

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 17/03/2022 9:54:11 AM ACDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number:	SAD76/2020
File Title:	AARON FURNELL & ORS v SHAHIN ENTERPRISES PTY LTD ACN 008 150 543
Registry:	SOUTH AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 18/03/2022 8:26:26 AM ACDT

A handwritten signature in blue ink, reading "Sia Lagos".

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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Second Further Amended Statement of claim

(amended pursuant to leave given by Charlesworth J on 25 February 2022)

No. SAD76 of 2020

Federal Court of Australia

District Registry: SA

Division: Fair Work

Aaron Furnell and others listed in the Schedule

Applicants

Shahin Enterprises Pty Ltd ACN 008 150 543

Respondent

A PARTIES

1. At all material times, the Respondent was the employer of each of:
 - (a) the Applicants;
 - (b) the Group 1 Members (as defined in paragraph 8 below);
 - (c) the Group 2 Members (as defined in paragraph 32 below);
 - (d) the Group 3 Members (as defined in paragraph 49 below);
 - (e) the Group 4 Members (as defined in paragraph 74~~6~~5 below); and
 - (f) the Group 5 Members (as defined in paragraph 93~~5~~5 below).
2. The Respondent is a National System Employer within the meaning of section 14 of the Fair Work Act 2009 (Cth) (**FW Act**).
3. Each of the Applicants was, during their employment with the Respondent, a national system employee within the meaning of section 13 of the FW Act.

Filed on behalf of (name & role of party)	The Applicants		
Prepared by (name of person/lawyer)			
Law firm (if applicable)	Adero Law		
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4. At all material times until 30 June 2018, the employment by the Respondent of the Applicants and the Group 1 Members, Group 2 Members, Group 3 Members, Group 4 Members and Group 5 Members up to that date was subject to each of:
- (a) the Shahin Enterprises Pty Ltd Employee Collective Agreement Customer Service Employee (the **Customer Service CA**); and/or
 - (b) the Shahin Enterprises Pty Ltd Employee Collective Agreement Full Time Employees (the **Full Time CA**).
5. Each of Customer Service CA and the Full Time CA was:
- (a) approved by the Australian Workplace Authority on 25 June 2008; and
 - (b) an employee collective agreement within the meaning of s 327 of the Workplace Relations Act 1996 (Cth);
 - (c) on and from 1 July 2009:
 - (i) a 'transitional instrument';
 - (ii) specifically, an 'agreement-based transitional instrument'; and
 - (iii) more specifically, a 'collective agreement-based transitional instrument',
- within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) (the **FW Transitional Act**) and the FW Act, which continued to apply to the employment of the Applicants by the Respondent until 30 June 2018.

Particulars

- (i) Schedule 2 and items 3 and 4 of schedule 3 of the FW Transitional Act.
 - (ii) The Customer Service CA and the Full Time CA were terminated by order Commissioner Hampton of the Fair Work Commission made on 1 March 2018 and taking effect on 30 June 2018.
6. At all material times from 1 July 2018, the employment by the Respondent of the Applicants and the Group 1 Members, Group 2 Members, Group 3 Members, Group

4 Members and Group 5 Members by the Respondent was governed by the Vehicle Manufacturing, Repair, Services and Retail Award (the **Award**).

7. The claims pleaded below are broken down into claims made in respect of:
- (a) the period between the date 6 years prior to ~~the filing of this statement of claim~~ 14 May 2020 and 30 June 2018 (the **Collective Agreement Period**); and
 - (b) the period between 1 July 2018 and the date of the filing of this second further amended statement of claim (the **Modern Award Period**).

B GROUP 1 CLAIM: AARON FURNELL, PAUL YOUNG AND GROUP 1 MEMBERS UNDERPAYMENT

B-1 REPRESENTATIVE PROCEEDINGS

8. Each of the First Applicant and the Second Applicant brings this proceeding as a representative proceeding pursuant to Part IVA of the Federal Court of Australia Act 1976 (Cth):
- (a) in his own right; and
 - (b) on behalf of current and former non-salaried employees of the Respondent who, at any time during the Collective Agreement Period and Modern Award Period:
 - (i) were employed in the positions of:
 - (1) console operator;
 - (2) driveway attendant; or
 - (3) roadhouse (food) attendant,pursuant to the Customer Service CA during the Collective Agreement Period and the Award during the Modern Award Period,
 - (ii) were directed verbally from time to time, to:

- (1) arrive at work, ~~be available to perform work and perform work~~ 10 minutes prior to the start of their scheduled shift (**Pre-Shift Work**);
- (2) stay at work, be available to perform work and perform work after the completion of their scheduled shift (**Post-Shift Work**); and/or
- (3) work through their shifts without taking a meal break by attending to customers during this period or being available during this period (either by being the only rostered employee and directed to attend any customers throughout their shift, or being directed from time to time while on a meal break to serve customers) to attend to customers without being given additional time for a meal break, despite their shifts scheduling such a break and a period of 30 minutes of their shifts being treated as an unpaid meal break (**Meal Break Work**);
- (iii) were not paid their entitlements in the Collective Agreement Period arising from the Customer Service CA in respect of the Pre-Shift Work, Post-Shift Work and/or Meal Break Work;
- (iv) were not paid their entitlements in the Modern Award Period arising from the Award in respect of the Pre-Shift Work, Post-Shift Work and/or Meal Break Work; and
- (v) have not, as at the date of commencement of this proceeding, commenced proceedings against the Respondent in respect of the non-payment or underpayment of their full entitlements for the Pre-Shift Work, Post-Shift Work and/or Meal Break Work

(Group 1 Members).

Particulars

The First Applicant brings the claim on behalf of Group 1 Members during the Collective Agreement Period. The Second Applicant brings the claim on behalf of Group_1 Members during the Collective Agreement Period and the Modern Award Period.

9. The Second Applicant:

- (a) commenced employment with the Respondent on ~~6 November~~ or around 23 October 2013;
- (b) between ~~6 November~~ 23 October 2013 and 44 5 February 2019 was employed as a console operator at an 'On The Run' service station operated by the Respondent located at the corner of Kings Road and Lawrence Hargrave Way, Parafield, South Australia (**Parafield Store**);
- (c) performed duties consistent with working as a console operator, including attending to point of sale operations, console operating, general customer service duties, preparing food items, general restocking of products throughout the store and refrigerators, general cleaning duties and performing fuel dips at the 'On the Run' service station;
- (d) was engaged as a part-time employee pursuant to the Customer Service CA and his ordinary hours of work were agreed on the commencement of his employment to be 25-hours per week;
- (e) between 23 October 2013 and 30 April 2015 was engaged as a 'trainee' and was paid the following rates:
 - (i) between on or around the commencement of his employment and 2 July 2014, \$20.24 per hour during his Monday to Friday shifts and \$23.18 per hour on weekends and public holidays; and
 - (ii) between on or around 3 July 2014 and 30 April 2015, \$20.84 per hour during his Monday to Friday shifts and \$23.87 per hour on weekends and public holidays;
- (f) concluded his traineeship on 30 April 2015;
- (g) from 1 May 2015 until 44 5 February 2019 was paid at various rates per hour during his Monday to Friday shifts and a higher amount per hour on weekends and public holidays. In the final months of the Collective Agreement Period was paid \$22.60 per hour on weekdays.

10. Each Group 1 Member including the First and Second Applicants was:

- (a) employed by the Respondent as either a console operator, driveway attendant or roadhouse (food) attendant;
- (b) employed pursuant to
 - (i) the Customer Service CA during the Collective Agreement Period; and/or
 - (ii) the Award during the Modern Award Period;
- (c) performed duties consistent with their classifications as console operator, driveway attendant or roadhouse (food) attendant under the Customer Service CA or console operator (Vehicle Industry RS&R Employee Level 4 R4), driveway attendant (Vehicle Industry RS&R Employee Level 1 R1 or Level 4 R4) or roadhouse attendant (Vehicle Industry RS&R Employee Level 2 R2) under the Award;
- (d) directed verbally to:
 - (i) work in accordance with his or her rostered hours; and
 - (ii) perform work in addition to their rostered hours, namely the Pre-Shift Work, Post-Shift Work and Meal Break Work.

B-2 GROUP 1 | ENTITLEMENTS

11. Pursuant to the Customer Service CA, each of the First Applicant, the Second Applicant and the other Group 1 Members was entitled to be paid the rate of pay set out in Schedule 1 of the Customer Service CA as amended from time to time for all hours of work performed in each weekly pay period.

Particulars

Clause 5.1 Customer Service CA.

12. Pursuant to the Modern Award, each of the First Applicant, the Second Applicant and the other Group 1 Members was entitled to be paid at the rate of pay set out in clause 33 of the Modern Award as amended from time to time for all hours of work

performed in each weekly pay period.

Particulars

Clauses 24 and 33 of the Award.

13. Pursuant to the Customer Service CA, each of the First Applicant, the Second Applicant and the other Group 1 Members who was working a shift of more than 6 hours was entitled to an unpaid meal break of 30 minutes in each shift, or where directed verbally to work without a break a 20 minute paid crib break to be taken at an operationally convenient time which may be in more than one period.

Particulars

Clauses 4.1.4 and 4.1.5 Customer Service CA.

14. Pursuant to the Award, each of the First Applicant, the Second Applicant and the other Group 1 Members who was working a shift of more than five hours was entitled to an unpaid meal break of between 30 and 60 minutes in each shift where the Respondent elected for such employee to take such a break, or where directed verbally to work without a break a 20 minute paid crib break to be taken whilst maintaining customer service.

Particulars

Clauses 26 and 43.1 Award.

B-3 GROUP 1 | UNPAID WORK

Pre-Shift Work

15. During the entire period of his employment, the Second Applicant was rostered by the Respondent to work as a 'midnight to dawn' worker. His roster contemplated that his shifts would start at 11:00pm or 12:00am and conclude at 7:30am or 8:00am the following day, respectively.
- 15A. At all material times during the Collective Agreement Period and the Modern Award Period, the Respondent had a common or general practice of verbally directing employees being either a console operator, driveway attendant or roadhouse (food) attendant to:

- (a) work in accordance with his or her rostered hours;
 - (b) attend work 10 minutes prior to the commencement of their shift;
 - ~~(c) perform Pre-Shift work, by doing various work duties during this period,~~
- and not pay employees for such work so attending.

Particulars

- (i) In respect of the First Applicant, the First and Second Applicants repeat the particulars to paragraph 18 below.
- (ii) In respect of the Second Applicant, the First and Second Applicants repeat the particulars to paragraphs 16 and 17 below.
- (iii) Such direction was given to other Group 1 Members:
 - (1) in initial induction sessions organised by the Respondent at the offices of the Peregrine Corporation, 270 The Parade, Kensington South Australia where such directions were made by representatives of the Respondent engaged in the Respondent's Human Resources Team; and/or
 - (2) during the course of their employment by store and area managers, including the following store managers at the following locations and the following area managers:
 - (i) given to the Third Applicant by the store manager, Melissa Negus when she was working at the On The Run petrol station located at 1477 Main South Road, Darlington, South Australia (Darlington Store);
 - (ii) given to the Third Applicant and Group 1 Members engaged at the Darlington Store by the area manager, Peter Hall, and insofar as it was given to the Third Applicant, it was given from time to time, and:
 - (I) on average, approximately fortnightly; and
 - (II) as and when Mr Hall considered it appropriate;

- (iii) given to the Fourth Applicant by the store manager of the Oporto located in the City Cross Shopping Centre on 33 – 39 Rundle Mal, Adelaide, South Australia (**City Oporto**) in about July 2014;
- (iv) given to the Fourth Applicant by the various store managers of the 'Oporto' operated by the Respondent as part of a complex centred around one of its service stations at 248 Curtis Road, Munno Para West, South Australia (**Munno Para West Store**), being approximately eleven store managers, from the commencement of the Fourth Applicant's employment until the end of the Fourth Applicant's employment period;
- (v) given to the Fourth Applicant and Group 1 Members engaged at the Munno Para West Store by the store managers, Tia and Megan (surname not known to the Applicants), and insofar as it was given to the Fourth Applicant, it was given from time to time, and:
 - (I) on average, approximately once per month;
 - (II) as and when the Tia and Megan considered it appropriate; and
 - (III) at times, via SMS text message;
- (vi) given to the Fifth Applicant and Group 1 Members engaged at the On The Run at 41/49 West Terrace, Adelaide, South Australia (**West Terrace Store**) by the Store Manager, Laura D'Cruz, and insofar as it was given to the Fifth Applicant, it was given from time to time, and:
 - (I) during their first shift;
 - (II) on average, monthly; and
 - (III) when Ms D'Cruz considered it appropriate;

- (vii) given to Group 1 Members engaged at the On The Run service station located at 50 Adelaide Road, Mannum, South Australia (**Mannum Store**) by the store manager, the Third Applicant, as directed to by area managers. Those area managers were:
- (I) Shelley Fisher from about 24 October 2018 until January 2019; and
- (II) Marcus Simms from about January 2019 until the end of the Third Applicant's employment period;
- (viii) the On The Run service station at 20A Main North Road, Thorngate in South Australia (**Fitzroy Store**) by the Store Manager, Charlotte (surname not known to the Applicants), until a time in 2016;
- (ix) the On The Run service station at 195 South Road, Mile End in South Australia (**Mile End Store**) by the Manager in Training, Shane (surname not known to the Applicants), from a time in 2016 until June 2018. Shane (surname not known to the Applicants) provided such direction as Store Manager from a time in 2018 until at least June 2018;
- (x) the On The Run service station at 480/484 Brighton Road, Brighton in South Australia (**Brighton Store**) by the Store Manager, John (surname not known to the Applicants), from January 2016 until January 2017;
- (xi) the On The Run service station at 203 Main Road, Blackwood in South Australia (**Blackwood Store**) by the Area Manager, Simon Cook, from late 2018 until early 2019;
- (xii) the On The Run service station at 1 Belair Road, Kingswood in South Australia (**Kingswood Store**) by

the Area Manager, Simon Cook, from early 2019 until June 2019;

(xiii) the On The Run service station at 159 Dyson Road, Christies Beach in South Australia (**Dyson Road Store**) by the Store Manager, who was either Tina Wright or David Eastham, from the beginning of the claim period until January 2018. The Applicants do not have knowledge of directions provided at the Dyson Road Store for the period of late 2012 to early 2013;

(xiv) the On The Run service station at 1175 South Road, St Marys in South Australia (**St Marys Store**) by the Manager in Training, Brodie Hinton, and the Store Manager, Shayne Paltridge, from January 2017 until mid-2018;

(xv) the On The Run service station at Lot 92 Mail North Road, Hillbank in South Australia (**Hillbank Store**) by the Store Manager, Dylan Garwood, between February 2013 and November 2014;

(xvi) the On The Run service station at 35 Eyre Highway, Ceduna in South Australia (**Ceduna Store**) by the Store Manager, Dylan Garwood, between December 2015 and February 2017;

~~(3) — The Applicants will provide particulars of employees, sites, periods and circumstances (including the identity if known of the person giving such directions) of such conduct prior to the service of evidence.~~

(iv) Such direction was given to Group 1 Members by their Store Managers / Assistant Store Managers etc. (being Group 3 Members), after those Group 3 Members were instructed to pass such a direction on to such Group 1 Members by area managers, including the following area managers,

- (1) Laura D'Cruz, a trainee Area Manager, who was engaged to supervise the following On The Run stores from September 2016 until April 2017:
- (I) the store located at 1 Fullarton Road & North Terrace, Kent Town in South Australia (**Kent Town Store**);
 - (II) the store located at 372 Kensington Road, Erindale in South Australia (**Erindale Store**);
 - (III) the store located at 87-91 Portrush Road, Evandale in South Australia (**Evandale Store**);
 - (IV) the store located at 294 The Parade, Kensington in South Australia (**Kensington Store**);
 - (V) the store located at 172-176 Glynburn Road, Tranmere in South Australia (**Tranmere Store**);
 - (VI) the store located at 90-92 Payneham Road, Stepney in South Australia (**Stepney Store**);
 - (VII) the store located at 114 North Terrace, Adelaide in South Australia (**North Terrace Store**);
 - (VIII) the store located at 139 Angas Street and Pulteney Street, Adelaide in South Australia (**Pulteney Street Store**);
 - (IX) the store located at 76 The Parade, Norwood in South Australia (**Norwood Store**); and
 - (X) the store located at 390 Fullarton Road, Fullarton in South Australia (**Fullarton Store**);
- (2) the North Region Area Manager, Dylan Garwood, who was engaged to supervise the following On The Run stores from December 2014 until December 2015:
- (i) the store located at 22 King Street, Port Lincoln in South Australia (**Port Lincoln Store**);
 - (ii) the store located at 328 Senate Road, Port Pirie in South Australia (**Port Pirie Store**);

- (iii) the store located at 48-50 Playford Road, Whyalla in South Australia (**Whyalla Store**);
 - (iv) the store located at 131-135 Heaslip Road, Angle Vale in South Australia (**Angle Vale Store**);
 - (v) the store located at Old Port Wakefield Road, Two Wells in South Australia (**Two Wells Store**);
 - (vi) the store located at 19 Frances Terrace, Kadina in South Australia (**Kadina Store**);
 - (vii) the store located at 496 Main North Road & Potts Point Road, Evanston in South Australia (**Evanston Store**);
and
 - (viii) the store located at 186 Main North Road, Clare in South Australia (**Clare Store**);
- (3) the Central Region Area Manager, Dylan Garwood, who was engaged to supervise the following On The Run stores from February 2017 until January 2018:
- (i) the store located at 345 Military Road, Largs Bay in South Australia (**Largs Bay Military Road Store**);
 - (ii) the store located at 148 Grange Road, Flinders Park in South Australia (**Flinders Park Store**);
 - (iii) the store located at 282 Henley Beach Road and Holbrook Road, Underdale in South Australia (**Underdale Store**);
 - (iv) the drive-through store located at Woodville;
 - (v) the drive-through store located at 417-473 Tapleys Hill Road, Fulham Gardens in South Australia (**Fulham Gardens Store**);
 - (vi) the store located at 510 Henley Beach Road, Fulham in South Australia (**Fulham Store**);
 - (vii) the store located at 488-494 South Road, Kurralta Park in South Australia (**Kurralta Park Store**);

- (viii) the drive-through store located at Tapleys Hill Road and West Beach Road, West Beach in South Australia (**Harbour Town Store**);
 - (ix) the store located at 89 Military Road, West Beach in South Australia (**West Beach Store**);
 - (x) the store located at 356 Tapleys Hill Road, Seaton in South Australia (**Seaton Store**);
 - (xi) the store located at 79-81 Sir Donald Bradman Drive, Hilton in South Australia (**Hilton Store**);
 - (xii) The drive-through store located at 701 Port Road, Woodville Park in South Australia (**Woodville Park Store**); and
 - (xiii) the store located at 81 David Terrace, Woodville Park in South Australia (**David Terrace Store**).
- ~~(v) As to (c), the duties included the duties alleged in 17(c)(i) or similar duties performed in respect of part of the 'On The Run' petrol station area and the duties alleged in 17(c)(ii). Further particulars may be provided by way of evidence.~~

16. On or prior to commencing in the pattern of employment described in 15 above, and throughout his entire employment, the Second Applicant was directed verbally by representatives of the Respondent that:

- (a) he must attend work at least 10 minutes prior to his rostered start time; and
- (b) this was a 'requirement' of the Respondent.

Particulars

Such directions were provided to the Second Applicant:

- (i) in an initial induction session organised by the Respondent at the offices of the Peregrine Corporation, 270 The Parade, Kensington South Australia where such directions were made by representatives of the Respondent engaged in the Respondent's Human Resources Team; and
- (ii) throughout his employment by ~~store and area managers at the sites where he~~

worked night shift supervisors, Andrew Lewinski and BJ (full name not known to the Applicants) at the Parafield Store.

17. Throughout the entire period of his employment, the Second Applicant:
- (a) was directed verbally by representatives of the Respondent to attend work 10 minutes prior to the commencement of his shift;
 - (b) did so attend; and
 - (c) ~~was directed verbally by representatives of the Respondent to and did perform one or more of the following duties during this period:~~
 - (i) ~~conducting a 'site walk' which involved touring the 'On The Run' petrol station including the forecourt area and:~~
 - (1) ~~filling buckets; and/or~~
 - (2) ~~emptying rubbish bins around the facility; and~~
 - (ii) ~~meeting with the worker whose shift was about to conclude and receiving a 'handover' of duties from that worker; and.~~
 - (d) was not paid for ~~this work~~ so attending.

Particulars

~~Such directions was given~~ were provided to the Second Applicant regularly throughout his employment by store and area managers at the locations where he worked.:

- (i) in an initial induction session organised by the Respondent at the offices of the Peregrine Corporation, 270 The Parade, Kensington South Australia where such directions were made by representatives of the Respondent engaged in the Respondent's Human Resources Team; and
 - (ii) throughout his employment by night shift supervisors, Andrew Lewinski and BJ (full name not known to the Applicants) at the Parafield Store.
18. On or prior to commencing employment and throughout the entire period of his employment, the First Applicant:

- (a) was directed verbally by representatives of the Respondent to attend work 10 minutes prior to the commencement of his shift;
- (b) did so attend as directed; and
- (c) ~~was not paid for so attending.~~ was directed verbally by representatives of the Respondent to and did perform Pre-Shift Work, by doing the following tasks during this period:
 - (i) ~~conducting a 'site walk' which involved touring the 'On The Run' petrol station including the forecourt area;~~
 - (ii) ~~in the course of doing so:~~
 - (1) ~~filling buckets; and/or~~
 - (2) ~~emptying rubbish bins around the facility; and~~
- (d) ~~was not paid for this work.~~

Particulars

Such directions were provided to the First Applicant:

- (i) ~~in an initial induction session organised by the Respondent at the offices of the Peregrine Corporation, 270 The Parade, Kensington South Australia where such directions were made by representatives of the Respondent engaged in the Respondent's Human Resources Team; and throughout his employment by store manager, Russell Vaughan and area managers at the sites where he worked, Darryl Kelcey of the 'Happy Wash' outlet operated by the Respondent located at 139 Angas Street, Adelaide, South Australia~~
(Angas Street Site).

19. Each of the Group 1 Members:

- (a) was directed verbally by representatives of the Respondent to attend work 10 minutes prior to the commencement of their shift;
- (b) did so attend; and
- (c) ~~was directed verbally by representatives of the Respondent to and did~~

~~perform various work duties during this period; and~~

- (d) was not paid for ~~such work~~ so attending.

Particulars

As to (a) ~~and (c)~~, the Applicants repeat particular (iii) to paragraph 15A above.

Meal Break Work

20A. At all material times during the Collective Agreement Period and the Modern Award Period, in respect of employees who were:

- (a) either a console operator, driveway attendant or roadhouse (food) attendant;
- (b) rostered for and worked:
 - (i) 6 or more hours in the Collective Agreement Period; and/or
 - (ii) 5 or more hours in the Modern Award Period; and
- (c) allocated in the Respondent's rostering system an unpaid meal break of 30 minutes in each such shift,

the Respondent had a common or general practice of:

- (d) directing such employees to undertake Meal Break Work, by verbally directing them not to take such meal breaks but to attend to customers during this period and/or be available to attend customers during this period without being given additional time for a meal break; and
- (e) paying those employees as if they had taken such rostered unpaid meal breaks during their shift (with a 30-minute deduction from their pay on each shift).

Particulars

- (i) In respect of the First Applicant, the First Applicant repeats the particulars to paragraph 21 below.
- (ii) In respect of the Second Applicant, the Second Applicant repeats the particulars to paragraph 20 below.

- (iii) Such direction was given to the other Group 1 Members:
- (1) in initial induction sessions organised by the Respondent at the offices of the Peregrine Corporation, 270 The Parade, Kensington South Australia where such directions were made by representatives of the Respondent engaged in the Respondent's Human Resources Team; and/or
 - (2) during the course of their employment by store and area managers, including the following store managers at the following locations and the following area managers:
 - (i) given to the Third Applicant by the store manager, Melissa Negus at the Darlington Store;
 - (ii) given to the Fourth Applicant by Tia and various store managers at the Munno Para West Store;
 - (iii) given to the Fifth Applicant by the store manager, Laura D'Cruz at the West Terrace Store;
 - (iv) the Fitzroy Store by the Store Manager, Charlotte (surname not known to the Applicants), until a time in 2016;
 - (v) the Mile End Store by the Manager in Training, Shane (surname not known to the Applicants), from a time in 2016 until June 2018. Shane (surname not known to the Applicants) provided such direction as Store Manager from a time in 2018 until at least June 2018;
 - (vi) the Brighton by the Store Manager, John (surname not known to the Applicants), from January 2016 until January 2017;
 - (vii) the Blackwood Store by the Area Manager, Simon Cook, from late 2018 until early 2019;
 - (viii) the Kingswood Store by the Area Manager, Simon Cook, from early 2019 until June 2019;
 - (ix) the Dyson Road Store by the Store Manager, who was either Tina Wright or David Eastham, from the

beginning of the claim period until January 2018. The Applicants do not have knowledge of directions provided at the Dyson Road Store for the period of late 2012 to early 2013;

- (x) the Hillbank Store by the Store Manager, Dylan Garwood, between February 2013 and November 2014;
- (xi) the Ceduna Store by the Store Manager, Dylan Garwood, between December 2015 and February 2017;
- (xii) by Laura D'Cruz, a trainee Area Manager, who was engaged to supervise the following On The Run stores from September 2016 until April 2017:

- (I) the Kent Town Store;
- (II) the Erindale Store;
- (III) the Evandale Store;
- (IV) the Kensington Store;
- (V) the Tranmere Store;
- (VI) the Stepney Store;
- (VII) the North Terrace Store;
- (VIII) the Pultney Street Store;
- (IX) the Norwood Store; and
- (X) the Fullarton Store;

- (iv) Such direction was given to Group 1 Members by their Store Managers / Assistant Store Managers etc. (being Group 3 Members), after those Group 3 Members were instructed to pass such a direction on to such Group 1 Members by area managers, including the following area managers,

- (1) Laura D'Cruz, a trainee Area Manager, who was engaged to supervise the following On The Run stores from September 2016 until April 2017:
 - (i) the Kent Town Store;
 - (ii) the Erindale Store;
 - (iii) the Evandale Store;
 - (iv) the Kensington Store;
 - (v) the Tranmere Store;

- (vi) the Stepney Store;
- (vii) the North Terrace Store;
- (viii) the Pultney Street Store;
- (ix) the Norwood Store; and
- (x) the Fullarton Store;
- (2) the North Region Area Manager, Dylan Garwood, who was engaged to supervise the following On The Run stores from December 2014 until December 2015:
 - (i) Port Lincoln Store;
 - (ii) Port Pirie Store;
 - (iii) Whyalla Store;
 - (iv) Angle Vale Store;
 - (v) Two Wells Store;
 - (vi) Kadina Store
 - (vii) Evanston Store; and
 - (viii) Clare Store;
- (3) the Central Region Area Manager, Dylan Garwood, who was engaged to supervise the following On The Run stores from February 2017 until January 2018:
 - (i) Largs Bay Military Road Store;
 - (ii) Flinders Park Store;
 - (iii) Underdale Store;
 - (iv) Fulham Gardens Store;
 - (v) Fulham Store;
 - (vi) Kurralta Park Store;
 - (vii) Harbour Town Store;
 - (viii) West Beach Store;
 - (ix) Seaton Store;
 - (x) Hilton Store;
 - (xi) Woodville Park Store; and
 - (xii) David Terrace Store.

~~The Applicants will provide particulars of employees, sites, periods and circumstances (including the identity if known of the person giving such directions) of such conduct prior to the service of evidence.~~

20. Throughout the entire period of his employment, the Second Applicant:

- (a) was allocated in the Respondent's rostering and time recording system a 30-minute unpaid meal break.

Particulars

This recording system worked such that for a scheduled shift of 7.5 to 9 hours between 11:00pm or 12:00am and 7:30 or 8:00am the Second Applicant was paid for 7 to 8.5 hours' work. The electronic time and attendance system used by the Respondent did not allow the Second Applicant (when entering his time into this system) to elect that he had not taken the rostered break.

- (b) was directed to do Meal Break Work, in that he was during his 'midnight to dawn' shift (either in one break or as a break taken over several sittings) as he was:
 - (i) almost always working on his own at the Respondent's 'On The Run' service station;
 - (ii) directed verbally by Representatives of the Respondent to serve customers and/or be available to attend to customers throughout his entire shift, and
- (c) was paid as if he had taken a rostered unpaid meal break of 30 minutes in each shift that he worked.

Particulars

Such direction was given to the Second Applicant regularly throughout his employment by ~~store and area managers~~ night shift supervisors, Andrew Lewinski and BJ (full name not known to the Applicants) at the Parafield Store.

- 21. Throughout the entire period of his employment, the First Applicant, in respect of shifts where he worked 6 or more hours (in the Collective Agreement Period) or 5 hours or more (in the Modern Award Period):

- (a) was allocated in the Respondent's rostering system an unpaid meal break of 30 minutes in each shift;

- (b) was, on approximately one third of such shifts, directed verbally to do Meal Break Work, in that he was required by representatives of the Respondent to attend to customers during this period ~~and/or be available to attend to customers during the period~~ and was not given additional meal break time during his shift); ~~and~~
- (c) was, on the remaining two thirds of such shifts, directed to remain onsite during his meal break and be available to perform Meal Break Work, so as to be available to help out his co-workers in the event they became busy and it was necessary for his break to be so interrupted; and
- (d) was paid as if he had taken such rostered unpaid meal breaks (with a 30-minute deduction from their pay on each shift).

Particulars

Such direction was given to the First Applicant regularly throughout his employment by his store manager, Russell Vaughan at the Angas Street Site ~~and area managers.~~

22. Each of the Group 1 Members, in respect of shifts where they worked 6 or more hours (in the Collective Agreement Period) or 5 hours or more (in the Modern Award Period):

- (a) was allocated in the Respondent's rostering system an unpaid meal break of 30 minutes in each shift;
- (b) was directed verbally to undertake Meal Break Work by representatives of the Respondent, by being required to attend to customers and/or be available to attend to customers during this period without being given additional time for a meal break; and
- (c) was paid as if they had taken such rostered unpaid meal breaks during their shift (with a 30-minute deduction from their pay on each shift).

Particulars

As to (b), the Applicants repeat the particulars to paragraph 20A above.

Post-Shift Work

22A. At all material times during the Collective Agreement Period and the Modern Award Period, the Respondent had a common or general practice of directing employees being either a console operator, driveway attendant or roadhouse (food) attendant:

- (a) to work in accordance with his or her rostered hours;
- (b) to perform duties which could not be completed during their scheduled shifts, including because they were unable to leave their station unattended and were directed to serve customers;
- (c) not to leave work at the conclusion of their shifts until their duties were completed; and
- (d) to perform Post-Shift Work, including by attending to such accumulated duties at the end of their shifts,

and not paying such employees for such Post-Shift work.

Particulars

- (i) In respect of the First Applicant, such directions were given to the First Applicant regularly throughout his employment by store and area managers where he worked.
- (ii) In respect of the Second Applicant, the First and Second Applicants repeat the particulars to paragraph 23 below.
- (iii) Such direction was given to the Group 1 Members during the course of their employment by store and area managers-, including the following store managers at the following locations and the following area managers:
 - (i) given to the First Applicant by the store manager, Russell Vaughan and the area manager Darryl Kelcey at the Angas Street Site;
 - (ii) given to the Second Applicant by the store managers engaged at the Parafield Store:

- (I) Sally Watson from the commencement of the Second Applicant's employment until the latter part of 2017; and
- (II) Lisa (surname not known to the Applicants) from the latter part of 2017 until the conclusion of the Second Applicant's employment;
- (iii) given to the Second Applicant by the area manager, Tony (surname not known to the Applicants) at the Parafield Store;
- (iv) given to the Third Applicant by the store manager, Melissa Negus and the area manager, Peter Hall;
- (v) given to the Fourth Applicant by the store manager of the City Oporto in about July 2014;
- (vi) given to the Fourth Applicant by the various store managers of the Munno Para West Store, being approximately eleven store managers, from the commencement of the Fourth Applicant's employment until the end of the Fourth Applicant's employment period;
- (vii) given to the Fourth Applicant and Group 1 Members engaged at the Munno Para West Store by the store managers Tia and Megan (surname not known to the Applicants), and insofar as it was given to the Fourth Applicant, it was given from time to time, and:
 - (I) during the course of their initial store induction;
 - (II) at the commencement of their employment at the Munno Parra West store;
- (viii) given to the Fifth Applicant by the store manager Laura D'Cruz at the West Terrace Store;
- (ix) given to the Group 1 Members engaged at the Mannum

Store by the store manager, the Third Applicant, as directed to by the area manager, Marcus Simms;

- (x) the Fitzroy Store by the Store Manager, Charlotte (surname not known to the Applicants), until a time in 2016;
- (xi) the Mile End Store by the Manager in Training, Shane (surname not known to the Applicants), from a time in 2016 until June 2018. Shane (surname not known to the Applicants) provided such direction as Store Manager from a time in 2018 until at least June 2018;
- (xii) the Brighton by the Store Manager, John (surname not known to the Applicants), from January 2016 until January 2017;
- (xiii) The St Marys Store by the Manager in Training, Brodie Hinton, from January 2017 until mid-2018;
- (xiv) the Dyson Road Store by the Store Manager, who was either Tina Wright or David Eastham, from the beginning of the claim period until January 2018. The Applicants do not have knowledge of directions provided at the Dyson Road Store for the period of late 2012 to early 2013;
- (xv) the Hillbank Store by the Store Manager, Dylan Garwood, between February 2013 and November 2014;
- (xvi) the Ceduna Store by the Store Manager, Dylan Garwood, between December 2015 and February 2017;
- (xvii) the North Region Area Manager, Dylan Garwood, who was engaged to supervise the following On The Run stores from December 2014 until December 2015:
 - (I) Port Lincoln Store;
 - (II) Port Pirie Store;
 - (III) Whyalla Store;
 - (IV) Angle Vale Store;
 - (V) Two Wells Store;

- (VI) Kadina Store
- (VII) Evanston Store; and
- (VIII) Clare Store;
- (ii) Such direction was given to Group 1 Members by their Store Managers / Assistant Store Managers etc. (being Group 3 Members), after those Group 3 Members were instructed to pass such a direction on to Group 1 Members by area managers, including the following area managers.
 - (1) Laura D'Cruz, a trainee Area Manager, who was engaged to supervise the following On The Run stores from September 2016 until April 2017:
 - (i) the Kent Town Store;
 - (ii) the Erindale Store;
 - (iii) the Evandale Store;
 - (iv) the Kensington Store;
 - (v) the Tranmere Store;
 - (vi) the Stepney Store;
 - (vii) the North Terrace Store;
 - (viii) the Pultney Street Store;
 - (ix) the Norwood Store; and
 - (x) the Fullarton Store;
 - (2) the North Region Area Manager, Dylan Garwood, who was engaged to supervise the following On The Run stores from December 2014 until December 2015:
 - (i) Port Lincoln Store;
 - (ii) Port Pirie Store;
 - (iii) Whyalla Store;
 - (iv) Angle Vale Store;
 - (v) Two Wells Store;
 - (vi) Kadina Store
 - (vii) Evanston Store; and
 - (viii) Clare Store.

~~The Applicants will provide particulars of employees, sites, periods and circumstances (including the identity if known of the person giving such directions) (including the identity if known of the person giving such directions) of such conduct prior to the service of evidence.~~

23. Throughout the entire period of his employment:

- (a) the Second Applicant was directed verbally by representatives of the Respondent that he was not able to leave work upon the conclusion of his shift until:
 - (i) the staff member who relieved him commenced serving customers in his place; and
 - (ii) all his duties were attended to;

Particulars

Such direction was given to the Second Applicant regularly throughout his employment by various agents of the Respondent being store and area managers and also human resources staff and training staff in his induction referred to in the particulars to paragraph 16 and 22A above.

- (b) there were duties which the Second Applicant was unable to attend to until ~~the conclusion of his shift~~ the staff member who relieved him commenced serving customers in his place;

Particulars

At the conclusion of his shifts, another staff member who was rostered on commenced and was able to relieve the Second Applicant from being stationed at the point of sale of the 'On The Run' service station.

- (c) the Second Applicant then attended to such duties at the end of his shift, including:
 - (i) restocking the shelves and refrigerators;
 - (ii) cleaning the bathroom / store; ~~and~~
 - (iii) emptying the bins; and
 - (iv) any other tasks not completed during the shift arising from attending instead to customers,
- until these duties were attended to.

24. The additional work required of the Second Applicant as alleged in paragraph 23 above required:
- (a) ~~generally, approximately 15-20 minutes on weekday shifts~~ during the period 23 October 2013 to the latter part of 2017, at least 20 minutes and up to two hours after most of his shifts; and
 - (b) ~~generally, approximately 45 minutes and up to 50 minutes on weekend shifts~~ during the period from the latter part of 2017 to 5 February 2019, at least 20 minutes and up to two hours after every shift.
25. [Deleted]
26. As to each of the First Applicant and the other Group 1 Members:
- (a) each was directed verbally that they could not leave work until their duties were completed;
 - (b) each was directed verbally to perform duties which could not be completed during their scheduled shifts, including because they were unable to leave their station unattended and were required to serve customers;
 - (c) each performed Post-Shift Work, by:
 - (i) in the case of the First Applicant, finishing washing a car, emptying buckets of water, and/or assisting in closing up the Happy Wash outlet;
 - (ii) in the case of other Group 1 Members, attending to such accumulated duties at the end of their shifts; and
 - (d) each was not paid for performing such Post-Shift work.

Particulars

The Applicants repeat the particulars to paragraph 22A above. Further as to the First Applicant, the First Applicant on some occasions refused to perform Post-Shift work and on other occasions performed as directed.

B-4 GROUP 1 | CONTRAVENTIONS AND LOSS

27. By reason of the matters alleged in paragraphs 4 to 6 and 11 to 14 above, the Respondent was required:

- (a) during the Collective Agreement Period (by clauses 4.1.4, 4.1.5 and 5.1 of the Customer Service CA); and
- (b) during the Modern Award Period (by clauses 24, 26 and 43.1 of the Award),

to make payment to the Second Applicant and each of the Group 1 Members for time spent during:

- (c) the Pre-Shift Work, being the 10 minutes ~~work which they completed~~ spent attending work prior to the commencement of their scheduled shift;
- (d) the Meal Break Work, being the 30-minute period during shifts of 6 hours or more (in the Collective Agreement Period) or 5 hours or more (in the Modern Award Period) which was treated by the Respondent as an unpaid meal break; and
- (e) the Post-Shift Work, being the period at the conclusion of their scheduled shift when they were performing work that could not be attended to throughout their shift.

28. In breach of its obligations as alleged in paragraph 27 above, and by reason of the matters alleged in paragraphs 15 to 26 above, the Respondent failed to pay to the First Applicant, the Second Applicant and each other Group 1 Member for time spent during hours of work being:

- (a) the Pre-Shift Work, being the 10 minutes work which they completed prior to the commencement of their scheduled shift;
- (b) the Meal Break Work, being the 30-minute period during shifts of 6 hours or more (in the Collective Agreement Period) or 5 hours or more (in the Modern Award Period) which was treated by the Respondent as an unpaid meal break; and

- (c) the Post-Shift Work, being the period at the conclusion of their scheduled shift when they were performing work that could not be attended to throughout their shift.
29. By breaching the Customer Service CA as alleged in paragraph 28 above during the Collective Agreement Period, the Respondent contravened section 323 of the FW Act.

Particulars

- (i) The Customer Service CA, as a 'transitional instrument' within the meaning of the FW Transitional Act, can be enforced under the provisions of the FW Act: See Schedule 3, Items 2 and 34 of the FW Transitional Act.
 - (ii) Each Group 1 Member was underpaid in the Collective Agreement Period by an amount equal to the difference between the amount that each Group 1 Member was entitled to receive for all hours worked in the Collective Agreement Period and the amount paid to each Group 1 Member in this period.
30. By breaching the Award as alleged in paragraph 28 above during the Modern Award Period, the Respondent contravened sections 45 and 323 of the FW Act.

Particulars

- Each Group 1 Member was underpaid in the Modern Award Period by an amount equal to the difference between the amount that each Group 1 Member was entitled to receive for all hours worked in the Modern Award Period and the amount paid to each Group 1 Member in this period.
31. By reason of the breaches as alleged in paragraphs 29 and 30 above, each of the First Applicant, the Second Applicant and the other Group 1 Members is entitled to an order pursuant to section 545 of the FW Act that the Respondent is required to compensate each of them for the underpayment of entitlements owed to them.

B-5 GROUP 1 | FAILURE TO KEEP RECORDS AND FURTHER CONTRAVENTIONS

Failure to keep records

31A In relation to the Pre Shift, Meal Break and Post Shift Work performed by the First Applicant, Second Applicant and Group 1 Members as described in paragraphs 15 to 26 above, each such hour of work performed throughout the Collective Agreement Period and Modern Award Period was overtime for which a loading or penalty rate was payable.

Particulars

Clause 43.4 of the Award and clause 4.3 of the Customer Service CA.

31B By reason of the matters pleaded in paragraph 31A, the Respondent was required to keep and maintain an accurate record (for the entirety of the Collective Agreement Period and Modern Award Period) of:

- a) the number of such overtime hours worked by the First Applicant, Second Applicant and each Group 1 Member (on each day); or
- b) the times at which each of the First Applicant, Second Applicant and each Group 1 Member started and ceased working such overtime hours.

Particulars

Regulation 3.34 of the Fair Work Regulations 2009 (Cth) and section 535(1) of the FW Act.

31C Throughout the Collective Agreement Period and Modern Award Period, the Respondent failed to keep accurate records, in that the records it did keep did not record the overtime hours described in paragraph 31A (in respect of the First Applicant, the Second Applicant and each Group 1 Member).

Particulars

The Respondent kept hard copy time book records of such working hours for the period of 2014 to 2017. Thereafter the Respondent kept time and attendance records in an electronic system called 'Time 2 Work'. It did not record in either system the overtime hours arising from the performance of the Pre-Shift, Meal Break and Post Shift Work.

31D The Respondent was required to record on the payslips of the First Applicant, the Second Applicant and each Group 1 Member (for the entirety of the Collective Agreement Period and Modern Award Period) the overtime hours performed by such

Group 1 Members in the performance of the Pre Shift, Meal Break and Post Shift Work.

Particulars

Regulation 3.46 of the Fair Work Regulations (Cth) and section 536 of the FW Act.

31E Throughout the Collective Agreement Period and Modern Award Period, the Respondent failed to record on the First Applicant's, the Second Applicant's and Group 1 Members' payslips, the overtime hours performed by such Group 1 Members in the performance of the Pre Shift, Meal Break and Post Shift Work.

31F The Respondent had a common or general practice of not recording, in its time and attendance systems, overtime hours worked by Group 1 Members arising from their working Pre Shift, Meal Break and Post Shift Work as described in this section B of this statement of claim

31G The Respondent had a common or general practice of not recording on the payslips of Group 1 members, overtime hours worked by Group 1 Members arising from their working Pre Shift, Meal Break and Post Shift Work.

31H By reason of the matters in paragraphs 31A to 31C and 31F above, in respect of such failure to keep a record of these overtime hours, the Respondent contravened section 535(1) of the FW Act.

31I By reason of the matters in paragraphs 31D, 31E and 31G above, in respect of such a failure to record such overtime hours on Group 1 Members' payslips, the Respondent contravened section 536(2) of the FW Act.

False or misleading records

31J Further to the matters set out above, throughout the First Applicant's employment the Respondent kept and maintained records in relation to his employment which were false or misleading in that they did not accurately record the overtime hours performed by the First Applicant in the performance of the Pre Shift, Meal Break and Post Shift Work.

31K The Respondent, when it kept such false or misleading records, knew that the records were false or misleading.

Particulars

Such knowledge is to be attributed to the Respondent from the knowledge of its employee Russell Vaughan, Store Manager of the Respondent at the Angas Street Site, the site at which the First Applicant worked throughout the entirety of his employment period.

Mr Vaughan's conduct and knowledge is attributed to the Respondent by section 793 of the FW Act, such conduct and knowledge being:

- a) **Knowledge:** Mr Vaughan was an employee of the Respondent during this period, and had actual knowledge that the hours recorded in a time book which related to the First Applicant were inaccurate in that they did not record the Pre Shift Work, Meal Break Work and Post Shift Work.
- b) **Conduct:** Mr Vaughan verbally directed the First Applicant not to record such overtime hours in the time book when he commenced his employment at the Angas Street Site. When Mr Vaughan so directed the First Applicant, he was engaging in conduct within the scope of his apparent authority, as a manager employed by the Respondent.

31L Throughout the Second Applicant's employment the Respondent kept and maintained records in relation to his employment which were false or misleading in that they did not record the overtime hours performed by the Second Applicant in the performance of the Pre Shift, Meal Break and Post Shift Work.

31M The Respondent, when it kept such false or misleading records, knew that the records were false or misleading.

Particulars

Such knowledge is to be attributed to the Respondent from the knowledge of its employees who were employed as the Store Manager of the Respondent at the Parafield Store, the site at which the Second Applicant worked throughout the entirety of his employment period. Those Store Managers were:

- a) Sally Watson from the commencement of the Second Applicant's employment until the latter part of 2017; and
- b) Lisa (surname not known to the Applicants) from the latter part of 2017 until the conclusion of the Second Applicant's employment.

The conduct and knowledge of Ms Watson and Lisa is to be attributed to the Respondent by the operation of section 793 of the FW Act, such conduct and knowledge being:

- a) **Knowledge:** Ms Watson and Lisa were employees of the Respondent during these periods and had actual knowledge that the hours recorded in a time book and on the Time2Work electronic system which related to the Second Applicant were inaccurate in that they did not record the Pre Shift Work, Meal Break Work and Post Shift Work.
- b) **Conduct:** Ms Watson and Lisa verbally directed the Second Applicant not to record such overtime hours in the time book and Time2Work system. When Ms Watson and Lisa so directed the Second Applicant, they were engaging in conduct within the scope of their apparent authority, as managers employed by the Respondent.

31N The Respondent:

- a) had a common or general practice of keeping false or misleading records in relation to the Group 1 Members in that such records did not record overtime hours worked by Group 1 Members attending to Pre Shift, Meal Break and Post Shift Work; and
- b) knew that the records it retained were false or misleading in that they did not record such overtime hours.

Particulars

Such knowledge is to be attributed to the Respondent from the knowledge of the following store managers at the following locations and the following area managers:

- (i) Russell Vaughan, Store Manager of the Angas Street Site throughout the First Applicant's employment;
- (ii) Sally Watson, Store Manager of the Parafield Store from the commencement of the Second Applicant's employment until the latter part of 2017;
- (iii) Lisa (surname not known to the Applicants), Store Manager of the Parafield Store from the latter part of 2017 until the conclusion of the Second Applicant's employment;

- (iv) Melissa Negus, Store Manager of the Darlington Store from the commencement of the Third Applicant's employment until about 1 August 2017;
- (v) Store Manager of the City Oporto in about July 2014;
- (vi) Megan (surname not known to the Applicants), Store Manager at the Munno Para West Store;
- (vii) Laura D'Cruz, Store Manager at the West Terrace Store throughout the Fifth Applicant's employment;
- (viii) Charlotte (surname not known to the Applicants), Store Manager of the Fitzroy Store, until a time in 2016;
- (ix) Shane (surname not known to the Applicants), Manager in Training of the Mile End Store, from a time in 2018 until at least June 2018;
- (x) John (surname not known to the Applicants), Store Manager of the Brighton Store, from January 2016 until January 2017;
- (xi) Shayn Paltridge, Store Manager of the St Marys Store, and Brodie Hinton, Manager in Training of the St Marys Store, from January 2017 until mid-2018;
- (xii) Simon Cook, the Area Manager supervising the Blackwood Store, from late 2018 until early 2019;
- (xiii) Simon Cook, the Area Manager supervising the Kingswood Store, from early 2019 until June 2019;
- (xiv) either Tina Wright or David Eastham, Store Manager of the Dyson Road Store, from the beginning of the claim period until January 2018. The Applicants do not have knowledge of Store Managers' conduct for the period of late 2012 to early 2013;
- (xv) Dylan Garwood, Store Manager of the Hillbank Store, between February 2013 and November 2014;
- (xvi) Dylan Garwood, Store Manager of the Ceduna Store, between December 2015 and February 2017;
- (xvii) Laura D'Cruz, Store Manager of the West Terrace Store, between October 2014 to June 2015; and,
- (xviii) Dylan Garwood, the North Region Area Manager, who was engaged to supervise the following On The Run stores from December 2014 until December 2015:
 - (1) Port Lincoln Store;
 - (2) Port Pirie Store;

- (3) Whyalla Store;
- (4) Angle Vale Store;
- (5) Two Wells Store;
- (6) Kadina Store
- (7) Evanston Store; and
- (8) Clare Store;

The conduct and knowledge of such managers (employees) of the Respondent is attributed to the Respondent by section 793 of the FW Act, such conduct and knowledge being:

- a) **Knowledge:** such managers listed above were employees of the Respondent during these periods and had actual knowledge that the hours recorded in time books and on the Time2Work electronic system which related to Group 1 Members were inaccurate in that they did not record the Pre Shift Work, Meal Break Work and Post Shift Work, by reason of the fact that such managers
 - (i) had a common or general practice of directing Group 1 Members not to record overtime hours worked as the Pre Shift Work, Meal Break Work, and Post Shift Work in the Time2Work electronic system and knew that the Group 1 Members whom they so directed:
 - (1) complied with such a direction; and
 - (2) nevertheless, still worked overtime hours in the performance of Pre Shift Work, Meal Break Work, and Post Shift Work; or
 - (ii) reviewed entries in the Time2Work electronic system where Group 1 Members had recorded time worked in the performance of the Pre Shift Work, Meal Break Work, and Post Shift Work (being time worked in addition to their rostered hours) and where this occurred, the managers had a common or general practice of revising the records so that the system would no longer record such overtime.
- b) **Conduct:** such managers listed above were employees of the Respondent and:
 - (i) had a common or general practice of directing Group 1 Members, who worked at the named stores in the identified periods, not to record overtime hours worked in the Pre Shift Work, Meal Break Work and Post Shift Work, verbally, with words to the effect of “only record your rostered hours unless told otherwise”, or alternatively:

- (ii) were required, as a part of their duties, to ensure that records kept by the Respondent of the working hours of Group 1 Members were accurate; and
- (iii) took inadequate steps to ensure that the records kept by the Respondent of the working hours of Group 1 Members were accurate, in that inadequate steps were taken to ensure that these records recorded time spent attending to the Pre Shift Work, Meal Break Work and Post Shift Work performed by Group 1 Members. Such managers should have, but did not, direct all such Group 1 Members to the effect that they were to record all such hours of work in the Respondent's time and attendance records; and
- (iv) by doing either (i) or (ii) and (iii) above were engaging in conduct within the scope of their apparent authority, as managers employed by the Respondent.

31O By reason of the matters pleaded in paragraphs 31J to 31N above, in relation to the First Applicant, Second Applicant and Group 1 Members, the Respondent contravened section 535(4) of the FW Act by knowingly keeping such false or misleading records.

Serious Contraventions

31P Where they were engaged in after 15 September 2017, the contraventions pleaded in paragraphs 31H, 31I and 31O were serious contraventions within the meaning of section 557A of the FW Act, as the Respondent:

- a) engaged in the contraventions knowingly; and
- b) such contraventions were part of a systematic pattern of conduct relating to one or more of the Respondent's employees, being the common and general practices pleaded at paragraphs 31F, 31G and 31N above.

Particulars

Knowledge of the elements of the contraventions is to be attributed to the Respondent from the matters set out as particulars to paragraphs 31K, 31M and 31N above.

31Q The Respondent knowingly engaged in the contraventions pleaded in paragraphs 29 and 30 above, as:

- a) the Respondent knew of the elements of the contraventions, being that:
 - i. such Group 1 Members were performing Pre Shift, Meal Break and Post Shift Work; and
 - ii. such Group 1 Members were not paid for performing such work.

Particulars

Knowledge of the elements of the contraventions is to be attributed to the Respondent from the knowledge of the following store managers at the following locations and the following area managers:

- a) Russell Vaughan, Store Manager of the Respondent at the Angas Street Site throughout the First Applicant's employment;
- b) Sally Watson from the commencement of the Second Applicant's employment until the latter part of 2017;
- c) 'Lisa' (surname not known to the Applicants) from the latter part of 2017 until the conclusion of the Second Applicant's employment;
- d) Melissa Negus, Store Manager of the Darlington Store from the commencement of the Third Applicant's employment until about 1 August 2017;
- e) Store Manager of the City Oporto in about July 2014;
- f) Megan (surname not known to the Applicants), Store Manager at the Munno Para West Store;
- g) Laura D'Cruz, Store Manager of the West Terrace Store throughout the Fifth Applicant's employment;
- h) Charlotte (surname not known to the Applicants), Store Manager of the Fitzroy Store, until a time in 2016;
- i) Shane (surname not known to the Applicants), Manager in Training of the Mile End Store, from a time in 2018 until at least June 2018;
- j) John (surname not known to the Applicants), Store Manager of the Brighton Store, from January 2016 until January 2017;
- k) Shayn Paltridge, Store Manager of the St Marys Store, and Brodie Hinton, Manager in Training of the St Marys Store, from January 2017 until mid-2018;
- l) Simon Cook, the Area Manager supervising the Blackwood Store, from late 2018 until early 2019;
- m) Simon Cook, the Area Manager supervising the Kingswood Store, from early 2019 until June 2019;

- n) either Tina Wright or David Eastham, Store Manager of the Dyson Road Store, from the beginning of the claim period until January 2018. The Applicants do not have knowledge of Store Managers' conduct for the period of late 2012 to early 2013;
- o) Dylan Garwood, Store Manager of the Hillbank Store, between February 2013 and November 2014;
- p) Dylan Garwood, Store Manager of the Ceduna Store, between December 2015 and February 2017;
- q) Laura D'Cruz, Store Manager of the West Terrace Store, between October 2014 to June 2015; and
- r) Dylan Garwood, Area Manager of the North Region, who was engaged to supervise the following On The Run stores from December 2014 until December 2015:
 - a. Port Lincoln Store;
 - b. Port Pirie Store;
 - c. Whyalla Store;
 - d. Angle Vale Store;
 - e. Two Wells Store;
 - f. Kadina Store
 - g. Evanston Store; and
 - h. Clare Store.

The conduct and knowledge of such managers (employees) of the Respondent is attributed to the Respondent by section 793 of the FW Act, such conduct and knowledge being:

- a) **Knowledge:** such managers listed above were employees of the Respondent during these periods and had actual knowledge that Group 1 Members were performing the Pre Shift Work, Meal Break Work and Post Shift Work and were not being paid for such work, by reason of the fact that such managers
 - (i) had a common or general practice of directing Group 1 Members not to record overtime hours worked as the Pre Shift Work, Meal Break Work, and Post Shift Work in the Time2Work electronic system and knew that the Group 1 Members whom they so directed:
 - (1) complied with such a direction; and
 - (2) nevertheless, still worked overtime hours in the performance of Pre Shift Work, Meal Break Work, and Post Shift Work; or

(ii) reviewed entries in the Time2Work electronic system where Group 1 Members had recorded time worked in the performance of the Pre Shift Work, Meal Break Work, and Post Shift Work (being time worked in addition to their rostered hours) and where this occurred, the managers had a common or general practice of revising the records so that the system would no longer record such overtime.

- b) **Conduct:** such managers listed above were employees of the Respondent and:
- i. had a common or general practice of directing Group 1 Members, who worked at the named stores in the identified periods, not to record overtime hours worked in the Pre Shift Work, Meal Break Work and Post Shift Work, verbally, with words to the effect of “only record your rostered hours unless told otherwise”, or alternatively:
 - ii. were required, as a part of their duties, to ensure that records kept by the Respondent of the working hours of Group 1 Members were accurate; and
 - iii. took inadequate steps to ensure that the records kept by the Respondent of the working hours of Group 1 Members were accurate, in that inadequate steps were taken to ensure that these records recorded time spent attending to the Pre Shift Work, Meal Break Work and Post Shift Work performed by Group 1 Members. Such managers should have, but did not, direct all such Group 1 Members to the effect that they were to record all such hours of work in the Respondent’s time and attendance records; and
 - iv. by doing either (i) or (ii) and (iii) above were engaging in conduct within the scope of their apparent authority, as managers employed by the Respondent.

Additionally, on 3 June 2019 Deputy President Lieschke delivered judgment in the South Australian Employment Court in the matter of Mathew v Shahin Enterprises Pty Ltd [2019] SAET 111 (the **Mathew Decision**). In that matter the Court’s judgment made clear that Mr Mathew was entitled to be paid for Pre Shift, Meal Break and Post Shift work he performed.

Further, at least from the date of service of Mr Mathew’s claim, the Respondent was on notice and had knowledge that the Applicants and Group 1 Members might be entitled to be paid for the Pre Shift, Meal Break and Post Shift Work. Such knowledge is also to be attributed to the Respondent from the knowledge of the

employee(s) of the Respondent who were served with Mr Mathew's claim and those who instructed the Respondent's solicitors in the defence of Mr Mathew's claim.

Additionally, in relation to the Pre-Shift Work: the Respondent had written policies in place which mandated that this work was to be performed before Group 1 Members started their morning or afternoon shifts. Such policies were contained in at least the following documents:

- (i) Darlington Store Site Walk Form;
- (ii) Expectations at Mile End Drive Thru;
- (iii) Safe Working Practices in an Automotive Workplace;
- (iv) My guide to fuel and forecourt; and
- (v) Angle Vale Store To Do List.

Through these written policies the Respondent authorised the contraventions relating to the Pre Shift Work.

31R Where they were engaged in after 15 September 2017, the contraventions pleaded in paragraphs 29 and 30 were serious contraventions within the meaning of section 557A of the FW Act as the Respondent:

- a) engaged in the contravention knowingly, by reason of the matters in paragraph 31Q above; and
- b) such contraventions were part of a systematic pattern of conduct relating to one or more of the Respondent's employees, being the common and general practices pleaded at paragraphs 15A, 20A, 22A, 31F, 31G and 31N above.

C GROUP 2 CLAIM: AARON FURNELL UNDERPAYMENT

C-1 REPRESENTATIVE PROCEEDINGS

32. The First Applicant brings this proceeding as a representative proceeding pursuant to Part IVA of the Federal Court of Australia Act 1976 (Cth):

- (a) in his own right; and
- (b) on behalf of current and former non-salaried employees of the Respondent who, at any time during the Collective Agreement Period:

- (i) were employed in the positions of:
 - (1) console operator;
 - (2) driveway attendant; or
 - (3) roadhouse (food) attendant,
 pursuant to the Customer Service CA,
- (ii) were asked or directed verbally from time to time, to perform work in excess of their ordinary hours (**Overtime**);
- (iii) were not paid their entitlements arising from the Overtime in that they were paid for such Overtime at their base rate of pay and not at the applicable overtime penalty rate provided for in the Customer Service CA; and
- (iv) have not, as at the date of commencement of this proceeding, commenced proceedings against the Respondent in respect of the underpayments of their entitlements relating to the Overtime.

(Group 2 Members).

33. The First Applicant:

- (a) commenced employment with the Respondent on 28 May 2014;
- (b) between 28 May 2014 and ~~2 September~~ 26 August 2015 was employed as a 'trainee' driveway attendant at a 'Happy Wash' outlet operated by the Respondent located at ~~139 Angas Street, Adelaide, South Australia~~ the Angas Street Site;
- (c) performed duties consistent with working as a driveway attendant, including point of sale operations, valet attendant, manually washing cars, handling chemicals used for the washing of cars and cleaning the forecourt of the Happy Wash outlet;
- (d) was engaged as a part-time 'trainee' employee pursuant to the Customer Service CA to perform 15 ordinary hours of work per week; and

- (e) was paid the following rates:
 - (i) from ~~June 28 May~~ 2014 to ~~25 June 2015~~4: \$15.88 per hour on weekdays and \$18.16 on weekends;
 - (ii) from ~~26 June 2015~~4 to ~~September 30 June~~ 2015: \$16.353 per hour on weekdays and \$18.71 per hour on weekends; and
 - (iii) from ~~September 1 July~~ 2015: \$16.76 per hour on weekdays and \$19.18 on weekends.

34. Each Group 2 Member was:

- (a) employed by the Respondent during the Collective Agreement Period as either a non-salaried console operator, driveway attendant or roadhouse (food) attendant;
- (b) employed pursuant to the Customer Service CA;
- (c) performed duties consistent with their classifications as console operator, driveway attending or roadhouse (food) attendant under the Customer Service CA;
- (d) asked or directed verbally to:
 - (i) work their ordinary hours; and
 - (ii) perform additional work outside of their ordinary hours, for which they were paid but at their base rate of pay not at an overtime rate.

C-2 GROUP 2 | ENTITLEMENTS

35. Pursuant to the Customer Service CA, the ordinary hours of the First Applicant and each of the Group 2 Members were not permitted to exceed an average of 38 hours per week or, where the employee was engaged on a part-time basis an amount equal to that employee's agreed part time hours up to a maximum of 38 hours per week.

Particulars

Clause 4.1.1 of the Customer Service CA.

36. Pursuant to the Customer Service CA, as the First Applicant was engaged as a part-time employee to perform 15 hours per week as alleged in paragraph 33(d) above, all time worked by the First Applicant in excess of 60 hours in any four week period was to be paid to him as overtime at the loading of time and one half (150%) of his base rate for each hour worked in excess of 60 hours in the four week period.

Particulars

Clause 4.2 of the Customer Service CA.

37. Pursuant to the Customer Service CA, in respect of the entitlement to overtime loading set out in paragraphs 35 and 36 above, such loading was not required only where the employee elected to work 'voluntary overtime' being:

- (a) overtime arising from an employee's genuine request to work 'voluntary overtime' at their ordinary (base) rate of pay;
- (b) such requests must be made in writing in a prescribed form which identifies:
 - (i) the location where such 'voluntary overtime' shall be performed;
 - (ii) the date and time upon which such 'voluntary overtime' shall be performed; and
 - (iii) the duration (number of hours in a week) for which such 'voluntary overtime' shall be performed.

Particulars

Clause 4.2.1 and Schedule 2 Customer Service CA.

C-3 GROUP 2 | UNPAID WORK

38. The First Applicant worked for the Respondent in sixteen sequential 4-week periods (between the week ending 4 June 2014 and the week ending 19 August 2015) followed by one ~~2~~one-week period (the weeks ending 26 August 2015 ~~and 2 September 2015~~).

Particulars

First Applicant's Employee Previous Earnings Report for pay end periods between 1 June 2014 and 15 June 2016.

39. The First Applicant performed work for the Respondent in each of the 4-week periods and the final 2one-week period alleged in paragraph 38 above for more than 60 hours in each 4-week period and for more than 3015 hours in the 2one-week period, being a total of 746 hours being hours performed in excess of 60 hours in each of these four-week periods and 3015 hours in the final 2one-week period.

Particulars

First Applicant's Employee Previous Earnings Report for pay end periods between 1 June 2014 and 15 June 2016.

- 39A. At all material times during the Collective Agreement Period, in respect of employees who:
- (a) were either a console operator, driveway attendant or roadhouse (food) attendant;
 - (b) were engaged either:
 - (i) on a part-time basis, and who worked hours in excess of the 4-weekly average of their agreed part-time hours and/or worked in excess of 152 hours in certain 4-week periods; and/or
 - (ii) on a full-time basis (not being salaried staff), and who worked in excess of 152 hours in 4-week periods of their employment,(in each case, the excess hours being **Overtime Hours** for this section C of the pleadings);
 - (c) did not perform such Overtime Hours pursuant to a genuine request to work 'voluntary overtime' at their ordinary (base) rate of pay; and or
 - (d) did not complete the 'voluntary overtime' form prescribed by the Customer Service CA in relation to such Overtime Hours, including by completing the date and time upon which such work shall be performed, the location where it shall be performed and the duration of such Overtime Hours,

the Respondent had a common or general practice of only paying such staff at their 'base rates' of pay in respect of such Overtime Hours.

Particulars

The payroll system for the Respondent was administered centrally, against rosters and attendance records maintained by managers and staff at store locations. The extent of the practice is known to the Respondent by its own records. As to the First Applicant, the First Applicant repeats paragraphs 40 to 41 below.

40. The First Applicant was paid at his base rate of pay (as alleged in paragraph 33(e) above) for all hours worked, including all 746 hours worked in excess of the 60 hour average and ~~30~~15 hour average identified in paragraph 39 above.
41. In relation to all of the 746 hours worked by the First Applicant in excess of the 60 hour average and ~~30~~15 hour average, the First Applicant did not:
 - (a) perform such work pursuant to a genuine request he made to work 'voluntary overtime' at his ordinary (base) rate of pay;
 - (b) complete the 'voluntary overtime' form prescribed by the Customer Service CA containing the location where such overtime shall be performed, the date and time upon which it shall be performed and the duration of such overtime.
42. Each of the Group 2 Members worked Overtime Hours, namely each:
 - (a) was engaged on a part-time basis, and worked hours in excess of the 4-weekly average of their agreed part-time hours and/or worked in excess of 152 hours in certain 4-week periods; and/or
 - (b) was engaged on a full-time basis (not being salaried staff), and worked in excess of 152 hours in 4-week periods of their employment;and
 - (c) did not perform such work pursuant to a genuine request to work 'voluntary overtime' at their ordinary (base) rate of pay;
 - (d) did not complete the 'voluntary overtime' form prescribed by the Customer Service CA in relation to such Overtime Hours, including by completing the

date and time upon which such work shall be performed, the location where it shall be performed and the duration of such Overtime Hours; and

(e) were paid at their 'base rates' of pay in respect of such Overtime Hours.

C-4 GROUP 2 | CONTRAVENTIONS AND LOSS

43. By reason of the matters alleged in paragraphs 4 to 6 and 35 to 37 above, the Respondent was required by the Customer Service CA to make payment to the First Applicant and each Group 2 Member of an overtime loading equal to 50% of the base rate of pay for each hour of overtime performed by the First Applicant / Group 2 Member.
44. In breach of the obligations of the Respondent as alleged in paragraph 43 above, by reason of the matters alleged in paragraphs 38 to 41 above, the Respondent underpaid the First Applicant in respect of the Overtime Hours in an amount which equals 50% of his relevant base rate of pay for all hours worked in excess of 60 hours in each of the 16 four-week periods and in excess of ~~30~~15 hours in the final ~~two~~one-week period identified in paragraphs 38 to 41 above.

Particulars

That is, 50% of the First Applicant's base rate of pay for 746 hours, being the total hours which the Respondent's records indicate the First Applicant worked in excess of 60 hours in each of these 16 four-week periods and in excess of ~~30~~15 hours in the final ~~two~~one-week period.

45. In breach of the obligations of the Respondent as alleged in paragraph 43 above, by reason of the matters alleged in paragraph 42 above, the Respondent underpaid each of the Group 2 Members in respect of Overtime Hours in an amount which equals 50% of their relevant base rate of pay for all hours worked as Overtime Hours.
46. By breaching the Customer Service CA as alleged in paragraphs 44 and 45 above, the Respondent breached clause 4.2 of the Customer Service CA.
47. By contravening the Customer Service CA as alleged in paragraph 46 above, the Respondent contravened section 323 of the FW Act.
48. By reason of the contraventions as alleged in paragraph 47 above, each of the First Applicant and the Group 2 Members is entitled to an order pursuant to section 545 of

the FW Act that the Respondent is required to compensate him or her for the underpayment of entitlements owed to each of them.

C-5 GROUP 2 | FAILURE TO KEEP RECORDS AND FURTHER CONTRAVENTIONS

Failure to keep records

48A In relation to the Overtime Hours referred to in Section C of this statement of claim performed by the First Applicant and Group 2 Members as described in paragraphs 38 to 42 above, each such hour of work performed throughout the Collective Agreement Period was overtime for which a penalty rate or loading (however described) was payable.

Particulars

Clause 4.3 of the Customer Service CA.

48B By reason of the matters pleaded in paragraph 48A, the Respondent was required to keep and maintain an accurate record (for the entirety of the Collective Agreement Period) of:

- a) the number of such Overtime Hours worked by the First Applicant and each Group 2 Member (on each day); or
- b) the times at which each of the First Applicant and each Group 2 Member started and ceased working such Overtime Hours.

Particulars

Regulation 3.34 of the Fair Work Regulations 2009 (Cth) and section 535(1) of the FW Act.

48C Throughout the Collective Agreement Period, the Respondent kept records of the fact that the Overtime Hours were worked by the First Applicant and Group 2 Members, but failed to record that they were worked as overtime, instead recording these hours as ordinary hours of work, giving rise to a penalty rate or loading (however described).

Particulars

The Respondent kept hard copy records of such working hours for the period 2014 to 2017. Thereafter the Respondent kept time and attendance records in an electronic system called 'Time 2 Work'.

48D The Respondent had a common or general practice of not recording, in its time and attendance systems, hours worked by Group 2 Members being Overtime Hours as hours worked as overtime that would attract a penalty rate or loading (however described).

48E By reason of the matters in paragraphs 48A to 48D above, in respect of such failure to keep a record of these Overtime Hours as overtime, the Respondent contravened section 535(1) of the FW Act.

48F The Respondent was required to record on the payslips of the First Applicant and each Group 2 Member (for the entirety of the Collective Agreement Period) the fact that the Overtime Hours attracted a penalty rate or loading (however described), by reason of the matters pleaded in paragraph 48A.

Particulars

By Regulation 3.46 of the Fair Work Regulations 2009 (Cth) and section 536(2) of the FW Act.

48G The Respondent failed to record on the payslips of the First Applicant and the Group 2 Members the fact that a penalty rate or loading (however described) was payable in connection with the Overtime Hours and the fact that the Overtime Hours were worked as overtime.

48H The Respondent had a common or general practice of not recording, on the First Applicant's and Group 2 Members' payslips, the penalty rate or loading (however described) applicable to the Overtime Hours worked by Group 2 Members.

48I By reason of the matters in paragraphs 48A and 48F to 48H above, in respect of such failure to record on the First Applicant's and Group 2 Members' payslips the applicable penalty rate or loading (however described), the Respondent contravened section 536(2) of the FW Act.

D GROUP 3 CLAIM: SHANNAN MAHONEY UNDERPAYMENT

D-1 REPRESENTATIVE PROCEEDINGS

49. The Third Applicant brings this proceeding as a representative proceeding pursuant to Part IVA of the Federal Court of Australia Act 1976 (Cth):

- (a) in her own right; and
- (b) on behalf of current and former employees of the Respondent who, at any time during the Collective Agreement Period and Modern Award Period:
 - (i) were employed in salaried managerial positions of:
 - (1) store manager;
 - (2) assistant store manager;
 - (3) store manager in training;
 - (4) food manager;
 - (5) assistant food manager; or
 - (6) food manager in training,

pursuant to the Full Time CA in the Collective Agreement Period and the Award during the Modern Award Period,
 - (ii) were directed verbally from time to time, to perform work in excess of 38 hours per week (**Overtime**);
 - (iii) were not paid their entitlements arising from the Overtime arising from the Full Time CA in the Collective Agreement Period and Award during the Modern Award Period; and
 - (iv) have not, as at the date of commencement of this proceeding, commenced proceedings against the Respondent in respect of the underpayments of their entitlements relating to the Overtime-

(Group 3 Members).

50. The Third Applicant:

- (a) commenced employment with the Respondent on 1 February 2017;
- (b) between 1 February 2017 and 17 August 2017 was engaged pursuant to the Customer Service CA as a part-time 'trainee' console operator and completed her traineeship on 17 August 2017;
- (c) around ~~17~~2 August 2017 was promoted to the full-time position of 'manager in training' and was, during this period;
 - (i) employed as a full-time 'manager in training' pursuant to the Full Time CA; and
 - (ii) paid an annualised salary ~~during this period~~ of \$42,036.20 until around 12 October 2017 when this annualised salary was increased to \$42,878.00;
- (d) between ~~30 June~~ 1 July 2018 and ~~22~~3 October 2018 was employed as a full-time 'manager in training' pursuant to the Award and was paid an annualised salary of \$44,974.80 during this period;
- (e) between ~~22~~4 October 2018 and ~~5 November 2018~~ 12 February 2019 was promoted to the full-time position of 'acting store manager', was employed in this position pursuant to the Award and was paid an annualised salary of \$45,975 during this period;
- (f) between ~~5 November 2018~~ 13 February 2019 and the termination of her employment on or around 27 August 2019 was promoted to the full-time position of 'store manager', was employed in this position pursuant to the Award and was paid an annualised salary of \$45,975 from ~~5 November 2018~~ 13 February 2019 until ~~March 2019~~ 27 February 2019 and \$48,273 ~~from 28 February 2019~~ until the termination of her employment on or around 27 August 2019;
- (g) performed these positions at 'On The Run' service stations operated by the Respondent located at:
 - (i) ~~1477 Main South Road, Darlington, South Australia~~ the Darlington Store;

- (ii) 80 Oaklands Road, Glengowrie, South Australia (**Glengowrie Store**);
and
- (iii) ~~50 Adelaide Road, Mannum, South Australia~~ **the Mannum Store**,
- (h) when employed as a 'manager in training', 'acting store manager' and 'store manager' per sub-paragraphs (c) to (f) above was paid her annualised salary by way of weekly payments of equal amounts which totalled over twelve months to the annualised salary;
- (i) other than by receiving payment of these annualised salary amounts, did not receive any other payments from the Respondent in satisfaction of her entitlements arising from her work with the Respondent;
- (j) throughout her employment performed duties which included:
 - (i) predominantly the duties associated with working as a console operator (being those duties set out at paragraph 9(c) above in relation to the Second Applicant);
 - (ii) general service station duties, including barista duties, limited food service and cleaning duties; and
 - (iii) after being engaged in 'managerial' roles spent a small proportion of her time attending to rostering and managing staff who would work at the service station where she was stationed, receiving and overseeing deliveries at the service station, processing staff time and attendance logs through the Respondent's 'Time2Work' system and handling customer complaints'.

51. When employed pursuant to the Award in the Modern Award Period the Third Applicant was working under the 'Vehicle Industry RS&R employee level 4 R4' classification in the Award and was classified as such by the Respondent.

52. Each Group 3 Member was at all material times:

- (a) employed by the Respondent in a full-time salaried position in one of the positions set out at sub-paragraph 49(b)(i) above;

- (b) paid an annualised salary purportedly in satisfaction of all entitlements arising from the Full Time CA and Award;
- (c) covered by and employed pursuant to the Full Time CA during the Collective Agreement Period;
- (d) covered by and employed pursuant to the Award during the Modern Award Period;
- (e) directed verbally to work:
 - (i) his or her ordinary hours; and
 - (ii) perform work outside of these rostered hours,
- (f) performed duties which were substantially the same as those performed by the Third Applicant and described in sub-paragraph 50(j) above; and
- (g) during the Modern Award Period were working under the Vehicle Industry RS&R employee Level 4 R4 classification contained in the Award.

D-2 GROUP 3 | ENTITLEMENT

- 53. Pursuant to the Full Time CA, the ordinary hours of the Third Applicant and each of the Group 3 Members could not exceed 38 hours per week.
- 54. Pursuant to the Full Time CA, if the Third Applicant or any of the Group 3 Members worked in excess of 38 hours per week in any given week, such work was to be treated as 'overtime' work and was to be paid at the rate of time and one-half (150%) of the applicable base rate of pay.

Particulars

Clause 4.2 Full Time CA.

- 55. Pursuant to the Full Time CA, the sole exception to the entitlement to overtime loading set out in paragraph 54 above was that such an overtime loading could be avoided where the employee elected to work 'voluntary overtime' being:
 - (a) overtime worked arising from an employee's genuine request to work 'voluntary overtime' at their base rate of pay;

- (b) such requests must be made in writing in the prescribed form which identified:
 - (i) the location where such 'voluntary overtime' shall be performed;
 - (ii) the date and time upon which such 'voluntary overtime' shall be performed; and
 - (iii) the duration (number of hours in a week) for which such 'voluntary overtime' shall be performed.

Particulars

Clause 4.2.1 and Schedule 2 Full Time CA.

- 56. Pursuant to the Award, the ordinary hours of the Third Applicant and each of the Group 3 Members during the Modern Award Period could not exceed 38 hours per week.

Particulars

Clause 37.2 of the Award.

- 57. Pursuant to the Award, if the Third Applicant or any of the Group 3 Members worked in excess of 38 hours per week in any given week, such work was to be treated as 'overtime' work by the Award and was to be paid at the following rates:
 - (a) where such overtime work was performed on a weekday or Saturday at the rate of time and one-half (150%) for the first three hours and double time thereafter (200%); and
 - (b) where such overtime work was performed on a Sunday or public holidays at the rate of double time (200%).

Particulars

Clauses 43.1 and 43.4 of the Award.

- 58. Pursuant to the Award, any time worked by the Third Applicant and any of the Group 3 Members as 'ordinary time' being up to 38 hours per week on Saturdays, Sundays and public holidays attracted the following penalty rates:

- (a) where such work was performed after noon on a Saturday, time and one-half (150%);
- (b) where such time was performed on a Sunday, time and one-half (150%); and
- (c) where such time was worked on a public holiday, double time (200%).

Particulars

Clause 43.3 of the Award.

D-3 GROUP 3 CLAIM | UNPAID WORK

59. ~~Throughout her employment by the Respondent~~ Whilst employed by the Respondent pursuant to an annualised salary, the Third Applicant:

- (a) was rostered on to work a pattern of five shifts per week scheduled on Tuesday, Wednesday, Thursday, Friday and Saturday for a total of 42 to 42.5 hours, 2 to 2.5 hours of which were unpaid meal breaks;

Particulars

The Respondent's rosters recorded the scheduled start and finish times for the Third Applicant during her period of employment, whilst engaged on an annualised salary. These rosters generally provided for the Third Applicant to work approximately the following shift start and end times:

- (i) 6:00am until 3:00pm;
- (ii) 7:00am until 4:00pm;
- (iii) 2:00pm until 11:00pm;
- (iv) 3:00pm until 11:00pm
- (v) 6:00am until 10:00am; and
- (vi) 7:00am until 11:00am;

~~start her shifts between 6:00am and 7:00am each day; finish her shifts between 3:00pm and 4:30pm each day; and take an unpaid meal break of 30 minutes throughout each of her~~ the shifts she was rostered to work for a duration of 6 or more hours (in the Collective Agreement Period) or 5 hours or more (in the Modern Award Period). These rosters operated such that the total duration of the Third Applicant's rostered shifts would be 42 to 42.5

hours, 2 to 2.5 hours of which were to be unpaid meal breaks. That is, the rosters contemplated that the Third ~~Respondent~~ Applicant would work 40 hours per week.

- (b) commenced work at approximately 10 minutes prior to her rostered start time;
- (c) ~~however,~~ finished work, on average, approximately one to two hours after her rostered finish time;
- (d) was not given the opportunity to take an uninterrupted break throughout her rostered shifts such that she worked for the entirety of her rostered shifts (and for one to two hours at the conclusion of each rostered shift); and-
- (e) accordingly, worked ~~52.5 hours~~ between approximately 49 hours and 50 minutes to 53 hours and 35 minutes each week when attending to work for rostered shifts, being ~~14.5 hours~~ 11 hours and 50 minutes to 15 hours and 35 minutes of overtime (i.e. in excess of ordinary hours under the Full Time CA and/or the Award).

60. The Third Applicant was required to perform such overtime as:

- (a) she was directed verbally by the Respondent that she was unable to finish her shifts until all of her duties were complete and this overtime was necessary to attend to all of the duties which had been assigned to her, being:
 - (i) operating consoles;
 - (ii) serving customers;
 - (iii) assisting with putting away deliveries;
 - (iv) attending to staff who had approached her with questions, complaints, or other issues; ~~and~~
 - (v) attending or conducting staff meetings; and
 - (vi) attending to managerial duties (including rostering staff, attending to paperwork mandated by the Respondent, training staff and preparing job lists and tasks for staff);

- (b) she was directed verbally by the Respondent to work additional hours when other staff members at the service stations she was working at called in sick or where there were incidents at these service stations requiring her attention after the completion of her rostered hours;
- (c) she was so directed by the Respondent to work such additional hours because her supervisor (the Area Manager of the Respondent to whom she reported) directed her to perform such work in order to avoid incurring costs in paying non-salaried staff to fill staffing gaps in rosters.

Particulars

Such directions were given ~~on average on about a weekly basis~~ to the Third Applicant by the following representatives of the Respondent at the following locations she was engaged at:

- (i) Melissa Negus, Store Manager of the Darlington Store;
- (ii) Peter Hall, Area Manager who supervised the Darlington Store;
- (iii) Steve Stamatopoulos, Regional Manager who supervised the Darlington Store;
- (iv) Mika O'Brien, Store Manager of the Glengowrie Store;
- (v) Biorn (surname not known to the Applicants), Area Manager who supervised the Glengowrie Store from about December or January 2017 until June or July 2017;
- (vi) Sally (surname not known to the Applicants), Area Manager who supervised the Glengowrie Store from about July 2017 until September 2017;
- (vii) Shelley Fisher, Area Manager who supervised the Mannum Store from about 24 October 2018 until January 2019; and
- (viii) Marcus Simms, Area Manager who supervised the Mannum Store from about January 2019 until the end of the Third Applicant's employment period.

61. Further, in addition to the rostered shifts and overtime alleged in paragraph 59 above, through the course of her employment whilst engaged on an annualised salary, the Third Applicant:

- (a) was regularly directed by the Respondent to work additional shifts on her rostered days off, being Mondays and Sundays; and
- (b) did work such shifts, as directed for approximately ~~40.5~~ between three to eight hours in duration, with no break, all such hours being overtime work.

Particulars

The Third Applicant picked up such additional shifts, on average, ~~twice~~ once per month for a duration of between three to eight hours each shift (such shifts being worked ~~approximately once per month~~ on a Sunday and ~~once~~ on a Monday).

61A. During the Collective Agreement Period and the Modern Award Period, in respect of employees who:

- (a) were employed by the Respondent in a full-time salaried position in one of the positions set out at sub-paragraph 49(b)(i) above;
- (b) were paid an annualised salary purportedly in satisfaction of all entitlements arising from the Full Time CA and Award;
- (c) performed duties which were substantially the same as some or all of those performed by the Third Applicant and described in sub-paragraph 50(j) above; and
- (d) either:
 - (i) were covered by and employed pursuant to the Full Time CA during the Collective Agreement Period; or
 - (ii) were covered by and employed pursuant to the Award during the Modern Award Period,

it was the common or general practice of the Respondent of:

- (e) directing such workers to work his or her ordinary hours; and
- (f) directing verbally such workers to perform work outside of those ordinary hours, including:

- (i) additional time performed prior to the commencement of their rostered shifts (being work akin to Pre-Shift Work described in paragraph 8 above);
- (ii) additional hours performed at the end of their rostered shifts;
- (iii) time worked through their scheduled breaks (their not having an opportunity to take such breaks); and
- (iv) additional shifts which they worked as and when required by the Respondent,

(together, **Overtime Hours** for this section D of the pleadings); and

- (g) not paying any additional remuneration for performing any of these categories of such Overtime Hours.

Particulars

- (i) As to the Third Applicant, the Third Applicant repeats paragraphs 679 to ~~68~~70 below.
- (ii) Such direction was given to the other Group 3 Members during the course of their employment by store and area managers, including the following store managers at the following locations and the following area managers:

~~The Applicants will provide particulars of employees, sites, periods and circumstances (including the identity if known of the person giving such directions) of such conduct prior to the service of evidence.~~

- (1) given to Brodie Hinton, a Manager in Training at the St Marys Store, by Shayn Paltridge, the St Marys Store Manager, between January 2017 to mid-2018;
- (2) given to Brodie Hinton, a Manager in Training at the Belair Store, by Simon Cook, the Area Manager with supervision of the Belair Store, from mid-2018 until late 2018;
- (3) given to Dylan Garwood, the Hillbank Store Manager, Area Managers. Those Area Managers were:

- (i) Tony Reily, the Area Manager with supervision of the Hillbank Store, between May 2014 and July 2014;
 - (ii) Stephen Fitzsimmons, the Area Manager with supervision of the Hillbank Store, between September 2014 and November 2014;
- (4) given to Dylan Garwood, the Ceduna Store Manager, by Tony Riely, the Area Manager responsible for the Ceduna Store;
- (5) given to Laura D'Cruz, the West Terrace Store Manager, by:
 - (i) Brad Carmichael, the Area Manager with supervision of the West Terrace Store, between October 2014 and November 2014; and
 - (ii) Deepak Damodaran, the Area Manager with supervision of the West Terrace Store, between November 2014 and June 2015;
- (6) given to various Group 3 Members by Dylan Garwood, the Hillbank Store Manager, who trained Managers in training from time to time in the period of May 2014 and November 2014;
- (7) given to Group 3 Members by Dylan Garwood, the North Region Area Manager, engaged to work at the following stores, from December 2014 until December 2015:
 - (i) Port Lincoln Store;
 - (ii) Port Pirie Store;
 - (iii) Whyalla Store;
 - (iv) Angle Vale Store;
 - (v) Two Wells Store;
 - (vi) Kadina Store
 - (vii) Evanston Store; and
 - (viii) Clare Store;
- (8) given to Group 3 Members by Dylan Garwood, the Central Region Area Manager, engaged to work at the following stores from February 2017 until January 2018:

- (i) Largs Bay Military Road Store;
- (ii) Flinders Park Store;
- (iii) Underdale Store;
- (iv) Fulham Gardens Store;
- (v) Fulham Store;
- (vi) Kurralta Park Store;
- (vii) Harbour Town Store;
- (viii) West Beach Store;
- (ix) Seaton Store;
- (x) Hilton Store;
- (xi) Woodville Park Store; and
- (xii) David Terrace Store;

- (9) given to Group 3 Members by Laura D'Cruz, a trainee Area Manager, engaged to work at the following stores from September 2016 to April 2017:

- (i) the Kent Town Store;
- (ii) the Erindale Store;
- (iii) the Evandale Store;
- (iv) the Kensington Store;
- (v) the Tranmere Store;
- (vi) the Stepney Store;
- (vii) the North Terrace Store;
- (viii) the Pultney Street Store;
- (ix) the Norwood Store; and
- (x) the Fullarton Store.

62. [Not used]

63. [Not used]

64. Despite performing the Overtime Hours of work as alleged in paragraphs 59 and 61 above, the Third Applicant only received weekly payment of her annualised salary being the salary amounts set out at paragraphs 50(c) to 50(f) above.

65. Each Group 3 Member throughout their employment in salaried positions:

- (a) similarly performed Overtime Hours being:

- (i) additional Pre-Shift Work prior to the commencement of their shifts;
 - (ii) additional hours performed at the end of their rostered shifts;
 - (iii) time worked through their scheduled breaks (their not having an opportunity to take such breaks); and
 - (iv) additional shifts which they worked as and when required by the Respondent,
- (b) but did not receive any additional remuneration for performing such Overtime Hours, only receiving the weekly payments of their annualised salaries.

D-4 GROUP 3 CLAIM | CONTRAVENTION AND LOSS

66. By reason of the matters alleged in paragraphs 4 to 6 and 53 to 55 above, during the Collective Agreement Period, by virtue of the Third Applicant's pattern of work outlined in paragraphs 59 and 61 above, the Third Applicant was entitled by the Full Time CA during each week of her employment to:

- (a) payment of the applicable base rate of pay for 38 hours per week; and
- (b) payment at the overtime hourly rate of pay for 14.5 hours between approximately 11 hours and 50 minutes to 15 hours and 35 minutes per week on the weeks when the Third Applicant did not perform an additional shift and 25 hours between 14 hours and 50 minutes to 23 hours and 35 minutes per week on the weeks when she did₂.

67. By reason of the matters alleged in paragraphs 4 to 6 and 56 to 58 above, during the Modern Award period, based on the Third Applicant's pattern of work outlined in paragraphs 59 and 61 above, the Third Applicant was entitled by the Award during each week of her employment to receive and the Respondent was obliged to:

- (a) payment of the applicable base rate of pay for 38 hours per week, being \$20.91 per hour in July 2018 for hours worked other than on Saturday after noon, Sunday and public holidays which were to be paid at a penalty rate of either \$31.365 or \$41.82 per hour in July 2018; and
- (b) payment at the overtime hourly rate of pay for 14.5 hours between approximately 11 hours and 50 minutes to 15 hours and 35 minutes per

week on the weeks when she did not perform an additional shift and ~~25 hours~~
between 14 hours and 50 minutes to 23 hours and 35 minutes per week on
the weeks when she did (at the rate of either \$31.365 or \$41.82 per hour in
July 2018 depending upon whether such overtime was performed on a
weekday / Saturday or Sunday),

being, as at July 2018, at least \$1,249.37 per week as a consequence of the
overtime hours that she was working and the time that she spent working on
weekends and public holidays.

68. By reason of the matters alleged in paragraphs 4 to 6 and 53 to 58 above, each of
the Group 3 Members was entitled:

(a) during the Collective Agreement Period; and

(b) during the Modern Award Period,

to:

(c) payment at the applicable base rate of pay for 38 hours per week; and

(d) payment at the overtime rate of pay for Overtime Hours performed, being:

(i) additional Pre-Shift Work performed prior to the commencement of
their rostered shifts;

(ii) additional hours performed at the end of their rostered shifts;

(iii) time worked through their scheduled breaks; and

(iv) additional shifts which were worked as and when required by the
Respondent, and

(e) in respect of the Modern Award Period only, payment at applicable penalty
rates where work was performed on Saturdays after noon, Sundays and
public holidays.

69. In breach of the obligations of the Respondent as alleged in paragraphs ~~64~~ 66 above,
during the Collective Agreement Period, the Respondent failed to pay the Third
~~Respondent~~ Applicant for Overtime Hours at the overtime hourly rate required by the
Full Time CA.

70. In breach of the obligations of the Respondent as alleged in paragraph ~~65~~ 67 above, during the Modern Award Period the Respondent:
- (a) paid the Third Applicant an annualised salary as alleged in subparagraphs 50(e) and 50(f) above;
 - (b) failed to pay the Third Applicant for overtime hours at the overtime hourly rate required by the Award; and
 - (c) failed to pay the Third Applicant penalty rates as required by the Award,
- and thereby failed to pay the Third Applicant in accordance with her entitlements under the Award.
71. In breach of the obligations of the Respondent as alleged in paragraphs ~~66~~ 68 above, during the Collective Agreement Period, the Respondent failed to pay the Group 3 Members for Overtime Hours at the overtime hourly rate required by the Full Time CA.
72. In breach of the obligations of the Respondent as alleged in paragraph ~~66~~ 68 above, during the Modern Award Period the Respondent:
- (a) paid each of the Group 3 Members annualised salaries payable and paid each week; and
 - (b) thereby failed to pay each Group 3 Member in accordance with their entitlements under the Award.
73. By reason of the matters alleged in paragraphs ~~66~~ 68 to ~~70~~ 72 above, by failing to pay amounts to which the Third Applicant and each Group 3 Member was entitled:
- (a) during the Collective Agreement Period, the Respondent breached the Full Time CA; and
 - (b) during the Modern Award Period, the Respondent breached the Award.
74. By reason of the matters pleaded in paragraph ~~74~~ 73 above, by:
- (a) breaching the Full Time CA and Award in failing to pay the amounts in respect of the work performed by the Third Applicant and each Group 3 Member, the Respondent contravened section 323 of the FW Act;

Particulars

Each Group 3 Member was underpaid by the amounts by which their annualised salaries were insufficient to satisfy all monetary entitlements arising from the Full Time CA / Award, including their entitlements to be paid for overtime and penalty rates.

- (b) by so breaching the Award the Respondent contravened section 45 of the FW Act.

75. By reason of the contraventions alleged in paragraph 72~~4~~ above, each of the Third Applicant and each Group 3 Member is entitled to an order pursuant to section 545 of the FW Act that the Respondent is required to compensate each of them for the underpayment of entitlements owed by reason of the matters pleaded in this section D of this claim.

D-5 FAILURE TO KEEP RECORDS AND FURTHER CONTRAVENTIONS

Failure to keep records

- 75A In relation to the Overtime Hours referred to in this Section D of this statement of claim performed by the Third Applicant and Group 3 Members as described in paragraphs 59 to 65 above, each such hour of work performed throughout the Collective Agreement Period and Modern Award Period was overtime for which a loading or penalty rate was payable.

Particulars

Clause 4.3 of the Customer Service CA and clause 43.4 of the Award.

- 75B By reason of the matters pleaded in paragraph 75A, the Respondent was required to keep and maintain an accurate record (for the entirety of the Collective Agreement Period and Modern Award Period) of:

- a) the number of such Overtime Hours worked by the Third Applicant and each Group 3 Member (on each day); or
- b) the times at which each of the Third Applicant and each Group 3 Member started and ceased working such Overtime Hours.

Particulars

Regulation 3.34 of the Fair Work Regulations 2009 (Cth) and section 535 of the FW Act.

75C Throughout the Collective Agreement Period and Modern Award Period, the Respondent failed to keep such records, in that the records it did keep did not record the Overtime Hours described in paragraph 75A (in respect of the Third Applicant and each Group 3 Member).

Particulars

The Respondent kept hard copy records of such working hours for the period 2014 to 2017. Thereafter the Respondent kept time and attendance records in an electronic system called 'Time 2 Work', though did not record in this system the Overtime Hours.

75D Throughout the Collective Agreement Period and Modern Award Period, the Respondent was required to record on the payslips of the Third Applicant and each Group 3 Member the Overtime Hours performed by such Group 3 Members.

Particulars

Regulation 3.46 of the Fair Work Regulations (Cth) and section 536 of the FW Act.

75E Throughout the Collective Agreement Period and Modern Award Period, the Respondent failed to record on the Third Applicant's and Group 3 Members' payslips, the Overtime Hours performed by such Group 3 Members.

75F The Respondent had a common or general practice of not recording, in its time and attendance systems, Overtime Hours worked by Group 3 Members as described in this section D of this pleading.

75G The Respondent had a common or general practice of not recording on the payslips of Group 3 Members, the Overtime Hours worked by Group 3 Members as described in this section D of this pleading.

75H By reason of the matters in paragraphs 75A to 75C and 75F above, in respect of such a failure to keep a record of the Overtime Hours, the Respondent contravened section 535(1) of the FW Act.

75I By reason of the matters in paragraphs 75D, 75E and 75G above, in respect of such a failure to record such Overtime Hours on payslips, the Respondent contravened section 536(2) of the FW Act.

False or misleading records

75J Further to the matters set out above, throughout the Third Applicant's employment the Respondent kept and maintained records in relation to the Third Applicant which were false or misleading in that they did not accurately record the Overtime Hours performed by the Third Applicant described in this section D of this pleading.

75K The Respondent, when it kept such false or misleading records, knew that the records were false or misleading.

Particulars

Such knowledge is attributed to the Respondent through the knowledge of its employees, being:

- a) Melissa Negus, the Store Manager of the Darlington Store, where the Third Applicant worked from February 2017 to November 2017;
- b) Mika O'Brien the Store Manager of the On The Run petrol station located at the Glengowrie Store, where the Third Applicant worked from November 2017 to October 2018; and
- c) Bjorn (surname not known to the Applicants), Sally (surname not known to the Applicants) and Marcus Simms being persons employed as Area Managers with responsibility and oversight for the Third Applicant during her employment.

The conduct and knowledge of Ms Negus, Mr O'Brien, 'Bjorn', 'Sally' and Mr Simms is attributed to the Respondent by section 793 of the FW Act, such conduct and knowledge being:

- a) **Knowledge:** Ms Negus, Mr O'Brien, 'Bjorn', 'Sally' and Mr Simms were employees of the Respondent during these periods and had actual knowledge that the hours recorded in the Respondent's time books and on the Time2Work electronic system which related to the Third Applicant were inaccurate in that they did not record the Overtime Hours described in this section D of this statement of claim.

- b) **Conduct:** Ms Negus, Mr O'Brien, 'Bjorn', 'Sally' and Mr Simms directed the Third Applicant not to record such Overtime Hours in the time book and Time2Work system. When they did so, they were engaging in conduct within the scope of their apparent authority, as managers employed by the Respondent.

75L The Respondent:

- a) had a common or general practice of keeping false or misleading records in relation to the Group 3 Members in that such records did not record the Overtime Hours worked as described in this section D of this pleading;
- b) knew that the records it retained were false or misleading in that they did not record such Overtime Hours.

Particulars

Such knowledge is attributed to the Respondent by the knowledge of the following store managers at the following locations and the following area managers:

- (i) Melissa Negus, the Store Manager of the Darlington Store, where the Third Applicant worked from February 2017 to November 2017;
- (ii) Mika O'Brien the Store Manager of the On The Run petrol station located at the Glengowrie Store, where the Third Applicant worked from November 2017 to October 2018; and
- (iii) Bjorn (surname not known to the Applicants), Sally (surname not known to the Applicants) and Marcus Simms being persons employed as Area Managers with responsibility and oversight for the Third Applicant and other Group 3 Members during their employment;
- (iv) Shayn Paltridge, the Store Manager of the St Marys Store, between January 2017 to mid-2018;
- (v) Simon Cook, the Area Manager with supervision of the Belair Store, from mid-2018 until late 2018;
- (vi) Tony Reily, the Area Manager with supervision of the Hillbank Store, between May 2014 and July 2014;
- (vii) Stephen Fitzsimmons, the Area Manager with supervision of the Hillbank Store, between September 2014 and November 2014;
- (viii) Tony Riely, the Area Manager responsible for the Ceduna Store,
- (ix) Brad Carmichael, the Area Manager with supervision of the West Terrace Store, between October 2014 and November 2014;

- (x) Deepak Damodaran, the Area Manager with supervision of the West Terrace Store, between November 2014 and June 2015;
- (xi) Dylan Garwood, the Store Manager of the Hillbank Store, between May 2014 and November 2014;
- (xii) Dylan Garwood, the North Region Area Manager, who supervised the following stores from December 2014 until December 2015:
- a. Port Lincoln Store;
 - b. Port Pirie Store;
 - c. Whyalla Store;
 - d. Angle Vale Store;
 - e. Two Wells Store;
 - f. Kadina Store
 - g. Evanston Store; and
 - h. Clare Store;
- (xiii) Dylan Garwood, the Central Region Area Manager, who supervised the following stores from February 2017 until January 2018:
- a. Largs Bay Military Road Store;
 - b. Flinders Park Store;
 - c. Underdale Store;
 - d. Fulham Gardens Store;
 - e. Fulham Store;
 - f. Kurralta Park Store;
 - g. Harbour Town Store;
 - h. West Beach Store;
 - i. Seaton Store;
 - j. Hilton Store;
 - k. Woodville Park Store; and
 - l. David Terrace Store;
- (xiv) Laura D'Cruz, a trainee Area Manager, who supervised the following stores from September 2016 to April 2017:
- a. the Kent Town Store;
 - b. the Erindale Store;
 - c. the Evandale Store;
 - d. the Kensington Store;
 - e. the Tranmere Store;
 - f. the Stepney Store;

- g. the North Terrace Store;
- h. the Pultney Street Store;
- i. the Norwood Store; and
- j. the Fullarton Store.

The conduct and knowledge of such managers (employees) of the Respondent is attributed to the Respondent by section 793 of the FW Act, such conduct and knowledge being:

a) **Knowledge:** such managers listed above were employees of the Respondent during these periods and had actual knowledge that the hours recorded in a time book and on the Time2Work electronic system which related to Group 3 Members were inaccurate in that they did not record the Overtime Hours as described in this section D of this pleading, by reason of the fact that such managers

(i) had a common or general practice of directing Group 3 Members not to record overtime hours worked as the Overtime Hours in the Time2Work electronic system and knew that the Group 3 Members whom they so directed:

(1) complied with such a direction; and

(2) nevertheless, still worked overtime hours in the performance of the Overtime Hours; or

(ii) reviewed entries in the Time2Work electronic system where Group 3 Members had recorded time worked in the performance of the Overtime Hours (being time worked in addition to their rostered hours) and where this occurred, the managers had a common or general practice of revising the records so that the system would no longer record such Overtime Hours.

b) **Conduct:** such managers listed above were employees of the Respondent and:

i. had a common or general practice of directing Group 3 Members who worked at the named stores in the periods identified, not to record the Overtime Hours as described in this section D of this pleading, verbally, with words to the effect of “only record your rostered hours unless told otherwise”, or alternatively;

ii. were required, as a part of their duties, to ensure that records kept by the Respondent of the working hours of Group 3 Members were accurate; and

- iii. took inadequate steps to ensure that the records kept by the Respondent of the Group 3 Members were accurate, in that inadequate steps were taken to ensure that these records recorded time spent by Group 3 Members attending to the Overtime Hours as described in this section D of this pleading. Such managers should have, but did not, direct all such Group 3 Members to the effect that they were to record all such hours of work in the Respondent's time and attendance records; and
- iv. by doing either (i) or (ii) and (iii) above were engaging in conduct within the scope of their apparent authority, as managers employed by the Respondent.

75M By reason of the matters pleaded in paragraphs 75J to 75L above, in relation to the Third Applicant and Group 3 Members, the Respondent contravened section 535(4) of the FW Act by knowingly keeping such false or misleading records.

Serious Contraventions

75N Where they were engaged in after 15 September 2017, the contraventions pleaded in paragraphs 75H, 75I and 75L were serious contraventions within the meaning of section 557A of the FW Act as the Respondent:

- a) engaged in the contravention knowingly; and
- b) such contraventions were part of a systematic pattern of conduct relating to one or more of the Respondent's employees, being the common or general practices pleaded at paragraphs 75F, 75G and 75L above.

Particulars

Knowledge of the elements of the contraventions (and thus knowledge of the contraventions occurring) is attributed to the Respondent by the particulars to paragraphs 75K and 75L above.

75O The Respondent knowingly engaged in the contraventions pleaded in paragraph 74 above, since:

- a) the Respondent knew of the elements of the contraventions, being that:
 - i. such Group 3 Members were performing the Overtime Hours as set out in this section D of this pleading; and
 - ii. such Group 3 Members were not paid for performing such work.

Particulars

Knowledge of the elements of the contraventions (and thus knowledge of the contraventions occurring) is attributed to the Respondent by the knowledge of the following store managers at the following locations and the following area managers:

- (i) Melissa Negus, the Store Manager of the Darlington Store, where the Third Applicant worked from February 2017 to November 2017;
- (ii) Mika O'Brien the Store Manager of the On The Run petrol station located at the Glengowrie Store, where the Third Applicant worked from November 2017 to October 2018;
- (iii) Peter Hall, Bjorn (surname not known to the Applicants), Sally (surname not known to the Applicants) and Marcus Simms being persons employed as Area Managers and Steve Stamatopoulos as Regional Manager with responsibility and oversight for the Third Applicant and other Group 3 Members during their employment;
- (iv) Shayn Paltridge, the Store Manager of the St Marys Store, between January 2017 to mid-2018;
- (v) Simon Cook, the Area Manager with supervision of the Belair Store, from mid-2018 until late 2018;
- (vi) Tony Reily, the Area Manager with supervision of the Hillbank Store, between May 2014 and July 2014;
- (vii) Stephen Fitzsimmons, the Area Manager with supervision of the Hillbank Store, between September 2014 and November 2014;
- (viii) Tony Riely, the Area Manager responsible for the Ceduna Store,
- (ix) Brad Carmichael, the Area Manager with supervision of the West Terrace Store, between October 2014 and November 2014;
- (x) Deepak Damodaran, the Area Manager with supervision of the West Terrace Store, between November 2014 and June 2015;
- (xi) Dylan Garwood, the Store Manager of the Hillbank Store, between May 2014 and November 2014;
- (xii) Dylan Garwood, the North Region Area Manager, who supervised the following stores from December 2014 until December 2015:
 - a. Port Lincoln Store;
 - b. Port Pirie Store;
 - c. Whyalla Store;
 - d. Angle Vale Store;

- e. Two Wells Store;
 - f. Kadina Store
 - g. Evanston Store; and
 - h. Clare Store;
- (xiii) Dylan Garwood, the Central Region Area Manager, who supervised the following stores from February 2017 until January 2018:
- a. Largs Bay Military Road Store;
 - b. Flinders Park Store;
 - c. Underdale Store;
 - d. Fulham Gardens Store;
 - e. Fulham Store;
 - f. Kurralta Park Store;
 - g. Harbour Town Store;
 - h. West Beach Store;
 - i. Seaton Store;
 - j. Hilton Store;
 - k. Woodville Park Store; and
 - l. David Terrace Store;
- (xiv) Laura D'Cruz, a trainee Area Manager, who supervised the following stores from September 2016 to April 2017:
- a. Kent Town Store;
 - b. Erindale Store;
 - c. Evandale Store;
 - d. Kensington Store;
 - e. Tranmere Store;
 - f. Stepney Store;
 - g. North Terrace Store;
 - h. Pultney Street Store;
 - i. Norwood Store; and
 - j. Fullarton Store;

The conduct and knowledge of such managers (employees) of the Respondent is attributed to the Respondent by section 793 of the FW Act, such conduct and knowledge being:

- a) **Knowledge:** such managers listed above were employees of the Respondent during these periods and had actual knowledge that Group 3 Members were

performing the Overtime Hours as described in this section D of this pleading and were not being paid for such work, by reason of the fact that such managers

- (i) had a common or general practice of directing Group 3 Members not to record overtime hours worked as the Overtime Hours in the Time2Work electronic system and knew that the Group 3 Members whom they so directed:
 - (1) complied with such a direction; and
 - (2) nevertheless, still worked overtime hours in the performance of the Overtime Hours; or
- (ii) reviewed entries in the Time2Work electronic system where Group 3 Members had recorded time worked in the performance of the Overtime Hours (being time worked in addition to their rostered hours) and where this occurred, the managers had a common or general practice of revising the records so that the system would no longer record such Overtime Hours.

b) **Conduct:** such managers listed above were employees of the Respondent and:

- i. had a common or general practice of directing Group 3 Members, who worked at the named stores in the identified periods, not to record the Overtime Hours as described in this section D of this pleading, verbally, with words to the effect of “only record your rostered hours unless told otherwise”, or alternatively;
- ii. were required, as a part of their duties, to ensure that records kept by the Respondent of the working hours of Group 3 Members were accurate; and
- iii. took inadequate steps to ensure that the records kept by the Respondent of the Group 3 Members were accurate, in that inadequate steps were taken to ensure that these records recorded time spent by Group 3 Members attending to the Overtime Hours as described in this section D of this pleading. Such managers should have, but did not, direct all such Group 3 Members to the effect that they were to record all such hours of work in the Respondent’s time and attendance records; and
- iv. by doing either (i) or (ii) and (iii) above were engaging in conduct within the scope of their apparent authority, as managers employed by the Respondent.

E GROUP 4 CLAIM: TRAINEE UNDERPAYMENT

E-1 GROUP 4 REPRESENTATIVE PROCEEDINGS

76. Each of the First, Fourth and Fifth Applicants bring this proceeding as a representative proceeding pursuant to Part IVA of the Federal Court of Australia Act 1976 (Cth):

- (a) in their own right; and
 - (b) on behalf of current and former employees of the Respondent who, at any time during the Collective Agreement Period:
 - (i) were employed as 'trainees' in the positions of:
 - (1) console operator;
 - (2) driveway attendant; or
 - (3) roadhouse (food) attendant,pursuant to the Customer Service CA during the Collective Agreement Period,
 - (ii) were engaged as 'off-the-job' trainees during their employment in this period
 - (iii) performed work during this period and were paid a base rate of pay for such work which was lower than the comparable base rate of pay that would have applied had the Award applied to them and not the Customer Service CA.
- (Group 4 Members).**

E-2 LEGAL FRAMEWORK

76A. Since the 1990s, the vocational educational and training system in all States and Territories (VET System) has distinguished between two different modes of teaching the formally-taught “units of competency” in a traineeship, namely:

(a) “off the job” training, in which:

- (i) a Registered Training Organisation (RTO) is responsible for teaching the units of competency (whether or not the RTO uses its own personnel, and whether or not the teaching occurs at the RTO's premises);
- (ii) the RTO receives a government subsidy for each hour of training delivered; and
- (iii) the employer's role is to provide informal training and guidance to the trainee in the performance of their work; and

(c) “on the job” training, in which:

- (i) the employer is responsible for teaching the units of competency, as well as providing informal training and guidance to the trainee in the performance of their work;
- (ii) the RTO only has a monitoring and assessment role; and
- (iii) the RTO receives a government subsidy for each visit it makes to the workplace.

76B. Since the 1990s, the VET System has required each trainee, their employer, and their RTO, to enter into a training plan, which specifies the relevant mode of delivery of the units of competency.

78C. Since the 1990s, the standard form trainee contracts used in the VET System have obliged the employer and the trainee to comply with the trainee's training plan.

76D. At all material times, on its proper construction, it was a term of the Award that if a part-time traineeship was established on the basis that it was to be a fully off-the-job traineeship, in the sense that the RTO was to be responsible for teaching all of the units of competency in the traineeship, then for the duration of the traineeship, the trainee was entitled to be paid the applicable part-time trainee rates of pay specified in the Award

(Award Rate), without the 20% reduction applicable in cases where the employer was to be responsible for teaching some or all of the units of competency.

Particulars

The Applicants rely on:

A. The text of the Award as in force from time to time:

(i) Prior to the first full pay period on or after 1 July 2017:

Award cl E.4.2, E.4.2(f)(ii).

(ii) On or after 1 July 2017: Award cl 35.5, incorporating the

Miscellaneous Award 2010 cl E.3, E.4.2(f)(ii).

B. The context of the Award, including the matters pleaded in paragraphs 76A to 76C.

76E. At all material times, if a part-time trainee was covered by the Award, then pursuant to Items 13(1)-(2) of Schedule 9 of the FW Transitional Act, in the event that that at any time the rate of wages to which they were entitled under the Customer Service CA fell below the applicable Award Rate (as in force from time to time), then the Customer Service CA was to be read as instead requiring the Respondent to pay the employee the applicable Award Rate.

E-3 RELEVANT FACTS

77. In addition to the material facts of the First Applicant's employment described at paragraph 33 above, for the purposes of this Claim 4 the First Applicant:

- (a) at the commencement of his employment and training arrangement had completed Year 12 and had been out of secondary school for a period of more than five years;
- (b) entered into a training contract with the Respondent which was registered with and approved by the South Australian Department of State Development as a Training Contract within the meaning of Part 4 of the Training and Skills Development Act 2008 (SA);
- (c) such a training contract ~~and arrangement~~ associated training plan provided that:

- (i) the First Applicant's training was directed towards his receiving the qualification of 'Certificate III in Retail Operations (SIR30212)';
- (ii) the First Applicant would receive training from a Registered Training Organisation being Training, Innovation, Management and Enterprise Pty Ltd (later known as Time Education and Training Pty Ltd) (**TIME**);
and
- (iii) in such training, the delivery of all formal units was to be provided to the First Applicant on an 'off-the-job' basis; ~~for the purposes of Schedule E of the Award such that it was contemplated that the First Applicant would attend to any such training outside of his ordinary working hours and would not be paid for his time spent attending to such training;~~ and
- ~~(iii)~~(iv) the training was to be provided part-time.

78. The Fourth Applicant:

- (a) Commenced employment with the Respondent on 2 July 2014;
- (b) between 2 July 2014 and 29 March 2016 was employed as a 'trainee' roadhouse (food) attendant at an 'Oporto' operated by the Respondent as part of a complex centred around one of its service stations at 248 Curtis Road, Munno Para West, South Australia;
- (c) completed his 'traineeship' on 29 March 2016 and thereafter continued to be employed by the Respondent as a roadhouse (food) attendant until 14 December 2016;
- (d) performed duties consistent with working as a roadhouse attendant, including fast food preparation in accordance with food safety standards, stocktake, performing temperature checks of prepared food, customer service and point

of sale operations, cleaning and maintenance of front of house and back of house areas including cleaning tables, removing rubbish and cleaning floors;

- (e) was engaged as a 'part-time' trainee employee pursuant to the Customer Service CA initially to perform 25 ordinary hours per week which was later revised to 15 hours per week;
- (f) at the commencement of his employment and training arrangement had completed Year 12 and had been out of secondary school for a period of more than five years;
- (g) entered into a training contract with the Respondent which was registered with and approved by the South Australian Department of State Development as a Training Contract within the meaning of Part 4 of the Training and Skills Development Act 2008 (SA);
- (h) such a training contract and ~~arrangement~~ associated training plan provided that:
 - (i) the Fourth Applicant's training was directed towards his receiving the qualification of 'Certificate III in Retail Operations (SIR30212)';
 - (ii) the Fourth Applicant would receive training from a Registered Training Organisation being TIME; ~~and~~
 - ~~(iii)~~ (iv) in such training, the delivery of all formal units was to be provided to the Fourth Applicant on an 'off-the-job' basis, for the purposes of Schedule E of the Award such that it was contemplated that the Fourth Applicant would attend to any such training outside of his ordinary working hours and would not be paid for time spent attending to such training; and
 - ~~(iii)~~ (iv) the training was to be provided part-time.
- (i) during his employment in the 'traineeship' was paid a base rate of pay of \$16.35 per hour on weekdays and \$18 per hour on weekends and public holidays;

79. The Fifth Applicant:

- (a) commenced employment with the Respondent on 7 January 2015;
- (b) between 7 January 2015 and 15 April 2015 was employed as a 'trainee' console operator pursuant to the Customer Service CA at the 'On The Run' service station operated by the Respondent and located at 41/49 West Terrace, Adelaide, South Australia;
- (c) performed duties consistent with working as a console operator, including point of sale operations, cash drops, conducting fuel dips, preparing pastries for consumption at the instore bakery, cleaning the service station and toilet area, removing rubbish, attending to lottery ticket sales, cigarette sales and general retail and food sales over the counter, including making coffee, serving pastries etc. and performing stocktakes;
- (d) was engaged as a part-time 'trainee' employee pursuant to the Customer Service CA to perform 25 ordinary hours per week;
- (e) at the commencement of his employment and training arrangement had completed Year 12 and had been out of secondary school for a period of more than ~~three~~ two years but less than three years;
- (f) entered into a training contract with the Respondent which was registered and approved by the South Australian Department of State Development as a Training Contract within the meaning of Part 4 of the Training and Skills Development Act 2008 (SA);
- (g) such a training contract and ~~arrangement~~ associated training plan provided that:
 - (i) the Fifth Applicant's training was directed towards his receiving the qualification of 'Certificate III in Retail operations (SIR30212)';
 - (ii) the Fifth Applicant would receive training from a Registered Training Organisation being TIME; ~~and~~
 - (iii) in such training, the delivery of all formal units was to be provided to the Fifth Applicant on an 'off-the-job' basis ~~for the purposes of Schedule E of the Award such that it was contemplated that the Fifth Applicant would attend to any such training outside of his ordinary~~

~~working hours and would not be paid for his time spent attending to such training; and~~

~~(iii)~~(iv) the training was to be provided part-time;

(h) was, throughout his employment as a 'trainee', paid a base rate of pay of \$14.2740 per hour on weekdays and \$16.3360 per hour on weekends and public holidays.

80. ~~During their traineeships, none of the First, Fourth and Fifth Applicants engaged in any 'on-the-job' training as a part of their training contracts and the training programs which they were enrolled in in their employment with the Respondent.~~

81. ~~During their traineeships, all time spent by the First, Fourth and Fifth Applicants in attending to such training courses was spent either:~~

~~(a) — on their own time outside of hours spent in employment with the Respondent;
or~~

~~(b) — during staff meetings that they attended with representatives of the Respondent which they were not paid to attend.~~

82. Each Group 4 Member was during the Collective Agreement Period:

(a) employed by the Respondent as a console operator, driveway attendant or roadhouse (food) attendant, within the meaning of the Award;

(b) employed pursuant to the Customer Service CA;

(c) engaged as a 'trainee' and in a traineeship such that they:

(i) entered into a training contract with the Respondent which was registered with and approved by the South Australian Department of State Development as a Training Contract within the meaning of Part 4 the Training and Skills Development Act 2008 (SA);

- (ii) such training contract and ~~arrangement~~ associated training plan providing that:
 - (1) they were working towards receiving the qualification of 'Certificate III in Retail Operations (SIR30212)' or Certificate II in Automotive Sales (AUR21105) or other qualification;
 - (2) they would receive training from a Registered Training Organisation being TIME or some other Registered Training Organisation nominated by the Respondent in the Group 4 Member's training contract or ~~arrangement~~ training plan; or
 - (3) in such training, the delivery of all formal units was to be provided to them on a solely 'off-the-job' basis ~~for the purposes of Schedule E of the Award such that it was contemplated that they would attend to such training outside of their ordinary working hours and would not be paid for time spent attending to such training, and~~
 - ~~(3)~~ (4) the training was to be provided part-time.
- (iii) ~~such training, if at all provided, was provided on a solely 'off-the-job' basis such that they did not engage in any training during paid working hours; and~~
- (d) ~~they were during their traineeship, paid wages at a base-rate of pay which was lower than that the applicable Award Rate which would have applied to them under the Award had the Award applied to their employment with the Respondent (instead of the Customer Service CA).~~

E-2 GROUP 4 ENTITLEMENT

- 83. By reason of the matters pleaded at paragraphs 76A to 82 above, T throughout their employment during the Collective Agreement Period as trainees in the positions of console operator, driveway attendant and roadhouse (food) attendant pursuant to the Customer Service CA each of the First, Fourth and Fifth Applicants and each member of Group 4 was covered by the Award within the meaning of section 48 of the FW Act entitled to be paid wages at the applicable Award Rate.
- 84. ~~Had the Award applied to each of the First, Fourth and Fifth Applicants and each Group 4 Member during this period within the meaning of section 47 of the FW Act:~~

- (a) ~~the First Applicant and each Group 4 Member employed during this period as a trainee driveway attendant would have been employed pursuant to the Award in the classification of Vehicle Industry RS&R Employee Level 1 R1 or Level 4 R4;~~
- (b) ~~The Fifth Applicant and each Group 4 Member employed during this period as a trainee console operator would have been employed pursuant to the Award in the classification of Vehicle Industry RS&R Employee Level 4 R4; and~~
- (c) ~~The Fourth Applicant and each Group 4 Member employed during this period as a trainee roadhouse (food) attendant would have been employed pursuant to the Award in the classification of Vehicle Industry RS&R Employee Level 2 R2.~~

85. ~~As trainees engaged pursuant to the terms of a training contract operating under the Training and Skills Development Act 2008 (SA), had the Award applied to each of the First, Fourth and Fifth Applicants their relevant base rate of pay under the Award would be determined in accordance with Schedule E of the Award during the period of their traineeship~~

Particulars

~~Clauses 15.1 and 35.5 of the Award as was in place during January 2015 in each of the First, Fourth and Fifth Applicant's traineeship~~

86. ~~†~~The Award Rate which applied to the Fifth Applicant during his traineeship was \$16.83 per hour, and the Award Rate which applied to each of the First and ,Fourth and Fifth Applicants during their traineeships with the Respondent were as follows,
~~the relevant base rate of pay under the Award which would have applied to each of them would have been:~~

- (a) ~~\$18.07~~ \$18.70 per hour between ~~28-14~~ May 2014 and 30 June 2014;
- (b) ~~\$18.61~~ \$19.26 per hour between 1 July 2014 and 30 June 2015 ; and
- (c) ~~\$19.08~~ \$19.74 per hour between 1 July 2015 and 30 June 2016.

Particulars

Prescribed base rate of pay for trainee in 'Wage Level AB' who has been out of school for such period of time after completion of year 12 and who is a trainee per Schedules E and E1 of Award in place at times above. 'Wage Level AB' applies as the training package which each of these Applicants were enrolled in was working towards a Certificate III in Retail Operations, that is a 'retail services' training package listed in clause E.1.2 or in any event by operation of clause E.5.4.

87. ~~The 20% discount that can be applied to these wage rates for 'on-the-job' trainees (or partly 'on-the-job' trainees) was not applicable to each of the First, Fourth and Fifth Applicants because all of their training was delivered 'off-the-job', if at all.~~

Particulars

~~Clause E.5.2(f) of Schedule E of the Award.~~

88. ~~The base rates of pay set out in paragraph 84 above are higher than those which were paid to each of the First, Fourth and Fifth Applicants during their traineeships (being those amounts set out at paragraphs 33(e), 76(i) and 77(h) above).~~
89. ~~The Customer Service CA applies in respect of the First, Fourth and Fifth Applicants during their traineeships such that the base rates of pay which the First, Fourth and Fifth Applicants were entitled to receive under the Customer Service CA were equal to the amounts set out in paragraph 84 above at the relevant times.~~

Particulars

~~By operation of Item 13(2) of Schedule 9 of the FW Transitional Act.~~

90. ~~As to each of the Group 4 Members:~~
- ~~(a) — each was covered by the Award within the meaning of section 48 of the FW Act during their employment as trainees pursuant to the Customer Service CA;~~
- ~~(b) — had the Award applied to them, it would have applied such that the classifications of Vehicle Industry RS&R Employee Level 1 R1, Level 2 R2 or Level 4 R4 (as the case may be) applied to them during their employment as trainees pursuant to the Customer Service CA;~~

- (c) ~~each was enrolled in training packages which worked towards their obtaining a 'Certificate III in Retail Operations' or Certificate II in Automotive Sales (AUR21105) or other qualification that is a 'retail services' training package such that had the Award applied to them they would have been entitled to have been paid at Wage Level B under Schedule E of the Award;~~
- (d) ~~each was entitled to a base rate of pay equal to that set out in paragraph 84 above where they had been out of school for more than five years at the commencement of their traineeships (or more than three years after the completion of year 12);~~
- (e) ~~in any event, in respect of Group 4 Members who had been out of school for a shorter period of time, such members were entitled to the relevant base rates of pay contained in Schedule E of the Award determined with reference to their age and the period of time that had elapsed since they had left school;~~
- (f) ~~consequently, the Customer Service CA applies to each Group 4 Member during their traineeships such that the rates of pay which each Group 4 Member was entitled to receive is at least equal to that contained in Schedule E to the Award (determined with reference the period of time that has elapsed since they left school); and~~
- (g) ~~the rates of pay which were paid by the Respondent to each of the Group 4 Members during their traineeships pursuant to the Customer Service CA were less than those contained in Schedule E of the Award described above.~~

E-3 GROUP 4 | CONTRAVENTION AND LOSS

91. ~~By reason of the matters pleaded in paragraphs 4 to 6 and 81 to 88 above, the Respondent was required to pay each of the First, Fourth and Fifth Applicant and each Group 4 Member a base rate of pay which was at least equal to that contained in Schedule E of the Award applicable to such employees during all periods of these employees' traineeships.~~
92. ~~In breach of its obligations as alleged in paragraphs 89-83 and 86 above, the Respondent failed to pay each of the First, Fourth and Fifth Applicants and each Group 4 Member a base rate of pay which was wages at least equal to the applicable Award Rate during all time worked in the Collective Agreement Period that contained~~

~~in Schedule E of the Award applicable to such employees during all periods of these employees' traineeships.~~

Particulars

Each of the First, Fourth and Fifth Applicants and each Group 4 Member has been underpaid by an amount equal to the difference between the rate that they were entitled to be paid at and the rate that they were actually paid at pursuant to the Customer Service CA. Further particulars may be given after discovery and determination of the common questions.

93. By breaching its obligations as alleged in paragraph ~~92~~ 90 above, the Respondent breached the terms of the Customer Service CA as affected ~~amended~~ by the operation of Item 13 of Schedule 9 of the FW Transitional Act and the Award and thereby contravened ~~section 323 of the FW Act~~ Item 2(1) of Schedule 16 to the FW Transition Act.
94. By reason of the breaches alleged at paragraphs ~~90 and 91~~ 93 above, each of the First, Fourth and Fifth Applicants and each Group 4 Member is entitled to an order pursuant to section 545 of the FW Act that the Respondent is required to compensate each of them for the underpayment of entitlements owed by reason of the matters pleaded in this part E of this claim.

F GROUP 5 CLAIM: UNLAWFUL DEDUCTIONS

F-1 REPRESENTATIVE PROCEEDINGS

95. Each of the First, Second, Third, Fourth and Fifth Applicants bring this proceeding as a representative proceeding pursuant to Part IVA of the Federal Court of Australia Act 1976 (Cth):
- (a) in their own right; and
 - (b) on behalf of current and former employees of the Respondent who, at any time during the Collective Agreement Period and Modern Award Period:
 - (i) were employed pursuant to the Customer Service CA or Full Time CA during the Collective Agreement Period and Award during the Modern Award Period,
 - (ii) had amounts deducted from their pay purportedly for the cost of:

- (1) uniforms which they were directed by the Respondent to wear when working; and
- (2) criminal history checks obtained by the Respondent prior to their commencing in their employment-

(Group 5 Members)

Particulars

- (i) The First Applicant brings the claim on behalf of Group 5 Members during the Collective Agreement Period.
- (ii) The Second Applicant brings the claim on behalf of Group 5 Members during the Collective Agreement and Modern Award Periods.
- (iii) The Third Applicant brings the claim on behalf of Group 5 Members during the Collective Agreement and Modern Award Periods.
- (iv) The Fourth Applicant brings the claim on behalf of Group 5 Members during the Collective Agreement Period.
- (v) The Fifth Applicant brings the claim on behalf of Group 5 Members during the Collective Agreement Period.

F-2 GROUP 5 | UNLAWFUL DEDUCTIONS

- 96. Each of the First, Second, Third, Fourth and Fifth Applicants and Group 5 Members had amounts totalling to:
 - (a) \$150 deducted from their pay purportedly to cover the cost of a uniform provided to each Applicant that they may wear during their working hours (\$90 in the case of the Third Applicant and \$205 in the case of the Second Applicant); and
 - (b) \$40 deducted from their pay purportedly to cover the costs of a police check performed by the Respondent prior to their commencing employment.
- 97. In respect of the First, Second, Third, Fourth and Fifth Applicants these deductions were made on the following dates in respect of the following amounts:

- (a) For the Second Applicant:
 - (i) \$40 on 30 October 2013 purportedly for the costs of a police check; and
 - (ii) \$40 on 6 November 2013, \$40 on 13 November 2013, \$40 on 20 November 2013, \$30 on 27 November 2013 and \$55 on 15 August 2018 totalling \$205 purportedly for the costs of a uniform,
- (b) For the First Applicant:
 - (i) \$20 on each 4 June 2014 and 11 June 2014 totalling \$40 purportedly for the costs of a police check; and
 - (ii) \$30 on 18 June 2014, \$30 on 25 June 2014, \$20 on 2 July 2014, \$30 on 9 July 2014, \$20 on 16 July 2014, \$20 on 23 July 2014 totalling \$150 purportedly for the costs of a uniform,
- (c) For the Third Applicant:
 - (i) \$30 on 8 February 2017 and \$10 on 15 February 2017 totalling \$40 purportedly for the costs of a police check; and
 - (ii) \$10 on 22 February 2017, \$10 on 1 March 2017, \$10 on 8 March 2017, \$20 on 15 March 2017, \$10 on 22 March 2017, \$10 on 29 March 2017, \$20 on 5 April 2017 totalling \$90 purportedly for the costs of a uniform,
- (d) For the Fourth Applicant:
 - (i) \$40 on 9 July 2014 purportedly for the costs of a police check; and
 - (ii) \$40 on 16 July 2014, \$25 on 23 July 2014, \$25 on 30 July 2014, \$25 on 6 August 2014, \$25 on 13 August 2014 and \$10 on 20 August 2014 totalling \$150 purportedly for the costs of a uniform,
- (e) For the Fifth Applicant:
 - (i) \$20 on each 14 January 2015 and 21 January 2015 totalling \$40 purportedly for the costs of a police check; and

- (ii) \$20 on 28 January 2015, \$20 on 4 February 2015, \$20 on 11 February 2015, \$10 on 18 February 2015, \$20 on 25 February 2015, \$20 on 4 March 2015, \$20 on 11 March 2015 and \$20 on 18 March 2015 totalling \$150 purportedly for the costs of a uniform.

Particulars

Employee Previous Earnings reports for each of the First, Second, Third, Fourth and Fifth Applicants.

98. In respect of the First, Third, Fourth and Fifth Applicants the \$150 (or \$90 in the case of the Third Applicant) deducted purportedly for the costs of their work uniform was reimbursed to each of these Applicants upon the termination of each of their employment.
99. In respect of the Second Applicant the \$205 deducted purportedly for the costs of their work uniform was not reimbursed upon the termination of their employment despite his uniform being returned.
100. None of the First, Second, ~~Third, Fourth~~ or Fifth Applicants or any of the Group 5 Members authorised the Respondent to make such deductions in writing in an authorisation which specified the amount of the deduction.
101. The deductions referred to in paragraphs 946 to 957 above were not made principally for the benefit of the relevant First, Second, Third, Fourth or Fifth Applicants or any Group 5 Member.
102. The deductions referred to in paragraphs 946 to 957 above were not authorised by the Customer Service CA, the Full Time CA, the Award or any enterprise agreement, modern award or law of the Commonwealth or a State or Territory.
103. Accordingly, these deductions were not permitted deductions within the meaning of section 324 of the FW Act.

F-3 GROUP 5 | CONTRAVENTION AND LOSS

104. By reason of the matters pleaded in paragraphs 4 to 6 and 946 to 1043 above, the Respondent was required to pay each of the First, Second, Third, Fourth and Fifth Applicants and each Group 5 Member in full and without the deductions referred to in paragraphs 946 to 957 above.

Particulars

Sections 323, 324 FW Act.

105. By making the deductions referred to in paragraphs 946 to 957 above from the pay of each the First, Second, Third, Fourth and Fifth Applicant and each Group 5 Member, the Respondent contravened section 323 of the FW Act.
106. By reason of the contravention alleged in paragraph 1035 above, the First, Second, Third, Fourth and Fifth Applicant and each Group 5 Member is entitled to an order pursuant to section 545 of the FW Act that the Respondent is required to compensate each of them for the underpayment of entitlements owed by reason of the Respondent's contravention of the FW Act pleaded in this part F of this claim.

G COMMON ISSUES

107. The questions of law or fact common to the claims of the members of Group 1, 2, 3, 4- and 5 in this proceeding are as follows.
- 105A. In respect of Group 1 Members, whether there was a common or general practice of the Respondent as alleged in paragraph 15A.
- 105B. In respect of Group 1 Members, during the Collective Agreement Period and the Modern Award Period, who were:
- (a) either a console operator, driveway attendant or roadhouse (food) attendant;
 - (b) rostered for work for 5 or 6 or more hours;
 - (c) allocated in the Respondent's rostering system an unpaid meal break of 30 minutes in each such shift,

whether there ~~was a~~ were common or general practices of the Respondent as alleged in paragraph 20A.

- 105C In respect of Group 1 Members, whether there was a common or general practice of the Respondent during the Collective Agreement Period and the Modern Award Period as alleged in paragraph 22A.

108. In respect of Group 1 Members whether, on the proper interpretation of the Customer Service CA and the Award, the Respondent was required to pay each group member for: time spent being available to attend to and attending to the Pre-Shift Work.

(a) — ~~time spent being available to attend to and attending to the Pre-Shift Work;~~

(b) — ~~time spent attending to the Post-Shift Work; and~~

(c) — ~~time spent attending to the Meal Break Work.~~

108A In respect of Group 1 Members whether, on the proper interpretation of the Customer Service CA and the Award, the Respondent was required to pay each group member for time spent attending to Post-Shift Work.

108B In respect of Group 1 Members whether, on the proper interpretation of the Customer Service CA and the Award, the Respondent was required to pay each group member for time spent attending to the Meal Break Work.

108C In respect of Group 1 Members, whether the Respondent had a common or general practice of not recording in its time and attendance systems, overtime hours worked by Group 1 Members arising from time spent attending to the Pre-Shift Work.

108D In respect of Group 1 Members, whether the Respondent had a common or general practice of not recording in its time and attendance systems, overtime hours worked by Group 1 Members arising from time spent being attending to the Post-Shift Work.

108E In respect of Group 1 Members, whether the Respondent had a common or general practice of not recording in its time and attendance systems, overtime hours worked by Group 1 Members arising from time spent attending to the Meal Break Work.

108F In respect of Group 1 Members, whether the Respondent had a common or general practice of not recording on the payslips of Group 1 Members, overtime hours worked by Group 1 Members arising from time spent being available to attend to and attending to the Pre-Shift Work.

108G In respect of Group 1 Members, whether the Respondent had a common or general practice of not recording on the payslips of Group 1 Members, overtime hours worked by Group 1 Members arising from time spent attending to the Post-Shift Work.

- 108H In respect of Group 1 Members, whether the Respondent had a common or general practice of not recording on the payslips of Group 1 Members, overtime hours worked by Group 1 Members arising from time spent attending to the Meal Break Work.
- 108I In respect of Group 1 Members, whether the Respondent had a common or general practice of keeping false or misleading records in relation to Group 1 Members in that the records they kept did not record overtime hours arising from time spent being available to attend and attending to the Pre-Shift Work.
- 108J In respect of Group 1 Members, whether the Respondent had a common or general practice of keeping false or misleading records in relation to Group 1 Members in that the records they kept did not record overtime hours arising from time spent attending to the Post-Shift Work.
- 108K In respect of Group 1 Members, whether the Respondent had a common or general practice of keeping false or misleading records in relation to Group 1 Members in that the records they kept did not record overtime hours arising from time spent attending to the Meal Break Work.
- 108L In respect of Group 1 Members, whether the managers of such Group 1 Members directed Group 1 Members not to record overtime hours worked in the Pre Shift Work, Meal Break Work and Post Shift Work in the Respondent's time keeping systems.
- 108M In respect of Group 1 Members, whether the managers of such Group 1 Members were required to ensure that records kept by the Respondent about the working hours of Group 1 Members were accurate and if so, whether they failed to take adequate steps to ensure that such records were accurate by failing to direct Group 1 Members to record Pre Shift Work, Meal Break Work and Post Shift Work in the Respondent's time keeping systems.
- 106A. In respect of Group 2 Members, during the Collective Agreement Period, who:
- (a) were either a console operator, driveway attendant or roadhouse (food) attendant;
 - (b) were engaged either:

- (i) on a part-time basis, and who worked hours in excess of the 4-weekly average of their agreed part-time hours and/or worked in excess of 152 hours in certain 4-week periods; and/or
- (ii) on a full-time basis (not being salaried staff), and who worked in excess of 152 hours in 4-week periods of their employment, and
- (c) did not perform such work pursuant to a genuine request to work 'voluntary overtime' at their ordinary (base) rate of pay; ~~and~~
- ~~(d) did not complete the 'voluntary overtime' form prescribed by the Customer Service CA in relation to such overtime, including by completing the date and time upon which such work shall be performed, the location where it shall be performed and the duration of such overtime;~~

whether the Respondent had a common or general practice of only paying such staff at their 'base rates' of pay in respect of such overtime.

106B. In respect of Group 2 Members, during the Collective Agreement Period, who:

- (a) were either a console operator, driveway attendant or roadhouse (food) attendant;
- (b) were engaged either:
 - (iii) on a part-time basis, and who worked hours in excess of the 4-weekly average of their agreed part-time hours and/or worked in excess of 152 hours in certain 4-week periods; and/or
 - (iv) on a full-time basis (not being salaried staff), and who worked in excess of 152 hours in 4-week periods of their employment, and
- (c) did not complete the 'voluntary overtime' form prescribed by the Customer Service CA in relation to such overtime, including by completing the date and time upon which such work shall be performed, the location where it shall be performed and the duration of such overtime,

whether the Respondent had a common or general practice of only paying such staff at their 'base rates' of pay in respect of such overtime.

109. In respect of Group 2 Members whether, on the proper interpretation of the Full Time CA, the Respondent was required to pay each group member an overtime loading for:

(a) ~~for~~ part time employees:

(i) time spent working in excess of their agreed part-time hours (averaged over a four-week period); or

(ii) time spent in excess of 152 hours in a four-week period;

(b) ~~for~~ full time employees, time spent working in excess of 152 hours in a four-week period,

in circumstances where such work was not performed pursuant to the 'voluntary overtime' regime contained in the Customer Service CA.

109A In respect of Group 2 Members, whether the Respondent had a common or general practice of not recording, in its time and attendance systems, Overtime Hours as described in section C of this pleading which had been worked by Group Members.

109B In respect of Group 2 Members, whether the Respondent had a common or general practice of not recording, on the Group 2 Members' payslips, the penalty rate or loading (however described) applicable to the Overtime Hours worked by the Group 2 Members as described in section C of this pleading.

107A. In respect of Group 3 Members, during the Collective Agreement Period and the Modern Award Period, who:

(a) were employed by the Respondent in a full-time salaried position in one of the positions set out at sub-paragraph 49(b)(i) above;

(b) were paid an annualised salary purportedly in satisfaction of all entitlements arising from the Full Time CA and Award; and

(c) performed duties which were substantially the same as some or all of those performed by the Third Applicant and described in sub-paragraph 50(j) above; and

(d) either:

- (i) were covered by and employed pursuant to the Full Time CA during the Collective Agreement Period; or
- (ii) were covered by and employed pursuant to the Award during the Modern Award Period;

whether there was the common or general practice of the Respondent as alleged in paragraph 61A(e) to (g).

110. In respect of Group 3 Members whether, on the proper interpretation of the Full Time CA and Award, the Respondent was required to pay each group member employed in a salaried position amounts above the weekly annualised salary payments that were made to such members, in satisfaction of these members entitlements to additional payments by reason of:

- (a) these members performing regular scheduled overtime by way of additional work before, during and after their shifts;
- (b) these members performing regular unscheduled overtime by way of the performance of additional shifts on their usual rostered days off; and
- (c) these members performing some of their work at times and on days which entitled them to penalty rates.

110A In respect of Group 3 Members, whether the Respondent had a common or general practice of not recording, in its time and attendance systems, Overtime Hours worked by Group 3 Members as described in section D of this pleading.

110B in respect of Group 3 Members, whether the Respondent had a common or general practice of not recording on the payslips of Group 3 Members, the Overtime Hours worked by Group 3 Members as described in section D of this pleading.

110C In respect of Group 3 Members, whether the Respondent had a common or general practice of keeping false or misleading records in relation to the Group 3 Members in that such records did not record the Overtime Hours as described in section D of this pleading.

110D In respect of Group 3 Members, whether the managers of such Group 3 Members directed Group 3 Members not to record Overtime Hours as described in section D of this pleading in the Respondent's time keeping systems.

110E In respect of Group 3 Members, whether the managers of such Group 3 Members were otherwise required to ensure that records kept by the Respondent about the working hours of Group 3 Members were accurate and if so, whether they failed to take adequate steps to ensure that such records were accurate by failing to direct Group 3 Members to record Overtime Hours as described in section D of this pleading into the Respondent's time keeping systems.

111. In respect of Group 4 Members whether they were entitled to be paid the applicable Award Rate during the Collective Agreement Period., ~~on the proper interpretation of the Customer Service CA, FW Transitional Act and FW Act, the members were entitled to a base rate of pay equal to the base rate of pay which would have applied had the Award determined the terms of such members' employment and not the Customer Service CA~~

111A In respect of Group 4 Members, whether there was a common or general practice of the Respondent to pay wages calculated without reference to the applicable Award Rate.

111B In respect of Group 4 Members, whether they were paid less than the Award Rate for all time worked during the Collective Agreement Period.

112A In respect of Group 5 Members, whether, there was a common or general practice of the Respondent to take deductions from the First, Second, Third, Fourth and Fifth Applicants' and Group Members wages;

112B In respect of Group 5 Members, whether those deductions taken from Group Members wages were said to be taken on account of uniform costs and police check costs;

112. In respect of Group 5 Members, whether, on the proper interpretation of the FW Act, Award, Customer Service CA and the Full Time CA the deductions taken from Group 5 Members wages were purportedly to meet the costs of their uniforms and police checks undertaken by the Respondent (whether or not reimbursed at some later date) were taken in contravention of the FW Act.

H REMEDIES

113. The Applicants seeks ~~a declaration that the Respondent has contravened:~~

- (a) a declaration that the Respondent has contravened sections 323 and 45 of the FW Act as alleged in paragraphs 29 and 30 above;
- (b) a declaration that the contraventions of sections 323 and 45 of the FW Act as alleged in paragraphs 29 and 30 above, were serious contraventions within the meaning of section 557A of the FW Act as alleged in paragraphs 31Q to 31R;
- (c) a declaration that the Respondent has contravened section 535(1) of the FW Act as alleged in paragraph 31H above;
- (d) a declaration that the contravention of section 535(1) of the FW Act by the Respondent as alleged in paragraph 31H above was a serious contravention within the meaning of section 557A of the FW Act as alleged in paragraph 31P;
- (e) a declaration that the Respondent has contravened section 536(2) of the FW Act as alleged in paragraph 31I above;
- (f) a declaration that the contravention of section 536(2) of the FW Act by the Respondent as alleged in paragraph 31I above was a serious contravention within the meaning of section 557A of the FW Act as alleged in paragraph 31P;
- (g) a declaration that the Respondent has contravened section 535(4) of the FW Act as alleged in paragraph 31O above;
- (h) a declaration that the contravention of section 535(4) of the FW Act by the Respondent as alleged in paragraph 31O above was a serious contravention within the meaning of section 557A of the FW Act as alleged in paragraph 31P;
- (i) a declaration that the Respondent has contravened section 323 of the FW Act as alleged in paragraph 47 above;
- (j) a declaration that the Respondent has contravened section 535(1) of the FW Act as alleged in paragraph 48E above;
- (k) a declaration that the Respondent has contravened section 536(2) of the FW Act as alleged in paragraph 48I above;

- (l) a declaration that the Respondent has contravened sections 323 and 45 of the FW Act as alleged in paragraphs 724(a) and 724(b) above;
- (m) a declaration that the Respondent has contravened section 535(1) of the FW Act as alleged in paragraph 75H above;
- (n) a declaration that the contravention of section 535(1) of the FW Act by the Respondent as alleged in paragraph 75H above was a serious contravention within the meaning of section 557A of the FW Act as alleged in paragraph 75N;
- (o) a declaration that the Respondent has contravened section 536(2) of the FW Act as alleged in paragraph 75I above;
- (p) a declaration that the contravention of section 536(2) of the FW Act by the Respondent as alleged in paragraph 75I above was a serious contravention within the meaning of section 557A of the FW Act as alleged in paragraph 75N;
- (q) a declaration that the Respondent has contravened section 535(4) of the FW Act as alleged in paragraph 75M above;
- (r) a declaration that the contravention of section 535(4) of the FW Act by the Respondent as alleged in paragraph 75M above was a serious contravention within the meaning of section 557A of the FW Act as alleged in paragraph 75N;
- (s) a declaration that the Group 4 Members were paid less than the Award Rate and were thereby underpaid;
- ~~(s)~~(t) a declaration that the Respondent has contravened section 323 of the FW Act Item 2(1) of Schedule 16 to the FW Transition Act as alleged in paragraph 94-93 above; and
- ~~(t)~~(u) a declaration that the Respondent has contravened section 323 of the FW Act as alleged in paragraph 1035 above.

114. The Applicants seek an order for compensation pursuant to section 545 of the FW Act for loss suffered by the Applicants and the members of each Group 1, 2, 3, 4 and

5 in connection with these contraventions of the FW Act, namely the loss pleaded at paragraphs 31, 48, ~~735~~, ~~92-94~~ and 104~~6~~ above.

115. The Applicants seek an order for interest on such amounts of compensation up to the date of judgment pursuant to section 547 of the FW Act.
116. The Applicants seek an order for the payment of a pecuniary penalty pursuant to section 546 of the FW Act, to be paid to each of the Applicants and members of each Group 1, 2, 3, 4 and 5 to be ordered as a consequence of each of the Respondent's contraventions of sections 45, ~~323~~, 535(1), 535(4) and 536(2) of the FW Act, and Item 2(1) of Schedule 16 to the FW Transition Act, as set out in paragraph 114~~3~~ above.

Date: ~~27 August 2021~~ 16 March 2022



Signed by Rory Markham
Lawyer for the Applicant

This pleading was prepared by Rory Markham, lawyer and settled by Mr Michael Whitbread, Mr Joel Fetter, and ~~Justin Hogan-Doran~~ Dr Kristine Hanscombe QC of Counsel.

Certificate of lawyer

I Rory Markham certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: ~~27 August 2021~~ 16 March 2022



Signed by Rory Markham
Lawyer for the Applicant

Schedule of Parties

First Applicant	Aaron Furnell
Second Applicant	Paul Young
Third Applicant	Shannan Mahoney
Fourth Applicant	Christopher Palmer
Fifth Applicant	Laurence Lagoon Williamson
Respondent	Shahin Enterprises Pty Ltd ACN 008 150 543