

FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v LAND CHOICE PTY LTD & ANOR [2009] FMCA 1255

INDUSTRIAL LAW – Civil penalty proceedings – where contraventions of Workplace Relations Act and Regulations admitted – factors for consideration.

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)

Property, Stock and Business Agents Act 2002 (NSW), s.11

Workplace Relations Act 1996 (Cth), ss.6, 166D, 167, 171, 182, 208, 232, 234, 235, 245, 246, 318, 717, 718, 719, 722, 727, 728, 836, 846, 900, 904

Workplace Relations Regulations 2006 (Cth), regs.2.14.3, 2.14.4, 2.14.5, 2.19.4, 2.19.11

Australian Competition and Consumer Commission v Australian Safeway Store Pty Ltd (1997) 145 ALR 36

Australian Ophthalmic Supplies Pty Limited v McAlary-Smith (2008) 165 FCR 560; [2008] FCAFC 8

Cotis v Macpherson (2007) 169 IR 30; [2007] FMCA 2060

Community and Public Sector Union v Telstra Corporation Limited (2001) 108 IR 228; [2001] FCA 1364

Dennington v Pee Cee Pty Ltd [2008] FMCA 79

Gibbs v The Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216

Hollis v Vabu Pty Ltd (2001) 207 CLR 21; [2001] HCA 44

Kelly v Fitzpatrick (2007) 166 IR 14; [2007] FCA 1080

Longmire v Murray Clarke Enterprises Pty Ltd & Anor [2008] FMCA 1028

Lynch v Buckley Sawmills Pty Ltd (1984) 3 FCR 503

Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25

Mason v Harrington Corporation Pty Limited [2007] FMCA 7

McIver v Healey [2008] FCA 425

Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70

Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383; [2008] FCAFC 70

Pearce v The Queen (1998) 194 CLR 610; [1998] HCA 57

Ponzio v B & P Caelli Constructions Pty Ltd and Others (2007) 158 FCR 543; [2007] FCAFC 65

Printing and Kindred Industries Union and Others v Vista Paper Products Pty Ltd and Another (1994) 127 ALR 673

Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412

Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

Stevens v Brodribb Sawmilling Company Proprietary Limited (1986) 160 CLR

16

Victoria University of Technology v Australian Education Union (1999) 91 IR 96; [1999] FCA 1065

Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor [2009] FMCA 38

Applicant: FAIR WORK OMBUDSMAN

First Respondent: LAND CHOICE PTY LTD
(ACN 102 352 385)

Second Respondent: SUGIHARTO SUGIHARTO

File Number: SYG1465 of 2009

Judgment of: Barnes FM

Hearing date: 10 November 2009

Delivered at: Sydney

Delivered on: 17 December 2009

REPRESENTATION

Counsel for the Applicant: Ms P Lowson

Solicitors for the Applicant: Fisher Cartwright Berriman

Counsel for the Respondents: Mr P Cleary

Solicitors for the Respondents: Pryor Tzannes & Wallis Solicitors

DECLARATIONS AND ORDERS

THE COURT DECLARES THAT:

- (1) The first respondent contravened s.900(1) of the *Workplace Relations Act 1996* (Cth) (“the Act”) in relation to the employment of Ms Tiek Leng Lau in that it misrepresented the contract under which she was to perform work as a contract for services.
- (2) The second respondent contravened s.900(1) of the Act in that he was involved in the first respondent’s contravention in relation to the employment of Ms Tiek Leng Lau.
- (3) The first respondent contravened s.182(1) of the Act in relation to the employment of Ms Tiek Leng Lau in that it failed to pay her the guaranteed basic periodic rate of pay for the period of her employment from 23 March 2007 to 27 September 2007.
- (4) The second respondent contravened s.182(1) of the Act in that he was involved in the first respondent’s contravention in relation to the employment of Ms Tiek Leng Lau.
- (5) The first respondent contravened s.234(2) of the Act in relation to the employment of Ms Tiek Leng Lau in that it failed to credit her with the amount of annual leave accrued during each month of her employment.
- (6) The second respondent contravened s.234(2) of the Act in that he was involved in the first respondent’s contravention in relation to the employment of Ms Tiek Leng Lau.
- (7) The first respondent contravened s.235(2) of the Act in relation to the employment of Ms Tiek Leng Lau in that it failed to pay her an amount for each hour of her untaken accrued annual leave on termination of her employment on 27 September 2007.
- (8) The second respondent contravened s.235(2) of the Act in that he was involved in the first respondent’s contravention in relation to the employment of Ms Tiek Leng Lau.
- (9) The first respondent contravened s.246(4) of the Act in relation to the employment of Ms Tiek Leng Lau in that it failed to credit to her the

amount of paid personal/carer's leave accrued during each month of her employment.

- (10) The second respondent contravened s.246(4) of the Act in that he was involved in the first respondent's contravention in relation to the employment of Ms Tiek Leng Lau.
- (11) The first respondent contravened clause 4(c) of the notional agreement preserving the terms of the Real Estate Industry (State) Award 2003 ("the NAPSA") in relation to the employment of Ms Tiek Leng Lau in that it failed to give her one week's notice of termination or to make a payment in lieu of notice of termination of her employment.
- (12) The second respondent contravened clause 4(c) of the NAPSA in that he was involved in the first respondent's contravention in relation to the employment of Ms Tiek Leng Lau.
- (13) The first respondent contravened clause 31(b)(ii) of the NAPSA in relation to the employment of Ms Tiek Leng Lau in that it failed to pay her a weekly vehicle/locomotion allowance during her employment.
- (14) The second respondent contravened clause 31(b)(ii) of the NAPSA in that he was involved in the first respondent's contravention in relation to the employment of Ms Tiek Leng Lau.
- (15) The first respondent contravened clause 33(h)(i) of the NAPSA in relation to the employment of Ms Tiek Leng Lau in that it failed to pay her annual leave loading in respect of accrued annual leave on termination of her employment.
- (16) The second respondent contravened clause 33(h)(i) of the NAPSA in that he was involved in the first respondent's contravention in relation to the employment of Ms Tiek Leng Lau.
- (17) The first respondent contravened regs.2.19.11(1), 2.19.11(3) and 2.19.11(4) of the *Workplace Relations Regulations 2006* (Cth) ("the Regulations") in relation to the employment of Ms Tiek Leng Lau in that it failed to keep records relating to her and containing details of her remuneration, allowances, benefits and payments to her.

THE COURT ORDERS THAT:

- (1) Pursuant to s.904(1) of the Act a penalty of \$8,000 be imposed on the first respondent in respect of s.900(1) of the Act.
- (2) Pursuant to s.904(1) of the Act a penalty of \$1,600 be imposed on the second respondent in respect of his contravention of s.900(1) of the Act in relation to the employment of Ms Tiek Leng Lau.
- (3) Pursuant to s.719(1) of the Act a penalty of \$8,000 be imposed on the first respondent in respect of its contravention of s.182(1) of the Act in relation to the employment of Ms Tiek Leng Lau.
- (4) Pursuant to s.719(1) of the Act a penalty of \$1,600 be imposed on the second respondent in respect of his contravention of s.182(1) of the Act in relation to the employment of Ms Tiek Leng Lau.
- (5) Pursuant to s.719(1) of the Act a penalty of \$1,600 be imposed on the first respondent for its contravention of s.234(2) of the Act in relation to the employment of Ms Tiek Leng Lau.
- (6) Pursuant to s.719(1) of the Act a penalty of \$320 be imposed on the second respondent in respect of his contravention of s.234(2) of the Act in relation to the employment of Ms Tiek Leng Lau.
- (7) Pursuant to s.719(1) of the Act a penalty of \$1,600 be imposed on the first respondent in respect of its contravention of s.235(2) of the Act in relation to the employment of Ms Tiek Leng Lau.
- (8) Pursuant to s.719(1) of the Act a penalty of \$320 be imposed on the second respondent in respect of his contravention of s.235(2) of the Act in relation to the employment of Ms Tiek Leng Lau.
- (9) Pursuant to s.719(1) of the Act a penalty of \$1,600 be imposed on the first respondent in respect of its contravention of s.246(4) of the Act in relation to the employment of Ms Tiek Leng Lau.
- (10) Pursuant to s.719(1) of the Act a penalty of \$320 be imposed on the second respondent in respect of his contravention of s.246(4) of the Act in relation to the employment of Ms Tiek Leng Lau.

- (11) Pursuant to s.719(1) of the Act a penalty of \$1,600 be imposed on the first respondent in respect of its contravention of clause 4(c) of the NAPSA in relation to the employment of Ms Tiek Leng Lau.
- (12) Pursuant to s.719(1) of the Act a penalty of \$320 be imposed on the second respondent in respect of his contravention of clause 4(c) of the NAPSA in relation to the employment of Ms Tiek Leng Lau.
- (13) Pursuant to s.719(1) of the Act a penalty of \$1,600 be imposed on the first respondent in respect of its contravention of clause 31(b)(ii) of the NAPSA in relation to the employment of Ms Tiek Leng Lau.
- (14) Pursuant to s.719(1) of the Act a penalty of \$320 be imposed on the second respondent in respect of his contravention of clause 31(b)(ii) of the NAPSA in relation to the employment of Ms Tiek Leng Lau.
- (15) Pursuant to s.719(1) of the Act a penalty of \$200 be imposed on the first respondent in respect of its contravention of clause 33(h)(i) of the NAPSA in relation to the employment of Ms Tiek Leng Lau.
- (16) Pursuant to s.719(1) of the Act a penalty of \$40 be imposed on the second respondent in respect of his contravention of clause 33(h)(i) of the NAPSA in relation to the employment of Ms Tiek Leng Lau.
- (17) Pursuant to reg.2.14.4 of the Regulations a penalty of \$400 be imposed on the first respondent in respect of its contravention of reg.2.19.11(1) of the Regulations in relation to the employment of Ms Tiek Leng Lau.
- (18) No penalty be imposed on the first respondent in respect of its contraventions of regs.2.19.11(3) and 2.19.11(4).
- (19) Payment of the penalties imposed on the first respondent be made to the Consolidated Revenue of the Commonwealth on or before 17 December 2010.
- (20) Payment of the penalties imposed on the second respondent be made to the Consolidated Revenue of the Commonwealth on or before 17 June 2010.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG1465 of 2009

FAIR WORK OMBUDSMAN
Applicant

And

LAND CHOICE PTY LTD
(ACN 102 352 385)
First Respondent

SUGIHARTO SUGIHARTO
Second Respondent

REASONS FOR JUDGMENT

These proceedings

1. On 19 June 2009 the applicant (then known as the Workplace Ombudsman) commenced proceedings in this court under the *Workplace Relations Act 1996* (Cth) (the Act) seeking orders that penalties be imposed on the first and second respondents in respect of breaches of the Act, the *Workplace Relations Regulations 2006* (Cth) (the Regulations) and the notional agreement preserving the terms of the Real Estate Industry (State) Award 2003 (the NAPSA). The applicant also sought orders that the first respondent pay outstanding wages and entitlements, and interest thereon, to Ms Tiek Leng Lau.
2. It is not in dispute that the Workplace Ombudsman (now the Fair Work Ombudsman) was a statutory appointee under s.166D(1) of the Act and a duly appointed workplace inspector under s.167(1A) and had standing to commence these proceedings pursuant to s.718 of the Act

and reg.2.14.3(2) of Division 3 of Part 14 of Chapter 2 of the Regulations. Notwithstanding the introduction of the *Fair Work Act 2009* (Cth) these proceedings continue after 1 July 2009 pursuant to item 13 of Part 3 of Schedule 18 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

3. In an agreed statement of facts tendered in court the respondents admitted the alleged breaches and agreed that the court should order that the first respondent pay Ms Lau \$15,119.07 and interest in the amount of \$3,104.94 in respect of outstanding wages and entitlements. It was also accepted by the respondents that penalties should be imposed, although the parties differed as to the appropriate penalty.
4. For the reasons set out below, I considered it appropriate to make the orders that the first respondent, Land Choice Pty Ltd (Land Choice) pay the sum of \$15,119.07 to Ms Lau pursuant to s.719(6) of the Act representing outstanding wages and entitlements for the period of her employment and interest thereon for the period from 27 September 2007 in the sum of \$3,104.94 pursuant to s.722 of the Act. I ordered that the payments be made within 28 days. The respondents had sought that the payments to Ms Lau (and the penalties) be paid by instalments. I indicated that I would give my reasons for not acceding to this request in relation to the payments to Ms Lau in my judgment (see [124] – [130] below). Counsel for each of the parties made submissions on penalty.

Background

5. The circumstances of the contraventions in issue are set out in the agreed statement of facts. There is nothing in the material before the court to suggest that it should not rely on that statement. Each party also relied on affidavit evidence.
6. It is necessary to set out in brief some information in relation to the relationship between the respondents and Ms Lau. Land Choice is a body corporate and was at all relevant times an employer within the meaning of s.6(1) of the Act. It was the operator of Kingsford First National Real Estate from December 2002 to October 2008. It is not in

dispute that Land Choice was the holder of a licence under the *Property, Stock and Business Agents Act 2002* (NSW) (the PSBA Act).

7. The second respondent, Mr Sugiharto, was at all relevant times the sole director of Land Choice and the licensee in charge of Kingsford First National Real Estate and a licensed real estate agent under the PSBA Act.
8. Commencing on 23 March 2007 Land Choice employed Ms Lau as a real estate salesperson. Ms Lau was employed until 27 September 2007. It is agreed that during the term of her employment she worked on average 40 hours per week for the first respondent performing the duties of a “*salesperson*” under the terms of the NAPSA.
9. During Ms Lau’s employment she received only one payment of \$1,414.20 from the first respondent (which was characterised as a commission payment) and one superannuation payment was made on her behalf by Land Choice. She was purportedly subject to an “*Independent Contractor Agreement*” under which she was entitled only to commission payments. This agreement was prepared on behalf of Land Choice by amendment of pro forma documents contained on a CD-Rom disc created by the Real Estate Employers’ Federation of New South Wales (REEF), of which Land Choice was a member. Mr Sugiharto provided copies of the agreement documents to Ms Lau prior to the commencement of her engagement.
10. On 22 March 2007 an application in the name of Ms Lau for a certificate of registration under the PSBA Act was completed. The section that had to be signed by the licensee in charge of the office where Ms Lau was employed was signed by Mr Sugiharto as licensee in charge of Land Choice trading as Kingsford First National Real Estate.
11. Section 11(1) of the PSBA Act provides that “[t]he holder of a certificate of registration must not act as or exercise any of the functions of a real estate salesperson ... unless the person does so as an employee of the holder of a licence under this Act.”
12. Section 11(2) is as follows:

The holder of a certificate of registration must not exercise any of the functions of a real estate salesperson, stock and station salesperson, business salesperson or registered manager unless he or she does so under the supervision of a person who:

(a) is the licensee in charge of the place of business at which the employee is employed, and

(b) is the holder of a licence that allows the licensee to exercise that function without contravening this Act.

13. In April 2007 Ms Lau obtained a certificate of registration under the PSBA Act that specified that she was employed by Land Choice under the supervision of Mr Sugiharto. The certificate authorised the holder to carry on the activities of a real estate salesperson “*whilst employed and under the supervision of a licensed Real Estate Agent*”. At no time during Ms Lau’s employment with Land Choice did she ever hold a real estate licence.
14. The respondents acknowledge that Ms Lau was not eligible to be employed as an independent contractor under the PSBA Act and that as an employee she was entitled to certain entitlements under the Act, the Regulations and the provisions of the Real Estate Industry (State) Award preserved as terms of a NAPSA.
15. Ms Lau’s employment with Land Choice was terminated on 27 September 2007 without notice or pay in lieu of notice.
16. The first respondent did not pay Ms Lau for hours worked during the period of her employment; did not accrue and credit any annual leave or personal/carer’s leave for her; did not make any payment to her in respect of accrued annual leave, annual leave loading or wages in lieu of notice on termination of her employment; and did not pay her any monies in respect of a vehicle or locomotion allowance (although she used her own motor vehicle for work purposes). Nor did it keep any records of details in respect of her employment, including the rate of pay and any incentive-based payments, bonuses, loadings, penalty rates, allowances or other entitlements.
17. In these circumstances, Land Choice has admitted contraventions of nine provisions of the Act, the Regulations and the NAPSA, while Mr Sugiharto admitted that he was involved in Land Choice’s

contraventions of each of these provisions, other than the Regulations that relate to the keeping of records by an employer.

18. Penalties are sought pursuant to ss.719(1) and 904(1) of the Act and reg.2.14.4 of the Regulations in relation to the first respondent and, based on s.728 of the Act, in relation to the second respondent. Section 728 is as follows:

(1) A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.

(2) For this purpose, a person is involved in a contravention of a civil remedy provision if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

19. The respondents conceded that these are the provisions to which regard should be had in assessing penalties in this case.

Section 900 of the Act: sham contracting

20. It is a contravention of s.900(1) of the Act for a person who is a party to a contract with an individual to misrepresent a contract as a contract for services under which the individual performs work, or is to perform work, for the person as an independent contractor, when in reality the contract is a contract of employment under which the person is the employer of the individual. Land Choice admitted that it had contravened s.900(1) in representing that the document described as "*Independent Contractor Agreement*" was a contract under which Ms Lau performed work for it as an independent contractor.

21. Under s.900(2):

A person does not contravene subsection (1) if the person proves that, at the time the person made the representation concerned, the person did not know that, and was not reckless as to whether, the contract was a contract of employment rather than a contract for services.

22. Land Choice has admitted that at the time of providing the agreement to Ms Lau for signature, it was reckless as to whether she was being offered a contract of employment rather than a contract for services.
23. In addition, Mr Sugiharto admitted that he was reckless and was “involved” in the first respondent’s breach of s.900(1) of the Act within the meaning of s.728 of the Act.
24. It is clear that the “agreement” provided to Ms Lau represented that the contract was a contract for services rather than a contract for employment, when it could not be classified as such because Ms Lau was not eligible to enter into such an agreement as she was not a licensed real estate agent and was the holder of a certificate of registration under the PSBA Act. Mr Sugiharto held Land Choice out to be the employer of Ms Lau on her application for a certificate of registration. Under the PSBA Act, as an unlicensed person (and the holder of a certificate of registration), Ms Lau was not permitted to act as a real estate salesperson unless she did so as an employee.
25. The admission by the first and second respondents that Ms Lau was in fact an employee of Land Choice was properly made, having regard to the principles considered by the High Court in *Stevens v Brodribb Sawmilling Company Proprietary Limited* (1986) 160 CLR 16 and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; [2001] HCA 44. I am satisfied on the evidence before the court that the first respondent had significant control over the manner in which Ms Lau performed her work; that the position description identified the hours she was required to work; that Ms Lau was advised that her work could not be performed on a part-time basis; that she was required to attend weekly meetings of the first respondent; that she was provided with a calling script for “cold calling” prospective homeowners and advised that she was required to “letterbox drop” 4000 advertising pamphlets per fortnight; and that she was provided with equipment such as a mobile

telephone, business cards, computer access and a desk in the office of the business.

26. The admitted recklessness as to whether the contract was a contract of employment rather than a contract for services is consistent with the fact that notwithstanding that the REEF CD-ROM disc from which the agreement documents were prepared for Ms Lau contained a statement that commission-only agreements could only be entered into with licensed real estate agents, such an agreement was used in relation to Ms Lau. Moreover, the pro forma document entitled "*Commission Structure for Contractor Sales Consultant*" was amended for use in relation to Ms Lau to exclude the statement that it was agreed that as a licensed real estate agent pursuant to the PSBA Act, she would be remunerated by way of commission only. Accordingly this statement in the pro forma document should have alerted the respondents to the issue of whether Ms Lau was required to be a licensed real estate agent to enter into such an agreement.
27. The applicant also submitted that, as a member of REEF, Land Choice had the ability to seek clarification and advice on the implementation of the independent contractor agreement used in respect of Ms Lau and that in failing to check whether such documents could be used, both respondents could and should be deemed to be reckless. In light of the admissions by the respondents and the fact that they do not seek to rely on any defence in s.900(2) of the WR Act it is not necessary to determine this issue to be satisfied that the respondents did contravene s.900 as admitted, but I will return to the issue of recklessness in relation to the appropriate penalty to be imposed.
28. Section 904 of the Act is as follows:
- (1) *The Court may, on application by an eligible person, make an order imposing a pecuniary penalty on a person who has contravened subsection 900(1), 901(1), 902(1) or 903(1).*
- (2) *The maximum penalty that may be imposed under subsection (1) is:*
- (a) *60 penalty units for an individual; or*
- (b) *300 penalty units for a body corporate.*

(2A) If a person has contravened subsection 902(1), the Court may, on application by an eligible person, grant an injunction and make any other orders that the Court considers necessary to stop the contravention or remedy its effects.

(2B) Other orders the Court may make under subsection (2A) include (but are not limited to):

(a) if the contravention was constituted by dismissing an employee--an order to reinstate the person dismissed to the position that the person occupied immediately before the dismissal or to a position no less favourable than that position; and

(b) in any case--to pay to the person dismissed, or threatened with dismissal, compensation for loss suffered as a result of the dismissal or threatened dismissal.

(2C) The Court may make orders under subsection (2A) in addition to, or instead of, imposing a pecuniary penalty.

(3) Each of the following is an eligible person for the purposes of this section:

(a) a workplace inspector;

(b) an individual affected by the contravention;

(c) an organisation of employees of which the individual affected by the contravention is (or has applied to become) a member, if it is acting with the written consent of the individual.

29. By virtue of s.900(3), s.900(1) is a civil remedy provision. Section 728(1) provides that a person who is involved in a contravention (in the sense defined in s.728(2)) of a civil remedy provision is treated as having contravened that provision. It is agreed that Mr Sugiharto was the sole director of Land Choice, the licensee in charge and the ultimate decision maker in respect of Land Choice's human resources decisions as well as being in charge of day-to-day management of Land Choice and responsible for ensuring that Land Choice complied with its legal obligations in respect of employees. Mr Sugiharto signed the agreement with Ms Lau on behalf of Land Choice and was the maker or procurer of the relevant representation. In these circumstances he was knowingly involved in the contravention by Land Choice and

hence is also liable to a penalty under s.904. The same may be said about his involvement in the other contraventions of the Act and the Award/NAPSA.

Section 182 of the Act: failure to pay ordinary time wages at the applicable rate.

30. From the time the Act came into force (27 March 2006), under s.208 of the Act, the pay and classification provisions of the Award preserved as provisions of a NAPSA became a preserved Australian Pay and Classification Scale (APCS) (see Schedule 8 to the Act). Sections 176 – 316 of the Act constitute the Australian Fair Pay and Conditions Standard (see s.171(3)) by which Land Choice was bound under Part 7 of the Act from 27 March 2006. In such circumstances, under s.182(1) of the Act Ms Lau, as an employee, had to be paid a basic periodic rate of pay for each of the employee's guaranteed hours that was at least equal to the basic periodic rate of pay that was payable to the employee under the APCS (the guaranteed basic periodic rate of pay).
31. During the term of Ms Lau's employment (from 23 March 2007 to 27 September 2007), the minimum rate of pay (the basic periodic rate) under the Award/NAPSA for a salesperson was \$14.38 per hour. The rate increased to \$14.65 per hour from 1 October 2007. Given that Mr Sugiharto agreed on behalf of Land Choice that Ms Lau worked on average 40 hours per week for Land Choice and was not paid any wages during her employment (and only one commission payment described above), it was properly admitted that, in breach of its obligation under s.182(1) of the Act, Land Choice failed to pay Ms Lau the basic periodic rate of pay prescribed under the APCS and that she received only one commission payment of \$1,414.20. It was agreed that this resulted in an underpayment to her of \$15,530.40.
32. It was also agreed that Mr Sugiharto was involved in this contravention within s.728 (and see ss.717 and 727). Under s.719 of the Act (which is discussed below) penalties may be imposed on each respondent for breach of s.182 which formed part of the Australian Fair Pay and Conditions Standard (see ss.171 and 717).

Section 234 of the Act: failure to credit annual leave

33. Under s.232(2) of the Act, an employee is entitled to accrue an amount of paid annual leave for each completed four week period of continuous service with an employer. Under s.234(2), each month an employer must credit to an employee the amount of annual leave accrued by the employee under s.232(2). The respondents admitted that no annual leave was credited to Ms Lau by Land Choice. Mr Sugiharto admitted that he was involved in Land Choice's breach (and see ss.318 and 728). Hence penalties may be imposed under s.719 of the Act (and see s.717) for contravention of s.234(2).
34. While the statement of agreed facts refers to a breach of s.232(2), it is clear from the submissions for the respondents that it is understood and accepted that the contravention in question was a contravention of s.234(2) of the Act.

Section 235 of the Act: failure to pay accrued annual leave on termination

35. Under s.235(2) of the Act Land Choice was required to pay Ms Lau her untaken accrued annual leave at the applicable rate when her employment was terminated on 27 September 2007. It is agreed that this did not occur and that on termination Ms Lau was entitled to payment of \$1,008.81 in respect of accrued annual leave. Mr Sugiharto admitted involvement in this contravention (see ss.318 and 728). Penalties may be imposed under s.719 (see s.717) of the Act.

Section 246 of the Act: failure to credit personal/carer's leave

36. Under s.246(2) of the Act an employee is entitled to accrue an amount of paid personal/carer's leave for each completed four week period of continuous service. Under s.246(4) each month an employer must credit to an employee the amount of paid personal/carer's leave accrued. It was admitted that Land Choice failed to credit personal/carer's leave during Ms Lau's employment, in breach of s.246(4) and that Mr Sugiharto was involved in this contravention (see ss.318 and 728). Penalties may be imposed under s.719 (see s.717) of the Act.

Clause 4(c) of the Award/NAPSA: failure to pay salary in lieu of notice

37. Clause 31 of Part 3 of Schedule 8 to the Act states that:

If, immediately before the reform commencement, [27 March 2006] the terms and conditions of employment of one or more employees in a single business or a part of a single business:

(a) were not determined under a State employment agreement; and

(b) were determined, in whole or in part, under a State award (the original State award) or a State or Territory industrial law (the original State law);

a notional agreement preserving State awards is taken to come into operation on the reform commencement in respect of the business or that part of the business.

38. From 27 March 2006 Land Choice was bound by the NAPSA in respect of the employment of employees including Ms Lau. Employee is defined in cl.3 of the Award/NAPSA to include “*all salespersons however employed.*”

39. Under cl.4(c) of the Award/NAPSA, the employer may terminate the employment of an employee by giving the employee a specified minimum period of notice (or payment of salary in lieu of notice). In the case of Ms Lau who had worked for Land Choice for less than one year, Land Choice was required to give one week’s notice of termination of her employment or to make a payment to her of \$581.82 in lieu of notice of termination. Land Choice admitted that it failed to pay Ms Lau salary in lieu of notice in accordance with this provision. Mr Sugiharto admitted that he was involved in the breach of this provision by being party to the contravention (and see ss.717 and 728). It was accepted that penalties may be imposed under s.719 of the Act.

Clause 31(b)(ii) of the Award/NAPSA: failure to pay vehicle/locomotion allowance

40. Under cl.31 of the Award/NAPSA, employees required to use their own vehicles for work purposes are entitled to a weekly allowance as set out

in Table 2 to the Award. Land Choice admitted that it failed to make any payment to Ms Lau in respect of vehicle/locomotion allowance in breach of cl.31(b)(ii) of the Award/NAPSA and Mr Sugiharto admitted that he was involved in this breach. It was admitted that, based on the Table, over the period of Ms Lau's employment she was entitled to a payment of \$2,821.50 in respect of locomotion allowance. It is not in dispute that Part B of the Award/NAPSA (which applied to wholly or partly salaried salespersons and contained cl.31) was applicable (cf Part C which applied to a commission only salesperson licensed pursuant to the PSBA Act who had entered an employment agreement). Penalties may be imposed on each respondent under s.719 of the Act in respect of this breach.

Clause 33(h)(i) of the Award/NAPSA: failure to pay annual leave loading on termination of employment

41. Clause 33 of the Award/NAPSA provides for payment of an annual leave loading and for the calculation of the amount payable. Pursuant to subcl.33(h)(i), on termination of the employment of Ms Lau Land Choice was required to pay her an annual leave loading of 17.5 per cent in respect of accrued, but untaken, annual leave. Land Choice admitted that, in breach of this provision, it did not pay any monies representing annual leave or holiday loading on termination of Ms Lau's employment, whereas she was entitled to \$176.54. Mr Sugiharto admitted involvement in the breach. It is not in dispute that penalties may be imposed under s.719 of the Act.

Regulation 2.19.11 of the Regulations: failure to keep proper records

42. Under Part 19 of Chapter 2 of the *Workplace Relations Regulations 2006* (Cth) (the Regulations), an employer who employs an employee must cause a record to be made in accordance with the Regulations in relation to the employee (see reg.2.19.4(1) and also ss.836 and 846 of the Act). Division 3 of Part 19 of the Regulations regulates the content of such records. In particular, reg.2.19.11(1) provides that the record relating to the employee must contain details of the rate of remuneration paid to the employee. In addition, pursuant to reg.2.19.11(3), an employer is required to keep records containing

details of any incentive-based payments; bonus; loading; penalty rates; or other monetary allowance or separately identifiable benefit to which the employee was entitled. Under reg.2.19.11(4) the record relating to the employee must also contain details of the gross and net amounts paid to the employee and any deductions made from the gross amount paid to the employee.

43. Consistent with the evidence before the court, Land Choice has admitted that it was bound by and breached regs.2.19.11(1), 2.19.11(3) and 2.19.11(4) of the Regulations in relation to Ms Lau.
44. Penalties for contraventions of the Regulations are provided for in Part 14 of Chapter 2. Regulation 2.14.4 provides that a court (which by reg.2.14.3 includes this court) may order a person who contravenes a civil remedy provision in the Regulations to pay a pecuniary penalty of up to the maximum penalty permissible under subsection 846(2)(g) of the Act (and see reg.2.14.5 in relation to multiple contraventions of civil remedy provisions). Subregulations 2.19.11(1), (3) and (4) are civil remedy provisions (reg.2.19.11(6)). It is agreed that the maximum penalty for a contravention of the Regulations at the relevant time by a corporation was \$5,500. There is no suggestion that Mr Sugiharto contravened or was involved in a contravention of the Regulations.

Principles in relation to determining penalty

45. Section 719 of the Act is as follows:

(1) An eligible court may impose a penalty in accordance with this Division on a person if:

- (a) the person is bound by an applicable provision; and*
- (b) the person breaches the provision.*

(2) Subject to subsection (3), where:

- (a) 2 or more breaches of an applicable provision are committed by the same person; and*
- (b) the breaches arose out of a course of conduct by the person;*

the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term.

(3) Subsection (2) does not apply to a breach of an applicable provision that is committed by a person after an eligible court has imposed a penalty on the person for an earlier breach of the provision.

(4) The maximum penalty that may be imposed under subsection (1) for a breach of an applicable provision is:

(a) 60 penalty units for an individual; or

(b) 300 penalty units for a body corporate.

(5) If, in a proceeding under this section in relation to an ITEA, it appears to the eligible court that a party to the ITEA has suffered loss or damage as a result of a breach of the ITEA by the other party, the court may order the other party to pay the amount of the loss or damage to the first-mentioned party.

(6) Where, in a proceeding against an employer under this section, it appears to the eligible court that an employee of the employer has not been paid an amount that the employer was required to pay under an applicable provision (except a term of an ITEA), the court may order the employer to pay to the employee the amount of the underpayment.

(7) Where, in a proceeding against an employer under this section, it appears to the eligible court that the employer has not paid an amount to a superannuation fund that the employer was required, under an applicable provision (except a term of an ITEA), to pay on behalf of a person, the court may order the employer to make a payment to or in respect of that person for the purpose of restoring the person, as far as practicable, to the position that the person would have been in had the employer not failed to pay the amount to the superannuation fund.

(8) Without limiting the generality of subsection (7), the eligible court may order that the employer pay to the superannuation fund referred to in subsection (7), or another superannuation fund, an amount equal to the amount (in this subsection called the unpaid amount) that the employer failed to pay together with such additional amount as, in the opinion of the court, represents the return that would have accrued in respect of the unpaid amount had it been duly paid by the employer.

(9) An order must not be made under subsection (6) or (7) in relation to so much of an underpayment as relates to any period more than 6 years before the commencement of the proceeding.

(10) A proceeding under this section in relation to a breach of an applicable provision must be commenced not later than 6 years after the commission of the breach.

46. The power to impose a penalty in relation to breach of s.900 is found in s.904 of the Act. The maximum penalties available under s.904(2) in relation to each of the first and second respondents are the same as under s.719.
47. The parties have agreed, and I am satisfied, that there were breaches of five provisions of the Act and three provisions of the Award/NAPSA by Land Choice and that in respect of each breach a maximum penalty of \$33,000 may be imposed on Land Choice under s.719 or s.904 of the Act. It was also agreed, and I accept, that Mr Sugiharto was involved in each of these eight contraventions (within s.728 of the Act) and that under s.719 or s.904 he may be subject to a maximum penalty of \$6,600 in relation to each such contravention. The maximum penalty for each contravention of the Regulations by Land Choice is \$5,500 (see reg.2.14.4 and s.846(2)(g)).
48. The power to require an employer to pay to an employee an amount of an underpayment appears in s.719(6) of the Act. It was pursuant to that section that I made orders (to which the parties agreed) that Land Choice pay \$15,119.07 to Ms Lau together with interest thereon up to the date of the order. That amount was calculated taking into account the fact that the first respondent had paid Ms Lau \$5,000 on 6 October 2009. The parties agreed on the amount owed to Ms Lau in respect of outstanding entitlements and that the calculation of interest was in accordance with the Federal Court Rules (see s.722 of the Act).

Number of breaches

49. Each breach of each separate obligation in the Act, the Regulations and the NAPSA by each respondent is a separate contravention of an applicable provision for the purposes of ss.719, 904 and reg.2.14.4 (see *Gibbs v The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223 per Gray J). However s.719(2) provides that

where two or more breaches of an applicable provision are committed by the same person and the breaches arose out of a course of conduct by the person, the breaches shall, for the purposes of s.719, be taken to constitute a single breach of the term. Regulation 2.14.5 is to similar effect in relation to multiple contraventions of a civil remedy provision of the Regulations. There is no equivalent provision in relation to contravention of s.900, but as only one contravention of that section by each respondent is in issue in these proceedings, no question arises in relation to the penalties to be imposed for multiple contraventions of s.900.

50. It was conceded by the applicant that the respondents should each have the benefit of s.719(2) of the Act in relation to repeated breaches of a particular provision of the Act or term of the NAPSA (for example, the ongoing failure to pay a locomotion/vehicle allowance, to credit personal carer's leave, or to pay the basic period rate of pay to Ms Lau) and that reg.2.14.5 should be applied to the same effect to the multiple breaches of each of the three separate provisions in the Regulations by the first respondent (regs.2.19.11(1), 19.11(3) and 19.11(4)).

51. Insofar as the respondents submitted that breaches of separate provisions arose out of the one course of conduct within the meaning of s.719(2) of the Act or reg.2.14.5, I reject this submission. Both s.719(2) and reg.2.14.5 operate in relation to two or more breaches of the same "term" or "provision" of the Act, Regulations or NAPSA and not to breaches of a number of different provisions of the Act, Regulations or NAPSA (see *McIver v Healey* [2008] FCA 425). In *Gibbs* Gray J held that each separate obligation (in that case in an award) should be regarded as a term for the purposes of the predecessor to s.719, although, as his Honour also stated (at 223):

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.

52. In the present case, as a matter of substance each provision considered above gives rise to a separate obligation.

Categories of breach

53. The respondents also submitted that the breaches admitted by the first respondent should be classified into no more than six categories of breach and that similarly the breaches by the second respondent (excluding the record keeping breaches) constituted five categories of breach. On this basis it was submitted that no more than six penalties should be imposed on the first respondent and no more than five penalties imposed on the second respondent. The suggested categories were as follows:
1. “*record keeping*” breaches of the Regulations (applicable to the first respondent only);
 2. “*misrepresentation*” breaches of s.900 of the Act by each respondent;
 3. “*pay rate*” breaches of s.182(1) of the Act by each respondent;
 4. “*locomotion allowance*” breaches of cl.31(b)(ii) of the NAPSA by each respondent;
 5. “*leave*” breaches of ss.234 and 246 of the Act by each respondent; and
 6. “*termination*” breaches of s.235 of the Act and clauses 4(c) and 33(h)(i) of the NAPSA by each respondent.
54. In support of this proposition, counsel for the respondents referred to the discussion by the Full Court of the Federal Court in *Australian Ophthalmic Supplies Pty Limited v McAlary-Smith* (2008) 165 FCR 560; [2008] FCAFC 8 of the approach that had been taken at first instance. The magistrate in that case had approached the question of penalty for 22 breaches by reference to 11 categories of breach that were identified because the breaches were said to involve “*some degree of overlap*” (at [44]).
55. However no issue was taken by the appellant in *Australian Ophthalmic Supplies* with the imposition of penalties by reference to 11 categories. What was in issue on appeal was whether the Magistrates’ Court had failed to take into account the principle that the penalties imposed

should not be so great as to be excessive and the manner in which the totality principle was applied. Graham J suggested (at [46]) that in imposing penalties on the basis of categories of breach the magistrate:

... appears to have had in mind the principle enunciated by McHugh, Hayne and Callinan JJ in Pearce v The Queen [1998] HCA 57; (1998) 194 CLR 610 at [40] namely:

40 To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.

56. Graham J suggested (at [71]) that where there had been numerous breaches:

... the starting point should have been to determine appropriate penalties for each contravention of the statutory norm, due regard being had to the apparent degree of overlap.

57. Although Graham J was of the view that this was what the magistrate had done, his Honour found that the magistrate had failed to consider whether the aggregate penalty was just and appropriate.

58. In relation to the manner in which the totality principle had to be applied Gray J stated that (at [23]):

What the magistrate was required to do in the present case was to determine an appropriate level of penalty for each contravention, as if it were a separate offence, and then to look at the aggregate of those penalties in the light of the overall conduct of the appellant, to form a view as to whether that aggregate was out of proportion to that overall conduct.

59. However, Gray J suggested (at [24]) that the magistrate had gone about the task in a different way:

Having acknowledged the totality principle, she then appears to have applied it at the beginning of the process, by grouping the 22 contraventions into 11 categories of breaches. She did not revisit the application of the principle in relation to the aggregate that she determined in her conclusion. Unlike Buchanan J, but like Graham J, I do not think that the magistrate erred in regarding \$8,000 as an appropriate penalty for each of the categories of contravention. There were 11 categories, but in reality there were 22 contraventions. In turn, those contraventions involved many other contraventions, but each of the 22 was treated as a single breach because the contraventions within it arose out of a course of conduct.

60. While Gray J did not consider that the magistrate had erred in regarding a particular amount “*as an appropriate penalty for each of the categories of contravention*” (at [24]), his Honour found that she had erred in that she did not “*revisit*” the application of the totality principle as a final check to form a view as to whether the aggregate of the penalties determined for each contravention as if it were a single offence was out of proportion to the overall conduct (at [23]).

61. While disagreeing with the penalty imposed, Buchanan J referred with approval to the categorisation of the contraventions by the magistrate in light of the principles in *Pearce* as follows (at [93]):

... the learned magistrate correctly appreciated the need to avoid any form of double punishment for the same conduct. Accordingly, she grouped the 22 established contraventions into categories of breaches and fixed penalties for the categories of breaches rather than individual contraventions, so as to accommodate “some degree of overlap”. Her approach of avoiding double punishment for common matters in overlapping contraventions was in accordance with authority.

62. The remarks of Gray J in *Gibbs* are of relevance in relation to the respondents’ contentions. After finding that each separate obligation imposed (in that case by an award) was a “*term*” for the purposes of the predecessor to s.719(2), his Honour stated at 223:

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.

63. Hence, the extent to which there is overlap between the different provisions in issue can, consistent with the approach in *Pearce*, be addressed in the manner suggested by Gray J in *Gibbs*.
64. Reference was made to *Longmire v Murray Clarke Enterprises Pty Ltd & Anor* [2008] FMCA 1028 in which the applicant had conceded that breaches by the respondent of five separate provisions of an award and two separate provisions of the Act should be treated as falling into two categories. It was in those circumstances, and in light of the views expressed in *Australian Ophthalmic Supplies*, that I considered that the appropriate way to reflect that concession was to impose no penalty in respect of breaches of terms that substantially overlapped or imposed cumulative obligations, consistent with the approach taken in *Gibbs* at 223 per Gray J.
65. The applicant in this case conceded generally that to the extent that two or more contraventions had common elements, this should be taken into account in determining the appropriate penalty in all the circumstances for each contravention, that the respondents should not be penalised more than once for the same conduct and that the penalties imposed should be an appropriate response to what they did (see *Australian Ophthalmic Supplies* at [71]).
66. In particular, the applicant conceded that (notwithstanding that there were contraventions of each of three regulations) only one penalty should be imposed on the first respondent in respect of the separate contraventions of regs.2.19.11(1), (3) and (4) as these provisions contain common elements in that each provision relates to the keeping of records about details of payments to an employee during the period of employment. This concession goes beyond acceptance of the application of reg.2.14.5 to multiple contraventions of a single provision.
67. I accept that there are common elements in the record keeping breaches by the first respondent and am of the view that this should be taken into account in the manner suggested by Gray J in *Gibbs* at 223 (as referred to with approval by Marshall J in *McIver v Healey* at [17]).
68. On this basis I consider it appropriate to take into account the substantial overlap in the obligations in the three regulations in issue by

imposing a penalty for the contravention of reg.2.19.11(1) but no separate penalty in respect of the breaches of regs.2.19.11(3) and 2.19.11(4).

69. The applicant did not concede that there were common elements of the nature considered by Gray J in *Gibbs* in relation to the other provisions in issue.
70. The respondents submitted that the breaches of ss.234 and 246 of the Act fell into one category as those breaches related to the failure to accrue, credit and accumulate leave for Ms Lau. The admitted breach of s.234 related to monthly crediting of accrued annual leave, while the breach of s.246 of the Act related to the failure by the employer to credit to Ms Lau each month with an amount of paid personal/carer's leave to which she was entitled. Neither admitted breach related to payment obligations (cf ss.235 and 245).
71. In contrast to the situation in which a number of provisions relate to a particular kind of entitlement (such as was considered in *McIver v Healey*) the entitlements to accrue annual and personal leave are conceptually distinct and no cumulative obligations arise in relation to such distinct entitlements. Although each contravention arises out of a failure each month to credit the employee with a (different) entitlement to accrued leave, I am not satisfied that this gives rise to a substantial overlap such that only one penalty should be imposed (or no penalty imposed for contravention of one of these provisions).
72. The respondents also contended that the breaches of clauses 4(c) and 33(h)(i) of the NAPSA and s.235 of the Act fell into the same category on the basis that each of these breaches related to payments that the first respondent was required to pay Ms Lau at the time her employment was terminated. I am not persuaded that the common temporal element of the obligations is in itself such as to establish that the provisions overlap substantially so that to penalise the respondents twice would be contrary to the principle enunciated in *Pearce v The Queen*. In particular, I am not persuaded that there is such commonality between the obligation in cl.4(c) of the NAPSA to pay an employee one week's salary in lieu of notice on termination of employment and the obligations in relation to payments in relation to

accrued but untaken annual leave on termination of employment. The breach of cl.4(c) of the NAPSA is a distinct breach.

73. I do, however, accept the submission that there are significant common elements or overlap between s.235 of the Act (which requires payment of accrued annual leave on termination) and cl.33(h)(i) of the NAPSA which requires payment of an annual leave loading on termination. Indeed I note that in *Australian Ophthalmic Supplies*, the magistrate had grouped breaches of two provisions of the award in question which related to annual leave and annual leave loading (see Graham J at [44]).
74. Each provision relates to an entitlement on termination in relation to payment in relation to accrued (but untaken) annual leave. It is the case that the same maximum penalty is available for a breach of each of these provisions, notwithstanding that the amounts in issue would be quite different because the annual leave loading (being calculated at the rate of 17.5 per cent of salary) would always be a lesser amount than the amount to be paid for accrued annual leave. Nonetheless, each of these provisions relates to an obligation to make a payment to an employee on termination in relation to annual leave. The actual amount of the leave loading is calculated by reference to the untaken period of annual leave to which the employee is entitled. In that sense these provisions impose cumulative obligations arising in relation to an entitlement to payment in respect of annual leave on termination. I consider that while the extent of the overlap is not such that no penalty should be imposed in respect of breach of one of these provisions, it is appropriate that a relatively nominal penalty be imposed in respect of the breach by each respondent of the annual leave loading provision in cl.33(h)(i) of the NAPSA having regard to the penalty to be imposed in relation to the breach by each respondent of s.235 of the Act.

Factors relevant to penalty

75. As submitted by the applicant, the issues of whether there has been a course of conduct and whether there are common elements in the provisions contravened are distinct from, and in addition to, the application of the “*totality principle*” after an appropriate penalty for each contravention has been determined. It is at that point that the court is to take a final look at the aggregate penalty to determine

whether it is an appropriate response to the conduct which led to the breaches (see *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 and *Australian Ophthalmic Supplies* and *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383; [2008] FCAFC 70 at [41] – [46]).

76. Hence it is necessary to determine an appropriate penalty in respect of each course of conduct or contravention having regard to all of the circumstances of the case before considering the application of the totality principle to the aggregate penalty. The factors relevant to the imposition of penalties under the Act have been considered in a number of cases. In *Mason v Harrington Corporation Pty Limited* [2007] FMCA 7 Mowbray FM referred to a “non-exhaustive” range of considerations. This list was adopted by Tracey J in *Kelly v Fitzpatrick*. Such a list does not prescribe or restrict the matters which may be taken into account in the exercise of the court’s discretion (see *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11] and *Australian Ophthalmic Supplies* at [91] per Buchanan J).
77. The parties addressed the factors identified in *Mason v Harrington*. I note that while it may also be relevant to have regard to matters such as character, antecedents, age, means and physical and mental condition in relation to an individual respondent, there was little evidence in that regard before the court in relation to the second respondent.

The nature and extent of the conduct

78. The conduct in this case involved a misrepresentation as to the nature of the contract under which Ms Lau was engaged as a real estate salesperson, a failure to pay her any amount representing wages and entitlements (other than one payment in respect of commission) for approximately a six month period and a failure by the first respondent to keep necessary records. It also involved a failure to pay Ms Lau entitlements on termination of her employment. It would appear that the first respondent gained the benefit of a percentage of the commission earned by Ms Lau as well as her services in promotional activities, such as conducting open house inspections, making cold calls and delivery of promotional materials and the use of her own vehicle for the performance of those activities at no cost to the

respondents. Ms Lau's evidence is that she otherwise did some work at the office regularly.

79. The respondents contended that the breaches were isolated. While there is no evidence before the court to suggest that either of the respondents engaged in such conduct in relation to any one else, including the other people employed by the first respondent, the breaches in relation to Ms Lau's entitlements which fell due during the time that she worked for the first respondent were ongoing during her employment.
80. It is the case that the breaches arose in essence from the fact that the respondents mistakenly and recklessly treated and remunerated Ms Lau as an independent contractor when she was not the holder of a real estate licence under the PSBA Act. In that sense the breaches of s.900 and s.182 of the Act were of most significance. However it cannot be said that the mistake by the respondents was simply that they used information provided to them by the REEF on the CD-ROM without researching all the information contained therein when it came to engaging a person on an independent contractor agreement and that this ameliorated the nature of their conduct, given that the agreement used in relation to Ms Lau differed significantly from the pro forma document provided on the CD-ROM.
81. Nonetheless, the evidence before the court (and I note in this respect that the second respondent was not required for cross-examination), is not such that it can be inferred that the conduct of the respondents was deliberate, intentional or wilful.

The circumstances in which the conduct took place

82. As the applicant contended, the breaches took place in circumstances where Ms Lau was a new entrant to the Australian workforce, having recently moved to Australia from Singapore. She had previously lived in Australia, but she had not previously worked here. Nor had she had any experience in the Australian real estate industry. On this basis the applicant submitted that Ms Lau could be classified as a vulnerable worker.

83. Except insofar as Ms Lau had not previously been in employment in Australia, I am not persuaded on the evidence before the court that she should be classified as a worker of particular vulnerability. It has not been established that the first respondent, through the second respondent, took advantage of her “*vulnerability*” to its benefit as the applicant contended. The evidence before the court is that Ms Lau had lived in Australia from 1993 to 2002 and that she then worked in Singapore as a real estate agent, sales agent and property manager from 2003 to 2006, and completed a three week course in property practice thereafter.
84. Mr Sugiharto and Ms Lau gave accounts of the conversations preceding Ms Lau’s engagement that differed in some respects. In circumstances where neither of the deponents were cross-examined it is difficult to reconcile conflicts in their affidavit evidence. What is clear on both accounts is that the discussion between Mr Sugiharto and Ms Lau about her possible employment proceeded on the basis that she was experienced in real estate sales (in Singapore) and that if she were to be engaged it would be as an independent contractor on a commission basis.
85. Mr Sugiharto was the sole director and licensee in charge of the business before and during Ms Lau’s employment. As licensee in charge of the business he had obligations under the PSBA Act. The first and second respondents also had access to the information provided by REEF, which included clarification that a commission only structure could only be used in relation to the employment of a salesperson who possessed a real estate agents licence under the PSBA Act. It was the responsibility of the respondents (not Ms Lau) to ensure that she was engaged on the correct basis.
86. However Mr Sugiharto’s unchallenged evidence is that at the time that Land Choice and Ms Lau entered into the independent contractor agreement he was unaware that this was not allowed and had understood that if a person was registered as a real estate agent they could be a contractor. His evidence is that he only became aware that a person must be licensed to be an independent contractor when these proceedings were commenced. I accept Mr Sugiharto’s unchallenged

affidavit evidence in this respect. However he also admitted his recklessness in relation to the nature of the contract.

Nature and extent of any loss or damage

87. The detriment caused to Ms Lau as a result of the breaches was that she was underpaid \$20,119.07 in 2007. At the time of the hearing this had not been remedied, except for a payment of \$5,000 received by Ms Lau from the first respondent in October 2009. The respondents have now accepted that the underpayment occurred and have accepted responsibility for the error. The first respondent has been ordered to pay the outstanding balance and interest thereon.
88. At the time Ms Lau was employed she was a single mother with two children. There is no evidence before the court as to whether Ms Lau had any other source of income (apart from payments from her former husband). In any event, the failure to receive such an amount cannot have had an insignificant impact on her.

Similar previous conduct

89. There is no evidence, nor any suggestion, that either of the respondents have previously been found by a court to have engaged in similar conduct.

Whether breaches arose out of the one course of conduct

90. In a broad sense the breaches arose out of one course of conduct in that they all related to Ms Lau's employment. The breaches followed on from her initial engagement and subsequent remuneration on the basis that she was an independent contractor rather than an employee. However while the respondents are entitled to the benefit of s.719(2) of the Act in respect of multiple breaches of each term, as discussed above, this relates only to multiple breaches of the same term and not to breaches of different sections of the Act, provisions of the NAPSA and Regulations.
91. The applicant accepted that only one penalty should be imposed in relation to the breaches of the record keeping provisions of the

Regulations by the first respondent and, as discussed above, I am of the view that where there is substantial overlap in contraventions, this should be reflected in the penalties imposed.

Size of the business enterprise

92. Mr Sugiharto's evidence is that Land Choice is a small company that currently employs six people in the Kingsford area of Sydney and that at the relevant time it was of a similar size. He suggested that any substantial penalty against Land Choice may involve it being wound up so that five employees would lose their jobs. However to the extent that Mr Sugiharto relied on the size of Land Choice as justification for the failure to pay Ms Lau her minimum entitlements, as Tracey J stated in *Kelly v Fitzpatrick* at [28], and as was referred to with approval in *Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor* [2009] FMCA 38 at [26]:

No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction "must be imposed at a meaningful level": see Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd [2001] ATPR 41-815 at [13].

93. Further, in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [27] Driver FM stated:

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

Deliberateness of the breaches

94. The applicant submitted that the breaches by the first respondent were deliberate, in the sense that they were put in place with an intention to avoid paying wages and entitlements to Ms Lau. Mr Sugiharto deposed in his affidavit that the breaches were not deliberate, as he was

not aware that Ms Lau was entitled to wages, annual leave, notice and other entitlements. As indicated, he was not required for cross-examination. It was not disputed that Land Choice and Mr Sugiharto were reckless (at least in relation to whether the contract on which Ms Lau was employed was a contract of employment rather than a contract for services). Land Choice's engagement of Ms Lau as a contractor deprived her of her rights to employment protections and demonstrated a disregard for its obligations under the law. The evidence does point to Mr Sugiharto being aware of the difference between an independent contractor and an employee, but it has not been established that the breaches arose out of wilfulness on the part of the respondents or that the respondents deliberately disregarded obligations which were known to be applicable in relation to the employment of Ms Lau given that she was not the holder of a real estate licence.

Involvement of senior management

95. Senior management was involved in the contravention. Mr Sugiharto admitted that at all times during Ms Lau's employment he was the sole director of the first respondent and responsible for its day-to-day management, including the hiring of staff, the negotiation of pay rates and conditions with staff, ensuring compliance with Commonwealth workplace relations obligations and the licensee in charge of the business. It was not suggested that any other person was involved in the contraventions.

Contrition, corrective action, cooperation with authorities

96. The applicant accepted that the second respondent had expressed contrition in his affidavit of 6 October 2009 and that one payment of \$5,000 was made to Ms Lau by cheque dated 6 October 2009. The respondents have accepted responsibility for what they see as a "*mistake*" and Mr Sugiharto has apologised to Ms Lau. Mr Sugiharto deposed that Land Choice was unable to pay more than this at that time but that it was "*endeavouring to pay Ms Lau more funds as soon as funds become available*". This is a very generally expressed and not entirely satisfactory demonstration of contrition in relation to an

admitted outstanding liability. It is only limited corrective action. In that respect I note that there is no evidence about the bases on which other persons were engaged as salespersons. There is, as the applicant submitted, insufficient evidence before the court in respect of the claimed incapacity to meet Ms Lau's entitlements (plus interest) which have remained outstanding for a period of over two years.

97. In assessing the respondents' cooperation with authorities it is necessary to have regard to the circumstances of the investigation and attempts to secure compliance. The applicant first wrote to the second respondent, as director of the first respondent, informing him of Ms Lau's claim on 16 October 2007, that is, over two years ago. On 15 April 2008 a breach notice was sent by facsimile to Mr Sugiharto recording the finding by the applicant that Ms Lau had been engaged as an employee by the first respondent, stating what action the first respondent could take to rectify the breaches and the consequences if the breaches were not rectified. No response was received to this notice. On 28 April 2008 a final notice was sent by facsimile to the second respondent stating that if the breaches were not rectified within seven days the matter would be recommended for legal action to recover outstanding amounts due to Ms Lau.
98. On 2 May 2008 the legal representatives for the respondents contacted the applicant and advised that they wished to make submissions on the issue of Ms Lau's employment status and on 9 May 2008 they sent an email to the applicant disputing the findings in the breach notice. On 26 May 2008 the applicant invited the second respondent to participate in a recorded interview, an invitation which the second respondent declined through his representatives on 29 May 2008. On 12 June 2008 the applicant issued a notice to produce to the second respondent. Documents were provided in response on 25 June 2008. On 19 January 2009 the applicant advised the respondents' representatives that the matter was being considered for litigation.
99. Prior to the commencement of these proceedings the applicant did not receive any payment from the first respondent in respect of outstanding entitlements owed to Ms Lau. Nor did Ms Lau. The only payment to Ms Lau in relation to these entitlements was the payment of \$5,000 on 6 October 2009. The hearing was on 10 November 2009. The first

respondent sought time to pay Ms Lau, based on a profit and loss statement for 2007 – 2008 and a bank account statement for one month, discussed further below.

100. The applicant accepted that the respondents were cooperative in respect of the investigation and that part of the delay in progressing the matter appeared to reflect a change in the person conducting the investigation. It is the case that during this time the respondents could, if they wished, have remedied the situation in respect of Ms Lau. However they did not accept the breaches until 2009. A demonstration of contrition by way of partial repayment did not occur until the \$5,000 payment in October 2009.
101. The applicant submitted in that it was relevant that Mr Sugiharto had not on his own account attempted to make good any underpayment, which it was suggested he could have done notwithstanding that it was the first respondent's responsibility. However on the evidence before the court I do not consider this to be a factor of more than minor significance in relation to Mr Sugiharto, given that the obligation to pay Ms Lau was on the first respondent.
102. As accepted by the applicant, the fact that an agreement was reached and an agreed statement of facts prepared saved time and money. For the most part (except in relation to s.900, the breach of which was only agreed in recent times) once the proceedings were commenced there was an agreement and acknowledgement of breach by the respondents.

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

103. As the applicant submitted, one of the principle objects of the Act is the maintenance of an effective safety net and effective enforcement mechanisms. This is reflected in the magnitude of the maximum penalties available.

Specific and general deterrence

104. The applicant submitted that specific deterrence was a factor to be considered in relation to both respondents on the basis that the first respondent remained an employer in the real estate industry and the second respondent was currently a director of a company, so that it was possible that he was or would in the future be the director of a company that employed people. I accept that this is so, but also bear in mind that it has not been established that there was a wilful or deliberate breach of the Act, Regulations or NAPSA by either respondent or that there were any contraventions of this nature in relation to the engagement of other salespersons.
105. In relation to general deterrence it is relevant to have regard to the comments of Lander J in *Ponzio v B & P Caelli Constructions Pty Ltd and Others* (2007) 158 FCR 543; [2007] FCAFC 65 at [93]:

In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: Yardley v Betts (1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: R v Thompson (1975) 11 SASR 217.

106. It was submitted that the real estate industry in New South Wales was an industry in which individuals were often paid on a commission basis, although there is no evidence before the court in this regard other than the evidence of the documentation provided by REEF. Nonetheless I accept that a message should be sent to the community, and to the real estate industry in general, that employees should be correctly identified and appropriately remunerated and should not be paid on a commission only basis if not licensed. The applicant submitted that it was also necessary to ensure that licensees in charge in the real estate industry who have obligations under the PSBA Act, such as the second respondent, understand and abide by those

obligations, including payment of proper entitlements to unlicensed employees working under their supervision. Although these proceedings were not in relation to any statutory obligations under that Act I accept that there is a need for general deterrence in relation to the obligations that are in issue in these proceedings

107. In this case, as Finkelstein J stated in *Community and Public Sector Union v Telstra Corporation Limited* (2001) 108 IR 228; [2001] FCA 1364 (at [9]):

... even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and to act as a warning to others not to engage in similar conduct: R v Thompson (1975) 11 SASR 217.

108. The imposition of penalties does act as a warning to other employers and reinforces the seriousness with which the courts treat the underpayment of employee entitlements. Both small and large businesses have an obligation to meet these requirements. If not, it will normally be necessary to “mark the failure by imposing an appropriate monetary sanction” at a “meaningful level” (see *Kelly v Fitzpatrick* at [28]).

Attributes of the second respondent

109. While it can be relevant to have regard to matters such as the character, antecedents, age, means and condition of an individual respondent in determining penalty, the only evidence in that respect is that Mr Sugiharto states in his affidavit of 6 October 2009 that he would find it difficult to pay any penalty on the basis that the real estate industry has been “slow” in the Kingsford area for at least six months and that this has affected his earning capacity. The same claim is made in relation to Land Choice. As the applicant noted, there is no other evidence to support this assertion in relation to the second respondent. In the absence of acceptable evidence, the court cannot find that either respondent’s finances are as dire as was implied (*Dennington v Pee Cee Pty Ltd* [2008] FMCA 79 at [43]). However the issue of time to pay Ms Lau and the penalties is discussed below.

Determination

110. I find that the first respondent breached each of the provisions as set out above and that the second respondent was involved in each contravention (except of the Regulations).
111. Consistent with the approach taken by Goldberg J in *Australian Competition and Consumer Commission v Australian Safeway Store Pty Ltd* (1997) 145 ALR 36 at 53 (approved in *Australian Ophthalmic Supplies* per Gray J at [23] and per Buchanan J (at [97])) it is appropriate first to calculate an appropriate level of penalty for each respondent in relation to each of the breaches having regard to the above factors. The totality principle should then be applied as a final check at the end of the process by considering the aggregate of the penalties in relation to each respondent in light of the overall conduct to form a view as to whether that aggregate is out of proportion to the overall conduct (see *Australian Ophthalmic Supplies* at [23] and [96]).
112. As discussed above, I consider it appropriate that the applicant's concession in relation to the first respondent's breaches of the record keeping requirements of the Regulations should be recognised by imposition of a penalty for breach of reg.2.19.11(1) but not for the breaches of regs.2.19.11(3) and (4). Further, the significant overlap and common elements in the obligations in relation to annual leave termination payments should be recognised by the imposition of nominal penalties in respect of one of the overlapping obligations.
113. The applicant submitted that penalties in the mid to high range should be imposed. In particular it was submitted that this was not a case in which a nominal penalty only should be imposed as the conduct in question meant that a vulnerable employee was left without any payment of wages for six months and the conduct of the respondents should be considered serious.
114. The respondents submitted that on all the evidence penalties in the low range should be imposed, in particular on the basis that the offences arose out of a mistake and that there was no evidence of deliberateness or prior breaches. It was submitted that there should be a 25 or 30 per cent discount for contrition and the acceptance of liability.

115. I have had regard to the evidence before me, all the above considerations and the submissions of the parties. In my view the most significant and central of the breaches by the first respondent are the reckless breach of s.900 of the Act in relation to the nature of the contract under which Ms Lau performed work for it in circumstances where Land Choice had the ability and the opportunity to seek clarification and advice from the Real Estate Employers Federation and also the breach of s.182 of the Act to pay ordinary wages to Ms Lau at the applicable rate throughout her employment. In a broad sense the other breaches followed on from the initial treatment of Ms Lau as an independent contractor and the failure to pay her ordinary wages and this should be reflected in the penalties. I bear in mind that there were repeated breaches of the first respondent's obligations under s.182 over a period of six months. The breaches cannot be considered trivial or technical (cf *Victoria University of Technology v Australian Education Union* (1999) 91 IR 96; [1999] FCA 1065).
116. In setting appropriate penalties I have also had regard to the fact that the breaches represented a significant failure to provide basic and important wage and condition entitlements to an employee who had not previously worked in Australia in the real estate industry. This continued for six months and involved, at the least, a reckless disregard for the respondents' obligations. It took some time to be acknowledged and was not remedied before the hearing (beyond a \$5,000 payment).
117. The penalty should reflect the need for some specific deterrence and more particularly for general deterrence, reinforcing the seriousness with which the courts treat the non-payment of basic employee entitlements.
118. The amount of the penalty should, however, be mitigated by the contrition shown and the cooperation of the respondents since commencement of these proceedings. I have had regard to the fact that partial rectification of the underpayments occurred prior to the hearing. The respondents admitted liability. The applicant was spared the expense of preparation for a trial on liability and the penalty hearing proceeded on the basis of an agreed statement of facts. I have also borne in mind that the breaches all flowed in essence from an underlying reckless mistake as to whether Ms Lau could be and was

engaged as an independent contractor and that there is no evidence of any similar previous conduct.

119. In relation to the second respondent there is no proper evidence as to his financial position. The evidence in relation to the first respondent is limited (as discussed below).
120. On all the evidence, and in light of the matters discussed above, I consider that a reduction should be allowed in relation to each penalty in recognition of the respondents' admission of liability, acceptance of wrongdoing and contrition and the fact that the respondents facilitated the course of justice, albeit not initially (see *Australian Ophthalmic Supplies* and *Mornington Inn* at [72] – [77]). However, as the applicant submitted, the reduction should not be as great as that sought by the respondents, given the failure to pay Ms Lau her entitlements before the hearing.
121. In all the circumstances I consider that allowing for a discount in the order of 20%, a penalty of \$8,000 should be imposed on the first respondent in respect of the breach of s.900 of the Act and a penalty of \$1,600 on the second respondent (reflecting the different maximum penalties available). Similarly a penalty of \$8,000 should be imposed in respect of the breach of s.182. Penalties of \$1,600 should be imposed on the first respondent for the breaches of each of ss.234, 235 and 246 of the Act, cl.4(c) of the Award/NAPSA and cl.31(b)(ii) of the Award/NAPSA. Penalties of \$320 should be imposed on the second respondent for each of these breaches. However a nominal penalty of \$200 should be imposed on the first respondent (and a similarly nominal penalty of \$40 on the second respondent) for the breach of cl.33(h)(i) of the Award/NAPSA in recognition of the substantial overlap and common elements with the obligation in s.235 of the Act. Having regard to the maximum penalty for breach of the Regulations, the penalty to be imposed on the first respondent for breach of the Regulations should be \$400.
122. On this basis the total penalty in relation to the first respondent should be \$24,600 (\$4,840 for the second respondent).

The totality principle

123. As a final check I have had regard to the totality principle and considered whether aggregate penalties of \$24,600 for the first respondent and \$4,840 for the second respondent are just and appropriate and not excessive (see *Australian Ophthalmic Supplies* at [102] per Buchanan J) for the total conduct involved (see *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70). Proceeding by “instinctive synthesis” (see *Australian Ophthalmic Supplies* at [27] per Gray J and *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [37]) and having regard to the overall conduct in question, I consider that the aggregate penalties of \$24,600 and \$4,840 in relation to the first and second respondents respectively are not in all the circumstances excessive and not out of proportion to the overall conduct of each respondent (see *Australian Ophthalmic Supplies* at [23] per Gray J). They are just and appropriate (per Graham J at [73]) and in my view such aggregate penalties are an appropriate response to the conduct of each respondent.

Whether time should be allowed to pay Ms Lau or the penalties

124. Mr Sugiharto claimed that the respondents would find any penalty difficult to pay on the basis that the real estate market in the area had been “slow” for at least six months, thus affecting his earning capacity and that of the first respondent. However in *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503 Keely J stated at 508:

In this connection it is important that the respondent -- and other employers bound by the award or by other awards under the Act - - understand the importance of complying with an award and it follows that any decision taken by them which is regarded as affecting their obligations to comply with particular provisions of an award or the award generally should only be taken after careful consideration. They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed.

125. Indeed in *Printing and Kindred Industries Union and Others v Vista Paper Products Pty Ltd and Another* (1994) 127 ALR 673, while there

was evidence suggesting that both a company and an individual may have difficulties in paying penalties, Wilcox J stated (at 688) that:

I do not think I should allow it to deflect me from imposing whatever penalties are otherwise appropriate.


(Also see *Cotis v Macpherson* (2007) 169 IR 30; [2007] FMCA 2060 at [12]).

126. While Mr Sugiharto also deposed on 6 October 2009 that the first respondent was unable to pay Ms Lau her entitlements at that time, the evidence in relation to the financial situation of the respondents is limited. Tendered in evidence were copies of a profit and loss statement for Land Choice for the year ending 30 June 2008 which showed a total income of \$598,320. No such evidence was provided in relation to the 2008/2009 financial year. I note that the profit and loss statement does show a significant increase in income from the previous year. Further, while expenses of \$571,467.37 were listed for 2007 – 2008, without further evidence it is not possible to determine the first respondent’s current financial position from this document. Also tendered was a copy of a bank account statement in the name of Land Choice Pty Ltd for October 2009. However there is no evidence before the court as to the precise nature and purpose of this particular bank account, which refers to Land Choice Pty Ltd trading as “Bless Real Estate”, or to identify the nature of the transactions such that it might give an indication as to the present financial position of the first respondent.
127. There is also evidence before the court from the applicant in the supplementary affidavit of Anthony Willoughby as to sales of properties by the first respondent “recently”, although it is apparent that some of this information goes back to March 2009.
128. The respondents’ submissions in relation to their financial situation are relevant to the issue of whether time should be allowed for payment of penalties and the time for the first respondent to pay Ms Lau her entitlements. Given that Ms Lau was deprived of her financial entitlements for over two years and the amount involved I was not satisfied on the limited evidence before the court that the first respondent was unable to pay her entitlements or that orders should be

made for payment to her by instalments or over a lengthy period of time.

129. While I accept that a respondent's difficulty in paying a penalty (even if established) should not prevent a court from imposing penalties that are otherwise appropriate, in this case I consider that it is appropriate to allow the first respondent some time to pay the penalties to be imposed, notwithstanding the limited information before the court. Counsel for the applicant opposed any delay in the time for payment to Ms Lau, but made no submission about the possible deferral of the obligation on the first respondent to pay penalties for up to a maximum of one year. No such concession was made in relation to the second respondent. There is no specific evidence in relation to his situation (beyond the assertion about his earning capacity based on sales of real estate).
130. On the evidence before the court I propose to allow the first respondent 12 months to pay the penalties imposed and the second respondent six months. The penalties imposed on the first respondent should be paid to the Commonwealth within 12 months, as discussed above. The penalties imposed on the second respondent should be paid within six months.

I certify that the preceding one hundred thirty (130) paragraphs are a true copy of the reasons for judgment of Barnes FM

Associate: 

Date: 17 December 2009