FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v LIQUID FUEL & ORS [2015] FCCA 3139 (No.2)

Catchwords:
INDUSTRIAL LAW – Penalty hearing – contraventions of *Workplace Relations Act 1996*, *Fair Work Act 2009* and associated legislation and regulations – consideration of appropriate penalty for contravening conduct by respondents.

Legislation:
Workplace Relations Act 1996 (Cth) ss.4(1), 719, 841(a)
Workplace Relations Regulations 2006 (Cth), reg.14.4
Fair Work Act 2009 (Cth), ss.12, 539(2), 546, 557
Federal Circuit Court Rules 2001 (Cth) r.16.05(2)
Evidence Act 1995 (Cth), s.191
Crimes Act 1914 (Cth), s.4AA

Cases cited:
Fair Work Ombudsman v Liquid Fuel Pty Ltd &Ors [2015] FCCA 2694
Rocky Holdings Pty Limited v Fair Work Ombudsman [2014] FCAFC 62
Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
Kelly v Fitzpatrick (2007) 166 IR 14
Australian Ophthalmic Supplies Pty Ltd v Mc Alary-Smith [2008] FCAFC 8
Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216
FWO v Ramsey Food Processing Pty Ltd (No 2) [2012] FCA 408
Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3) [2011] FCA 579
Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258
Finance Sector Union v Commonwealth Bank of Australia (2005) 147 IR 462
McIver v Healey [2008] FCA 425
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Ponzio v B & P Caelli Constructions Pty Ltd [2006] FCA 1221
Fair Work Ombudsman v Maclean Bay Pty Ltd (No.2) [2012] FCA 557
Fair Work Ombudsman v Devine Marine Group Pty Ltd [2015] FCA 370
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357
Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2) (1999) 94 IR 231

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	LIQUID FUEL PTY LTD ACN 127 489 776
Second Respondent:	XIN ZHANG
Third Respondent:	LINDA QU
Fourth Respondent:	NIAN LI
File Number:	MLG 559 of 2013
Judgment of:	Judge O'Sullivan
Hearing date:	11 November 2015
Date of Last Submission:	11 November 2015
Delivered at:	Melbourne
Delivered on:	4 December 2015

REPRESENTATION

Counsel for the Applicant:	Mr Tracey
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the Respondents:	Mr Burmeister
Solicitors for the Respondents:	Stamford Lawyers

ORDERS

(1) Pursuant to subsection 719(1) of the *Workplace Relations Act 1996* (WR Act), regulation 14.4 of the *Workplace Relations Regulations 2006* (WR Regulations) and subsection 546(1) of the *Fair Work Act 2009* (FW Act), the First Respondent pay a penalty of $79,537.50 in respect of the contraventions declared in paragraph 1 of the Court's Declarations dated 8 October 2015.

(2) Pursuant to regulation 14.4 of the WR Regulations and 546(1) of the FW Act, the Second Respondent pay a penalty of $4,504.50 in respect of his involvement in the First Respondent's contraventions declared in paragraph 1(h) to (k) of the of the Court's Declarations dated 8 October 2015.

(3) Pursuant to regulation 14.4 of the WR Regulations and 546(1) of the FW Act, the Third Respondent pay a penalty of $4,504.50 in respect of her involvement in the First Respondent's contraventions declared in paragraph 1(h) to (k) of the of the Court's Declarations dated 8 October 2015.

(4) Pursuant to subsection 719(1) of the WR Act and 546(1) of the FW Act, the Fourth Respondent pay a penalty of $3,861.00 in respect of his involvement in the First Respondent's contraventions declared in paragraph 1(a) to (e) of the of the Court's Declarations dated 8 October 2015, as amended pursuant to rule 16.05(2) of the *Federal Circuit Court Rules 2001* (Cth) on 11 November 2015.

(5) Pursuant to subsection 841(a) of the WR Act and subsection 546(3)(a) of the FW Act, the Respondents pay their respective penalties to the Commonwealth within 60 days of the date of this order.

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

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 559 of 2013

FAIR WORK OMBUDSMAN
Applicant

And

LIQUID FUEL PTY LTD
ACN 127 489 776
First Respondent

XIN ZHANG
Second Respondent

LINDA QU
Third Respondent

NIAN LI
Fourth Respondent

REASONS FOR JUDGMENT

1. The Fair Work Ombudsman (the applicant) commenced proceedings against Liquid Fuel Pty Ltd (the first respondent) and three other respondents by application and statement of claim filed on 26 April 2013. In *Fair Work Ombudsman v Liquid Fuel Pty Ltd & Ors* [2015] FCCA 2694 (the principal judgment) the Court noted:

> *"3. The applicant alleged inter alia that two former employees of the first respondent had been underpaid in contravention of the* Workplace Relations Act 1996 *(Cth) (the WR Act),* the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 *(Cth) (the Transitional Act) and the* Fair Work Act 2009 *(Cth) (the FW Act).*

> *4. The applicant also alleged that Xin (also known as Kevin) Zhang (the second respondent), Linda Qu (the third respondent) and Nian Li (the fourth respondent) were involved in those contraventions and separately liable as accessories for the contraventions committed by the first respondent pursuant to s.728 of the WR Act and s.550 of the FW Act.*
>
> *5. The first respondent operated a business that ran a BP Service Station in Berwick Victoria (the Site). Mr Sukhpal Singh and Mr Sunil Verma (the Employees) were employed by the first respondent at the Site between October 2007 until February 2013 and December 2008 until April 2013 respectively as casual console operators.*
>
> *6. The second and third respondents are married and were managers of the business operating at the Site. The fourth respondent, who lives in Toorak, is the father and father-in-law respectively of the third and second respondents respectively and a director of the first respondent which operated the business at the Site.*
>
> *7. The first respondent has made full admissions in relation to the allegations made against it in the statement of claim. The parties have subsequently filed a 'Amended' Statement of Agreed Facts (S.O.A.F.) for that purpose and seek that the Court, at an appropriate time make the requisite declarations and any orders by way of penalty against the first respondent for the admitted contraventions."*

2. Whilst the first respondent admitted liability, the other respondents contested that issue. On 8 October 2015 and for the reasons set out in the principal judgment (which should be read in conjunction with these reasons) the Court made declarations as to the liability of all respondents for contraventions of the WR Act, WR Regulations, Transitional Act, FW Act and FW Regulations and adjourned the matter to a penalty hearing.[1]

3. The contraventions that the respondents were found in the principal judgment to be responsible for or involved in, resulted in (*inter alia*) an underpayment of over $100,000.00 to 2 former employees of the first respondent. There were also repeated breaches of record keeping and pay slip obligations.

[1] Pursuant to Rule 16.05(2) paragraph 1 of those orders was amended by consent on 11 November 2015.

Penalty hearing

4. Pursuant to the above mentioned orders, the matter returned to Court on 11 November 2015 for a penalty hearing. The applicant was represented by Mr Tracey. The respondents were represented by Mr Burmeister.

5. The applicant relied on:

   a) application and Statement of Claim filed on 26 April 2013;

   b) amended Statement of Agreed Facts filed on 24 December 2014 and marked Exhibit A1 (**SOAF**);

   c) affidavit of Sally Patti McLeod filed on 13 June 2014 and marked Exhibit A2;

   d) affidavit of Sukhpal Singh filed on 7 February 2014 marked Exhibit A3;

   e) affidavit of Sunil Verma filed on 7 February 2014 marked Exhibit A4;

   f) affidavit of Ashley Kate Hurrell filed on 10 February 2014;

   g) affidavit of Ashley Kate Hurrell filed on 2 June 2015;

   h) transcript of liability hearing 20 and 21 July 2015;

   i) the principal judgment;

   j) affidavit of Belinda Todorov filed on 29 October 2015;

   k) written submissions filed 29 October 2015; and

   l) minute of proposed orders.

6. The respondents relied on:

   a) affidavits of Nian Li filed 5 February 2014 and 5 March 2014;

   b) affidavit of Xin Zhang filed 5 February 2014;

   c) affidavit of Linda Qu filed 5 February 2014; and

d) written submissions filed 5 November 2015.

7. In submissions before the Court, Counsel for the applicant relied on the material referred to earlier. It was submitted the evidence in this case was such that the Court should impose "*meaningful penalties"* for the contravening conduct. It was submitted the former employees were "*vulnerable employees who worked unsociable hours"* and the contravening conduct resulted in a significant underpayment of $110,000.

8. It was submitted that the respondents' behaviour demonstrated a "*reckless disregard"* for their obligations and whilst the first respondent should receive some discount for its co-operation there was no "*genuine remorse"* by the respondents in this case.

9. Finally, Counsel for the applicant took issue with the claim made in the respondents' written submissions that there was no need for specific deterrence and also noted there was no financial evidence from the respondents which could be taken into account when considering the totality of the penalty.[2]

10. Counsel for the respondents also relied on the material referred to earlier. However in submissions before the Court Counsel for the respondents acknowledged in light of the Full Court authority in *Rocky Holdings Pty Limited v Fair Work Ombudsman* [2014] FCAFC 62 that many of the criticisms in the respondents' written submissions on grouping couldn't be sustained. Nonetheless by reference to earlier authority Counsel asked the Court to take into account what was said to be the like nature of the contraventions in arriving at an appropriate penalty.

11. Counsel for the respondents emphasised that the first respondent had co-operated fully and whilst the other respondents had challenged liability, the respondents had no prior history and this should be taken into account.

[2] The Applicant made no submissions in relation to the amount or range of penalties for the contraventions (see *Director; Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59).

Approach to penalty proceedings

12. The applicant's standing to commence these proceedings was not in dispute. The power for the Court to order the imposition of penalties arises under the WR Act and WR Regulations in respect of contraventions occurring prior to 1 July 2009[3], and the FW Act for contraventions occurring on or after 1 July 2009.[4]

13. Subsection 4(1) of the WR Act and section 12 of the FW Act provide that "*penalty unit*" has the same meaning as in the *Crimes Act 1914* (Cth). At all relevant times, section 4AA of the *Crimes Act* defined "*penalty unit*" to be $110.[5]

14. The appropriate penalties for the contravening conduct by the respondents are to be determined as follows. The first step for the Court is to identify the separate contraventions. Each contravention of each separate obligation found in the WR Act, WR Regulations, Transitional Act, FW Act and FW Regulations is a separate contravention of a civil remedy provision for the purposes of subsection 719(1) of the WR Act, Regulation 14.4 of the WR Regulations and section 539(2) of the FW Act[6]. This involves consideration of whether the contraventions constitute a single course of conduct, such that multiple contraventions should be treated as a single contravention.

15. Second, to the extent that two or more contraventions have common elements, this should be taken into account in considering an appropriate penalty. 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.[7] This task is distinct from and in addition to the final application of the "*totality principle*".[8]

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[3] Section 719(1) of the WR Act, as given effect by item 11(1) of Schedule 2 to the Transitional Act.
[4] Item 16 of Schedule 16 to the Transitional Act; section 546(1) of the FW Act.
[5] This increased to $170 on and from 28 December 2012, and $180 from 31 July 2015.
[6] *Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 374 at [24]; *McIver v Healey* [2008] FCA 425 at [16].
[7] *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at 571 [46] (Graham J) (*Merringtons*).
[8] *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 838 at [41]-[46] (Stone and Buchanan JJ) (*Mornington Inn*).

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

17. 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.[9] The Court should apply an "*instinctive synthesis*" in making this assessment.[10] This is known as the "*totality principle*".

18. The factors which may be taken into account in the assessment of penalty are well established and weren't controversial. The factors relevant to the imposition of a penalty were summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 [26]-[59], as follows:

> *"a. the nature and extent of the conduct which led to the breaches;*
>
> *b. the circumstances in which that conduct took place;*
>
> *c. the nature and extent of any loss or damage sustained as a result of the breaches;*
>
> *d. whether there had been similar previous conduct by the respondent;*
>
> *e. whether the breaches were properly distinct or arose out of the one course of conduct;*
>
> *f. the size of the business enterprise involved;*
>
> *g. whether or not the breaches were deliberate;*
>
> *h. whether senior management was involved in the breaches;*
>
> *i. whether the party committing the breach had exhibited contrition;*
>
> *j. whether the party committing the breach had taken corrective action;*

[9] 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)
[10] *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J)

k. whether the party committing the breach had cooperated with the enforcement authorities;

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

m. the need for specific and general deterrence."

19. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14. In *Australian Ophthalmic Supplies Pty Ltd v Mc Alary-Smith* [2008] FCAFC 8 Buchanan J after referring to the decision in *Kelly v Fitzpatrick* (supra) said at [9]:

> *"9. Checklists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations…"*

Contraventions

20. As identified in the principal judgment the first respondent admitted there were:

- contraventions of WR Act and Transitional Act and failure to pay basic periodic rate of pay;
- contraventions of WR Act and Transitional Act, failure to pay casual loading;
- contraventions of FW Act and relevant modern award for failing to pay correct rate;
- contraventions of FW Act and relevant modern award for correct Saturday, Sunday and Public Holiday rates;
- contraventions of FW Act and relevant modern award for overtime rate;
- contraventions of WR Regulations for record keeping;

- contraventions of FW Act for record keeping; and
- contraventions of WR and FW Act for pay slips.

21. In the principal judgment the Court also found that:

    a) the second and third respondents were involved in, and therefore liable as accessories for, the first respondent's contraventions of the record keeping and pay slip obligations in the WR Regulations, FW Act and FW Regulations; and

    b) the fourth respondent was involved in, and therefore liable as an accessory for, the underpayment of minimum wages contraventions by the first respondent.

Grouping of contraventions

22. Subsection 719(2) of the WR Act, Regulation 14.5 of the WR Regulations and subsection 557(1) of the FW Act provide that where two or more contraventions of a civil remedy provision are committed by the same person, and arise out of a course of conduct by the person, the contraventions shall be taken to be a single contravention of the provision.

23. The applicant's position in written submissions was the Court should find there were:

    a) 14 contraventions of separate civil penalty provisions by the first respondent, in relation to the former employees;

    b) seven contraventions of separate civil penalty provisions by each of the second and third respondents in relation to the former employees; and

    c) five contraventions of separate civil penalty provisions by the fourth respondent in relation to the former employees.

24. However the applicant submitted that in accordance with the authorities referred to in those written submissions those contraventions should be grouped as follows:

a) contraventions of minimum rates, transitional penalty rates, overtime, records of hours and wages, records of overtime and pay slips by the first respondent;

b) contraventions of records of hours and wages, records of overtime and pay slips by the second respondent;

c) contraventions of records of hours and wages, records of overtime and pay slips by the third respondent; and

d) contraventions of minimum rates by the fourth respondent.

25. It was the applicant's submission that such an approach to grouping would mean the respondents faced a possible maximum penalty of $137,500, $7,700, $7,700 and $6,600 respectively.

26. The respondents' written submissions took issue with the applicant's submissions generally and the position set out therein on grouping of the various contraventions. In written submissions and after referring to *Pearce v The Queen* (1988) 194 CLR 610 the respondents' position was they should not be penalised more than once for the same conduct as:

> *"7. The Respondents submit that the FWO's approach to grouping transgresses this principle. The Respondents' offending straddled the introduction of legislative reform (being the introduction of the FW Act and the making of the relevant Modern Award). Despite this, the FWO seeks to re-penalise them separately for conduct that becomes contravening purely as a consequence of the legislative reform.*
>
> *8. The Respondents' conduct was consistent throughout. First, they failed to pay Messrs Singh and Verma the full amount to which they were entitled (by paying them a flat rate). Second, they failed to keep records and provide pay slips."*

27. Those submissions then went on to refer to the decision in *Gibbs v The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 and then attempted to analyse the applicant's position on grouping of the contraventions. The respondent's position in written submissions on that issue was:

> *"17. The Respondents submit that the contraventions should be grouped to properly reflects what each of the Respondents*

did (rather than grouping on the basis of the prevailing boundaries in the legislation and instruments), as follows:

Group	***Description***	***Source***
Pay group (**Group A**)	*FWO's Groups 1, 2 and 3:* *Contraventions of minimum pay and casual loading obligations.* *Failure to pay Modern Award penalty rates.* *Failure to pay Modern Award overtime.*	*WR Act and later FW Act*
Record keeping (**Group B**)	*FWO's Groups 4, 5 and 6:* *Failure to keep employee records before commencement of FW Act.* *Failure to keep record of overtime hours worked on and from commencement of FW Act.* *Failure to issue compliant pay-slips*	*WR Act and later FW Act*

18. Regardless of the approach to grouping, the parties agree that the maximum applicable to Mr Li (the Fourth Respondent) ought be $6,600.00.

19. The Respondents submit that Groups A and B ought be applied. That approach provides the following maxima:

(a) $49,500.00 for The First Respondent;

(b) 3,300.00 for Mr Zhang; and

(c) $3,300.00 for Ms Qu."

28. However as noted earlier, in submissions before the Court, Counsel for the respondents acknowledged the difficulty with advancing those submissions given the decision of the Full Court in *Rocky Holdings Pty Limited v Fair Work Ombudsman* [2014] FCAFC 62.

29. In *Gibbs v City of Altona*[11] Gray J, in respect of the legislative predecessor of the current provisions under consideration, said as follows in respect of how the Court was to approach repeated

[11] *Gibbs v City of Altona* (1992) 37 FCR 216 at 223.

omissions of an award, which related to the same course of conduct. His Honour said as follows:

> *"… The ascertainment of what is a term should depend not on matters of form, such as how the award maker has chosen to designate by numbers or letters the various provisions of an award, but on matters of substance, namely the different obligations which can be spelt out. For these reasons, I incline to the view that each separate obligation imposed by an award is to be regarded as a "term", for the purposes of s 178 of the Act. If the different terms impose cumulative obligations or obligations that substantially overlap, it is possible to take into account the substance of the matter by imposing no penalty, or a nominal penalty, in respect of breaches of some terms, but a substantial penalty in respect of others."*

30. The Court is required to give recognition to the distinct legal nature of each breach arising under the WR Act, Transitional Act, FW Act and associated regulations. Whilst section 557 of the FW Act (and its predecessor) operates to allow groupings of contraventions of the same obligation or term of an industrial instrument, not the entire range of terms breached under that one instrument.

31. In *FWO v Ramsey Food Processing Pty Ltd (No 2)*[12] Buchanan J considered the application of section 719(2) of the *WR Act,* the legislative predecessor of section 557. He said as follows:

> *"On one view, the failure to make any of the required payments arose from a single course of conduct. They all arose from a determination by the respondents that no payment would be made upon the termination of employment of any of the employees, or the employees as a group. However, this approach gives insufficient attention to the separate legal character of the three forms of obligation earlier identified. I am satisfied that each of those forms of obligation requires separate recognition. I am not, however, satisfied that each individual example of defiance of an obligation is permitted separate recognition. In my view the individual examples, constituted by the failure to make payments to particular individual employees, arise out of a course of conduct in each of the three instances. Any penalty must be assessed taking that into account."*[13]

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[12] *FWO v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408.

[13] *FWO v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408 at [2] The passage was approved by the Full Court in *Rocky Holdings Pty Limited v Fair Work Ombudsman* [2014] FCAFC 62 at [18].

32. In the circumstances of this matter and given the separate legal character of the obligations that were the subject of the various contraventions, they should be grouped as follows:

a) first respondent:

Contravention	**Maximum penalty**
1. Minimum rate	$33,000.00
2. Transitional penalty rates	$33,000.00
3. Overtime	$33,000.00
4. Record ordinary hrs + wages	$5,500.00
5. Record of overtime hours	$16,500.00
6. Pay slips	$16,500.00
Total	$137,500.00

b) second respondent:

Contravention	**Maximum penalty**
1. Record ordinary hrs + wages	$1,100.00
2. Record of overtime hours	$3,300.00
3. Pay slips	$3,300.00
Total	$7,700.00

c) third respondent:

Contravention	**Maximum penalty**
1. Record ordinary hrs + wages	$1,100.00
2. Record of overtime hours	$3,300.00
3. Pay slips	$3,300.00
Total	$7,700.00

d) fourth respondent:

Contravention	**Maximum penalty**
1. Minimum rate	$6,600.00
Total	$6,600.00

Considerations relevant to appropriate penalty

33. In submissions upon which it relied the applicant addressed the Court on the relevant considerations. It was submitted in this case that they include:

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

    b) the circumstances in which the conduct took place and deliberateness;

    c) the nature and extent of any loss or damage;

    d) the size of the respondent's business;

    e) the involvement of senior management;

    f) the respondents contrition, corrective action and cooperation with the enforcement authorities;

    g) ensuring compliance with minimum standards; and

    h) deterrence.

34. The respondents didn't take issue with this. I accept that in this case those are relevant considerations to take into account in arriving at an appropriate penalty.

Nature and extent of the conduct which led to the breaches

35. The applicant submitted:

> *"38. This matter concerns underpayments to two employees totalling $111,874.42 over a four year period from August 2008 to August 2012, being the total period covered by the time and wage records provided to the Office of the Applicant (FWO) during its investigation of the complaints made by the Employees.*
>
> *39. The Applicant submits that the conduct in this matter is serious, involving a very substantial underpayment of base level entitlements to safety net reliant workers over a significant period of time, along with considerable record keeping and pay slip deficiencies.*

40. The Employees were paid the Flat Rates of Pay, as low as $10 an hour and increasing by $1 an hour approximately once a year during the Relevant Period to $17 around the time that the Employees made complaints to the FWO [SOAF at 20, 21, 32 and 33; Singh Affidavit paragraph 12 and 24; Verma Affidavit paragraphs 20- 23].

41. Despite operating a 24/7 business in which the Employees were required to work morning, afternoon and night shifts, weekends and public holidays, the First Respondent failed to pay the Employees any penalty rates or overtime.

42. The Underpayment did not include any monies which may be owing to Mr Singh for the first 10 months of his employment, during which time no records were made or kept by the First Respondent, of the time worked by, or monies paid to Mr Singh [SOAF paragraph 55 - 58], as a consequence of which the FWO was unable to assess any entitlements owed to Mr Singh in respect of this period. This is conduct for which the Second and Third Respondents have been found to be liable as accessories.

43. Based on the evidence before the Court regarding the rates paid to the Employees after this time, and Mr Singh's claim that he was initially paid $10 an hour by the First Respondent [Singh Affidavit paragraph 10], it is open to the Court to infer that further underpayments would have occurred in respect of Mr Singh prior to the Relevant Period, which cannot be quantified and will not be recovered.

44. The First Respondent's failure to properly record hours of work that would have attracted overtime rates of pay worked by the Employees from 2010, in which the Second and Third Respondents' were involved, also prevented the FWO from fully assessing the overtime entitlements owed to the Employees [SOAF at 62]. In particular, due to the Respondents' practice of only recording the number of hours worked by the Employees each day (and not the time at which work was performed), any overtime that would have been triggered on a daily basis due to back to back shifts was not able to be assessed [see Singh Affidavit paragraph 15], meaning only overtime for working in excess of 38 hours per week could be quantified.

45. The record keeping obligations imposed by the FW Act are directed at ensuring the creation and retention of records that are a critical tool in assessing compliance with

Commonwealth workplace laws. As was stated by this Court in Fair Work Ombudsman v Bound For Glory Enterprises & Anor[14]*:*

"One of the principal objects of the FW Act is the maintenance of an effective safety net of employer obligations, and effective enforcement mechanisms. The failure to keep records by the Respondents which is admitted arguably undermines and frustrates the attainment of that object. There is also the issue that the failure to keep the records themselves and the vice that conduct gives rise to. As was identified in *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258 and *Fair Work Ombudsman v Orwill Pty Ltd & Anor* [2011] FMCA 730 the problem where employers don't keep proper records is that it creates a structure within which breaches of the industrial laws can easily be perpetrated."

46. *The Employees were also issued with seriously deficient pay slips throughout the Relevant Period, including the Employees' first name or nickname and gross and net wages for the period, but not their full name or hours of work, which were separately handwritten on the envelope in which the pay slip was issued to the employee [Singh Affidavit paragraph 20 and Annexure SS-1; Verma Affidavit paragraph 24]. The form of the pay slips issued to the Employees [see Annexure SS-1 Singh Affidavit] meant that the Employees were unable to verify their hourly wage or prove their income for the purpose of obtaining finance or checking their entitlements.*

47. *In this regard, the Applicant notes the comments of Riethmuller FM (as he then was) in* Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor[15] *with respect to the important role that pay slips play in ensuring any errors in wage payments can be quickly identified and rectified:*

"Whilst the record keeping obligation with respect to pay slips only appears in the Regulations, its central importance in industrial matters cannot be underestimated. Proper pay slips allow employees to understand how their pay is

[14] [2014] FCCA 432, Judge O'Sullivan at [76].

[15] [2012] FMCA 258 at [67] and cited with approval in *Fair Work Ombudsman v Bundaberg Security Pty Ltd* [2014] FCCA 592 at [26]; *Director Of The Fair Work Building Industry Inspectorate v Zion Tiling Pty Ltd* (No.2) [2013] FCCA 1288 at [38]; and *Fair Work Ombudsman v Bento Kings Meadows Pty Ltd* [2013] FCCA 977 at [34].

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..."

36. The respondents submitted:

> *"22. The Respondents accept that their conduct involved multiple breaches of the relevant legislation and was continuous over a sustained period of time.*
>
> *23. The Court has made findings in relations to the wilful blindness. The Respondents submit that such findings, while by no degree excusing their conduct, place it at a lesser position on the scale than deliberate, fully informed, offending.*
>
> *24. In this regard, the Respondents submit that the contraventions must be understood in the context of the factual background, which may be described as follows:*
>
> *(a) Ms Qu and Mr Zhang completed their studies. Neither of them secured employment. Ms Qu reached out to her father, Mr Li, who became aware that a petrol station was for sale for $1,800,000.00. There was no due diligence or negotiation. Mr Li, through The First Respondent, purchased the petrol station.*
>
> *(b) While one may expect that the incoming operator of a business franchised from a large multi-national corporation would be required to undertake detailed training in all aspects of operations and compliance, this was not the case.*
>
> *(c) The "hand-over" was composed of the outgoing vendor confirming the employees' details and the flat rate being paid to them. The First Respondent adopted these employment practices, effectively inheriting the offending.*
>
> *(d) The Respondent received notice of potential contraventions was on 22 June 2012 and co-operated with the FWO's investigation. On 29 January 2013 the FWO issued Mr Li with a Determination of Contravention relating to Mr Singh and Mr Verma.*

(e) By 21 February 2013 the First Respondent paid each of Mr Singh and Mr Verma a lump sum remedying their respective underpayments.

25. At paragraph 42 of the FWO Submissions an allegation is made in relation to alleged further underpayments. This allegation has not previously been made in the proceeding and should be disregarded by the Court."

37. I accept the submissions of the applicant that the conduct in this matter involving as it does a substantial underpayment of $110,000 continuing over a number of years with considerable record keeping and pay slip deficiencies is a very serious matter. The conduct cannot be regarded as isolated and the period of time over which it occurred is also serious.

Circumstances in which the conduct took place and deliberateness

38. The applicant submitted:

"48. As was the subject of considerable evidence at the liability trial and set out in the SOAF, transcript of hearing and Liability Decision, the Second, Third and Fourth Respondents are each highly educated individuals [Liability Decision 13, 20, 21, First Li Affidavit paragraph 7, 24 and 25; Qu Affidavit paragraph 16; Zhang Affidavit paragraph 12].

49. The Business was purchased for $1.8M by the Fourth Respondent, for the Second and Third Respondents to operate after they couldn't find employment satisfactory to them after their Masters. So much was agreed. However considerable contest has existed between the parties however as to what the Respondents' backgrounds and work experience demonstrated with respect to their legal liability and culpability for the conduct in these proceedings.

50. Despite his educational background, capacity to incorporate a company for the purpose of purchasing and operating the Business [First Li Affidavit, paragraph 4] and ability to raise or commit funds of $1.8M with the presumed intention of operating the Business with a view to profit, the Fourth Respondent took no steps to ascertain the legal obligations of the First Respondent and ensure it met them, despite deposing that:

"…I have always relied on others to assist me and have done my best to ensure we were compliant. This has been a challenge for me given the changing nature of our workforce and the variation in the laws" [First Li Affidavit at paragraph 7].

As the sole and secretary director, this was his responsibility.

51. *The Respondents' Submissions and approach to liability has been structured around a claim of alleged ignorance, naiveté or negligence of the Respondents' employment obligations based on a purported lack of business experience [Respondents' Submissions at paragraphs 74, 85 and 102].*

52. *In the Liability Decision, the Court has found with respect to the Fourth Respondent that:*

    (a) *despite his attempts to suggest otherwise, he was very much involved in running the business at the Site: at [82];*

    (b) *he deliberately refrained from making obvious inquiries and deliberately sought to play on that to deny accessorial liability: at [83];*

    (c) *it is inherently unlikely given the investment he made in the First Respondent ($1.8M) and his background (a former lecturer with a PHD in mathematics) that his evidence where he sought to distance himself from the operation of the business should be accepted and it was rejected: at [84];*

    (d) *his evidence that he was concerned about the finance of the business at the Site belies the veracity of claims that he was not aware of the first respondent's obligations to the Employees: at [85]; and*

    (e) *in light of his background and as a director of the First Respondent he exhibited wilful blindness in respect of the First Respondents award related obligations.*

53. *In respect of the Second and Third respondents the Court found that the contraventions occurred in a context in which they were both "knowing participants in not keeping the required records and in compiling the pay slips without*

including the required details" and rejected the claims "they didn't know what was going on" [at 96].

54. *The Employees depose to repeatedly enquiring about their rates of pay and requesting pay increases throughout their employment, including noting that employees at other businesses in the industry get higher rates [Singh Affidavit at paragraphs 12 and 18; Verma Affidavit at paragraph 20], and the Court found that the Second and Third Respondents were "clearly on notice of the queries made by the Employees regarding their rights and entitlements and …undertook to look into them." [at [94]]. Yet no steps were taken between purchasing the business in 2007 and the FWO's investigation in 2012.*

55. *To the extent that the Respondents lacked of knowledge of the First Respondent's precise obligations as an employer when purchasing the Business from the existing operator, that is a failure on the part of each of the Respondents. As noted by this Court, "it is incumbent upon employers to make all necessary enquiries to ascertain their employees' proper entitlements and pay employees at their proper rates".*

56. *This is particularly important in this instance, as the Employees are both foreign nationals who, at the time of the contraventions, had recently come to Australia on a visa before commencing employment with the First Respondent [Singh Affidavit at paragraph 2; Verma Affidavit at paragraph 2]. While the Employees both speak English, it is not their first language and they both depose to being unaware of their entitlements as an employee and having a lack of understanding of employment requirements in Australia [Singh Affidavit paragraph 3 and 11; Verma Affidavit paragraph 3, 9, 19 and 22]. For these reasons, the Employees were particularly reliant on the Respondents to comply with the law and extend them their due entitlements.*

57. *The FWO has previously found, and the Courts have observed, that it is not uncommon for attributes such these to diminish a person's capacity to understand and enforce their workplace rights. In* Fair Work Ombudsman v Go Yo Trading Pty Limited & Anor *[2012] FMCA 865, Jarrett FM (as he then was) cited a number of authorities accepting the proposition that foreign nationals holding a visa fall into a class of vulnerable workers when he stated at [15]:*

"Foreign nationals working in Australia on visas, be they 417 visas or 457 visas or some other form of visa, in my view, represent a particular class of employee who are potentially vulnerable to improper practices by their employer. The cases demonstrate that those characteristics mean that a particular employee concerned is of a vulnerable class: see, for example, *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd* (2012) FMCA 258, *Fair Work Ombudsman v Orwill Pty Ltd* (2011) FMCA 730; *Fair Work Ombudsman v Sanada Investments Pty Ltd* [2010] FMCA 401 at [60]."""

39. The respondents' submissions were:

> *"29. Upon purchase of the petrol station, the First Respondent adopted the employment practices of the vendor to the sale. So much is confirmed by Mr Singh.*
>
> *30. The Court has made findings in relation to the wilful blindness. The Respondents submit that such findings, while by no degree excusing their conduct, place it at a lesser position on the scale than deliberate, fully informed, offending."*

40. The applicant submitted that the respondents had effectively taken advantage of the former employees who were described as "*vulnerable"*. However relevantly for present purposes in *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2015] FCA 370 White J said:

> *"26. However, I do not accept that exploitation of this kind should be regarded as an aggravating factor. It seems to be similar to the kinds of exploitation which the workplace laws are intended to prevent and which is present in the case of many contraventions of the present kind. It is necessary to exercise care before treating a commonplace circumstance, or a usual incident of a contravention, as an aggravating circumstance. The impact on affected workers may in some circumstances be an aggravating factor but that will usually be when that impact is greater by reason of a particular vulnerability of an employee or some other particular circumstance, so that the conduct of the contravening employer can be seen to be more egregious:* Hanssen Pty Ltd v Jones *[2009] FCA 192; (2009) 179 IR 87 at [61]."*

41. The issue of whether a breach is deliberate was considered by (as His Honour then was) Federal Magistrate Driver in *Cotis v McPherson* [2007] FMCA 2060 at para [17]:

> *"In issue in this matter is whether the identified breaches were deliberate. I do not think that they were deliberate in the sense of Mr Macpherson setting out with an intention to breach the* Workplace Relations Act. *However, the facts compel the conclusion that Mr Macpherson was at least reckless in relation to the responsibilities of his company and himself as an employer. Mr Macpherson was made aware of some of the breaches by employees whilst the business was still in operation. He also acknowledged the breaches to the inspector following the closure of the business. Mr Macpherson has no contest with the evidence provided by Ms Cotis."*

42. The respondents' actions were, at the very least, reckless and show a disregard for their obligations. This should be regarded as an aggravating factor in determining the pecuniary penalty to be imposed upon the respondents.

Nature and extent of any loss or damage

43. The applicant submitted:

> *"58. The Applicant submits that total amount of the underpayment, $111,874.42 is significant in a number of respects.*
>
> *59. The underpayment is an exceptionally large sum, comprised by underpayments to just two employees over a four year period. The significance of an underpayment in excess of $50,000 to a low paid worker cannot be disputed, and the Respondents accept that the loss and damage suffered by the Employees was significant [Respondents' Submissions at paragraph 75].*
>
> *60. The First Respondent had the benefit of this money until the underpayments were rectified on or around 21 February 2013.*
>
> *61. The Underpayment is also significant when considered as a proportion of the minimum entitlements owed to the Employees, who were paid just:*
>
> *(a) 62% of their minimum casual rate of pay;*

(b) 59% of their entitlements for work performed on weekends and public holidays; and

(c) 0% of their overtime entitlement;

62. *Mr Singh deposes that he was responsible for supporting his wife and daughter during the Relevant Period and that "*it was very hard to survive when I was getting paid $10 to $14 an hour. At times, we would have to borrow money just to pay the rent at the end of the month*" [Singh Affidavit at paragraph 13]*.

63. *Mr Verma deposes that he felt that he should have been earning more "*as I worked very hard, sometimes long hours and weekends for a flat rate of pay*" and states that the rectification of the underpayment helped him pay off some debts [Verma Affidavit at paragraph 19 and 30]*.

64. *Relevantly, the rates paid to the Employees during the Relevant Period did not at any time satisfy the minimum wage for an award free casual employee in the national workplace relations system (or during the majority of this period, the Federal/National Minimum Wage), let alone the Employees' entitlements under the Vehicle Industry Pay Scale or Modern Award [see Attachment E to these submissions]*.

65. *The disparity between the minimum wages applicable to every adult employee in the national workplace relations system and the rates paid to the Employees by the First Respondent highlights the gross carelessness of the conduct, particularly in circumstances where the Employees were expressing concern about their pay rates, and in the context of a Business operating 24 hours a day, 7 days a week, where no penalty rates were paid, despite the notorious nature of these entitlements in the Australian community.*

66. *The Applicant submits that the First Respondent, and the Fourth Respondent, manifestly failed to take any reasonable and required steps expected of all employers to ensure compliance with minimum employment standards.*

67. *Further, as outlined in paragraph 24 above, the loss arising from the record keeping contraventions cannot be assessed, due to the First, Second and Third Respondents' failure to make or keep the required records necessary to verify Mr Singh's entitlements between 24 October 2007 to 24 August*

2008, and all overtime entitlements owed to the Employees from 1 January 2010.

68. Further, the failure to issue proper pay slips being contraventions for which the First, Second and Third Respondents are liable, also deprived the Employees of an effective means of proving their income, which Mr Singh deposes prevented him from being able to apply for a home loan or get a credit card [Singh Affidavit at paragraph 21].

44. The respondents' submitted:

"26. All underpayments to Mr Singh and Mr Verma were promptly made good.

27. Despite this, the Respondents accept that loss and damage suffered by each of Mr Singh and Mr Verma was significant.

28. At paragraph 67 of the FWO Submissions an allegation is made in relation to alleged additional underpayments. This allegation has not previously been made in the proceeding and should be disregarded by the Court."

45. The underpayments, as is accepted, caused loss and damage to each of the former employees and this will be taken into account in arriving at an appropriate penalty.

The size of the respondent's business

46. The applicant submitted:

"69. The Applicant accepts that the Respondents operate a small family-run business, with approximately 10 employees [First Li Affidavit at paragraph 5; Singh Affidavit at paragraph 9; Verma Affidavit at paragraph 11].

70. However, regardless of the size of the business or its financial structures or position, the Applicant submits that an employer cannot be absolved of its legal responsibility to comply with the law in relation to the employment of its employees.

71. 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. [16]*"*

47. The respondents' submissions were:

> *"33. The undertaking carried on by the First Respondent can properly be described as a small family-owned business.*
>
> *34. Strictly speaking, "senior management" was involved in the breaches. However, to classify Mr Li (or for that matter Ms Qu and Mr Zhang) as having the characteristics ordinarily attributed to senior management would be inappropriate."*

48. I accept the size of the respondents business provides no reason for mitigation of penalty.

The involvement of senior management

49. The applicant submitted:

> *"72. The involvement of the Second, Third and Fourth Respondents in the contraventions is outlined at paragraphs 5 above and in the Liability Decision at paragraphs [81] to [97]. There was certainly nobody else collectively responsible for the First Respondent's contraventions other than the three individual Respondents.*
>
> *73. The Applicant accepts that in a business of this size the term "*Senior Management*" has less relevance, but notes that Court found that the Fourth Respondent, who is the director and secretary of the First Respondent, and its most ultimate senior manager, was a person involved in some of the contraventions."*

50. The respondents' submissions on this factor were set out earlier. The material before the Court makes clear the officers of the first respondent were all involved in the contravening conduct.

The respondent's contrition, corrective action and co-operation with the enforcement authorities

51. The applicant submitted:

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16 *Kelly* at [27]; *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [27].

*"**Contrition***

74. *The Applicant acknowledges that the First Respondent made full admissions of liability and rectified the Underpayments, which indicates an acceptance of wrongdoing.*

75. *The Second to Fourth Respondents did not admit liability for the contraventions for which the Court has ultimately found them liable, following a two day trial on liability. The Applicant acknowledges however the agreement of the Second to Fourth Respondents to a number of admitted facts in the SOAF, which substantially narrowed the factual issues to be determined at hearing on liability, The admitted facts did not come at "the earliest opportunity" considering these proceedings were commenced in April 2013 and the initial agreement of these Respondents to those admitted facts came in November 2013.*

76. *The Second, Third and Fourth Respondents claim to each "sincerely apologise to the ex-employees" and to "the Court for the situation we are now facing" in their Affidavits [Zhang Affidavit at paragraph 17; Qu Affidavit at paragraph 23; First Li Affidavit at paragraph 33]. However the Applicant submits that this should not be afforded significant weight in mitigation of penalty. As was noted by the Court in the Liability Decision:*

    "Whilst it was clear from their evidence each of the second to fourth respondents had come to recognise the unlawful aspects of the conduct of the first respondent and were embarrassed by this, it was far from clear whether that was only because the unlawful conduct had been discovered or for some other reason/s. On balance I find it was the former.

    Overall the evidence of each of the respondents' witnesses left the clear impression they sought to minimise their own involvement and knowledge of critical matters to the issue of accessorial liability. Many parts of their evidence was self-serving and I am satisfied a retrospective rationalisation of their conduct."

77. *The Respondents also submit that they have "*ensured that each of Mr Singh and Mr Verma receive a written apology in relation to the contraventions*" as "*a manifestation of the genuine contrition and remorse of each Respondent*" [Respondents' Submissions at paragraph 87(g) and 88].*

78. The Employees deposed in February 2014 that no apology had been made to them directly by the Respondents [Singh Affidavit at paragraph 33; Verma Affidavit at paragraph 31] despite the contraventions being brought to the Respondents' attention in 2013 [SOAF at 72(b); First Hurrell Affidavit at paragraph 11 and Annexure AKH-4 at pages 18-37].

79. The absence of any apology prior to February 2014 was also particularly significant where:

(a) the Employees continued to work for the First Respondent well after the Respondents were made aware of the compliance issues [SOAF at 7(g)];

(b) the Employees depose that the Third Respondent had a meeting with each of them after becoming aware of the complaints to the FWO to ask that the Employees "help us"' by withdrawing their complaint as the Respondents did not want to get "in trouble", yet no efforts were made to rectify the amounts owing to the employees at that time [Singh Affidavit at paragraph 26-27; Verma Affidavit at paragraph 25-26]; and

(c) the Respondents provided a letter signed by Mr Verma on 27 June 2012 to the FWO [First Hurrell Affidavit at paragraph 7 and Annexure AKH-2] with a cover letter dated 5 July 2012 saying "the complaint by the employee Sunil Verma has already been resolved", despite Mr Verma asking the Third Respondent not to use this letter shortly after signing it when he realised no back payment had been made [Verma Affidavit at paragraph 26].

80. After the employees deposed to the absence of any direct apology, the Third Respondent wrote a letter of apology on behalf of all of the Respondents dated 27 February 2014, which is annexed to the Second Li Affidavit.

81. The Applicant submits the Court should not place significant weight on the written apology when viewed in the full factual context in which it was given.

Corrective Action

82. The Applicant welcomes the evidence of corrective action in the form of compliance with the Modern award and pay slips, and the steps taken by the First Respondent to join an industry

association for employers who can advise it on its obligations to employees [Second Li Affidavit at paragraphs 2 and 3].

83. *The Respondents also rectified the underpayments in full to the Employees on 21 February 2013 following a formal Determination of Contravention letter (Contravention Letter) being issued by the FWO on 29 January 2013 [SOAF at 73 and 76].*

84. *However, the Applicant rejects the submissions that the Respondents have demonstrated that all affected employees, and not just those the subject of these proceedings have had corrective action implemented [Respondent Submissions at 87(e)]. That is simply incorrect. The Applicant submits that the evidence in fact demonstrates a pattern by the Respondents of only rectifying or producing evidence of compliance when called out by the Regulator. This is an aggravating factor warranting the imposition of appropriate penalties.*

85. *Each of the Respondents had been advised by correspondence issued on 8 October 2012 of the entitlements applying to casual and permanent Console Operators under the Modern Award, and were also advised to take immediate action to ensure the First Respondent was meeting its obligations under the Modern Award at that time [SOAF at 72(b)(iii) and (iv); First Hurrell Affidavit at paragraph 11].*

86. *On 7 November 2012, the Fourth Respondent was advised by the FWO to consider:*

    (a) the requirements of the Modern Award;

    (b) using the resources available on the FWO website (including PayCheck Plus to determine current rates of pay) or contacting the Fair Work Infoline as necessary to seek further information; and/or

    (c) joining an employer association or contacting BP Australia for information and assistance regarding the First Respondent's employment responsibilities [SOAF at 72(d)].

87. *The Contravention Letter also advised the Respondents to:*

    (a) take immediate steps to ensure all employees are paid in accordance with the Modern Award;

(b) take immediate steps to ensure all record keeping obligations are being met in relation to all current employees;

(c) undertake a review of the Employees' entitlements and rectify any underpayments that occurred in the period from 9 July 2012 in relation to Mr Verma and from 6 August 2012 in relation to Mr Singh; and

(d) undertake a review of all current and former employees' entitlements from the time the company commenced operations and rectify any underpayments identified [SOAF at 73(d)].

88. Despite this advice, the FWO received five further complaints in April and August 2013 from other employees of the First Respondent alleging underpayment contraventions [see First Hurrell Affidavit at paragraphs 17-20]. In September 2013, the FWO was provided with the Respondents' assessment of the amounts owing to these employees, and the Parties agreed on 22 October 2013 that they were underpaid a total of $99,111.72 between 22 October 2007 and 26 May 2013 [First Hurrell Affidavit at paragraph 21; SOAF at 78 and 81], being after these proceedings were commenced.

89. These additional underpayments were rectified between 14 and 21 January 2014 [First Hurrell Affidavit at paragraph 23], a year after the Respondents were advised to undertake a review of all current and former employees' entitlements and rectify any underpayments identified, despite the Respondents' former solicitor advising the FWO on 1 May 2013 that he was instructed that these steps had been taken [First Hurrell Affidavit at paragraph 18 and Annexure AKH-8] and contrary to the Fourth Respondent's claim that these complaints were "dealt with immediately" [First Li Affidavit at paragraph 19].

90. Further, Inspector Hurrell deposes that in March 2015 (almost two years after the commencement of proceedings) a further complaint was received from an employee who worked for the First Respondent in the period between May 2011 and August 2012, who was paid between $10 and $12 per hour [Second Hurrell Affidavit at paragraph 3]. Mr Bansal has now been paid his entitlements.

91. There is no explanation why the Respondents failed to take steps to rectify underpayments to Mr Bansal until the FWO intervened in May 2015, despite his employment falling within the same period as those employees back paid in 2013 in response to the additional complaints. The Applicant submits it is open to infer that there may be other former employees for in respect of whom no corrective action has been taken.

92. In addition, in relation to Mr Singh, the evidence also indicates that he was not paid correctly between the end of the Relevant Period assessed by the FWO on 5 August 2012 and the end of his employment in early 2013, as he deposes to working on Saturdays and Sundays during this period but not being paid more than about $17 an hour [Singh Affidavit at paragraph 17, 25 and 30], during which time he was entitled to be paid $27.29 per hour for weekend work [SOAF at 38(c)]. There is no evidence that any underpayments arising after Relevant Period assessed by the FWO were rectified in respect of Mr Singh.

93. The Fourth Respondents states, in relation to the contraventions subject to this proceeding, that "I can honestly say that had the staff raised concerns about their wages with the business I would have taken immediate steps to rectify it" [First Li Affidavit at paragraph 11]. This is a hollow statement not supported by his conduct in respect of the additional complaints, which would not have arisen had he complied with the FWO's advice in October 2012 and January 2013 for the First Respondent to review its own records to assess compliance and rectify any underpayments owing.

94. The Respondents' failure to take prompt and complete corrective action is of concern to the FWO in circumstances where extensive advice had been given to the Respondents by the FWO regarding their employment obligations and the need to take immediate action to ensure compliance, particularly in circumstances where compliance proceedings were on foot [SOAF at 78].

Co-operation with authorities

95. The First Respondent has generally cooperated during the course of the investigation of the contraventions subject to this proceeding, including by:

(a) providing the Applicant with documents and records on request [SOAF at 72(a)]; and

(b) admitting liability at an early stage [SOAF at 74 and 88].

96. The Fourth Respondent also participated in the investigation process as a Representative of the First Respondent, including by participating in a record of interview in which he provided information about the operation of the Business and management of employees and workplace relations obligations by the Respondents [SOAF at 72(c)].

*97. As was borne out in the cross-examination of the Fourth Respondent in the liability hearing and subsequent findings of the Court, the weight to be given to the Fourth Respondent's co-operation in the investigation must be viewed in light of the finding that his evidence was a "*contrivance*": Liability Decision at [84]."*

52. The respondents' submissions were:

"35. The First Respondent has embarked on a course of conduct whereby it accepted that the contraventions took place; accepted the FWO's advice in relation to the contraventions; and admitted fully, at the first opportunity, the allegations against it.

36. Within one month of being served with a Determination of Contravention, the First Respondent remedied the underpayments to those employees by making lump sum payments into their respective bank accounts. Since then, it has taken steps to ensure that there will be no future contraventions; and apologised to each of Mr Singh and Mr Verma in writing.

37. Each of these steps is a manifestation of the genuine contrition and remorse of the First Respondent. The First Respondent submits that it has indicated an acceptance of wrongdoing and a suitable credible expression of regret; and a willingness to facilitate the course of justice.

38. In those circumstances, the First Respondent submits that it is entitled to a discount in relation to any penalty this Court may be minded to order."

53. On this issue it is timely to remember what the Full Court said in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [74] – [76]:

> *"... a discount should not be available simply because a respondent has spared the community the cost of a contested trial. Rather, the benefit of such a discount should be reserved for cases where it can be fairly should that an admission of liability:*
>
> *(a) has indicated an acceptance of wrongdoing and suitable and credible expression of regret; and/or*
>
> *b) has indicated a willingness to facilitate the course of justice."*

54. Whilst it was accepted the first respondent would expect to receive credit for its co-operation there is no basis to do so for each of the other respondents. In that regard in the principal judgment their evidence was found not to be credible and the explanations they proffered inherently implausible given their backgrounds. I accept the applicant's submissions on this factor and am satisfied that despite the underpayments being remedied there is an absence of genuine contrition or remorse on the part of all of the respondents and only platitudes offered once they had been found out.

Ensuring compliance with minimum standards

55. The applicant submitted:

> *"98. A fundamental object of the FW Act is to provide a guaranteed safety net of adequate minimum entitlements for employees, with a corresponding purpose being the maintenance of an 'even playing field' for all employers with regard to employment costs.*
>
> *99. The substantial penalties set by the legislature for contraventions of the FW Act reinforce the importance placed on compliance with these minimum standards. The Applicant submits that the maintenance of this regime is particularly pertinent in the "extremely competitive industry of the retail sale of petrol, oil and other lubricants in what is an oligopolistic market" in which "it is a matter of common knowledge that retail fuel operators do not operate standard business hours". For this reason employment costs comprise a significant aspect of a business' operations within this industry, as indicated by the quantum of the underpayments in this matter.*

100. In this instance the Respondents failed to afford the Employees basic and well known entitlements to a minimum wages, casual loadings, penalty rates and overtime. The reasonable extension of this is that the First Respondent was financially advantaged over a significant period in comparison with industry competitors who were paying their employees' legal entitlements.

101. The prolonged and fundamental nature of the contraventions in the present proceedings demonstrates the Respondents' disregard for the First Respondent's obligations as an employer.

102. The record keeping contraventions are particularly serious. These obligations play a central role in the capacity of the regulator to monitor and enforce compliance with minimum employment standards."

56. The respondents' written submissions didn't specifically address this factor. A number of decisions including the *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3),*[17] the matter of *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd*[18] and *Finance Sector Union v Commonwealth Bank of Australia*[19] are relevant. The matters discussed in those authorities which deal with the importance of maintaining effective minimum terms and conditions of employment and the enforcement of industrial instruments are apposite in this case. The former employees' basic entitlements were ignored and that is an aggravating factor in this case.

Specific Deterrence

57. The applicant submitted:

"Specific deterrence

106. While the Applicant accepts that the Respondents have taken some corrective action, there remains a need for specific deterrence here for the following reasons:

[17] *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3)* [2011] FCA 579.
[18] *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258.
[19] *Finance Sector Union v Commonwealth Bank of Australia* (2005) 147 IR 462.

(a) *the Respondents continue to operate the Business and employ employees, and Mr Li remains in control of the Business [Li First Affidavit paragraph 5];*

(b) *the further complaint in March 2015 (whilst not alleged to relate to a period after the proceedings were commenced) leaves doubt as to the genuineness of the assertions made by the Respondents to the regulator and the Court about the extent of the corrective action undertaken, and the timeliness of the corrective action; and*

(c) *the lack of credible acceptance of responsibility by the Second to Fourth Respondents and the findings of the Court in relation the credit of the Second to Fourth Respondents in their evidence to the Court in the proceedings.*

107. The Applicant submits that only penalties imposed at the high end are likely to make the contravening conduct unprofitable and the prospect of any future contraventions commercially, and personally, undesirable."

58. The respondents' submitted that:

> *"40. In the First Respondent's case, the contravening conduct was followed by immediate cooperation, acceptance of the consequences, remediation and other acts of contrition. In the circumstances, the First Respondent submits that they are in no need of specific deterrence."*

59. Gray J observed in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357; (2008) 177 IR 243; [2008] FCAFC 170 at [37] that:

> *"Specific deterrence focuses on the party on whom the penalty is to be imposed and the likelihood of that party being involved in a similar breach in the future. Much 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."*

General Deterrence

60. The applicant submitted:

> *"<u>General Deterrence</u>*

108. The Applicant submits that the need for general deterrence is a key factor warranting the imposition of a penalty in this proceeding.

109. The Respondents' submit that:

(a) the declaratory orders to made by the Court;

(b) the bringing of the proceeding itself; and

(c) the Respondents cooperation during the investigative phase and their agreeing to forego a contested hearing on liability, each of which steps had the effect of releasing the Applicant's resources (thereby allowing the Applicant to pursue other contraventions, thereby increasing general deterrence);

mean that a financial penalty is not necessary to ensure general deterrence [Respondents' Submissions at paragraph 94(a) to (c)].

110. Firstly, it is noted that the cases relied on by the Respondents in support of these submissions involved matters where the parties made joint submissions in respect of penalty and where significant penalties were in fact imposed.

111. Secondly, while declaratory relief plays an important role in general deterrence, this is primarily by way of education to outline the employment obligations subject to the proceeding and to provide context to the penalties ordered. While discretionary, declarations are commonly made in proceedings taken by the Applicant in circumstances where penalties are also ordered in respect of the contraventions as expressly provided for in the FW Act. Contrary to the Respondents' submissions, a failure to impose penalties at a meaningful level in circumstances where serious contraventions as admitted by the Respondents are found may undermine the deterrence objective, as discussed further below.

112. Thirdly, while the First Respondent's admission of the contraventions has assisted in the resolution of these proceedings, the submission that it chose to "forego a contested hearing on liability" may be understood to indicate that the admissions made are not indicative of an unreserved acceptance of wrongdoing on its part, which raises further concern in respect of the need for specific deterrence. It also cannot be said, particularly in light of the additional complaints received by the FWO after these proceedings were

commenced, that the First Respondents' conduct has "released the Applicant's resources" to pursue other contraventions. The proposition in (c) is plainly wrong in the case of the Second to Fourth Respondents; as there was a contested hearing after the decision in Potter was handed down and the agreement to forgo a contested hearing was withdrawn.

113. Fourthly, the Respondents' conduct in this matter was objectively serious, for the reasons already outlined, and the Applicant submits that the law should mark its disapproval of the conduct engaged in by the Respondents and impose penalties which serve as a warning to others. The Respondents and others should be left in no doubt that the failure to ascertain or implement their obligations in respect of their employees will not be tolerated.

114. Finally, contraventions of workplace laws are not easily detected or enforced, as is evident in the current proceeding, with the Employees only becoming aware of and seeking to enforce their entitlements after a number of years of employment with the First Respondent. For this reason, the fundamental importance of general deterrence is to impress upon employers the importance of ascertaining and complying with their obligations to employees, and to deter employers who may be tempted to commit similar contraventions."

61. The respondents' submitted that:

> *"41. The Respondents submit that the declaratory orders to be made by the Court, and the bringing of the proceeding itself, go towards ensuring general deterrence."*

62. Deterrence both specific and general is important in this case. In relation to the former, given the previous discussion because of and the scale and period of time over which the contravening conduct occurred. I also accept there is a need for general deterrence because Marshall J said 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."*

Totality principle

63. In submissions on this issue the applicant noted that having fixed an appropriate penalty for each course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct and is not oppressive or crushing. The applicant submitted that whilst not oppressive or crushing any penalty must bear relativity to the seriousness of the conduct engaged in by the respondents. In written submissions the respondent's position was:

> *"43. This is of significant importance in this proceeding. The factual background involves the good faith purchase of a business by a father in the hope that its operation will provide for his family. That purchase was made on the basis of an understanding that the business could be run profitably. In turn, that understanding was reached on the basis of assumptions in relation to labour costs.*
>
> *44. All of these assumptions have proved to be incorrect. The Respondents are now faced with running a business for which they paid too much, in circumstances where it is unclear that they will ever be able to run it profitably. While not to detract from the harm caused by the Respondents' contraventions, they submit that any significant financial penalty is likely to have an oppressive or crushing effect."*

64. In submissions before the Court the applicant noted there was no financial evidence from the respondents capable of substantiating a claim that any penalty was crushing and Counsel for the respondent did not suggest otherwise.

Consideration of appropriate penalty

65. In light of the submissions referred to above and on the material before the Court the factors that are most relevant to the determination of an appropriate penalty for each of the respondents in this matter are:

a) the nature and impact of the contraventions;

b) the respondents' conduct demonstrating a reckless disregard of workplace laws and that I am not satisfied there's been genuine contrition expressed by the respondents; and

c) the need for both specific and general deterrence.

66. Therefore the appropriate penalty for each respondent is set out below.

a) In relation to the first respondent it is appropriate to find the contraventions at the mid to serious end of the scale but to allow a discount of 25% for the first respondent's co-operation and the other exculpatory matters referred to above. The total in the table below represents 58% of the maximum.

Grouping	**Maximum penalty**	**Penalty**
1. Minimum rate	$33,000.00	$19,800
2. Transitional penalty rates	$33,000.00	$19,800
3. Overtime	$33,000.00	$19,800
4. Record ordinary hrs + wages	$5,500.00	$2,887.50
5. Record of overtime hours	$16,500.00	$8,625
6. Pay slips	$16,500.00	$8,625
Total	$137,500.00	$79, 537.50

b) In relation to the second respondent, given the particular involvement of the second respondent it is appropriate to find the contraventions at the mid end of the scale and allow a discount of 10% for the exculpatory matters referred to earlier. The total in the table below represents 58% of the maximum.

Grouping	**Maximum penalty**	**Penalty**
1. Record ordinary hrs + wages	$1,100.00	$643.50
2. Record of overtime hours	$3,300.00	$1,930.50
3. Pay slips	$3,300.00	$1,930.50
Total	$7,700.00	$4,504.50

c) Similarly, in relation to the third respondent, given the particular involvement of the third respondent it is appropriate to find the contraventions at the mid end of the scale and allow a discount of 10% for the exculpatory matters referred to earlier. The total in the table below represents 58% of the maximum.

Grouping	**Maximum penalty**	**Penalty**
1. Record ordinary hrs + wages	$1,100.00	$643.50
2. Record of overtime hours	$3,300.00	$1,930.50
3. Pay slips	$3,300.00	$1,930.50
Total	$7,700.00	$4,504.50

d) As with the involvement of the second and third respondents it is appropriate to put the contraventions of the fourth respondent at the mid end of the scale and allow a discount of 10% for the exculpatory matters referred to earlier. The total in the table below represents 58% of the maximum.

Grouping	**Maximum penalty**	**Penalty**
1. Minimum rate	$6,600.00	$3,861.00
Total	$6,600.00	$3,861.00

67. The application of the totality principle does not mean the penalties arrived at before its application must be reduced. Given the maximum possible penalty applicable to the contraventions for each of the respondents referred to above, the total penalties for each of the respondents is a proper reflection of the totality of the wrong doing and is not oppressive or crushing.

68. Accordingly, as the Court:

- is directed by the relevant authorities to consider what is appropriate in all the circumstances of this case;[20] and
- in its discretion in relation to penalty is not fettered by a checklist of mandatory criteria;[21] and
- is satisfied the penalty for the whole of the contravening conduct is appropriate and the parties agreed any penalty be payable within 60 days

I make the orders as set out at the beginning of these reasons.

I certify that the preceding sixty-eight (68) paragraphs are a true copy of the reasons for judgment of Judge O'Sullivan

Associate:

Date: 4 December 2015

[20] See *Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2)* (1999) 94 IR 231.
[21] See *Australian Ophthalmic Supplies Pty Limited v McAlary-Smith* [2008] FCAFC 8.