

Enforcement under Work Choices

Introduction

1. The intent of this paper is to discuss Enforcement under Work Choices with reference to the decision of Mowbray FM in *Mason v Harrington Corporation Pty Ltd, trading as Pangaea Restaurant and Bar [2007] FMCA 7* (“the Harrington case”). The Harrington case was one of the first applications for penalty brought by an Office of Workplace Services (“OWS”) inspector to come before the courts. The original application was filed 31 March 2006. The hearing, which eventually proceeded by way of a hearing on penalty only, was held on 10 and 11 July 2006. The decision was handed down on 16 January 2007. It was a matter that was prepared and listed as a contest but resolved into a hearing on penalty only, on the first day of hearing.

Background

2. The establishment of the OWS as an executive agency was gazetted in the Commonwealth Government Gazette on 17 March 2006 effective 27 March 2006. Prior to the establishment of the executive agency there was an Office of Workplace Services as part of the Department of Employment and Workplace Relations. The Office of Workplace Services was subsequently “rebranded” as the Workplace Ombudsman on 1 July 2007.
3. In the second reading speech accompanying the *Workplace Relations Amendment (Work Choices) Bill* made 2 November 2005 Hansard House of Representatives at page 22, Minister Andrews said:

“Improved protection

Work Choices will put in place strong and practical measures to ensure all parties abide by the awards, collective agreements and AWAs as well as the fair pay and conditions standard, state awards and agreements that are to be brought into the new system.

The Office of Workplace Services will have increased powers. These include the power to enforce compliance with the *Workplace Relations Act*, awards and agreements, the freedom of association provisions and the rules for agreement making.

The compliance regimes applying to unprotected industrial action, abuse of right of entry laws and contraventions of freedom of association provisions will also be strengthened.”

4. In the Explanatory Memorandum accompanying the *Workplace Relations Amendment (Work Choices) Bill* in the Regulation Impact Statement, the memorandum states at page 28:

“Where entering to investigate a suspected breach, union officials’ access to non-member records would be restricted, in most instances. This is consistent with the Government’s view that unions should operate as membership-based service organisations. It should help unions to provide better services to their members, while ensuring the privacy of non-members. The Office of Workplace Services (OWS) will investigate breaches affecting non-members.”

5. It is apparent from both the speech and the Explanatory Memorandum, that as part of the reforms introduced by Work Choices, the government intended to reinvigorate state agency enforcement of awards, certified agreements and the like, at least in respect of non union members. Whilst, as appears above, additional limits were placed on organisations in respect of right of entry under Work Choices. Unions retained the right to bring proceedings for breach of “applicable provisions” where the breach related to or affected the member of the organisation or work carried on by them (section 718(6)(f) of the *Workplace Relations Act 1996* (“the Act”) see s 178(5)(d) of the *Pre Work Choices Act*). Organisations also retained the right to bring other types of enforcement proceedings, see ss 806 and 807(4) of the Act.
6. This was not the first time such a body was set up. In 1977 the Fraser Government set up the Industrial Relations Bureau (“the IRB”) which



remained in place until 1983. The description of that body found in the

Australian Trade Union Archives is as follows:

“Commonwealth

Function: Regulatory Body

The Industrial Relations Bureau was established under the Conciliation and Arbitration Amendment Act 1977. The role of the Bureau was to secure the observance of the Conciliation and Arbitration Amendment Act 1904 and regulations and awards.

The Central Office was established on 1 March 1978 and located in Melbourne to enable easy access to the Conciliation and Arbitration Commission and the Australian Council of Trade Unions. The Bureau’s divisions were the Advising and General Branch, the Special Activities Division, the Industrial Regulations Division and the Management Branch.

In 1983 the Industrial Relations Bureau was abolished by the Conciliation and Arbitration Amendment Act, No 33, 1983. Its functions were taken over by the Arbitration Inspectorate Division of the Department of Employment and Industrial Relations.”

7. The Arbitration Inspectorate Division morphed over time into that part of the Department of Employment and Industrial Relations known as the Office of Workplace Services. It is perhaps of note that unlike the IRB the OWS does not have its central office located in proximity to either the Australian Industrial Relations Commission (“AIRC”) or the ACTU. Its head office is located in the industrial park adjacent to Canberra airport.

Initial perceptions of the OWS

8. The creation of the OWS as an executive agency was greeted with scepticism if not hostility. On 24 April 2006, back in the days when Maxine McKew was a journalist with the ABC and prospects of John Howard losing the next election, let alone the seat of Benalong, seemed remote, the 7:30 Report broadcast a report under the heading “Office of

Workplace Services struggles to win confidence”. The transcript of the report includes the following:

“MAXINE MCKEW: On almost a daily basis, it seems, there are fresh reports of workers claiming to have been unfairly sacked, or having had their pay or conditions cut under the Federal Government's new industrial relations laws. Of course, there is no question that a highly organised union campaign is doing its best to publicise the most egregious examples of employer behaviour. The union movement is often the first port of call for workers who feel they have been unfairly treated, not least because few seem to know of the Government's own investigative unit. The Office of Workplace Services has been set up to monitor breaches of the new IR laws and can prosecute employers who do so. But so far, it has struggled to attract the attention or confidence of employees. Heather Ewart reports.

HEATHER EWART: On a bitterly cold Melbourne afternoon, 100 of Australia's lowest paid workers quietly file into a city church hall to share their fears that under the Federal Government's new IR laws their pay is about to be cut.

MALE CLEANER: We will not stop raising our voices until we get a fair deal for all cleaners, and together we will make a difference. Thank you very much.

....

TOULA PETROULAS: For me, just the union help me. That's why I apply union, I come to the union.

HEATHER EWART: Yet, just a few blocks from this Catholic Church hall is the Federal Government's Melbourne Office of Workplace Services. The body the Federal Government is telling workers to complain to if they feel their bosses are breaching the new laws.

NICHOLAS WILSON, DIRECTOR, OFFICE OF WORKPLACE SERVICES: What that means is that if people have any particular problems about how the Act is being implemented in their workplace, awards or agreements, then they can contact the office.

HEATHER EWART: The trouble is that workers like Toula Petroulas say they've never heard of the office. Do you know about that?

...

NICHOLAS WILSON: Well, it's always a concern if people have complaints that they can't bring to fruition. Obviously, the Office of Workplace Services has been recently formed. We need to get out there and make sure that people understand who we are.

ROB HULLS, VICTORIAN INDUSTRIAL RELATIONS MINISTER: I would say no-one knows about the Office of Workplace Services. I haven't seen it advertised anywhere. I don't think the Federal Government wants people to know about it.

Dr JOHN BUCHANAN, AUSTRALIAN CENTRE FOR INDUSTRIAL RELATIONS RESEARCH: Well, we've got to be honest there. How things was done in the past was essentially through a strong union movement. And it's very hard to have a Government instrumentality replace a mass democratic organisation, or a network of mass democratic organisation. So in a sense, I think they've got an almost impossible job to do.

....

NICHOLAS WILSON: Certainly, the expectation that we have is that employers, and employees for that matter, need to comply with the Act. If they are in a position where they simply refuse, then it's incumbent on us to take those matters as far as we can, which includes taking the matters to court.

HEATHER EWART: Can you see much legal action being taken by the new Office of Workplace Services at all?

ROB HULLS: Look, I think that if you have a look at the previous body that it replaced, there'll be little or no action taken by this body.

....

Dr JOHN BUCHANAN: When you've got hundreds of thousands of sites of economic practice, there's potential, major potential for violation, and so I think the poor Office of Workplace Services have a job way beyond what it's capable of delivering.

...”

9. The now Deputy Premier, Attorney-General, Minister for Industrial Relations and Minister for Racing, was not alone in suggesting that the OWS would not be proactive in pursuing enforcement. In **‘Research**

Evidence About the Effects of the ‘Work Choices’ Bill a Submission to the Inquiry into the *Workplace Relations Amendment (Work Choices) Bill 2005* by a group of 150 Australian Industrial Relations, Labour Market, and Legal Academics November 2005, the following submission was made:

“13 Enforcement

The historical record of federal industrial enforcement agencies in recovering unpaid employee entitlements is very poor (L. Bennett, *Making Labour Law in Australia*, Butterworths, 1994; M. Goodwin, *The Great Wage Robbery: Enforcement of Minimum Labour Standards in Australia*, Unpublished PhD Thesis, 2004, University of New South Wales.). The performance of the Office of Workplace Services (the OWS) in this regard continues to be poor. It settles claims by consent, but it has declined to comment on whether settlements meet the actual amounts owed or some lesser amount accepted by the employee in lieu of bearing the personal expense of court recovery proceedings, which could exceed the amounts due. The OWS engages in court recovery actions and prosecution of offending employers in only rare circumstances, and almost never unless the amount owed is \$10,000 or more. This policy and practice clearly favours unscrupulous, law-breaking employers, and it is likely that many employees are not being provided with their legal wages and conditions entitlements. In contrast, the record of state agencies shows that they are much more effective in the recovery of employee entitlements.⁵⁴ Meanwhile, the Office of the Employment Advocate (the OEA) and the former Building Industry Taskforce both have a history of largely ignoring employer law-breaking and pursuing unions almost exclusively.⁵⁵ Under the *Bill*, the OEA’s enforcement responsibilities will be taken over by the OWS.

The role of the OWS will be significantly expanded if the *Bill* is passed. There is no evidence that its current enforcement policy and practice will be revised to maximise compliance by employers, or that it will not adopt the OEAs current enforcement practice of ignoring employer law-breaking. This will directly cause further injustice and economic harm to employees and unfairly single out their unions.”

10. Even *Workers On Line* the “Official Organ Of Labournet” a resource for the Labour movement provided by the Labour Council of NSW was sceptical. In an editorial headed “Double Jeopardy” dated 8 September 2006 issue 323 Peter Lewis said:



“As more examples of the human misery that is WorkChoices comes to light, the Howard Government is constructing a devious defence strategy that further erodes the independence of the public service.

It's called the Office of Workplace Services and it is emerging as a cross between a media monitoring service and a damage control spin unit, publicly funded but with a sharp partisan political focus.

First a little bit of history. There once was an independent judicial body with real powers that set wages and conditions and ensured workers were treated legally. It was called the Australian Industrial Relations Commission but, with WorkChoices, John Howard realised a 20-year dream to 'put a sword through its heart'.

No longer can the Commission determine unfair dismissals for most employees, force employers to the bargaining table or assist parties avoid industrial action. Today, it is a sad shell of its former self, its remaining powers lay in stripping conditions out of awards and threatening massive penalties on workers who take action now deemed illegal.

In its place, the government has established its Office of Workplace Services, with a budget of more than \$32 million. The actual role of this body has never been clearly defined, although government bills it as its industrial watchdog.

In fact, more than a month after being promised answers to three simple questions about its role by an agency press officer, Workers Online is still waiting for the information.

What we do know is OWS's job is to enforce WorkChoices, which is a misnomer, in that the laws take away most rights for workers and replaces them with a regime of penalties bosses can use to drive workers from unions.

The real use OWS has been put to is in the field of damage control. From day one, when Cowra Abattoir sackings became news, OWS officers were sent to follow the news.

What emerged was the company decision to take workers head on was deferred until the heat died down, a later OWS ruling confirmed the employer's action in sacking staff and rehiring them at lower rates, was legal under WorkChoices,

The OWS allowed the government to deflect attention, buy time, then greenlight the controversial tactics as "perfectly legal".

Over recent months, the OWS has continued this modus operandi.

An example close to home. Workers Online posted a story about a Korean worker threatened with deportation after having his fingers chopped off. First thing Monday, the OWS was on the line asking for details it could follow-up.

Another example this week. A Chinese guest worker on slave wages and conditions - paying an immigration agent \$10,000 of his salary - makes multiple complaints to the OWS. No joy, until unions break the story in the media.

It continues this week: workers are fined a week's salary for placing overtime bans - on the legal advice of the firm that actually wrote the law -the OWS is investigating; workers locked out for refusing to sign individual contracts - the OWS will have a look.

So what good an OWS investigation? Well on the evidence to date, the OWS goes and talks to the employer, gets their side of the story, and then briefs the Minister - who bodgies the briefings into 'investigations' and leaks them to the media.

In this way the wheels of workplace justice may be spinning, but they are not delivering anything other than damage control for a Minister who continues to deny the new ground rules of the Australian workplace.

It is a short term strategy straight out of Orwell. Create a public bureau that looks like a legal enforcement body, use it for political purposes and hide behind it when the going gets tough.

..."

What the OWS and Workplace Ombudsman have done

11. It would seem that these concerns were unfounded (or having been raised were addressed by the OWS). In an interview with the ABC on its National Interest program of 7 October 2007, Nicholas Wilson the former Director and current Ombudsman said that the OWS/Workplace Ombudsman had, since its institution, dealt with in excess of 21,000 cases. According to Mr Wilson most of these were resolved within 3 months. As a result some \$20 million in underpayments for some 14,000 workers had been recovered. As part of this process some 73 matters were taken to court.

12. A review of the cases prosecuted by the OWS described on the “Litigation Outcomes” and “Litigation Outcomes Archive” parts of the Workplace Ombudsman web site (<http://www.wo.gov.au/>) shows that around 60% of underpayment prosecutions involved sums significantly of less than \$10,000. It also shows that in around 66% of cases the penalties imposed were greater than the amounts ordered to be repaid. In the Harrington Case the underpayment outstanding at the time of the hearing was \$3,816. The total underpayment for the 2 employees was \$7,866. The penalty imposed was \$64,000.

13. The penalties flowing from these prosecutions are paid into consolidated revenue. This can be contrasted with the “ordinary order” in enforcement proceedings pre Work Choices where the penalties are paid to the individual applicant or applicant union. This practice was discussed by Merkel J in *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847 where his Honour imposed a penalty of \$750,000 and ordered that it be paid to the FSU. At paragraphs 63 and following His Honour said:

“63 The final matter relates to whether the penalty should be paid to FSU or into the Consolidated Revenue Fund. Section 356 of the *WR Act* empowers the Court to order that the penalty, or part of the penalty, be paid into the Consolidated Revenue Fund or to a particular organisation or person. However, in view of the legislative policy in s 347 (that costs orders are not to be made save where a party institutes a proceeding vexatiously or without reasonable cause) it is clear that the power to order payment of a penalty to a party under s 356 should not be exercised for the purpose of reimbursing to a party the costs incurred by that party: see *Victoria University of Technology v Australian Education Union* (1999) 91 IR 96 at 107 [34]. But, it does not follow that the costs incurred are irrelevant. For example, evidence may be adduced to demonstrate the nature and extent of the work that had to be carried out to prosecute the proceeding (see *Clothing & Allied Trades Union of Australia v Snuggleright Industries Pty Ltd* (1990) 34 IR 124 at 126-127) or to demonstrate whether an order in a party’s favour under s 356 would not result in some unwarranted windfall being enjoyed by the party (see *CPSU, The Community and*

Public Sector Union v Telstra Corporation Ltd (2001) 108 IR 228 ('*Telstra*') at 233 [27]). I would add that FSU adduced evidence on that issue and, on the basis of that evidence, I am satisfied that the order sought by FSU, namely that the penalties be paid to it, would not provide it with an unwarranted windfall.

...

65 Section 356 and its predecessor, s 120 of the *Conciliation and Arbitration Act 1904* (Cth), were said to be derived from the 'common informer' cases: see *Schanka & Ors v Employment National (Administration) Pty Ltd (No 2)* (2001) 114 FCR 379 at 404 ('*Schanka*'). A common informer has been described as 'a private person suing for private benefit to recover a statutory penalty': see *Hawkesbury City Council v Foster & Anor* (1997) 97 LGERA 12 at 14-15 and *Schanka* at 404. In *Finance Sector Union v Australian and New Zealand Banking Group Ltd* [2002] FCA 1035, Wilcox J stated at [16]:

'the rationale of the practice is that it tends to encourage a "common informer" to police the relevant legislation: see Vehicle Builders' Employees' Federation of Australia v General Motors-Holden Pty Ltd (1977) 32 FLR 100 at 113. That rationale is likely to be defeated if the common informer is not allowed to make a profit.'

Making orders in favour of an organisation under s 356, or its predecessor, s 120 of the *Conciliation and Arbitration Act 1904* (Cth), was also said to tend to encourage 'the enforcement of awards': see *Electrical Trades Union of Australia v Sims Products Ltd (trading as Besco Batteries)* (1988) 42 IR 250 at 254 per Gray J and *Australian Federation of Air Pilots v Skywest Airlines Pty Ltd* (1996) 70 IR 284 at 287 per Marshall J.

66 CBA disputed FSU's reliance on 'common informer' cases in relation to s 356 but was not able to proffer a principle explaining why, in the usual course, a union should be deprived of the benefit of an order under the section .

67 Under the *WR Act*, unions play a critical enforcement role in relation to the unlawful conduct of employers, such as the conduct of CBA in this case. In that regard in *Telstra*, Finkelstein J observed at 233 [27]:

'It cannot be doubted that employer and employee organisations play a legitimate and important role in seeing

that there is compliance with the provisions of the Workplace Relations Act. For example, an individual employee will rarely have the ability to fund a proceeding for a contravention. If unions do not bring such proceedings, contraventions will go unpunished.'

68 Similarly, in *Seven Network (Operations) Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors (No 2)* (2001) 110 IR 372, I stated, at 375:

'where the conduct in question targets a particular organisation or person and that person is authorised to commence and commences a proceeding for the imposition of a penalty, in the usual course it is appropriate to order that the penalty be paid to the organisation or person.'

69 In *Gibbs v The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223 Gray J stated:

'[t]he usual order, when [a] proceeding is not brought by an inspector appointed under the Act, is for payment to the person or organisation applying for the penalty.'

70 In *Telstra*, Finkelstein J stated that perhaps the "usual" order described by Gray J at 233 [26]:

'is to be explained on the basis that often an industrial organisation brings proceedings for a contravention of the Workplace Relations Act to protect the legitimate interests of its individual members.'

71 In my view, there is nothing in s 356, its historical origins or the scheme of the *WR Act* that discloses any reason in the present case for departing from the 'usual' order that the penalty be paid to the FSU.
..."

14. The prosecutions brought by the OWS have been associated with a number of audits, including audits into the accommodation industry (which led to the recovery of \$260,000), ACT restaurants (which recovered in excess of \$1.5 million). There have also been audits of fast food outlets, the trolley collecting industry and the cleaning industry, among others.

15. An interesting aspect of these prosecutions has been the use of State and Federal Magistrates Courts. Of the cases described on the Ombudsman's website just over 80% were dealt with or are pending in either the State Magistrates Court or the Federal Magistrates Court with the split being pretty even. The remainder were dealt with or are pending in the Federal Court.
16. These matters listed on the site fall under the following categories:
- (a) Wages and conditions 79%
 - (b) Agreement making/duress 14%
 - (c) Freedom of Association 2%
 - (d) Failure to comply with notice to produce/hinder obstructed 2%
 - (e) Industrial action 1%
 - (f) Strike pay 1%.
17. The focus of this paper is underpayments. Recent examples of applications brought by the OWS concerning freedom of association and agreement making/duress are *Jordan v Mornington Inn Proprietary Limited* [2007] FCA 1384 Heerey J (total penalty \$170,000) and *Smith v Granada Tavern & Ors (No 3)* [2007] FMCA 1548 Burchardt FM (total penalty \$31,680).

The Harrington Case

18. The facts of the Harrington case were as follows:
- (a) Harrington Corporation ran a restaurant in Canberra known as "the Pangaea Bar and Restaurant".
 - (b) In early 2005 Rosanna Ramirez Cabisidan and Margarito T Sorrosa independently responded to an advertisement for employment placed in a newspaper in the Philippines.
 - (c) They were both engaged as chefs and signed a contract of employment with the Harrington Corporation in the following terms:

1. You will be sponsored for employment for a subclass 457 visa to enable you to work in Australia as a Chef for a contract period of two years.
 2. You can only work as a Chef for the sponsoring employer while you remain in Australia and hold a subclass 457 visa sponsored by the employer.
 3. You will be employed under the conditions of the *Liquor & Allied Industries Catering, Café, Restaurant, etc — (ACT) Award* at Level 4 Hospitality Service, or similar award.
 4. Under the Award you will be paid AU \$29,182 gross salary for a standard 38 hour working week plus the award rate for any overtime hours worked. Income tax will be deducted by the employer.
 5. If you breach-your visa conditions while in Australia, you will reimburse the employer for any debts incurred by the Department of Immigration and Multicultural and Indigenous Affairs in locating and detaining you, while you are sponsored by the employer on a subclass 457 visa.
- (d) Ms Cabisidan and Mr Sorrosa arrived in Australia on Friday 19 August 2005. They entered Australia under a section 457 Visa. They were met on arrival at Sydney Kingsford Smith Airport by the employer and taken to Canberra.
- (e) In Canberra they were provided with accommodation in a group house shared with other employees of the Harrington Corporation who were also working under 457 Visas.
- (f) During the time that Ms Cabisidan and Mr Sorrosa were employed by the Harrington Corporation the hourly rate for a level 4 employee working ordinary hours under the Award was \$15.2158. This variation was made on 24 June 2005, effective on 2 July 2005. The hourly rate that Ms Cabisidan and Mr Sorrosa were paid was \$14.7681 which was the Award rate prior to 2 July 2005 and consistent with the amount in the employment contract.
- (g) In their first week of employment the Respondent paid Ms Cabisidan and Mr Sorrosa the amount of \$100 in addition to the weekly salary in order to assist them with the expenses associated with their relocation to Canberra.
- (h) The Respondent also made the following deductions from the salary paid to Ms Cabisidan and Mr Sorrosa :
- (I) Rent \$35.50 per week
 - (II) Uniform \$40
 - (III) Medical insurance \$34.50.

19. The breaches alleged by Mr Mason, the OWS inspector who instituted the proceeding, alleged: failure to pay the correct hourly rate; failure to pay for all hours worked; failure to pay the weekend work penalty rates; failure to pay proportional annual leave upon termination; failure to pay one weeks wages in lieu of notice of termination of employment. Applying section 719(2) of the Act (offences that arise out of a course of conduct as constituting a single breach of the term) the court proceeded on the basis that there were 7 breaches of the Award, 5 common to Mr Sorrosa and Ms Cabisidan and 2 for Mr Sorrosa alone.
20. As with most cases of this type there was no evidence that Harrington Corporation deliberately set out to breach the award. Rather, consistent with the fact that the rate being paid was the previous award rate, it would appear that the Corporation was unaware that the rates had been varied. There was evidence that when it became aware of its obligations the Corporation tried to settle the case for an amount less than the total amount due. It is also apparent that the breaches had occurred over a seven-week period and involved a significant percentage of the amounts payable to the two employees in question. The learned Federal Magistrate appears to have proceeded on the basis that had the employment not come to an end the breaches would have been ongoing. The employees in question were in a particularly vulnerable position given that their 457 Visa was contingent upon their ongoing employment with the corporation. Indeed, at the time the case was heard both employees had returned to the Philippines.
21. The maximum penalty for a contravention of section 719 of the Act is 300 penalty units. This is the same as the penalty that had been in place since August 2004 for a breach of section 178 of the *Workplace Relations Act 1996* (“the Act”) as it was prior to the changes to the Act made by *Workplace Relations Amendment (Work Choices) Act 2005* (“the Pre Reform Act”).

22. Section 4 of the Act adopts the meaning of penalty unit found in the *Crimes Act 1914*. That Act provides:

“4AA Penalty units

(1) In a law of the Commonwealth or a Territory Ordinance, unless the contrary intention appears:

penalty unit means \$110.”

23. Accordingly the maximum penalty for each breach was \$33,000. A potential maximum of \$210,000.

24. In his decision His Honour commenced his consideration of penalty with the general observation that this is an imprecise business. At paragraph 18 he said:

In *Trade Practices Commission v TNT Australia Pty Ltd* [1995] ATPR 40,161 at 40,165 Burchett J said:

[I]t cannot be denied that the fixing of the quantum of a penalty is not an exact science. It is not done by the application of a formula, and within a certain range, courts have always recognised that one precise figure cannot be incontestably said to be preferable to another.

25. Having made this general observation His Honour went on to consider the objects of the Act both pre-and post-work choices and concluded that both sets of objects emphasised the importance of minimum standards, including wages and of the enforcement of those standards. His Honour also noted the magnitude of the penalties provided for by the Act (at paragraph 21). In respect of this matter and His Honour went on to say at paragraph 22:

“It is also relevant to note that the maximum penalty has been increased very significantly in the last two years. It was raised from \$10,000 to \$33,000, an increase of 230 per cent. In view of this large increase the following comments of Merkel J in a slightly different

context at [72] in *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847 are apposite – also noting that the maximum penalty for each breach that Merkel J was considering was \$10,000:

Finally I note that the penalties imposed in the present case ... greatly exceed penalties imposed under the WR Act or its predecessors in previous cases. It may be that breaches by unions and employers of industrial legislation from time to time have been accepted as part of the give and take of industrial disputation. However, in recent years industrial legislation has increasingly codified and prescribed what is acceptable, and what is unacceptable, industrial conduct. The legislature has, over time, also moved to increase the penalties that may be imposed in respect of unlawful industrial conduct. In my view, any light handed approach that might have been taken in the past to serious, wilful and ongoing breaches of the industrial laws should no longer be applicable. As is apparent from the penalties that I have imposed, I have not accepted that such an approach, which was urged by CBA (which contended that either no penalty or only a nominal penalty was appropriate), is applicable in the present case.”

26. His Honour then went on to address the matters that he considered the authorities established were relevant to fixing penalty, these were:
- (a) Nature and extent of the conduct;
 - (b) Circumstances in which the conduct took place;
 - (c) Nature and extent of any loss or damage;
 - (d) Similar previous conduct;
 - (e) Whether the breaches were properly distinct or arose out of one course of conduct;
 - (f) Size of the company;
 - (g) Deliberateness of the breaches;
 - (h) Involvement of senior management;

- (i) Corporations contrition, corrective action and cooperation with the enforcement authorities; and
 - (j) Deterrence.
27. In respect of the last matter His Honour said at paragraph 51:

“The authorities have emphasised the significance of deterrence, both specific and general, in setting pecuniary penalties (see *CPSU, The Community and Public Sector Union v Telstra Corporation Limited* [2001] FCA 1364 at [9], *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847 at [60]). When discussing general deterrence in a trade practices matter Finkelstein J said that “[f]or a penalty to have the desired effect, it must be imposed at a meaningful level” (*Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited* [2001] FCA 383 at [13]).”
28. In addition to imposing a penalty His Honour also made orders requiring full restitution of the amounts which had been underpaid.
29. I have dealt with the Harrington case at some length, not only because it is an early example of enforcement under work choices but also because the matters referred to by His Honour have been generally picked up as a useful summary of the issues that need to be addressed when imposing a penalty in these types of proceedings (see for example *Flattery v The Italian Eatery T/As Zeffirelli's Pizza Restaurant* [2007] FMCA 9). In *Kelly v Fitzpatrick* [2007] FCA 1080 a decision handed down in July of this year, Tracey J. said:

“In *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 Mowbray FM identified “a 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”. Those considerations were derived from a number of decisions of this Court. I gratefully adopt, as potentially relevant and applicable, the various considerations identified by him.”
30. Not surprisingly in the light of this endorsement a number of subsequent decisions have referred to both *Kelly* and the Harrington case itself. (For example *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007]

FMCA; *Inspector Robert John Hortle v Aprint (Aust) Pty Ltd & Anor*
[2007] FMCA 1547; *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA
1550; *Coles v Elsen Bros Pty Ltd* [2007] FMCA 1838.)

31. His Honour Tracey J. also usefully clarified the approach to the totality principle at paragraph 30 he said:

“Another factor which must be taken into account in the fixing of pecuniary penalties for multiple breaches of statutory stipulations is the totality principle. This principle is designed to ensure that the aggregate of the penalties imposed is not such as to be oppressive or crushing. Different views have been expressed as to the manner in which the principle ought properly to be applied. On one view the starting point should be the determination of an appropriate total penalty. That figure would then be divided by the number of breaches to produce a penalty for each breach: see *CPSU v Telstra Corporation Limited* (2001) 108 IR 228 at 230[7]. The orthodox position, however, which I consider should be adopted, is that the starting point is the determination of appropriate penalties for each contravention of the statutory norm. The aggregate figure is then considered with a view to ensuring that it is an appropriate response to the conduct which led to the breaches: see *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 53. See also *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65 at [145] per Jessup J. This approach was recently described, in the criminal context from which the totality principle is derived, as “the orthodox, but not necessarily immutable, practice” adopted by sentencing courts: see *Johnson v R* (2004) 205 ALR 346 at 356[26] per Gummow, Callinan & Heydon JJ.”

32. Finally, *Kelly* is a reminder that there is no necessary correlation between the amount of underpayment and the appropriate penalty. In that case the underpayment which had occurred over a number of years totalled \$96,664.76. At the date of the hearing this amount had been repaid. The total penalty for the 6 breaches of the award was \$3,660.

Conclusion

33. Work Choices introduced significant changes not just in the forms of industrial regulation but also in the method of enforcement. As illustrated



by the outcome in the Harrington case, it would appear that the concerns that these latter changes would allow employers to breach the industrial instruments that apply to them with impunity, have not been realised.

Chris O'Grady
Latham Chambers

Deleted: 21 November 2007