FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liquidation) (No 4) [2021] FCA 1242

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| File number(s): |  |
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| Judgment of: | **KATZMANN J** |
|  |  |
| Date of judgment: | 14 October 2021 |
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| Catchwords: | **INDUSTRIAL LAW** — allegations of multiple contraventions of numerous civil penalty provisions of the *Fair Work Act 2009* (Cth) relating to employment of seven massage therapists recruited to work from the Philippines — which, if any, award applied — whether employer contravened s 45 of the Act by failing to pay minimum wages, public holiday and overtime rates — whether employer contravened s 44 by failing to comply with National Employment Standards — where employees worked long hours, were required to be available to perform massages throughout the time the employer’s premises were open to the public and were not paid overtime rates, whether employees were requested or required to work unreasonable hours contrary to s 62(1) — whether employer failed to pay untaken annual leave entitlements on termination as required by s 90(2) — whether employer failed to give employees a Fair Work Information Statement in accordance with s 125 — whether sufficient for employer to put a copy on a wall in the staff room— whether by making deductions from their wages purportedly to repay loans in the absence of written authorisations, employer acted contrary to s 323(1) — where employer allegedly required employees to return a portion of their salaries in cash, whether employer required employees to spend amounts from their wages for the benefit of the employer contrary to s 325(1)**INDUSTRIAL LAW** — adverse action — whether employer took adverse action against employees in contravention of s 340 by threatening to repatriate them to the Philippines if they exercised their workplace rights to make a complaint or inquiry — whether employer took adverse action against employees in contravention of s 351 by reason of their race, national extraction and/or social origin**INDUSTRIAL LAW** — coercion — whether employer threatened to return employees to the Philippines or have their families there killed if they reported their working conditions to authorities in contravention of s 343(1)**INDUSTRIAL LAW** — record keeping contraventions — whether employer made or kept records and/or pay slips of the kind prescribed by the *Fair Work Regulations 2009* (Cth) — whether employer contravened s 535(1) by failing to make and keep records of the number of overtime hours worked or the start and finish times of overtime hours worked contrary to reg 3.34; of the periods of annual leave taken and the balance of their entitlements to annual leave from time to time contrary to reg 3.36(1); and of the nature of the termination of the employees’ employment contrary to reg 3.40 — whether pay records false or misleading to employer’s knowledge in contravention of reg 3.44(1) — whether employer made use of entries in employee records knowing the entries were false or misleading — whether employer failed to provide pay slips to employees for parts of their periods of employment in contravention of s 536(1) and whether employer contravened s 536(2) because pay slips did not include certain information prescribed by reg 3.46 **ACCESSORIAL LIABILITY** —whether sole director of employer who recruited employees and who was admittedly responsible for the overall direction, management and supervision of employer’s operations was knowingly concerned in employer’s contraventions — whether supervisory employee was knowingly concerned in some of the contraventions**CORPORATIONS** — deed of company arrangement — where employer had entered into a deed of company arrangement and the employees in question were parties to the deed and had been paid according to its terms, whether deed extinguishes the underlying liability — whether Ombudsman a creditor —whether an order of any kind could be made against employer **PRACTICE AND PROCEDURE —** whether leave should be granted to Ombudsman to amend pleadings after conclusion of hearing |
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| Words & phrases: | “give”, “require”, “spend”, “in his or her employment”, “race”, “national extraction”, “social origin” |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) ss 15AA, 46*Bankruptcy Act 1966* (Cth) s 82(3)*Conciliation and Arbitration Act 1904* (Cth) s 5(1) (repealed) *Corporations Act 2001* (Cth) ss 435A, 435C, 444A(4), 444D(1), 473B, 553, 553B*Evidence Act 1995* (Cth) s 140*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Sch 9, subitem 5 *Fair Work Act 2009* (Cth) ss 3, 11, 12, 14, 26, 27, 44(1), 45, 46, 47, 48(4), 48, 61, 62, 90, 116, 117, 124, 125, 153, 194, 195, 323, 324, 325, 326, 327, 336, 340, 341, 342, 343, 348, 351, 360, 361, 535, 536, 545(3), 546(1), 549, 551, 682, 771, 772, 723, 793*Federal Court of Australia Act 1976* (Cth) s 37M*Migration Act 1958* (Cth) ss 140UA, 140V, 140X, 140XB, 140XC, 235, 245AB, 245AG, 245AR, 245AS*Racial Discrimination Act 1975* (Cth) ss 10, 15(1)*Fair Work Regulations 2009* (Cth) regs 2.02, 2.12, 3.33, 3.34, 3.36, 3.40, 3.44(1), 3.44(6), 3.46(2)*Federal Court Rules 2011* (Cth) rr 1.32, 1.40, 8.21, 16.08, 16.53*Legal Services Directions 2017* (Cth) App B, cl 2*Migration Regulations 1994* (Cth) reg 2.79(2)*Proceeds of Crime Regulations 2002* (Cth) reg 6(l)*Confiscation of Criminal Assets Act 2003* (ACT) ss 84(1), 85(1)*Crimes Act 1900* (ACT) s 30*Criminal Code 2002* (ACT) ss 62, 64*Discrimination Act 1991* (ACT) ss 7(1), 10*Equal Opportunity Act 1984* (Vic) s 4 (repealed)*Equal Opportunity Act 2010* (Vic) s 4*Hair and Beauty Industry Award 2010* ccl 3.1, 4, 7, 17, Sch B*Health Professionals and Support Services Award 2010* ccl 3.1, 4, 7, 11.2, 14, 15, 18.5(a), 23, 24, 28.1, 32.2, A.2.5, A.5, A.7.3, B.1, Sch C*International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) Art 1.1*Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth)Explanatory Memorandum to the Corporate Law Reform Bill 1992 (Cth)Explanatory Memorandum to the Fair Work Bill 2008 (Cth) |
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| Cases cited: | *4 yearly review of modern awards – Health Professionals and Support Services Award 2010* [2019] FWCFB 8538*Adler v Australian Securities and Investments Commission* [2003] NSWCA 131; 21 ACLC 1810; 46 ACSR 504; 179 FLR 1*Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175*Atkins Freight Services Pty Ltd v Fair Work Ombudsman* [2017] FCA 1134*Australian Beverage Distributors v Evans & Tate Premium Wines Pty Ltd* [2006] NSWSC 560; 58 ACSR 22; 200 FLR 332; 24 ACLC 657*Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Appeal)* (2019) 269 FCR 262*Australian Communications and Media Authority v Mobilegate Ltd (a company incorporated in Hong Kong) (No 8)* [2010] FCA 1197; 275 ALR 293*Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq)* [2017] FCA 521*Australian Competition and Consumer Commission v Phoenix Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement)* [2016] FCA 1246*Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* (2001) 115 FCR 442*Australian Education Union v Victoria (Department of Education and Early Childhood Development)* (2015) 239 FCR 461*Australian Medical Council v Wilson* (1996) 68 FCR 46*Australian Securities and Investments Commission v Adler* [2002] NSWSC 171; 41 ACSR 72; 20 ACLC 576; 168 FLR 253*Australian Securities and Investments Commission v Lawrenson Light Metal Die Casting Pty Limited* [1999] VSC 500; 33 ACSR 288; 158 FLR 307*Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435*Banque Commerciale SA (in liq) v Akhil Holdings Limited* (1990) 169 CLR 279*BE Australia WD Pty Ltd (subject to a deed of company arrangement) v Sutton* (2011) 82 NSWLR 336*Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969*Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500*Brash Holdings Ltd (Administrator appointed) v Katile Pty Ltd* [1996] 1 VR 24*Briginshaw v Briginshaw* (1938) 60 CLR 336*Browne v Dunn* (1893) 6 R 67*Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322*Calado v Minister for Immigration and Multicultural Affairs* (1997) 81 FCR 450*Cement Australia Pty Ltd v Australian Competition and Consumer Commission* (2010) 187 FCR 261*Chief Executive Offıcer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161*Chong v CC Containers Pty Ltd* [2015] 49 VR 402*CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384*Cigarette & Gift Warehouse Pty Ltd v Whelan* (2019) 268 FCR 46*City of Swan v Lehman Brothers Australia Ltd (subject to a Deed of Company Arrangement)* (2009) 179 FCR 243*City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426*Commonwealth of Australia* v *Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482*Commonwealth v McEvoy* (1999) 94 FCR 341*Community and Public Sector Union (CPSU) v Telstra Corp Ltd (No 2)* (2000) 101 FCR 45*Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455*Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2015) 230 FCR 298*Construction, Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87; 59 AILR ¶100–686; 164 IR 299*Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697; 64 AILR ¶101–659*Council of the NSW Bar Association v Power* (2008) 71 NSWLR 451*Cummins South Pacific Pty Limited v Keenan* [2020] FCAFC 204, 302 IR 400*Currie v Dempsey* (1967) 69 SR (NSW) 116*Dilosa v Latec Finance Pty Ltd (No 1)* (1966) 84 WN (Pt 1) (NSW) 557*Director of the Fair Work Building Industry Inspectorate v Robinson* (2016) 241 FCR 338*Ealing London Borough Council v Race Relations Board* [1972] AC 342*Eatock v Bolt* (2011) 197 FCR 261*Ex parte McLean* (1930) 43 CLR 472*EZY Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134; 360 ALR 261; 282 IR 86*Fabre v Arenales* (1992) 27 NSWLR 437*Fair Work Ombudsman v Al Hilfi* [2016] FCA 193*Fair Work Ombudsman v Australian Workers’ Union* [2017] FCA 528; 271 IR 139*Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liquidation)* [2019] FCA 1601*Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liquidation) (No 2)* [2020] FCA 348*Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034; 152 ALD 209*Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456*Foots v Southern Cross Management Pty Ltd* (2007) 234 CLR 52*Giorgianni v The Queen* (1985) 156 CLR 473*Hamilton v Whitehead* (1988) 166 CLR 121*HL Bolton (Engineering) Co. Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159*Ho v Powell* (2001) 51 NSWLR 572*Hospital Employees’ Industrial Union of Workers, WA v Proprietors of Lee-Downs Nursing Home* (1977) 57 WAIG 455*Jones v Dunkel* (1959) 101 CLR 298*Josephson v Walker* (1914) 18 CLR 691*King-Ansell v Police* [1979] 2 NZLR 531*Kowalski v Trustee, Mitsubishi Motors Australia Limited Staff Superannuation Pty Ltd* [2003] FCAFC 18*Kucks v CSR Ltd* (1996) 166 IR 182*Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361*Lamont v University of Queensland (No 2)* [2020] FCA 720*Lehman Brothers Holdings Inc. v City of Swan* (2010) 240 CLR 590*Leotta v Public Transport Commission* *(NSW)* (1976) 9 ALR 437; 50 ALJR 666*Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202*Mandla v Dowell Lee* [1983] 2 AC 548 (HL)*Maritime Union of Australia v Fair Work Ombudsman* (2016) 247 FCR 154*Mathers v Commonwealth of Australia* (2004) 134 FCR 135*Merlin Gerin (Australia) Pty Ltd v Wojcik* [1994] VSC 209*Metropolitan Health Service Board v Australian Nursing Federation* (2000) 99 FCR 95*Milardovic v Vemco Services Pty Ltd (Administrators Appointed)(No 2)* (2016) 242 FCR 492*Minister for Immigration and Border Protection v EFX17* [2021] HCA 9; 95 ALJR 342; 388 ALR 351*Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29; 94 ALJR 818; 381 ALR 601; 297 IR 338*Musa v Alzreaiawi* [2021] NSWCA 12*MYT Engineering Pty Limited v Mulcon Pty Limited* (1999) 195 CLR 636*Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1*Payne v Parker* [1976] 1 NSWLR 191*PIA Mortgage Services Pty Ltd v King* (2020) 274 FCR 225*Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* (2016) 248 FCR 18*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355*Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611*Rumble v The Partnership trading as HWL Ebsworth* [2019] FCA 1409; 289 IR 72*Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27; 327 ALR 460; 149 ALD 88*Secretary, Department of Health and Ageing v Prime Nature Prize Pty Ltd (in liq)* [2010] FCA 597*Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378*Shackley v Australian Croatian Club Ltd* [1995] IRCA 475; 61 IR 430*Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271; 314 ALR 346; 242 IR 1*Sons of Gwalia* *Sons of Gwalia Ltd (subject to a deed of company arrangement) v Margaretic* (2007) 231 CLR 160*Squires v Flight Stewards Association of Australia* (1982) 2 IR 155*State of Victoria v Construction, Forestry, Mining and Energy Union* (2013) 218 FCR 172*State of Victoria v Mansfield* (2003) 130 FCR 376*Tattsbet Ltd v Morrow* (2015) 233 FCR 46*Tesco Supermarkets Ltd v Nattrass* [1972] AC 153*The Commonwealth v Tasmania* (1983) 158 CLR 1*Tomlinson v Ramsey Food Processing Pty Limited* (2015) 256 CLR 507*Vale v Sutherland* (2009) 237 CLR 638*WACB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] HCA 50; 79 ALJR 94; 210 ALR 190; 80 ALD 69*Walsh v Greater Metropolitan Cemeteries Trust (No 2)* [2014] FCA 456; 66 AILR ¶102–285; 243 IR 468*Warrumunda Village Inc v Pryde* (2002) 116 FCR 58*Water Board v Moustakas* (1988) 180 CLR 491*West v Government Insurance Office (NSW)* (1981) 148 CLR 62*Yorke v Lucas* (1985) 158 CLR 661Australia, Senate, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, Report to the Senate Education and Employment Committee (2016)Australian Law Reform Commission, *Protection of Human Genetic Information in Australia*, Report No 96 (2003)*Award Modernisation – Statement – Full Bench* [2009] AIRCFB 50*Butterworths Australian Legal Dictionary* (Butterworths, 1997)Committee of Experts on the Application of Conventions and Recommendations, *Equality in Employment and Occupation: Report III (Part 4B): General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No 111)* (Report presented to the International Labour Conference, 75th sess, Geneva, 1988)Heydon JD, *Cases and Materials on Evidence* (Butterworths, 1975)Heydon JD, *Cross on Evidence* (12th ed, Lexis Nexis Butterworths, 2019)*Macquarie Dictionary* (8th ed, Pan Macmillan Australia, 2020)Murray M “Fines and Penalties – Provable in Bankruptcy?” (2000) 10(3) New Directions in Bankruptcy 13Symes C and Duns J, *Australian Insolvency Law,* (3rd ed, Lexis Nexis Butterworths, 2015) |
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| Division: | Fair Work Division |
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| Registry: | New South Wales |
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| National Practice Area: | Employment and Industrial Relations |
|  |  |
| Number of paragraphs: | 972 |
|  |  |
| Date of last submissions: | 5 February 2021 |
|  |  |
| Date of hearing: | 21–25 October 2019, 30 November–11 December 2020 |
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| Counsel for the Applicant: | Mr M Seck with Ms B Byrnes |
|  |  |
| Solicitor for the Applicant: | Office of the Fair Work Ombudsman |
|  |  |
| Counsel for the First Respondent: | The First Respondent did not appear |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent was self-represented |
|  |  |
| Counsel for the Third Respondent: | The Third Respondent was self-represented |

ORDERS

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|  | ACD 41 of 2018 |
|   |
| BETWEEN: | FAIR WORK OMBUDSMANApplicant  |
| AND: | FOOT & THAI MASSAGE PTY LTD (ACN 147 134 272)First RespondentCOLIN KENNETH ELVINSecond RespondentJUN MILLARD PUERTOThird Respondent  |

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| order made by: | KATZMANN J |
| DATE OF ORDER: | 14 OCTOBER 2021 |

THE COURT ORDERS THAT:

1. Leave be granted to the applicant to file and serve a second further amended originating application and a second further amended statement of claim in the form of annexures ST-47 and ST-48 to the affidavit of Sharissa Thirukumar affirmed on 22 December 2020.

2. Leave also be granted to the applicant to amend the second further amended statement of claim to incorporate in paragraphs 152, 153, 159 and 160 the following additional cross-references: 47HP, 53HP, 59HP and 65HP.

3. By **21 October 2021**, the applicant file and serve the second further amended originating application and statement of claim incorporating the above amendments.

4. By **28 October 2021** the applicant file and serve further submissions and, if necessary, affidavit evidence, particularising in detail the steps taken by Mr Ronnie Wong that enabled him to reach the conclusion that the base hourly rates at all relevant times were as set out in the table to paragraph 4 of his fourth affidavit affirmed on 22 December 2020.

5. By **4 November 2021**, the second respondent file any amended defence in response to the amendments made in the second further amended statement of claim.

6. By **25 November 2021**, the second respondent file and serve any affidavit evidence in response to Mr Wong’s fourth affidavit and any further affidavit filed as a result of order 4 above.

7. The parties use their best endeavours to agree on orders giving effect to these reasons, including the amount of the underpayments.

8. The matter be referred to Senior National Judicial Registrar Priestley to assist the parties to reach agreement.

9. If the parties are unable to reach agreement by **16 December 2021**, pursuant to s 54A of the *Federal Court of Australia Act 1976* (Cth) Senior National Judicial Registrar Priestley be appointed as a referee to conduct an inquiry into the following questions in accordance with these reasons and to provide a written report to the Court setting out her opinion on those questions and her reasons:

(a) With respect to minimum wages, public holidays worked, Monday to Saturday overtime and Sunday overtime worked:

(i) What amounts should have been paid to each of the Massage Therapists during his or her period of employment with the first respondent?

(ii) Comparing the agreed amounts paid to each of the Massage Therapists during their employment with the amounts they should have been paid, to what extent was each of them underpaid?

(b) With respect to accrued untaken annual leave, comparing the agreed amount of untaken annual leave each of the Massage Therapists had at the time their respective periods of employment with the first respondent ended with the amounts they should have been paid in accrued untaken annual leave, to what extent was each of them underpaid?

10. The parties be provided with an opportunity to make further submissions on these questions to the referee in accordance with any directions she may make.

11. The matter be listed for further case management within seven (7) days of the provision to the Court of the referee’s report.

12. Leave be granted to apply on three (3) days’ notice.

**THE COURT NOTES THAT:**

13. In these orders:

(a) the term “Massage Therapists” is a reference to the former employees of the first respondent listed in para 4 of this judgment;

(b) “the agreed amounts paid to each of the Massage Therapists during their employment” are the amounts recorded in column 5 of tables 2, 3, 4 and 5 of annexure A to the amended statement of claim and reproduced in all subsequent iterations of the applicant’s pleading including in annexure A to the second further amended statement of claim; and

(c) “the agreed amount of untaken annual leave each of the Massage Therapists had at the time their respective periods of employment with the first respondent ended” is a reference to the amount appearing alongside the names of the Massage Therapists in column 2 of table 7 in annexure A to the amended statement of claim and reproduced in all subsequent iterations of the applicant’s pleading including in annexure A to the second further amended statement of claim.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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REASONS FOR JUDGMENT

KATZMANN J

# INTRODUCTION

1 In September 2017 the Australian Parliament passed the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth). The amendments included in the Bill were made in response to community concerns about the exploitation of vulnerable workers. Among the most vulnerable are foreign workers on temporary visas. This case is concerned with the wages and conditions of employment of seven such workers before the amendments were introduced.

2 Foot & Thai Massage Pty Ltd (in liquidation) (**FTM**) was the owner and operator of a therapeutic massage shop which traded as “foot&thai”. In this proceeding the Fair Work **Ombudsman** alleges that FTM contravened the *Fair Work Act 2009* (Cth) (**FW Act** or **Act**) in numerous respects and that Colin Kenneth **Elvin,** the sole director of FTM, and Jun Millard **Puerto**, an employee of FTM who was responsible for supervising other FTM employees, were involved in most of these contraventions.

3 Numerous contraventions are pleaded in the Ombudsman’s statement of claim. The alleged contraventions include underpayment of wages to employees recruited from the Philippines to work for FTM as massage therapists; breaches of the National Employment Standards and other terms and conditions of employment prescribed by the FW Act; threats of retribution in the event that the employees complained about their situation; and poor and misleading record-keeping.

4 In alphabetical order the employees in question are Irene **Amacio**; Cristina **Bantilan**; Ruben **Benting**; Delo Be **Isugan**; Mayet **Ortega**; Janice **Castaneda** (formerly Mapute); and Cyrene **Sarto**. For convenience, from now on, when I refer to them collectively, they are the **Massage Therapists** or **Therapists**.

5 The Ombudsman seeks various forms of relief, including declarations, orders for compensation, and pecuniary penalties.

6 Liability is disputed.

7 In its defence FTM claimed that it could not be subjected to any order for underpayment of wages because it was a party to a deed of company arrangement executed on 11 April 2016 in respect of which each of the Massage Therapists lodged a formal proof of debt or claim and was paid for unpaid wage and annual leave entitlements and that the deed extinguished any claims or debts of those employees. Otherwise, for various reasons, FTM claimed that it did not know and could not plead to many of the matters alleged against it.

8 Mr Elvin and Mr Puerto also filed defences, initially raising the privilege against self-exposure to a penalty. After the Ombudsman’s witnesses gave evidence, Mr Elvin amended his defence. Mr Puerto did not. Although he was present for the duration of the proceeding, he elected to play no active part in it.

9 The proceeding has had a long and unhappy history.

10 On 13 August 2019, well after the matter had been listed for hearing and the Ombudsman had filed her evidence on liability, FTM appointed external administrators and resolved to wind up the company. On 26 September 2019 I made orders under s 500(2) of the *Corporations Act 2001* (Cth) granting the Ombudsman leave to proceed against the company in liquidation: *Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liquidation)* [2019] FCA 1601. That brought to an end FTM’s participation in the proceeding. The liquidator chose not to appear or file submissions.

11 The hearing began in October 2019. At that time, only the Ombudsman’s evidence was presented. All former FTM employees whose affidavits were read were required by Mr Elvin for cross-examination and all except Ms Ortega and Ms Sarto were cross-examined. After the testimony of the last of the Ombudsman’s witnesses was received, orders were made, amongst other things, providing for the respondents to file any amended defences, affidavits, and submissions.

12 The orders afforded the respondents nearly two months to file amended defences and nearly four months for them to put on evidence. The orders were not complied with. The history is summarised in *Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liquidation) (No 2)* [2020] FCA 348.

13 Ultimately, Mr Elvin did file an amended defence in which he waived the privilege. He also filed a number of affidavits. Mr Puerto did not file an amended defence and did not go into evidence. Nor did he cross-examine any of the witnesses or make any submissions.

14 The trial was due to resume in April 2020 but was adjourned until December 2020, largely because of difficulties occasioned by the COVID-19 pandemic. On that occasion, at Mr Elvin’s request, most of the Ombudsman’s witnesses were recalled for further cross‑examination and Ms Sarto, who had not previously been required for cross-examination, was now required. Mr Elvin and his witnesses were also cross-examined on their affidavits.

# THE STATUTORY FRAMEWORK

15 Section 44(1) of the FW Act prohibits a national system employer from contravening a provision of the National Employment Standards (**NES**). This subsection is a civil remedy provision: see Pt 4–1. A national system employer is defined in s 14 to include a constitutional corporation. A constitutional corporation is a corporation to which s 51(xx) of the *Constitution* applies (s 12), that is to say, a foreign corporation or a trading or financial corporation formed within the limits of the Commonwealth.

16 The NES appears in Pt 2–2 of the Act. It sets minimum standards of employment “which cannot be displaced” (s 61). Those minimum standards relate to a number of matters. Relevantly, they include maximum weekly hours of work (Div 3); annual leave entitlements (Div 6); public holiday entitlements (Div 10); and the provision of a Fair Work Information Statement (Div 12).

17 A person is prohibited from contravening a term of a modern award (s 45), provided that the award applies to the person (see s 46). A modern award applies to an employee and an employer if it covers them, is in operation, and no other provision of the Act provides or has the effect that the modern award does not apply to them (s 47). Unless the modern award has ceased to operate (see s 48(4)), a modern award covers an employee and employer if the award is expressed to cover them (s 48(1)) or a provision of the Act, an order of the Fair Work Commission made under the Act, or an order of a court so provides or has that effect (s 48(2)).

18 Sections 62 and 90 set some of the minimum standards under the NES.

19 Section 62 imposes a ceiling on the number of hours an employee may be required to work. It relevantly limits the hours of work an employer may request or require of a full-time employee to 38 hours unless the additional hours are reasonable and gives an employee the right to refuse to work such additional hours as are unreasonable. It also prescribes a list of factors that must be taken into account in determining whether the additional hours are reasonable or unreasonable as the case may be.

20 Section 90(2) requires an employer to pay an employee for any period of paid leave an employee has not taken when the employee’s employment comes to an end.

21 The FW Act also provides for other conditions of employment.

22 Section 323(1)(a) requires a national system employer to “pay an employee amounts payable to an employee in relation to the performance of work… in full, except as provided by s 324”. Amongst other things, the amounts include the following if they become payable during a relevant period: loadings; overtime or penalty rates; and leave payments.

23 Section 324 permits an employer to deduct an amount from an employee’s wages or salary provided they are authorised in writing by the employee or by law or court order to do so and the amount of the deduction is specified.

24 Section 325 prohibits an employer from requiring an employee, directly or indirectly, “to spend any part of an amount payable to the employee in relation to the performance of work if the requirement is unreasonable in the circumstances”.

25 Section 326 provides that terms in an award, enterprise agreement or contract of employment have no effect if they allow an employer to deduct an amount from an employee’s wages or salary or to make a payment to an employer if the deduction or payment is for the benefit of the employer or a related party and is unreasonable in the circumstances.

26 Section 327 relevantly provides that in proceedings for the recovery of an amount payable to an employee in relation to the performance of work:

(b) any amount that the employee has been required to spend contrary to subsection 325(1), or in accordance with a term to which subsection 326(3) applies, is taken never to have been paid to the employee.

27 Section 340 prohibits an employer from taking adverse action against an employee, including by dismissing or threatening to dismiss the employee, amongst other things, to prevent the exercise by the employee of a workplace right. Section 351 prohibits an employer from taking such action for various reasons including the employee’s race, national extraction or social origin. Section 343 relevantly prohibits an employer from taking or threatening to take action against an employee with intent to coerce the employee from exercising a workplace right. These sections create some of the “general protections” for which the FW Act provides.

28 The FW Act and the *Fair Work Regulations 2009* (Cth) (**FW Regulations**) also impose obligations on employers with regard to the records that must be made and kept and the use to which they may be put and the issuing and content of pay slips.

29 Accessorial liability is covered by Pt 4–1 Div 4.

30 A person who is “involved” in the employer’s contraventions within the meaning of s 550 of the Act is equally liable for those contraventions.

31 Section 793 (in Pt 6–5) deals with the liability of corporations. In substance, it deems certain conduct engaged in by officials of a body corporate or by others at their direction or with their consent or agreement to be action also engaged in by the body corporate. It also provides for a simple method of establishing knowledge, intention, opinion, belief or purpose.

32 All these provisions were in force at all relevant times. Statements in these reasons concerning the content of these and other provisions of the Act and Regulations are intended to apply to the period of the Ombudsman’s claim regardless of the tense of the verb used to introduce them.

# THE OMBUDSMAN’S CLAIMS AGAINST FTM

33 The Ombudsman alleged that FTM contravened the FW Act in the following respects.

34 First, the Ombudsman alleged that in around late August 2012 to early September 2012 Mr Elvin and Mr Puerto advised Ms Amacio, Ms Bantilan and Ms Isugan that they would be required to repay FTM $800 in cash each fortnight because FTM’s business located at shop 6, 36 Weedon Close Belconnen (**the Belconnen shop**) was not earning enough money and not getting enough customers and that, on and from 26 August 2012 until about 2 June 2013, FTM, through Mr Elvin and Mr Puerto, instructed them to do so. Similar allegations were made with respect to Ms Castaneda, Ms Ortega and Ms Sarto. The advice was said to have been given to them on or about 11 April 2013 and the instruction in the period on and from 21 April 2013 to 5 January 2014. Payments purportedly made pursuant to the instructions were described in the Ombudsman’s pleadings as “Fortnightly Cashback Payments”.

35 The Ombudsman alleged that this conduct contravened s 325(1) of the FW Act.

36 Second, the Ombudsman alleged that the deductions from the wages payable to the Massage Therapists for “staff loans” were impermissible deductions and that FTM thereby contravened s 324 of the Act.

37 Third, the Ombudsman alleged that, having regard to s 327 of the Act, as a result of the fortnightly payments and the deductions for loan repayments, the ordinary hourly rates paid to the Massage Therapists were below the award rates. The Ombudsman contended that the Massage Therapists were covered by the *Health Professionals and Support Services Award 2010* (**Health Award**) or, alternatively, by the *Hair and Beauty Industry Award 2010* (**Hair and Beauty Award**)*.*

38 Fourth, the Ombudsman alleged that FTM did not always pay the Massage Therapists overtime when they worked in excess of 76 hours a fortnight in contravention of the relevant award.

39 Fifth, the Ombudsman alleged that FTM failed to pay the Massage Therapists public holiday rates in contravention of the relevant award.

40 Sixth, the Ombudsman alleged that FTM failed to pay the Massage Therapists on termination of their employment their annual leave entitlements in contravention of the relevant award and s 90(2) of the FW Act.

41 Seventh, the Ombudsman alleged that FTM failed to give each of the Massage Therapists a Fair Work Information Statement before, or as soon as practicable after, they commenced employment in contravention of s 125(1) of the FW Act.

42 Eighth, the Ombudsman alleged that FTM required or requested the Massage Therapists to work unreasonable additional hours in contravention of s 62(1) of the Act.

43 The basis of this claim was that the Massage Therapists were required to work more than 38 hours a week without receiving their minimum entitlements to overtime under the relevant award; they were not supervising or managing other employees; and there were risks to their health and safety from working the number of hours they worked on average each week.

44 Ninth, the Ombudsman alleged that there were a number of contraventions relating to the making and keeping of records the provision of pay slips.

45 The Ombudsman claimed that, in contravention of s 535(1) of the FW Act and regs 3.34, 3.36(1), and 3.40 of the FW Regulations, FTM failed to record:

(1) the number of overtime hours worked by each of the Massage Therapists each day and when they started and ceased working overtime hours;

(2) the amount of annual leave taken by the Massage Therapists and the balance of their respective entitlements to annual leave from time to time; and

(3) the manner of termination of their employment and the name of the person who acted to terminate their employment.

46 The Ombudsman claimed that from the fortnightly pay period commencing 31 March 2014 until the end of their respective periods of employment, in contravention of s 536(1) of the FW Act, FTM failed to provide the Massage Therapists with pay slips within one working day of paying them, or at all.

47 The Ombudsman also claimed that, in contravention of s 536(2) of the Act, during the period in which FTM made deductions from their pay it failed to record on the pay slips the name, or the name and number, of the fund or account into which each of the deductions was paid as prescribed by reg 3.46(2) of the FW Regulations.

48 Furthermore, the Ombudsman claimed that, in contravention of reg 3.44(1) of the FW Regulations, FTM failed to ensure that the records were not false or misleading because they did not disclose the fortnightly cashback payments.

49 She also claimed that, by failing to disclose the fortnightly cash refunds when it produced its pay records to the Ombudsman in answer to a notice to produce, FTM made use of entries in the pay records knowing that they were false or misleading, in contravention of reg 3.44(6) of the FW Regulations.

50 Finally, the Ombudsman pleaded contraventions of the general protections provisions of the FW Act.

51 The Ombudsman claimed that FTM contravened ss 340(1)(b) and 343(1)(a) of the Act by threatening to send the Massage Therapists back to the Philippines and to take reprisals against their families if they complained to the authorities about working conditions.

52 She also claimed that FTM took adverse action against the Massage Therapists because of their Filipino race, national extraction and/or “social origin” in contravention of s 351 of the Act.

# THE EVIDENCE

53 The evidence was lengthy. It consisted of a large volume of documents and a substantial body of oral evidence. The Court Book alone ran to nearly 5,000 pages.

## The Ombudsman’s evidence

54 The Ombudsman read affidavits sworn by eight former FTM employees: the seven Massage Therapists and Bartolome Durado, another employee. As I mentioned earlier, all but Ms Ortega were cross-examined by Mr Elvin. Each witness except for Mr Durado gave evidence with the assistance of an interpreter. The Ombudsman also read affidavits of Luke Thomas, a Fair Work Inspector and Team Leader, and Ronnie Wong, an Assistant Team Leader in the Calculations Team at the Office of the Ombudsman. Mr Wong was required for cross‑examination. Mr Thomas was not.

55 Not all the evidence was controversial. Much of it was uncontradicted.

56 Employees recruited from the Philippines commenced employment with FTM in two separate groups. There were about 14 massage therapists in the first group and seven in the second. The first group arrived in Australia on 19 June 2012. Included in that group were Ms Amacio, Ms Bantilan, Mr Benting and Ms Isugan. The evidence indicates that a number of the other members of the group returned to the Philippines before this proceeding was instituted. The second group arrived in Australia on 13 April 2013. It included Ms Castaneda, Ms Ortega and Ms Sarto.

57 Mr Durado immigrated to Australia from the Philippines in 1990 and worked for FTM from 22 August 2014 until 26 October 2015, performing cleaning, maintenance work and some administrative tasks. The Ombudsman makes no claims with respect to him. His evidence corroborated the evidence of the Massage Therapists.

### The first group

58 All the Therapists in both groups were born in the Philippines.

59 Ms Isugan was born in Cebu. Her first language is Cebuano. She can speak Tagalog and English but has some difficulty understanding spoken English. She started working as a massage therapist in Cebu in 2005, when she was about 17. When she accepted employment with FTM she was working 12 hours a day, six days a week, earning the equivalent of around $35 per week.

60 Ms Amacio and Ms Bantilan worked for the same business.

61 Ms Amacio was born in Leyte. Her first language is also Cebuano. She can also speak Tagalog and English well but has some difficulty understanding spoken English. She finished high school in the Philippines and started working as a massage therapist in 2006 when she was about 20 years old. Her husband and two young children live in Cebu.

62 Ms Bantilan was born in Daanbantayan. She speaks Cebuano, Tagalog and English but sometimes finds spoken English difficult to understand. She finished high school when she was 17 and also started working as a massage therapist in Cebu when she was about 20. Her husband and two children, aged eight and ten at the time she swore her affidavit, live in Cebu.

63 Mr Benting was born in Cadiz City. He can speak Cebuano, Tagalog, Hiligaynon and English, although he has some difficulty understanding spoken English. He finished high school in the Philippines and completed a Bachelor of Elementary Education at a university in Cebu in 2009. He started working as a massage therapist in Cebu in 2010, when he was about 22. He earned the equivalent of around $40 a week. His parents and siblings live in the Philippines.

### Recruitment of the first group

64 In November 2011 Mr Elvin was visiting the Philippines and had a massage at the business where Ms Isugan and Ms Bantilan worked. Later that day, after Ms Isugan and Ms Bantilan had finished work, they were approached by an uncle of Mr Elvin who introduced them to Mr Elvin Mr Elvin asked them if they wanted to work for him in Australia and invited them to a meeting that night at the Marriott Hotel in Cebu to discuss the matter. Mr Benting was separately invited to this meeting but did not attend. Approximately 15 people attended the meeting, including Mr Elvin and his father, Colin Godfrey Elvin (**Elvin Snr**). Mr Elvin explained that he was advertising for full-time massage therapists in Australia, with free accommodation, a free plane ticket to Australia, and a salary of $52,000 per year including sick leave and holiday pay. Both Ms Isugan and Ms Bantilan were interested as it offered them the chance of earning substantially higher wages than they were earning in the Philippines. Accordingly, they gave Mr Elvin their contact details. In December 2011, Ms Isugan and Ms Bantilan met with Mr Elvin again for an “interview” in which they gave him a massage. He said he would contact them about the role shortly thereafter.

65 In January 2012, Mr Benting attended a meeting at the SM Mall in Cebu where he met Mr Elvin and Mr Puerto. He had been encouraged to go to the meeting by some of his workmates. At the meeting, Mr Elvin offered him a job as a massage therapist in Australia on similar terms. Mr Benting told Mr Elvin he was interested in the job and gave him his contact details. Mr Elvin said that his father had been impressed by a massage Mr Benting had given him, so he would hire Mr Benting.

66 In around January or February 2012, Ms Isugan, Ms Bantilan and Mr Benting attended another meeting with Mr Elvin and Mr Puerto and about 12 other massage therapists at the Radisson Blu Hotel in Cebu. Mr Elvin told the group that they had been hired to work for him in Australia and that Mr Puerto would assist them to obtain Australian visas. At this meeting, Mr Puerto asked them whether they needed to borrow any money to arrange their visa documents. He told them Mr Elvin was willing to lend them some money but they would have to pay it back from their salaries when they started working. Before they emigrated, Ms Bantilan borrowed the equivalent of about $500 to 600, Ms Isugan borrowed the equivalent of around $350, and Mr Benting borrowed the equivalent of $80. Mr Elvin maintained that he loaned them substantially more than this but provided no evidence to support his contention.

67 In February 2012, Mr Puerto contacted Ms Amacio and asked if she would like to work in Australia with Mr Elvin. One of her colleagues had provided Mr Elvin with her telephone number. Ms Amacio met Mr Puerto at the National Statistics Office where she obtained a certified birth certificate. This was to assist Mr Puerto to arrange her Australian visa. He explained that another Filipino massage therapist had had problems obtaining a birth certificate and she was being hired instead. He offered her a job as a massage therapist on similar terms to the offers made by Mr Elvin to the others.

68 In around late February or early March 2012, Ms Isugan, Ms Bantilan and Ms Amacio met Mr Puerto at the SM Mall and signed contracts of employment with FTM that had already been signed by Mr Elvin on FTM’s behalf. At this meeting Ms Amacio borrowed the equivalent of $150 from Mr Puerto for living expenses. Ms Bantilan and Ms Amacio recalled that Mr Puerto told them at this meeting that Mr Elvin had paid for them to attend a Thai massage course at the NKYR Academy in Cebu, which they needed to complete in order to obtain a visa. Ms Amacio, Ms Bantilan and Mr Benting completed this course in 2012.

69 In around June 2012, Mr Puerto met with Ms Bantilan at the SM Mall and asked her to sign her employment contract again. On 13 June 2012, Mr Benting signed a similar employment contract.

70 After their visas had been granted, the first group flew to Sydney with Mr Puerto on 18 June 2012. From 19 June to 23 June 2012, the group stayed at 44A Edwards Street, Higgins, where Mr Elvin’s parents lived, before moving to the house at the rear of the premises (44B Edwards Street) (**the Residence**), on around 24 June 2012 after a group of Thai workers had moved out.

### The second group

71 Ms Castaneda was born in Davao City. Her first language is Visayan. She can speak, read and write in Tagalog and English, although has some difficulty understanding spoken English. After completing a Bachelor of Science and Nursing she began working as a massage therapist in Manila in 2008 at the age of about 25. In her last job in the Philippines, she worked eight hours a day, six days a week and earned the equivalent of $240 a month. Her family lives in the Philippines.

72 Ms Ortega was born in Manila. Her first language is Tagalog. She can also speak, read and write in English but sometimes needs assistance to understand spoken English. Ms Ortega completed a diploma in computer programming and a course in massage therapy and started working as a massage therapist in May 2007 when she was 21. Before coming to Australia, Ms Ortega worked eight hours a day, six days a week and earned the equivalent of around $300 a month. Her son, parents and sister live in the Philippines.

73 Ms Sarto was born in Tupi, South Cotabato. Her first language is Tagalog and she can speak, read and write English well. After finishing high school she completed a course in hotel management. She started working as a massage therapist in 2008 when she was about 21 at the same business as Ms Ortega. Before coming to Australia, she earned the equivalent of around $250 a month. Her parents and siblings live in the Philippines.

### Recruitment of the second group

74 The second group were recruited by FTM in a similar way to the first.

75 In June and August 2012 Ms Castaneda, Ms Ortega and Ms Sarto each learned that Mr Elvin was advertising positions for massage therapists in Australia. They understood that there was to be a meeting about the matter at the Ascott Makati Hotel in Manila. They each attended this meeting in about August 2012. There, they met Mr Elvin and Mr Puerto. At the meeting Mr Puerto asked them to give Mr Elvin a trial massage. After they did so, Mr Elvin described the position being advertised. He told them they would be paid a salary of $52,000 a year, they would work eight hours a day for five days a week, and would have paid holidays, free accommodation, free utilities, free food, and transport to and from work. Each of them was interested in the position as it promised a substantial increase in their income. They were asked to provide various documents to Mr Puerto in order to obtain Australian visas.

76 In around September or October 2012, Ms Castaneda, Ms Ortega and Ms Sarto attended another meeting with Mr Elvin and Mr Puerto at the Ascott Makati Hotel. At this meeting, they were each offered the position and they each signed an employment contract, which Mr Elvin had already signed. Mr Elvin spoke about the contract in English, with Mr Puerto interpreting. The terms were substantially the same as had been described at the initial meeting.

77 On around 5 April 2013, Mr Puerto asked Ms Castaneda, Ms Ortega and Ms Sarto to attend an employment agency in Manila where they signed the same employment contracts they had already signed. Ms Castaneda said that this was because the employment agency needed a copy of the contract.

78 On 10 April 2013, Ms Castaneda, Ms Ortega and Ms Sarto met Mr Puerto at a hotel near Robinson Mall in Manila where he told them that the business was “not doing very well” and they would not be paid their full salary. He said they would be paid $1800 every fortnight, but would have to pay back $800. He said that they would be paid their full salary when the business “picked up”.

79 After their visas had been granted, the second group arrived in Australia with Mr Puerto on 13 April 2013. They moved into the Residence shortly thereafter.

### Accommodation

80 The Massage Therapists lived at the Residence with Mr Puerto. The house had four bedrooms and three bathrooms. Three rooms could fit four people and one room could fit five or six. After the second group arrived in April 2013, there were approximately 16 or 17 people living in the house, with Mr Puerto sleeping in the living room on a couch.

81 Ms Isugan and Mr Benting said they were compelled to live at the Residence; they were not given a choice of living anywhere else. Ms Amacio and Ms Bantilan said that when they moved into the Residence, Mr Elvin confiscated their passports. Mr Elvin challenged Ms Bantilan (but not Ms Amacio) on this matter, but she maintained that he had.

82 Ms Amacio, Ms Bantilan, Ms Isugan and Mr Benting deposed that they were not allowed to leave the Residence for the first seven or eight months other than to go to work. They said this was because Mr Elvin was concerned about immigration officials discovering that they were living at the house. In cross-examination Ms Isugan and Ms Bantilan said that they were only confined to the Residence for the first three months.

83 From around late 2012 or early 2013, Ms Amacio, Ms Bantilan, Ms Isugan and Mr Benting said they were permitted to leave the house on their days off but they had a curfew of 3 pm. They said this curfew was extended to 5 pm or 6 pm later in 2013, and to 7 pm or 8 pm in 2014. Ms Ortega and Ms Castaneda deposed that when they arrived in April 2013 the curfew was 7 pm. In cross-examination Ms Amacio testified that the curfew was ultimately lifted, as opposed to being further relaxed, but she could not recall when this occurred.

84 There was a gate at the side of 44A Edwards Street that provided access to the Residence. The Massage Therapists deposed that they could not leave the Residence without the gate being opened for them. They said that the gate was locked at around 11 pm each night and opened in the morning before they left for work. They said that “Colin’s mum”, Mrs Elvin, Mr Elvin or Mr Puerto would lock the gate and the therapists did not have access to the key.

85 Mr Elvin put to some of the Therapists (Ms Amacio, Ms Bantilan, Ms Castaneda and Ms Isugan) that the gate was not actually locked but was merely bound by a chain to give the appearance that it was locked. But they were resolute. Each of them maintained that the gate was locked overnight. In addition, Ms Isugan said that if they wanted to do exercises in the morning, or leave the Residence on their days off, they needed to ask Mrs Elvin to open the gate. Ms Castaneda and Ms Bantilan testified that if they left the Residence on their days off and Mrs Elvin was not at home when they returned, they would need to wait for her to return to open the gate, or call Mr Puerto to do the same.

### Rules and threats

86 The Massage Therapists deposed that there were a number of rules they were required to observe. The rules prohibited them from having friends, including boyfriends or girlfriends; speaking to anyone about their pay and conditions; leaving the house at night; bringing their mobile phones to work; speaking Filipino at work or letting the customers know they were not Thai; drinking alcohol or soft drinks; eating junk food or white rice; and complaining “about anything”. Mr Elvin told them that if they did not follow the rules, or if they knew someone who was breaking a rule and did not report it, they would be sent back to the Philippines. These rules were regularly repeated during staff meetings between 2012 and 2015, and Mr Puerto would interpret these rules into Cebuano or Tagalog.

87 Some of the therapists (Ms Castaneda, Mr Benting and Ms Bantilan) deposed that Mr Elvin instructed them to tell immigration officials, in the event of an inspection, that they worked eight hours a day for five days a week, with a 30 minute break, and received holiday pay and a salary of $52,000 a year. They said he also them told not to record their actual hours of work. Consistent with the rules and these instructions, when police and immigration officials attended the Belconnen shop in around July 2012, Ms Bantilan told them she was “happy and the work was good”. Ms Amacio and Ms Bantilan said that Mr Elvin returned their passports after he was informed of the inspection.

88 In July 2012, Mr Elvin made threats to the first group that if they told anyone about their pay and conditions at FTM, including their families or immigration officials, he would arrange for their families in the Philippines to be killed. Mr Elvin told the therapists that it would be “easy” for him to pay someone to do this and Ms Amacio and Mr Benting deposed that he said it would only cost him 10,000 pesos. These threats were made during a late night meeting with the first group that lasted until 4 am. Mr Elvin was “very angry” during the meeting, and screamed and swore at the therapists. Mr Puerto translated what Mr Elvin was saying into Cebuano and at one point, according to Ms Amacio, made a gesture to the group with his finger as if he was slicing his throat. Earlier in the night Mr Elvin had driven the group home from the Belconnen shop “very fast” while swerving from one side of the road to the other. He was apparently angry that one of the therapists had spoken to a Filipino customer in Tagalog, and yelled at the group about the rules he expected them to follow.

89 Mr Elvin made similar threats to hurt the Therapists’ families or send them home to the Philippines during subsequent meetings between 2012 and early 2014. Although the Massage Therapists from the second group did not say that Mr Elvin directly threatened to have their families killed, they were each aware that threats of this nature had been made to the first group.

90 Ms Ortega, for example, said that in around 2013 and 2014 some of the therapists in the first group reported that Mr Elvin told them that if they told anyone about their situation he would hire someone to kill their families at a cost of only 10,000 pesos and they were “very scared of him”. Ms Ortega said that she knew that it was not impossible to hire a killer in the Philippines and she believed what she was told. Ms Sarto deposed that in around late April or May 2013 she had a conversation with Ms Amacio in which she told Ms Amacio that Mr Elvin had “such strict rules” and that she was scared to do the wrong thing and be sent home. Ms Sarto went on to say:

Irene then said to me, words to the following effect: “*You must not complain about anything. He is scary. He told us if we say anything to Immigration that he will get someone in the Philippines to hurt and kill our families. He said he will really do it. I think he is serious*.”

91 Ms Sarto said she was “even more scared” when she heard that. She added:

[Ms Bantilan] and [Ms Amacio] also told me that if they saw me breaking the rules that they had to tell [Mr Elvin] or [Mr Puerto] otherwise they would get in trouble and be sent home.

92 All the Therapists were afraid of breaking the rules and believed they would be sent home if they did so, or that their families would be hurt or killed. This was reinforced when Mr Elvin sent home several therapists to the Philippines between June 2012 and early 2014 for breaking his rules or for alleged underperformance.

93 All the Therapists were frightened of Mr Elvin, particularly when he was angry. Ms Bantilan deposed that Mr Elvin became angry whenever someone complained about their hours or wages, and Mr Benting said he would often scream and swear at the therapists. Mr Benting testified that he was “more angry than calm” when dealing with his employees. Ms Castaneda said that she was “so scared” because Mr Elvin yelled at them “very easily”.

94 The Therapists understood that Mr Elvin was the owner and manager of FTM and had responsibility for their wages and conditions, and for the hiring and firing of the therapists. Mr Elvin attended the Belconnen shop most days and stayed for four to six hours. There were CCTV cameras outside the massage rooms, in the reception area, and in the staff areas at the shop. The cameras also recorded sound, according to Mr Durado.

95 The Therapists said that Mr Elvin would spend most of his time monitoring the CCTV footage on his computer and reviewing the customer booking records. Ms Sarto said he sometimes went to the staff lounge to tell therapists to do work as he could “see in the cameras that [they] are not working”. Mr Elvin also had regular one-on-one meetings with some of the therapists where he would speak about their performance or the performance of others and tell them how to speak to customers and what to say if immigration officials asked them any questions about their employment at FTM. Ms Castaneda said that Mr Elvin regularly spoke to her about her performance and warned her that, if she did not improve, she would be sent back to the Philippines.

96 The Therapists understood that Mr Puerto was a supervisor at the Belconnen shop and an assistant to Mr Elvin. He did not massage any customers. Mr Puerto would frequently remind the therapists of Mr Elvin’s rules and would pass on or translate his directions. Mr Puerto was at the shop most days and lived at the Residence with the therapists. Ms Sarto, Mr Benting and Ms Bantilan deposed that Mr Puerto would watch them and listen to their conversations, both at the shop and at the Residence. Ms Amacio and Mr Benting said he would confiscate their mobile phones at night and Mr Benting said he checked whether they were asleep and would get angry if they were not. Mr Benting said that their phones were mainly confiscated by Mr Puerto in 2012. After FTM opened another shop in Phillip, ACT, Mr Puerto attended the Belconnen shop less frequently and moved out of the Residence in around November 2014.

### Hours and breaks

97 On 24 or 25 June 2012, the first group commenced work at the Belconnen shop. The second group commenced on 15 April 2013. The shop was open from 10 am to 10 pm seven days a week and most public holidays. The closing time was extended to 10.30 pm in around September 2013. Every Massage Therapist worked six days a week, including on weekends and public holidays. Those who were rostered to work on the same day would commute to and from work in a van driven by Mr Elvin, Mr Puerto or occasionally Mr Elvin Snr. Mr Benting and Ms Castaneda deposed that the van did not have enough seats for everyone, so some of them sat on the floor. Ms Castaneda testified that initially the only vehicle that transported the therapists was a seven-seater red Tarago, before Mr Elvin purchased a new van in 2014.

98 They arrived at work at around 9.45 am and began massaging customers at 10 am. They did not finish until the shop closed, after which time they would spend an additional 15 to 30 minutes cleaning massage rooms, showers, toilets and saunas before being transported back to the Residence. This was sometimes not until 11 pm, according to Mr Benting and Ms Sarto.

99 Ms Amacio testified that, when they first arrived in Australia, Mr Elvin told the therapists to limit the amount of massage hours to seven per day. Ms Bantilan said they were told to limit massage hours to five or six during the first two months. Each Therapist reported carrying out more hours of massage than this:

(a) Ms Amacio and Ms Bantilan said they massaged customers between 8.5 and 9.5 hours a day. However, Ms Amacio said this was only on a busy day;

(b) Ms Isugan said she completed between seven and 9.75 massage hours;

(c) Mr Benting testified during cross-examination that he performed up to 9.5 massage hours on a busy day, and a minimum of two to three hours if it was not busy;

(d) Ms Ortega said she spent between eight and nine hours massaging customers on a busy day, and six to seven on a regular day;

(e) Ms Sarto said she massaged customers between 8 and 10 hours a day; and

(f) Ms Castaneda merely said she was working “long hours every day”.

100 The Therapists performed various types of massage, including shiatsu, deep tissue, Swedish, foot reflexology, aroma, Thai oil, Thai massage, remedial, oil and dry massage, and head, shoulders and back massage. Each massage would last between 30 minutes and two hours, and appointments were sometimes scheduled without breaks between customers. Mr Durado said that he saw the Massage Therapists take breaks of between 10 and 30 minutes between customers. The Therapists reported feeling tired and sore due to the workload.

101 In between appointments, the Therapists folded towels, mopped floors, refilled bottles of oils and lotions, cleaned and prepared hot towels for the next customer, and practised their massage skills on Mr Elvin or each other. Ms Isugan testified that there were therapist assistants who would assist with these tasks but they did not start work until 4 pm. She said that even with this assistance, “there [were] always tasks to do…we never stop”. Mr Benting stated that the therapist assistants would sometimes attend in the afternoons, but would only attend the shop daily when it was “very busy”. Ms Castaneda said that there were therapist assistants worked in two shifts, one in the morning and one in the afternoon, but she still had to perform cleaning tasks despite their assistance.

102 The Massage Therapists had breaks for lunch and dinner at different times each day depending on their customer bookings. They usually had a lunch break sometime between 12.30 pm and 1.30 pm, and a dinner break between 4.30 pm and 7.30 pm. They said their breaks lasted between 15 and 30 minutes, although if they were busy, their breaks would only be 10 to 15 minutes, or they had no break at all.

103 Ms Bantilan, Ms Isugan and Mr Benting deposed that throughout 2012 they were not permitted to leave the Belconnen shop during their breaks as Mr Elvin told them that they “always need[ed] to be there for the customers”. For the first three months of this period, Ms Isugan said that Mr Puerto would purchase food for the therapists as required.

104 From early 2013, after the second group arrived, Ms Bantilan, Ms Isugan and Mr Benting said they could leave the shop if they had a vacant slot between appointments and there was no other tasks to do. The therapists were required to ask for permission from the receptionists before they left the shop, and notify them when they returned. Ms Amacio said that the receptionists would review the electronic booking system used to record customer appointments — known as **Kitomba** — and inform her when she could take her break. Ms Bantilan said that they often had to “beg” the receptionist for a break, and they sometimes refused if there was a customer waiting. According to Ms Isugan and Ms Sarto, when they managed to get a break, the break was never more than 30 minutes.

105 Mr Elvin challenged the therapists extensively on this evidence in cross-examination.

106 Ms Isugan testified that they were not permitted to leave the Belconnen shop for the “first few months”. She said that she did not recall having long breaks between customers because “there were other tasks we had to do”. She maintained that she was massaging at least eight to nine customers per day. She also testified that the time of her lunch break varied according to customer bookings and was not always between 12.30 and 1 pm.

107 Ms Bantilan maintained that she massaged up to 9.5 hours a day, and that she never had breaks between massages of one to two hours. She also said that there were never any times that, after massaging customers for two consecutive hours, she received a break of 30 minutes to one hour. In addition, she said that she was not allowed to leave the Belconnen shop during working hours until after the second group arrived.

108 Mr Benting similarly maintained that the therapists were not allowed to leave the Belconnen shop during working hours until the second group arrived. He conceded that he sometimes had breaks between massages that were longer than 30 minutes and up to two hours if it was not busy. In addition he conceded that he did not always have lunch or dinner at the times specified in his affidavit, and that it depended on his customer appointments on the day. He disputed the accuracy of the Kitomba records.

109 Ms Castaneda said there were times when she had breaks between massages of one or two hours, although noted that she was performing other tasks during these breaks.

110 Ms Amacio denied that she ever had meal breaks of one to two hours. However when her attention was drawn to a Kitomba record from 9 December 2012, she said that it was open to her to have a meal break during a two-hour period between customers. She said she never carried out less than four hours of massage a day. Although Mr Elvin put to Ms Amacio that she never massaged for 9.5 hours a day, the Ombudsman referred the Court to several Kitomba records from April 2014 which showed that she did.

111 Ms Sarto maintained that her appointments were usually booked without any breaks in between customers, despite some Kitomba records indicating otherwise.

### Wages and cashbacks

112 The Massage Therapists said that their salaries were paid fortnightly by FTM but the amount was not always the same. They said that the amount was usually between $1,700 and $1,900, but they sometimes received payments of $2,100. The Therapists were unsure why this occurred.

113 Upon their commencement at FTM, Mr Puerto told each therapist to create a bank account with the St George Bank into which their salaries would be paid. In around April 2014, Mr Elvin told the therapists to stop using this account and to instead establish an account with the National Australia Bank (**NAB**). Thereafter their salaries were paid into that account.

114 Each of the Massage Therapists transferred a significant portion of their salary to their families in the Philippines to assist them with education, health care, and other matters.

115 Within three months of their arrival in Australia, Mr Elvin told the therapists in the first group at a meeting in the Residence that they would need to “give back” $800 each fortnight because “the shop [was] not doing well”. For a period of approximately eight months from about September 2012 and June 2013, every fortnight the Therapists from the first group were required to withdraw $800 in cash from an ATM and provide it to Mr Elvin or Mr Puerto. The Therapists would go to an ATM on their breaks or their days off to make the withdrawals. Occasionally Mr Elvin or Mr Puerto would drive a group of them to an ATM at a nearby shopping mall. After the second group arrived, Mr Elvin told the first group that they would no longer need to pay back any amounts as the business had improved.

116 In a supplementary affidavit, Ms Amacio said that there were at least two occasions when she paid back less than $800 but compensated by paying back more than $800 in subsequent fortnights to make up the difference. Ms Bantilan gave similar evidence, also in a supplementary affidavit.

117 Between April 2013 and January 2014, the Therapists in the second group were also required to withdraw $800 in cash each fortnight and provide it to Mr Elvin or Mr Puerto. In a supplementary affidavit, Ms Castaneda deposed there was one occasion when she did not pay back $800 as she wanted to send that money to her family. She said she repaid the outstanding amount in subsequent fortnights. In January 2014, Mr Puerto informed the therapists that the business had improved and that they no longer needed to pay back any amounts.

### Pay slips, loans and deductions

118 Each of the Therapists in the first group deposed that they received pay slips from Mr Elvin or Mr Puerto by hand in 2012 and 2013, that they stopped receiving regular pay slips after 2013, and that in 2015 they received between three and four. The Therapists in the second group similarly reported receiving payslips initially by hand, and not receiving pay slips after mid-2014. The pay slips recorded the Massage Therapists as working 38 hours a week or 76 hours a fortnight, which they said was not consistent with their actual hours of work. None of the pay slips recorded the $800 they paid during the so-called cashback periods.

119 A number of pay slips recorded deductions described as “staff loans”. The relevant pay slips were annexed to the Therapists’ affidavits. The Therapists believed these deductions were to cover the amounts they had borrowed from Mr Elvin in the Philippines, although they all remarked that the deducted amounts were greater than the loans they had received:

(a) a total of $1,500 was deducted from Ms Amacio’s wages despite receiving a loan of around $150;

(b) a total of $1,739.44 was deducted from Ms Bantilan’s wages despite borrowing approximately $500 to $600;

(c) a total of $1,684.93 was deducted from Ms Isugan’s wages despite being loaned approximately $350; and

(d) a total of $1,500 was deducted from Mr Benting’s wages despite being loaned only about $80.

120 Ms Castaneda, Ms Ortega and Ms Sarto deposed that they never received a loan from either Mr Elvin or Mr Puerto. Yet, Ms Castaneda’s first two pay slips disclose that a total of $638.41 was deducted from her wages. She deposed that Mr Elvin and Mr Puerto told her in the Philippines that they would cover flight, visa and medical costs. Ms Ortega’s first two pay slips similarly reveal that a total of $672.91 was deducted from her wages, despite never receiving a loan or signing any document agreeing for a deduction to be made. Similarly, a total of $638.41 was deducted from Ms Sarto’s wages despite never receiving a loan or agreeing for a deduction to be made. In each case the deductions are recorded as “staff loan[s]”.

121 Mr Elvin cross-examined Ms Isugan about other payments he made to her while in the Philippines, such as payments for dental work, and whether she regarded these payments as “loans”. Ms Isugan said that they believed that Mr Elvin had “volunteered to pay for it, that it was … free”. Mr Elvin questioned Mr Benting, Ms Castaneda, Ms Amacio and Ms Bantilan about other payments he had made to them for airfares, training expenses, birth certificates and security clearances. But in no case did he suggest to them that these payments were loans.

### Annual leave

122 The Massage Therapists said they had two weeks of annual leave each year. They took this leave over the Christmas/New Year period when the Belconnen shop was closed. During this time, the Therapists would fly to the Philippines together with Mr Puerto, who would also accompany them on the return journey. Ms Isugan and Ms Bantilan said they paid for their own flights in 2012 and 2013, but Mr Elvin paid for some or all of their airfares thereafter. Mr Benting said Mr Elvin paid for his flights in 2013, 2014 and 2015. Ms Castaneda, Ms Ortega and Ms Sarto said they paid for their own flights in 2013 and Mr Elvin paid for part of them in the following years.

123 Ms Isugan stated that she spent only eight days of annual leave in the Philippines in 2012 and 12 days in 2013.

124 Ms Bantilan suggested that she did not receive a total of 14 days annual leave every year. She said that the “first holiday was about 8 days, the second one was about 10 days, the third one was 14 days, and the fourth one in 2015 was 14 or 15 days”.

125 Ms Bantilan was taken to an apparent inconsistency between this evidence and a statement she made to the Australian Federal Police on 18 April 2016. In that statement, she said she had two weeks annual leave in 2013, rather than 10 days. She clarified that her leave that year consisted of 10 days in the Philippines and two days in Australia. She also accepted there was an inconsistency between her affidavit and another statement she made on 18 January 2018 in which she said that Mr Elvin covered the cost of her annual flights to the Philippines. She said she “might have forgotten to mention” that she paid for her own flights in 2012 and 2013 and that Mr Elvin paid for half the cost of the flights in 2014 and 2015.

### Fair Work Information statement

126 Each of the Massage Therapists gave evidence that they were not provided with a Fair Work Information Statement.

### End of employment

127 Ms Isugan’s employment with FTM ended on 26 October 2015. She deposed that Mr Elvin dismissed her because she was having a relationship with Mr Durado. Mr Durado was also dismissed. Ms Isugan said that she left the Residence at around 11 pm on 26 October 2015 with only her rosary beads, wallet, iPad and phone. She testified that she thought it was “good luck” the gate was unlocked at the time. In late 2015, she applied for a personal protection order against Ms Elvin, which was granted in early 2016.

128 In November 2015 Ms Isugan lodged an application for unfair dismissal against FTM with the Fair Work Commission. She made a statement for the purposes of this application on 18 January 2018. On 8 March 2019, the Commission found that her dismissal was harsh, unjust and unreasonable and ordered FTM to pay her compensation of $29,228.55.

129 Ms Isugan provided a “Request for Assistance” form to the Ombudsman on 10 December 2015. She said she did not mention the cashbacks because her lawyer at the time did not ask about them.

130 Ms Sarto, Ms Ortega and Ms Castaneda resigned from FTM in late 2015 or early 2016 and did not return after taking annual leave in the Philippines.

131 On 8 February 2016 Mr Benting ended his employment with FTM. He left the Belconnen shop during a break and did not return. He feared for his safety after overhearing Mr Elvin yelling about him and the other therapists who had contacted Legal Aid ACT about their employment at FTM. He said Mr Elvin referred to the others as “traitors against the company for making back wage claims” and called him “crazy” and “an idiot” for complaining about his wages while he was still working for FTM. Mr Elvin did not challenge this evidence in cross-examination or adduce evidence to the contrary. Mr Benting gave the following evidence about his state of mind at the time:

I remember I was scared. I was sweating and shaking in fear. I felt that [Mr Elvin] was capable of anything when he was angry and I remembered the threats he made to us. I was in fear of my safety so I decided to leave and not return to the shop. That day I remember saying to the receptionist as I left the shop that I was just going to the mall. I left wearing my uniform and never went back. I did not tell anyone. I was panicking and I was shaking. I did not know what to do or where to go because I had no family in Australia.

132 A few days later, he sent Mr Puerto a text message saying that he no longer wanted to work for FTM.

133 At about 7 am on 12 February 2016 Ms Amacio and Ms Bantilan decided to resign from FTM. They did not tell Mr Elvin or Mr Puerto that they were leaving. They asked Mrs Elvin to unlock the gate to the Residence so that they could attend church. They left most of their belongings behind. Once outside they called Ms Isugan and Mr Durado who came to pick them up. They did not return to the Residence or the Belconnen shop.

134 After leaving FTM, Mr Benting testified that he, Ms Castaneda, Ms Bantilan, Ms Amacio, Ms Ortega and Ms Sarto commenced employment with another massage business, True Balance, which was managed by Ms Sarah Clenci, Mr Durado’s sister. Ms Isugan also confirmed that she now worked there. Ms Amacio and Ms Bantilan said they started working at True Balance shortly after they left FTM.

## Mr Elvin’s evidence

135 Mr Elvin read affidavits from himself, his father, his mother, and Ms Palma Yu, a former therapist assistant at FTM. Mr Elvin and each of his witnesses also gave oral evidence, the Ombudsman having required them for cross-examination.

### Colin Kenneth Elvin

#### Background

136 Mr Elvin was born in Canberra. His father is Australian and his mother Filipino. He said he has strong links to the Philippines, a country he estimated having visited more than 30 times. After finishing high school Mr Elvin attended the Australian National University where he studied economics. He conceded in cross-examination that he did not complete his degree, and agreed that his affidavit created a misleading impression that he had.

137 In 2006 Mr Elvin attained a qualification in Thai massage from Watpo Traditional Medical School in Thailand. In 2008 he attained a Certificate IV in Massage from the Australian Institute of Applied Sciences.

138 In February 2008 Mr Elvin established a partnership with Ms Kim Long Liv called Foot & Thai Massage. Mr Elvin testified that he recruited Thai employees from Thai massage parlours in Sydney who held student visas. He said that they were only permitted to work up to 20 hours as a condition of their visas and the business paid for them to catch buses to Canberra on weekends in between their study commitments. He also provided them with accommodation at the Residence and in a rented house in Phillip, ACT. He said that he saw some benefit in employing Thai people to be “authentic”, but noted that they spoke English “extremely poorly”. Mr Elvin described the business as a “massive logistical exercise” given the limited working hours of the employees, the high turnover rate, and the need to transport the employees to and from Canberra. He said that he tried to obtain subclass 457 visas for the employees to allow them to remain in Canberra on a full-time basis but their English was not good enough to qualify for this class of visa.

139 In 2010 Mr Elvin decided to replace the Thai employees with Filipinos. He was aware that Filipinos studied English at school and reasoned that that they would qualify for an exemption to the English language test required for the subclass 457 visa. He also said that the subclass 457 visa did not require a holder to have a formal qualification and that it was sufficient for the holder to have had at least three years of industry experience. Mr Elvin agreed that the product of his decision was to only employ people from one racial group. He denied, however, that he wanted to hire Filipinos because they were vulnerable and would accept inferior terms and conditions, or that they could be controlled and kept in the same location.

140 In 2011 Mr Elvin established FTM as an incorporated company. He was the sole director, secretary and shareholder until early 2016.

#### Recruitment of the Massage Therapists and Mr Puerto

141 Mr Elvin said that he travelled to Cebu in around December 2011 and Manila in 2012 or 2013 to recruit Filipino therapists. On the first trip he was accompanied by his father and mother. He and his father attended a number of local massage spas and received trial massages from various therapists to identify those with skills of a sufficient quality to work full time at FTM. He also contacted a German national who operated a local massage spa and paid him to recommend any of his own employees to Mr Elvin. Mr Elvin and his father invited a number of the therapists to a meeting at the Marriott Hotel in Cebu to discuss working for him in Australia. Mr Elvin told the attendees of the meeting that he was searching for massage therapists to work at his massage parlour in Canberra. He said that the role was a full-time position with a salary of $52,000 per year working six days a week with an annual two week vacation during which they could travel to the Philippines. Mr Elvin promised to pay for their plane tickets and accommodation and to obtain their working visas in Australia. Despite the terms of the contracts he signed with each of them, he denied telling them that they would work five days per week or that they would receive public holiday penalty rates. He understood that the offers were attractive because the therapists were promised salaries significantly higher than what they were earning in the Philippines. Mr Elvin made similar representations at the Ascott Hotel in Manila during the second visit in 2012 or 2013.

142 In cross-examination Mr Elvin said that he circulated copies of an employment contract to the attendees of the meetings during each of the visits. He testified that he drafted this contract himself by modifying a template he had downloaded from the internet. He testified that he was overwhelmed with paperwork at the time and took “shortcuts” by not getting legal advice. As a result, he said, the contract he drafted was “dodgy”. He claimed to have referred to the Health Award in the contract on the basis of a Google search. He said that he had “skimmed over” that Award and noticed that it referred to “health professionals”. He also read that the Award referred to a remedial masseur as a “common health professional” and considered this was the closest occupation to a massage therapist. He said that massage therapists provided complementary services to health professionals and therefore assumed that they would most likely be covered by the Award as support services employees. He agreed that the contract was to be read in conjunction with the Award and that the employees would be performing duties and responsibilities contemplated by one of the classifications in the Award.

143 Mr Elvin denied that he had identified the Hair and Beauty Award as a relevant award during his searches in 2011. He testified that he only became aware of the Hair and Beauty Award some time after he employed the Massage Therapists and considered that it might apply to them. He contacted the Hair and Beauty Industry Association to seek their advice and was informed that that award would apply to the Massage Therapists but he did not take any steps to ensure that he complied with that award after he received that advice.

144 Mr Elvin conceded that, by giving the Massage Therapists the employment contract, he was conveying to them that they would not have to work more than an average of 38 hours per week. He asserted, for the first time, that he had told the Massage Therapists in the Philippines that the contract was “bodgie” and that it did not reflect what their actual terms and conditions of employment would be at FTM. He said that the contract was merely drafted to fulfil the requirements of the subclass 457 visa. This resulted in the following exchange with the Ombudsman’s counsel, Mr Seck:

[MR SECK:] Do you agree with me that the contract is conveying ‑ ‑ ‑?

[MR ELVIN:] Yes, the contract is completely wrong and everything is completely wrong in it. I never lied to the staff. I told them exactly the terms of the work. What I did was I just put this bodg[ie] contract in just to get it done, just to get it over the line through immigration. And that’s how this all happened.

[MR SECK:] You said bodg[ie]. Do you mean ‑ ‑ ‑?

[MR ELVIN:] Well, you know, the contract was just put in as to tick the boxes for immigration.

…

HER HONOUR: So does that mean you were trying to deceive the Department of Immigration?

[MR ELVIN:] Well, yes, your Honour.

…

HER HONOUR: ‑ ‑ ‑ if you – you don’t have to answer the question if you think your answer may incriminate you?

[MR ELVIN:] I wasn’t trying to deceive. I just put in the – I just – as I said, I drafted all of these things really, really quickly because I had so many other things to do. It wasn’t about deceive, it was just, you know, it was just given that way. And I should have checked things, I should have done things properly, I should have went to a lawyer.

MR SECK: You weren’t only deceiving the Department of Immigration, Mr Elvin, you were deceiving the employees. Do you agree?

[MR ELVIN:] No, I told – I told the employees exactly – exactly the arrangements before they came.

[MR SECK:] So when you use the word bodg[ie], you’re – what you’re meaning was that it was a contract that didn’t accurately reflect the true terms of the – true terms of the employment relationship. Is that what you mean by that?

[MR ELVIN:] Yes.

…

[MR SECK:] You don’t say that in any of your evidence. Do you agree?

[MR ELVIN:] Yes.

…

MR SECK: When did you say this to them; before they started employment or after they started employment?

[MR ELVIN:] Before.

[MR SECK:] Was it before or after they signed a contract?

[MR ELVIN:] Before.

[MR SECK:] So you got them to sign a contract which you told them was “bodgie”?

[MR ELVIN:] Yes, and I’ve suffered for that.

[MR SECK:] Did you tell each of the employees that the contract was bodgie?

[MR ELVIN:] Yes. I told everybody, the whole group.

[MR SECK:] When – did you tell them in the Philippines?

[MR ELVIN:] Yes.

…

[MR SECK:] So, from the start, you agree, you had misrepresented to the employees by giving them this contract what terms and conditions of employment they could expect to receive in Australia?

[MR ELVIN:] No, I explained to them that “You guys know that you can’t do the massages just” – “you massage every hour minus a lunchbreak and then go home.” I explained to them that “You guys know that you work here in the Philippines, and it’s the same in here, in Australia, that massages can’t be conducted consecutively unless you’re trying to slave-drive the staff and kill them. And, therefore, to be able to get the six customers required per day – or six hours per day – to afford the 52,000 plus all the benefits that the only way” – like – so I explained it all to them, basically.

[MR SECK]: And I put to you again that that’s a lie?

[MR ELVIN:] No, that’s not a lie

[MR SECK:] You just made that up?

[MR ELVIN:] No, it’s not a lie. That’s not a lie. I was honest. I was open and honest with the staff. I never lied to them about things. I just – I told them honestly and I told them about the contract.

145 Mr Elvin also testified that he told the Massage Therapists that the contract of employment did not reflect their actual terms and conditions because there was no award that afforded them sufficient breaks. This resulted in the following exchange:

[MR SECK:] So when you said earlier on in answer to one of my questions that the reason why this contract didn’t reflect the actual terms and conditions of employment is because there was no award that gave them sufficient breaks. You must have been referring to an award. Which award were you referring to?

[MR ELVIN:] Yes, well, I skim read lots of awards and, yes, didn’t find anything that would assist.

[MR SECK:] Your answer, in terms of the logic you’ve just applied, why wouldn’t you just reduce the number of massages and pay them for the breaks they were taking in between massages?

[MR ELVIN:] Because it would be impossible to do that. We wouldn’t have the money to pay them because there would be no customer – there wouldn’t be enough customers and it would be just impossible to try to meet that $52,000.

[MR SECK:] And what you were being paid for is to, you understood, is for the massage therapists to do work during the hours allowed for under the award, correct?

[MR ELVIN:] Yes.

[MR SECK:] When you say that you, in effect, couldn’t afford it, you were using that as an excuse as to why you didn’t have to apply with the award conditions, correct?

[MR ELVIN:] No, it wasn’t an excuse. We were tied – everything was tight. Like, we were just – yes, it was tight. Things have always been tight. It is never actually – it was never actually really doing well. We always were owing taxes. It was always – we were always, like, struggling. So I just tried to save costs where I could and that made sure that this happens to me.

[MR SECK:] Your evidence earlier on, Mr Elvin, that the contract of employment – sorry, that you told the massage therapists who comprised the group of seven that the contract of employment did not apply because the award didn’t provide for sufficient breaks is completely made – it’s completely made up?

[MR ELVIN:] I explained it in simple terms – I expressed it to them in simple terms. I didn’t explain it complicated like that, but I basically told them that I can’t find – I can’t find, like, basically, it was difficult to draft the contract and meet the terms as for what we needed. And therefore, this contract’s not right. I let them know that up front. I said, “This contract’s not right. It’s impossible,” and the reason being is to get that amount of money, we’ll never be able to afford that going on any of these – the whole thing wouldn’t have ever happened because it’s not affordable based on – so, you know, they would not be able to come to Australia and get their 50,000-odd a year.

146 Mr Elvin claimed that certain awards only permitted lunch breaks, so he would be required to “force the staff to work four hours straight in a massage, then take a lunch break”. That gave rise to the following exchange:

HER HONOUR: Are you telling the court that you did not understand that awards prescribe minimum conditions of work? Minimum standards?

[MR ELVIN:] Yes, I understand that. That it prescribed minimum standards. I just always – I felt that I wasn’t – I wasn’t doing the wrong thing because I – if – if it were in a perfect sense, if a 457 had minimum pay rates. So if they didn’t have that minimum payrate then I could bring them over, for example, on – on a proper – like, I could follow this to the T but I would be paying them much less. I would be paying them $35,000, what the pay scale was. But because the requirement was that – to get a 457 person, you had to pay them over 2000. So yeah. Yeah. So basically, in a perfect sense, if I could have it the perfect way, I would have just given them a $35,000 a year salary and then I wouldn’t have required them to be working so much. I wouldn’t have required – I wouldn’t have had so many requirements. But because of the amount that was described under the 457 and then the nature of the massage and the prices we were charging, it wasn’t – it just simply wasn’t possible. Like, they wouldn’t have been able to come.

[HER HONOUR:] So you made an economic decision not to comply with the award?

[MR ELVIN:] Yes. I made the economic decision and the reasoning behind it was that they’re getting paid well. I’m not – I’m not doing anything bad to these people, it’s just that I can’t find the award that would apply to give them breaks in between their massages.

…

[HER HONOUR:] If the award – if you understood that the awards prescribe minimum standards, there was nothing to prevent you providing rest breaks for the massage therapists, was there?

[MR ELVIN:] Yes, the actual operation of the business prevented me, because if you give breaks in-between each massage, then to do six hours of massage, you would need to be there for, you know, the period before ten and ten. So…

[HER HONOUR:] So you would have to pay overtime. That was the problem, was it?

[MR ELVIN:] I wasn’t trying to avoid the overtime…

[HER HONOUR:] I’m just trying to understand why you say there was a problem providing breaks to people under the award?

[MR ELVIN:] Okay. Because…yep because – all I can do is just explain it basically the way – the simple way I see it is – the salary under a regular award, like just a normal nine to five or something like that for a masseuse therapist – for a massage therapist – is around $35,000, so my thinking was, that “okay, I’m going to give them $52,000 and that would compensate them”, so it was sort of my own remedy to fix this but not do it in a wrong way, because, you know, I wanted the staff to be paid properly. And yes, all of these things like overtime applied, because I didn’t have any Individual Flexibility Arrangement to offer them and extra ...

147 Once the contracts were signed by the Massage Therapists, Mr Elvin provided them to the Philippine Overseas Employment Administration (**POEA**) for approval, an agency he understood had responsibility for ensuring that the terms and conditions of overseas employment contracts were not unfairly exploitative of Filipino workers. He said that he understood he was deceiving the POEA by providing them with written contracts that did not reflect the actual terms and conditions which would apply to the Therapists.

148 During the first visit to Cebu, Mr Elvin recruited Mr Puerto as a massage therapist but he subsequently assumed the role of “massage supervisor” to assist Mr Elvin in communicating with the other recruits and organising their training. Mr Elvin testified that Mr Puerto also had responsibility for mixing oils, purchasing garments, and responding to minor issues raised by the therapists. Notwithstanding the conditions of Mr Puerto’s visa, Mr Elvin said that he did not notify the Department of Immigration that Mr Puerto was no longer working as a massage therapist.

#### Accommodation

149 Mr Elvin confirmed the evidence of the Massage Therapists that they stayed at the Residence. Under cross-examination he admitted there were “a lot of occupants” at the Residence and that at one point it accommodated 16 people. He said that Mr Puerto stayed at the Residence but denied he was required to sleep on a sofa, saying he might have done so voluntarily.

150 Mr Elvin agreed that there was a gate beside the Residence that was over 165cm high and claimed that it would be possible for someone with sufficient fitness to jump over it. He denied that the gate was ever locked, saying that a chain was wrapped around it to give it the appearance being locked for security purposes. He testified that the police “checked the gate when no one was there” and confirmed that it was not locked. When his attention was drawn to an Australian Federal Police (**AFP**) report referring to an inspection of the premises on 24 December 2015 that recorded the gate as being locked, he adhered to his earlier evidence.

#### Rules and threats

151 Mr Elvin denied being concerned that, if the massage therapists could leave the Residence of their own volition at night or on their days off, they would speak to the Department of Immigration or other authorities about their working conditions at FTM. He maintained that “[e]verybody was extremely happy”. He also denied that Mr Puerto stayed at the Residence to spy on the massage therapists and report back to Mr Elvin about their conversations.

152 Mr Elvin acknowledged that he required the massage therapists to follow rules, but claimed that these rules differed from the rules they described. He said that the notion he had prohibited the therapists from having friends or speaking to anyone other than each other was “ridiculous”.

153 Mr Elvin did admit that he initially prohibited the therapists from speaking in their native language at the shop. He claimed this was a “marketing thing” and that he wanted to avoid complaints regarding the departure of the Thai massage therapists who had developed a loyal client base. He said that “not long after” he openly told customers they were Filipino.

154 Mr Elvin denied telling the massage therapists that they could not speak to anyone regarding their employment conditions or they would be sent back to the Philippines and denied that he told them what to eat. He also denied that he prohibited them from bringing their mobile phones to work, and said that he only prohibited them from having relationships with customers. On the other hand, he agreed that, during an interview with the AFP on 24 December 2015, he said that the massage therapists were not permitted to have their phones at work and that they were not allowed to have boyfriends at the Residence.

155 Mr Elvin denied telling the therapists that they would be sent back to the Philippines if they broke a rule, or knew someone breaking a rule and did not report it. Mr Elvin described as “ridiculous”, “preposterous”, “insane” and a “complete, utter lie” the evidence that he had made threats to arrange to kill the therapists’ families if they did not follow his rules.

#### Hours and breaks

156 Mr Elvin gave evidence that massage work is physically exhausting and that a therapist should receive a break of 30 minutes after every massage, including a break of at least one hour after completing two hours of continuous massage. On the other hand, he testified that the break pattern at FTM was “fluid” and depended on the receptionist’s management of customer bookings. He said that, if a massage therapist did not receive a break between massages, they would be compensated for this later, so that it “balances out”.

157 Mr Elvin denied that the massage therapists performed tasks other than massaging, although he admitted that they were responsible for making the beds between appointments.

158 In his affidavit Mr Elvin deposed that Ms Isugan “did not do between 7 hours and 9.75 hours of massages each day” and that there were “always breaks between customers”. He also denied more generally the allegations made by the other Massage Therapists regarding their work routine and hours of work. He said that he did not check the Kitomba records and that his statement was based on what he told the receptionists and “how it was supposed to be”.

159 When his attention was drawn to a Kitomba record relating to Ms Amacio which showed that she did not receive a 30 minute break between appointments, Mr Elvin blamed this on an error made by the receptionists. He accepted that he had ultimate responsibility for the receptionists, but said that the onus was on the Therapists to complain about the number of appointments that had been booked.

160 Mr Elvin claimed that he directed the receptionists not to allow the therapists to perform more than six hours of massages a day, but told them that it was “possible to go up to eight hours on a busy day to accommodate customers”. When taken to several Kitomba records indicating that Ms Amacio performed more than eight hours of massages on a number of days, Mr Elvin claimed that the therapists would be afforded some time off work later in the week as compensation. After Mr Seck noted that Ms Amacio did not appear to have been afforded any time off, Mr Elvin gave the following somewhat unintelligible answer:

Well, that’s how it was, Mr Seck. That’s how the procedures work. They – they couldn’t – you have to – also, you have to take into account the total number of hours during the week. That’s the issue. Okay. Now, sometimes on weekends we – you know, some days there were no – no customers on Mondays or Tuesdays or whatever. The weekends – some were – you know, the weekends were allowed to go up to eight and if the receptionist has done this I don’t know. I don’t know what has happened. Okay. Because I haven’t looked at it every single day. But we – we were complained to about it and we worked all – we worked through these. Every week we worked through these things.

161 It was put to Mr Elvin that it was not possible for the Therapists to take the morning or afternoon off work and spend it at the Residence as the van drove the Therapists to the Belconnen shop in the morning and did not return until around 10.30 or 11 pm. Mr Elvin testified that the therapists could ask Mr Puerto to “give them a lift” back to the Residence if they needed. When it was put to Mr Elvin that he made no mention of this in his affidavit, he claimed that he “was only given a few days for [his] affidavit” and that it was “poorly conceived”. When he was reminded of the numerous extensions of time he was given to file his evidence, he agreed that he had an ample opportunity to prepare his case and that he had received assistance in preparing his affidavit.

162 Mr Elvin deposed that “everyone who worked for Foot & Thai was required to take proper breaks” and that a group of employees would “often” take a lunch break of “at least an hour” if they walked to a nearby shopping mall. In cross-examination, Mr Elvin acknowledged that the Therapists’ ability to have their allocated lunch and dinner breaks depended on the receptionists’ management of the customer bookings. He agreed that the Therapists’ meal breaks would be recorded in Kitomba and that the Kitomba records spoke for themselves. He denied that the therapists were required to remain at the shop until it closed at 10 or 10.30 pm even if they had no appointments in the evening, stating that he, Mr Puerto or Mr Elvin Snr could transport them to the Residence at an earlier time if requested, “when it was possible”. But he conceded that this depended on his and Mr Puerto’s availability. He also conceded that the therapists were required to make themselves “ready, willing and able” to perform work during the shop’s opening hours on the days that they were rostered to work.

163 Mr Elvin denied that the therapists were not permitted to leave the Belconnen shop between 2012 to mid-2013 unless they were accompanied by him or Mr Puerto and it was for a specific purpose. He also denied that from May 2013 they were required to obtain permission from the receptionists or Mr Puerto to leave the shop. He said the therapists were only required to let the receptionists know where they were going when they left the shop.

#### Pay slips, loans and deductions

164 Mr Elvin conceded in his affidavit that there were times when pay slips were not generated. In cross-examination he said that he had a manager and bookkeepers who were responsible for the provision of pay slips, and speculated that “if no one asked for a pay slip, perhaps someone was sloppy and didn’t print one”. He said that he understood that an employer had an obligation to supply a pay slip to employees for each pay period, and claimed that he instructed staff to do this. But he took no responsibility for any failure of FTM to provide pay slips to the Therapists.

165 Mr Elvin acknowledged that there were no written authorisations for the deductions of certain amounts from the salary payments to the Massage Therapists. He said that Mr Puerto wrote down how much he lent to each Therapist when they were in the Philippines, but that none of the Therapists signed this document. He said that the purpose of the loans were to assist the Therapists during the period after they ceased employment in the Philippines and before they commenced at FTM and to cover them for any expenses incurred in travelling to Australia. He instructed his manager to deduct the amounts loaned to the Therapists from their wages, but said that it was a “preposterous lie” that the amounts that were deducted exceeded the amounts of the loans. He said that he “never needed to” ensure these amounts matched as this was the responsibility of the manager. He said that “if there was an issue the staff would always come to [him]”.

166 Mr Elvin admitted that the pay slips were inaccurate but said that this was because they were based on a “sham contract” and the “wrong award”. On the other hand, he denied that the pay slips incorrectly recorded the number of hours worked by the Therapists, stating that he “only considered them to work while they had a massage” and because there was an “unspoken individual flexibility agreement”. He said that he instructed the manager and bookkeepers what to include in the pay slips and suggested that it was “always in agreement” that the massage therapists were only paid for their “massage hours. Later in cross-examination Mr Elvin stated that the payroll system, known as Cashflow, did not accurately record the Therapists’ “working hours” or overtime hours because these were based on a “sham” contract.

#### Cashbacks

167 Mr Elvin described the evidence about the cashbacks as “ridiculous” and deposed that “no one was ever required to pay back $800 a fortnight”. He denied that Mr Puerto kept a document that recorded the amounts paid back by the Massage Therapists. He also denied that he required the repayments because the Therapists were vulnerable due to their visa status.

#### Fair Work Information Statement and employee records

168 When asked if he provided the Massage Therapists with a Fair Work Information Statement, he said he thought he did and that “it was in the staff room on the wall in front of them”.

169 Mr Elvin said that there were a number of other employment records maintained by FTM besides Cashflow, including spreadsheets and Google Business. He said that the Therapists’ annual leave was recorded on one of these systems but he could not recall if their overtime hours and the manner of their termination were also recorded. He said that he forwarded these documents to **Deloitte** Touche Tohmats during the administration process but claimed that “Deloitte lost the files”. He accepted that the Ombudsman issued to FTM a notice to produce time and wage records for the Massage Therapists in June 2016. He claimed not to recall if he was responsible for responding to the notice, although said it was “possible” he was, and denied that he had produced employment records to the Ombudsman that contained false and misleading information.

#### Discrimination

170 Mr Elvin disagreed with several propositions put to him regarding the race, national extraction and social origin of the massage therapists. In particular, Mr Elvin denied that he did not pay the Therapists in accordance with an award, required them to work unreasonable hours, or directed them to make cash repayments because they were Filipino and could be exploited due to their social isolation and financial dependence on FTM. Mr Elvin described these propositions as “laughable”. Mr Elvin said he “loves Filipinos” and was proud of his Filipino heritage. He said that he treated the Filipino workers the same way he treated the Thai workers (a proposition that raised more questions than it answered) and that there was “was no exploitation in [his] mind”.

#### Post-employment events

**171** In his affidavit Mr Elvin deposed that in around mid-2015, Ms Isugan and Mr Durado commenced a relationship. He said that by late October 2015 two customers had made “serious complaints over two days” regarding Ms Isugan’s performance: that she was “burping in a customer’s ear” and “not providing massages to an acceptable standard”. At around this time, Mr Elvin dismissed Mr Durado. He deposed that Mr Durado then immediately contacted Ms Isugan and “encouraged her to run away from her job”. He said that on 26 October 2015 Ms Isugan did not return to work and did not return his calls.

172 Mr Elvin said that after leaving FTM, Mr Durado and Ms Isugan applied for personal protection orders against him and made complaints to the Fair Work Commission and the Ombudsman. He deposed that they then contacted Ms Clenci and “within a short space of time” Ms Clenci opened True Balance. He said that she did this on the understanding that each of the Massage Therapists would work for her.

173 In April and May 2016 the AFP investigated complaints made by Ms Isugan and Mr Durado. Mr Elvin gave a statement to the AFP as part of that investigation. He told the AFP that he had received two serious complaints about Ms Isugan which were a catalyst for her dismissal. However he then denied that he had dismissed Ms Isugan at all as she had “run away”, and stated that he could not recall what he told the AFP. When taken to a case note of his interview with the AFP which recorded him saying that Mr Isugan had been dismissed due to complaints, he said: “I may have told the police that I dismissed her but I was incorrect”. When taken to an earlier email from FTM to the AFP which stated that Ms Isugan had been terminated for repeated misconduct, he changed his evidence again, saying that he terminated her because she disappeared and that he “made a mistake” by telling the AFP that it was for repeated misconduct.

174 Mr Elvin said that he told the AFP that the massage therapists worked six days per week for 10 hours a day, and that they generally received a break between customers of between 30 minutes to two hours.

175 He said that he told the AFP that the therapists had signed an employment contract but did not tell the police that it was a sham. He denied that he was attempting to give the AFP a misleading impression to the AFP that the therapists were employed under conditions that were “legitimate and lawful”.

176 Mr Elvin said he could not recall a meeting with officials from the Department of Immigration on 15 May 2012 in which he said that the massage therapists would be paid $52,000 a year and weekend penalty rates.

### Laura Elvin

177 Laura Elvin, aged 77 at the time of the 2020 hearing, is Mr Elvin’s mother and the wife of Mr Elvin Snr. Mrs Elvin is Filipino by birth and gave evidence at the hearing with the assistance of a Filipino interpreter, although her affidavit was sworn without such assistance. During cross-examination, Mrs Elvin testified that her affidavit was written by her son and that she could not recall its contents. Mrs Elvin said she had not read the affidavits of any of the Massage Therapists or Mr Durado, although later said that she had read them but could not recall their contents. She said her memory was “not very good”.

178 Mrs Elvin testified that in 2008 she and her husband transferred ownership in their property at Edwards Street to Mr Elvin to help him finance the establishment of FTM. Mrs Elvin said she was willing to do this because she would do anything to see her son succeed in business.

179 Mrs Elvin deposed that between February 2008 and early 2016 she and her husband made the Residence available to Mr Elvin to accommodate first the Thai and later the Filipino massage therapists. She deposed that the property was “completely redecorated and furnished to a high standard”, and had a total of four bedrooms with eight bunkbeds. She stated that no more than eight people occupied the Residence. But in cross-examination she testified that she “didn’t go back there” and could not actually recall the number of people residing there. In her affidavit she claimed that in late June 2012 a total of five people were living there, including. Ms Isugan, Ms Bantilan, Ms Amacio and Mr Benting. But when it was put to her in cross-examination that more than five people were living at the Residence in June 2012, she claimed she could not recall. She denied that she had included this statement in her affidavit because Mr Elvin had told her to, although repeated that her “memory [was] not very good”.

180 Mrs Elvin agreed that she did not hear every conversation that Mr Elvin and Mr Puerto had with the Massage Therapists at the Residence.

181 Mrs Elvin deposed that none of the employees living at the Residence ever needed to ask permission to leave and that the gate beside the property was never locked. She said that there was a chain wrapped around the upper part of the gate with a padlock that was “never used”. She said that “[n]o one had a key to enter or exit because [the gate] was not locked”. She said that the gate was about 166 cm high, and that it would be difficult for the massage therapists to jump over.

182 She deposed that Mr Elvin, Mr Puerto or sometimes Mr Elvin Snr drove the massage therapists to work at around 9.30 am each morning. She said that they returned home at 9 pm every night. She deposed that she observed on “many occasions” the therapists coming and going on their days off, although in cross-examination she revealed that she only “sometimes” observed them and maintained that they had “nothing to do” with her. She also said that the boyfriends or girlfriends of some of the therapists visited the Residence on occasion. When it was put to her that she never saw anyone other than the massage therapists entering the Residence, she replied that she once saw a man visiting one of the therapists. She said that she told the therapists the next day: “don’t bring any visitor here during night time”.

### Colin Godfrey Elvin

183 Colin Godfrey Elvin, aged 80 at the time of the 2020 hearing, is the father of Mr Elvin and husband of Mrs Elvin. He told the Court that his affidavit was written by Mr Elvin but said that he “must have” read and signed it. He appeared to confuse his affidavit with one he had taken to a police station. The affidavit contained multiple sentences that were identical to Mrs Elvin’s affidavit and largely repeated the same evidence.

184 Like his wife, Mr Elvin Snr testified that he would do anything to help his son succeed in business. He said that he accompanied Mr Elvin on a trip to Cebu in 2011 to help him recruit massage therapists and that he attended one or two meetings during that visit. He said he did not recall whether Mr Elvin told the therapists that the contract of employment was “bodgie” or that it was written to satisfy the requirements of the subclass 457 visa. And he appeared unfazed by the suggestion. He said that it was Mr Elvin’s business and “it wasn’t [his] concern to go into all of the details”.

185 Like Mrs Elvin, Mr Elvin Snr also deposed that a total of eight people lived in the Residence. In cross-examination, however, he said that 15 people “could have been” living there but he “didn’t count any particular number”, explaining that he did not visit the Residence except to carry out repair work. He said that “there would be about six or seven people on the bus” — which I took to be a reference to the van — but “it wasn’t like 15” and it “might have been less than that”. He claimed that his “memory [was] not real good”. When it was put to him that he only included the statement in his affidavit because Mr Elvin told him to, he replied: “no, I don’t know”.

186 Mr Elvin Snr deposed that there was a gate beside the property that was never locked. He said that there was a chain wrapped around the upper part of the gate with a padlock on it but the padlock was “never used”. He said the chain was left on the gate to give the appearance that it was locked to avoid theft. In cross-examination, however, he also said that the chain was there to keep his dogs in the yard. He denied that the gate was locked to stop the dogs escaping.

187 At one point, Mr Elvin Snr acknowledged that the gate was locked when the massage therapists returned at night, but he quickly recanted. That occurred during the following exchange with the Ombudsman’s counsel, Ms Byrnes:

[MS BYRNES:] Well, I’m going to put it to you that, when the van came home at night, your wife, Laura, locked up the gates?

[MR ELVIN SNR:] I don’t recall who locked up the gate, whether they locked it up, the workers locked it up or myself or who.

[MS BYRNES:] And the gates were locked overnight, weren’t they?

[MR ELVIN SNR:] Locked? They weren’t locked; they – they had the chain put on. There was only a chain put on the – there was no lock involved.

188 In his affidavit Mr Elvin Snr also said that Mr Elvin purchased a “large 14 seater van” to transport the therapists to and from the shop, and that sometimes he drove the van. In cross-examination, in contrast, he said that the “bus held about six”. He said that each day the therapists would leave at around 9.30 am and return at around 10.30 pm. He agreed that he only drove the van to transport the therapists to and from work, although noted that there were “seldom” occasions where he transported some therapists to the dentist or post office.

189 In his affidavit Mr Elvin Snr said that he observed the therapists on “many occasions…coming and going on their days off” and that he occasionally saw the therapists’ boyfriends or girlfriends visiting the Residence. He also said that the therapists were never restricted in leaving the Residence. In cross-examination, he could not recall the dates or years when he observed this occurring. And when it was put to him that, because he never visited the Residence, he never saw anyone other than the therapists entering and exiting the property, he conceded that he never had.

190 Like his wife, Mr Elvin Snr agreed that he did not hear every conversation that Mr Elvin and Mr Puerto had with the massage therapists at the Residence. As the Residence was a separate brick building from the house in which Mrs Elvin and her husband lived and the limited circumstances in which they visited the Residence, it is reasonable to conclude that it is highly unlikely that they heard most of those conversations. There was no suggestion in the evidence that they ever listened in on the conversations.

### Ms Palma Yu

191 Ms Yu was born in the Philippines and immigrated to Australia 27 years ago. She is the sister of Mr Durado and Ms Clenci. She gave oral evidence with the assistance of a Filipino interpreter.

192 Ms Yu deposed that she was employed by FTM as a therapist assistant “on and off” between mid-2010 and January 2015. Her duties at the Belconnen shop included cleaning, washing towels, and general housekeeping. She said that she had previously assisted the Thai massage therapists before the arrival of the first group. During cross-examination, Ms Yu testified that she worked part-time at FTM from 2010 to mid-2013, working four hours a day for five days a week, before she left for a period of care for her father. She said she resumed “some time” in 2015 and, contrary to her affidavit, worked until 2016. She said that she worked intermittently because she suffered from back and knee problems and was therefore unsure when she worked. She initially gave evidence that her ordinary hours of work were from 6 am to 10 am, but later revised this to 8 am to 12 pm, and said that she occasionally worked to 1 pm.

193 Ms Yu deposed that she spoke to, and associated with, each of the Ombudsman’s witnesses during the course of her employment. She presented FTM as a pleasant place to work. In her affidavit she remarked that:

In my experience no one was ever locked up or had any limits put on their freedom. No one was threatened by [Mr Elvin]. Everyone from the Philippines was extremely happy. They were very well looked after, got paid big money, had free accommodation, got driven around whenever they wanted, could leave if they wanted to, got a free trip home every Christmas, and they got to work and socialise with people from the same Country with similar ideas.

…

From the time I started working for Foot & Thai in 2010 until about late 2015 there were really no problems with the staff including massage therapists, receptionists, therapist assistants and others employed in the business. Everyone followed the rules and worked happily and cooperatively.

194 Ms Yu deposed that in around 2013 she visited Batemans Bay with Mr Benting and Ms Isugan and that she “used to take all the other staff…sightseeing, shopping or meals”. In cross-examination, however, Ms Yu agreed that she never took the therapists sightseeing as a group because they never had time off together. But she denied that she only took the therapists out shopping or for meals on their days off.

195 Ms Yu deposed that she never saw Mr Elvin or Mr Puerto “stop any staff member from taking a break”. She said that everyone was required by Mr Elvin to take “proper breaks” of no less than 30 minutes between customers and that lunch and dinner breaks were often one hour. She also stated that the therapists often had breaks of two to three hours and, if they were not busy, would not begin work until 4pm. She said that staff “always commented on how happy they were”.

196 It was put to Ms Yu’s that her observations regarding the therapists’ breaks were limited to the times when she worked at FTM, noting that she only worked until 12 or 1 pm. Ms Yu then claimed that she often did not leave the shop after she had finished work, and that she sometimes remained until 4 pm. But she agreed that she did not speak to the therapists while they worked, and could not make observations regarding the therapists’ dinner breaks. She also agreed that she was unable to observe the therapists at all times.

197 Between 2012 and 2015 Ms Yu said she went to the Residence several times. She said that the gate beside the property was “never locked” and that there was a chain merely wrapped around it. She said she never heard any FTM employee say that the gate was locked, or that they were not allowed to leave the Residence or that there was a curfew in place.

198 Ms Yu deposed that she could not recall anyone complaining or mentioning an incident in July 2012 where Mr Elvin drove the therapists in a van “very fast” while screaming and swearing. She also said that no one ever told her that they were scared of Mr Elvin or Mr Puerto. Additionally, Ms Yu never heard Mr Elvin or Mr Puerto threaten to kill an employee’s family member in the Philippines. She said that Mr Elvin was not a violent person and she never heard him speaking to any employee in a mean or derogatory way.

199 Ms Yu said that the rules Mr Elvin allegedly required the massage therapists to follow “simply did not exist”. She noted that she never heard Mr Elvin or Mr Puerto tell any employee that they could not have a relationship with another person and that Mr Elvin simply reminded staff to be professional around customers and encouraged them not to cheat on their partners in the Philippines.

200 She confirmed that there was a CCTV camera system operating at the Belconnen shop, including outside the massage rooms and in the staff areas. She said she never saw Mr Elvin, Mr Puerto and Mr Durado watching the CCTV images “for any length of time”.

201 She said that if a therapist assistant was unwell, the massage therapists shared responsibility for “folding towels and keeping the shop clean and tidy”.

202 Ms Yu said that Ms Amacio never told her that she was required to pay Mr Elvin $800 a fortnight.

203 Ms Yu deposed that in 2015 Mr Durado commenced a relationship with Ms Isugan. After Mr Durado was dismissed, she said Ms Isugan “ran away from work to live with him”. She claimed that she then began contacting FTM therapists to offer them jobs. She said that in the months after October 2015, she attended several meetings with Mr Durado, Ms Isugan and “all the other witnesses” where they discussed “how they wanted to take over Foot & Thai or start a new shop”. She said that her sister, Ms Clenci, and her husband, Zoran, led this effort and “everyone else fell into line”. She added that Ms Clenci’s daughter was a receptionist at FTM at the time and had “access to all the information about how the business runs”. Ms Yu deposed that Ms Clenci sought to buy FTM in voluntary administration, and after this was unsuccessful, she and Zoran Clenci “immediately began setting up the True Balance shop”. She said that Ms Isugan, Ms Ortega, Ms Castaneda, Ms Amacio and Ms Bantilan all currently work at True Balance, and that Mr Benting and Ms Sarto previously worked there.

## The credibility of the witnesses

204 The evidence of the Massage Therapists was broadly consistent and all the Ombudsman’s witnesses easily withstood cross-examination. While there were some discrepancies, I am satisfied that they were doing their best to give a truthful account of their experiences. I have no doubt that the Therapists were genuinely afraid of Mr Elvin. A number of them broke down in cross-examination when recounting some of their experiences working for FTM and Mr Elvin’s behaviour, in particular. Ms Isugan sobbed as she recounted the threats of harm to her family. Mr Benting wept as he recalled the anger displayed by Mr Elvin the night he threatened to harm family members of staff who reported the “real situation”. Ms Castaneda broke down several times. She sobbed as she gave evidence about Mr Elvin’s criticisms of her performance and his threats to send her home if she did not improve. She was in tears as she told the Court about his angry outbursts and her fear of him. Ms Amacio fought back tears as she recalled Mr Puerto conveying Mr Elvin’s threats of reprisals.

205 That said, the evidence the Massage Therapists did not always correspond with the contemporaneous records. Where it differed from the contemporaneous records, I have preferred the records.

206 For a good deal of time during the hearing Mr Elvin was courteous and cooperative and conducted himself in a way that belied the picture painted by the evidence of the Massage Therapists. Under cross-examination, however, he made an altogether different impression. He laughed inappropriately at some of the questions as if to impress upon the Court that the propositions within them were laughable or, as he put it, “ridiculous”. Under the pressure of cross-examination, he appeared to snap, demonstrating that he had a volatile temper. He became quite belligerent, shouting many of his answers at the cross-examiner. This behaviour made the evidence given by the Massage Therapists concerning his angry outbursts and threatening behaviour all the more credible.

207 It was theoretically possible, of course, that Mr Elvin’s behaviour in cross-examination was merely a reflection of indignation at having to respond to false allegations. But I rejected that theoretical possibility, not only because of the weight of the evidence in support of the Ombudsman’s case but also because of the poor quality of Mr Elvin’s evidence including the content of his answers in cross-examination.

208 Mr Elvin proved to be an unreliable witness, who was given to dissembling. Aspects of his account were contrary to contemporaneous documents he admitted were accurate. Many of his answers were unresponsive to the questions. Parts of his evidence were internally inconsistent. Parts of his evidence defied credibility. At times his evidence made little sense. One vivid example was his testimony concerning how he came to nominate the Health Award in the employment contracts.

209 Mr Elvin is not an honest man. The evidence is replete with examples of his dishonest business practices.

210 He promoted FTM on the company’s website, for instance, as “a registered massage clinic” when there was no requirement for registration of massage clinics, disingenuously claiming to rely on the fact that the business had an Australian Business Number. He overstated the experience of some of his staff. He falsely claimed that the FTM therapists were “licensed overseas” when he knew that none of the Massage Therapists were licensed.

211 Moreover, he admitted to being dishonest. He claimed, for example, to have intentionally deceived both the Australian immigration authorities and the Filipino labour authorities by holding up the employment contracts as genuine when in fact they were bogus or, as he put it to the Court ,“bodgie”.

212 His dishonesty was not confined to his business practices.

213 He gave evidence, for example, that the gates to the 44 Edwards Street properties were never locked and that the police confirmed that when they visited the house and saw they were unlocked. He claimed that an AFP officer told him that when the police visited the premises the gates were not locked. But an AFP case note of an inspection of the premises on 24 December 2015 recorded that “[p]olice observed a gate approximately 1.2 – 1.5 metres in height that was locked” and that the officers scaled the fence in order to obtain access to the Residence. Furthermore, a contemporaneous file note made by Fair Work Inspector Hurrell (**FWI Hurrell**), annexed to Mr Thomas’s affidavit (LRT-51), of a conversation she had with Mr Puerto at the Belconnen shop on 19 October 2016 during a site visit records that Mr Puerto told her that the gate was locked in the evenings (from 11 pm to 6/7 am) so that the employees could not leave the premises at night. A contemporaneous file note taken by Michelle Reid, another Fair Work Inspector who accompanied FWI Hurrell on the site visit, similarly records that Mr Puerto said that the gate was locked in the evenings (see LRT-52).

214 When asked why certain evidence was being proffered for the first time in cross-examination, Mr Elvin replied that he had only been given a few days to prepare his affidavit, when he was initially afforded four months to file his affidavits and the time was later extended more than once, including in the final instance over the well-founded objection of the Ombudsman. In the result, he had approximately five months to do so.

215 Numerous other examples are provided in the Ombudsman’s written submissions.

216 I formed the view that Mr Elvin was generally prepared to say anything in order to exculpate himself, regardless of whether it was true or accurate.

217 In these circumstances, I consider that his evidence should not be accepted unless it is against his interest or corroborated by reliable independent evidence. The evidence given by his parents was neither reliable nor independent. I have no confidence in Ms Yu’s capacity to give reliable evidence about the conditions of employment of the Massage Therapists, since she did not work after 1 pm until 2016 and was often absent from the workplace, whether because of the nature of her duties or due to injury or illness.

## Absent witnesses

218 No evidence was adduced by FTM. Moreover, no evidence was elicited from a number of witnesses from whom Mr Elvin might reasonably have been expected to adduce evidence to rebut the Ombudsman’s case.

219 First, Mr Elvin did not present evidence from a single massage therapist to contradict the evidence of the seven presented by the Ombudsman. Nor did he adduce evidence from any of the receptionists who worked at FTM during the period of the claim. Each of these witnesses could have given evidence about the matters in dispute. As the Ombudsman submitted, the receptionists might have given evidence about the systems in place at FTM, including any system for ensuring that the Massage Therapists did not work unreasonable hours and were given sufficient breaks. But the scope of evidence the receptionists could have given was broader than that. According to Mr Elvin, the receptionists were “trained to carry out a supervisory role” at the FTM shops if he were absent and they supervised or managed the employees whenever he was absent (see email to Lara Hurrell dated 12 September 2016, annexed to Mr Thomas’s affidavit as LRT-36).

220 No explanation was offered for the absence of any of these witnesses.

221 What is more, although Mr Puerto was a key player and the person through whom Mr Elvin’s instructions and alleged threats were conveyed, Mr Elvin did not adduce any evidence from him. And Mr Puerto did not challenge the Ombudsman’s case or present evidence of his own.

222 The unexplained failure of a party to give evidence or call witnesses may lead to an inference that the missing evidence or absent witness would not have assisted that party’s case: ***Jones v Dunkel***(1959) 101 CLR 298 esp. at 308 (Kitto J), 312 (Menzies J) and 321 (Windeyer J). The Court make take that circumstance into account in deciding whether to accept particular evidence that relates to a matter on which the absent witness could have spoken: JD Heydon, *Cross on Evidence* (12th ed., Lexis Nexis Butterworths, 2019) at [1215],citing *O’Donnell v Reichard* [1975] VR 916 at 929 (FC). It does not matter that the party who could have called the evidence does not bear the burden of proof. Moreover, evidence the witness might have contradicted can be accepted more readily: *Jones v Dunkel* at 312 (Menzies J). And any inference favourable to the other party for which there is a foundation in the evidence can more comfortably be drawn: *Jones v Dunkel* at 308 (Kitto J); at 312 (Windeyer J).

223 As Hodgson JA explained in *Ho v Powell* (2001) 51 NSWLR 572 at [16], *Jones v Dunkel* was a particular application of the principle in *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970 that “[a]ll evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted”.

224 While a *Jones v Dunkel* inference cannot fill gaps in the evidence and cannot convert conjecture or suspicion into inference, if the inference is drawn it can “weigh the scales, however slightly, in favour of the opposing party”: ***Adler*** *v Australian Securities and Investments Commission* [2003] NSWCA 131; 21 ACLC 1810; 46 ACSR 504; 179 FLR 1 at [649] (Giles JA, Mason P and Beazley JA agreeing at [1] and [2] respectively).

225 There are three conditions for the operation of the rule: *first*, that it might be expected that the evidence from the person would be adduced by the party; *second*, that the evidence would elucidate a particular matter; and *third*, that the failure of the person to give evidence is unexplained: *Payne v Parker* [1976] 1 NSWLR 191 at 201–2 (Glass JA), *Musa v Alzreaiawi* [2021] NSWCA 12 at [79]–[80] (Gleeson JA, Bell P and Macfarlan JA agreeing at [1] and [2] respectively). A *Jones v Dunkel* inference will not be drawn if there are facts which disclose that the reason for not adducing evidence from the person was not that the party “fears to do so”: *Fabre v Arenales* (1992) 27 NSWLR 437 at 445–6 (Mahoney JA, Priestley and Sheller JJA agreeing at 454). As Mahoney JA explained in that case at 449‑450:

The significance to be attributed to the fact that a witness did not give evidence will in the end depend upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. But there are circumstances in which it has been recognised that such an inference is not available or, if available, is of little significance. The party may not be in a position to call the witness. He may not be sufficiently aware of what the witness would say to warrant the inference that, in the relevant sense, he feared to call him. The reason why the witness is not called may have no relevant relationship to the fact in issue: it may be related to, for example, the fact that the party simply does not know what the witness will say. A party is not, under pain of a detrimental inference, required to call a witness “blind”.

226 The explanation must be established by evidence; unavailability of witnesses or lack of recollection, for example, is not to be presumed from the passage of time: *West v Government Insurance Office (NSW)* (1981) 148 CLR 62 at 70 (Murphy J)*;* *Cross on Evidence* at [1215]. No evidence was adduced in the present case to account for the absence of evidence from any of the other massage therapists, the receptionists or Mr Puerto.

227 These principles, sometimes referred to as the rule in *Jones v Dunkel* or a *Jones v Dunkel* inference, do not operate so as to require a party to give “cumulative evidence”. As Heydon put it, if only some people who attended a relevant meeting give evidence about what happened at the meeting, no such inference can normally be drawn as the rule does not require that time be wasted calling unnecessary witnesses: *Cross on Evidence* at [1215]. In the context of the present case, that means that no adverse inference could be drawn from the fact that the Ombudsman’s did not adduce evidence from other massage therapists. Since Mr Elvin argued that the Ombudsman’s witnesses were lying, however, and that the conditions under which they worked were different, his failure to adduce such evidence is a different matter.

228 Further:

[A] party’s failure to give any satisfactory explanation of a prima facie case against him may suggest that the case is sound, either because silence is assent — an implied admission, or because it shows a consciousness of guilt or liability, or because inferences from the prima facie case, being unchallenged, are thereby strengthened. The presumption is the stronger where the facts are particularly within his knowledge.

Heydon JD, *Cases and Materials on Evidence* (Butterworths, 1975) at 62.

229 The fact that the proceedings are proceedings for a pecuniary penalty is not a satisfactory explanation: *Australian Securities and Investments Commission v Adler* [2002] NSWSC 171; 41 ACSR 72; 20 ACLC 576; 168 FLR 253 at [504] (Santow J); appeal dismissed in *Adler* at [664]–[669]. The proceedings are still civil proceedings. The Court is expressly charged with applying the rules of evidence for civil matters when hearing proceedings relating to a contravention of a civil remedy provision: FW Act, s 551.

230 Reliance on the penalty privilege does not prevent the Court from drawing an adverse inference. And the privilege against self‑incrimination can only be claimed by a witness and then only under oath or affirmation: *Chong v CC Containers Pty Ltd* [2015] 49 VR 402 at [236].

231 A *Jones v Dunkel* inference may be drawn in both civil and criminal proceedings and regardless of the fact that the witness cannot be compelled to give evidence which is likely to incriminate him or her or expose him or her to a penalty*: Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* (2001) 115 FCR 442 (***ACCC v Universal Music***) at [33] (Hill J); *Adler* at [661] (Giles JA, with whom Mason P and Beazley JA agreed); *Council of the NSW Bar Association v Power* (2008) 71 NSWLR 451 at [25] (Hodgson JA, with whom Beazley and McColl JA agreed at [1] and [44]). In *ACCC v Universal Music* at [33] Hill J observed:

Where the proceedings are criminal (and the present proceedings are not; they are proceedings, inter alia, for the recovery of a civil penalty) it might be thought that the failure of the accused to go into evidence should not lead to the drawing of *Jones v Dunkel* inferences. After all it is clear that a witness can not be compelled to give evidence which is likely to incriminate the witness or expose the witness to a penalty. However, even in criminal cases it has been held that the failure of the accused, who is in a position to deny, explain or answer the evidence adduced by the prosecution, to give evidence will permit the jury to draw inferences adverse to the accused more readily: see *Azzopardi v R* (2001) 205 CLR 50; 179 ALR 349, affirming *Weissensteiner v R* (1993) 178 CLR 217. A fortiori, therefore, the failure of a respondent to proceedings for recovery of a pecuniary penalty to give evidence on a matter relevant to an issue in the proceeding and deny, explain or answer the evidence adduced against the respondent will permit the Court more readily to draw the inferences to which the decision in *Jones v Dunkel* refers.

232 Here the conditions for the operation of the rule are established and the available inferences are not only open, they should be drawn. The absence of evidence from Mr Puerto is of particular significance, not only because he was clearly available and did not testify, but also because he is a party and was personally involved in many of the critical events. In *Dilosa v Latec Finance Pty Ltd* (1966) 84 WN (Pt 1) (NSW) 557 at 582, in a passage cited by approval in *Australian Securities and Investments Commission v Adler* [2002] NSWSC 171; 41 ACSR 72; 20 ACLC 576; 168 FLR 253at [448], Street J observed:

The inference which a Court can properly draw in the absence of a witness, where such absence is not satisfactorily accounted for, is that nothing which this witness could say would assist the case of the party who would normally have been expected to have called that witness. The significance of this inference differs according to the closeness of the relationship of the absent witness with the party against whom the inference is sought to be propounded. Where the absent witness is a party himself then considerable importance may well attach to the inference. Similarly, the inference is significant if the absent witness is, as in the present case, a person who … was personally engaged in the transactions in question and who was in fact present at Court during part of the hearing …

See, too, *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361at [63] (Heydon, Crennan and Bell JJ).

# THE AGREED AND UNDISPUTED FACTS

233 FTM and Mr Elvin made a number of admissions in their amended defences and Mr Elvin also made admissions in his final submissions. The following facts were either admitted or not denied or disputed. I make findings accordingly.

234 FTM was registered on 1 November 2010. At all relevant times it was a constitutional corporation and a national system employer within the meaning of the FW Act.

235 FTM owned and operated the Belconnen shop and was the employer of each of the Massage Therapists during the period 24 June 2012 to 11 February 2016 (**the claim period**).

236 Between 1 November 2011 and 11 April 2016 (and therefore throughout the claim period) Mr Elvin was FTM’s sole director and shareholder and also its secretary. He was responsible for the overall direction, management and supervision of the company’s operations. That included setting the operating hours of the Belconnen shop; the recruiting, hiring and firing of employees; determining wages and conditions of employment; setting and adjusting pay rates; paying wages and deciding hours of work; setting times for employees’ meal and rest breaks; writing rosters for employees; supervising employees; and approving annual leave for, and personal leave requests, of employees. He was also responsible for the management and supervision of Mr Puerto.

237 From 15 December 2015 to 17 October 2017 FTM was under the external administration of Ezio Senatore and Neil Cussen of Deloitte. From 4 January 2016 to 4 April 2016 it was subject to an “Operating Licence Deed” to which Mr Elvin and the administrators were also parties. From 11 April 2016 to 17 October 2017 FTM was a party to a deed of company arrangement (**DOCA**).

238 The Belconnen shop was open to the public seven days a week. In the period from 24 June 2012 to 15 September 2013 its opening hours were from 10 am until 10 pm and thereafter until the end of the claim period from 10 am until 10.30 pm.

239 FTM employed each of the Massage Therapists (as such) at the Belconnen Shop during the claim period:

 Ms Bantilan from 24 June 2012 to 11 February 2016;

 Ms Amacio from 24 June 2012 to 10 February 2016;

 Mr Benting from 24 June 2012 to 8 February 2016;

 Ms Isugan from 24 June 2012 to 26 October 2015;

 Ms Ortega from 15 April 2013 to 13 January 2016;

 Ms Castaneda from 15 April 2013 to 13 January 2016; and

 Ms Sarto from 15 April 2013 to 12 January 2016.

240 The Massage Therapists were recruited from the Philippines and sponsored by FTM under subclass 457 visas to work at the Belconnen shop. A subclass 457 visa was a temporary work visa, which entitled the holder to enter Australia and work for an approved business for a limited period. The visas were valid for four years. Those granted to the therapists in the first group expired on 31 May 2016. Mr Elvin organised the visas and made the travel arrangements. Mr Puerto accompanied the massage therapists on their flights from the Philippines to Australia and took them to their accommodation.

241 For the duration of their employment the Massage Therapists lived together at the Residence. The Residence was a four-bedroom house located at the rear of 44A Edwards Street in which Mr Elvin’s parents lived separately. Mr Elvin owned both houses. They were formerly owned by his parents but ownership was transferred to him when he set up FTM. The massage therapists were driven to and from work each day by Mr Elvin, Mr Puerto or Mr Elvin Snr.

242 Mr Elvin was the person with overall responsibility for recruiting the massage therapists from the Philippines to work for FTM in Australia. He was responsible for the payment of their wages. He knew the hours they worked, the nature of their work, and the duties they performed. He was the person to whom each of them reported during their employment with FTM.

243 Mr Puerto was employed by FTM at all relevant times during the claim period.

244 Each of the Massage Therapists signed a contract of employment before coming to Australia. The contracts were prepared and countersigned by Mr Elvin “for and on behalf of [FTM]”. They were identical in form. The opening paragraphs read:

This letter invites you to become an employee of foot&thai. We hope you will enjoy your position of Massage Therapist and become a significant contribution to the success of the Company. If you accept our offer, this letter will constitute the terms of your employment with us, which will commence when you arrive in Australia (subject to Visa Processing times).

If a word or phrase has a specific meaning in the Fair Work Act 2009(Cth) (the Act), then it has that meaning in this letter. If no meaning is set out in the Act, then it has its plain English meaning. If it is capable of having a narrow and a wide meaning or construction, then it has the widest possible meaning, unless stated otherwise in this letter. If applicable, this letter should be read in conjunction with the Health Professionals and Support Services Award 2010.

245 The employment of each of the Massage Therapists was described as “full-time permanent employment”. The “day to day duties and responsibilities” were listed in the schedule to the agreement.

246 For present purposes reference need only be made to certain clauses of the contract.

247 The ordinary hours of work were set by clause 2. Clause 2.1 defined them as “an average of 38 hours per week in a fortnight or four week period” and stipulated that no more than 10 ordinary hours of work (exclusive of meal breaks) were to be worked in any one day. Unless otherwise stated, the ordinary hours of work for “a day worker” would be worked between 10 am and 10 pm Monday to Sunday (cl 2.2). The therapists could be asked to work additional hours, which I take to mean hours over and above 38 hours per week, but in that event they would be “remunerated accordingly” (cl 2.3). Each could be required to work “ordinary and/or additional hours with additional remuneration on public holidays” (cl 2.4).

248 Pay rates for weekend work were prescribed by clauses 2.6 and 2.7:

2.6 Where the work location of a practice services patients on a seven day a week basis, the ordinary hours of work for an employee at that location will be between 10.00 am and 10.00 pm Monday to Sunday. Work performed on a Saturday will be paid at the rate of time and a quarter of the employee’s ordinary rate of pay instead of the loading prescribed in clause 2.7 – Saturday and Sunday work. Work performed on a Sunday will be paid at the rate of time and a half of the employee’s ordinary rate of pay instead of the loading prescribed in clause 2.7.

2.7 Saturday and Sunday work

a. For all ordinary hours worked between midnight Friday and midnight Sunday, a day worker will be paid their ordinary hourly rate and an additional 50% loading.

b. A casual employee who works on a Saturday or Sunday will be paid a loading of 75% for all time worked instead of the casual loading of 25%.

249 Clause 5 provided for overtime penalty rates. An employee who worked outside their ordinary hours on any day was to be paid at the rate of time and a half for the first two hours and double time thereafter (cl 5.1).

250 The contract term was four years, with the dates to coincide with the “457 Work Permit” (cl 11).

251 Remuneration was governed by clause 12. The annual “base salary” was $52,000 plus 9% superannuation (cl 12.3). Costs of travel (return airfares and travel to work), accommodation, uniforms and visa processing (passports, health and character checks) were to be paid by FTM.

252 Annual leave was covered by clause 20, which supplemented that which was provided for in the NES. Annual leave loading for employees other than shift workers was 17.5% of the ordinary rate of pay (cl 20.2).

253 Employees required to work on a public holiday were to be paid “time and a half for all time worked” (cl 21.2).

254 Clause 27.3 provided:

This agreement will continue to apply to your employment unless varied by mutual agreement in writing.

255 By clause 27.5 FTM agreed to provide a Fair Work Information Statement to all new employees in accordance with the FW Act and noted that the Statement “contains information about the National Employment Standards and the respective roles of [the Fair Work Commission] and the Fair Work Ombudsman”.

256 The “day to day duties and responsibilities” listed in Item 1 to the schedule to the agreements were described as follows (without alteration):

**Massage:**

- Thai Foot Reflexology

- Thai Head, Shoulder and Back

- Traditional Thai

- Aromatherapy Oil

- Deep Tissue

- Sports

- Remedial

- Swedish

* massaging the soft tissues of the body, such as muscles, tendons and ligaments, to assist healing • utilising a range of massage techniques to enhance sports performance and prevent injury
* administering treatments to promote relaxation, improve circulation and relieve muscle tension
* assessing and treating specific soft tissue dysfunction and providing rehabilitation advice
* employing other techniques such as essential oils to assist recovery
* assessing client’s physical condition and case history and advising on stretching exercises and relaxation techniques
* Performs therapeutic massage and administers body treatments for relaxation, health, fitness and remedial purposes. Keep accurate and up-to-date records regarding a client’s condition before and after massage therapy session in cases of a client being treated for a specific condition
* Obtain and keep an overview or profile of the client’s state of being and health history and discuss any problem areas that may contraindicate massage.
* Acknowledge their professional limitations and refer the client to an appropriate health professional when necessary, in cases where massage may be or is contraindicated
* Perform only those services for which they are qualified and which represent their training and education
* Following different types of sanitary procedures in order to keep the room and the facility clean

257 At all relevant times during their respective employment periods, each of the Massage Therapists arrived at the Belconnen shop at approximately 9.45 am and performed duties until the shop’s closing time. These duties included performing different remedial or therapeutic massages on customers, providing after-care advice to customers, washing and folding towels, undergoing massage training and general cleaning. FTM admitted the Ombudsman’s allegations about the total number of ordinary hours, public holiday hours, and the number of overtime hours the Massage Therapists worked for FTM. FTM also admitted the amounts the Ombudsman alleged it had paid to the Massage Therapists for the hours they worked, though not the cash refunds. While Mr Elvin did not admit these matters, he did not dispute them either.

258 Mr Elvin knew that FTM directly or indirectly requested or required the Therapists to work additional hours in excess of 38 hours per week during their respective employment periods. He also knew that FTM did not give the Therapists a Fair Work Information statement. He had access to, and monitored, FTM employees on CCTV cameras at the Belconnen shop. Each of these matters was admitted in his amended defence.

259 FTM failed to pay each of the Massage Therapists any amounts in relation to their entitlement to accrued, untaken annual leave when their respective employment period ended.

260 From time to time, FTM made deductions from the Massage Therapists’ fortnightly wages, which the Ombudsman contends were unauthorised. They are described in the employees’ pay slips as “staff loans” and amounted to $1,500 each for Ms Amacio and Mr Benting; $1,739.44 for Ms Bantilan; $1,684.93 for Ms Isugan; $638.41 for Ms Castaneda and Ms Sarto; and $672.91 for Ms Ortega — a total of $8,374.10.

261 Each of these matters were admitted in FTM’s further amended defence.

262 Mr Benting, Ms Amacio, Ms Bantilan, Ms Sarto, Ms Castaneda and Ms Ortega each resigned from their employment with FTM without notice.

263 On or around 19 July 2017 the Massage Therapists received total of $144,883.18 from Deloitte, on behalf of FTM, for unpaid entitlements relating to wages and annual leave.

# THE BURDEN AND STANDARD OF PROOF

264 With one qualification, the burden of proof rests with the Ombudsman. The qualification relates to the adverse action and coercion claims. In those cases, as I explain later in these reasons, there is a statutory presumption that the action was taken for the alleged reason or with the alleged intent unless the respondents prove otherwise.

265 As this is a civil proceeding, the Ombudsman need only prove the elements of the various causes of action to the civil standard of proof, the balance of probabilities. But whether or not that standard is met is informed by the nature of the cause of action or defence, the nature of the subject-matter of the proceeding and the gravity of the allegations: *Evidence Act 1995* (Cth), s 140. Section 140 of the Evidence Act is, in effect, an enactment of the principle explained by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361–2:

Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. 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.

266 In considering whether the Ombudsman has made out her case, I have borne these principles firmly in mind.

# THE INTERLOCUTORY APPLICATION

267 Before going any further, it is convenient to deal with the Ombudsman’s belated application to further amend the originating application and statement of claim.

## Background

268 The Ombudsman’s principal case is that the Massage Therapists were covered by the Health Award which covered:

(a) employers throughout Australia in the health industry and their employees in the classifications listed in clauses 14 – Minimum weekly wages for Support Services employees and 15 – Minimum weekly wages for Health Professional employees to the exclusion of any other modern award;

(b) employers engaging a health professional employee falling within the classification listed in clause 15.

269 In the original statement of claim, filed on 22 June 2018, the Ombudsman pleaded that the Health Award covered and applied to FTM in relation to the employment of the Employees and that the Massage Therapists were “properly classified” as “Support Services employee – level 2” (**SSE Level 2**).

270 An amended originating application and statement of claim were filed on 9 August 2019 making corrections to certain calculations underpinning the underpayments allegations.

271 None of the respondents admitted that the Health Award applied.

272 FTM elected not to plead to the relevant paragraphs, contending that they involved matters of law. In his amended defence Mr Elvin claimed to have “insufficient knowledge” of the allegations concerning the award and asserted he was not required to plead to them and made no assertions, one way or the other, with respect to award coverage.

273 At a case management hearing on 9 August 2019, through its solicitor FTM informed the Court that there was no longer an issue about the award. Shortly thereafter, however, FTM went into liquidation, its lawyers withdrew, and it never amended its defence.

274 In the course of his opening address, I raised with lead counsel for the Ombudsman, Mr Seck, some concerns about whether the Massage Therapists fell within the classification of “Support Services employee”, making the rather obvious point that “support services” suggests that such employees are supporting other employees or other persons and inquired of counsel who those other employees or persons were. He replied:

It does suggest that, your Honour, and we don’t say they’re providing support to any other person, and your Honour does raise directly with me a good point that implicit in the expression “support services” suggests that they’re supporting another person. We say because they’re not professional employees, they’re – can only fall within the definition of “support services”, otherwise no other classification could apply. My learned junior reminds me that the evidence also shows that the massage therapists performed other cleaning and clerical duties as part of their job.

So there is a component of their work which involves support services, but the massage services are not, on their face, supporting any other professional service. And one of the difficulties that often arises in awards, obviously, is trying to find the most appropriate classification for the employees. **In this case, the most appropriate classification, on its face, is not clear here because of the issue that your Honour has just identified.** We would submit that having regard to the classifications, the best “fit” would be the support services classification.

(Emphasis added.)

275 I was later told that Mr Elvin would contend that the Hair and Beauty Award applied and not the Health Award. Mr Seck informed the Court that, regardless of which Award applied, there were underpayments and foreshadowed a further amendment to plead the Hair and Beauty Award in the alternative. He said that, if Mr Elvin was going to contend that the Hair and Beauty Award applied, then the Ombudsman would “want to cover all bases” and do that sooner rather than later.

276 The next day the Ombudsman was granted leave to amend her pleading and on 21 November 2019 she filed a further amended statement of claim pleading, in the alternative, that the Hair and Beauty Awardapplied.

277 When he opened his case in December 2020, Mr Elvin submitted that the Hair and Beauty Award was not the correct award and there was doubt as to whether either or any award applied. He denied that massage was “a health care service”.

278 Evidence later emerged which indicated that the Massage Therapists were in all likelihood “health professionals” within the meaning of the Health Award and in her closing submissions the Ombudsman contended that the Massage Therapists fell either within SSE Level 2 or Health Professional – level 1 (**HP Level 1**). Mr Seck indicated that the Ombudsman would file an application for leave to amend her pleading to reflect this. Mr Elvin foreshadowed that he would oppose any such application.

279 True to her word, on 23 December 2020 the Ombudsman filed an interlocutory application seeking leave to file a second further amended statement of claim to include the further alternative pleading that the Massage Therapists fell within the classification of HP Level 1 and to adduce new evidence. She also applied for leave to file a further amended originating application and she filed submissions in support of the application. The Ombudsman also filed two affidavits. One was affirmed by Sharissa Thirukumar, a senior lawyer in the Office of the Fair Work Ombudsman with the conduct of the proceeding. The affidavit explained the Ombudsman’s application and annexed a draft second further amended statement of claim. The other was affirmed by Mr Wong. It provided revised calculations based on the HP Level 1 classification. The effect of the amendments is to substantially increase the amount of the underpayments claim.

280 True to his word, Mr Elvin opposed the application and filed submissions of his own. Mr Puerto did not oppose the application.

281 The proposed amendments to the pleadings were summarised in the Ombudsman’s submissions as follows:

(1) additional pleadings relevant to the Massage Therapists’ qualifications and experience and Mr Elvin’s recognition of those qualifications;

(2) alternative underpayment amounts for the following contraventions under the Health Award as a result of the different rates of pay applicable to the SSE Level 2 and HP Level 1 classifications: minimum hourly rates, public holiday rates, overtime rates, annual leave taken during employment and annual leave on termination amounts; and

(3) consequential amendments, for example to amend the adverse action pleadings to include the injury constituted by the alternative claims.

282 The proposed amendments to the further amended originating application consisted of the addition of alternative orders in the event that the Court were to find that HP Level 1 was the appropriate classification.

## The evidence

283 Ms Thirukumar deposed that the Ombudsman pleaded the SSE Level 2 classification on the basis of the evidence she had in her possession at the time the proceeding was instituted. That evidence indicated that the Massage Therapists did not hold Australian qualifications and included correspondence received from lawyers then acting for Mr Elvin that he did not require the Massage Therapists to hold qualifications (LRT-36). Neither FTM nor Mr Elvin pleaded to the allegations concerning the applicable award. In his opening written submissions, Mr Elvin did not address the question of award coverage or the appropriate classification. At the hearing he contended that no award covered the Massage Therapists.

284 In mid-late November 2020 the Department of Home Affairs produced documents in response to a subpoena issued at Mr Elvin’s request on 29 October 2020. On 1 December 2020 Mr Elvin served on the Ombudsman a bundle of documents which included a letter sent by FTM to the Department dated 1 February 2013, which was admitted into evidence and marked Exhibit 8.

285 During cross-examination on 1 and 2 December 2020 Mr Elvin testified that:

(1) he was aware that the Massage Therapists had at least three years of experience in the massage industry;

(2) he read Exhibit 8 before it was sent to the Department, in which he, on behalf of FTM, represented that three years’ relevant experience was equivalent to a formal qualification in massage therapy;

(3) he required the Massage Therapists to attend the NKYR Academy in the Philippines to obtain qualifications before starting work with FTM and arranged for them to be trained to the standard FTM required; and

(4) he recognised those qualifications and deemed them to be acceptable.

286 Once she heard this evidence, Ms Thirukumar, together with her supervisor, considered whether there was additional evidence before the Court relevant to the issue of the classification of the Massage Therapists under the Health Award and whether it was necessary to amend the pleading to allege an alternative classification of HP Level 1.

287 On 10 and 11 December 2020 Mr Seck informed the Court that leave would be sought to file a second further amended statement of claim and an order was made that she do so by 23 December 2020. Three days later Ms Thirukumar instructed Mr Wong to update the rates of pay in the Health Award calculations from SSE Level 1 to HP Level 1 and include annual pay point progressions for each of the Massage Therapists as prescribed by cl 15.1 and 15.2. The affidavit from Mr Wong includes that information.

## The submissions

288 The Ombudsman submitted that leave should be granted for the following reasons.

(1) The proposed amendments are important not only to the determination of this case and the resolution of the issues in dispute but also to the Ombudsman’s function in enforcing minimum statutory entitlements under the FW Act.

(2) Judicial consideration of the issue of award coverage and classification for massage therapists generally is in the public interest.

(3) The proposed amendments arose out of evidence not previously known to the Ombudsman and “uniquely known” to Mr Elvin, elicited for the first time during his cross-examination, and contrary to earlier representations he made to the Ombudsman.

(4) Before the evidence was elicited, the Ombudsman lacked “a sufficient evidential basis” to plead that the Massage Therapists fell within the HP Level 1 classification.

(5) There was no delay and limited prejudice.

289 Mr Elvin bemoaned the series of amendments to the pleadings already made by the Ombudsman. He submitted that it could be inferred that, when the Ombudsman amended her pleading to include the Hair and Beauty Award she effectively abandoned the claim under the Health Award and is now effectively abandoning the claim under the Hair and Beauty Award. He submitted that the application was “extremely late” and the substantial increase in the quantum of the claim was “clearly prejudicial”. He submitted, too, that the facts that he is a litigant in person with no legal training or experience, is the primary carer of two young children, is unemployed and has a diagnosed history of clinical depression compounded the prejudice caused by the delay. He complained that the Ombudsman had not behaved as a model litigant. Finally, he submitted that the application was futile because the claim the Ombudsman wishes to advance through the proposed second further amended statement of claim is unlikely to succeed. Mr Elvin referred to s 37M of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), the relevant rules, and a number of authorities, principal among which was the leading case of ***Aon*** *Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175.

290 While there is cause for lament and Mr Elvin is understandably critical of the Ombudsman’s conduct, the inference he invited is not open. The Ombudsman never abandoned reliance on the Health Award. This was always her principal claim. She pleaded the Health and Beauty Award in the alternative and then only because it was raised by Mr Elvin as a possibility. Mr Elvin well knew that. Not only was it clear from the pleading but he was repeatedly told as much during the hearing.

291 I will deal with the other arguments in due course.

## The legal principles

292 The relevant legal principles are uncontroversial.

293 An applicant may apply for leave to amend an originating application or a statement of claim for any reason.

294 Rule 8.21 of the *Federal Court Rules 2011* (Cth) (**FCR**), which deals with amendments to an originating application relevantly provides:

(1) An applicant may apply to the Court for leave to amend an originating application for any reason, including:

…

(g) to add or substitute a new claim for relief, or a new foundation in law for a claim for relief, that arises:

(i) out of the same facts or substantially the same facts as those already pleaded to support an existing claim for relief by the applicant; or

(ii) in whole or in part, out of facts or matters that have occurred or arisen since the start of the proceeding.

295 The Court has the power to make any order it considers appropriate in the interests of justice (FCR, r 1.32) and at any stage of a proceeding it may exercise a power mentioned in the Rules on its own initiative or on the application of a party or a person with a sufficient interest in the proceeding (FCR, r 1.40).

296 Rule 16.53 requires that a party in the Ombudsman’s position requires the leave of the Court to further amend a statement of claim.

297 A convenient summary of the relevant principles appears in the Full Court’s judgment in *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322 at [19]–[21] where Gilmour and Foster JJ observed :

The power of the Court to grant or refuse leave must be exercised in the way that best promotes the Court’s overarching purpose to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible: s 37M(3) of the FCA Act and the *Federal Court Rules 2011* (Cth) (FCR): *Bowen Energy Ltd v 2KD Drilling Pty Ltd* [2012] FCA 275 at [8]; *Australian Competition and Consumer Commission v Jutsen (No 2)* [2010] FCA 982 at [12]-[13]; *Suzlon Energy Ltd v Bangad* (2011) 196 FCR 259 at [19]; *University of Sydney v ResMed Ltd (No 5)* [2012] FCA 232 at [14]. ...

The Court’s power to grant leave to amend is broad and has the remedial objective of ensuring that any defect in the pleadings is cured and that the real questions in the controversy are properly agitated and to avoid a multiplicity of proceedings: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [14] ... The object of the Court is not to punish parties for mistakes made in the conduct of their case, but to correct errors with the result that a decision can be made on the real matters in controversy: *Clough v Frog* (1974) 48 ALJR 481 at 482; 4 ALR 615 at 618, citing *Cropper v Smith* (1884) 26 Ch D 700 at 710-711.

Leave to amend should be granted unless the proposed amendment is futile, such that the issue sought to be added is unlikely to succeed, the amendment is likely to be struck out or would cause substantial prejudice or injustice to the opposing party in a way that cannot be compensated by costs: *Research in Motion Ltd v Samsung Electronics Australia Pty Ltd* (2009) 176 FCR 66 at [21]-[22]; *Ron Medich Properties Pty Ltd v Bentley-Smythe Pty Ltd* [2010] FCA 494 at [8]. Rule 16.21 of the FCR identifies the grounds on which pleadings may be struck out.

298 Mr Elvin relied on several passages from the judgments in *Aon*.

299 First he referred to the remarks of French CJ’s at [4]–[6] in which his Honour outlined the errors made in the courts below:

Save for the dissenting judgment of Lander J in the Court of Appeal, the history of these proceedings reveals an unduly permissive approach at both trial and appellate level to an application which was made late in the day, was inadequately explained, necessitated the vacation or adjournment of the dates set down for trial, and raised new claims not previously agitated apparently because of a deliberate tactical decision not to do so. In such circumstances, the party making the application bears a heavy burden to show why, under a proper reading of the applicable Rules of Court, leave should be granted.

In the proper exercise of the primary judge’s discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to Aon could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system. Given its nature, the circumstances in which it was sought, and the lack of a satisfactory explanation for seeking it, the amendment to ANU’s statement of claim should not have been allowed. The discretion of the primary judge miscarried.

It appears that a factor in the decision of the primary judge and of the Court of Appeal was the decision of this Court in *JL Holdings*. That case arose out of an entirely different factual setting. However, to the extent that statements about the exercise of the discretion to amend pleadings in that case suggest that case management considerations and questions of proper use of court resources are to be discounted or given little weight, it should not be regarded as authoritative. For the reasons set out more fully below, I would allow the appeal. I agree with the orders proposed in the joint judgment.

300 He then referred to the observation of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [67]:

ANU did not dispute that the substance of its contention was that the “real issues in the proceeding” extended to any issues which a party sought in good faith to advance and which were arguable. For the reasons which follow, that contention cannot be accepted.

301 Finally he relied on the remark in the plurality’s judgment at [101]:

In *Ketteman* Lord Griffiths recognised, as did the plurality in *JL Holdings*, that personal litigants are likely to feel the strain more than business corporations or commercial persons. So much may be accepted. But it should not be thought that corporations are not subject to pressures imposed by litigation. A corporation in the position of a defendant may be required to carry a contingent liability in its books of account for some years, with consequent effects upon its ability to plan financially, depending upon the magnitude of the claim. Its resources may be diverted to deal with the litigation. And, whilst corporations have no feelings, their employees and officers who may be crucial witnesses, have to bear the strain of impending litigation and the disappointment when it is not brought to an end. The stated object in the *Court Procedures Rules*, of minimising delay, may be taken to recognise the ill‑effects of delay upon the parties to proceedings …

## Consideration

302 Mr Elvin is understandably aggrieved. The Ombudsman’s application was brought very late. In *Construction, Forestry, Mining and Energy Union v* ***BHP Coal*** *Pty Ltd* (2015) 230 FCR 298 at [63]–[65] the Full Court (Logan, Bromberg and Katzmann JJ) observed:

[A] civil suit for the recovery of a pecuniary penalty is a proceeding of a penal nature: *Naismith v McGovern* (1953) 90 CLR 336 at 341. In this class of case, it is especially important that those accused of a contravention know with some precision the case to be made against them. Procedural fairness demands no less. …

Litigation is not a free for all. The overarching purpose of the civil practice and procedure provisions that apply in this Court is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible (*Federal Court of Australia Act 1976* (Cth) (“FCA Act”), s 37M). It would not be just to decide a case on a different basis than the way it was conducted. Nor would it be just to permit an applicant to change the nature of its case after the evidence has closed and its weaknesses pointed out, at least not without a formal application and the grant of leave, on terms if necessary.

303 Nevertheless I am persuaded that the Ombudsman’s application should be granted.

304 First, the Ombudsman appears to have been misled by Mr Elvin into thinking that the Massage Therapists had no formal qualifications and that until Mr Elvin’s cross-examination, she believed that she lacked sufficient information to enable her to plead that the HP Level 1 classification applied.

305 In an attachment to an email from Bradley Allen Love Lawyers, dated 12 September 2016, being annexure LRT-36 to Mr Thomas’s affidavit (at p 2346 of the Court Book), which recorded questions asked of Mr Elvin by the Ombudsman and Mr Elvin’s answers, the following exchange is recorded:

9: What qualifications (if any) are your massage therapists required to have?

* Mr Elvin did not require his staff to hold any formal qualifications when he was the employer.

306 Exhibit 8 (document 79 in Mr Elvin’s tender bundle) consisted of an email to the Department of Immigration and Citizenship dated 1 February 2013 attaching a letter in response to a request for information made on 11 January 2013. The letter was sent by Lynette Salazar on behalf of Mr Elvin. It referred to a number of primary subclass 457 visa holders who were employees of FTM. They included Mr Puerto, Mr Benting, Ms Isugan, Ms Bantilan, and Ms Amacio. It included a position description for the role of massage therapist.

307 Item 9 of the Department’s request sought evidence of licensing, registration or membership where they are mandatory to work in the nominated occupation under Australian law. This was the response:

In accordance with the Australian Skills Recognition Information (ASRI), listed on the website for the Department of Immigration and Citizenship and by ANZSCO on the Australian Bureau of Statistics for skills needed for a massage therapist in Australia, it states that at least three years relevant experience may substitute for the formal qualification of a AQF Associate Degree, Advanced Diploma or Diploma (ANZSCO Skill Level 2).

308 The evidence adduced from Mr Elvin in cross-examination accords with the summary in Ms Thirukumar’s affidavit. Mr Elvin testified that the Massage Therapists had at least three years’ experience in the massage industry before coming to Australia (T651/24–26) and he understood that, for the purpose of acquiring a subclass 457 visa, at least three years’ relevant experience may substitute for the formal qualification of Australian Qualifications Framework (**AQF**) associate degree, advanced diploma or diploma (Australian and New Zealand Standard Classification of Occupations (**ANZSCO**) skill level 2) (T653–4). He also testified that he required the Massage Therapists to attend the NKYR Academy in the Philippines to obtain qualifications before they started work for FTM (T646/5–24); paid for them to obtain those qualifications (T651/11); and recognised the certification of the NKYR Academy as constituting qualifications as a massage therapist (T646/12–14; 698/25–26). He further testified that the Massage Therapists were trained in remedial massage (T640/23).

309 Some of these matters were known to the Ombudsman before the originating application was filed. Internal advice given to the Ombudsman tendered by Mr Elvin (and marked exhibit 2R10) records that the Therapists were “overseas qualified massage therapists with 5+ years of previous experience”. It also shows that she was aware that they were sponsored under the subclass 457 visa as employees at ANZSCO classification 411611 and that the indicative skill level of this classification was an AQF associate degree, advanced diploma, diploma, or alternatively, at least three years of relevant experience.

310 On the basis of this information the advice was that the Therapists were not only covered by the Health Award but that they fell within the classification of HP Level 1. The evidence does not disclose what the Ombudsman did with this advice. It is evident, however, that by the time Mr Wong was instructed to calculate the Therapists’ entitlements the Ombudsman must have decided that the classification was not apt because Mr Wong was told that they were all classified as SSE Level 2.

311 The attachment to the email from Bradley Allen Love dated 12 September 2016, to which the internal advice did not refer, would likely have confused matters and may well have contributed to that decision

312 The new information elicited in cross-examination was that Mr Elvin required the Massage Therapists to attend the NKYR Academy to obtain qualifications before they started work for FTM and that he recognised the certification of the NKYR Academy as constituting qualifications as a massage therapist. A qualification “deemed acceptable by the employer” is sufficient to place a health professional in the classification of HP Level 1. Armed with this information, which was inconsistent with the information provided by Mr Elvin through his solicitors, the Ombudsman could more confidently claim that the Therapists were properly classified as HP Level 1.

313 Second, this case is distinguishable from *Aon.*

314 In *Aon* the ANU sued three insurers seeking indemnity for losses it suffered in a fire. Six months later it joined Aon, its insurance broker, as a defendant and claimed damages against it in the alternative based on Aon’s failure to renew insurance over some of the property. On the third day of a four week trial the university settled its case against the insurers and consent judgments were later entered. The ANU then applied for an adjournment of the trial and leave to amend its statement of claim to add a substantial new claim against Aon based on allegations that Aon had been obliged to ascertain and declare the correct value of the property to the insurers and to provide certain advice to the university. No explanation for the amendment was offered. The primary judge granted leave to amend and, by majority, the Court of Appeal dismissed the appeal. Both French CJ and the plurality in the High Court emphasised the importance of case management considerations because they had been overlooked below.

315 As the Full Court (Keane CJ, Gilmour and Logan JJ) observed in ***Cement Australia*** *Pty Ltd v Australian Competition and Consumer Commission* (2010) 187 FCR 261 at [51], *Aon* is “not a one size fits all case”. The weight to be given to the relevant considerations, both individually and in combination, and the outcome of the balancing process involved in the exercise of the discretion may vary according to the facts of the particular case. In contrasting the circumstances of that case with *Aon,* the Full Court went on to point out at [52] that in *Aon* the claim introduced by the amendment had not previously been raised because of a deliberate tactical decision on the part of the ANU (*Aon* at [4] and [24]). Given the delay in proposing the amendment, an explanation was required and none was given (*Aon* at [106]).

316 This case is very different.

317 Unlike *Aon* the Ombudsman is not seeking leave to add a substantial new claim. Unlike the decision taken by the ANU in *Aon,* the Ombudsman’s decision to plead the Support Services classification was not a tactical decision. Further, unlike the ANU in *Aon*, the Ombudsman provided an explanation to the Court. Until the new evidence emerged, the Ombudsman believed it to be the right classification. When the new information emerged, she believed she might have been mistaken. It is true that she could have obtained the information in exhibit 8 from the Department of Home Affairs herself, if not before the proceeding started, at least by subpoena once it had. That may have been enough to plead the HP Level 1 classification. But her omission to do so is at most an oversight. Any prejudice to Mr Elvin is largely, if not entirely, of his own making.

318 Third, although the timing of the application is unfortunate, and the application for leave to amend was made very late, there was minimal delay in making it once the Ombudsman realised her potential error.

319 Fourth, the interests of the Massage Therapists should also be considered. They were not party to the Ombudsman’s conduct. If the HP Level 1 classification is the correct classification, there is no good reason why they should be penalised for error on the Ombudsman’s part.

320 Fifth, this case should be determined on its merits.

321 In *Leotta v Public Transport Commission* *(NSW)* (1976) 9 ALR 437 at 446; 50 ALJR 666 at 668, Stephen, Mason and Jacobs JJ said:

If in the cause of action upon which the plaintiff sued there had emerged at the conclusion of the evidence facts which, if accepted, established that cause of action, then it was the duty of the trial judge to leave the issue of negligence to the jury. The pleadings should have been amended in order to make the facts alleged and the particulars of negligence precisely conform to the evidence which had emerged.

322 In *Banque Commerciale SA (in liq) v Akhil Holdings Limited* (1990) 169 CLR 279 at 296–7 Dawson J remarked that “modern pleadings have never imposed so rigid a framework that if evidence which raises fresh issues is admitted without objection at trial, the case is to be decided upon [a different basis]… cases are determined on the evidence, not the pleadings”. That remark was approved by five justices of the High Court in *Vale v Sutherland* (2009) 237 CLR 638at [41].

323 As the Full Court observed in *Cement Australia* at [68], there is nothing in *Aon* or in the FCA Act to suggest that it is irrelevant for the Court to take into account in the exercise of its discretion the desirability that a case be decided on its merits, so as to preserve public confidence in the administration of justice.

324 In *Water Board v Moustakas* (1988) 180 CLR 491 at 497 Mason CJ, Wilson, Brennan and Dawson JJ said that if issues not apparent from the pleadings are litigated, the pleadings should be amended accordingly. In effect, that is all the Ombudsman seeks to do. The new evidence is necessary only because the classification they want to rely on affects the extent of the underpayments.

325 Sixth, I take into account Mr Elvin’s feelings but any prejudice occasioned to him as a result of a grant of leave is minimal in the scheme of things. He opened his case by saying that the Health Award did not apply. There is no reason to think that Mr Elvin’s position would have been any different if the Ombudsman had pleaded from the outset that the Massage Therapists were properly classified as HP Level 1. The fact that the amounts claimed in the proposed second amended statement of claim are substantially higher than those previously claimed is simply the consequence of the application, if it be the case, of the correct classification in the Award.

326 Seventh, I reject Mr Elvin’s submission that it would be futile to grant the Ombudsman’s application.

327 Contrary to Mr Elvin’s submission, practitioners of complementary medicine are covered by the Health Award. Indeed, remedial masseurs, reflexologists and aromatherapists are listed as “common health professionals” under the Award. Notably, the Therapists’ contract of employment provided that their day-to-day duties involved remedial massage, Thai foot reflexology and massages using aromatherapy oil.

328 There is no evidence one way or the other as to whether the Massage Therapists were registered with a professional organisation. Regardless, registration with a professional organisation does not determine whether they were health professionals within the meaning of the Health Award or came within the HP Level 1 classification.

329 In his submissions on the interlocutory application Mr Elvin referred the Court to the website of the Association of Massage Therapists (**AMT**), which he described as the oldest association in Australia “to represent massage therapy in its own right and the premier representative body for professional therapists”. He submitted that the AMT website is informative and contradicts the Ombudsman’s claim that the Massage Therapists are covered by the Health Award or, for that matter, the Hair and Beauty Award. He referred to representations made by the AMT to the effect that there is no legislation that “applies solely or specifically to the practice of massage” and “no uniform national system in relation to unregistered health practitioners such as massage therapists”. These representations are not to the point. They are concerned with regulation of registered and unregistered health practitioners. At the same time, they belie Mr Elvin’s argument because they disclose that the AMT considers that massage therapists are health practitioners.

330 Mr Elvin’s submissions also included a link to the AMT’s website.

331 The AMT website is indeed informative, not because it contradicts the Ombudsman’s claim that the Massage Therapists are covered by the Health Award, but because it supports it. Three of the five facts sheets included in the “Practice Resources” of the Members section (accessible by clicking on the “Members” tab at the top of the home page) refer to the Health Award as the award covering massage therapists. One is specifically concerned with award entitlements. That identifies the Health Award and the place where it can be found. It begins with the following statement:

The Health Professionals and Support Services Award 2010 came into effect on 1 January 2010. Along with the National Employment Standards (NES), this Award contains the minimum conditions of employment for Remedial Massage Therapists. Together, the Health Professionals Award and the NES are a safety net that cannot be altered to the disadvantage of the employee/therapist.

332 In any case, the pleading currently relies on the Health Award. The only change the Ombudsman seeks to make is to the classification into which the Massage Therapists fell.

333 Eighth, I do not accept that the Ombudsman has behaved otherwise than as a model litigant.

334 The obligation of the Commonwealth and Commonwealth agencies to behave as model litigants in the conduct of litigation is set out in the *Legal Services Directions 2017* (Cth). It applies to the handling of claims and litigation brought by or against the Commonwealth or a Commonwealth agency.

335 The nature of the obligation is to act honestly and fairly by doing or not doing certain things set out in cl 2 of Appendix B of the Directions. Mr Elvin referred to a number of those matters:

(a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;

(aa) making an early assessment of

(i) the Commonwealth’s prospects of success in legal proceedings that may be brought against the Commonwealth; and

(ii) the Commonwealth’s potential liability in claims against the Commonwealth;

(e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:

(i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true [.]

…

(f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim[.]

336 Most of these matters are irrelevant because they relate to cases brought against the Commonwealth or Commonwealth agency. Mr Elvin is the not a claimant. The Ombudsman has not required Mr Elvin to prove a matter she knew to be true. If anything, the Ombudsman and her lawyers bent over backwards to assist Mr Elvin. There have been a number of delays in this proceeding. The Ombudsman did not cause any of them. To the extent that granting leave to the Ombudsman will cause further delay, Mr Elvin is substantially responsible for it.

337 Mr Elvin complained that he had not been given an opportunity to file a further amended defence. But the complaint is premature. He will be given that opportunity once the Ombudsman files her documents. He will also be given an opportunity to address the new evidence from Mr Wong. As I indicated to the parties at the hearing, I do not propose making final orders in this judgment. Rather, I intend to do as I foreshadowed, namely to direct the parties to try and agree on the orders in the light of my findings and reasons and, if they are unable to do so, to refer to a referee the question concerning the extent of the underpayments. Mr Elvin may file any evidence he wishes in response to Mr Wong’s affidavit and he may make submissions on the matter to the referee in accordance with any directions the referee may make.

338 In the meantime I will proceed on the basis that he denies the new allegations.

# THE ISSUES

339 The following issues arise for determination:

(1) In relation to the **applicable award** and classification:

(a) whether FTM was covered by the Health Award or the Hair and Beauty Award;

(b) if the former, whether the Massage Therapists came within the classifications listed in clauses 14 or 15, that is as Support Services employees in the classification of SSE Level 2 or as Health Professional employees in the classification of HP Level 1; or

(c) if the latter, whether the Therapists fell within the classification of “Hair and Beauty Employee Level 2”.

(2) In relation to the alleged requirement to work **unreasonable hours**:

(a) whether the Massage Therapists were requested or required to work in excess of 38 hours per week; and

(b) if so, whether those hours were “unreasonable” in contravention of s 62(1) of the FW Act.

(3) In relation to the **underpayment claims**, whether:

(a) Ms Isugan, Mr Benting, Ms Bantilan and Ms Amacio were required to spend (by paying back from their wages) $800 a fortnight in the period 26 August 2012 to 2 June 2013 in contravention of s 325 of the FW Act;

(b) Ms Sarto, Ms Ortega and Ms Castaneda were required to spend (by paying back from their wages) $800 a fortnight in the period 21 April 2013 to 5 January 2014 in contravention of s 325 of the FW Act;

(c) the deductions made from the Massage Therapists’ wages were authorised in writing by the Massage Therapists and principally for their benefit as required by s 324 of the FW Act; and

(d) whether the Massage Therapists were paid their entitlements to minimum wages, public holiday rates, and overtime rates in accordance with the applicable award.

(4) In relation to the **record-keeping claims**, whether:

(a) FTM’s employee records and the pay slips provided by FTM to the Massage Therapists met the requirements of the FW Act and FW Regulations;

(b) FTM failed to provide pay slips to the Massage Therapists, as required, from 31 March 2014 to the end of their respective employment periods;

(c) FTM did not make and keep records in respect of the number of overtime hours, periods of annual leave taken, and the nature of the termination of the Therapists’ employment;

(d) FTM’s employee pay records were false and misleading in that they did not record the actual wages to the Therapists during the cash back periods, did not accurately record the number of hours worked, and did not accurately record the Therapists’ entitlements to overtime; and

(e) FTM made use of false or misleading pay records when producing them to the Ombudsman in response to a notice to produce issued on 1 June 2016.

(5) In relation to the **adverse action and coercion claims**, whether FTM has rebutted the presumption in s 361 of the FW Act that it:

(a) engaged in adverse action against the Therapists to prevent them from exercising their workplace rights to make a complaint or inquiry in relation to their employment, in contravention of s 340(1)(b) of the FW Act;

(b) took adverse action against the Therapists by reason of their race and/or national extraction and/or social origin by injuring them in their employment in contravention of s 351(1) of the FW Act; and

(c) took actions against the Massage Therapists with the intent to coerce each of the Therapists to not exercise a workplace right, in contravention of s 343(1)(a) of the FW Act.

(6) Whether Mr Elvin and Mr Puerto were knowingly involved in the claimed contraventions of FTM as alleged.

(7) Whether theDOCA operates as a bar to the proceedings, which, in turn raises the following issues:

(a) whether the Ombudsman is a “creditor” for the purposes of the DOCA;

(b) whether the DOCA extinguished the underlying claims against FTM; and

(c) whether the DOCA operates to bar all the Ombudsman’s claims.

# THE APPLICABLE AWARD

## The law

340 Section 47(1) of the FW Act relevantly provides that a modern award applies to an employee and an employer if the award is in operation; covers the employee or employer; and no other provision of the Act provides, or has the effect, that the award does not apply to the employee or employer. A modern award does not apply to an employee (or an employer in relation to the employee) at any time the employee is “a high income employee” (s 47(2)). A reference in the Act to a modern award applying to an employee is a reference to the award applying to the employee in relation to particular employment (s 47(3)).

341 A modern award “covers” an employee or employer if it is expressed to do so (s 48(2)) unless the award has ceased to operate (s 48(4)).A reference in the Act to a modern award covering an employee is a reference to the award covering the employee in relation to particular employment (s 48(5)).

342 These provisions have not changed since the Act commenced in 2009.

343 Thus, the resolution of the key question — which, if any, award applies — turns on the proper construction of the coverage clauses in the Health Award and the Hair and Beauty Award as they were cast at the time of the Massage Therapists’ employment with FTM.

344 The principles of construction are well-established.

345 First, although an award is not a statute, generally speaking the principles of statutory interpretation apply.

346 An award is an instrument given the force of law. In effect, however, the FW Act, like its predecessors, “enacts by the prescribed constitutional method the provisions contained in the award”: *Ex parte McLean* (1930) 43 CLR 472 at 479 (Isaacs CJ and Starke J). As French J explained in *City of* ***Wanneroo*** *v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; 153 IR 426at [52], as an instrument made by an authority (here, the Fair Work Commission), absent the contrary intention, the *Acts* ***Interpretation Act*** *1901* (Cth) applies to it as if it were an Act and as if each provision of the award were a section of the Act; expressions used in the award have the same meaning as the Act; and the award is to be read and construed subject to the Act and so as not to exceed the Commission’s power (see Interpretation Act, s 46). It follows, as French J went on to explain in *Wanneroo* at [53]:

The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to ‘… the entire document of which it is a part or to other documents with which there is an association’. It may also include ‘… ideas that gave rise to an expression in a document from which it has been taken’ – *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518 (Burchett J); *Australian Municipal, Clerical and Services Union v Treasurer of the Commonwealth of Australia* (1998) 80 IR 345 (Marshall J).

347 Second, the principles expounded by Madgwick J in *Kucks v CSR Ltd* (1996) 166 IR 182 at 184 apply:

It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.

### The Health Award

348 At all material times the coverage clause (cl 4) relevantly provided that:

4.1 This industry and occupational award covers:

(a) employers throughout Australia in the health industry and their employees in the classifications listed in clauses 14 – Minimum weekly wages for Support Services employees and 15 – Minimum weekly wages for Health Professional employees to the exclusion of any other modern award;

(b) employers engaging a health professional employee falling within the classification listed in clause 15.

4.2 This award does not cover an employee excluded from award coverage by the [FW] Act.

…

4.8 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

349 No respondent alleged that any of the Massage Therapists was excluded from award coverage by the FW Act.

350 The effect of cl 4.1 is that the Health Award covers both employers throughout Australia in the health industry and their employees in the classifications of Support Service employees and Health Professional employees and also employers not in the health industry but who engage Health Professional employees. It follows that if FTM falls into either para (a) or para (b) of cl 4.1 it was covered by the Health Award to the exclusion of any other modern award.

351 The first question, then, is whether FTM was an employer in the health industry.

#### Was FTM an employer in the health industry?

352 The “health industry” is defined in cl 3.1 to mean “employers whose business and/or activity is in the delivery of health care, medical services or dental services”.

353 Plainly FTM was not an employer whose business or activity was in the delivery of medical or dental services. The Health Award could only have covered it if its business or relevant activity was “in the delivery of health care”.

354 “Health care” is not defined in the Health Award so it is reasonable to infer that the expression was intended to bear its ordinary meaning. The *Macquarie Dictionary* (8th ed, Pan Macmillan Australia, 2020)defines “health care” as “medical and other services provided for the maintenance of health, prevention of disease, etc.” and “health” as including, relevantly:

1. soundness of body; freedom from disease or ailment.

2. the general condition of the body or mind with reference to soundness and vigour …

355 As the Ombudsman submitted, the evidence shows that FTM’s business was in the “health industry” because it was involved in the business of delivering health care.

356 FTM held a “medical malpractice insurance” policy.

357 The services FTM offered were described on its website as “therapeutic massage”. It promoted its business as a provider of therapeutic and remedial massages for which private health insurance rebates may be available. It provided a suite of massage services intended to relax the client or be remedial in nature and alleviate ailments. FTM’s “**Operations Manual** Therapist” describes the various forms of massage. Each of the descriptions extols the role of massage in healing the body and enhancing wellbeing. Remedial massage, for example, is described in this way:

**Remedial Massage** is a deep massage done by skilled hands to create the conditions for the body’s return to optimal health after injury. It is used to treat strains, sprains, broken bones, bruising, and any injury where the skin is intact. Deep tissue massage removes blockages, damaged cells; scar tissue and adhesions left after injury, speeds up recovery and encourages more complete healing. Remedial Massage is also used for conditions created by lifestyle for example Repetitive Strain Injury and Back Pain.

The techniques used are designed to increase the flow of blood and lymph around the body, particularly in the injured areas. This enables the body to heal.

358 The Operations Manual lists at length the health benefits of all forms of massage offered by FTM, including increasing blood circulation, improving the lymphatic system and metabolism, decreasing soreness and discomfort in muscles, and promoting relaxation. Mr Elvin also gave some oral evidence to similar effect. Aromatherapy was one of the massage services FTM offered. In cross-examination Mr Elvin agreed that one of the “goals” of aromatherapy was “to improve or to relax the individual” and that relaxation provides health benefits. In the Operations Manual, the “main benefit of aromatherapy” is said to be that “essential oils oxygenate the blood stream and stimulate the immune system … which leads to enhanced health and wellness”. Mr Elvin gave evidence that he wrote the Operations Manual and trained the Massage Therapists using it.

359 Massage is sometimes referred to as “traditional medicine”. Mr Elvin referred to it as “complementary to medicine”. He tendered a document entitled “Complementary Health Industry Reference Committee 2019 Industry Skills Forecast” (Ex 2R22), which described “massage and remedial massage therapy” in the following way:

Massage therapists perform therapeutic massage and administer body treatments for health, fitness and remedial purposes. Therapeutic massage is the manipulation of muscle and connective tissue, generally by hand, to promote bodily function, assist in the relevant tissue recovery and enhance wellbeing.

360 Reflexology, another service provided by FTM and included in the position description in the contracts for all the Massage Therapists, was also described:

Reflexology is a specialised tactile therapy whereby the application of pressure and soothing techniques to reflex points of the body can improve nerve and blood supply, relax the body and mind, and help restore balance and wellbeing.

361 Since I have found that FTM was covered by the Health Award because it was an employer in the health industry, the next question is in what classification the Massage Therapists were employed.

#### In what classification were the Massage Therapists employed?

362 Clause 14 relates to minimum weekly wages for “Support Services employees”. Clause 15 relates to minimum weekly wages for Health Professional employees and includes Health Professional employee–levels 1 to 4. The lowest pay point (pay point 1) for the lowest level of Health Professional employee (level 1) is “UG 2 qualification”. The second lowest is “three year degree entry”. “UG 2” is an abbreviation for “undergraduate 2” and is defined in cl 3.1 of the award to mean “an employee with a diploma or equivalent”.

363 Clause 13 provides that all employees covered by the award must be classified according to the structure and definitions set out in Schedule B – Classification Definitions.

364 The classifications of Support Services employees were defined in Schedule B.1 to the award. Clause B.1.1 deals with the SSE Level 1 classification, which is the entry level. It reads:

**Entry level:**

An employee with less than three months work experience in the industry and who performs basic duties.

An employee at this level:

* works within established routines, methods and procedures;
* has minimal responsibility, accountability or discretion;
* works under direct or routine supervision, either individually or in a team; and
* is not required to have previous experience or training.

Indicative roles at this level are:

|  |  |  |
| --- | --- | --- |
| **General and administrative services** | **Food services** | **Technical and clinical** |
| Assistant gardenerCar park attendantCleanerGeneral clerkHospital orderlyIncinerator operatorLaundry handSeamsperson | Food and domestic services assistant | Animal house attendantCSSD attendantDarkroom processorDental assistant (unqualified)Laboratory assistantMedical imaging supportOrthotic technicianRecording attendant (including EEG and ECG)Social work/Welfare aideTheatre attendant |

365 Clause B.1.2 deals with the SSE Level 2 classification upon which the Ombudsman relied. At all relevant times it provided:

An employee at this level:

* is capable of prioritising work within established routines, methods and procedures;
* is responsible for work performed with a limited level of accountability or discretion;
* works under limited supervision; either individually or in a team;
* possesses sound communication skills; and
* requires specific on-the-job training and/or relevant skills training or experience.

In addition to level 1, other indicative roles at this level are:

|  |  |  |
| --- | --- | --- |
| **General and administrative services** | **Food services** | **Technical and clinical** |
| Driver (less than 3 tonne)Gardener (non-trade)General clerk/Typist (between 3 months and less than 1 years service)HousekeeperMaintenance/Handyperson (unqualified)Storeperson | Diet cook (a person responsible for the conduct of a diet kitchen; an unqualified (non-trade) cook employed as a sole cook in a kitchen. | Instrument technicianPersonal care worker grade 1 |

366 The Ombudsman submitted that SSE Level 2 was the correct classification for the Massage Therapists based on the fact that they had had at least three months previous work experience in the massage industry and had completed massage training courses in the Philippines; performed certain massages and used techniques defined in the Operations Manual; operated within established routines with limited discretion or autonomy; had sound communications skills, and received further on the job training.

367 There are problems with the Ombudsman’s argument.

368 First, it takes cl B.1.2 out of context. On a plain reading of the Award, Support Services employees provide support to Health Professionals. If an employee is a Health Professional they cannot be a Support Services employee even if they are required to perform some duties which might fall within that description. Second, the Ombudsman’s argument accorded little weight to the “indicative roles”. She pointed to “personal care worker grade 1” but I do not consider that the role of a massage therapist equates to, or resembles that of, a personal care worker.

369 In my opinion the Massage Therapists were Health Professionals.

370 The term “health professional” is not defined in the Health Award. But Schedule C contains a list of “common health professionals”. It relevantly includes the following:

Aromatherapist

…

Masseur, Remedial

…

Reflexologist

…

371 The list does not include medical practitioners or nurses for that matter. Rather, it is a list of what might properly be described as allied health professionals. Among the other professionals listed are various types of therapists, including acupuncturists, homoeopathists, musculoskeletal therapists, myotherapists, naturopathists, occupational therapists, and physiotherapists.

372 By definition, a therapist is a person who provides therapy. “Therapy” derives from the Greek *therapeia* meaning healing. The first listed meaning of therapy in the *Macquarie Dictionary* is “the treatment of disease, disorder, defect, etc., as by some remedial or curative process”.

373 The history of the making of the Award indicates that the intention was to include all health professionals other than medical practitioners and nurses. In a statement issued by the Australian Industrial Relations Commission during the award modernisation process, the Full Bench of the Commission explained:

The exposure draft of the *Health Professionals and Support Services Industry and Occupational Award 2010* is a generic exposure draft to cover professional and technical classifications together with clerical and administrative classifications. We have sought, in the salary structure and level of salaries, to accommodate all health professionals (except doctors and nurses) employed in both the health industry and industry generally …

See *Award Modernisation – Statement – Full Bench* [2009] AIRCFB 50 at [78].

374 The use of the word “common” in Schedule C indicates that the list is not intended to be exhaustive. The Full Bench of the Fair Work Commission has confirmed that it is not exhaustive but indicative: *4 yearly review of modern awards – Health Professionals and Support Services Award 2010* [2019] FWCFB 8538 at [26]. The reasons were given at [27]:

a) The roles of some health professionals are adjusting as technology, research and consumer demand are changing.

b) The titles of some health professionals are changing as professional bodies prefer one title over another.

c) It is not desirable for some health professionals to be covered by the HPSS Award and others to be award free simply because of a change in name or adjustment in role.

d) It is inconsistent with the modern awards objective that “The FWC must ensure that modern awards, taken together with the NES, provide a fair and relevant minimum safety net of terms and conditions” to confine the coverage of the *HPSS Award* to a limited number of specific titles of health professionals.

e) It is consistent with the modern awards objective and s.143 (2) of the *Fair Work Act 2009* (FW Act) that clause 4 Coverage of the *HPSS Award*, in conjunction with Schedule B2 Health Professional employees – definitions, governs the coverage of the HPSS Award, supplemented, rather than confined by Schedule C.

375 The evidence establishes that the Massage Therapists were health professionals within the meaning of the Health Award because they performed aromatherapy, remedial massage, reflexology, and, as the Ombudsman submitted, aspects of myotherapy. The fact that they also performed other forms of massage is immaterial.

376 The job description provided to the Department of Immigration and Citizenship corresponds to the position description in each of the Therapists’ contract of employment. It was in the following terms:

This position required them to performing [sic] Thai foot reflexology, Thai head, shoulders and back, Traditional Thai, Aromatherapy, Deep tissue, Sports, Remedial and Swedish massages to customers as well as the duties listed below.

* Massage the soft tissues of the body, such as muscles, tendons and ligaments, to assist healing, utilising a range of massage techniques to enhance sports performance and prevent injury.
* Administering treatments to promote relaxation, improve circulation and relieve muscle tension.
* Assessing and treating specific soft tissue dysfunction and providing rehabilitation advice
* Employing other techniques, such as essential oils, to assist recovery
* Assessing client’s physical condition and case history and advising on stretching exercises and relaxation techniques
* Performs therapeutic massage and administers body treatments for relaxation, health, fitness and remedial purposes. Keep accurate and up-to date records regards a client’s condition before and after massage therapy session in cases of a client being treated for a specific condition
* Obtain and keep an overview or profile of the client’s state of being and health history and discuss any problem areas that may contraindicate massage,
* Acknowledge their professional limitations and refer the client to an appropriate health professional when necessary, in cases where massage may be or is contraindicated
* Perform only those services for which they are qualified and which represent their training and education
* Following different types of sanitary procedures in order to keep the room and the facility clean

377 This description bears all the hallmarks of the work of a health professional.

378 The representation that the job required them to perform remedial massages is inconsistent with Mr Elvin’s statement to the Court (at T697) that he knew that the massage therapists were not remedial masseurs.

379 Schedule B.2 of the Health Award describes the various levels of health professional employees.

380 Clause B.2.1 describes the position of HP Level 1, upon which the Ombudsman relied, thus:

Positions at level 1 are regarded as entry level health professionals and for initial years of experience.

This is the entry level for new graduates who meet the requirement to practise as a health professional (where appropriate in accordance with their professional association’s rules and be eligible for membership of their professional association) or **such qualification as deemed acceptable by the employer**. **It is also the level for the early stages of the career of a health professional.**

(Emphasis added.)

381 The evidence does not suggest that any of the higher level positions are applicable.

382 As I mentioned earlier, in cross-examination Mr Elvin testified that he directed the Massage Therapists to undergo training at the NKYR Academy in the Philippines; that he paid for the training; and that he recognised and accepted the qualifications obtained after they had completed the training. While only Ms Amacio, Mr Benting, Ms Ortega, and Ms Bantilan gave evidence that they held qualifications from the NKYR Academy, Mr Elvin testified that he understood that all of them had undertaken the course.

383 It will be recalled that HP Level 1 employees at pay point 1 are classified as employees with a diploma or equivalent (cl 15.2). FTM informed the Department of Immigration and Citizenship that all its massage therapists had at least three years’ industry experience which was equivalent to a diploma. In cross-examination, Mr Elvin denied that he had made such a representation despite earlier conceding that he had. And he also denied that three years’ experience was equivalent to a diploma. But the documentary evidence speaks for itself. In its letter to the Department of 1 February 2013, FTM referred to the ANZSCO classifications and relied on the statement by ANZSCO that “at least three years relevant experience may substitute for the formal qualification of a AQF Associate Degree, Advanced Diploma or Diploma (ANZSCO Skill Level 2)”. Plainly, FTM represented to the Department that the experience of the Therapists in the Philippines was equivalent to a diploma.

384 For these reasons, I find that the Massage Therapists held qualifications which were deemed acceptable by FTM and, in any event, was the appropriate level for the Massage Therapists who were in the early stages of their careers as health professionals.

385 The ANZSCO classification for “massage therapist” accords with the description of an HP Level 1 employee in the Health Award. ANZSCO defines massage therapist a person who “performs therapeutic massage and administers body treatments for health, fitness and remedial purposes”. The tasks include “massaging the soft tissues of the body, such as muscles, tendons and ligaments, to assist healing” and “administering treatments to promote relaxation, improve circulation and relieve muscle tension”. The indicative skill level is AQF associate degree, advanced diploma, diploma, or alternatively at least three years of relevant experience. This is consistent with the skill level of HP Level 1 employee. ANZSCO also lists several “specialisations” for massage therapists, including remedial masseur, shiatsu therapist and sports medicine masseur. These are consistent with the relevant “common health professionals” in Schedule C of the Health Award and inconsistent with the skill level and indicative roles of a SSE Level 2 employee.

386 While ANZSCO has a separate classification for “health professionals”, it is apparent that this classification is different from the “health professionals” covered by the Health Award. ANZSCO defines health professionals as people who “develop health care programs and policies, conduct tests and diagnose and treat physical and physiological disorders…”. Health professionals are described as having a bachelor degree or higher, and occupying roles such as medical practitioners, midwives and nurses. As will be recalled, the Health Award is not intended to cover these occupations.

387 It follows that at all relevant times the applicable classification for the employment of the Massage Therapists was HP Level 1.

388 There is an apparent conflict or at least tension between the stipulation in cl 4.1(a) that the Health Award covers “employers … and their employees in the [relevant] classifications … to the exclusion of any other modern award” and the terms of cl 4.8 (“Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work”). The apparent conflict or tension should be resolved in the way the plurality (McHugh, Gummow, Kirby and Hayne JJ) indicated in ***Project Blue Sky*** *Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70]:

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court “to determine which is the leading provision and which the subordinate provision, and which must give way to the other”. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

389 The apparent conflict or tension in the present case should be resolved by recognising that, in the case of employers in the health industry and their employees in the relevant classifications, the Health Award applies to the exclusion of any other modern award. Clause 4.8 is concerned with employers outside the health industry but who employ health professionals. Lest I am wrong, however, I will consider whether FTM was covered by the Health and Beauty Award and, if so, which classification of that award is most appropriate to the work performed by the Massage Therapists and to the environment in which they normally performed their work.

### The Hair and Beauty Award

390 The coverage clause in the Hair and Beauty Award, also cl 4, relevantly provides:

4.1 This award covers employers throughout Australia in the hair and beauty industry and their employees in the classifications listed in clause 17‑Minimum weekly wages to the exclusion of any other modern award. The award does not cover employees who perform hair and beauty work in the general retailing, theatrical, amusement and entertainment industries.

4.2 The award does not cover an employee excluded from award coverage by the Act.

…

4.7 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

391 As the Ombudsman submitted, this coverage clause has three elements:

(1) The employers must be in the hair and beauty industry;

(2) The employees must be in the classifications listed in cl 17; and

(3) The employees must not perform hair and beauty work in the general retailing, theatrical, amusement and entertainment industries.

392 “Hair and beauty industry” is defined in cl 3.1 to mean:

(a) performing and/or carrying out of shaving, haircutting, hairdressing, hair trimming, facial waxing, hair curling or waving, beard trimming, face or head massaging, shampooing, wig-making, hair working, hair dyeing, manicuring, eye-brow waxing or lash tinting, or any process or treatment of the hair, head or face carried on, using or engaged in a hairdressing salon, and includes the sharpening or setting of razors in a hairdressing salon; and/**or**

(b) **performing and/or carrying out** manicures, pedicures, nail enhancement and nail artistry techniques, waxing, eyebrow arching, lash brow tinting, make-up, analysis of skin, development of treatment plans, facial treatments including massage and other specialised treatments such as lymphatic drainage, **high frequency body treatments, including full body massage** and other specialised treatments using machinery and other cosmetic applications and techniques, body hair removal, including (but not limited to) waxing chemical methods, electrolysis and laser hair removal, **aromatherapy** and the application of aromatic plant oils for beauty treatments, using various types of electrical equipment for both body and facial treatments

(Emphasis added.)

393 The Ombudsman submitted that:

In the alternative to the [Ombudsman’s] claim is that the massages performed by the Massage Therapists were remedial in nature and therefore covered by the health professionals stream, it would be open to the Court to conclude that the substantial character of the work was repetitive and did not require diagnosis skills or a detailed understanding of anatomy. [Mr Elvin] gave evidence at the hearing that all of the massages with the exception of Thai Foot Reflexology and Thai Foot, Head, Back and Shoulder massages are “full body massages” which worked on the entirety of the body and the Massage Therapists were trained to perform all of these massages. He also agreed that massage puts frequent pressure and stretches parts of the body. [FTM] also offered aromatherapy.

[Mr Elvin’s] implied assertion that [FTM] did not fall within the hair and beauty industry because the Massage Therapists do not use machinery and other cosmetic applications and techniques must be rejected. It is clear when read in context, the phrase is ‘high frequency body treatments’, including fully body massage’ as one example and other specialised treatments using machinery and other cosmetic applications and techniques as a second example. The word ‘and’ clearly is to be read disjunctively such that to be included in the definition of ‘hair and beauty industry’, the work need only involve full body massage or other specialised treatments. The final phrase ‘using various types of electrical equipment for both body and facial treatments’ does not mean that all techniques listed must use electrical equipment just that such equipment may be used. That the Complementary Health Industry Reference Committee 2019 Industry Skills Forecast does not mention the Hair and Beauty Award is explicable because it was a report (that was produced after the Massage Therapists no longer worked for [FTM]) which focussed on the Health industry, not because the Hair and Beauty Award does not apply to some Massage Therapists.

394 The Ombudsman proceeded to outline the history of the making of the Hair and Beauty Award to which, for reasons that will shortly become apparent, it is unnecessary to refer.

395 Having regard to the broad definition of “hair and beauty industry” in the Hair and Beauty Award and the history of the Award summarised in the Ombudsman’s closing submissions, one might well conclude that FTM was in the “hair and beauty industry”. Contrary to the Ombudsman’s argument, however, the Massage Therapists were not employed in any of the classifications in cl 17.

396 Clause 17 contains only a list of levels and pay rates for each level. It must be read with the classifications in Schedule B. Those classifications are:

**B.1 Hair and Beauty Employee Level 1** means a receptionist or salon assistant**.**

**B.2 Hair and Beauty Employee Level 2** means:

(a) a make-up artist who holds a Certificate II in make-up services (or equivalent);

(b) a nail technician who holds a Certificate II in Nail Technology (or equivalent); or

(c) an unqualified beautician or cosmetologist.

**B.3 Hair and Beauty Employee Level 3** means:

(a) a beautician who holds a Certificate III in Beauty Services (or equivalent); or

(b) a hairdresser who holds a Certificate III in Hairdressing (or equivalent).

**B.4 Hair and Beauty Employee Level 4** means a Beauty Therapist who holds a Certificate IV in Beauty Therapy (or equivalent).

**B.5 Hair and Beauty Employee Level 5** means:

(a) a hairdresser who holds a Certificate IV (or equivalent); or

(b) a trichologist who is a hairdresser and holds a Certificate IV in Trichology (or equivalent).

**B.6 Hair and Beauty Employee Level 6** means a beauty therapist who holds a Diploma in Beauty Therapy (or equivalent).

(Original emphasis.)

397 The Ombudsman submitted that the Massage Therapists are properly classified as Level 2 employees under the Hair and Beauty Award because they did not hold any of the qualifications required for the higher levels and, to the extent that they performed massages which were not directed to delivering health benefits, “it follows that they were provided for relaxation purposes”. But the submission ignores the reference to “beautician or cosmetologist”. At best, it impermissibly strains the meaning of those words. A beautician is a person skilled in cosmetic treatment and beauty aids (*Macquarie Dictionary*, p 129). “Cosmetologist” has not found its way into the *Macquarie Dictionary* but “cosmetology” is defined as “the art and techniques relating to cosmetics” (at p 353). “Unqualified” in both trades the Massage Therapists certainly were but they were not hired to, nor did they engage in, either the work of a beautician or cosmetologist.

398 It follows that even if the Hair and Beauty Award also covered FTM, the Massage Therapists were nonetheless covered by the HP Level 1 classification, it being the award classification which was most appropriate to the work they performed and to the environment in which they normally performed it.

# THE LIABILITY OF FTM: SOME GENERAL MATTERS

399 At all relevant times s 793 provided that:

**Liability of bodies corporate**

*Conduct of a body corporate*

(1) Any conduct engaged in on behalf of a body corporate:

(a) by an officer, employee or agent (an ***official***) of the body within the scope of his or her actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;

is taken, for the purposes of this Act and the procedural rules, to have been engaged in also by the body.

*State of mind of a body corporate*

(2) If, for the purposes of this Act or the procedural rules, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is enough to show:

(a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and

(b) that the person had that state of mind.

*Meaning of* ***state of mind***

(3) The state of mind of a person includes:

(a) the knowledge, intention, opinion, belief or purpose of the person; and

(b) the person’s reasons for the intention, opinion, belief or purpose.

…

(5) In this section, ***employee*** has its ordinary meaning.

400 The effect of s 793 is that the conduct and state of mind of an official, employee or agent is attributed to the body corporate: *Director of the Fair Work Building Industry Inspectorate v Robinson* (2016) 241 FCR 338 at [48]–[50] (Charlesworth J).

401 This means that if either or both of Mr Elvin or Mr Puerto engaged in the conduct with which the contraventions are concerned and the conduct was within the scope of their actual or apparent authority, FTM also engaged in that conduct and their state of mind is taken to be the state of mind of FTM.

# THE UNDERPAYMENT CLAIMS

## General

402 Mr Elvin submitted that FTM did not calculate any employee entitlements on the basis of either award. He asserted that, although the contracts FTM entered into with the Massage Therapists recorded that the Health Award “was to be read with” the contract, the inclusion of the award was “an error”. In cross-examination Mr Elvin repeatedly described the contracts as “sham” and claimed that they had been varied with the knowledge of the Massage Therapists. He submitted that the calculation of the employee entitlements was based on “what was in effect an unwritten individual flexibility agreement” to which both parties adhered over many years. No such allegation was made in FTM’s amended defence. FTM merely admitted without qualification the Ombudsman’s claim, which (save for the words underlined below which were added in the last version) appeared in para 10 of its statement of claim and all subsequent iterations, that each of the Massage Therapists entered into a contract of employment with FTM, which was signed by Mr Elvin on its behalf, and included the following terms:

(a) full-time employment in the position of ‘Massage Therapist’ upon arrival in Australia;

(b) employment duration of four years;

(c) the performance of work was to take place at the Belconnen Shop;

(d) a gross annual salary of AU$52,000 and gross fortnightly wages of AU$2,080; and

(e) entitlements to penalty rates, overtime rates and annual leave loading.

**PARTICULARS**

*A. Each of the Contracts was signed by the Second Respondent on behalf of the First Respondent.*

*B. The respective Contracts for Ms Amacio and Ms Isugan were signed by the Third Respondent in the capacity of a witness.*

*C. On behalf of the First Respondent, the Third Respondent gave the Contract to each of the Employees.*

*D. The entitlements to penalties, annual leave loading and overtime rates prescribed in the Contracts were in accordance with the* Health Professionals and Support Services Award 2010*.*

*E. Each of the Contracts included the words “*if applicable, this letter should be read in conjunction with the Health Professionals and Support Services Award 2010*.”*

403 In his amended defence Mr Elvin did not plead that any of the Massage Therapists was employed under a contract that differed in any respect from that which each of them had signed. Nor did he make any submission to that effect in his opening submissions — other than to submit that the form of the contract was “incorrect” — or suggest to any of the Massage Therapists in cross-examination that they had agreed to any variation of the contract. In these circumstances, it was not open to Mr Elvin to allege or, for that matter, give evidence that they had agreed to one.

404 Moreover, when FTM was served with a notice to produce, amongst other things, documents and records relating to the terms of engagement of the Massage Therapists, including employment agreements or contracts, a copy of which was emailed to Mr Elvin personally, it produced the contracts upon which the Ombudsman relied and did not suggest that those contracts had been varied at any time. Mr Elvin telephoned FWI Hurrell, the day the documents were produced but the file note of the conversation, which was annexed to Mr Thomas’s affidavit (LRT-17), indicates that he did not tell her that the contracts he was producing were other than genuine or did not accurately reflect the terms upon which the Therapists were engaged and which governed their employment.

405 In any case, an oral individual flexibility agreement cannot displace the terms of an award.

406 In conformity with s 45 of the FW Act and like any modern award, both the Health Award and the Health and Beauty Award only entitle an employer and an employee to enter into an individual flexibility agreement for the purpose of meeting “the genuine individual needs” of each of them and on certain conditions (cl 7). Those conditions are that:

(a) the agreement is made without coercion or duress (cl 7.2);

(b) the terms that were varied only relate to arrangements for when work is performed; overtime rates; penalty rates; allowances; and/or leave loading (cl 7.3(a));

(c) in the result, the employee is left better off overall than the employee would have been if no individual flexibility agreement had been agreed to (cl 7.3(b)); and

(d) the agreement between the employer and the individual employee:

(i) is in writing, names the parties to the agreement and is signed by the employer and the individual employee;

(ii) states each term of the award that the employer and the individual employee have agreed to vary;

(iii) details how the application of each term has been varied by agreement;

(iv) details how the agreement results in the individual employee being better off overall in relation to the individual employee’s terms and conditions of employment; and

(v) states the date the agreement begins to operate (cl 7.4).

407 Further, the employer is obliged to give the individual employee a copy of the agreement and keep the agreement as a time and wages record (Health Award, cl 7.5; Hair and Beauty Award, cl 7.6).

408 An employer seeking to enter into such an agreement must provide a written proposal to the employee and, where the employee’s understanding of written English is limited, the employer must take measures, including translating the proposal into “an appropriate language”, to ensure that the employee understands the proposal (cl 7.7).

409 Most, if not all, these conditions were not satisfied. Certainly, as Mr Elvin admitted, no written agreement was ever prepared, let alone entered into. And there is no evidence that a written proposal for such an agreement in conformity with cl 7.7 was ever presented to the Massage Therapists.

410 For all these reasons I find that the only contracts into which FTM entered with the Massage Therapists were the written contracts tendered in evidence and presented to the relevant authorities. I also find, based on Mr Elvin’s own evidence, that he never had any intention of complying with many of the terms of the contract and that he made an economic decision not to comply with the award (see T730/21).

## Contraventions of the award (FW Act, s 45)

### Introduction

411 It will be recalled that s 45 of the FW Act provides that a person must not contravene a term of a modern award.

### Minimum wages

412 As I have already observed, the minimum weekly wage for an HP Level 1 employee is set out in cl 15.2 of the Health Award. The relevant starting pay point is pay point 1, which is specified to be $719.70 per week. This rate is subject to two adjustments. One is that, pursuant to cl 15.1(a), the applicable rate increases annually by one pay point on the anniversary of the employee’s commencement date until the employee reaches pay point 6. The second applies only to the period from 24 June 2012 until 6 July 2014 (**the transitional period**) when the transitional provisions, contained in Sch A to the Health Award, applied.

413 During the transitional period, there was no pre-modern award that provided adequate coverage. Clause A.2.3 of the Health Award provides that from the first full pay period on or after 1 July 2010 until the first full pay period on or after 1 July 2014, the employer must pay no less than the minimum wage in the relevant transitional minimum wage instrument. Clause 3.1 defines “transitional minimum wage instrument” as having the same meaning as in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth). Subitem 5(3)(b) of Sch 9 of that Act relevantly defines “transitional minimum wage instrument” as including the rate of the standard federal minimum wage immediately before the repeal of the *Workplace Relations Act 1996* (Cth) (**WR Act**), which occurred on 1 July 2009. Consequently, the relevant transitional minimum wage instrument is the Australian Pay and Classification Scale derived from the Australian Fair Pay Commission Wage Setting Decision No 2/2009. The **federal minimum wage** under this instrument was $14.31 per hour.

414 Clause A.2.5 allows the employer to phase in the minimum wage rates specified under the Award in instalments over several years. The employer is required to pay an employee no less than the minimum wage for the relevant Award classification “minus the specified proportion of the transitional amount”. The **transitional amount** is the difference between the minimum wage under the Award and the standard federal minimum wage. The proportions of the transitional amount that must be paid start at 80% on 1 July 2010 and decrease yearly by 20% until 1 July 2014. Thus, cl A.2.5 provides:

From the following dates the employer must pay no less than the minimum wage for the classification in this award minus the specified proportion of the transitional amount:

|  |  |
| --- | --- |
| **First full pay period on or after** |  |
| 1 July 2010 | 80% |
| 1 July 2011 | 60% |
| 1 July 2012 | 40% |
| 1 July 2013 | 20% |

415 The same process applies for the payment of loadings and penalty rates, but not overtime.

416 In the present case the transitional amount applies during the period between 24 June 2012, when the first group started work for FTM, and 6 July 2014, being the beginning of the first full pay period after 1 July 2014 (cl A.2.7). As Mr Wong deposed in para 7 of his fourth affidavit, the minimum hourly wage for an HP Level 1 employee at pay point 1 is $18.94 ($719.70 divided by 38, representing the ordinary hours of work). For pay point 2, the minimum hourly rate is $19.67 ($747.60 divided by 38). Pursuant to cl A.2.5, the transitional amount payable is then reduced each year in 20% increments until the end of the 2013 financial year.

### Public holiday rates

417 Clause 32.2 of the Health Award provides that any employee required to work on a public holiday will be paid double time and a half for all time worked. During the transitional period, as the federal minimum wage instrument did not include a provision for public holiday penalty rates, cl A.7.3 of the Award provided that the relevant loading or penalty be phased in at 20% annual increments from 1 July 2010. Clause 15.1(a) also applied to annually increase the pay point rate, and therefore the public holiday rate, until the Therapist reached pay point 6.

### Monday to Saturday overtime rates

418 Clause 23 of the Health Award provided:

**Ordinary hours of work**

23.1 The ordinary hours of work for a full-time employee will be an average of 38 hours per week in a fortnight or four week period.

23.2 Not more than 10 ordinary hours of work (exclusive of meal breaks) are to be worked in any one day.

419 Clause 24 provided:

**Span of hours**

**…**

24.1Unless otherwise stated, the ordinary hours of work for a day worker will be worked between 6.00 am and 6.00 pm Monday to Friday.

420 For relevant purposes, overtime rates were prescribed by cl 28.1(a)–(c) of the Health Award as follows:

(a) An employee who works outside their ordinary hours on any day will be paid at the rate of:

(i) time and a half for the first two hours; and

(ii) double time thereafter.

(b) All overtime worked on a Sunday will be paid at the rate of double time.

(c) These extra rates will be in substitution for and not cumulative upon the shift loading prescribed in clause 29 – Shiftwork.

421 These provisions apply for the duration of the employment of all the Massage Therapists. The transitional provisions of the Award do not apply to overtime rates because they do not fall within the definition of “loading or penalty” in cl A.4.

422 Thus, the Therapists’ entitlement to overtime rates is to be calculated on the basis of: (a) hours worked in excess of 38 hours per week in accordance with cl 28.1 and cl 23.1; (b) hours worked in excess of 10 ordinary hours (exclusive of meal breaks) on any one day in accordance with cl 28.1(a) and cl 23.2; or (c) hours worked outside the span of hours in cl 24.1 for work performed Monday to Friday, with all work on a Saturday treated as overtime. In addition, the progressive pay point increases specified in cl 15.1(a) apply. This is the approach the Ombudsman took.

### Sunday overtime rates

423 It will be recalled that cl 28.1(b) of the Health Award provides that all overtime worked on a Sunday will be paid at the rate of double time. Again, the transitional provisions of the Award do not apply to Sunday overtime rates. The Ombudsman calculated Sunday overtime in accordance with cl 28.1(b).

### Were the Therapists paid below the award rates?

424 In its further amended defence FTM admitted the Ombudsman’s allegations as to:

(1) the total number of ordinary hours the Massage Therapists worked for FTM;

(2) the total number of hours the Massage Therapists worked on public holidays;

(3) the total number of overtime hours the Massage Therapists worked between Monday and Saturday;

(4) the total number of overtime hours the Massage Therapists worked on Sundays; and

(5) the amounts the Massage Therapists were paid for the above hours.

425 Based on the admissions made in FTM’s further amended defence, it is evident that the Massage Therapists were underpaid, regardless of which of the two awards applied and the classification which applied to their employment. They were not paid the minimum hourly rates having regard to the hours they worked. They were not paid public holiday penalty rates when they worked public holidays. They were not paid Monday to Saturday overtime rates when they worked overtime over the period Monday to Saturday. Nor were they paid Sunday overtime rates when they worked overtime on Sundays.

426 I find that FTM breached the Health Award in all these respects and therefore contravened s 45 of the Act.

### To what extent were the Therapists underpaid?

427 All that remains is for the extent of the underpayments to be determined. As I foreshadowed at the hearing, in the first instance the parties should endeavour to agree on them in the light of my findings. I will make orders setting out a process by which this is to take place and what is to happen in the event that they cannot reach agreement. If the calculations in Mr Wong’s fourth and final affidavit are correct, then the Massage Therapists were underpaid a total of $1,189,598.99 for the above contraventions, before certain deductions discussed below.

428 The assumptions Mr Wong made were disclosed in his first affidavit. I consider them to be fair and reasonable. Most favoured the respondents. Those assumptions included the following matters:

(1) the Massage Therapists worked on all days on which one or more client appointments were recorded in FTM’s business management software system, Kitomba;

(2) for the period from 8 July 2013 to 14 July 2013 in respect of which no appointment records were provided, the Massage Therapists worked 38 ordinary hours in the week;

(3) subject to (4)–(7) below, on each day worked from 24 June 2012 to 7 July 2013 and from 15 July 2013 to 15 September 2013 the Massage Therapists started work at 9.45 am, finished work at 10 pm, and had two 30 minute unpaid meal breaks. From 16 September 2013 to 11 February 2016 the Therapists finished work at 10.30 pm;

(4) where a day in the Kitomba appointment records was entirely shaded in grey with no written explanation and no recorded appointments, it was treated as a non-working day;

(5) where a day in the Kitomba appointment records included a block of time shaded in grey with no written explanation, the block of time was treated as time not worked;

(6) where a day in the Kitomba appointment records included a recorded appointment within a larger block of time that was shaded in grey with no written explanation, only the duration of the appointment within the larger block of time was treated as time worked; and

(7) where a day in the Kitomba appointment records included more than one appointment within a larger block of time that was shaded in grey with no written explanation, only the period within the larger block from the start time of the first appointment to the finish time of the last appointment was treated as time worked.

429 Mr Wong explained in that affidavit that, except for a one-off payment to each Massage Therapist of approximately $6,500 on 29 June 2015, which was not reflected in any of their bank statements, he relied on the pay slips and pay records of FTM as indicating the wages actually paid.

430 Further, Mr Wong deducted from the entitlements allegedly owed an amount commensurate with the amount the Massage Therapists would have been paid under the Health Award in respect of the period of notice they were required to, but did not, give when they quit FTM or abandoned their employment and because of the provision by FTM of board and lodging during their employment. The first deduction was made because of cl 11.2 of the Health Award, the second because of cl 18.5(a).

431 Clause 11.1 of the Health Award provides that notice of termination is provided for in the NES. The minimum period of notice is set out in s 117 of the FW Act. For employees with a period of continued service of more than three but less than five years, the employer is required to give at least three weeks’ notice or payment in lieu.

432 Clause 11.2 deals with notice of termination by an employee. It provides:

The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination under this award of the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.

433 Clause 18.5(a) provides that, where the employer provides board and lodging, the wage rates prescribed in the award will be reduced, in the case of employees receiving full adult rates of pay, by $21.19 per week.

434 The Ombudsman also deducted from the calculation of the underpayments the amounts paid to the Massage Therapists by Deloitte during the voluntary administration.

435 All of these deductions were appropriate.

436 On the other hand, I have difficulty understanding Mr Wong’s base rate calculations.

437 In her second further amended statement of claim at para 43HP, the Ombudsman pleaded that the following minimum hourly rates applied to the Therapists at the HP Level 1 classification:

|  |  |
| --- | --- |
| **Period** | **HP Level 1 rate** |
| 17 June 2012 to 30 June 2012 | Pay point 1: $16.95 |
| 1 July 2012 to 30 June 2013 | Pay point 1: $18.16Pay point 2: $18.63 |
| 1 July 2013 to 6 July 2014 | Pay point 1: $19.33Pay point 2: $19.96Pay point 3: $20.71 |
| 7 July 2014 to 5 July 2015 | Pay point 2: $21.39Pay point 3: $22.34Pay point 4: $23.11 |
| 6 July 2015 to 11 February 2016 | Pay point 3: $22.90Pay point 4: $23.69 |

438 This table is based on the table to para 4 of Mr Wong’s fourth affidavit, except that his table begins (correctly) on 24 June 2012, when the first group started work for FTM. The figure for pay point 2 in the penultimate row appears to be an error, since the figure given by Mr Wong is $20.60.

439 No reference was made to any of these figures in the Ombudsman’s submissions and regrettably I am unable to discern how Mr Wong determined them. Applying the methodology he purported to use, I come up with different figures.

440 In para 7 of his fourth affidavit Mr Wong stated:

To obtain the pay rates in the table above that applied from 24 June 2012 to 6 July 2014, I:

(a) used the “transitional amount” referred to in Schedule A to the Health Award, being the difference between the minimum wage that was included in the Health Award for a HP Level 1 employee as at 1 July 2010 of $18.94 and the minimum hourly wage of $14.31 contained in the [Transitional Standard Federal Minimum Wage];

(b) applied clause 15.2 of, and clause A.2.5 of Schedule A to, the Health Award to determine the applicable minimum wages for the Massage Therapists;

(c) applied clause 32.2 of, and clause A.7.3 of Schedule A to, the Health Award to determine the applicable public holiday rates for the Massage Therapists; and

(d) applied clauses 28.1(a) and 28.1(b) of the Award to determine the applicable overtime rates for the Massage Therapists, without reference to Schedule A which does not address overtime entitlements.

441 Using the same methodology, however, I calculate the HP Level 1 rate in the first period, for example, which is from 24 June 2012 until 30 June 2012, as $16.16, not $16.95. Similarly, by my reckoning, the HP Level 1 rate at pay point 1 in the second period, from 1 July 2012 to 30 June 2013, is $17.09 rather than $18.16. Those sums are derived in the following way.

442 For the first period, the transitional amount is 60% of $4.63 ($18.94, being the hourly pay point 1 rate for HP Level 1 minus $14.31, being the federal minimum wage), which equals $2.78. That amount must be subtracted from $18.94, which amounts to $16.16. During this period, then, FTM was obliged to pay the Massage Therapists an hourly rate for ordinary hours of no less than $18.94 minus $2.78, which is $16.16. For a 38 hour week that becomes $614.08.

443 The transitional amount for the second period (from 1 July 2012 to 30 June 2013) is 40% of $4.63, which equals $1.85. Until 24 June 2013, when pay point 2 rates became applicable for the first group, FTM was obliged to pay the Massage Therapists an hourly rate for ordinary hours of no less than $18.94 minus $1.85 or $17.09.

444 Similar issues are apparent in relation to the remaining pleaded rates during the transitional period. Yet even following this period the pleaded rates appear inconsistent with the Award. For instance, the hourly rate payable to the Therapists at pay point 4 in the fourth period (7 July 2014 to 5 July 2015) is $21.25. This is the weekly rate specified in cl 15.2 of $807.60 divided by 38. The rate the Ombudsman pleaded was $23.11.

445 If there are errors in the calculation of the figures for the minimum wages, those errors will infect the calculations for public holiday and overtime rates. It is, of course, entirely possible that I overlooked something.

446 In the circumstances, the Ombudsman should file and serve further submissions explaining with precision the steps taken by Mr Wong to reach the hourly figures he gave for all pay points in all columns in the table to para 4 and, if necessary, a further affidavit from Mr Wong.

## Contraventions of the NES (FW Act, s 44)

### Failure to pay annual leave entitlements on termination

447 At all material times s 90(2) of the FW Act provided that:

If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

448 The Ombudsman calculated the Massage Therapists’ entitlement to annual leave on termination on the basis of the following matters, as recorded in Mr Wong’s first affidavit:

(1) the Therapists accrued paid annual leave based on 38 hours per week;

(2) any periods where paid annual leave was taken by the Therapists, as identified in their pay slips and the Kitomba records, were subtracted from the accrued amounts;

(3) the normal working days of the Therapists, based on the Kitomba records, were treated as periods of annual leave taken during the Christmas shutdown periods in 2013–14 and 2014–15, and any day recorded in Kitomba as a public holiday between 1 January 2016 and 13 January 2016;

(4) Mr Benting, Ms Amacio, Ms Bantilan, Ms Isugan, Ms Sarto and Ms Castaneda be treated as “shiftworkers” for the purposes of being entitled to an additional week of paid annual leave pursuant to s 87 of the FW Act for certain periods;

(5) public holidays falling on the Therapists’ normal working days over any period of paid annual leave be treated as a paid absence in accordance with s 116 of the FW Act;

(6) the Therapists did not receive any payments for accrued untaken annual leave on termination of their employment with FTM.

449 It is not clear why Ms Ortega was not considered a “shiftworker”.

450 In its further amended defence FTM admitted that:

(1) at the time their respective employment with FTM came to an end each of the Massage Therapists had a period of untaken paid annual leave (para 31);

(2) the periods of accrued untaken annual leave were as set out in column 2 of table 7 in annexure A to the amended statement of claim (para 31); and

(3) FTM failed to pay each of the Massage Therapists anything for accrued, untaken annual leave when their respective employment ended as set out in column 5 of table 7 in annexure A to the amended statement of claim (para 33).

451 On the basis of the admissions I find each of these matters proved. It follows that FTM failed to comply with s 90(2) and so contravened s 44 of the FW Act by not paying each of the Massage Therapists the amount that would have been payable to them with respect to the period of untaken annual leave they had at the end of their employment.

# ADDITIONAL CONTRAVENTIONS OF THE NES

### Unreasonable additional hours

#### The claim

452 The Ombudsman claims that FTM contravened s 44 of the FW Act by requiring the Massage Therapists to work unreasonable hours over and above 38 hours a week prescribed by s 62(1).

#### The law

453 During the period of the claim s 62 relevantly provided as follows:

**Maximum weekly hours**

*Maximum weekly hours of work*

(1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:

(a) for a full-time employee—38 hours; or

…

*Employee may refuse to work unreasonable additional hours*

(2) The employee may refuse to work additional hours (beyond those referred to in paragraph (1)(a) or (b)) if they are unreasonable.

*Determining whether additional hours are reasonable*

(3) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:

(a) any risk to employee health and safety from working the additional hours;

(b) the employee’s personal circumstances, including family responsibilities;

(c) the needs of the workplace or enterprise in which the employee is employed;

(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

(e) any notice given by the employer of any request or requirement to work the additional hours;

(f) any notice given by the employee of his or her intention to refuse to work the additional hours;

(g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;

(h) the nature of the employee’s role, and the employee’s level of responsibility;

(i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64;

(j) any other relevant matter.

*Authorised leave or absence treated as hours worked*

(4) For the purposes of subsection (1), the hours an employee works in a week are taken to include any hours of leave, or absence, whether paid or unpaid, that the employee takes in the week and that are authorised:

(a) by the employee’s employer; or

(b) by or under a term or condition of the employee’s employment; or

(c) by or under a law of the Commonwealth, a State or a Territory, or an instrument in force under such a law.

#### The issues

454 The following issues arise:

(1) whether the Massage Therapists were required or requested to work in excess of 38 hours per week; and

(2) if so, whether those hours were “unreasonable” in contravention of s 62(1) of the FW Act.

455 The Ombudsman identified three additional issues:

(3) whether the Therapists were not “working” when they were on authorised breaks for the purposes of s 62(4) of the FW Act;

(4) whether FTM required the Therapists to attend to cleaning and other ancillary tasks while they were not massaging customers; and

(5) the length and frequency of the breaks given to the Therapists.

The first of these is captured by issue (1). The second and third go to issue (2).

#### Did FTM require the Massage Therapists work in excess of 38 hours a week?

456 There is doubt that the Massage Therapists worked in excess of 38 hours a week.

457 While their contracts stipulated that their working hours would be between 10 am and 10 pm Monday to Sunday, it was common ground that on any working day, save for those periods when they took authorised breaks, the Massage Therapists were present at the Belconnen shop either working or available for work. In its further amended defence, FTM admitted the number of hours the Ombudsman pleaded each of the Massage Therapists actually worked. The average hours of work were approximately 67.5 hours per week up to 15 September 2013, based on 11.25 hours a day for six days each week, and 70.5 hours per week thereafter, based on 11.75 hours a day for six days each week.

458 Throughout the day, the Massage Therapists mainly performed massages on clients. The duration of each massage varied from 30 minutes to two hours. Appointments and the occasional walk-in client were recorded in the Kitomba appointment system. Mr Elvin admitted that these records were accurate.

459 The Ombudsman’s analysis of the Kitomba records, which was not the subject of any serious challenge, shows that:

 the years 2013, 2014, and 2015 were busier than 2012;

 the average number of massage hours performed per day across the entire employment period was close to seven;

 between 76.6% and 86.4% of total days were days with six or more massage hours;

 between 49.1% and 57.1% of total days were days with seven or more massage hours; and

 between 15.9% and 25.5% of total days were days with eight or more massage hours.

460 While Mr Elvin denied it, all the Massage Therapists maintained that they were also required to attend to washing, folding and other duties in between massaging clients. I accept the evidence of the Massage Therapists in this regard. In cross-examination Mr Elvin denied that they had other responsibilities with the exception of making and remaking beds. He said that it was Mr Puerto’s job to mix the oils. But there was no evidence from Mr Puerto to support him. Ms Amacio, Ms Bantilan, Ms Isugan, Ms Ortega, and Ms Sarto deposed to having cleaned toilets and showers. Mr Elvin denied that the Therapists cleaned the toilets and the bathrooms, asserting that they had a cleaner, and insisted that all the other non-massage tasks the Therapists gave evidence of performing, such as washing teacups, folding and putting away towels, and taking out rubbish were performed by the therapists’ assistant or cleaner.

461 The evidence given by the Massage Therapists was not inherently improbable. Each of the Massage Therapists deposed that, although Ms Yu and Mr Durado were employed to undertake the ancillary tasks, they performed those tasks, too, as there was plenty of work to be done.

462 Furthermore, their evidence was supported by both Mr Durado and Ms Yu.

463 Mr Durado deposed that, if the massage therapists had a break between customers, he saw them go into the staff lounge and “squeeze, heat and fold face towels and take dirty laundry to the towel room to put in the washing machine and take items out of the washing machine and put them in the dryer”. He said he would help them “but there was always a lot of towels and robes to wash and there was only one washing machine and dryer and two microwaves in the staff lounge to heat the hot towels”.

464 Ms Yu’s evidence was that she worked for FTM “on and off” because she was often unwell. She said she did not work at all from mid-2013 until 2015. She also testified that when she resumed work after a period of absence she asked for, and was given, lighter duties. Further, when she worked she testified she worked only four hours a day five days a week and then only from 6 am to 10 am. Later, however, she said she did not start until 8 am and finished around 12 noon or 1 pm. And for at least an hour and a half each day, she said was away from the Belconnen shop. Nonetheless Ms Yu deposed that “housekeeping, folding towels and keeping the shop clean and tidy was part of being a therapist” and that the massage therapists “shared” housekeeping duties if a therapist assistant was unwell.

465 In any event, it matters not whether the Massage Therapists were actually performing cleaning and washing tasks in between massages, as it was common ground that throughout the time the shop was open the Massage Therapists were required to be available to walk-in customers.

466 As the Ombudsman submitted, the Massage Therapists were “working” for the purposes of s 62(1) when FTM required them to be “available” to work throughout the day and they were ready, willing and able to perform the work. The Ombudsman’s submission reflects the authorities which provide part of the relevant context in which the section is to be construed.

467 In ***Hospital Employees****’ Industrial Union of Workers, WA v Proprietors of Lee-Downs Nursing Home* (1977) 57 WAIG 455, for example, the Western Australian Industrial Appeal Court held that “time worked” in the expression “time worked in excess of the ordinary hours” in the Nursing Aides and Nursing Assistants’ (Private) Award included time an employee was at work regardless of whether the employee is actually performing nursing duties. Burt CJ, with whom Wallace J agreed, held at 455 that time is “time worked” within the meaning of the award if, during the time under consideration, whatever the employee is doing when on work premises, he is doing it on the express or implied instructions of his employer. His Honour went on to explain:

What he is doing need not involve any physical activity. It may be that he is required to be in a certain place at and during a certain time so that he can act should a certain event happen and in such a case, as it seems to me, the time so spent is “time worked” whether the event initiating physical activity happens or does not happen. He also serves who only stands and waits.

468 The expression “he also serves who only stands and waits” was in all likelihood taken from the judgment of Dixon J in *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 466 in which his Honour observed:

Some difficulty has been felt in saying what is the service which carries wages. The wages are incident to the subsisting relationship of master and servant. A master who sends his servant upon a holiday upon full pay can be sued for wages under the contract, although not on a common count for work and labour done. They also serve who only stand and wait …

469 *Hospital Employees* concerned a nursing assistant employed to work in a nursing home. Her employer required her to attend work one weekend from 5 pm on the Friday night until 9 am on the Monday morning. She agreed to a request by her employer to sleep on the premises and attend to the patients and their “needs and… wants”. She was also required “to report any emergencies which arose relative to the inmates of the home”. At first instance the industrial magistrate held that she was not entitled to be paid for the time she was sleeping but only for the time she was performing nursing duties. On appeal, the majority held that the magistrate erred in so finding.

470 In *Warrumunda Village Inc v Pryde* (2002) 116 FCR 58 Lee and Finkelstein JJ held that “personal care workers” employed at a residential aged care hostel, who were rostered on what was called a “sleepover shift” to render assistance between 10 pm and 7.30 am but who were free to sleep or do whatever they wished when not, were engaged in “work” for the purposes of the *Health Services Union of Australia (Victoria – Private Sector) Interim Award 1993* and the *Health and Allied Services — Private Sector — Victoria Award 1995.* Each of those awards fixed remuneration by reference to hours worked.

471 Lee J held at [17], applying *Hospital Employees,* that:

An employee who attends at the place of employment pursuant to the employer’s direction to be at the employer’s premises for a period of time and be available to provide service at the premises as required by the employer, is not carrying on private activities but is providing service to the employer.

472 Finkelstein J similarly held at [37] that the words “work” or “worked”, when used in provisions such as cll 13 and 15 and similar awards to the awards under consideration, referred to “an employee who is under the instruction of an employer” and “the time under instruction is time worked”.

473 Further, while there was a dispute about the number and frequency of the breaks given to the Massage Therapists, it is clear from s 62(4) that the times the Massage Therapists were on authorised breaks is to be treated as time worked for the purposes of s 62(1).

#### Were the excess hours unreasonable?

474 The effect of s 62(1) is that requiring or requesting a full-time employee to work in excess of 38 hours is prima facie unreasonable but that there is an exception if it is reasonable for such a requirement or request to be made. In such a case, the burden rests on the respondent employer to prove that the excess hours were reasonable see, for example, *Currie v Dempsey* (1967) 69 SR (NSW) 116 at 125 (Walsh JA). What is “reasonable” is necessarily assessed on a case-by-case basis, by reference to the employee’s circumstances and the employer’s business in accordance with the terms of s 62(3). *BHP Coal* at [173].

475 The Ombudsman submitted that the hours the employees worked in excess of 38 hours were unreasonable for the following reasons:

(1) According to Safe Work Australia’s “Guide for Managing the Risk of Fatigue at Work” at Appendix C – Risk Management Chart, a working week of 56 hours or more is high risk.

(2) The Massage Therapists frequently massaged for more than six hours per day, had only two 30 minute breaks during the day, and were required to be available to work at the shop from 10 am to 10 pm six days a week.

(3) That work was physically demanding.

(4) These conditions were at odds with what they were originally told the job entailed and the terms of employment set out in their employment contracts. It was not until they arrived in Australia and started working at the shop that they understood the hours actually required of them.

(5) They were only paid for up to a maximum of 76 hours a fortnight and the effect of the cashback arrangement resulted in a lower ordinary rate overall during those fortnightly periods.

(6) The Massage Therapists were driven to work each morning before the Belconnen shop opened and driven home after the shop closed each night and therefore had no choice in relation to the number and span of their working hours.

(7) The Massage Therapists were not in a position to give notice of their intention to refuse the additional hours having regard to their visa status, their reliance on FTM’s sponsorship of their visas, their living arrangements, and the threats made by Mr Elvin.

476 There are inconsistencies between the evidence given by the Massage Therapists and the Kitomba records. If the Kitomba records are accurate, Ms Isugan’s account of massaging between seven and 9.75 hours a day, for example, is plainly an exaggeration, at least if it is to be taken as applying to the whole of her employment. In the first week of her employment, for example, she performed six hours of massage on the first day, four on the second, four and a half on the third, six on the fourth, six on the fifth, and six on the sixth. But there were many days when she worked seven or more hours. And the hours increased over the years. In the week commencing Sunday 4 October 2015, for example, the Kitomba records showed that she massaged for 6.75 hours on the Sunday, 9.25 on the Monday, seven on the Tuesday, 6.75 on the Wednesday, 7.5 on the Friday, and 6.25 on the Saturday. The following week was similar. The Kitomba records show that she massaged for eight hours on the Sunday, eight on the Monday, five on the Tuesday, eight on the Wednesday, six on the Friday and 7.5 on the Saturday. The Ombudsman’s analysis of those records, which I accept as accurate, showed that on 51% of her total days’ worked she massaged customers for seven hours or more and on 15.85% of those days she performed eight or more hours of massage.

477 I am not satisfied that Ms Isugan’s evidence on this subject was deliberately false. More likely than not her recollection on this matter was imperfect, probably coloured by the longer hours she was working in the latter part of her employment.

478 Since the evidence the Massage Therapists gave about their massage hours of work and the duration of their breaks was based on their recollections, it was always going to be problematic. FTM accepted the accuracy of the Kitomba records. So, too, did Mr Elvin. The Ombudsman did not challenge their reliability and her calculations were based on them. In the circumstances, I propose to rely on those records rather than the recollections of the Therapists.

479 The Kitomba records show that on numerous occasions the Therapists worked in excess of six hours, that on average they worked in excess of six hours, and that during 2014 and 2015 the average for each of them was roughly 7.5 and seven respectively. There were certainly days on which they worked eight or more hours: 213 in Ms Amacio’s case, 197 in Ms Bantilan’s, 154 in Ms Isugan’s, 187 in Mr Benting’s, 204 in Ms Ortega’s, 202 in Ms Sarto’s, and 200 in Ms Castaneda’s.

480 In any event in its further amended defence FTM admitted the total number of hours the Ombudsman alleged in her pleading that each of them worked.

481 In cross-examination Ms Amacio testified that, when they first arrived in Australia, Mr Elvin told them to limit the amount of massage hours to seven a day. Yet, on 54.6% of the total days she worked for FTM she was massaging customers for seven hours or more and on 19.9% for eight hours or more. Ms Bantilan said that they were told in the first and second month to limit massage hours to five or six. Yet, on 55.6% of the total days she worked she was massaging customers for seven hours or more and on 18.7% for eight hours or more.

482 Clause 27.1 of the Health Award provides that an employee who works in excess of five hours is entitled to an unpaid meal break of 30 to 60 minutes and clause 27.2 provides for two paid 10 minute tea breaks in each four hours worked. The tea breaks, but not the meal breaks, count as time worked.

483 All the Massage Therapists deposed that they usually took one to two breaks a day of 30 minutes each, except when the shop was busy. In the Fair Work Commission proceedings involving Ms Isugan and Mr Durado, Mr Elvin testified that the shop was “always busy”.

484 In cross-examination in this case Mr Elvin testified that he told the AFP it would be impossible to massage effectively without significant breaks, that massaging is physically demanding and exhausting work; that except for aromatherapy and foot massage the massages are equally taxing; and that massage therapists should only do six massages per day with a half an hour break between each massage or a longer break if they did two consecutive one hour massages. He conceded this was not always possible but said there were “schedules” and it happened “most of the time” and that the receptionists were trained to ensure that breaks were given and mistakes only happened “[once] in a blue moon”.

485 In cross-examination Mr Elvin also said that there were guidelines for the receptionists in scheduling appointments to allow for breaks. He said that it was up to the massage therapists to tell the receptionist if they were too tired to take on an appointment but that the receptionist had the final say on whether an appointment was made and had a level of discretion not to follow the guidelines in emergency situations such as when someone was sick or did not turn up or in the case of a double booking. No representations to this effect appeared in his affidavit. No such guidelines were produced or tendered.

486 When challenged about entries that showed nine hours of massage in a day, Mr Elvin altered his account, claiming that receptionists were instructed that eight hours was possible but “the average needs to stay at six”, adding that this must have happened because someone was sick or “had [her] periods”.

487 On the other hand, he agreed that the receptionist would first try to accommodate customers who had been double-booked which would result in fewer or shorter breaks for the Massage Therapists. He said it was up to the Massage Therapists to complain as he did not check the Kitomba system.

488 In the absence of evidence from any receptionist, I put no weight on Mr Elvin’s account.

489 The only other evidence contradicting the Massage Therapists about the breaks they took or were afforded came from Ms Yu. In her affidavit she said:

Everyone, and especially the therapists were required by [Mr Elvin] to take proper breaks, and for the therapists this was always no less than 30 minutes between customers, and lunch and dinner breaks were often one hour and often breaks were 2 to 3 hours. If we were not busy, staff did not start until 4 pm when customers finished work.

490 She also deposed that “[a]ll employees took proper breaks throughout the day” and that everyone “cooperated so that all of us got breaks”.

491 There is no evidence to indicate, however, that Ms Yu was ever present when any instructions were given by Mr Elvin to the Massage Therapists. Nor is there any reliable evidence to indicate how she was in a position to know what breaks they took.

492 In any case her evidence was contradictory. While she claimed that Mr Elvin “had a policy of encouraging everyone to take proper breaks between massages of at least 30 minutes”, she also deposed that “[s]taff would always complain if they did not have time to recover between massages”.

493 Furthermore, the Kitomba records do not support her evidence. As the Ombudsman submitted those records show that there was no routine practice of scheduling breaks of at least 30 minutes between appointments. As the Ombudsman’s analysis of the Kitomba records demonstrated, there were over 500 occasions for each Therapist where there was at least one instance of a break of less than 30 minutes between massages. In Ms Bantilan’s case the number was 534, Ms Amacio’s 639, Ms Isugan’s 563, Mr Benting 605, Ms Ortega 608, Ms Sarto 603, and Ms Castaneda 595.

494 In all probability increased customer demand and the financial fragility of the business caused FTM to require, or at least request, the Massage Therapists to work longer hours.

#### Conclusion

495 The Ombudsman has proved that the Massage Therapists worked well in excess of 38 hours a week throughout their employment and that they were required to do so, whether undertaking massages or performing other tasks or merely making themselves available to work when necessary.. FTM did not prove that the requirement was reasonable and neither did Mr Elvin. Consequently, the alleged contraventions of s 44 of the FW Act are made out.

### Failure to provide a Fair Work Information Statement

#### The claim

496 The Ombudsman alleged in para 94 of the pleadings that none of the Massage Therapists was provided with a copy of the Fair Work Information Statement as required by the legislation at any time. In its further amended defence FTM claimed that it had sought to interrogate Mr Elvin and Mr Puerto but, because they had exercised their privilege against penalty and refused to answer its questions, it did not know and could not admit the allegation. In his defence, Mr Elvin merely claimed that he was not required to plead to the allegation. In his amended defence, however, Mr Elvin admitted that he knew that FTM did not provide the Massage Therapists with the Fair Work Information Statement. His affidavit was silent on the matter. His written submissions did not address the subject.

#### The law

497 Section 124 requires the Ombudsman to prepare a Fair Work Information Statement containing information about the NES; modern awards; agreement-making under the Act; termination of employment; the role of the Fair Work Commission and the Ombudsman; and various other matters. Section 125 requires the employer to give the Statement to each employee “before, or as soon as practicable after, the employee starts employment”.

498 Regulation 2.02 of the FW Regulations prescribes the manner in which an employer may give the Statement to an employee. Subregulations (2) to (6) provide that the Statement may be given to the employee personally; sent by pre-paid post to the employee’s residential address or to a postal address nominated by the employee; sent by fax to the employee; and provided by emailing an electronic link to the Statement to the employee’s work email address or to another email address nominated by the employee. But subreg (7) states that “[s]ubregulations (2) to (6) do not prevent the employer from using another manner of giving the Statement to the employee”.

#### Did FTM fail to give the Therapists a Fair Work Information Statement?

499 The contracts of employment stated that the Massage Therapists would be given a copy of the Statement but no evidence was filed to indicate that it was. All the Massage Therapists deposed that they had not been given the Fair Work Information Statement. Mr Thomas’s affidavit disclosed that the Ombudsman obtained no evidence during her investigation that the Statement had been provided to them. And, as I have already observed, in his amended defence Mr Elvin admitted that it had not been provided to any of them.

500 Mr Elvin claimed, for the first time in cross-examination, that the Statement was on the wall in the staff room. The proposition was never put to any of the Ombudsman’s witnesses and Ms Yu said nothing about it. Having regard to the opinion I have formed of Mr Elvin’s credibility, I cannot accept his belated claim. Besides, Mr Elvin did not say when the Statement was placed on the wall in the staff room.

501 In any event, I do not accept that posting the Fair Work Information Statement on the wall of the staff room amounts to “giving” it to the employees.

502 The word “give” as used in s 125 of the FW Act is not defined. Accordingly, the word is to be given its ordinary meaning, understood in its context: ***WACB*** *v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] HCA 50; 79 ALJR 94; 210 ALR 190; 80 ALD 69 at [37].

503 Used in the way it appears in s 125 and the FW Regulations, the ordinary meaning of “give” is “to deliver freely” or “hand over”: *Macquarie Dictionary* at p 653, “give”, sense 1. Subregulation 2.02(7) should be read *ejusdem generis* with the other subregulations.

504 In *WACB* the Court was concerned with the obligation of the Refugee Review Tribunal to give a copy of its written statement of reasons to the applicant for review. The time to apply for review of that decision was held to run from the time a copy of the written statement was given to the applicant. Gleeson CJ, McHugh, Gummow and Heydon JJ held at [37] that:

In that setting to give a document ordinarily requires its physical delivery, not some act of constructive delivery of possession which, at general law, may suffice to transfer property in a chattel. It will not be enough to communicate to the applicant orally that the document has arrived, or to communicate the gist of the document, or even to read the document to the applicant. What is required is that the written statement be physically given to the applicant. Only once this has occurred can it be said that s 478(1)(b) is enlivened and time begins to run. …

See also *Minister for Immigration and Border Protection v EFX17* [2021] HCA 9; 95 ALJR 342; 388 ALR 351 at [23].

505 While the context here is different, I consider that the same meaning applies to the same word in the Fair Work Regulations. Giving the Fair Work Information Statement to new employees is a means of ensuring that employees are aware from the time they start work for an employer of their rights and entitlements at work. It provides a useful checklist of important information about pay and conditions to which they might reasonably have recourse throughout their employment in the privacy of their own homes if they so choose or in consultation with their union or legal representatives. It includes advice on the roles of the Ombudsman and the Commission and information on how to contact them. Since there is no requirement that a copy of the Statement be provided in a language other than English, an employee whose first language is not English may well wish to have it translated into their native language. In my view the Regulations require actual, not constructive, delivery of the Statement to employees.

506 For all these reasons, FTM contravened s 44 of the FW Act by failing to give each of the Massage Therapists the Fair Work Information Statement as it was obliged to do by s 125 of the Act.

# CLAIMS RELATING TO OTHER TERMS AND CONDITIONS OF EMPLOYMENT

## Unauthorised deductions

### The law

507 It will be recalled that s 323(1)(a) of the FW Act requires that FTM pay the Massage Therapists in full in relation to the performance of work, except as provided by s 324. Section 323 is a civil penalty provision (see Pt 4–1).

508 The only exceptions are those for which s 324(1) provides. Importantly, s 324(2) relevantly requires that an authorisation for the purposes of para (1)(a) specify the amount of the deduction. The effect of this provision is that, unless the amount of a deduction is specified in an authorisation, it does not matter that the deduction is authorised in writing by the employee and is principally for the employee’s benefit. An authorisation that does not specify the amount of the deduction is insufficient to engage the exception in para (1)(a).

509 An employer is only permitted to make deductions from amounts payable to an employee in defined circumstances. Those circumstances, set out in s 324(1), are if:

(a) the deduction is authorised in writing by the employee and is principally for the employee’s benefit; or

(b) the deduction is authorised by the employee in accordance with an enterprise agreement; or

(c) the deduction is authorised by or under a modern award or an FWC order; or

(d) the deduction is authorised by or under a law of the Commonwealth, a State or a Territory, or an order of a court.

### The allegations

510 The Ombudsman claims that the Massage Therapists were not paid in full because certain deductions were made from their wages, described in their pay slips as “staff loans”, when none of the circumstances set out in s 324(1) applied.

### Consideration

511 There was no dispute that the Massage Therapists borrowed money, that money was deducted from their wages, and that some of the pay slips referred to deductions being made for “staff loans”.

512 While some of the Therapists deposed that they borrowed the money from Mr Puerto, it is clear from the evidence that the loans were not made by him. He was lending the money as agent for FTM or on Mr Elvin’s behalf. Mr Elvin deposed that it was he who provided the loans. In other words, he was the source of the money Mr Puerto lent. In cross-examination he testified that the money came out of the FTM bank account.

513 In their evidence in chief, some of the Massage Therapists deposed that they borrowed money from either Mr Elvin or Mr Puerto while in the Philippines. Ms Amacio, for example, said she borrowed 8,000 pesos (about AUD150) from Mr Puerto. She remembered writing her name and the amount she borrowed on a piece of paper Mr Puerto gave her at the time and upon which the names of other massage therapists were recorded. But she also said that the paper “did not say anything about the amount that was going to be deducted from [her] wages”. Moreover, pay slips for the period from 16 July 2012 to 26 August 2012 show a total of AUD1,500 in deductions. While Ms Amacio deposed that she believed the deductions were to cover the 8,000 pesos loan, she was unable to account for the considerable difference in the amounts.

514 In para 35 of their further amended defence FTM admitted that the deductions as alleged were made and it did not plead that any of the exceptions was engaged. In the absence of such a pleading the Court is entitled to infer that none applied: *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Appeal)* (2019) 269 FCR 262 at [112].

515 In any case, as any of the matters listed in s 324(1) would enable the respondents to “avoid” the Ombudsman’s claims, the burden of proving that an exception applies rested with the respondents and the respondents did not discharge that burden. No evidence was adduced to suggest, let alone prove, that any of the exceptions was engaged. FTM produced no documents to the Ombudsman evidencing that any of the Massage Therapists provided written authorisation for the deductions to be made from their wages. The record or records made by Mr Puerto in the Philippines were not tendered. In his affidavit Mr Elvin said the loans were repaid by deductions from the Therapists’ wages and “[t]his was managed by my book keeper”. No evidence was adduced from the book keeper so a *Jones v Dunkel* inference is available. As it happened, however, direct evidence emerged at the hearing to defeat a possible defence. In cross-examination Mr Elvin testified that there was no written agreement documenting the loans and no signed authorisations had been given by any of the Massage Therapists.

516 It is true that each of the contracts contained a clause in the following terms:

**18. Debts**

18.1 If you owe money to us, forfeit the right to monies already paid or you are paid more than you are entitled to be paid, we may withhold (to the extent permissible by industrial laws) the amount forfeited, or the amount of the debt or overpayment, from any amounts otherwise payable to you, including salary or reimbursement of expenses.

517 Having regard to the terms of s 324(2), however, this clause was insufficient to amount to an authorised deduction since it did not specify the amount of the deduction.

518 As FTM admitted that it deducted the amounts from the wages of the Massage Therapists described in the records as “staff loans” and did not prove that any of the exceptions in s 324(1) applied, I find that FTM contravened s 44 by failing to comply with s 323(1) in the manner alleged. The amounts deducted are recorded in column 3 of table 8 of annexure A to the amended statement of claim and reproduced in all subsequent iterations of the Ombudsman’s pleading including the second further amended statement of claim.

## Unreasonable requirement to spend part of wages

### The law

519 At the time of the alleged contraventions, s 325(1) provided that:

An employer must not directly or indirectly require an employee to spend any part of an amount payable to the employee in relation to the performance of work if the requirement is unreasonable in the circumstances.

520 Section 325(2) provided that the regulations may prescribe circumstances in which such a requirement is or is not reasonable but during the relevant periods no circumstances were prescribed.

521 Subsection 326(3) provided that a term of a modern award, an enterprise agreement or contract of employment has no effect to the extent that the term permits, or has the effect of permitting, an employer to make a requirement that would contravene s 325(1) or directly or indirectly requires an employee to spend an amount if the requirement would contravene s 325(1) if it had been made by an employer.

522 Section 327 is also relevant. It relevantly provided that:

In proceedings for recovery of an amount payable to an employee in relation to the performance of work:

…

(b) any amount that the employee has been required to spend contrary to subsection 325(1) … is taken never to have been paid to the employee.

523 In other words, as the **Explanatory Memorandum** to the Fair Work Bill 2008 (Cth) makes clear (at [1294]), if an employee is required to spend wages in contravention of this clause, then the amounts so spent can be recovered from the employer as an underpayment of wages claim.

524 The elements of the contravention, then, are that:

(1) the employer required an employee to spend part of her or his wages; and

(2) the requirement was unreasonable in the circumstances.

525 Neither “require” nor “spend” is defined in the FW Act, so one would infer that Parliament intended these words to have their ordinary meaning.

526 The Explanatory Memorandum provides little guidance on the meaning of the section. It merely observed (at [1292]):

For example, it is likely to be unreasonable for an employer to require an employee to donate a proportion of his or her pay to a charitable or religious organisation nominated by the employer. It may be reasonable, however, for an employer to require an employee who is a tradesperson to purchase tools required to perform his or her duties (unless the employer is otherwise required to provide those tools).

527 Mr Elvin made no submissions on the construction point. The Ombudsman submitted that:

The word “require” in s 325(1) of the FW Act connotes a demand but, that the demand can be made “directly or indirectly” which, considered in the context of the remedial nature of the provision, suggests a broad meaning was intended as to what may constitute a requirement made by an employer. The word “indirectly” conveys that a requirement need not be express and may be conveyed or imposed by circumstances created by the employer which exhort the employee to spend in a particular way. A requirement can be imposed by obligation or need. If the circumstances created by the employer can be said to have necessitated the spending by the employee, then the employer will have required it. Spending necessitated by employer pressure can constitute a requirement. What constitutes enough pressure will be a question of fact and degree. The degree of pressure necessary to constitute a requirement is to be assessed in a practical way including by reference to whether the spending is a result of the free and genuine choice of the employee.

528 I accept those submissions although I do not accept that the ordinary meaning of the verb “require” is limited to the making of a demand. The verb is used in s 325(1) in its transitive mode. In this sense the *Macquarie Dictionary* defines “require” at p 1296 in this way:

1. to have need of; need: *he requires medical care*.

2. to call on authoritatively, order, or enjoin (a person, etc.) to do something: *to require an agent to account for money spent*.

3. to ask for authoritatively or imperatively; demand.

4. to impose need or occasion for; make necessary or indispensable: *the work required infinite patience*.

5. to call for or exact as obligatory: *the law requires annual income tax returns*.

6. to place under an obligation or necessity.

7. to wish to have: *to require room service*.

529 “Spend” is relevantly defined to mean “to pay out, disburse or expend”. The *Oxford English Dictionary* (online) (accessed 21 September 2021) relevantly defines “spend” as “give (money) to pay for goods, services or so as to benefit someone or something”. To pay out of, or give money earned, so as to benefit one’s employer is within the scope of the ordinary meaning of “spend”.

530 In *Australian Education Union v Victoria (Department of Education and Early Childhood Development)* (2015) 239 FCR 461 at [336] Bromberg J observed that the genesis of s 325(1) can be traced back to the Truck Acts. His Honour went on to say at [339]–[340]:

Under s 325(1) a requirement is only prohibited if the requirement is “unreasonable in the circumstances”. That qualifier is new and not found in predecessor legislation. It does, however, reflect the approach taken to deductions by the combination of ss 324(1) and 326(1)(c)(ii). Indeed, there is a high degree of symmetry in the approach taken by Div 2 to deductions made from salary and an employer’s requirement that salary be spent in a particular way

If a requirement to spend is capable of consisting in the making of a deduction from salary, then an overlap exists. The same conduct can be the subject of a contravention of each of ss 323(1) and 325(1). That may suggest that s 325(1) may only have been intended to deal with the spending of wages which are to be, or have been, remitted to the employee, and not to deal with a deduction from salary (which, by its nature, is not remitted to the employee). There is, however, at least one indication to the contrary. The prohibition is directed at the spending of “any part of an amount *payable* to the employee”. Further, the imposition of a requirement that salary be spent in a particular way may have been intended to warrant a sanction, even where the making of a deduction to effectuate that spending also results in a sanction. Neither party suggested that the terms of s 325(1) are to be construed as limited to amounts which have been or are to be remitted to the employee …

(Original emphasis.)

531 That case was concerned with fortnightly deductions made from teachers’ salaries in return for the provision of laptop computers and associated services for use as a work tool but could be used for personal purposes. The central issue was whether the teachers’ pre-tax contributions to the cost of the computers were deductions permitted by s 324(1) but an issue also arose as to whether the deductions contravened s 325(1). His Honour found that they did. He considered that the requirements made of the teachers in question to spend part of their salaries was unreasonable for four reasons: first, the spending occurred in the absence of genuine choice; second, the rate of spending was set at an excessive rate of contribution; third, the deductions were not made principally for the benefit of the teachers; and fourth, the value of the benefits actually received did not afford a countervailing justification (at [356]).

### The allegations

532 In both her opening and closing submissions the Ombudsman claimed that FTM contravened s 325(1) by requiring each of the Massage Therapists to repay from their earnings $800 per fortnight to FTM for a period of time after they started work for FTM. Each of the Massage Therapists gave evidence to this effect. In every iteration her pleading, however, including in the draft second further amended statement of claim, the Ombudsman did not include an allegation that FTM had required Mr Benting to pay back money from his wages, limiting her claim to the six female Therapists, despite the evidence given by Mr Benting which was to the same effect. I was informed that this was a “forensic choice”, although I was not informed why the choice was made and it is not open to me to speculate. In these circumstances I consider that the Ombudsman should be held to her pleading. Had the position been otherwise I would likely have inferred that the omission of Mr Benting was inadvertent, dealt with the matter on its merits and invited the Ombudsman to amend her pleading, for the matter was not only captured by her opening submissions but Mr Elvin cross-examined Mr Benting on his evidence on this subject: see, for example, *Leotta v Public Transport Commission (NSW)* (1976) 9 ALR 437 at 446; 50 ALJR 666 at 668 (Stephen, Mason and Jacobs JJ); *Water Board v Moustakas* (1988) 180 CLR 491 at 497 (Mason CJ, Wilson, Brennan and Dawson JJ).

### Consideration

533 The claim that FTM contravened s 325(1) by requiring the therapists to repay in cash money they had earned, which the Ombudsman referred to as “the cashback contraventions”, were hotly disputed. Nevertheless, I am satisfied that the claim has been proved. In short, the evidence given by the Therapists supports the claim. The evidence is consistent with the bank records. Mr Puerto was well placed to have rebutted the evidence if it were false, but he did not. And none of the conditions that enable an employer to make deductions from wages was satisfied.

534 Each of the Massage Therapists gave evidence that they were required to pay FTM $800 per fortnight for a period of about eight months after they first arrived in Australia and that they did as they were told, sometimes giving the money to Mr Puerto and sometimes directly to Mr Elvin.. Not only that, but, as the Ombudsman submitted, they corroborate each other’s account. Furthermore, as the Ombudsman also submitted, requests for assistance lodged with the Ombudsman in 2019 by employees who arrived in Australia in 2014 provide “strikingly similar accounts”. Judith Bugtai, Charlen Centillas, Geraline Dadula, Veronica Paquibot, Charis Borbajo and Juvylyn Polinar, who arrived in the ACT in November 2014, all reported that for the first year they had to “give back” from their fortnightly earnings between $500 and $600 in cash.

535 The evidence establishes, too, that the payments were made in response to an authoritative request such that they were placed under an obligation to make them.

536 The evidence given by Ms Amacio, for example, was that:

In or around August or September 2012, Colin had a meeting with all of us at the house. I could understand what Colin was saying in English but Jun also translated this to us all in Cebuano. Colin said to us words to the effect of: “*You will need to give back $800 each fortnight because the shop is not doing well*”.

537 Ms Amacio said she sometimes gave the money to Mr Elvin and sometimes to Mr Puerto.

538 Similarly, Ms Bantilan deposed that at a meeting in or around September 2012 Mr Elvin and Mr Puerto told them words to the effect:

The shop is not really earning much, I have a loan to pay and rent and electricity and the shop is not really getting enough customers, so you will need to give back $800 each fortnight. If we get lots of customers then you can keep your wages. If you don’t give the money back, I will send you home.

539 Ms Amacio said that she saw Ms Bantilan give money back to Mr Elvin or Mr Puerto “because” they did it together after they withdrew money from an ATM on their day off. Close inspection of the bank records shows that for the most part, although not invariably, they withdrew money on the same day.

540 Ms Isugan gave evidence about the same meeting. She said that Mr Elvin told them words to the following effect:

You will all need to give back $800 each fortnight because we don’t have enough income for the business at the moment, but your salary will be fixed up and increased later on when the business makes more money.

541 Similarly, Mr Benting said that in around September 2012 Mr Elvin told the massage therapists at a meeting at the Residence that they would need to give back $800 per fortnight because the shop is not doing well.

542 Ms Isugan said she sometimes gave the money to Mr Puerto and sometimes to Mr Elvin.

543 Ms Castaneda deposed that two days before they left the Philippines to come to Australia, Mr Puerto told the second group of therapists, which included Ms Ortega and Ms Sarto, words to the following effect:

[T]he shop is not doing very well at the moment and we cannot give you your full salary. We will give you $1800 every fortnight and you will have to pay back $800 each time. You will get your full salary when the business picks up.

544 She also said that, at a meeting at the Residence soon after they arrived at which Mr Puerto was also present, Mr Elvin told them:

I know [Mr Puerto] has explained to you why you need to pay us back some of your salary for some time. Give the $800 to either me or [Mr Puerto].

545 Ms Sarto deposed that at a meeting at the Residence during their first week in Australia, at which Mr Puerto was present, Mr Elvin told the second group of therapists words to this effect:

[W]e will deposit your full wages into your account but you have to withdraw $800 and give the money to [Mr Puerto].

546 She added that when her wages were paid into her bank account Mr Puerto told her that the money had been deposited and she had to give him $800 back. She said that these remarks were made in the presence of other massage therapists. She gave the money to Mr Puerto and on occasions she saw him pass it on to Mr Elvin.

547 She said that she gave the money to Mr Puerto and sometimes to Mr Elvin and that when she paid Mr Puerto he told her he was going to give the money to Mr Elvin.

548 Ms Ortega also deposed that when they arrived in Australia, “around 23 April 2013”, Mr Elvin told them that they would have to pay back $800 from their salary and that Mr Puerto had already explained why that was necessary. She also deposed that, after their wages had been paid, she saw Ms Castaneda and Ms Sarto give money back to Mr Puerto and that she, herself, withdrew the money from a St George ATM each fortnight on her day off and gave the money to Mr Puerto and sometimes to Mr Elvin.

549 They were all unshaken in cross-examination.

550 In substance, the employees were directed to pay the money back to FTM. An obligation was imposed upon them.

551 According to their file notes Mr Puerto apparently informed the inspectors at the site visit that employees never gave him cash. But against the sworn evidence of the Massage Therapists and in view of his unexplained failure to give sworn evidence to contradict them, I give this evidence no weight.

552 Mr Elvin vigorously denied the Ombudsman’s allegations.

553 In his affidavit Mr Elvin deposed, in effect, that none of the Therapists was ever required to repay $800 a fortnight. In his opening submissions, he insinuated that the fact that they all gave evidence to this effect and that the evidence they gave which bore upon the other claims which he denied was also consistent meant that they must have conspired to give false evidence. But no such proposition was put to them in cross-examination although he was repeatedly reminded of his obligation to put a proposition to a witness if he intended to challenge their evidence or lead evidence to the contrary: *Browne v Dunn* (1893) 6 R 67 (HL). In any case, while this was a theoretical possibility, having regard to the evidence that was given and the inferences that are open from the unexplained absence of evidence from Mr Puerto and the other massage therapists, I am persuaded that the reason the Therapists’ evidence was consistent on this and other questions was that they were telling the truth.

554 Mr Elvin tendered the request for assistance forms lodged with the Ombudsman in 2019 by the six massage therapists who arrived in 2014. He contended, in effect, that as these request forms contained allegations that “closely mirror” the allegations made by the Massage Therapists, and because these employees also worked for True Balance after leaving FTM, they undermined the evidence of the Massage Therapists and supported the case theory he urged upon the Court, namely that there was a conspiracy by the Massage Therapists to harm him. I reject that contention. This evidence does no such thing.

555 First, there is no evidence of such a conspiracy. Mr Elvin asked Mr Durado in cross‑examination whether he was “part of a plan to take over Foot & Thai with Sarah Clenci”. Mr Durado said he was not. While there was evidence that, after some of the Massage Therapists left FTM, they went to work for True Balance, a massage business owned by Sarah Clenci, there was no evidence of any plot to make false allegations and give false evidence about FTM and/or Mr Elvin. The fact that some of the Therapists went to work for True Balance is entirely neutral. It is understandable that the Therapists would have wanted to work elsewhere. The FTM business was in a precarious state, the company having just entered voluntary administration. Further, as their ability to lawfully remain in Australia depended on them having a sponsor, they would need to secure employment with another employer as quickly as possible after leaving FTM. It is a huge leap to contend that because they left FTM to work at a rival massage business, they conspired to give false evidence under oath against FTM and Mr Elvin. Besides, if their description of the conditions at FTM is to be accepted, they would surely have been attracted to the prospect of working for a different employer.

556 Second, the bank statements of the Therapists are not inconsistent with their evidence.

557 The bank statements of the Therapists in the first group disclose that during the first cashback period, from 26 August 2012 until 2 June 2013, in the days following the payment of their wages, they frequently withdrew amounts of around $1,000 (and sometimes $800 precisely) from the same two or three ATMs, and often at around the same time. The same pattern is also evident in relation to the bank statements of the therapists in the second group (Ms Sarto, Castaneda and Ortega).

558 In his opening submissions, Mr Elvin submitted, in effect, that the Massage Therapists could not have withdrawn $800 a fortnight because the amounts they were remitting to the Philippines would not make this possible. A comparison of the bank statements and remittance records disproves this submission. The relevant information, taken from those documents, appears in Annexure A to these reasons. It demonstrates that, notwithstanding the amounts the Therapists transmitted overseas during the periods in question, there were still sufficient funds for them to have repaid FTM the amounts in question. I have taken into account the evidence which indicates that their living expenses would have been insubstantial. They were not charged rent, apparently had no or at least minimal transport costs since they were driven to and from work and, given the number of hours they were required or expected to attend the workplace, had few opportunities to spend what they earned.

559 Third, there is also circumstantial evidence to support the Ombudsman’s case.

560 The Kitomba records generally show that the hours of massage the Therapists performed during their respective “cashback” periods were less than the hours they worked after the periods, indicating that business was slow in those periods. Notably, Mr Elvin gave evidence that the business was more profitable before 2012 when he engaged the Thai workers on a casual basis at a rate of $35 an hour.

561 Further, under cross-examination Mr Elvin suggested that he was struggling to pay them what FTM had agreed to pay. During cross-examination he claimed (without proof) that the average salary of a massage therapist in Australia was $35,000 but that the minimum he could pay a massage therapist under the 457 visa scheme was $52,000. In an unguarded moment, he went on to say in a passage I have already quoted:

Yeah. So basically, in a perfect sense, if I could have it the perfect way, I would have just given them a $35,000 a year salary and then I wouldn’t have required them to be working so much. I wouldn’t have required – I wouldn’t have had so many requirements. But because of the amount that was described under the 457 [$52,000pa] and then the nature of the massage and the prices we were charging, it wasn’t – it just simply wasn’t possible. Like, they wouldn’t have been able to come [to Australia and earn $50,000 odd].

562 This evidence tends to corroborate the accounts of the Massage Therapists that they were required to refund a portion of their income when the shop was doing poorly. In the light of this evidence, I accept the Ombudsman’s submission that it is no coincidence that the total amount repaid by each Massage Therapist over the period in question (approximately eight months) — $16,000 for Ms Isugan, Amacio and Bantilan and $14,400 for Ms Sarto, Ortega and Castaneda — is roughly the difference between $52,000 and $35,000.

563 The obvious purpose of requiring these payments to be made in cash rather than complying with the contract was to avoid the detection of the authorities.

564 I therefore find that FTM required Ms Isugan, Ms Amacio, Ms Bantilan, Ms Sarto, Ms Ortega and Ms Castaneda to spend $800 per fortnight of their wages to support its business by directing them to refund that amount during the periods in question. I also find that the requirement was unreasonable in the circumstances. The Massage Therapists had no genuine choice about the matter. They received no countervailing benefit, such as reduced hours or extended leave. It was also a breach of their contracts of employment. And it resulted in them being paid below Award wages. It was also unreasonable because it was a breach of FTM’s sponsorship obligations which required that it ensure that the earnings and conditions of the employees it sponsored were not less favourable than an Australian citizen would receive for performing equivalent work (see *Migration Act 1958* (Cth), s 140H read with *Migration Regulations 1994* (Cth), reg 2.79).

565 It follows that FTM breached s 325(1) of the FW Act as alleged and therefore contravened s 44 in this respect as well.

# THE RECORD-KEEPING CLAIMS

## The law

566 An employer’s obligations in relation to record-keeping appear in s 535 of the Act. Section 535 relevantly provides:

**Employer obligations in relation to employee records**

(1) An employer must make, and keep for 7 years, employee records of the kind prescribed by the regulations in relation to each of its employees.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) The records must:

(a) if a form is prescribed by the regulations—be in that form; and

(b) include any information prescribed by the regulations.

Note: This subsection is a civil remedy provision (see Part 4-1).

...

567 With respect to overtime records the FW Regulations relevantly provided:

**3.34 Records—overtime**

For subsection 535(1) of the Act, if a penalty rate or loading (however described) must be paid for overtime hours actually worked by an employee, a kind of employee record that the employer must make and keep is a record that specifies:

(a) the number of overtime hours worked by the employee during each day; or

(b) when the employee started and ceased working overtime hours.

Note: Subsection 535(1) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.

568 With respect to leave records, the FW Regulations relevantly provided:

**3.36 Records—leave**

(1) For subsection 535(1) of the Act, if an employee is entitled to leave, a kind of employee record that the employer must make and keep is a record that sets out:

(a) any leave that the employee takes; and

(b) the balance (if any) of the employee’s entitlement to that leave from time to time.

(2) If an employer and employee agree to cash out an accrued amount of leave:

(a) a copy of the agreement is a kind of employee record that the employer must make and keep; and

(b) a kind of employee record that the employer must make and keep is a record that sets out:

(i) the rate of payment for the amount of leave that was cashed out; and

(ii) when the payment was made

Note: Subsection 535(1) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.

569 With respect to termination of employment, reg 3.40 provided:

**Records—termination of employment**

For subsection 535(1) of the Act, if an employee’s employment is terminated, a kind of employee record that the employer must make and keep is a record that sets out:

(a) whether the employment was terminated:

(i) by consent; or

(ii) by notice; or

(iii) summarily; or

(iv) in some other manner (specifying the manner); and

(b) the name of the person who acted to terminate the employment.

Note: Subsection 535(1) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.

570 Regulation 3.33 of the FW Regulations relevantly required an employer to make and keep records which specify the rate of remuneration, the gross and net amounts paid to the employee, any deductions made, and any penalties or loadings that the employee was entitled to be paid.

571 Regulation 3.44 dealt with the accuracy of records. It relevantly provided:

**3.44 Records—accuracy**

(1) An employer must ensure that a record that the employer is required to keep under the Act or these Regulations is not false or misleading to the employer’s knowledge.

Note: Subregulation (1) is a civil remedy provision to which Part 4 1 of the Act applies. Division 4 of Part 4 1 of the Act deals with infringement notices relating to alleged contraventions of civil remedy provisions.

…

(6) A person must not make use of an entry in an employee record made and kept by an employer for the purposes of this Subdivision if the person does so knowing that the entry is false or misleading.

Note: Subregulation (6) is a civil remedy provision to which Part 4-1 of the Act applies. Division 4 of Part 4-1 of the Act deals with infringement notices relating to alleged contraventions of civil remedy provisions.

## The allegations

572 The Ombudsman pleaded that in contravention of s 535(1) FTM failed to make and keep a record that specified:

(a) the number of overtime hours worked by each of the Massage Therapists on each day or the time each of the Massage Therapists started and ceased working overtime hours as required by reg 3.34;

(b) the annual leave taken by the Massage Therapists and the balance of their respective entitlement to annual leave from time to time, as required by reg 3.36(1); and

(c) the manner in which the employment of each of the Massage Therapists was terminated and the name of the person who acted to terminate their employment, as required by reg 3.40.

573 The Ombudsman also pleaded that FTM contravened reg 3.44(1) by failing to ensure that the pay records it was required to keep under the Act or Regulations were not false or misleading to its knowledge. The gravamen of this allegation was that the pay records relating to Ms Amacio, Ms Bantilan and Ms Isugan during each fortnight of the “First Cashback Period”, namely the period during which they were required to refund $800 a fortnight in cash from their wages, and those of Ms Castaneda, Ms Ortega and Ms Sarto during each fortnight of the “Second Cashback Period” were knowingly false or misleading as to the net amounts paid because they did not refer to, or take into account, the fortnightly repayments.

574 Further, the Ombudsman pleaded that, in contravention of reg 3.44(6), FTM made use of the false or misleading records when it produced them to FWI Hurrell on 16 June 2016 in response to a notice to produce.

## Consideration

575 On 17 May 2016 Deloitte forwarded to FWI Hurrell records made and kept by FTM which included annual leave records pertaining to the Massage Therapists and some pay slips for the financial years 2012 to 2013, 2013 to 2014, 2014 to 2015, and 2015 to 2016. In so doing the administrators are taken to have been acting as the company’s agent: Corporations Act, s 437B.

576 On 1 June 2016 another Fair Work Inspector, Juanita Keenan, issued FTM with a notice to produce, amongst other things, time and wage records for the Massage Therapists for the period 1 June 2012 to 31 January 2016. A copy of the notice to produce was emailed to Mr Elvin.

577 In response to this notice, on 16 June 2016 Mr Elvin (on behalf of FTM) caused some documents to be produced to the Ombudsman. Those documents included pay records, entitled “pay history”, for each of the Massage Therapists for their respective periods of employment. These records purported to identify, amongst other things, the gross and net wages paid to the Therapists, the dates of payment, and the deductions made from the gross wages.

578 The leave and pay records that were produced on 17 May and 16 June 2016, which appear in annexures LRT-3 and LRT-21 to Mr Thomas’s affidavit, did not record any of the following information:

(a) the number of overtime hours worked by each employee or the start and finish time of overtime hours worked as required by reg 3.34;

(b) the periods of annual leave taken by the Massage Therapists and the balance of their entitlement to annual leave from time to time, as required by reg 3.36(1); and

(c) the nature of the termination of the employment of the Massage Therapists, as required by reg 3.40.

579 In the first and third cases, no records at all were produced which would answer the description in the relevant regulation. In the second case, annexure LRT-3 included a record which referred to annual leave but it was not a record of the kind required by reg 3.36(1). In particular, it did not document the days of annual leave that were taken during each year the Therapists were employed and the days or hours that were untaken from time to time.

580 I therefore find that FTM contravened s 535(1) by failing to make and keep records of the number of overtime hours worked by each of the Massage Therapists or their start and finish times of overtime hours worked, as prescribed by reg 3.34; the periods of annual leave they took and the balance of their entitlement to annual leave from time to time, as prescribed by reg 3.36(1); and setting out the nature of the termination of their employment, as prescribed by reg 3.40.

581 It was not in dispute that the pay records relating to Ms Amacio, Ms Bantilan, Ms Isugan, Ms Castaneda, Ms Ortega and Ms Sarto during the periods in which they were allegedly required to repay in cash $800 a fortnight from their wages did not mention any such payments or reflect them in the net amounts. They merely record the amounts they were paid before the cash repayments were made. As I have found that the allegations were made out, it follows that the pay records were false or misleading as to the net amounts paid because they did not refer to, or reflect, the effect of the repayments. Mr Elvin knew that the entries in the pay records were false or misleading because he knew exactly what money was paid out to the Therapists and what was returned. His knowledge is attributable to FTM (FW Act, s 793). It follows that the records were not merely false or misleading on this account but they were knowingly false or misleading.

582 Similarly, by producing to FWI Hurrell on 16 June 2016 records which did not mention the cash refunds and by not pointing that out, FTM made use of false or misleading records.

583 Consequently, FTM also contravened regs 3.44(1) and 3.44(6).

# FAILURE TO GIVE PAY SLIPS IN ACCORDANCE WITH THE ACT

## The law

584 Section 536 of the FW Act provides that:

(1) An employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Section 80 of the *Paid Parental Leave Act 2010* requires an employer to give information to an employee to whom the employer pays an instalment under that Act.

(2) The pay slip must:

(a) if a form is prescribed by the regulations—be in that form; and

(b) include any information prescribed by the regulations.

Note: This subsection is a civil remedy provision (see Part 4-1).

585 I referred above to reg 3.44. It will be recalled that reg 3.44(1) requires an employer to ensure that a record it is required to keep under the Act or Regulations is not false or misleading to its knowledge. It will also be recalled that reg 3.44(6) requires that a person must not make use of an entry in an employee record made and kept by an employer for subdivision 1 of Ch 3, Pt 3-6, Div 3 of the FW Regulations if the person does so knowing that the entry is false or misleading.

586 Regulation 3.46 prescribes the information the pay slips must contain. At all material times it relevantly provided:

**Pay slips—content**

(1) **For paragraph 536(2)(b) of the Act, a pay slip must specify:**

(a) the employer’s name; and

(b) the employee’s name; and

(c) the period to which the pay slip relates; and

(d) the date on which the payment to which the pay slip relates was made; and

**(e) the gross amount of the payment**; **and**

**(f) the net amount of the payment**; and

(g) any amount paid to the employee that is a bonus, loading, allowance, penalty rate, incentive-based payment or other separately identifiable entitlement; and

(h) on and after 1 January 2010—the Australian Business Number (if any) of the employer.

(2) **If an amount is deducted from the gross amount of the payment, the pay slip must also include the name, or the name and number, of the fund or account into which the deduction was paid.**

(3) If the employee is paid at an hourly rate of pay, the pay slip must also include:

(a) the rate of pay for the employee’s ordinary hours (however described); and

(b) the number of hours in that period for which the employee was employed at that rate; and

(c) the amount of the payment made at that rate.

(4) If the employee is paid at an annual rate of pay, the pay slip must also include the rate as at the latest date to which the payment relates.

(5) If the employer is required to make superannuation contributions for the benefit of the employee, the pay slip must also include:

(a) the amount of each contribution that the employer made during the period to which the pay slip relates, and the name, or the name and number, of any fund to which the contribution was made; or

(b) the amounts of contributions that the employer is liable to make in relation to the period to which the pay slip relates, and the name, or the name and number, of any fund to which the contributions will be made.

(6) In subregulation (5):

***contributions*** does not include a contribution in respect of a defined benefit interest (within the meaning of the *Superannuation Industry (Supervision) Regulations 1994*) in a defined benefit fund (within the meaning of the *Superannuation Industry (Supervision) Act 1993*).

Note: Subsection 536(2) of the Act is a civil remedy provision. Section 558 of the Act and Division 4 of Part 4-1 deal with infringement notices relating to alleged contraventions of civil remedy provisions.…

(Emphasis added.)

## The allegations

587 Two allegations of pay slip violations were made.

588 First, the Ombudsman pleaded that, from on or about the fortnightly pay period commencing 31 March 2014 until the end of their respective periods of employment, FTM did not give the Massage Therapists a pay slip within the period prescribed by s 536(1) or at all. Rather, pay slips were provided “from time to time”.

589 Second, the Ombudsman also pleaded that, in breach of s 536(2), during the period when deductions were made from their wages FTM issued pay slips to the Massage Therapists which did not include the name, or the name and number, of the fund or account into which the deductions were paid.

590 In both her opening and closing submissions, the Ombudsman submitted that the pay slips contravened regs 3.46(1)(e) and (f) by failing to record the correct gross and net amounts paid to each of the Massage Therapists during the so-called “cashback” periods. However no such allegation is contained in the pleadings. Leave was not sought, let alone granted to amend the pleadings, and to grant leave at this stage would be inappropriate: *BHP Coal* at [63]–[65].

591 Similarly, the Ombudsman’s counsel submitted in closing that the pay slips were false and misleading in contravention of reg 3.44(1) by failing to record the $800 cashback payments. Again, this submission was inconsistent with the pleadings. The contraventions in relation to the regs 3.44(1) and 3.44(6) in the second further amended statement of claim relate to the “Pay Records” kept by FTM in relation to the Therapists, which appear at annexure LRT-21 to Mr Thomas’s affidavit.

592 “Pay Records” are defined in para 102 of the second further amended statement of claim as “pay records titled ‘Pay History’ for each of the Employees for their respective Employment Periods”. Pay slips are separately defined in para 100. The pay histories are in annexure LRT‑21, and they are different from the pay slips provided to the Therapists (and as defined in para 100). The pay histories do not include pay slips.

593 Once again, leave was not sought to amend the pleadings. The Ombudsman should be confined to her pleaded allegations.

## Consideration

594 With respect to the first pleaded allegation, the Massage Therapists all testified that they were not given pay slips after the end of 2013 or March 2014, except for between three and four that were provided in 2015. They were not challenged on this matter and Mr Elvin conceded in his affidavit that there were times when pay slips were not generated but said he could not recall what those times were or which of the Therapists were affected. He testified that he became aware after FTM went into voluntary administration that pay slips “sometimes weren’t given out”. He said, however, that he had instructed his manager to provide them to the Therapists, and that if they were not provided it was not his fault.

595 I find that FTM contravened s 536(1) by not giving the Massage Therapists pay slips after about 31 March 2014, save for the three or four pay slips provided in 2015.

596 With respect to the second pleaded allegation, I note that none of the pay slips produced to the Ombudsman includes either the name, or name and number of the fund or account into which the deductions (referred to as “staff loan[s]”) were paid, as prescribed by reg 3.46(2).

597 I therefore find that FTM contravened s 535(2) by failing to record in the pay slips the details prescribed by reg 3.46(2).

# THE GENERAL PROTECTION CLAIMS

598 These are the two adverse action claims and the coercion claims.

## General rules

599 The relevant provisions fall within Pt 3–1 of the Act which provides general workplace protections, specifically Div 3, which protects workplace rights and the exercise of those rights, and Div 5, which relevantly includes protection from certain forms of discrimination.

600 Division 7 includes a number of “ancillary rules” which apply, where relevant, to all contraventions of Pt 3–1. Sections 360 and 361 are pertinent.

601 Section 360 provides that a person takes action for a prohibited reason if the reasons for the action include that reason. For this purpose the Court need only be satisfied that the prohibited reason was “a substantial and operative reason” for the employer’s action or “a substantial and operative factor” in the employer’s reasons: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at [56]–[59] (French CJ and Crennan J); [104], [127] (Gummow and Hayne JJ).

602 Section 361(1) relevantly provides that, if it is alleged in an application in relation to a contravention of Pt 3–1 of the Act, that a person took action for a particular reason or with a particular intent and taking the action for that reason or with that intent would constitute a contravention of Pt 3­1, it is presumed that the action was taken for that reason or with that intent unless the person proves otherwise.

603 The circumstances in which a person takes “adverse action” against another person are set out in the table to s 342(1). The circumstances covered by the table relevantly include in item 1 any of the following action taken by an employer against an employee:

(a) dismissing the employee;

(b) injuring the employee in his or her employment; and

(c) altering the position of the employee to the employee’s prejudice.

604 In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 (***Patrick Stevedores v MUA)*** at [4] Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ held in relation to the predecessor provision (s 298K(1) of the WR Act, which was relevantly identical to s 340(1) read with item 1 in the table to ss 342(1) and 360), that:

Paragraph (a) covers termination of employment; par (b) covers injury of any compensable kind; par (c) is a broad additional category which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question.

605 “Adverse action” includes threatening to take action covered by the table in s 342(1) (see s 342(2)). To threaten someone within the meaning of s 342 involves communicating an intention to inflict harm on a person; the essence of a threat is that it is made to intimidate a person: *Community and Public Sector Union (CPSU) v Telstra Corp Ltd (No 2)* (2000) 101 FCR 45 (***CPSU v Telstra***) at [15].

606 The Ombudsman brings two adverse action claims. One relates to the alleged threats made by Mr Elvin to take reprisals against the Massage Therapists if they reported their working conditions to the authorities. That is an allegation that FTM contravened s 340 of the FW Act by taking adverse action against the Massage Therapists to prevent them exercising a workplace right. The other is a claim of unlawful discrimination contrary to s 351 of the Act.

## Adverse action contrary to s 340 of the FW Act

### The allegations

607 The Ombudsman pleaded that FTM took adverse action against each of the Massage Therapists to prevent them from exercising their workplace rights in contravention of s 340(1)(b) of the Act.

608 She alleged that FTM (through Mr Elvin and Mr Puerto) instructed the Massage Therapists not to tell, discuss with, or make complaints about their working conditions to, anyone, including the immigration authorities, and threatened to send them home to the Philippines if they did, which would necessarily bring their employment with FTM to an end (and therefore amount to a dismissal) and to arrange to kill their families if they reported FTM to the Department of Immigration and Border Protection (which amounted to a threat to injure the Therapists in their employment within the meaning of item 1(b) in the table in 342(1) of the FW Act and/or a threat to alter their positions to their prejudice within the meaning of item 1(c)). She did not specifically plead that FTM threatened to send them home to the Philippines if they broke any of the rules. But on any reasonable view a threat of this kind would be captured by the term “working conditions”, since the effect of the evidence is that it was a condition of the Therapists’ employment that they comply with the rules.

609 Mr Elvin denied the allegations.

### The law

610 Section 340 of the FW Act relevantly provides as follows:

(1) **A person must not take adverse action against another person**:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

**(b) to prevent the exercise of a workplace right by the other person.**

Note: This subsection is a civil remedy provision (see Part 4-1).

(Emphasis added.)

611 “Workplace right” is defined in s 341(1). Relevantly it includes a situation in which the person against whom the adverse action was allegedly taken:

(c) is able to make a complaint or inquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee—in relation to his or her employment.

612 By s 11 of the FW Act, the terms “employers” and “employees” carry their ordinary meanings.

613 “Workplace law” is relevantly defined in s 12 to mean:

(a) [the FW] Act; or

…

(d) any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters).

614 I accept the Ombudsman’s submission that the ability to make a complaint or inquiry to the immigration authorities about the conditions of employment of the Massage Therapists falls within the terms of s 341(1)(c)(i). The Migration Act and the Migration Regulations are laws of the Commonwealth that regulate the relationships between employers and employees.

615 As the Ombudsman submitted, there are a number of provisions of the Migration Act that regulate the employment relationship between Australian employers and sponsored visa holders. They include ss 245AB, 245AG, 245AR, and 245AS.

616 Section 245AB provides that it is an offence if a person knowingly allows an unlawful non-citizen to work, and it is an aggravated offence if the worker is being exploited. Section 245AG defines the terms “work” and “allows”. Section 245AR prohibits a person from asking or receiving a benefit in return for the occurrence of a “sponsorship-related event”. Section 245AS prohibits a person from offering to provide or providing a benefit in return for the occurrence of a “sponsorship-related event”.

617 All Sections 245AB and 25AG were in force throughout the periods in which FTM employed the Massage Therapists. Sections 245AR and 245AS commenced on 30 November 2015.

618 Further, by reg 2.79(2) of the Migration Regulations a sponsor is required to provide a visa holder with no less favourable terms and conditions of employment than the sponsor provides, or would provide, to an Australian citizen or permanent resident. Compliance with sponsorship obligations may be monitored by immigration inspectors or Fair Work Inspectors who have investigative powers under the Migration Act: see Migration Act, ss 140UA and 140V. Both Fair Work Inspectors and inspectors appointed by the Minister under s 140V(1) of the Migration Act have wide powers which may be exercised, amongst other things, for the purpose of determining whether a sponsorship obligation is being, or has been, complied with (Migration Act, s 140X). They include the power to enter business premises or other places if the inspector reasonably believes that there are records or documents relevant to a s 140X purpose (s 140XB) and the power to inspect any work and interview any person while on the premises or other place (s 140XC). From at least 1 August 2013, Fair Work Inspectors have had delegated power to monitor compliance with certain sponsorship obligations, including the obligation imposed by reg 2.79(2) of the Migration Regulations and, in particular, the requirement that sponsors ensure that a subclass 457 visa holder is receiving at least the same salary as that which was approved at nomination: *Direction No 58 – Exercise of Powers by Fair Work Inspectors* (in force until 2 August 2018; see now Direction No. 76) made under s 499 of the Migration Act.

619 A broad view has been taken of the scope of s 341(1)(c) and para (d) of the definition of “workplace law” in s 12.

620 For the purpose of determining whether a law is a workplace law, it is unnecessary to establish the existence of the right or entitlement about which the complaint is made: ***Tattsbet*** *Ltd v Morrow* (2015) 233 FCR 46 (Allsop CJ, Jessup and White JJ) at [107]–[110].

621 In *Tattsbet* an employee alleged that the *Superannuation Guarantee (Administration) Act 1992* (Cth) under which an employee claimed to have an entitlement to superannuation contributions made for her benefit was a “workplace law” within the meaning of para (d). She relevantly alleged that she had a “workplace right” within the meaning of s 341(1)(c)(i) in that she could make a complaint or inquiry to the Australian Taxation Office about her entitlement and that adverse action had been taken against her to prevent her from exercising that right. At [107]–[110] Jessup J, with whom Allsop CJ and White J agreed at [1] and [140] respectively, held that the existence of a workplace right for the purposes of s 341(1)(c)(i) is not dependent on the existence of an entitlement under the workplace law. It was sufficient to satisfy the subsection in that case if a person proposed to make a complaint about a matter under a workplace law. Consequently, as Jessup J put it at [110], “[t]he SGA Act was a workplace law to the extent that it was the [employee’s] proposal to make a complaint or inquiry to the ATO based on her contention that she was an employee”.

622 Similarly, in *Cummins South Pacific Pty Limited v Keenan* [2020] FCAFC 204, 302 IR 400 at [45] Bromberg J, with whom Mortimer J agreed at [209], held that the ability of an employee to complain or inquire within the meaning of s 341(1)(c) need not be underpinned by a right or entitlement held by the employee.

623 Previously, however, two Full Courts had agreed with the opinion expressed by Dodds‑Streeton J in *Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271; 314 ALR 346; 242 IR 1 at [625]:

In my opinion, the requirement that the complaint be one that the employee “is able to make” in relation to his or her employment suggests that there are complaints which the employee is not able to make in relation to his or her employment. The ability to make a complaint does not arise simply because the complainant is an employee of the employer. Rather, it must be underpinned by an entitlement or right. The source of such entitlement would include, even if it is not limited to, an instrument, such as a contract of employment, award or legislation.

See ***PIA Mortgage Services*** *Pty Ltd v King* (2020) 274 FCR 225 at [12]–[13] (Rangiah and Charlesworth JJ); at [164] (Snaden J) and *Cigarette & Gift Warehouse Pty Ltd v Whelan* (2019) 268 FCR 46 at [28] (Greenwood, Logan and Derrington JJ)*.* None of these judgments mentioned *Tattsbet.*

624 As it happens, the difference of opinion does not matter in the present case. That is because the Massage Therapists plainly had a right or entitlement to make a complaint to the Ombudsman who had (and has) the capacity to seek compliance with the provisions of the FW Act and to the immigration authorities who had (and have) the capacity to seek compliance with the provisions of the Migration Act, such as an inspector appointed by the Minister under that Act or someone working in the relevant government department.

625 In any event, in *PIA Mortgage Services* at [20] and [26] Rangiah and Charlesworth JJ held that an employee who alleges that his or her employer has contravened a statutory provision relating to the employment is “able to make a complaint” within s 341(1)(c)(ii) of the FW Act. Their Honours observed that the right or entitlement derives from the statutory provision alleged to have been contravened and “encompasses the making a complaint to the employer or an appropriate authority about the alleged contravention”, whether or not the statute directly or expressly confers a right to bring proceedings or to complain to an authority. For the reasons given above, each of the Ombudsman and the Department responsible for immigration matters is such an authority.

626 Whether a complaint or inquiry is “in relation to … employment” for the purposes of s 341(1)(c)(ii) obviously depends on its subject-matter. But the words “in relation to” are words of wide import: ***Walsh*** *v Greater Metropolitan Cemeteries Trust (No 2)* [2014] FCA 456; 66 AILR ¶102–285; 243 IR 468 at [41] (Bromberg J).

627 The relationship need not be a direct one; an indirect relationship is enough: *Construction, Forestry, Mining and Energy Union v* ***Pilbara******Iron*** *Company (Services) Pty Ltd (No 3)* [2012] FCA 697; 64 AILR ¶101–659 at [64] (Katzmann J); *Shea* at [631] (Dodds-Streeton J) and *Walsh* at [42] in which Bromberg J, following my judgment in the *Pilbara Iron* case, held that the relevant connection would likely exist in circumstances “[w]here the subject matter of the complaint raises an issue with potential implications for the complainant’s employment”.

### The issues

628 The following issues arise:

(1) whether FTM made the threats as alleged;

(2) whether the threats amounted to “adverse action” within the meaning of s 342(1); and, if so,

(3) whether FTM rebutted the presumption that the threats were made for the alleged reasons.

### Did FTM threaten the Massage Therapists as alleged?

629 Evidence was given by all the Massage Therapists in the first group that they were threatened by FTM. Their evidence was not identical but it was very similar and broadly consistent.

630 The evidence was that these threats were made by Mr Elvin and conveyed to them in their first language by Mr Puerto. As I have explained, in the absence of evidence from Mr Puerto, the evidence of the Massage Therapists, which he might have contradicted, can be accepted more readily. At no point did Mr Elvin suggest, and there is no evidence to indicate, that Mr Puerto did not faithfully interpret Mr Elvin’s words or that Mr Puerto was acting as a rogue agent. In these circumstances, it is particularly significant that Mr Puerto failed to give evidence to contradict the evidence of the Massage Therapists and corroborate Mr Elvin. The inference is irresistible that the evidence he could have given would not have assisted FTM or, for that matter, Mr Elvin.

631 As I have already indicated, the threats Mr Elvin allegedly made are more extensive than those the subject of the s 340 claims. The Ombudsman also pleaded that FTM threatened that their families would be killed if they reported FTM to the Department of Immigration and Border Protection. These allegations are relevant only to the adverse action claims based on s 351 and the coercion claims under s 353 but it is convenient at this point to deal with the evidence concerning those allegations, too, since the threats to have their families killed were said to have been made on some occasions contemporaneously with the threats to send them home to the Philippines.

632 One particular occasion was seared in the memories of all the Therapists in the first group. Ms Amacio described it thus:

I remember one day in around July 2012, when [Mr Elvin] was driving me and some of the other first batch of massage therapists home from work in the van. I remember [Ms Isugan], [Ms Bantilan] and [Mr Benting] were also in the van. [Mr Elvin] swerved the van from one side of the road to another. He was driving so fast and swerving into so many lanes. He was angry and when he spoke to us he was shouting and swearing. We were all very scared.

In the van, [Mr Elvin] shouted to me and all of the massage therapists in the car and said words to the effect of

*“I saw Zoren was speaking to a Filipino customer today. I saw and heard what he was saying from the cameras in my office. What the fuck is wrong with you all. I gave you rules to follow and you are not listening to me. I told you not to speak to anyone in your language.”*

[I] knew that Zoren had a Filipino customer and I heard him speaking to the customer in Tagalog that same day when the customer was on the foot massage chair[.] When we got to the house that night, [Mr Elvin] held a meeting with all of the first batch massage therapists. He spoke to us from 11.30pm until 4am the following day. Myself and the other first batch massage therapists were sitting down in the living room and [Mr Elvin] and [Mr Puerto] were standing while they spoke to us. I remember all of the first batch was there, including [Ms Bantilan], [Mr Benting] and [Ms Isugan]. During that meeting [Mr Elvin] was very angry and he was screaming. He repeated the rules many times. He said to us words to the effect of:

*“if any of you speaks out or complains to immigration or to any of your friends or family in Australia, I will have your family members in the Philippines killed. It is easy to hire someone in the Philippines to have one of your relatives killed”.*

[Mr Puerto] then said, in Cebuano, words to the effect of:

*“if you ever talk about your salary or the work you’re doing in the shop, I will get someone in the Philippines to kill your family. I have so many connections in the Philippines. My friend kills people as his job and it will only cost me 10,000 pesos to get him to kill someone for me.”*

I was very scared when they said this to me. I believed that [Mr Elvin] and [Mr Puerto] would do something like this. During this meeting, I remember that [Mr Puerto] made a gesture with his finger while staring at us, like he was slicing his throat.

“Zoren” was a reference to Zoren Pugoy, who was recruited to work for FTM at the same time as the Therapists in the first group.

633 Ms Amacio went on to report that Mr Elvin and Mr Puerto had told them of a number of cases, which she related, of workers being sent back to the Philippines for flouting one or other of the FTM rules.

634 She was repeatedly challenged in cross-examination about the threats to kill but adhered to her evidence. When asked why she believed the threats, she replied:

Yes, because that’s what we understood from what [Mr Puerto] was translating to us, and with his finger slicing the throat.

635 At that point I noted that she signified with a finger the gesture she described in her affidavit “like he was slicing his throat” and was fighting back tears.

636 Ms Amacio was scared of Mr Elvin. She said she was scared he would get angry with her and send her home, too, or hurt her family if she did anything wrong “or talked out of place”. She said she did not want to be sent back to the Philippines because the money she was earning in Australia was helping her family. She later detailed the benefits to her family of the money she had sent them.

637 Ms Bantilan deposed that during meetings with Mr Elvin and Mr Puerto at the Residence in the first month after arriving in Australia the therapists were told that if they did not follow the rules they would be sent home to the Philippines. Amongst other things, she remembered them saying:

Do not tell anyone about what happens at the shop. Do not tell them how many hours you are working or you will be in trouble with Immigration and be sent home[.]

638 She said that Mr Elvin would repeatedly tell her and the other massage therapists, especially during 2012 to 2013, that if they did not listen to him he would send them home.

639 She also gave an account of the episode described by Ms Amacio and set out at [629] above. Her evidence was consistent with the evidence of Ms Amacio. It is unnecessary to repeat it here. It is sufficient to observe that it was consistent with the evidence of Ms Amacio and she, too, deposed that Mr Elvin screamed at them during the late night meeting words to the following effect:

If you report me to Immigration, I will have your family killed. If you speak to immigration about me at all, I will get someone in the Philippines to kill your family. It is easy for me to do this.

640 Ms Bantilan recalled another meeting at the Residence with Mr Elvin and Mr Puerto in late 2012 in which Mr Elvin said words to the effect of:

Don’t tell anybody about what is going on because I have lot of connections in the Philippines and in Australia. Don’t even tell your husband. If you do I will kill your family. You know how easy it is for me to arrange someone to do that there.

641 She went on to say that, whenever they complained or mentioned anything about their hours of work or wages, Mr Elvin would get angry and repeat his threats to send them back and kill their families.

642 While Ms Bantilan acknowledged in cross-examination that she had never experienced violence from Mr Elvin or seen him being violent, she did say that they had seen him “very angry”.

643 Evidence to similar effect was given by the other Massage Therapists in this group — Ms Isugan and Mr Benting.

644 Ms Isugan said that one night after work about five days after the late night meeting at the Residence in July 2012, Mr Puerto told her to go and speak to Mr Elvin in his car where Mr Elvin repeated his threat. She said he told her words to the effect of:

If you tell immigration about anything that is happening or whatever I have told you, you can’t cover your face, I know who you are and I will get my revenge, even if this goes to court.

645 Mr Benting deposed that during the late night meeting at the Residence in July 2012 Mr Elvin, apparently seething with anger (“screaming and swearing”), said to the therapists words to the effect:

If you tell anyone what is going on here, if you tell your family or tell Immigration, I will kill your families. If you report me to Immigration, I will kill your family. It is so easy for me to pay someone in the Philippines to kill someone. It only costs 10,000 pesos. You must not complain and you have to listen to me and follow the rules always if you want to stay in Australia.

646 In cross-examination he burst into tears when recalling Mr Elvin’s anger that night. After composing himself, he volunteered:

You told us then that if we were going to tell other people about our real situation here, that you were going to do something like kill family members.

647 Mr Elvin’s follow-up question was passing strange. It was: “[W]hat exactly was I upset about?”

648 None of the witnesses were shaken in cross-examination. Each of them remains in fear of him. Mr Benting said he no longer lives in Canberra because he is scared of him.

649 Having regard to the consistency of the evidence given by the Massage Therapists, their demeanour under cross-examination, Mr Elvin’s propensity to lie when it suited him, Mr Puerto’s silence, and the evidence of an obvious motive to make the statements attributed to him, I am satisfied that the allegations that Mr Elvin threatened to send them back to the Philippines if they informed “immigration” of their working conditions and to have their families killed have been proved to the requisite standard.

650 The evidence given by the Therapists in the second group was different. None of them said that Mr Elvin made threats to kill their families. But each deposed that he told them they would be sent to the Philippines if they broke the rules or told “immigration” the truth about their working conditions.

651 Ms Sarto deposed that when they arrived at the house in Higgins, Mr Elvin said to them words to the following effect:

[Y]ou are not allowed to go out of the house at night after work and that the gate of the house will be locked. If you try to leave, I will send you back to the Philippines.

652 She also deposed that, about a week later, Mr Elvin told the second group of massage therapists after they returned from work (in the presence of the first group):

[Y]ou have to live here while you are working for me. I do not want you to drink alcohol or be friends with anyone else, especially any other people from the Philippines. You do not need to have any friends here. Do not talk to anyone, especially Filipino people. Do not try and get boyfriends or girlfriends. If you do not listen to me or if you try to leave, then I will send you back to the Philippines. Wendy used to work for me at Foot & Thai but I sent her back to the Philippines because she got a boyfriend.

653 Ms Sarto said that Mr Puerto was present, too, and translated what Mr Elvin said into Tagalog. She said that Mr Puerto told them:

If immigration visits the shop, you are to say that you work eight hours a day, you get paid $52,000 a year and you get holiday pay. We will send you back to the Philippines if you tell them the truth about your hours.

654 Ms Sarto also mentioned a conversation in late April or May 2013 in which Ms Amacio warned her that she should not complain about anything and reported that Mr Elvin had told them that, if they said anything to immigration he would get someone in the Philippines to “hurt and kill [their] families”.

655 She also said that in a “one on one session” with Mr Elvin in around late 2013 he told her:

There was a girl who worked here called Wendy and I sent her home. Do you know why I sent her home? It is because she disobeyed me. She didn’t listen to my rules. I told her if she spoke to Immigration after she left that I would get someone to kill her family.

656 She said she was scared of Mr Elvin and felt under “stress and pressure” not to make him or Mr Puerto angry. She feared for her job which she did not want to lose because of the financial assistance it enabled her to provide for her family in the Philippines.

657 Ms Ortega who, it will be recalled, was not required for cross-examination, deposed that the therapists who arrived with her were told they had to follow a number of rules, that if they broke the rules they would be sent home to the Philippines, and that they were not to tell immigration about the hours they were working at the shop or their working conditions.

658 Ms Ortega also said that in around 2013 and 2014, some of the therapists in the first group said to her words to the following effect:

[Mr Elvin] told us that if we tell anyone about this situation then he will hire a killer that is only costing 10,000 pesos to kill their family. We have been very scared of him.

659 Ms Castaneda remembered being told by Mr Elvin around the time the second group arrived in Canberra in April 2013 that they were not allowed to write down their actual hours of work “because there might be people from immigration that pop in and visit us and they do not want to see anything about the hours of work”. She also said that Mr Puerto trained them what to say if “immigration” came to the shop. In particular she said that in about April 2013, while they were all at the Residence, Mr Puerto said to them words to the following effect:

[I]f immigration visits the shop, you are to say that you work eight hours a day, you get paid $52,000 a year and you get holiday pay. We will send you back to the Philippines if you tell them truth about your working hours. There was an investigation in the shop from immigration in 2012 because there used to be Thai therapists working here. They dobbed on the company to immigration and the company was checked by immigration. The Thai people were sent back home so we now have Filipino therapists.

660 Ms Castaneda also deposed that Mr Elvin threatened to send her back to the Philippines if she did not perform well.

661 In addition Ms Castaneda recounted a conversation with Ms Amacio “on or around the end of 2013” in which Ms Amacio told her that Mr Elvin told the first group of therapists that if they told the truth to immigration about their situation he would hire someone to kill their families in the Philippines. In cross-examination Ms Castaneda said that she “remember[ed] very well she was very frightened”.

662 Mr Elvin strenuously denied making any such threats but I do not believe his denials.

663 None of the Therapists were discredited in cross-examination. I do not accept that any of them gave false evidence because they had been reprimanded by him. Their failure to make complaints until after they left FTM’s employ, a matter raised in cross-examination, is readily explicable by their fear of the reprisals Mr Elvin might take if they did. Ms Isugan said as much. As I mentioned earlier, their demeanour under cross-examination was consistent with their evidence. It was obvious that they were terrified of what Mr Elvin might do. Mr Elvin revealed in cross-examination his willingness to deceive. Furthermore, Mr Elvin’s demeanour under cross-examination graphically demonstrated how angry he could become when vexed or stressed.

664 I also take into account the fact that FTM was advised of the conditions of the subclass 457 visas when they were granted. For example in an email dated 1 June 2012 from the Department of Immigration of Immigration and Citizenship, FTM was advised that, as an approved standard business sponsor, it had to comply with its sponsorship obligations as well as “other Commonwealth, State and Territory Laws”. FTM was reminded of its obligations as a sponsoring employer to ensure that the terms and conditions provided to the visa holder are “no less favourable than the terms and conditions they provide, or would provide, to an Australian citizen or Australian permanent resident to perform work in an equivalent position at the same location”. FTM was also told in emails from the Department dated 4 April 2013 in relation to the approval of visas for the second group:

You should also be aware that the department may take administrative action such as cancelling your approval as a standard business sponsor or barring you from making any future applications for approval as a sponsor in certain circumstances. These circumstances include, but are not limited to, failure to satisfy a sponsorship obligation, providing or causing to provide false or misleading information to Immigration or the Migration Review Tribunal, or contravening a Commonwealth, State or Territory law.

665 In the 2012 email the Therapists themselves were told:

Once your visa ceases your permission to remain in Australia ends. You will need to obtain another visa or depart Australia. If you remain in Australia without a visa you will be an “unlawful non-citizen” and there will be serious consequences including possible detention and removal from Australia. If you are removed from Australia in this way there may be consequences should you wish to return to Australia in the future.

666 The uncontradicted evidence of the Therapists in the first group was that both police and “immigration” visited the Belconnen shop in July 2012. A week or two before the visit, at a meeting at the Residence, Mr Elvin told the Therapists, with Mr Puerto translating, what to say if “immigration” were to question them about their work in the shop. Mr Benting remembered Mr Puerto passing around a piece of paper with a list of things to say to the immigration officials. While he did not remember everything that was on the piece of paper and it was retrieved by Mr Puerto after everyone had read it, he did remember that it included words to the effect of: “8 hours of work, 30 minute break and 5 days a week”. He also recalled being told words to the following effect:

Do not write down your hours of work on anything that Immigration can find. If you tell them anything other than what is on the paper I showed you then I will tell Colin to send you home.

667 Mr Elvin was also informed by the Department by letter dated 11 January 2013 that FTM had been “identified for monitoring” as part of the Department’s activities to ensure sponsors are complying with sponsorship responsibilities”. He was advised that there are a number of circumstances in which the Minister might take administrative action against a sponsor, including by barring or cancelling approval, and that those circumstances include providing false or misleading information to the Department. While the letter from the Department post-dated the threats the Therapists in the first group said were first made in July 2012, the letter indicates that complaints had been made to the Department by other therapists hired around the same time as the Therapists in the first group: Zoren Pugoy, Ruben Bacolod, Melinda Barrios, and Mary Alolor.

668 On his own account, FTM had provided the Department with false and misleading information about the conditions of employment of the Massage Therapists. Mr Elvin had every reason to be worried about the possibility that the Therapists might report him to the Department or some other Commonwealth authority like the Ombudsman. The consequences for him would be dire. Even if he or the company were not prosecuted, if the truth were revealed his business model would be destroyed and in all likelihood the business itself would fail.

669 I find that Mr Elvin threatened to send all the Massage Therapists back to the Philippines (thereby terminating their employment) if they broke any of the rules, discussed or complained to anyone about their working conditions or reported FTM to “immigration” and to have their families killed if they did. I am unable to say whether Mr Elvin had any intention of carrying out these threats but I am satisfied that the Massage Therapists believed he was capable of doing so. A number of the Therapists gave evidence that therapists had been sent home either because they did not, or refused to, comply with one or other rule or because they were threatening to report Mr Elvin him to “immigration”. Mr Benting’s evidence was the most detailed in this respect.

670 While the Therapists in the second group were not directly threatened, they all become aware of the threats. A threat does not have to be conveyed directly to a particular employee. As Finkelstein J observed in *CPSU v Telstra* at [15], a threat can be just as effective “if it is communicated to a person in circumstances where it is intended to or is likely to find its way to the person threatened”. The threats made to the first group were communicated to them in circumstances where they were at least likely to reach other therapists, including those in the second group such as Ms Castaneda, Ms Ortega and Ms Sarto, who were brought into the service of FTM at the Belconnen store while members of the first group were still working there.

671 The threats were made by Mr Elvin within the scope of his apparent authority. Section 793 of the FW Act deems any conduct engaged in on behalf of a body corporate by an officer, employee or agent of the body within the scope of his or her actual or apparent authority to have been engaged in also by that body. I therefore find that FTM made these threats.

### Did the threats amount to adverse action?

672 I find that the threats to repatriate the Massage Therapists to the Philippines if they broke any of the rules or told “immigration” or anyone else about their working conditions amounted to adverse action because, in effect, they were threats made by FTM to dismiss them. In the circumstances it is unnecessary to decide whether it is also adverse action in either of the other two pleaded respects.

### Did FTM rebut the presumption that the threats were made for the alleged reasons?

673 FTM did not rebut the statutory presumption. The reason the threats were made is evident from their contents. I find that the threats were made in order to prevent them from exercising their workplace rights to make complaints to the immigration authorities or the Ombudsman in relation to their employment.

## Adverse action contrary to s 351(1) of the FW Act

### The allegations

674 In para 133 of the amended statement of claim and all its subsequent iterations, the Ombudsman pleaded that, during their employment, FTM took adverse action against the Massage Therapists within the meaning of item 1(b) in the table to s 342(1) of the FW Act in that it injured them in their employment by:

(a) failing to pay them minimum hourly rates;

(b) requiring them to make fortnightly cash repayments from their earnings;

(c) failing to pay them public holiday rates;

(d) failing to pay them Monday to Saturday overtime rates;

(e) failing to pay them Sunday overtime rates

(f) failing to pay their annual leave entitlements on termination;

(g) failing to pay them in full by reason of the unauthorised deductions;

(h) requesting or requiring them to work unreasonable additional hours;

(i) making the threats to send them back to the Philippines or have their families killed if they complained about their working conditions and instructing them not to discuss with, or complain about, those conditions to anyone; and/or

(j) causing the gates of the Residence to be locked overnight, thereby curtailing their movement outside working hours.

### The law

675 Section 351 relevantly provides as follows:

**Discrimination**

(1) **An employer must not take adverse action against a person who is an employee** … **of the employer because of the person’s race,** colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, **national extraction or social origin.**

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) **However, subsection (1) does not apply to action that is:**

**(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or**

(b) taken because of the inherent requirements of the particular position concerned; or

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) Each of the following is an ***anti-discrimination law*:**

 **…**

(ac) the *Racial Discrimination Act 1975;*

 …

(g)the *Discrimination Act 1991* of the Australian Capital Territory[.]

(Emphasis added.)

676 None of the terms “race”, “national extraction” or “social origin” are defined in the Act. It is therefore reasonable to infer that they were intended to have their ordinary meanings. But each of these terms can have a number of meanings. In determining which of the available meanings is intended, the terms must be read in context. The process of construing the meaning of any provision in a statute must always begin by examining its context and “[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute”: *Project Blue Sky* at [69] (McHugh, Gummow, Kirby and Hayne JJ). “Context” is used here in its widest sense to include such things as the existing state of the law and the mischief the new law is intended to remedy: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. It also includes the immediate statutory context and the legislative history.

677 In interpreting s 351, the Court is obliged to prefer the interpretation that would best achieve the statutory purpose (or object) to each other interpretation: Interpretation Act, s 15AA. The object of the FW Act appears in s 3. It is “to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusionfor all Australians by: … (e) enabling fairness and representation at work and the prevention of discrimination by … protecting against unfair treatment and discrimination …”. The objects of Pt 3–1 are set out in s 336(1) (in Div 1). They relevantly include:

(a) to protect workplace rights;

…

(c) to provide protection from workplace discrimination;

(d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.

678 The terms “race”, “national extraction”, and “social origin” appear elsewhere in the Act. Section 153, in Ch 2 Pt 2–3 Div 3, for example, prohibits the inclusion in a modern award of terms that discriminate against an employee “because of, or for reasons including, the employee’s race, … national extraction or social origin”. In Ch 2 Pt 2–4 Div 4, s 194 relevantly provides that a term of an enterprise agreement is an unlawful term if it is “a discriminatory term” and s 195(1) defines a term of an enterprise agreement as a discriminatory term “to the extent that it discriminates against an employee covered by the agreement because of, or for reasons including, the employee’s race, … national extraction or social origin”. Section 772(1), in Ch 6, Pt 6–4, Div 2, prohibits an employer from terminating an employee’s employment for any one or more of a number of reasons including (in para (f)) “race, … national extraction or social origin”. The object of that Division is described in s 771. It is to give effect, or further effect, to:

(a) the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation, done at Geneva on 25 June 1958 ([1974] ATS 12); and

(b) the ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, done at Geneva on 23 June 1981 ([1991] ATS 7); and

(c) the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4); and

(d) the Termination of Employment Recommendation, 1982 (Recommendation No. R166) which the General Conference of the ILO adopted on 22 June 1982.

679 The Explanatory Memorandum stated at [2771] that Pt 6–4 Div 2 “broadly reproduces” the unlawful termination protections in s 659 of the WR Act for non-national system employees, where a remedy is not available under the general protections provisions in Pt 3–1.

680 In contrast to Pt 6–4 Div 2, however, Pt 3–1, which includes s 351, does not rely on the external affairs power in the *Constitution* in the same way as the unlawful termination protections, which, unlike the provisions in Pt 3–1, apply to all employees in Australia (see Explanatory Memorandum at [1342]). Nevertheless, the attributes listed in s 351(1) also appear in s 772(1)(f). It has been said that “[i]t is a sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise”: *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J, with whose judgment Barwick CJ and Jacobs J agreed). Notwithstanding the different constitutional foundations for the different parts of the FW Act, I do not consider that there is reason to do otherwise in determining the true meaning of the same terms in s 351(1).

681 Another part of the relevant context is s 351(2) and (3). In ***Sayed*** *v Construction, Forestry, Mining and Energy Union* [2015] FCA 27; 327 ALR 460; 149 ALD 88 at [164], speaking of the term “political opinion”, Mortimer J held that:

The context in which it appears, especially the presence of s 351(2) and (3) as central aspects of the determination of a contravention under s 351(1), means that the term should be given, insofar as it is possible, a meaning which is consistent with the interpretation it has been given in anti-discrimination law.

682 The same is true of the other attributes in s 351.

### The issues

683 Three questions arise for consideration:

(1) Did FTM injure the Massage Therapists in their employment by taking the actions listed in [674] above;

(2) Did FTM (or Mr Elvin) prove that the actions were not taken because of the race, national extraction and/or social origin of the Massage Therapists?

(3) If FTM did prove that the actions were not taken because of their race but did not prove that they were not taken because of either their national extraction or social origin, does s 351(1) apply since discrimination on the basis of national extraction and social origin is not unlawful under the *Discrimination Act 1991* (ACT)?

### Did FTM injure the Massage Therapists in their employment by taking the action listed in [674] above?

684 It will be recalled that to “injure an employee in his or her employment” has been interpreted broadly to cover, not only a legal injury, but “any adverse [effect on], or deterioration in, the advantages enjoyed by the employee before the conduct in question”: *Patrick Stevedores v MUA* at [4]. Applying this test, each of the actions upon which the Ombudsman relied amounts to an injury. And it is beyond doubt that all the matters listed in (a)–(i) above are injuries in the Massage Therapists’ employment or threats to injure them in their employment and I so find. The more difficult question is whether (j) (curtailing their movement outside working hours by causing the gates of the Residence to be locked overnight) was an injury “in [their] employment”. The point was certainly arguable, since living in the Residence behind the gates was not merely incidental to their employment, but at least on one view of the evidence a condition of their employment. But the proposition is not self-evident. And no argument in support of it was advanced, either orally or in writing. Save to deny that the gates were ever locked, Mr Elvin did not address the matter.

685 There appear to be few authorities directly on point and none I have been able to find with analogous facts. The dearth of authority is surprising considering that the phrase has a long pedigree. It first appeared in s 5(1) of the *Conciliation and Arbitration Act 1904* (Cth), which in 1982 took the following form:

An employer shall not dismiss an employee, or injure him in his employment, or alter his position to his prejudice, by reason of the circumstances that …

686 One of the circumstances was refusing or failing to join in industrial action (s 5(1)(aa)). In *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155 Ellicott J held that action by an employer in standing down an employee at the request of the union was “action which injures the employee in his employment” within the meaning of s 5(1) (at 164). His Honour remarked:

The words “injure in his employment” are in the context of s. 5 words of wide import … They are, in my view, applicable to any circumstances where an employee in the course of his employment is treated substantially differently to the manner in which he or she is ordinarily treated and where that treatment can be seen to be injurious …

687 In *Maritime Union of Australia v Fair Work Ombudsman* (2016) 247 FCR 154 (***MUA v FWO****)* the Full Court considered the scope of the phrase “in the person’s employment...” in column 2 of item 7 of the table to s 342(1). Item 7 relevantly provides that adverse action is taken by an industrial association, or an officer or member of an industrial association, against a person if the industrial association or its officer or member:

(b) takes action that has the effect, directly or indirectly, of prejudicing the person **in the person’s employment** or prospective employment[.]

(Emphasis added.)

688 In *MUA v FWO* the action in question was displaying posters at numerous parts of the workplace vilifying as “scabs” a number of employees who had worked during a strike. The Full Court was unanimous that the action fell within the terms of the provision.

689 Tracey and Buchanan JJ held at [16] that:

It is apparent that the intent of distributing the posters, quite apart from their natural tendency to engender fear for the personal safety of the persons concerned, and the safety of their families and even their property, was to severely diminish the standing of the targets with their fellow employees, then and in the future. We would not accept that a consideration of “employment” for this purpose should be confined to any narrow consideration of a formal relationship with an employer or to physical or tangible benefits of employment.

690 They went on to note at [21] that the primary judge was comfortably satisfied that the publication of the posters had achieved their intended effect and that “those intended effects were bound up with their employment”, adding that “[i]t would be artificial to say that the prejudice was not *in* the employment”.

691 The situation in the present case is not so clear cut.

692 Moreover, in *MUA v FWO* at [59] Bromberg J held:

The word “in” … requires that the [prejudicial] effect be located *in* the person’s employment. It identifies that there must be a nexus between the effect and an advantage enjoyed by the person which that effect has prejudicially altered. The advantage affected must be an advantage enjoyed *in* the person’s employment. The word “in” connotes that the advantage must derive from the employment. If a mere relation, as distinct from a derivational relation, between the employment and the advantage had been intended, the familiar statutory phrase “in or in connection with”, or perhaps just “in connection with”, would likely have been utilised. The preposition “in” operates by way of limitation. That it does not have the breadth of “in connection with” or “in relation to” has been emphasised on many occasions in relation to the phrase “in trade or commerce” in the former s 52 of the *Trade Practices Act 1974* (Cth): *Toben v Jones* (2012) 298 ALR 203 at [40] (Yates J) and the cases there cited. In *Concrete Constructions (NSW) Pty Limited v Nelson* (1990) 169 CLR 594, Toohey J at 614 said of the phrase “in trade or commerce”:

… The question is not whether the conduct engaged in was *in connexion with* trade or commerce or *in relation to* trade or commerce. It must have been *in* trade or commerce. While there are dangers in seeking for the meaning of an expression through the substitution of another, the phrase “as part of trade or commerce” does, I think, come close to what is intended.

(Emphasis in original.)

693 In ***Lamont*** *v University of Queensland (No 2)* [2020] FCA 720 at [78] Rangiah J agreed. His Honour also pointed by way of contrast to the use of the phrase “in relation to his or her employment” in the definition of “workplace right”. I would add that the same phrase also appears in the table to s 342(1), itself, in two places, including, importantly, in item 3, which provides that adverse action is taken by “a person (the principal) who has entered into a contract for services with an independent contractor against the independent contractor … if the principal:

(b) injures the independent contractor in relation to the terms and conditions of the contract[.]

694 Rangiah J observed in *Lamont* that a closer connection between the injury and the employment is required for an injury to be “in … employment”, noting that not every injury with a relationship to employment is necessarily an injury “in employment”.

695 In the absence of any assistance on this question, I am not satisfied that curtailing the movement of the Massage Therapists by causing the gates of the Residence to be locked overnight is action which injures the Therapists “in [their] employment”.

696 The Ombudsman alleged that the adverse action was taken against the Massage Therapists for reasons which included their race and/or national extraction and/or social origin. Thus it is presumed that the action was taken for those reasons unless FTM proves otherwise (s 361).

697 The Ombudsman pleaded that the Massage Therapists were Filipino by both race and national extraction. On the question of social origin she pleaded in paras 136–137:

136 By reason of the matters pleaded at paragraphs 9, 12, 13, 14(a) to 14(d), 16 and 17 above, the Employees:

(a) were born and lived in a country with low socio-economic circumstances relative to Australia;

(b) were each sponsored on a 457 visa and therefore dependent on the First Respondent to stay in Australia;

(c) had English as their second language;

(d) were not educated in Australia and were unaware of their legal rights;

(e) were socially isolated from the broader Australian community by virtue of them residing in the Residence where the gates were locked overnight and being directed not to talk to anyone about their working conditions; and

(f) had financially dependent family members back in the Philippines and regularly remitted funds back to the Philippines to support them.

***Particulars***

*A. The Philippines is ranked as the 116th country out of 188 countries globally in the Human Development Index as included in a United Nations Development Programme’s Human Development Report released on 21 March 2017 (****Human Development Index****).*

*B. Australia is ranked second out of 188 countries globally in the Human Development Index.*

*C. The Employees were dependent on their employment with the First Respondent to remain in Australia.*

*D. As the Employees came from the Philippines on a 457 Visa under the sponsorship of the First Respondent to work in Australia, they were more vulnerable to exploitation and underpayments as they were not aware of their employment entitlements under the FW Act and Australian law.*

137 By reason of the characteristics pleaded at paragraph 136 above, **the Employees had the ‘social origin’ of a “vulnerable worker on a temporary subclass 457 visa recruited to work in Australia from a lower socio economic South East Asian country**” for the purposes of section 351(1) of the FW Act.

***Particulars***

*A. The term ‘social origin’ refers to somebody’s socio-occupational or ‘sociooccupational category’ and is measured by the lack of a person’s economic, social, cultural or human capital.*

(Emphasis added).

### Did FTM (or Mr Elvin) rebut the presumption that a substantial and operative reason for injuring the Massage Therapists in their employment was their race, national extraction and/or social origin?

698 There is no dispute that at all relevant times Mr Elvin recruited only Filipinos directly from the Philippines to work as massage therapists for FTM on subclass 457 visas.

#### Mr Elvin’s evidence

699 Mr Elvin denied that the reason he did not pay the Massage Therapists in accordance with the award was their Filipino race. In answer to the proposition that he acted in this way because they came from the Philippines and, to his knowledge, were vulnerable, he replied:

My mum would never allow something like that. She was friends with them all.

700 But Mrs Elvin had no say in the matter. Moreover, neither the evidence given by the Massage Therapists nor the evidence given by Mrs Elvin supports the assertion that Mrs Elvin was a friend of any, let alone all, of the Therapists. On her own evidence she barely spoke to, or interacted with, them.

701 In answer to the proposition that he failed to pay the Massage Therapists in accordance with the award because he knew they were vulnerable employees, Mr Elvin replied:

I treat all human beings as equal. That’s the way I am, okay, Mr Seck. I don’t look at different people in different ways. If they’re decent human beings, then I’m a decent human being.

702 He also insisted he had treated the Filipino employees in exactly the same way he treated the Thai employees.

703 Mr Elvin also denied that he did not pay the Therapists in accordance with the award because he understood he could exploit them as a result of their social isolation and financial dependence and denied that he made them work the hours they did because he knew they were vulnerable as a result of working under 457 visas, being socially isolated in Australia, and financially dependent on him. Similarly, he denied requiring the Therapists to make the fortnightly cash repayments for these reasons or because they came from the Philippines.

#### Race and national extraction

704 In substance, the Ombudsman’s pleaded case was that race and national extraction were one and the same. But they are not synonymous and, in construing any statutory provision, a court must strive to give meaning to every word: *Project Blue Sky* at [71]. Still, the terms may overlap, just like race and colour or race and ethnicity. In some circumstances, people of the same race or colour may have the same national extraction and vice versa, but that is by no means invariably so. Whatever else may be clear, however, there is no bright line between race, colour, and national extraction nor, for that matter, between race and religion. Indeed, the lines between race, colour, national extraction, religion and social origin are equally blurry.

705 The *Butterworths Australian Legal Dictionary* (Butterworths, 1997) defined “race” as “a group of people who regard themselves as having a particular historical identity in terms of their colour, or their racial, national or ethnic origins”.

706 In *Calado v Minister for Immigration and Multicultural Affairs* (1997) 81 FCR 450 at 455 Tamberlin J observed that the popular understanding of race “accords importance to physical appearance, skin colour and ethnic origin”: His Honour went on to say:

There can be no single test for the meaning of the expression “race” but the term connotes considerations such as whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of colour, and national or ethnic origins. Another consideration is whether the characteristics of members of the group are those with which a person is born and which he or she cannot change.

707 The *Equal Opportunity Act 1984* (Vic) defined “race” in s 4(4) to include “colour, nationality, and ethnic or national origin”. Its successor, the *Equal Opportunity Act 2010* (Vic), defines “race” (in s 4) to include “colour… descent or ancestry… nationality or national origin… [and] ethnicity or ethnic origin”. Both even contemplate that one might have more than one race, for they include in the definition a stipulation in the following terms (s 4(e) of the current Act) or to the following effect (s 4(5) of the 1984 Act):

[I]f 2 or more distinct races are collectively referred to as a race—

(i) each of those distinct races;

(ii) that collective race[.]

708 The obvious intention of the Victorian Parliament was to ensure that the term “race” was interpreted as broadly as possible. Similarly, the intention of the Australian Parliament was to ensure that no-one fell through the cracks.

709 In ***Macabenta***  *v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202 at 209–10, the Full Court (Carr, Sundberg and North JJ), noting that the phrase used in s 10 of the *Racial Discrimination Act 1975* (Cth) — “race, colour or national or ethnic origin” — were transposed from Art 1.1 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (**Racial Discrimination Convention**), held that the same phrase in the Racial Discrimination Act should carry the meaning intended by the Convention. Their Honours continued:

The object and purpose of the treaty are, in our opinion, sufficiently clear. **They can be seen to be the elimination of racial discrimination and the provision of guaranteed rights without distinction as to race, colour, or national or ethnic origin.** The core concern is racial discrimination. Our reading of the extrinsic materials relied upon by the appellant, and in particular the debates in the Sub-commission on Prevention of Discrimination and Protection of Minorities and in the General Assembly itself (in Committee), shows that **the addition of the words “colour, or national or ethnic origin” was intended to give added content and meaning to the word “race” or “racial discrimination**”. The delegates had divergent views on whether “national origin” meant something different from “ethnic origin”. But in the end, they were all agreed that the quest was to capture the somewhat elusive concept of race.

(Emphasis added.)

710 In its 2003 report on the *Protection of Human Genetic Information in Australia*, the Australian Law Reform Commission observed at [36.42] that:

It is now well-accepted among medical scientists, anthropologists and other students of humanity that “race” and “ethnicity” are social, cultural and political constructs, rather than matters of scientific “fact”.

711 The Ombudsman referred in her closing submissions to two dictionary definitions of race before effectively ignoring them.

221. The Macquarie Dictionary defines ‘race’ as ‘1. A group of people sharing genetically determined characteristics such as skin pigmentation or hair texture. 2. The differentiation of people according to genetically determined characteristics. It is defined in the Shorter Oxford English Dictionary as ‘a tribe, nation or people, regarded as of common stock; any of the major divisions of humankind, having in common distinct physical features or ethnic background’.

222. No Australian court or tribunal has sought to advance a precise or exhaustive definition of “race”. Overseas courts have considered the definition of race and eschewed scientific or sociological definitions of race. The case law states that race should be understood in the popular sense rather than an anthropological or biological sense. The real test is whether the individuals or group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour, or their racial, national or ethnic origins. That must be based on a belief shared by members of the group.

712 In *Shackley v Australian Croatian Club Ltd* [1995] IRCA 475; 61 IR 430 an employee, who claimed she was told by the president of the Croatian Club that she was dismissed from her employment because she was not Croatian, succeeded in establishing that she was dismissed because of her race in contravention of s 170DF of the *Industrial Relations Act 1988* (Cth). But the Court (Moore J) was at pains to emphasise that no submission was made that the characteristic of being Croatian is not a characteristic of “race” as the term was used in s 170DF(1)(f) (a predecessor of s 772(1)(f) of the FW Act), in contradistinction to “national extraction or social origin”. Rather, the matter proceeded on the assumption that it was. The issue between the parties was primarily a factual one, whether the words the employee attributed to the Club’s president were uttered.

713 The only authorities on the question of race to which I was taken were ***Ealing London Borough Council*** *v Race Relations Board* [1972] AC 342 and ***King-Ansell*** *v Police* [1979] 2 NZLR 531.

714 *Ealing London Borough Council* involved a Polish immigrant (Zesko), who was qualified by residence for housing accommodation afforded by the Council but was not accepted onto the Council’s waiting list because of the Council’s rule that an applicant had to be “a British subject within the meaning of the *British Nationality Act 1948*”. Zesko complained to the Race Relations Board. The Board determined that the Council had unlawfully discriminated against him on the ground of his “national origins” contrary to the *Race Relations Act 1968* (UK), which relevantly outlawed discrimination in the provision of housing accommodation by one person against another on the ground of colour, race or ethnic or national origins. At first instance Swanwick J refused to grant declarations the Board had sought. The question on the appeal was whether discrimination in favour of British subjects (within the meaning of the British Nationality Act) and against aliens was discrimination on the ground of “national origins”.

715 By majority, Lord Kilbrandon dissenting, the House of Lords held that Zesko had been discriminated on the ground of his nationality, rather than his national origins, and that therefore the Council had not acted unlawfully.

716 Zesko identified as Polish but his nationality was Russian. At the time of his birth Poland was part of Russia and, in any case, he was born in Siberia. I will return to *Ealing London Borough Council* later but it is relevant to note at this point that Viscount Dilhorne observed at 359 that Zesko’s race was Polish. By rendering unlawful discrimination on the ground of colour, race or ethnic or national origins in an Act the long title of which included the prevention of discrimination on racial grounds, his Lordship considered (at 358) that the use of the words “colour, race or ethnic origins” “show[ed] the content of the word ‘racial’”. His Lordship also held that Zesko’s national origins were Polish.

717 Lord Simon observed at 362 that “racial” was not a term of art and apprehended that anthropologists would dispute how far the word “race” is biologically relevant. He described the crucial expression as “rubbery and elusive language”. He intimated that race was being used here “in its popular sense” and that the object was “to leave no loophole for evasion”. Similarly, Lord Cross surmised at 366 that the reason “ethnic or national origins” were inserted was to prevent argument over the exact meaning of “race”.

718 The question in *King-Ansell* concerned the meaning of the expression “ethnic … origins of that group of persons” in s 25 of the *Race Relations Act 1971* (NZ), which in substance provided that it was an offence to do certain things “with intent to excite hostility or ill-will against, or bring into contempt or ridicule” “any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons”. That is not the question in the present case. But the Court did comment on the meaning of “race” in the context of the Race Relations Act.

719 At trial the prosecution called expert evidence from an academic with post-graduate degrees in anthropology and sociology on the meaning of “race” and “ethnic origin”. The academic, Dr MacPherson, referred to race as “the possession of a set of genetic characteristics which are typical in all members of that race” (at 534). While Richmond P considered that his definitions were not appropriate in the context of the legislation (at 535) and that the word “race” is used in the Act in a wider, popular sense, his Honour regarded the evidence Dr MacPherson gave about to the traditional customs and beliefs of the Jewish people as “of critical importance to the case”.

720 No comparable evidence was adduced here. Still, the Ombudsman argued that the test formulated by Richardson J in *King-Ansell* was the test that should be applied to the meaning of “race” in the FW Act. She relied on the following statement at 542:

The ultimate genetic ancestry of any New Zealander is not susceptible to legal proof. **Race is clearly used in its popular meaning**. **So are the other words**. The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins. That must be based on a belief shared by members of the group.

(Emphasis added.)

721 In *Mandla v Dowell Lee* [1983] 2 AC 548 (HL), where the question was whether Sikhs were to be regarded as a “racial group” for the purposes of the *Race Relations Act 1976* (UK),the answer was said to turn on whether Sikhs were a group defined by reference to “ethnic origin”. Lord Fraser of Tullybelton, with whom the other Law Lords agreed, said at 562:

For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.

722 At 564 his Lordship approved the remarks of Richardson J in *King-Ansell* at 542, cited above, and also his Honour’s statement at 543 that:

[A] a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.

723 In *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 244, however, speaking of the expression “people of any race” in s 51(xxvi) of the *Constitution,* Brennan J said:

As the people of a group identify themselves and are identified by others as a race by reference to their common history, religion, spiritual beliefs or culture as well as by reference to their biological origins and physical similarities, an indication is given of the scope and purpose of the power granted by par. (xxvi). The kinds of benefits that laws might properly confer upon people as members of a race are benefits which tend to protect or foster their common intangible heritage or their common sense of identity. Their genetic inheritance is fixed at birth; the historic, religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may provide. The advancement of the people of any race in any of these aspects of their group life falls within the power.

724 In the same case, Deane J said at 573–4 that the expression had a “wide and non-technical meaning” and relied on *King-Ansell* and *Mandla.*

725 In *Eatock v Bolt* (2011) 197 FCR 261at [313] Bromberg J held that the words “race” and “ethnic origin” in the Racial Discrimination Actshould be given their “broad popular meanings” and observed that, in popular usage, the terms are often used interchangeably. His Honour considered that attempting to draw a meaningful distinction between them is likely to prove elusive, although “race” can be used to identify a category of people made up of many ethnic origins. He held that Australian Aboriginal people are a race with a common ethnic origin as they are a group of people who regard themselves and are regarded by others as having the two essential distinguishing features mentioned by Lord Fraser in *Mandla*: a long shared history and a distinctive culture.

726 I accept the Ombudsman’s argument that “race” in the FW Act is also intended to have a broad meaning. On the assumption that the test formulated by Richardson J in *King-Ansell* is equally applicable to determining the question of race for the purposes of the FW Act, however, there was a paucity of evidence on the subject. In particular, I was not taken to any evidence to show that the Massage Therapists or Filipinos generally regard themselves and are regarded by others in the community as having such an identity or such features. I was not invited to take judicial notice of the matter and I do not think it is open to me to do so.

727 On the other hand, in cross-examination Mr Elvin admitted that, by deciding to employ people on subclass 457 visas from the Philippines, FTM was “only employing people from one racial group”. That constitutes evidence that he recruited massage therapists on FTM’s behalf from a particular racial group. Whether that group is properly defined as Filipino or by reference to the particular ethnic group from which they came hardly seems to matter.

728 In *King-Ansell* Woodhouse J said at 536:

The issue, of course, is not the meaning which very wisely may have been given to the concept of race for purposes of comprehensible scientific discussion but what meaning the word is intended to convey in the statute. In that regard it will be noticed that Dr MacPherson himself has recognised that the word has a “common usage”, as he expressed it. And that **common usage has for long enabled constant reference to be made to biologically different peoples as a single race. For example it is a natural use of the word to speak of the English race or of the Slavs as a race, or of Germans. It is a meaning which is concerned, not with genetic processes, but with shared characteristics of a socio-political nature such as customs, philosophy and thought, history, traditions, nationality, language or residence without any reference to biological considerations.** **And when the purpose and language of the Race Relations Act is considered as a whole I am satisfied that is the way in which the term is intended to be used.**

(Emphasis added.)

729 A similar approach should be taken to the use of the term “race” in the FW Act. Based on the fact that Mr Elvin accepted that the Massage Therapists came from a single racial group, I accept that they were selected for employment on the basis of their race. Mr Elvin was not asked to identify what that racial group was. Giving race the broad interpretation adopted by Woodhouse J in *King-Ansell,* however, andconsistent with the purpose and language used in the Act, it is enough that they are all Filipino. Regardless, for the reasons given below, I am also persuaded that both their race and national extraction were substantial and operative reasons for the way they were treated in their employment.

730 The Racial Discrimination Act prohibits discrimination by reason of national origin rather than national extraction. The difference in the terminology used in that Act and that which is used in the FW Act, however, is not substantial and may only be attributable to the different historical origins of the provisions in question. The relevant text of the Racial Discrimination Act is taken from Art 1.1 of the Racial Discrimination Convention, which is a schedule to the Racial Discrimination Act and which the Act transposed into Australian domestic law: *Commonwealth v McEvoy* (1999) 94 FCR 341 at [31] (von Doussa J). “Nationality” is a legal status; “national origins” or “national extraction” is not: *Ealing London Borough Council* at 365 (Lord Cross); *Australian Medical Council v Wilson* (1996) 68 FCR 46. In *Ealing London Borough Council,* which was concerned with unlawful discrimination on the ground of colour, race, or ethnic or national origins under the *Race Relations Act 1965* (UK), Viscount Dilhorne said at 358 that, in the context of the Act, the word “national” in “national origins” means “national in the sense of race and not citizenship”

731 In *Macabenta*, which was concerned with the meaning of “national origin” in s 10(1) of the Racial Discrimination Act, the Full Court at 211–212 applied *Ealing London Borough Council,* expressly approving the following passage in the speech of Lord Cross at 365 of that judgment:

There is no definition of “national origins” in the Act and one must interpret the phrase as best one can. To me it suggests a connection subsisting at the time of birth between an individual and one or more groups of people who can be described as “a nation” — whether or not they also constitute a sovereign state ... Suppose, for example, that a man of purely French descent marries a woman of purely German descent and that the couple had made their home in England for many years before the birth of the child in question. It could ... be said that the child had three “national origins”; French through his father, German through his mother and English not because he happened to have been born here but because his parents had made their home here. Of course, in most cases a man has only a single “national origin” which coincides with his nationality at birth in the legal sense and again in most cases his nationality remains unchanged throughout his life. But “national origins” and “nationality” in the legal sense are two quite different conceptions and they may well not coincide or continue to coincide.

732 In *Merlin Gerin (Australia) Pty Ltd v* ***Wojcik***[1994] VSC 209Nathan J observed that the words “nationality and ethnic or national origin” in the *Equal Opportunity Act 1984* (Vic) were “not quite the same as “national extraction and social origin”, terms used in the *Metal Industries Award 1984* which relevantly prohibited termination of employment on the ground of “national extraction or social origin”. His Honour considered that the differences showed “some, but not great, distinction”. He said that “national extraction” was “a little wider” than “nationality or national origin” and it was “at least arguable, that nationality is restricted to citizenship or a country other than, or perhaps as well as Australia, but ‘national extraction’ refers to antecedents as well as citizenship”.

733 Later, his Honour said, albeit without reference to authority:

“National extraction” means both the nation and the nationality from which a person is derived, either by birth or by self and community identification. A person may perceive themselves to be, and be seen by the community in which they live, work and mix as being non-Australian despite the fact that they have been born here.

#### Social origin

734 I was taken to no case law on the meaning of “social origin” in the FW Act.

735 “Social origin” discrimination was defined by the ILO Committee of Experts on the Application of Conventions and Recommendations to include discrimination because of class, caste or socio-occupational category (Committee of Experts on the Application of Conventions and Recommendations, *Equality in Employment and Occupation:* ***Report*** *III (Part 4B): General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No 111)* (Report presented to the International Labour Conference, 75th sess, Geneva, 1988)). At [54] of the Report (on p 53) the authors wrote:

During the preparatory work of the Convention, social origin was mainly envisaged in terms of social mobility, defined as the possibility for an individual to pass from one class or social category to another. **The problem of discrimination on the basis of social origin arises when an individual’s membership in a class, a socio‑occupational category or a caste determines his or her occupational future either by denying him or her certain jobs or activities or, on the contrary, by assigning him or her to certain jobs.** Although such situations are rarely encountered in so pronounced a form at the present time, prejudices and preferences based on social origin may still persist even where rigid stratification has disappeared.

(Emphasis added.)

736 In *Wojcik,* Nathan J observed that “social origin” is wider than “national origin” in that it includes factors apart from country of birth.

[“Social origin”] comprehends those matters which are formulative of a person’s acculturation. These include language or mother tongue(s), life cycle customs such as initiation into a religious community, affirmation of adulthood, and such things as diverse as dress and diet. The list is not exhaustive, nor could it ever be, each person’s characteristics must be decided individually. The determinants of “social origin” are not merely self-defined, but also depend upon the way in which a person is assigned by the dominant or majority group in the community in which that person socialises, lives or works. Consequently a person may have one social origin in one circumstance and a different one in another …

[“Social origin”] is wider than both nationality and “national extraction”. A person may have been born in Australia, even of Australian born great grandparents and yet have a social origin different from that of the mainstream. Of course, one immediately thinks of Koories but they are covered by the anti-discrimination provisions relating to race. The social origin of persons to which the Award relates are those who may have maintained different social customs from those prevailing in the community in which they also socialise, live and work. Another example illustrates the point. Some religious groups sustain exclusive communities, shunning the general community and excluding their young people from it. They often maintain different dress standards from the mainstream and costume themselves in antique clothing throughout their lives. All this seems ludicrous to the general onlooker. Plainly the people on the Glen Iris tram would say such people have a different social origin to themselves, yet both the dominant and the distinct group could be locally born.

737 His Honour considered that “ethnic origin”, the expression used in the *Equal Opportunity Act 1984* (Vic), was encompassed by “social origin”, the expression used in the Metal Trades Award. He referred to the *Macquarie Dictionary* definition of “ethnic” and accepted that it accurately defined the word “in common parlance” as:

(1) pertaining to, or peculiar to a population and especially to a speech group, (3) of or pertaining to members of the community who are migrants or the descendants of migrants and whose native language is not English and (8) a term of abuse or derision.

738 I accept that the term “social origin”, like “race” and “national extraction”, is to be interpreted broadly, consistently with the legislative purpose of protecting people from workplace discrimination.

739 The Ombudsman submitted that the social origin of the Massage Therapists could be characterised as “vulnerable workers on temporary subclass 457 visas recruited to work in Australia from a lower socio-economic country”.

740 The vulnerability of workers on temporary visas is notorious. Concerns about the exploitation of temporary migrant workers prompted a 2008 review of the integrity of the temporary work visa scheme in 2008. In March 2015, while the Massage Therapists were still working for FTM, the Senate arranged for an inquiry by its Education and Employment References Committee into, amongst other things, “the extent of any exploitation and mistreatment of temporary work visa holders”. The Committee’s final report was published in March 2016. In its report, entitled *A National Disgrace: The Exploitation of Temporary Work Visa Holders,* the Committee accepted that, despite the high level of regulation of the 457 visa program, temporary visa workers were vulnerable to exploitation. It examined the underlying structural factors that made them vulnerable. It concluded (at [6.81], read with [6.8]–[6.19]) that one of the key structural factors was the worker’s dependence on the sponsoring employer both for work and, ultimately, the right to stay in Australia.

741 The Ombudsman argued that the social origin of the Massage Therapists is characterised by the following circumstances:

(a) being born and having lived in a country with lower “socio-economic circumstances” than Australia;

(b) being sponsored on temporary subclass 457 visas and therefore dependent on an employer to stay in Australia;

(c) not being native English speakers (“having English as a second language”);

(d) not having been educated in Australia and unaware of their legal rights;

(e) being socially isolated from the broader Australian community by virtue of them residing in the accommodation provided by their employer where the gates were locked overnight and being directed not to talk to anyone about their working conditions;

(f) having financially dependent family members back in the Philippines and regularly remitting money there to support them.

#### Consideration

742 While Mr Elvin insisted that the actions in question were not taken because of the race or national extraction of the Massage Therapists, I am not persuaded that the presumption in favour of the Ombudsman has been rebutted. For the reasons given earlier, I take his denials with a grain of salt. I can place no reliance on his evidence.

743 It is plain that the threats to send the Massage Therapists back to the Philippines or cause harm to their families in the Philippines were made because they were of Philippine extraction. They would certainly not have been made if they were Australian. I am also satisfied that a substantial and operative reason FTM took the other actions was that Mr Elvin believed the Therapists would be prepared to put up with below award rates and conditions that contravened the NES because, to his knowledge, the rates FTM paid were far higher than the rates they were paid in the Philippines and the hours they were required to work were substantially less, and that they were unlikely to complain because they were Filipinos with families in the Philippines, to whom the Therapists were devoted and who relied on their financial support. According to a file note made by FWI Hurrell annexed to Mr Thomas’s affidavit, Mr Elvin told FWI Hurrell that in the Philippines “they get $150 a month and they work until 2 am, the conditions were much better here”. He also told her that the Therapists did not complain about the money in Australia.

744 By force of s 793(2) of the FW Act, Mr Elvin’s reasons are taken to be FTM’s reasons.

745 For these reasons I find that the adverse action described in (a)–(i) of [672] above was taken because of the Therapists’ race and national extraction.

746 Without doubt, however, other factors were also operative, especially their precarious positions as temporary visa holders who had been sponsored by FTM to come to Australia and whose continuing residence in this country for the duration of the sponsorship depended on their continuing employment.

747 I accept that the place and circumstances of their birth and the circumstances in which they came to Australia are aspects of the social origins of the Massage Therapists. I also accept that the facts that they are not native English speakers and were educated in the Philippines are also relevant to their social origins. Furthermore, I accept that social isolation from the broader Australian community is often a feature of the migrant experience. But I cannot accept that the circumstances in which they were placed in Australia by FTM are relevant to this question. They do not speak to their social “origins”. Nor do I see the relevance of their family circumstances except to the extent that they indicate that the Therapists did not come from wealth and their families were dependent on them for financial support.

748 Nevertheless I do accept that the social origin of each of the Massage Therapists can fairly be described in the way the Ombudsman pleaded the matter, namely that of a vulnerable worker on a temporary subclass 457 visa recruited to work in Australia from a lower socio-economic South East Asian country**.**

749 I find that FTM has failed to discharge its burden of proving that the social origin of the Massage Therapists was not a substantial and operative reason for the actions it took to injure the Massage Therapists in their employment. Through Mr Elvin, FTM knew of their social origins, in particular their socio-economic backgrounds and precarious residential status, and exploited these matters to its advantage.

750 The remaining question is whether action taken for this reason was not unlawful under any anti-discrimination law in force in the ACT.

### Was the action not unlawful under any anti-discrimination law in force in the ACT?

751 At all material times the *Discrimination Act 1991* (ACT) prohibited discrimination in work. Section 10 of the Act relevantly provided:

(1) It is unlawful for an employer to discriminate against a person—

(a) in the arrangements made for the purpose of deciding who should be offered employment; or

(b) in deciding who should be offered employment; or

(c) in the terms or conditions on which employment is offered.

(2) It is unlawful for an employer to discriminate against an employee—

(a) in the terms or conditions of employment that the employer affords the employee; or

(b) by denying the employee access, or limiting the employee’s access, to opportunities for promotion, transfer or training or to any other benefit associated with employment; or

(c) by dismissing the employee; or

(d) by subjecting the employee to any other detriment.

…

752 But discrimination in work is only unlawful if it is carried out on the ground of any of the attributes listed in s 7(1), referred to as “protected attributes”. At all relevant times the protected attributes included race but not national extraction or social origin. I was not taken to any authorities under the Discrimination Act to indicate that “race” was intended to include national extraction. “Immigration status” is now a protected attribute but it was not during the periods the Massage Therapists worked for FTM.

753 Still, the Racial Discrimination Act applies in the ACT and at all relevant times s 15(1) of the Racial Discrimination Act provided that:

It is unlawful for an employer or a person acting or purporting to act on behalf of an employer:

(a) to refuse or fail to employ a second person on work of any description which is available and for which that second person is qualified;

(b) to refuse or fail to offer or afford a second person the same terms of employment, conditions of work and opportunities for training and promotion as are made available for other persons having the same qualifications and employed in the same circumstances on work of the same description; or

(c) to dismiss a second person from his or her employment;

by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person.

754 While “national extraction” and “national origin” are not precisely the same, it could not be said that s 351(1) does not apply in the ACT to the adverse action upon which the Ombudsman relies insofar as a substantial and operative reason for that action was either the race or the national extraction of the Massage Therapists.

755 Adverse action taken because of social origin, however, is a different matter.

756 In ***Rumble*** *v The Partnership trading as HWL Ebsworth* [2019] FCA 1409; 289 IR 72, a case of alleged adverse action taken in NSW because of an employee’s political opinion, Perram J held at [143]:

The use of phrase “not unlawful” is expressed to capture actions beyond express statutory exemptions. As dismissal for political opinion is not unlawful under any anti-discrimination law in NSW, I consider that if Dr Rumble had been dismissed in NSW then that action would not have contravened s 351 of the Act.

757 In the preceding paragraph his Honour rejected Dr Rumble’s submission that “not unlawful” is limited to actions which are specifically permitted under an anti-discrimination law as opposed to where the relevant anti-discrimination law is silent on the matter. His Honour explained:

Such a construction does not sit with the plain meaning of “not unlawful”. If an action is not proscribed by any anti-discrimination law then plainly the action is not unlawful. Nor does it sit with the supplementary explanatory memorandum to the *Fair Work Bill 2008* (Cth), which explained an amendment changing the wording in s 351(2) from “authorised by” to “not unlawful” in the following terms (at [220]):

Paragraph 351(2)(a) of the Bill (together with paragraph 342(3)(a)), currently provide that action is not discriminatory if it is authorised by or under a Commonwealth, State or Territory anti-discrimination law. This exception is intended to ensure that where action is not unlawful under a relevant anti-discrimination law (e.g., because of the application of a relevant statutory exemption) then it is not adverse action under subclause 351(1). The word “authorised” may not capture all action that is not unlawful under anti-discrimination legislation, especially if the legislation does not specifically authorise the conduct but has the effect that the conduct is not unlawful. These amendments ensure the exception operates as intended.

758 The Ombudsman argued that his Honour’s opinion was *obiter*,wrong,and should not be followed. She submitted that the correct interpretation of s 351(2) is that it does not operate to defeat the plain words of s 351(1), which makes it unlawful to take adverse action on the basis of social origin. That submission must be rejected because it is crystal clear that s 351(2) limits the scope of s 351(1) to discrimination that is unlawful under the anti-discrimination statutes listed therein and social origin is not unlawful under any of those statutes.

759 The Ombudsman went on to argue that the phrase “not unlawful under an anti-discrimination law” is capable of referring either to conduct which is not unlawful because a specific provision of the anti-discrimination law makes it “not unlawful” or that it is not unlawful because the anti-discrimination law does not contain protections making it unlawful to discriminate on the ground of that attribute. The Ombudsman submitted that the former construction is the correct one because the preposition “under” “suggests that the anti-discrimination law must be the source that makes the discrimination ‘not unlawful’” and is “designed to pick up express defences, carve outs, exemptions and authorisations which have the effect of making the discriminatory actions lawful”. She claimed that if the subsection was intended to apply also to the absence of a legal prohibition “a more natural phrasing would have been ‘not unlawful in that State or Territory’”.

760 As Perram J observed in *Rumble* at [146], the exception in s 351(2)(a) appears to have no analogue in s 772(1)(f). If his Honour’s construction of s 351 is right, it means that an employee could bring an action for unlawful termination of his or her employment for a reason including social origin but not a general protections application on the same basis. His Honour described this as “idiosyncratic” and an “anomaly”. The “idiosyncrasy” or “anomaly” can be explained by the different history and constitutional foundations of the unlawful termination provisions in Pt 6–4 on the one hand and the general protection provisions in Pt 3–1 on the other. Still, the Ombudsman submitted that to avoid the “idiosyncratic anomaly” identified in *Rumble,* s 351(2)(a) should be read in the way she urged on the Court, namely to limit its operation to cases of specific exemptions or exceptions. But this would defeat the apparent intention of s 351(2)(a) without removing the anomaly, since s 772(1)(f) applies regardless of whether the conduct in question is covered by an exemption or exception in an anti-discrimination law. In any case, s 723 provides that a person must not make an unlawful termination application in relation to conduct if the person is entitled to make a general protections court application in relation to the conduct.

761 Perram J’s opinion in *Rumble* was certainly *obiter* but I am not persuaded that it is wrong. Besides, it accords with the opinion expressed by Mortimer J in *Sayed* at [161], to which the Ombudsman did not refer. In *Sayed* her Honour said:

[T]he terms of s 351(2), read with subs (3), … must be applied. Those provisions expressly pick up the detailed regimes of each of the territory, state and federal anti-discrimination statutes. In other words, the requirements that there be “less favourable treatment”, the complicated requirements for indirect discrimination, and the exceptions for which each statute provides are, through these provisions, incorporated so as to limit the protections given by Div 5 of Part 3-1 of the Fair Work Act in a way which is intended to mirror the limits under those other legislative schemes. **When read** **as a whole, ss 351** **and 342(1) Item 1(d) will operate to render only conduct proscribed under other anti-discrimination regimes as conduct contravening s 351**. That, in substance, is the outcome for which the respondent contended, although not because of the meaning of “discriminates” in Item 1(d) of s 342(1), but rather at the subsequent step of the application of the prohibition in s 351.

(Emphasis added.)

I interpolate that s 342(1) item 1(d) refers to one of the meanings of adverse action, namely where an employer “discriminates between” the employee and other employees of the employer.

762 Contrary to the Ombudsman’s submission, it seems to me that the phrase “not unlawful under any anti-discrimination law in force in the place where the action is taken” is not confined to “express defences, carve outs, exemptions and authorisations” in the anti-discrimination laws. It is wider than that. The apparent intention is to ensure that the protection afforded by s 353(1) is no greater than that provided by an anti-discrimination law in force in the place where the action was taken. Action is lawful unless there is a law which makes it unlawful. Action may be “not unlawful” for any one of a number of reasons, including because it is not expressed to be unlawful, because the alleged contravener has a defence, or because it is exempt from the provisions of the legislation. This interpretation is supported by the passage in the Supplementary Explanatory Memorandum to which Perram J referred in *Rumble.* While explanatory memoranda are not infallible, they can generally be taken as reliable indications of the intentions of government-sponsored legislation: *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29; 94 ALJR 818; 381 ALR 601; 297 IR 338 at [71]–[72] (Gageler J).

763 One other thing should be noted. Section 26 provides that the FW Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or employer. But s 27 provides that s 26 does not apply to certain laws. In particular, it does not apply to State and Territory anti-discrimination laws (s 27(1A)). The Explanatory Memorandum to the Fair Work Bill identified the reason at [140]:

The intention is that rights and remedies in relation to termination of employment and other adverse treatment for discriminatory reasons in State and Territory anti-discrimination and equal employment opportunity legislation are preserved in their application to national system employers and employees. A person whose employment has been terminated or who has been adversely treated in employment for reasons such as race, colour, sex, sexual preference, age or other discriminatory reasons could seek a remedy under either a State or Territory anti-discrimination or equal employment opportunity law or a remedy for contravention of the protections under Division 5 of Part 3-1 (General protections), but not both (see Division 3 of Part 6-1 (Multiple actions)).

764 It is plain that s 351 was not intended to expand the scope of federal, State or Territory anti-discrimination laws but to work harmoniously with them.

### Conclusion

765 FTM contravened s 351(1) of the FW Act by taking adverse action against the Massage Therapists in that it injured them in their employment in the respects alleged in para 133(a)–(i) of her pleadings for reasons which included their race and national extraction. While FTM also took the action against them because of their social origin, s 351(1) does not apply to such action because taking adverse action against a person for that reason is not unlawful under any of the anti-discrimination laws in force in the ACT at the time of the contraventions.

## The coercion claims

### The allegations

766 The Ombudsman alleged that FTM took the actions pleaded against each of the Massage Therapists, namely to threaten to send them back to the Philippines or arrange to kill their families if they made a complaint about their working conditions, with the intent to exert pressure on them, which negated their practical choice as to whether or not to exercise their workplace right to make a complaint or inquiry in relation to their employment.

### The law

767 Section 343(1) of the FW Act prohibits a person from threatening to organise or take any action against another person with intent to coerce the other person, or a third person, to exercise or not exercise, or propose to exercise or not exercise, a workplace right.

768 In *Fair Work Ombudsman v Australian Workers’ Union* [2017] FCA 528; 271 IR 139 at [54] Bromberg J summarised the effect of the authorities on the meaning and scope of the expression “threatening to take action” in the context of s 342(2)(a) of the Act:

*First*, “threatening to take action” must involve the communication of a threat directed at an ascertainable person which is received or is likely to be received by that person. That a particular outcome is threatened by existing or prospective circumstances is not a threat of the requisite kind. *Second*, to threaten means to communicate an intent to inflict harm or, in other words, a warning of an intention to inflict harm. *Third*, the essence of a threat is that it is made for the purpose of intimidating a person. Accordingly, “threatening to take action” must involve an expression of an intimidatory purpose. *Fourth*, it is not necessary that a subjective intent to carry out the threat be established. *Fifth*, the notion of a threat is not confined to an intent to inflict harm which was unlawful or unjustified. *Sixth*, the presence of malice or some other injurious motive is a prerequisite. *Lastly*, a threat to take action may be conditional (in the sense that X will occur if Y does not).

769 The phrase “intent to coerce” in s 343 and its analogue in the predecessor legislation, s 170NC of the WR Act has a settled meaning. It involves two elements. The first is an intention that the “pressure be exerted which, in a practical sense, will negate choice” and the second is “the exertion of the pressure must involve conduct that is unlawful, illegitimate or unconscionable”: *State of Victoria v Construction, Forestry, Mining and Energy Union* (2013) 218 FCR 172 at [70]–[72] (Buchanan and Griffiths JJ), citing *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378 at [41] (Merkel J).

### Consideration

770 By reason of s 361, it is presumed that the threats were made to the Massage Therapists with the intent to negate their choice unless FTM proved otherwise. The presumption was not rebutted. In any event, I am satisfied that FTM had the requisite intention.

771 For the reasons given at [627]–[669] above in relation to the corresponding adverse action claim, all of the elements in s 343(1) have been established to the requisite standard of proof.

772 The plain words of the threats themselves indicates that they were intended to “negate the choice” of each of the Massage Therapists to make a complaint about their working conditions.

773 It is unquestionably illegitimate to threaten to dismiss an employee for making a complaint about her or his conditions of employment as it is conduct prohibited by s 340 of the FW Act. And there can be no doubt that the threats to arrange to have the families of therapists killed involved conduct which was at least illegitimate and unconscionable, if not also unlawful. It is an offence under s 30 of the *Crimes Act 1900* (ACT) for a person to make a threat to another person to kill a third person intending that other person to fear that the threat would be carried out or being reckless as to whether the other person would have that fear and the threat is made without lawful excuse and in circumstances in which a reasonable person would fear that the threat would be carried out. Further, the effect of s 62 of the *Criminal Code 2002* (ACT), read with s 64 of that Act, is that the application of the Crimes Act extends beyond the territorial limits of the ACT (and Australia) if (a) the offence is committed completely or partly in the ACT, whether or not the offence has any effect in the ACT; or (b) the offence is committed completely outside the ACT (whether or not outside Australia) but has an effect in the ACT.

774 Accordingly, I find that FTM also contravened s 343(1) of the FW Act by threatening to send the Massage Therapists back to the Philippines and to have their families in the Philippines killed with intent to coerce them not to exercise their rights to complain about their working conditions. While I am not satisfied that he intended to carry out those threats, I am persuaded that Mr Elvin (and therefore FTM) communicated an intention to cause harm to the Therapists, both directly and indirectly, if they complained about their working conditions, and that he did so in order to intimidate them into silence.

# THE ACCESSORIAL LIABILITY CLAIMS

## The allegations

775 The Ombudsman alleged that each of Mr Elvin and Mr Puerto was involved in the contraventions within the meaning of s 550 of the FW Act in that he aided and abetted, counselled or procured, or was knowingly concerned in all or most of the contraventions. If the allegation is made out, then Mr Elvin and Mr Puerto are taken to have contravened those provisions.

## The law

776 At all material times s 550 provided:

**Involvement in contravention treated in same way as actual contravention**

(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

(2) A person is ***involved in*** a contravention of a civil remedy provision if, and only if, the person:

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

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

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

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

(Original emphasis.)

*777* The relevant principles for determining whether a person is involved in a contravention within the meaning of s 550 are taken from the criminal law and largely derive from two High Court judgments published in 1985: ***Giorgianni*** *v The Queen* (1985) 156 CLR 473 and *Yorke v Lucas* (1985) 158 CLR 661.

*778* First, to be knowingly concerned in a contravention a person need not know that the conduct in question is unlawful but must know its essential elements. Actual knowledge is required. It is not enough that the person ought to have known. But proof of actual knowledge may be established by either direct or circumstantial evidence. See, for example, *Fair Work Ombudsman v* ***South Jin*** *Pty Ltd* [2015] FCA 1456 at [229]–[231] (White J).

*779* Second, as the Ombudsman acknowledged, the presumption erected by s 361 does not apply here. It is up to her to prove that the alleged accessories had knowledge of each essential element of the contravention. See, for example, *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* (2016) 248 FCR 18 at [448] (Rangiah J).

780 Third, where an alleged accessory is aware of a system producing certain outcomes and those outcomes constitute contraventions of the Act, it is unnecessary to show that the alleged accessory knew the details of each of those outcomes in order to establish the requisite knowledge. A person may be knowingly concerned in a contravention of s 45 of the FW Act even though the person does not know the details of which hours a particular employee worked or when the hours were worked: *Fair Work Ombudsman v* ***Grouped Property Services*** *Pty Ltd* [2016] FCA 1034; 152 ALD 209 at [957] (Katzmann J), approved by the Full Court (Flick, Bromberg and O’Callaghan JJ) in ***EZY Accounting*** *123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134; 360 ALR 261; 282 IR 86 at [34]. See also *Australian Communications and Media Authority v Mobilegate Ltd (a company incorporated in Hong Kong) (No 8)* [2010] FCA 1197; 275 ALR 293 (Logan J) at [172]. Thus, as I observed in *Grouped Property Services* at [957],a person, who knew that an employee worked on weekends but did not know which weekends or the number of hours the employee worked, could be knowingly concerned in the employer’s failure to pay weekend penalty rates.

781 Fourth, the alleged accessory must have engaged in conduct which implicates him in the contraventions so as to demonstrate that there is some “practical connection” between him and the contravention: *Construction, Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87; 59 AILR ¶100–686; 164 IR 299 at [26] (Tamberlin, Gyles and Gilmour JJ); *South Jin* at [227].

## Liability of Mr Elvin

782 The Ombudsman alleged that Mr Elvin aided, abetted, counselled or procured all the pleaded contraventions by FTM, except for the pay slip contraventions, and/or, by his acts or omissions, was directly or indirectly knowingly concerned in, or a party to, them. Her submissions, however, were confined to the claim that he was knowingly concerned in the contraventions.

783 Mr Puerto was in the best position to corroborate Mr Elvin’s account. Yet, he did not give evidence. I infer that anything Mr Puerto could say would not have assisted Mr Elvin’s case.

*784* The allegations concerning Mr Elvin’s liability are set out in paras 147 to 153 of the second further amended statement of claim. Read literally, the cross-references in paras 152 and 153 to paras 47, 53, 59 and 65 are references to contraventions of the Health Award based on the SSE Level 2 classification; they do not expressly pick up the allegations concerning the contraventions of the Health Award based on the HP Level 1 classification. But I take those references to incorporate paras 47HP, 53HP, 59HP and 65HP. I propose to grant leave to the Ombudsman to further amend her pleading to make this clear. No prejudice would be occasioned to Mr Elvin by reason of this amendment. No reasonable person would think that, by bringing her interlocutory application to enable her to plead the HP Level 1 classification, the Ombudsman was abandoning her case that Mr Elvin was liable for FTM’s contraventions of the Health Award and the NES.

### The underpayment contraventions

785 These are the award contraventions (the failure to pay minimum wages, public holiday rates, and overtime rates) and the contraventions of the NES by failing to pay annual leave entitlements on termination.

786 For the following reasons I am satisfied that Mr Elvin had actual knowledge of the essential elements of each of these contraventions and that he was practically implicated or involved in, or connected to, them.

787 From 1 November 2010 until 11 April 2016, Mr Elvin was the sole director, secretary and shareholder of FTM. He was also its executive or managing director. At all relevant times it was he who controlled what the company did. His was its “directing mind and will, its centre and ego, and its brains”: *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 190 (Lord Pearson). See also *HL Bolton (Engineering) Co. Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172 (Denning LJ). Where such a person engaged in conduct which constitutes the contraventions by the company and had knowledge of their essential elements, it necessarily follows that that person was knowingly concerned in the contraventions: *Hamilton v Whitehead* (1988) 166 CLR 121at 128 (Mason CJ, Wilson and Toohey JJ).

788 In the email to FWI Hurrell sent on 12 September 2016, through his then legal representatives Mr Elvin admitted that he was responsible for each of the following tasks: making day to day business decisions; setting the operating hours of the business; recruiting or hiring of employees; organising their visas; providing for their accommodation; writing their employment contracts; deciding wage rates; deciding the hours employees were to work; setting times for employees’ meal and rest breaks; writing rosters for employees; paying wages; supervising employees at the shops; approving annual and personal leave; terminating employment; and arranging workers’ compensation insurance. Other duties — paying superannuation; creating and issuing group certificates; and creating and issuing pay slips — he said were the responsibility of FTM’s bookkeeper, Maria Cabrera, under his general supervision.

789 In his amended defence Mr Elvin admitted that at all relevant times he knew:

(1) the trading hours of the Belconnen shop;

(2) that each of the Massage Therapists was engaged on a full-time basis;

(3) the days and hours each of them were alleged to have worked;

(4) the amounts the Ombudsman alleged FTM paid to each of them; and

(5) that each had accrued untaken annual leave at the time their employment with FTM ended.

790 Mr Elvin also admitted that he knew that the FW Act and Regulations applied to the employment of the Massage Therapists. The contracts of employment he drafted purported to comply with the FW Act. They also indicate that he knew of the NES. They certainly establish that he knew there were National Employment Standards to which employers were required to adhere and had some understanding of aspects of them.

791 Furthermore, Mr Elvin admitted that he prepared and signed the contracts of employment with the Massage Therapists, that he was responsible for creating or authorising the creation of the employment records kept by FTM, that he was the person who created or authorised the creation of the pay records, and that he was the person who caused the pay records to be provided to the Ombudsman.

792 In cross-examination Mr Elvin agreed that he made all the critical decisions associated with the business, that Mr Puerto and the other managers acted under his direction, and that he had access to all the information systems of FTM including the Kitomba booking and billing system. He said that the hours of work recorded in the payroll system were based on what he told the Massage Therapists to do. He said he checked that the hours of work had been accurately taken from the Kitomba records and entered into the payroll system. He also said that he authorised the amounts paid to the Massage Therapists each fortnight.

793 In cross-examination Mr Elvin testified that he had responsibility for signing off on the payroll. He agreed that any time worked outside 38 hours a week was overtime. He also admitted to knowing that the Massage Therapists were not paid public holiday rates as prescribed by their contracts. He testified that he knew that overtime rates and “things like [that]” had to be paid because he did not have an individual flexibility arrangement.

794 Despite his evidence to the contrary, I am also satisfied that Mr Elvin knew that the Massage Therapists were covered by an award which prescribed minimum rates and that at all relevant times he believed that was likely to be the Health Award.

#### The award contraventions

795 The essential elements of the award contraventions are that:

(1) the Massage Therapists were not paid the minimum award rates;

(2) the Massage Therapists worked on a number of public holidays and FTM failed to pay public holiday rates;

(3) the Massage Therapists worked in excess of their ordinary hours on weekdays or Saturdays but were not paid time and a half for the first two excess hours and double time thereafter; and

(4) the Massage Therapists worked excess hours on a Sunday but were not paid at double time rates for those hours.

796 Having regard to Mr Elvin’s role and responsibilities with FTM, the admissions made in correspondence with the Ombudsman, in the defence and in cross-examination Mr Elvin was knowingly concerned in the contraventions relating to the failure to pay minimum award rates and overtime and public holiday rates. Mr Elvin knew the days and hours the Massage Therapists were working and the amounts they were paid. He knew the times they were driven to work and the times they were driven home from work. He knew the hours they were required to make themselves available to work. Indeed, it was he who required them to be available for work 12 hours a day six days a week. He determined what to pay them. And he knew they worked overtime hours and on public holidays but that FTM did not pay penalty rates for this work. It follows that he was knowingly concerned in all FTM’s award contraventions.

#### The contraventions of the NES

797 The NES contraventions involving underpayments relate to FTM’s failure to comply with s 90(2) by not paying out untaken annual leave at the end of the Therapists’ employment.

798 Since Mr Elvin admitted that he knew that each of the Therapists had accrued untaken annual leave at the time their employment with FTM ended, that he determined what they should be paid and he approved their annual leave, he was knowingly concerned in these contraventions.

### The additional contraventions of the NES

799 The first of these are FTM’s contraventions of s 62(1).

800 The essential elements of this contravention are that:

(1) FTM requested or required the Massage Therapists to work more than 38 hours a week; and

(2) the additional hours were unreasonable, having regard to the matters listed in s 62(3).

801 For the following reasons I am satisfied that Mr Elvin had the requisite knowledge and was practically implicated in, or connected with, these contraventions and therefore knowingly concerned in them.

802 The evidence established that Mr Elvin required the Massage Therapists to be available to work at any time during the 12 hour period from the time they arrived at work until the time they were driven home except on the one day a week they had off. It also established that they were required or requested to work, including by performing and being available to perform massages, for more than 38 hours a week throughout the period the subject of the claim. He did not plead or prove that those additional hours were reasonable.

803 I am also satisfied that Mr Elvin had the requisite knowledge and was practically implicated in, or connected with, the contraventions by FTM of s 125 relating to the failure to give the Massage Therapists a Fair Work Information Statement before, or as soon as practicable, after they started their employment with FTM.

804 Mr Elvin knew that employers were required to provide employees with one. He admitted as much in cross-examination and the contracts of employment he drafted for the Massage Therapists all contained an agreement by FTM to provide the Fair Work Information Statement to all new employees in accordance with the FW Act. He admitted in his defence that at all material times he knew that FTM did not provide the Massage Therapists with one.

805 For these reasons I find that Mr Elvin was knowingly concerned in the contraventions by FTM of s 125.

### The contraventions of provisions relating to other terms and conditions of employment

806 The first of these are the contraventions of s 323(1). They concern the unauthorised deductions from wages to repay loans allegedly made to some of the Therapists before they came to Australia.

807 In para 76 of his amended defence Mr Elvin said that “‘staff loan’ repayments were accurately recorded on employee payslips”. In substance, that was an admission that he knew that the deductions for “staff loans” recorded on the pay slips had been made. In the absence of a plea and proof that the deductions were permitted in accordance with s 324, Mr Elvin has no defence to this aspect of the Ombudsman’s case. In any case, in cross-examination he admitted that the details of the loans were not documented and that he had never obtained written authorisations for the deductions.

808 It follows that Mr Elvin was knowingly concerned in these contraventions.

809 The second of these contraventions concern the unreasonable requirements made of the six female Therapists to spend part of their wages to support the FTM business, contrary to s 325(1) of the FW Act.

810 Since I have accepted the evidence from the Massage Therapists that Mr Elvin required them to make the cash refunds and that the money was paid to him or Mr Puerto on his behalf, I find that he knew that the so-called cashbacks were required and the money returned. Consequently, Mr Elvin was knowingly concerned in these contraventions.

### The record-keeping contraventions

811 I found that FTM contravened s 535(1) of the FW Act by failing to make and keep a record that specified:

(a) the number of overtime hours worked by each of the Massage Therapists on each day or the time each of the Massage Therapists started and ceased working overtime hours as required by reg 3.34;

(b) the annual leave taken by the Massage Therapists and the balance of their respective entitlements to annual leave from time to time, as required by reg 3.36(1); and

(c) the manner of termination of the employment of each of the Massage Therapists and the name of the person who acted to terminate their employment, as required by reg 3.40.

812 I also found FTM contravened reg 3.44(1) because the pay records relating to Ms Amacio, Ms Bantilan and Ms Isugan during each fortnight of the “First Cashback Period” and those of Ms Castaneda, Ms Ortega and Ms Sarto during each fortnight of the “Second Cashback Period” were knowingly false or misleading as to the net amounts paid because they did not take into account the fortnightly repayments. It was Mr Elvin who required the money to be refunded to FTM.

813 Mr Elvin was knowingly concerned in all of these contraventions.

814 First, he knew that the Massage Therapists were ready, willing and able to work in excess of 38 hours a week, knew the hours they attended the workplace, and knew there were no records of the overtime hours they worked as required by reg 3.34. In cross-examination he claimed he instructed his manager and bookkeeper to “fix this” but “just glossed over everything after that”.

815 Second, he was admittedly responsible for creating or authorising the creation of the pay records; the bookkeeper worked under his supervision; and he admitted to checking the Kitomba records to make sure the Therapists’ hours of work were accurately entered into the payroll system. He must therefore have known that the Massage Therapists had some annual leave owing at the end of their employment and that they were not paid for it.

816 Third, he was admittedly responsible for creating the employment records kept by FTM and it was his ultimate responsibility to ensure that they complied with the legislative requirements.

817 Finally, I found that FTM contravened reg 3.44(6) by making use of the false or misleading records when it produced them to FWI Hurrell on 16 June 2016 in response to the notice to produce issued to FTM on 1 June 2016.

818 On 4 January 2016 FTM, then “Foot & Thai Massage Pty Limited (Administrators Appointed)”, granted Mr Elvin a licence to operate and manage the business on certain terms and conditions. It is not clear when the licence was terminated, but it is clear that in June 2016 (and until the period of voluntary administration came to an end), Mr Elvin remained involved in the FTM business. In cross-examination he accepted the proposition that he was a consultant to the business at this time. In cross-examination, Mr Elvin claimed not to recall being responsible for responding to the notice to produce but accepted it was possible. Mr Thomas’s evidence, however, makes it plain that it was Mr Elvin who was responsible. Annexure LRT-16 to Mr Thomas’s affidavit reveals that on 3 June 2016 FWI Hurrell sent a copy of the notice to produce to Mr Elvin at his personal email address (colin.elvin@gmail.com) after receiving a call from him that morning. In that email she confirmed that the response was due by 5 pm on 16 June 2016 and informed Mr Elvin that he could send his response in sections if that were easier for him. A file note made by FWI Hurrell of a telephone conversation with Mr Elvin at 4.17 pm on 16 June, annexed to Mr Thomas’s affidavit at LRT-17, shows that Mr Elvin was “currently sending NTP response in about 40 emails”. It is apparent from this information that Mr Elvin at least assumed the responsibility for responding to the notice to produce. Indeed, this evidence indicates that he responded personally.

819 It follows that he was knowingly involved in the contravention of reg 3.44(6).

### The pay slip contraventions

820 Contrary to her submissions, the Ombudsman did not plead that Mr Elvin was involved in the pay slip contraventions. At paras 152 and 153 of the Ombudsman’s pleading, there is no cross-reference to the allegations involving the pay slips, nor is there reference to any conduct linking Mr Elvin to these contraventions. In contrast, the pleading alleges that only Mr Puerto was involved in the pay slip contraventions. I do not therefore propose to address the Ombudsman’s submissions on this matter.

### The adverse action contraventions

821 I will deal first with the contraventions of s 340(1)(b).

822 It will be recalled that I found that Mr Elvin threatened to send all the Massage Therapists back to the Philippines if they broke any of the rules or discussed with, or complained to, anyone, including “immigration”, about their working conditions to anyone or reported FTM to “immigration” and to have their families killed if they did. It will also be recalled that I found that the threats amounted to adverse action within the meaning of the Act because, in effect, they were threats to dismiss them from their employment. Finally, it will be recalled that I found that the threats were made in order to prevent the Therapists from exercising their workplace rights to make a complaint to the immigration authorities or the Ombudsman in relation to their employment.

823 As it was Mr Elvin who made the threats, it follows that he was knowingly concerned in these contraventions.

824 I now turn to the contraventions of s 351(1). I found that FTM contravened s 351(1) by injuring the Massage Therapists in their employment in the respects alleged in para 133(a)–(i) of her pleadings for reasons which included their race and national extraction.

825 The injuries in employment comprised the breaches of the award; the failure to pay annual leave entitlements on termination; the failure to comply with s 323(1) consequential upon the unauthorised deductions from the Therapists’ salaries purportedly for “staff loans”; the unreasonable requirement that the Therapists return a portion of their fortnightly earnings to FTM; the unreasonable requirement or request of the Therapists to work in excess of 38 hours a week; and the threats to repatriate the Therapists to the Philippines or to have their families killed if they complained to anyone about their working conditions. I have already determined that Mr Elvin was knowingly concerned in the contraventions of s 44, 45 and 340 which were constituted by these actions or threatened actions. It follows that he was knowingly concerned in the injuries to the Therapists in their employment constituted by the same acts or threats and I so find.

826 For the reasons given at [744] above, I find that Mr Elvin knew that FTM took the action in question for reasons which included their race and national extraction.

827 Consequently, Mr Elvin was also knowingly concerned in the contraventions of s 351(1).

### The coercion contraventions

828 These were contraventions of s 343(1) of the FW Act founded on the threats Mr Elvin made to the Massage Therapists, the subject of the first adverse action contraventions. As he was the person who made the threats, Mr Elvin was knowingly concerned in these contraventions, too.

### Conclusion

829 Mr Elvin was knowingly concerned in all of FTM’s contraventions, except the pay slip contraventions. He was therefore involved in those contraventions within the meaning of s 550(2) and is taken to have contravened them himself.

## Liability of Mr Puerto

830 The Ombudsman pleaded that Mr Puerto was an accessory to all the contraventions other than those with respect to the failure to pay untaken annual leave on termination and the record-keeping claims, except the contravention of s 535(1) of the FW Act constituted by the failure to comply with reg 3.34 (by ensuring that the pay records were not knowingly false or misleading).

831 The allegations against him are set out in paras 159 and 160 of the Ombudsman’s pleadings. I take the cross-references in those paragraphs to paras 47, 53, 59 and 65 to include paras 47HP, 53HP, 59HP and 65HP. I grant leave to the Ombudsman to further amend her pleading to make this clear. As in Mr Elvin’s case, no prejudice would be occasioned to Mr Puerto by reason of this amendment.

832 She alleges that he was involved in FTM’s contraventions “by virtue of his role” as Mr Elvin’s “assistant” or “right hand man” who, acting under his instructions:

 directed the Massage Therapists in the performance of their duties;

 sometimes directed Mr Durado in the performance of his duties;

 was aware of “the loan arrangements” between some of the Massage Therapists and FTM;

 attended the Belconnen shop almost every day and had access to CCTV cameras and the Kitomba records;

 informed some of the Massage Therapists about the requirement to repay $800 a fortnight from their wages and translated this message to other Massage Therapists;

 received some of that money to give to Mr Elvin;

 drove them in a group to ATMs around Canberra so that they could withdraw cash from which the $800 a fortnight sum was paid to him on behalf of FTM;

 translated the threats to the Massage Therapists and communicated them separately to some of them; and

 gave out pay slips.

833 Each of these matters are established by the evidence. Although he gave no evidence in this proceeding, he was a witness in the proceedings brought by Ms Isugan and Mr Durado in the Fair Work Commission. He admitted there to being the massage supervisor and Mr Elvin’s “second-in-charge”. As the massage supervisor and Mr Elvin’s “second-in-charge” and the man who generally drove the Therapists to and from work, he knew the hours they were required to work and the nature of the work they undertook. He also distributed their pay slips. He directed them in the performance of their duties; was aware of the loans made to some of them; and informed them about the need to repay $800 a fortnight during the so-called cashback periods and translated Mr Elvin’s instructions to others. He drove them to the ATMs from which they made cash withdrawals and on a number of occasions they handed the money to him.

834 In some respects, however, the Ombudsman’s submission was a bold one.

835 There is no evidence to suggest that Mr Puerto had any role to play in the decision FTM made not to adhere to the terms of the Health Award or the NES. Nor is there any evidence that he played any part in fixing of the terms or conditions under which the Therapists actually worked. And there is no evidence to suggest that during their employment he had any involvement with the preparation of the payroll or the bookkeeping or, beyond preparing rosters, that he had any clerical responsibilities. Mere knowledge of the company’s conduct is not enough: As I mentioned earlier, to be knowingly concerned in, or party to, a contravention the alleged accessory must have engaged in some act or conduct which implicates or involves him or her in that contravention so that there is “a practical connection” between the person and the contravention.

### The underpayment contraventions

836 In Mr Puerto’s case, these are only FTM’s award breaches: the failure to pay minimum wages, public holiday and overtime rates.

837 With respect to these matters, the only thing connecting Mr Puerto with the contraventions is that some of the time he distributed the pay slips to Therapists. Information provided to the Fair Work Inspectors on the occasion of their site visit in October 2016 confirms that the pay slips were not always issued but indicates that, when they were, they were first provided in hard copy and later by email.

838 I was not taken to any evidence to indicate whether the pay slips were provided in an envelope or not or whether he was aware of their contents and have been unable to find any such evidence. Nor was I referred to any evidence from which an inference could reasonably be drawn that he was aware of their contents or of Mr Elvin’s decision not to adhere to the terms of the contracts by not paying minimum wages, public holiday rates or overtime rates.

839 So, while Mr Puerto knew that the Massage Therapists were employees, knew the work they did and the hours they worked, there is insufficient evidence to prove that he was aware of the wages they were actually paid or the way the wage rates were calculated. Moreover, there is no evidence that he was involved in the making of the payments or the decision not to pay overtime or public holiday rates. For these reasons, I am not satisfied that he was knowingly concerned in FTM’s contraventions of s 45 of the FW Act.

### The additional contraventions of the NES

840 On the other hand, I find that Mr Puerto was knowingly concerned in some of FTM’s contraventions of s 44.

841 The first relate to FTM’s failure to comply with s 62(1).

842 There is no doubt that Mr Puerto was aware that FTM requested or required the Massage Therapists to work more than 38 hours a week. After all, he often drove them to and from work and he was their supervisor. He did not contradict the Therapists evidence about the work they did in addition to massages. He unquestionably knew that they were required or at least had been requested to be available to work for well in excess of 38 hours a week. He did not plead, and the evidence did not establish, that the additional hours were reasonable.

843 The second relate to FTM’s failure to comply with s 125 of the Act by not giving the Therapists the Fair Work Information Statement.

844 As I noted above, Mr Puerto was aware of the terms of the Therapists’ employment contracts, having signed an identical one himself. The contracts included an agreement by FTM to provide the Statement to all new employees in accordance with the FW Act. The evidence establishes that Mr Puerto gave each of the Therapists their employment contracts and that they signed them in his presence. The Statement was not attached to any of these contracts. Mr Puerto would have known that they did not receive one with the contracts. Having regard to his role as their supervisor and his closeness to Mr Elvin, it is more probable than not that he also knew that they were not given one at any time before they started work for FTM or as soon as practicable thereafter.

### The contraventions of provisions relating to other terms and conditions of employment

845 The first of these contraventions relate to FTM’s failure to comply with s 323(1) by making unauthorised deductions from the Therapists’ wages purportedly in repayment of the loans FTM or Mr Elvin made to some of the Therapists. While there is an available defence, it will be recalled that no defence was pleaded so that the contravention was made out merely by the making of the deductions. The evidence shows that Mr Puerto was involved in providing the loans to Ms Amacio, Ms Bantilan and Ms Isugan in that it was he who provided the money to the Therapists. Ms Amacio’s evidence, which I accept, particularly in the absence of any challenge to it or evidence to the contrary, is that Mr Puerto told her that “[t]he money will be taken from [your] wages when you start working”. Ms Bantilan gave evidence to a similar effect.

846 The second are the breaches by FTM of s 325(1) of the FW Act by unreasonably requiring the six female Therapists to spend part of their wages to support the FTM business.

847 In these instances Mr Puerto not only knew what they were required to do but he also facilitated the payments by accepting the money given to him by the Therapists. In so doing, he was “linked in purpose” with the contraventions of FTM and that is sufficient to establish the requisite connection: see *EZY Accounting* at [33].

848 For these reasons I am satisfied that Mr Puerto had knew the essential elements of, and was sufficiently connected with, or implicated in, FTM’s contraventions of both ss 323(1) and 325(1) so as to make him knowingly concerned in those contraventions.

### The record-keeping contraventions

849 The Ombudsman only pleaded that Mr Puerto was an accessory to one of FTM’s record-keeping contraventions: the failure to make and keep employee records specifying the number of overtime hours worked by the Therapists and the times when they started and ceased working overtime time hours, contrary to reg 3.34 and s 535(1) of the FW Act. Mr Puerto’s involvement with this contravention has not been made out. No submissions were made on this point and no evidence was adduced to prove that he was involved in the creation or maintenance of the employee records. To the contrary, Mr Elvin testified that he instructed his manager to record the Therapists’ overtime hours, not Mr Puerto.

### The pay slip contraventions

850 It will be recalled that there were two such contraventions: first, contravening s 536(1) by failing to give the Massage Therapists pay slips within the prescribed period or at all from about the fortnightly pay period commencing 31 March 2014 until the end of their employment; and second, contravening s 536(2) by failing to include in their pay slips the name, or the name and number, of the fund or account into which the deductions for the alleged loan repayments were paid.

851 Mr Puerto was said to be an accessory to FTM’s pay slip contraventions on the basis of the following matters:

(1) he knew that from on or about the fortnightly pay period commencing 31 March 2014 to the end of their respective employment periods, FTM did not provide the Massage Therapists with a pay slip within one working day of the payment of their wages, or at all; and

(2) he was aware of the content of the pay slips that were given by FTM to the Therapists as he was responsible for providing these pay slips to the Therapists from time to time either personally or by email, and he was a person to whom each of the Therapists consulted about issues regarding their pay.

852 The evidence establishes that Mr Puerto was at least partly responsible for the provision of pay slips from time to time. Each of the Therapists deposed that they received pay slips from Mr Puerto initially by hand, and then by email, and that they stopped receiving them altogether in around late 2013 to May 2014, except for a few in 2015. Ms Bantilan also deposed that she had asked Mr Puerto for her pay slips in 2014, which suggests there was a common understanding that Mr Puerto was responsible for providing the pay slips to the Therapists. Mr Elvin conceded in his affidavit that he was aware that pay slips were not always generated and he adhered to that evidence in cross-examination. It follows that Mr Puerto was knowingly concerned with FTM’s contravention of s 536(1) of the FW Act.

853 The evidence does not establish, however, that Mr Puerto was aware of the contents of the pay slips. While Ms Amacio, Ms Bantilan, Mr Benting, Ms Isugan and Ms Ortega deposed that Mr Puerto sent them pay slips by email, suggesting he had access to electronic copies of them, it is unclear whether in fact he ever looked at the pay slips. Mr Elvin testified that he instructed his manager, who was either Ms Salazar or Ms Sherilyn Streeter, to produce and provide the pay slips to FTM employees. There is no evidence that Mr Puerto had any role in preparing the pay slips. It appears he was merely a messenger, and a poor one at that. I am therefore not satisfied that Mr Puerto was knowingly concerned with FTM’s contravention of s 536(2).

### The adverse action contraventions

854 The first of the adverse action contraventions is the contravention of s 340 which concerns the threats of reprisals made to the Therapists if they broke the rules or complained about their working conditions.

855 The Massage Therapists deposed that Mr Puerto translated Mr Elvin’s threats to some of the Therapists and conveyed them separately to others. It cannot be the case that merely acting as an interpreter makes an employee knowingly concerned in, or a party to, a contravention. By conveying Mr Elvin’s threats to the Massage Therapists in the manner in which he did, however, Mr Puerto was not a mere interpreter. First, there was the slicing of the throat gesture of which Ms Amacio spoke. Then there were the occasions when, independently of Mr Elvin, Mr Puerto would repeat Mr Elvin’s threats and the other occasions on which a threat was implied, for example the occasion Ms Amacio recalled when Mr Puerto told the first group of therapists that “Cheryl has been sent home because she had a relationship [and n]o one can have a relationship”. Ms Castaneda recalled a particular occasion in about April 2013 when Mr Puerto tutored the second group about what to say if “immigration” came to the shop, told them they would be sent back to the Philippines if they told the truth about their working hours, and informed them that the Thai therapists had been sent home.

856 For these reasons I am satisfied that he was a knowing participant in FTM’s contraventions of s 340.

857 The second set of adverse action contraventions are the contraventions of s 351(1) by injuring the Massage Therapists in their employment for reasons which included the Therapists’ race and national extraction.

858 To the extent that the allegations against Mr Puerto relate to his alleged involvement in the award breaches, for the reasons given above at [836]–[839], I reject them. To the extent that this allegation relates FTM’s failure to pay the Therapists their annual leave entitlements when their employment came to an end, I make no finding as it was not pleaded that Mr Puerto was liable for this contravention.

859 For the reasons given above at [841]–[842], [845]–[848] and [855]–[856], I am satisfied that Mr Puerto was a party to the injuries inflicted on the six female Therapists by FTM’s requirement that they make fortnightly cash repayments from their earnings (para 133(b) of the Ombudsman’s pleadings); FTM’s failure to pay the Therapists in full because of the unauthorised deductions (para 133(g)); FTM’s request or requirement for the Therapists to work unreasonable additional hours (para 133(h)); and the making of the threats to send them back to the Philippines (and, in the case of the first group, to have their families killed) if they complained about their working conditions and the instructions not to discuss or complain about those conditions to anyone (para 133(i)).

860 Except with respect to the making of the threats, however, where it is virtually self-evident, I am not persuaded that Mr Puerto knew that a substantial and operative reason FTM injured the Therapists in this way was because of their race or national extraction. Not only is there no direct evidence on the subject, but the Ombudsman did not refer me to any evidence from which such an inference should or could be drawn.

861 It follows that I am not satisfied that Mr Puerto was knowingly concerned in FTM’s contraventions of s 351(1), save in the limited respect constituted by the making of the threats.

### The coercion contraventions

862 For the reasons given above in relation to the contraventions of s 340, I find that Mr Puerto was also knowingly concerned in the contraventions of s 343(1).

### Conclusion

863 Mr Puerto was knowingly concerned in FTM’s contraventions of s 44 constituted by FTM’s failure to comply with ss 62(1) and 125. He was also knowingly concerned with FTM’s contraventions of provisions relating to other terms and conditions of employment, namely ss 323(1), and 325(1). Mr Puerto was also knowingly concerned in FTM’s contraventions of ss 340 and 343 and, to the limited extent that he was involved in the making of the threats, also s 351(1). He was also knowingly concerned in FTM’s contraventions of s 536(1). He was therefore involved in those contraventions within the meaning of s 550(2) and is taken to have contravened those provisions.

864 The allegations that Mr Puerto was knowingly concerned in the contraventions of s 45, s 535(1) by reason of contravening reg 3.34, and s 536(2) of the FW Act were not proved and must be dismissed.

# THE EFFECT OF THE DOCA

865 Part 5.3A of the Corporations Act (ss 435A–451D) provides for the business, property and affairs of an insolvent company to be placed in administration in order to maximise the chances of the company, or as much as possible of its business to continue in existence or, at least, to bring about better returns for the company’s creditors and members than they would receive if the company were immediately wound up (s 435A).

866 Section 444D(1) provides that a deed of company arrangement binds all creditors of the company, “so far as concerns claims [against it] arising on or before the date specified in the deed under paragraph 444A(4)(i)”. The “date specified in the deed under s 444A(4)(i)” is “the day (not later than the day when the administration began) on or before which claims must have arisen if they are to be admissible under the deed”. The administration of the company begins when an administrator is appointed (s 435C).

## The DOCA

867 FTM went into voluntary administration on 15 December 2015 and the first complaint was made to the FWO by one of the Massage Therapists (Ms Isugan) that very day. Complaints were made by four others (Mr Benting, Ms Castaneda, Ms Ortega and Ms Sarto) on 15 March 2016 (before the DOCA was executed) and by Ms Amacio and Ms Bantilan on 27 May 2016 (after the DOCA was executed).

868 In accordance with s 444D(1) of the Corporations Act, the DOCA only binds creditors of FTM in respect of “claims” arising on or before 15 December 2015 (see Sch 1 item 4).

869 On 18 March 2016, a meeting of creditors of FTM, held in the Canberra offices of Deloitte, resolved that the company execute a deed of company arrangement and appoint Ezio Senatore and Neil Cussen as joint and several administrators.

870 The DOCA commenced on 11 April 2016. It was terminated on 17 October 2017 on the basis that it was wholly effectuated.

871 The parties to the DOCA were FTM (then Foot & Thai Massage Pty Ltd (Administrators Appointed)), the administrators, Viet Ngo (the then company director), and Mr Elvin as the former director.

872 Clause 10 provided:

**Employees**

10.1 The Deed Administrator will adjudicate on Historical Employee Claims like all other Claims in accordance with clauses 11 and 12 of this Deed.

10.2 The Company will honour annual leave Claims of every Current Employee, and to that extent Current Employees will not be able to prove for annual leave entitlements under this Deed and will be barred from instituting or continuing any legal action, or other proceedings, or from otherwise maintaining an entitlement to a Claim to recover those annual leave entitlements as against the Deed Fund.

873 Clause 11 relevantly provided:

**Claims**

11.1 Subject to the provisions of this Deed, A, B, C and E of Division 6 of Part 5.6 of the Act apply to the proof or acceptance of debts or claims, of Participating Unsecured Creditors under this Deed as if references in those sub-divisions to “liquidator” and “relevant date” were, respectively, references to “Deed Administrator” and “Commencement Date” as defined in this Deed.

11.2 Every creditor who is entitled to establish a Claim, against the Company who either:

(a) fails to prove within the time prescribed by this Deed, or within any extension of time granted by the Deed Administrator; or

(b) fails to institute proceedings to establish a claim against the Deed Administrator within two months of the Commencement Date;

shall be deemed to have abandoned their Claim and will be barred from instituting or continuing any legal action or other proceedings, or from otherwise maintaining an entitlement to claim (whether under this Deed or otherwise), to recover or to be paid the whole or any part of the debt or Claim by virtue of which the person claims to be a Creditor, and those debts or Claims shall be disregarded by the Deed Administrator calculating or making any distribution to Creditors under this Deed, unless the Deed Administrator in his absolute and controlled discretion otherwise determines.

…

874 Division 6 of Pt 5-6 of the Corporations Act deals with the proof and ranking of claims in a winding up. Subdivision A includes ss 553 and 553B, which deal with debts and claims that are provable in a winding up and to which I will come later. Subdivisions B and C are irrelevant for present purposes.

875 “Commencement Date” is defined in cl 1.1(f) and Sch 1item 9 of the DOCA as the date of the DOCA. The date of the DOCA is 11 April 2016, the date it was executed.

876 Absent a contrary intention, “claims” is defined in cl 1.1(e) to mean “all and any existing, or contingent claims, including Historical Employee Claims, and or causes of action, debts, or liability of whatever nature which exist as at the Appointment Date”. The Appointment Date is 15 December 2015, the date of the appointment of the administrators.

877 “Historical Employee Claims” are defined in cl 1.1(r) to mean:

all current or contingent claims **by current or former employees of the Company** arising out of or in connection with the employees’ employment relationship with the Company, including, but not limited to, outstanding employee entitlements, superannuation claims, unpaid overtime and unfair dismissal claims.

(Emphasis added.)

878 Clause 12 was in the following terms:

**Moratorium and barring Creditors’ debts or Claims**

12.1 Subject to sections 445C, 445D and 445F of the Act and except as otherwise provided in this Deed:

(a) from the date this Deed comes into effect, there is a moratorium on Creditors enforcing debts or claims;

(b) from the date this Deed comes into effect, this Deed may be pleaded by the Company against any Creditor in bar of all debts or Claims;

(c) a Creditor must not, before the termination of this Deed, or after termination of this Deed unless the Deed is terminated pursuant to a default on behalf of the Company in compliance with its obligations under this Deed:

(i) take or concur in the taking of any step to wind up the Company;

(ii) except for the purpose of and to the extent provided by this Deed, institute or prosecute any legal proceedings against the Company in relation to any debts or Claims;

(iii) take any further steps (including any step by way of legal or equitable execution) in any proceedings against or in relation to the Company at the Commencement Date;

(iv) exercise any right of set off or cross action to which the Creditor would not have been entitled had the Company been wound up on the Commencement Date;

(v) commence or take any further step in any arbitration against the Company or to which the Company is a party; or

(vi) take any other step whatsoever to recover any debt or Claim.

879 On or about 19 July 2017 the Massage Therapists received a total of $144,883.18 (gross) from Deloitte on behalf of FTM and pursuant to the DOCA for unpaid entitlements relating to wages and annual leave made up as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| **Employee** |  **Wages** |  **Annual leave** | **Total** |
| Ms Bantilan | $22,398.45 | $1,051.93 | **$23,450.38** |
| Ms Amacio | $22,870.73 | $1,016.63 | **$23,887.36** |
| Mr Benting | $18,075.09 | $1,051.93 | **$19,127.02** |
| Ms Isugan | $20,834.89 | $988.18 | **$21,823.07** |
| Ms Ortega | $16,819.13 | $971.92 | **$17,791.05** |
| Ms Castaneda | $17,675.27 | $971.71 | **$18,646.98** |
| Ms Sarto | $19,185.40 | $971.92 | **$20,157.32** |

## The issues

880 Two issues are raised by FTM’s defence.

881 The first is whether the claim with respect to the underpayments is maintainable. The resolution of that issue turns on whether the Ombudsman is a creditor for the purposes of the DOCA and the Corporations Act and that depends on whether, at the time FTM went into administration, the Ombudsman had a “claim” as defined in s 553 of the Corporations Act and within the meaning of the DOCA: *Australian Competition and Consumer Commission v* ***Phoenix*** *Institute of Australia Pty Ltd (Subject to Deed of Company Arrangement)* [2016] FCA 1246 at [60] (Perry J).

882 The second is whether the effect of the DOCA is that all debts covered by it are extinguished.

## Mr Elvin’s position

883 Despite not raising any issue about the effect of the deed in his defence and without seeking leave to amend, Mr Elvin submitted that, not only did the DOCA cover the claims with respect to the underpayments but it also covered the record-keeping contraventions and the contraventions with respect to working unreasonable hours. He conceded that all the other claims were not covered by the DOCA. At the same time, however, he submitted that the DOCA acts as a bar to recovery or enforcement of any order whatsoever. In supplementary submissions, he asserted that “the DOCA presents an insurmountable defence” to the Ombudsman’s claims. Like FTM, he contended that the underlying debts were extinguished by the DOCA. He also argued that, by denying certain claims in his defence, he had, in effect, raised these issues in his pleading.

884 The submission that Mr Elvin’s defence puts these matters in issue must be rejected. He was obliged by r 16.08 of the *Federal Court Rules 2011* (Cth) to expressly plead to these matters and he did not. Nevertheless, I propose to deal with all his arguments.

## The Ombudsman’s position

885 The Ombudsman contended that it was not a creditor and that, even if it were, the DOCA does not cover all the claims she made in this proceeding. In particular, the Ombudsman argued, it does not cover the adverse action claims under ss 340 and 351(1) or the coercion claim under s 343(1) or any of the contraventions that occurred after the appointment of the administrators on 15 December 2015. The Ombudsman submitted that the claims all ended on the last day of the Therapists’ employment, which, save in the case of Ms Isugan, was after 15 December 2015. In any case, the Ombudsman submitted, the DOCA does not preclude her from seeking orders for the payment of pecuniary penalties or declaratory relief and it does not bar the proceedings against Mr Elvin and Mr Puerto.

## Was the Ombudsman a creditor of FTM?

886 A creditor of a company is a person or entity to whom the company owes money.

887 There is no doubt that the Massage Therapists were creditors of FTM for the purposes of the DOCA. But was the Ombudsman? Oddly enough, there is no authority directly on point.

888 The functions of the Ombudsman are prescribed by s 682 of the FW Act. One of those functions is “to commence proceedings in a court … to enforce [the Act], fair work instruments and safety net contractual entitlements” (s 682(1)(d)). “Safety net contractual entitlements” are contractual entitlements relating to any of the subject-matters covered by a modern award and the NES (s 12).

889 In performing her statutory function of commencing enforcement proceedings in a court, the Ombudsman is not the agent of employees. She does not act on their behalf. And the agreement of the employees to a deed of release does not give rise to an estoppel. The Ombudsman brings such a proceeding, not to enforce the employees’ entitlements on their behalf, but pursuant to her statutory power to enforce the legislation: ***Tomlinson*** *v Ramsey Food Processing Pty Limited* (2015) 256 CLR 507 at [44] (French CJ, Bell, Gageler and Keane JJ). Thus orders for the payment of compensation in a proceeding brought by the Ombudsman are not made in satisfaction of a claim made on behalf of employees.

890 In ***Atkins Freight Services*** *Pty Ltd v Fair Work Ombudsman* [2017] FCA 1134, White J rejected an argument that deeds of settlement entered into by two employees had the effect that their employer was “no longer liable” to pay any amount for “underpayment of wages” and that no order with respect to underpayment could be made under s 545(3) of the FW Act or its predecessor, s 719(6) of the WR Act.

891 In *Atkins Freight Services* two employees had entered into deeds with their employer in which they agreed to settle any claims for wages arising out of their employment and to release the employer, any related corporation, and its directors, employees and agents from “any such claims [they] might have as at the date of execution of [the deed]”. They also agreed that the release applied to “such claims regardless of whether they arise from an agreement, from a statute or from some other law or industrial instrument” and irrespective of whether the employees were “presently aware of any right to make such a claim”. White J held at [32], following *Tomlinson,* that the Ombudsman was not representing the interests of the two employees and was not bound by the agreements they had made. His Honour also held that, by themselves, the deeds could not limit the jurisdiction or powers of the court (in that case the Industrial Magistrate’s Court) or the powers of the Ombudsman. And as the Ombudsman was not a party to the deeds, she could not be bound by them and they could not give rise to an estoppel which was binding on her.

892Besides, it is well established that employers and employees may not contract out of award entitlements: *Josephson v Walker* (1914) 18 CLR 691 at 700 (Isaacs J); *Metropolitan Health Service Board v Australian Nursing Federation* (2000) 99 FCR 95 at [17]–[25] (French). No contract can derogate from the terms and conditions fixed by an industrial award: *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410at 421 (Brennan CJ, Dawson and Toohey JJ). Moreover, s 61 of the FW Act expressly provides that the NES cannot be displaced. It is true that parties may compromise litigation which is on foot or in contemplation: *Kowalski v Trustee, Mitsubishi Motors Australia Limited Staff Superannuation Pty Ltd* [2003] FCAFC 18 at [17]. At the time the administrators were appointed to FTM however, no litigation was on foot or in contemplation.

893But a deed of company arrangement is no ordinary contract or deed of release. Since it binds not only the parties but also the company’s creditors and regardless of whether they voted in favour of entering into the deed, its binding force is not contractual. Rather, “it derives its operative force from statute” and for this reason “the deed has such force as the statute provides and no more”: ***City of Swan*** *v Lehman Brothers Australia Ltd (subject to a Deed of Company Arrangement)* (2009) 179 FCR 243 at [5]–[9] (Stone J), Rares and Perram JJ agreeing at [63], [84], [86] and [122]. As Stone J observed in *City of Swan* at [6] (Rares and Perram JJ agreeing at [73] and [145] respectively), that much is clear from *MYT Engineering Pty Limited v Mulcon Pty Limited* (1999) 195 CLR 636 where, at 649, the majority (Gleeson CJ, Gaudron, Gummow and Hayne JJ) said this:

No doubt a deed of company arrangement will contain stipulations and promises of a kind found in contracts between parties. But a deed of company arrangement is more than a set of promises between those who are parties to it. … First, it is a document that, on execution, effects a change in status of the company — from a company under administration to a company subject to a deed of company arrangement. Secondly, it is a document that contains terms that bind all creditors of the company “so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i)” … Those obligations stem from the combined operation of the deed of company arrangement and the Law, not from any contractual bargain between the persons bound, and are imposed on *all* creditors — not just those who voted in favour of any composition or moratorium reflected in the deed of company arrangement.

894 Neither “creditor” nor “claim” is defined in Pt 5.3A of the Corporations Act. In ***Brash Holdings*** *Ltd (Administrator appointed) v Katile Pty Ltd* [1996] 1 VR 24 at 28–36 Brooking, Phillips and Hansen JJ held that a “creditor” for the purposes of Pt 5.3A is a person who has a claim that would be provable under s 553 in a winding up, that is, a present or future claim, certain or contingent, ascertained or only sounding in damages.

895 A “creditor who is entitled to establish a Claim against the Company” in cl 11 of the DOCA should be read as referring only to such a creditor. The question whether the Ombudsman was a creditor of FTM at the relevant time devolves into the question of whether the Ombudsman then had a claim that would be provable under s 553 in a winding up.

896 Section 553(1) provides:

Subject to this Division ... in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred **before the relevant date**, are admissible to proof against the company.

(Emphasis added.)

897 In order for a claim to be a claim of the kind within s 553 of the Corporations Act, it must be demonstrated that the circumstances giving rise to the claim occurred before the date of appointment of administrators: *Sons of Gwalia* *Sons of Gwalia Ltd (subject to a deed of company arrangement) v Margaretic* (2007) 231 CLR 160at [168] (Hayne J). It is abundantly clear, as Hayne J put it in that case at [172] that the legislative intention was to define provable claims very widely.

898 The Ombudsman submitted that she was not a creditor for the following reasons.

899 First, she relied on *Tomlinson* and *Atkins.* She argued that she did not act on behalf of the Massage Therapists but as a regulator, pursuant to her functions under s 682(1)(d) of the FW Act. She submitted that orders for the payment of employees’ entitlements are not made in satisfaction of a claim asserted on an employee’s behalf but pursuant to the power of the Court which can only be exercised if it finds that the employees have not been paid their entitlements. Similarly, she argued that the Ombudsman did not have “an existing legal right to ‘assert a right to participate in the division of the assets of the company’” because she “does not have an entitlement but takes action to enforce laws”. Consequently, there was: no underlying legal liability to her, only to the Therapists.

900 There is force in this argument. But, as the Ombudsman acknowledged, it seems to be at odds with *Phoenix* in which Perry J held that the Australian Competition and Consumer Commission (**ACCC**) was a creditor of the company. In *Phoenix*, Perry J considered that the ACCC was a creditor because its claim against the respondents pursuant to ss 232 and 239 of the Australian Consumer Law (**ACL**) was a contingent claim. I will return to this case shortly. It is sufficient at this point to note that the Ombudsman submitted that in the present case both the factual circumstances and the statutory scheme are distinguishable from those considered in *Phoenix.* Alternatively, she submitted that *Phoenix* was wrongly decided.

901 Second, the Ombudsman relied on the fact that the definition of “claim” in cl 1.1 of the DOCA includes “historical employee claims” which are defined as “claims…by employees” and does not apply to claims by a regulator.

902 This submission overlooked the broad definition of “claims” of which “historical employee claims” is merely a subset.

903 Still, at the relevant time, I am not satisfied that the Ombudsman had a claim against FTM for the purposes of the DOCA. FTM was not indebted to the Ombudsman. The Ombudsman was not a present or a future creditor. Nor, in my opinion, was the Ombudsman a contingent creditor.

904 A creditor of a company is a person or entity to whom or which the company is indebted. A future creditor is one whose debt is not presently due but which will become due in the future. A contingent creditor is one to whom an existing obligation is owed out of which a liability may arise on the occurrence of a possible future event. See *Australian Beverage Distributors v Evans & Tate Premium Wines Pty Ltd* [2006] NSWSC 560; 58 ACSR 22; 200 FLR 332; 24 ACLC 657at [37] (White J). A contingent liability only arises if there is an existing obligation out of which, on the happening of the contingency (an event that may or may not occur), the company will be liable to pay a sum of money, whether liquidated or sounding only in damages: *Community Development Pty Ltd v* ***Engwirda*** *Construction Co* (1969) 120 CLR 455 at 459 (Kitto J, with whom Barwick CJ and Windeyer J agreed).

905 *Engwirda* was concerned with the meaning of “creditor” in s 221 of the *Companies Acts 1961* (Qld) in the context of an application by one company for an order winding up another company. Section 221 relevantly conferred power on the Supreme Court of Queensland to make a winding up order on the petition of “any creditor, including a contingent or prospective creditor, of the company”. The petitioner was a construction company (builder) which had undertaken work to build home units on land owned by the appellant pursuant to a contract which included an arbitration clause. The builder claimed that it was owed more than the contract price because the contract price had been increased by extras. The Supreme Court made the winding up order and an appeal from that order to the Full Court was dismissed. The High Court affirmed the decision of the Full Court.

906 .Kitto J observed at 458–9 that the builder was clearly not a creditor of the appellant in the sense of a person to whom money is presently owing, as the contract made an arbitral award a condition of any obligation to pay. By the winding up petition the builder claimed, in effect, that it was a contingent creditor since the contract imposed on the appellant a liability to pay it an amount consisting of the contract price (less that which had already been paid) plus the value of the extras, contingent upon the respondent doing the relevant work to the satisfaction of the architect (or ultimately the arbitrator). At 459 his Honour said:

Not much assistance is to be gained, I think, from observations that are to be found in reported cases as to the import of the word “contingent”, and I shall refer to one only. In *In re William Hockley Ltd*. [1962] 1 W.L.R. 555 at 558., Pennycuick J. suggested as a definition of “a contingent creditor” what is perhaps rather a definition of “a contingent or prospective creditor”, saying that in his opinion it denoted “a person towards whom, under an existing obligation, the company may or will become subject to a present liability upon the happening of some future event or at some future date”. The importance of these words for present purposes lies in their insistence that there must be an existing obligation and that out of that obligation a liability on the part of the company to pay a sum of money will arise in a future event, whether it be an event that must happen or only an event that may happen. A building contract creates, as soon as it is entered into, an obligation upon the building owner to pay the contract price, either as a whole upon a future event or, more usually, by progress and final payments each of which is to be made on a future event. The event or events may not happen, but if and when one of them does happen the building owner, by force of the contractual obligation, must pay the builder a sum of money. It is, I think, nothing to the point that the event may be complex, as where the payment is agreed to be made when the whole or some part of the work has been done to the satisfaction of an architect as expressed in a certificate or to the satisfaction of an arbitrator as expressed in an award: the building owner is bound from the time the contract is made to pay money to the builder upon a contingency; and that in my opinion makes the builder a contingent creditor of the owner.

907 In *Phoenix* at [75]–[80] Perry Jdistinguished ***BE Australia*** *WD Pty Ltd (subject to a deed of company arrangement) v Sutton* (2011) 82 NSWLR 336 upon which the ACCC had relied and upon which the Ombudsman relied in the present case.

908 The salient facts in *BE Australia* were as follows.

909 Mary Sutton worked as a tax consultant for the benefit of the company (**BEA**) through labour hire companies. The arrangements under which she worked for BEA were terminated without notice or payment in lieu. Within a month of the termination of those arrangements she filed proceedings in the Industrial Relations Commission of NSW (**IRC**) against BEA, alleging that the arrangements were unfair within the meaning of s 106 of the *Industrial Relations Act 1996* (NSW) (**IR Act**). At that time s 106 relevantly provided that the IRC may make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry if it finds the contract is or was an unfair contract either from the commencement of the contract or at a later time.

910 Nearly four years later, and shortly before the hearing was due to start, BEA was placed in voluntary administration. A deed of company arrangement was later approved by BEA’s creditors. Ms Sutton lodged a proof of debt in respect of her claim under the IR Act and the administrators of the deed rejected the proof. Ms Sutton then filed proceedings in the Equity Division of the Supreme Court seeking either an order reversing the decision of the administrators to reject her proof of debt or an order under s 447A of the Corporations Act, the effect of which would entitle the administrators to admit her proof of debt under the deed. Palmer J held that the administrators had correctly rejected the proof of debt but also held that an order under s 447A should be made, the effect of which was that she was treated as a creditor for the purpose of the deed. The Court of Appeal granted leave to BEA and the administrators to appeal against the order and granted Ms Sutton an extension of time and leave to cross-appeal. The cross-appeal was dismissed and the appeal allowed.

911 The Court of Appeal held, following *Brash Holdings,* that a person who did not have a “claim” within the meaning of s 553 of the Corporations Act was not a “creditor” for the purposes of Pt 5.3A (at ([1]; [133], [143]–[144]; [223]–[224]). By majority, Young JA dissenting, the Court held that the primary judge erred in making the order deeming Ms Sutton to be a creditor as s 447A conferred no such power ((at [1]; [181], [206]–[208]).

912 In *Phoenix* at [76] Perry J observed that “the critical passages of the judgment” start at [105] where Campbell JA was dealing with the question of whether the fact that litigation was on foot in the IRC at the time of the appointment of the administrators meant that she had a claim within the meaning of s 553. His Honour (with whom on this question both McColl and Young JJA agreed) held:

[J]ust because something is a “*claim*” in one sense of the word does not necessarily mean that it is a “*claim*” within the meaning of s 553. The particular shade of meaning that “*claim*” has in s 553 can be ascertained from the purpose of the section. That purpose is that all the legal obligations to which a company is subject should be ascertained, and each of them valued as at a common date, so that those obligations can be taken into account in a winding up or other administration that is under way. Someone has a “*claim*” within the meaning of s 553 if he or she has a basis, founded on an existing legal right, for asserting a right to participate in the division of the assets of the company. Ms Sutton did not have one of those.

913 Rather, his Honour later remarked, Ms Sutton had “nothing more than a right to take proceedings” and the company had no legal obligation to her until the Commission made an order.

914 The Ombudsman submitted that a claim to enforce provisions of the FW Act is “analogous [to] the jurisdiction conferred by s 106 of the IR Act”.

915 The analogy between this case and *BE Australia* is at best imperfect. As Perry J noted at [78], the section gave the IRC a wide discretion to alter retrospectively substantive rights and liabilities, a factor which the Court of Appeal took into account in holding that Ms Sutton was not a creditor of BEA. Her Honour agreed at [80] with a submission advanced by the respondents in *Phoenix* that “the reason why the Court in *BE Australia* held that an application for an exercise of the power in s 106 of the IR Act to vary a contract did not give rise to a provable debt is because the power in s 106 of the IR Act was a power to create new rights not based on a pre-existing obligation”. Her Honour observed that s 106 did not confer power to grant relief sourced in a pre-existing obligation but that the right only arose when the IRC concluded that the contract was “unfair”. Thus, before an order was made, the applicant had nothing more than a right to take proceedings. Her Honour contrasted the position in the case before her on the basis that the alleged contraventions of ss 232 and 239 of the ACL were pre-existing obligations owed at the relevant date for the purposes of the DOCA.

916 Her Honour emphasised (at [79]) a remark by Campbell JA in *BE Australia* at [107]. In *BE Australia* at [107] Campbell JA concluded from his review of the authorities that “[e]ach of those decisions required that there be an existing legal obligation that a company owed at the relevant date to someone before that person has a ‘claim’ that is provable in the winding up of the company”. ”Someone” and “that person” are one in the same. The authorities his Honour reviewed do not stand for the proposition that a person is a creditor of a company at the relevant time because the company has an existing obligation to another person with whom the putative creditor has no relationship and when the company has had no dealings with the putative creditor.

917 In *Australian Securities and Investments Commission v Lawrenson Light Metal Die Casting Pty Limited* [1999] VSC 500; 33 ACSR 288; 158 FLR 307 at [78]–[79] Gillard J observed:

It is clear from a reading of Part 5.3A of the *Corporations Law* that the reference to a creditor is to a person who has had dealings with the company and who is owed money by it.

That is not to be taken as an exhaustive definition. The whole scheme of Pt 5.3A puts the fate of the company in the hands of its creditors, those who have dealt with it in the past, are owed money by it and who can by reason of their dealings and information supplied make a decision as to its future.

918 In the present case, the Ombudsman was never in a legal relationship with the relevant employees neither at the time FTM went into administration nor at the time the DOCA commenced. The Ombudsman was not a person who had had dealings with FTM or to whom FTM owed money. At the relevant date all the Ombudsman had was a mere right to bring proceedings to enforce the provisions of the FW Act.

919 In *Phoenix* the existing obligation was said to be the existing obligation of the respondent companies to comply with the relevant provisions of the ACL, which were alleged to have been breached by conduct occurring before the relevant date. Of course that obligation was not owed to the ACCC. With respect to her Honour, it may be doubted whether a regulator who takes enforcement proceedings against a company is a creditor for the purposes of Pt 5.3A until or unless a court has made an order in the regulator’s favour.

920 Nevertheless, it is unnecessary to determine whether Perry J was right or wrong to come to the conclusion she did in *Phoenix* because that case is distinguishable on the facts. Equally, it is unnecessary to decide the broader question raised by the Ombudsman’s submissions, namely, whether the Ombudsman could ever be a creditor for the purposes of s 553.

921 In *Phoenix* the ACCC filed its originating application with the Court on 23 November 2015. It was not until 21 March 2016 that the decision was made to place the respondent companies in voluntary administration. In contrast, in the present case, the originating application was not filed until nearly three years after the company went into administration. In *Phoenix* the deed was still on foot when the ACCC launched its case. In the present case, the Ombudsman launched her case eight months after the DOCA was terminated.

922 As I mentioned earlier, the first complaint to the Ombudsman was not made until 15 December 2015, which was the day the administrators were appointed. The evidence given by Mr Thomas indicates that FTM was not in the Ombudsman’s sights before the complaints were made and no investigation into the complaints was begun until, at the earliest, late April 2016, after the DOCA was executed, and was not completed until June 2018, when FTM was not longer under administration.

923 Mr Thomas deposed that FWI Hurrell, who left the Office of the Ombudsman in 2018 after 13 months maternity leave, “had primary carriage of the [Ombudsman’s] investigation” from 28 April 2016 and does not say or suggest that anyone else had carriage of, or was involved in, any investigation before then. Mr Thomas was FWI Hurrell’s Team Leader (supervisor) at that time. In infer from this evidence that the investigation had not begun before FWI Hurrell started looking into the allegations from 28 April 2016. It was not until May 2018 that the Ombudsman first notified FTM that enforcement action was possible. There is no evidence to indicate that the Ombudsman had had any contact with FTM before then. A letter to FTM dated 23 May 2018, emailed the same day by FWI Hurrell (in LRT-63) appears to be the first advice to FTM that it had contravened the FW Act. The letter also required FTM to pay the Therapists what were then considered to be the amounts they were underpaid. On the question of enforcement action the letter stated:

**Enforcement action**

It is important for you to note the FWO may take enforcement action. Efforts by the Company to correct the contraventions set out above will be considered in deciding whether or not to start enforcement action.

Enforcement action can include taking the Company to court to seek financial penalties and/or other orders for non-compliance with Commonwealth workplace laws.

We can also start legal action against individuals and/or other businesses involved in contraventions of Commonwealth workplace laws.

**Possible maximum penalties for each contravention are $54,000 for a body corporate and $10,800 for an individual.**

(Original emphasis.)

924 I cannot see how the Ombudsman could be a creditor of FTM — even a contingent creditor —when she had not even formulated a claim at the relevant time. While FTM then had an existing obligation to the Therapists (and other employees), it had no obligation to her. For the reasons given in *Tomlinson,* she was not then — or, for that matter, later — their agent. FTM was not indebted to the Ombudsman either at the time it went into administration or at the time of the making of the DOCA. Nor did FTM have an existing obligation to the Ombudsman out of which a liability might arise on the occurrence of a possible future event.

925 It follows that the Ombudsman was not entitled to prove her claims in a winding up and therefore was not a creditor of FTM within the meaning of Pt 5.3A of the Corporations Act and the DOCA.

## Did the DOCA extinguish the underlying claims against FTM?

926 FTM pleaded that the DOCA extinguished any claims or debts of the Massage Therapists who were also “party” to the DOCA, including any claims or debts for wages. Presumably FTM meant that the Massage Therapists were covered by the DOCA, as creditors of FTM, for they were certainly not parties to it.

927 I am not satisfied that this plea is made out.

928 The DOCA did not purport to extinguish claims or debts, in contrast, for example, to the deed of company arrangement considered in ***Lehman Brothers*** *Holdings Inc. v City of Swan* (2010) 240 CLR 590*.* Rather, as the Ombudsman submitted, clauses 11 and 12 operate as a covenant by creditors not to sue FTM to enforce their claims or recover their debts. Alternatively, the DOCA released FTM from the claims or debts which were provable in a winding up, but not otherwise: cf. *Foots v Southern Cross Management Pty Ltd* (2007) 234 CLR 52at [3] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

## Which, if any, of the claims made in the proceeding were covered by the DOCA?

929 The debts or claims that can be compromised by a deed of company arrangement are those that would be provable in a winding up: *Lehman Brothers* at [38] (French CJ, Gummow, Hayne and Kiefel JJ). The reference to “claims” in s 444D(1) is a reference only to claims which would be provable against the company in a winding up: *City of Swan* at [30], [87], [135]. It will be recalled that the claims covered by the DOCA are those existing or contingent on 15 December 2015.

930 If, as I have found, the Ombudsman was not a creditor of FTM at the relevant time, then none of the claims made in the proceeding are affected by the DOCA. That said, whether or not the Court should make the orders the Ombudsman seeks for FTM to pay the amount of the underpayments to her for payment out as compensation to the Massage Therapists is a vexed one. The Ombudsman’s submissions do not address this question.

931 Section 545 of the FW Act relevantly provides that the Court may make any order it considers appropriate if it is satisfied that a person has contravened a civil remedy provision, including an order for compensation for loss suffered because of the contravention.

932 There may be public interest considerations which tell against the making of such an order in this case. I propose to defer the resolution of this question until I have heard further from the parties. As the company itself is unrepresented and Mr Elvin is a litigant in person, I intend to arrange for amicus curiae to be appointed to assist.

933 If I am wrong to conclude that the Ombudsman was not a creditor of FTM at the relevant time, then the Ombudsman is barred by the terms of the DOCA from maintaining the claims with respect to the underpayments, and the Court would be precluded from ordering that the amount of the outstanding underpayments be paid to the Ombudsman for payment out to the Massage Therapists. But a number of the claims would still be maintainable.

934 Plainly, the Ombudsman’s claims for declarations are not provable debts in a winding up and so are not covered by the DOCA. To be a provable debt, a claim must be capable of estimation in monetary terms: Symes C and Duns J, *Australian Insolvency Law* (3rd ed, Lexis Nexis Butterworths, 2015) [4/3]. For this reason, too, none of the record-keeping and pay slip contraventions, the contraventions of s 125 of the FW Act, or the general protection obligations are affected by the DOCA.

935 Claims arising out of circumstances that occurred after the appointment of the administrators on 15 December 2016 are also excluded.

936 Certainly some of the claims arose from circumstances that occurred after the appointment of the administrators. All but one of the contraventions of s 90(2) of the FW Act are obvious examples as they relate to non-payment of accrued annual leave at the end of the Therapists’ employment. The Ombudsman submitted that all the underpayment claims arose at the time the employment of the Therapists came to an end. If that were right, then none of the claims would be affected by the DOCA except for those relating to Ms Isugan. But the Ombudsman’s submission was unsupported by argument and I cannot accept it. To the extent that the Massage Therapists were underpaid at any time after FTM went into administration, the debts or claims arising from those underpayments would not be affected by the DOCA even if, contrary to the conclusion I have reached, the Ombudsman was a creditor of FTM when the administrators were appointed.

937 That leaves the claims for pecuniary penalties.

938 Section 553B excludes from proof court-imposed penalties and fines apart from amounts payable under a pecuniary penalty order made under s 26 of the *Proceeds of Crime Act 1987* (Cth) or an order made under a corresponding State or Territory Law. In the ACT, for example, that is a penalty order made under ss 84(1) or 85(1) of the *Confiscation of Criminal Assets Act 2003* (ACT): see *Proceeds of Crime Regulations 2002* (Cth)*,* cl 6(l). Section 553B provides as follows:

**Insolvent companies—penalties and fines not generally provable**

(1) Subject to subsection (2), penalties or fines imposed by a court in respect of an offence against a law are not admissible to proof against an insolvent company.

(2) An amount payable under a pecuniary penalty order, or an interstate pecuniary penalty order, within the meaning of the *Proceeds of Crime Act 1987*, is admissible to proof against an insolvent company.

939 In *Mathers v Commonwealth of Australia* (2004) 134 FCR 135 at [9] and [29] Heerey J held that civil penalties sought by the ACCC under s 76 of the *Trade Practices Act 1974* (Cth) were “penalties or fines imposed by a court in respect of an offence against a law” within the meaning of s 553B(1) and so were not admissible to proof against an insolvent company.

940 Section 553B(1) is in substantially the same terms as s 82(3) of the *Bankruptcy Act 1966* (Cth), which reads that “penalties or fines imposed by a court in respect of an offence against a law … are not provable in bankruptcy”. In *State of Victoria v Mansfield* (2003) 130 FCR 376 at [33] the Full Court (Black, Kenny and Downes JJ) observed:

Section 82(3) is framed on the premise, first, that a penalty or fine in respect of an offence is imposed by a court to meet the public interest in punishing the offender for his or her offence; and second, that the interests of ordinary creditors should not be adversely affected by the criminal or quasi-criminal conduct of the bankrupt. (If fines or penalties were to be treated as provable debts, then the funds available to ordinary creditors would be diminished: see Murray M “Fines and Penalties – Provable in Bankruptcy?” (2000) 10(3) *New Directions in Bankruptcy* 13 at 13–14.

971 It is evident that the rationale for s 553B(1) is the same. The Explanatory Memorandum to the Corporate Law Reform Bill 1992 (Cth) proposed the insertion of s 553B in the former Act (the *Corporations Law*) at [854]:

Under subsection 82(3) of the Bankruptcy Act, penalties or fines imposed by a court in respect of an offence against the law, whether the law of the Commonwealth or not, are not provable in a corporate winding up. The Harmer Report recommended that fines imposed before or after the commencement of a winding up should be admissible in corporate insolvency. The Report also recommended that costs ordered to be paid in respect of the proceedings for the offence should also be admissible. The rationale for this recommendation was that in relation to a corporate insolvency a fine should be admissible because, after the company has been wound up, there is no-one against whom the fine can be claimed and the fine is a claim by the community as a whole. **The recommendation of the Harmer Report is not implemented in the Bill on the basis that although the fine may be a claim by the community, fines are by their nature generally intended to be a deterrent. In the case of a corporate insolvency, it is difficult to justify ‘penalising’ creditors for a wrong committed by the company.** Proposed section 553B provides that penalties or fines imposed by a court are not admissible to proof against an insolvent company.

(Emphasis added.)

942 In *Mathers* Heerey J observed (at [25]) that the word “offence” has no fixed technical meaning in the law; a failure to do something prescribed by an act of parliament may be called an “offence” although there is no criminal sanction but only “a pecuniary sanction” which can be recovered as a civil debt. His Honour noted (at [26]) that in its ordinary meaning “offence” can mean many different things, including a breach of law, and that “criminal offence” was merely “a species of the genus offence”. His Honour said at [29]:

In my opinion, a contravention of s 46 or 47 of the *Trade Practices Act* is an “offence against a law” within the meaning of s 553B(1) of th*e Corporations Act*. Plainly those provisions of the *Trade Practices Act* answer the description of “a law”. A contravention of those sections is an “offence” against that law. The following features demonstrate that a contravention of s 46 or 47 has much in common with the public law aspects of criminal offences in the strict sense:

* a contravention of s 46 or 47 is a breach, or as the *Shorter Oxford* *Dictionary* tells us, a violation or transgression of that law
* that law takes the form of a general prohibitory norm — “A corporation shall not…”
* the sanction authorised by s 76 is a pecuniary penalty payable to the Commonwealth; it is not a compensation for a person wronged, as is provided in the separate remedies for damages (s 82) or compensation (s 87(1A))
* a penalty fixed under s 76 is discretionary; the Court has regard to public interest aspects, such as general deterrence, and features of moral blameworthiness, such as previous contraventions
* a s 76 penalty is in truth a punishment, designed to deter conduct which Parliament has determined is contrary to public welfare

943 Pecuniary penalties under the FW Act are no different. Accordingly, his Honour’s observations apply with equal force to orders for pecuniary penalties under the FW Act.

944 Section 546(1) of the FW Act relevantly provides that:

The Federal Court … may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

945 A contravention of any of the relevant provisions of the FW Act and Regulations is a breach of the law. The law takes the form of a general prohibitory norm, for example: “a person must not …” (ss 45, 340, 348); “an employer must not … (ss 44, 62, 351). The sanction authorised by s 546 is discretionary. In exercising its discretion the Court has regard to the same considerations to which his Honour referred in *Mathers*. Proceedings for the recovery of a pecuniary penalty have both civil and criminal characteristics. While the standard of proof is the civil standard, a pecuniary penalty, like a fine, has a deterrent purpose. A penalty under s 546 is also designed to deter conduct which Parliament has determined is contrary to public welfare. And the consequences of the imposition of a civil penalty can be punishing: *Chief Executive Offıcer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at [114] (Hayne J).

946 On the other hand, s 549 of the FW Act provides that:

A contravention of a civil remedy provision is not an offence.

947 Nevertheless, as Mortimer J observed in *Milardovic v Vemco Services Pty Ltd (Administrators Appointed)(No 2)* (2016) 242 FCR 492 at [9], the authorities on s 549 suggest that the reference to “offence” in that section is to a “criminal offence”. It is trite that the meaning of a word can vary depending on the context in which it is used.

948 In *Fair Work Ombudsman v Al Hilfi* [2016] FCA 193 Besanko J held at [61], that pecuniary penalties may be imposed under s 546 of the FW Act because they fall within the exception in s 82(3) of the Bankruptcy Act and the debts are therefore not provable in bankruptcy. In my opinion, pecuniary penalties under s 546 equally fall within the exception in s 553B(1) of the Corporations Act.

949 Contrary to Mr Elvin’s submissions, the fact that FTM may not be able to pay the penalties is not to the point: see, for example, *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq)* [2017] FCA 521 at [[26]](https://jade.io/article/530258/section/140175) (Bromwich J); *Phoenix* at [98]. After all, the dominant, if not the only, purpose of a pecuniary penalty order is protective; it is to promote “the public interest in compliance” so as to deter not only the contravener but also others who might otherwise be tempted to follow suit: *Commonwealth of Australia* v *Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ (Keane J agreeing at [79]). As Stone J put it in *Secretary, Department of Health and Ageing v Prime Nature Prize Pty Ltd (in liq)* [2010] FCA 597 at [22] “[t]his deterrent function is not defeated by the fact that the company is in liquidation and unable to pay penalties”.

## Does the DOCA affect the claims against Elvin and Puerto?

950 The answer to this question is no.

951 The purpose of a deed of company arrangement is to maximise the chances of the company (or as much of its business as possible) continuing in existence or, if that is not possible, securing a better return for the company’s creditors and members than would result if the company were immediately wound up: see Corporations Act, s 435A.

952 As the plurality explained in *Lehman Brothers* at [52]–[53], s 444D(1) limits the extent to which a deed of company arrangement binds creditors and the Corporations Act does not bind creditors beyond that limit. More particularly, the Act does not bind creditors to give up a claim against a person other than the subject company. Their Honours went on to observe at [55]:

Effect must be given in the application of s 444D(1) to the words “so far as concerns claims arising on or before the day specified in the deed”. Effect must be given to those words, recognising that the claims to which they refer are claims against the subject company.

# CONCLUSIONS

953 In summary, I have come to the following conclusions.

954 First, the Ombudsman should have leave to rely on her second further amended statement of claim.

955 Second, in relation to the questions concerning award coverage and classification, the Health Award applied to FTM and the Massage Therapists at all relevant times and the classification to which Massage Therapists belonged was HP Level 1.

956 Third, FTM contravened s 45 of the FW Act by failing to pay the Massage Therapists minimum hourly rates, public holiday penalty rates, Monday to Saturday overtime rates, and Sunday overtime rates in accordance with the Health Award.

957 Fourth, FTM contravened s 44 of the Act by:

 requiring the Massage Therapists to work unreasonable hours over and above 38 hours a week contrary to s 62(1);

 not paying each of the Massage Therapists the amount that would have been payable to them with respect to the period of untaken annual leave they had at the end of their employment, contrary to s 90(2); and

 failing to give each of the Massage Therapists the Fair Work Information Statement as required by s 125.

958 Fifth, FTM contravened s 325(1) in that it unreasonably required Ms Amacio, Ms Bantilan, Ms Isugan, Ms Castaneda, Ms Ortega and Ms Sarto to spend $800 per fortnight of their wages on its business by directing them to refund that amount during the so-called cashback periods, contrary to s 325(1).

959 Sixth, FTM contravened s 323(1) by deducting amounts from the wages of the Massage Therapists described in the records as “staff loans” when the deductions were not authorised by any of the exceptions in s 324(1).

960 Seventh, FTM contravened s 535(1) by failing to make and keep records of:

 the number of overtime hours worked by each of the Massage Therapists or their start and finish times of overtime hours worked as prescribed by reg 3.34 of the FW Regulations;

 the periods of annual leave they took and the balance of their entitlement to annual leave from time to time as prescribed by reg 3.36(1); and

 setting out the nature of the termination of their employment as prescribed by reg 3.40.

961 Eighth, FTM contravened reg 3.44(1) by making and keeping pay records that, to its knowledge, were false or misleading as to the net amounts paid to Ms Amacio, Ms Bantilan, Ms Isugan, Ms Castaneda, Ms Ortega and Ms Sarto because they did not record or reflect the amounts they were required to return in cash from their salaries during the so-called cashback periods.

962 Ninth, FTM contravened reg 3.44(6) of the FW Regulations by producing to FWI Hurrell on 16 June 2016, in response to a notice to produce issued by the Ombudsman, records which did not mention the cash refunds or point out the errors.

993 Tenth, FTM contravened s 536(1) of the FW Act by not giving the Massage Therapists pay slips after about 31 March 2014 in contravention of s 536(1).

964 Eleventh, FTM contravened s 536(2) by failing to record in the pay slips it did give the Massage Therapists the details prescribed by reg 3.46(2).

965 Twelfth, FTM took adverse action against the Massage Therapists in contravention of s 340(1) of the FW Act by threatening to send the Massage Therapists back to the Philippines if they broke any of the rules, discussed with, or complained to, about their working conditions or reported FTM to “immigration” and to have their families killed if they did. These threats amounted to adverse action because, in effect, they were threats made by FTM to dismiss them. The threats were made in order to prevent them from exercising their workplace right to make a complaint to the relevant authorities in relation to their employment.

966 Thirteenth, FTM took adverse action against the Massage Therapists in contravention of s 351(1) of the FW Act by injuring them in their employment in the respects alleged in para 133(a)–(i) of the Ombudsman’s pleadings for reasons which included their race and national extraction.

967 Fourteenth, FTM also contravened s 343(1) of the FW Act by threatening to send the Massage Therapists back to the Philippines and to have their families in the Philippines killed with intent to coerce them not to exercise their rights to complain about their working conditions.

968 Fifteenth, Mr Elvin was knowingly concerned in all of the contraventions by FTM, except the pay slip contraventions. He was therefore involved in those contraventions within the meaning of s 550(2) of the Act and is taken to have contravened those provisions.

969 Sixteenth, Mr Puerto was knowingly concerned in FTM’s contraventions of ss 62(1), 125, 323(1), and 325(1). Mr Puerto was also knowingly concerned in FTM’s contraventions of ss 340 and 343, 536(1) and, to a limited extent, s 351. He was therefore involved in those contraventions within the meaning of s 550(2) and is taken to have contravened those provisions. I am not satisfied, however, that he was knowingly concerned in the contraventions of ss 45, 535(1) or 536(2).

970 Seventeenth, the defence based on the DOCA fails since the Ombudsman was not a “creditor” of FTM within the meaning of the DOCA and the relevant provisions of the Corporations Act and the DOCA did not extinguish the claims against FTM, Mr Elvin or Mr Puerto. Even if the Ombudsman were a “creditor”, the DOCA did not affect the Ombudsman’s case against Mr Elvin or Mr Puerto. Nor would the DOCA have precluded the Ombudsman from obtaining declaratory relief or pecuniary penalties or, for that matter, seeking orders with respect to the record-keeping and pay slip contraventions, the failure to comply with s 125 of the FW Act, or the adverse action and coercion contraventions.

# ORDERS

971 It remains for me to determine the relief that should be granted. That is not a simple matter, not least because of the Ombudsman’s late amendments. The process will need to take place in stages and I will make orders to facilitate this process.

972 First, the parties will be given the opportunity to agree on orders giving effect to my reasons, including the extent to which the Therapists have been underpaid for the purposes of the award contraventions. Since the respondents are unrepresented, I will arrange for a Registrar of the Court to assist in the process. As I foreshadowed during closing argument, in the event that agreement cannot be reached, I will appoint a referee to decide the amount of the underpayments, based on my findings. The matter will then need to return to court for a hearing on the penalties that should be awarded and the making of final orders.

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| I certify that the preceding nine hundred and seventy two (972) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Katzmann. |

Associate:

Dated: 14 October 2021

# ANNEXURE A

## First cashback period (26 August 2012 – 2 June 2013)

|  |
| --- |
| **Amacio** |
| **Wages paid by FTM** | **ATM withdrawals** | **International transfers** |
| **Date** | **Amount**  | **Date** | **Amount**  | **Date** | **Amount**  |
| 27 August 2012 | $1,179.40 | 5 September 2012 | $1,000.00 | N/A | N/A |
| 10 September 2012 | $1,879.10 | 17 September 2012 | $500.00$1,000.00 | N/A | N/A |
| 24 September 2012 | $1,691.95 | 28 September 2012 | $1,000.00 | N/A | N/A |
| 3 October 2012 | $1,000.00 |
| 9 October 2012 | $500.00 |
| 10 October 2012 | $2,015.30 | 12 October 2012 | $500.00 | N/A | N/A |
| 22 October 2012 | $1,000.00 |
| 23 October 2012 | $1,000.00 |
| 23 October 2012 | $1,960.30 | 24 October 2012 | $1,000.00 | N/A | N/A |
| 30 October 2012 | $1,000.00 |
| 7 November 2012 | $1,000.00 |
| 7 November 2012 | $1,653.65 | 8 November 2012 | $1,000.00 | N/A | N/A |
| 13 November 2012 | $650.00 |
| 20 November 2012 | $1,607.80 | 21 November 2012 | $1,000.00 | 29 November 2012 | $158.00$312.00 |
| 22 November 2012 | $600.00 |
| 5 December 2012 | $1,620.35 | 6 December 2012 | $1,000.00 | N/A | N/A |
| 7 December 2012 | $650.00 |
| 17 December 2012 | $1,583.60 | 19 December 2012 | $1,000.00 | 20 December 2012 | $3,012.00 |
| 20 December 2012 | $350.00 |
| 31 December 2012 | $782.42 | 3 January 2013 | $200.00 | N/A | N/A |
| 8 January 2013 | $300.00 |
| 14 January 2013 | $40.00 |
| 15 January 2013 | $1,329.05 | 16 January 2013 | $1,000.00 | N/A | N/A |
| 17 January 2013 | $300.00 |
| 30 January 2013 | $1,888.06 | 31 January 2013 | $1,000.00 | 31 January 2013 | $512.00 |
| 1 February 2013 | $900.00 |
| 13 February 2013 | $123.95$1,701.80 | 14 February 2013 | $1,000.00 | 14 February 2013 | $178.00 |
| 15 February 2013 | $300.00 |
| 26 February 2013 | $1,768.18 | 27 February 2013 | $1,000.00 | 28 February 2013 | $612.00 |
| 28 February 2013 | $600.00 |
| 5 March 2013 | $690.00 |
| 11 March 2013 | $1,768.16 | 13 March 2013 | $1,000.00 | 20 March 2013 | $412.00 |
| 14 March 2013 | $720.00 |
| 25 March 2013 | $1,830.25 | 26 March 2013 | $1,000.00 | 28 March 2013 | $182.00 |
| 27 March 2013 | $800.00 |
| 9 April 2013 | $1,922.40 | 10 April 2013 | $1,000.00 | 10 April 2013 | $612.00$612.00$58.00 |
| 15 April 2013 | $920.00 |
| 23 April 2013 | $1,851.15 | 24 April 2013 | $1,000.00 | N/A | N/A |
| 26 April 2013 | $850.00 |
| 7 May 2013 | $1,839.40 | 8 May 2013 | $1,000.00 | 8 May 2013 | $312.00 |
| 9 May 2013 | $800.00 |
| 21 May 2013 | $1,815.85 | 22 May 2013 | $1,000.00 | 22 May 2013 | $158.00 |
| 24 May 2013 | $800.00 |
| **TOTAL** | **$33,812.12** |  | **$34,870.00** |  | **$7,130** |

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| **Bantilan** |
| **Wages paid by FTM** | **ATM withdrawals** | **International transfers** |
| **Date** | **Amount**  | **Date** | **Amount**  | **Date** | **Amount**  |
| 27 August 2012 | $1,182.55 | 30 August 2012 | $800.00 | N/A | N/A |
| 5 September 2012 | $1,000.00 |
| 10 September 2012 | $1,787.40 | 17 September 2012 | $1,000.00 | N/A | N/A |
| 18 September 2012 | $300.00 |
| 21 September 2012 | $100.00 |
| 24 September 2012 | $1,602.00 | 27 September 2012 | $500.00 | N/A | N/A |
| 28 September 2012 | $200.00 |
| 3 October 2012 | $600.00 |
| 8 October 2012 | $1,000.00 |
| 8 October 2012 | $1,949.20 | 12 October 2012 | $1,000.00 | N/A | N/A |
| 22 October 2012 | $500.00 |
| 23 October 2012 | $500.00 |
| 23 October 2012 | $1,954.00 | 26 October 2012 | $1,000.00 | 28 October 2012 | $662.00$212.00$258.00 |
| 30 October 2012 | $200.00 |
| 5 November 2012 | $500.00 |
| 6 November 2012 | $1,647.40 | 8 November 2012 | $1,000.00 | 9 November 2012 | $112.00$112.00 |
| 20 November 2012 | $900.00 | 15 November 2012 | $312.00 |
| 20 November 2012 | $1,610.65 | 22 November 2012 | $1,000.00 | N/A | N/A |
| 28 November 2012 | $600.00 |
| 4December 2012 | $1,578.75 | 5 December 2012 | $1,000.00 | 6 December 2012 | $112.00 |
| 6 December 2012 | $600.00 | 8 December 2012 | $112.00 |
| 17 December 2012 | $1,582.15 | 20 December 2012 | $1,000.00 | N/A | N/A |
| 21 December 2012 | $500.00 |
| 31 December 2012 | $787.61 | 3 January 2013 | $200.00 | N/A | N/A |
| 8 January 2013 | $400.00 |
| 14 January 2013 | $20.00 |
| 15 January 2013 | $1,259.00 | 16 January 2013 | $1,000.00 | 18 January 2013 | $912.00 |
| 17 January 2013 | $200.00 |
| 21 January 2013 | $60.00 |
| 29 January 2013 | $1,876.96 | 31 January 2013 | $1,000.00 | 6 February 2013 | $112.00$162.00 |
| 1 February 2013 | $500.00 |
| 6 February 2013 | $300.00 |
| 13 February 2013 | $354.08$1,350.69 | 14 February 2013 | $1,000.00 | 15 February 2013 | $1,112.00 |
| 15 February 2013 | $700.00 |
| 26 February 2013 | $1,769.47 | 27 February 2013 | $1,000.00 | 28 February 2013 | $212.00$212.00$162.00 |
| 28 February 2013 | $700.00 |
| 4 March 2013 | $70.00 |
| 11 March 2013 | $1,769.45 | 13 March 2013 | $1,000.00 | 14 March 2013 | $362.00$112.00 |
| 14 March 2013 | $700.00 |
| 25 March 2013 | $1,768.15 | 26 March 2013 | $1,000.00 | 3 April 2013 | $100.00$100.00 |
| 27 March 2013 | $700.00 |
| 30 March 2013 | $20.00 |
| 8 April 2013 | $66.68$1883.20 | 10 April 2013 | $1,000.00 | 10 April 2013 | $1,212.00 |
| 11 April 2013 | $900.00 | 11 April 2013 | $132.00 |
| 23 April 2013 | $1,836.15 | 24 April 2013 | $1,000.00 | 24 April 2013 | $162.00 |
| 26 April 2013 | $800.00 | 28 April 2013 | $382.00 |
| 4 May 2013 | $182.00 |
| 9 May 2013 | $92.00 |
| 10 May 2013 | $1,846.60 | 11 May 2013 | $1,000.00 | 15 May 2013 | $112.00 |
| 13 May 2013 | $800.00 | 19 May 2013 | $112.00 |
| 20 May 2013 | $1,840.70 | 22 May 2013 | $1,000.00 | 24 May 2013 | $112.00$142.00 |
| 24 May 2013 | $800.00 | 29 May 2013 | $1,112.00 |
| **TOTAL** | **$33,302.84** |  | **$33,650.00** |  | **$9,202.00** |

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| **Isugan** |
| **Wages paid by FTM** | **ATM withdrawals** | **International transfers** |
| **Date** | **Amount**  | **Date** | **Amount**  | **Date** | **Amount**  |
| 27 August 2012 | $1,182.55 | 5 September 2012 | $1,000.00 | N/A | N/A |
| 10 September 2012 | $1,782.55 | 17 September 2012 | $1,000.00$1,000.00 | N/A | N/A |
| 19 September 2012 | $1,000.00 |
| 24 September 2012 | $1,602.45 | 29 September 2012 | $1,000.00 | N/A | N/A |
| 1 October 2012 | $500.00 |
| 3 October 2012 | $700.00 |
| 8 October 2012 | $1,852.05 | 13 October 2012 | $1,000.00 | N/A | N/A |
| 17 October 2012 | $500.00 |
| 23 October 2012 | $1,952.60 | 24 October 2012 | $1,000.00 | N/A | N/A |
| 31 October 2012 | $1,000.00 |
| 6 November 2012 | $1,642.55 | 7 November 2012 | $1,000.00 | 9 November 2012 | $2,312.00 |
| 8 November 2012 | $1,000.00 |
| 10 November 2012 | $40.00 |
| 20 November 2012 | $1,580.45 | 22 November 2012 | $1,000.00 | N/A | N/A |
| 23 November 2012 | $550.00 |
| 28 November 2012 | $20.00 |
| 4 December 2012 | $1,594.70 | 5 December 2012 | $1,000.00 | 8 December 2012 | $262.00 |
| 7 December 2012 | $600.00 |
| 17 December 2012 | $1,598.10 | 18 December 2012 | $1,000.00 | N/A | N/A |
| 21 December 2012 | $200.00 |
| 31 December 2012 | $784.82 | 7 January 2013 | $700.00 | N/A | N/A |
| 15 January 2013 | $1,295.75 | 17 January 2013 | $1,000.00 | 18 January 2013 | $512.00 |
| 18 January 2013 | $200.00 |
| 23 January 2013 | $160.00 |
| 26 January 2013 | $1,852.75 | 31 January 2013 | $1,000.00 | 31 January 2013 | $302.00$252.00 |
| 1 February 2013 | $500.00 |
| 4 February 2013 | $340.00 |
| 13 February 2013 | $114.50$1,715.54 | 14 February 2013 | $1,000 | 14 February 2013 | $612.00 |
| 18 February 2013 | $830.00 |
| 26 February 2013 | $1,795.66 | 27 February 2013 | $1,000.00 | 28 Feb 2013 | $512.00$262.00 |
| 28 February 2013 | $780.00 |
| 11 March 2013 | $1,772.74 | 13 March 2013 | $1,000.00 | 13 March 2013 | $512.00 |
| 14 March 2013 | $700.00 |
| 25 March 2013 | $1,830.25 | 27 March 2013 | $1,000.00 | 28 March 2013 | $222.00$562.00 |
| 28 March 2013 | $700.00 |
| 3 April 2013 | $150.00 |
| 9 April 2013 | $1,884.50 | 10 April 2013 | $1,000.00 | 11 April 2013 | $612.00 |
| 15 April 2013 | $920.00 |
| 23 April 2013 | $1,860.30 | 24 April 2013 | $1,000.00 | 24 April 2013 | $212.00$562.00 |
| 26 April 2013 | $800.00 | 28 April 2013 | $112.00 |
| 7 May 2013 | $1,840.70 | 8 May 2013 | $1,000.00 | 8 May 2013 | $212.00$112.00$132.00 |
| 9 May 2013 | $840.00 |
| 21 May 2013 | $1,799.55 | 22 May 2013 | $1,000.00 | 22 May 2013 | $212.00 |
| 23 May 2013 | $790.00 | 29 May 2013 | $192.00 |
| **TOTAL** | **$33,335.06** |  | **$34,520.00** |  | **$8,680.00** |

## Second cashback period (21 April 2013 – 5 January 2014)

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| **Castaneda** |
| **Wages paid by FTM** | **ATM withdrawals** | **International transfers** |
| **Date** | **Amount**  | **Date** | **Amount**  | **Date** | **Amount**  |
| 1 May 2013 | $390.95 | N/A | N/A | N/A  |  |
| 9 May 2013 | $1,626.45 | 15 May 2013 | $2,017.00 | 11 May 2013 | $1,000.00 |
| 22 May 2013 | $1,796.25 | 23 May 2013 | $1,000.00 | 26 May 2013 | $558.00 |
| 27 May 2013 | $780.00 |
| 4 June 2013 | $1,791.05 | 6 June 2013 | $1,000.00 | N/A | N/A |
| 8 June 2013 | $90.00$50.00 |
| 18 June 2013 | $1,791.05 | 19 June 2013 | $1,000.00 | 19 June 2013 | $550.00 |
| 20 June 2013 | $900.00 | 21 June 2013 | $108.00$465.00 |
| 2 July 2013 | $1,786.45 | 5 July 2013 | $200.00$50.00 | N/A | N/A |
| 8 July 2013 | $840.00 |
| 17 July 2013 | $1,786.45 | 18 July 2013 | $1,780.00 | 18 July 2013 | $1,100.00 |
| 30 July 2013 | $1,807.35 | 31 July 2013 | $1,000.00 | 1 August 2013 | $765.00$200.00 |
| 1 August 2013 | $800.00 |
| 12 August 2013 | $1,733.55 | 14 August 2013 | $1,000.00 | 14 August 2013 | $750.00 |
| 15 August 2013 | $740.00 |
| 22 August 2013 | $1,791.05 | 28 August 2013 | $1,000.00 | 28 August 2013 | $1,020.00 |
| 29 August 2013 | $790.00 |
| 10 September 2013 | $1,795.65 | 16 September 2013 | $200.00 | 21 September 2013 | $450.00 |
| 21 September 2013 | $100.00 |
| 24 September 2013 | $1,798.20 | 26 September 2013 | $1,000.00 | 26 September 2013 | $500.00 |
| 30 September 2013 | $150.00 |
| 10 October 2013 | $1,851.15 | 10 October 2013 | $800.00 | N/A | N/A |
| 23 October 2013 | $1,874.05 | 25 October 2013 | $3,000.00 | 25 October 2013 | $1,950.00$155.00 |
| 5 November 2013 | $1,825.70 | 7 November 2013 | $450.00 | 17 November 2013 | $108.00 |
| 11 November 2013 | $100.00 |
| 18 November 2013 | $5000.00 |
| 19 November 2013 | $1,825.70 | 25 November 2013 | $550.00 | 21 November 2013 | $2,012.00$165.00 |
| 3 December 2013 | $1,815.25 | 5 December 2013 | $150.00 | 4 December 2013 | $2,995.00 |
| 7 December 2013 | $100.00 |
| 14 December 2013 | $20.00 |
| 17 December 2013 | $1,802.80 | 18 December 2013 | $3,900.00 | 20 December 2013 | $2,510.00 |
| **TOTAL** | **$30,889.10** |  | **$30,557.00** |  | **$17,361.00** |

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| **Ortega** |
| **Wages paid by FTM** | **ATM withdrawals** | **International transfers** |
| **Date** | **Amount**  | **Date** | **Amount**  | **Date** | **Amount**  |
| 1 May 2013 | $412.85 | N/A | N/A | N/A | N/A |
| 9 May 2013 | $1,657.35 | 13 May 2013 | $2,070.00 | 16 May 2013 | $1,108.00 |
| 22 May 2013 | $1,802.15 | 23 May 2013 | $500.00$500.00$500.00$300.00 | 24 May 2013 | $1,008.00 |
| 3 June 2013 | $1,839.40 | 5 June 2013 | $1,000.00$800.00 | N/A | N/A |
| 17 June 2013 | $1,846.60 | 19 June 2013 | $1,000.00$800.00 | 19 June 2013 | $1,508.00 |
| 1 July 2013 | $1,836.15 | 3 July 2013 | $100.00 | N/A | N/A |
| 4 July 2013 | $100.00 |
| 5 July 2013 | $100.00 |
| 8 July 2013 | $1,000.00 |
| 10 July 2013 | $100.00 |
| 11 July 2013 | $300.00 |
| 17 July 2013 | $1,845.30 | 18 July 2013 | $500.00 | 20 July 2013 | $518.00 |
| 23 July 2013 | $700.00 |
| 24 July 2013 | $100.00 |
| 30 July 2013 | $1,846.60 | 31 July 2013 | $800.00 | N/A | N/A |
| 1 August 2013 | $1,000.00 |
| 13 August 2013 | $1,851.15 | 14 August 2013 | $1,000.00$100.00 | 15 August 2013 | $1,008.00 |
| 16 August 2013 | $800.00 |
| 27 August 2013 | $1,843.85 | 28 August 2013 | $1,000.00$1,000.00 | 28 August 2013 | $1,008.00 |
| 29 August 2013 | $100.00 |
| 10 September 2013 | $1,830.25 | 11 September 2013 | $1,000.00$830.00 | 12 September 2013 | $1,008.00 |
| 21 September 2013 | $500.00 |
| 25 September 2013 | $1,000.00 |
| 25 September 2013 | $1,859.00 | 26 September 2013 | $1,000.00 | N/A | N/A |
| 10 October 2013 | $1,917.85 | 11 October 2013 | $1,000.00 |  |  |
| 23 October 2013 | $1,000.00 |
| 23 October 2013 | $1,952.80 | 29 October 2013 | $1,000.00$1,000.00 | 23 October 2013 | $2,008.00 |
| 5 November 2013 | $1,000.00 |
| 5 November 2013 | $1,884.50 | 7 November 2013 | $1,000.00 | 10 November 2013 | $2,008.00 |
| 19 November 2013 | $1,901.15 | 20 November 2013 | $300.00 | N/A | N/A |
| 22 November 2013 | $1,000.00 |
| 2 December 2013 | $1,893.65 | 12 December 2013 | $1,000.00$1,000.00 | 5 December 2013 | $2,008.00 |
| 12 December 2013 | $2,008.00 |
| 16 December 2013 | $1,878.65 | 18 December 2013 | $1,000.00$800.00 | N/A | N/A |
| **TOTAL** | **1003 $31,899.25** |  | **$31,700.00** |  | **$15,198.00** |

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| **Sarto** |
| **Wages paid by FTM** | **ATM withdrawals** | **International transfers** |
| **Date** | **Amount**  | **Date** | **Amount**  | **Date** | **Amount**  |
| 1 May 2013 | $415.15 | N/A | N/A | N/A | N/A |
| 9 May 2013 | $1,701.00 | 10 May 2013 | $2,000.00 | N/A | N/A |
| 22 May 2013 | $1,802.15 | 25 May 2013 | $1,000.00 | N/A | N/A |
| 27 May 2013 | $700.00 |
| 4 June 2013 | $1,834.85 | 6 June 2013 | $100.00$900.00 | 12 June 2013 | $131.46 |
| 7 June 2013 | $1,000.00 |
| 17 June 2013 | $1,854.45 | 20 June 2013 | $800.00 | N/A | N/A |
| 28 June 2013 | $300.00 |
| 1 July 2013 | $1,834.85 | 5 July 2013 | $100.00 | N/A | N/A |
| 10 July 2013 | $200.00 |
| 11 July 2013 | $20.00 |
| 17 July 2013 | $1,842.00 | 18 July 2013 | $1,000.00 | 20 July 2013 | $1,022.10 |
| 19 July 2013 | $100.00$900.00 |
| 30 July 2013 | $1,845.30 | 2 August 2013 | $100.00$100.00$100.00 | N/A | N/A |
| 13 August 2013 | $1,854.45 | 14 August 2013 | $1,000.00 | 17 August 2013 | $2,022.05 |
| 15 August 2013 | $1,000.00 |
| 16 August 2013 | $100.00$500.00 |
| 23 August 2013 | $50.00 |
| 26 August 2013 | $1,846.60 | 28 August 2013 | $1,000.00 | N/A | N/A |
| 29 August 2013 | $790.00 |
| 10 September 2013 | $1,840.70 | 11 September 2013 | $1,000.00 | 14 September 2013 | $754.57 |
| 18 September 2013 | $500.00 |
| 20 September 2013 | $950.00 |
| 24 September 2013 | $950.00 |
| 20 September 2013 | $50.00 |
| 24 September 2013 | $50.00 |
| 24 September 2013 | $1,859.00 | 26 September 2013 | $1,000.00 | 2 October 2013 | $2,999.00 |
| 28 September 2013 | $1,000.00 |
| 9 October 2013 | $1,907.40 | 10 October 2013 | $1,000.00 | 11 October 2013 | $108.00 |
| 16 October 2013 | $1,000.00 | 16 October 2013 | $1,512.00 |
| 23 October 2013 | $1,936.15 | 25 October 2013 | $1,000.00 | N/A | N/A |
| 4 November 2013 | $1,887.80 | 5 November 2013 | $1,000.00 | 6 November 2013 | $502.00 |
| 18 November 2013 | $200.00 |
| 18 November 2013 | $1,892.35 | 27 November 2013 | $500.00 | N/A | N/A |
| 2 December 2013 | $1,864.90 | 4 December 2013 | $400.00 | 4 December 2013 | $272.00 |
| 16 December 2013 | $1,883.20 | 18 December 2013 | $1,000.00 | N/A | N/A |
| 19 December 2013 | $1,000.00 |
| **TOTAL** | **$31,902.30** |  | **$26,460.00** |  | **$9,323.18** |