



Australian Government

Fair Work OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Marsil Pty Ltd (ABN 411 630 464 64)

and

Kyung Jun Kim

Section 715 ENFORCEABLE UNDERTAKING

Parties

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by:
 - (a) Marsil Pty Ltd (ABN 411 630 464 64) (**Marsil**); and
 - (b) Kyung Jun Kim (**Mr Kim**), Director, Marsil Pty Ltd;
- for the purposes of section 715 of the *Fair Work Act 2009* (**FW Act**).

Background

2. Marsil operate two (2) café stores at 1/528 Kent Street Sydney New South Wales (**NSW**) and 1/537-551 George Street Sydney NSW.
3. Mr Kim admits and agrees that, at all material times, he:
 - a. was the sole director of Marsil, having been so since 27 March 2013;
 - b. was ultimately responsible for overall direction, management and supervision of the operations at Marsil in relation to engaging staff, setting and adjusting pay rates and determining wages and conditions of employment;
 - c. was aware that employees are entitled to be paid for work performed in accordance with applicable industrial instruments and Commonwealth workplace laws; and
 - d. by reason of the matters set out in subparagraphs (a) to (c) was responsible in a practical sense for ensuring Marsil complied with its legal obligations.
4. On 26 February 2014, the FWO commenced an investigation (**Investigation**) after it received Requests for Assistance (**RFA**) regarding allegations of wage underpayments from the following former employees of Marsil:
 - a. [REDACTED]
 - b. [REDACTED]
 - c. [REDACTED]

(collectively, the **Employees**).
5. The Employees were employed by Marsil and their primary duties included making coffees, making sandwiches, serving sandwiches, preparing ingredients for light snack meals, washing dishes and taking customer orders and monies.
6. Marsil employed [REDACTED] on a casual basis from 25 July 2014 to 31 December 2014 (**Employment Period**) to perform work at both café stores.
7. Marsil employed [REDACTED] on a casual basis from 8 June 2014 to 18 December 2014

(Employment Period) to perform work at both café stores.

8. Marsil employed [REDACTED] on a full time basis from 1 April 2014 to 13 November 2014 (Employment Period) to perform work at both café stores.
9. During the Employment Period the terms and conditions of the Employees employment were governed by the FW Act and the *Restaurant Industry Award 2010* (Restaurant Award). For the purposes of transitional provisions of Schedule A to the Restaurant Award, the applicable transitional instrument was the *Restaurants, etc, Employees (State) Award*.
10. The Employees were classified under the Restaurant Award as food and beverage attendant grade 1 for the Employment Period.
11. As a result of its investigation, the FWO determined that Marsil had contravened provisions of the FW Act and the Restaurant Award. In particular, the FWO found that Marsil had underpaid the Employees a total amount of **\$38,749.79 gross** for work performed by failing to pay the correct minimum hourly rate of pay in accordance with the Restaurant Award.

Contraventions

12. The FWO has determined, and Marsil and Mr Kim admits, that Marsil and Mr Kim contravened:
 - a. Section 45 of the FW Act by failing to comply with the following provisions of the Restaurant Award:

Minimum wage rates – clauses 20.1 and A.2 of Schedule A of the Restaurant Award

Pursuant to clauses 20.1, and A.2 of Schedule A of the Restaurant Award, the Employees were entitled to be paid by the Company minimum weekly wages according to their classifications (detailed below) under the Restaurant Award.

Marsil and Mr Kim did not pay the Employees the appropriate minimum weekly wage rate for work performed.

Casual loadings – clauses 13.1 and A.5 of Schedule A of the Restaurant Award

Pursuant to clause 13.1 and clause A.5 of Schedule A of the Restaurant Award, those Employees who were employed on a casual basis were entitled to be paid a casual loading of 23% (in the period 24 December 2012 to 30 June 2013) and 24% (in the period 1 July 2013 to 15 September 2013) of the minimum weekly wage for all time worked.

Marsil and Mr Kim did not pay the Employees who were employed on a casual basis the appropriate casual loading for all time worked.

Penalty Rates – clauses 34.1 and A.7 of Schedule A of the Restaurant Award

Pursuant to clauses 34.1 and A.7 of Schedule A of the Restaurant Award, the Employees were entitled to be paid by the Company:

- for full-time and part-time employees –
 - For ordinary time hours worked on a Saturday before 1pm: 125%;
 - For ordinary time hours worked on a Saturday after 1pm: 150%

- For ordinary time hours worked on a Sunday: 150%; and
- For ordinary time hours worked on a public holiday: 250%;
- for casual employees (all inclusive of the transitional casual loading) –
 - For ordinary time hours worked on a Saturday: 150%;
 - For ordinary time hours worked on a Saturday after 1pm: 170%
 - For ordinary time hours worked on a Sunday: 175%; and
 - For ordinary time hours worked on a public holiday: 250%.

Marsil and Mr Kim did not pay the Employees the appropriate minimum penalty rates for work performed on a Saturday, Sunday or public holiday.

Overtime – clauses 33.1 and 33.2 of the Restaurant Award

Pursuant to clauses 33.1 and 33.2 of the Restaurant Award, those Employees who were employed on a full-time basis were entitled to be paid by the Employer overtime payments for work performed outside the spread of hours or rostered hours of an average of 38 per week, payable at the following rates:

- For overtime worked on a Saturday (first 2 hours): 175%
- For overtime worked on a Saturday (after first 2 hours): 200%; and
- For all overtime worked on a Sunday: 200%.

Marsil and Mr Kim did not pay the Employees who were employed on a full-time basis the appropriate overtime rates for work performed outside the spread of hours or rostered hours of an average of 38 per week.

- b. Section 535 (1) and (2) of the FW Act by failing to make and keep records in the prescribed form
- c. Section 536(1) of the FW Act by failing to issue pay slips within one working day of paying amounts in relation to the performance of work
- d. Section 90(2) of the FW Act by failing to pay to the employee amounts in relation to annual leave on termination

Commencement of Undertaking

13. This Undertaking comes into effect when:

- a. the Undertaking is executed by Marsil and Mr Kim; and
- b. the FWO accepts the Undertaking so executed.

14. Upon the commencement of this Undertaking (the **Commencement Date**), and for the purposes of section 715 of the FW Act, Marsil and Mr Kim undertakes to assume the obligations as set out below.

Undertakings

For the purposes of section 715 of the FW Act, Marsil and Mr Kim undertakes to:

Rectify the underpayments

15. Within 14 days of the execution of this Undertaking, rectify the contraventions identified in the Preliminary Findings letter dated 27 July 2015. The total underpayments arising from the contraventions are \$38,749.79 less taxation.
16. Provide proof of such payment to the FWO on the day payment is made to employees;
17. If the underpaid Employee(s) cannot be located, with 14 days of the execution of this Undertaking, pay such Employee(s) share of the underpayment into the consolidated revenue of the Commonwealth of Australia (through the FWO) on behalf of the relevant underpaid Employee(s), in accordance with section 559 of the FW Act;

Future Workplace relations compliance

18. Ensure that it complies at all times and in all respects with the FW Act, *the Fair Work Regulations 2009* (Cth) and the applicable Modern Award;
19. Provide the FWO, within 14 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 (18) above. Without limitation, such systems and processes will include systems and processes relating to:
 - a. Ensuring employees receive the correct minimum rates of pay and entitlements, such as penalty rates and overtime rates;
 - b. Issuing pay slips to employees within 1 working day of payment; and
 - c. Keeping accurate and complete records to ensure employees receive their correct wages and entitlements

FWO My Account Registration

20. Within 14 days of the execution of the execution of this undertaking, register with the FWO 'My Account' portal at www.fairwork.gov.au and have completed the profile, minimum pay rates and Award options.
 - a. Within 14 days of the execution of the Undertaking provide to the FWO the Marsil 'My Account' registration number.
 - b. Within 28 days of the execution of the Undertaking, at a mutually agreed time and location, demonstrate to an FWO Officer via www.fairwork.gov.au 'My Account' current Restaurant Award minimum pay rates and Saturday, Sunday and Public Holiday penalty rates.

Apology

21. Send a letter of apology (**Apology Letter**) to the Employees in the form of Attachment B to this undertaking within 14 days of the execution of this Undertaking
22. Provide to the FWO a copy of the Apology Letter and proof of it being sent to the Affected Employees on the day it is sent;

Audit activity

23. Cause to have performed by an accounting professional (for example a Certified Practising Accountant) or an employment law specialist, at Marsil's expense, audits of Marsil's compliance with all Commonwealth workplace laws and instruments (**Audits**), relating to the pay and conditions of 50 per cent of employees for each year as follows:

The Audit is to be conducted twice over a period of 18 months according to the following schedule:

- a. an Audit of the first complete pay cycle following 1 December 2015, which is to be finalised and details of the methodology used to conduct the audit and a copy of the certified report provided to the FWO within 28 days of the last day of the pay cycle;
 - b. an Audit of the first complete pay cycle following 1 December 2016, which is to be finalised and details of the methodology used to conduct the audit and a copy of the certified report provided to the FWO within 28 days of the last day of the pay cycle;
24. Upon request by FWO, provide within 7 days of receiving such request a copy of all documents provided to the auditor for the purpose of undertaking an Audit;
25. In the event that an Audit discloses contraventions of any applicable Commonwealth workplace laws or instruments, to rectify all such contraventions and provide evidence of rectification to the FWO within 14 days of receipt of the Audit results by Marsil;

Workplace Notice

26. Within 14 days of the execution of this Undertaking, cause to be displayed a notice in the form of Attachment A to this Undertaking (**Workplace Notice**):
- a. For a period of 28 days, at 1/528 Kent Street and 1/537-551 George Street Sydney NSW; and
 - b. Ensure that the Workplace Notice is printed in at least A3 size and is clearly displayed:
 - i. In a location to which all employees have access;
 - ii. In a manner which is reasonably capable of drawing attention of all employees to the Workplace Notice (for example, by placement on a staff noticeboard;
27. Provide photographic evidence to the FWO of the placement of the Workplace Notice within seven (7) days of its placement.

Record Keeping

28. Within 14 days provide to the FWO time copies of time and wage records and payslips that comply with Commonwealth workplace laws

No Inconsistent Statements

29. Marsil:
- 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 imply anything that is inconsistent with admission or acknowledgements contained in this agreement.

Acknowledgements

30. Marsil and Mr Kim 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 relations obligations by Marsil and Mr Kim;
- (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 the Marsil or Mr Kim has contravened any of the terms of this 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, Marsil and Mr Kim may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.

Executed as an undertaking

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



(Signature of director)



(Signature of director/company secretary)

KYUNG JUN KIM

(Name of director)

KYUNG JUN KIM

(Name of director/company secretary)

18th / Aug / 2015

(Date)

18th / Aug / 2015

(Date)

in the presence of:



(Signature of witness)

Robert Kim

(Name of witness)



(Signature of witness)

Robert Kim

(Name of witness)

EXECUTED by Kyung Jun Kim:

[insert party]

(Date)

in the presence of:

(Signature of witness)

(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 and Compliance

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:



(Signature of witness)

19 August 2015

(Date)

Ying Zheng

(Name of Witness)

Attachment A – Form of Workplace Notice

Contravention of Fair Work Act

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) into allegations that Marsil Pty Ltd trading as Incanto Coffee (**Marsil**) contravened the *Fair Work Act 2009* by:

1. failing to pay an employee their correct minimum base hourly rates of pay for time worked;
2. failing to pay an employee penalty rates for time worked on Saturdays;
3. failing to pay an employee penalty rates for time worked on Sundays;
4. failing to pay an employee penalty rates for time worked on Public Holidays;
5. failing to pay an employee overtime rates for hours worked outside of ordinary hours;
6. failing to keep accurate and comprehensive employee records; and
7. failing to provide an employee a payslip within one business day of wage payments.

Marsil 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 through Workplace Relations Training and regular audits .

Marsil expresses its sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, Marsil 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 [REDACTED]. 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

FORM OF APOLOGY LETTER TO AFFECTED EMPLOYEES

<Date>

<Employee Name>

<Employee Address>

Dear <Employee Name>

I am writing to apologise on behalf of Marsil Pty Ltd trading as Incanto Coffee (**Marsil**) for non-compliance with Commonwealth Workplace relations laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) determined that Marsil had contravened the *Fair Work Act 2009* by:

1. failing to pay an employee their correct minimum base hourly rates of pay for time worked;
2. failing to pay an employee penalty rates for time worked on Saturdays;
3. failing to pay an employee penalty rates for time worked on Sundays;
4. failing to pay an employee penalty rates for time worked on Public Holidays;
5. failing to pay an employee overtime rates for hours worked outside of ordinary hours;
6. failing to keep accurate and comprehensive employee records; and
7. failing to provide an employee a payslip within one business day of wage payments.

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

Marsil is taking steps to remedy the contraventions, including by [insert applicable details, – eg: rectifying \$[insert amount] that you have been underpaid. You will/have receive/d this payment on [insert date] and will be provided with payment advice regarding the payment].

Marsil have formally admitted to the FWO that Marsil did not comply with its obligations under Commonwealth workplace relations laws and have 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 we have committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

Marsil 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

[Director]