



# Fair Work

## OMBUDSMAN

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### ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Shinobu Sushi Bar Pty Ltd.

(ABN: 53 164 665 730)

**Section 715 ENFORCEABLE UNDERTAKING**

**Parties**

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by:

- (a) Shinobu Sushi Bar Pty Ltd (**the Employer**); and
- (b) Xiaoqiang LIN (Mr LIN) Director, the Employer

for the purpose of Section 715 of the *Fair Work Act 2009* (**FW Act**).

**Background**

2. The Employer operates three restaurant businesses known as:

- (a) Shinobu Sushi Bar, Park Beach Plaza, COFFS HARBOUR NSW
- (b) Shinobu Sushi Bar, Stockland Mall, ROCKHAMPTON QLD
- (c) Shinobu Sushi Bar, Westfield Shopping Centre, WEST LAKES SA.

- 3. On 5 August 2015, FWO commenced an audit of the Employer's compliance with Commonwealth workplace laws at the COFFS HARBOUR restaurant (**Business**). The Audit covered the period from 1 January 2015 to 7 September 2015 (**Audit Period**).
- 4. The Employer employed a number of overseas workers on Working Holiday 417 Visas and Student 572 Visas at the Business who were engaged as Kitchen Hands, Food and Beverage Attendants and Cooks (**Employees**).
- 5. From 1 January 2010 the terms and conditions of the Employees' employment were governed by the *Restaurant Industry Award 2010* (MA000119) (**the MA**) the FW Act and the *Fair Work Regulations 2009* (**FW Regs**).
- 6. On 27 August 2015 the Employer provided to the FWO employment records and payroll advices relevant to the Business.
- 7. On or about 19 February 2016, the Employer admitted the records provided to the FWO were false or misleading.
- 8. The Employer further admitted that it had failed to make and keep accurate records for the Employees as required by the FW Act and FW Regs.
- 9. As a result of the Employer failing to make and keep any employee records, the FWO has been unable to calculate any monies that may be owing to the Employees employed at the Business who were employed during the Audit Period.

**Contraventions**

- 10. The FWO has determined, and the Employer admits, that the Employer contravened the following provisions of the FW Act and the FW Regs:
  - (a) Subsection 535(1) FW Act and Sub Regulation 3.36(1) FW Regs by failing to make and keep leave records for the Employees.
  - (b) Sub regulation 3.44(1) FW Regs by failing to ensure that employee records made and kept by the Employer pursuant to Subsection 535(1) FW Act and Regulation 3.33 FW Regs were not false or misleading to the Employer's knowledge.
  - (c) Sub regulation 3.44(6) by making use of employee records required to be kept by the FW Act and the FW Regulations knowing that those records were false or misleading.

- (d) Section 536 FW Act by failing to issue pay slips to the Employees within one day of paying them an amount in relation to the performance of their work.

(Collectively referred to as the **Contraventions**)

### **Commencement of Undertaking**

11. This Undertaking comes into effect when:
- (a) the Undertaking is executed by Shinobu Sushi Bar Pty Ltd and by Xiaoqiang Lin; and
  - (b) the FWO accepts the Undertaking so executed.
12. Upon the commencement of this Undertaking the Employer undertakes to assume the obligations set out below.

### **Undertakings**

13. For the purposes of Section 715 of the FW Act the Employer and Mr Lin undertake to:

#### *FWO My Account Registration*

- (a) Within 28 days of the execution of this Undertaking:
- i. register with the FWO 'My Account' portal at [www.fairwork.gov.au](http://www.fairwork.gov.au) and complete the profile, minimum pay rates and Award options;
  - ii. provide to the FWO the 'My Account' registration number;
  - iii. at a mutually agreed time and location, demonstrate to a FWO officer My Account knowledge of the current *Restaurant Industry Award 2010* minimum pay rates including rates for working weekends, public holidays and overtime provisions for employees;
  - iv. subscribe to receive email alerts from the FWO relating to the MA, available at <http://www.fairwork.gov.au/website-information/staying-up-to-date/subscribe-to-email-updates>;
  - v. subscribe to FWO's Employer newsletter for the relevant State <http://fairwork.gov.au/about-us/news-and-media-releases/newsletter>, selecting at least the following options:
    - pay updates;
    - award updates;
    - public holiday entitlements;
    - working hours and breaks;
  - vi. Provide to the FWO evidence of the above subscriptions, including advising the FWO of the email address used to register.

#### *Future Workplace Relations Compliance*

- (b) Ensure the Employer complies at all times and in all respects with the FW Act, FW Regs and the MA;
- (c) 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 (b) above. Without limitation, such systems and processes relating to:
  - Ensuring employees receive the correct minimum rates of pay and entitlements,

 Lin

such as penalty rates and overtime rates;

- Issuing pay slips to employees within 1 working day of payment as prescribed by Section 536 FW Act and Part 3.6 Subdivision 2 FW Regs;
- Making and keeping accurate records and complete employee records as prescribed by Section 536 FW Act and Part 3.6 Subdivision 1 FW Regs including records relating to the taking of leave and recording leave balances;
- Making and keeping part-time work agreements for part time workers in accordance with clause 12.3 of the MA.

#### *Record Keeping*

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

#### *Public Notices*

- (e) Place a notice within each of the three workplaces which is accessible to all employees (**Workplace Notice**) within 28 days of the execution of this Undertaking for a total consecutive period of seven (7) days in the terms set out in **Attachment A**;
- (f) The Workplace Notice is to displayed in English and in languages which represent the first languages of the employees currently working in each of the workplaces;
- (g) Provide copies of the **Workplace Notice** and provide photographic evidence of their display to the FWO within seven (7) days of the display of the notices;

#### *Apology*

- (h) Send to the Employees to their last known address within 28 days of the execution of this Undertaking an apology (**Apology Letter**) in the form of the letter set out in **Attachment B**;
- (i) Within seven (7) days of the Apology Letter being sent provide to the FWO a copy of the Apology Letter and proof of it being sent to the Employees;

#### *Self- Audit and Reporting Activity*

- (j) During the 2016- 2017 and 2017-2018 financial years undertake the self-audit and reporting activities outlined in (k);
- (k) By 1 May 2017 and 1 May 2018 have completed by an external accounting professional (e.g. Certified Practising Accountant), audit specialist or employment law specialist (at the expense of the Employer) an audit of its compliance with Commonwealth workplace laws in relation to all its employees. Specifically:
  - i. The external accounting professional, audit specialist or employment law specialist who undertakes the audit must be approved by the FWO prior to the commencement of each audit
  - ii. The Employer must demonstrate compliance with their record keeping and pay slip obligations under the FW Act and FW Regulations;
  - iii. The Employer must demonstrate compliance with the MA and in particular wages (including any applicable overtime, weekend and public holiday penalties or loadings and casual loading etc.), as well as the requirement for written agreements for part time workers;
  - iv. The Employer must provide to the FWO evidence of superannuation contributions to a superannuation fund for the benefit of the employees as this will avoid the Employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to employees;

- v. Each audit is to be conducted upon all of the Employer's full-time, part-time and casual employees working at each of the Employer's business locations for a period of four (4) full pay periods of which at least one pay period must include a Public Holiday occurring in 2017 and 2018. The audit methodology must be approved by the FWO and is to be submitted for approval by 1 March 2017 and 1 March 2018 respectively; and
- vi. The Employer must provide a copy of the audit to the FWO by 15 May 2017 and 15 May 2018 respectively;
- (l) To make available to the FWO if requested the records used to conduct the audit; and
- (m) Provide evidence of rectification of any contraventions disclosed by the audit to the FWO by 31 May 2017

*Matters notified to the FWO*

- (n) Where the FWO receives a request for assistance regarding non-compliance with the MA, the Employer and its officers undertake to fully co-operate with the FWO to ensure compliance. This includes:
  - Providing all requested employment records and other documentation to the FWO within 21 days of being notified of the request for assistance
  - Participating fully in any subsequent requests for information relevant to the request for assistance, including participation in any formal records of interview;
  - Co-operation in FWO's processes employed to resolve the request for assistance

*Workplace relations training*

- (o) 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**);
- (p) ensure the Training relates to compliance with all applicable Commonwealth workplace laws and instruments, including but not limited to the General Protection Provisions of the FW Act, the rights and responsibilities of employers under the FW Act and the *Restaurant Industry Award 2010* (MA 000119);
- (q) ensure the Training is conducted by an accredited workplace trainer; such person or organisation to be approved by the FWO and paid for by the Company;
- (r) 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;
- (s) provide evidence of attendance at the Training to the FWO within seven days of the Training being provided (including the name and position of all attendees and the date on which the Training was attended);

*Donation to The Working Women's Centre Brisbane*

- (t) By 30 September 2016 make a donation of \$5,000 to the Queensland Working Women's Centre and by 30 September 2017 make a second and final donation of \$5,000 to the Queensland Working Women's Centre and
- (u) Provide proof of the payment referred to in the previous paragraph to the FWO within 7 days of each payment being made

**No Inconsistent Statements**

14. The Employer:

- (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

15. The Employer 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](http://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) if the FWO considers that the Employer 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 may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.

**Executed as an undertaking**

EXECUTED by Shinobu Sushi Bar Pty Ltd.

Lin Xiao Qiang

16/08/2016

(Signature on behalf of Shinobu Sushi Bar Pty Ltd.)

Xiaoqiang LIN (Johnny LIN) DIRECTOR

(Date)

[Signature]

(Date)

16/08/2016

(Signature on behalf of Shinobu Sushi Bar Pty Ltd.)

Junyuan TAN DIRECTOR

in the presence of:

[Signature]

in the presence of:

(Signature of witness)

(Signature of witness)

HENRY NG

(Name of witness)

(Name of witness)

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

[Signature]

Steven Ronson

6 SEPTEMBER 2016

(Date)

Executive Director Dispute Resolution and Compliance

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:

[Signature]

(Signature of witness)

LISA-MARIE OLIVER

(Name of Witness)

[Signature] Lin

## ***Attachment A – Form of Workplace Notice***

**Contraventions of the *Fair Work Act 2009*, and the *Fair Work Regulations 2009* by**

**Shinobu Sushi Bar Pty. Ltd.**

The Office of the Fair Work Ombudsman (**FWO**) is the government agency responsible for ensuring compliance with workplace laws.

Recently the FWO audited Shinobu Sushi Bar Pty Ltd to check that employees are paid correctly. The audit could not be completed because Shinobu did not keep correct records.

This means that the FWO was unable to check whether employees received the correct minimum pay under the *Restaurant Industry Award 2010*.

Shinobu has contravened the *Fair Work Act 2009* and the *Fair Work Regulations 2009* by:

- failing to make and keep pay, annual leave and personal leave records; and
- providing to the FWO Employment Records the Employer knew were false or misleading.

Shinobu also failed to provide employees with pay slips within one day of being paid.

We have formally admitted to FWO that these contraventions occurred and have entered into an Enforceable Undertaking with the FWO (available at [www.fairwork.gov.au](http://www.fairwork.gov.au)) committing to a number of measures to fix the contraventions.

We express our sincere regret and apologise for the conduct which resulted in the contraventions. Furthermore we give 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 Shinobu Sushi Bar Pty Ltd. and have queries or questions relating to your employment please contact Mr Xiaoqiang LIN (Johnny LIN) on phone [REDACTED].

The minimum wage rates that apply under the *Restaurant Industry Award 2010* are below. The complete award can be found at:  
[https://www.fwc.gov.au/documents/documents/modern\\_awards/award/ma000119/default.htm](https://www.fwc.gov.au/documents/documents/modern_awards/award/ma000119/default.htm)

If you believe that you have been underpaid you can also contact the FWO via the website at [www.fairwork.gov.au](http://www.fairwork.gov.au)

Xiaoqiang LIN (Johnny LIN)





## ***Attachment B – Letter of Apology***

**Date>**

**<Employee Name & Address>**

Dear <Employee Name>

I am writing to apologise on behalf of Shinobu Sushi Bar Pty Ltd. for non-compliance with Commonwealth Workplace relations laws.

Shinobu has contravened the *Fair Work Act 2009* and the *Fair Work Regulations 2009* by:

- failing to make and keep pay, annual leave and personal leave records; and
- providing to the FWO Employment Records the Employer knew were false or misleading.

Shinobu also failed to provide employees with pay slips within one day of being paid.

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

Shinobu Sushi Bar Pty Ltd. has taken steps to remedy the contraventions, including by:

- Committing to future compliance in relation to Record Keeping
- Undertaking audits to ensure employees are being paid correctly

Shinobu Sushi 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](http://www.fairwork.gov.au).

As part of the Enforceable Undertaking, Shinobu Sushi Bar Pty Ltd has committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

Shinobu Sushi Bar Pty Ltd expresses sincere regret and apologises to you for failing to comply with our lawful obligations.

Should you have any questions relating to your employment including whether you have been underpaid during your employment with us, please contact Mr Xiaoqiang LIN (Johnny LIN) on Phone [REDACTED]

Alternatively, anyone can contact the FWO via the website at [www.fairwork.gov.au](http://www.fairwork.gov.au)

Yours sincerely,

Xiaoqiang LIN (Johnny LIN)  
Shinobu Sushi Bar Pty. Ltd.

Handwritten signature of Xiaoqiang LIN (Johnny LIN) in black ink, consisting of a stylized first name and the surname 'Lin'.