FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v THE HUB @ MERMAID PTY LTD & ANOR *[2015] FCCA 306*

Catchwords:
INDUSTRIAL LAW – Contraventions of Fair Work Act – grouping of contraventions – fixing of pecuniary penalties.

Legislation:
Australian Pay and Classification Scale Hospitality Industry – Restaurant Catering and Allied Establishment Award – South Eastern Division 2002
Conciliation and Arbitration Act 1904 (Cth), s.119(1A)
Fair Work Act 2009, ss.45, 193, 536, 536(1), 536(1)(b), 536(2), 539(2), 545(a), 546(1), 546(3)(a), 547(2), 550(1), 557(1)(b), 557(2), 577, 577(1), 712, 712(3), 712(5), 716(2), 716(4A), 716(5), 793(1), 793(2)
Restaurant Industry Award 2010, cll.13.1, 20.1, 20.3, 34.1, 34.2(a)(i), 34.2(a)(ii), A.2.5, A.5.4, A.7.3
Workplace Relations Act 1996

Cases cited:
AMIEU v Meneling Station Pty Ltd (1987) 16 IR 245
Australian Opthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 4) [2013] FCA 930
Blandy v Coverdale NT Pty Ltd ACN 102 611 423 [2008] FCA 1533
Commonwealth Steamship Owners' Association v Waterside Workers' Federation of Aust (1962) 17 IIB 1221
Fair Work Ombudsman v ACN 052 182 180 Pty Ltd [2013] FMCA 688
Fair Work Ombudsman v Bundaberg Security Pty Ltd [2014] FCCA 592
Fair Work Ombudsman v Dalley Holdings Pty Ltd [2013] FCA 509
Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2) [2012] FCA 557
Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2) [2012] FCA 408
Fair Work Ombudsman v Rocky Holdings Pty Ltd & Ors [2013] FCCA 1549
Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258
Gibbs v The Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216
Jarrad v Melbourne & Metropolitan Tramways Board (1978) 21 ALR 201
Kelly v Fitzpatrick [2007] FCA 1080
McIver v Healey [2008] FCA 425
Quinn v Martin (1977) 16 ALR 141

Rowe v Capital Territory Health Commission (1982) 62 FLR 383
Seymour v Stawell Timber Industries Pty Ltd (1985) 9 FCR 241
Townsend v General Motor-Holden's Ltd (1981) 50 FLR 355
Workplace Ombudsman v Golden Maple Pty Ltd & Ors [2009] FMCA 664
Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor [2009] FMCA 38
Workplace Ombudsman v Securit-E Holdings Pty Ltd (In Liquidation) [2009] FMCA 700

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	THE HUB @ MERMAID PTY LTD
Second Respondent:	GRAHAM JOHN BELL
File Number:	BRG 369 of 2013
Judgment of:	Judge Jarrett
Hearing date:	26 June 2014
Date of Last Submission:	26 June 2014
Delivered at:	Brisbane
Delivered on:	17 February 2015

REPRESENTATION

Solicitor for the Applicant:	Mr Leahy
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the Respondents:	Mr S. Reidy
Solicitors for the Respondents:	MSB Lawyers

ORDERS

THE COURT DECLARES THAT:

(1) The First Respondent contravened:

(a) s.45 of the *Fair Work Act 2009* (Cth) in that it failed to pay to Mr Michael McClymont:

(i) the minimum rate of pay for juniors, for all hours worked, in accordance with clauses 20.3 and A.2.5 of the *Restaurant Industry Award 2010*;

(ii) casual loading in accordance with clauses 13.1 and A.5.4 of the *Restaurant Industry Award 2010*;

(iii) penalty rates for work performed on Saturdays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*;

(iv) penalty rates for work performed on Sundays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*;

(v) penalty rates for work performed on public holidays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*;

(vi) penalty rates for work performed between 10:00pm and midnight Monday to Friday in accordance with clauses 34.2(a)(i) and A.7.3 of the *Restaurant Industry Award 2010*; and

(vii) penalty rates for work performed between midnight and 7:00am Monday to Friday in accordance with clauses 34.2(a)(ii) and A.7.3 of the *Restaurant Industry Award 2010*.

(b) s.45 of the *Fair Work Act 2009* (Cth) in that it failed to pay to Mr Damien Stalker:

(i) the minimum rate of pay for all hours worked in accordance with clauses 20.1 and A.2.5 of the *Restaurant Industry Award 2010*;

(ii) casual loading in accordance with clauses 13.1 and A.5.4 of the *Restaurant Industry Award 2010*;

(iii) penalty rates for work performed on Saturdays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*;

(iv) penalty rates for work performed on Sundays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*;

(v) penalty rates for work performed on public holidays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*; and

(vi) penalty rates for work performed between 10:00pm and midnight Monday to Friday in accordance with clauses 34.2(a)(i) and A.7.3 of the *Restaurant Industry Award 2010*;

(c) s.45 of the *Fair Work Act 2009* (Cth) in that it failed to pay to Mr Benjamin Ward:

(i) the minimum rate of pay for all hours worked in accordance with clauses 20.1 and A.2.5 of the *Restaurant Industry Award 2010*;

(ii) casual loading in accordance with clauses 13.1 and A.5.4 of the *Restaurant Industry Award 2010*;

(iii) penalty rates for work performed on Saturdays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*;

(iv) penalty rates for work performed on Sundays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*;

(v) penalty rates for work performed on public holidays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*; and

(vi) penalty rates for work performed between 10:00pm and midnight Monday to Friday in accordance with clauses 34.2(a)(i) and A.7.3 of the *Restaurant Industry Award 2010*;

(d) s.45 of the *Fair Work Act 2009* (Cth) in that it failed to pay to Ms Ashlea Piggott:

(i) the minimum rate of pay for all hours worked in accordance with clauses 20.1 and A.2.5 of the *Restaurant Industry Award 2010*;

(ii) casual loading in accordance with clauses 13.1 and A.5.4 of the *Restaurant Industry Award 2010*;

(iii) penalty rates for work performed on Saturdays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*;

(iv) penalty rates for work performed on public holidays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*; and

(v) penalty rates for work performed between midnight and 7:00am Monday to Friday in accordance with clauses 34.2(a)(ii) and A.7.3 of the *Restaurant Industry Award 2010*.

(e) s.45 of the *Fair Work Act 2009* (Cth) in that it failed to pay to Ms Sarah Moses:

(i) the minimum rate of pay for all hours worked in accordance with clauses 20.1 and A.2.5 of the *Restaurant Industry Award 2010*;

(ii) casual loading in accordance with clauses 13.1 and A.5.4 of the *Restaurant Industry Award 2010*;

(iii) penalty rates for work performed between 10:00pm and midnight Monday to Friday in accordance with clauses 34.2(a)(i) and A.7.3 of the *Restaurant Industry Award 2010*; and

(iv) penalty rates for work performed between midnight and 7:00am Monday to Friday in accordance with clauses 34.2(a)(ii) and A.7.3 of the *Restaurant Industry Award 2010*.

(f) s.45 of the *Fair Work Act 2009* (Cth) in that it failed to pay to Ms Marbe Kelly:

(i) the minimum rate of pay for all hours worked in accordance with clauses 20.1 and A.2.5 of the *Restaurant Industry Award 2010*;

(ii) casual loading in accordance with clauses 13.1 and A.5.4 of the *Restaurant Industry Award 2010*;

(iii) penalty rates for work performed on Saturdays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*;

(iv) penalty rates for work performed on public holidays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*; and

(v) penalty rates for work performed between midnight and 7:00am Monday to Friday in accordance with clauses 34.2(a)(ii) and A.7.3 of the *Restaurant Industry Award 2010*.

(g) s.45 of the *Fair Work Act 2009* (Cth) in that it failed to pay to Ms Rebekka Bennor:

(i) the minimum rate of pay for all hours worked in accordance with clauses 20.1 and A.2.5 of the *Restaurant Industry Award 2010*; and

(ii) casual loading in accordance with clauses 13.1 and A.5.4 of the *Restaurant Industry Award 2010*;

(h) s.45 of the *Fair Work Act 2009* (Cth) in that it failed to pay to Ms Amarinda Kaur:

(i) the minimum rate of pay for all hours worked in accordance with clauses 20.1 and A.2.5 of the *Restaurant Industry Award 2010*;

(ii) casual loading in accordance with clauses 13.1 and A.5.4 of the *Restaurant Industry Award 2010*;

(iii) penalty rates for work performed on Saturdays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*;

(iv) penalty rates for work performed on Sundays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*; and

(v) penalty rates for work performed between 10:00pm and midnight Monday to Friday in accordance with clauses 34.2(a)(i) and A.7.3 of the *Restaurant Industry Award 2010*;

(i) s.45 of the *Fair Work Act 2009* (Cth) in that it failed to pay to Ms Janelle Incerti:

(i) the minimum rate of pay for all hours worked in accordance with clauses 20.1 and A.2.5 of the *Restaurant Industry Award 2010*;

(ii) casual loading in accordance with clauses 13.1 and A.5.4 of the *Restaurant Industry Award 2010*;

(iii) penalty rates for work performed on Saturdays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*;

(iv) penalty rates for work performed on Sundays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*;

(v) penalty rates for work performed on public holidays in accordance with clauses 34.1 and A.7.3 of the *Restaurant Industry Award 2010*;

(vi) penalty rates for work performed between 10:00pm and midnight Monday to Friday in accordance with clauses 34.2(a)(i) and A.7.3 of the *Restaurant Industry Award 2010*; and

(vii) penalty rates for work performed between midnight and 7:00am Monday to Friday in accordance with clauses 34.2(a)(ii) and A.7.3 of the *Restaurant Industry Award 2010*.

(j) s.536(1)(b) of the *Fair Work Act 2009* (Cth) by failing to give payslips to Mr McClymont, Mr Ward, Ms Piggott, Ms Moses, Ms Kelly and Ms Kaur at any time during the period of their employment and by failing to provide Ms lncerti with payslips in respect of payments made other than in respect of two payments made to her in October, 2012;

(k) s.712(3) of the *Fair Work Act 2009* (Cth) by failing to comply with a Notice to Produce Records or Documents issued pursuant

to s.712 of the *Fair Work Act 2009* (Cth) by Inspector Casey dated 3 August, 2012 to make available the following records in relation to the employees named therein:

(i) employment agreements;

(ii) employment types;

(iii) award job classifications and wage levels;

(iv) job duties;

(v) period of employment;

(vi) payments made, including EFT bank transfer statements;

(vii) payslips;

(viii) work rosters and timesheets;

(ix) annual leave records;

(x) notices of termination;

(xi) Tax File Number Declarations; and

(xii) separation certificates;

(l) s.712(3) of the *Fair Work Act 2009* (Cth) by failing to comply with a Notice to Produce Records or Documents issued pursuant to s.712 of the *Fair Work Act 2009* (Cth) by Inspector Casey dated 18 February, 2013 to make available the following records in relation to the employee named therein:

(i) employment agreements;

(ii) employment type;

(iii) award job classifications and wage level;

(iv) job duties;

(v) period of employment;

(vi) payments made, including EFT bank transfer statements;

(vii) payslips;

(viii) work rosters;

(ix) timesheets and log book entries;

(x) annual leave records;

(xi) notices of termination;

(xii) Tax File Number Declarations; and

(xiii) separation certificates;

(m) s.716(5) of the *Fair Work Act 2009* (Cth) in that it failed to comply with a compliance notice issued on 17 September, 2012 in accordance with s.716(2) of the *Fair Work Act 2009* (Cth).

(2) the second respondent was involved in each of the first respondent's contraventions identified in declaration 1 hereof.

THE COURT ORDERS THAT:

(3) pursuant to s.546(1) of the *Fair Work Act 2009* (Cth) the first respondent pay a penalty of $70,000 for the contraventions set out in declaration 1 above;

(4) pursuant to s.539(2) of the *Fair Work Act 2009* (Cth) the second respondent pay a penalty of $14,500 for his involvement in the contraventions set out in declaration 1 above;

(5) pursuant to s.546(3)(a) of the *Fair Work Act 2009* (Cth) that all pecuniary penalties be paid within 30 days of the date of this order and be paid into the Consolidated Revenue Fund of the Commonwealth.

BY CONSENT THE COURT FURTHER ORDERS THAT:

(6) pursuant to s.547(2) of the *Fair Work Act 2009* (Cth) the first respondent undertake a wages and entitlements audit to assess its compliance with the *Fair Work Act 2009* (Cth) and applicable Fair Work Instruments in respect of:

(a) all employees employed by the first respondent for the financial year ending on 30 June 2014; and

(b) former employees of the first respondent, Russell Kilarney, Dominque Western, Corey Susol, Dakin Jurie, Kate Holland and Megan Pinch.

(7) The findings of that audit referred to in paragraph 6 are to be provided to the applicant within three months of the date of this order.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE

BRG 369 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

THE HUB @ MERMAID PTY LTD
First Respondent

GRAHAM JOHN BELL
Second Respondent

REASONS FOR JUDGMENT

1. This application concerns contraventions of the *Fair Work Act 2009* (Cth) by the respondent corporation and its director and shareholder, Graham Bell. The first respondent conducts a restaurant business on the Gold Coast. The second respondent is, and was at all material times a director, the secretary and a shareholder of the first respondent. He is, and was at all material times, the manager of the restaurant business with primary responsibility for its day to day running and control.

2. A statement of agreed facts has been prepared by the parties and the alleged contraventions have been admitted by the respondents. It falls to the Court to determine the appropriate penalties to be imposed upon the respondents and the other orders that ought to be made in respect of the first respondent's admitted contraventions of the Act.

3. I have been assisted in the preparation of these reasons and my consideration of the matter more generally by the extensive written submissions delivered on behalf of each of the parties.

Background

4. The following recitation of facts is taken from the statement of agreed facts filed on 2 April, 2014 and the parties' submissions. None of it is contentious.

5. The first respondent carries on the business of a tapas bar and restaurant, trading as *The Hub@Varsity* at Varsity Lakes on the Gold Coast. It employed Michael McClymont, Damien Stalker, Benjamin Ward, Ashlea Piggott, Sarah Moses, Marbe Kelly, Rebekka Bennor, Amarinda Kaur and Janelle Incerti. I will refer to these people collectively as "the employees". The employees were engaged by the first respondent on a casual basis in various roles including as kitchen hands, cooks and wait-staff.

6. The second respondent was responsible for engaging the employees, determining the terms and conditions of their employment and for the payment of their wages. For the purposes of s.793(1) of the Act, the second respondent's conduct was conduct engaged in on behalf of the first respondent within the scope of his actual or apparent authority. For the purposes of s.793(2) of the Act, the second respondent was a person whose state of mind was the state of mind of the first respondent.

7. The employment of the employees was governed by the *Restaurant Industry Award 2010*, which commenced operation on 1 January, 2010. The first respondent was bound by the Award and the Award covered the employees' employment with the first respondent.

8. The employees, commensurate with their skills and experience, performed work which fell within the following classifications set out in Schedule B of the Award:

Name	**Classification**
Ms Kelly	Introductory
Ms Bennor	Introductory
Mr McClymont	Cook Grade 1
Mr Stalker	Cook Grade 1
Mr Ward	Cook Grade 1
Ms Incerti	Cook Grade 1

Ms Piggott	Food and Beverage Attendant Grade 2
Ms Moses	Food and Beverage Attendant Grade 2
Ms Kaur	Food and Beverage Attendant Grade 2

9. The *Australian Pay and Classification Scale Hospitality Industry – Restaurant Catering and Allied Establishment Award – South Eastern Division 2002* regulated the pay rates applicable to the employees.

Underpayment Contraventions

10. The first respondent was required to pay the employees (save for Mr McClymont) the minimum wage rate (exclusive of penalties and allowances) for all hours worked in accordance with clauses 20.1 and A.2.5 of the Award. The first respondent was required to pay Mr McClymont, who was aged 19 and 20 at the time of his employment, the minimum wage rate for junior employees (exclusive of penalties and allowances) for all hours worked, in accordance with clauses 20.3 and A.2.5 of the Award. During their employment, the employees worked various hours for the first respondent.

11. The parties agree that the first respondent contravened s.45 of the Act in that it did not pay to the employees the amounts that they were entitled to be paid for the hours that they worked resulting in underpayments totalling $9060.49 as follows:

Name	**Underpayment (ordinary hours)**
Mr Stalker	$745.92
Mr Ward	$1,266.88
Ms Piggott	$1,897.32
Ms Moses	$490.10
Ms Kelly	$611.92
Ms Bennor	$162.83
Ms Kaur	$835.95
Ms Incerti	$258.88
Mr McClymont	$2,790.69

12. The first respondent was also required to pay the employees casual loading of 23.4% of their ordinary rate of pay, in accordance with

clauses 13.1 and A.5.4 of the Award. The parties agree that each of the employees was entitled to be paid, but was not paid the following amounts by way of casual leave loading:

Name	**Underpayment (casual loading)**
Mr McClymont	$2,570.76
Mr Stalker	$177.56
Mr Ward	$409.14
Ms Piggott	$570.59
Ms Moses	$161.15
Ms Kelly	$195.58
Ms Bennor	$38.75
Ms Kaur	$299.10
Ms Incerti	$1,746.87

13. The failure to pay those amounts was in contravention of s.45 of the Act.

14. The employees were also entitled to be paid penalty rates for Saturday work at the rate of 150% of their ordinary rate of pay (increased by the applicable casual loading) for ordinary hours worked on a Saturday, in accordance with clauses 34.1 and A.7.3 of the Award. During the period of their employment, Mr McClymont, Mr Stalker, Mr Ward, Ms Piggott, Ms Kelly, Ms Kaur and Ms Incerti each worked various hours on a Saturday. In breach of s.45 of the Act, the first respondent failed to pay these employees any penalty rates for that work, resulting in underpayments totalling $396.14:

Name	**Underpayment (Saturday penalty)**
Mr McClymont	$133.54
Mr Stalker	$15.41
Mr Ward	$27.57
Ms Piggott	$26.76
Ms Kelly	$6.20
Ms Kaur	$51.71
Ms Incerti	$134.95

15. The employees were also entitled to penalty rates in respect of hours worked on a Sunday pursuant to clauses 34.1 and A.7.3 of the Award at a rate of 175% of their ordinary rate of pay (increased by the applicable casual loading). Mr McClymont, Mr Stalker, Mr Ward, Ms Kaur and Ms Incerti each worked various hours on a Sunday during their employment with the first respondent. The first respondent failed to pay any penalty rates to these employees for that work thereby contravening s.45 of the Act and resulting in underpayments totalling $735.36:

Name	**Underpayment (Sunday penalty)**
Mr McClymont	$272.15
Mr Stalker	$47.02
Mr Ward	$90.81
Ms Kaur	$60.54
Ms Incerti	$264.84

16. The first respondent was required by clauses 34.1 and A.7.3 of the Award to pay a penalty rate of 250% of their ordinary rate of pay (increased by the applicable casual loading) for ordinary hours worked on a public holiday. Mr McClymont, Mr Stalker, Mr Ward, Ms Piggott, Ms Kelly and Ms Incerti each worked various hours on public holidays during their employment with the first respondent. The first respondent breached s.45 of the Act by not paying any penalty for ordinary hours worked on a public holiday by them, resulting in underpayments totalling $474.28:

Name	**Underpayment (public holiday penalty)**
Mr McClymont	$212.50
Mr Stalker	$81.08
Mr Ward	$56.76
Ms Piggott	$62.84
Ms Kelly	$23.26
Ms Incerti	$37.84

17. Clauses 34.2 and A.7.3 of the Award required that a penalty rate of 10% of the standard hourly rate was to be paid for ordinary hours worked

between 10.00pm and midnight from Monday to Friday (inclusive). Mr McClymont, Mr Stalker, Mr Ward, Ms Moses, Ms Kaur and Ms Incerti each worked various hours between 10.00pm and midnight, Monday to Friday, during their employment with the first respondent. The first respondent failed to pay these employees any penalty rate for that work, resulting in underpayments totalling $28.44:

Name	**Underpayment (late evening penalty)**
Mr McClymont	$14.98
Mr Stalker	$0.36
Mr Ward	$1.44
Ms Moses	$1.08
Ms Kaur	$7.79
Ms Incerti	$2.79

18. Clauses 34.2 and A.7.3 of the Award required the first respondent to pay a penalty at the rate of 15% of the standard hourly rate for ordinary hours worked between midnight and 7.00am, Monday to Friday (inclusive). Mr McClymont, Ms Piggott, Ms Moses, Ms Kelly and Ms Incerti each worked various hours between midnight and 7.00am, Monday to Friday, during their employment with the first respondent. The first respondent did not pay any penalty for that work, thereby breaching s.45 of the Act and resulting in underpayments totalling $58.04:

Name	**Underpayment (early morning penalty)**
Mr McClymont	$32.77
Ms Piggott	$14.51
Ms Moses	$2.16
Ms Kelly	$1.08
Ms Incerti	$7.52

19. In the aggregate the first respondent underpaid the employees a total of $16,922.25.

Failure to provide pay slips

20. Section 536(1) of the Act requires that an employer give a pay slip to each of its employees within one working day of paying an amount to the employee for the performance of work. The first respondent did not:

    a) give a pay slip to Mr McClymont, Mr Ward, Ms Piggott, Ms Moses, Ms Kelly and Ms Kaur at any time in respect of any payments made to them; or

    b) give a pay slip to Ms Incerti in respect of payments made to her, other than in respect of two payments made in October, 2012.

21. By failing to provide the pay slips to these employees, the first respondent contravened s.536(1) of the Act.

Failure to comply with notices to produce records or documents

22. On 3 August 2012, Ms Louise Casey, a Fair Work Inspector issued a notice to produce records or documents to the first respondent regarding the employment of Mr Ward, Mr Stalker, Ms Piggott, Ms Bennor, Ms Moses and Ms Kelly. The notice was issued pursuant to s.712 of the Act. Specifically, the notice sought the production of pay slips, employment agreements and work rosters. The notice required the records to be produced to Inspector Casey at Surfers Paradise by 22 August, 2012.

23. Following service of the notice on the first respondent, Inspector Casey exchanged a series of emails with the second respondent (on behalf of the first respondent) in an attempt to arrange the production of the records. Despite that however, the first respondent failed to produce to the applicant the records that were subject of the notice. That failure was a contravention of s.712(3) of the Act.

24. Subsequently, on 17 September, 2012 Inspector Casey issued a notice, pursuant to s.716(2) of the Act directing the first respondent to take specified action to remedy the contraventions identified in that notice, within 21 days of the date of the notice. It required the first respondent

to produce reasonable evidence of compliance with the notice within 28 days.

25. The first respondent failed to take the actions required by the compliance notice as it neither paid the amounts specified to the relevant employees, nor did it provide documentation confirming compliance. By failing to take these actions, the first respondent contravened s.716(5) of the Act.

26. On 18 February, 2013 Inspector Casey issued a second notice to produce payslips, employment agreements and work rosters to the first respondent in respect of, inter alia, Ms Kaur and Ms Incerti pursuant to s.712 of the Act. The second notice required production of the relevant documents by 18 March, 2013. However, the first respondent failed to produce the documents in accordance with the second notice. The first respondent contravened s.712(3) of the Act by not complying with the second notice.

27. Inspector Casey wrote to the second respondent, in his capacity as the director of the first respondent, informing him that the first respondent had not complied with the second notice. The letter asked if there was a reasonable excuse for non-compliance with the second notice. No explanation was forthcoming.

Accessorial liability of the second respondent

28. The second respondent admits that he was involved, within the meaning of that term as used in s.550(1) of the Act, in the first respondent's contraventions of the Act and the Award (as detailed above). By the operation of s.550(1), the second respondent is taken to have committed the same contraventions as the first respondent. The second respondent admits he had actual knowledge of the factual matters which comprise the contraventions alleged against the first respondent and was an intentional participant in such matters.

The investigation

29. The office of the applicant received a complaint from Mr McClymont on 14 May, 2012 alleging underpayment of wages and commenced an investigation of that complaint on 8 June, 2012. Further complaints of

contraventions were received from the other employees throughout the course of June, 2012.

30. On 18 June, 2012 Inspector Casey visited the first respondent's business premises and met with the second respondent in his capacity as a director of the first respondent. They exchanged contact details, including email addresses. Later that day, Inspector Casey sent to the second respondent, via registered post and email, a notice to produce records or documents in relation to the employment of Mr McClymont, Mr Stalker and Mr Ward. On 28 June, Inspector Casey wrote to the first and second respondents, notifying them that the office of the applicant had commenced an investigation into alleged contraventions of the Act by the first respondent. A further notice to produce documents or records in relation to the employment of Ms Piggott, Ms Moses and Ms Bennor was annexed to that letter.

31. A series of exchanges took place between Inspector Casey and the second respondent throughout July in which the second respondent acknowledged receipt of the correspondence from the office of the applicant. He undertook to provide the relevant documents. Inspector Casey also offered the second respondent the opportunity to participate in a formal interview. She made a number of appointments to meet with the second respondent which he did not keep.

32. On 27 July, 2012 Inspector Casey sent by way of email to the second respondent, in his capacity as a director of the first respondent, a determination of contravention letter. This was followed on 3 August, 2012 by the notice to produce described in more detail above.

33. On 17 September, 2012 Inspector Williams served a compliance notice and infringement notice upon the respondents. These notices were later withdrawn on 9 November, 2012 and the second respondent was again offered the opportunity to participate in a formal interview, which he confirmed via email that he wished to do. A series of appointments were made and were either rescheduled or simply not kept by the second respondent. I note that on one occasion he provided a medical certificate stating that he suffered from a "medical condition" which rendered him unfit on 6 and 7 December. On another occasion, he told Inspector Casey that he was "in the middle of a move". No

reasons were offered for the rescheduling of, or failure to attend, other appointments.

34. The second respondent continued to evade the applicant's investigation in this manner until 15 February, 2013 when Inspector Casey sent two separate notifications of a full investigation by way of letter to the second respondent, in his capacity as director of the first respondent, in relation to Ms Kaur and Ms Incerti. On that day in a telephone conversation, the second respondent gave undertakings to Inspector Casey that he would provide the relevant information as a matter of priority. This was followed by the second notice to produce described in more detail above. The respondents failed to provide the information.

35. On 18 March, 2013 Inspector Casey wrote to the second respondent, by way of email and letter, asking him if there was a reasonable excuse for the non-compliance. On 22 March, 2013 Inspector Casey sent a second tranche of determination of contravention letters in relation to Ms Kaur and Ms Incerti to the second respondent. On that day, the second respondent emailed Inspector Casey, making an appointment for an interview. On 28 March, 2013, he attempted to reschedule the interview but did not respond when Inspector Casey provided him, via email, with a list of alternative times.

36. The first and second respondents failed to provide any documents or records to the office of the applicant during the investigation. In light of this, and of the second respondent's repeated failure to present himself for interview, I am of the opinion that the respondents were entirely uncooperative with the applicant's investigation.

Pecuniary penalties

37. The applicant seeks orders pursuant to s.546(1) of the Act imposing pecuniary penalties on the first respondent in respect of the contraventions identified above. In view of his admitted accessorial liability, the applicant seeks orders pursuant to s.539(2) of the Act that pecuniary penalties be imposed upon the second respondent.

38. The first step in assessing the appropriate penalties is to identify the separate contraventions involved. Each breach of an obligation is a

separate contravention: *Gibbs v Mayor, Councillors and City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16]. Secondly, the Court should consider whether the identified contraventions can, as a matter of law and do, as a matter of fact, constitute a single course of conduct for the purposes of s.557(1) of the Act. Thirdly, where there is commonality in the elements of contraventions, this should be taken into account in determining an appropriate penalty, as the respondents should not be punished more than once for the same conduct: *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [46] per Graham J. Fourthly, the Court must consider the appropriate penalty for the single contraventions and if relevant, each group of contraventions, taking into account all of the relevant circumstances. Finally, the Court must have regard to the "totality principle". Murphy J, in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 4)* [2013] FCA 930, described the principle as follows:

> "*[18] However, the court's task in assessing penalty is one of instinctive synthesis. This process requires the court to take all relevant factors into account to arrive at a single result which takes due account of them. Care should be taken with the use of a checklist setting out a range of relevant factors as they give rise to a risk of transforming the process of instinctive synthesis into the application of a rigid catalogue of matters for attention.*
>
> *[19] Proportionality and consistency commonly operate as a final check on the penalty assessed, but the penalty should not be derived from comparing the case which is the subject of assessment with any other particular case.*
>
> *[20] The totality of the penalties imposed must also be appropriate. The totality principle requires that the total penalty for all related contraventions ought not exceed what is proper for all contravening conduct involved. The rationale of the principle is to ensure that the proposed penalty is proportionate when the contraventions are viewed collectively."*

Grouping of contraventions

39. The starting point is to identify each separate contravention. Here, there are numerous contraventions of multiple Award provisions in respect of a number of employees that took place over varying periods of time for each employee. The breach of each identifiable obligation imposed by the Act or the Award gives rise to a separate contravention: *Gibbs v Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at p.223; *Blandy v Coverdale NT Pty Ltd ACN 102 611 423* [2008] FCA 1533 at [56].

40. Each time a particular employee did not receive a payment to which he or she was entitled the first respondent committed a contravention of the Act. The number of individual contraventions has not been quantified by the applicant or the respondents. I have not quantified them but they are clearly numerous.

41. Section 557 of the Act requires that some multiple contraventions of a civil remedy provision be dealt with as one contravention in certain circumstances. Relevantly, s.557 provides:

> ***Course of conduct***
>
> *(1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:*
>
> > *(a) the contraventions are committed by the same person; and*
> >
> > *(b) the contraventions arose out of a course of conduct by the person.*
>
> *(2) The civil remedy provision are the following:*
>
> > *(a) subsection 44(1) (which deals with contraventions of the National Employment Standards);*
> >
> > *(b) section 45 (which deals with contraventions of modern awards);*
> >
> > *…*
> >
> > *(o) subsections 536(1) and (2) (which deal with employer obligations in relation to pay slips);*

...

> *(3) Subsection (1) does not apply to a contravention of a civil remedy provision that is committed by a person after a court has imposed a pecuniary penalty on the person for an earlier contravention of the provision.*

42. Section 557(1) clearly applies to the underpayment contraventions (contraventions of s.45 of the Act) and the contraventions relating to the failure to provide pay slips (contraventions of ss.536(1) and 536(2)). The contraventions of ss.712(3) and 716(5) of the Act do not attract the benefit of s.557(1) as they do not appear in the specific penalty provisions listed in s.557(2) of the Act.

43. The respondents submit that the contraventions concern five common groups of transactions, namely:

a) a failure to pay minimum hourly rates;

b) a failure to pay casual loading;

c) a failure to pay penalty rates;

d) a failure to provide payslips; and

e) a failure to comply with the requirements of inspectors.

44. They submit that the Court should impose five pecuniary penalties, one for each group. They argue that the first respondent's offending conduct should be seen as a continuum of conduct producing a particular result and accordingly, they should be treated as one act of contravening conduct for the purpose of imposing a penalty.

45. It is not entirely clear from the respondents' submission whether it is suggested that the above groupings are mandated by s.557(1) of the Act or whether the grouping is the result of a discretionary approach by the Court. To the extent that it is the former, I cannot accept that suggestion.

46. In *Fair Work Ombudsman v Bundaberg Security Pty Ltd* [2014] FCCA 592 at [10] I expressed the view that s.557(1) only authorises the aggregation of two or more contraventions of the *same* civil remedy provision. I adhere to that view. My view appears consistent with that

expressed by Emmett FCCJ in *Fair Work Ombudsman v Rocky Holdings Pty Ltd & Ors* [2013] FCCA 1549 at [20]:

> *... I am satisfied that "*two or more contraventions of a civil remedy provision referred to in subsection 2*" is intended to refer to two or more contraventions of each of "*the civil remedy provisions*" identified in s.557(2) of the FWA relevant to the admitted contraventions by the first respondent and referred to above.*

47. It also appears consistent with the approach taken to those sections which preceded s.557(1) in earlier forms of industrial legislation: *Quinn v Martin* (1977) 16 ALR 141 at 143; *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 266 and *Gibbs v The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223.

48. The contraventions of s.45 – the contraventions of the minimum wage rates provision (the cl.20 breaches), the casual loading provision (the cl.13.1 breaches) and the penalty rates provisions (the cl.34 breaches) – might all be treated as one contravention if they arose out of a course of conduct by the first respondent. So too, the payslips contraventions might be treated as a single contravention if they arose out of a course of conduct by the first respondent. The contraventions of ss.712(3) and 716(5) of the Act are not amenable to aggregation under s.557(1) of the Act.

49. There is no direct authority on the meaning of "course of conduct" in s.557(1)(b) of the Act. However, a number of decisions deal with the meaning of that phrase as it appears in other industrial legislation. Whilst no exhaustive list of matters that point one way or another is appropriate because each case must be assessed according to its own unique facts, some signposts emerge from the cases to assist a court to determine whether there has been a *course of conduct* for present purposes.

50. The nature and number of decisions by an employer that lead to the contravening conduct are relevant. Multiple decisions in respect of multiple employees are less likely to fall within a single course of conduct, especially when those decisions are separate and distinct in terms of subject matter, time, location, or in terms of outcomes.

51. In *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241, the applicants were two apprentices of the respondent. Following the appointment of a receiver to the respondent, the apprentices were told their employment had terminated, in breach of the relevant industrial legislation. They continued to work for twelve weeks without pay. The Court held that the purported dismissals of the two apprentices were effected by a single act and that any subsequent failure to pay each of the apprentices arising from that decision was part of a course of conduct for the purposes of s.119(1A) of the *Conciliation and Arbitration Act* 1904 (Cth).

52. Similarly, in *Jarrad v Melbourne & Metropolitan Tramways Board* (1978) 21 ALR 201, the Court treated a decision to stand down a number of employees as a single breach because the standing down of each employee was the result of a single decision taken by the employer. And in *Townsend v General Motor-Holden's Ltd* (1981) 50 FLR 355 an employer's omissions to give two employees proper notice of a shut-down gave rise to a single penalty.

53. However, *Rowe v Capital Territory Health Commission* (1982) 62 FLR 383 involved contraventions relating to two student nurses who commenced studying different courses with the respondent in different years. One contravention related to a decision of the employer made in 1979 in respect of one student. The other contravention related to a decision made in 1981 in respect of another student. Keely J declined to find that the two breaches arose out of a "course of conduct" for the purposes of s.119(1A) of the *Conciliation and Arbitration Act 1904* (Cth) because the decisions which resulted in the contraventions were in respect of different employees who belonged to different student cohorts, were separated in time and concerned different subject matter.

54. A decision by an employer may affect different employees in different ways. This was one of the factors considered important in *Workplace Ombudsman v Golden Maple Pty Ltd & Ors* [2009] FMCA 664 where certain arrangements were entered into between an employer and its employees, in contravention of the *Workplace Relations Act 1996* (Cth). The fact that the arrangements with each employee lasted for different periods influenced the decision that there were separate and distinct

breaches, as opposed to a single breach resulting from a course of conduct.

55. Not just time, but geography may be relevant to whether there was a single course of conduct. In *Commonwealth Steamship Owners' Association v Waterside Workers' Federation of Aust* (1962) 17 IIB 1221, the Court found that where employees had stopped work across three different ports on the same day as part of a nation-wide stoppage in the industry, separate breaches and penalties were imposed for each.

56. A continuity of purpose can bind together many actions into a course of conduct for the purposes of s.557(1) of the Act (e.g. where a broad company policy results in many disparate breaches or contraventions). Where the contraventions occur in the pursuit of a particular purpose, there may be a course of conduct sufficient to engage s.557(1) of the Act.

57. Whether two or more contraventions arise out of a course of conduct is a question of fact. There is an onus on the first respondent to adduce evidence or otherwise persuade the Court that it should have the benefit of s.557(1) of the Act: *AMIEU v Meneling Station Pty Ltd* (1987) 16 IR 245 at [257], *Workplace Ombudsman v Securit-E Holdings Pty Ltd (In Liquidation)* [2009] FMCA 700 at [5].

58. The grouping of contraventions suggested by the respondents would see the contraventions aggregated by reference to the provision in the award that was contravened. Thus, all of the contraventions of the minimum wage rates provision (the cl.20 breaches) would be aggregated. So too all contraventions of the casual loading provision (the cl.13.1 breaches) would be aggregated, as would the contraventions of the penalty rates provisions (the cl.34 breaches). They are the first three groups set out earlier in these reasons.

59. But in my view, s.557(1) does not permit that grouping in this case because there is nothing to suggest that each of the contraventions within each group arose from a course of conduct. For example, there is nothing to suggest that the first or second respondents took a single decision to pay the employees at a rate that was not in accordance with the award. The employees worked over different periods, some commencing work with the first respondent before others. The first

respondent could have, but did not give any evidence about the circumstances in which it chose to pay the employees as it did.

60. The respondents have led no evidence to establish that the contraventions the subject of these proceedings were part of a course of conduct on the part of the first respondent. Not all of the first respondent's employees are the subject of these proceedings. It is reasonable to infer that there was, therefore, some differential treatment of employees – not all were treated the same (i.e. underpaid) by reason of a single decision or broad policy on the part of the first respondent.

61. In my view, however, I can readily infer, I think, that the underpayment of each particular employee, and the failure to pay that employee the relevant penalty rates was a course of conduct for the purposes of s.557(1). I think it likely that one decision was made about payment to each of the employees as and when they started employment for the first respondent. Thus, in respect of each employee, the pay rate contraventions (the cl.20, cl.13.1 and cl.34 breaches) can be aggregated under s.557(1) of the Act and treated as a single contravention.

62. So too, I think it likely that the pay slips contraventions are the result of a single decision by the first respondent about how it would conduct its business and provide information to its employees generally. I am satisfied that those contraventions probably came about as a result of a course of conduct on the part of the first respondent.

63. Accordingly, after the application of s.557(1) of the Act, in my view the contraventions are best grouped as follows:

a) one contravention in respect of each of the nine employees concerned in this matter for failure to pay basic rate of pay, failure to pay casual loading and failure to pay penalty rates (a total of nine contraventions);

b) one contravention of s.536 of the Act in respect of a failure to provide pay slips;

c) two contraventions for breach of s.712(3) of the Act; and

d) one contravention for breach of s.716(5) of the Act.

64. Accordingly, there are a total of 13 contraventions that each might attract the imposition of a penalty in this case.

65. Having identified the relevant contraventions and applied s.557(1) of the Act, it is open to the Court 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.

66. As I have already set out above, the respondents submit that the contraventions ought to be grouped into five common groups of transactions, namely those relating to:

a) the minimum hourly rates contraventions;

b) casual loading contraventions;

c) penalty rate contraventions;

d) pay slip contraventions; and

e) the responses to requirements of the inspectors.

67. Whilst the Court has a discretion to further aggregate groups of contraventions, that further aggregation is for the purpose of fixing an appropriate penalty in respect of each of the contraventions. The further aggregation is not undertaken for the purpose of defining each contravention with which the Court has to deal. I reject the respondent's submissions to the contrary.

Penalties

68. In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (supra), Murphy J succinctly identified, with respect, the general principles to be applied in the imposition of penalties. His Honour stated:

> "*[16] The purposes to be served by the imposition of penalties are threefold:*
>
> > *"1. Punishment - which must be proportionate to the offence in accordance with prevailing standards;*

2. Deterrence - both specific and general; and

3. Rehabilitation."

[17] Courts exercising industrial jurisdiction have identified a range of factors for assessing the appropriate penalty which, while not mandatory considerations, may be relevant to the circumstances of a particular case. These include:

"(a) the nature and extent of the conduct;

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

(c) the period of the conduct;

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

(e) whether there has been similar previous conduct by the respondents;

(f) whether the contraventions arose out of one course of conduct;

(g) whether senior management was involved in the conduct;

(h) whether any contrition has been exhibited;

(i) whether any corrective action has been taken;

(j) the cooperation of the respondents; and

(k) the need for deterrence.""

(citations omitted)

69. The maximum penalties that could be imposed by the Court on the first respondent and second respondents for single contraventions are as follows:

Provision contravened	**First Respondent**	**Second Respondent**
s.45	$33,000	$6,600

s.536(1)	$16,500	$3,300
s.712(3)	$33,000	$6,600
s.716(5)	$16,500	$3,300

70. The total maximum penalty that might be imposed upon the first respondent for the 13 contraventions identified above is $363,000. The total maximum penalty that might be imposed upon the second respondent for the 13 contraventions identified above is $72,600.

71. As I have earlier noted, the first respondent carried on the business of a café and tapas bar at Varsity Lakes on the Gold Coast. The second respondent was a director of the first respondent's business and responsible for the day to day running of the business. He argues, in his affidavit filed on 19 June, 2014 that he has general management responsibility for the business operations of the first respondent and in particular, the management of its human resources.

72. I accept that the admitted contraventions represent a serious failure to afford nine employees basic entitlements under the Award, including two employees who were not paid at all. These are young, relatively unskilled workers earning low rates of pay. The purpose of the Act is to provide a safety net which ensures adequate minimum award entitlements to employees. As such, contraventions of the most basic award provisions are not to be treated lightly.

73. One of the employees, Mr McClymont, was aged 19 and 20 at the time of the contraventions in respect of his employment. His underpayment of $6,027.39 forms the bulk of the underpayments of ordinary wages. Although that is significant in itself, it is particularly so given the short period of his employment.

74. The employees have suffered economic loss as a consequence of the contraventions. There was a total underpayment to the nine employees of $16,922.25 – a significant amount given their relatively short periods of employment. Two of the employees were not paid at all and of the remaining seven, six were not paid between 70 and 85 per cent of their entitlement. Such underpayments would be significant to any

employee but they are especially egregious given that the employees were award-reliant.

75. The first respondent retained the underpayment which was only rectified shortly before the hearing in this matter.

76. The first respondent has not previously been the subject of any proceedings brought by the applicant or its predecessors for contraventions of workplace laws. In his affidavit, the second respondent deposes that he has been an employer, from time to time, of up to 50 employees for more than 20 years. He further deposes that he has never been the subject of any complaints by his employees regarding entitlements. However, whilst there is no evidence before the Court to suggest otherwise, the circumstances beg the question: How did these contraventions come about if the second respondent was so experienced? The respondents provide no answer to that question.

77. The second respondent does suggest that he was responsible for engaging new employees, and at the relevant time he was drinking heavily and was perhaps psychologically unwell. But that does not explain why these particular employees were underpaid whilst others in the first respondent's employment seemingly were not.

78. In his affidavit, the second respondent deposes that the first respondent is a small, family-owned business employing 31 staff as permanent, casual and apprentice employees. The second respondent holds a 25 per cent stake in the first respondent, with the remaining shares being held by his wife, daughter and mother-in-law. Approximately 25 employees rely on the first respondent as their sole place of employment.

79. The fact that the first respondent is small business, whilst relevant, has only minimal significance to the determination of the appropriate penalties. In *Kelly v Fitzpatrick* [2007] FCA 1080 Tracey J observed at [28]:

> *"No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction*

> *"must be imposed at a meaningful level": see* Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd *[2001] ATPR 41-815 at [13]*."

80. Simpson FM (as his Honour then was) similarly outlined the limited relevance of a business's size to consideration of penalty in *Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor* [2009] FMCA 38. In that case, his Honour stated:

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

81. There is evidence before me that the second respondent was declared bankrupt on 29 May, 2013. He was compelled to sell his previous business and also lost his home as a result. In *Fair Work Ombudsman v ACN 052 182 180 Pty Ltd* [2013] FMCA 688, the Court dealt with the imposition of penalties where the respondent was experiencing financial difficulty. In that case, Judge Turner stated at [24]:

> *"The court notes that penalties are not characterised as provable debts, and hence survive bankruptcy. This was acknowledged by*

the court in Cotis v McPherson *[2007] FMCA 2060, where the court recognised the seriousness of contraventions which showed a disregard for the respondent's statutory obligations, particularly in light of his "significant business experience" and failure to pay the entitlements either before or after the closure of the business, and stated at [12]:*

> *... it is ... 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. The mere fact that a business fails and that its premises close is not an excuse for a failure to pay entitlements due to employees ...*

[25] In that case the court imposed penalties on the bankrupt respondent of $18,750.00, in acknowledgement of the seriousness of the matter. That decision emphasises that a court should not be deterred from imposing significant or high range penalties on bankrupt respondents where it considers that it is appropriate and necessary to do so, to reflect the need for specific and general deterrence. The second respondent's bankruptcy in this case is but one matter which must be weighed in the balance of all the objective and subjective circumstances of the matter to determine the appropriate penalty."

82. Again, whilst the second respondent's bankruptcy is relevant, its significance is limited. It is incumbent upon the Court to set a penalty which, amongst other matters, indicates its disapproval of the conduct in question and serves as a warning to others.

83. The applicant submits that a deliberate decision was made not to pay Mr Stalker and Ms Bennor. He further submits that the payment practices of the first respondent were inconsistent and chaotic, with employees unable to predict when they would be paid. It is also clear from the affidavit material that employees were frequently only paid upon their own request, rather than when their entitlement fell due. I accept those submissions. The evidence of the employees before me bears them out. I also conclude from the conduct of the second respondent in evading the Fair Work inspectors that the first respondent, through the agency of the second respondent, took deliberate action to avoid its responsibilities to its employees.

84. The first respondent failed to comply with the first notice to produce by the specified date of 22 August, 2012. It was not until over a year later

that some documents were provided in respect of that notice. Similarly, the first respondent failed to comply with the second notice to produce by the specified date of 18 March, 2013. It was not until November of that year that some documents were provided in respect of that notice.

85. The first respondent failed to comply with the compliance notice at all. The first and second respondents appear not to have taken the applicant's correspondence and statutory demands seriously, seemingly choosing to ignore them and behave in a manner that, on its most favourable interpretation, was highly evasive.

86. In addition to the economic loss occasioned to the employees, the conduct of the first respondent is conduct which undermines the utility and effectiveness of a fundamental object of the Act. One of the principal objects of the Act is to provide a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions for all employees. In order to enforce these terms and conditions, Fair Work inspectors must be able to exercise the powers conferred upon them by the Act. Those powers allow the applicant to investigate and enforce compliance with minimum standards and industrial instruments. The conduct of the first respondent in failing to comply with the various notices issued by the Fair Work inspectors obstructed the conduct of a proper investigation into the entitlements owed to the employees. This made it difficult for the inspectors to determine the amounts owed and paid to each employee, undermining the statutory objectives and principal objective of the Act.

87. The failure to provide pay slips further disempowered the employees. In *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258 at [67], Riethmuller FM (as his Honour then was) explained:

> *…[a pay slip's] 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.*

88. I adopt, with respect, his Honour's observations.

89. The respondents were provided with ample time to provide the records sought by the applicant in the first and second notices to produce. They were also provided with opportunities to rectify the underpayments prior to the issue of the compliance notice. In respect of the notices to produce, they were adequately warned of the consequences of non-compliance and yet chose not to comply. This non-compliance, at best for both respondents, took place with reckless disregard for their obligations under the Fair Work Act.

90. The applicant further submits that the first respondent made deliberate decisions not to provide employees with pay slips as a practice despite requests made by Ms Incerti, Mr McClymont, Ms Piggott and Ms Kaur. In my view that much is clear from the evidence of those employees.

91. The second respondent submits that he was drinking heavily at the time of the contraventions and was suffering from anxiety and depression. Leaving aside the absence of any evidence about those claims by the second respondent, although that may demonstrate a lack of mala fides on his part, it does not mitigate the first or second respondents' conduct. The second respondent submits that "[I] buried my head in the sand" and "hoped that it would all go away". Indeed, that seems to have been what he did. But as an experienced business owner, the second respondent was no doubt fully aware of his industrial obligations to the first respondent's employees and should not be permitted to simply ignore them.

92. A corporate entity can only act through its authorised officers and agents. The second respondent was, at the relevant times, the director of the first respondent and made the decisions regarding the day-to-day running of the business. He admits that he was the first respondent's "directing mind and will" and that he was involved in each of the contraventions by the first respondent.

93. The respondents admit that they did not cooperate with the office of the applicant during the investigation. They did, however, allow the matter to proceed via an agreed statement of facts once this application was on foot. A contested hearing has been avoided. The applicant submits that a 10 per cent discount on penalty would accord an appropriate

recognition of the respondents' cooperation in that regard. The respondents submit that such a discount should stand at 20 per cent. In my view, however, it is easy to overstate the significance of this matter proceeding to a penalty hearing on a statement of agreed facts.

94. It is clear that for a large part of the life of these proceedings, the respondents were denying the allegations made against them. In October, 2013 the Court directed that all evidence in the case be on affidavit. Directions were made for the delivery of affidavits of evidence in chief by both parties. The applicant filed affidavits by a number of witnesses. The respondents filed nothing until the second respondent filed an affidavit on 19 June, 2014. It was not until the matter returned to court in April, 2014 that it became clear that the matter would proceed by way of an agreed statement of facts and a penalty hearing.

95. The first respondent has rectified the underpayments due to Mr McClymont, Ms Moses and Ms Incerti. It caused bank cheques to be delivered to the office of the applicant to rectify the underpayments in respect of the other employees. Those efforts to make good the contraventions should be accorded some credit in the assessment of penalty. The significance of that rectification is diminished by the fact that the payments were not made until the eve of the penalty hearing.

96. It is also submitted for the respondents that they have taken action to avoid a recurrence. In his evidence, the second respondent accepts responsibility for the underpayments, admits that he has "done wrong" and says that he is "ashamed of my conduct". He states that he has now implemented a complaints handling system at the business and has annexed a written copy of those procedures to his affidavit. He further states that he has stopped drinking and undertakes to perform his duties and obligations correctly in the future. He also notes that he has joined the Restaurant and Catering Industry Association in an effort to keep abreast of such obligations. What he does not say, however, is that the first or second respondents have put in place steps to ensure that employees are paid the correct amounts and that they are given pay slips in accordance with their entitlements.

97. Ensuring compliance with minimum standards is an important consideration in this case. As I have already noted, one of the objects

of the Act has been the maintenance of an effective safety net of minimum terms and conditions and effective enforcement mechanisms for those minimum terms and conditions. One of the purposes of the Act is to ensure that there is a level playing field for employers in relation to wage costs.

98. In *Fair Work Ombudsman v Dalley Holdings Pty Ltd* [2013] FCA 509, Bromberg J suggested at [19] that:

> *"In imposing a penalty, it is imperative for the court to impose a penalty that reinforces the fundamental importance of compliance with the safety net of entitlements specified by the National Employment Standards and the general protection provisions of the of the Act."*

The penalty imposed should therefore be at a meaningful level to ensure compliance with minimum standards.

99. Furthermore, the failure to comply with the notices issued by the applicant is a serious matter and the respondents should be left under no apprehension about their obligations to comply with such notices.

100. It is well established that the need for specific and general deterrence is a factor that is relevant to the imposition of a penalty under the Act. 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] FCAFC 65, where his Honour noted:

> "*[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 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 ...*"

101. The applicant submits that the penalties in this case should be imposed on a meaningful level so as to deter other employers from committing

similar contraventions. It further submits that there is a high need for general deterrence in the café, restaurant and takeaway food sector as there are a high number of complaints received by the applicant in this particular sector and a high number of those complaints result in contraventions being identified. The sector also employs a large number of low-skilled and vulnerable workers. The evidence relied upon by the applicant bears out those submissions.

102. It is also submitted by the applicant that, when imposing penalties, the Court should have regard to the "message sent" to employers and the community generally. In this case, it must be made clear that employers must provide employees with the correct entitlements; take steps to respond to correspondence and notices issued by government regulators such as a the applicant and provide each employee with a payslip every pay. In that regard, I accept the applicant's contention that, adopting the observations of Marshall J in *Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2)* [2012] FCA 557 at [29]:

> *"It is important to ensure that the protections provided by the Act to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected."*

103. The applicant submits that the need for specific deterrence in this case is a significant matter. The applicant points out that the first respondent continues to operate and employ staff at its business and the second respondent continues his involvement. Although I accept the contention that specific deterrence is important in this case, I do not accept that there has been no demonstration of remorse on behalf of the respondents. In his June affidavit, the second respondent notes that he is ashamed of his conduct. He further details the effect that the contraventions have had on his business and personal life, including the breakdown of his marriage. The underpayments have been rectified, albeit very late in the day.

Accessorial liability

104. The same considerations should apply in determining penalty in respect of the conduct of both the first and second respondents. The second respondent ran the business of the first respondent and in the statement of agreed facts, he has admitted that: he was involved in the day-to-

day activities of the first respondent; was the manager of the business with primary responsibility for and control of the day-to-day running of the business; determined the terms and conditions of employment of the employees; and was responsible for the payment of wages to the employees. He has further admitted that he had actual knowledge of the factual matters which comprise the contraventions and was an intentional participant in the factual matters which comprise the contraventions alleged against the first respondent.

105. The Fair Work Act fixes separate penalty amounts for individuals and bodies corporate. It is therefore appropriate for each respondent to be penalised separately. Such an approach was endorsed by the Federal Court in *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408, where Buchanan J noted, at [8]:

> *"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."*

Penalties

106. In this case the specific penalty ranges sought by the applicant in respect of the first respondent's contraventions are:

a) Failure to pay specified hourly rates – 40 per cent of the maximum;

b) Failure to pay specified hourly rates (junior) – 40 per cent of the maximum;

c) Failure to pay casual loading – 40 per cent of the maximum;

d) Failure to pay penalty rates for Saturday – 20 per cent of the maximum;

e) Failure to pay penalty rates for Sunday – 20 per cent of the maximum;

f) Failure to pay public holiday penalty – 20 per cent of the maximum;

g) Failure to pay penalty for work during defined hours, Monday to Friday – no penalty;

h) Failure to provide pay slips – 80 per cent of the maximum;

i) Failure to comply with August 2012 NTP – 70 per cent of the maximum;

j) Failure to comply with February 2013 NTP – 70 per cent of the maximum; and

k) Failure to comply with Compliance Notice – 40 per cent of the maximum.

On the applicant's reckoning, that is a total penalty of $110,400, including a 10 per cent discount. There is no specific evidence of the first respondent's financial position before the Court, although there are some generalised statements by the second respondent that the first respondent's financial position is poor. I imagine that a penalty of that size would be a significant impost upon the first respondent. The respondents submit that the business would have to close if such a penalty were imposed upon the first respondent.

107. In respect of the second respondent, the applicant seeks penalties in the same percentages. Such penalties would total $22,080, including a 10 per cent discount.

108. I have adopted a different grouping of the contraventions than that suggested by the parties.

109. In respect of the contraventions of s.45 of the Act, I consider it appropriate that there be a pecuniary penalty of $5,000 for each contravention (or employee) as identified by me above. Those penalties total $45,000.

110. In respect of the contravention of s.536(1) of the Act, I consider a penalty of $5,000 is appropriate. The circumstances in which the respondent's failed to provide the employee with pay slips demand a significant penalty.

111. The contraventions of s.712(3) of the Act are serious. There is nothing to suggest that the first respondent took its obligations under those notices seriously. It engaged, through the second respondent, in nothing more than obfuscation and avoidance. I consider a penalty of $12,500 for each of these contraventions is appropriate.

112. Finally, the contravention of s.716(5) of the Act is also serious. It was a direct request to the first respondent to rectify the identified contraventions. The first respondent, for reasons which are not explained in any sensible way, ignored the request. Compliance with the request would have avoided these proceedings in large measure: s.716(4A) of the Fair Work Act. A penalty of $10,000 is appropriate.

113. The above penalties total $80,000. In settling on an appropriate penalty, the Court must determine whether the aggregate penalty is one that is an appropriate response to the conduct which led to the breaches. The aggregate penalty should not be "oppressive or crushing" and should be considered after an appropriate penalty for each contravention has been determined. Such a penalty will be determined by "instinctive synthesis", taking into account all the matters relevant to the penalty. The objective of the totality principle is to ensure that an appropriate overall penalty is imposed and to ensure that the sum of the individual penalties does not exceed what is proper, having regard to the totality of the contravening conduct.

114. I have set out the first respondent's contravening conduct above. The evidence is consistent with both the first and second respondent paying wages without regard to the Award. How that came about is just not explained. The nature of the breaches and the flagrant disregard of the applicant's attempts to investigate and resolve this matter call for a high penalty.

115. The only mitigating factors appear to be the first respondent's lack of any previous contraventions, the belated co-operation with the applicant in these proceedings and the very recent rectification of the underpayments.

116. Having regard to those matters, my analysis of the facts and circumstances set out above suggest that a "just and appropriate" figure for a total penalty is $70,000.

117. In respect of the second respondent, I adopt a similar approach to that taken to the contraventions committed by the first respondent. For the contraventions relating to s.45 of the Act, I consider a penalty of $1,000 for each employee is appropriate. That is a total penalty for those contraventions of $9,000.

118. In relation to the contravention for failing to supply pay slips a penalty of $1,000 is appropriate. For the failure to comply with the notices to produce, I impose a penalty of $2,500 for each offence. As to the failure to comply with the compliance notice, a penalty of $2,000 is appropriate.

119. The total penalties for the contraventions in which the second respondent was involved are $17,000. For the same reasons as I have expressed above, it is appropriate to reduce the total penalty to $14,500.

120. The applicant further seeks an order pursuant to s.545(1) of the Act that the first respondent undertake a wages and entitlements audit to assess its compliance with the Act and applicable industrial instruments in respect of all employees for the financial year ending 30 June, 2014. The respondents consent to the orders that are sought in that regard.

I certify that the preceding one hundred and twenty (120) paragraphs are a true copy of the reasons for judgment of Judge Jarrett delivered on 17 February, 2015.

Associate:

Date: 17 February, 2015