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Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
File Number:	NSD2004/2019
File Title:	CAMERON BAKER & ANOR v WOOLWORTHS LIMITED ABN 88 000 014 675 & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Dated: 9/05/2022 7:10:47 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Defence to the Further Amended Statement of Claim

No. NSD2004 of 2019

Federal Court of Australia

District Registry: New South Wales

Division: Fair Work

Cameron Baker

First Applicant

Rhys Piro

Second Applicant

Woolworths Group Limited (ABN 88 000 014 675)

First Respondent

Woolworths (South Australia) Pty Limited (ABN 34 007 873 118)

Second Respondent

Application of the "minimum entitlements" provision

1A. By way of context for this defence, and in answer to the whole of the claim, the respondents say:

(a) that each of the Baker Contracts and Piro Contract (as defined in paragraphs 6(b) and 7(b) respectively below) set out:

(i) Mr Baker's and Mr Piro's respective remuneration, which comprised a base salary (less applicable tax) and company superannuation; and

(ii) other benefits and allowances paid under the contracts,

(together, the Contract Entitlements);

(b) that it was a term of the Baker Contracts and Piro Contract that the base salary would be paid in fortnightly instalments;

Filed on behalf of (name & role of party)

Prepared by (name of person/lawyer)

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Woolworths Group Limited (ABN 88 000 014 675) and Woolworths (South Australia) Pty Limited (ABN 34 007 873 118), First and Second Respondents, respectively

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- (c) that it was a term of the Award that monetary obligations imposed by the Award may be absorbed into over-Award payments:

Particulars

(A) Award Clause 2.2

- (d) that, insofar as the Contract Entitlements exceeded entitlements under the Award (Award Entitlements), the Contract Entitlements comprised over-Award payments;
- (e) that it was a material term of the Baker Contracts and Piro Contract that if, at any time, Mr Baker and Mr Piro were entitled to any payment (whether under legislation, an industrial Instrument, the National Employment Standards or otherwise) (Minimum Entitlements), Mr Baker and Mr Piro agreed that:
- (i) as far as possible, the Contractual Entitlements would be in satisfaction of the Minimum Entitlements over a 26 week period calculated at the applicable minimum rate; and
 - (ii) the Minimum Entitlements do not form part of the Baker Contracts or Piro Contract;

Particulars

(A) Baker Contracts and Piro Contract, clause 6 "minimum entitlements".

- (f) in the premise of (e) above, the Baker Contracts and Piro Contract provided that:
- (i) the cumulative amount of the Contract Entitlements paid to Mr Baker and Mr Piro were in satisfaction of the cumulative amount of all Award Entitlements, calculated over 26 week periods; and
 - (ii) the Contract Entitlements were to be set off against Award Entitlements, over 26 week periods;
- (g) that, accordingly, in respect of each 26 week period of employment, each of Mr Baker and Mr Piro were entitled to be paid the greater of:
- (i) the cumulative amount of the Contract Entitlements; and
 - (ii) the cumulative amount of Award Entitlements; and
- (h) that for each 26 week period of a Salaried Employee's employment:
- (i) if the cumulative amount of Award Entitlements exceeded the cumulative amount of the Contract Entitlements that had been paid, then Woolworths

or Woolworths SA (as the case may be) was required to make a further payment equalling the amount by which Award Entitlements exceeded the Contract Entitlements (**Contractual Shortfall**); and

- (ii) if the cumulative amount of the Contract Entitlements that had been paid exceeded the cumulative amount of Award Entitlements, then no further action was required and Mr Baker and Mr Piro were entitled to keep the amount by which the Contract Entitlements exceeded Award Entitlements (**Contractual Surplus**).

The respondents have remediated the Salaried Employees

1B. By way of further context for this defence, and in answer to the whole of the claim, the respondents say that:

- (a) in respect of each 26 week period of Mr Baker's, Mr Piro's and other group members' employment, Woolworths or Woolworths SA (as the case may be) in 2019, before the proceedings commenced, began the process of:
 - (i) reconciling their Contractual Entitlements and Award Entitlements, having regard to the Evening Work Term/Loading, the Night Work Term/Loading, the Saturday Work Term/Loading, the Sunday Work Term/Loading, the Public Holiday Work Term/Loading, the Overtime Term/Rate, the Break Between Work Term/Rate, the First Meal Allowance/Term, the Further Meal Allowance/Term and the Annual Leave Term/Loading (as each of those terms is defined or described in paragraphs 19, 22, 25, 28, 31, 34, 38, 41, 44 and 47 of this defence);
 - (ii) paying the Contractual Shortfall (to the extent that any has been determined as arising to date), plus interest on the Contractual Shortfall calculated at 5.5%, in respect of 26 week periods where Award Entitlements exceeded the amount that had been paid pursuant to Contract Entitlements; and
 - (iii) making the company superannuation contributions in respect of so much of the Contractual Shortfall which constituted Ordinary Time Earnings, plus interest on that amount at 10% per annum.

- (b) Woolworths or Woolworths SA (as the case may be) have completed the process referred to in paragraph 1B(a).

Particulars

- (A) The respondents have, as at the date of this defence, made total payments as referred to in paragraph 1B(a) amounting to approximately \$330,000,000 (inclusive of interest and superannuation).
- (B) In respect of Mr Baker, payments as referred to in paragraph 1B(a) have been made amounting to approximately \$79,005.39 (inclusive of interest and superannuation).
- (C) In respect of Mr Piro, payments as referred to in paragraph 1B(a) have been made amounting to approximately \$68,264.26 (inclusive of interest and superannuation).

The Salaried Employees have not suffered any loss

1C. By way of further context for this defence, and in answer to the whole of the claim, the respondents say that, by virtue of paragraphs 1A and 1B above, where no Contractual Shortfall occurred in relation to Mr Baker, Mr Piro or any group member in a particular 26 week period or where there is such a Contractual Shortfall but payments as referred to in paragraph 1B have covered that Contractual Shortfall:

- a. the respondents have not underpaid Mr Baker, Mr Piro or any group member (as the case may be) in respect of any of the Award Entitlements; and
- b. neither Mr Baker, Mr Piro, nor any group member, has suffered any loss to invoke the Court's power to make an order for compensation under s 545 of the Fair Work Act 2009 (Cth).

The respondents plead as follows in answer to the Further Amended Statement of Claim:

1. In answer to paragraph 1, the respondents:
 - (a) admit that Mr Baker brings the proceeding purportedly as a representative proceeding pursuant to part IVA on his own behalf and on behalf of persons described in paragraph 1; and
 - (b) otherwise do not know and therefore cannot admit paragraph 1.
2. In answer to paragraph 2, the respondents:

- (a) admit that Mr Piro brings the proceeding purportedly as a representative proceeding pursuant to part IVA on his own behalf and on behalf of persons described in paragraph 2; and
 - (b) otherwise do not know and therefore cannot admit paragraph 2.
- 3. The respondents admit paragraph 3 insofar as the Group and Group Members are referred to in the Further Amended Statement of Claim, and otherwise do not know and therefore cannot admit paragraph 3.
- 4. The respondents admit paragraph 4.
- 5. In answer to paragraph 5, the respondents:
 - (a) admit that the Award covered throughout Australia any employer engaged in the general retail industry (as that term is defined in clause 3.1 of the Award), other than employers covered by the Fast Food Industry Award 2010, the Meat Industry Award 2010, the Hair and Beauty Industry Award 2010 or the Pharmacy Industry Award 2010;
 - (b) deny that the Award covered all employees of any such employer, and say that the Award only covered employees in the classifications listed in clause 16 of the Award;
 - (c) admit paragraph 5(2);
 - (d) will refer to and rely on the Award for its full force and effect; and
 - (e) otherwise deny paragraph 5.
- 6. ~~In answer to paragraph 6, t~~The respondents admit paragraph 6 and further say that:
 - (a) ~~[not used]-admit that Mr Baker commenced employment with Woolworths at its supermarket at Camberwell in Victoria on 13 May 2014, in the position "Replenishment Team Manager" pursuant to an offer in writing from Woolworths dated 6 May 2014 with attached Contract of Employment, which Mr Baker accepted on 7 May 2014;~~
 - (b) say that Mr Baker entered into further contracts of employment over the course of his employment with Woolworths (collectively with the contract referred to in paragraph 6 of the FASOC, the **Baker Contracts**);

Particulars

- (A) Offer in writing from Woolworths dated 9 December 2016, with attached Contract of Employment.

(B) Offer in writing from Woolworths dated 31 July 2016, with attached Contract of Employment.

- (c) ~~deny that Mr Baker's base salary upon commencement was \$65,000 and say that~~ Mr Baker's remuneration comprised the base salary of \$60,000 and company superannuation of \$5,500 per annum; and
- (d) they will refer to and rely on the Baker Contracts for their full force and effect; and
- ~~(e) otherwise deny paragraph 6.~~

7. In answer to paragraph 7, the respondents:

- (a) say that as at 2 September 2013 Mr Piro was a full-time employee of Woolworths SA at its supermarket at Newton Village Shopping Centre in South Australia in the position of "Replenishment Team Manager" **(Piro Position)**;
- (b) say that Mr Piro was employed pursuant to an offer in writing dated 18 July 2013 with attached Contract of Employment, which Mr Piro accepted on 22 July 2013 **(Piro Contract)**;
- (c) ~~deny~~ admit that Mr Piro's base salary upon commencement was \$48,000 ~~but say that Mr Piro's remuneration comprised a base salary of \$49,200;~~
- (d) say that Mr Piro's remuneration comprised a base salary of \$49,200 and company superannuation of \$4,551 per annum;
- (e) will refer to and rely on the Piro Contract for its full force and effect; and
- (f) otherwise deny paragraph 7.

8. In answer to paragraph 8, the respondents:

- (a) ~~say that each of the Baker and Piro Contracts set out:~~
 - ~~(i) Mr Baker and Mr Piro's respective remuneration, which comprised a base salary (less applicable tax) and company superannuation; and~~
 - ~~(ii) other benefits and allowances paid under the contracts,~~(together, the **Contract Entitlements**); refer to and repeat paragraph 1A; and
- (b) [not used] ~~say that it was a term of the Baker Contracts and Piro Contract that the base salary be paid in fortnightly instalments;~~
- (c) [not used] ~~say that it was a term of the Award that monetary obligations imposed by the Award may be absorbed into over Award payments;~~

Particulars

~~(A) — Award cl 2.2~~

- (d) ~~[not used] say that, insofar as Contract Entitlements exceeded entitlements under the Award (Award Entitlements), the Contract Entitlements comprised over Award payments;~~
- (e) ~~[not used] say that it was a material term of the Baker Contracts and Piro Contract that if, at any time, Mr Baker and Mr Piro were entitled to any payment (whether under legislation, an industrial instrument, the National Employment Standards or otherwise) (Minimum Entitlements) Mr Baker and Mr Piro agreed that:~~
 - ~~(i) — as far as possible, the remuneration and other benefits under the Baker Contracts and Piro Contract will be in satisfaction of the Minimum Entitlements over a 26 week period calculated at the applicable minimum rate; and~~
 - ~~(ii) — the Minimum Entitlements do not form part of the Baker Contracts or Piro Contract;~~

Particulars

~~(A) — Baker Contracts and Piro Contract, clause 6 "minimum entitlements".~~

- (f) ~~[not used] in the premise of (e) above, the Bakers Contracts and Piro Contract provided that:~~
 - ~~(i) — the cumulative amount of Contract Entitlements paid to Baker and Piro and group members respectively were in satisfaction of the cumulative amount of all Award Entitlements, calculated over 26 week periods; and~~
 - ~~(ii) — Contract Entitlements were to be set off against Award Entitlements, over 26 week periods;~~
- (g) ~~[not used] say that, accordingly, in respect of each 26 week period of his employment, each of Mr Baker and Mr Piro was entitled to be paid the greater of:~~
 - ~~(i) — the cumulative amount of Contract Entitlements; and~~
 - ~~(ii) — the cumulative amount of Award Entitlements;~~
- (h) ~~[not used] say that for each 26 week period of Mr Baker and Mr Piro's employment:~~
 - ~~(iii) — if the cumulative amount of Award Entitlements exceeded the cumulative amount of Contract Entitlements that had been paid, then Woolworths or Woolworths SA (as the case may be) was required to make a further~~

~~payment equalling the amount by which Award Entitlements exceeded Contract Entitlements (**Contractual Shortfall**); and~~

~~(iv) if the cumulative amount of Contract Entitlements that had been paid exceeded the cumulative amount of Award Entitlements, then no further action was required and Mr Baker and Mr Piro were entitled to keep the amount by which Contract Entitlements exceeded Award Entitlements (**Contractual Surplus**); and~~

(i) otherwise deny paragraph 8.

9. ~~In answer to paragraph 10, the The respondents admit paragraph 9 and further say that Mr Baker's last worked shift was 5 June 2019;~~

~~(a) deny that Mr Baker worked a shift on 18 June 2019;~~

~~(b) say that Mr Baker's last worked shift was 5 June 2019; and~~

~~(c) otherwise admit paragraph 10.~~

10. ~~In answer to paragraph 11, the The respondents admit paragraph 10;~~

~~(a) say that Mr Piro remained in the Piro Position up until on or around 9 May 2016, at which point he commenced employment as a non-salaried employee with Woolworths SA in the position of "Store Team Member";~~

~~(b) say that Mr Piro remained employed by Woolworths SA in a non-salaried position until the end of the shift commenced by him on or about 22 July 2018; and~~

~~(c) otherwise deny paragraph 11.~~

11. In answer to paragraph 12~~1~~, the respondents:

(a) admit that each of the Baker Position and the Piro Position was:

(i) in a supermarket in the general retail industry as defined in the Award;

(ii) a Manager Salaried Position; and

(iii) within the Award classification of "Retail Employee Level 6";

(b) deny that each of the Baker Position and the Piro Position was in a Big W Discount Department Store; and

(c) otherwise deny paragraph 12~~1~~.

12. In answer to paragraph 13~~2~~, the respondents:

(a) ~~save as set out below~~, admit that the Award as amended from time to time applied to Mr Baker;

- (b) save as set out below, admit that the Award as amended from time to time applied to Mr Piro;
- (c) ~~[not used] say that, by reason of s 57 of the FWA, the Award did not apply to employees who were covered by an enterprise agreement;~~
- (d) say that the Award only applied to Mr Piro while he was employed in the Piro Position and until on or around 89 May 2016; and
- (e) deny that the Award as amended from time to time applied to Mr Piro following the Piro Termination, following which he was covered by an enterprise agreement whilst he remained employed by Woolworths SA₂;
- (f) ~~deny that the Award as amended from time to time applied to Group Members who were covered by an enterprise agreement;~~
- (g) ~~say that Group Members who did not hold salaried positions were covered by an enterprise agreement.~~

Particulars

- (A) ~~Woolworths National Supermarket Agreement 2012.~~
- (B) ~~Woolworths Supermarkets Agreement 2018.~~
- (C) ~~BIG W Stores Agreement 2012.~~
- (D) ~~BIG W Stores Agreement 2019.~~

13. In answer to paragraph 134, the respondents:

- (a) ~~[not used] say that, from 26 May 2014 to 17 March 2019, Mr Baker's ordinary roster was from Tuesday night to Saturday night from 10pm to 7am;~~
- (b) ~~[not used] say that, from 18 March 2019 to the termination of his employment, Mr Baker's ordinary roster was from Monday night to Friday night from 9pm to 6am~~
~~(collectively, (a) and (b) are referred to in this defence as the **Baker Ordinary Rosters**); and~~
- (c) say that, between 20 April 2015 and the termination of his employment, Mr Baker agreed to work the following standard rosters, by either entering rosters in SuccessFactors, which were then "accepted" by his Line Manager, or "accepting" the rosters (by clicking the button marked "accept") which had previously been entered by his Line Manager in the respondents' SuccessFactors system:
 - (i) between 20 April 2015 and 17 March 2019, Tuesday night to Saturday night from 10pm to 7am;

- (ii) between 18 March 2019 and the termination of his employment, Monday night to Friday night from 9pm to 6am,
 - (d) say that, while he was employed in the Baker Position, Mr Baker's published roster varied from time to time. From week to week, Mr Baker either:
 - (i) determined his own roster, a process which was known and approved of by the Store Manager and/or his Line Manager, which was then published in the respondents' Kronos system; or
 - (ii) agreed with the Store Manager and/or his Line Manager to work a particular roster, which was then published in the respondents' Kronos system.
 - (e) say further that Mr Baker agreed from time to time with the Store Manager and/or his Line Manager, or reached a common understanding with the first respondent, that Mr Baker would work a roster pattern which was different to the rostered hours as published in the respondents' Kronos system.
 - ~~(e)(f)~~ otherwise deny paragraph 134.
14. The respondents repeat paragraphs 1A, 4 to 6, 8, 109 and 12-14~~11-13~~ of this defence, and otherwise admit paragraph 154.
15. In answer to paragraph 156, the respondents:
- (a) refer to paragraph 45~~56~~ and 57 of this defence and say that Mr Piro's roster prior to 24 June 2014 is irrelevant to these proceedings;
 - (b) ~~[not used]refer to paragraph 11 of this defence and say that Mr Piro's roster following 9 May 2016 is irrelevant to these proceedings;~~
 - (c) ~~[not used]say that, from 23 June 2014 to 4 January 2015, Mr Piro's ordinary roster was a two week rotating roster as follows:~~
 - ~~(i) — Week 1: 1pm to 10pm (Monday to Friday); and~~
 - ~~(ii) — Week 2: 1pm to 10pm (Monday, Tuesday, Thursday, Friday) and 10am to 7pm (Saturday);~~
 - (d) ~~[not used]say that, from 5 January 2015 to 4 October 2015, Mr Piro's ordinary roster was a two week rotating roster as follows:~~
 - ~~(i) — Week 1: 3pm to 12am (Monday, Wednesday to Friday) and 11.30am to 8.30pm (Saturday); and~~
 - ~~(ii) — Week 2: 3pm to 12am (Monday, Wednesday to Friday) and 1pm to 10pm (Tuesday);~~

- (e) ~~[not used] say that, from 5 October 2015 to 6 December 2015, Mr Piro's ordinary roster was a two week rotating roster as follows:~~
- ~~(i) — Week 1: 3pm to 12am (Monday, Wednesday to Friday), 1pm to 10pm (Tuesday); and~~
 - ~~(ii) — Week 2: 3pm to 12am (Monday, Wednesday, Friday), 1pm to 10pm (Tuesday), 11.30am to 8.30pm (Saturday);~~
- (f) ~~[not used] say that, from 7 December 2015 to 9 May 2016, Mr Piro's ordinary roster was a two week rotating roster as follows:~~
- ~~(i) — Week 1: 3pm to 12am (Monday to Friday); and~~
 - ~~(ii) — Week 2: 3pm to 12am (Monday to Wednesday and Friday) and 11.30am to 8.30pm (Saturday);~~
- ~~(collectively, (a) to (e) are referred to in this defence as the **Piro Ordinary Rosters**); and~~
- (g) say that, between 20 April 2015 and 8 May 2016, Mr Piro agreed to work the following standard rosters, by "accepting" the rosters (by clicking the button marked "accept") which had previously been entered by his Line Manager in the respondents' SuccessFactors system:
- (i) between 20 April 2015 and 8 November 2015, a two week rotating roster as follows:
 - (A) Week 1: Monday: 3pm – 12am; Tuesday: 1pm – 10pm; Wednesday – Friday: 3pm – 12am.
 - (B) Week 2: Monday: 3pm – 12am; Tuesday: 1pm – 10pm; Wednesday and Friday: 3pm – 12am; Saturday 11.30pm – 8.30pm.
 - (ii) between 9 November 2015 and 22 November 2015, a three week rotating roster as follows:
 - (A) Week 1: Monday: 8am – 5pm; Tuesday: 12pm – 9pm; Wednesday – Saturday: 8am – 5pm;
 - (B) Week 2: Tuesday: 12pm – 9pm; Wednesday – Thursday and Saturday – Sunday: 8am – 5pm;
 - (C) Week 3: Monday: 3pm – 12am; Tuesday: 1pm – 10pm; Wednesday: 3pm – 12am; Saturday: 12pm – 9pm.
 - (iii) between 23 November 2015 and 8 May 2016, a two week rotating roster as follows:

(A) Week 1: Monday – Friday: 3pm – 12am;

(B) Week 2: Monday – Wednesday: 3pm – 12am; Friday: 3pm – 12am;
Saturday: 11.30am – 8.30pm

(h) say that, while he was employed in the Piro Position, Mr Piro's published roster varied from time to time. From week to week, Mr Piro either:

(i) determined his own roster, a process which was known and approved of by his Store Manager and/or Line Manager, which was then published in the respondents' Kronos system; or

(ii) agreed with the Store Manager and/or Line Manager to work a particular roster, which was then published in the respondents' Kronos system.

(i) say further that Mr Piro agreed from time to time with the Store Manager and/or his Line Manager, or reached a common understanding with the second respondent, that Mr Piro would work a roster pattern which was different to the rostered hours as published in the respondents' Kronos system.

~~(g)~~(j) otherwise deny paragraph 1615.

16. In answer to paragraph 176, the respondents:

(a) repeat paragraphs 1A, 4, 5, 7, 8, 140 to 12 and 12 to 135 of this defence;

(b) admit that Mr Piro was a "full time employee" of Woolworth Ltd as defined in the Award from 22 July 2013 to 89 May 2016; and

(c) otherwise deny paragraph 176.

17. In answer to paragraph 187, the respondents:

(a) ~~say that Mr Piro, other than when he was on leave, worked in accordance with the Piro Ordinary Rosters with limited exceptions (including on public holidays, where applicable); repeat paragraphs 13 and 15 of the defence;~~

(b) ~~[not used] say that Mr Baker's work hours (including on public holidays, where applicable) frequently deviated from the Baker Ordinary Rosters but that he did not work more than 5 days per week; and~~

(c) otherwise deny paragraph 187.

18. The respondents deny paragraph 198 and say that, for the purposes of the Award, "ordinary hours" of work are defined in Part 5 of the Award.

The Alleged Evening Work Contraventions

19. In answer to paragraph 2019, the respondents:

- (a) repeat paragraphs 1A and 8 of this defence;
- (b) admit that there were terms of the Award applicable to Mr Baker's employment in the Baker Position and Mr Piro's employment in the Piro Position for any "ordinary hours" worked by them after 18.00 on any Monday to Friday, for which a loading of 25% applied (the **Evening Work Term/Loading**);
- (c) say that the Evening Work Term/Loading was to be taken into account in calculating the Award Entitlements;
- (d) say that the Evening Work Loading is calculated on the ~~rates of pay~~ minimum hourly wages under the Award;
- (e) say that the Evening Work Loading is only payable for ordinary hours and not overtime hours; and
- (f) otherwise deny paragraph 2019.

20. In answer to paragraph 2120, the respondents:

- (a) repeat paragraphs 1A to 1C, 8 and 2019 of this defence; and
- (b) [not used] ~~say that, in respect of each 26 week period of Mr Baker's, Mr Piro's and other group members' employment, Woolworths or Woolworths SA (as the case may be) in 2019, before the proceedings commenced, began the process of:~~
 - (i) ~~reconciling their Contractual Entitlements and Award Entitlements, having regard to the Evening Work Term/Loading, the Night Work/Term Loading, the Saturday Work Term/Loading, the Sunday Work Term/Loading, the Public Holiday Work Term/Loading, and the Overtime Term/Rate (as each of those terms is defined or described in paragraphs 20, 23, 26, 29, 32 and 35 of this defence);~~
 - (ii) ~~paying the Contractual Shortfall (to the extent that any has been determined as arising to date), plus interest on the Contractual Shortfall calculated at 5.5%, in respect of 26 week periods where Award Entitlements exceeded the amount that had been paid pursuant to Contract Entitlements; and~~
 - (iii) ~~making the company superannuation contributions in respect of so much of the Contractual Shortfall which constitutes Ordinary Time Earnings, plus interest on that amount at 10% per annum; and~~
- (c) otherwise deny paragraph 2120.

21. In answer to paragraph 2221, the respondents:

- (a) repeat paragraphs 1A to 1C, 8, 19 and 20 and 24 of this defence; and
- (b) otherwise deny paragraph 2221.

The Alleged Night Work Contraventions

22. In answer to paragraph 2322, the respondents:

- (a) repeat paragraphs 1A to 1C and 8 of this defence;
 - (b) say that there were terms of the Award applicable to Mr Baker's employment in the Baker Position and Mr Piro's employment in the Piro Position for any "ordinary hours" hours worked by them after 23.00 on any day, for which the following rates applied:
 - (i) time and a half for the first three hours so worked and double time thereafter until 07.00 (Monday to Saturday); and
 - (ii) [not used] ~~double time thereafter until 07.00 (Monday to Saturday) or 09.00 (Sunday)~~; and
 - (iii) double time between 24.00 Saturday and 9.00 Sunday; and
 - (iv) double time between 23.00 Sunday and 24.00 Sunday.
- (the **Night Work Term/Loading**);

Particulars

- (A) Award cl 27.2
 - (B) Award cl 29.2(2)(a)
 - (C) Award cl 29.2(d)
 - (c) say that the Night Work Term/Loading was to be taken into account in calculating the Award Entitlements;
 - (d) say that the Night Work Loading is calculated on the ~~rates of pay~~ minimum hourly wages under the Award; and
 - (e) otherwise deny paragraph 2322.
23. In answer to paragraph 2423, the respondents:
- (a) repeat paragraphs 1A to 1C, 8, 2420 and 2322 of this defence; and
 - (b) otherwise deny paragraph 2423.
24. In answer to paragraph 2524, the respondents:
- (a) repeat paragraphs 1A to 1C, 8, 2322 and 2423 of this defence; and

- (b) otherwise deny paragraph 2524.

The Alleged Saturday Work Contraventions

25. In answer to paragraph 2625, the respondents:

- (a) repeat paragraphs 1A and 8 of this defence;
- (b) admit that there were terms of the Award applicable to Mr Baker's employment in the Baker Position and Mr Piro's employment in the Piro Position for any "ordinary hours" worked by them on a Saturday, for which a loading of 25% applied (the **Saturday Work Term/Loading**);
- (c) say that the Saturday Work Term/Loading was to be taken into account in calculating the Award Entitlements;
- (d) say that the Saturday Work Loading is calculated on the ~~rates of pay~~ minimum hourly wages under the Award;
- (e) say that the Saturday Work Loading is only payable for ordinary hours and not overtime hours; and
- (f) otherwise deny paragraph 2625.

26. In answer to paragraph 2726, the respondents:

- (a) repeat paragraphs 1A to 1C, 8, 2420 and 2625 of this defence; and
- (b) otherwise deny paragraph 2726.

27. In answer to paragraph 2827, the respondents:

- (a) repeat paragraphs 1A to 1C, 8, 2625 and 2726 of this defence; and
- (b) otherwise deny paragraph 2827.

The Alleged Sunday Work Contraventions

28. In answer to paragraph 2928, the respondents:

- (a) repeat paragraphs 1A and 8 of this defence;
- (b) admit that there were terms of the Award applicable to Mr Baker's employment in the Baker Position and Mr Piro's employment in the Piro Position for any "ordinary hours" worked by them on a Sunday, for which a loading applied as follows:
 - (i) 100% loading between 1 January 2010 and 30 June 2017;
 - (ii) 95% loading between 1 July 2017 and 30 June 2018;
 - (iii) 80% loading between 1 July 2018 and 30 June 2019; and

- (iv) 65% loading between 1 July 2019 to 30 June 2020,
(the **Sunday Work Term/Loading**);
 - (c) say that the Sunday Work Term/Loading was to be taken into account in calculating the Award Entitlements;
 - (d) say that the Sunday Work Loading is calculated on the minimum hourly wages rates of pay under the Award;
 - (e) say that the Sunday Work Loading is only payable for ordinary hours and not overtime hours; and
 - (f) otherwise deny paragraph 2928.
29. In answer to paragraph 3029, the respondents:
- (a) repeat paragraphs 1A to 1C, 8, 2420 and 2928 of this defence; and
 - (b) otherwise deny paragraph 3029.
30. In answer to paragraph 3430, the respondents:
- (a) repeat paragraphs 1A to 1C, 8, 2928 and 3029 of this defence; and
 - (b) otherwise deny paragraph 3430.

The Alleged Public Holiday Contraventions

31. In answer to paragraph 3231, the respondents:
- (a) repeat paragraphs 1A and 8 of this defence;
 - (b) admit that there were terms of the Award applicable to Mr Baker's employment in the Baker Position and Mr Piro's employment in the Piro Position for any hours worked by them on a Public Holiday, for which a loading applied as follows:
 - (i) 150% loading between 1 January 2010 and 30 June 2017; and
 - (ii) 125% loading from 1 July 2017,
 (the **Public Holiday Work Term/Loading**);
 - (c) say that the Award allowed employees to be given Time Off In Lieu of the Public Holiday Work Loading;
 - (d) say that the Public Holiday Work Term/Loading was to be taken into account in calculating the Award Entitlements;
 - (e) say that the Public Holiday Work Loading is calculated on the minimum hourly wages rates of pay under the Award;

- (f) say that the Public Holiday Work Loading is only payable for ordinary hours and not overtime hours; and
- (g) otherwise deny paragraph 3231.

32. In answer to paragraph 3332, the respondents:

- (a) repeat paragraphs 1A to 1C, 8, 21-20 and 3231 of this defence; and
- (b) otherwise deny paragraph 3332.

33. In answer to paragraph 3433, the respondents:

- (a) repeat paragraphs 1A to 1C, 8, 3231 and 3332 of this defence; and
- (b) otherwise deny paragraph 3433.

The Alleged Overtime Contraventions

34. In answer to paragraph 3534, the respondents:

- (a) repeat paragraphs 1A and 8 of this defence;
 - (b) ~~[not used] say that the reference to 'space of hours' in paragraph 35 of the Amended Statement of Claim should be a reference to 'span of hours';~~
 - (c) admit that there were terms of the Award applicable to Mr Baker's employment in the Baker Position and Mr Piro's employment in the Piro Position for any hours required by Woolworths or Woolworths SA to be worked by them:
 - (i) in excess of the ordinary hours of work (as defined in the Award);
 - (ii) outside the span of hours (excluding shiftwork); or
 - (iii) outside the roster conditions prescribed in clauses 27 and 28 of the Award, to be paid at:
 - (iv) time and a half for the first three hours and double time thereafter; and
 - (v) double time on a Sunday and double time and a half on a public holiday,
- (collectively the "Overtime Term/Rate");

Particulars

(A) Award, cl 29.2

- (d) say that the Award provides that, due to unexpected operational requirements, an employee's roster for a given day may be changed by mutual agreement with the employee prior to the employee arriving for work;

Particulars

(A) Award, cl 28.14(~~cb~~)

(e) say that clause 28.14 of the Award:

- (i) only applies to roster changes initiated by the employer and not where the employee initiates the roster change;
- (ii) does not apply in circumstances where the employee is not required by the employer to work outside the hours set out in the roster and the employee performs such work voluntarily without the express or implied authorisation of the employer; and
- (iii) does not apply where an employer and employee have agreed from time to time or reached a common understanding that the employee will work a roster pattern which is different to the published rostered hours;

~~(e)~~(f) say that the Award allows employees to be given Time Off In Lieu of Overtime Rates; and

~~(f)~~(g) otherwise deny paragraph ~~36~~34.

35. In response to paragraph ~~36~~35, the respondents:

- (a) say that the assertion that there was a requirement from time to time has not been properly pleaded or particularised and is therefore embarrassing and liable to be struck out; and
- (b) by reason of paragraph (a), deny paragraph ~~36~~35.

36. In answer to paragraph ~~37~~36, the respondents:

- (a) repeat paragraph 1A to 1C, 8, 20, 21, 34 and 35 ~~and 36~~ of this defence;
- (b) ~~[not used] say that, in the premises of paragraphs 35(b) and 35(c) above, Mr Baker and Mr Piro are only entitled to overtime for working hours outside of the Baker Ordinary Rosters or Piro Ordinary Rosters if:~~
 - ~~(i) — they work after their rostered end time; and~~
 - ~~(ii) — their total worked hours are greater than their total rostered hours; and~~
- (c) otherwise deny paragraph ~~37~~36.

37. In answer to paragraph ~~38~~37, the respondents:

- (a) repeat paragraphs 1A to 1C, 8, ~~36~~35 and ~~37~~36 of this defence; and
- (b) otherwise deny paragraph ~~38~~37.

The Alleged Break Between Work Periods Contravention

38. In answer to paragraph 38, the respondents:

- (a) repeat paragraphs 1A and 8 of this defence;
- (b) admit that there were terms of the Award applicable to Mr Baker's employment in the Baker Position and Mr Piro's employment in the Piro Position that, in the absence of any agreement to reduce the break between shifts as referred to in sub-paragraph (c) below:
 - (i) entitled them to a 12-hour rest period between the completion of work, including any reasonable additional hours or overtime on one day, and the commencement of work on the next day; and
 - (ii) required them, if they recommenced work again without having had 12 hours off work, to be paid double the rate they would otherwise be entitled to until such time as they were released from duty for 12 consecutive hours,
(the Break Between Work Term/ Rate);
- (c) say that clause 31.2(c) of the Award states: "[b]y agreement between an employer and an employee or employees the period of 12 hours may be reduced to not less than 10 hours"; and
- (d) say that an agreement was reached between the respondents and the employees in Woolworths supermarkets, including Mr Baker and Mr Piro, to reduce the period of 12 hours to 10 hours as provided for in clause 31.2(c) of the Award;

Particulars

1. employees agreed to reduce the break between shifts to 10 hours by their conduct in accepting and working in accordance with rosters applying to them and other employees containing less than 12 hours' break between shifts.
2. employees knew of the respondents' standard practice of publishing rosters with a minimum of 10 hours' break between shifts as a result of the following:
 - i. The Woolworths National Supermarkets Agreement 2009 and the Woolworths National Supermarkets Agreement 2012, one or both of which applied to those Group Members previously performing work covered by those instruments, both contained (at clause 4.11) an express agreement by employees covered by those

agreements to reduce the length of the break between shifts to 10 hours.

ii. At all material times, employees have been included in the same rosters that applied to employees covered by an enterprise agreement, who comprise a significant majority of the supermarkets employees.

3. At all material times, employees knowingly, consistently and without opposition, worked in accordance with rosters with less than 12 hours' break between shifts.

(e) further and in the alternative, the respondents say that an agreement was reached between the respondents and each of Mr Baker and Mr Piro to reduce the period of 12 hours to 10 hours as provided for in clause 31.2(c) of the Retail Award);

Particulars

1. Mr Piro agreed with the second respondent to work a standard roster that provided for breaks between shifts of less than 12 hours (Piro Agreed Reduced Break Roster);
2. Mr Piro accepted the Piro Agreed Reduced Break Roster (previously entered by his line manager) by clicking a button marked "accept" in the respondents' SuccessFactors system;
3. Mr Piro agreed to reduce the break between shifts by setting his own roster, a process which was known and approved by his store manager and/or assistant store manager, which was then recorded in the respondents' Kronos system, and which included a break of less than 12 hours between shifts;
4. Mr Baker and/or Mr Piro agreed to reduce the break between shifts on particular occasions when Mr Baker and/or Mr Piro agreed to return to work before their rostered start time on a particular day, and this reduced the break between the completion of work on the previous day and the commencement of work on the particular day to less than 12 hours;

(f) say that, on a proper construction of clause 31.2 of the Award, where Mr Baker or Mr Piro worked outside the rostered hours prescribed in clause 28.14 of the Award or worked overtime under clause 29.1 or clause 29.2 of the Award without the authorisation of, or having been required by, the respondents to work such hours, then such additional hours are not included for the purposes of determining

whether Mr Baker or Mr Piro has had a 12 hour rest period, or the agreed shorter rest period under clause 31.2(c), between the completion of work on one day and the commencement of work on the next day;

(g) say further, that clause 31.2(b), properly construed, requires the employer to pay the employee double the rate prescribed by clause 17 of the Award (or clause 18 of the Award in the case of junior employees), in addition to any shift penalties or overtime payments that the employee is otherwise entitled to be paid for the hours worked; and

(h) otherwise deny paragraph 38.

39. In answer to paragraph 39, the respondents:

(a) repeat paragraphs 1A to 1C, 8, 20 and 38 of this defence;

(b) say that neither Mr Baker's standard rosters in SuccessFactors, nor his rosters published in Kronos, included breaks between shifts of less than 12 hours; and

(c) otherwise deny paragraph 39.

40. In answer to paragraph 40, the respondents:

(a) repeat paragraphs 1A to 1C, 8, 38 and 39 of this defence; and

(b) otherwise deny paragraph 40.

The Alleged Meal Allowance Contraventions

41. In answer to paragraph 41, the respondents:

(a) repeat paragraphs 1A and 8 of this defence;

(b) admit that there were terms of the Award applicable to Mr Baker's employment in the Baker Position and Mr Piro's employment in the Piro Position that:

(i) if they were required to work more than one hour of overtime after the employee's ordinary time of ending work, without being given 24 hours' notice, the employee would either be provided with a meal or paid a meal allowance in the amounts specified in paragraph 41(3) (**First Meal Allowance/Term**); and

(ii) where such overtime work exceeded four hours, a further meal allowance was required to be paid in the amounts specified in paragraph 41(4) (**Further Meal Allowance/Term**);

(c) say that, on a proper construction of clause 20.1(a), the Meal Allowance Entitlement only applies where an employer authoritatively or imperatively

dictates or demands that the employee work the additional hours and the Meal Allowance Entitlement is therefore not enlivened when the employee works overtime at their own initiative or accepts an offer to work overtime;

- (d) say that, on a proper construction of clause 20.1(a), the employee's ordinary time of ending work is the time that the employee customarily finishes work and not the employee's finishing time published on the roster; and
- (e) otherwise deny paragraph 41.

42. In answer to paragraph 42, the respondents:

- (a) repeat paragraphs 1A to 1C, 8, 20 and 41 of this defence; and
- (b) otherwise deny paragraph 42.

43. In answer to paragraph 43, the respondents:

- (a) repeat paragraphs 1A to 1C, 8, 41 and 42 of this defence; and
- (b) otherwise deny paragraph 43.

The Alleged Annual Leave Loading Contraventions

44. In answer to paragraph 44, the respondents:

- (a) repeat paragraphs 1A and 8 of this defence;
- (b) admit that there were terms of the Award applicable to Mr Baker's employment in the Baker Position and Mr Piro's employment in the Piro Position that during a period of annual leave a loading of 17.5% or the relevant weekend penalty rates (whichever is the greater) applied (the **Annual Leave Term/Loading**);
- (c) say that the Annual Leave Term/Loading was to be taken into account in calculating the Award Entitlements;
- (d) say that the Annual Leave Loading is calculated on the ~~rates of pay~~ minimum hourly wages under the Award; and
- (e) otherwise deny paragraph 44.

45. In answer to paragraph 45, the respondents:

- (a) repeat paragraphs 1A to 1C, 8, 20 and 44 of this defence; and
- (b) otherwise deny paragraph 44.

46. In answer to paragraph 46, the respondents:

- (a) repeat paragraphs 1A to 1C, 8, 44 and 45 of this defence; and
- (b) otherwise deny paragraph 46.

The Alleged Payment Contraventions

47. In answer to paragraph 47, the respondents:
- (a) repeat paragraphs 1A and 8 of this defence;
 - (b) rely on the terms of the Award for their full terms and effect; and
 - (c) otherwise deny paragraph 47.
48. In answer to paragraph 48, the respondents:
- (a) repeat paragraphs 1A to 1C, 8, 20, 23, 26, 29, 32, 36, 39, 42 and 45 of this defence;
and
 - (b) otherwise deny paragraph 48.
49. In answer to paragraph 49, the respondents:
- (a) repeat paragraphs 1A to 1C, 8, 47 and 48 of this defence; and
 - (b) otherwise deny paragraph 49 of this defence.

The Alleged Record Keeping Contraventions

50. The respondents admit paragraph ~~39~~50.
51. In answer to paragraph ~~40~~51, the respondents:
- (a) repeat paragraph ~~36~~35 of this defence;
 - (b) say that Woolworths and Woolworths SA required employees, including Mr Baker and Mr Piro, to clock in / out at the start and end of each shift;

Particulars

- (A) Woolworths and Woolworths SA directed employees to use the biometric finger scan clock in / clock out system orally and in writing as part of induction training: Store induction handbook – all team members (2016).
- (B) It was a requirement that employees use the biometric finger scan clock in/ clock out system, compliance with which was followed-up by Store Administrators: Document entitled "Time Clock" available on the intranet and accessible by Mr Baker and Mr Piro.
- (c) say that the clock in records were retained by Woolworths and Woolworths SA as records of the actual hours worked by Mr Baker and Mr Piro, and therefore of the overtime worked by them;

- (d) ~~say that the clock in records show when Mr Baker and Mr Piro started and finished working each day and can be compared to the Baker Ordinary Rosters and Piro Ordinary Rosters; and say further that, where an employee is paid an all-inclusive salary, on a proper construction of regulation 3.34 of the *Fair Work Regulations 2009*, the respondents have satisfied their obligations if they have kept a record of the rostered hours and worked hours of the employee; and~~
- (e) otherwise deny paragraph 4051.

52. In response to paragraph 4152, the respondents:

- (a) admit that any contravention of each of the Evening Work Term, Night Time Work Term, Saturday Work Term, Sunday Work Term, Public Holiday Work Term and Overtime Work Term was prohibited by s 45 of the FWA;
- (b) admit that a contravention of the Record Keeping Obligation would be prohibited by s 45 of the FWA;
- (c) admit that a contravention of s 45 of the FWA is, by operation of s 539 of the FWA a civil remedy provision for the purposes of ss 545 and 546;
- (d) repeat paragraphs ~~[40]20~~ to ~~[40]51~~ of this defence and deny that the respondents engaged in any of the contraventions alleged;
- (e) say that if, which is denied, the respondents engaged in any of the contraventions alleged, they rely on s 556 and s 557 of the FWA;
- (f) further say that if, which is denied, Woolworths and Woolworths SA are liable for contravening more than one of the Evening Work Term/Loading, the Night Work/Term Loading, the Saturday Work Term/Loading, the Sunday Work Term/Loading, the Public Holiday Work Term/Loading, and the Overtime Term/Rate, the Break Between Work Term/Rate, the First Meal Allowance/Term, the Further Meal Allowance/Term, the Annual Leave Loading/Term and the Payment Term (as each of those terms is defined or described in paragraphs ~~2019, 2322, 2625, 2928, 3231, and 3534~~, 38, 41, 44 and 47 of this defence), and upon the applicants affording procedural fairness to the respondents as to the case they have to meet on the question of penalty and the finding of the Court on the finding of liability (if any), the respondents reserve the right to invoke section 557;
- (g) in the same premises, the respondents reserve the right to contend that, by operation s 556, only a single penalty can be imposed in respect of a particular course of conduct;

- (h) say that in the premises of sub-paragraph (g) above, any penalty imposed in respect of Mr Baker and Mr Piro operates as a bar against penalties pleaded in respect of other Group Members; and
- (i) otherwise deny paragraph 4152.

Group Members and their claims

53. In answer to paragraph 4253, the respondents:
- (a) repeat paragraphs 1A to 1C, 8, 2019, 2322, 2625, 2928, 3231, 3534, 38, 41, 44 and 47 of this defence; and
 - (b) otherwise deny paragraph 4253.
54. In answer to paragraph 4354, the respondents:
- (a) repeat paragraphs 1B to 1C, 24-20 and 4253 of this defence; and
 - (b) otherwise deny paragraph 4354.
55. In answer to paragraph 4455, the respondents:
- (a) repeat paragraphs 1B to 1C and 41-52 to 4354 of this defence;
 - (b) say that, to the extent group members seek compensation and/or damages with respect to alleged contraventions arising prior to 29 November 2013 in the case of claims against Woolworths (subject to paragraphs 56 and 5745 below), and prior to 24 June 2014 in the case of claims against Woolworths SA, those claims are statute barred pursuant to s 544 of the FWA; and
 - (c) otherwise deny paragraph 4455.
56. Further, in respect of the amendments to the originating application and statement of claim filed on 24 June 2020 and 18 June 2020 respectively:
- (a) the Court should order that those amendments take effect as at the date of the making of those amendments, namely 24 June 2020;
 - (b) those amendments do not add or substitute a new claim for relief, or a new foundation in law for a claim for relief, that arises out of the same facts or substantially the same facts as those pleaded in the statement of claim filed 29 November 2019;
 - (c) to the extent that the causes of action of the applicants and each Group Member raised by those amendments accrued or arose more than six years prior to 24 June 2020, those causes of action are statute barred pursuant to s 544 of the FWA.

57. Further, in respect of the amendments to the Further Amended Originating Application and Further Amended Statement of Claim filed on 22 September 2021:

- (a) the Court should order that those amendments take effect as at the date of the making of those amendments, namely 22 September 2021;
- (b) those amendments do not add or substitute a new claim for relief, or a new foundation in law for a claim for relief, that arises out of the same facts or substantially the same facts as those pleaded in the statement of claim filed 29 November 2019 or the Amended Statement of Claim filed on 18 June 2020;
- (c) to the extent that the causes of action of the applicants and each Group Member raised by those amendments accrued or arose more than six years prior to 22 September 2021, those causes of action are statute barred pursuant to s 544 of the FWA.

Date: ~~16 July 2020~~ 09 May 2022


Signed by Ian Timothy Bolster
Lawyer for the First and Second Respondents

This pleading was prepared by Ian Timothy Bolster, lawyer and settled by Michael Seck of Counsel, Yaseen Shariff SC of Counsel and Ruth C A Higgins SC.

Certificate of lawyer

I Ian Timothy Bolster certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: ~~16 July 2020~~ 09 May 2022



Signed by Ian Timothy Bolster
Lawyer for the First and Second Respondents