



Australian Government

Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

and

DEGANI @ BENTONS PTY LTD

ABN: 14141636428 / ACN: 141636428

and

Kerry Marie Rowson

ENFORCEABLE UNDERTAKING

Parties

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) pursuant to section 715 of the *Fair Work Act 2009* (Cth) (**FW Act**) by:
 - (a) Degani@Bentons Pty Ltd trading as Degani Bentons Square ABN 14141636428 (**the Company**), 147 Salmon Street Hastings Vic 3915; and
 - (b) Kerry Marie Rowson (**Ms Rowson**), a Director of the Company.

Commencement of Enforceable Undertaking

2. This Enforceable Undertaking comes into effect when:
 - (a) the Enforceable Undertaking is executed by the Company and Ms Rowson; and
 - (b) the FWO accepts the Undertaking so executed.

Background

3. The Company operates a Degani branded café under a licensee arrangement with Degani Australia Pty Ltd.
4. The Company commenced operations on 22 January 2010 and operates a café within the restaurant industry.
5. The Company is covered by the *Restaurant Industry Award 2010* (**the Award**) in respect of its employees who perform duties in accordance with the classifications set out in Schedule B of the Award.
6. Ms Rowson admits and agrees that:
 - (a) She has been Director of the Company since 1 March 2013;
 - (b) Was ultimately responsible for the overall direction, management and supervision of the operations at the Company in relation to engaging staff, setting and adjusting pay rates and determining wages and conditions of employment;
 - (c) By reason of the matters set out in subparagraphs (a) and (b) was responsible in a practical sense for ensuring the Company complied with its legal obligations.
7. The Company engaged a workplace relations advice service in September 2015. This service provided the Company with “annualised loaded rates” (loaded rates) calculated so as to compensate employees for penalty rates applicable for weekend work for permanent employees. These loaded rates were intended for use only when the employees worked a specific shift pattern. The Company was also provided with rates and penalties from the Award for casual and full-time employees not paid loaded rates.
8. Degani Bentons Square was audited by the FWO as part of a compliance activity that reviewed a number of Degani stores. The FWO issued the Company with a Notice to Produce Records or Documents requiring the Company to produce employee records for the period 12 September 2016 – 13 November 2016 (**Audit Period**).

9. During the Audit Period, the Company employed 20 employees including 6 junior employees.
10. The FWO investigation found that the permanent employees were working hours outside the shift pattern used to calculate their loaded rate. This resulted in loaded rates being insufficient to compensate these employees for all penalty and overtime shifts worked.
11. The FWO investigation found that casual employees were not receiving sufficient casual loading and penalty rates.
12. As a result of the audit the FWO has determined, and Ms Rowson admits, that during the Audit Period, the Company has contravened:
 - (a) Section 45 of the FW Act, by failing to comply with the following terms of the Award;
 - (i) Clause 12.3 and 12.4 by failing to agree on a regular pattern of work for part-time employees and failing to record any variation to the hours of work in writing;
 - (ii) Clause 12.5 by failing to roster a part-time employee for a minimum of three consecutive hours;
 - (iii) Clause 13.1 by failing to pay casual employees a casual loading of 25%;
 - (iv) Clause 32.1 by failing to provide employees, including casual employees, working five or more hours in a day with an unpaid meal break of no less than 30 minutes;
 - (v) Clause 33.2(a), by failing to pay Monday to Friday overtime rates;
 - (vi) Clause 34.1 by failing to pay Saturday, Sunday and public holiday penalty rates;
 - (vii) Clause 34.2(a)(ii) by failing to pay the additional payment for work done between midnight and 7:00 am on Monday to Friday; and
 - (viii) Clause 35.2(b) by failing to pay annual leave loading.
 - (b) Section 44 of the FW Act which provides that an employer must not contravene a term of the National Employment Standards (**NES**). The contraventions of the NES determined are:
 - (i) Section 116 of the FW Act, by failing to pay an employee for absence on a public holiday.
13. The underpayment arising as a result of the contraventions during the Audit Period totals \$9,370.75 gross to 15 employees.

Enforceable Undertaking

14. Upon the execution of this Undertaking and for the purposes of section 715 of the FW Act, the Company and Ms Rowson undertake the following:

13.1 Rectify underpayments

- (a) In accordance with the payment plan in Attachment D, rectify the contraventions as identified in paragraph 12 by paying the 15 employees \$9,370.75 gross as detailed in Attachment A and provide evidence to the FWO that the payments were made by each date.

13.2 FWO My Account registration

- (a) Within 14 days of the execution of this undertaking:
- (i) Register with the FWO My Account Portal at www.fairwork.gov.au/register and fully complete the My Account Profile, including information about the business and award coverage, through this portal;
 - (ii) Using the FWO Pay Calculator, calculate relevant minimum pay rates (and penalty rates where necessary) and save these calculations to your My Account; and
 - (iii) Provide to the FWO the 'My Account' Customer Registration Number (CRN).

13.3 Apology

- (a) Send a letter of apology (**Apology Letter**) to the employees in the form of Attachment C to this Undertaking and provide copies to the FWO within 14 days of the execution of this Undertaking.

13.4 Future workplace relations compliance

- (a) Ensure that the Company complies at all times and in all respects with the FW Act, the *Fair Work Regulations 2009* (Cth) and the Award;
- (b) Provide the FWO, within 60 days of the date of execution of this Undertaking, details of systems and processes already in place or to be implemented to comply with paragraph (a) above. Without limitation, such systems and processes relating to:
- (i) Ensuring each employee is correctly employed under the categories of full-time, part-time or casual and informing each employee of their status at the time of their engagement;
 - (ii) Ensuring each employee is classified correctly in accordance with Schedule B of the Award;
 - (iii) Ensuring employees receive the correct minimum rates of pay and entitlements, such as penalty rates and overtime rates;
 - (iv) Keeping accurate and complete records to ensure employees receive their correct wages and entitlements;
 - (v) Ensuring that all records relating to the starting and finishing times of employees to whom this clause applies are kept;
 - (vi) Ensuring that part-time agreements are made for part-time employees, as per clauses 12.3 and 12.4 of the Award.
 - (vii) Ensure copies of the Award and the NES are available to all employees to whom they apply in accordance with clause 5 of the Award. They need to be available either on a noticeboard which is conveniently located at or near the workplace or through electronic means, whichever makes them more accessible.

13.5 FWO Online Training

- (a) Within 30 days of execution of this Undertaking ensure that all persons responsible for management, payroll and human resources complete all education courses designed for employers available on the FWO online learning centre via <http://www.fairwork.gov.au/how-we-will-help/online-training> and provide certificates of

completion to the FWO.

13.6 Audit Activity

- (a) Cause to have performed by an accounting professional (for example a Certified Practising Accountant) or an employment law specialist, at the Company's expense, audits of the Company's compliance with all Commonwealth workplace laws and instruments (**Audits**), including but not limited to the following clauses and sections of the Award and FW Act:
- (i) Clause 12.3 and 12.4 part-time agreements and variation to the hours of work are in writing;
 - (ii) Clause 12.5 rostering a part-time employee for a minimum of three consecutive hours;
 - (iii) Clause 13.1 casual loading;
 - (iv) Clause 32.1 unpaid meal breaks;
 - (v) Clause 33.2(a), Monday to Friday overtime rates;
 - (vi) Clause 34.1 Saturday, Sunday and public holiday penalty rates;
 - (vii) Clause 34.2(a)(ii) additional payment for work done between midnight and 7:00 am on Monday to Friday;
 - (viii) Clause 35.2(b) annual leave loading; and
 - (ix) Clause 38.2 additional arrangements for full-time employees which prescribes that a full-time employee whose rostered day off falls on a public holiday must:
 - a. be paid an extra day's pay;
 - b. be provided with an alternative day off within 28 days; or
 - c. receive an additional day's annual leave.
- (b) The Audits will include the pay and conditions of all employees including a reconciliation of an employee engaged under an annualised salary arrangement each year; and
- (c) 21 days prior to the Audits due date/s, as specified below, the Company will provide for the FWO's approval, details of the methodology to be used to conduct the Audit and will ensure that the following requirements are met:
- (i) Audit 1 is to be finalised by 20 December 2017 and is to include:
 - a. An audit of six (6) full pay periods between 1 December 2016 and 30 November 2017. The pay periods must include at least one public holiday and to include pay periods prior to 1 July 2017 and pay periods after 1 July 2017 in respect of pay rates, conditions, pay slips and record keeping in relation to all employees;
 - b. Audit 1 is to be finalised and a report on the outcomes of the audit is to be provided to the FWO within 28 days of the finalisation date 20 December 2017. The report must include details of the Company's compliance or non-compliance with the clauses as listed in clause a) (i) – (xi).
 - (ii) Audit 2 is to be finalised by 20 December 2018 and is to include:

- a. An audit of six (6) full pay periods between 1 December 2017 and 30 November 2018. The pay periods must include at least one public holiday and include pay periods prior to 1 July 2018 and pay periods after 1 July 2018 in respect of pay rates, conditions, pay slips and record keeping in relation to all employees.
 - b. Audit 2 is to be finalised and a report on the outcomes of the audit is to be provided to the FWO within 28 days of the finalisation date 20 December 2018. The report must include details of the Company's compliance or non-compliance with the clauses as listed in clause a) (i) – (xi).
- (d) Without limiting paragraph (a) above, ensure that the Audits examine the Company's compliance with any wage rate, penalty or allowance increases arising from the Fair Work Commission's Annual Wage Reviews;
- (e) In the event the Audits disclose contraventions of any applicable Commonwealth workplace law and/or instruments, rectify all such contraventions within 14 days of each of the finalisation dates specified in subclause (i) and (ii) above, including rectification of any and all underpayments to employees and provide evidence of rectification to the FWO;
- (f) If requested, provide the FWO with all records and documents used to conduct the audit, including any working documents, within 7 days of such a request;
- (g) If any employees identified as having underpayments owing to them cannot be located within 60 days of each of the finalisation dates specified in subclause (i) and (ii) above, the Company will make application to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act to pay money into the Commonwealth Revenue Fund. The Company will complete the required documents supplied by the FWO.

13.7 *Employee education*

- (a) The Company will:
- (i) Issue information packs containing current versions of the FWO fact sheets listed below and Fair Work Information Statement to all existing employees and new employees on commencement with the Company:
 - a. Fact sheet "About the Fair Work Ombudsman";
 - b. Fact sheet "Employer obligations in relation to employee records and pay slips";
 - c. Fact sheet "Fair Work Information Statement".
 - (ii) Provide to the FWO copies of the Acknowledgement of Receipt – FWO Fact Sheets and Fair Work Information Statement (Attachment E) within 30 days of the execution of the Undertaking.
 - (iii) Ensure the information pack outlined in paragraph (i) above is provided to new employees within 30 days of them commencing employment with the Company. The packs should be provided to all new employees who commence employment within a period of two years from the date of execution of this Undertaking.
 - (iv) Provide the FWO copies of the Acknowledgement of Receipt – FWO Fact Sheets and Fair Work Information Statement (Attachment E) signed by new employees to the FWO every 6 months.

13.8 *Matters notified to the FWO*

- (a) Where the FWO receives a request for assistance regarding non-compliance with the Award, the Company and its officers undertake to fully co-operate with the FWO to ensure compliance. This includes:
- (i) Providing all requested employment records and other documentation to the FWO relevant to the request for assistance;
 - (i) Participating fully in any subsequent requests for information relevant to the request for assistance, including participation in any formal records of interview; and
 - (ii) Co-operation in FWO's processes utilised to resolve the request for assistance.

13.9 *Workplace Notice*

- (a) Within 30 days of the execution of this Undertaking, cause to be displayed within the workplace controlled by the Company a notice in the form of Attachment B to this Undertaking (Workplace Notice) and provide photographic evidence of its display and the location of the notice in the workplace:
- (i) Ensure that the Workplace Notice is printed in at least A3 size and is clearly displayed:
 - a. In a location to which all employees who work at Degani Bentons Square have access;
 - b. In a manner which is reasonably capable of drawing attention of all employees to the Workplace Notice (for example, by placement on a staff noticeboard;
 - c. For a period of 28 continuous days.
 - (ii) At the end of the period of 28 days provide confirmation to the FWO that the Workplace Notice has been continuously displayed for the required period.

13.10 *Record Keeping*

- (a) Within 30 days provide to the FWO a copy of time and wage records and payslips for one employee for the first full pay period following the execution of this Undertaking. Such records are to comply with Commonwealth workplace laws.

13.11 *Access to the Award and NES*

- (a) The Company will:
- (i) Ensure that copies of the Award and the NES are available to all employees to whom they apply in accordance with Clause 5 of the Award. These will be made available either:
 - a. On a noticeboard which is conveniently located at or near the workplace;
or
 - b. Through electronic means.

No inconsistent statements

15. The Company and Ms Rowson:
- (a) must not; and
 - (b) must ensure that each of its officers, employees or agents, do not, Make any statement, orally or in writing or otherwise imply anything that is inconsistent with admission or acknowledgements contained in this Undertaking.

Acknowledgements

16. The Company and Ms Rowson acknowledge that:
- (a) The FWO may;
 - (i) make this Undertaking (and any of the Attachments hereto) available for public inspection, including by posting it on the FWO internet site at www.fairwork.gov.au;
 - (ii) release a copy of this Undertaking (and any of the Attachments hereto) pursuant to any relevant request under the Freedom of Information Act 1982 (Cth);
 - (iii) issue a media release in relation to this Undertaking;
 - (iv) from time to time, publicly refer to the Undertaking (and any of the Attachments hereto) and its terms; and
 - (v) rely upon the admissions made by the Company set out in paragraph 6 above in respect of decision making concerning any future non-compliance with the Company's workplace relations obligations.
 - (b) Consistent with the Note to section 715(4) of the FW Act, this Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct set out herein;
 - (c) Consistent with section 715(3) of the FW Act, the Company and Ms Rowson may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
 - (d) If the Company contravenes any of the terms of this Enforceable Undertaking:
 - (i) The FWO may apply to any of the Courts set out in section 715(6) of the FW Act, for orders under section 715(7) of the FW Act; and
 - (ii) This Enforceable Undertaking may be provided to the Court as evidence of the admissions made by Ms Rowson in paragraphs 6 above, and also in respect of the question of costs.

Executed as an undertaking

EXECUTED by Degani@Bentons Pty Ltd in accordance with section 127(1) of the Corporations Act 2001:

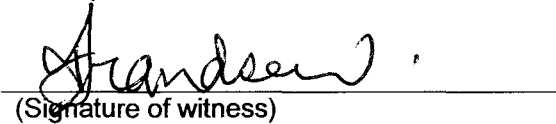

(Signature of director)

Kerry Marie Rowson

(Name of director)

8 / 11 / 17
(Date)

in the presence of:


(Signature of witness)


Peter J. Frandsen
(Name of witness)

EXECUTED by Kerry Marie Rowson


Signature of Kerry Marie Rowson

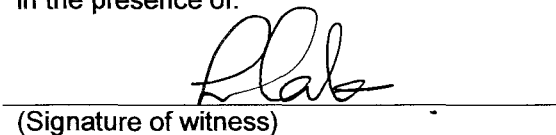
in the presence of:

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


Deputy Fair Work Ombudsman Operations

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:


(Signature of witness)

(Signature of director/company secretary)

(Name of director/company secretary)

(Date)

in the presence of:

(Signature of witness)

(Name of witness)

8 / 11 / 17
(Date)

15 / 11 / 17
(Date)

LOUISE CATO
(Name of witness)

Attachment A – Affected Employees

Employee Name	Classification	Underpayment
██████████	Food & beverage attendant grade 2	\$1318.43
██████████	Food & beverage attendant grade 2	\$1023.09
██████████	Food & beverage attendant grade 2	\$1207.92
██████████	Food & beverage attendant grade 2	\$867.66
██████████	Food & beverage attendant grade 2	\$1046.15
██████████	Food & beverage attendant grade 2	\$471.22
██████████	Cook grade 5	\$121.14
██████████	Food & beverage attendant grade 2	\$149.28
██████████	Food & beverage attendant grade 2	\$737.61
██████████	Food & beverage attendant grade 2	\$178.69
██████████	Food & beverage attendant grade 2	\$91.66
██████████	Food & beverage attendant grade 2	\$384.83
██████████	Food & beverage attendant grade 2	\$322.25
██████████	Food & beverage attendant grade 2	\$814.46
██████████	Cook grade 4	\$636.36
Total underpayments		\$9370.75



Attachment B –Workplace Notice

FORM WORKPLACE NOTICE

Contravention of Fair Work Act by Degani@Bentons Pty Ltd

We refer to the audit conducted by the Office of the Fair Work Ombudsman (**FWO**) which determined that Degani@Bentons Pty Ltd had contravened the *Fair Work Act 2009* and *Restaurant Industry Award 2010* by:

- Failing to pay casual loading to casual employees;
- Failing to pay Saturday, Sunday, Public holiday and Early morning penalty rates;
- Failing to pay overtime rates;
- Failing to pay part-time and full-time employees for absence on a Public holiday;
- Failing to pay annual leave loading; and
- Failing to provide employees, including casual employees, working five or more hours in a day, an unpaid meal break of no less than 30 minutes.

Degani@Bentons Pty Ltd has formally admitted to FWO that these contraventions occurred and has entered into an Enforceable Undertaking with the FWO (available at www.fairwork.gov.au) committing to a number of measures to remedy the contraventions, including by rectifying the underpayments.

Degani@Bentons Pty Ltd expresses its sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, Degani@Bentons Pty Ltd gives a commitment that such conduct will not occur again and that it will comply with all requirements of the Commonwealth workplace relations laws in the future.

Attachment C – Letter of Apology

FORM OF APOLOGY LETTER TO AFFECTED EMPLOYEES

<Date>

<Employee Name>

<Employee Address>

Dear <Employee Name>

I am writing to apologise on behalf of Kerry Rowson and Degani@Bentons Pty Ltd for non-compliance with Commonwealth Workplace relations laws. A recent audit conducted by the Office of the Fair Work Ombudsman (**FWO**) determined that Degani@Bentons Pty Ltd had contravened the *Fair Work Act 2009* and the *Restaurant Industry Award 2010* by:

- Failing to provide the correct rate of pay to employees;
- Failing to pay casual loading to casual employees;
- Failing to pay Saturday, Sunday, Public holiday and Early morning penalty rates;
- Failing to pay overtime rates;
- Failing to pay an employee for absence on a Public holiday;
- Failing to pay annual leave loading; and
- Failing to provide employees, including casual employees, working five or more hours in a day, an unpaid meal break of no less than 30 minutes.

Regrettably, the audit determined that you were affected by the above contraventions.

Degani@Bentons is taking steps to remedy the contraventions, by making back payments to affected employees of a total of \$9370.75 that you have been underpaid.

You will receive payment in two instalments in accordance with the attached payment plan. The first payment will be made on 1 December 2017 and the second will be made on 2 January 2018. You will be provided with payment advice regarding each payment.

Kerry Rowson has formally admitted to the FWO that Degani@Bentons Pty Ltd did not comply with its obligations under Commonwealth workplace relations laws and has entered into an Enforceable Undertaking with the FWO, a copy of which is available from the FWO website at www.fairwork.gov.au. As part of the Enforceable Undertaking we have committed to a number of measures to ensure future compliance with Commonwealth workplace relations laws.

Degani@Bentons Pty Ltd expresses its sincere regret and apologises to you for failing to comply with our lawful obligations.

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

Yours sincerely

Kerry Rowson

Attachment D - Payment Plan

Name	Total underpayment	1st instalment 1 December 2017	2nd instalment 2 January 2018
██████████	\$1318.43	\$659.22	\$659.22
██████████	\$1023.09	\$511.55	\$511.55
██████████	\$1207.92	\$603.93	\$603.93
██████████	\$867.66	\$433.83	\$433.83
██████████	\$1046.15	\$523.08	\$523.08
██████████	\$471.22	\$235.61	\$235.61
██████████	\$121.14	\$60.57	\$60.57
██████████	\$149.28	\$74.63	\$74.63
██████████	\$737.61	\$368.81	\$368.81
██████████	\$178.69	\$89.35	\$89.35
██████████	\$91.66	\$45.83	\$45.83
██████████	\$384.83	\$192.42	\$192.42
██████████	\$322.25	\$161.13	\$161.13
██████████	\$814.46	\$407.23	\$407.23
██████████	\$636.36	\$318.18	\$318.18
	\$9370.75	\$4685.37	\$4685.38

Attachment E – FWO Fact Sheets and FWIS acknowledgement template.

Acknowledgement of Receipt – FWO Fact Sheets and Fair Work Information Statement

I, of

agree that I received a copy of the FWO Fact Sheets **About the Fair Work Ombudsman and Employer obligations in relation to employee records and pay slips** and a copy of the **Fair Work Information Statement**.

Signed:

Date:/...../.....