



Australian Government

Fair Work

OMBUDSMAN

ENFORCEABLE UNDERTAKING

Between

The Commonwealth of Australia

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

TENKOMORI RAMEN PTY LTD (ACN 602 624 037);

and

Koji Aoki

ENFORCEABLE UNDERTAKING

PARTIES

1. This enforceable undertaking (Undertaking) is given to the Fair Work Ombudsman by:
 - (a) Tenkomori Ramen Pty Ltd (ACN 602 624 037) (**Tenkomori Ramen**); and
 - (b) Mr Koji Aoki (**Mr Aoki**)pursuant to section 715 of the *Fair Work Act 2009* (Cth) (**FW Act**).

COMMENCEMENT OF UNDERTAKING

2. This Undertaking comes into effect when:
 - (a) the Undertaking is executed by Tenkomori Ramen and Mr Aoki; and
 - (b) the FWO accepts the Undertaking so executed (as evidence by the FWO's endorsement below).
3. Upon the commencement of this Undertaking (the **Commencement Date**), Tenkomori Ramen and Mr Aoki undertake to assume the obligations set out at paragraph 16.

BACKGROUND:

4. Tenkomori Ramen operates an authentic Japanese ramen restaurant located on George Street, Sydney, in New South Wales, trading as Tenkomori Ramen House (the **Restaurant**).
5. Mr Aoki admits and agrees that, at all material times, he:
 - (a) was principally responsible for the direction and management of business operations;
 - (b) was the person who set the pay rate for the Employee;
 - (c) and by reason of the matters set out in subparagraphs (a) to (b) was responsible in a practical sense for ensuring the Company complied with its legal obligations.
6. The FWO commenced an investigation in February 2015, (the **Investigation**) after it received a Request for Assistance (**RFA**) regarding allegations of underpayments by the

Restaurant to its former employee identified in Schedule A (the **Employee**).

7. The Restaurant employed the Employee between 18 November 2014 to 1 February 2015 (the **Employment Period**).
8. During the Employment Period, the Employee's terms and conditions of employment were governed by the FW Act and the *Restaurant Industry Award 2010* (the **Modern Award**).
9. The Investigation determined that the Employee was employed on a casual basis.
10. The Employee's duties in the Restaurant included taking orders, delivering of food to the tables, clearing tables, general cleaning duties, food preparation and cooking duties. The FWO determined the Employee was classified as Level 2 in the Modern Award. The definition of a Level 2 classification in the Modern Award includes a Food and Beverage Attendant Grade 2 and Cook Grade 1 which provides for the same rate of pay (Level 2). The definition of a Food and Beverage Attendant Grade 2 and Cook Grade 1 is consistent with the duties performed by the Employee.
11. At all relevant times, the Restaurant paid the Employee a flat rate of pay for all hours worked, including evening work, weekends and public holidays.
12. The FWO has determined the Restaurant failed to pay the Employee the following entitlements applicable to an Employee of casual status:
 - (a) the required minimum rate of pay for every hour the Employee worked;
 - (b) the required shift loading for work performed on evenings;
 - (c) the required penalty rates for work performed on Saturdays, Sundays and Public Holidays; and
 - (d) the required casual loading for every hour the Employee worked.
13. The FWO determined that during the course of the Employment Period, the Restaurant and Mr Aoki underpaid the Employee an aggregate total of \$3,290.34 (gross) (**Underpayment**).

CONTRAVENTIONS

14. The FWO has determined, and Tenkomori Ramen and Mr Aoki admits, that on the basis of the factual matters outlined above, Tenkomori contravened:

(a) section 45 of the FW Act, which states a person must not contravene a term of a modern award. Those contraventions were as follows:

- Underpayment of base hourly rate (cl. 20.1);
- Underpayment of casual loading (cl.13.1);
- Underpayment of evening penalty rates (cl. 34.2 (i)); and
- Underpayment of Saturday, Sunday and Public Holiday penalty rates, (cl. 34)

15. The FWO has determined and Mr Aoki admits, that he was involved in the contraventions listed above within the meaning of section 550(a) and (c) of the FW Act.

ENFORCEABLE UNDERTAKING

16. Upon the commencement of this Undertaking and for the purposes of section 715 of the FW Act, Tenkomori Ramen and Mr Aoki (both in his role at Tenkomori Ramen and as a director of other entities where specified in the following paragraphs) undertakes the following:

Rectify the underpayments

- (a) Within 14 days of the execution of this Undertaking, rectify the contraventions identified in the Letter of Findings through payment of the total underpayment of \$3,290.34 (gross) to the Employee.
- (b) Provide proof of such payment to the FWO on the day the payment is made.

Future Workplace relations compliance

- (c) Take all reasonable steps to ensure that any entities in which Mr Aoki holds the role of Director including Tenkomori Ramen comply at all times, and in respects with applicable Commonwealth workplace laws and instruments, including but not limited to the Modern Award, FW Act and *Fair Work Regulations 2009* by developing systems and processes to promote ongoing compliance with those requirements.

(d) Provide the FWO, within 28 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 will include systems and processes relating to:

- (i) Ensuring employees receive the correct minimum rates of pay and entitlements, such as penalty rates and overtime rates;
- (ii) Issuing pay slips to employees within 1 working day of payment; and
- (iii) Keeping accurate and complete records to ensure employees receive their correct wages and entitlements

Workplace relations training

- (e) Within 90 days of the execution of this Undertaking , organise and ensure training is provided to all persons including but not limited to Mr Aoki, who have managerial responsibility for human resource, recruitment or payroll functions at Tenkomori Ramen and any other Associated Entities conducting a restaurant business (within the meaning of section 50AAA of the *Corporations Act 2001* (Cth)) (**Training**);
- (f) Ensure the Training relates to compliance with applicable Commonwealth of Australia workplace laws and instruments, including but not limited to the rights and responsibilities of employers under the FW Act and the Modern award;
- (g) Ensure the Training is conducted by an accredited workplace trainer, such person or organisation to be approved by the FWO and paid for at the expense of the Restaurant;
- (h) Provide the training materials to be used in the Training to the FWO no later than 14 days before the Training is to be conducted;
- (i) Provide evidence of attendance at the Training to the FWO within 7 days of the Training being provided (including the name and position of all attendees and the date on which the training was attended)
- (j) For a period of 18 months from the execution of this Undertaking , ensure that

training is conducted in the manner prescribed in paragraphs 16 (e) – (i) in relation to any new or existing employees or contractors who, after the commencement of this Undertaking, acquire managerial responsibilities that include human resources, recruitment or payroll functions on behalf of the Restaurant

FWO My Account Registration

- (k) Within 7 days of the execution of the execution of this undertaking, register with the FWO 'My Account' portal at www.fairwork.gov.au and have completed the profile, minimum pay rates and Award options.
 - (i) Within 14 days of the execution of the Undertaking provide to the FWO the (Tenkomori Ramen) 'My Account' registration number.
 - (ii) Within 21 days of the execution of the Undertaking, at a mutually agreed time and location, demonstrate to an FWO Fair Work Inspector via www.fairwork.gov.au 'My Account' current (*Restaurant Industry Award 2010*) minimum pay rates and relevant penalty rates ie Saturday, Sunday Shift and Public Holiday Penalty rates

Apology

- (l) Send a letter of apology (**Apology Letter**) to the Employee in the form of **Attachment B** to this undertaking within 14 days of the execution of this Undertaking
- (m) On the day of the Apology Letter being sent, provide proof to the FWO

Audit activity

- (n) Cause to have performed by an accounting professional (for example a Certified Practising Accountant) or an employment law specialist, at the Restaurant's expense, audits of its compliance with all Commonwealth workplace laws and instruments (**Audits**), relating to the pay and conditions of all employees according to the following schedule:
 - (i) an Audit of the first complete pay cycle following 1 January 2016, which is to be finalised within 28 days of the last day of the pay cycle;
- (o) Provide to the FWO, by 28 February of each Audit period, details of the

methodology used to conduct the Audit and the outcomes of the Audit;

- (p) In the event an Audit discloses contraventions of any applicable Commonwealth workplace law and/or instruments, rectify all such contraventions within 14 days of the Audit being provided to the Restaurant including rectification of any and all underpayments to employees;
- (q) Provide evidence of rectification of the contraventions to the FWO within 14 days of the Audit being provided to Restaurant.

Workplace Notice

- (r) Place a notice within the workplace (**Workplace Notice**) in the terms set out in **Attachment C**.
 - a. The notice is to be placed, and photographic evidence of its display provided to the FWO, within 28 days of the execution this Undertaking.
 - b. This notice is to be accessible to all employees and posted for a total consecutive period of at least seven (7) days.

Subsidiary Companies and Transferees

- (s) Tenkomori Ramen and Mr Aoki undertakes to take all reasonable steps to:
 - (i) Ensure that all Associated Entities of Tenkomori Ramen conducting a restaurant business (within the meaning of section 50AAA of the *Corporations Act 2001 (Cth)*) comply at all times and in all respects with applicable Commonwealth workplace laws and instruments, including but not limited to the Modern Award and the FW Act;
 - (ii) Monitor the compliance by its Associated Entities with applicable Commonwealth workplace laws and instruments and take all reasonable steps to ensure that any identified contraventions of such laws or instruments are rectified by the relevant Associated Entity;
- (t) in the event that Tenkomori Ramen sells or otherwise transfers some or all of its business to another entity (**Transferee**) (whether an Associated Entity or otherwise) within 18 months of the Commencement Date, to:
 - (i) provide a copy of this Undertaking to the Transferee prior to the sale

or transfer; and

- (ii) provide to the FWO, within 7 days of the sale or transfer of business details of the sale or transfer, including the identity of the Transferee and the business functions or operations that have been sold or transferred

NO INCONSISTENT STATEMENTS

17. Tenkomori Ramen and Mr Aoki:

- (i) must not; and
- (ii) 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 agreement.

ACKNOWLEDGEMENTS

18. Tenkomori Ramen and Mr Aoki acknowledges that:

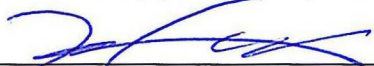
- a) This Enforceable Undertaking is given by it and accepted by the FWO pursuant to section 715 of the FW Act;
- b) The FWO may;
 - (i) make this Enforceable Undertaking (and any of the Attachments hereto) available for public inspection, including by posting it on the FWO internet site at www.fairwork.gov.au;
 - (ii) release a copy of this Enforceable 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 Enforceable Undertaking;
 - (iv) from time to time, publicly refer to the Enforceable Undertaking (and any of the Attachments hereto) and its terms; and
 - (v) rely upon the admissions made by Tenkomori Ramen and Mr Aoki set out in paragraphs 14 and 15 above in respect of decision making

concerning any future non-compliance with Tenkomori Ramen and Mr Aoki's workplace relations obligations.

- c) Consistent with the Note to section 715(4) of the FW Act, this Enforceable Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct set out herein; and
- d) If Tenkomori Ramen and Mr Aoki 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 Tenkomori Ramen and Mr Aoki in paragraphs 14 and 15 above, and also in respect of the question of costs.

Executed as an undertaking

EXECUTED by TENKOMORI RAMEN PTY LTD (ACN 602 624 037) in accordance with section 127(1) of the *Corporations Act 2001*:



(Signature of director)

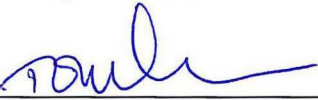
Koji Aoki

(Name of director)

21 / 10 / 2015

(Date)

in the presence of:



(Signature of witness)

Tomoko Yamamoto

(Name of witness)



(Signature of director/company secretary)

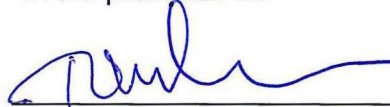
Koji Aoki

(Name of director/company secretary)

21 / 10 / 2015

(Date)

in the presence of:

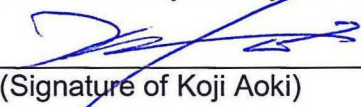


(Signature of witness)

Tomoko Yamamoto

(Name of witness)

EXECUTED by Mr Koji Aoki:




(Signature of Koji Aoki)

21 / 10 / 2015

(Date)

in the presence of:



(Signature of witness)

Tomoko Yamamoto

(Name of witness)

(Date)

(Date)

in the presence of:

(Signature of witness)

(Name of witness)

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



Steven Ronson
Executive Director
Dispute Resolution and Compliance

3 NOVEMBER 2015
(Date)

in the presence of:



(Signature of witness)

Brodie Smith
(Name of Witness)

Schedule A – Employee name

[REDACTED]

Attachment B – Letter of Apology

<Date>

<Employee Name>

<Employee Address>

Dear <Employee Name>

I am writing to apologise on behalf of Tenkomori Ramen Pty Ltd trading as Tenkomori Ramen House for non-compliance with Commonwealth Workplace relations laws. A recent investigation conducted by the Office of the Fair Work Ombudsman (**FWO**) determined that Tenkomori Ramen Pty Ltd had contravened the *Fair Work Act 2009* by:

- failing to pay the correct minimum hourly rate of pay for time worked Monday to Friday;
- failing to pay the required shift loading for work performed on evenings;
- failing to pay the required penalty rates for work performed on Saturdays, Sundays and Public Holidays; and
- failing to pay the casual loading.

Regrettably, the investigation determined that you were affected by the above contraventions. Tenkomori Ramen Pty Ltd is taking steps to remedy the contraventions, including by rectifying \$3,290.34 that you have been underpaid and changing workplace practices.

You **will/have receive/d** this payment on **[insert date]** and will be provided with payment advice regarding the payment.

Tenkomori Ramen Pty Ltd have formally admitted to the FWO that they did not comply with their obligations under Commonwealth workplace relations laws and have 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.

Tenkomori Ramen Pty Ltd express its sincere regret and apologises to you for failing to comply with our lawful obligations.

Should you have any questions, please contact Mr Koji Aoki on xxxxxxxxx.

Yours sincerely

Mr Koji Aoki

Director, Tenkomori Ramen Pty Ltd

Attachment C – Form of Workplace Notice

Contravention of *Fair Work Act 2009* and the *Restaurant Industry Award 2010* by Tenkomori Ramen Pty Ltd and Koji Aoki.

We refer to the investigation conducted by the Office of the Fair Work Ombudsman (FWO) into allegations that:

- Tenkomori Ramen Pty Ltd trading as Tenkomori Ramen House; and
- Koji Aoki

contravened the *Fair Work Act 2009* and the *Restaurant Industry Award 2010*.

The FWO has determined, Tenkomori Ramen Pty Ltd and Mr Aoki each admits, that Tenkomori Ramen Pty Ltd and Mr Aoki contravened the *Fair Work Act 2009 and the Restaurant Industry Award 2010* in the period 18 November 2014 and 1 February 2015 by:

- failing to pay the correct minimum hourly rate of pay for time worked Monday to Friday;
- failing to pay the required shift loading for work performed on evenings;
- failing to pay the required penalty rates for work performed on Saturdays, Sundays and Public Holidays; and
- failing to pay the casual loading

Tenkomori Ramen Pty Ltd and Mr Aoki 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 underpayment to the employee affected by the contraventions.

Tenkomori Ramen Pty Ltd and Mr Aoki express its sincere regret and apologises for the conduct which resulted in the contraventions. Furthermore, Tenkomori Ramen Pty Ltd and Mr Aoki each gives a commitment that such conduct will not occur again and that it will comply with all requirements of the Commonwealth workplace relations laws in the future.

If you worked for Tenkomori Ramen Pty Ltd and have queries or questions relating to your employment, please contact Mr Koji Aoki **on [insert telephone]**.

Alternatively, anyone can contact the FWO via the website at www.fairwork.gov.au or the Infoline on 13 13 94.