



Australian Government

Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

Surmin Pty Ltd (ACN: 158640352)

Section 715 ENFORCEABLE UNDERTAKING

Parties

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) by Surmin Pty Ltd trading as Pizza Hut Surry Hills for the purposes of section 715 of the *Fair Work Act 2009* (**FW Act**).

Background

2. Yum! Restaurants Australia Pty Ltd (**Yum!**) trading as Pizza Hut Australia and Pizza Hut (**Pizza Hut**) is a foreign owned proprietary company first registered in Australia in 1969. Pizza Hut currently operates 13 dine-in restaurants and an estimated 298 stores, all of which are operated by franchisees.
3. On 23 November 2015, Fairfax Media reported of widespread wage fraud and sham contracting in relation to the engagement of delivery drivers by Pizza Hut franchisees. The article claimed that a contract obtained by Fairfax Media demonstrated a driver was entitled to \$6 per delivery, with a maximum of two deliveries per round trip. Additionally, the contract specified that the driver was required to provide their own vehicle and was responsible for fuel, vehicle maintenance and insurance.
4. Acting proactively in response to said allegations in the media, the FWO commenced the Pizza Hut Delivery Drivers Compliance Activity (**Activity**), randomly selecting 38 Pizza Hut sites across Australia. Surmin Pty Ltd a franchise of Pizza Hut was selected as part of the Activity.
5. Surmin Pty Ltd was registered on 30 May 2012 and is a family owned business. Mr Sureshkumar Patel was appointed as a Director of the company on 30 May 2012 and Mr Krone Patel was appointed as a Director of the company on 02 July 2012. Both directors perform the role of delivery drivers within the store.
6. During the period from 1 January 2016 to 31 January 2016 (**Assessment Period**) the FWO conducted an audit of the payments made to three delivery drivers, other than the Directors, engaged by Surmin Pty Ltd as independent contractors. The delivery drivers were paid \$6.95 per delivery.
7. As a result of the Audit, the FWO determined that:
 - (a) the delivery drivers engaged by Surmin Pty Ltd, who were the subject of the audit, were, in fact and in law, employees and not independent contractors (**Employees**);
 - (b) Surmin Pty Ltd was the true employer of the Employees;
 - (c) the terms and conditions of the Employees' employment was governed by the *Pizza Hut – SDA National Employee Relations Agreement 2010* [AE880937];
 - (d) the appropriate classification of the Employees was 'Method B' Delivery drivers; and
 - (e) the Employees had not been underpaid by reference to the work performed under the *Pizza Hut – SDA National Employee Relations Agreement 2010*.

Contraventions

8. The FWO has determined, and Surmin Pty Ltd admits, that Surmin Pty Ltd contravened:
 - (a) Section 357(1) of the FW Act by representing to three workers that the contract of ~~employment under which each worker was employed was a contract for services for work~~ as an independent contractor.
 - (b) Section 535 of the FW Act for failing to make and keep employee records for the employees as prescribed by sub regulation 3.33(2) of the *Fair Work Regulations 2009*

(FW Regulations); and

- (c) Section 536 of the FW Act for failing to issue pay slips in a form prescribed by the FW Regulations

Commencement of Undertaking

9. This Undertaking comes into effect when:
- (a) the Undertaking is executed by Surmin Pty Ltd; and
 - (b) the FWO accepts the Undertaking so executed.
10. Upon the commencement of this Undertaking, Surmin Pty Ltd undertake to assume the obligations set out below.

Undertakings

11. Upon the execution of this Undertaking and for the purposes of section 715 of the FW Act, Surmin Pty Ltd, undertake the items set out in paragraphs 12 to 18.

12. **Implement fundamental changes to its labour engagement practices**

Within 28 days of the execution of this Undertaking:

- (a) alter their operations so that all individuals who are engaged by Surmin Pty Ltd to perform deliveries will be engaged as employees, not as independent contractors, and will be paid pursuant to the *Pizza Hut – SDA National Employee Relations Agreement 2010*; and
- (b) provide to the FWO written confirmation that the changes in subparagraph 13(a) above have been completed, by no later than 28 days after the execution of this Undertaking or seven days after the completion of the changes in paragraph 13(a) occurring.

13. **FWO MyAccount Registration**

Within 14 days of the execution of this Undertaking:

- (a) register with the FWO 'My Account' portal at <https://www.fairwork.gov.au/my-account/registerpage.aspx> and have completed the profile, minimum pay rates and Modern Award options through this portal; and
- (b) provide to the FWO the Company's 'My Account' Customer Registration Number (CRN).

Within 21 days of the execution of this Undertaking, Surmin Pty Ltd will subscribe, and provide evidence to the FWO of subscriptions, to the following:

- (a) FWO's 'General Information' email alerts relation to the *Fast Food Industry Award 2010*, available at <https://www.fairwork.gov.au/website-information/staying-up-to-date/subscribe-to-email-updates>; and
- (b) FWO's 'Employer Newsletter' for the relevant State and industry, available at <https://www.fairwork.gov.au/about-us/news-and-media-releases/newsletter>, selecting at least the following options:
 - i. pay updates;
 - ii. modern award updates;
 - iii. holiday entitlements;
 - iv. working hours and breaks; and
 - v. annual leave/sick leave.

14. **Apology**

Within 28 days of the execution of this Undertaking:

- (a) send a letter of apology as per Attachment B to the following employees:
 - i. [REDACTED]
 - ii. [REDACTED]
 - iii. [REDACTED]
- (b) within 7 days of the distribution of the letters of apology to those employees provide copies to the FWO;

15. **Workplace notices**

Within 28 days of the execution of this Undertaking:

- (a) display a notice in the form of Attachment A to this Undertaking (**Workplace Notice**), in a place which is accessible by all Employees for a period of 28 days; and
- (b) provide written details of the method of displaying or providing the Workplace Notice and photographic proof of its display to the FWO within 7 days of it first being displayed.

16. **Public Notice**

- (a) place a public notice in the Saturday edition of Sydney City News newspaper (**Public Notice**) within 28 days of the FWO publishing a Media Release on its website in respect of this Undertaking which:
 - (i) Appears within the first 10 pages of the Sydney City News newspaper;
 - (ii) Must be in the size of 8cm x 10cm; and
 - (iii) Is in the form of Attachment A.
- (b) provide a copy of the Public Notice to the FWO within 7 days of the publication of the notice.

17. **Future workplace relations compliance**

- (a) commit to ongoing compliance with applicable Commonwealth workplace laws and instruments, including the FW Act, by developing systems and processes to promote ongoing compliance with those requirements; and
- (b) provide to the FWO, within 90 days of the execution of this Undertaking, written details of the systems and processes implemented in satisfaction of the undertaking in subparagraph 17(a) above designed to ensure such ongoing compliance.

18. **Employee education**

- (a) issue information packs containing current versions of the FWO fact sheets listed below and a Fair Work Information Statement to all new employees on commencement with the Company:
 - (i) Fact sheet "About the Fair Work Ombudsman"
 - (ii) Fact sheet "Employer obligations in relation to employee records and pay slips"
 - (iii) Fact Sheet "Fair Work Information Statement"

19. **Record Keeping**

Within 28 days of the execution of this Undertaking:

- (a) 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

Acknowledgements

20. Surmin Pty Ltd 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 Surmin Pty Ltd;
- (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 Surmin Pty Ltd 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, Surmin Pty Ltd may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO.

Executed as an undertaking

EXECUTED by Surmin Pty Ltd (ACN: 158640352) in accordance with section 127(1) of the Corporations Act 2001:

K.S. Patel.

(Signature of director)

(Signature of director/company secretary)

KRONE PATEL

(Name of director)

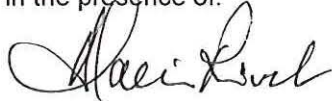
(Name of director/company secretary)

10/06/2016

(Date)

(Date)

in the presence of:



(Signature of witness)

in the presence of:


(Signature of witness)

MAI RIVET

(Name of witness)

(Name of witness)

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


STEVE RONSON 

[Insert name and role of Delegate]

15 JUNE 2016
(Date)

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:

Paola 

(Signature of witness)

Paola Poblete.
(Name of Witness)

Attachment A – Form of Public and Workplace Notice

Contravention of *Fair Work Act 2009* by Surmin Pty Ltd trading as Pizza Hut, Surry Hills.

We refer to the recent Compliance Activity (the **Activity**) conducted by the Office of the Fair Work Ombudsman (**FWO**) into allegations raised regarding widespread wage fraud and sham contracting in relation to the engagement of delivery drivers by Pizza Hut franchisees.

As a part of the Activity, the FWO completed an Audit into the compliance of Surmin Pty Ltd with the *Fair Work Act 2009* (**FW Act**).

Surmin Pty Ltd owns a Pizza Hut store located at Shop 1-2 450 Elizabeth St, Surry Hills, NSW 2010 and no previous contraventions of Commonwealth workplace laws have been determined against Surmin Pty Ltd.

The FWO determined that Surmin Pty Ltd has contravened:

- (a) Section 357(1) of the FW Act by representing to three workers that the contract of employment under which each worker was employed was a contract for services for work as an independent contractor;
- (b) Section 535 of the FW Act for failing to make and keep employee records for the employees as prescribed by sub regulation 3.33(2) of the Fair Work Regulations 2009 (FW Regulations); and
- (c) Section 536 of the FW Act for failing to issue pay slips in a form prescribed by the FW Regulations.

(collectively known as the **Contraventions**)

Surmin Pty Ltd has formally admitted to the 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.

Surmin Pty Ltd expresses its sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, Surmin 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 worked for Surmin Pty Ltd and have queries or questions relating to your employment, please contact [party to include contact details].

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

<Date>

<Name>

<Employee Address>

Dear<Name>

I am writing to apologise on behalf of Surmin Pty Ltd trading as Pizza Hut Surry Hills for non-compliance with Commonwealth workplace relation laws.

On 23 November 2015, Fairfax Media reported of widespread wage fraud and sham contracting in relation to the engagement of delivery drivers by Pizza Hut franchisees. Acting proactively in response to said allegations in the media, the FWO commenced the Pizza Hut Delivery Drivers Compliance Activity (**Activity**), randomly selecting 37 Pizza Hut sites across Australia. Surmin Pty Ltd a franchise of Pizza Hut was selected for audit as part of the Activity.

As a result of the audit, the FWO determined that the delivery drivers engaged by Surmin Pty Ltd, who were the subject of the audit, were, in fact and in law, employees and not independent contractors, which is a contravention of:

- (a) Section 357(1) of the *Fair Work Act 2009* (**FW Act**) by representing to three workers that the contract of employment under which each worker was employed was a contract for services for work as an independent contractor.

This resulted in the following contraventions:

- (a) Section 535 of the FW Act for failing to make and keep employee records for the employees as prescribed by sub regulation 3.33(2) of the Fair Work Regulations 2009 (**FW Regulations**); and
- (b) Section 536 of the FW Act for failing to issue pay slips in a form prescribed by the FW Regulations.

(collectively known as the **Contraventions**)

Regrettably, the investigation determined that you were affected by the above Contraventions. Surmin Pty Ltd is taking steps to remedy the Contraventions.

Surmin Pty Ltd has formally admitted to the FWO that Surmin 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 is available from the FWO website at www.fairwork.gov.au.

As part of the Enforceable Undertaking Surmin Pty Ltd have committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

Surmin Pty Ltd expresses their sincere regret and apologises to you for failing to comply with its lawful obligations.

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

Yours sincerely

<signature>

<insert name>

Director