FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v VIPER INDUSTRIES PTY LTD & ANOR [2015] FCCA 492

Catchwords:
INDUSTRIAL LAW – Failure by the first respondent to comply with a compliance notice sent in accordance with s.716 of the *Fair Work Act 2009* (Cth) – contraventions of the *Fair Work Act 2009* (Cth) – second respondent's involvement in the first respondent's contravention of the *Fair Work Act 2009* (Cth) pursuant to s.550 of the *Fair Work Act 2009* (Cth) – appropriate civil penalty to be paid by the respondents.

PRACTICE & PROCEDURE – Application for default judgment.

Legislation:
Fair Work Act 2009 (Cth), ss.546, 716

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

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	VIPER INDUSTRIES PTY LTD (ACN 157 689 248)
Second Respondent:	JACK YOUNES
File Number:	SYG 1772 of 2014
Judgment of:	Judge Emmett
Date of Last Submission:	28 January 2015

Delivered at: Sydney

Delivered on: 4 March 2015

REPRESENTATION

Solicitors for the Applicant: (Fair Work Ombudsman)

No appearance by or on behalf of the respondent

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 1772 of 2014

FAIR WORK OMBUDSMAN
Applicant

And

VIPER INDUSTRIES LTD (ACN 157 689 248)
First Respondent

JACK YOUNES
Second Respondent

REASONS FOR JUDGMENT

1. On 27 June 2014, the applicant commenced proceedings against the respondents by way of Statement of Claim alleging the failure by the first respondent to comply with a compliance notice, issued by the applicant on 17 April 2014 in respect of underpayments by the first respondent to an employee in the amount of $6,741.92 ("**the Compliance Notice**"). The Statement of Claim also pleaded accessorial liability of the second respondent in relation to his knowing involvement in the first respondent's failure to comply with the compliances notice, as required under s.716 of the *Fair Work Act 2009* (Cth) ("**the Act**"). By Amended Statement of Claim, filed on 30 July 2014, the amount of the underpayment was amended to $6,471.92.

2. Various orders were made by the Court since the commencement of the proceeding for the respondents to file and serve any Defence. Pursuant to orders made by me on 25 November 2014, and in light of the failure of the respondents to comply with orders of the Court in filing any Defence, the applicant was given leave to file and serve an Application

in a Case seeking default judgment, together with evidence by way of affidavit and submissions in support, by 16 January 2015.

3. On 16 January 2015, the applicant filed an Application in a Case seeking default judgment in respect of the failure of the first respondent to comply with the Compliance Notice and the knowing involvement of the second respondent in that failure. The applicant also sought civil penalties pursuant to s.546 of the Act for the contraventions of s.716 of the Act by each of the respondents.

4. On 28 January 2015, orders were made by me in the following terms:

> "*1. Default judgment is entered for the applicant against the first and second respondent pursuant to Rule 13.03B(2)(c) of the Federal Circuit Court Rules 2001 (Cth).*
>
> *2. Upon the admissions which the respondent are taken to have made, consequent upon their default pursuant to Rule 13.03A(2) of the Federal Circuit Court Rules 2001 (Cth), the Court declares that:*
>
> > *(i) The first respondent contravened subsection 716(5) of the Fair Work Act 2009 (Cth) by failing to comply with a compliance notice issued on 17 April 2014 ("**Compliance Notice**"), requiring the first respondent to:*
> >
> > > *a) Pay to Ms Amy-Leigh Cook a total of $6,471.92 (gross).*
> > >
> > > *b) Produce to the applicant reasonable evidence with the Compliance Notice.*
> >
> > *(ii) The second respondent was involved in, within the meaning of subsection 550(2) of the Fair Work Act 2009 (Cth), the first respondent's contravention of subsection 716(5) of the Fair Work Act 2009 (Cth) and is therefore taken to have contravened that provision.*
>
> *3. Pursuant to section 545 of the Fair Work Act 2009 (Cth), the first respondent is to comply with the Compliance Notice by paying the sum of $6,471.92 to Ms Amy-Leigh Cook within a period of 28 days.*"

5. Those Orders were made based on the evidence of Anna Kovalsky as deposed to in her affidavit, affirmed 16 January 2015, and the affidavit of Barry John McDonnell, sworn 16 January 2015. I was satisfied that

copies of the Orders made by me on 15 October 2014 and 25 November 2014 were duly served on the respondents, together with the Application in a Case filed on 16 January 2015 and the affidavits in support. I was satisfied that each of the respondents was aware of the orders sought by the applicant in the Application in a Case filed on 16 January 2015 and has had sufficient time to participate in that matter and these substantive proceedings should the respondents, or either of them, have chosen to do so.

6. On 19 January 2015, the applicant filed submissions on penalties sought by the applicant by reason of the failure of the first respondent to comply with the Compliance Notice issued on 17 April 2014 and the second respondent's knowing involvement in that failure, as the sole director, sole shareholder and company secretary of the first respondent. Based on the evidence before me, I am satisfied that the evidence relied on by the applicant in support of the penalties sought, together with the submissions in support, were duly served on the respondents.

7. I accept the applicant's submission on penalty in its entirety:

> 1. *"In the event that the Court is inclined to order default judgment in this matter, the applicant makes the following submissions in relation to penalty.*
>
> ***OVERVIEW***
>
> 2. *This matter relates to a failure to comply with a compliance notice (**Compliance Notice**) issued to the first respondent on 17 April 2014 under s716(5) of the Fair Work Act 2009 (Cth) (**FW Act**).*
>
> 3. *The Compliance Notice related to the applicant's investigation of a complaint made by Ms Amy-Leigh Cook (**Ms Cook**) that the first respondent had underpaid her during the period from 9 July 2012 to 31 October 2013 at which time she was employed by the first respondent as an apprentice hairdresser.*
>
> 4. *The respondents are:*
>
>> a. *Viper Industries Pty Ltd, the first respondent – which operated a hair and beauty salon trading as 'Lattouf Hair & Day Spa Castle Hill' in the State of New South Wales; and*

b. *Mr Jack Younes, the second respondent – the sole director, company secretary and sole shareholder of the first respondent.*

5. *The Compliance Notice was personally served on the second respondent on 17 April 2014. The Compliance Notice requested payment of an amount of $6,471.92 to Ms Cook by 8 May 2014.*

6. *These proceedings were commenced by way of application and statement of claim on 27 June 2014.*

7. *On 16 January 2015, the applicant filed an application in the case seeking default judgment. The basis for the application was that the respondents had failed participate in Court proceedings and had therefore failed to defend the proceedings with due dilligence. For further detail about the applicant's default judgment application please refer to the applicant's default judgment submissions which were also filed on 16 January 2015.*

8. *In the event that default judgment is ordered against the respondents, the applicant seeks orders pursuant to section 546(1) of the FW Act requiring the respondents to pay penalties in relation to their contraventions of s716(5) of the FW Act.*

9. *As set out in paragraph 97 below, the applicant is seeking high range penalties. The applicant submits that the penalties sought are appropriate because:*

    a. *the respondents' failure to comply with the Compliance Notice represents a failure to acknowledge and address its employment obligations;*

    b. *the failure to comply with statutory notices such as compliance notices undermines and frustrates the powers conferred on Fair Work Inspectors, which are conferred for the purposes of providing an effective and resource efficient means of achieving compliance with lawful minimum entitlements;*

    c. *the Compliance Notice related to the first respondent's failure to pay Ms Cook her minimum entitlements under the Hair and Beauty Industry Award 2010 (**Modern Award**) relating to Ms Cook's: base rate of pay, weekend penalties,*

overtime rates, public holiday penalties, annual leave and termination entitlements. These were basic and fundamental entitlements which were well known to the respondents, including by reason of their prior interactions with the regulator regarding past complaints;

d. *the second respondents' conduct during the investigation and court proceedings was evasive and did not demonstrate cooperation with the investigation, including through the second respondent:*

    i. *on several occasions promising to provide documents or asserting that certain document existed but then failing to provide these to the applicant;*

    ii. *refusing to make himself available to accept service of the application and statement of claim (Originating Documents); and*

    iii. *attempting to deny service of documents which had been personally served (that is, the Compliance Notice and the Originating Documents); and*

e. *the respondents have each had previous interactions with the office of the applicant, which demonstrate an awareness of their obligations under workplace laws and which suggests a concerning pattern of non-compliance over a period of time, warranting a deterrent outcome in this matter.*

DOCUMENTS RELIED UPON

10. The applicant relies upon the following documents:

a. *affidavit of Anna Kovalsky affirmed and filed on 16 January 2015 (**Kovalsky Affidavit**); and*

b. *affidavit of Barry John McDonnell sworn and filed on 19 January 2015 (**McDonnell Affidavit**).*

11. The applicant also notes the second respondent's email correspondence, copied to the court on 16 January 2015, and

has sought to address the matters raised therein in the following submissions.

COMPLIANCE NOTICES

12. *A contravention of subsection 716(5) of the FW Act (a failure to comply with a compliance notice) has previously come before a Court for a determination of penalty in the matters of Fair Work Ombudsman v Extrados Solutions Pty Ltd & Anor [2013] FCCA 815 (**FWO v Extrados**), Fair Work Ombudsman v Jaycee Trading Pty Limited (ACN 150 676 396) & Anor (No.2) [2013] FCCA 2128 (**FWO v Jaycee**) Fair Work Ombudsman v Daladontics (Vic) Pty Ltd [2014] FCCA 2571 (**FWO v Daladontics**).*

13. *The issuing of compliance notices was a new power given to Fair Work Inspectors under the FW Act.[1] The Explanatory Memorandum to the FW Act explains that compliance notices were designed to be another option to deal with non-compliance instead of pursuing court proceedings.[2]*

14. *Section 716 of the FW Act allows a person to whom a compliance notice is issued to have an opportunity to rectify an underpayment without being subject to civil remedy proceedings. The effect of a compliance notice is that:*

    a. *if a person complies with the compliance notice (that is, rectifies the underpayment):*

        i. *no civil remedy proceedings can be brought against the person in respect of the underpayment (subsection 716(4A)); and*

        ii. *the person is not taken to have admitted or been found to have contravened the civil remedy provision in respect of the underpayment (subsection 716(4B)); but*

    b. *if a person fails to comply with a compliance notice, subsection 716(5) allows an inspector to bring civil remedy proceedings against that person, and seek appropriate consequential orders that the Court has power to make under the FW Act, such as pecuniary penalties.*

[1] Item 33 of subsection 539(2) of the FW Act.
[2] *Fair Work Bill 2008*, Explanatory Memorandum at [2673].

15. *The failure to comply with a compliance notice 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*[3]*. The time and costs involved in these proceedings, which became inevitable following the non-compliance*[4]*, should be contrasted with the relatively small amount the Compliance Notice required to be paid.*

LEGISLATIVE PROVISIONS RELATING TO PENALTY

Standing

16. *The Fair Work Ombudsman is appointed by the Governor-General by written instrument under section 687 of the FW Act and is a Fair Work Inspector under section 701 of the FW Act.*

Power to impose a penalty and maximum penalties under the FW Act

17. *The table below sets out the legislative power to impose a penalty and the maximum penalties available in respect of the relevant contravention pursuant to subsection 539(2) of the FW Act:*

Contravention	Court's power to impose penalty	Reference for maximum penalty	Maximum penalty for corporation	Maximum penalty for corporation ($)	Maximum penalty for individual	Maximum penalty for individual ($)
s 716(5) FW Act	s 546 FW Act	Item 33, s 539(2) FW Act	150 penalty units	$25,500[5]	30 penalty units	$5,100[6]

PRINCIPLES RELEVANT TO DETERMINING PENALTY

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

19. *The first step for the Court is to identify the separate contraventions involved. Each contravention of each separate obligation found in the FW Act is a separate contravention of*

[3] *FWO v Daladontics at* [16].
[4] ibid
[5] Section 12 of the FW Act provides that "penalty unit" has the same meaning as section 4AA of the *Crimes Act 1912* (Cth) (**Crimes Act**). At the time the respondents failed to comply with the compliance notice (on 8 May 2014), section 4AA defined "penalty unit" to be $170.
[6] *Ibid.*

a civil remedy provision for the purposes of section 539(2) of the FW Act.[7]

20. *Secondly, the Court should consider whether the contraventions arising in the first step constitute a single course of conduct.*[8]

21. *Thirdly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what an appropriate penalty 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]

22. *Fourth, the Court will consider an appropriate penalty to impose in respect of each contravention having regard to all of the circumstances of the case.*

23. *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".*

Grouping of Contraventions – Course of conduct and common element

24. *Given the contraventions relate to a single contravention on the part of the respondents, a consideration of the grouping of contraventions does not arise.*

25. *The applicant submits that the Court should find that the first and second respondents each engaged in one contravention of section 716(5) of the FW Act for which penalties should be imposed. The liability of the second respondent arises under section 550(1) of the FW Act which states that "a person who*

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[7] *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)

[8] Subsection 557(1) of the FW Act.

[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).

[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).

is involved in a contravention of a civil remedy provision is taken to have contravened that provision".

26. *The applicant submits that the Court should consider the maximum penalty it could impose in these proceedings is:*

    a. *(a) $25,500.00 on the first respondent; and*

    b. *(b) $5,100.00 for the second respondent.*

Factors relevant to determining penalties

27. *The factors relevant to the imposition of a penalty have been summarised by Mowbray FM in Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7 (**Pangaea**), [26] to [59], 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;*

    h. *whether senior management was involved in the contraventions;*

    i. *whether the party committing the contravention has exhibited contrition;*

    j. *whether the party committing the contravention has taken corrective action;*

    k. *whether the party committing the contravention has cooperated with the enforcement authorities;*

    l. *the need to ensure compliance with minimum standards by provision of an effective means for*

investigation and enforcement of employee entitlements; and

m. *the need for specific and general deterrence.*

28. *This summary was adopted by Tracey J in Kelly v Fitzpatrick (2007) 166 IR 14; [2007] FCA 1080 (**Kelly**) at [14]. 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: Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550 at [11]; Merringtons at [91] per Buchanan J.*

29. *Following is an analysis of each of the factors which the applicant submits are relevant to the determination of penalty in relation to the contraventions in this matter.*

Conduct and circumstances leading to the contraventions

30. *In summary, the circumstances relating to the issuance of the Compliance Notice are as follows:*

    a. *on 3 December 2013, the Ms Cook lodged a workplace complaint with the applicant. Ms Cook's complaint related to alleged underpayments during the period from 9 July 2012 to 31 October 2013, at which time she was employed by the first respondent as an apprentice hairdresser;*[13]

    b. *following an investigation of Ms Cook's entitlements, on 7 March 2014, Inspector McDonnell issued the first respondent with a "Determination of Contravention" letter. This letter stated that the applicant had determined that Ms Cook had been underpaid an amount of $6,471.92 by the first respondent and requested rectification of the underpayment by 24 March 2014;*[14]

    c. *in response to the above letter, on 12 March 2014, the second respondent contacted Inspector McDonnell by telephone and generally disputed the veracity of the calculations. Notwithstanding Inspector McDonnell's assurance that they were based on the respondents' own records, and his*

[13] McDonnell Affidavit, paragraph 9 and Tab 3 of Exhibit "BM-1".
[14] McDonnell Affidavit, paragraph 21 and Tab 16 of Exhibit "BM-1".

invitation on 12 March 2014[15] and 28 March 2014[16] to particularise any specific concerns, the respondents did not further dispute the amount or provide Inspector McDonnell with the documents he purported to rely on[17].

d. *on 17 April 2014, Inspector McDonnell issued the Compliance Notice requiring payment of $6,471.92 by personally handing it to the second respondent in his capacity as sole director of the first respondent. The deadline for compliance with the Compliance Notice was 8 May 2014 with evidence of payment to be supplied by 15 May 2014 and the second respondent was advised of his rights in respect of review of the notice if he wished to do so;[18] and*

e. *by 15 May 2014, the respondents had not contacted Inspector McDonnell in respect of the Compliance Notice, paid any amount to Ms Cook or requested a review of the Compliance Notice.*

31. *The contravention came about, in essence, because the first respondent ignored a compulsory notice issued by a Fair Work Inspector. Accordingly, it is submitted that the first respondent's failure to comply with, and in any way respond to, the Compliance Notice should be viewed in the context of the broader investigation into Ms Cook's complaint.*

32. *The applicant made extensive efforts to engage with the respondents, making efforts to assist the respondents to comply with their obligations to Ms Cook without the need for litigation or other enforcement. In particular, Inspector McDonnell:*

    a. *provided the respondents with prior notice of the applicant's findings and an opportunity to voluntarily rectify the Underpayment through the contravention letter dated 7 March 2014;*

    b. *provided the respondents with copies of the applicant's underpayment calculations and*

[15] McDonnell Affidavit, paragraph 22.
[16] McDonnell Affidavit, paragraph 23(b).
[17] McDonnell Affidavit, paragraphs 23(c), 24.
[18] McDonnell Affidavit, paragraphs 25(a)-(b) and Tab 21 of Exhibit "BM-1".

provided opportunity for the respondents to specify any concerns with those calculations[19]*;*

c. *arranged to meet with the second respondent to conduct a recorded interview so that the respondents would have opportunity to explain their position in relation to the alleged contraventions;*[20] *and*

d. *afforded the respondents multiple opportunities to provide its employment records to address employee allegations.*[21]

33. *In response to these extensive efforts, the respondents had only limited engagement with the applicant consisting of:*

    a. *the provision of a limited amount of documents requested by Inspector McDonnell (being payslips, a contract of employment and apprenticeship papers);*[22] *and*

    b. *the second respondent making regular promises to provide additional documents (such as, rosters and timetables) which he claimed to rely on, then failing to provide these documents.*[23]

34. *In light of this context, the Applicant submits that the first respondent's failure to comply with the Compliance Notice represents a fundamental failure to acknowledge and address its employment obligations.*

Nature and extent of loss

35. *At the time that Ms Cook worked for the respondent she was, aged between 18 to 19 years of age.*[24] *Courts have accepted that young workers may be vulnerable in the workplace due to a weaker bargaining position or inexperience of their workplace entitlements.*[25]

36. *The first respondent's failure to comply with the Compliance Notice denied Ms Cook payment of wages which had been*

[19] McDonnell Affidavit, paragraph 22.
[20] McDonnell Affidavit, paragraphs 17 and 18.
[21] McDonnell Affidavit, paragraphs 19 and 20.
[22] McDonnell Affidavit, paragraph 11.
[23] McDonnell Affidavit, paragraphs 13, 15, 23(c), 24, 25(d), 25(e).
[24] McDonnell Affidavit, paragraph 9 and Tab 2 of Exhibit "BM-1".
[25] *Fair Work Ombudsman v Nicole Patrice Dawe* [2013] FMCA 191 at [14]; *Fair Work Ombudsman v Primrose Development Company Pty Ltd* [2009] FMCA 632 at [59].

outstanding since at least 31 October 2013 (when Ms Cook ceased employment with the first respondent). Ms Cook continues to be denied the Underpayment amount of $6,471.92. While this amount is not objectively large, this does not mean it is not significant for Ms Cook. As noted by Judge O'Sullivan in Fair Work Ombudsman v Zillion Zenith International Pty Ltd:

> "The amounts involved may seem trifling to some but they were required to be paid to young employees for whom they were far from trifling and for which they've had to wait."[26]

37. *To put the Underpayment amount in context, the amount of $6,471.92 owed to Ms Cook equates to more than 14 weeks' pay.[27] Ms Cook has still not received any payment of this amount more than 14 months after she has ceased to work for the first respondent.*

38. *While it is the first respondent's failure to comply with the Compliance Notice that is before Court, the underlying contraventions that gave rise to the Compliance Notice form part of the "substratum of facts" of these proceedings[28] and, the applicant submits, are relevant to the Court's consideration of penalty.*

39. *The Underpayment amount arose through the first respondent failing to pay Ms Cook her minimum entitlements under the Modern Award in respect of her: base rate of pay, weekend penalties, overtime rates, public holiday penalties, annual leave and termination entitlements.. These were basic and fundamental entitlements which were well known to the respondents, including by reason of their prior interactions with the regulator regarding past complaints. By failing to pay these entitlements, the first respondent also failed to comply with clauses 5.1 and 6.1 of Ms Cook's contract of employment[29] which sets out that her entitlements to wages, penalty rates and leave will be as per the Modern Award.*

40. *In addition to the monetary loss arising from the failure to comply with the Compliance Notice and the impact of the underlying contraventions, the applicant submits that the Court should also consider the loss to the statutory objectives*

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[26] [2014] FCCA 433 at [52]. The amounts referred to by Judge O'Sullivan range from $10.31 to $480. See also *Fair Work Ombudsman v Bound for Glory Enterprises & Anor* [2014] FCCA 432 at [52].
[27] Refer to payslip provided at McDonnell Affidavit, paragraph 11 and Tab 5 of Exhibit "BM-1".Calculation based on a typical weekly rate of $453.51.
[28] *Fair Work Ombudsman v Extrados Solutions Pty Ltd & Anor* [2014] FCCA 815 at [9].
[29] McDonnell Affidavit, paragraph 11 and Tab 5 of Exhibit "BM-1".

of the FW Act caused by the failure to comply with the Compliance Notice.[30]

41. *In continuing to withhold these amounts from Ms Cook, the first respondent has obtained the ongoing benefit of the use of those funds. Such conduct not only benefits the first respondent to the employee's detriment, but also undermines the concept of a level playing field for employers, with respect to labour costs.*

42. *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"[31] *the FW Act. The failure to comply undermines and frustrates the powers conferred on Fair Work Inspectors, which are conferred for the purposes of providing an effective means of enforcing compliance with lawful minimum entitlements. There is a significant cost to the public by reason of the need to bring this matter before the court to enforce compliance.*

Compliance history

43. *It is submitted the failure to comply with the Compliance Notice formed part of a broader pattern of conduct by both respondents involving failures to meet their workplace obligations.*

44. *The respondents have not previously been the subject of proceedings by the applicant for contraventions of workplace laws and the applicant is not aware of any findings of contravention by a Court in respect of the respondents. However, the respondents have each had relevant interactions with the office of the applicant, which demonstrate an awareness of their obligations under workplace laws and which suggest a concerning pattern of non-compliance over a period of time; therefore calling for a deterrent outcome in this matter.*

45. *The Federal Court has previously held that while the effect of contravening conduct is more cogent if it has been the subject*

[30] 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]
[31] *Pagasa* at [56].

of conviction, other prior conduct is still relevant, though perhaps of less weight[32].

Compliance history of the first respondent

46. *In addition to the complaint lodged by Ms Cook, the applicant received a further eight complaints by employees of the first respondent (**Additional Complaints**), as set out below:*

    a. *the Additional Complaints were received during the period from 7 September 2012 to 5 June 2014 (before, during and after the period of the Cook complaint and Compliance Notice);*

    b. *the Additional Complaints were lodged by young workers, each aged between 16 to 27 years with five of the Additional Complaints being made by workers under the age of 21;*

    c. *each of the Additional Complaints related to alleged underpayments of wages; and*

    d. *contraventions were determined in respect of four of the Additional Complaints, an additional complaint was resolved by mediation and the remaining three complaints were unable to be resolved based on the evidence available.*[33]

47. *The applicant submits the Court can and should give consideration to the significant number of complaints the applicant has received against the first respondent as this can give important context to the contravening conduct and demonstrates the respondents' knowledge of their obligations and the consequent need for a deterrent penalty.*

Compliance history of the second respondent

48. *The second respondent is the sole director, the secretary and the sole shareholder of the first respondent.*[34] *The second respondent is the "hands and brain" of the first respondent*[35] *in that the first respondent can only act through the actions and decisions of the second respondent*

[32] *Williams v CFMEU (No 2)* [2009] FCA 548; *ABCC v CFMEU (No 2)* [2011] FCA 1518 at [59]; both applying *The Queen v McInerney* (1986) 42 SASR 111 at 113 and 124
[33] McDonnell Affidavit, paragraphs 42 to 43.
[34] McDonnell Affidavit, paragraphs 7 and 8.
[35] *Hamilton v Whitehead* (1988) 166 CLR 121

49. *The applicant submits that the Court should give consideration to the second respondent's involvement in a further five complaints during the time that the business trading as 'Lattouf Hair & Day Spa Castle Hill' (**the Salon**) was operated by Fluid Corporation Pty Ltd (**Fluid Corporation**)as this:*

    a. *indicates that he was on notice as to the existence of minimum employment conditions even prior to commencing to operate the Salon through the first respondent; and*

    b. *demonstrates the underlying behaviours and attitudes of the of the first respondent's "hands and brain".*

50. *It can be inferred that the second respondent was involved in the running of the business at the time that it was operated by Fluid Corporation because:*

    a. *Ms Cook commenced her employment at the Salon during the time it was operated by Fluid Corporation and indicates that she knew the second respondent at the time and understood the second respondent to be "a boss" at the Salon along with his wife Rema36;*

    b. *Ms Rema Younes nee Nassr, the second respondent's wife was formerly a director of Fluid Corporation;*

    c. *a liquidator appointed in respect of Fluid Corporation indicated to Inspector McDonnell that he understood that Fluid Corporation was under the control of Rema and Jack Younes and that following the insolvency of Fluid Corporation, by arrangement with the franchisor, the business commenced being operated by the first respondent[37]; and*

    d. *during the period prior to July 2012, whilst the Salon was operated by Fluid Corporation, the applicant received five complaints from its staff (**Fluid Corporation Complaints**). For at least three of these complaints the applicant dealt directly with*

[36] McDonnell Affidavit, paragraph 38(a).
[37] McDonnell Affidavit, paragraph 38(d) and Tab 31 of Exhibit "BM-1".

the second respondent as the employer representative.

51. *The applicant's files in relation to the Fluid Corporation Complaints show that:*

    a. *the complaints were lodged in the period from 13 February 2011 to 18 June 2012;*

    b. *each complaint related to an underpayment of award entitlements including wages and leave entitlements; and*

    c. *communications in respect of at least three of the complaints were either sent to or received from the second respondent who identified himself as a "manager at the company"*[38].

52. *In the applicant's submission, the numerous complaints lodged with the applicant in respect of the respondents over a period of several years demonstrates that the respondents' failure to comply with the Compliance Notice (and its underlying circumstances) was not a one off contravening event, and should be viewed in a context of repeated and factually similar complaints. On that basis it is submitted that a penalty of high deterrent value is required.*

Size and financial circumstances of Business

53. *On the material available the applicant accepts that the first respondent is apparently no longer trading.*[39] *There is otherwise no evidence before the Court as to the size and financial circumstances of either of the respondents.*

54. *If the respondents did intend to rely on or place any evidence before the Court as to their financial circumstances, the applicant submits that an employer's financial position at the time of the contraventions is not relevant to the question of penalty.*[40] *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.*[41]

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[38] McDonnell Affidavit, paragraphs 39 to 41.
[39] McDonnell Affidavit, paragraph 22 and Tab 17 of Exhibit "BM-1".
[40] See *Cotis v McPherson* (2007) 169 IR 30 at [16] and *Kelly* at [28]
[41] Kelly at [27]; *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [27].

55. *Further, the first respondent was given the opportunity to provide to the applicant any excuse it may have had for the failure to comply with the Compliance Notice.*[42] *At no stage did the respondents raise with the applicant any financial difficulties impacting on the first respondent's capacity to comply with the Compliance Notice.*

56. *In the context of compliance notices, Judge Jarrett in* Fair Work Ombudsman 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." [43]

57. *To the extent that the issue of capacity to pay may be raised, the FWO refers to a relevant line of authority regarding the primacy of general deterrence. In* Jordan v Mornington Inn Pty Ltd,[44] *Heerey J was required to determine the appropriate penalties to be imposed on an employer for admitted contraventions ss 400(5) and 792 of the WR Act. His Honour stated:*[45]

> As to the respondent's own financial position, however, in considering the size of a penalty, capacity to pay is of less relevance than the objective of general deterrence: *Leahy (No 2)* at [9]. In any event, to the extent that financial hardship might mitigate what would otherwise be an appropriate penalty, such an argument would need to be based on evidence. Apart from the income figures mentioned above, which were advanced from the Bar table, no such evidence was forthcoming.

58. *On appeal,*[46] *Stone and Buchanan JJ described the statement of principle highlighted in the above extract from the judgment of Heerey J as being "unimpeachable".*[47]

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[42] McDonnell Affidavit, paragraph 28 and Tab 22 of Exhibit "BM-1".
[43] [2014] FCCA 815 at [10].
[44] (2007) 166 IR 33
[45] At [99] (emphasis added).
[46] (2008) 168 FCR 383.
[47] At [69].

59. *In support of the principle he identified in Jordan, Heerey J cited a paragraph from the judgment of Merkel J in* ACCC v Leahy Petroleum Pty Ltd (No 2)[48] *which concerned the determination of appropriate penalties for price-fixing behaviour in breach of s 45 of the* Trade Practices Act 1974 *(the TPA). In the paragraph of the judgment of Merkel J referred to by Heerey J, her Honour stated:*[49]

> "The size of the contravening companies and their respective capacities to pay a penalty were relied upon as factors in mitigation in the present case. Plainly, such factors can be relevant to the penalty that is necessary to deter the company from contravening the Act in the future. … However, a contravening company's capacity to pay a penalty is of less relevance to the objective of general deterrence because that objective is not concerned with whether the penalties imposed have been paid. Rather, it involves a penalty being fixed that will deter others from engaging in similar contravening conduct in the future. Thus, general deterrence will depend more on the expected quantum of the penalty for the offending conduct, rather than on a past offender's capacity to pay a previous penalty. I therefore respectfully agree with the observation of Smithers J, referred to by Burchett and Kiefel JJ in NW Frozen Foods, to the effect that, a penalty that is no greater than is necessary to achieve the object of general deterrence, will not be oppressive. …"

60. *More recently in* FWO v Promoting U Pty Ltd,[50] *Burchardt FM observed:*

> "... Respondents cannot hope to have their conduct in effect exonerated by the Court merely because they are impecunious. Parliament has set significant penalties for the sort of contraventions that the Respondents engaged in and I do not think it is appropriate for the totality principle to operate simply to ensure that penalties are imposed in suitably insignificant amounts to meet the Respondents' capacity to pay".[51]

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[48] (2005) 215 ALR 281
[49] At [9].
[50] [2012] FMCA 58
[51] [2012] FMCA 58 at [57]

Deliberateness

61. *The Compliance Notice was personally served on the second respondent in his capacity as sole director of the first respondent.*[52] *The Compliance Notice stated, in bold, that failure to comply may contravene a civil remedy provision and that if the first respondent failed to take action to comply the applicant may commence legal proceedings against it, and against any persons involved in the failure to comply.*[53] *Further, a detailed guidance note about explaining the nature of compliance notices was included with the Compliance Notice.*[54] *Inspector McDonnell specifically drew the respondents attention to the fact that a failure to comply with the Compliance Notice constituted a contravention of the FW Act.*[55] *This warning was reiterated in FWI McDonnell's letter of 13 June 2014, inviting the Respondent to provide any reasons for its non-compliance.*[56]

62. *Prior to the issue of the Notices, the first respondent was issued with a determination of contravention letter, including the same determinations of contravention in the Compliance Notice.57*

63. *Despite the multiple opportunities to rectify the Underpayment amount, and the very clear warnings contained in the Compliance Notice and the follow up correspondence, the first respondent failed to take any action to comply with or review the Compliance Notice.*

64. *In this context, the applicant submits it is open for the Court to infer the contravention was deliberate.*

65. *It is noted that significantly after the period for compliance the respondents have contended that an arrangement was made with a third party to meet the amount involved. If that evidence is accepted by the court, this does not remove the respondents' responsibility for addressing the notice, or ensuring that payment of the amount occurred. To do so would undermine the utility of the notices.*

[52] McDonnell Affidavit, paragraphs 25(a)-(b).
[53] McDonnell Affidavit, paragraph 25 and Tab 21 of Exhibit "BM-1".
[54] Ibid.
[55] Ibid.
[56] McDonnell Affidavit, paragraph 28 and Tab 22 of Exhibit "BM-1".

Corrective Action

66. *To date, the respondents have not rectified the amount owing to Ms Cook. Notably, strike off action has been initiated against the first respondent by ASIC[58]. The applicant requested deferral of the strke off proceedings pending the resolution of these proceedings but it is possible that the first respondent may be deregistered as a result of the ASIC strike off action. In this context it seems possible that the Ms Cook will notreceive her outstanding entitlements, unless the alleged arrangement with Lattouf is met.*

67. *There is also no evidence that the first respondent has taken any corrective action to prevent future contraventions of workplace law, should it recommence trading.*

Alleged arrangement with a third party

68. *During the course of the proceedings (but subsequent to the period for compliance with the Compliance Notice), the second respondent has informally alleged that the first respondent entered into an arrangement with Mr Stephan Lattouf, the franchisor of Lattouf Hair and Beauty (**Lattouf**) under which Lattouf would pay Ms Cook the Underpayment amount. The second respondent alleged that this arrangement could be evidenced by a contract of sale between the first respondent and Lattouf, but failed to provide the applicant with a copy of this document despite promising to do so on several occasions[59].*

69. *On 16 January 2015, the second respondent forwarded an email to the applicant and the Court which he purports is an email from Lattouf in which Lattouf undertakes to pay Ms Cook the underpayment amount.[60] In respect of this email the applicant submits:*

    a. *the email should not be accepted as evidence of the existence of any arrangement between the first respondent and Lattouf because:*

        i. *the provenance of the email is uncertain as it has been provided to the applicant and the Court in unsworn form; and*

[58] Kovalsky Affidavit, Annexure "Ak-1"
[59] Kovalsky Affidavit, paragraphs 12(c), 15(c) and 17.
[60] McDonnell Affidavit, paragraph 36.

ii. *the email, if accepted as being an email from Lattouf, appears to describe a potential arrangement which may come into existence following agreement between the parties. No evidence has been supplied to show that such agreement was subsequently made;*

b. *even if it were accepted that there was an arrangement between the first respondent and Lattouf this would have limited relevance for the proceedings because:*

i. *the proceedings relate to the respondents' failure to comply with the Compliance Notice. The deadline for compliance was 15 May 2014. By this date the respondents had not either complied with the Compliance Notice or requested a review of the Compliance Notice;*

ii. *the obligation to comply with the Compliance notice rested with the respondents and could not be displaced by a purported contract with a third party. To do so would be contrary to the public interest;*

iii. *even if it is accepted that the first respondent entered into the purported arrangement with Lattouf then Lattouf has failed to pay Ms Cook in accordance with that contract, and the respondents have not provided any evidence of taking steps to enforce its terms;*

iv. *the respondents had the opportunity to raise and properly evidence the arrangement at the time of filing a defence but failed to avail themselves of this opportunity; and*

v. *at best, this appears to be an unsuccessful attempt by the second respondent to remedy the contravention after the fact.*

Contrition

70. *The respondents have not accepted responsibility for their conduct and have not expressed any contrition for their conduct to towards Ms Cook, the Court or the applicant. In this regard, the applicant notes the comments of Judge Jarrett*

*in the decision of Extrados that "*one would have thought that if there was an ounce of contrition … something would have been paid.*"*[61]

71. *Rather than accepting any responsibility for the contravention, the respondents have continued to avoid the consequences of its conduct by failing to pay Ms Cook the Underpayment amount (or at least, if accepted on the evidence, failing to ensure that their third party did so within the necessary period, or at all) and failing to engage in the Court proceedings in any meaningful way.*[62]

Cooperation with enforcement authorities

72. *The respondents demonstrated limited cooperation with the applicant during the investigation. Instead of cooperating with the applicant, in particular, the second respondent:*

    a. *failed to provide documents to the applicant both during the investigation and during the Court proceedings despite multiple promises that he would do so;*[63] *and*

    b. *failed to attend a scheduled Record of Interview with Inspector McDonnell. The respondents were notified at the time that this meeting was scheduled that Inspector McDonnell would be travelling to Sydney from Melbourne specifically in order to attend the meeting.*[64]

73. *Additionally, it can be inferred from the evidence before the Court that the respondents actively sought to avoid contact from the applicant on the basis that:*

    a. *when informed during the investigation by Inspector McDonnell that the registered addresses listed by ASIC for both the first and second respondents were out of date, the second respondent failed to provide updated information;*[65]

    b. *the second respondent failed to attend a scheduled Record of Interview;*[66]

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[61] [2014] FCCA 815 at [12].
[62] See applicant's submissions in respect of default judgment filed on 16 January 2015.
[63] McDonnell Affidavit, paragraphs 13, 14, 15, 23(c), 24, 25 and Kovalsky Affidavit, paragraphs 12(c) and 15(d).
[64] McDonnell Affidavit, paragraphs 17 to 18 and Tabs 9 to 10 of Exhibit "BM-1".
[65] McDonnell Affidavit, paragraph 33.
[66] McDonnell Affidavit, paragraphs 17 to 18.

c. *initial attempts at personal service on the second respondent at the registered addresses and principal place of business were unsuccessful.*[67] *Once attempts at service at the Kellyville Address commenced, the second respondent:*

   i. *made 7 phone calls to Inspector McDonnell in a short period of time;*

   ii. *said to Inspector McDonnell "this can get really ugly";*

   iii. *refused to provide an alternate address for service or make himself available for service;*

   iv. *attempted to deny receipt of the Compliance Notice which Inspector McDonnell had personally handed to him on 17 April 2014;*[68] *and*

   v. *subsequently denied that service had occurred at the Kellyville Address despite personal service having been effected on him*[69].

74. *The respondents have failed to participate in these proceedings to date: failing to attend the hearings, file any documents or otherwise comply with orders of the Court. The respondents have shown a disregard not only for the applicant as a regulator, but also towards the authority of the Court.*

75. *In certain circumstances, where a respondent has cooperated with enforcement authorities and admitted to their contravening conduct early in proceedings, they may be entitled to a discount on penalty where the making of admissions indicates an acceptance of wrong doing or has facilitated the course of justice.*[70]

76. *The respondents' lack of cooperation with the applicant and with the Court, necessitating an application for default judgment, makes clear that no discount to penalty should be applied, and the applicant submits the respondents' lack of*

[67] Kovalsky Affidavit, paragraph 9.
[68] McDonnell Affidavit, paragraph 35.
[69] Kovalsky Affidavit, paragraph 11(c) and Annexure "AK-5".
[70] *Mornington Inn supra* at 74-76 per Stone and Buchanan JJ.

cooperation should also be viewed as an aggravating factor in consideration of penalty.

Compliance with Minimum Standards

77. *Ensuring compliance with minimum standards is a very important consideration in this case. A principal object of the FW Act is the preservation of an effective safety net of employee entitlements and effective enforcement mechanisms.*[71]

78. *In order to enforce this safety net Fair Work Inspectors must be able to exercise their compliance powers effectively. The purpose of the powers conferred on Fair Work Inspectors (such as the power to issue a compliance notice) is to provide the applicant with an effective means for investigating and enforcing compliance within minimums standards and industrial instruments without reliance on court proceedings. 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 the compliance notices is seen by the Court in the context of the 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."

79. *The failure to comply with the Compliance Notice undermines the FW Act's enforcement framework, and the safety net of entitlements it is designed to protect.*[72]

80. *Ordering penalties at a meaningful level for a compliance notice breach allows the Court to show that there are serious consequences for failing to comply with the Compliance Notice, in circumstances where compliance in the first place would have meant the respondents escaped any penalty or any finding of a breach of the FW Act.*[73] *The Applicant submits that penalties are warranted to ensure there is a considerable financial incentive for this employer and other employers to change their non-compliant practices.*

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[71] Section 3 of the FW Act.
[72] *Fair Work Ombudsman v Nerd Group Australia Pty Ltd & Anor (No 3)* [2012] FMCA 891 at [35].
[73] FW Act, subsection 716(4A). See also *FWO v Daladontics* at [16]

81. *Compliance with minimum standards also creates an even playing field for employers within the same industry as the first respondent, who do comply with workplace laws. The first respondent's ongoing non-compliance may impact other employers who provide the correct wages and entitlements to their employees (including small business employers) in respect of their ability to compete and remain productive. These considerations underline the need to deter other employers from choosing to ignore compulsory notices from the applicant, and to make such practices financially unviable.*

Deterrence

82. *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. The primacy of deterrence in the determination of penalty was emphasised by French J (as he then was) in* Re Trade Practices Commission v CSR Ltd *[1990] FCA 521 at 40, in which he stated:*

> "The principal, and I think probably the only, object of the penalties imposed by s.76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act." [74]

Specific Deterrence

83. *In respect of specific deterrence, the applicant notes the comments of Justice Gray 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".[75]

84. *As noted above, there is no evidence that the respondents have shown any genuine remorse, taken any steps to rectify the underpayments contained in the Compliance Notice (including by making payment to Ms Cook or by seeking to enforce the terms of the purported arrangement with Lattouf) or taken any action to ensure future compliance with workplace relations laws. Instead, the respondents have demonstrated ongoing*

[74] At [40]. See for example in the industrial context, *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).
[75] *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at 369.

disregard for their workplace obligations and towards the Court. There is therefore a clear need to send a very strong message to the respondents of the serious nature of the contravening conduct.

85. *The applicant acknowledges specific deterrence may be seen as a less relevant consideration in the context where the first respondent is no longer trading and may potentially soon be deregistered. However, it is open to the second respondent to operate other businesses in future. The large number of previous complaints to the applicant in respect of the first respondent, coupled with those for the past entity under the second respondent's management, indicates there is a considerable need for specific deterrence.*[76]

86. *The applicant submits there is a need for the penalty imposed in this matter to be imposed at a level that deters the second respondent from engaging in any future non-compliant conduct.*

General Deterrence

87. *The need for general deterrence in the present case is equally important and the law should mark its disapproval of the respondents' conduct by setting a penalty that serves as a warning both to other employers in the industry, and employers that have been issued with compliance notices.*

88. *The evidence before the Court is that the applicant received 594 complaints in respect of the hair and beauty industry in the 2013 to 2014 financial year, and 664 complaints in the 2012 to 2013 financial year.*[77] *Of these complaints a significant proportion related to young workers: 58% in 2013/14 and 63% in 2012/2013.*[78] *Additionally, an audit conduct by the applicant of 858 hair and beauty industry businesses found that the majority of these businesses were not fully compliant with their workplace obligations.*[79] *This data supports a submission that there is a considerable need for general deterrence in the hair and beauty industry.*

89. *The analysis of the hair and beauty industry undertaken by the applicant also shows that the hair and beauty industry employs a significant number of young workers.*[80] *This is also*

[76] *Fair Work Ombudsman v Cuts Only the Original Barber Pty Ltd & Ors* [2014] FCCA 2381 at [174].
[77] McDonnell Affidavit, paragraph 48 and Tab 39 of Exhibit "BM-1".
[78] McDonnell Affidavit, paragraph 49 and Tab 39 of Exhibit "BM-1".
[79] McDonnell Affidavit, paragraph 47 and Tab 38 of Exhibit "BM-1".
[80] McDonnell Affidavit, paragraphs 49-50.

reflected in the complaint data. Courts have held there is a particular need for general deterrence in industries that regularly employ young workers.[81] *The applicant submits the Court should send a strong message that the failure to make payments to young workers is not acceptable and will result in a meaningful sanction.*

90. *There is a need to send a message to the community, and particularly employers, that employers must provide their employees with the correct entitlements and take steps to respond to correspondence and notices issued by government regulators such as the applicant. This was emphasised by Judge Jarrett in* Fair Work Ombudsman v VS Investment Group Pty Ltd*, where his Honour stated in the context of a failure to comply with a statutory notice to produce documents:*

> "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."[82]

91. *Employers should be in no doubt that they have a positive obligation to ensure compliance with the obligations they owe to their employees under the law. There should also be no doubt as to the importance of mechanisms to enforce these employee entitlements. As observed by Marshall J in* Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2)*:*

> "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."[83]

Totality

92. *Having fixed an appropriate penalty for each course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to*

[81] *Fair Work Ombudsman v Nicole Patrice Dawe* [2013] FMCA 191 at [33]; *Fair Work Ombudsman v Primrose Development Company Pty Ltd* [2009] FMCA 632 at [59].
[82] *Fair Work Ombudsman v VS Investment Group Pty Ltd* [2013] FCCA 20 at [51].
[83] [2012] FCA 557 at [29].

the conduct which led to the breaches, and is not oppressive or crushing.[84]

93. *Whilst the penalty imposed must not be crushing or oppressive, it must nevertheless bear relativity to the seriousness of the conduct engaged in by the respondents.*[85] *Further, the capacity to pay a penalty is of less relevance than the objective of general deterrence and a penalty set at the level necessary to achieve the object of general deterrence will not be oppressive.*[86] *As highlighted above, there is a very significant need for general deterrence in these proceedings.*

94. *The applicant submits that the penalty range submitted in paragraph 97 below would be an appropriate response to the contravening conduct in this matter…"*

8. The applicant also prepared a recommendation as to penalty. I accept 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]).

9. In considering an appropriate penalty, I have regard to and accept the following submissions by the applicant as follows:

95. *"The contraventions before the Court involve the respondents' failure to comply with a Compliance Notice. The respondents' conduct and its failure to comply with the Compliance Notice:*

a. *demonstrated a disregard towards its workplace obligations, given the second respondent's knowledge of his obligations both in respect of the*

[84] See *Kelly*, supra at [30]; *Merringtons*, supra at [23] per Gray J, [71] per Graham J, [102] per Buchanan J.
[85] See also: *Fair Work Ombudsman v Promoting U Pty Ltd & Anor* [2012] FMCA 58.
[86] *ACCC v Leahy Petroleum Pty Ltd (No 2)* (2005) 215 ALR 281 at [9].

Compliance Notice and the underlying obligations, and previous interactions with the regulator over a significant period;

b. *occurred despite extensive efforts of the applicant to assist the respondents to resolve the matter;*

c. *affected a young employee in an industry which suffers compliance problems;*

d. *indicated a lack of contrition, corrective action and willingness to cooperate with the applicant and the Court; and*

e. *undermines the statutory objective of the FW Act and the compliance powers of the applicant;*

f. *warrants a penalty which will serve as a strong specific deterrent for the respondents and as a general deterrent for the hairdressing industry and persons receiving compliance notices.*

96. The respondents have chosen not to participate in these proceedings in any meaningful way. The Court should not infer any mitigating factors in the respondents absence; to do so would mean that the respondents could be treated more advantageously for their failure to engage with the Court and address its non-compliance.

97. The applicant therefore recommends a penalty in the range of 80% to 90% of the maximum penalty available for the grouped contraventions, equating to $20,400 to $22,950 for the first respondent and $4,080 to $4,590 for the second respondent."

10. The maximum penalty in respect of the conduct of the first respondent is $25,500. The maximum penalty in respect of the conduct of the second respondent is $5,100.

11. The applicant accepts that the first respondent is no longer trading. However, the compliance history of the first respondent and the second respondent demonstrates a reckless disregard by the respondents of their workplace obligations to their employees, which are referred to above in the applicant's submissions.

12. In considering that penalty, I have had regard to whether it is an appropriate response to the conduct which led to the breaches and is not oppressive or crushing. I have also had regard to:

    i) The necessity for the penalty to bear relatively to the seriousness of the conduct engaged in by the respondents;

    ii) The complete failure by the respondents, or either of them, to participate in the proceeding or cooperate in any way in the proceeding;

    iii) The failure to rectify in accordance with the Compliance Notice;

    iv) The applicant has ceased to operate.

13. In the circumstances, I am satisfied that the first respondent should be ordered to pay a civil penalty in the amount of $20,400, being 80% of the maximum; and the second respondent should be ordered to pay a civil penalty in the amount of $4,080, being 80% of the maximum, for their contraventions of the Act in the first respondent's failure to comply with the Compliance Notices. I am satisfied that such penalties comply with the principles relating to the consideration of Totality referred to above.

14. Accordingly, the declarations and orders sought by the applicant in the Amended Statement of Claim filed on 30 July 2014 should be made.

I certify that the preceding fourteen (14) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Associate:

Date: 4 March 2015