

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2021 WAIRC 00084

CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN

HEARD : FRIDAY, 26 FEBRUARY 2021

DELIVERED : FRIDAY, 26 MARCH 2021

FILE NO. : M 85 OF 2018

BETWEEN : ALASTAIR ENKEL
CLAIMANT

AND

WE R FINANCE PTY LTD (ACN 137 850 714)
FIRST RESPONDENT

AND

HARRY CHARLES ROSS
SECOND RESPONDENT

CatchWords : INDUSTRIAL LAW – FAIR WORK – Assessment of pecuniary penalties for contraventions of *Fair Work Act 2009* (Cth)

Legislation : *Fair Work Act 2009* (Cth)
Fair Work Regulations 2009 (Cth)
Industrial Relations Act 1979 (WA)
Crimes Act 1914 (Cth)

Instruments : *Banking, Finance and Insurance Award 2010* (Cth)

Case(s) referred to in reasons: : *Enkel v We R Finance Pty Ltd* (2019) WAIRC 651
Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union [2020] FCA 1662
Sayed v Construction, Forestry, Mining and Energy Union [2016] FCAFC 4
Fair Work Ombudsman v Northcoast Security Services Group Pty Ltd (No.3) [2020] FCCA 521; (2020) 350 FLR 285
Singtel Optus Pty Ltd v Australian Competition and Consumer Commissioner [2012] FCAFC 20

Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd [2015] FCA 492
Fair Work Ombudsman v Priority Matters Pty Ltd (No 5) [2020] FCCA 901
Miller v Minister of Pensions [1947] 2 All ER 372
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2) [2017] FCA 557
Kelly v Fitzpatrick [2007] FCA 1080; (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8; (2008) 165 FCR 560
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
Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2) [2016] FCA 244

Result : Pecuniary penalty to be paid

Representation:

Claimant : Mr D. Scaife (of counsel) from Eureka Lawyers
 Respondents : Mr A. Metaxas (of counsel) from Metaxas Legal

FURTHER REASONS FOR DECISION

- 1 Following Mr Alastair Enkel's (the Claimant) successful appeal to the Federal Court of Australia, the Western Australian Industrial Magistrates Court (IMC) must now do two things:
 - 1.1 assess penalties relevant to We R Finance Pty Ltd (ACN 137 850 714) (the First Respondent) according to law; and
 - 1.2 assess penalties relevant to Mr Harry Charles Ross (the Second Respondent).
- 2 On 13 June 2019, the First Respondent was found to have contravened s 44 and s 45 of the *Fair Work Act 2009* (Cth) (the Act), in that the First Respondent was found to have:
 - failed to pay the Claimant an amount under the *Banking, Finance and Insurance Award 2010* (Cth) (the Banking Modern Award) and the Act; and
 - failed to comply with the National Employment Standards (NES) and in doing so contravened a civil remedy provision in failing to pay the amount.
- 3 Further, the First Respondent was found to have contravened the Banking Modern Award by failing to provide copies of the Banking Modern Award and NES to the Claimant, and did not comply with reg 3.32 and reg 3.34 of the *Fair Work Regulations 2009* (Cth) (the Regulations) in failing to keep and maintain certain prescribed records of employment.
- 4 On appeal, and pursuant to s 550(2)(c) of the Act, the Second Respondent was found to be involved in, and liable for, the First Respondent's contraventions of the Act comprising the failures to pay the Claimant his entitlements under the Banking Modern Award and the NES.

- 5 The Second Respondent was not found to be involved in, or liable for, the First Respondent's failure to provide copies of the Banking Modern Award and the NES, and failure to keep certain employment records.
- 6 Schedule I of these supplementary reasons outline the jurisdiction, standard of proof and practice and procedure of the IMC in determining this case.
- 7 Schedule II of these supplementary reasons outline the provisions of the Act and principles relevant in determining an appropriate pecuniary penalty (if any) for the Respondents' contraventions.

The Claimant's Submissions On Penalty

- 8 I have reviewed the Claimant's outline of submissions lodged on 27 November 2020. They largely replicate the Claimant's previous outline of submissions lodged on 4 July 2019. I do not intend to repeat the submissions, which I summarised in *Enkel v We R Finance Pty Ltd* (2019) WAIRC 651.¹
- 9 The Claimant relies upon the two witness statements dated 26 March 2019 and 2 July 2019, he lodged for the purposes of the substantive hearing and the first penalty hearing.
- 10 I note the Claimant now characterises the Respondents' conduct as 'moderate seriousness'.
- 11 The Claimant also refers to *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCA 1662 [83], and relies on a lack of contrition and corrective action increasing the need for specific deterrence in the Respondents' case. I do not wholly agree with the Claimant, whereof itself a lack of contrition does not mean an increase in penalty, but, when viewed with other factors, may lead a Court to conclude that a higher penalty is warranted.
- 12 Whereas in the original outline of submissions the Claimant's proposed penalty for the First Respondent was \$110,000, the Claimant's proposed penalty is now \$115,000. I am unable to explain the increase in the suggested penalty as it relates to the First Respondent.
- 13 The Claimant's proposed penalty for the Second Respondent is \$17,000.
- 14 The Claimant submits the penalties should be awarded to him in accordance with the decision in *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4.

The Respondents' Submissions On Penalty

- 15 The Respondents lodged an outline of submissions and an affidavit of Harry Charles Ross sworn on 21 December 2020 (the Ross Affidavit).
- 16 The Second Respondent deposes to his and the First Respondent's historical and current financial state, and annexes to the Ross Affidavit income tax returns for himself and the First Respondent.²
- 17 The Second Respondent further deposes to the potential crushing effect on the First Respondent and to the severe financial strain on himself if the Claimant's proposed penalties are imposed.³
- 18 The Second Respondent explains the circumstances behind the Claimant's queries concerning his [the Claimant's] employment, and the Second Respondent's reliance on an outdated contract of employment and the assistance of a bookkeeper and an accountant, who he says informed him that the Claimant had not been underpaid. The Second Respondent also refers to advice provided by an industrial agent and to correspondence with Fair Work Ombudsman.⁴

- 19 The Second Respondent deposes that he never intended to mislead the Claimant and acted on advice from third parties.
- 20 The Second Respondent expresses contrition and explains the steps he has taken to ensure that something similar does not occur in the future.⁵
- 21 The Second Respondent was cross-examined by the Claimant's representative.
- 22 Similar to the Claimant, the Respondents outlined the general principles on the imposition of penalties and, thereafter, consider the factors applicable in the imposition of penalties. In summary, the Respondents contend (relevant to the claim):
- the facts in *Fair Work Ombudsman v Northcoast Security Services Group Pty Ltd (No.3)* [2020] FCCA 521; (2020) 350 FLR 285, as relied upon by the Claimant, does not advance that the First Respondent self-evidently profited from its contraventions of the Banking Modern Award;
 - the contraventions relevant to the Claimant's underpayments occurred over 7.5 months of employment;
 - the Respondents have no prior contraventions;
 - while the Second Respondent was found to have been involved in the First Respondent's contraventions of the Act comprising the failures to pay the Claimant his entitlements under the Banking Modern Award and the NES, the Respondents' did not deliberately set out to contravene the Banking Modern Award and the NES or misdirect the Claimant in response to his concerns;
 - the Respondents deny deliberately intending to contravene the Act;
 - despite the Second Respondent's involvement, as a senior officer, in the contraventions, this does not mean he or the First Respondent employ a conscious and deliberate strategy to avoid their obligations;
 - the Respondents have demonstrated contrition and made a payment of the sum ordered following the IMC's decision on 22 August 2019 into the Claimant's solicitor's trust account. The Respondents should not be penalised for properly engaging in litigation;
 - while the Respondents accept the need for general deterrence, specific deterrence is less relevant for the purpose of determining penalty where neither Respondent have previously been convicted, or penalised for contravening workplace laws. Thus, *Singtel Optus Pty Ltd v Australian Competition and Consumer Commissioner* [2012] FCAFC 20, relied upon by the Claimant, is not a comparable case; and
 - the Respondents identify contraventions for which it says no penalty may be considered.
- 23 The Respondents' proposed penalty for the First Respondent is \$25,000 and for the Second Respondent is \$5,000.

Determination On Penalty

- 24 The maximum penalty with respect to each contravention of s 44 and s 45 of the Act by the First Respondent is 60 penalty units which is \$63,000, given the First Respondent is a body corporate.

- 25 The maximum penalty with respect to each contravention of s 535 of the Act by the First Respondent is 60 penalty units which equates to \$63,000 given the First Respondent is a body corporate.
- 26 The maximum penalty with respect to each contravention of s 44 and s 45 of the Act by the Second Respondent is 60 penalty units which is \$12,600, given the Second Respondent is a natural person.
- 27 The effect of s 557(1) of the Act is that two or more contraventions of the Act 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.
- 28 I have had regard to the parties' evidence and submissions and to the findings in the substantive decision and the appeal decision. I find that certain contraventions by the Respondents are properly characterized as a single contravention where there is a commonality in the conduct or the contravention flows from a course of conduct. I characterise the contraventions as follows:
- minimum wage contraventions (cl 13 of the Banking Modern Award);
 - overtime contraventions (cl 23.1 of the Banking Modern Award);
 - annual leave loading contravention (cl 24.3 of the Banking Modern Award);
 - superannuation contravention (cl 21.1 of the Banking Modern Award);
 - annual leave contravention (s 90(2) of the Act);
 - access contraventions (the Banking Modern Award and NES);
 - records contraventions (reg 3.32 of the Regulations); and
 - records contraventions (reg 3.34 of the Regulations).
- 29 The following considerations are significant in assessing penalties in this case:
- the determination of the claim required consideration of the Banking Modern Award and its applicability to work carried out by the Claimant;
 - the Respondents failed to pay the Claimant the correct award rates relevant to ordinary pay, overtime, annual leave and annual leave loading (the superannuation follows as a result). However, I do not accept the sinister character of the failures attributed by the Claimant, and the financial documents annexed to the Ross Affidavit do not support the Respondents profiteering from its contraventions;
 - the Second Respondent was found on appeal to be involved in, and liable for, the First Respondent's failure to pay the Claimant the correct award rates relevant to ordinary pay, overtime, annual leave and annual leave loading;
 - the First Respondent only failed to ensure copies of the Banking Modern Award and NES was made available to the Claimant and failed to keep certain employment records;
 - the Respondents have not been found to have previously contravened the Act;
 - the circumstances surrounding the Respondents' failures demonstrate some reliance by the Second Respondent on the erroneous advice of others;
 - the First Respondent is a private business, which experienced a downturn in business from 2018 to July 2019. The Second Respondent resurrected the First Respondent's

business in or around December 2019, but the business remains in a poor, albeit improving, financial state;

- in the Ross Affidavit, the Second Respondent expressed contrition, noting this was his and the First Respondent's first contravention, and the First Respondent provided payslips to the Claimant (albeit at the incorrect award rate). The Second Respondent has taken steps to ensure that, as the First Respondent's business improves and expands, the contraventions will not occur in the future;
- there is likely to be a 'crushing effect' on the Respondents if the Claimant's proposed penalties are imposed, where the First Respondent's business improved from December 2019, subject to the worldwide pandemic in 2020, and the Second Respondent received the JobKeeper supplement up to September 2020;
- as I have previously stated in *Enkel v We R Finance Pty Ltd* (2019) WAIRC 651 [22], I found the Claimant to have overstated the impact of the First Respondent's actions and do not consider the Claimant to be 'vulnerable in the same way as indicated in' *Director, Fair Work Building Industry Inspectorate v Foxville Projects Group Pty Ltd* [2015] FCA 492;
- a degree of proportionality is required when regard is had to each contravention (for example, the re-calculated annual leave based on the Banking Modern Award rate resulted in \$122.33 owed to the Claimant, whereas the Claimant proposes a penalty of \$9,450); and
- the Claimant's proposed penalties do not reflect the objective seriousness of the contraventions and can be described as 'aspirational'. The Claimant accepts that this is not the worst example of its kind.

30 Considering the above, while deliberation of punishment and specific deterrence are of some importance, the need to deter employers from making assumptions about the applicable terms of employment and disregarding of award considerations are of greater importance. Further, ensuring vigilance in applying the correct award and thereafter adhering to the requirements of the terms of the correct award and to the Act. My previous view remains that the conduct in all the circumstances is properly categorised in the low range.

31 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.

32 For these reasons, the penalties to be applied which, in my view, are a proportionate reflection of the gravity of the contravening conduct by the Respondents and are no more and no less than is necessary to achieve the goals of specific and general deterrence, are:

	The First Respondent		The Second Respondent	
	Maximum	Penalty applied	Maximum	Penalty applied
Minimum wage contravention (cl 13 of the Banking Modern Award)	\$63,000	\$15,000	\$12,600	\$3,000
Overtime contravention (cl 23.1 of the Banking Modern Award)	\$63,000	\$15,000	\$12,600	\$3,000
Annual leave loading contravention (cl 24.3 of the Banking Modern Award)	\$63,000	\$5,000	\$12,600	\$1,500
Superannuation contravention (cl 21.1 of the Banking Modern Award)	\$63,000	\$6,000	\$12,600	\$1,500
Annual leave contravention (s 90(2) of the Act)	\$63,000	\$7,000	\$12,600	\$2,000
Access contraventions (cl 5 of the Act)	\$63,000	\$3,000		
Records contravention (reg 3.32 of the Regulations)	\$63,000	\$2,500		
Records contravention (reg 3.34 of the Regulations)	\$63,000	\$2,500		
Total	\$504,000	\$56,000	\$63,000	\$11,000

- 33 Further, 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’.⁶
- 34 Accordingly, for reasons of totality, a reduction of 20% is applied in respect of the amount relevant to the First Respondent with the resultant final penalty being \$44,800, and a reduction of 20% is applied in respect of the amount relevant to the Second Respondent with the resultant final penalty being \$8,800.
- 35 The Claimant seeks an order pursuant to s 546(3)(c) of the Act that the penalties be paid to him, and I make these orders.

Orders

- 36 The First Respondent is ordered to pay a pecuniary penalty of \$44,800 to the Claimant.

37 The Second Respondent is ordered to pay a pecuniary penalty of \$8,800 to the Claimant.

D. SCADDAN
INDUSTRIAL MAGISTRATE

¹ To the extent necessary to do so, I replicate my previous summary of the Claimant's outline of submissions as follows from [15]:

[15] ...

- *the First Respondent's conduct was a deliberate scheme to avoid minimum protections set out in the Banking Modern Award given the Claimant's contract of employment stated the Banking Modern Award applied to the Claimant;*
- *the Claimant was a young employee, vulnerable and inexperienced in workplace rights, trusting the First Respondent to do the right thing;*
- *the Claimant considers that the First Respondent deliberately exploited him through attempts to dissuade the pursuit of entitlements as the First Respondent had invested in training and helped the Claimant establish himself in the finance industry;*
- *requests by the Claimant for explanation about his payment in accordance with the Banking Modern Award were repeatedly met with defiance and misdirection by the First Respondent;*
- *the First Respondent profited from its exploitation of the Claimant; and*
- *senior management was involved in setting the Claimant's employment terms and conditions and failed to take corrective action.*

[16] *Further, the Claimant submits that the nature and extent of the loss and damage suffered by the Claimant included a relatively large underpayment over a comparatively short period of time. The underpayment contributed to financial hardship experienced by the Claimant and he suffered emotional harm caused by financial stress and working long hours without proper remuneration.*

[17] *The Claimant accepts the First Respondent has no known previous contraventions of industrial law but says the First Respondent lacks contrition and failed to cooperate with the Claimant when he raised concerns and failed to take corrective action.*

[18] *The Claimant characterises the First Respondent's conduct as substantial and willful contraventions of the Act where, he says, the First Respondent's contraventions show open defiance to the Claimant's concerns and attempts to mediate the issues.*

² The Ross Affidavit [3] - [8]; [30] - [48].

³ The Ross Affidavit [55], [56].

⁴ The Ross Affidavit [16] - [28].

⁵ The Ross Affidavit [50], [52] - [54].

⁶ *Fair Work Ombudsman v Priority Matters Pty Ltd (No 5)* [2020] FCCA 901.

Schedule I: Jurisdiction, Practice And Procedure Of The Western Australian Industrial Magistrates Court 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 Act. The IMC, being a court constituted by an industrial magistrate, is ‘an eligible State or Territory court’: the Act s 12(see definitions of ‘*eligible State or Territory court*’ and ‘*magistrates court*’); the *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: the Act s 544.
- [3] The civil penalty provisions identified in s 539 of the Act include:
- Section 44 – contravention of the NES.
 - Section 45 – contravention of a modern award.
 - Section 535 – failing to keep prescribed records of employment.
- [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’: the Act s 12, s 14. 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’: the Act s 13.
- [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: the Act s 546.

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.

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

Pecuniary penalty orders

- [1] The Act 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). 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 Act: the Act s 546(2). If the contravener is a body corporate, the maximum penalty is five times the maximum number of penalty units proscribed for a natural person: the Act s 546(2).
- [2] The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): the Act s 12. 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; (2007) 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 and*
- *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; (2008) 165 FCR 560 [91].
- [6] ‘Multiple contraventions’ may occur because the contravening conduct done by 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;
 - (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 Act. It provides that two or more contraventions of specified civil remedy provisions (including contraventions of an enterprise agreement and a contravention on s 323 on the payments) by an employer are taken to 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* apply to case where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 [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] FCAFC 8; (2008) 165 FCR 560 [47] - [52].
- [9] Section 546(3) of the Act 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 (Administrators Appointed) (No 2)* [2016] FCA 244 [40] - [44], Mortimer J summarised the law (citations and quotations omitted) on this provision in light of *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4:

*[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' [**Gibbs v The Mayor, Councillors and Citizens of City of Altona** [1992] FCA 553] ... exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted.*