FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v STEPPING STONES CHILD CARE CENTRE (NSW) PTY LTD & ANOR *[2015] FCCA 429*

Catchwords:
INDUSTRIAL LAW – Agreed failure by the first respondent to comply with two compliance notices sent in accordance with s.716 of the *Fair Work Act 2009* (Cth) – agreed involvement by the second respondent in the first respondents' failures to comply with compliance notices – appropriate civil penalties to be paid by respondents pursuant to s.546 of the *Fair Work Act 2009* (Cth).

Legislation:
Fair Work Act 2009 (Cth) s.539, 716
Crimes Act 1914 (Cth) s.4AA

Cases Cited:
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285
Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72
Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd [2014] FCA 336
Australian Competition and Consumer Commission v Mandurvit Pty Ltd [2014] FCA 464
Kelly v Fitzpatrick (2007) 166 IR 14
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	STEPPING STONES CHILD CARE CENTRE (NSW) PTY LTD (ACN 125 050 311)
Respondent:	AILSA TAVENDALE
File Number:	SYG 1442 of 2014
Judgment of:	Judge Emmett

Date of Last Submission:	9 December 2014
Delivered at:	Sydney
Delivered on:	4 March 2015

REPRESENTATION

Solicitors for the Applicant:	Office of the Fair Work Ombudsman

No appearance by or on behalf of the respondents.

FEDERAL CIRCUIT COURT OF AUSTRALIA AT SYDNEY

SYG 1442 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

STEPPING STONES CHILD CARE CENTRE (NSW) PTY LTD (ACN 125 050 311)
First Respondent

AILSA TAVENDALE
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. By Statement of Claim filed on 28 May 2014, the applicant sought various declarations and orders against the respondents by reason of the failure of the first respondent to comply with two Compliance Notices, issued to the first respondent on 23 January 2014, pursuant to s.716(2) of the *Fair Work Act 2009* (Cth) ("**the FW Act**") in relation to underpayments of entitlements to two named employees.

2. The Compliance Notices were in respect of contraventions by the first respondent of the Children's Services Award 2010 ("**the Modern Award**").

3. The second respondent is the sole director and company secretary of the first respondent and is alleged to have been involved in the day-to-day management and supervision of the first respondent and principally responsible for the overall direction and decision making on behalf of

the first respondent, including ensuring that the first respondent complied with its legal obligations under the FW Act and in particular the Compliance Notices. The Statement of Claim alleges that the second respondent had actual knowledge of the first respondent's contraventions of the FW Act and was an intentional participant in the first respondent's contraventions of the FW Act.

Statement of Agreed Facts and Admissions

4. Pursuant to orders made by the Court on 6 November 2014, the applicant filed an Agreed Statement of Facts and I make findings of fact in accordance with that document as follows:

> *"**PART A - BACKGROUND***
>
> ***Applicant***
>
> *1. The applicant, the Fair Work Ombudsman (**FWO**), has standing and authority to bring these proceedings and to pursue declarations, orders and penalties in relation to contraventions by the first and second respondents.*
>
> ***Inspector Hinson***
>
> *2. Ryan Hinson (**Inspector Hinson**) is and was at all material times:*
>
> *a. a Fair Work Inspector appointed by the Applicant under section 700 of the Fair Work Act 2009 (Cth) (**FW Act**) pursuant to Instruments of Appointment dated 24 May 2010 and 12 December 2013; and*
>
> *b. entitled to exercise the compliance powers in subdivision D of Division 3 of Part 5-2 of the FW Act, including the power to determine whether the FW Act, a modern award or a National Minimum Wage Order is being, or has been, complied with.*
>
> ***First respondent***
>
> *3. Stepping Stones Child Care Centre (NSW) Pty Ltd (ACN 125 050 311) (**Stepping Stones**) is and was at all relevant times:*
>
> *a. a company incorporated under the Corporations Act 2001 (Cth);*
>
> *b. able to be sued in and by its corporate name;*

c. a constitutional corporation within the meaning of section 12 of the FW Act; and

d. a national system employer within the meaning of section 14 of the FW Act.

*4. For the period 7 February 2013 to 19 July 2013 (**Contravention Period**), Stepping Stones was the entity that employed:*

*a. Ms Joanne Campbell (**Ms Campbell**); and*

*b. Ms Jennifer Shapley (**Ms Shapley**).*

*(collectively, **Employees**)*

*5. At all relevant times, Stepping Stones operated a long day care facility at 132 Wentworth Street, Oak Flats, in the State of New South Wales (**Business**).*

6. As at the date of filing this Statement of Agreed Facts, Stepping Stones continues to operate the Business.

7. The FW Act applied to Stepping Stones in respect of its employment of the Employees during the Contravention Period.

Second respondent

*8. Ailsa Tavendale (**Tavendale**) is and was at all relevant times:*

a. the sole director and company secretary of Stepping Stones;

b. the person who exercised day-to-day management and supervision of Stepping Stones;

c. principally responsible for the overall direction, management and supervision of Stepping Stones' operations;

d. for the purposes of subsection 793(1) of the FW Act, a person whose conduct referred to in this Statement of Agreed Facts was conduct engaged in on behalf of Stepping Stones within the scope of her actual or apparent authority; and

e. for the purposes of subsection 793(2) of the FW Act, a person whose state of mind for the conduct referred to in

this Statement of Agreed Facts was the state of mind of Stepping Stones.

Employees

9. During the period from about 7 February 2013 to 30 May 2013:

a. Ms Campbell held a Certificate III in Children's Services; and

b. Stepping Stones employed Ms Campbell as a child care worker in the Business.

10. On or about 22 August 2013, Ms Campbell made a complaint to the FWO alleging that Stepping Stones had not made payment to her for time worked during the period outlined in paragraph 9 above.

11. During the period from about 21 June 2013 to 19 July 2013:

a. Ms Shapley held a Certificate III in Children's Services; and

b. Stepping Stones employed Ms Shapley as a child care worker in the Business.

12. On or about 23 August 2013, Ms Shapley made a complaint to the FWO alleging that Stepping Stones had not made payment to her for time worked during the period outlined in paragraph 11 above.

Attempts by the FWO to educate and communicate with Stepping Stones and Tavendale prior to these proceedings

Education following receipt of complaints in May 2013

*13. In May 2013, the FWO received complaints from three employees of Stepping Stones (other than Ms Campbell and Ms Shapley) which alleged that Stepping Stones was not fulfilling its obligations under the FW Act and the Children's Services Award 2010 (**Modern Award**) in regards to the payment of wages, the payment of wages in appropriate timeframes (including non-payment of wages for approximately 3 months) and the provision of payslips.*

14. The FWO did not initiate litigation against Stepping Stones and Tavendale in regards to those complaints, but instead decided that the most appropriate action was to educate Stepping Stones

and Tavendale of the First Respondent's obligations under the FW Act and the Modern Award.

15. On 17 June 2013, the FWO sent an email to Tavendale, in her capacity as the Director of Stepping Stones. The email provided to the Respondents education regarding:

> *a. the requirement under the Modern Award for employers to pay wages regularly;*
>
> *b. the requirement under the FW Act for pay slips to be provided to employees in respect of the payment of such wages; and*
>
> *c. the requirements as to the information that must be included in pay slips provided to employees.*

16. The FWO's email of 17 June 2013, advised that:

> *a. the FWO considered that Stepping Stones and Tavendale had been 'educated' regarding those issues; and*
>
> *b. if the FWO received any further complaints, it would consider those complaints for further action.*

Education and attempts to communicate with the Respondents, following receipt of the Employees' Complaints but before issuing Compliance Notices

*17 Following receipt of the complaints set out in paragraphs 10 and 12 above (**Complaints**), in the period from or around 22 and 23 August 2013, to 20 November 2013, the FWO, Stepping Stones and Tavendale engaged in the communications set out at **Annexure A** to this Statement of Agreed Facts.*

Issuing of compliance notice

18. After conducting an investigation into the complaints made by each of the Employees, Inspector Hinson formed a reasonable belief, within the meaning of subsection 716(1) of the FW Act, that, during the Contravention Period:

> *a. Stepping Stones had contravened terms of the Modern Award with respect of the employment of the Employees (the **Contraventions**); and*
>
> *b. the Contraventions resulted in underpayments of entitlements to the Employees.*

*19. On 23 January 2014, Inspector Hinson issued to Stepping Stones two notices pursuant to section 716(2) of the FW Act. One of the notices was issued with respect to the failure to pay Ms Campbell's wages (**Campbell Compliance Notice**). The other notice was issued with respect to the failure to pay Ms Shapley's wages (**Shapley Compliance Notice),** (collectively, the **Compliance Notices**).*

*20. A copy of the Campbell Compliance Notice is found at **Annexure B** to this Statement of Agreed Facts.*

*21. A copy of the Shapley Compliance Notice is found at **Annexure C** to this Statement of Agreed Facts.*

22. The Compliance Notices required Stepping Stones to:

> *a. pay to Ms Campbell a total of $2,551.48 (gross) in respect of minimum rates of pay, within 21 days of the issue of the Campbell Compliance Notice (that is, on or before 13 February 2014);*
>
> *b. pay Ms Shapley a total of $790.16 (gross) in respect of minimum rates of pay and casual loading, within 21 days of the issue of the Shapley Compliance Notice (that is, on or before 13 February 2014); and*
>
> *c. provide to Inspector Hinson written documentation confirming that the amounts were paid to the Employees and the date of such payments, within seven days of making the payments set out in paragraphs 21(a) and (b) above (that is, on or before 20 February 2014).*

23. The Compliance Notices were served on Stepping Stones by Inspector Hinson personally giving them to Tavendale (as director of Stepping Stones) at the Business at 132 Wentworth Street, Oak Flats, in the State of New South Wales, on 23 January 2014.

24. The Compliance Notices set out all matters required by subsection 716(3) of the FW Act.

25. Stepping Stones did not make the payments referred to at paragraphs 22(a) and 22(b) on or before 13 February 2014.

26. Stepping Stones did not provide to Inspector Hinson any documentation regarding the payments set out at paragraphs 22(a) and 22(b) above on or before 20 February 2014.

27. As a result of the facts agreed at paragraphs 25 and 26 above, the first respondent did not comply with the Compliance Notices.

Further events at the time, and after the service, of the Compliance Notices

Education of the Respondents when serving the Compliance Notices

28. On 23 January 2014, Inspector Hinson and Fair Work Inspector David Dixon (a Fair Work Inspector appointed under section 700 of the FW Act) attended Stepping Stones' Business premises and met with Tavendale. During the meeting, Inspector Hinson handed two letters to Tavendale along with the Compliance Notices.

29. The letters of 23 January 2014 referred to in 28 above:

> *a. informed Stepping Stones and Tavendale that Ms Campbell and Ms Shapley had not received any payment from Stepping Stones following the "Resolution Outcome Notification" letters dated 5 November 2013;*
>
> *b. informed Stepping Stones and Tavendale that the FWO had decided to issue the Compliance Notices to Stepping Stones;*
>
> *c. attached a copy of the FWO's Compliance Notice Guidance Note and drew Stepping Stones' and Tavendale's attention to the consequences of failing to comply with a compliance notice.*

30. During the meeting of 23 January 2014:

> *a. Inspector Hinson advised Tavendale that:*
>
> > *i. he was serving two Compliance Notices on her as Stepping Stones had failed to pay Ms Campbell and Ms Shapley or to make contact with the FWO;*
> >
> > *ii. the Compliance Notices provided 21 days for Stepping Stones to make the payments noted in the Compliance Notices and then further time to provide evidence of those payments;*
> >
> > *iii. a copy of bank transaction receipts would constitute evidence of the payments; and*

iv. if Stepping Stones failed to make the payments in time, the matter may progress to litigation; and

b. Tavendale:

i. stated that she had not returned Inspector Hinson's telephone calls; and

ii. stated that she would make the required payments in the following week.

Education of the Respondents after serving the Compliance Notices but before commencing litigation

*31. On 26 February 2014 Inspector Hinson posted two letters to Tavendale on behalf of Stepping Stones. Each letter was titled "7 day letter advising non-compliance with Compliance Notice" (**7 Day Letters**). The 7 Day Letters:*

a. outlined that Stepping Stones had failed to comply with the Compliance Notices;

b. requested that Stepping Stones inform the FWO, within 7 days, if it had any reasonable excuse for failing to comply with the Compliance Notices; and

c. set out that if no reasonable excuse was provided, the FWO may commence legal action against Stepping Stones and any other persons involved.

32. Inspector Hinson did not receive any response to the 7 Day Letters.

Commencement of these proceedings

*33. On 28 May 2014 (**Commencement Date**), these proceedings were commenced.*

34. As at the Commencement Date, Stepping Stones had not paid to the Employees the amounts as set out in paragraphs 22(a) and 22(b) above.

Events since the commencement of these proceedings

*35. Subsequent to filing the Statement of Claim, the matter was listed for a First Court Date at 9:30am on 8 August 2014 in the Federal Circuit Court at Sydney (**First Directions Hearing**).*

36. On or about 29 May 2014, Stepping Stones was served with the originating documents for these proceedings and provided with a letter dated 29 May 2014 about these proceedings.

37. On 30 May 2014, Tavendale was personally served with the originating documents for these proceedings and provided with a letter dated 29 May 2014 about these proceedings.

38. The FWO sent further correspondence about these proceedings to Stepping Stones and Tavendale on 12 June 2014 and 31 July 2014

39. Neither Stepping Stones nor Tavendale responded to any of the correspondence sent by the FWO during May, June and July 2014.

40. At about 8:30 am on 8 August 2014, just prior to the First Directions Hearing, Tavendale telephoned Ms Jenna Pervan, a Lawyer employed by the FWO and said to Ms Pervan words to the effect:

> "I cannot attend the directions hearing as I am unwell, and also the employees have been paid so I would like to resolve this quickly".

41. At about 9:30am on 8 August 2014, Tavendale sent an email to the Court stating that she was unable to attend the First Directions Hearing and that the Employees had been paid.

42 The assertions on 8 August 2014 by Tavendale that the Employees had been paid, both in the conversation with Ms Pervan at paragraph 40 above and in the email to the Court at 0 above, were not correct.

Rectification

43. Stepping Stones made the following back-payments to the Employees, on the dates set out in the table below:

Date of payment	*Ms Shapley*	*Ms Campbell*
13 August 2014	*$622.37*	*$2047.48*
7 October	*$192.99*	*$504.00*

2014		
TOTAL	*$815.36*[1]	*$2,551.48*

44. On or about 20-22 October 2014, Tavendale provided the FWO with evidence of back-payments to the Employees as set out in paragraph 43 above.

PART B – CONTRAVENTIONS BY STEPPING STONES

Contraventions of subsection 716(5) of the FW Act

45. By reason of the matters agreed at paragraphs 18 to 27 above, Stepping Stones failed to comply with the Campbell Compliance Notice and the Shapley Compliance Notice.

46. Stepping Stones has no reasonable excuse for not complying with the Campbell Compliance Notice and the Shapley Compliance Notice.

47. Stepping Stones has not made an application to the Federal Court, the Federal Circuit Court or an eligible State or Territory Court for a review of the Compliance Notices pursuant to section 717 of the FW Act.

48. By reason of the matters agreed at paragraphs 45 to 47 above, Stepping Stones contravened subsection 716(5) of the FW Act by:

a. failing to comply with the Campbell Compliance Notice; and

b. failing to comply with the Shapley Compliance Notice.

PART C - ACCESSORIAL LIABILITY OF TAVENDALE

Contraventions of subsection 716(5) of the FW Act

49. Further to the matters agreed at paragraph 8 above, at all relevant times, Tavendale was:

a. responsible for the day-to-day management of Stepping Stones in relation to industrial instruments and

[1] We note that this amount includes an overpayment of $25.20 that was paid to Ms Shapley on 7 October 2014.

arrangements, setting and adjusting pay rates, and determining wages and conditions of employment of Stepping Stones' employees;

b. responsible for making payment of wages, on behalf of Stepping Stones, to its employees;

c. responsible for, making and did make, decisions regarding the employment of the Employees on behalf of Stepping Stones;

d. responsible for making decisions on behalf of Stepping Stones regarding the terms and conditions upon which persons would be employed by Stepping Stones, the work to be performed, and the time, method and manner of payments to employees;

e. a person who:

> *i. knew of Stepping Stones' obligations, under the FW Act and the Modern Award, to pay its employees wages in a timely fashion for the performance of work and to provide pay slips in respect of any payments for the performance of that work;*
>
> *ii. knew the hours of work of the Employees during the Contravention Period;*
>
> *iii. knew that wages were not paid to the Employees during the Contravention Period;*
>
> *iv. knew about the Employees' claims that Stepping Stones had not paid the Employees their lawful entitlements to wages during the Contravention Period;*
>
> *v. knew of the communications from Inspector Hinson set out in paragraphs 15, 17 (and Annexure A), 23, 28, 29, 30, and 31 above;*
>
> *vi. personally received, from Fair Work Inspector Hinson, the Campbell Compliance Notice;*
>
> *vii. personally received, from Fair Work Inspector Hinson, the Shapley Compliance Notice;*

viii. knew that Stepping Stones was required to comply with the Compliance Notices unless Stepping Stones had a reasonable excuse to not comply;

ix. knew that Stepping Stones did not pay $2,551.48 (gross) to Ms Campbell on or before 13 February 2014;

x. knew that Stepping Stones did not pay $790.16 (gross) to Ms Shapley on or before 13 February 2014; and

xi. knew that Stepping Stones did not have a reasonable excuse for not complying with the Compliance Notices.

50. By reason of the matters agreed in paragraphs 8 and 49 above, Tavendale:

a. had actual knowledge of the factual matters which comprise Stepping Stones' contraventions of subsection 716(5) of the FW Act; and

b. was an intentional participant in the factual matters which comprise Stepping Stones' contraventions of subsection 716(5) of the FW Act.

51. By reason of the matters agreed in paragraph 50 above, Tavendale:

a. was involved in (within the meaning of subsection 550(2) of the FW Act) Stepping Stones' contraventions of subsection 716(5) of the FW Act; and

b. by reason of subsection 550(1) of the FW Act, is taken to have committed those contraventions.

Admissions

52. Stepping Stones admits that it contravened subsection 716(5) of the FW Act, by:

a. failing to comply with the Shapley Compliance Notice; and

b. failing to comply with the Campbell Compliance Notice.

53. Tavendale admits that she was involved in, within the meaning of subsection 550(1) of the FW Act, the contraventions of Stepping Stones agreed at paragraph 52 above."

5. Attached to the back of these reasons are the annexures referred to above.

Submissions on Penalty

6. On 2 December 2014, the Court made orders directing the parties to file and serve evidence and submissions on the issue of penalty by 5 December 2014 and further directed that any application for an oral hearing on penalty was to be filed and served by midday on 4 December 2014. A further direction was made that in the event that there was no oral hearing sought by either party, orders and reasons would be sent to the parties in due course.

7. No application for an oral hearing was made by either party. The applicant filed evidence and submissions in accordance with the directions. No further material was filed by the respondents.

The Evidence on Penalty

8. The applicant relied on an affidavit of Michelle Elise Carey, affirmed 9 December 2014, as to service upon the respondents of the applicant's penalty submissions and evidence relied upon by the applicant on penalty. In the circumstances, I am satisfied that service was effected upon the respondents of those documents.

9. Further, there was no appearance by the respondents at any of the directions hearings before me. However, I am satisfied on the evidence before me filed by the applicant in the affidavits of Michelle Sarah Bale Turner, sworn 4 December 2014, and Michelle Elise Carey, sworn 4 December 2014, that copies of all orders made by the Court were duly served by the applicant upon the respondents.

Applicant's Submissions on Penalty

10. In submissions on penalty dated 5 December 2014, the applicant addressed the background of the matter, the documents relied upon by the applicant, the proper approach by the Court to penalty, the admitted contraventions and the factors relevant to penalty. I accept those

submissions in their entirety, save as to the appropriate penalty. Those submissions are as follows:

> *"**Introduction***
>
> *1. The Applicant seeks the imposition of pecuniary penalties on the Respondents for two contraventions of s 716(5) of the Fair Work Act 2009 (Cth) (**FW Act**), being the failure to comply with two compliance notices that required the First Respondent to pay wages owing to two child care workers for work performed by them in early and mid 2013.*
>
> *2. The First Respondent operates a children's day care facility in Oak Flats, a business that is owned, operated and managed by the Second Respondent (the **Business**). The Business continues to trade and employ child care workers.*[2]
>
> *3. The admitted facts establish that:*
>
> > *(a) the contraventions of the Children's Services Award 2010 (**Award**) identified in the compliance notices arose from a complete non-payment of wages to the employees for time worked;*[3]
> >
> > *(b) the contraventions occurred in the context of extensive efforts to assist the Respondents to comply and avoid litigation, including:*
> >
> > > *(i) previous education regarding obligations under the FW Act and Award in relation to similar workplace complaints;*[4]
> > >
> > > *(iii) numerous opportunities to co operate with the regulator and rectify underpayments prior to the issuing of the compliance notices;*[5]
> > >
> > > *(iii) being put on notice that if they did not comply with the compliance notices that litigation may result and were later warned that litigation was pending.*[6]
>
> *4. The amounts owing to the two employees have now been paid, although this did not occur in full until 7 October 2014.*[7]

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[2] Carey Affidavit at [5] – [8].
[3] SOAF [19].
[4] SOAF [13] – [16].
[5] SOAF Annexure A.
[6] SOAF [29]-[30].

5. The Applicant submits that the legislature has set penalties for failing to comply with a compliance notice because the failure will cause (as it has done in these proceedings) the Applicant, and the Court, to spend time and public funds in dealing with civil remedy proceedings which would not have been necessary, had compliance occurred.

6. As to the penalties recommended by the Applicant, the Applicant submits that the Court should impose aggregate penalties of:

(a) First Respondent: $32,130; and

(b) Second Respondent: $6,426.

These proposed penalties represent 70% of the maximum for each Respondent, with the further deduction of a 10% discount in recognition of the admissions of liability made by the Respondents (see paragraph 56 below).

7. These submissions set out the basis on which the Court can be satisfied that there is a need for meaningful penalties to be imposed, and the penalties sought above are appropriate, noting in particular:

(a) that the Respondents' failure to comply with the compliance notices is conduct that undermines the effectiveness and fundamental objects of the FW Act;

(b) in the context in which the notices were issued, the Respondents' conduct must be viewed as deliberate;

(c) the Respondents have not demonstrated any contrition for the contravening conduct;

*(d) the Business continues to operate and the Respondents' co operation since August 2013, until the entering into a Statement of Agreed Facts (**SOAF**) in late November 2014, has been negligible; and*

(e) the need for general and specific deterrence.

DOCUMENTS RELIED UPON

8. The Applicant relies upon the following documents:

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[7] SOAF [43].

(a) Application and Statement of Claim filed on 28 May 2014;

(b) Statement of Agreed Facts filed on 27 November 2014;

(c) Affidavit of Michelle Elise Carey affirmed 4 December 2014;

(d) Affidavit of Michelle Bale-Turner affirmed 4 December 2014; and

(e) Draft orders filed with these submissions.

9. The Affidavit of Ms Bale-Turner is not relevant to penalty, it addresses the Applicant's compliance with orders in the proceedings to serve materials on the Respondents.

APPROACH TO PENALTY

10. The authorities establish that the appropriate penalties are to be determined as follows.

11. First, each contravention of each separate obligation found in the FW Act is a separate contravention of a civil remedy provision for the purposes of section 539(2) of the FW Act.[8] *Section 557(1) of the FW Act provides for treating multiple contraventions of the some civil remedy provisions, involved in a course of conduct, as a single contravention.*

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

13. Thirdly, the Court will consider an appropriate penalty to impose in respect of each contravention, whether a single contravention, a course of conduct or group of contraventions, having regard to all of the circumstances of the case.

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

[9] *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at 571 [46] (Graham J) (Merringtons).

[10] *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at [41]-[46] (Stone and Buchanan JJ) (Mornington Inn).

14. Finally, having fixed an appropriate penalty for each contravention, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the contravening conduct.[11] *The Court should apply an "instinctive synthesis" in making this assessment.*[12] *This is known as the totality principle.*

ADMITTED CONTRAVENTIONS

15. The Respondents, in the SOAF, admit to two contraventions of s 716(5) of the FW Act, a civil remedy provision.[13]

Course of conduct and grouping

16. Contraventions of s 716(5) do not attract the operation of the course of conduct provisions in s 557(1) of the FW Act, because this is not a civil remedy provision specified in s 557(2) of the FW Act.

17. The Court has discretion to group separate contraventions together where the contraventions may be said to overlap with each other, or involve the potential punishment of the Respondents for the same or substantially similar conduct. However there is no evidence before the Court that the First Respondent's failure to comply with the two compliance notices arose from the one transaction or decision and should be grouped.[14]

17. The Applicant submits that the two compliance notices do not have common elements which would warrant the further 'grouping' of the contraventions[15] *because they related to two employees who:*

> *(a) each made separate complaints to the Applicant;*[16]
>
> *(b) were employed in different types of employment;*[17]
>
> *(c) whose entitlements were due to be paid over separate periods of time.*[18]

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[11] See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (Kelly); *Merringtons*, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).
[12] *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).
[13] SOAF [48], [51].
[14] *AMIEU v Meneling Station* (1987) 16 IR 245 notes that the burden is on the party relying on it to establish the course of conduct.
[15] *Pearce v R* (1998) 194 CLR 610 at [40].
[16] SOAF [10], [12].
[17] SOAF Annexure B and C.

18. Further, the Respondents were aware that two separate notices were served, each requiring steps to be taken, and each involving penalties for non-compliance.

19. This is consistent with the approach adopted by this Court recently in Fair Work Ombudsman v Daladontics (Vic) Pty Ltd ***(Daladontics)***.[19]

Maximum Penalties

20. The Applicant submits that the maximum penalties that could be imposed on the Respondents for the two contraventions are:

(a) First Respondent: $51,000;[20] *and*

(b) Second Respondent: $10,200.[21]

Factors relevant to penalty

21. A non-exhaustive list of factors relevant to the imposition of a penalty have been summarised by Mowbray FM (as he then was) in Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar ***(Pangaea)***,[22] *as follows:*

(a) the nature and extent of the conduct which led to the contraventions;

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

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

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

(e) whether the contraventions 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 contraventions were deliberate;

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[18] SOAF Annexure B and C.
[19] [2014] FCCA 2571 at [20] (Hartnett J).
[20] Item 33, subsection 539(2) FW Act - 150 penalty units. See also Section 12 of the FW Act which provides that "penalty unit" has the same meaning as section 4AA of the *Crimes Act 1912* (Cth).
[21] Item 33 subsection 539(2) FW Act - 30 penalty units.
[22] [2007] FMCA 7 at [26] – [59].

(h) whether senior management was involved in the contraventions;

(i) whether the party committing the contravention had exhibited contrition;

(j) whether the party committing the contravention had taken corrective action;

(k) whether the party committing the contravention had 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.

22. This summary was adopted by Tracey J in Kelly v Fitzpatrick[23] *(**Kelly**). While the 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.*[24]

Nature and extent of the conduct

23. The power of a Fair Work Inspector to issue a compliance notice was introduced into the FW Act to provide a mechanism for dealing with non-compliance with minimum entitlements in the FW Act as an alternative to issuing court proceedings for each underlying contravention of an obligation.[25]

24. Pursuant to s 716 of the FW Act, a person to whom a compliance notice is issued has the opportunity to rectify contravention(s) and be protected from civil remedy proceedings in respect of the contravention(s). If a person complies with the compliance notice (that is, rectifies the underpayment):

(a) no civil remedy proceedings can be brought against the person in respect of the contravention(s) – s 716(4A); and

(b) the person is not taken to have admitted or been found to have contravened the civil remedy provision in respect of the contravention(s) - s 716(4B).

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[23] (2007) 166 IR 14; [2007] FCA 1080 at [14].
[24] *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11]; *Merringtons* supra at [91] per Buchanan J.
[25] *Fair Work Bill 2008*, Explanatory Memorandum at [2673].

25. Where a person fails to comply with a compliance notice, s 716(5) allows an inspector to bring civil remedy proceedings against that person, and seek appropriate orders to remedy the contravention, which can include pecuniary penalties under s 546 of the FW Act.

26. Fair Work Inspector Hinson, having formed a reasonable belief that the First Respondent had contravened the Award and underpaid Ms Campbell and Ms Shapley, personally served the compliance notices at the Business on the Second Respondent (in her capacity as an officer of the First Respondent).[26] *The two compliance notices required payments totalling $3,341.64 to be made to the employees and the production of evidence to the Applicant that the amounts had been paid within a specified time.*[27]

27. The First Respondent failed to make payments in the time required by the compliance notices (despite assertions by the Second Respondent the payments would be made).[28]

28. The unwillingness of the First Respondent to comply with the statutory notices, or the Second Respondent to procure that compliance in her role as director, is further demonstrated by the failure to respond to an invitation by Fair Work Inspector Hinson to provide any reasonable excuse for the failure to comply with the notices.[29] *In the face of the threat of litigation, no steps were taken to make the payments.*

Circumstances in which the conduct took place

29. The Applicant received a workplace complaint from Ms Campbell on or about 22 August 2013 alleging non-payment of wages.[30] *A workplace complaint from Ms Shapley was received on 23 August 2013 also alleging non-payment of wages.*[31]

30. The failures by the First Respondent to comply with the compliance notices should be viewed in the context of the efforts made by the Applicant to assist the Business to comply with its obligations to employees and to avoid the need for litigation, and

[26] SOAF [18] – [21].
[27] SOAF [22].
[28] SOAF [25] – [26] and [30(b)].
[29] SOAF [31].
[30] SOAF [10].
[31] SOAF [11].

the fact that the failure to pay the employees was admitted as early as October 2013.[32]

31. The Respondents were put on notice of their obligations to pay employees through their interactions with the Applicant in relation to the earlier complaints, which clearly alerted them to the need to pay its employees and the potential consequences of not doing so.[33]

32. Extensive efforts were also made by the Fair Work Inspector to communicate with the Respondents upon receiving the workplace complaints from Ms Campbell and Ms Shapley and to secure voluntary compliance prior to issuing the compliance notices. From 2 October 2013 to 20 November 2013 the Fair Work Inspector made no less than and 11 phone calls, sent six emails and sent formal outcome letters recommending rectification of underpayments in order to avoid further enforcement action.[34]

33. The Respondents also had ample opportunity to work with the Applicant after the issuing of the compliance notices and prior to these proceedings being issued. Had they done so, the Applicant would not have pursued litigation in respect of the underpayments. Indeed, if the compliance notices had been complied with the Applicant is prevented from doing so.[35]

Nature and extent of the loss

34. The contraventions the subject of the notices were basic and fundamental in nature, and arose from the First Respondent's complete failure to pay the employees for work performed. A failure to pay any wages at all, in the Applicant's submission, should always be viewed as serious and significant.

35. Ms Campbell was not paid $2,551.48 for 128.75 hours of part time work between 21 February 2013 and 31 May 2013. Ms Shapley was not paid $790.16 for 32.45 hours of work between 21 June 2013 and 19 July 2013, comprising minimum wages and casual loading.[36]

36. The underpayment amount for each employee remained outstanding until 7 October 2014, although partial rectification was made on 13 August 2014. By reference to the periods worked

[32] SOAF Annexure A.
[33] SOAF [15]-[16].
[34] SOAF Annexure A.
[35] FW Act, subsection 716(4A).
[36] SOAF Annexure B and C.

by the employees, this meant that they were deprived of the benefit of those amounts for periods in the region of 1 year and 4 months (Ms Campbell) and 1 year and 3 months respectively. It is open to the Court to infer that the amounts owed to Ms Shapley and Ms Campbell would have remained unpaid but for the Applicant commencing these proceedings.

37. In addition to the monetary loss arising from the failure to comply with the compliance notices, the Applicant submits that the Court should also consider the loss to the statutory objectives of the FW Act caused by the failure to comply with the notices.[37]

38. The Respondents' intentional failure to comply with a mandatory notice issued by the workplace regulator is "conduct … [which] undermines the utility and effectiveness of a fundamental object"[38] *the FW Act.*

Similar previous conduct

39. The Respondents have not previously been the subject of proceedings by the Applicant or its predecessors for contraventions of workplace laws.

40. In the Applicant's submission, whilst the Court may place most weight on a prior finding of a court, the Court may have regard to other similar conduct of the Respondents in determining penalty.

41. The Applicant had received three prior workplace complaints alleging similar contraventions to those which were the subject of the compliance notices. These workplace complaints were the subject of written correspondence to the Second Respondent in June 2013 regarding the First Respondent's obligations to pay wages and comply with the FW Act and Award obligations.[39]

42. The Applicant submits that the First Respondent's conduct towards the two employees subject of the compliance notices is of a similar character to the matters the First Respondent was warned about in June 2013 and can be taken into account when determining the appropriate penalty.[40] *It is particularly relevant*

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[37] See Secretary, Department of Health and Ageing v Pagasa Australia Pty Ltd [2008] FCA 1545 (**Pagasa**) at [56]; Olsen v Sterling Crown Pty Ltd [2008] FMCA 1392 at [51].
[38] *Pagasa* at [56].
[39] SOAF [15]-[16].
[40] *Veen v The Queen (No 2)* [1988] HCA 14 at page 477; *Temple v Powell* [2008] FCA 714 at [64] as summarised in *Australian Building & Construction Commissioner v Construction, Forestry, Mining & Energy Union (No 2)* [2010] FCA 977 at [47], [64].

that Ms Shapley's entire period of employment occurred after the warning was given.

Size and financial circumstances of the business

43. There no evidence before the Court as to the size of the Business. In the context of compliance notices, Judge Jarrett in Applicant v Extrados Solutions Pty Ltd & Anor ***(Extrados)*** *noted:*

> "The obligation to comply with the Fair Work Act and, in particular, s.716 falls just as heavily on small corporations and small businesses – and individuals, for that matter – as it does on large employers or businesses. Put shortly, one cannot shirk one's responsibilities imposed by law simply because one might be described as a "small business" or because the business has a particular size. It is incumbent on all employers to comply with the requirements of the Fair Work Act." [41]

44. There is no evidence before the Court of the financial circumstances of the Business. In any event, the Applicant submits that an employer's financial position at the time of the contraventions is not relevant to the question of penalty.[42] *Employers, be they small, medium or large, have an obligation to meet minimum standards in relation to their employees; they cannot overcome financial difficulties by underpaying their employees.*[43]

45. There is evidence before the Court that the Second Respondent owns the property at which the Business operates in Oak Flats and another property at Engadine.[44] *There is otherwise no evidence as to the financial position of either Respondent.*

Involvement of senior management

46. The Second Respondent is the sole director and secretary of the First Respondent. She has admitted that she was the person responsible for compliance with employment obligations and knew that wages were not paid and that there was a failure to comply with the compliance notice.[45]

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[41] [2014] FCCA 815 at [10].
[42] See *Cotis v McPherson* (2007) 169 IR 30 at [16] and *Kelly* at [28]
[43] Kelly at [27]; *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [27].
[44] Carey Affidavit at [9]-[10].
[45] SOAF [8], [49].

Deliberateness of the contraventions

47. The Applicant submits that the Court should find that the two contraventions being the failure to comply with the two notices were deliberate. This is an important factor in favour of imposing penalties in the range proposed by the Applicant.

48. The two compliance notices were served personally on the Second Respondent as the director of the First Respondent, at which time she:

> *(a) was provided with guidance material about compliance notices;*
>
> *(b) was informed of the potential consequences of non-compliance, including the possibility of proceedings and penalties; and*
>
> *(c) undertook to comply with the notices.*[46]

Contrition

49. There is no direct evidence of contrition on the part of the Respondents for the contraventions.

Corrective action

50. Subsequent to proceedings being commenced, the First Respondent rectified the underpayments to the employees; however full rectification was not made until 7 October 2014. The Second Respondent has admitted that her assertions to the Applicant and the Court that rectification had occurred prior to 8 August were not true.[47]

51. There is no evidence of the Respondents having taken any steps to prevent similar contraventions occurring in the future. However the Applicant acknowledges that the Respondents have consented to the making of orders directed at ensuring future compliance with workplace laws, which include:

> *(a) that the First Respondent will assess its compliance for all employees for a six month period and report on this to the Applicant and rectify any identified contraventions; and*

[46] SOAF [29]-[30].
[47] SOAF [42].

(b) the Second Respondent will undertake training on employer obligations under the FW Act within six months.[48]

Co-operation with enforcement authorities

52. The Respondents co operated on a very limited basis in the investigation by producing some documents and responding to some contact from the Fair Work Inspector, including undertaking to make payments.[49] *However it was ultimately the Respondents' own failures to do the things stated would be done and a continued lack of co operation that brought about the issuing of the compliance notices and these proceedings.*[50]

53. The Respondents' actions were until very recently largely non-responsive, as demonstrated by a continuing pattern of not engaging with the Applicant's office and not participating fully in the proceedings. The Respondents have, at a fairly late stage, facilitated the conduct of the proceedings by admitting liability, entering into the SOAF and consenting to the making of declarations and orders. The Applicant acknowledges that the admissions and execution of the SOAF has saved the expense of a fully contested hearing.

54. Where Respondents have co-operated and have made admissions early in the course of an investigation, or soon after the commencement of proceedings, it is appropriate to allow a discount of penalty. However a discount, or discounts of a particular amount, is not automatic upon admissions being made. In considering the application of penalty discount, the statements of Stone and Buchanan JJ in Mornington Inn are apposite:

> "... 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 credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice."[51]

55. The Applicant submits that the Respondents' co-operation should not be overstated and that the weight it is given in mitigation of penalty should be considered in light of the chronology of events from August 2013 through to November 2014 as detailed in the SOAF.

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[48] SOAF [55(a) and (d)].
[49] SOAF Annexure A and [30].
[50] SOAF [28] – [33].
[51] *Mornington Inn supra* at 74-76 per Stone and Buchanan JJ.

56. On this basis the Applicant submits that a discount of 10% on penalty is appropriate in recognition for the Respondents' admissions and co-operation in entering into the SOAF. A greater discount is not appropriate where the admissions of liability are more properly viewed as an acceptance of the inevitable, rather than a genuine acceptance of wrongdoing.

Ensuring compliance with minimum standards

57. Compliance with minimum standards is an important consideration in the present case. A principal object of the FW Act is the preservation of an effective safety net for employee entitlements and effective enforcement mechanisms.[52]

58. In order to enforce these terms, Fair Work Inspectors must be able to exercise their compliance powers effectively. The purposes of the powers conferred on Fair Work Inspectors (including the power to issue compliance notices under section 716 of the FW Act) is to provide the Applicant with an effective means for investigating and enforcing compliance with minimum standards and industrial instruments without requiring reliance on court proceedings.[53] *In Daladontics Judge Hartnett recognised the important function of compliance notices acting as an alternative to litigation, stating at [23]:*

> "The failure by the Respondent company to comply with compliance notices is seen by the Court in the context of numerous efforts made by the applicant to assist the Respondent company with the investigation into the two complaints, and specifically, to avoid the need for litigation."

59. The deliberate choice to not comply with the compliance notices undermines the FW Act's enforcement framework, and the safety of net of entitlements it is designed to protect.[54]

60. Ordering penalties at a meaningful level for a compliance notice breach shows that there are consequences for the failure, in circumstances where compliance in the first place would have meant that the Respondents would not face any penalty or any finding of a breach of the FW Act.[55] *The Applicant submits that penalties are warranted to ensure there is no incentive for*

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[52] Section 3 of the FW Act.
[53] *Fair Work Ombudsman v Finetune Holdings Pty Ltd & Anor (No 2)* [2012] FMCA 349 at [42].
[54] *Fair Work Ombudsman v Nerd Group Australia Pty Ltd & Anor* (No 3) [2012] FMCA 891 at [35].
[55] FW Act, subsection 716(4A).

employers to ignore compulsive notices such as a compliance notice.

61. Compliance with minimum standards also creates an even playing field for employers within the same industry as the Respondents who do comply with workplace laws. This practice may impact other employers who pay their employees the correct wages and conditions (including small business employers) in respect of their ability to compete and remain productive. These considerations underline the need to deter other employers from contravening these provisions.

Deterrence

62. It is well established that the need for specific and general deterrence is a factor that is relevant to the imposition of a civil penalty.[56]

Specific deterrence

63. The Applicant notes the comments of Gray J in Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union *where his Honour observed in relation to specific deterrence that:*

> "[m]uch will depend on the attitude expressed by that party as to things like remorse and steps taken to ensure that no future breach will occur".[57]

64. The Applicant submits that there is a need for specific deterrence because of the following factors:

> *(a) the Respondents were on notice of the consequences of non-compliance with the Award and FW Act and this did not alter their conduct;*
>
> *(b) the non-compliance continued after these proceedings were commenced and the Respondents have demonstrated a non-responsive attitude to participating in these proceedings;*
>
> *(c) the late stage of rectification;*
>
> *(d) no explanation, acknowledgment of the seriousness of the conduct, genuine acceptance of responsibility, or*

[56] See for example, *Pangaea*, supra at [26]-[59] and *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65; (2007) 158 FCR 543 at 559-60 (Lander J).
[57] (2008) 171 FCR 357 at 369.

evidence of contrition or corrective action in the Business has been provided; and

(e) Stepping Stones continues to operate.[58]

65. The need for specific deterrence in circumstances where the business continues to operate was discussed in Daladontics *where Judge Hartnett stated at [30]:*

> "The need for specific deterrence is high as the Respondent company continues to operate. There is no evidence that it has taken any steps to prevent further contraventions by it and its noncompliance with the earlier Court orders continues to this day. The need for general deterrence is also an important factor in these proceedings. The penalties imposed by the Court should be imposed at a meaningful level."

66. Having regard to the nature and extent of the contraventions and their conduct in the investigation and these proceedings, the Applicant submits that only penalties imposed at level recommended are likely to make the contravening conduct unprofitable and the prospect of any future contraventions commercially, and personally, undesirable.

67. The penalties recommended take into account the Respondents' consent to orders compelling each of them to undertake further actions to demonstrate compliance with workplace laws in respect of the Business, which goes some way to addressing the need for specific deterrence.

General deterrence

68. The need for general deterrence in the present case is high and the law should mark its disapproval of the Respondents' conduct by setting a penalty that serves as a warning to others.[59]

69. The need for deterrence and regulation in the Child Care Industry was also acknowledged by FM Whelan (as she then was) in Fair Work Ombudsman v La Kosta Childcare Centre and Kindergarten Pty Ltd & Ors[60] *where she stated:*

> "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

[58] Carey Affidavit at [5]-[8].
[59] (2007) 166 IR 14 at [25].
[60] [2012] FMCA 551 at [97].

> 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."

And further at [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."[61]

70. There is a need to send a message to the community, and particularly employers in the child care industry, that employers must respond to correspondence and notices issued by Government regulators such as the Applicant. This was stressed by Judge Jarrett in Fair Work Ombudsman v VS Investment Group Pty Ltd where his Honour stated:

> "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 those notices."[62]"

11. The applicant also prepared a recommendation as to penalty. I accept the applicant's submission that the view of the regulator as to the appropriate penalty is a relevant but not determinative factor (see *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285, 298 per Burchett and Kiefel JJ; *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 at [51]). I further accept that the regulator does not have, and is not expected to have, the independent role and characteristics of a prosecutor in criminal proceedings (see *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2014] FCA 336 per Middleton J at [140] – [143]; and *Australian Competition and Consumer Commission v Mandurvit Pty Ltd* [2014] FCA 464 per McKerracher J at [71] – [72]).

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[61] *Ibid.* See also *Fair Work Ombudsman v WKO Pty Ltd* [2012] FCA 1129 at [74] – [80] and *Fair Work Ombudsman v Mahomet* [2014] FCCA 1872.
[62] [2013] FCCA 20 at [51].

12. I further accept the applicant's submissions in relation to the receipt and taking into account of submissions made by the regulator as to the appropriate penalty as follows:

> *"73. In* Barbaro v R,[63] *the High Court held that the practice of counsel for the prosecution providing a submission about the bounds of the available range of sentences was wrong, and should cease. It has been suggested that this decision has implications for the determination of civil penalties in proceedings such as this one.*
>
> *74. In the Applicant's submission,* Barbaro *applies only to sentencing hearings in criminal proceedings, and should not be applied by analogy in civil penalty proceedings. To do so would overturn the settled practice in this Court and in the Federal Court in relation to the determination of civil penalties.*
>
> *…*
>
> *76. Neither the ratio, nor any seriously considered dicta in* Barbaro *require the Court to depart from the approach taken by this Court, and the Federal Court as to the receipt and taking into account of submissions made by the regulator as to the appropriate penalty.*[64]
>
> *77. A Full Court of the Federal Court in Director,* Fair Work Building Industry Inspectorate v Construction Forestry Mining and Energy Union *has heard argument as to the application of* Barbaro *to civil penalty proceedings.*[65] *Judgment in that proceeding is currently reserved. Unless the Full Court in that decision alters the settled approach in light of the High Court's reasoning in* Barbaro*, this Court should not depart from settled practice in relation to penalty submissions.*[66]*"*

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[63] (2014) 305 ALR 323 (***Barbaro***).

[64] *EnergyAustralia* supra at [125] Per Middleton J; and *Mandurvit* supra at [77] – [78] per McKerracher J; *Tax Practitioners Board v Dedic* [2014] FCA 511 per Davies J at [3]; *DP World Sydney Limited v Maritime Union of Australia* (No 2) [2014] FCA 596 per Flick J at [23]; *Australian Securities and Investments Commission v Newcrest Mining Ltd* [2014] FCA 698 per Middleton J at [7];*Tax Practitioners Board v Su* [2014] FCA 731 per Jagot J at [9]; *Australian Competition and Consumer Commission v Titan Marketing Pty Ltd* [2014] FCA 913 Per Rangiah J at [16]. Cf *Australian Competition and Consumer Commission v Flight Centre Limited (No 3)* [2014] FCA 292 per Logan J at [56], noting that his Honour did not hear argument on this point and which has not been followed in subsequent decisions.

[65] The appeal in this matter, proceeding number QUD257 of 2013, was heard in Brisbane on 11 and 12 August 2014.

[66] *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2014] FCA 160, [26]-[31].

13. The following recommendation as to penalty was made by the applicant:

> *"The applicant recommends that a penalty of 70% of the maximum be imposed on the First and Second Respondents for each of the contraventions of the FW Act. After the recommended discount of 10% for admissions, this equates to a total penalty against the First Respondent of $32,130 and $6,426 against the second respondent."*

14. Accordingly, I have considered the applicant's recommendation as to penalty as supported by:

a) Its submission that there is a need for meaningful penalties to be imposed because of the respondent's failure to comply with Compliance Notices, which is conduct which undermines the effectiveness and fundamental objects of the FW Act.

b) The context in which the Compliance Notices were issued.

c) The deliberateness of the respondents' conduct with Compliance Notices, which is conduct which undermines the effectiveness and fundamental objects of the FW Act.

d) The fact that the business continues to operate.

e) The respondents' lack of cooperation since August 2013.

f) The ultimate rectification by the first respondent following the issuing of the Compliance Notices and the commencement of this proceeding.

g) The need for general and specific deterrence.

15. The two Compliance Notices required payments totalling $3,341.64 in respect of two employees. Partial rectification was made on 13 August 2014 in respect of work completed in the first half of 2014 by each of the employees and total rectification was made by 7 October 2014, although not in compliance with the timeframe of the Compliance Notices.

16. I accept the applicant's submission that it is open to the Court to infer that the amounts owed to the employees would have remained unpaid

but for the applicant commencing these proceedings and I draw that inference.

17. I do have regard to the fact that the respondents have not previously been subject to formal proceedings by the applicant or its predecessors for contravention of workplace laws. However, I do note that the respondents were the subject of intervention by the applicant owing to previous complaints by three workers in May 2013.

18. Whilst there is no direct evidence of the financial circumstances of the first respondent's business, the evidence before me suggests that the respondent's business is a small business. The first respondent operated a long day care facility at Oak Flats in New South Wales and continues to operate that business.

19. I note that the second respondent admits that she was the person responsible for compliance with the employment obligations and that she knew that wages were not paid and that there had been a failure by the first respondent to comply with the Compliance Notices. In the circumstances, I accept that the contraventions by each of the respondents was deliberate.

20. The applicant submits that there is no direct evidence of contrition on the part of the respondents for the contraventions. I do not accept that submission. The respondents participated in the preparation and filing of an Agreed Statement of Facts in which liability was admitted and all underpayments were rectified by 7 October 2014.

21. Based on the evidence before me, I am satisfied that there has been a level of cooperation with the applicant and contrition by the respondents as reflected in the conduct referred to above.

22. I also accept that in the circumstances of this case, a civil penalty attracts both specific deterrence and general deterrence. No payment was made by the first respondent until after the time that the application to this Court was filed. Yet the respondents were on notice of the consequences of a failure to comply with the Modern Award and the FW Act as stated in the Compliance Notices. As stated above, the business continues to operate and, accordingly, specific deterrence is an

appropriate consideration in the imposition of any civil penalty in this matter.

23. Further, I accept in their entirety the applicant's submissions on general deterrence.

24. The maximum penalties that could be imposed on the respondent for the two contraventions are $51,000 in respect of the first respondent pursuant to s.539(2) of the FW Act and s.4AA of the *Crimes Act;* and $10,200 in respect of the second respondent pursuant to s.359(2) of the FW Act.

25. In my view, the recommended penalty by the applicant is high and to my mind does not properly reflect the contrition of the respondents and their cooperation in the preparation of an Agreed Statement of Facts and the rectification of the underpayments to the employees in full and the clean history that the respondents have had as far as prosecutions by the applicant are concerned.

26. In the circumstances, the appropriate penalty for the first respondent's conduct in relation to its contraventions in failing to comply with each of the compliance notices and in light of the factors relevant to penalty, should be a total of $12,000. In relation to the second respondent, for the reasons above, in my view the penalty should be $3,000.

27. Having fixed those penalties, it is well accepted that the Court should take a final look at the aggregate penalty to determine whether it is an appropriate response to the conduct which led to the breaches and is not oppressive or crushing (see *Kelly v Fitzpatrick* (2007) 166 IR 14; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560). Further, the penalty imposed must bear relativity to the seriousness of the conduct engaged in by the respondents. Having regard to those factors, I am satisfied that the penalty I propose to order is appropriate.

28. Having regard to the public interest and importance in compliance notices being complied with by employers, I am satisfied that declarations should be made in respect of the contraventions by each of

the respondents of the FW Act in the failure by the first respondent to comply with the two compliance notices issued on 23 January 2014.

29. Further, in addition to the imposition of penalties, the applicant seeks the following orders:

> *"3. The first respondent will undertake, or at its expense engage a third party with qualifications in accounting or workplace relations to undertake, an audit of the first respondent's compliance with the* Fair Work Act 2009 *(Cth) and the* Children's Services Award 2010 ***("Award")*** *on the following terms:*
>
> > *a. The audit period will be the period of six months commencing on the date of this order;*
> >
> > *b. The audit is to be completed within 30 days of the end of the audit period;*
> >
> > *c. the audit will apply to all employees employed at any time during the audit period in a classification of work under the Award;*
> >
> > *d. The audit will assess the first respondent's compliance with the following obligations according to each employee's classification of work, category of employment and hours worked during the audit period:*
> >
> > > *i. Wages and work-related entitlements under the Award;*
> > >
> > > *ii. Accrual and payment of entitlements under the National Employment Standards in Part 2-2 of the* Fair Work Act 2009 *(Cth).*
> > >
> > > *iii. Method and frequency of payment in accordance with s.323 of the* Fair Work Act 2009 *(Cth);*
> > >
> > > *iv. Record keeping and pay slip obligations in Division 3 of Part 3-6 of the* Fair Work Act 2009 *(Cth).*
>
> *4. Within 30 days of the audit being completed, the first respondent will provide to the applicant:*
>
> > *a. A copy of the audit report which will include a statement of the methodology used in the audit; and*
> >
> > *b. Written details of any contraventions identified in the audit and the steps the first respondent will take to rectify*

any identified contravention(s) and by when the rectification will occur.

5. The second respondent is to engage, at her own expense, a person or organisation with professional qualifications in workplace relations, to provide training to the second respondent within six months of the date of this order that covers the following:

a. Obligations on employers under the Award and the National Employment Standards in the Fair Work Act 2009 *(Cth).*

b. payment of wages in accordance with Division 2 of Part 2-9 of the Fair Work Act 2009 *(Cth).*

6. Within 30 days of completing the training in order 5 above, the second respondent is to provide to the applicant, in writing:

a. The date on which the training was completed;

b. The name of the person or organisation that conducted the training;

c. The details of the method of delivery of the training and the content of the training."

30. Having regard to the overall circumstances of this case and the importance of ensuring that both respondents comply with their obligations under the FW Act and the Modern Award, and the serious failure of the first respondent to comply with Compliance Notices issued by the applicant and the second respondent's knowing involvement in those failure, in my view the further orders sought by the applicant are appropriate.

I certify that the preceding thirty (30) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Associate:

Date: 4 March 2015

Annexure A – Communications between the FWO, Stepping Stones and Tavendale following the receipt of the Complaints but before issuing of Compliance Notices

Date	Details of communication
2 October 2013	• Inspector Hinson called Stepping Stones' landline number and left a voicemail message asking for his call to be returned. o This call was not returned.
9 October 2013	• Inspector Hinson phoned Stepping Stones' landline number but there was no answer. o On this occasion no voicemail message was left.
10 October 2013	• Inspector Hinson phoned Stepping Stones' landline number and had a telephone discussion with Tavendale in which: o Inspector Hinson informed Tavendale that: ▪ the FWO had received the Complaints ▪ the Employees had alleged that they had not been paid for the hours they worked; and ▪ even though Ms Campbell was employed by Stepping Stones through Workskills Illawarra, it was Stepping Stones' repsonsiblity to pay Ms Campbell's wages; and o Tavendale informed Inspector Hinson that she understood the issues and would make payments to the Employees.
10 October 2013	• Inspector Hinson sent an email to Tavendale summarising the conversation from 10 October 2013 and asking for time records of the hours and periods worked by the Employees. o This email was not responded to.
18 October 2013	• Inspector Hinson called Stepping Stones' landline number and left a voicemail message asking Tavendale to return his call. o This call was not returned.
21 October 2013	• Inspector Hinson sent an email to Tavendale requesting that she respond to his email of 10 October 2013.
23 October 2013	• Inspector Hinson called Stepping Stones' landline number and left a voicemail message asking Tavendale to return his call. o This call was not returned.
24 October 2014	• Tavendale sent an email to Inspector Hinson in response to his email of 21 October 2013, informing him that she would send the documentation to him within an hour. o Tavendale did not subsequently produce the documents.
24 October 2014	• Inspector Hinson called Stepping Stones' landline number and left a voicemail message asking Tavendale to return his call. o This call was not returned.
25 October 2014	• Tavendale sent an email to Inspector Hinson attaching pay records for Ms Campbell. • Inspector Hinson and Tavendale exchanged emails arranging a telephone discussion for 2pm that day. o Tavendale did not phone Inspector Hinson at 2pm. • Inspector Hinson subsequently phoned Stepping Stones' landline number and left a voicemail asking Tavendale to return his call. o This call was not returned.
28 October 2014	• Inspector Hinson called Stepping Stones' landline number and left a voicemail message asking Tavendale to return his call. o This call was not returned.
29 October 2014	• Tavendale sent an email to Inspector Hinson advising that she was available to discuss the investigation that day. • Inspector Hinson sent an email to Tavendale arranging a telephone discussion for 2pm that day.

	• Inspector Hinson called Stepping Stones' landline number at 2:15pm and left a voicemail message asking Tavendale to return his call. o This call was not returned. • Inspector Hinson called Stepping Stones' landline number at 3:40pm and left a voicemail message asking Tavendale to return his call. o This call was not returned.
30 October 2013	• Tavendale sent an email to Inspector Hinson stating that she would be available to finalise the matter that day. Inspector Hinson was away on this day.
31 October 2013	• Inspector Hinson responded to Tavendale's email from 30 October 2013 indicating that: o Stepping Stones should rectify the payment of wages as soon as possible to avoid any further involvement of the FWO; and o the FWO would sent formal letters to Tavendale regarding this matter.
5 November 2013	• Inspector Hinson sent two letters to Tavendale on behalf of Stepping Stones entitled "Resolution Outcome Notification". The letters: o recommended that Stepping Stones review its time and wage records and assess whether Ms Campbell received her minimum entitlements under the FW Act and Modern Award; o recommended that if Ms Campbell had not received her minimum entitlements, the Company should rectify the underpayment directly to Ms Campbell within 14 days and supply the FWO with a payslip for any amounts paid; o advised that if payment was not made to Ms Campbell in accordance with the above recommendations, the FWO may consider further enforcement action; o recommended that Stepping Stones review its time and wage records and assess whether Ms Shapley received her minimum entitlements under the FW Act and Modern Award; o recommended that if Ms Shapley had not received her minimum entitlements, the Company should rectify the underpayment directly to Ms Shapley within 14 days and supply the FWO with a payslip for any amounts paid; o advised that if payment was not made to Ms Shapley in accordance with the above recommendations, the FWO may consider further enforcement action. • No response was received to these letters.
12 November 2013	• Inspector Hinson called Stepping Stones' landline number and left a voicemail message asking Tavendale to return his call. o This call was not returned.
20 November 2013	• Inspector Hinson called Stepping Stones' landline number and left a voicemail message asking Tavendale to return his call. o This call was not returned.

Annexure B – Campbell Compliance Notice

Australian Government **Fair Work OMBUDSMAN**

GPO Box 9887
SYDNEY NSW 2001

COMPLIANCE NOTICE
(ISSUED UNDER SECTION 716(2) OF THE *FAIR WORK ACT 2009*)

Date of Issue: 23 January 2014

Name of Employer: Stepping Stones Child Care Centre (NSW) Pty Ltd trading as Stepping Stone Child Care Centre

ACN: 125050311

Director: Ms Ailsa Tavendale

I, Ryan Hinson, being a duly appointed Fair Work Inspector and having conducted an assessment into alleged contraventions of Commonwealth workplace laws, have determined that:

- Stepping Stones Child Care Centre (NSW) Pty Ltd trading as Stepping Stone Child Care Centre **(the Employer)** is an employer within the jurisdiction of the *Fair Work Act 2009* **(the Act)**;
- Ms Joanne Campbell **(Ms Campbell)** was employed by the Employer between 21 February 2013 and 31 May 2013 **(the Employment Period)**;
- Ms Campbell was employed on a part time basis as a childcare assistant with a Certificate III in Children's services;
- For the entire Employment Period, Ms Campbell's terms and conditions of employment were governed by the *Children's Services Award 2010* **(Modern Award)** and the Act;
- The relevant classification under the Modern Award for Ms Campbell was a Children's Services Employee Level 3.1 on commencement; and
- Ms Campbell did not receive any payment for time worked.

By reason of the above, I have further determined that the Employer has contravened a term of the Modern Award.

The details of the contravention are as follows:

- The Employer has contravened clause 14.1 and Schedule A of the Modern Award by failing to pay Ms Campbell the minimum hourly rate of pay for work performed Monday to Friday **(ordinary hours)**.
- Pursuant to clause 14.1 and Schedule A of the Modern Award, Ms Campbell was entitled to be paid $20.13 per hour for all ordinary hours.

- During the Employment Period, Ms Campbell worked 126.75 hours and did not receive payment for these hours.
- The FWO has not received records regarding which days Ms Campbell worked. As such, Ms Campbell was entitled to receive payment of $20.13 per hour as a minimum for all hours worked.
- During the Employment Period, in respect of 126.75 hours worked, Ms Campbell:
    - was entitled to be paid **$2,551.48**;
    - was not paid any amount; and
    - is therefore owed an amount of **$2,551.48**.

Required Action

In accordance with subsection 716 (2) of the Act, the Employer is now required within 21 days of the date of this letter to:

1. Pay Ms Campbell the amount of **$2,551.48** (gross) less any payments of taxation that would ordinarily be deducted, for the contravention of subsection 323 (1) of the Act; and
2. Produce written documentation to confirm that the Employer has made the payment as specified above, and the date of payment within 7 days of making such payment.

Failure to comply with this Notice may contravene a civil remedy provision. If you do not comply with this Notice, the Fair Work Ombudsman may commence legal action against the company and or individuals involved in the contravention to recover any outstanding monies and to seek civil penalties. Civil penalties may also be sought for non-compliance with this Notice.

The Employer may apply to the Federal Court, Federal Circuit Court or eligible State or Territory Court for a review of this Notice on either or both of the following grounds:

a) **the Employer disputes that it has committed the contravention referred to above;**

b) **the Employer disputes that this Notice complies with subsections 716 (2) or (3) of the Act.**

Ryan Hinson
Fair Work Inspector
Fair Work Ombudsman

Annexure C – Shapley Compliance Notice

Australian Government **Fair Work OMBUDSMAN**

GPO Box 9887
SYDNEY NSW 2001

COMPLIANCE NOTICE
(ISSUED UNDER SECTION 716(2) OF THE *FAIR WORK ACT 2009*)

Date of Issue: 23 January 2014

Name of Employer: Stepping Stones Child Care Centre (NSW) Pty Ltd trading as Stepping Stone Child Care Centre

A.C.N.: 125050311

Director: Ms Ailsa Tavendale

I, Ryan Hinson, being a duly appointed Fair Work Inspector and having conducted an assessment into alleged contraventions of Commonwealth workplace laws, have determined that:

- Stepping Stones Child Care Centre (NSW) Pty Ltd trading as Stepping Stone Child Care Centre **(the Employer)** is an employer within the jurisdiction of the *Fair Work Act 2009* **(the Act)**;
- Ms Jennifer Shapley **(Ms Shapley)** was employed by the Employer between 21 June 2013 and 19 July 2013 **(the Employment Period)**.
- Ms Shapley was employed on a casual basis as a childcare assistant with a Certificate III in Children's services;
- For the entire Employment Period, Ms Shapley's terms and conditions of employment were governed by the *Children's Services Award 2010* [MA000120] **(Modern Award)** and the Act;
- The relevant classification under the Modern Award for Ms Shapley was a Children's Services Employee Level 3.1 on commencement.
- Ms Shapley did not receive any payment for time worked.

By reason of the above, I have further determined that the Employer has contravened terms of the Modern Award.

The details of the contraventions are as follows:

1. The Employer has contravened clause 14.1 and Schedule A of the Modern Award by failing to pay Ms Shapley the minimum hourly rate of pay for work performed Monday to Friday (ordinary hours).
   - Pursuant to clause 14.1 and Schedule A of the Modern Award, Ms Shapley was entitled to be paid:

- $20.13 per hour from the first pay period from 1 July 2012; and
- $20.66 per hour from the first pay period from 1 July 2013.

- The Employer has confirmed that, during the Employment Period, Ms Shapley worked 32.45 hours and did not receive payment for these hours.

- The FWO has not received time and wage records to identify when the hours were worked. As such, Ms Shapley was entitled to receive payment of $20.13 per hour as a minimum for all hours worked.

- During the Employment period, in respect of 32.45 hours worked Ms Shapley:

  - was entitled to be paid **$653.22**,
  - was not paid any amount; and
  - is therefore owed an amount of **$653.22**.

2. The Employer has contravened clause 10.5 and Schedule A by failing to pay Ms Shapley a casual loading for all ordinary hours worked.

   - Pursuant to clause 10.5 and Schedule A of the Modern Award, Ms Shapley was entitled to be paid, in addition to her minimum hourly rate, a casual loading of:

     - 21%, or $4.22 per hour, from the first pay period from 1 July 2012; and
     - 23%, or $4.75 per hour, from the first pay period from 1 July 2013.

   - The FWO has not received time and wage records to identify when the hours were worked. As such, Ms Shapley was entitled to receive a casual loading of $4.22 per hour as a minimum for all ordinary hours worked.

   - During the Employment Period, in respect of the casual loading for 32.45 hours worked, Ms Shapley:

     - was entitled to be paid an amount of **$136.94**;
     - was not paid any amount; and
     - is therefore owed an amount of **$136.94**.

Required Action

In accordance with subsection 716 (2) of the Act, the Employer is now required within 21 days of the date of this letter to:

1. Pay Ms Shapley the amount of **$790.16** (gross) less any payments of taxation that would ordinarily be deducted, for the contravention of subsection 323 (1) of the Act in relation to the underpayment contraventions identified above, comprised of:

   - **$653.22** in respect of ordinary hours, and
   - **$136.94** in respect of the casual loading on ordinary hours; and

2. Produce written documentation to confirm that the Employer has made the payment as specified above, and the date of payment within 7 days of making such payment.

Failure to comply with this Notice may contravene a civil remedy provision. If you do not comply with this Notice, the Fair Work Ombudsman may commence legal action against the company and or individuals involved in the contravention to recover any outstanding monies and to seek civil penalties. Civil penalties may also be sought for non-compliance with this Notice.

The Employer may apply to the Federal Court, Federal Circuit Court or eligible State or Territory Court for a review of this Notice on either or both of the following grounds:

a) the Employer disputes that it has committed the contravention referred to above;

b) the Employer disputes that this Notice complies with subsections 716 (2) or (3) of the Act.

Ryan Hinson
Fair Work Inspector
Fair Work Ombudsman

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