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## Case Alert

### **Workplace Relations Update** **Penalty Proceedings for Unpaid Wages**

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As was the case under the late *Workplace Relations Act* 1996 (Cth), the new *Work Choices Act* 2005 (Cth) continues to enable the Commonwealth to initiate proceedings to impose a penalty on employers whom fail to heed to statutory minimum wage requirements and obtain the recovery of such amounts of underpayment. The body which currently holds such powers of enforcement, is the Office of Workplace Services (OWS).

OWS' powers are extensive, and include the investigative capability to enter premises, obtain documents and interview persons. Such investigations may only result in an OWS workplace inspector issuing a notice requiring rectification of alleged contraventions, or an infringement notice requesting a payment of penalty. However, an inspector can choose to prosecute the offender by issuing penalty proceedings, where it is believed there is "a deliberate and knowing contravention and/or deliberate obstruction of a workplace inspector"<sup>1</sup>.

The following recent decisions serve to shed light on just some of the considerations which courts take into account when determining the amount of the penalty imposed for a breach of statutory minimum wage requirements.

#### [Mason v Harrington Corporation Pty Limited \[2007\] FMCA 7 \(16 January 2007\)](#)

In recently determining the appropriate penalty for a Canberra restaurant's failure to meet its minimum wage obligations to its employees, Federal Magistrate Mowbray found in January 2007, that an employer's level of contrition to be of considerable importance. As such, the defendant had failed to rectify its underpayments as soon as becoming aware of its obligations, rather only offering to pay such monies once OWS proceedings had begun. Other considerations included the fact that maximum thresholds for monetary penalties have significantly increased regarding minimum wage infringements under the WR Act. Also, the totality principle was applied, whereby multiple contraventions which take place under a single umbrella of conduct are eligible for reduction into single breaches, so to avoid compounded penalties for actions which may amount to the same head of conduct. In this instance, twelve separate breaches were reduced to seven, amounting to a "just and appropriate" penalty finding of \$64,000.00. Finally, the penalty imposed was afforded reduction given that the offending employer had admitted the breaches prior to hearing.

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<sup>1</sup> Speech presented by Nick Wilson, NSW Industrial Relations Society Seminar, Sydney, 11 October 2006.



***Flattery v The Italian Eatery t/as Zeffirelli's Pizza Restaurant [2007] FMCA 9 (2 February 2007)***

In a subsequent decision in February 2007, Mowbray FM confirmed his considerations given earlier, when determining an appropriate penalty for infringing minimum wage obligations. However, additionally, regard was given to whether the employer was deliberate or careless in effecting such contraventions. A total of eight breaches were found to incur a total penalty of \$50,000.00.

***Cotis v Pow Juice Pty Ltd [2007] FMCA 140 (15 February 2007)***

In mid February this year, Federal Magistrate Lloyd-Jones advised of further considerations when determining the relevant penalty for contravention of minimum wage provisions. These included the circumstances in which the conduct took place, as well as the potential vulnerability which the young casual employees were susceptible to in their employment. Of note, and in the interests of the employer's defence, was recognition of the respondent's poor financial position to pay such penalties. A total of six breaches were found to incur a total penalty of \$45,500.00.

***Zeljko Kavacevic v Kevin Kingsley (t/as Wood & Things) (Unreported, Magistrates' Court of Victoria, 15 March 2006)***

In March 2007 in a matter in which the respondent, sole-trading employer Mr Kingsley, was represented by Anderson Rice, AJ Chambers found the following considerations relevant in determining the appropriate penalty for employers whom breach their minimum statutory wage obligations:

- The employee Mr Fry was not in a strong bargaining position to negotiate his pay or assert his rights, given he was a young first-year apprentice cabinet maker;
- Despite Mr Kingsley agreeing to a court order for reimbursement of the alleged total underpayments, he resultantly failed to pay this amount within the 30 days granted;
- Through attempts made by OWS, Mr Kingsley repeatedly failed to voluntarily rectify or make good the underpayment to Mr Fry;
- Mr Kingsley's non-payment of wages at all to his employee would have significantly impacted on Mr Fry; and
- Despite under the totality principle, the Defendant submitted that the four separate breaches arose out of a single course of conduct and hence amounted to a single breach. However, her Honour found that such breaches failed to 'substantially overlap'.

However, Anderson Rice successfully established the following mitigating factors for its client Mr Kingsley, which significantly reduced the penalty imposed. Her honour favourably considered the following factors in imposing such lesser penalty:

- Mr Kingsley appeared in court and admitted the alleged breaches;
- Mr Kingsley had no previous record of engaging in such contravening conduct;



- The size and financial viability of Mr Kingsley's business were taken into account, including his recent poor financial circumstances;
- The court took account of the significant increase in maximum penalty rates under s.178 of the WR Act since August 2004, from \$1,000.00 to \$6,000.00 for individual offenders;
- In terms of deterrence, the likelihood of Mr Kingsley repeat-offending was limited, given the closure of his business and pursuance of employment elsewhere.

Given that the potential applicable maximum penalty for four distinct breaches of the relevant *Furnishing Industry National Award 2004* was \$26,400.00, the aggregate penalty of \$5,280.00 imposed on Mr Kingsley, was an excellent outcome.

## Conclusion

In a media release placed on its website on 20 March 2007, OWS Director Nicholas Wilson argued that such decisions serve to highlight the importance that employers are made aware of their workplace obligations, and that unless infringements are remedied immediately, such businesses run the risk of being audited and facing court proceedings. It seems that in the wake of a deregulated *Work Choices* era for wage-setting and enforcement, the new OWS is set to continue to investigate and litigate matters where employers continue to contravene their statutory minimum wage obligations owed. This is particularly so of audits currently being undertaken within the hospitality, retail and tourism industries.

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