party represented by lawyers – whereas I understand my friend's submissions, the lawyers were careful and diligent in them trying to determine what should go into the statement of agreed facts for the purpose of the determination of the true facts upon which it is open for this court to make findings of contraventions said it's not in dispute that she was terminated by Rainbow Paradise, but then they want to rely on a statement from the year before now in order to prove what, to prove that the termination was not at the volition of Rainbow Paradise.

... and she [the respondents] should not be given leave... what utility can this evidence be if Mr Ismail gives it in circumstances where Ms Austin has not been required to give evidence. Her mother has not been required to give evidence, both of whom say, and as seems to have been accepted by Ms Moelau's solicitors on 24 February of this year that she was, in fact, terminated...

...

In circumstances where you can see with respect to Mr Ismail's evidence it is directly contrary to what was agreed by the parties, and if this is going to occur with respect to Ms Moelau's evidence it will elongate the trial exponentially, and in circumstances where it will ultimately be of no utility because even if I challenge Ms Moelau about her evidence with respect to these issues your Honour has the unchallenged evidence of Ms Austin and Ms Kidd ... with respect to paragraphs 17 on the basis of what my friend is now saying I would like your Honour to re-open your ruling with respect to that and not allow it on the basis of what my friend is saying is the purpose of it, and I would ask if it can be that our objections with respect to this matter be identified on the basis of an MFI.

...I will be asking of the court is not to accept my friend's submission. Secondly, to mark as MFI the objections of the respondents, and the third thing that we ask is that with respect to your Honour's ruling with respect to paragraph 17 of Mr Ismail's affidavit that it should not be allowed...

(Transcript, Federal Circuit Court proceedings, 22 July 2014, pp.110-117)

71. Ms Raper's submission in respect of this evidence in the Ismail Affidavit at [16]-[18] should not be allowed and the earlier ruling in respect of these paragraphs be re-opened. I agreed to adopt this course, however, this action must be considered in respect of the circumstances of my earlier ruling. When Ms Dinnen indicated that the respondents' first witness would be Mr Ismail and his evidence was contained in an affidavit sworn on 26 March 2013, Ms Raper then handed up a copy of the objections to the respondents' evidence. The objections to the Ismail Affidavit are as follows:

Objections to Affidavit of Fawaz Ismail sworn 26 March 2013

Paragraph	Whole or part	Objection
13	"I deny that Ms Minasmasihi was not given a pay slip. During the period from the opening of Rainbow Paradise Preschool in 2006 until I ceased my involvement with the centre in or about September 2012, I was not aware of any complaint by any employee that they had not received a pay slip."	Inconsistent with SOAF at [87]-[90] – see s.191(2)(a) of the Evidence Act
16-18	Whole	Inconsistent with SOAF at [45]-[50] – see s.191(2)(a) of the Evidence Act
20	Whole	To the extent that the paragraph is relied upon to prove that Austin resigned her employment, inconsistent with SOAF at [45]-[50] – see s.191(2)(a) of the Evidence Act
22	"Every endeavour was made to comply with all notices to produce serviced on Rainbow Paradise Preschool"	To the extent that the paragraph is relied upon to prove that Rainbow Paradise complied with the November Notice to Produce and February Notice to Produce by the required dates, inconsistent with SOAF at [105] – see s.191(2)(a) of the Evidence Act
23	"This was the rate we were advised to pay Jessica when we made an initial inquiry to the Fair Work Ombudsman"	Hearsay
24	Whole	Hearsay

72. For the present purposes, I refer to the objection to [16]-[18]. Both parties made lengthy submissions as to relative merit, especially for the

inclusion or exclusion of this material. My initial response was to advise the parties that I would note the objection and allow the material in and give it whatever weight that would be appropriate at the time of writing my decision. I took this approach because of my growing concern about the progress and management of the proceedings generally. The Court was initially advised that as a result of the parties agreeing to prepare a SOAF in respect of the admission of liability that a penalty hearing was anticipated to be completed within one half hearing day. This had now extended to three hearing days, with each party calling four witnesses with each being subjected to extensive cross-examination. Further, the objections were only handed to the Court immediately prior to the objections being raised.

73. With the benefit of the argument advanced by both parties, which has been briefly extracted above, I have formed the view that it was appropriate to reconsider my ruling in respect to [16]-[18] of the Ismail Affidavit and I indicated that my new ruling would be for them to be excluded. After further lengthy submissions, by both parties, Ms Dinnen advised the Court that the respondents conceded that they were not pressing [16]-[18] of the Ismail Affidavit and they were only pressed for the purposes of the respondents evidence of those conversations, not of the truth of what was in those conversations.

Section 682 of the FW Act

74. At the end of the first day of the hearing on 11 March 2014, together with the benefit of written submissions prepared by the respondents in respect of penalty, I made the following observation:

> *… come before the court next time I invite you to contemplate section 682 of the Fair Work Act and maybe prepare brief written submissions on that issue…*
>
> (Transcript, Federal Circuit Court proceedings, 11 March 2014, p.99.23-25)

75. In written submissions, addressing this issue, Ms Dinnen identified the following passages in her submissions in respect to penalty at [122], [203]-[205]:

> ***Circumstances in which the conduct took place***

122. The Court should take into account the following as the circumstances in which the conduct took place:

122.1 The background identified above at paragraphs 2-10 of these submissions [summarised at [8]-[11] above]*;*

122.2 The evidence from the Second Respondent, her husband Mark Moelau, employee Fawaz Ismail, and solicitor Margaret Pavey regarding the difficulties faced by the Respondents in providing child care services and in dealing with the Applicant;

122.3 That at the time that the contraventions took place, the respondent had not been provided with any education by the Applicant regarding the interpretation of any applicable awards. Nor were the Respondents advised of any resources that may be available to them to educate themselves about the relevant awards and obligations of employers generally. The information provided to the Respondents by the Applicant "encouraged" them to "ensure that the entitlements of all your employees are being met and urge you to rectify any underpayments that may have occurred", without assisting them to identify or calculate those entitlements or underpayments;

122.4 The Respondents were required to know, understand, and correctly interpret complex industrial instruments and workplace standards in the context of significant legislative change, in a period stretching from before the introduction of the Fair Work Act 2009 including the rationalisation of Modern Awards;

122.5 That classification according to Awards is an evaluative judgment to be conducted by the employer at the commencement of an employee's employment, and that there is no evidence that the Second Respondent failed to conduct this evaluative process;

122.6 That the confusion in correctly classifying employees the subject of the dispute and the correct pay rates according to the Award involved not just the Respondents but the Applicant and its representatives;

122.7 That prior to the contraventions, The Second Respondent on behalf of the First Respondent had sought to clarify pay rates and classifications on numerous occasions

with the Applicant's representatives and was given incorrect and/or conflicting advice;

122.8 That two of the three employees the subject of these complaints only worked for the Respondents for 2 weeks or less;

122.9 That once notified of contraventions or their correct obligations under the Act (Contravention Notice dated 2 September 2010), the Respondents did not repeat the conduct and ensured that the issues were rectified.

76. Ms Dinnen submits that as a consequence of the above passages, s.682 of the FW Act is relevant in these proceedings as a mitigating penalty consideration, taking into account the circumstances in which the offences took place, the knowledge of the respondents as an indicator of their intention and in relation to the conduct of the prosecutor.

77. The issue arose, during the cross-examination of Inspector Lam and an objection was raised by Ms Raper on the basis of relevance to the following question:

Ms Dinnen: So you say in that – so the conversation you have outlined at paragraph 14 is the entire conversation that you had with Gina on that date?

Inspector Lam: Yes.

Ms Dinnen: Can you point to where in that conversation you were providing education to the respondents?

Inspector Lam: No, not in this call, but as part of our duties as inspectors we do provide education.

Ms Dinnen: I understand that part of your duties are to provide education, but what I'm asking you is when did you provide education to the respondents?

Inspector Lam: I can't recall. The proceedings have been a long time ago.

Ms Dinnen: So you can recall the details throughout your affidavits of dates that telephone conversations and so on were made with respect to contraventions, but not in relation to education?

Inspector Lam: Well, I can't recall exactly when the education was made, but it would be in my affidavit.

Ms Dinnen: Well, I put it to you, Inspector Lam, that you did not provide any education to the respondents.

(Transcript, Federal Circuit Court proceedings, 11 March 2014, pp.64.36-65.7)

78. In the absence of the witness, Ms Dinnen made the following submission:

Ms Dinnen: The applicant's submissions in relation to this case with respect to all of the contraventions that my client is said to have committed, both admitted and not admitted, is that my client had knowledge and was aware of her obligations under the Act, and was provided with many opportunities to obtain that knowledge, she made phone calls and so on, and that the evidence of those phone calls and the evidence of the conversations that she had on numerous occasions demonstrate that she had knowledge and she was aware of her obligations.

The position of the respondents is that the numerous telephone calls and the numerous conversations that she had with various people within the Fair Work Inspectorate demonstrate that she did not understand her obligations and that she was confused as to what she needed to do and was being provided with conflicting information. The statutory function of the Fair Work Ombudsman is not just to issue compliance notices and to enforce contraventions of the Act: it is also to education. And my client's position is, and the evidence will be, and the submissions will be that she was not provided with the assistance that she needed and that the evidence demonstrates that. So that is why I'm asking the inspector the extent, if any, that he provided any education to the respondents.

Judge Lloyd-Jones: Now, are there any guidelines with respect to what education should be provided or is this a broad, nebulous term?

Ms Dinnen: I really don't know, your Honour. It's a statutory function. It's explained in that document, which I think was A3 or A4, just now that the first step is education and so on, and then after that there are compliance issues, and it's the respondent's position that they did not receive any such education. I don't know to what extent the Fair Work Ombudsman was required to do so, but one would expect that, under a statutory function,

where they are enforcing one side they should be complying with the other side as well.

(Transcript, Federal Circuit Court proceedings, 11 March 2014, p.65.25-66.7)

79. The document referred to by Ms Dinnen was Exhibit "A4", being an email from Inspector Lam to the respondents attaching fact sheets from the FWO, including the powers of the Fair Work Inspectors. Those facts sheets, in turn, refer to FWO's litigation policy, published on its website. The FWO has also published on its website, its documents access policy, investigative process policy, compliance notice policy and enforcement undertaking policy. There does not seem to be any guidance published by the applicant in respect of policies relating to the promotion of harmonisation, productive and cooperative workplace relations (s.682(1)(a)(i)) or in respect of policies or guidelines regarding the provision of education, assistance and advice to employers (s.682(1)).

80. The thrust of the argument advanced by Ms Dinnen is that despite its statutory function, as expressed in s.682, the FWO appears to have neglected the "*positive*" side of the compliance dichotomy as expressed in s.682(1)(a)(i) and referred to in its ligation policy as "*positive motivators*".

81. On 22 July 2014, the FWO filed submissions on s.682 stating that the respondents s.682 submissions must be rejected by reason of the following:

a) Section 682 of the FW Act is a statement of function with which the FWO is empowered; it does not prescribe obligations on the FWO to take particular steps at particular times; in, particular, it does not prescribe some "*positive*" or mandatory obligation to *educate the respondents*;

b) The FWO's investigations which led to these proceedings were conducted entirely according to the powers granted by the FWO and its inspectors under the FW Act (including under s.682 of the FW Act), and its internal practice notes;

c) Rainbow Paradise, as the employer of the complainant, and the directors of the employer employing entity bear the primary obligation to ascertain and provide for entitlements under the FW Act. The respondents cannot seek to blame the FWO for their own failings whether it be through lack of education, knowledge or otherwise; and

d) Notwithstanding the FWO's submission on the operation of s.682 of the FW Act, the respondents;

i) Have been involved in a number of prior complaints before those which form the basis of these proceedings;

ii) Were provided with a substantial amount of information by the FWO on their entitlements prior to and during the course of their investigation which led to these proceedings;

iii) Were given opportunities for voluntary compliance before these proceedings were commenced; and

iv) Failed to take up those opportunities or cooperate with the investigation process.

82. The FWO submits that these proceedings arose as the result of:

a) Complaints made to the FWO by Austin (in May 2010) and Minasmasihi (in February 2012); and

b) As the result of the investigations conducted by Inspector Lam into entitlements paid to Kidd (which began in October 2011) (the "complainant investigations").

83. The FWO submits that the complainant investigations arose in the context in which the respondents were well aware of the FWO, as well as their workplace relations obligations and the consequences of not following those obligations. In particular:

a) The respondents had dealt with the FWO and its predecessor in relation to six previous complaints prior to those which form the basis of these proceedings. Each of those matters were resolved voluntarily, with the respondent being warned to pay and provide all employees with the correct pay and

conditions each time (First Lam Affidavit, Exhibit "JL-1", Tab 3,4, 5, 6, 7, 8); and

b) The respondents had been making telephone calls to the Fair Work Info line and its predecessor since 2008 (Second Lam Affidavit, Exhibit "JL-2").

84. The FWO submits that in the context of the previous complaints and the respondents' telephone calls to the Fair Work InfoLine, and in the course of the complainant investigations, the respondents were provided with a substantial amount of information on entitlements and on the respondents' workplace relations obligations. This information included:

a) General information about the award and workplace obligations and how to find that information; and

b) Specific information about the obligations and entitlements which have been contravened in this matter including the exact pay rates for Austin, Kidd and Minasmasihi. A list of the information provided to the respondents between 2007 and 2012 was included as Annexure "A" to the applicant's submissions on liability and penalty, dated 28 February 2014.

85. The FWO contends that in the course of the complainant investigation, it provided the respondents with ample opportunities to voluntarily comply with the obligations or, alternatively, put their own positions forward to the FWO. The respondents did not take up these opportunities. In particular:

a) Contravention letters (which are issued in accordance with cl.5.02 of the *Fair Work Regulations 2009* (Cth)) were issued on 2 September 2010 (by Inspector Narelle Northwood), 10 December 2010, 17 April 2012 and 29 May 2012 (by Inspector Lam), each of which offered the respondents opportunity to rectify under payments or alternatively discuss the FWO's findings (Northwood Affidavit, Annexure "NN10"; First Lam Affidavit, Exhibit "JL-1", Tab 11, 44, 45). The respondents did not provide a reply to those contravention letters;

b) On 17 August 2010, on 10 May 2011, Inspectors Northwood and Lam, respectively, sent requests to the respondents for an electronically recorded interview, in which the respondents could put their views to the FWO and answer questions: Northwood Affidavit, Annexure "NN7"; First Lam Affidavit, Exhibit "JL1" (Tab 22). No response was received to those invitations;

c) In late 2010, senior Fair Work inspector Sundar Rajagopaian specifically took steps to progress Inspector Northwood's investigation through educated voluntary compliance; Rajagopaian Affidavit at [6]-[14]. As part of the educated voluntary compliance, Inspector Rajagopaian made site visits to the respondents on 14 and 21 September 2010 and discussed, among other things, workplace obligations, wage rates and calculations. An invitation was made to the respondents to provide their own submissions and calculations which the FWO could take into account: Rajagopaian Affidavit at [9]-[11] and Annexure "SR5". There is no evidence that the respondents ever took up this opportunity until June 2012: First Lam Affidavit, Exhibit "JL1", (Tab 48); and

d) The respondents did not cooperate with the FWO during the compliance investigation.

86. It was only after the final contravention letter in May 2012 was not responded to, that on 18 June 2012 the FWO wrote to the respondents indicating that these proceedings would be commenced: First Lam Affidavit, Exhibit "JL1" (Tabs 47,48).

87. Section 682 of the FW Act describes the function of the FWO:

> ***Functions of the Fair Work Ombudsman***
>
> *(1) The Fair Work Ombudsman has the following functions:*
>
> *(a) to promote:*
>
> *(i) harmonious, productive and cooperative workplace relations; and*

(ii) compliance with this Act and fair work instruments;

including by providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;

(b) to monitor compliance with this Act and fair work instruments;

(c) to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;

(d) to commence proceedings in a court, or to make applications to the FWC, to enforce this Act, fair work instruments and safety net contractual entitlements;

(e) to refer matters to relevant authorities;

(f) to represent employees or outworkers who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC, under this Act or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees or outworkers will promote compliance with this Act or the fair work instrument;

(g) any other functions conferred on the Fair Work Ombudsman by any Act.

Note 1: The Fair Work Ombudsman also has the functions of an inspector (see section 701).

Note 2: In performing functions under paragraph (a), the Fair Work Ombudsman might, for example, produce a best practice guide to achieving productivity through bargaining.

(2) The Fair Work Ombudsman must consult with the FWC in producing guidance material that relates to the functions of the FWC.

88. The Explanatory Memorandum to the *Fair Work Bill (2008)* (which became the FW Act) (Explanatory Memorandum) states:

Clause 682 - Functions of the Fair Work Ombudsman

2549. The functions of the FWO are set out in this clause.

2550. The broad function of the FWO is to promote: harmonious and cooperative workplace relations and compliance with this Act (defined in clause 12 to include the regulations) and fair work instruments (defined in clause 12 to include modern awards, enterprise agreements and orders of FWA such as national minimum wage orders).

2551. A key aspect of this function is to assist employers, employees and organisations to understand and comply with their rights and obligations under this Bill and fair work instruments by providing education, assistance and advice to employees, employers and organisations. This may involve:

. providing general information (e.g., fact sheets, guides and other guidance materials);

. developing and implementing targeted education campaigns for a particular industry or class of employees (e.g., juniors, employees in hospitality, foreign workers);

. assisting parties to access 'self-help' remedies (e.g., by providing information about the small claims procedure); and

. responding to requests for advice or information (e.g., about the NES or a particular employee's entitlements under a modern award).

2552. It is also a function of the FWO to monitor compliance, inquire into and investigate contraventions of this Bill and fair work instruments paragraphs 682 (b) and (c)). Inspectors will be able to exercise a range of powers to determine compliance. Subdivision D of Division 3 of this Part sets out the powers that inspectors have and when those powers may be exercised.

2553. The FWO will also have discretion to inquire into and investigate contraventions of a safety net contractual entitlement. Safety net contractual entitlement is defined in clause 12 to mean an entitlement in a contract of employment about any of the subject matter described in subclause 61(2) or subclause 139(1). This includes, for example, a contractual entitlement to wages in excess of minimum wages set out in a modern award or enterprise agreement. It would also include a contractual entitlement to paid parental leave. Subclause 706(2) sets out the circumstances in which inspectors can investigate contraventions of safety net contractual entitlements.

2554. The functions of the FWO emphasise preventative compliance (e.g., through education and advice) and co-operative and voluntary compliance (e.g., through enforceable undertakings). However, in some circumstances it will be necessary for the FWO to enforce compliance more formally, through compliance notices or court proceedings. The FWO will be able to institute proceedings (paragraph 682(d)) and may represent employees who are or may become parties to proceedings under this Bill or a fair work instrument

where such representation would promote compliance with this Act or the fair work instrument (paragraph 682(f)).

2555. It is also important that the FWO will be able to work with other relevant law enforcement agencies including State and Territory health and safety authorities, police, the Australian Tax Office and the Australian Competition and Consumer Commission. The FWO can refer matters to relevant authorities (paragraph 682(e)). The circumstances in which the FWO can disclose or authorise the disclosure of information to relevant authorities is set out in Subdivision E of Division 3 of this Part.

2556. Other Acts may also confer functions on the FWO (paragraph 682(g)).

89. The FWO submits that the wording of s.682 of the FW Act and the Explanatory Memorandum is not couched in mandatory or prescriptive terms requiring the FWO to take a particular step or carry out a particular function at a particular time (such as during an investigation). Rather, s.682 of the FW Act is a statement of functions, setting out what the FWO is empowered to do.

90. The FWO submits that, at all times, its investigations were carried out in accordance with the functions prescribed under s.682 of the FW Act and the policies published by the FWO. Sections 682(1)(b)-(d) specifically empower the FWO to monitor compliance with the FW Act and the Fair Work instruments, inquire into and investigate any acts or practice that many be contrary to the FW Act or a Fair Work instrument, and to commence proceedings in a court to enforce the FW Act. The powers to investigate and commence proceedings are specifically linked to the Explanatory Memorandum to the work and the powers of the Fair Work Inspector, which are set out in ss.700-717 of the FW Act. The Explanatory Memorandum also specifically provides at [2554] that:

> *In some circumstances it may be necessary for the FWO to enforce compliance more formally, through compliance notices or Court proceedings.*

91. Under the FW Act the FWO was empowered to:

a) Investigate Austin's and Minasmasihi's complaints;

b) Make enquiries into and investigate, the entitlements that have been paid to Kidd; and

c) Commence proceedings in a Court to enforce contraventions of the WR Act and the FW Act by the respondents.

The argument advanced on behalf of the FWO is that the compliance investigations in the commencement of these proceedings were carried out in accordance with s.682 of the FW Act.

92. The written submissions tendered by the FWO state that the respondents, in their submissions, seek to blame the FWO for their failure to pay entitlements to Austin, Kidd and Minasmasihi, to which the FWO's response is that the respondents wore the obligation to ascertain pay entitlements and to give careful consideration before making employment related decisions. In support of this submission the FWO relies upon the following authorities:

a) *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503 per Keely J, where his Honour held at 508:

> *In this connection it is important that the respondent – and other employers bound by the award or by other awards under the Act – under 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 a particular provision of the award or the award generally should only be taken after careful consideration.*

b) *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (in liq.) & Ors* [2013] FCCA 52 per Judge Riley where her Honour stated at [35]:

> ***Whether or not the breaches were deliberate***
>
> *... it is incumbent upon employers to make all necessary enquiries to ascertain their employees' proper entitlements and pay their employees at the proper rates.*

c) *Fair Work Ombudsman v Mildura Battery Company Pty Ltd* [2014] FCCA 192 where Judge Turner stated at [37]:

> *37. Ignorance of the law is no excuse: see Fair Work Ombudsman v Access Embroidery (Australia) Pty Ltd [2012] FMCA 835 at [40]–[49]. It is incumbent on employers to make all necessary enquiries to ascertain their employees' proper entitlements and pay their employee at the proper*

rates: Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (in liq.) [2013] FCCA 52 at [35].

d) *Fair Work Ombudsman v Bosen Pty Ltd* [2011] VMC 81 per Magistrate Hawkins at [51] where her Honour stated:

> *There is a need to send a message to the community at large, and small employers particularly, that the correct entitlement for employees must be paid and that steps must be taken by employers (of all sizes) to ascertain and comply with minimum entitlements (as opposed to ignoring those obligations). Compliance should not be seen as a bastion of the large employer, with human resources staff and advisory consultants (accountants, consultants, lawyers) behind them.*

e) *Walden v Hensler* (1987) 163 CLR 561 at 568, where Brennan J held:

> *Section 22 provides:*
>
> > *Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.*

This principle has been applied in number cases brought by the regulators, such as *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 per Gyles J at [16] (brought under the WR Act), and *Australian Competition and Consumer Commission v Eternal Beauty Products Pty Ltd* [2012] FCA 1124 per Murphy J being a penalty proceedings under *Trade Practices Act 1974* (Cth) and *Competition and Consumer Act 2010* (Cth); and

f) *Brobbel v S & C Mack* [2008] FMCA 1355 per Turner FM (as he was then), where his Honour held at [15]:

> *The facts in this case show ignorance of the law by the second respondent and a careless disregard for the rights of the employee. It is no excuse for the second respondent to say that he was confused and did not know what he was doing. Ignorance of the law is no excuse. An employer dealing with an employee and their rights under the law has a responsibility to make enquiries to find out what the*

employee is entitled to, and what is required of the employer. It is no defence for an employer to obtain advice but say that it left him frustrated by things that he knew nothing about...

93. The FWO submits that the respondents were primarily responsible for making enquiries for determining the correct entitlements and obligations regarding Austin, Kidd and Minasmasihi. The respondents had been warned about those obligations during the previous investigation, conducted by the FWO regarding other employees of Rainbow Paradise. To the extent that the respondents failed to comply with those obligations in respect to Austin, Kidd and Minasmasihi, they cannot no seek to deflect the blame to the FWO on the pretext of s.682 of the FW Act.

94. The FWO submits that the respondents' submissions tendered on the issue of s.682 of the FW Act suggest that the FWO did not provide the respondent with any education, where it was provided it was ambiguous and of no assistance to the respondents, or provided in the context of an investigation and therefore not truly educative. The FWO rejects these allegations on the following basis:

a) A substantial amount of information was provided to the respondents between 2007 and 2012, including general information about awards and workplace obligations, and how to find that information as specific information about the obligation and entitlements which had been contravened (including exact pay rates). The evidence does not support the respondents' admissions that "*the respondent has not been provided with any education by the applicant regarding the interpretation of any applicable awards… advised of any resources that may be available to them to educate themselves about the relevant awards and obligations of employers generally*". The respondents were on notice of their obligations and the consequence of failure to comply with those obligations;

b) In respect of the allegation that the information provided was ambiguous or conflicting, it is only supported by one example in that the notice of the obligations to ascertain and pay correct entitlements to all employees, and not simply those

who were the subject of previous complaint. The respondents failed to acknowledge the specific information regarding entitlements and obligations; and

c) It is further alleged that the information provided by the FWO "*provided largely in the context of threatened investigations, allegations of non-compliance, and threatened prosecutions*" and which "*cannot be said to be truly educative*", cannot be sustained for the following reasons:

i) A large part of the information provided to the respondents was provided in calls made to the Fair Work InfoLine. These calls were initiated by the respondents and all but four of them (Second Lam Affidavit, exhibit "JL2" (Tabs 6, 17, 19 and 22) concern enquiries that were unrelated to any complaint made against the respondents;

ii) The previous complaints were resolved voluntarily between the employees and the respondents, and the information provided during those complaints should be seen in that context. In each case the FWO closed the complaint after money was rectified, but before doing so, the FWO provided the respondents with information and warned them about the need for compliance with all of their employees which is in accordance with the FWO's compliance system authorised under s.682 of the FW Act and the FWO's policies; and

iii) The investigations regarding Austin, Kidd and Minasmasihi provided the respondents with many opportunities to voluntarily comply and/or put their own position forward before legal proceedings were finally commenced in June 2012.

95. The information provided to the respondents was not provided as the respondents submit. Much of it was initiated by the respondents; the remainder was provided in the context of investigations conducted fairly and in accordance with the FWO's processes, in which the

respondents were offered opportunities to voluntarily comply, or provided their own information.

96. The FWO submits that the operation of s.682 of the FW Act should have no impact in reducing any penalty imposed on the respondents as the respondents have suggested in their submissions in respect to this section. The evidence shows that:

a) The FWO provided the respondents with a substantial amount of information in the course of previous investigations, telephone calls to the Fair Work InfoLine and in the course of the complainant investigations;

b) The respondents were on notice of their obligations and the consequences of not complying with them;

c) The FWO offered the respondents the opportunity for voluntary compliance or to put their position forward; and

d) The respondents did not take up those opportunities or cooperate during the complainant investigations.

Determination of Penalty

Legislative Provisions Relating to Penalty

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

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

No.	Provision contravened	Description of contravention	Contraventions	Employees	Maximum penalty for contravention
1.	Subsection 182(1) WR Act (as continued by item 5 of Schedule 16 of the	Failing to pay basic periodic rate of pay	Multiple contraventions	2 employees (Austin, Kidd)	$33,000 (Rainbow) $6,600

	Transitional Act)				(Moelau)
2.	Section 45 FW Act (clause 10.3 & 14.1 of Modern Award)	Failing to pay minimum wages	Multiple contraventions	2 employees (Austin, Minasmasihi)	$33,000 (Rainbow) $6,600 (Moelau)
3.	Subsection 44(1) FW Act (section 117 FW Act)	Failing to provide notice of termination or pay in lieu thereof	2 contraventions	2 employees (Austin, Minasmasihi)	$33,000 (Rainbow) $6,600 (Moelau)
4.	Section 44(1) FW Act (section 90 FW Act)	Failure to pay Austin accrued annual leave upon termination)	Multiple contraventions	1 employee (Austin)	$33,000 (Rainbow) $6,600 (Moelau)
5.	Section 234 WR Act (as continued by sub-item 6(1) of Schedule 16 of the Transitional Act)	Failure to accrue annual leave for Kidd and pay out accrued annual leave on termination)	Multiple contraventions	1 employee (Kidd)	$33,000 (Rainbow) $6,600 (Moelau)
6.	Subsection 44(1) FW Act (sections 87 and 90 FW Act)	Failure to accrue annual leave for Minasmasihi and pay accrued annual leave on termination)	Multiple contraventions	1 employee (Minasmasihi)	$33,000 (Rainbow) $6,600 (Moelau)
7.	Section 45 FW Act (clause 24.3 Modern Award)	Failure to pay annual leave loading	Multiple contraventions	1 employee (Minasmasihi)	$33,000 (Rainbow) $6,600 (Moelau)
8.	Section 45 FW Act (clause 22.2 Modern Award)	Failure to provide paid rest pauses	Multiple contraventions	1 employee (Austin)	$33,000 (Rainbow) $6,600 (Moelau)
9.	Subsection 323(1) FW Act	Failure to comply with frequency of pay obligations	Multiple contraventions	2 employees (Austin and Kidd)	$33,000 (Rainbow) $6,600 (Moelau)
10.	Subsection 536(1) FW Act	Failure to provide pay slip	1 contravention	1 employee	$16,500 (Rainbow) $3,300 (Moelau)

11.	Subsection 712(3) FW Act	Failure to comply with Notices to Produce	2 contraventions	N/A	$33,000 (Rainbow) $6,600 (Moelau)

Principles Relevant to Determining Penalty

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

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

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

   i) Are committed by the same person; and

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

c) To the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all of the circumstances for each contravention. The respondents should not be penalised more than once for the same conduct. The penalty imposed should be an appropriate response to what the respondents did: *Australian*

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

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

e) Having fixed an appropriate penalty for each group of contraventions or course of conduct, view the aggregate penalty to determine whether it is an appropriate response to the conduct which has led to the breaches: *Kelly v Fitzpatrick* (2007) 166 IR 14 per Tracey J at [30]; *Cousins v Merringtons* (supra) per Gray J at 23, Graham J at [71], and Buchanan J at [102]. An "*instinctive censuses*" should be applied in making this assessment: *Cousins v Merringtons* (supra) per Gray J at [27] and Graham J at [55] and [78].

Factors Relevant to Determining Penalties

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

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

b) The circumstances in which that conduct took place;

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

d) Whether there has been similar previous conduct by the respondent;

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

f) The size of the business enterprise involved;

g) Whether or not the breaches were deliberate;

h) Whether senior management was involved in the breaches;

i) Whether the party that committed the breach has exhibited contrition;

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

k) Whether the party committing the breached has cooperated with the enforcement authorities;

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

m) The need for specific and general deterrence.

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

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

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

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

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

Factors Relating to Penalty

104. The written submissions prepared by FWO (partially reproduced at Annexure "B") contain a detailed analysis of the relevant factors to the imposition of a penalty based on the approach in *Mason v Harrington Corporation* (supra) and adopted in *Kelly v Fitzpatrick* (supra).

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

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

> *74. It is important to note that it is not a sufficient basis for a discount that the plea has saved the cost of a contested hearing – that would discriminate against a person who exercised a right to contest the allegations. A discount may be justified, however, if the plea is properly to be seen as willingness to facilitate the course of justice. Remorse and an acceptance of responsibility also merit consideration where they are shown.*
>
> *75. A conventional consideration in assessing a discount in a criminal case for a plea of guilty is the stage in the proceedings at which the plea is entered. Normally, the maximum discount for this factor, sometimes thought to be 25%, is reserved for a plea made at the first reasonable opportunity although, as was indicated in Cameron (at [23] – [24]) there is no obligation to make an early plea to a charge which wrongly particularises the substance to which the charge relates.*
>
> *76. As Branson J has pointed out (see Alfred v Walter Construction Group Limited [2005] FCA 497) the rationale for providing a discount for an early plea of guilty in a criminal case*

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

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

> *125. Although the applicant concedes that the respondents have admitted liability and could be said to have cooperated by partaking in the investigation, at least in a limited fashion; particularly by engaging in the record of interview process; by providing some necessary records and, by signing the agreed statement of facts, although that itself was only agreed on the day of trial and, of course, only after some delay, the applicant says that the Court should not be too anxious to afford the respondent a significant discount for its admission and conduct.*
>
> *126. In considering whether or not a discount should be applied, I have regard to the observations of Branson J in Mornington Inn Pty Ltd v Jordan, where her Honour said:*
>
> > *"The rationale for providing a discount for early plea of guilty in a criminal case does not apply neatly to a case such as the present, where a civil penalty is sought and the case proceeds on pleadings. Nevertheless, in our view, it should be accepted, for the same reasons as given in Cameron, that a discount should not be available simply because a respondent has spared the community the cost of a contested trial. Rather the benefit of such a discount should be reserved for cases where it can fairly be said an admission of liability (a) has indicated an acceptance of wrongdoing and suitable and credible expression of regret and/or (b) has indicated a willingness to facilitate the course of justice."*

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

107. The FWO submits that the respondents admit liability for contraventions of the WR Act, the Transitional Act and the FW Act as they each applied at various times with respect to the following:

a) Payment of the appropriate basic periodic rate of pay or minimum wages to Austin, Kidd, and Minasmasihi in contravention of s.182(1) of the WR Act (as continued by item 5 of Schedule 16 of the Transitional Act) and s.45 of the FW Act, with reference to Clauses 10.3 and 14.1 of the relevant Modern Award;

b) Provision of notice of termination, or pay in lieu thereof, to Austin in contravention of s.44(1) of the FW Act, with reference to s.117 of the FW Act;

c) Payment of accrued annual leave on termination of employment to Austin, Kidd and Minasmasihi in contravention of s.234 of the WR Act (as continued by sub-item 6(1) of Schedule 16 of the Transitional Act) and s.44(1) of the FW Act, with reference to s.87 and s.90 of the FW Act;

d) Payment of annual leave loading to Ms Minasmasihi in contravention of s.45 of the FW Act with reference to Clause 24.3 of the relevant Modern Award;

e) Payment of rest pauses provided to Austin in contravention of s.45 of the FW Act with reference to Clause 22.2 of the relevant Modern Award;

f) Paying Austin and Kidd in full in contravention of s.323(1) of the FW Act; and

g) Providing Minasmasihi with a payslip in relation to a payment made on 17 January 2012, in contravention of s.536(1) of the FW Act.

108. The respondents do not agree with the FWO's allegations or submissions regarding the number or volume of contraventions

identified for each of the issues identified above, or their assessment of severity of the contraventions.

109. The entirety of the respondents' admitted contraventions stem from two issues:

a) Moelau's interpretation and application of employee classifications identified from the Modern Award and its predecessor, which resulted in underpayment of minimum wages, underpayment of notice on termination of employment, underpayment of annual leave and annual leave loading; and

b) Moelau's ignorance of Rainbow Paradise's obligations with respect to various provisions of the FW Act, specifically:

i) That employees accrue annual leave (and where applicable, annual leave loading) irrespective of their length of service (s.87 of the FW Act), in circumstances where the two employees for whom contraventions were alleged were employed for two weeks or less by Rainbow Paradise;

ii) That rest pauses had to be paid according to the Modern Award; and

iii) That Rainbow Paradise was not entitled to withhold a "bond" from employees to prevent abandonment of employment, which resulted in the contravention of the frequency of pay provision (s.323) of the FW Act.

Classification of Employees

110. The respondents acknowledge the FWO's classification of Austin, Kidd and Minasmasihi is set out at [18] above. However, the FWO maintains that the respondents were required to classify Austin, Kidd and Minasmasihi in accordance with the relevant award for the purposes of paying them their minimum award wage and entitlements at the commencement of each employee's employment by Rainbow Paradise. This required the respondents to identify, interpret and correctly apply complex provisions of the relevant award and other

industrial instruments at the commencement of each employee's employment. The FWO acknowledges that industrial instruments including the existence, application and transition of state and federal awards, individual and collective agreements, and minimum pay and condition standards, have undergone significant and complex changes over the past eight years and in particular in the past six years since the introduction of the FW Act in 2009.

111. Austin, Kidd and Minasmasihi's employment was governed by a combination of both the state *Miscellaneous Workers Kindergarten and Childcare Centre & Award* and the Commonwealth *Children's Service Award 2010*, as their respective employment stretched over a period in which the WR Act, the Transitional Act and the FW Act overlapped and applied at various times. The FWO states that its case against the respondents in relation to contraventions involving "*falling to pay basic periodic rate of pay*" pursuant to s.182(1) of the WR Act (as continued by Item 5 of Schedule 16 of the Transitional Act) and "*failing to pay minimum wages*" pursuant to s.45 of the FW Act hinges on technical breaches of the FW Act resulting from incorrect classifications of Rainbow Paradise employees by Moelau. These incorrect classifications have resulted in an underpayment of minimum wages, underpayment of annual leave and annual leave loading, and underpayments of notice upon termination.

112. The FWO acknowledges that the evidence from Moelau is that she had no training or background in interpretation of awards or industrial instruments. She was reliant on her own knowledge and interpretation of the industrial classification system, at a time in which minimum pay rates and classifications were in constant flux. She was also reliant upon her own interpretation, classification and opinion of each employee's qualifications, training and experience and capabilities, as they presented themselves to her at the commencement of their employment. The evidence of Moelau also demonstrates that when in doubt regarding her classification of employees, she sought assistance from the Fair Work Infoline and was given conflicting and confusing advice, and that the correspondence from the FWO during the investigation process prior to the commencement of these proceedings was also conflicting at times. The FWO acknowledges that there is no evidence to suggest that the respondents deliberately or intentionally

classified any employee at a rate lower than that to which they were entitled without reasonable justification.

113. The FWO acknowledges that were the choice and application of classification open to interpretation (as is for all awards and for every employee's individual employment), and that interpretation conducted to the best of the interpreter's ability, without any evidence of malintent, there could be no justification for imposing significant penalties for an incorrect classification.

Austin's Classification

114. Moelau states that she relied on her own assessment of the employees' qualifications, training and experience (First Moelau Affidavit at [29]-[39]; Second Moelau Affidavit at [33]-[35]). Moelau states that she made careful assessment of Austin's qualifications, training and experience. It was her opinion that Austin's training and experience did not support the level of qualifications obtained by Austin. Moelau therefore determined that the reality of Austin's capabilities did not support the classification of childcare worker, step 5. These issues were discussed by Moelau with Austin at the time of her employment.

115. Prior to the commencement of these proceedings, the FWO's correspondence to the respondents identified Austin's classification as a childcare worker, step 2, requiring a pay rate of $17.59 per hour (First Moelau Affidavit, Annexure "GM15" – letter dated 2 September 2010).

116. After these proceedings commenced in June 2012, the FWO provided the respondents with the opinion that Austin should have been classified as a childcare worker, step 5 and therefore paid at the rate of $18.23 per hour. The respondents accepted this opinion and finalised all payments in relation to the FWO's calculated underpayment of Austin on 20 July 2012 (Third Moelau Affidavit).

Kidd's Classification

117. At the time Kidd commenced employment, Moelau could only rely upon her own assessment of Kidd's qualifications, training and experience at that time. The evidence of Moelau is that Kidd was hired as a support worker and the only duties she fulfilled during her two weeks of employment were cleaning and assistance in food preparation

(First Moelau Affidavit at [92]-[96]). Moelau therefore determined that at the time of Kidd's commencement of employment her lack of qualifications, training and experience and the task she was hired to complete justified a classification of support worker, not childcare worker.

118. After the commencement of these proceedings in June 2012, the FWO advised the respondents that, in its opinion, Kidd should have been classified as a childcare worker, step 1 and paid $17.65 per hour (Second Moelau Affidavit, Annexure "B").

119. The respondents, since the end of 2013, accepted the FWO's opinion as regulator in relation to the correct classification of Kidd's employment. Although the FWO contends that Kidd was not paid anything in relation to her employment until after these proceedings were commenced, that allegation is incorrect as a payment of $438.50 (net) was made to Kidd on 2 November 2011. Further, final underpayment of the outstanding amount of $359.80 (net) was made on 12 July 2012.

Minasmasihi's Classification

120. At the time that Minasmasihi commenced employment, Moelau could only rely on her own assessment of Minasmasihi's qualifications, training and experience at that time. The evidence of Moelau was that Minasmasihi was hired as a part time support worker and the only basis she fulfilled during her two weeks of employment was cleaning and assisting in food preparation (First Moelau Affidavit at [72], [75], [76]). Moelau's determination at the time of commencement of the employment of Minasmasihi was her lack of qualifications, training and experience, and the tasks she was hired to complete justified a classification of support worker. Moelau was informed by the Fair Work Infoline that the correct rate for a support worker was $15.86 per hour. She was also informed that the rate for a support worker which included supervising children was $16.72 per hour (First Moelau Affidavit at [84]). Moelau states that in her opinion, Minasmasihi was not entitled to the higher rate of pay because she did not and was not allowed to supervise children during her short employment with Rainbow Paradise.

121. The opinion of the FWO is that Minasmasihi should have been paid at the higher rate of $16.72 per hour. While the respondents dispute that Minasmasihi supervised any children they are accepting the FWO's final opinion, as regulator, in relation to the correct classification of Minasmasihi's employment. Payment of $694.70 was made to Minasmasihi in early January 2012 after several unsuccessful attempts by Rainbow Paradise to make those payments following the cessation of Minasmasihi's employment on 24 November 2011. The other dispute between the parties as to whether Minasmasihi was employed on a full-time or part-time basis. Moelau's evidence is that Minasmasihi was employed part-time for a specific number of hours during her two week employment with Rainbow Paradise and as a result of that dispute the FWO claims additional underpayments owing to Minasmasihi.

Effect of the Classification Discrepancy on Other Contraventions

122. The respondents claim that the incorrect classification of Austin, Kidd and Minasmasihi was the sole reason why the respondents have breached the following provisions of the WR and FW Acts:

a) Failure to pay the appropriate basic periodic rate of pay or minimum wages to Austin, Kidd and Minasmasihi in contravention of s.182(1) of the WR Act (as continued by Item 5 of schedule 16 of the Transitional Act) and s.45 of the FW Act with reference to cl.10.3 and 14.1 of the relevant Modern Award. This is due to the respondents believing that each of the employees was correctly classified at a level different to that identified by the FWO after their employment with resulting underpayments; and

b) Payment of the incorrect amount of accrued annual leave on termination of employment to Austin in contravention of s.234 of the WR Act (as continued by subsection 6(1) of schedule 16 of the Transitional Act) and s.44(1) of the FW Act with reference to ss.87 and 90 of the FW Act. This is due to Kidd being paid an amount of annual leave on termination which was based on a different classification rate to that which the FWO identified after her employment.

123. The incorrect classification of Austin and Kidd also explained, in part, the respondents' contravention of s.323(1) of the FW Act. Aside from Moelau's erroneous belief that she was entitled to withhold one weeks' worth of wages as "bond" to prevent abandonment from employment, the respondents submit to technically breaching this provision on the basis that they applied the incorrect rate of pay to Austin and Kidd, they could not have paid those employees in full within one month as required by s.323(1) of the FW Act.

The respondent's misapplication of Fair Work obligations

124. Counsel for the respondents made detailed submissions that, at the time that the remainder of the admitted contraventions of the WR Act and FW Act occurred, the respondents were ignorant and/or misunderstood their obligations under the Acts which resulted in the contraventions. The respondents acknowledge that they did not pay Kidd or Minasmasihi annual leave or annual leave loading upon the termination of their employment because each of those employees was employed by Moelau for a period of two weeks or less which was within their 'training' or 'trial' period (First Moelau Affidavit at [9]-[11], [72], [93], [95]) and Moelau was ignorant at that time of specific obligations under s.87(2) of the FW Act which provides that employees accrue annual leave (and where applicable, annual leave loading), irrespective of their length of service.

125. It is submitted that the resultant contraventions of s.234 of the WR Act (as contained by subsection 6(1) of Schedule 16 of the Transitional Act) and s.44(1) of the FW Act, with reference to s.87 and s.90 of the FW Act and s.45 of the FW Act with reference to cl.24.3 of the relevant Modern Award, were not raised by the FWO during the investigation, despite Moelau's extensive correspondence and communications with the FWO's investigators in 2010 and 2011. The first time that these contraventions were identified and particularised by the FWO was in the initiation of these proceedings with the filing of the Statement of Claim on 28 July 2012.

126. In relation to the contravention of s.45 of the FW Act with the reference to cl.22.2 of the relevant Modern Award regarding non-payment of rest pauses of Austin, the FWO has consistently failed to appreciate the distinction in Moelau's evidence in these proceedings

that while rest pauses were provided to Austin, these were unpaid because Moelau did not realise at the time, in 2009 and in early 2010, that rest pauses were supposed to be paid. So much is evidenced from [9] of the FWO's Outline of Submissions which allege that Rainbow Paradise and Moelau admitted to failing to provide Austin with rest pauses. This is incorrect. Rainbow Paradise and Moelau admitted to failing to provide Austin with paid rest pauses. Moelau's evidence demonstrates that rest pauses were provided to Austin (First Moelau Affidavit at [53] and [54]). It is submitted that Rainbow Paradise and Moelau were unaware until the FWO's contravention notice issued to them on 2 September 2010 (First Moelau Affidavit, Annexure "GM15") that the rest pauses provided to employees were required to be paid. Rainbow Paradise provided all employees with rest pauses but erroneously did not pay for these pauses until informed by FWO of the requirement to do so in September 2010. Following the contravention notice provided by FWO in September 2010 there is no evidence that Rainbow Paradise failed to pay any employee for rest pauses as required by the FW Act.

127. It is submitted that Moelau was also under the erroneous impression that Rainbow Paradise was entitled to withhold one week's pay as a 'bond' to discourage abandonment of employment without notice. The necessity for doing so was explained in Moelau's evidence (First Moelau Affidavit at [23]-[25], [29], [51] and Second Moelau Affidavit at [49]-[51]). As a result Rainbow Paradise contravened the frequency of pay requirements at s.323 of the FW Act. As soon as Moelau became aware this practice was prohibited, which was when the FWO issued the contravention notice on 2 September 2010, Rainbow Paradise and Moelau ceased this practice (First Moelau Affidavit at [51]; Second Moelau Affidavit at [49]-[51]). Following the contravention notice provided by FWO on 2 September 2010, there is no evidence that Rainbow Paradise inappropriately withheld or deducted wages from the employees as a 'bond' in contravention of s.323 of the FW Act.

128. It is submitted that Rainbow's and Moelau's contraventions of the payslip preventions, i.e. the failure to provide Minasmasihi with a payslip in contravention of s.536(1) of the FW Act relates solely to the payment of the $694.70 made by Rainbow Paradise to the FWO on 17

January 2012, after several unsuccessful attempts by Rainbow Paradise and Moelau to pay Minasmasihi following the termination of her employment. Moelau's evidence is that, to the best of her recollection, a payslip for the amount paid was posted to Minasmasihi (First Moelau Affidavit at [90]; Second Moelau Affidavit at [52]-[53]).

129. It was submitted that Rainbow Paradise and Moelau do not have any evidence of the postage of this payslip other than Moelau's statement. Rainbow Paradise and Moelau have therefore admitted this contravention because of the impossibility of proving that Minasmasihi received the payslip which they say was posted. Moelau was aware at the time of the payment was made to Minasmasihi of Rainbow Paradise's obligation to provide payslips and considered that she had complied accordingly. It was not until the prosecution was commenced on 28 January 2012 that an allegation was first made of failure to provide a payslip in the circumstances outlined above. Rainbow Paradise and Moelau have provided to the FWO copies of numerous payslips during the investigation process in relation to all staff members the subject of the investigation. There is no evidence suggesting that Rainbow and Moelau failed to provide any other payslips in relation to their employment during the investigation process or afterwards.

Rectification action

130. It is submitted that once Rainbow Paradise and Moelau were made aware of their obligations under the FW Act, i.e. that they were required to accrue and pay annual leave irrespective of length of service, that rest pauses had to be paid, and they could not withhold a 'bond' to prevent abandonment of employment, they acknowledged these obligations and sought to rectify them by instating new practices and procedures relating to the payment of employees. Rainbow Paradise and Moelau also hired a consultant to assist with Award interpretation and compliance with their Fair Work obligations.

131. It is submitted that Rainbow Paradise and Moelau sought to resolve these proceedings on a number of occasions, most recently in 2013 by offering an extensive and onus enforceable undertaking to the FWO, but all proposals had been rejected. Rainbow Paradise and Moelau understand that the FWO's position is that each individual

contravention they have identified should result in a hefty penalty, regardless of any factual disputes or Rainbow Paradise's or Moelau's circumstances.

132. In respect of the issue of underpayments and back payments, the actual amounts of underpayments, resulting from the contraventions alleged in these proceedings have been in dispute, because of confusion regarding the calculation of actual amounts owed. Rainbow Paradise and Moelau have sought clarification on a number of occasions from the FWO with respect to the calculation to the amounts owing. The confusion is not limited to Rainbow Paradise and Moelau as FWO's employees were also inconsistent and confused as to the correct rate of pay for various employees and the amount owing (Ismail Affidavit at [24]-[30]). The FWO's calculation of underpayments owing as set out in the Statement of Claim, Amended Statement of Claim and submissions is claimed to be confusing to an experienced industrial practitioner, let alone Moelau. The FWO has failed to properly identify how it reached the figures sought with reference to the evidence, and had failed to specify whether those figures are tax inclusive or exclusive. It has also inconsistently identified when Rainbow Paradise and Moelau have made payments towards those amounts owing and the extent to which those payments satisfy the total amounts said to be owing.

133. It is submitted that in respect of Austin's underpayment that initially the FWO notified Rainbow Paradise and Moelau of a complaint made against them with respect to Austin's underpayment on 22 June 2010 (First Moelau Affidavit, Annexure "GM12"). The allegations included underpayments of hourly rates, but did not identify what those hourly rates were or what the underpayment allegedly amounted to. In the FWO's notice of contravention letter to Rainbow Paradise and Moelau, on 2 September 2010, the FWO's representative had identified that Austin should have been paid at a rate of $17.59 per hour. The figure of $5,494.55 gross owed to Austin was identified, however, no calculation of how that figure was reached was provided. The notice of contravention noted, however, that an amount had already been paid to Austin in relation to her employment. Austin had, in fact, been paid an amount of $2,407.50 net ($3,488.55 gross) in 2009 in relation to wages owed. By June 2012 the FWO was claiming that Austin was owed an

additional $4,707.82 in back payments, but the calculation of how that figure was reached was not provided. The calculation of how the figure of $4,707.82 was reached was provided for the first time in the Statement of Claim filed on 28 June 2012.

134. It is submitted that once the calculation was provided (in the Statement of Claim) Rainbow Paradise paid Austin an amount of $3,329.82 net ($4,707.82 gross) on or around 20 July 2012. However, the FWO continued to claim that Rainbow Paradise and Moelau underpaid Austin in the amount of $1,387. They have failed to take into account that their calculation of payments owed to Austin was a gross amount and Rainbow Paradise and Moelau were required to deduct applicable taxes which they had done. Therefore no underpayments have been owing to Austin since 20 July 2012.

135. In respect to Kidd's underpayment on 2 November 2011 a payment of $438.50 net was made to Kidd in respect of the money that is owed to her from discussions with the FWO's representatives. By 18 July 2012 the FWO claimed that Kidd was owed $1,532.02 gross however, by 20 June 2012 the FWO claimed that Kidd was owed $1,525.77 gross. There was no calculation provided to Rainbow Paradise or Moelau as to how the figures of $1,532.02 or $1,525.77 were reached until the Statement of Claim was filed on 28 June 2012.

136. It is submitted that the payment of $438.50 net made to Kidd in 2011 by Rainbow Paradise and Moelau has not been taken into account in the FWO's calculations, as it continues to claim that Kidd was paid nothing in respect to her wages prior to the commencement of proceedings. On 12 July 2012, following Rainbow Paradise's and Moelau's receipt of the Statement of Claim, which included the underpayment calculations for the first time, an additional payment of $394.80 net was made by Rainbow Paradise and Moelau with respect to Moelau's calculation of underpayments owed to Kidd. At the time the payment was made Moelau had not agreed with the FWO's classification of Kidd, but agreed that underpayments were owed and calculated these accordingly. Moelau did not have any tax file numbers for Kidd and so withheld $46.5% tax accordingly. The total amount paid to Kidd by Rainbow Paradise and Moelau was $833.30 net. This amounts to $1,557.57 gross which is more than the amount

the FWO continues to claim was underpaid. There has been no underpayment owing to Kidd since 12 July 2012.

137. In respect to Minasmasihi's underpayment on 17 January 2012, a payment of $694.70 net was made by Rainbow Paradise and Moelau with respect to the total underpayments owed to Minasmasihi. An amount of $791.27 gross is now said, by the FWO, to be owed to Minasmasihi at the cessation of her employment, based on the hours she worked for Rainbow Paradise on Rainbow Paradise's evidence. However, based on the FWO's evidence the amount said to be owed to Minasmasihi on cessation of her employment has included:

a) $2,296.13 according to letters dated 18 June 2012 and 20 June 2012;

b) $2,990.83 according to the Statement of Claim filed 28 June 2012; and

c) $2,713.72 according to the Amended Statement of Claim filed 7 September 2012.

138. It is submitted that it has been difficult for Rainbow Paradise and Moelau to identify the correct figure owed to Minasmasihi because of the varying figures provided by FWO, and the FWO's failure to specify whether and to what extent these figures include payments already made and tax deductions. Rainbow Paradise and Moelau continue to dispute that Minasmasihi was employed on a full-time basis and was therefore entitled to minimum guaranteed hours for the duration of her employment and continue to dispute that her employment was terminated on 2 December 2011.

139. It is submitted that Rainbow Paradise and Moelau have expressed and continue to express their willingness to immediately pay any underpayments that are identified by the Court during these proceedings.

140. The final issue that Rainbow Paradise and Moelau wish to bring to the Court's attention concerns the terminations of Austin's, Kidd's and Minasmasihi's employment. Until the filing of the Amended Defence in November 2013, Rainbow Paradise and Moelau's position was that it had not terminated the employment of these three employees. The

significance of this position is that if each of these employees resigned from their employment, rather than their employment being terminated by Rainbow Paradise and Moelau, they were not entitled to be paid an additional week's pay as they had not provided notice of their resignation. Nevertheless, Rainbow Paradise and Moelau paid the notice period claimed for Austin and Kidd prior to the commencement of these proceedings.

141. It is submitted that Moelau believes that Austin's employment with Rainbow Paradise had been terminated by Austin's resignation, following a discussion between two of them in which Moelau was critical of Austin's performance. While the details of the conversation are disputed, Moelau agrees that the effect of the conversation could have given Austin the impression, or belief, that her employment was being terminated. Further, Moelau agreed that the allegations of performance issues were only provided to Austin in writing after the telephone conversation and that the Centrelink certificate of separation provided to Austin identified her termination as being employer-instigated due to unsuitability for the role. Moelau's evidence (First Moelau Affidavit at [56]) demonstrates that she encouraged employees who left Rainbow Paradise's employ to contact Fair Work Australia if they had any issues regarding the termination of their employment. Austin did not bring any proceedings in the Fair Work Commission for unfair dismissal or unpaid entitlements following the termination of her employment by Rainbow Paradise and Moelau. The contravention notice issued by the FWO on 2 September 2010 (First Moelau Affidavit, Annexure "GM15"), identifies that there was a dispute as to whether Austin resigned her employment or whether it was terminated, but noted that the parties agreed that an offer to provide notice to Austin was rejected and therefore the notice had to be paid. As stated above it took some time for the calculations to be finalised regarding amounts owed by Rainbow Paradise and Moelau, and these were not completed until July 2012.

142. Moelau also believed that both Kidd and Minasmasihi had abandoned their employment with Rainbow Paradise within two weeks of commencing that employment, by walking off the job without providing notice (First Moelau Affidavit, re: Minasmasihi at [82] and [83]; First Moelau Affidavit, re: Kidd at [102]-[103]). Rainbow

Paradise and Moelau decided to accept the FWO's position in relation to the termination of Kidd's employment as the time and effort involved in defending their position regarding Kidd's abandonment of employment would be too difficult in circumstances where the factual events that were in dispute took place over two years ago.

143. It is submitted that Rainbow Paradise and Moelau have maintained throughout these proceedings that Minasmasihi's employment was not terminated at Rainbow Paradise on the basis of matters deposed to by Mark Moelau (Mark Moelau Affidavit at [8]-[16]). Rainbow Paradise and Moelau continue to assert that in circumstances set out in the Mark Moelau Affidavit that Minasmasihi abandoned her employment.

144. It is submitted that the first time any issue was raised in respect of Kidd's and Minasmasihi's employment termination and therefore unpaid notice requirements was with the filing of these proceedings on 28 June 2012. It is noted that the filing of these proceedings was more than six months after the cessation of Minasmasihi's employment and over two years after the cessation of Kidd's employment. Neither Kidd nor Minasmasihi commenced any proceedings in the Fair Work Commission for unfair dismissal or unpaid entitlements following their cessation of employment with Rainbow Paradise.

Penalty Considerations

145. Counsel for Rainbow Paradise and Moelau indicate their agreement with the FWO's submissions at [99] above, identifying the principles relevant to determining penalty. However, they do disagree with the FWO's application of those principles in these proceedings for the following reasons:

a) Rainbow Paradise and Moelau disagree with the quantum or volume of contraventions identified in the Table set out at [98] above. By way of example the FWO contends that Rainbow Paradise and Moelau have committed "multiple contraventions" at lines 4, 5, 6 and 7 of the Table, yet each of those contraventions relate to a single failure to pay out annual leave or annual leave loading upon termination in relation to a single employee. The argument advanced is that cannot be said that this failure constitutes "multiple contraventions" when each employee was

only terminated once and was therefore only entitled to be paid out annual leave entitlements on that one occasion, especially in circumstances where each of those employees worked for Rainbow Paradise for two weeks or less. Similarly the FWO's contention of "multiple contraventions" at line 9 of the Table cannot be supported where there are only two identifiable occurrences of that contravention, i.e. the withholding of one week's pay for each of two employees as a "bond" in 2009. In relation to the other entries on the Table which identify "multiple contraventions", being lines 1, 2 and 8, each of those contraventions derive from a single common element which results in a course of conduct; and

b) In respect of the grouping of contraventions being course of conduct and common elements in relation to lines 1 and 2 of the Table, the FWO submission is that there is a common element of Moelau identifying the wrong classification of each of the employees. Therefore there were multiple contraventions consisting of a single course of conduct involving a failure to pay basic periodic rates of pay or minimum wages following from the one common element. In relation to line 8 of the Table, Moelau's evidence (Second Moelau Affidavit at [36]-[39]) was that she was unaware that rest pauses were required to be paid, which again resulted in multiple contraventions consisting of a course of conduct involving a failure to pay for rest pauses following from that one element. Once notified of her mistake in 2010, Rainbow Paradise and Moelau ensured that all rest pauses were paid.

146. It is submitted by the FWO that the WR Act and FW Act both contain course of conduct provisions which allow multiple breaches to be grouped together and treated as one where breaches arose out of a common act and decision of the employer (WR Act, s.719(2); FW Act, s.557). It was established in *Workplace Ombudsman v Securit-E Holdings Pty Ltd (in liq.) & Ors* (2009) 187 IR 330 at [5] that Rainbow Paradise and Moelau bear the onus of establishing the application of these principles to their breaches. In addition to the course of conduct provisions the FWO accepts that some of the contraventions have common elements and this should be taken into account when considering and appropriate penalty to ensure Rainbow Paradise and

Moelau are not punished more than once for the same or substantially similar conduct.

147. The argument advanced by the FWO is that this Court should find the contraventions set out in the Table at [98] above should be reduced to a total of 9 contraventions being:

a) Failure to pay basic periodic rate of pay/minimum wages to Austin, Kidd and Minasmasihi (arising from s.182(1) of the WR Act and cl. 14 of the Modern Award);

b) Failure to provide Austin with paid rest pauses (cl. 22.2 of the Modern Award);

c) Failure to pay annual leave to Austin, Kidd and Minasmasihi (s.234 of the WR Act; ss.87 and 90 of the FW Act);

d) Failure to pay annual leave loading to Minasmasihi (Modern Award cl. 24.3);

e) Failure to comply with frequency of pay obligations in relation to Austin and Kidd (s.323(1) of the FW Act);

f) Failure to provide Minasmasihi with a payslip (s.536(1) of the FW Act);

g) Failure to provide Austin and Minasmasihi with notice of termination (s.117 of the FW Act);

h) Failure to comply with a notice to produce issued November 2011 (s.712(3) of the FW Act); and

i) Failure to comply with a notice to produce issued February 2012 (s.712(3) of the FW Act).

148. The reason for marshalling these nine contraventions are as follows:

a) Rainbow Paradise and Moelau have the benefit of s.719(2) of the WR Act and s.557 of the FW Act in relation to repeated breaches of each term regarding of the employees. Accordingly, in circumstances where identified contraventions listed on the Table at [98] above, related to multiple employees in the course of

conduct provisions in s.719(2) of the WR Act and s.557 of the FW Act should be applied;

b) A reduction in number of contraventions should be made given that separate contraventions have occurred by reason of legislative change, or a change in operation on the industrial instrument. In this case additional contraventions have occurred by reason of the WR Act, Transitional Act and the FW Act and the operation of the Childcare APCS and the Modern Award, accordingly:

   i) The failure to pay basic periodic rate of pay/minimum wages to Austin, Kidd and Minasmasihi which took place under the WR Act (s.182(1)) and the FW Act (s.45) rose out of the one decision that Rainbow Paradise failed to pay each of Austin, Kidd and Minasmasihi their basic periodic rate of pay or minimum wages. The consequence was that the FWO claims that only one contravention has occurred (rather than three);

   ii) Failure to accrue or pay annual leave to Austin, Kidd and Minasmasihi, which took place under the WR Act and the FW Act, whilst giving rise to two sets of contraventions, in fact arose out of one decision by Rainbow Paradise to fail to pay each Austin, Kidd and Minasmasihi their annual leave. Consequently, the FWO claims only one contravention occurred (rather than two); and

c) The FWO submits that the course of conduct or common element provisions do not otherwise reduce the number of contraventions.

149. Rainbow Paradise and Moelau agree with the FWO's submissions in respect to the principle grouping of contraventions, however disagrees with the FWO's application of that principle to the circumstances in these proceedings, arguing that the total number of contraventions should be reduced to five for the following reasons:

a) Failure to correctly interpret and apply classifications to employees, resulting in the underpayment of minimum wages,

underpayment of notice of termination, and underpayment of annual leave and annual leave loading;

b) Failure to accrue or pay annual leave (and, where applicable, annual leave loading) on termination irrespective of the employee's length of service;

c) Failure to pay employees for rest pauses;

d) Withholding a "bond" from employees to prevent abandonment of employment which resulted in the contravention of the frequency of pay provisions (FW Act, s.323); and

e) Failure to provide Minasmasihi with a pay slip.

150. The FWO disagrees with this analysis and maintains that each contravention of each separate obligation found in the FW Act, and each term of an award, in relation to each employee is a separate contravention: *Gibbs v Mayor, Councillors and Citizens of the City of Altona* (supra) at 223; *McIver v Healey* (supra) at [16]. Recently in *Rocky Holdings Pty Ltd v Fair Work Ombudsman* (2014) 221 FCR 153 per North, Flick and Jagot JJ at [10]-[11], the Court found that the words "*civil penalty provision*" in s.557 when referring to subsection s.44(1) or s.45 of the FW Act referred to each provision of the National Employment Standards or each term of an award respectively. When determining course of conduct and common elements it is not on what practices the respondents may have engaged in, rather, what provisions have been contravened, or what entitlements have been provided.

151. The issues in respect of underpayments of minimum wages, notice of termination, annual leave and annual leave loading in this matter arise from six separate provisions of the NES or terms of the Modern Award, being:

a) Subsection 182(1) of the WR Act and cl.14 of the Modern Award (minimum wages);

b) Section 117 of the FW Act (notice of termination);

c) Section 234 of the WR Act and ss.87 and 90 of the FW Act (annual leave); and

d) Clause 24.3 of the Modern Award (annual leave loading).

The FWO concedes that legislative changes between the WR Act and the FW Act, and between the Childcare APCS and the Modern Award which affect the minimum wage and annual leave contraventions, mean that the above contraventions should be reduced to four. Similarly, the payment of annual leave and annual leave loading arises from three separate contraventions which the FWO has submitted reduces to two when legislative changes are taken into account.

152. Consequently, the FWO submits that the admitted contraventions to which penalties should be imposed should be no less than seven. Two Notice to Produce contraventions, which the FWO submits have been made out on the evidence, increases this number to nine.

153. Rainbow Paradise and Moelau acknowledge and agree that the relevant factors to determine penalty are those set out at [100]-[104] above. In the FWO's Outline of Submissions, filed 28 February 2014, there is a detailed analysis of the relevant factors referred to in *Pangaea* at [26]-[59]. FWO's Outline of Submissions, filed 28 February 2014 has been partially reproduced in in Annexure "B" below.

Proportionality

154. Counsel for Rainbow Paradise and Moelau, in their Outline of Submissions (filed 10 March 2014) and Final Closing Submissions (filed 19 September 2014), argued that the FWO's proposed penalties are disproportionate to the alleged conduct and request the total penalty (between both Rainbow Paradise and Moelau) be no more than $8,500 this being the value of the total underpayments calculated at the time of the FWO's investigation. In support of this contention this amount is actually higher than the amount owed in reality because the FWO had not included previous payments made to those employees and there had been no outstanding other payments owed to these three employees since July 2012.

155. The Court was referred to the decision in *Fair Work Ombudsman v La Kosta Childcare Centre and Kindergarten Pty Ltd & Ors* [2012] FMCA 551 Per Whelan FM (as she was then) which addressed the issues that the Court entitled to take into account regarding the nature

of employment in the childcare industry. The submission is that there should be a balance against the circumstances in *La Kosta* (supra) in the evidence provided by Moelau and the difficulty she has in running and maintaining Rainbow Paradise according to appropriate childcare standards in the context of young employees quickly abandoning their employment for the purposes of continuing Centrelink payments. As expressed in *La Kosta*:

> *100. The approach generally taken by the Court is to fix an appropriate penalty for each contravention or group of contraventions and then to consider whether the total penalty is an appropriate response to the conduct and the penalties imposed are not such as to be oppressive or crushing…*

156. It is argued on behalf of Rainbow Paradise and Moelau that it would be appropriate to treat the contraventions as a whole in relation to the two separate courses of action, being the underpayments due to the misapplication of the classifications of the relevant Modern Award and the failure to comply with the industrial obligations due to ignorance, misunderstanding or misapplication of those requirements. The following principles identified in *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq.) & Anor* [2012] FCA 479 should be used in conjunction with the Court's discretion:

a) Proportionality; that any penalty imposed should not exceed that which is appropriate or proportionate to the gravity of the contravention found proven in the light of its objective circumstances: *Hoare v R* (1989) 167 CLR 348 at 354 (Mason CJ, Dean, Dawson, Toohey and McHugh JJ); *Veen v R* (1979) 143 CLR 458 at 467-468 (Stephen J) and 482-483 (Jacobson J) and 495 (Murphy J); *Veen v R (No.2)* (1988) 164 CLR 465 at 472 (Mason CJ, Brennan, Dawson and Toohey JJ, 485-486), (Wilson J, 490-491) (Dean J, 496) (Gaudron J).

b) Parsimony; the court must ensure that it imposes the minimum term consistent with the attainment of the relevant purposes of sentencing taking care that the punishment is only for the crimes before the Court: *R v Valentini* (1980) 48 FLR 416 at 420 (Bowen CJ, Muirhead and Evatt JJ);

c) Penalty maximum: that the maximum penalty should be reserved for the worst type of contravention: *Veen v R (No.2)* (supra) at 478 (Mason CJ, Brennan, Dawson and Toohey JJ): *Stuart v Construction, Forestry, Mining and Energy Union & Anor* (2010) 185 FCR 308 at [30] (Moore J). It is submitted that the amount of a penalty is not an exact science: *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 per Burchett and Kiefel JJ.

157. If the full or substantial amount of the total available penalty was imposed this would certainly be considered "*oppressive and crushing*" to Rainbow Paradise and Moelau, and would be disproportionate to the quantum of the admitted contraventions. In *La Kosta*, despite the underpayments totalling over $116,000, the conduct continued with respect to the same employees for a number of years, and there being no evidence of adverse financial circumstances, the total penalty awarded was $85,000 against the first respondent company and $17,000 against the second respondent individual.

Conduct of Prosecutor

158. An important element in these proceedings has been the conduct of the FWO and the prosecutor being entirely out of proportion to the alleged value and seriousness of the contraventions. This is highly relevant in the determination of penalty. Counsel for the respondents in the closing submissions addressed this issue and I agree with those contentions.

159. The evidence demonstrates that in relation to the contraventions the respondents admitted that when they were notified in September 2010 and have made efforts to resolve those issues. The underpayment claims following the contravention notice were never fully articulated until the Statement of Claim was filed on 28 June 2012. The incorrect classification of "employee", in the absence of any intent to do so and in circumstances where the evaluative judgment has to be conducted by the employer at the commencing employment as opposed to the two after the cessation of employment, could not be considered by a reasonable person to be a major violation or deliberate flouting of the Acts, especially in the context of the repeated and constant contact with the FWO to ascertain the appropriate rates to be applied.

160. Counsel for the respondents submits, and from the material before the Court, I acknowledge that the extent to which these proceedings have been prosecuted and the manner of the prosecution following the investigation in 2010, the proceedings have been unnecessarily aggressive and seem to have been aimed at driving up the respondents' legal costs, causing the most disruption possible to Rainbow Paradise and the most distress possible for Moelau.

161. The respondents submit that in relation to legal costs they do not argue against the submissions that "*they are responsible for their own decisions*" and "*the occurring of some level of legal costs is an enviable consequence of a respondent choosing, as most will, to obtain legal advice or representation in connection with the proceedings brought by the FWO under the WR Act and the FW Act.*" The respondents agree that "*legal costs that arise as an ordinary incident of litigation conducted in a reasonable manner are to be borne by the respondents*". However, the respondents take issue with the submission that those particular proceedings have been "*conducted in a reasonable manner*".

162. The respondents' representatives informed the Court that it is their belief that there has been no willingness to compromise or discuss reasonable alternatives to full-scale prosecution by FWO of every single possible iteration of each possible contravention, despite the respondents numerous communications with FWO, both prior to and after the commencement of the proceedings. Most correspondence has been lengthy, aggressive and threatening and with seemingly no regard to the increasing costs of litigation to be borne by the respondents. Similarly, the volume of evidence filed by the FWO has been overwhelming for the respondents.

163. I acknowledge and accept the respondents' argument that this is especially egregious given the Commonwealth's model litigant policy, the FWO's own policy for prosecution and the FWO's statutory role which does not only include enforcement, investigation and compliance, but also requires the promotion of harmonious, productive and cooperative workplace relations offering people a single point of contact for them to obtain accurate and timely information about

Australia's workplace relations system, as well as educating people within Australia about fair work practices, rights and obligations.

164. The respondents acknowledge that information was provided by the FWO over the course of 2008-2011 with respect to their industrial obligations. However, the information provided was, for the most part, ambiguous and of no real assistance to the respondents in ascertaining exactly what their obligations and requirements were in a practical sense. The FWO provided as an example a warning to the respondents in its "*resolution letters*" which stated:

> *May I take this opportunity to encourage you to ensure that the entitlements of all your employees are being met and urge you to rectify any underpayments that may have occurred.*

This does not provide the respondents with any real assistance in complying with its obligations – it fails to assist in identifying what the entitlements are, or whether there were any underpayments occurring which required rectification. The respondents could, therefore, rely only on its own interpretation and knowledge of the specific industrial obligations they believed they were required to comply with and its own interpretation of classification rates and award requirements.

165. Further, the respondents contend that the information which the FWO claims to have provided to the respondents to ensure their awareness with their industrial obligations was provided largely in the context of threatening investigations, allegations of non-compliance, and threatening prosecution.

166. In the FWO's Final Submissions it contests the above allegations made by the respondents and submits that no evidence was provided to sustain any allegations that the FWO had done anything other than what is required to do under the FW Act.

Determination of Penalty

167. The FWO has identified 11 contraventions which are contained in the Table at [99] above. When grouping of contraventions is taken into consideration, this number is reduced to 9 which are identified at [168]-[169] below. Rainbow Paradise would be required to pay $280,500 and Moelau would be required to pay $56,100 (being, a total

of $336,600). If the maximum penalty were to be imposed on the respondents in this matter then Rainbow Paradise would be required to pay $360,500 and Moelau $69,300 (being, a total of $415,800). As indicated in *Veen v R (No. 2)* (supra) per Mason CJ, Brennan, Dawson and Toohey JJ at 478; *Stuart v Construction, Forestry, Mining and Energy Union* (supra) per Moore J at [30], clearly the matter before this Court does not fall into that sort of categorisation.

168. The FWO has prepared the following Table of grouped contraventions for Rainbow Paradise, as follows:

List of Maximum Penalties, after Grouping

Penalties against Rainbow Paradise

Provision Contravened	**Description of contravention**	**Maximum Penalty**
Section 182(1) WR Act Section 45 FW Act (cl. 14.1 Modern Award)	Failure to pay minimum wages to Austin, Kidd and Minasmasihi	$33,000
Section 45 FW Act) (cl. 22.2 Modern Award)	Failure to provide Austin with paid rest pauses	$33,000
Subsection 44(1) FW Act (s117 FW Act)	Failure to provide Austin and Minasmasihi with notice of termination or pay in lieu thereof	$33,000
Section 234 WR Act Subsection 44(1) FW Act (ss 87 & 90 FW Act)	Failure to provide annual leave to Austin, Kidd and Minasmasihi	$33,000
Section 45 FW Act (cl. 24.3 Modern Award)	Failure to provide annual leave loading to Minasmasihi	$33,000
Subsection 323(1) FW Act	Failure to comply with frequency of payment obligations in relation to Austin and Kidd	$33,000
Subsection 536(1) FW Act	Failure to provide Minasmasihi with a pay slip	$16,500
Subsection 712(3) FW	Failure to comply with	$33,000

Act	the November Notice to Produce	
Subsection 712(3) FW Act	Failure to comply with the February Notice to Produce	$33,000
TOTAL		$280,500

169. The FWO has also prepared table of grouped contraventions for Moelau, as follows:

List of Maximum Penalties, after Grouping

Penalties against Moelau

Provision Contravened	**Description of contravention**	**Maximum Penalty**
Section 182(1) WR Act Section 45 FW Act (cl. 14.1 Modern Award)	Failure to pay minimum wages to Austin, Kidd and Minasmasihi	$6,600
Section 45 FW Act) (cl. 22.2 Modern Award)	Failure to provide Austin with paid rest pauses	$6,600
Subsection 44(1) FW Act (s117 FW Act)	Failure to provide Austin and Minasmasihi with notice of termination or pay in lieu thereof	$6,600
Section 234 WR Act Subsection 44(1) FW Act (ss 87 & 90 FW Act)	Failure to provide annual leave to Austin, Kidd and Minasmasihi	$6,600
Section 45 FW Act (cl. 24.3 Modern Award)	Failure to provide annual leave loading to Minasmasihi	$6,600
Subsection 323(1) FW Act	Failure to comply with frequency of payment obligations in relation to Austin and Kidd	$6,600
Subsection 536(1) FW Act	Failure to provide Minasmasihi with a pay slip	$3,300

Subsection 712(3) FW Act	Failure to comply with the November Notice to Produce	$6,600
Subsection 712(3) FW Act	Failure to comply with the February Notice to Produce	$6,600
TOTAL		$56,100

170. I agree with the submissions made on behalf of the respondents that revised list of maximum penalties would be "*oppressive and crushing to Rainbow Paradise and Moelau and would be disproportionate to the quantum of the admitted contraventions*".

171. Having a list of maximum penalties for each contravention or group of contraventions, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the contraventions and is not oppressive or crushing: *Kelly v Fitzpatrick* (supra) at [30]; Australian *Ophthalmic Supplies Pty Ltd v McAlary-Smith* (supra) at [23], [71] and [102]. The respondents submit that a penalty imposed on the respondents potentially would be oppressive or crushing and subject to not conflating the process of "*intuitive senses*" and the "*totality*" principle. I agree with these submissions. In the circumstances of this matter, in particular where Moelau is the sole shareholder of Rainbow Paradise, if the Court were to impose a penalty on Moelau in addition to imposing the recommended penalty on Rainbow Paradise, this would effectively result in Moelau paying two penalties, being the penalty ordered against the company and the penalty ordered against herself: *Lawlor v Personal Hire Pty Ltd* (2009) 179 IR 91 at [33].

172. It is not in dispute that deterrence is, if not the principle object of the imposition of a penalty, certainly a significant object of such penalty: *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076 per French J at 57, 153. This is subject to the need to insure that the penalty is proportionate to the contravention and not oppressive: *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* (1978) ATPR 40-091 at 17,896. Deterrence may be seen as both specific to the

particular respondent and general in the sense of deterring others from engaging in similar conduct and thereby ensuring compliance with relevant acts.

173. In *Australian Competition and Competition Commission v Leahy Petroleum Pty Ltd & Ors (No. 3)* (2005) 215 ALR 301 Goldberg J addressed the uneasy tension between applying the principle that a penalty should not be crushing or oppressive and a court should have regard to financial means of the respondent on one hand, while on the other hand imposing a penalty which will have due regard to the seriousness of the contravention and the need for such penalty to have an adequate general deterrence component, rather than the conclusion that the penalty was inappropriate having regard to the financial resources of the party.

174. I also note the approach adopted by his Honour Tracey J in *Kelly v Fitzpatrick* (supra) at [30], where his Honour stated:

> *30. Another factor which must be taken into account in the fixing of pecuniary penalties for multiple breaches of statutory stipulations is the totality principle. This principle is designed to ensure that the aggregate of the penalties imposed is not such as to be oppressive or crushing. Different views have been expressed as to the manner in which the principle ought properly to be applied. On one view the starting point should be the determination of an appropriate total penalty. That figure would then be divided by the number of breaches to produce a penalty for each breach: see CPSU v Telstra Corporation Ltd (2001) 108 IR 228 at 230[7]. The orthodox position, however, which I consider should be adopted, is that the starting point is the determination of appropriate penalties for each contravention of the statutory norm. The aggregate figure is then considered with a view to ensuring that it is an appropriate response to the conduct which led to the breaches: see Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36 at 53. See also Ponzio v B & P Caelli Constructions Pty Ltd [2007] FCAFC 65 at [145] per Jessup J. This approach was recently described, in the criminal context from which the totality principle is derived, as "the orthodox, but not necessarily immutable, practice" adopted by sentencing courts: see Johnson v R (2004) 205 ALR 346 at 356[26] per Gummow, Callinan & Heydon JJ.*

175. Moelau indicated in the SOAF at [96] that Rainbow Paradise is a small business with a small number of employees, to which the FWO responded that this was not an excuse for the respondents' offending conduct being due to size and financial circumstances of the operations: *Workplace Ombudsman v Saya Cleaning Pty Ltd* (2009) 179 IR 358 at [27]-[29] and the authorities referred to in those paragraphs; in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 where Driver FM (as he then was) stated:

> *27. Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award.*13 *Obligations by employers for adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevance to the Court's consideration of penalty. As stated recently, by Tracey J in Kelly v Fitzpatrick [2007] FCA 1080, 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.*

176. Notwithstanding the financial hardship that an employer may be experiencing, in *Lynch v Buckley Sawmills Pty Ltd* (supra) Keely J stated:

> *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 effecting their obligation to comply with particular provisions of the award or awards 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 belief that no substantial penalty will be imposed in respect of the breach found by the Court to have been committed.*

177. Moelau emphasised a number of factors in relation to her financial circumstances as well as those of Rainbow Paradise:

a) The status of Rainbow Paradise as providing a service to disadvantaged families in a low socioeconomic area. The FWO disputes that it is open for the respondents to argue they are able to exploit employees (from a low socioeconomic background) because they are providing services to disadvantaged families in that area;

b) There are limited funds left from which either Rainbow Paradise or Moelau can pay any monetary penalty. The FWO states that the respondents had (and continue to have) sufficient funds to pay their employees. Contrary to Moelau's assertion that Rainbow Paradise "*does not operate on a large profit*", and has "*limited funds*" to pay a monetary penalty. The financial information contained in Moelau's Affidavit suggests otherwise when considering the underpayment in this matter: First Moelau Affidavit, Annexure "GM1"; and

c) Further, the FWO holds against Moelau that she held a second job as a hospital technical officer, that her husband, Mark, also held a second job at Blacktown Hospital and that they were able to afford a small bus to transport children.

178. I view this in a slightly different light, taking into consideration the contents of [8]-[11] above, specifically it should be repeated that the student population is predominately Indigenous or African refugees. Over 60% of the children have behavioural issues including ADHD, autism, developmental delays and other physiological problems due to abuse and neglect, coupled with speech and other physical impairments. Students often come from single parent families where the source of income is Centrelink and the parents commonly have dropped out of school before School Certificate level. Even more damning is that 90% of the students are referred to Rainbow Paradise by the Department of Family and Community Services with many having been removed from the parents' care by that government organisation.

179. The effect of these proceedings to date has resulted in Moelau ceasing to employ from the general public and restricting her operations to the use of family members. The quantum of the penalty proposed by FWO taken against the background of the declared profit margin of the

operation would most probably result in insolvency and the closure of the operation altogether. I find it difficult to accept that this the objective of the Act and would undoubtedly be oppressive or crushing: *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* (supra) per Tracey J, where his Honour stated at [60]:

> *60. Another factor to be considered is the totality principle. This principle is designed to ensure that the aggregate of penalties imputed is not such as to be oppressive or crushing see: Kelly at [30] referred to with approval by Buchanan J in Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560 at [89]. The orthodox position requires the determination of appropriate penalties for each contravention arising from the same course of conduct. The aggregate figure is then considered to ensure that the penalty is an appropriate response to the conduct in question see: Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36 at 53and Ponzio at [145] per Jessup J.*

180. If I adopted a 50% penalty reduction of $140,250 against Rainbow Paradise and $29,050 against Moelau giving a total of $169,300 I believe that amount to be oppressive to the organisation and to Moelau. Turning to Rainbow Paradise's financial results being $57,228 for the year ending 30 June 2010, this would be, in effect, in excess of three years' profits to meet the penalty. If it is taken against the profit for the year ending 30 June 2012 which is $28,187 this would take approximately six years' profits to meet the penalty. This is difficult to reconcile with the legislated objective of the function of the FWO "*to promote: harmonious, productive and cooperative workplace relations… by providing education, assistance and advice to… employers… and producing best practice guides to workplace relations and workplace practices*" being a highly trumpeted political objective of the Act at the time of its launch, but subject to vigorous submissions on behalf of the FWO that they have no legal obligation to observe (see [74]-[96] above, particularly [81]).

181. I have formed the view that the penalty faced jointly by Rainbow Paradise and Moelau should not exceed 50% of the organisations profit for the 2012 financial year or, in other words, an amount not exceeding

$14,038 (being 3.65% of the maximum penalty), and will make orders and declarations to this effect.

I certify that the preceding one hundred and eighty-one (181) paragraphs are a true copy of the reasons for judgment of Judge Lloyd-Jones

Associate:

Date: 19 June 2015

Annexure "A" - Chronology

Date	Event	Evidence Reference
August 2007	Rainbow Paradise Preschool commences operation	First Moelau Affidavit at [5]
December 2007-March 2008	FWO investigation of Melissa Mirow complaint	First Lam Affidavit at [12], (Tab 3)
November 2008-December 2008	FWO investigation of Rachel Kelleher complain	First Lam Affidavit at [12], (Tab 4), Steedman Affidavit at [8]
January 2009	FWO investigation of Shaden Mechreky complaint	First Lam Affidavit at [12] (Tab 5)
3 July 2009	Austin commences employment	SOAF at [4]
August to October 2009	FWO investigation of Ateca Pasi complaint	First Lam Affidavit at [12]
10 August 2009	Kidd commences employment	SOAF at [5]
21 August 2009	Kidd's employment ends	SOAF at [5]
September to October 2009	FWO investigation of Carla Zammit complaint	First Lam Affidavit at [12]
12 February 2010	The respondents terminate Austin's employment	SOAF at [45]-[50]
March 2010	Moelau telephones FWO information line	
March 2010	FWO investigation of complaint by Nicole Chan	First Lam Affidavit at [12] (Tab 8)
18 March 2010	Respondents enter into Compliance Agreement Form stating that will issue pay slips to all employees and keep time and wage records	First Lam Affidavit (Tab 9)
22 June 2010	FWO commences investigation into Austin's investigation	SOAF at [12]
29 June 2010	FWO issues a Notice to Produce regarding Austin's complaint	Northwood Affidavit "NN4"
13 July 2010	Respondents produce documents	Northwood Affidavit "NN6"

2 September 2010	FWO issues a contravention letter on the Respondents regarding Austin complaint	Northwood "NN10"
10 December 2010	FWO issues a final contravention letter on the respondents regarding the Austin complaint	First Lam Affidavit (Tab 11)
October 2011	FWO commences investigation into Kidd's complaint	SOAF at [13]
11 November 2011	Miniasmasihi commences employment	SOAF at [4]
16 November 2011	First disputed Notice to Produce (First Notice) issued	SOAF at [103]; First Lam Affidavit (Tab 28)
29 November 2011	Email from Ms Stratis (Moelau) to Inspector Lam	First Lam Affidavit (Tab 29)
1 December 2011	Respondents fail to comply with First Notice	SOAF at [105]
2 December 2011	Minasmasihi's employment ends (disputed by respondents)	First Minasmasihi Affidavit at [26]-[28]
6 December 2011	Moelau contacts FWO information line	First Lam Affidavit (Tab 25)
17 January 2012	FWO writes to respondents regarding non-compliance with First Notice	First Lam Affidavit (Tab 33)
20 January 2012	Email form Ms Stratis (Moelau) to Inspector Lam	First Lam Affidavit (Tab 34)
31 January 2012	Email from Inspector Lam to Ms Stratis (Moelau)	First Lam Affidavit (Tab 35)
1 February 2012	FWO commences investigation into Minasmasihi's complaint	SOAF at [14] First Lam Affidavit (Tab 38)
5 February 2012	Second disputed Notice to Produce (Second Notice) issued	SOAF at [104]; First Lam Affidavit (tab 39)
8 February 2012	Email from Ms Stratis to Inspector Lam in response to 31 Jan 2012 email	First Lam Affidavit (Tab 36)
8 February 2012	Email from Ms Stratis to Inspector Lam in response to investigation of Minasmasihi's complaint	First Lam Affidavit (Tab 40)
16 February 2012	Email from Inspector Lam to Ms Stratis	First Lam Affidavit (Tab 41)

16 February 2012	Email from Ms Stratis to Inspector Lam	First Lam Affidavit (Tab 42)
21 February 2012	Respondents fail to comply with the Second Notice	SOAF at [105]
15 March 2012	Notice of non-compliance issued by Inspector Lam	First Lam Affidavit (Tab 43)
17 April 2012	Contravention letter regarding Kidd and Minasmasihi issued	First Lam Affidavit (Tab 44)
29 May 2012	Final contravention letter issue regarding Kidd and Minasmasihi	First Lam Affidavit (Tab 45)
18 June 2012	FWO informs the respondents of intention to commence proceedings	First Lam Affidavit (Tab 46)
25 June 2012	Respondents fax documents to FWO	First Lam Affidavit (Tab 48)
28 June 2012	The current proceedings were commenced	-
12 July 2012	Respondents make partial back-payment of $359.80 to Kidd	
20 July 2012	Respondents make partial back-payment of $3,329.82 to Austin	SOAF at [75]
17 August 2012	Respondents file a Defence	-
9-15 November 2012	FWO's evidence in chief filed (10 affidavits)	-
28 February 2013-26 March 2013	Respondents' evidence filed (4 affidavits)	-
19-22 April 2013	FWO's evidence in reply filed (8 affidavits)	-
8 May 2013	Court orders that the proceedings	

Annexure "B" – FWO's Outline of Submissions

Nature and extent of the conduct

1. The nature and extent of the conduct (if all contraventions are found by the Court) broadly relates to three separate types of failures by the Respondents:

   (a) failing to provide minimum entitlements;

   (b) failing to provide a payslip; and

   (c) failing to comply with NTPs.

   Minimum entitlement contraventions

2. The Respondents failed to provide the three employees with the majority of their basic minimum employee entitlements, being:

   (a) basic periodic rates of pay / minimum rates of pay;

   (b) annual leave;

   (c) annual leave loading;

   (d) paid rest pauses;

   (e) notice of termination or pay in lieu thereof; and

   (f) the right to receive pay in full and on a regular basis.

3. Where the employees were paid for the work they performed, their wages were significantly lower than the statutory minimum:

Employee	**Hourly rate payable**	**Hourly rate paid**	**Percentage paid as a proportion of entitled rate for ordinary hours**
Austin	$18.23	Average of $11.27 (3 July to	62%

		18 December 2009)[1]	
		Average of $13.41 (18 January to 12 February 2010)[2]	74%
Kidd	$17.65	No wages paid	0%
Minasmasihi	$16.72	Average of $6.43[3]	38%

4. For certain periods of their employment, Austin and Minasmasihi received no wages at all:

   (a) Austin was not paid for the period from 3 to 9 July 2009, when her wages were deducted as a "bond" in case she resigned her employment without notice.[4] In addition, she was not paid for some hours worked on 28 July 2009, 31 July 2009, 3 September 2009, 15 October 2009 and 27 October 2009 when she contends (but it is not agreed) that she was sent home early due to low numbers of children;[5] and

   (b) of the 16 days that the FWO contends Minasmasihi was employed (which is disputed), there were 7 days when the FWO contends that Minasmasihi was entitled to be paid, but was not paid.[6]

5. Despite both employees being engaged on a full-time basis, both were sent home on occasions and not paid for the time not worked, and both were terminated over the phone without any payment in lieu of notice being made. It is noted that these facts are disputed in this case.

[1] SOAF, [29]; calculation determined by $10,439.64 ÷ 926 hours = $11.27
[2] SOAF, [30]; calculation determined by $1,808.00 ÷ 134.8 hours = $13.41
[3] SOAF, [115]; calculation determined by $732.73 ÷ 114 hours = $6.43. The Respondents dispute the number of hours worked.
[4] SOAF, [81]-[83]; Jessica Austin Affidavit 14.11.12, [20].
[5] SOAF, [31]-[34]; Jessica Austin Affidavit 14.11.12, [16]-[17].
[6] SOAF, [115]; Lilit Minasmasihi Affidavit 9.11.12, [13]-[17], [25]-[28]. The FWO does not allege that Minasmasihi was entitled to pay on 17 November 2011 when she was absent due to a medical appointment.

6. Weight must be given to the lengthy period of time over which the underpayments were made.[7] The Respondents' failures occurred at two points of time approximately two years apart, in the period between July 2009 and February 2010, and again in November 2011.[8] A number of the contraventions engaged in in relation to Austin and Kidd were repeated in relation to Minasmasihi.[9]

7. By engaging in these contraventions, the Respondents failed to comply with one of the fundamental objects of Australian workplace legislation, which ensures a guaranteed safety net of fair, relevant and enforceable terms and conditions.[10] These laws ensure that there is an even playing field in the industry for all employers regarding employment costs. Contraventions of these important entitlements undermine the workplace relations regime as a whole and demonstrate a disregard for the Respondents' legal obligations.

Pay slip contraventions

8. The contravention in this matter involved the non-provision of a payslip to Minasmasihi in relation to the payment made to her on 17 January 2012, after her employment had ended.[11]

9. Record-keeping and payslip obligations are important for monitoring compliance with the relevant industrial instruments. The non-provision of payslips can impact significantly on the ability of employees to verify and prove their income and entitlements; particularly where disputes arise as to outstanding amounts (as has arisen in these proceedings). Riethmuller FM (as his Honour then was) in *Fair Work Ombudsman v Taj Palace*

[7] *McIver v Healey* [2008] FCA 425 at [34].
[8] See SOAF, [40] (compare minimum wage contraventions from 3 July 2009 to 18 December 2009 for Austin, from 10 to 21 August 2009 for Kidd, from 11 November 2011 to 24 November/2 December 2011 for Minasmasihi); [50]-[52] and [125]-[128] (notice of termination contravention on 12 February 2010 for Austin, 2 December 2011 for Minasmasihi; [72] (annual leave/annual leave loading contraventions from 10 to 21 August 2009 for Kidd, on 12 February 2010 for Austin, on 24 November 2011 or 2 December 2011 for Minasmasihi).
[9] That is, minimum wages, notice of termination and annual leave/annual leave loading – see footnote 8.
[10] WR Act, section 3(c); FW Act, section 3.
[11] Lilit Minasmasihi Affidavit 9.11.12, [35]-[36].

Tandoori Indian Restaurant Pty Ltd [2012] FMCA 258 at [67] noted the important role that payslips play in ensuring any errors in wage payments can be quickly identified and rectified:

> "*Whilst the record keeping obligation with respect to pay slips only appears in the Regulations, its central importance in industrial matters cannot be underestimated. Proper pay slips allow employees to understand how their pay is calculated and therefore easily obtain advice. Pay slips provide the most practical check on false record keeping and underpayments, and allow for genuine mistakes or misunderstandings to quickly be identified. Without proper pay slips employees are significantly disempowered, creating a structure within which breaches of the industrial laws can easily be perpetrated*."

NTP contraventions

10. Inspector Lam served notices to produce records or documents under section 712 of the FW Act on Moelau, on behalf of Rainbow Paradise, on 16 November 2011[12] and 6 February 2012.[13] Rainbow Paradise did not respond to either the November NTP or February NTP by the required dates. Some documents matching the description of the documents sought in the November NTP and February NTP were provided by facsimile on 25 June 2012,[14] but there has otherwise been no compliance with either NTP.[15]

11. In order to enforce the minimum terms and conditions set by the WR Act and FW Act, Fair Work Inspectors must be able to exercise their compliance powers effectively. The purpose of the powers conferred on Fair Work Inspectors (which include the power to issue notices to produce

[12] Lam Affidavit 8.11.12, [37] and Ex JL-1, Tab 28.
[13] Lam Affidavit 8.11.12, [48] and Ex JL-1, Tab 39.
[14] Lam Affidavit 8.11.12, Ex JL-1, Tab 48.
[15] For example, the November NTP sought personnel details, time records and wage payment receipts for employees employed between 1 July 2009 and 30 June 2010. Rosters appearing at Lam Affidavit 8.11.12, Ex JL-1, Tab 55, refer to employees other than Austin and Kidd, for whom records have never been produced by the Respondents.

under section 712 of the FW Act) is to provide the FWO with an effective means for investigating and enforcing compliance with minimum standards and industrial instruments. Failing to comply with notices to produce stultifies the FWO's ability to investigate and enforce compliance. Thereby, the effectiveness of the principal objects of the workplace relations system are undermined: *Fair Work Ombudsman v ACN 146 435 118 Pty Ltd & Anor (No.2)* [2013] FCCA 1270 at [37].

12. Furthermore, as noted in *Fair Work Ombudsman v Nerd Group Australia Pty Ltd (No.3)* [2012] FMCA 891 (***Nerd Group (No. 3)***), the failure to comply with NTPs has a significant effect on the potential loss and damage suffered by complainants:

> *11. The extent of the conduct and loss and damage might be said to be limited to the failure to produce the relevant documents. It goes further than that, however, because it involves not merely a failure to comply with the requests in the First NTP and Second NTP, but also has the following consequence[s]:*
>
> *a. the powers conferred on Fair Work Inspectors, which are designed to provide the FW Ombudsman with means to investigate and enforce compliance with minimum legislated standards, and industrial instruments, are impaired by a failure to comply with an NTP; and*
>
> *b. employees may be denied their lawful entitlements, or part thereof, because the failure to comply with the NTP means that documents essential to a determination of which entitlements have been complied with are not produced, and entitlements, or partly met entitlements, might not be able to be calculated, properly or at all.*
>
> *12. The investigative, compliance and enforcement powers of the FW Ombudsman, and the payment to employees of entitlements, are therefore adversely affected by a failure to comply with an NTP. Thus there is damage and loss in the sense of a failure to comply with a statutory objective, and "this effect must be considered as being of similar importance as would be the case if loss and damage were suffered." By failing to provide the records as requested, Nerd Group and Mr Garber engaged in conduct undermining the utility and effectiveness of the relevant legislative provisions.*[16]

[16] *Nerd Group (No. 3)* at paras.11-12 per Lucev FM (footnotes deleted). See also *Fair Work Ombudsman v Industrial Roadpavers (WA) Pty Ltd* [2010] FMCA 204; (2010) 194 IR 436 at 446-447

13. As a result, in recent decisions Courts have considered that a failure to comply with a notice to produce is a serious breach, and have awarded significant penalties.[17]

Circumstances in which the conduct took place

Respondents' prior involvement with the FWO and knowledge of pay and conditions

14. The Respondents' contraventions of the WR Act and FW Act must be seen in the context of the history of their involvement with the FWO and the knowledge gained by them from those interactions.

15. Inspector Lam's searches demonstrate that Rainbow Paradise and Moelau had been investigated by the FWO six times prior to the current complaints and where those previous matters involved similar contraventions to those in these proceedings:

Employee and date	**Allegations**
Melissa Mirow[18] (late 2007-early 2008)	Failure to pay basic periodic rate of pay Conducting trial work without payment
Rachel Kelleher[19] (November 2008)	Underpayment of hourly rate

per Lucev FM; [2010] FMCA 204 at paras.28 and 33 per Lucev FM; *Fair Work Ombudsman v Jaycee Trading Pty Ltd & Anor (No.2)* [2013] FCCA 2128 at [62].

[17] See *Fair Work Ombudsman v VS Investment Group Pty Ltd* [2013] FCCA 208 at [51] per Judge Jarrett: "*The failure to comply with a notice properly issued by the applicant in the course of its investigations and the discharge of its statutory functions is serious. Recipients of such notices should be left under no misapprehension about their obligations to comply with such notices"* (a 50% penalty was ordered); see also *Fair Work Ombudsman v Quincolli Pty Ltd (No. 2)* [2013] FMCA 17 (mid-range penalty ordered); *Fair Work Ombudsman v Manning* [2013] FCCA 1443 at [30]-[39], [52] (80% penalty awarded); *Fair Work Ombudsman v Dawe* [2013] FMCA 191 (90% penalty ordered).

[18] Lam Affidavit 8.11.12, Ex JL-1, Tab [3].

[19] Lam Affidavit 8.11.12, Ex JL-1, Tab [4].

Shaden Mechreky[20] (January 2008)	Failure to make payment in lieu of termination
Carla Zammit[21] (October 2009)	Non-payment for time worked
Ateca Pasi[22] (August 2009)	Non-payment for time worked
Nicole Chen[23] (March 2010)	Failure to pay basic periodic rate of pay Failure to make payment in lieu of termination Failure to make payment for meal breaks

16. Whilst, the FWO is not submitting that these previous complaints constitute prior contraventions, these complaints demonstrate the Respondents' heightened level of understanding of their industrial obligations and being on notice regarding the consequences of potential breaches of those obligations. Despite this information and warnings, the Respondents persisted with a course of conduct in wilful disregard of their obligations.

17. In each case Rainbow Paradise and Moelau were informed about their obligation to provide employee entitlements, and warned that they needed to ensure that *all* employees were being provided with the correct entitlements. The FWO's resolution letters stated words to the effect of:

> "*… May I take this opportunity to encourage you to ensure that the entitlements of all your employees are being met and urge you to rectify any underpayments that may have occurred*."[24]

[20] Lam Affidavit 8.11.12, Ex JL-1, Tab [5].
[21] Lam Affidavit 8.11.12, Ex JL-1, Tab [6].
[22] Lam Affidavit 8.11.12, Ex JL-1, Tab [7].
[23] Lam Affidavit 8.11.12, Ex JL-1, Tab [8].
[24] See, for example, Lam Affidavit 8.11.12, Ex JL-1, Tabs 5, 6, 7.

18. In addition to their involvement in FWO investigations, the Respondents concede that they regularly called the FWO's telephone advice line, the Fair Work Infoline and its predecessor, the Workplace Infoline.[25] Inspector Lam's searches show that in the period from 18 January 2008 to 6 December 2011, the Respondents made 27 separate calls to the advice lines.[26]

19. Information provided from the previous investigations and the Respondents' calls to the advice lines show that the Respondents received a substantial amount of information about their workplace obligations, including specific information about the exact pay rates that were applicable to the employees.

20. **Annexure A** to these submissions illustrates that there can be no doubt that the Respondents knew what their obligations were, or at least where to find that information if they did not know and were on notice regarding failure to comply with their obligations under industrial laws and industrial awards. The information, provided by the FWO, to the Respondents on numerous occasions included:

    (a) material concerning the applicability to the Respondents' business of the Child Care APCS[27] from at least 19 March 2008, and the Modern Award from at least 12 January 2010;[28] and

    (b) material concerning the exact pay rates for a child care worker under the Child Care APCS ($17.65) on 16 December 2008,[29] a 19 year old child care worker with a Certificate III and traineeship ($18.23) on 12 January 2010,[30] and a part-time support worker ($16.72) on 2 December 2011.[31]

[25] SOAF, [92].
[26] Lam Affidavit 18.4.13, [9].
[27] Lam Affidavit 8.11.12, Ex JL-1, Tab 3.
[28] SOAF, [93], [95]; Lam Affidavit 18.4.13, Ex JL-2, Tab 8.
[29] Affidavit of Skye-Anne Steedman dated 13 November 2012, [8].
[30] Lam Affidavit 18.4.13, Ex JL-2, Tab 9.
[31] Lam Affidavit 18.4.13, Ex JL-2, Tab 25.

21. Despite, the degree of information the Respondents received about their industrial obligations, they failed to act accordingly and at all times in fact paid lower than the rate of pay in the information they received. When setting a penalty, the Court should view the contraventions in light of the information received and the Respondents' subsequent disregard for that information.

Vulnerability

22. A further aggravating factor for these contraventions is the vulnerability of the three employees in this matter, by reason of their age and inexperience. The evidence shows that:

    (a) each of the employees were 19 years old at the time they were employed with Rainbow Paradise;[32]

    (b) all of the employees had been seeking work when they obtained positions with Rainbow Paradise: Austin had just completed her qualification and was looking for work, Kidd was seeking work, and Minasmasihi was seeking a traineeship – her first job out of high school.[33] In this context, Austin and Kidd worked for a lower pay rate than they were entitled ($12.25 in the case of Austin and $15.35 in the case of Kidd), and Minasmasihi worked more hours than she was paid for;[34]

    (c) Austin and Minasmasihi were generally reliant on family members when they engaged in important communications with Moelau, including termination conversations;[35] and

[32] SOAF, [4]; Jessica Austin Affidavit 14.11.12, [2]; Kidd Affidavit 12.11.12, [2]; Lilit Minasmasihi Affidavit 9.11.12, [2].
[33] Jessica Austin Affidavit 14.11.12, [3]; Kidd Affidavit 12.11.12, [3]; Lilit Minasmasihi Affidavit 9.11.12, [3]; Lilit Minasmasihi Affidavit 25.2.14, [3].
[34] Lilit Minasmasihi Affidavit 9.11.12, [12].
[35] Jessica Austin Affidavit 14.11.12, [35]-[36]; Lilit Minasmasihi Affidavit 9.11.12, [5], [26]-[28], [34]; Lilit Minasmasihi Affidavit 25.2.14, [9]-[10].

(d) each of the employees gave evidence that they felt pressured, intimidated or upset by Moelau during the course of their employment.[36]

23. The employees had a limited understanding of what their workplace rights were, by reason of their age and inexperience in the workforce, and were not in a position to challenge or object to the entitlements they were offered by Rainbow Paradise and Moelau. As a result, Rainbow Paradise and Moelau were able to withhold more from the employees' entitlements than an employee with more awareness of their workplace rights would have understood were owed to them and would have challenged.[37] The employees' vulnerability should be a significant factor when assessing the quantum of penalty: see *Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38 where Simpson FM (as his Honour then was) held (at [20]):

> "*... The vulnerability of these employees and the way they were exploited by the respondent is a significant factor when assessing the quantum of penalty*".

Socio-economic factors

24. In Moelau's evidence, she asserts that the socio-economic background of the Blacktown area and the difficulties with dealing with families and staff from that area caused her difficulties.[38] To the extent that her evidence infers that any penalty should be reduced for this reason, this submission should be rejected. Rather to the contrary, the low socio-economic background of the area and staff means that it is all the more

[36] Jessica Austin Affidavit 14.11.12, [30], [38]; Kidd Affidavit 12.11.12, [20]-[21]; Lilit Minasmasihi Affidavit 9.11.12, [28].
[37] See *Fair Work Ombudsman v ACN 146 435 118 Pty Ltd (No.2)* [2013] FCCA 1270 at [44]; *Fair Work Ombudsman v Jooine (Investment) Pty Ltd* [2013] FCCA 2144 at [90].
[38] Unsworn Affidavit of Gina Moelau provided to the FWO on 18 February 2014 (but not sworn at the time these submissions were filed) (**Unsworn Moelau Affidavit**), [18]-[19].

important that employers like Rainbow Paradise not be permitted to deny or undercut their employees their basic employee entitlements.[39]

Moelau's involvement

25. Moelau was the sole company director and shareholder of Rainbow Paradise. She was responsible for the overall direction, management and supervision of Rainbow Paradise's operations in relation to industrial instruments and arrangements, and setting pay rates, wages and conditions of employees, and was responsible for determining that Rainbow Paradise complied with its legal obligations under the WR Act and FW Act. Further, Moelau was served with the November NTP and February NTP and was informed of the consequences of failing to comply with those notices. Moelau's conduct was the cause of Rainbow Paradise's contraventions of the WR Act and FW Act.

Nature and extent of the loss

26. The total underpayment of $8,214.58 is a significant underpayment to these employees because they all earned low wages (with Kidd and Minasmasihi being classified at the lowest level for their classification type), and both Kidd and Minasmasihi were employed for only several weeks.

27. When the underpayment is seen as a percentage of the total wages owed, Minasmasihi's underpayment represents 27% of her wages, Austin's underpayment represents 33% of her wages, and Kidd's underpayment represents 100% of her wages.

28. Notwithstanding some rectification payments made after the commencement of these proceedings, the Employees have been without the benefit of their full wages for several years (as long as 4.5 years in the case of Austin). Rainbow Paradise and Moelau have had the benefit of not paying these amounts to the employees.

[39] See *Fair Work Ombudsman v E A Fuller & Sons Pty Ltd* [2013] FCCA 5 at [85(b)].

29. Furthermore, the financial loss suffered by Minasmasihi is acute given she has not been employed since termination.[40]

30. There is no evidence to suggest that Rainbow Paradise and Moelau's failure to comply with their workplace obligations would not have continued, had the employees' employment with Rainbow Paradise not continued and had their complaints not been brought to the attention of the FWO.

31. In relation to the Respondents' failures to comply with the November NTP and February NTP, the FWO considers that the Court should also consider loss and damage in view of the relevant statutory objective. The Respondents' conduct is "*conduct ...* [which] *undermines the utility and effectiveness of a fundamental object*",[41] in this case, the FW Act.

32. As set out above, the FW Act empowers Inspectors to issue notices to produce as an effective means of investigating and enforcing compliance with minimum standards and industrial instruments. Rainbow Paradise and Moelau's conduct in failing to comply with the notices issued by the FWO hindered the FWO's ability to conduct a proper investigation of all of Rainbow Paradise's employees. It is possible that the underpayments and contraventions identified by the FWO extended beyond those identified in the compliance notice,[42] but the FWO was unable to determine this due to the failure to respond to the notices to produce. The Respondents' conduct undermines the statutory objectives and the principal objects of the FW Act.

[40] Lilit Minasmasihi Affidavit 25.2.14, [11]-[12].
[41] *Secretary, Department of Health and Ageing v Pagasa Australia Pty Ltd* [2008] FCA 1545 at [56]; *Olsen v Sterling Crown Pty Ltd* [2008] FMCA 1392 at [51].
[42] See for example, the situation investigated by Inspector Lam regarding Lynette Gardner-Cole: Lam Affidavit 8.11.12, Ex "JL-1", Tab 30.

33. In this context, the Court should consider the effect of the notice to produce contraventions as being of similar importance to any monetary loss or damage.[43]

Similar previous conduct

34. The FWO accepts that there are no previous findings by a Court against either Rainbow Paradise or Moelau for contraventions of workplace laws.

35. However, the Respondents have a prior complaint history. In relation to the pay slip contravention, in March 2010 Moelau signed, on behalf of Rainbow Paradise, a "*Compliance Agreement Form*" with the FWO in which she agreed to issue pay slips to employees, and keep time and wage records for all employees, in accordance with the requirements of the FW Act and *Fair Work Regulations 2009* from the next pay period after 26 March 2010 (**Compliance Agreement Form**).[44] The Compliance Agreement Form specifically warned about "*issuing pay slips within 1 day of payment*".[45] When considering a penalty for the failure to provide Minasmasihi with a pay slip in November 2011 (which is the same conduct that the Respondents had agreed not to engage in), it is relevant that the Respondents were aware of their obligations because they entered into the Compliance Agreement Form.

Size and financial circumstances of the business

36. Information provided by Moelau indicates that Rainbow Paradise is a small business with a small number of employees.[46]

37. However, the Respondents are not able to excuse away their offending conduct by the size and/or financial circumstances of their operations: *Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA at [27] to [28] and the authorities referred to in those paragraphs:

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[43] *Olsen v Sterling Crown Pty Ltd* [2008] FMCA 1392 at [52]; *Fair Work Ombudsman v Industrial Roadpavers (WA) Pty Ltd* [2010] FMCA 204 at [28]; *Nerd Group (No. 3)* at [12].
[44] SOAF, [96].
[45] Lam Affidavit 8.11.12, Ex JL-1, Tab 9.
[46] Gina Moelau Affidavit 28.2.13, [7]-[8].

27. *In* Rajagopalan v BM Sydney Building Materials Pty Ltd [*2007] FMCA 1412 at paras. 27 to 29 it was said:*

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

28. *Notwithstanding financial hardship that an employer may be experiencing in* Lynch v Buckley Sawmills Pty Ltd *[1984] FCA 306; (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 obligation 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 penalty will be imposed in respect of a breach found by a court to have been committed."*

38. In Moelau's evidence as to penalty, she has emphasised a number of factors in relation to her own financial circumstances as well as those of Rainbow Paradise:

(a) the status of the preschool, providing a service to disadvantaged families in a low socio-economic area;[47]

(b) there are limited funds left from which either Rainbow Paradise or Moelau could pay any monetary penalty;[48]

(c) the expenditure of legal costs;[49] and

(d) a threat of corporate administration if a significant fine is imposed.[50]

39. With respect to the first proposition, the FWO disputes that it is open for the Respondents to argue that they are able to exploit employees (from low socio-economic backgrounds) because they are providing services to disadvantaged families in that area.

40. With respect to the second proposition, the FWO says that the Respondents had (and continue to have) sufficient funds to pay their employees. Contrary to Moelau's assertion that Rainbow Paradise "*does not operate on a large profit*",[51] and has "*limited funds*" to pay a monetary penalty,[52] the financial information contained in Moelau's affidavit suggests otherwise when considering the underpayments in this matter. Annexure "GM1" to Moelau's Affidavit of 28 February 2013 shows that Rainbow Paradise made the following profits over the financial years in which the contraventions took place:

(a) year ending 30 June 2010 = $57,228;

(b) year ending 30 June 2011 = $51,571; and

(c) year ending 30 June 2012 = $28,187.

41. In the year ending 30 June 2012 the profit was in addition to $20,000 in directors' fees (presumably taken by Moelau herself as Rainbow

[47] Gina Moelau Affidavit 28.2.13, [5]-[8]; Unsworn Moelau Affidavit, [16]-[17].
[48] Unsworn Moelau Affidavit, [4]-[15], [69].
[49] Unsworn Moelau Affidavit, [61]-[63].
[50] Unsworn Moelau Affidavit, [70].
[51] Gina Moelau Affidavit 28.2.13, [6].
[52] Unsworn Moelau Affidavit, [69].

Paradise's sole director). Moelau expects the profits for the year ending 30 June 2013 to be similar to the above figures.[53]

42. Moelau held a second job as Hospital Technical Officer.[54] Moelau's husband Mark indicates that he and Moelau were able to afford a small bus to transport children.[55]

Legal costs

43. To the extent that the Respondents rely on the expenditure of legal fees to reduce penalty, this submission should be rejected.

44. The Respondents are responsible for their own decisions: they chose to defend all contraventions for over 15 months in circumstances where they now admit that the majority of contraventions took place. In *ACE Insurance Limited v Trifunovski (No. 2)* [2012] FCA 793, Perram J held:

> "*There are risks in permitting the incurring of legal costs to count as an ameliorating factor in assessing a civil penalty. To do so may provide an economic incentive to a respondent to draw out a proceeding confident that money spent on its defence may result in a reduction in penalty. This, in turn, would conflict with the policy of encouraging early admission of wrongdoing by taking account of it in the process of penalty assessment as a positive matter: cf* Minister for Sustainability, Environment, Water, Population and Communities v De Bono *[2012] FCA 643 at [60], [73];* Secretary, Department of Health and Ageing v Export Corporation (Australia) Pty Ltd *[2012] FCA 42 at [91]*."

45. The incurring of some level of legal costs is an inevitable consequence of a respondent choosing (as most will) to obtain legal advice or representation in connection with proceedings brought under the WR Act and FW Act.

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[53] Unsworn Moelau Affidavit, [3].
[54] Gina Moelau Affidavit 28.2.13, [4].
[55] Mark Moelau Affidavit 28.2.13, [7].

46. It is reasonable and open to the Court to infer that, in setting the maximum penalties applying to contraventions of civil remedy provisions of the WR Act and FW Act, the parliament would have contemplated that a person facing such a penalty would also be likely to have incurred some level of legal costs, in particular given that the parliament gave consideration to how costs would be dealt with in section 824 of the WR Act and section 570 of the FW Act.

47. To allow a discount on penalty on account of the mere fact of having incurred some costs would, in effect, reduce the applicable maximum penalties that have been judged by parliament to be appropriate. The FWO relies on *Fair Work Ombudsman v Mildura Battery Company Pty Ltd* [2014] FCCA 192 at [64], where Judge Turner held (at [64]):

> "*The mere fact that the respondents incurred costs relating to the proceedings ought have no relevance to penalty, as they have resulted from the respondent choosing to obtain legal advice. The legislation sets out the maximum penalties to be imposed without mention of deduction for costs. Costs are not a consideration relevant to penalty as set out in* Mason [v Harrington Corporation Pty Ltd *[2007] FMCA 7*]".[56]

48. The FWO notes that:

    (a) section 824 of the WR Act provided that a party to a proceedings in a manner arising under the WR Act must not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceedings vexatiously or without reasonable cause; and

    (b) section 570 of the FW Act provides that a party to proceedings in a court exercising jurisdiction under the FW Act may only recover its legal costs in limited circumstances, including where such costs

[56] See also *Fair Work Ombudsman v Revolution Martial Arts Pty Ltd* [2013] FMCA 125 at [47]; *Fair Work Ombudsman v Australian Sales and Promotions Pty Ltd* [2013] FCCA 1502 at [21].

have been incurred by reason of the other party's unreasonable act or omission.[57]

49. Having regard to the above sections of the WR Act and FW Act, the FWO submits that:

    (a) there is a clear legislative intention that the jurisdiction be "no costs" unless the very high thresholds in section 824 of the WR Act or subsection 570(2) of the FW Act have been satisfied; and

    (b) legal costs that arise as an ordinary incidence of litigation conducted in a reasonable manner are to be borne by the Respondents, such costs also being the inevitable result of a respondent having civil remedy proceedings brought against them for having contravened Commonwealth workplace laws.

50. To obtain a discount on penalty by reason of costs incurred would, in the FWO's submission, be to circumvent the intention of the legislation that:

    (a) the jurisdiction be primarily a "no-costs" jurisdiction; and

    (b) a party may only recover its costs where the high thresholds set by section 824 of the WR Act or subsection 570(2) of the FW Act have been satisfied.

51. Further, the consideration of costs by the Court would operate to the benefit of those respondents with the means to obtain legal representation, and is not a factor with general application in respect of penalty.

Threat of insolvency/administration

52. The Court should also give no weight to the Respondents' threat of corporate insolvency or administration if a penalty is awarded.[58] As

[57] The threshold set by subsection 570(2) of the FW Act is high, in that the Court's discretion to award costs should only be exercised in a clear case: *Saxena v PPF Asset Management Ltd* [2011] FCA 395, at [5]-[6]; *Construction, Forestry, Mining and Energy Union and Others v Clark* (2008) 170 FCR 574 at [29].
[58] See Unsworn Moelau Affidavit, [70].

Driver FM (as his Honour then was) opined in *Cotis v MacPherson* [2007] FMCA 2060 at [12]:

> "*It is, in my view, important to make the point that employers should not and cannot regard insolvency, either personal or corporate, as a refuge from their responsibilities under the Workplace Relations Act*."

53. Similarly, Magistrate Hawkins stated in *Fair Work Ombudsman v Bosen Pty Ltd* [2011] VMC 21 at [51]:

> "[51] *There is a need to send a message to the community at large, and small employers particularly, that the correct entitlements for employees must be paid and that steps must be taken by employers (of all sizes) to ascertain and comply with minimum entitlements (as opposed to ignoring those obligations). Compliance should not be seen as the bastion of the large employer, with human resources staff and advisory consultants (accountants, consultants, lawyers) behind them*."

54. Given that one of the principal objects of the FW Act is to provide a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions for all employees, employers who seek to profit by failing to comply with that guaranteed safety net can undercut other employers in their industry who are paying their employees in accordance with the correct terms and conditions. This practice may force other employers who pay their employees the correct wages and conditions (including small business employers) to become unprofitable as they are not able to compete with the undercutting and may result in job losses. These considerations underline the need to deter other employers from contravening these provisions.

55. The FWO submits that the law should mark its disapproval of the conduct in question, and set an appropriate penalty which serves as a warning to others.[59]

Deliberateness of the contraventions

56. The extent to which the Respondents acted deliberately is a contested matter in this proceeding.

57. The FWO submits that it will be open for the Court to find that Rainbow Paradise and Moelau acted, at a minimum, with wilful blindness to their obligations to provide the three employees with their entitlements. However, it may be, after the Court has received and considered all the evidence, that the Court in fact finds that the Respondents acted with complete disregard to their obligations in relation to some or all of the contraventions.

58. The FWO has set out earlier in these submissions the state of the Respondents' knowledge of their obligations, at the time of the offending conduct, by reason of their involvement in previous FWO investigations and their calls to the Workplace Infoline/Fair Work Infoline.

59. Despite the extensive amount of information and warnings provided to Rainbow Paradise and Moelau, such that it could be in no doubt as to its workplace relations obligations and the effects of non-compliance, the Respondents failed to comply with the very entitlements it had received information about. This suggests the Respondents were at least wilfully blind or acted with complete disregard to their obligations. This factor should weigh in favour of a higher penalty.

Contrition, corrective action, co-operation with authorities

<u>Contrition</u>

60. The FWO will dispute at hearing that the Respondents are genuinely contrite. In the alternative, if the Court does accept that the Respondents'

[59] *Kelly* at [28]

expression of remorse is genuine, the FWO will submit that the Court should find that it was offered too late in the proceedings to constitute a mitigating factor.[60]

Corrective action

61. The Respondents have made limited attempts to rectify the underpayments. To date the only repayments made were:

    (a) a back-payment to Kidd of $359.80 on 12 July 2012; and

    (b) a back-payment to Austin of $3,329.82 on 20 July 2012.[61]

62. No further back-payments have been made and there are outstanding amounts still owed to Austin, Kidd and Minasmasihi.[62] The rectifications made constitute a small fraction of what is in fact owed to the employees: See [135] and [136] of the SOAF.

63. The FWO submits that the Court will find that the Respondents have not taken appropriate steps to ensure that there is future compliance with their workplace relations obligations.

Co-operation with authorities

64. The FWO acknowledges that in late 2013, the Respondents admitted all of the contraventions except the notice of termination contravention in relation to Minasmasihi and the notice to produce contraventions, and in doing so, saved cost to the public purse by avoiding the need for a four-day contested hearing originally set down for November 2013.[63]

65. However, the Respondents' admissions came very late in the proceedings, some 15 months after their commencement, and only after the FWO had filed 18 affidavits in support of its case as well as its outline of submissions. Moreover, even after making admissions the Respondents

[60] See *Fair Work Ombudsman v AJR Nominees Pty Ltd (No. 2)* [2014] FCA 128 at [36]-[37] (apology offered in late 2013 for conduct which occurred in 2010 and 2011).
[61] SOAF, [74]-[75].
[62] SOAF, [135]-[136] (the amounts are not agreed by the Respondents).
[63] SOAF, [18]-[22].

have failed to demonstrate any regret or remorse, or a willingness to facilitate the course of justice. The FWO relies upon the decision of the Full Court of the Federal Court in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 (per Stone & Buchanan JJ):

> "*[74] It is important to note that it is not a sufficient basis for a discount that the plea has saved the cost of a contested hearing – that would discriminate against a person who exercised a right to contest the allegations. A discount may be justified, however, if the plea is properly to be seen as willingness to facilitate the course of justice. Remorse and an acceptance of responsibility also merit consideration where they are shown.*
>
> *[76] ... it should be accepted, for the same reasons as given in Cameron* [*v R* (2002) 209 CLR 339]*, that a discount should not be available simply because a respondent has spared the community the cost of a contested trial. Rather, the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability: (a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice*."

66. In *Fair Work Ombudsman v Jetstar Airways Ltd* [2014] FCA 33, Buchanan J declined to discount the maximum penalty for admissions which were made at the last minute, after a significant amount of time had elapsed after the commencement of proceedings:

> *"[37]. In fact, I have no evidence of the attitude of any of the Respondents beyond a bare admission that contraventions occurred and penalties should be fixed. There is therefore no basis upon which to conclude that the Respondents regret their conduct or intend that it not be repeated. No further statement was made about the matter either during submissions, written or oral. Such matters may not be taken into account to increase any penalty otherwise*

appropriate. The significance of a lack of evidence showing contrition or remorse is that no occasion arises to consider, on that account, any discount from a penalty otherwise appropriate.

[38]. Similarly, there is no basis for a discount because the Respondents made admissions two days before trial, 18 months or so after the proceedings were commenced. Those admissions are not evident in any of the three defences which were filed, including the further amended defence filed less than two weeks before the admissions were made. In the present case, I see no occasion, therefore, upon which to discount from any penalty on the basis of an early admission of liability.

[39]. I conclude, therefore, that no occasion arises in the present case to consider any discount from penalties otherwise justified."

67. The FWO submits that there should be no discount afforded on penalty if the Court finds that the contraventions took place.

68. In addition to the above, the FWO requests that, when setting a penalty, a significant factor that the Court should take into account is the behaviour and attitude of the Respondents during the investigation that led to these proceedings. In the period from December 2010 to June 2012, when Inspector Lam had carriage of the investigation, the Respondents were highly un-cooperative with the FWO and showed little respect for it as a regulator tasked with investigating whether Rainbow Paradise's employees had been provided with their correct entitlements.

69. The Respondents did not comply with notices issued by the FWO (namely the November NTP and February NTP) or contravention letters issued by the FWO.[64]

70. Further, they did not participate in recorded interviews with the FWO which were offered to them.[65]

[64] See SOAF, [102]-[106], [129]-[130].

71. Most importantly, the emails sent by Moelau to Inspector Lam are indicative of the Respondents' failure to co-operate throughout the investigative period. Examples of the emails include:

(a) "*you need to perform your duties correctly from 1.5 years ago … You are not following the procedures to rectify a situation ASAP and it is your job to defuse a dispute rather than creating a dispute*" (in response to the issuing of the November NTP);[66] and

(b) "*you need to refer to me before making assumptions regarding our service thank you. You did not call me to request why this person was not paid. You need to perform your duties correctly before pointing your finger*" (in response to a notification of investigation regarding Minasmasihi)[67].

General Deterrence

72. General deterrence is an important factor in these proceedings. There is a need to send a message to the community, and particularly employers, that employers must provide their employees with the correct entitlements and take steps to respond to correspondence and notices issued by Government regulators such as the FWO. The role of general deterrence in determining the appropriate penalty is illustrated by the comments of Lander J in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543, [93]:

> "*In regard to 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*

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[65] See Northwood Affidavit, Annexure "NN7"; Lam Affidavit 8.11.12, Ex JL-1, Tabs 21 and 27. No response was received by the Respondents to any of these letters.
[66] Lam Affidavit 8.11.12, Ex JL-1, Tab 36.
[67] Lam Affidavit 8.11.12, Ex JL-1, Tab 40. See also, by way of example, Ex JL-1, Tab 24 *("I feel you are trying to find something against me … your actions are unprofessional and are threatening*"); Tab 30 (at p. 119) ("*... you continued to be persistent by trying to manipulate her to provide false information*" … "*you were unprofessional with your work ethics and please do not abuse your authority*" … "*it is requested by Lynette that I call the police if you continue to harass her via telephone calls*"); Tab 42 ("*You will have to wait* …")

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*."

73. General deterrence is particularly important in the child care industry in which Rainbow Paradise operates. The FWO refers to the comments made by Whelan FM (as her Honour then was) in *Fair Work Ombudsman v La Kosta Childcare Centre & Kindergarten Pty Ltd* [2012] FMCA 551 at [96]-[98]:

> "*96. The Applicant submits that it is important to send a message to the community at large and to employers in the childcare industry in particular because of the nature of employment in that industry.*
>
> *97. I am satisfied that the nature of employment in this industry is sufficiently well known for me to take judicial notice of the type of employment and profile of the employees in the industry. Like the employees in this case they are generally employed on a part-time or casual basis and can appropriately be regarded as low-paid. The industry is not one where enterprise bargaining is widespread and many employees are reliant on minimum wages and conditions. Many employees are young females.*
>
> *98. I accept that it is appropriate to remind other employers in this industry of the importance of ensuring that minimum wages and conditions are met*."

Specific deterrence

74. The FWO submits that the need for specific deterrence is high because of the following factors:

    (a) the large number of contraventions of the WR Act and FW Act;

    (b) the Employees were young and vulnerable;

    (c) the Employees have still not been paid all of their entitlements, even though the contraventions occurred up to 4.5 years ago and the proceedings have been on foot for over 18 months;

    (d) the Respondents have not co-operated with the FWO;

    (e) the contraventions were serious and wilful;

    (f) the FWO does not accept that Rainbow Paradise and Moelau have taken appropriate steps to prevent further contraventions;

    (g) the Respondents had already received warnings about their need to comply with workplace obligations, and had signed a compliance agreement form in relation to pay slips, and were on notice of the pay rates to be provided to the employees, but still failed to comply with their workplace relations obligations; and

    (h) Rainbow Paradise continues to operate and Moelau continues to be the sole director of Rainbow Paradise.

75. Rainbow Paradise and Moelau should be left in no doubt that failing to comply with workplace relations laws will not be tolerated by the Courts, that employees of Rainbow Paradise should be provided with their minimum entitlements and pay slips, and notices issued by regulators such as the FWO should be complied with.

Totality

76. Having fixed an appropriate penalty for each course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it

is an appropriate response to the conduct which led to the contraventions, and is not oppressive or crushing: see *Kelly* at [30]; *Merringtons* at [23] per Gray J, [71] per Graham J, and [102] per Buchanan J.

Accessorial Liability – senior management

77. The same considerations apply in determining penalty in respect of the conduct of Rainbow Paradise and Moelau. Moelau was clearly involved in Rainbow Paradise's contraventions, being:

    (a) the sole company director and shareholder and controlling mind of Rainbow Paradise[68];

    (b) principally responsible for the overall direction, management and supervision of Rainbow Paradise's operations in relation to industrial instruments and arrangements, setting pay rates, wages and conditions of employees, and therefore was the person responsible for ensuring that Rainbow Paradise complied with its legal obligations under the WR Act and FW Act;[69]

    (c) the person who made decisions on behalf of Rainbow Paradise regarding recruitment and termination of employees of Rainbow Paradise, the terms and conditions upon which persons would be employed by Rainbow Paradise, the work to be performed, and the time, method and manner of payments to the employees;[70]

    (d) the person that the FWO primarily dealt with during the investigations into the employees and the other employees of Rainbow Paradise;[71]

    (e) a person who was aware of the ability to call the Workplace Infoline / Fair Work Infoline to obtain information and advice about pay and

[68] SOAF, [3], [91(a)].
[69] Amended Statement of Claim, [3]; Amended Defence, [1]; SOAF [3].
[70] Amended Statement of Claim, [107(b)(i)-(iv)]; Amended Defence, [66]; SOAF [91].
[71] Amended Statement of Claim, [107(b)(v)]; Amended Defence, [66].

conditions for employees, and who obtained information and knowledge on that basis;[72]

(f) the person who signed the Compliance Agreement Form on 18 March 2010 regarding pay slips;[73]

(g) a person who knew the requirements for complying with NTPs, having previously complied with one issued by Inspector Narelle Northwood issued on 29 June 2010;[74] and

(h) the person on whom the November NTP and February NTP were served, and the only person who responded to correspondence about those NTPs.[75]

78. The FWO submits that the connection between Rainbow Paradise and Moelau (she being its sole director, company secretary and shareholder) should not reduce the amount of the penalty. To make this submissions, the FWO relies upon the decision of Buchanan J in *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2*) [2012] FCA 408 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 the*

[72] SOAF, [92]. See also SOAF, [93]-[95].
[73] SOAF, [96]. Lam Affidavit 8.11.12, Ex JL-1, Tab 9.
[74] SOAF, [107].
[75] SOAF, [108]-[110].

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".