



Australian Government

Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Double Hats Pty. Ltd. (ACN: 161 408 662)

and

Ms Mui Ha

LMS
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Section 715 ENFORCEABLE UNDERTAKING

Parties

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by;
 - (a) Double Hats Pty. Ltd. (the **Employer**); and
 - (b) Mui Ha (**Ms Ha**) Director of Double Hats Pty. Ltdfor the purposes of section 715 of the *Fair Work Act 2009* (**FW Act**).

Background

1. The Employer has been registered as a Constitutional Corporation since 27 November 2012 (ACN: 161 408 662).
2. The Employer operates in the restaurant industry, trading as Vinh Phat Chinese Seafood Restaurant, at Level 1, 10-12 Hughes St, Cabramatta, New South Wales.
3. The Employer's operation is covered by the *Restaurant Industry Award 2010* (the **Award**).
4. Ms Ha admits and agrees that, at all material times, she:-
 - (a) was a director of the Employer, having been so since 27 November 2012;
 - (b) was ultimately responsible for overall direction, management and supervision of the operations at the Employer in relation to engaging staff, setting and adjusting pay rates and determining wages and conditions of employment; and
 - (c) by reason of the matters set out in subparagraphs (a) and (b) was responsible in a practical sense for ensuring the Employer complied with its legal obligations.
5. In December 2015 the Employer was subject to an Audit as part of the FWO's NSW Western Sydney Campaign 2015. In April 2016, the Employer produced records to the FWO in response to a Notice to Produce Records or Documents issued and served on the Employer. An audit of the records produced found contraventions of Commonwealth workplace laws occurred between 7 December 2015 and 13 December 2015 affecting 22 employees performing various duties (whose names, Award classifications, and Amounts Owed as underpayments are as set out in **Attachment A**) (collectively the **Employees**).
6. The Employer has advised that the Employees were engaged on a part time basis and generally worked set hours each week.
7. The Employees were variably paid between \$17.30 and \$20.00 per hour, with the majority being paid a flat rate of between \$18.00 and \$20.00 per hour for all work performed, including hours worked on weekends.
8. The flat rates paid to the Employees for ordinary hours worked were at all material times less than the minimum hourly rate for ordinary hours corresponding to the relevant Award classification.
9. The flat rates paid to the Employees for weekend hours worked were at all material times less than the minimum penalty rates for weekend hours corresponding to the relevant Award classification.
10. The Employer accepted the findings of the audit and calculated the quantum of underpayments for the Employees for the period 1 July 2015 to 5 June 2016 (the **Calculation Period**) based on the Employees' usual patterns of work.
11. The Employer provided the FWO with a copy of its calculations which showed the amount of the total underpayments to the Employees during the Calculation Period to be \$79,817.60 and the

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FWO accepts these calculations. On or around 2 September 2016, the Employer rectified the underpayments to the Employees for the Amounts Owed and provided copies of pay slips to the FWO.

12. The Employer has rectified the underpayments. In accordance with the terms of this Undertaking the Employer agrees to take additional steps to ensure future compliance with the Award and workplace laws.

Contraventions

13. The FWO has determined, and the Employer admits, that the Employer contravened section 45 of the FW Act by failing to comply with the following provisions of the Award:

- (a) Clause 20 by failing to pay the Employees correct ordinary hourly rate of pay;
- (b) Clause 34 by failing to pay the Employees the correct Saturday and Sunday penalty rates;
- (c) Clause 12.3 by failing to make and keep a written agreement of each part-time employee's regular pattern of work; and
- (d) Clause 35.8 by failing to make and keep a separate written agreement each time annual leave is cashed out.

14. The FWO has further determined, and the Employer admits, that the Employer contravened section 535 of the FW Act by failing to comply with the following provisions of the *Fair Work Regulations 2009 (FW Regulations)*:

- (a) Regulation 3.36(1) by failing to make and keep a record of any leave (annual leave and personal/carer's leave) the Employees take and the balance of the Employees' entitlements to the leave from time to time; and
- (b) Regulation 3.36(2) by failing to make and keep an agreement to cash out an accrued amount of annual leave, and by failing to make and keep a record that sets out the rate of payment for the leave that was cashed out and the date payment was made.

Commencement of Undertaking

15. This Undertaking comes into effect when:

- (a) the Undertaking is executed by the Employer and Ms Ha; and
- (b) the FWO accepts the Undertaking so executed.

16. Upon the commencement of this Undertaking, the Employer undertakes to assume the obligations set out below.

Undertakings

17. For the purposes of section 715 of the FW Act the Employer undertakes, and Ms Ha undertakes to cause the Employer, to:

Rectify underpayment

- (a) Within 7 days of the commencement of this Undertaking, provide to the FWO a copy of the Employer's bank statement issued on or around 19 September 2016, as evidence of the rectification of underpayments made to the Employees;

- (b) Within 7 days of If requested, provide the FWO with any other records and documents to demonstrate that the underpayments have been rectified.

FWO MyAccount Registration

- (c) Within 28 days of the commencement of this Undertaking, register with the FWO 'My Account' portal at 'www.fairwork.gov.au' and complete the profile, minimum pay rates and award options through this portal;
- (d) Provide the FWO with the Company's 'My Account' registration number within 7 days of registration;
- (e) Subscribe to receive email alerts from the FWO relating to the Award, available at <https://www.fairwork.gov.au/website-information/staying-up-to-date/subscribe-to-email-updates>;
- (f) Provide to the FWO evidence of the above subscription, including advising the FWO of the email address used to register.

Future Workplace Relations Compliance

- (g) Comply at all times and in all respects with the FW Act, *Fair Work Regulations 2009* (Cth) (**FW Regulations**), the Award and any modern awards as they apply to any of the Employer's employees;
- (h) Provide the FWO, within 90 days of the date of execution of this Undertaking, details of systems and processes already in place or to be implemented to comply with paragraph (f) above. Without limitation, such systems and processes relating to:
- (i) Ensuring employees received the correct minimum rates of pay and entitlements, such as penalty rates and overtime rates;
 - (ii) Issuing payslips to employees within one working day of payment as prescribed by Section 536 FW Act and Part 3.6 Subdivision 1 of the FW Regulations including records relating to the taking of leave and recording leave balances;
 - (iii) Making and keeping part-time work agreements for part time workers in accordance with clause 12.3 of the Award.

Workplace Notice

- (i) Within 28 days of the commencement of this Undertaking, display a notice within the workplace in a place which is accessible to all employees (**Workplace Notice**) for a period of 14 consecutive days in the terms set out in **Attachment B**;
- (j) Within 28 days of the commencement of this Undertaking and at the Employer's expense, make or obtain a translation of the Workplace Notice in each language (other than the English language) normally spoken by any of the Employees (**Translated Workplace Notice(s)**). Such notice(s) are also to be displayed in accordance with clause (i).
- (k) Within 7 days of the display of the notice, provide a copy of the Workplace Notice and any and all Translated Workplace Notice(s) together with photographic evidence of its/their display to the FWO;

Apology

- (l) Within 28 days of the commencement of this Undertaking, send each of the Employees an apology (**Apology Letter**) in the form of the letter set out in **Attachment C** attaching a copy of the Translated Workplace Notice in the language normally spoken by the employee;

- (m) Within 7 days of the Apology Letter being sent, provide to the FWO a copy of each of the Apology Letters, the Translated Workplace Notice that was attached to the Apology Letter, and proof of their delivery to the Employees;

Self – Audit and Reporting Activity

- (n) Cause to have performed by an external accounting professional (e.g. Certified Practising Accountant), audit specialist or employment law specialist (at the expense of the Employer) future audits of the Employer's compliance with the FW Act, FW Regulations and fair work instruments including but not limited to the Award on the following terms:
- (i) The audits will be required to cover each of the full pay period(s) that fall in the period from 1 September to 30 September (inclusive) in the years 2017, 2018, and 2019;
 - (ii) The audits must be completed within 30 days of the end of the relevant audit period each year;
 - (iii) The audits will apply to all employees employed at any time during the audit period in a classification of work of any fair work instrument applying to the Employer in the audit period;
 - (iv) The audits will assess the Employer's compliance with the following obligations according to each employee's classification of work, category of employment and hours worked during the audit period:
 - wages and work-related entitlements;
 - any accrual and payment of entitlements under the National Employment Standards in Part 2-2 of the FW Act;
 - method and frequency of payment in accordance with section 323 of the FW Act;
 - record keeping and pay slip obligations in Division 3 of Part 3-6 of the FW Act; and
 - written agreements on work patterns for part-time employees, in accordance with clause 12.3 of the Award;
 - (v) Within 45 days of the end of the relevant audit period each year, the Employer will provide to the FWO a copy of the audit report which must include:
 - a statement of the qualifications of the person conducting the audit and the methodology used in the audit;
 - the audit findings;
 - written particulars of any contraventions identified in the audit, including steps the Employer will take to rectify any identified contravention(s), when the rectification will occur and evidence of rectification to be supplied to the FWO. All contraventions must be rectified by 31 December in the year of the audit.

Workplace relations training

- (m) Within five months of the execution of this Undertaking, organise and ensure training of the Director and all persons engaged by the Employer who have managerial responsibility for human resources, recruitment or payroll functions (Training);
- (n) Ensure the Training relates to compliance with all applicable Commonwealth workplace laws and instruments, including but not limited to the rights and responsibilities of the employer under the FW Act and the *Restaurant Industry Award 2010* (MA000119)

- (o) Ensure training is conducted by an accredited workplace trainer; such person or organisation to be approved by the FWO and paid for by the Company;
- (p) Provide the training materials to be used in the Training to the FWO no later than 14 days before the Training is to be conducted;
- (q) Provide evidence of attendance at the Training to the FWO within 7 days of the Training being provided (including the name and position of all the attendees and the date on which the Training was attended).

Donation to the South West Sydney Legal Centre

- (r) By 10 November 2016 make a donation of \$5,000 to the South West Sydney Legal Centre, and;
- (s) Provided proof of the payment referred to in the previous paragraph to the FWO within 7 days of the payment being made.

No inconsistent statements

18. The employer:

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

Make any statement, orally or in writing or otherwise imply anything that is inconsistent with the admission or acknowledgements contained in this agreement.

Acknowledgements

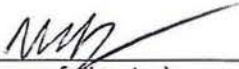
19. The Employer and Ms Ha acknowledge that:

- (a) the FWO may make this Undertaking (including any attachments) available for public inspection, including by posting it to its website at www.fairwork.gov.au (subject to the FWO taking any necessary steps to redact the names of individuals not party to the Undertaking);
- (b) the FWO may release a copy of this Undertaking pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
- (c) the FWO may issue a media release in relation to this Undertaking and from time to time, publicly refer to the Undertaking and its terms;
- (d) the admissions made in the Undertaking may be relied upon by the FWO in respect of any future decision about enforcement action to be taken in relation to any future non-compliance with Commonwealth workplace relations obligations by the Employer;
- (e) consistent with the Note to section 715(4) of the FW Act, this Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct set out in this Undertaking;
- (f) in the event the FWO considers that the Employer or Ms Ha has contravened any of the terms of this Undertaking 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;
- (g) consistent with section 715(3) of the FW Act, the Employer or Ms Ha may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.


Executed as an undertaking

EXECUTED by **Double Hats Pty. Ltd.** in accordance with section 127(1) of the *Corporations Act 2001*:

EXECUTED by **Mui Ha**:



(Signature of director)



(Signature of Mui Ha)

MUI HA

(Name of director)

MUI HA

(Mui Ha)

17-10-2016


(Date)

17-10-2016


(Date)

in the presence of:

in the presence of:



(Signature of witness)



(Signature of witness)

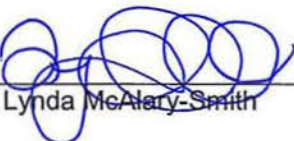
YUANFANG ZHANG

(Name of witness)

YUANFANG ZHANG

(Name of witness)

ACCEPTED by the FAIR WORK OMBUDSMAN pursuant to section 715(2) of the *Fair Work Act 2009* on:



Lynda McAleer-Smith


20/10/16

(Date)

Executive Director Proactive Compliance & Education

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:



(Signature of witness)

ROBERT HORTLE

(Name of Witness)

Attachment A – Employees and amounts owed

Employees	Classification	Amount Owed \$	Period of Engagement within the Calculation Period (weeks)
	Level 2 - cook grade 1	2160.00	48
	Level 1 – Kitchen Attendant Grade 1	2304.00	48
	Level 5 - food and beverage supervisor	9504.00	48
	Level 3 - food and beverage attendant grade 3	2160.00	48
	Level 1 – Kitchen Attendant Grade 1	3864.00	48
	Level 3 - Kitchen Attendant grade 3	4368.00	48
	Level 5 - cook grade 4	9072.00	48
	Level 1 – Kitchen Attendant Grade 1	1920.00	48
	Level 3 - food and beverage attendant grade 3	3120.00	48
	Level 1 - food and beverage attendant grade 1	2016.00	48
	Level 1 - food and beverage attendant grade 1	2016.00	48
	Level 2 - food and beverage attendant grade 2	480.00	48
	Level 2 - food and beverage attendant grade 2	390.00	39
	Level 1 - food and beverage attendant grade 1	2688.00	48
	Level 1 – Kitchen Attendant Grade 1	3360.00	48
	Level 5 - cook grade 4	9072.00	48
	Level 2 - food and beverage attendant grade 2	3648.00	48
	Level 2 - cook grade 1	5520.00	48
	Level 2 - cook grade 1	6624.00	48
	Level 1 – Kitchen Attendant Grade 1	2481.60	33
	Level 1 – Kitchen Attendant Grade 1	1300.00	26
	Level 1 – Kitchen Attendant Grade 1	1750.00	25
TOTAL		79817.60	
No. of Employees underpaid:		22	

Attachment B – Form of Workplace Notice

Contravention of *Fair Work Act 2009* and the Restaurant Industry Award 2010 by Double Hats Pty. Ltd.

A recent audit conducted by the Office of the Fair Work Ombudsman (FWO) determined that Double Hats Pty. Ltd. trading as Vinh Phat Chinese Seafood Restaurant contravened the *Fair Work Act 2009* by failing to pay employees the correct entitlements under the Restaurant Industry Award 2010 as follows:

- minimum hourly rates of pay for time worked Monday to Friday; and
- penalty rates for time worked on Saturdays and Sundays.

Double Hats Pty. Ltd. has formally admitted to FWO that these contraventions occurred and has entered into an Enforceable Undertaking with the FWO (available at www.fairwork.gov.au) committing to a number of measures to remedy the contraventions, including by rectifying the underpayments.

Double Hats Pty. Ltd. expresses its sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore Double Hats Pty. Ltd. gives a commitment that such conduct will not occur again and that it will comply with all requirements of the Commonwealth workplace relations laws in the future.

If you have queries or questions relating to your employment, please contact me, Mui Ha, on (insert phone number). Alternatively, anyone can contact the FWO via the website at www.fairwork.gov.au or the Infoline on 13 13 94.

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Attachment C – Letter of Apology

<Date>

<Employee name>

<Employee Address>

Dear <Employee Name>

I am writing to apologise on behalf of Double Hats Pty. Ltd. trading as Vinh Phat Chinese Seafood Restaurant for non-compliance with Commonwealth workplace relations laws. A recent audit conducted by the Office of the Fair Work Ombudsman (FWO) determined that Double Hats Pty. Ltd. contravened the *Fair Work Act 2009* by failing to pay employees the correct entitlements under the Restaurant Industry Award 2010 as follows:

- Minimum hourly rates of pay for work performed Monday to Friday
- Penalty rates for work performed on a Saturday and Sunday

The audit determined that you were affected by the above contraventions.

Double Hats Pty. Ltd. has taken steps to remedy the contraventions, including by:

- Paying you the amount that you have been underpaid (insert amount); and
- Committing to future compliance.

You received this payment by (insert date) and will be provided with a payment advice regarding the payment.

Double Hats Pty. Ltd. has formally admitted to the FWO that it did not comply with its obligations under Commonwealth workplace relations laws and has entered into an Enforceable Undertaking with the FWO, a copy of which is available from the FWO website at www.fairwork.gov.au. As part of the Enforceable Undertaking, Double Hats Pty. Ltd. has committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

We sincerely regret and apologise for failing to comply with our lawful obligations.

Should have any questions, please contact me, Mui Ha, on (insert phone number).

Yours sincerely

(Signature)

Mui Ha

Director

Double Hats Pty. Ltd.