

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

85 Degrees Coffee Australia Pty Ltd (ACN 108821521)

Section 715 ENFORCEABLE UNDERTAKING

Parties

1. This enforceable undertaking (the **Undertaking**) is given to the Fair Work Ombudsman (the **FWO**) by 85 Degrees Coffee Australia Pty Ltd (ACN: 108821521) (**85 Degrees**) for the purposes of section 715 of the *Fair Work Act 2009* (the **FW Act**).

Commencement of Undertaking

2. This Undertaking comes into effect when:
 - (a) the Undertaking is executed by 85 Degrees; and
 - (b) the FWO accepts the Undertaking so executed.
3. Upon the commencement of this Undertaking (the **Commencement Date**), 85 Degrees undertakes to assume the obligations set out below at paragraph 11.

Background

4. 85 Degrees operates a factory located at 45 Hutchinson Street, St Peters, NSW (the **Factory**). The Factory manufactures cake and bakery products for its retail stores.
5. 85 Degrees operates five retail stores across New South Wales, including a retail store located at 326 Victoria Avenue Chatswood (the **Retail Store**), selling cake and bakery products manufactured at the Factory.
6. The FWO commenced an investigation in November 2014 (the **Investigation**) after it received Requests for Assistance (**RFA**) regarding allegations of underpayments from its former employees from the Factory (the **Factory Employees**) and from the Retail Store (the **Retail Employee**).
7. For the Factory Employees, one was employed as a cleaner and the others were employed as packers. Their employment was covered by the *Food, Beverage and Tobacco Manufacturing Award 2010* [MA000073] (the **Food Award**).
8. For the Retail Employee, prior to 1 January 2010, the employment was covered by the Australian Pay and Classification Scale (**APCS**) derived from the *Shop Employees (State) Award* [AN120499] (the **Shop Employees Award**). After 1 January 2010, the employment was covered by the *General Retail Industry Award 2010* [MA000004] (the **Retail Award**).
9. The Employees were employed on a casual basis during the respective employment periods set out in **Attachment C** to the Undertaking.

Contraventions

10. The FWO has determined, and 85 Degrees admits, that:
 - (a) for the Retail employee, 85 Degrees contravened:
 - i. from 3 January 2009 to 30 June 2009, Section 182 (1) of the *Workplace Relations Act 1996* (Cth) (**WR Act**) by failing to pay the basic periodic rate of pay in the Australian Pay and Classification Scale (the **APCS**) for the hours worked; and
 - ii. from 1 July 2009 to 31 December 2009, Item 5 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the **TPCA Act**) by failing to pay the basic periodic rate of pay in the APCS for the hours worked in accordance with Section 182(1) of the WR Act; and
 - iii. from 3 January 2009 to 30 June 2009, Section 185(2) of the WR Act by failing to pay the casual loading in the APCS for the hours worked; and

- iv. from 1 July 2009 to 31 December 2009, Item 5 of Schedule 16 of the TPCA Act by failing to pay the casual loading in the APCS for the hours worked in accordance with Section 185(2) of the WR Act; and
- v. from 1 January 2010 to 13 October 2012, Section 45 of the FW Act by failing to comply with the following provisions of the Retail Award:
 - (1) Schedule A.2.3 (by reference to clause 17 and clause 18) by failing to pay the required minimum wages; and
 - (2) Schedule A.5.2 (by reference to clause 13.2) by failing to pay the required casual loading.
- (b) for the Factory Employees, from 3 April 2013 to 25 October 2014, 85 Degrees contravened:
 - i. Section 45 of the FW Act by failing to comply with the following provisions of the Food Award:
 - (1) Schedule A.2.3 (by reference to clause 20.1) by failing to pay the required minimum wages; and
 - (2) Schedule A.7 (by reference to clause 13.1, 33.1, 33.6 and 33.8) by failing to pay the required casual loading and penalty rates for working overtime, on Saturdays and Public Holidays.
- (c) from 1 January 2010 to 25 October 2014, 85 Degrees contravened:
 - i. Section 535 of the FW Act by failing to make and keep for 7 years employee time records of the kind prescribed by the Fair Work Regulations 2009 (the **FW Regulations**); and
 - ii. Section 535 of the FW Act by failing to make and keep for 7 years records of the number, or the start and finish times, of ordinary hours worked by employees in accordance with regulation 3.33 of the FW Regulations; and
 - iii. Section 535 of the FW Act by failing to make and keep for 7 years records of the number, or the start and finish times, of overtime hours worked by employees in accordance with regulation 3.34 of the FW Regulations.
 - iv. Section 535 of the FW Act by failing to keep pay records for 7 years of the kind prescribed by regulation 3.33 of the FW Regulations.
 - v. Section 536 of the FW Act by failing to comply with the contents prescribed by the FW Regulations 3.46.(3)(a) and 3.46.(3)(b) in relation to payslips.

Undertakings

11. For the purposes of section 715 of the FW Act:

Rectify Underpayments

- (a) 85 Degrees undertakes to pay the amount of \$42,775.66 less taxation to the Employees who were underpaid as a result of the Contraventions referred to in paragraph 10, according to the proportions set out in **Attachment C**, within 28 days of the Commencement Date;
- (b) 85 Degrees undertakes that, in relation to any future RFA received by the FWO for contraventions of Commonwealth workplace laws or instruments, 85 Degrees will:
 - i. use all reasonable endeavours to resolve the RFA, including rectifying any identified contraventions, within 60 days of being notified by the FWO of the RFA;
 - ii. where a RFA has been resolved, provide the FWO with evidence of resolution of the RFA; and

- iii. where a RFA has not been resolved by agreement with the employee within the period specified in subparagraph 11(b)(i), report to the FWO about the nature of the RFA and the steps taken to try to resolve it;

Public Notices

- (c) 85 Degrees undertakes to:
 - i. place a public notice in the Saturday edition of Australian Chinese Daily (**Public Notice**) within 28 days of the Commencement Date in the terms set out in Attachment A in Chinese;

Workplace Notices

- (d) 85 Degrees undertakes, to:
 - i. within 28 days of the Commencement Date, place a notice (**Workplace Notice**) within the Factory and the Retail store in a location which is accessible to all persons employed by 85 Degrees in the terms set out in **Attachment A** in both English and Chinese, such Workplace Notice to remain in place for a total period of 7 consecutive days; and
 - ii. provide a copy of the Workplace Notice and photographic evidence of its display to the FWO within 7 days of the display of the Workplace Notice;

Apology

- (e) 85 Degrees undertakes to:
 - i. within 7 days of the Commencement Date, send an apology to each of the Employees in English and Chinese in the terms set out in **Attachment B**, signed on behalf of 85 Degrees (**Apology**); and
 - ii. provide a copy of Apology signed by 85 Degrees to the FWO within 7 days of sending such Apology;

FWO My Account Registration

- (f) 85 Degrees undertakes to:
 - i. within 7 days of the Commencement Date, register with the FWO 'My Account' portal at www.fairwork.gov.au and complete the profile, minimum pay rates and Award options;
 - ii. within 14 days of the Commencement Date, provide to the FWO their respective 'My Account' registration numbers; and
 - iii. within 21 days of the Commencement Date, demonstrate to a FWO Fair Work Inspector via www.fairwork.gov.au 'My Account' knowledge of the current National minimum wage rate, Food Award and Retail Award minimum and penalty rates of pay;

Hotline and/or point of contact

- (g) 85 Degrees undertakes to:
 - i. within 14 days of the Commencement Date, set up a hotline and/or nominate a point of contact to deal with workplace enquires from its employees;
 - ii. within 21 days of the Commencement Date, provide the details of the hotline and/or point of contact to all of its employees in writing (**Written Communication**);
 - iii. provide evidence of the Written Communication to the FWO within 7 days of sending the Written Communication;

Future Workplace Relations Compliance

- (h) 85 Degrees undertakes to:
- i. ensure compliance at all times and in all respects with applicable Commonwealth workplace laws and instruments, including but not limited to the FW Act, the Food Award and the Retail Award;
 - ii. implement systems and processes to ensure ongoing compliance with the obligations referred to in paragraph 11(h)(i) above, including obligations relating to rates of pay, loadings, penalties, taxation, superannuation and record keeping; and
 - iii. provide to the FWO, within 28 days of the Commencement Date, details of systems and processes implemented in satisfaction of the undertakings in paragraphs 11(h)(i) and (ii) above;

Self-audits and Reporting

- (i) 85 Degrees undertakes:
- i. to have completed by an external accounting professional (e.g. Certified Practising Accountant), audit specialist or employment law specialist, at 85 Degrees' expense, an audit (**Audit**) of compliance with Commonwealth workplace laws and instruments, including but not limited to the FW Act, the Food Award and the Retail Award, in respect of pay, conditions and record keeping in relation to all of 85 Degrees' employees, according to the following schedule:
 - (1) an Audit of the first complete pay cycle following 1 January 2016, which is to be finalised within 28 days of the last day of the pay cycle;
 - (2) an Audit of the first complete pay cycle following 1 July 2016, which is to be finalised within 28 days of the last day of the pay cycle;
 - (3) an Audit of the first complete pay cycle following 1 January 2017, which is to be finalised within 28 days of the last day of the pay cycle;
 - (4) an Audit of the first complete pay cycle following 1 July 2017, which is to be finalised within 28 days of the last day of the pay cycle;
 - ii. within 7 days of the completion of each Audit, to provide the FWO with details of the methodology used to conduct the Audit and a copy of the certified audit report;
 - iii. to provide upon request from the FWO, all documents on which each Audit was based;
 - iv. in the event that an Audit discloses contraventions of any applicable Commonwealth workplace laws or instruments, to rectify all such contraventions within 14 days of receipt of the Audit results; and
 - v. to provide evidence of rectification of all contraventions disclosed by an Audit to the FWO within 14 days of rectification;

Workplace Relations Training

- (j) 85 Degrees undertakes to:
- i. implement within 120 days of the Commencement Date, a training program (**Training**) so that all persons responsible, either directly or indirectly, for the compliance by 85 Degrees with Commonwealth workplace laws and instruments, including all the company Directors, are made aware of 85 Degrees' and their obligations under Commonwealth workplace laws and instruments. At its election, they may each comply with their separate undertakings under this clause by the delivery of joint training;
 - ii. provide training material to participants in the Training including material on:

- (i) compliance with the FW Act, Fair Work Regulations, the Food Award and the Retail Award;
 - (ii) employer obligations in respect to record keeping and pay slips;
 - (iii) options available to persons to make complaints and FWO contact information; and
 - (iv) how to access FWO resources to calculate rates of pay;
- iii. ensure the Training is conducted by an accredited workplace trainer, such person or organisation to be approved by the FWO and paid for by 85 Degrees;
- iv. provide the training materials to be used in the Training to the FWO no later than 7 days before the Training is to be conducted;
- v. within 7 days of the Training being conducted, provide the FWO with evidence of attendance at the Training (including the name and position of all attendees and the date on which the Training was attended); and
- vi. for a period of 2 years following the Commencement Date, ensure that Training is conducted in the manner prescribed by paragraphs 11 (j)(i) to (v) above in relation to any person who acquires responsibilities that include human resource, recruitment or payroll functions for or on behalf of 85 Degrees, within 28 days of the person acquiring such responsibilities.

Subsidiary Companies & Transferees

- (k) 85 Degrees undertakes to take all reasonable steps to:
 - i. ensure that all associated entities (within the meaning of section 50AAA of the *Corporations Act 2001 (Cth)*) (**Associated Entities**) comply at all times and in all respects with applicable Commonwealth workplace laws and instruments, including but not limited to the FW Act, the Food Award and the Retail Award;
 - ii. monitor the compliance by its Associated Entities with applicable Commonwealth workplace laws and instruments; and
 - iii. ensure that any identified contraventions of such laws or instruments are rectified by the relevant Associated Entity;
- (l) 85 Degrees undertakes to, on a 6 monthly basis for a period of 2 years following the Commencement Date, report to the FWO in writing the steps taken to comply with the obligations in subparagraph 11(k) above;
- (m) 85 Degrees undertakes that in the event that it sells or otherwise transfers some or all of its business to another entity (**Transferee**) (whether an Associated Entity or otherwise) within 2 years of the Commencement Date, to:
 - i. provide a copy of this Undertaking to the Transferee prior to the sale or transfer; and
 - ii. provide to the FWO, within 7 days of the sale or transfer of business, details of the sale or transfer, including the identity of the Transferee and the business functions or operations that have been sold or transferred.

Broader community workplace relations education

- (n) 85 Degrees undertakes to:
 - i. make a donation of \$5,000.00 within 60 days of the Commencement Date to 'Asian Women at Work Inc' to fund education about workplace rights under the FW Act; and
 - ii. provide proof of the payment referred to in subparagraph 11(n)(i) above to the

FWO within 7 days of it being made.


Acknowledgements

12. 85 Degrees acknowledges 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 law or instruments by 85 Degrees;
 - (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) if the FWO considers that 85 Degrees 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;
13. consistent with section 715(3) of the FW Act, 85 Degrees may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; FWO reserves the right to rely on the terms of this Undertaking and the admissions made herein in respect of any future proceedings brought by the FWO against 85 Degrees in relation to any future contraventions of Commonwealth workplace laws;
14. 85 Degrees must not, and must ensure that their respective officers, agents and employees do not, make any statements, orally or in writing or otherwise, which convey or imply anything inconsistent with the admissions and acknowledgements contained in this Undertaking.

Executed as an undertaking

EXECUTED by 85 Degrees Coffee Australia Pty Ltd (ACN: 108821521) in accordance with section 127(1) of the *Corporations Act 2001*:


(Signature of director)


(Signature of director/company secretary)


shu-ching chen
(Name of director)

Tim Shu-Ming Hsu
(Name of director/company secretary)


14.05.2015
~~30.04.2015~~
(Date)

30 APRIL 2015
(Date)

in the presence of:


(Signature of witness)


in the presence of:


(Signature of witness)

Lisa Ling Cong
(Name of witness)

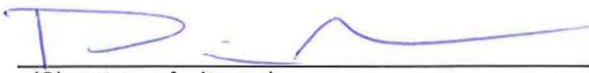
Lisa Ling Cong
(Name of witness)

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


Steven Ronson
Executive Director
Dispute Resolution & Compliance
Operations Group
Delegate for the FAIR WORK OMBUDSMAN

5 JUNE 2015
(Date)

in the presence of:


(Signature of witness)

PIA MORGAN
(Name of Witness)

Attachment A – Form of Workplace Notice

Contraventions of the *Fair Work Act 2009* and the *Food, Beverage and Tobacco Manufacturing Award 2010* and the *General Retail Industry Award 2010* by 85 Degrees Coffee Australia Pty Ltd

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (FWO) into allegations that 85 Degrees Coffee Australia Pty Ltd (85 Degrees) contravened the *Fair Work Act 2009*, the *Food, Beverage and Tobacco Manufacturing Award 2010* and the *General Retail Industry Award 2010*.

85 Degrees owns and operates a factory and 5 retail stores across New South Wales. No previous contraventions of Commonwealth workplace laws have been determined against 85 Degrees.

The FWO has found that 85 Degrees contravened the *Fair Work Act 2009*, the *Food, Beverage and Tobacco Manufacturing Award 2010* and the *General Retail Industry Award 2010* by:

1. failing to pay employees the correct minimum wage;
2. failing to pay some employees some hours worked;
3. failing to pay employees the applicable casual loading;
4. failing to pay some employees the applicable overtime rates for additional hours worked;
5. failing to pay some employees the applicable penalty rates for working on Saturday, Sunday and Public Holidays;
6. failing to keep employee records required by law;
7. failing to issue payslips to employees in the form required by law.

85 Degrees has formally admitted to the FWO that these contraventions occurred and has entered into an Enforceable Undertaking with the FWO (available at www.fwo.gov.au) committing to a number of measures to remedy the contraventions and prevent them from occurring in the future, including rectifying the underpayments to affected employees and changing workplace practices.

85 Degrees expresses its sincere regret and apologies for the conduct which resulted in the contraventions. Furthermore, 85 Degrees gives a commitment that such conduct will not occur again and that 85 Degrees will comply with all requirements of the Commonwealth workplace relations laws in the future.

If you worked for 85 Degrees and have queries or questions relating to your employment, please contact Ms Lisa Cong in the first instance on telephone 02 8373 8585. Alternatively, anyone can contact the FWO via the website at www.fairwork.gov.au or the Infoline on 13 13 94.

Attachment B – Letter of Apology

Address

Day Month Year

Dear ,

I am writing to apologise on behalf of 85 Degrees Coffee Australia Pty Ltd (**85 Degrees**) for non-compliance with Commonwealth Workplace relations laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) determined that 85 Degrees had contravened the *Workplace Relations Act 1996 (Cth)* and the *Fair Work Act 2009* and the *Food, Beverage and Tobacco Manufacturing Award 2010* (the **Food Award**) and the *General Retail Industry Award 2010* (the **Retail Award**).

The FWO has found that 85 Degrees contravened the *Workplace Relations Act 1996 (Cth)*, *Fair Work Act 2009*, Food Award and the Retail Award by:

1. failing to pay employees the correct minimum wage;
2. failing to pay some employees some hours worked;
3. failing to pay employees the applicable casual loading;
4. failing to pay some employees the applicable overtime rates for additional hours worked;
5. failing to pay some employees the applicable penalty rates for working on Saturday, Sunday and Public Holiday;
6. failing to keep employee records required by law;
7. failing to issue payslips to employees in the form required by law.

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

85 Degrees is taking steps to remedy the contraventions, including paying to you the amount of \$ (less taxation) that you have been underpaid. Please note that the net amount (after tax) will be paid to you and this has been agreed with the FWO.

85 Degrees has formally admitted to the FWO that 85 Degrees 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 85 Degrees has committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

85 Degrees expresses its sincere regret and apologises to you for failing to comply with our lawful obligations.


Should you have any questions, please contact Ms Lisa Cong in the first instance on 02 8373 8585 or by email to 85c6127@85cafe.com.

Yours sincerely,

Mr Shu Hsu

Director – 85 Degrees Coffee Australia Pty Ltd

Attachment C – Employees and amounts owed

Employees	Amount Owed	Period of engagement
	\$5,663.21 (less taxation)	2/7/2014 – 26/9/2014
	\$16,586.35 (less taxation)	3/4/2013 – 9/8/2013 29/5/2014 – 25/10/2014
	\$13,361.16 (less taxation)	8/05/2014 – 25/10/2014
	\$7,164.94 (less taxation)	3/1/2009 – 05/10/2012