WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00875
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	WEDNESDAY, 9 SEPTEMBER 2020
DELIVERED	**:**	THURSDAY, 29 OCTOBER 2020
FILE NO.	**:**	M 166 OF 2018
BETWEEN	**:**	RAYMOND MOATE **CLAIMANT** AND I.P.C. PTY LTD (ACN 061 746 996) **RESPONDENT**

CatchWords	**:**	INDUSTRIAL LAW – FAIR WORK – Assessment of pecuniary penalties for contraventions of *Fair Work Act 2009* (Cth)
Legislation	**:**	*Fair Work Act 2009* (Cth) *Taxation Administration Act* (Cth) *Industrial Relations Act 1979* (WA) *Magistrates Court (Civil Proceedings) Act 2004* (WA) *Crimes Act 1914* (Cth)
Instrument	**:**	*Manufacturing and Associated Industries and Occupations Award 2020* (Cth)
Case(s) referred to in reasons	**:**	***Moate v I.P.C. Pty Ltd*** [2020] WAIRC 00406 ***Fair Work Ombudsman v Priority Matters Pty Ltd (No 5)*** [2020] FCCA 901 ***WorkPac Pty Ltd v Skene*** [2018] FCAFC 131 ***Sayed v Construction, Forestry, Mining and Energy Union*** [2016] FCAFC 4 ***Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate*** [2015] HCA 46; 258 CLR 482 ***Miller v Minister of Pensions*** [1947] 2 All ER 372 ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336 ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27 ***Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)*** [2017] FCA 557

		Kelly v Fitzpatrick [2007] FCA 1080; 166 IR 14 ***Mason v Harrington Corporation Pty Ltd*** [2007] FMCA 7 ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8 ***Rocky Holdings Pty Ltd v Fair Work Ombudsman*** [2014] FCAFC 62 ***Fair Work Ombudsman v South Jin Pty Ltd (No 2)*** [2016] FCA 832 ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8; 165 FCR 560; 246 ALR 35 ***Milardovic v Vemco Services Pty Ltd (No 2)*** [2016] FCA 244
Result	**:**	Pecuniary penalty to be paid

Representation:

Claimant	**:**	Mr D. Scaife (of counsel) from Eureka Lawyers
Respondent	**:**	Mr J. Raftos (of counsel) from Moray & Agnew Lawyers

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SUPPLEMENTARY REASONS FOR DECISION (PENALTY)

1 On 2 July 2020, IPC Pty Ltd (the Respondent) was found to have contravened the following civil remedy provisions of the *Fair Work Act 2009* (Cth) (FWA):

- Section 44 of the FWA – Contraventions of the National Employment Standards (NES)
  - accrual of annual leave – s 87(2) of the FWA.
  - payment of untaken accrued annual leave upon termination of employment – s 90(2) of the FWA.
  - personal leave – s 96(2) of the FWA.
  - payment on public holidays – s 116 of the FWA.
  - supply of the Fair Work Information Statement – s 125 of the FWA.
- Section 45 of the FWA – Contraventions of the *Manufacturing and Associated Industries and Occupations Award 2020* (Award)
  - access to copies of the Award – cl 5 of the Award.
  - contributions to a superannuation fund – cl 35.2 of the Award.
  - payment of overtime – cl 40.1 of the Award.
  - payment of leave loading – cl 42.5 of the Award.
- Section 323 of the FWA – Contravention of Payment in Full
  - accrued long service leave (State).
- Section 535 of the FWA – Employee Records
  - failed to make and keep employee records.
- Section 536 of the FWA – Pay Slips
  - failed to provide pay slips.

2 In ***Moate v I.P.C. Pty Ltd (ACN 061 746 996)*** [2020] WAIRC 00406, the Industrial Magistrates Court of Western Australia (IMC), constituted by a different Industrial Magistrate (IM), provided its reasons for decision in respect of the contraventions (Liability Decision).

3 These supplementary reasons are in relation to an application by Mr Raymond Moate (the Claimant) for a pecuniary penalty pursuant to s 546(1) of the FWA and to determine (if necessary) the quantum of the claim.

4 The parties each provided an outline of written submissions on the payment of a pecuniary penalty.

5 Schedule I of these supplementary reasons outline the jurisdiction, standard of proof and practice and procedure of the IMC in determining this case.

6 Schedule II of these supplementary reasons outline the provisions of the FWA and principles relevant in determining an appropriate pecuniary penalty (if any) for the Respondent's contraventions.

Quantum And Interest

7 The Liability Decision found the following amounts are owed to the Claimant:

	Amount owed ($)
Overtime	7,878
Annual leave	22,961.12
Annual leave loading	4,018.20
Public holidays	11,700
Long service leave (State)	20,550.40
Total	**$67,107.72**

8 Interest on the relevant amounts owed are calculated as follows:[1]

Period	**Rate**	**Daily Rate**	**Days**	**Total**
18 July 2018 – 30 June 2019	5.5%	$10.11	347	$3,508.17
1 July 2019 – 31 December 2019	5.25%	$9.65	183	$1,765.95
1 January 2020 – 30 June 2020	4.75%	$8.73	181	$1,580.13
1 July 2020 – 29 October 2020	4.25%	$7.81	103	$804.43
Total				**$7,658.68**

9 Before turning to penalty, I note recent comments by Driver J in ***Fair Work Ombudsman v Priority Matters Pty Ltd (No 5)*** [2020] FCCA 901 (***Priority Matters***) at [6]:

> *… after such long running litigation is that the parties put forward completely different narratives said to bear upon the penalty issues for the Court to decide, to the extent … of speaking, in effect, different languages.*

10 These comments are apposite in this case, where one of the few points of agreement was the use of percentages as a guide to determine penalty, but even that resulted in vastly different suggested amounts for contraventions. For my part, the over-emphasis of the percentage value of a penalty

did nothing more than detract from the application of the principles relevant to the imposition of civil penalties.

11 Unlike in criminal sentencing, parties in FWA matters may suggest actual amounts in respect of civil penalties. One of the disadvantages of this is that it invites wildly disparate views, which hinders, rather than helps, in the imposition of a penalty.

12 I am, however, reminded that the court has a broad discretion to assess the appropriate penalty and, amongst other things, '*consider the overall penalties arrived at, including by reference to those which may be proposed by the FWO and what is proposed by the respondents, and apply the totality principle, to ensure that the penalties for each respondent are appropriate and proportionate to the conduct viewed as a whole, making such adjustments as are necessary*'.[2]

The Claimant's Submissions On Penalty

13 In summary, the Claimant submits:

- while resolution of the Claimant's claim required resolution of the principles in ***WorkPac Pty Ltd v Skene*** [2018] FCAFC 131 (***Skene***), the Respondent's conduct substantially differed from the conduct considered in ***Skene***;
- this is not a case where the parties mistakenly thought they were in a casual employment; the Respondent engaged the Claimant as a sham contractor from September 2012 to June 2015;
- the Respondent deliberately misrepresented to the Claimant he was a sham contractor when he was an employee; the February 2013 Waiver Document was a deliberate misrepresentation *prima facie* contravening s 357(1) of the FWA;
- the Respondent applied illegitimate pressure to the Claimant to sign the July 2015 Waiver Document; the circumstances surrounding the Claimant's signing of the July 2015 Waiver Document is *prima facie* a contravention of s 340, s 343 and s 344 of the FWA;
- the IMC can infer the Respondent knew, or at least suspected, that it was a sham contracting arrangement prior to 1 July 2015;
- he was an entirely passive party in his relationship with the Respondent and he relied upon the Respondent's advice; and
- the Respondent's conduct can be characterised as:
    - not the worst case imaginable, but is a gross failure to comply with the FWA; and
    - deliberate or at the very least recklessly indifferent to the true nature of the relationship.

14 The Respondent is a 'substantial business'.

15 The Claimant was a long serving and loyal employee, and the Respondent took advantage of the Claimant's passivity to induce him to sign documents that misrepresented the character, and underlying facts, of his relationship with the Respondent. The contraventions are many and varied, and do not solely arise out of the mischaracterisation of the employment relationship.

16 The Claimant was an unskilled older worker and is unlikely to work again.

17 Therefore, the need for general deterrence is great.

18 A substantial personal deterrent penalty is also called for as the Respondent expressed no contrition and failed to make payment of monies due at the cessation of the Claimant's employment without a reasonable excuse.

19 The Claimant proposes a cumulative penalty of $141,000 where the maximum total penalty is $606,000.

20 The Claimant submits that a totality principle discount of 25% is appropriate to be applied and the appropriate total of penalties to be imposed should be $105,000.

21 The penalties should be awarded to the Claimant in accordance with decision in ***Sayed v Construction, Forestry, Mining and Energy Union*** [2016] FCAFC 4.

22 The Respondent should be ordered to pay to the Claimant and the Claimant's superannuation fund the amounts specified.

The Respondent's Submissions On Penalty

23 In summary, the Respondent submits:

- the penalties imposed should be an appropriate response to what the Respondent did;
- this is not a matter in which an imposition of penalties is necessary to encourage general or specific deterrence;
- if the court is minded imposing a penalty, the appropriate amount is $23,121, considering the Respondent's conduct and the totality principle;
- it has been found to have contravened a number of provisions of the FWA, although in relation to one employee and essentially from the same type of error made twice;
- regard must be had for the separate legal quality of the obligations it has failed to observe;
- ***Skene*** is applicable in considering an appropriate penalty in this case;
- it made an honest mistake mischaracterising the nature of the Claimant's arrangement where there was no suggestion of a 'take it or leave it' approach or fraud to induce the Claimant to work as a contractor;
- while the court found [in the Liability Decision] in relation to the casual arrangement (only) it had used 'illegitimate pressure' and 'economic duress', the behaviour was isolated and occurred once, and there is no evidence that it deliberately set out to evade the law or 'short-change' the Claimant;
- it paid weekly amounts in excess of the minimum wage prescribed by the Award (including '25% casual loading'), and, while these amounts cannot be set off, they may be taken into consideration when determining penalty;
- it is otherwise a law-abiding corporate citizen from which it can be concluded that there is a culture of compliance and the evidence does not demonstrate any systemic, wilful or deliberate contravention of the FWA;
- the various breaches arose out of the same essential course of conduct, being an honest mistake as to the nature of the legal relationship;
- a smaller quantum may be imposed in circumstances if a party who has inadvertently breached its obligations rather than engaged in a deliberate and calculated breach;

- this was not a sham arrangement, but rather an incorrect characterisation of what the court found to be a 'permanent' employment relationship. Nothing in the evidence demonstrates it was avoiding, by using illegitimate means, its obligations under the FWA;
- it has taken corrective action;
- asserting its legal rights is not being uncooperative, and it genuinely thought it was acting within the law; and
- there is no evidence it profited from its contraventions.

24 The Respondent relies upon the oral evidence of Mr David Carr (Mr Carr), Managing Director of the Respondent.

25 Having regard to Mr Carr's evidence, the Respondent is a medium sized business and does not have dedicated human resources personnel. It is not a business of 'vast resources' and its current financial position is less secure than it was prior to the COVID-19 pandemic.

26 Mr Carr regrets the whole experience.

27 Further, the Respondent has learnt from the experience of these proceedings and has taken additional steps to ensure mistakes previously made are not repeated.

28 The Respondent rejects the Claimant's submissions that it deliberately set out to evade the law or otherwise deliberately misrepresented the arrangement to the Claimant. No evidence or finding was made in that regard. Further, the Respondent takes issue with the Claimant introducing references to other alleged contraventions never advanced by the Claimant.

Determination On Penalty

29 The maximum penalty with respect to a contravention of s 44, s 45 and s 323 of the FWA by the Respondent is 300 penalty units, given the Respondent is a body corporate.[3]

30 The maximum penalty with respect to a contravention of s 535 and s 546 of the FWA by the Respondent is 150 penalty units, given the Respondent is a body corporate.[4]

31 The effect of s 557(1) of the FWA is that two or more contraventions of the FWA are taken to constitute a single contravention if they are committed by the same person and arose out of a course of conduct by that person.

32 In addition to the statutory course of conduct provision, it is open to consider the application of common law course of conduct principles where the contraventions contain common elements or can be said to overlap with each other. It may be appropriate to group contraventions together where, if they were treated separately, this would potentially penalise a respondent twice.[5]

33 I have had regard to the parties' submissions and to the findings in the Liability Decision. I find that certain contraventions by the Respondent are properly characterised as a single contravention where there is commonality in the conduct or the contravention flows from a course of conduct. Grouping of the contraventions are as follows:

- overtime contravention – cl 40.1 of the Award;
- public holiday contravention – s 116 of the FWA;
- superannuation contravention – cl 35.2 of the Award;
- accrued annual leave contravention – s 87(2) of the FWA;

- annual leave contraventions (including annual leave loading) – s 90(2) of the FWA and cl 42.5 of the Award;
- personal leave contravention – s 96(2) of the FWA;
- access contraventions (the Award, NES and Fair Work Statement) – cl 5 of the Award and s 125 of the FWA;
- records contraventions – s 535 and s 536 of the FWA; and
- payment in full contravention (relevant to long service leave) – s 323 of the FWA.

34 Before outlining the specific considerations in assessing penalties, the following observations are relevant.

35 Counsel for the Claimant made submissions which, in my view, have limited application when regard is had to the findings in the Liability Decision. In particular, the Respondent deliberately misrepresented to the Claimant he was a sham contractor when he was an employee, and the circumstances surrounding the Claimant's signing of the July 2015 Waiver Document is *prima facie* a contravention of s 340, s 343 and s 344 of the FWA.

36 The Liability Decision made the following relevant findings in relation to the Employee/Contractor Issue and the February 2013 Waiver Document:

> *The state of the evidence does not enable me to make any findings on the circumstances of Mr Moate's signing of the document. The Company has not satisfied me that Mr Moate was made aware of the contents or significance of the document before he signed it. Mr Moate has not adduced evidence of any conduct of the Company that would constitute fraud or would be a basis for a remedy in equity.*[6] (emphasis added)
>
> *… the Company, motivated by concern about any payroll tax obligations, were arranging for contractors to execute documents to confirm the status of the worker as a contractor. The evidence of Mr Carr may be accepted; it is plausible and uncontradicted.*[7]
>
> *Mr Moate's passivity … is strking. This is not a case where Mr Moate's financial and taxation arrangements were a consequence of a decision by Mr Moate to set up a business. They were a consequence of Mr Moate following advice of the Company. The 'hallmarks of a person in business', in the circumstances of this case, may equally be viewed as a consequence of the Company and Mr Moate erroneously self-categorising Mr Moate as a person in business on his account.*[8] (emphasis added)
>
> *Although I am not satisfied that Mr Moate had turned his mind to the contents of the document, the inference to be drawn from Mr Moate's years of experience of being paid upon delivery of his invoice and not being paid when taking leave because of illness or holidays is that he considered himself to be an independent contractor.*[9]

37 While the ultimate conclusion reached in the Liability Decision was that the Claimant was an employee under the FWA for the whole of the claim period before 1 July 2015, my reading of the Liability Decision did not reveal IM Flynn (as he was then) to find, or draw an inference consistent with, the Respondent *misrepresenting* the arrangement between the parties (giving rise to consideration of a sham arrangement).

38 It was open to the Claimant to pursue a claim under s 357(1) of the FWA. However, such a claim cannot be pursued in the IMC. Further, had the Claimant decided to pursue a claim under s 357(1) of the FWA, it would have enabled the Respondent an opportunity to prove to the contrary any alleged representation or its effect.

39 The Claimant now attempts to import into the penalty assessment, via submission, an aggravating feature of the Respondent's conduct:

- which is a separate civil remedy provision that was not litigated;
- where there is no finding made upon which it is open to the court to impose a penalty reflecting such an aggravating feature. Ordinarily in sentencing (which I note the principles relevant to the imposition of civil penalties often replicate), a party who seeks to rely upon an aggravating circumstance that is not the subject of any findings or admissions must prove that aggravating circumstance; and
- which if relied upon by the court fundamentally denies procedural fairness to the Respondent and, arguably, subverts the proper court process.

40 For these reasons I place little reliance on the Claimant's submissions in relation to any alleged sham arrangement.

41 The Liability Decision made the following relevant finding in relation to the Full Time/Casual Issue and the 2015 Waiver Document:

> *First, my finding that Mr Moate signed the July 2015 Waiver Document after Ms Norton told him that without his written agreement to becoming a 'casual employee', the Company would cease to offer him further work, is evidence of illegitimate pressure applied by the Company to Mr Moate. Ms Norton's statement was not a threat of an unlawful act; the Company was free to (lawfully) terminate any legal arrangement by which it engaged Mr Moate to work for the Company … The illegitimate pressure applied by Ms Norton induced Mr Moate to sign the July 2015 Waiver Document.*[10] (emphasis added)

42 However, the use to which that finding was made was in relation to whether the Claimant was bound by the terms of the 2015 Waiver Document having signed the document and irrespective of whether he had read it. IM Flynn determined that the finding amounted to a finding of '*economic duress on the part of the Company*', and, consequentially, the Claimant was denied a reasonable opportunity to properly consider the 2015 Waiver Document.[11]

43 The effect of the finding was that the Respondent's case, as it related to reliance on the 2015 Waiver Document and associated documents, was diminished.

44 For similar reasons given above, it was open to the Claimant to pursue a claim under s 340 or s 344 of the FWA. Again, such a claim cannot be pursued in the IMC, and if the Claimant decided to do so, the Respondent would have had an opportunity to defend the claim. As it currently stands, albeit not on the exact basis as set out above, reliance on the finding in the manner suggested by the Claimant necessarily denies procedural fairness to the Respondent where the Claimant has chosen to litigate his claim in one manner and not another.

45 For these reasons, the finding by IM Flynn as it related to illegitimate pressure applied by Ms Lisa Norton (Ms Norton) inducing the Claimant to sign the 2015 Waiver Document and the economic duress on the part of the Respondent needs to be seen in context, and not improperly conflated with another civil remedy provision.

46 Therefore, the following considerations are significant in assessing penalties in this case:

- the determination of the claim required consideration of the circumstances surrounding '*the characterisation of the legal relationship*' between the Claimant and the Respondent;

- the Respondent failed in that context to pay the Claimant certain entitlements with the court determining the Claimant's status as an employee (rather than an independent contractor) and a full time employee (rather than a casual employee);
- the Respondent has not been found to have previously contravened the FWA;
- while there was a course of conduct because of the failure of the Respondent to account for and pay relevant entitlements, the Respondent accounted to the Claimant for time worked by either paying each invoice rendered and paying his hourly rate. The Respondent also paid the Claimant in accordance with its erroneous belief that he was a casual employee (that is, paid a premium, albeit the amount was not properly conveyed to the Claimant). Therefore, in that sense, the Respondent did not attempt to 'hide' any contraventions;
- further, the course of conduct arose because the Respondent erroneously characterised the relationship between it and the Claimant as an independent contractor and a casual employee (notably, the Claimant erroneously characterised himself in the same way). No finding was made that the Respondent engaged in deceitful conduct designed to dupe the Claimant. In fact, it was accepted that in 2013 the Respondent was motivated by concern about payroll taxation obligations in respect of the February 2013 Waiver Document;[12]
- the Respondent has taken steps to ensure future compliance with the Award and the FWA;
- together this demonstrates, if not contrition, a willingness to learn from the proceedings and a commitment not to repeat the conduct;
- the Respondent is a medium sized business employing 60 people. It is not a company of 'vast resources';
- the Claimant was an unskilled worker and relied upon the Respondent's advice as it related to financial and taxation arrangements;
- the Claimant's consequential 'loss' (being the actual entitlements as found in the Liability Decision) is reasonably significant;
- while Ms Norton, on behalf of the Respondent, was found to have used illegitimate pressure to induce signing of the July 2015 Waiver Document, there was no finding that any other person on behalf of the Respondent was involved or that this was a course of conduct by the Respondent; and
- a degree of proportionality is required when regard is had to each contravention.

47 In light of the above, considerations of punishment and specific deterrence are less important in this case than the need to deter employers more generally in contraventions of the FWA. The conduct in all the circumstances is properly categorised in the low range.

48 While criminal penalties import notions of retribution and rehabilitation, the primary purpose of a civil penalty is to promote the public interest in compliance with the law and not as an additional award of compensation for financial or emotional stress, hurt feelings, inconvenience or legal fees.[13]

49 For these reasons, the penalties to be applied are:

	Maximum	**Penalty applied**
Overtime contravention	$33,000 - $63,000	$6,000
Personal leave contraventions	$33,000 - $63,000	$10,000
Accrued annual leave contravention	$33,000 - $63,000	$15,000
Annual leave contraventions (including annual leave loading)	$33,000 - $63,000	$20,000
Public holiday contravention	$33,000 - $63,000	$8,000
Superannuation contravention	$33,000 - $63,000	$5,000
Access contraventions (Award and NES and Fair Work Statement)	$33,000 - $63,000[14]	$6,000
Records contraventions	$16,500 - $25,500	$8,000
Payment in full contravention (LSL)	$63,000	$7,500
Total		**$85,500**

50 Taking into account principles of totality, a reduction of 30% is applied with the resultant amount to be paid is $59,850.

51 The Claimant seeks an order pursuant to s 546(3)(c) of the FWA that the penalties be paid to him and an order is made that the Respondent pay the penalty of $59,850 to the Claimant.

Orders

52 Subject to any liability (if any) to the Commissioner of Taxation pursuant to the *Taxation Administration Act* (Cth), the Respondent is to pay to the Claimant within 56 days of the date of this order:

- $67,107.72 on account of underpayments as identified; and
- a pecuniary penalty of $59,850.

53 The Respondent is further ordered to pay within 56 days of the date of this order:

- $1,111.50 in superannuation contribution to the relevant superannuation fund for the benefit of the Claimant;[15] and
- interest on the judgment amount of $67,107.72 fixed in the amount of $7,658.68.

D. SCADDAN
INDUSTRIAL MAGISTRATE

[1] Applying the relevant cash rates referred to by the Claimant in his submissions and having regard to s 547(2) of the FWA.
[2] ***Fair Work Ombudsman v Priority Matters Pty Ltd (No 5)*** [2020] FCCA 901 (other citations omitted).
[3] The relevant penalty unit amount is $110 to $210 where the contraventions occurred between 2012 and 2018. The relevant penalty unit amount for the contravention relevant to the failure to provide a Fair Work Statement (s 125) is $170 where the contravention occurred in July 2015.
[4] The relevant penalty unit amount is $110 to $170 where the contraventions occurred between 2012 and 2015.
[5] ***Priority Matters*** at [28] (other citations omitted).
[6] Liability Decision at [34].
[7] Liability Decision at [35].
[8] Liability Decision at [42].
[9] Liability Decision at [46].
[10] Liability Decision at [73].
[11] Liability Decision at [73].
[12] Liability Decision at [35].
[13] ***Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate*** [2015] HCA 46; 258 CLR 482 [55] (referring to ***Trade Practices Commission v CSR Ltd*** [1990] FCA 521).
[14] The maximum penalty for failing to provide Fair Work Statement is $51,000.
[15] The Respondent did not take issue with the Claimant's calculation of 9.5% applied to public holiday pay as the ordinary time earnings attracting superannuation guarantee charge. The Liability Decision did not otherwise calculate the amount of underpaid superannuation.

Schedule I: Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court of Western Australia Under The *Fair Work Act 2009* (Cth)

Jurisdiction

[1] An employee, an employee organization or an inspector may apply to an eligible state or territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA. The Industrial Magistrates Court of Western Australia (IMC), being a court constituted by an industrial magistrate, is '***an eligible State or Territory court***': s 12 of the FWA (see definitions of '***eligible State or Territory court***' and '***magistrates court***'); *Industrial Relations Act 1979* (WA) s 81, s 81B.

[2] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: s 544 of the FWA.

[3] The civil penalty provisions identified in s 539 of the FWA include:

- Section 44 – contravention of the NES.
- Section 45 – contravention of a modern award.
- Section 323 – failing to make payments in full.
- Section 535 – failing to keep prescribed records of employment.
- Section 536 – failing to provide payslips.

[4] An '***employer***' has the statutory obligations noted above if the employer is a '***national system employer***' and that term, relevantly, is defined to include '*a corporation to which paragraph 51(xx) of the Constitution applies*': s 14, s 12 of the FWA. The obligation is to an '***employee***' who is a '***national system employee***' and that term, relevantly, is defined to include '*an individual so far as he or she is employed by a national system employer*': s 13 of the FWA.

[5] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for a person to pay a pecuniary penalty: s 546 of the FWA.

Burden and Standard of Proof

[6] In an application under the Act, the Claimant carries the burden of proving the claim. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

> *It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.*

[7] In the context of an allegation of the breach of a civil penalty provision of the Act it is also relevant to recall the observation of Dixon J said in ***Briginshaw v Briginshaw*** [1938] HCA 34; (1938) 60 CLR 336:

> *The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved*

> *to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.* [362]

[8] Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

Practice and Procedure of the Industrial Magistrates Court of Western Australia

[9] The *Industrial Relations Act 1979* (WA) provides that, except as prescribed by or under the FWA, the powers, practice and procedure of the IMC is to be the same as if the proceedings were a case under the *Magistrates Court (Civil Proceedings) Act 2004* (WA): s 81CA of *Industrial Relations Act 1979* (WA). Relevantly, regulations prescribed under the *Industrial Relations Act 1979* (WA) provide for an exception: a court hearing a trial is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit: reg 35(4).

[10] In ***Sammut v AVM Holdings Pty Ltd [No2]*** [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation (citations omitted):

> *The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly, such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence*. [40]

Schedule II: Pecuniary Penalty Orders Under The *Fair Work Act 2009* (Cth)

Pecuniary Penalty Orders

[1] The FWA provides that the IMC may order a person to pay an appropriate pecuniary penalty if the court is satisfied that the person has contravened a civil remedy provision: s 546(1) of FWA. The maximum penalty for each contravention by a natural person, expressed as a number of penalty units, set out in a table found in s 539(2) of the FWA: s 546(2) of the FWA. If the contravener is a body corporate, the maximum penalty is five times the maximum number of penalty units proscribed for a natural person: s 546(2) of the FWA.

[2] The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): s 12 of the FWA. The relevant rate is that applicable at the date of the contravening conduct:

Before 28 December 2012	$110
Commencing 28 December 2012	$170
Commencing 31 July 2015	$180
Commencing 1 July 2017	$210

[3] The purpose served by penalties was described by Katzmann J in ***Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)*** [2017] FCA 557 [338] in the following terms (omitting citations):

> *In contrast to the criminal law, however, where, in sentencing, retribution and rehabilitation are also relevant, the primary, if not the only, purpose of a civil penalty is to promote the public interest in compliance with the law. This is achieved by imposing penalties that are sufficiently high to deter the wrongdoer from engaging in similar conduct in the future (specific deterrence) and to deter others who might be tempted to contravene (general deterrence). The penalty for each contravention or course of conduct is to be no more and no less than is necessary for that purpose.*

[4] In ***Kelly v Fitzpatrick*** [2007] FCA 1080; 166 IR 14 [14], Tracey J adopted the following '*non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty*' which had been set out by Mowbray FM in ***Mason v Harrington Corporation Pty Ltd*** [2007] FMCA 7:

- *The nature and extent of the conduct which led to the breaches.*
- *The circumstances in which that conduct took place.*
- *The nature and extent of any loss or damage sustained as a result of the breaches.*
- *Whether there had been similar previous conduct by the respondent.*
- *Whether the breaches were properly distinct or arose out of the one course of conduct.*
- *The size of the business enterprise involved.*
- *Whether or not the breaches were deliberate.*
- *Whether senior management was involved in the breaches.*

- *Whether the party committing the breach had exhibited contrition.*
- *Whether the party committing the breach had taken corrective action.*
- *Whether the party committing the breach had cooperated with the enforcement authorities.*
- *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements.*
- *The need for specific and general deterrence.*

[5] The list is not '*a rigid catalogue of matters for attention. At the end of the day the task of the court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.*' (Buchanan J in ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** [2008] FCAFC 8; 165 FCR 560 [91]).

[6] 'Multiple contraventions' may occur because the contravening conduct done an employer:

(a) resulted in a contravention of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions;

(b) was done once only or was repeated; and

(c) was done with respect to a single employee or was done with respect to multiple employees.

[7] The fixing of a pecuniary penalty for multiple contraventions is subject to s 557 of the FWA. It provides that two or more contraventions of specified civil remedy provisions (including contraventions of an enterprise agreement and a contravention on s 323 of the FWA on the payments) by an employer are taken be a single contravention if the contraventions arose out of a course of conduct by the employer. Subject to proof of a 'course of conduct', the section applies to contravening conduct that results in multiple contraventions of a single civil penalty provision whether by reason of the same conduct done on multiple occasions or conduct done once with respect to multiple employees: ***Rocky Holdings Pty Ltd v Fair Work Ombudsman*** [2014] FCAFC 62; (2014) 221 FCR 153; ***Fair Work Ombudsman v South Jin Pty Ltd (No 2)*** [2016] FCA 832 [22] (White J) The section does *not* to apply to cases where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): ***Grouped Property Services Pty Ltd (No 2)*** [411] (Katzmann J).

[8] The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions. ***Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*** (2008) 165 FCR 560; 246 ALR 35; [2008] FCAFC 8 [47] - [52].

[9] Section 546(3) of the FWA also provides:

> ***Payment of penalty***
>
> *(3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:*
>
> *(a) the Commonwealth; or*

(b) a particular organisation; or

(c) a particular person.

[10] In ***Milardovic v Vemco Services Pty Ltd (No 2)*** [2016] FCA 244 [40] - [44], Mortimer J summarised the law (omitting citations and quotations) on this provision in light of ***Sayed***:

> … [T]*he power conveyed by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant.*
>
> … [T]*he initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the Gibbs … exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted.* (original emphasis)