



Australian Government

Fair Work OMBUDSMAN

ENFORCEABLE UNDERTAKING

Given by

Ejack Pty Ltd

ABN 93 116 041 555

to

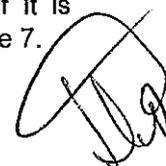
The Commonwealth of Australia

(as represented by the Office of the Fair Work Ombudsman)

concerning contraventions of Commonwealth workplace laws

Details

| Parties | FWO and Ejack Pty Ltd | |
|----------------------|---|---|
| FWO | Name | Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) |
| | ABN | 43884188232 |
| | Address | The Fair Work Ombudsman GPO Box 9887 SYDNEY NSW 2001 |
| | Telephone | (02) 8293 4617 |
| | Fax | (02) 6264 5026 |
| | Attention | Mark Davidson Director – Regional Services and Targeting |
| | Ejack Pty Ltd | Name |
| ABN | | 93116041555 |
| Incorporated in | | New South Wales |
| Address | | Shop 71, Lismore Square LISMORE NSW 2480 |
| Telephone | | (02) 6622 5926 |
| Fax | | (02) 6622 6740 |
| Attention | | John Kenny - Director |
| Recitals | A | The FWO commenced an investigation into allegations that Ejack Pty Ltd had breached Commonwealth workplace laws. |
| | B | By reason of the matters set out in Attachment "A" (Background), the FWO has determined, and Ejack Pty Ltd acknowledges, that Ejack Pty Ltd contravened Commonwealth workplace laws. |
| | C | The parties have agreed to resolve the contraventions without the need to resort to civil penalty litigation by way of this Enforceable Undertaking ("EU") made pursuant to section 715 of the <i>Fair Work Act 2009</i> (FW Act). |
| Governing law | Commonwealth | |
| Date of commencement | The date the parties execute the Enforceable Undertaking or, if it is executed on a different date, the date of the last execution. See page 7. | |



General terms

1 Admission of contravention

By reason of the matters described in Attachment "A" (**Background**), which are admitted without demur by Ejack Pty Ltd, the FWO and Ejack Pty Ltd agree that Ejack Pty Ltd contravened Commonwealth workplace laws in the respects set out in Attachment "B" ("**Contraventions**").

2 Limit of admission

2.1 The FWO acknowledges that the terms of this EU:

- (a) are solely for the purposes of resolving the FWO investigation into the Contraventions; and
- (b) must not be interpreted as an admission by Ejack Pty Ltd of liability for any matter, other than as expressly provided in this EU.

2.2 No assertion or matter in this EU may be relied upon as an admission by any person to support a cause of action in any other civil penalty proceeding.

2.3 However, this term does not prevent any matter in this EU being relied upon in future proceedings in order to inform a relevant Court or tribunal of the details of the conduct that was the evidentiary foundation for Ejack Pty Ltd entering into this EU.

2.4 This means that the FWO reserves the right to rely on the terms of this EU and the admissions in respect of any future proceedings brought by the FWO against Ejack Pty Ltd in relation to any future contraventions of Commonwealth workplace laws.

3 Enforceable undertakings

Ejack Pty Ltd **NOW UNDERTAKES** that, in consideration of the FWO agreeing not to apply for any orders under Division 2 of Part 4-1 of the FW Act in relation to the Contraventions (as evidenced by the FWO's acceptance of this EU endorsed below), Ejack Pty Ltd must do all those activities and things set out in Attachment "C" (**Undertakings**).

4 Commencement of enforceable undertaking

This EU comes into effect when:

- (a) the EU is executed by Ejack Pty Ltd; and
- (b) the FWO accepts the EU executed by Ejack Pty Ltd (as evidenced by the FWO's acceptance of this EU endorsed below).

5 Acknowledgements

Ejack Pty Ltd acknowledges that:

- (a) the undertakings it has given in this EU are reasonable in the circumstances;
- (b) this EU is given to and accepted by the FWO pursuant to section 715 of the FW Act;
- (c) the FWO may:



- (i) make this EU (and any of the Attachments) available for public inspection, including by posting it on the FWO internet site at www.fwo.gov.au (subject to the FWO taking any necessary steps to the redaction of the names of any person affected by the Contraventions);
 - (ii) release a copy of this EU (and any of the Attachments to it) pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
 - (iii) issue a media release in relation to this EU;
 - (iv) from time to time, publicly refer to the EU (and any of the Attachments to it) and its terms;
 - (v) rely upon the admissions made by Ejack Pty Ltd in paragraph 1 above in respect of any future decision about enforcement action to be taken in respect of any future non-compliance by Ejack Pty Ltd with Commonwealth workplace relations obligations.
- (d) consistent with the Note to section 715(4) of the FW Act, this EU in no way derogates from the rights and remedies available to any other person arising from the conduct set out in this EU; and
- (e) if Ejack Pty Ltd contravenes any of the terms of this EU:
- (i) the FWO may apply to any of the Courts set out in section 715(6) of the FW Act, for orders under section 715(7) of the FW Act; and
 - (ii) this EU may be provided to the Court as evidence of the admissions made by Ejack Pty Ltd in paragraph 1, and also in respect of the question of costs; and
 - (iii) this EU is to be taken as having been withdrawn from by Ejack Pty Ltd for the purposes of section 715(3) of the FW Act if the FWO gives its written consent (in which case the FWO may apply for orders against Ejack Pty Ltd under Division 2 of Part 4-1 of the FW Act).

6 No inconsistent statements

Ejack Pty Ltd:

- (a) must not; and
- (b) must ensure that each of its officers, employees or agents, do not,

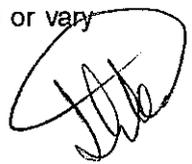
make any statement, orally or in writing, or otherwise which conveys or implies or reasonably conveys or implies anything inconsistent with admission or acknowledgements contained in this EU.

7 Termination by the FWO

At any time, the FWO may, by notice in writing, terminate this EU (that is, immediately and without notice) if the Ejack Pty Ltd commits, in the opinion of the FWO, a serious or persistent breach or non-observance of a term or terms of this EU.

8 Withdrawal from or variation to this EU

Consistent with section 715(3) of the FW Act, Ejack Pty Ltd may withdraw from or vary this EU at any time, but only with the consent of the FWO.



9 Continuing obligations**9.1 General survival**

Any provision of this EU remaining to be performed or observed by Ejack Pty Ltd or having effect after the cessation of this EU for whatever reason (including termination by the FWO or withdrawal from by Ejack Pty Ltd) remains in full force and effect and is binding on Ejack Pty Ltd after this EU ends.

9.2 Survival

Without limiting the generality of clause 9.1 ("General survival"), the following clauses survive termination of this EU for whatever reason (including termination by the FWO or withdrawal from by Ejack Pty Ltd):

- (a) Clause 1 (Admissions and contraventions); and
- (b) Clause 6 (No inconsistent statements).

10 Legally binding agreement

These terms are intended to have immediate effect on all parties upon acceptance by the FWO of this EU (as evidenced by the FWO's acceptance of this EU endorsed below).

11 Entire agreement

This EU constitutes the entire agreement of the parties about its subject matter and supersedes all previous agreements, understandings and negotiations on that subject matter. No oral explanation or information provided by either party to the other:

- (a) affects the meaning or interpretation of this EU; or
- (b) constitutes any collateral agreement, warranty or understanding between the FWO and Ejack Pty Ltd.

12 No representations or warranties

The Executive acknowledges that in entering into this EU they have not relied on any representations or warranties about the subject matter of this EU except as provided in this EU.

13 Construction

No rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of, or seeks to rely on, this EU or any part of it.

14 Costs

The parties must pay their own legal and other costs and expenses in connection with the preparation, execution and completion of this EU and other related documentation.



15 Severance

If the whole or any part of a provision of this EU is void, unenforceable or illegal in a jurisdiction it is severed for that jurisdiction. The remainder of the agreement has full force and effect and the validity or enforceability of that provision in any other jurisdiction is not affected. This clause has no effect if the severance alters the basic nature of this EU or is contrary to public policy.

16 Competency

Ejack Pty Ltd acknowledges that:

- (a) before executing this EU, Ejack Pty Ltd was given the opportunity to seek independent legal and other advice of their choice;
- (b) in the light of any advice provided to Ejack Pty Ltd, they considered their position;
- (c) if Ejack Pty Ltd has been advised by their solicitors, they have been advised by them as to the terms of this EU; and
- (d) Ejack Pty Ltd fully understands the effect of this EU.

17 Governing law

This EU is governed by the law in force in the place specified in the Details. Each party submits to the non-exclusive jurisdiction of the courts of that place.

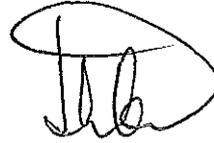


Signing page

SIGNED on [17 DECEMBER 2010] by
Ejack Pty Ltd by its duly authorised officer,
in the presence of:



(Signature of Witness)



(Signature of Officer)

BEN DERVETTEVILLE ROBIN

(Name of Witness in Full)

JOHN GERARD KENNY

(Name of Officer in Full)

24th January 2011
SIGNED on [] for
the COMMONWEALTH OF AUSTRALIA
(FAIR WORK OMBUDSMAN), by its duly
authorised officer in the presence of:



(Signature of Witness)



(Signature of Officer)

Jamie Webster

(Name of Witness in Full)

**NICHOLAS PAUL WILSON
FAIR WORK OMBUDSMAN**

or by his Delegate subject to the instrument of
delegation made pursuant to section 683 of the
FW Act and executed by Nicholas Paul Wilson
on 2 July 2009.

ATTACHMENT "A" (BACKGROUND)

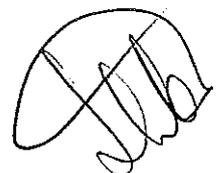
1. Ejack Pty Ltd operates a coffee shop/restaurant in Lismore NSW and employs staff as either wait staff or short order cooks, on a casual basis.
2. Mr John Gerard Kenny (**Mr Kenny**) is, at the date of this EU, the sole director of Ejack Pty Ltd.
3. Ejack Pty Ltd was registered on 1 September 2005.
4. Ms Anne Clare Kenny (Mr Kenny's sister) was a Director of Ejack Pty Ltd from 1 September 2005 until 30 April 2007.
5. Ejack Pty Ltd employed employees covered by the *Restaurant, &c., Employees (State) Award (Restaurants NAPSA)* on 26 March 2006.
6. Employment entitlements of employees of Ejack Pty Ltd came to the FWO's attention through a confidential complaint from a former employee. The complainant indicated that she had signed an AWA on commencement of her employment.
7. Mr Kenny on behalf of Ejack Pty Ltd indicated that other employees were also subject to AWA's but subsequent searches revealed that no such AWA's had been lodged with the Workplace Authority by Ejack Pty Ltd.
8. Mr Kenny advised that on commencement of Ejack Pty Ltd's operations, Ms Kenny was handling the "HR Side" of Ejack Pty Ltd.
9. The FWO advised Mr Kenny that the applicable industrial instrument covering employees of Ejack Pty Ltd is the Restaurants NAPSA.
10. On 10 September 2008 the FWO provided Mr Kenny with its calculations for the original complainant and those monies have been repaid.
11. Mr Kenny has undertaken his own assessment of underpayments to other staff on the basis of failure to lodge AWA's. These assessments have been conducted using spreadsheets provided by the FWO.
12. The FWO reviewed Ejack Pty Ltd's calculations identifying slight errors in the methodology used, which reduced the amount of monies outstanding. The total underpayment in this case has been assessed as \$137,983.63.
13. Mr Kenny has advised the FWO that he has already back payed an amount of \$44,716.56 as at 1 November 2010.
14. Mr Kenny has advised the FWO that he apologised to all existing employees of Ejack Pty Ltd for the contraventions during a meeting held in September 2008. A letter from Mrs Joanna King, Duty Manager of Ejack Pty Ltd, regarding this meeting appears at Attachment "E" to this EU.



ATTACHMENT "B" (CONTRAVENTIONS)

1. Ejack Pty Ltd contravened subsection 182(1) of the WR Act by failing to pay casual employees their required minimum rate of pay between 27 March 2006 and 21 October 2008.
2. Ejack Pty Ltd contravened subsection 185(2) of the WR Act by failing to pay casual employees their required casual loading between 27 March 2006 and 21 October 2008.
3. Ejack Pty Ltd contravened subclause 11.1.6 of the notional agreement preserving the terms of the Restaurants NAPSA by failing to pay casual employees their required penalty rates for time worked on weekends between 27 March 2006 and 21 October 2008.
4. Ejack Pty Ltd contravened subparagraph 4(3)(b)(ii) of the notional agreement preserving the terms of the *Annual Holidays Act (NSW) 1944* (**Annual Holidays NAPSA**).

Seen

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by several loops and a final flourish.

ATTACHMENT "C" (UNDERTAKINGS)

Ejack Pty Ltd undertakes to:

Future workplace relations compliance

1. ensure that it complies at all times and in all respects with the FW Act and the *Fair Work Regulations 2009* by developing systems and processes to ensure ongoing compliance with Commonwealth workplace laws, including but not limited to:
 - 1.1. regularly reviewing rates of pay and employee entitlements;
 - 1.2. contacting the FWO on a regular basis to ensure that the correct rates of pay and entitlements are being paid to its employees; and
 - 1.3. allowing regular visits from Fair Work Inspectors.
2. provide, within 28 days of the date of this EU, the FWO with details of the implementation of systems and processes designed to ensure ongoing compliance with Commonwealth workplace laws.

Make good underpayment

3. pay the outstanding amount of \$93,267.07 owed to employees employed between 27 March 2006 and 21 October 2008. The outstanding repayments are to be made on or before 30 June 2012. Proof of payment is to be provided to the FWO no later than 7 days after each payment is made.
4. if the underpaid employee/employees cannot be located, pay any outstanding amount into the consolidated revenue of the Commonwealth of Australia (through the FWO) to be held on trust for the relevant underpaid employee/employees.

Apology

5. write and send to each former employee of Ejack Pty Ltd employed between 27 March 2006 and 21 October 2008, a letter of apology in the form of Attachment "D" to this EU, signed by the Chief Executive Officer of Ejack Pty Ltd.

Paid meeting of affected employees

6. conduct a paid meeting for existing employees who were affected by the underpayment. At the meeting Ejack Pty Ltd must explain the rectification of the underpayment. Ejack Pty Ltd must invite a representative of the FWO to attend the meeting to explain this EU.

Ejack Pty Ltd workplace relations compliance training

- BAM*
By 31 April 2011
7. ~~within 21 days of the signing of this EU~~, Ejack Pty Ltd organise and ensure John Kenny attend a training course ("**the training course**") which deals with:
 - (a) the rights and responsibilities of employers under the FW Act; and
 - (b) the rights and responsibilities of employees under the FW Act.
 8. ensure the training course must be conducted by an accredited workplace trainer (not being anyone who has advised Ejack Pty Ltd in relation to the subject matter of the Contraventions) who is approved by the FWO and paid for by Ejack Pty Ltd.
 9. provide the training materials used in the training course to the FWO no later than 14 days before the training is to be conducted and the training materials must be approved by the FWO.

J. Shea

[Signature]

10. provide evidence of attendance at the training course and payment of the training course must to FWO within 7 days of the training being provided.

Future reporting to the FWO

11. report to the FWO at the end of each financial year, for the next 3 years after the date of this EU ("**reporting period**"), regarding the following matters:

- (a) the wage rates and entitlements paid to each employee employed over the reporting period;
- (b) the classification, age and employment status (casual, part-time, full time, trainee) of each employee employed over the reporting period; and
- (c) details of any proactive compliance measures implemented over the reporting period (for example attendance at relevant training or self auditing activities) aimed at ensuring improved compliance with Commonwealth workplace laws.

12. Such report will be in writing and must be received by the FWO by no later than the 15th day of July for each of the 3 years.



ATTACHMENT "D" (APOLOGY)

[Company letter head]

APOLOGY TO FORMER EMPLOYEES

Failure to pay correct rates of pay and entitlements between March 2006 and October 2008

Dear [Name],

I am writing to let you know about the outcome of a recent investigation by the Office of the Fair Work Ombudsman ("FWO"), and to offer Ejack Pty Ltd's sincere apology to all former employees of Ejack Pty Ltd for the unfortunate situation which was the subject of the FWO's investigation.

The FWO's investigation looked at how Ejack Pty Ltd failed to pay some of its staff in accordance with the provisions of the *Workplace Relations Act 1996*, the notional agreement preserving the terms of the *Restaurant, & c, Employees (State) Award* and the notional agreement preserving the terms of the *Annual Holidays Act 1944 (NSW)*, between 27 March 2006 and 21 October 2008.

Ejack Pty Ltd has formally admitted to the FWO that it failed to pay a number of staff their required minimum rates of pay, which it was required to pay under law.

Happily for Ejack Pty Ltd and its many valued employees, Ejack Pty Ltd has already compensated all current staff who were affected in this case and will continue to pay compensation to affected former staff over the next month.

Ejack Pty Ltd expresses its sincere regret and apologises to all past employees for failing to comply with its lawful obligations.

I thank you for your support.

Yours sincerely

John Kenny



ATTACHMENT "E"

8 November 2010

Mrs. Joanna King
Duty Manager
Ejack Pty Ltd.
Lismore 2480
NSW

To Whom It May Concern:

Re: Back payments.

I, Joanna King, Duty Manager for Ejack P/L, confirm that Mr. John Kenny, Director for Ejack P/L, sincerely apologized to all staff present at the Team Meeting convened by Mr. Kenny in September of 2008.

Mr. Kenny was extremely remorseful for the situation that the business had found itself in. He assured all team members that rectification for the mistake and that the repayment of staff was of the highest priority and that repayments would occur at the earliest opportunity.

I feel I can speak on behalf of all team members as I am the longest serving staff member for Ejack P/L.

Yours Sincerely



Mrs. Joanna King
Duty Manager

