NOTICE OF FILING

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File Title:	MARIA PABALAN v COLES SUPERMARKETS AUSTRALIA PTY LTD ABN 45 004 189 708
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.

Form 33
Rule 16.32

Second Further Amended Defence to ~~Third Further~~ Fifth Amended Statement of Claim

No. NSD542/2020

Federal Court of Australia
District Registry: New South Wales
Division: Fair Work

MARIA PABALAN
Applicant

COLES SUPERMARKETS AUSTRALIA PTY LTD (ABN 45 004 189 708)
Respondent

In answer to the ~~Third Further~~ Fifth Amended Statement of Claim filed 21 April 2026 ~~16 March 2022~~ (**~~3F~~5ASOC**), ~~incorporating amendments made by reason of the Second Further Amended Statement of Claim filed 6 December 2021,~~ the Respondent pleads as follows.

1. As to paragraph 1, it:

   (1) admits that the Applicant purports to bring this proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) on her own behalf and on behalf of the persons described in paragraph 1(2); and

   (2) otherwise does not know and therefore cannot admit the paragraph.

2. It admits paragraph 2.

3. As to paragraph 3, it:

Filed on behalf of Coles Supermarkets Australia Pty Ltd (ABN 45 004 189 708) (Respondent)
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(1) as to paragraph 3(1):

(a) admits that, pursuant to cl 4.1 of the *General Retail Industry Award 2010* (as it was called in the Relevant Period and the Litigation Period) (**Award**) and s 48(1) of the *Fair Work Act 2009* (Cth) (**FW Act**), the Award covered:

(i) employers throughout Australia in the general retail industry (as defined in cl 3.1) (except employers covered by the other awards listed in cl 4.1); and

(ii) employees of such employers in the classifications listed in cl 16 (except employees excluded pursuant to cll 4.2, 4.3, 4.4 or 4.7);

(b) otherwise denies paragraph 3(1); and

(2) admits paragraph 3(2).

4. As to paragraph 4, it:

(1) admits that the Applicant commenced full-time employment with the Respondent at its supermarket at Westfield Miranda, New South Wales in a position titled Caretaking Customer Service Manager;

(2) says that:

(a) the Applicant commenced that employment:

(i) on 14 June 2016;

(ii) [not used];

(iii) pursuant to a written employment agreement dated 1 June 2016, signed by the Applicant on 14 June 2016;

(iv) for a Total Fixed Compensation (**TFC**) package of $66,000 per annum, including salary and superannuation;

(b) the employment agreement relevantly provided that:

(i) the cash salary component of the Applicant's TFC included compensation for all entitlements, benefits or payments that might otherwise be due under any industrial instrument;

PARTICULARS

Employment agreement, page 1, section headed "Cash Salary".

(ii) the Applicant's TFC package was paid in full satisfaction of all hours worked;

PARTICULARS

Employment agreement, page 2, section headed "Hours of Work".

(c) cl 2.2 of the Award provided that the monetary obligations imposed on employers by the Award may be absorbed into overaward payments; and

(3) by reason of the matters pleaded in subparagraphs (b) and/or (c) above, payments provided for in the Award were absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and

(4) otherwise denies paragraph 4.

4A. As to paragraph 4A, it:

(1) as to paragraph 4A(1), says that between approximately 11 November 2016 and 6 August 2017, the Applicant held the position of Customer Service Manager at the Miranda Supermarket, with a TFC package of $66,000 per annum, including salary and superannuation, and otherwise denies the paragraph;

(2) as to paragraph 4A(2), says that between approximately 7 August 2017 and 4 November 2018, the Applicant held the position of Customer Service Manager at the Roselands Supermarket, with a TFC package of $70,000 per annum, including salary and superannuation, and otherwise denies the paragraph;

(3) denies paragraph 4A(3);

(4) as to paragraph 4A(4), says that between approximately 5 November 2018 and 18 August 2019, the Applicant held the position of Customer Service Manager at Coles' supermarket located at 566-594 Princes Highway, Kirrawee, New South Wales, with a TFC package of $71,925 per annum, including salary and superannuation, and otherwise denies the paragraph;

(5) as to paragraph 4A(5), says that on or about 1 April 2019, the Applicant's TFC, including salary and superannuation, increased to $75,500 per annum, and otherwise denies the paragraph;

(6) as to paragraph 4A(6), says that between approximately 19 August 2019 and 23 September 2019, the Applicant held the position of Caretaking Dairy Manager at Coles' supermarket located at 822-826 Old Princes Highway, Sutherland, New South Wales, with a TFC package of $75,500 per annum, including salary and superannuation, and otherwise denies the paragraph.

5. As to paragraph 5, it:

(1) says that:

(a) initially cl 23, later cl 23.3, of the Award permitted the Respondent to pay the Applicant on a monthly pay cycle;

(b) the employment agreement relevantly provided that the cash salary component of the Applicant's TFC would be paid monthly;

PARTICULARS

Employment Agreement, page 1, section headed "Cash Salary".

(2) says that in practice it paid the Applicant the cash salary component of her TFC on or about the 15th day of each month; and

(3) otherwise denies paragraph 5.

6. As to paragraph 6, it:

(1) says that the first pay period to conclude after the Applicant commenced employment on 14 June 2016 concluded on 30 June 2016;

(2) refers to and repeats paragraph 5; and

(3) otherwise denies paragraph 6.

7. As to paragraph 7, it:

(1) admits that the Applicant resigned from her employment with the Respondent with effect on 23 September 2019;

(2) repeats the matters set out at paragraphs 4 and 4A; and

(3) otherwise denies paragraph 7.

8. As to paragraph 8, it:

(1) admits that each of the positions referred to in paragraphs 4 and 4A(1),(2),(4)-(6) above was:

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

(b) a position, the title of which included the word “manager”; and

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

(2) repeats paragraph 4A(3); and

(3) otherwise denies paragraph 8.

9. As to paragraph 9, it:

(1) admits that the Award as amended from time to time applied to the Applicant in respect of her employment with the Respondent;

(2) says that:

(a) whether the Award applied to other persons in respect of their employment with the Respondent at a particular time is an individual issue, not a common issue;

(b) pursuant to s 57 of the FW Act, the Award did not apply to a person at a time when the *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited Retail Agreement 2011* or the *Coles Supermarkets Enterprise Agreement 2017* applied to that person; and

(3) otherwise denies paragraph 9.

10. As to paragraph 10, it:

(1) says that the Applicant was rostered for the hours recorded in the schedule data produced by the Respondent's solicitors to the Applicant's solicitors on 31 August 2020 (**Schedule Data**), save for any agreed variations to those hours from time to time;

(2) repeats paragraph 4A(3); and

(3) otherwise denies paragraph 10.

11. As to paragraph 11, it:

(1) admits that the Applicant was, throughout the period of her employment with the Respondent, a full-time employee within the meaning of cl 11 of the Award; and

(2) otherwise denies paragraph 11.

12. It denies paragraph 12 and says that from time to time the Applicant chose to work different hours from her rostered hours.

13. It denies paragraph 13 and says further that "ordinary hours" of work were as prescribed by Part 5 of the Award.

14. As to paragraph 14, it:

(1) admits that during the period in which the Applicant was employed by the Respondent, cl 29.4(a) of the Award provided for a penalty payment of an additional 25% loading to apply for ordinary hours worked by a full-time employee after 6.00pm;

(2) says that, on a proper construction of cl 29.4(a), that loading applied to minimum hourly rates of pay under the Award;

(3) says that, by reason of the matters pleaded in paragraphs 17(1)(a), (b) and (c) below, the finishing time for ordinary hours on all days of the week was 11.00pm;

(4) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the loading referred to in cl 29.4(a) was absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and

(5) otherwise denies paragraph 14.

15. It denies paragraph 15 and repeats paragraphs 4, 4A, 5, 7 and 14 above.

16. It denies paragraph 16 and repeats paragraphs 4, 4A, 5, 7 and 14 above.

17. As to paragraph 17, it:

(1) admits that during the period in which the Applicant was employed by the Respondent:

(a) cl 27.2(a) of the Award provided that except as provided in cl 27.2(b), ordinary hours may be worked within the following spread of hours:

(i) Monday to Friday, inclusive: 7.00am to 9.00pm;

(ii) Saturday, 7.00am to 6.00pm;

(iii) Sunday, 9.00am to 6.00pm;

(b) cl 27.2(b)(iii) provided that in the case of retailers whose trading hours extend beyond 9.00pm Monday to Friday or 6.00pm on Saturday or Sunday, the finishing time for ordinary hours on all days of the week will be 11.00pm;

(c) the Respondent was a retailer to which cl 27.2(b)(iii) applied;

(d) cl 29.2(a) relevantly provided that hours worked outside the span of hours (excluding shiftwork) prescribed in cl 27 are to be paid at time and a half for the first three hours and double time thereafter;

(2) says that, on a proper construction of cl 29.2(a), the references to time and a half and double time were to 1.5 and 2.0 times the minimum hourly rates of pay under the Award;

(3) says that, by reason of, initially cl 29.2(d), later cl 29.2(f), overtime was to be calculated on a daily basis;

(4) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the payments referred to in cl 29.2(a) were absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and

(5) otherwise denies paragraph 17.

18. It denies paragraph 18 and repeats paragraphs 4, 4A, 5, 7 and 17 above.

19. It denies paragraph 19 and repeats paragraphs 4, 4A, 5, 7 and 17 above.

20. As to paragraph 20, it:

(1) admits that during the period in which the Applicant was employed by the Respondent, initially cl 29.4(b), later cl 29.4(c), of the Award provided for a penalty payment of an additional 25% loading to apply for ordinary hours worked by a full-time employee on a Saturday;

(2) says that on a proper construction of that clause, that loading applied to minimum hourly rates of pay under the Award;

(3) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the loading referred to in, initially cl 29.4(b), later cl 29.4(c), was absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and

(4) otherwise denies paragraph 20.

21. It denies paragraph 21 and repeats paragraphs 4, 4A, 5, 7 and 20 above.

22. It denies paragraph 22 and repeats paragraphs 4, 4A, 5, 7 and 20 above.

23. As to paragraph 23, it:

(1) admits that during the period in which the Applicant was employed by the Respondent, there were clauses of the Award that provided for a penalty payment of the percentage loading set out below for ordinary hours worked by a full-time employee on a Sunday:

(a) from the commencement of her employment to 30 June 2017, pursuant to cl 29.4(c): 100%;

(b) from 1 July 2017 to 30 June 2018, pursuant to cl 29.4(c): 95%;

(c) from 1 July 2018 to 30 June 2019, initially pursuant to cl 29.4(c), later pursuant to cl 29.4(e): 80%;

(d) from 1 July 2019 to the cessation of her employment, pursuant to cl 29.4(e): 65%;

(2) says that, on a proper construction of these clauses, that loading applied to minimum hourly rates of pay under the Award;

(3) repeats paragraphs 4(2)(b) and (c) above and (3) and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the loading referred to in these clauses was absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and

(4) otherwise denies paragraph 23.

24. It denies paragraph 24 and repeats paragraphs 4, 4A, 5, 7 and 23 above.

25. It denies paragraph 25 and repeats paragraphs 4, 4A, 5, 7 and 23 above.

26. As to paragraph 26, it:

(1) admits that during the period in which the Applicant was employed by the Respondent, there were clauses of the Award that provided that:

(a) work on a public holiday must be compensated by payment of the additional percentage loading set out below for ordinary hours worked by a full-time employee:

(i) from the commencement of her employment to 30 June 2017, pursuant to cl 29.4(d)(i): 150%;

(ii) from 1 July 2017 to the cessation of her employment, initially pursuant to cl 29.4(d)(i), then pursuant to cl 29.4(f)(i): 125%;

(b) alternatively, initially pursuant to cl 29.4(d)(ii), then pursuant to cl 29.4(f)(ii), by mutual agreement of the employee and the employer, the employee may be compensated for a particular public holiday by either:

(i) an equivalent day or equivalent time off instead without loss of pay, to be taken within four weeks of the public holiday occurring; or

(ii) an additional day or equivalent time as annual leave;

(1A) says that, by reason of the matters pleaded at paragraph 26(1)(b) above, in circumstances where there was an agreement between the Applicant and the Respondent for the Applicant to be compensated for working on a particular public holiday by taking an equivalent day or equivalent time off instead without loss of pay, or taking an additional day or equivalent time as annual leave, in accordance with, initially cl 29.4(d), then cl 29.4(f), the Applicant was not entitled to the additional loading pleaded at paragraph 26(1)(a) above;

(2) says that, on a proper construction of these clauses, that loading applied to minimum hourly rates of pay under the Award;

(3) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the loading referred to in these clauses was absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and

(4) otherwise denies paragraph 26.

27. It denies paragraph 27 and repeats paragraphs 4, 4A, 5, 7 and 26 above.

28. It denies paragraph 28 and repeats paragraphs 4, 4A, 5, 7 and 26 above.

29. As to paragraph 29, it:

(1) admits that during the period in which the Applicant was employed by the Respondent:

(a) cl 29.2(a) provided that hours worked in excess of the ordinary hours of work, outside the span of hours (excluding shiftwork), or roster conditions prescribed in cll 27 and 28, are to be paid at time and a half for the first three hours and double time thereafter;

(b) initially cl 29.2(c), later cl 29.2(d) provided that the rate of overtime on a Sunday is double time, and on a public holiday is double time and a half;

(c) cl 29.3 provided that an employee and an employer may agree to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee;

(1A) says that it will refer at trial to the full terms and effect of cll 27 and 28 of the Award;

(1B) says that, by reason of the matters pleaded at paragraph 29(1)(c) above, in circumstances where there was an agreement between the Applicant and the Respondent for the Applicant to be compensated for working overtime by taking time off instead of being paid for that overtime (equivalent to the overtime payment that would have been made), in accordance with cll 29.3(a) and (b), the Applicant was not entitled to payment of overtime rates for that period of overtime worked;

(1C) says that, properly construed, authorised leave and public holidays rostered to be worked or which appeared on the Applicant's roster, but which were not in fact worked by the Applicant, did not constitute hours 'worked' for the purposes of cl 29.2(a);

(2) says that on a proper construction of cl 29.2(a) and initially cl 29.2(c), later 29.2(d), the references to time and a half, double time and double time and a half were to 1.5, 2.0 and 2.5 times the minimum hourly rates of pay under the Award;

(2A) says that where particular hours are paid at overtime rates as a result of a particular circumstance that triggers a requirement on the part of an employer to pay overtime to an employee, overtime is not payable again with respect to or for those same hours if a different circumstance under the Award capable of triggering overtime also applies;

(2B) says that, for the purposes of clauses 28.5 and 28.6 of the Award:

(a) a specific agreement was reached between the Respondent and the Applicant to work ordinary hours on more than 19 days in each four week cycle in circumstances where the Applicant was responsible for rostering her own shifts and rostered herself for more than 19 days in a four week cycle;

PARTICULARS

These agreements were implied by the conduct of the parties. Specifically, the Respondent giving to the Applicant the responsibility to roster her own shifts, and the Applicant's conduct in rostering her own shifts.

(b) further and in the alternative, in circumstances where the Applicant completed a roster choices document whereby she agreed by that document, or otherwise agreed in writing, to work ordinary hours on more than 19 days in a four week cycle, a specific agreement was reached between the Applicant and the Respondent to work ordinary hours on more than 19 days in each four week cycle;

PARTICULARS

These agreements were express and in writing. They were contained in the documents COL.0500.0042.0040 (dated 14 June 2016), COL.0500.0042.0039 (dated 22 August 2016), and COL.0500.0042.0038 (dated 26 January 2017).

(3) says that, by reason of, initially cl 29.2(d), later cl 29.2(f), overtime was to be calculated on a daily basis;

(4) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the payments referred to in cll 29.2(a) and initially 29.2(c), later 29.2(d), were absorbed into, and could be satisfied by, or set off

against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and

(5) otherwise denies paragraph 29.

30. It denies paragraph 30.

31. It denies paragraph 31 and repeats paragraph 4, 4A, 5, 7 and 29 above.

32. It denies paragraph 32 and repeats paragraph 4, 4A, 5, 7 and 29 above.

32A. As to paragraph 32A, it:

(1) admits that during the period in which the Applicant was employed by the Respondent:

(a) cl 31.2(a) provided that all employees will be granted a 12 hour rest period between the completion of work on one day and the commencement of work on the next day and that 'work' includes any reasonable additional hours or overtime;

(b) cl 31.2(b) provided that where an employee recommences work without having had 12 hours off work, then the employee will be paid at double the rate they would be entitled to until such time as they are released from duty for a period of 12 consecutive hours off work without loss of pay for ordinary time hours occurring during the period of such absence;

(c) cl 31.2(c) provided that by agreement between an employer and an employee, the period of 12 hours may be reduced to not less than 10 hours;

(2) says that on a proper construction of cl 31.2(b), the reference to 'double the rate' is a reference to a rate that is 2.0 times the minimum hourly rates of pay under the Award;

(3) says that whenever the Applicant worked in accordance with a roster containing a minimum of 10 hours' break between shifts, which roster was prepared by the Applicant and submitted by the Applicant to the Respondent for approval, and/or the Applicant otherwise agreed to work hours where the break between shifts was between 10 and 12 hours, an agreement in accordance with cl 31.2(c) had been reached;

PARTICULARS

These agreements were implied by the conduct of the parties. Specifically, the Respondent giving to the Applicant the responsibility to roster her own shifts and/or work hours as part of her role, and the Applicant's conduct in rostering her own shifts and working those hours and attending work.

(3A) further and in the alternative, in circumstances where the Applicant agreed to:

(i) return to work before her rostered start time on a particular day; and/or

(ii) work beyond her rostered end time on a particular day;

such that there was a break between shifts of between 10 and 12 hours, there was an agreement within the meaning of cl 31.2(c);

PARTICULARS

These agreements were implied by the conduct of the parties. The Respondent refers to the particulars in sub-paragraph (3) above.

(3B) further and in the alternative, in circumstances where an employee completed a roster choices document whereby they agreed by that document, or otherwise

agreed in writing, to have a minimum break of 10 hours between shifts, there was an agreement within the meaning of cl 31.2(c);

(4) repeats paragraph 12 above and says that any obligation to make the payments referred to in cl 31.2(b) is only enlivened in the event that an employee is directed to work in a manner that is inconsistent with cl 31.2(a) and in circumstances where an agreement in accordance with cl 31.2(c) had not been reached;

(5) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the payments referred to in cl 31.2(b), as modified by cl 31.2(c) from time to time, were absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and

(6) otherwise denies paragraph 32A.

32B. It denies paragraph 32B and repeats paragraphs 4, 4A, 5, 7 and 32A above.

32C. It denies paragraph 32C and repeats paragraphs 4, 4A, 5, 7 and 32A above.

32D. As to paragraph 32D, it:

(1) admits that during the period in which the Applicant was employed by the Respondent:

(a) cl 20.1(a) provided that an employee required to work more than one hour of overtime after the employee's ordinary time of ending work, without being given 24 hours' notice, will be either provided with a meal or paid a meal allowance and if that overtime work exceeds four hours, a further meal allowance will be paid;

(b) cl 20.1(b) provided that no meal allowance will be payable where an employee could reasonably return home for a meal within the period allowed;

(2) repeats paragraph 12 above and says that any obligation to make a payment referred to in cl 20.1(a) is only enlivened in the event that an employee is directed to work in a manner that would give rise to such an obligation under cl 20.1(a) and does not apply where an employee works overtime at their own initiative, or accepts or agrees to an offer to work overtime;

(2A) says further that an employee's ordinary time of ending work is the time that the employee customarily finishes work and not the employee's rostered finish time;

(3) says further that:

(a) whenever the Applicant set her own roster more than 24 hours before any day on which the Applicant worked more than one hour of overtime after her ordinary time of ending work and the Applicant's roster provided for the Applicant to work more than one hour of overtime after her ordinary time of ending work; or

(aa) whenever the Applicant had knowledge based on her usual pattern of work that she would likely work more than one hour of overtime after her ordinary time of ending work;

the Applicant was given 24 hours' notice of the requirement within the meaning of cl 20.1(a) of the Award; and

PARTICULARS

The notice in subparagraph 3(a) above is in writing and constituted by the Applicant's roster. The notice in subparagraph 3(aa) above is implied by the Applicant's usual pattern of work by which the Applicant would be on

notice that she would likely work more than one hour after her ordinary time of ending work.

(b) where there was any type of notice described in paragraph 32D(3) above provided to the Applicant, no obligation to pay the meal allowance to the Applicant was enlivened pursuant to cl 20.1(a) of the Award;

(4) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the payments referred to in cl 20.1(a) were absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis;

(5) says that the dollar amounts set out at sub-paragraphs 32D(3)(a)-(e) varied from time to time within the periods set out therein; and

(6) otherwise denies paragraph 32D.

32E. As to paragraph 32E, it:

(1) denies paragraph 32E and repeats paragraph 32D above; and

(2) says that the dollar amounts set out at sub-paragraphs 32E(1)-(5) varied from time to time within the periods set out therein.

32F. It denies paragraph 32F and repeats paragraphs 4, 4A, 5, 7, 32D and 32E above.

32G. It denies paragraph 32G and repeats paragraphs 4, 4A, 5, 7, 32D and 32E above.

32H. As to paragraph 32H, it:

(1) admits that during the period in which the Applicant was employed by the Respondent:

(a) cl 32.3(a) provided that during a period of annual leave an employee will receive a loading calculated on the rate of wage prescribed in clause 17 of the Award and that the annual leave loading is payable on leave accrued;

(b) cl 32.3(b)(i) provided that the loading for employees who would have worked on day work only had they not been on leave is 17.5% or the relevant weekend penalty rates, whichever is greater but not both;

(c) says that on a proper construction of cl 32.3(b)(i) the reference to a loading of '17.5% or the relevant weekend penalty rates' is a reference to the payment of a loading of 17.5% of the minimum hourly rates of pay under the Award for all ordinary hours that would have been worked but for the period of annual leave, **or** the payment of the minimum hourly rates of pay under the Award for all ordinary hours that would have been worked but for the period of annual leave and any weekend penalty rates that would have applied in the period of annual leave, whichever is greater;

(d) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the payments referred to in cl 32.3(b)(i) were absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and

(2) otherwise denies paragraph 32H.

32I. It denies paragraph 32I and repeats paragraphs 4, 4A, 5, 7 and 32H above.

32J. It denies paragraph 32J and repeats paragraphs 4, 4A, 5, 7 and 32H above.

32.JA It denies paragraph 32.JA.

32.JB As to paragraph 32.JB:

(1) as to paragraph 32.JB(1), it:

(a) admits that from time to time the Applicant placed orders for clothing items through the Respondent's intranet;

(b) says that the Applicant was provided with a certain number of Coles branded shirts by the Respondent at the Respondent's cost (the **Allocated Uniform Items**), which items could be ordered through the Respondent's intranet, and that the Applicant was also permitted to purchase additional clothing items through the Respondent's intranet at her discretion;

(c) refers to and repeats paragraph 32.JA, above; and

(d) otherwise denies paragraph 32.JB(1);

(2) as to paragraph 32.JB(2), it:

(a) says that the Respondent deducted from the Applicant's pay the cost of certain clothing items ordered by the Applicant through the Respondent's intranet from time to time in circumstances where those items ordered by the Applicant were discretionary items and were in addition to the Allocated Uniform Items provided to the Applicant by the Respondent; and

(b) otherwise denies paragraph 32.JB(2);

(3) as to paragraph 32.JB(3), it:

(a) admits that any clothing items ordered by the Applicant in accordance with paragraph 32.JB(1), above, were delivered to the Applicant;

(b) refers to and repeats paragraph 32.JA, above; and

(c) otherwise denies paragraph 32.JB(3);

(4) as to paragraph 32.JB(4), it:

(a) refers to and repeats paragraph 32.JA, above; and

(b) otherwise denies paragraph 32.JB(4).

32.JC As to paragraph 32.JC, it:

(1) says that during the period in which the Applicant was employed by the Respondent:

(a) cl 20.2(a) provided, inter alia, that where an employer requires an employee to wear any special clothing such as a uniform, then the employer will reimburse the employee for any cost of purchasing such special clothing and the cost of replacement items when the replacement is due to normal wear and tear;

(b) cl 20.2(b) provided that where an employee is required to launder any special uniform, dress or other clothing, the employee will be paid an allowance of $6.25 per week for a full-time employee and $1.25 per shift for a part-time or casual employee;

(2) says that:

(a) on its proper construction, the phrases ‘special clothing’ and ‘special uniform’ as used at cl 20.2 of the Award refer to items such as branded clothing items, and do not include non-branded items, general dress standards or clothing that it could reasonably be expected that an employee would otherwise own;

(b) cl 20.2(a) states that the reimbursement obligation referred to in cl 20.2(a) does not apply where such special clothing is supplied by, or paid for by, the employer;

(3) says further that:

(a) with respect to paragraph 32.JC(1), it:

(i) refers to and repeats paragraph 32.JA, above; and

(ii) repeats paragraphs 4(2)(b) and (c) and (3) above and says that, pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the payments referred to in cl 20.2(b) were absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis; and

(b) with respect to paragraph 32.JC(2), it:

(i) refers to and repeats paragraphs 32.JB(1)(b), 32.JB(2) and 32.JC(2)(a) and (b) above and says that by reason of the text of cl 20.2(a) of the Award, cl 20.2(a) did not apply and therefore no reimbursement was required; and

(ii) further and in the alternative, repeats paragraphs 4(2)(b) and (c) and (3) above and says that pursuant to cl 2.2 of the Award and/or the terms of the Applicant's employment agreement pleaded in those paragraphs, the payments referred to in cl 20.2(a) were absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of the Applicant's TFC, on an annual basis;

(4) otherwise denies paragraph 32.JC.

32.JD As to paragraph 32.JD, it:

(1) says that it did not make a separate payment of money to the Applicant by way of reimbursement of the cost of purchasing clothing items;

(2) refers to and repeats paragraphs 4, 4A, 5, 7, and 32.JC above and says that it was under no obligation to pay the Applicant, or reimburse the Applicant for, any sum pursuant to cl 20.2; and

(3) otherwise denies paragraph 32.JD.

32.JE It denies paragraph 32.JE and repeats paragraphs 4, 4A, 5, 7, 32.JC and 32.JD above.

32K. As to paragraph 32K, it:

(1) says that during the period in which the Applicant was employed by the Respondent:

(a) initially cl 23, later cl 23.1, provided that wages will be paid weekly or fortnightly according to the actual hours worked each week or fortnight, or may be averaged over a period of a fortnight;

(b) initially cl 23, later cl 23.3, provided that an enterprise which prior to 1 January 2010, paid particular classifications of its employees on a monthly pay cycle may continue to pay these particular classifications of employees on a monthly pay cycle (unless the employee was classified at level 3 or below); and

(2) says further that on its proper construction, initially cl 23, later 23.1, of the Award imposes an obligation on an employer with respect to the timing of the payment of wages only, and is not contravened by reason that any amount paid to an employee (including the Applicant) is incorrect, provided it is paid at the times provided by initially cl 23, later 23.1 of the Award;

(2A) in the alternative, if cl 23.1 does impose an obligation in respect of the amount of wages paid to an employee (which is denied):

(a) cl 23.1 does not apply in respect of an employee who is paid monthly, rather it applies only to those who are paid weekly or fortnightly; and

(b) cl 23.3 alone applies in respect of an employee who is paid monthly;

(2B) on a proper construction, cl 23.3 does not itself impose any obligation on an employer to pay an employee according to the actual hours worked by that employee each week or fortnight;

(3) repeats paragraph 4(2)(b) and (c) and (3) above and otherwise denies paragraph 32K.

32L. It denies paragraph 32L, repeats paragraphs 4, 4A, 5, 7, 15, 21, 24, 27, 31, 32B, 32F 32I, 32.JD and 32K above and says that by reason of the fact that the Applicant was paid monthly, clause 23.1 did not apply to her.

33. As to paragraph 33, it:

(1) admits that:

(a) s 535(1) of the FW Act required it to make, and keep for 7 years, employee records of the kind prescribed by the regulations in relation to each of its employees;

(b) reg 3.34 of the *Fair Work Regulations 2009* (Cth) prescribed that, if a penalty rate or loading (however described) must be paid for overtime hours actually worked by an employee, a kind of employee record that it must make and keep is a record that specifies:

(i) the number of overtime hours worked by the employee during each day; or

(ii) when the employee started and ceased working overtime hours; and

(2) says that on its proper construction, the record keeping obligations in reg 3.34 apply to circumstances where distinct and separate payments of overtime are made to the employee and do not apply in circumstances where an employee is paid an all-inclusive salary;

(3) further and in the alternative, on its proper construction, reg 3.34 only applies in circumstances where a penalty rate or loading "must be paid" for overtime hours actually worked by an employee paid an all-inclusive salary; and

(4) by reason of the Applicant's employment agreement, any penalty rate or loading for overtime hours actually worked were not payments that must have been paid by the Respondent to the Applicant for the purposes of reg 3.34;

(4A) in the alternative, if reg 3.34 does apply to the Applicant (which is denied), on a proper construction of reg 3.34, the Respondent has satisfied its obligations in circumstances where it has kept a record of the schedule data and clocking data for any hours worked by the Applicant (the satisfaction of reg 3.34 being in relation to those hours where there are roster and clocking data) as pleaded at paragraph 34(2) below; and

(5) otherwise denies paragraph 33.

34. As to paragraph 34, it says that:

(1) by reason of the matters pleaded in paragraphs 17(4) and 29(4) above, no penalty rate or loading was required to be paid to the Applicant for overtime hours;

(2) further, the Respondent made and kept:

(a) the Schedule Data; and

(b) the data extracted from the Respondent's Kronos system produced by the Respondent's solicitors to the Applicant's solicitors on 31 August 2020 (**Kronos Data**); and

(3) otherwise denies paragraph 34.

34A. As to paragraph 34A, it:

(1) admits that from 15 September 2017, s 535(4) of the FW Act provided that an employer must not make or keep a record for the purposes of s 535 that the employer knows is false or misleading; and

(2) otherwise denies paragraph 34A.

34B. As to paragraph 34B, it:

(1) admits that:

(a) from approximately October 2017, the Respondent directed department managers who were paid an annual salary, which included the Applicant, to 'clock in' and 'clock out' in the Respondent's Kronos system at the start and finish of each shift worked and that clocking on and clocking off for each shift was compulsory (the **Clocking Direction**);

(b) in order to clock in and clock out, the Applicant was required to enter an 8-digit code, which was provided to the Applicant by the OIC at the Roselands Supermarket for this purpose;

(2) says further that in or around October 2017 the Clocking Direction was communicated in team talks to department managers who were paid an annual salary, which included the Applicant, by store managers, store support managers or other store leadership;

(3) otherwise denies paragraph 34B.

34C. As to paragraph 34C, it:

(1) admits that the OIC at the Roselands Supermarket supplied the Applicant with a unique 8-digit code that was to be used to record in the Respondent's Kronos system the days and hours that the Applicant worked in accordance with the Clocking Direction;

(2) says that this code was supplied to the Applicant before November 2017; and

(3) otherwise denies paragraph 34C.

34D. As to paragraph 34D, it:

(1) admits that between November 2017 and February 2018 Mr Con Liveris was employed by the Respondent in a position with the title Store Manager at the Roselands Supermarket;

(2) admits that between November 2017 to February 2018 the Applicant was employed by the Respondent in a position with the title Customer Service Manager at the Roselands Supermarket; and

(3) otherwise denies paragraph 34D.

34E. As to paragraph 34E, it:

(1) says that meetings of persons employed in managerial roles at the Roselands Supermarket occurred frequently throughout the period the Applicant held the position of Customer Service Manager at the Roselands Supermarket; and

(2) by reason of the above, admits paragraph 34E.

34F. It denies paragraph 34F.

34G. As to paragraph 34G, it:

(1) admits that the Applicant clocked on and off for her shifts using the Kronos system from time to time;

(2) repeats paragraph 34F; and

(3) otherwise denies paragraph 34G.

34H. It denies paragraph 34H and repeats paragraphs 34F and 34G above.

34I. It denies paragraph 34I and repeats paragraphs 34F, 34G and 34H above.

35. As to paragraph 35, it:

(1) admits that:

(a) s 45 of the FW Act prohibited a person from contravening a term of a modern award;

(b) by operation of s 539, ss 45, 535(1) and 535(4) were civil remedy provisions for the purposes of ss 545 and 546;

(2) otherwise denies paragraph 35; and

(3) says that if, which is denied, it contravened ss 45, 535(1) or 535(4) as alleged:

(a) it intends to rely on ss 556 and 557; and

(b) it is entitled to set off the cash salary component of the Applicant's TFC against any liability it has to the Applicant under the FW Act;

(4) says further and in the alternative that if the Court concludes that any amount of the cash salary component of the Applicant's TFC that is over and above the minimum rate of pay in the Award (the **over award amount**) cannot at law be

set-off against, satisfied by or absorbed into any amount payable to the Applicant under the Award, then:

(a) the Court ought in any event exercise its discretion pursuant to s 545(2)(b) of the FW Act to reduce any compensation otherwise payable to the Applicant by the over award amount; and

(b) it would not be appropriate, within the meaning of s 545 of the FW Act, to make an order for compensation in respect of the Applicant in circumstances where such an order failed to accord with the compensatory and remedial purposes of s 545 by failing to take into account the over award amount or by failing to take into account the total annual salary paid to the Applicant pursuant to the terms of the employment agreement between the parties.

35A. It denies paragraph 35A and repeats paragraphs 34F, 34G, 34H and 34I above.

35B. It denies paragraph 35B and repeats paragraphs 34F, 34G, 34H, 34I and 35A above.

35C. As to paragraph 35C, it:

(1) says that s 557C of the FW Act applied only on and from 15 September 2017;

(2) says further that s 557C of the FW Act provides that where an applicant has made an allegation in relation to a matter and the requirements in sub-paragraphs (b) to (c) of that section are met, an employer has the burden of disproving the allegation(s) in relation to that matter only;

(2A) says further that where an allegation relates to an overtime payment in respect of particular hours worked by an employee (an **Overtime Allegation**), and there are schedule and clocking records in respect of those hours or the shift in which those hours were worked (thereby satisfying reg 3.34), s 557C(1) does not apply to that Overtime Allegation;

PARTICULARS

The respondent refers to paragraph 33(4A) above

(2B) refers to and repeats paragraphs 34B(1)-(2) above; and

(2C) says further that if, in relation to hours worked that are the subject of an Overtime Allegation, the Applicant failed to follow the Clocking Direction:

(a) the Respondent has a reasonable excuse within the meaning of s 557C(2) as to why there was a failure to comply with s 557C(1)(b); and

(b) therefore, s 557C(1) does not apply to that Overtime Allegation; and

(3) otherwise denies paragraph 35C.

36. As to paragraph 36, it:

(1) says that paragraphs 36, 37 and 38 are liable to be struck out as evasive or ambiguous, as likely to cause prejudice or embarrassment in the proceeding, and as failing to disclose a reasonable cause of action;

(2) says that:

(a) whether a Group Member was entitled to a payment under any of the clauses of the Award referred to in paragraphs 14, 17, 20, 23, 26, 29, 32A, 32D, 32E, 32H, 32.JC above;

(b) whether the Respondent contravened the clause of the Award referred to in paragraph 32K above in respect of a Group Member;

(c) whether the Respondent contravened ss 45, 535(1) or 535(4) of the FW Act in respect of a Group Member;

(d) whether the Respondent is entitled to set off the cash salary component of any Group Member's TFC against any liability it has to that Group Member under the FW Act; or

(e) whether the Court should exercise its discretion pursuant to s 545(2)(b) to reduce any compensation otherwise payable by any over award amount, and whether it would be appropriate, within the meaning of s 545, to make an order for compensation without taking into account any over award amount or the total annual salary paid to a Group Member,

is an individual issue, not a common issue, which cannot be addressed until that Group Member's claims have been properly pleaded and particularised;

(3) under cover of that objection, denies paragraph 36; and

(4) says further:

(a) during the Relevant Period and the Litigation Period, to the extent that a Group Member had a written contract of employment with the Respondent, all standard contracts of employment for Group Members while in Salaried Manager Positions (as that term is used in the ~~3F~~5ASOC) included terms:

(i) that Group Members received a total fixed compensation package, expressed as an agreed annual salary (**Annual Salary**), stated to be inclusive of a cash salary, superannuation and, in some instances, vehicle(s);

(ii) the Annual Salary was expressed to be paid in full satisfaction of all monetary benefits which might otherwise be payable under the Award, including minimum wages, overtime, penalties, loadings and allowances; and

(iii) the Annual Salary was expressed to be paid in full satisfaction of entitlements for all hours worked;

(b) alternatively, says that to the extent that a Group Member did not have a written contract of employment; that Group Member had an implied or inferred contract of employment with the Respondent (**Implied Contracts**). The contract was implied by or inferred from the conduct of the relevant Group Member and the Respondent. Specifically, the conduct of the Group Member in commencing and continuing to work in a Salaried Manager Position at the Respondent's store/s and the conduct of the Respondent in commencing and continuing to pay the Group Member an annual salary on a monthly basis;

(c) the Implied Contracts included terms to the effect that:

(i) those employees would be paid an Annual Salary, which was inclusive of a cash salary and superannuation, and which would be paid on a monthly basis;

(ii) the Annual Salary was paid in full satisfaction of all monetary benefits which might otherwise be payable under the Award or FW Act, including minimum wages, overtime, penalties, loadings and allowances; and

(iii) the Annual Salary was paid in full satisfaction of entitlements for all hours worked;

(d) the terms described in subparagraph (c) above were inferred from the conduct of the Group Members in commencing and continuing to work in Salaried Manager Positions at the Respondent's store/s and the conduct of the Respondent in commencing and continuing to pay those employees an annual salary on a monthly basis; alternatively, the terms are to be implied in fact to give business efficacy to the contracts;

(e) there was a coincidence of purpose and/or a close correlation between the nature of the employee's entitlements arising under the Award or the FW Act, and the monthly payments of annual salary under the contracts;

(f) by reason of the matters set out at subparagraphs (a) to (e) above, payments provided for in the Award were able to be absorbed into, and could be satisfied by, or set off against, the payment of the cash salary component of a Group Member's Annual Salary, on an annual basis.

37. As to paragraph 37, it:

(1) repeats paragraphs 32K, 32L and 36 above; and

(2) under cover of that objection, denies paragraph 37.

38. As to paragraph 38, it:

(1) repeats paragraphs 32K, 32L, 36 and 37 above; and

(2) under cover of that objection, denies paragraph 38.

39. It denies paragraph 39 and repeats paragraphs 34, 34F to 34I, 35A and 36 above.

39A. It says further that, to the extent that a person who was a Group Member before the filing of the Further Amended Originating Application (**FAOA**) and FASOC on 23 December 2020 applies for an order under Part 4-1 Division 2 of the FW Act against the Respondent in relation to an alleged contravention which occurred, or in relation to an alleged underpayment which relates to a period that is, more than 6 years before the filing of the Amended Originating Application and ASOC on 24 July 2020, such a claim is statute barred by operation of ss 544 and 545(5).

39B. It says further that, to the extent that a person who became a Group Member upon the filing of the FAOA and FASOC on 23 December 2020 applies for an order under Part 4-1 Division 2 of the FW Act against the Respondent in relation to an alleged contravention which occurred, or in relation to an alleged underpayment which relates to a period that is, more than 6 years before the filing of the FAOA and FASOC on 23 December 2020, such a claim is statute barred by operation of ss 544 and 545(5).

39C. It says further that, to the extent that a person who became a Group Member upon the filing of the 2FAOA and 2FASOC on 6 December 2021 or the 3FAOA and 3FASOC on 16 March 2022 applies for an order under Part 4-1 Division 2 of the FW Act against the Respondent in relation to an alleged contravention which occurred, or in relation to an alleged underpayment which relates to a period that is, more than 6 years before the filing of the 2FAOA and 2FASOC on 6 December 2021 or the 3FAOA and 3FASOC on 16 March 2022 (as the case may be), such a claim is statute barred by operation of ss 544 and 545(5).

Date: ~~20 April 2023~~ 5 May 2026

Signed by Damian Grave
Herbert Smith Freehills Kramer
Lawyer for the Respondent

This amended pleading was prepared by Jonathan Kirkwood SC and James Page of counsel

Certificate of lawyer

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

(a) each allegation in the pleading; and

(b) each denial in the pleading; and

(c) each non admission in the pleading.

Date: ~~20 April 2023~~ 5 May 2026

Signed by Damian Grave
Herbert Smith Freehills Kramer
Lawyer for the Respondent