



Australian Government

Fair Work OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Phat Elephant Pty Ltd (ACN 612604529)

and

Ms Alyssa Phadungkiat

ENFORCEABLE UNDERTAKING

PARTIES

1. This Enforceable Undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) pursuant to section 715 of the *Fair Work Act 2009* (Cth) (**FW Act**) by:
 - a) Phat Elephant Pty Ltd (the Company), trading as Phat Elephant ACN 612604529, Lot 50 Mulherin Drive, Mackay Marina Village, Mackay Harbour QLD 4740; and
 - b) Ms Alyssa Phadungkiat (Ms Phadungkiat) as Director of Phat Elephant Pty Ltd (the Director).

BACKGROUND

2. The Company operates Phat Elephant, a restaurant and bar located in Brisbane's central business district.
3. The Company employs approximately 30 staff in their restaurant. The Company predominantly employs international students.
4. Between January and February 2018, the FWO received enquiries from three Thai nationals employed at the Company. During their employment, the employees resided in Australia subject to student visas. They allege that they did not receive the correct minimum rates or entitlements and that their pay slips were misleading, as they did not list their correct working hours.
5. The terms and conditions of the employee's employment was governed by the FW Act, the *Fair Work Regulations 2009* (**FW Regulations**) and the *Restaurant Industry Award 2010* (**the Award**).
6. The Director admits and agrees that:
 - a) She has been Director of the Company since 25 May 2016;
 - b) That as sole Director, she was ultimately responsible for the overall direction, management and supervision of the operations of the Company in relation to engaging staff, setting and adjusting pay rates and determining wages and conditions of employment;
 - c) By reason of the matters set out in subparagraphs (a) and (b) was responsible in a practical sense for ensuring the Company complied with its legal obligations.
7. The FWO's investigation determined the employees listed in **Attachment A**, were employed by the Company during the following periods:
 - a) Employee A commenced employment with the Company on 12 June 2017 on a casual basis as a waiter and is currently still employed at the business;
 - b) Employee B was employed by the Company between 19 December 2016 and 2 February 2018 on a casual basis, as a waiter; and
 - c) Employee C was employed by the Company between 3 August 2016 and 13 January 2018 on a casual basis, as a waiter.

8. The Company employed the employees as Grade 2 Food and Beverage Attendants in accordance with the Award, and underpaid these employees by **\$27,164.82** (gross) collectively during their employment with the Company. The Company proactively made post termination payments of \$3,552.58 to Employee A and \$9,061.93 to Employee C and made the remaining payments to the employees, in accordance with calculations made by the FWO, between 24 December 2018 and 27 December 2018.
9. The FWO has determined, and the Company admits, that the Company contravened the following provisions of the FW Act:
 - a) Section 45 of the FW Act by failing to comply with the following terms of the Award;
 - (i) Clause 13.1 - casual loading;
 - (ii) Clause 20.1 - minimum rates of pay;
 - (iii) Clause 32.1 – breaks; and
 - (iv) Clause 34 - penalty rates.
 - b) Section 535(1) and (2) of the FW Act, by failing to make and keep for 7 years employee records of the kind prescribed by the Regulations, specifically records as prescribed by the following Regulation;
 - (i) Regulation 3.33(2) which provides if an employees is a casual or an irregular part time employee, an employer must keep a record which sets out the hours worked by the employee.
 - c) Section 712(3) of the FW Act, by failing to comply with a Notice to Produce Records or Documents.

COMMENCEMENT OF ENFORCEABLE UNDERTAKING

10. This Undertaking comes into effect when:

- a) the Undertaking is executed by the Company and the Director;
- b) the FWO accepts the Undertaking so executed.

ENFORCEABLE UNDERTAKING

11. Upon the execution of this Undertaking and for the purposes of section 715 of the FW Act, the Company and the Director undertake the following:

11.1 FWO My account registration

- a) Within 14 days of the execution of this Undertaking:
 - (i) register with the FWO My account portal at www.fairwork.gov.au/register and fully complete the My account profile, including information about the business and the Award, through this portal;
 - (ii) using the FWO Pay Calculator, calculate relevant minimum pay rates (and penalty rates where necessary) and save these calculations to My account;

- (iii) provide to the FWO the 'My account' Customer Registration Number (CRN);
- b) Within **45 days** of the execution of the Undertaking, at a mutually agreed time and location, demonstrate to an officer of the FWO, knowledge of the use of My account, including saving information within My account from the website and relevant FWO online tools. The Company must also demonstrate how its use of this saved information will contribute towards its compliance with workplace obligations including payment to employees of the correct minimum pay rates and applicable penalty rates;
- c) Within **28 days** of the execution of the Undertaking, subscribe to the FWO's subscription service and provide evidence to the FWO of the subscription:
 - (i) Subscribe to the FWO's 'Subscribe to email updates' function available at <http://www.fairwork.gov.au/website-information/staying-up-to-date/subscribe-to-email-updates>;
 - (ii) Choose the relevant State and industry, selecting information updates on the following options:
 - (a) pay rates and entitlements;
 - (b) new products and resources;
 - (c) about us and our work;
 - (d) updates in my industry;
 - (e) tailored information that's relevant to me.

11.2 Workplace relations systems and processes

- a) Ensure that it complies at all times and in all respects with the FW Act, the FW Regulations and the Award;
- b) Provide the FWO, within **60 days** of the date of execution of this Undertaking, details of systems and processes already in place to comply with paragraph a) above. Without limitation, such systems and processes shall include:
 - (i) Ensuring employees receive the correct minimum rates of pay and entitlements, such as penalty rates, overtime rates and shift penalties;
 - (ii) Providing accurate payslips to employees within one day of payment of wages;
 - (iii) Keeping accurate and complete records regarding hours worked by employees.

11.3 Workplace relations training

- a) Within 90 days of the execution of this Undertaking, organise and ensure workplace relations training (the Training) is undertaken by the Director, General Managers and Deputy General Managers of the Company and all other persons who have responsibility for human resources, recruitment or payroll functions;

- b) Ensure the Training relates to compliance with applicable Commonwealth of Australia workplace laws and instruments, including but not limited to the rights and responsibilities of employers under the FW Act and the Award;
- c) Ensure that the Training incorporates the seriousness of giving false and misleading information under the Criminal Code (Cth) as well as information regarding the systematic conduct of underpayment that affects one or more employees;
- d) Ensure the Training is conducted by a workplace trainer, such person or organisation to be approved by the FWO and paid for by the Company;
- e) 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;
- f) 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 attendees and the date on which the training was attended);
- g) Ensure that Training is conducted in the manner prescribed in paragraphs 11.3 b) and c) for a period of 12 months from the execution of this Undertaking, for any new or existing employees or contractors who acquire responsibilities that include human resources, recruitment or payroll functions on behalf of the Company. The Company must provide evidence of the Training to the FWO, within 90 days of the relevant employee or contractor taking on responsibility for the functions.

11.4 FWO Online Training

- a) Within 60 days of execution of this Undertaking ensure that all persons responsible for management, payroll and human resources complete all online education courses (Online Training) designed for employers available on the FWO online learning centre via <http://www.fairwork.gov.au/how-we-will-help/online-training> and provide certificates of completion to the FWO;
- b) For each person required to complete the Online Training, enter all of the required information in Attachment C and provide copies of the completed attachment to the FWO within 90 days of the execution of this Undertaking;
- c) For any persons taking on any of the functions or responsibilities in para 10.3 g), complete Attachment C and submit to the FWO within 28 days of taking responsibility for these functions.

11.5 Apology

- a) Send a letter of apology (**Apology Letter**) to the employees listed in **Attachment A** in the form of **Attachment B**. Provide copies to the FWO **within 14 days** of the execution of this Undertaking.

11.6 Audit Activity

- a) The Company and the Director undertake to engage an external professional with qualifications in accounting or workplace relations, or an external professional otherwise approved by the FWO, to perform bi-annual audits of compliance with Commonwealth workplace laws and instruments, including the Award (**Audits**), in relation to the Company and the other entities that the Director is also a director of.

The Audits will:

- (i) assess a sample of at least 20% of the workforce of each entity, across a range of classifications and types or categories of work;
 - (ii) be conducted for all full pay periods where all or part of the period falls within the following dates:
 - (a) 1 February 2019 – 28 February 2019 - to be finalised by 30 April 2019;
 - (b) 1 September 2019 – 30 September 2019 - to be finalised by 30 November 2019;
 - (c) 1 February 2020 – 29 February 2020 - to be finalised by 30 April 2020;
 - (iii) assess the Company's compliance with:
 - (a) wages or work-related entitlements under any applicable industrial instruments, including the Award, and the National Employment Standards;
 - (b) method and frequency of payment obligations under section 323 of the FW Act;
 - (c) record keeping and pay slip obligations listed within Division 3 of Part 3-6 of the FW Act and within the FW Regulations;
- b) Within 30 days of each of the finalisation dates specified above in paragraph 11.6(a)(ii), the Company will provide a copy of the Audit report to the FWO, which will include:
- (i) a statement about the methodology used to conduct the Audit; and
 - (ii) details of any contraventions identified in the Audit;
- c) If requested by the FWO, the Company will provide the FWO with any records or documents used to conduct the Audit, including any working documents, within 14 days of such a request;
- d) Within 30 days of the completion of the Annual Audit, the Company will:
- (i) rectify any contraventions, including any underpayments arising from contraventions identified;
 - (ii) provide to the FWO evidence of such rectification;
 - (iii) in the event that after making reasonable efforts, the Company is unable to locate any employee(s) to whom money is owed, the Company will make an application to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act to pay the money into the Commonwealth Revenue Fund (CRF). (Any employees that have underpayments paid into the CRF can contact the FWO to claim the money).

11.7 Reporting to the FWO

- a) The Company and the Director are to provide the following information to the FWO in

relation to all the entities that the Director is a Director of:

- (i) Report to the FWO every 3 months from the date of execution of the Undertaking on the details of any establishments or other parts of the Company's business either sold, leased or otherwise assigned to another legal entity;
- (ii) Report to the FWO every 3 months from the date of execution whether the Company opens, or acquires any new or additional establishments;
- (iii) In the event that there are any events required to be reported on, as described in i) above, provide any documentation or other evidence requested by the FWO to confirm the event/s that have transpired.

11.8 Workplace Notice

- a) **Within 28 days** of the execution of this Undertaking, cause to be displayed within all workplaces controlled by the Company a notice in the form of **Attachment D** to this Undertaking (**Workplace Notice**) and provide photographic evidence of its display and the location of the notice in the workplace;
- b) Ensure that each Workplace Notice is printed in at least A3 size and is clearly displayed:
 - (i) In a location to which all employees who work at the Company have access;
 - (ii) In a manner which is reasonably capable of drawing the attention of all employees to the Workplace Notice (for example, by placement on a staff noticeboard);
 - (iii) For a period of 28 continuous days;
- c) At the end of the period of 28 days provide confirmation to the FWO that each Workplace Notice has been continuously displayed for the required period.

11.9 'Mail-out' to former employees

- a) **Within 28 days** of the execution of this Undertaking provide communication to all former employees since the registration of the Company in the form of **Attachment D**;
- b) **Within 90 days** of the execution of this Undertaking provide to the FWO evidence of the transmission of communication between the Company and all former employees;
- c) The Company undertakes that upon receipt of any requests for assistance following this mail out relating to contraventions of Commonwealth workplace laws or instruments which occurred prior to the execution of this Undertaking, the Company will:
 - (i) use all reasonable endeavours to resolve the request, including rectifying any identified contraventions, **within 60 days** of being notified of the request for assistance;
 - (ii) where a request for assistance has been resolved, provide the FWO with evidence of resolution;

- (iii) where a request for assistance has not been resolved by agreement with the requester within the period specified in subparagraph 11.9(c)(i), report to the FWO about the nature of the matter and the steps taken to try to resolve it.

11.10 Record Keeping

- a) **Within 28 days** of the execution of this Undertaking provide to the FWO a copy of time and wage records and payslips for one employee for the first full pay period following the execution of this Undertaking. Such records are to comply with Commonwealth workplace laws.

11.11 Broader Community workplace relations education

- a) Make a donation **within 90 days** of **\$10,000** to the Multicultural Community Centre (website: <https://mccbrisbane.org/>) with the objective of assisting the promotion of compliance with Commonwealth workplace laws in the community, and provide evidence of the donation to FWO.

11.12 Access to the Award and NES

- a) The Company will:
 - (i) Ensure that copies of the applicable Award and the NES are available to all employees to whom they apply in accordance with Clause 5 of the Award. These will be made available either:
 - (a) On a noticeboard which is conveniently located at or near the workplace; or
 - (b) Through electronic means;
 - (c) Notify the FWO within 30 days of how the Company has made the Award and NES available to employees.

NO INCONSISTENT STATEMENTS

12. The Company and the Director:

- a) must not;
- b) must ensure that each of its officers, employees or agents, do not, make any statement, orally or in writing or otherwise imply anything that is inconsistent with admission or acknowledgements contained in this agreement.

ACKNOWLEDGEMENTS

13. The Company and the Director acknowledge that:

- a) The FWO may;
 - (i) make this Undertaking (and any of the Attachments hereto) available for public inspection, including by posting it on the FWO internet site at www.fairwork.gov.au;
 - (ii) release a copy of this Undertaking (and any of the Attachments hereto) pursuant to any relevant request under the Freedom of Information Act 1982

(Cth);

- (iii) issue a media release in relation to this Undertaking;
 - (iv) from time to time, publicly refer to the Undertaking (and any of the Attachments hereto) and its terms;
 - (v) rely upon the admissions made by Phat Elephant Pty Ltd as set out in paragraph 6 above in respect of decision making concerning any future non-compliance with workplace relations obligations;
- b) 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 herein;
- c) Consistent with section 715(3) of the FW Act, the Company and the Director may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO;
- d) If the Company or the Director contravene any of the terms of this Enforceable Undertaking:
 - (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;
 - (ii) This Enforceable Undertaking may be provided to the Court as evidence of the admissions made by the Director in paragraph 6 above, and also in respect of the question of costs.
- e) The *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* makes the following changes to the FW Act:
 - (i) increased penalties for 'serious contraventions' of workplace laws
 - (ii) makes it clear that employers can't ask for 'cashback' from employees or prospective employees
 - (iii) increases penalties for breaches of record-keeping and pay slip obligations
 - (iv) employers who don't meet record-keeping or pay slip obligations and can't give a reasonable excuse will need to disprove wage claims made in a court (this is also referred to as a reverse onus of proof)
 - (v) strengthen our powers to collect evidence in investigations
 - (vi) introduce new penalties for giving us false or misleading information, or hindering or obstructing our investigations.
- f) The above mentioned changes to the FW Act also mean that certain franchisors and holding companies can be held responsible if their franchisees or subsidiaries don't follow workplace laws (if they knew or should have known and could have prevented it).
- g) providing false or misleading information is a contravention of section 718A of the FW Act and is a civil remedy with a maximum penalty of \$630,000 for a body corporate or \$126,000 for an individual.

- h) Providing false or misleading information is also a criminal offense under section 137.1 and 137.2 of the Criminal Code Act 1995, which could result in imprisonment for up to 12 months.

Executed as an undertaking

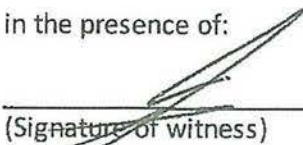
EXECUTED by Phat Elephant Pty Ltd in accordance with section 127(1) of the Corporations Act 2001:


(Signature of director)

ALYSSA P PHADUNGKIAT
(Name of director)

18/08/2019
(Date)

in the presence of:


(Signature of witness)

James Stuart Wright
(Name of witness)

EXECUTED by Ms Alyssa Phadungkiat


Alyssa Phadungkiat

(Signature of director/company secretary)

(Name of director/company secretary)

(Date)

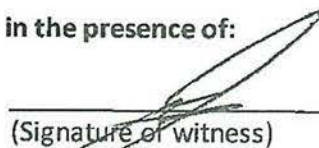
in the presence of:

(Signature of witness)

(Name of witness)


12/02/2019
(Date)

in the presence of:


(Signature of witness)

James Stuart Wright
(Name of witness)


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


Lynda McAulay-Smith, Executive Director Proactive
compliance + enforcement
[Insert name and role of Delegate]

(Date) 15/12/19

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:


(Signature of witness)

LOUISE CATO
(Name of witness)

ATTACHMENT A – UNDERPAID EMPLOYEES

Employee Name	Classification	Amount owed (gross)
Employee A [REDACTED]	Food and Beverage Attendant Level 2	Nil
Employee B [REDACTED]	Food and Beverage Attendant Level 2	Nil
Employee C [REDACTED]	Food and Beverage Attendant Level 2	Nil
	TOTAL AMOUNT OWING	Nil

ATTACHMENT B – LETTER OF APOLOGY

FORM OF APOLOGY LETTER TO AFFECTED EMPLOYEES

<Date>

<Employee Name>

<Employee Address>

Dear <Employee Name>

I am writing to apologise on behalf of Alyssa Phadungkiat and Phat Elephant Pty Ltd for non-compliance with Commonwealth Workplace relations laws. The recent investigation conducted by the Office of the Fair Work Ombudsman (FWO) determined that Phat Elephant Pty Ltd had contravened the *Fair Work Act 2009* and the *Restaurant Industry Award 2010* by:

- Failing to provide the correct rate of pay;
- Failing to pay correct casual loading;
- Failing to provide meal breaks;
- Failing to pay correct weekend and public holiday penalty rates.

Regrettably, the investigation determined that the above contraventions affected you.

Phat Elephant Pty Ltd is taking steps to remedy the contraventions, by making back payments to you for a total of \$XXXXXXX that you have been underpaid.

You will receive payment in X instalments in accordance with the attached payment plan. The first payment will be made on XX XXXX 2018 and the second will be made on XX XXXX 2018. You will be provided with payment advice regarding each payment.

Alyssa Phadungkiat has formally admitted to the FWO that Phat Elephant Pty Ltd 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 will be available from the FWO website at www.fairwork.gov.au. As part of the Enforceable Undertaking we have committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

Phat Elephant Pty Ltd expresses its sincere regret and apologises to you for failing to comply with our lawful obligations.

Should you have any questions, please contact [party to include contact details].

Yours sincerely

Alyssa Phadungkiat

ATTACHMENT C - TRAINING RESOURCES UTILISED FROM THE FAIR WORK OMBUDSMAN WEBSITE

I, _____ (Enter name and position in the organisation)
have undertaken the following tools:

Completed online courses* including:

- | | |
|---|-----------------------|
| • Difficult conversations in the workplace – manager course | date completed: _____ |
| • Hiring employees | date completed: _____ |
| • Managing employees | date completed: _____ |
| • Managing performance | date completed: _____ |
| • Diversity and discrimination | date completed: _____ |
| • Workplace flexibility | date completed: _____ |
| • Record-keeping and pay slips | date completed: _____ |

* Please provide printout of the Statement/Certificate of Attainment for each course completed

Viewed Videos including:

- | | |
|---|-----------------------|
| • Welcome to fairwork.gov.au | date completed: _____ |
| • Finding information for your industry | date completed: _____ |
| • My account | date completed: _____ |
| • Introduction to the Pay and Conditions Tool | date completed: _____ |
| • PACT – Award classifications | date completed: _____ |
| • PACT – Pay summary | date completed: _____ |
| • PACT – Penalty rates | date completed: _____ |
| • PACT – Allowances | date completed: _____ |
| • PACT – Award Coverage | date completed: _____ |

Read Factsheets including:

- | | |
|--|-----------------------|
| • Role of the Fair Work Ombudsman | date completed: _____ |
| • Contractors and employees – what's the difference? | date completed: _____ |

Read information on the following:

- | | | |
|---|--------------------|-----------------------|
| • Pay Overview | | |
| ○ Minimum wages | Page Ref No. _____ | date completed: _____ |
| ○ Penalty rates & allowances | Page Ref No. _____ | date completed: _____ |
| • Leave Overview | | |
| ○ Annual leave | Page Ref No. _____ | date completed: _____ |
| ○ Sick & carer's leave | Page Ref No. _____ | date completed: _____ |
| • Ending Employment Overview | | |
| ○ Notice & final pay | Page Ref No. _____ | date completed: _____ |
| ○ Unfair dismissal | Page Ref No. _____ | date completed: _____ |
| • Employee Entitlements Overview | | |
| ○ Types of employees | Page Ref No. _____ | date completed: _____ |
| ○ National Employment Standard | Page Ref No. _____ | date completed: _____ |
| • Awards & Agreements Overview | | |
| ○ Awards | Page Ref No. _____ | date completed: _____ |

Date and signature: _____

ATTACHMENT D – FORM OF WORKPLACE NOTICE AND EMPLOYEE 'MAIL-OUT'

Contraventions of Fair Work Act by Phat Elephant Pty Ltd

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (FWO) into allegations that Phat Elephant Pty Ltd (the **Company**) contravened the *Fair Work Act 2009* and *Restaurant Industry Award 2010* by:

- Underpaying employees in respect of their base rates of pay
- Underpaying employees in respect of applicable penalties such as evening work, Saturdays, Sundays, Public Holidays and overtime.
- Not providing meal breaks for employees in accordance with the Award

The Company has formally admitted to FWO that contraventions occurred in respect of 3 employees and has entered into an Enforceable Undertaking (EU) with the FWO (available at www.fairwork.gov.au) committing to a number of measures to remedy the contraventions, rectify workplace practices and ensure future compliance. The Company's undertakings include:

- Rectifying underpayments for some identified staff;
- Committing to workplace relations training for all staff responsible for paying employees;
- Completing full audits of entitlements paid to its award-covered employees within the period 1 February 2019 and 30 April 2020 and back paying any under-paid staff. Any former employees identified by the audit as having been underpaid will be contacted by the Company; and
- Making donations to the Multicultural Community Centre.

If the amount back paid to an employee exceeds the sum of \$20,000, the Company will provide reimbursement for financial advice up to the value of \$500 (upon provision of receipts or invoices from a registered financial advisor within 12 months of the commencement of the EU).

The Company expresses its sincere regret and apologises for the contraventions. Furthermore, the Company 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 worked for the Company from 25 May 2016 to the present and have queries or questions relating to your employment entitlements, please contact the Company at XXXXXXXX or on XXXXXXXX. Alternatively, if you have questions regarding your conditions of employment, please contact the FWO via the website at www.fairwork.gov.au or call the Infoline on 13 13 94.