

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 24/08/2021 7:18:56 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: VID685/2019
File Title: RILEY GALL v DOMINO'S PIZZA ENTERPRISES LIMITED
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 25/08/2021 9:56:21 AM AEST

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

Registrar

Important Information

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

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Form 33
Rule 16.32

Amended Defence

No: VID 685 of 2019

Federal Court of Australia
District Registry: Victoria
Division: General

Riley Gall

Applicant

Domino's Pizza Enterprises Limited (ACN 010 489 326)

Respondent

Unless otherwise defined herein, capitalised terms have the meaning as defined by the second further amended statement of claim filed on 24 August 2021 (**SFASOC**). Further, and for the avoidance of doubt, in pleading to the material facts alleged in the paragraphs of the SFASOC, Domino's does not plead to (including making any admissions to) the particulars subjoined to those allegations.

In answer to the SFASOC, Domino's says the following:

A THE PARTIES

- Domino's admits paragraph 1.

Filed on behalf of (name & role of party)	Domino's Pizza Enterprises Limited, the Respondent		
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[Form approved 01/08/2011]

2. In answer to paragraph 2, Domino's:
 - 2.1. admits that the proceeding has been purportedly commenced as a representative proceeding;
 - 2.2. admits there were Delivery Drivers and In-Store Workers employed to perform work in Australia by franchisees of Domino's during the Relevant Period; and
 - 2.3. otherwise denies paragraph 2.
3. In answer to paragraph 3, Domino's admits there were more than seven Delivery Drivers and In-Store Workers employed to perform work in Australia by Franchise Operators during the Relevant Period, but otherwise denies.
4. In answer to paragraph 4, Domino's:
 - 4.1. admits sub-paragraphs 4(a) and 4(c);
 - 4.2. save to refer to and rely on the terms of its "Master Franchise Agreement" with Domino's Pizza International Franchising Inc (**DPIF**) dated 25 May 1993 and as amended from time to time (**MFA**) for their effect, including to conduct the business of Domino's Pizza in Australia, and to paragraphs 5 and 6 below, otherwise admits sub-paragraph 4(b);
 - 4.3. says further that by the terms of the MFA, DPIF granted to Domino's, as Master Franchisee:
 - 4.3.1. the exclusive right to develop and operate and to sub-licence the right to develop and operate Domino's Pizza stores in Australia (**Stores**);
 - 4.3.2. an exclusive licence to use and sub-licence the use of the "Domino's System" and the "Marks" in the operation of Stores in Australia;

- 4.3.3. with the approval of DPIF, the right to grant to “sub-franchisees” the right to open and operate any Store or to use any Mark in a form of franchise and licence as approved by DPIF; and
- 4.4. says further that the MFA:
- 4.4.1. defined the “Domino’s System” as “*a method of preparing pizza and a chain of stores known as Domino’s Pizza stores which specialize in the sale of pizza, feature carry-out and delivery services and operate with a uniform business format, specially designed equipment, recipes, methods, procedures and designs*”;
- 4.4.2. defined the “Marks” as “*certain trade and business names, trade and service marks and commercial symbols in connection with the operation of Domino’s Pizza stores*”; and
- 4.4.3. imposed an obligation on Domino’s to ensure that Domino’s and its Sub-Franchisees complied with all applicable laws, ordinances, and regulations in Australia (**MFA Compliance Obligation**).

Particulars

As to paragraph 4.3, see clauses 1.1, 2.1 and 3.1 of the MFA. As to paragraph 4.4, see Recital A, Recital B, and clauses 5.10.5 and 10 of the MFA.

B THE DOMINO’S BUSINESS

5. In answer to paragraph 5, Domino’s:
- 5.1. denies that paragraph; and
- 5.2. refers to and relies on paragraphs 4 above and 6 below and says that at all relevant times, Domino’s and its Franchise Operators (from time to time) together and to the exclusion of all others, conducted a franchised business in Australia of collectively preparing and selling fast food, predominantly pizza,

in Australia from ‘Domino’s Pizza Stores’ (i.e., a Store) using the Domino’s System and Marks (as defined in the MFA) (**Domino’s Business**).

6. In answer to paragraph 6, Domino’s:

6.1. refers to and relies on paragraphs 4 and 5 above;

6.2. subject to production at trial of the Franchise Agreements relied on and reference to their full terms for their effect, otherwise admits that paragraph;

6.3. says further that the Franchise Agreements were Sub-Franchise Agreements (**SFA**) made under the MFA;

6.4. says further that by the terms of a SFA:

6.4.1. Domino’s granted to the Franchise Operator a Sub-Franchise to operate a “Domino’s Pizza Store” under the “Domino’s System” and a licence to use the “Marks” in the operation of the “Store”, and it was agreed that the Sub-Franchisee was required to operate the Store from within the “Territory” and Domino’s would not operate or grant a Sub-Franchise for the operation of a Domino’s Pizza Store during the term of the SFA whose territory significantly overlapped with the Territory;

6.4.2. Domino’s was appointed as the Franchise Operator’s agent to make agreements with any relevant union with respect to the terms of employment of all employees working in Domino’s Stores, have such agreements certified or approved by the Commission and act in relation to any letters of demand or logs of claim made by any relevant union or employee representative with respect to all employees working in Domino’s Stores and in any proceeding in the Commission which deal with the making of a dispute finding in relation to the letter of demand or log or claim;

- 6.4.3. the Franchise Operator agreed to conduct the Sub-Franchised Operation in accordance with the Operating Manual;
- 6.4.4. the Franchise Operator agreed to comply with all applicable laws, ordinances and regulations; and
- 6.4.5. upon its termination or expiration, all rights granted to the Franchise Operator under the SFA, including the Franchise Operator's sub-licence, also terminated; and
- 6.4.6. the following definitions applied:
 - 6.4.6.1. the "Domino's System" was defined as "*a method of preparing pizza and a chain of stores known as Domino's Pizza Stores that specialize in the sale of pizza featuring carry out and delivery services. This system is based on a uniform business format, specially designed equipment, recipes, methods, procedures and designs*";
 - 6.4.6.2. a "Domino's Pizza Store" was defined as "*a store operating using the Domino's System*";
 - 6.4.6.3. the "Store" was defined as the premises at the address detailed in Schedule 6 to the SFA;
 - 6.4.6.4. "Marks" was defined as "*the valuable trademarks, service marks and commercial symbols owned, used, promoted and licensed by Domino's in connections with the Domino's Pizza Stores*";
 - 6.4.6.5. "Territory" was defined to mean the area detailed in Schedule 7 to the SFA and as set out in an annexed map;

- 6.4.6.6. the “Sub-Franchised Operation” was defined as “*the Sub-Franchise conducted from the Store using Plant and Equipment and Stock in Trade*”;
- 6.4.6.7. the “Sub-Franchise” was defined as “*the rights granted under this Agreement by the Master Franchisee to You to use the Domino’s System and Marks*”; and
- 6.4.6.8. the “Operating Manual” was defined as “*operating manual, operational bulletins and similar materials containing proprietary know-how, mandatory and suggested specifications, standards and operating procedures and the rules prescribed from time to time by Domino’s or the Master Franchisee, and information relative to the operation of the Store*”.

Particulars

Using the Dominoids SFA as an example, as to paragraph 6.4.1, see clauses 2.1 and 5 of the SFA. As to paragraph 6.4.2 of the SFA, see clause 2.4.3 of the SFA. As to paragraph 6.4.3, see clause 16.5 of the SFA. As to paragraph 6.4.4, see clause 16.2 of the SFA. As to paragraph 6.4.5, see clause 19.5 of the SFA. As to paragraph 6.4.6, see clause 1 of the SFA.

7. In answer to paragraph 7, Domino’s:
- 7.1. refers to and relies on paragraph 6 above; and
- 7.2. otherwise admits that paragraph.
8. Domino’s admits paragraph 8.
9. In answer to paragraph 9, Domino’s:
- 9.1. refers to and relies on paragraph 7 above; and

9.2. otherwise admits that paragraph.

10. In answer to paragraph 10, Domino's:

10.1. refers to and relies on paragraph 7 above and paragraphs 27R, 27S, 35 and 53 below; and

10.2. otherwise admits that paragraph.

11. In answer to paragraph 11, Domino's:

11.1. refers to and relies on paragraph 7 above; and

11.2. otherwise admits that paragraph.

C INDUSTRIAL INSTRUMENTS

Applicable Awards pre-2001

12A. Prior to the commencement of the 2001 Agreement, Domino's and the Franchise Operators' In-Store Workers and Delivery Drivers were covered by a range of different State-based awards, resulting in different pay rates and conditions in every state and territory.

12AA. Domino's and the SDA first agreed on a move towards uniform terms and conditions of employment for employees working in Domino's Stores through the making of the Domino's Pizza - Delivery Drivers Award 1999 which was made by the Australian Industrial Relations Commission (AIRC) on 2 July 1999 and provided coverage until 31 December 2013 when it ceased to operate in accordance with the provisions of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

The 2001 Agreement and further mirror agreements

12B. In October 2001, the 2001 Agreement was certified by the AIRC under Division 3 of Part VIB of the Pre-Reform WR Act on the basis that Domino's and the Franchise Operators were the "one employer" of the Delivery Drivers and Instore Workers employed by them because the AIRC was satisfied that the Domino's Business was a

“single business” carried on as a “common enterprise” within the meaning of s.170LB(1)(a) and (2)(a) of the WR Act (**Common Enterprise Basis**).

- 12C. The 2001 Agreement commenced operation from 23 August 2001 and had a nominal expiry date of 30 July 2004 but continued to operate and provided coverage until it was terminated by the Fair Work Commission (**FWC**) with effect from 24 January 2018. From 2001 to 2005, further enterprise agreements that mirrored the 2001 Agreement and which applied to additional Franchisee Operators were certified by the AIRC. These agreements all had nominal expiry dates of 30 July 2004 but continued to operate and provided coverage until they were terminated by the FWC with effect from 24 January 2018.

The 2005 Agreement

- 12D. In November 2005, the 2005 Agreement was certified by the AIRC under Division 3 of Part VIB of the Pre-Reform WR Act on the Common Enterprise Basis.
- 12E. The 2005 Agreement commenced operation from 2 November 2005 and had a nominal expiry date of 1 December 2005 but continued to operate and provided coverage until it was terminated by the FWC with effect from 24 January 2018.

Rate increases under the Agreements

- 12F. From 2001 to 2005, Domino’s (on its own behalf and on behalf of the Franchise Operators) and the SDA negotiated and agreed to new increased rates to apply in relation to all existing Agreements (**SDA Agreed Rates**).
- 12G. In July 2005, the AIRC formally varied the terms of the existing Agreements referred to in paragraph 12C above to include the prevailing SDA Agreed Rates for the period through to 1 January 2006.
- 12H. On 28 March 2006, all existing Agreements became transitional instruments to which the provisions of Part 2, Division 1 of Schedule 7 to the Post-Reform WR Act applied and were, therefore, not able to be formally varied by the AIRC to reflect increases after that time in the SDA Agreed Rates.

- 12I. Despite paragraph 12H above, from August 2006 to 2010, Domino's (on its own behalf and on behalf of the Franchise Operators) and the SDA continued to negotiate and agree the SDA Agreed Rates, which continued to apply in relation to all existing Agreements.

The 2009 Agreement

- 12J. In 2009, Domino's (on its own behalf and on behalf of the Franchise Operators) and the SDA sought to negotiate a new enterprise agreement which would cover all Delivery Driver and In-Store Workers and replace all existing Agreements, but the parties were unable to agree on the allowances for the Delivery Drivers and as a result the 2009 Agreement only covered and applied to In-Store Workers.
- 12K. On 25 May 2010, the 2009 Agreement was approved by the FWC under the FW Act.
- 12L. The 2009 Agreement had a nominal expiry date of 25 May 2012 but continued to operate until it was terminated by the FWC with effect from 24 January 2018.

Post-2010 rate increases

- 12M. Following the introduction of the Award, the base rates of pay as provided for in the Award became payable to all employees, as increased pursuant to the FWC's Annual Wage Reviews. However, after the Award commenced, and until about 2017, Domino's (on its own behalf and on behalf of the Franchise Operators) continued to agree upon the rates that were payable under the Award, as well as other payments such as delivery allowances, with the SDA.
12. In answer to paragraph 12, Domino's:
- 12.1. refers to and relies on paragraphs 7 and 12A to 12M above;
 - 12.2. admits sub-paragraph 12(a);
 - 12.3. denies sub-paragraph 12(b);
 - 12.4. subject to the production at trial of the WR Act Agreements relied on and the reference to their full terms for their effect, otherwise admits that paragraph; and

- 12.5. says further that during their period of operation, the WR Act Agreements contained the rates of pay and terms and conditions of employment to be afforded to Delivery Drivers and In-Store Workers employed to perform work in all of the Franchise Stores.
13. In answer to paragraph 13, Domino's:
- 13.1. refers to and relies on paragraphs 7, 12A to 12M, 12.4 and 12.5 above;
- 13.2. admits that the employers bound by the WR Act Agreements included those alleged;
- 13.3. otherwise denies that paragraph; and
- 13.4. says further that by reason of the AIRC's certification on 2 November 2005 of the 2005 Agreement, Domino's and all Franchise Operators thereafter were bound by that Agreement because each of them was "*the employer*" within the meaning of s.170MA of the WR Act, with new Franchise Operators thereafter becoming bound by that Agreement by executing its SFA:
- 13.4.1. thereby becoming a member of the common enterprise (within the meaning of s.170LB (2)(a) of the WR Act) constituted by the Domino's Business; and
- 13.4.2. further or alternatively to sub-paragraph 13.4.1, by reason of the definition of "*Domino's Pizza*" in the 2005 Agreement as "*means [Domino's] and those franchisees that are listed in Appendix A and those franchisees who, through entering into a franchise agreement are a successor, assignee or transmittee of part of the business of [Domino's]*" (**Extended Coverage Clause**).
14. Save to refer to and rely on the terms of Part 2 of Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) for their effect, Domino's refers to and relies on paragraph 13 above and otherwise admits paragraph 14.

15. Domino's refers to and relies on paragraphs 12F to 12I and 12M above, and otherwise admits paragraph 15.
16. Save to say that the rates of pay, casual and part time loadings, weekend, public holiday, evening, and other penalty rates and shift allowances took effect from 1 July 2010 in accordance with the provisions of clause 2 and Schedule A of the Award, Domino's otherwise admits paragraph 16.
17. In answer to paragraph 17, Domino's:
 - 17.1. admits sub-paragraph 17(a);
 - 17.2. save in respect of employees of Domino's who were covered by an Enterprise Instrument, otherwise admits sub-paragraph 17(b); and
 - 17.3. admits sub-paragraph 17(c).
18. In answer to paragraph 18, Domino's:
 - 18.1. refers to and relies on paragraphs 7, 12 to 15 above and paragraphs 19, 20 and 25 below;
 - 18.2. admits that the Award would apply to Delivery Drivers and In-Store Workers if the Agreements or the Enterprise Instruments did not apply to them;
 - 18.3. says the Agreements or the Enterprise Instruments did apply to the Delivery Drivers and In-Store Workers; and
 - 18.4. otherwise denies that paragraph.
19. In answer to paragraph 19, Domino's:
 - 19.1. refers to and relies on the terms of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) for their effect;
 - 19.2. says further that by reason of clause 2 and Schedule A of the Award, the date on which the alleged deemed base rates took effect was from 1 July 2010; and
 - 19.3. otherwise admits that paragraph.

20. Subject to the production at trial of the FW Act Agreements relied on and the reference to their full terms for their effect, Domino's otherwise admits paragraph 20.
21. In answer to paragraph 21, Domino's:
 - 21.1. refers to and relies on paragraphs 7, 12 to 15, and 18 to 20 above and 25 below;
 - 21.2. refers to and relies on clause 2.2 of the Award, which provides that the monetary obligations imposed on employers by the Award may be absorbed into any over-award payments; and
 - 21.3. otherwise denies that paragraph.
22. In answer to paragraph 22, Domino's:
 - 22.1. refers to and relies on paragraphs 7, 12 to 15, and 18 to 20 above and 25 below;
 - 22.2. refers to and relies on clause 2.2 of the Award, which provides that the monetary obligations imposed on employers by the Award may be absorbed into any over-award payments; and
 - 22.3. otherwise denies that paragraph.
23. Domino's admits paragraph 23.
24. Domino's admits paragraph 24.
25. As to paragraph 25, Domino's:
 - 25.1. refers to and relies on paragraphs 12J to 12M above; and
 - 25.2. save to say that the TTEANA and the TTEANL were not negotiated with the SDA, otherwise admits paragraph 25.
- 25A. Save to say that the TTEANL was not negotiated with the SDA, Domino's otherwise admits paragraph 25A.

26. Domino's admits paragraph 26.

27. Domino's admits paragraph 27.

The North Caboolture Store

27A. Domino's admits paragraph 27A.

27B. Domino's admits paragraph 27B.

27C. Domino's admits paragraph 27C.

27D. Domino's admits paragraph 27D.

27E. In answer to paragraph 27E, Domino's:

27E.1. admits that between Commencement and 16 December 2012, it operated the Domino's System at the North Caboolture Store as Master Franchisee under the MFA; and

27E.2. otherwise denies that paragraph.

27F. In answer to paragraph 27F, Domino's:

27F.1. admits that by the terms of the sale and purchase agreement dated 17 December 2012, it sold the North Caboolture Store to Dominoids;

27F.2. says further that the terms of that sale and purchase agreement defined the "Store" sold as "*the Domino's pizza franchise listed in Item B of Schedule 1 together with and including the Plant and Equipment, Goodwill and Business Records of that store*"; and

27F.3. otherwise denies that paragraph.

27G. Domino's admits paragraph 27G.

27H. Domino's admits paragraph 27H.

27I. Domino's admits paragraph 27I.

27J. Domino's admits paragraph 27J.

27K. In answer to paragraph 27K, Domino's:

27K.1. admits that by the terms of the sale and purchase agreement dated 29 August 2016, Dominoids sold the North Caboolture Store to Domino's;

27K.2. says further that the terms of that agreement defined the "Store" sold as "*the Domino's pizza franchise listed in Item B of Schedule 1 together with and including the Plant and Equipment, Goodwill and Business Records of that store*";

27K.3. admits that Domino's SFA with Dominoids terminated as a consequence of the sale; and

27K.4. otherwise denies that paragraph.

27L. In answer to paragraph 27L, Domino's:

27L.1. admits that paragraph; and

27L.2. says further that the Store Asset Rental Management Deed was entered into on the basis that MC Pizza would buy the Domino's Franchise operated from the store and enter into a SFA in respect of that store with Domino's.

27M. In answer to paragraph 27M, Domino's:

27M.1. admits by the terms of the sale and purchase agreement dated 10 October 2016, it sold the North Caboolture Store to MC Pizza;

27M.2. says further that the terms of that agreement defined the "Store" sold as "*the Domino's pizza franchise listed in Item B of Schedule 1 together with and including the Plant and Equipment, Goodwill and Business Records of that store*"; and

27M.3. otherwise denies that paragraph.

27N. Save to refer to and rely on 27M above otherwise Domino's admits paragraph 27N.

27O. Save to refer to and rely on 27M above otherwise Domino's admits paragraph 27O.

27P. Save to refer to and rely on 27M above otherwise Domino's admits paragraph 27P.

27Q. Domino's admits paragraph 27Q.

D ALLEGED MISLEADING OR DECEPTIVE CONDUCT

D.1A Domino's Opinion

27R. At all times during the Relevant Period, Domino's held the opinion that unless a later Agreement applied, the 2005 Agreement applied to all Delivery Drivers and Instore Workers employed in the Domino's Business by Domino's or a Franchise Operator (**2005 Agreement Opinion**). The reasons why it held this opinion were that:

27R.1. the 2005 Agreement was certified under Div 3 of Part VIB of the WR Act on the basis that Domino's and the Franchisee Operators were the "one employer" of the Delivery Drivers and Instore Workers employed by them because the AIRC was satisfied that the Domino's Business was a "single business" carried on as a "common enterprise" within the meaning of s.170LB(1)(a) and (2)(a) of the WR Act;

27R.2. the 2005 Agreement had the Extended Coverage Clause;

27R.3. a Franchise Operator who became a franchisee after the 2005 Agreement became part of the Domino's Business as that Franchise Operator thereafter operated that part of the Domino's Business using the Domino's System constituted by the "Territory," as defined in that Franchise Operator's SFA, to the exclusion of Domino's and any other Franchise Operator and, thereby, became a successor, assignee or transmittee of that part of the Domino's Business;

27R.4. the SDA advised Domino's during the negotiation of the terms of the 2005 Agreement that the Extended Coverage Clause would mean that new franchisees would be covered by the 2005 Agreement as successors, assignees or transmittees of part of the Domino's Business and Domino's

agreed with the SDA to include that Extended Coverage Clause in the 2005 Agreement on that basis and for that purpose;

- 27R.5. the SDA continued to thereafter negotiate and agree rate adjustments to the 2005 Agreement on the basis that the Agreement applied to all Delivery Drivers and Instore Workers employed by Domino's and Franchise Operators; and
- 27R.6. since at least May 2009, the Fair Work Ombudsman (**FWO**) resolved underpayment claims against, and conducted audits and investigations of, Franchise Operators who were not listed in the annexure to a WR Act Agreement or a FW Act Agreement on the basis that the employee entitlements of employees of those Franchise Operators were governed by a WR Act Agreement or an FW Act Agreement and not an applicable award (including the Award), and not by reference to s.170MB of the WR Act or ss.313 and 314 of Part 2-8 of the FW Act.

Particulars

Those claims included:

- (a) Complaint made by Troy Hartwick to the FWO on 10 February 2009 alleging underpayment of wages by Pizza Perfection Pty Limited;
- (b) Complaint made by Mitchell Marsland to the FWO in January 2013 alleging underpayment of wages by Divenef Pty Limited;
- (c) Complaint by employees of TeenVan Pty Limited trading as Domino's Bundaberg to the FWO in November 2014 alleging underpayment of wages.

Domino's also refers to and relies on the Summary of Legal Position agreed as between FWO and Domino's (on its own behalf and on behalf of Franchise Operators) about 7 December 2011 (**Summary of Legal Position**) and FWO Domino's Compliance Activity Report 2018.

Further examples may be provided prior to trial.

- 27S. Holding that 2005 Agreement Opinion and given the MFA Compliance Obligation, since, at least, April 2012, Domino's configured and operated the internal employment affairs of the Domino's Business, including its operating procedures, training, software systems and audits, on the basis that Domino's and the Franchisee Operators' existing conditions of employment with their Delivery Drivers and their In-Store Workers were governed by and their rates of pay calculated in accordance with, the terms of the Agreements, the SDA Agreed Rates, the Deemed Base Rates and any further discretionary additional payments (collectively, **Domino's Business' Internal Existing Employment Systems**).

D.1 The alleged representations

28. In answer to paragraph 28, Domino's:

28.1. admits that Domino's was required to comply with the Pre-2015 Code and the 2015 Code (each, the **Code**);

28.2. admits that the Code required that Domino's:

28.2.1. provide to prospective franchisees and franchisees proposing to renew a franchise agreement or extend the term or scope of a franchise agreement (**Prospective Franchise Operators**), a "disclosure document" that complied with the Code to help the franchisee to make a reasonably informed decision about the proposed franchise by giving current information that is material to the running of the franchised business (**Franchise Information**);

28.2.2. not enter into the proposed franchise unless Domino's had received:

28.2.2.1. a written statement that the Prospective Franchise Operator had received, read and had a reasonable

opportunity to understand the disclosure document and the Code; and

- 28.2.2.2. a signed statement that the Prospective Franchise Operator had been given advice about the proposed franchise agreement by an independent legal adviser, independent business adviser or independent accountant or had been told by Domino's that that kind of advice should be sought but that the Prospective Franchise Operator had decided not to seek that advice,

(Prospective Franchisee's Acknowledgement Statements);

Particulars

Pre-2015 Code: see clauses 4, 6, 6A, 6B, 10, 11, 18, 19 and Annexure 1. 2015 Code: see clauses 5, 8, 9, 10, 11, 16, 17 and Annexure 1.

- 28.3. the Franchise Information required to be provided by the disclosure document as prescribed by the Code:
 - 28.3.1. included an obligation in respect of earnings information (**Earnings Statement**), if it was provided by the disclosure document, or to make a statement that Domino's does not give earnings information about the proposed franchise;
 - 28.3.2. did not include an obligation to provide information in relation to:
 - 28.3.2.1. the revenue, profits and overheads of the proposed franchise;
 - 28.3.2.2. the rates of pay or terms and conditions of employees to be employed by the prospective franchisee in the proposed franchise; and

Particulars

Pre-2015 Code: see clause 6 and Item 20 of Annexure 1.

2015 Code: see clause 8 and Item 21 of Annexure 1.

28.4. otherwise denies that paragraph.

28A. In answer to paragraph 28A:

28A.1. Domino's admits it provided documents to Prospective Franchise Operators in respect of a proposed franchise, which included the Franchise Information, in compliance with its obligations under the Code (collectively, the **Disclosure Documents**);

Particulars

To Dominoids, the following documents were provided:

1. Disclosure Document [DPE.001.001.0046];
2. Annexure A: Domino's Store Owner Details [DPE.001.001.0209];
Annexure A-1: Pinky's Store Owner Details [DPE.001.001.0300];
3. Annexure B: Domino's Store Events for the last 3 Financial Years [DPE.001.001.0137]; Annexure B-1: Pinky's Store Events for the last 3 Financial Years [DPE.001.001.0139];
4. Annexure C: Trade Marks [DPE.001.001.0244];
5. Annexure D: Sub-Franchise Agreement Part 1 (Sub-Franchise Agreement) [DPE.001.001.0140]; Annexure D: Sub-Franchise Agreement Part 2 (Prior Representations Deed and Annexure A, Prospective Franchisee Questionnaire) [DPE.001.001.0206] (**Prospective Franchisee Questionnaire**); Annexure D: Sub-Franchise Agreement Part 3 (Annexure A, Territory Legal) [DPE.001.001.0292]; Annexure D: Sub-Franchise Agreement Part 4 (Map – Dominos North Caboolture) [DPE.001.001.0060]; Annexure

- D: Sub-Franchise Agreement Part 5 (Authority to Insert Date of Commencement) [DPE.001.001.0002];
6. Annexure E: Schedule Prepayments Establishment Costs and Other Payments [DPE.001.001.0208];
 7. Annexure F: Average Franchise Results [DPE.001.001.0092];
 8. Annexure G: Financial Statement for Financial Year Ended 30 June 2011 [DPE.001.001.0174]; Annexure G-1: Financial Statement for Financial Year Ended 30 June 2012 [DPE.001.001.0095]; Annexure G-2: Master Franchisee's Solvency Statement for Financial Year Ended 30 June 2012 [DPE.001.001.0004];
 9. Annexure H: Franchising Code of Conduct [DPE.001.001.0005];
 10. Annexure I: Deed of Release of Franchise Documentation [DPE.001.001.0091];
 11. Annexure J: Master Franchisor Disclosure Document [DPE.001.001.0048]; Annexure J-1: Master Franchisor Financials & Independent Audit Report [DPE.001.001.0175];
 12. Annexure K: Domino's Pizza Code of Conduct [DPE.001.001.0149];
 13. Annexure L: PULSE System End User Agreement [DPE.001.001.0296]; Annexure L-1: AUS IT Support Agreement [DPE.001.001.0176]; Annexure L-2: Online Ordering Agreement [DPE.001.001.0094];
 14. Annexure M: Development Services Agreement [DPE.001.001.0297]; Annexure M-1: Development Services Agreement for Refurbishments [DPE.001.001.0216];
 15. Annexure N: Agency and Template Agreement [DPE.001.001.0151];

16. Annexure O: Loan Agreement [DPE.001.001.0299]; Annexure O-1: Company Change [DPE.001.001.0096]; Annexure O-2: Guarantee Fee Agreement [DPE.001.001.0132];
17. Annexure P: Site and Territory Details Part 1 [DPE.001.001.0218]; Annexure P: Site and Territory Details Part 2 [DPE.001.001.0007];
18. Annexure Q: Consent to Non-Disclosure of Contact Details [DPE.001.001.0273];
19. Annexure R: Ongoing Contracts Part 1 [DPE.001.001.0054]; Annexure R: Ongoing Contracts Part 2 [DPE.001.001.0275]; Annexure R: Ongoing Contracts Part 3 [DPE.001.001.0189];
20. Annexure S: Lease Details Part 1 [DPE.001.001.0190]; Annexure S: Lease Details Part 2 [DPE.001.001.0055]; Annexure S: Lease Details Part 3 [DPE.001.001.0022]; Annexure S: Lease Details Part 4 [DPE.001.001.0138]; Annexure S: Lease Details Part 5 [DPE.001.001.0259]; Annexure S-1: Store Licence Agreement Part 1 [DPE.001.001.0241]; Annexure S-1: Store Licence Agreement Part 2 [DPE.001.001.0264]; Annexure S-1: Store Licence Agreement Part 3 [DPE.001.001.0130]; Annexure S-1: Store Licence Agreement Part 4 [DPE.001.001.0265]; Annexure S-1: Store Licence Agreement Part 5 [DPE.001.001.0064];
21. Waiver Certificate and Acknowledgment [DPE.001.001.0028];
22. Section 11 Certificate, Acknowledgment of Receipt by Franchisee [DPE.001.001.0268],

(collectively, **Dominoids' Disclosure Documents**).

To MC Pizza, the following documents were provided:

1. Disclosure Document [DPE.001.001.0269]'

2. Annexure A: Domino's Store Owner Details – ANZ Part 1 of 3 [DPE.001.001.0303]; Annexure A: Domino's Store Owner Details – ANZ Part 2 of 3 (Australia only) [DPE.001.001.0164]; Annexure A: Domino's Store Owner Details – ANZ Part 3 of 3 (NZ only) [DPE.001.001.0166]; Annexure A-1: Pinky's Store Owner Details [DPE.001.001.0167];
3. Annexure B: Domino's Store Events for the last 3 Financial Years Summary - ANZ Part 1 of 4 [DPE.001.001.0119]; Annexure B: Domino's Store Events for Financial Year 2014 - 2015 Part 2 of 4 [DPE.001.001.0080]; Annexure B: Domino's Store Events for Financial Year 2013 - 2014 Part 3 of 4 [DPE.001.001.0301]; Annexure B: Domino's Store Events for Financial Year 2012 - 2013 Part 4 of 4 [DPE.001.001.0280]; Annexure B-1: Pinky's Store Events for the last 3 Financial Years [DPE.001.001.0109]; Annexure B-2: Name, Location and Contact Details Fin Yr 2014 - 2015 Part 1 of 3 [DPE.001.001.0160]; Annexure B-2: Name, Location and Contact Details Fin Yr 2013 - 2014 Part 2 of 3 [DPE.001.001.0247]; Annexure B-2: Name, Location and Contact Details Fin Yr 2012 - 2013 Part 3 of 3 [DPE.001.001.0187];
4. Annexure C: Trade Marks [DPE.001.001.0111];
5. Annexure D: Sub-Franchise Agreement - Part 1, Sub-Franchise Agreement [DPE.001.001.0181]; Annexure D: Sub-Franchise Agreement - Part 2, Prior Representations Deed [DPE.001.001.0188]; Annexure D: Sub-Franchise Agreement - Part 3, Prospective Franchisee Questionnaire [DPE.001.001.0248] (**Prospective Franchisee Questionnaire**); Annexure D: Sub-Franchise Agreement - Part 4, Section 10 Certificate [DPE.001.001.0249]; Annexure D: Sub-Franchise Agreement - Part 5, Form of Receipt – Territory Map [DPE.001.001.0073]; Annexure D: Sub-Franchise Agreement - Part 6, Map – Dominos North Caboolture [DPE.001.001.0162];

6. Annexure E: Schedule Prepayments Establishment Costs and Other Payments (Current) [DPE.001.001.0240];
7. Annexure F: Average Franchise Numbers - Aus & NZ FY 15 [DPE.001.001.0027];
8. Annexure G: Financial Statements for Financial Year Ending 2014 [DPE.001.001.0068]; Annexure G-1: Financial Statements for Financial Year Ending 2015 [DPE.001.001.0201]; Annexure G-2: Master Franchisee's Solvency Statement 31 October 2015 [DPE.001.001.0178];
9. Annexure H: Franchising Code of Conduct [DPE.001.001.0032];
10. Annexure I: Deed of Release of Sub-Franchise Agreement [DPE.001.001.0033];
11. Annexure J: Bookkeeping Services Agreement [DPE.001.001.0298];
12. Annexure K: Domino's Pizza Code of Conduct [DPE.001.001.0114];
13. Annexure L: AUS Pulse End User Licence Agreement [DPE.001.001.0192]; Annexure L-1: AUS IT Support Agreement [DPE.001.001.0074]; Annexure L-2: AUS Online Ordering Agreement [DPE.001.001.0270];
14. Annexure M: Development Level of Service Agreement – Construction [DPE.001.001.0128]; Annexure M-1: Development Level of Service Agreement – Refurbishment [DPE.001.001.0163]; Annexure M-2: Development Level of Service Agreement – Leasing [DPE.001.001.0076];
15. Annexure N: Agency and Template Agreement [DPE.001.001.0115];
16. Annexure P: Site and Territory Details [DPE.001.001.0077];
17. Annexure R: Ongoing Contracts [DPE.001.001.0036];

18. Annexure S: Lease Details Part 1 [DPE.001.001.0116]; Annexure S: Lease Details Part 2 [DPE.001.001.0117]; Annexure S: Lease Details Part 3 [DPE.001.001.0279]; Annexure S-1: Store Licence Agreement Part 1 [DPE.001.001.0278]; Annexure S-1: Store Licence Agreement Part 2 [DPE.001.001.0037]; Annexure S-1: Store Licence Agreement Part 3 [DPE.001.001.0217]; Annexure S-1: Store Licence Agreement Part 4 [DPE.001.001.0118];
19. Certificate of Independent Legal/Accounting/Business Advice [DPE.008.001.1059],

(collectively, **MC Pizza's Disclosure Documents**)

- 28A.2. the Earnings Statement provided by the Disclosure Document was, *inter alia*, that:
 - 28A.2.1. the Master Franchisee does not give earnings information about a specific Domino's Pizza sub-franchise;
 - 28A.2.2. the Master Franchisee cannot estimate earnings for a particular sub-franchise;
 - 28A.2.3. the Master Franchisee will not give out information about the past or current achievements of its sub-franchisees;
 - 28A.2.4. the Master Franchisee does not give projections or forecasts of earnings information;
 - 28A.2.5. actual financial performance figures for Stores in various regions are provided for "what it is worth" for the information of the prospective sub-franchisee and are based on information supplied by sub-franchisees, and no representation is given that they have been verified, checked or audited by the Master Franchisee or any third party;

Particulars

See Earnings Information in the Disclosure Document [DPE.001.001.0046], at Item 19.4.

- 28A.3. save for a copy of the proposed SFA, the Disclosure Document [DPE.001.001.0046], and (from about December 2013) the Bookkeeping Services Agreement, none of the documents specified in Annexure A to the SFASOC, being the documents said to contravene s.18 of the ACL, were included in the Disclosure Documents or were otherwise provided to a Prospective Franchisee prior to its entry into its SFA for the proposed franchise;
- 28A.4. prior to or on or about the date a Prospective Franchisee entered into its SFA for the proposed franchise with Domino's, Domino's obtained from the Prospective Franchisees:
- 28A.4.1. the Prospective Franchisee's Acknowledgement Statements; and
- 28A.4.2. the Prospective Franchisee Questionnaire;

Particulars

For Dominoids:

1. Section 11 Certificate, Acknowledgment of Receipt by Franchisee [DPE.001.001.0268];
2. Waiver Certificate and Acknowledgment [DPE.001.001.0028];
3. Prospective Franchisee Questionnaire [DPE.001.001.0025].

For MC Pizza:

1. Section 10 Certificate [DPE.001.001.0093];
2. Certificate of Independent Legal/Accounting/Business Advice [DPE.008.001.1059];

3. North Caboolture - Questionnaire - Casey Sebastian Benson.pdf [DPE.008.001.1258];
4. North Caboolture - Questionnaire - Mark Adam Glynn.pdf [DPE.008.001.8667].

28A.5. by the terms of the Prospective Franchisee Questionnaire, the Prospective Franchisee specified the information, statements, and representations made by Domino's that the Prospective Franchisee relied on in entering into the SFA;

28A.6. the Prospective Franchisee Questionnaires did not record that any statements to the effect of the Franchise Representations, the Franchise Opinion Representations, the Franchise Conduct, the Franchise Opinion Conduct or any part thereof had been made by Domino's to a Prospective Franchisee by the Disclosure Documents or otherwise by Domino's; and

Particulars

For Dominoids, see its Prospective Franchisee Questionnaire.

For MC Pizza, see its Prospective Franchisee Questionnaire.

28A.7. otherwise denies that paragraph.

28B. In answer to paragraph 28B, Domino's:

28B.1. subject to their production at trial and reference to their terms for their effects, admits that insofar as a Franchise Operator entered into:

28B.1.1. a SFA;

28B.1.2. a Sale and Purchase Agreement; or

28B.1.3. a Store Asset Rental Management Deed,

with Domino's, those documents were, during the Relevant Period, in substantially the same generic terms as those entered into with Dominoids or MC Pizza; and

28B.2. otherwise denies that paragraph.

28C. In answer to paragraph 28C, Domino's:

28C.1. subject to their production at trial and reference to their terms for their effect, admits that during the Relevant Period the Disclosure Documents provided to Prospective Franchisees were in substantially the same generic terms as the Dominoids Disclosure Documents and the MC Pizza Disclosure Documents; and

28C.2. otherwise denies that paragraph.

29. In answer to paragraph 29, Domino's:

29.1. refers to and relies on paragraphs 28 to 28C, and 29B to 29D below;

29.2. otherwise denies that paragraph; and

29.3. say further that none of the documents alleged as "Compliance Information", were required to be provided by the Code as disclosure documents or at all.

29A. Domino's does not plead to paragraph 29A as it contains no allegations against it.

29B. In answer to paragraph 29B, Domino's:

29B.1. refers to and relies on paragraphs 27R and 27S above;

29B.2. says further the documents pleaded in that paragraph were:

29B.2.1. not Disclosure Documents;

29B.2.2. not made available to Prospective Franchisees;

29B.2.3. only made available to Franchise Operators (as admitted hereafter) while they were part of the Domino's Business; and

- 29B.2.4. each, part of Domino's Business' Internal Existing Employment Systems;
- 29B.3. says further that the Franchisee R/L Target Group was the only group comprised of Franchise Operators;
- 29B.4. admits sub-paragraph (a) and says further that the 'Fair Work Laws – Australia' document (DPE.001.001.0131) was downloaded by approximately 4% of all primary and secondary franchisees and approximately 43% of all primary and secondary franchisees completed the training module;
- 29B.5. admits sub-paragraph (b) and says further that the 'Workplace Law Training Manual' document (DPE.002.002.0015) was downloaded by approximately 10% of all primary and secondary franchisees;
- 29B.6. admits sub-paragraph (c) and says further that the 'Fair Work Laws: Franchisee Orientation Program' document (DPE.001.001.0087) was downloaded by approximately less than 1% of all primary and secondary franchisees;
- 29B.7. admits sub-paragraph (d) and says further that the 'Policy – Bookkeeping Services Version 3.1' document (DPE.002.001.0153) was downloaded by approximately less than 1% of all primary and secondary franchisees;
- 29B.8. admits sub-paragraph (e) and says further that it is not known how many, if any, primary and secondary franchisees downloaded the 'Policy – Employment Law Compliance v1.2' document (DPE.002.001.0229);
- 29B.9. admits sub-paragraph (f) and says further that the 'My Domino's' document (DPE.001.001.0169) was downloaded by approximately 8% of all primary and secondary franchisees;
- 29B.10. admits sub-paragraph (g) and says further that the 'TANDA – Bookkeeper' Webinar (DPE.001.001.0136) was downloaded by approximately 3% of all primary and secondary franchisees;

- 29B.11. admits sub-paragraph (h) and says further that the ‘TANDA Help Guide’ document (DPE.001.001.0172) was downloaded by approximately 5% of all primary and secondary franchisees;
- 29B.12. admits sub-paragraph (i) and says further that the ‘Instructions for the Sales Report – using TANDA’ document (DPE.001.001.0202) was downloaded by approximately 2% of all primary and secondary franchisees;
- 29B.13. admits sub-paragraph (j) and says further that the ‘Policy – TANDA Software Implementation’ document (DPE.001.001.0196) was downloaded by approximately 1% of all primary and secondary franchisees;
- 29B.14. admits sub-paragraph (k) and says further that the ‘Domino’s Pizza Enterprises Driver Pay Rates to apply from 1 July 2017’ document (DPE.001.001.0171) was downloaded by approximately 14.5% of all primary and secondary franchisees and the ‘Domino’s Pizza Enterprises Instore Pay Rates to apply from 1 July 2017’ document (DPE.001.001.0081) was downloaded by approximately 15% of all primary and secondary franchisees;
- 29B.15. admits sub-paragraph (l) and says further that the ‘TANDA Information Kit’ document (DPE.001.001.0143) was downloaded by approximately 2% of all primary and secondary franchisees;
- 29B.16. admits sub-paragraph (m) and says further that the ‘Policy – TANDA Timesheet Approvals’ document (DPE.001.001.0200) was downloaded by approximately less than 1% of all primary and secondary franchisees;
- 29B.17. admits sub-paragraph (n) and says further that the ‘Re-classifying Team Members for the new Domino’s EBA’ document (DPE.001.001.0197) was downloaded by approximately less than 1% of all primary and secondary franchisees;
- 29B.18. admits sub-paragraph (o) and says further that the ‘Fast Food Industry Award 2010 TANDA’ document (DPE.001.001.0250) was downloaded by approximately less than 1% of all primary and secondary franchisees; and

29B.19. admits sub-paragraph (p) and says further that the 'Reclassifying Staff in TANDA' document (DPE.001.001.0277) was downloaded by approximately less than 1% of all primary and secondary franchisees.

29C. In answer to paragraph 29C, Domino's:

29C.1. refers to and relies on paragraphs 27R and 27S above;

29C.2. says further the documents pleaded in that paragraph were:

29C.2.1. not Disclosure Documents;

29C.2.2. not made available to Prospective Franchisees;

29C.2.3. only made available to Franchise Operators (as admitted hereafter) while they were part of the Domino's Business; and

29C.2.4. each, part of Domino's Business' Internal Existing Employment Systems;

29C.3. admits sub-paragraphs (a) and (b);

29C.4. admits sub-paragraph (c) and says further that approximately 26% of primary and secondary franchisees who received the document in sub-paragraph (c) viewed the document;

29C.5. admits sub-paragraph (d) and says further that approximately 35% of primary and secondary franchisees who received the document in sub-paragraph (d) viewed the document;

29C.6. admits sub-paragraph (e) and says further that approximately 27% of primary and secondary franchisees who received the document in sub-paragraph (e) viewed the document;

29C.7. admits sub-paragraph (f) and says further that approximately 26% of primary and secondary franchisees who received the document in sub-paragraph (f) viewed the document;

- 29C.8. admits sub-paragraph (g) and says further that approximately 48% of primary and secondary franchisees who received the document in sub-paragraph (g) viewed the document;
- 29C.9. admits sub-paragraph (h) and says further that approximately 50% of primary and secondary franchisees who received the document in sub-paragraph (h) viewed the document;
- 29C.10. admits sub-paragraph (i) and says further that approximately 34% of primary and secondary franchisees who received the document in sub-paragraph (i) viewed the document;
- 29C.11. admits sub-paragraph (j) and says further that approximately 14% of primary and secondary franchisees who received the document in sub-paragraph (j) viewed the document;
- 29C.12. admits sub-paragraph (k) and says further that approximately 13% of primary and secondary franchisees who received the document in sub-paragraph (k) viewed the document;
- 29C.13. admits sub-paragraph (l) and says further that approximately 32% of primary and secondary franchisees who received the document in sub-paragraph (l) viewed the document;
- 29C.14. admits sub-paragraph (m) and says further that approximately 40% of primary and secondary franchisees who received the document in sub-paragraph (m) viewed the document;
- 29C.15. admits sub-paragraph (n) and says further that approximately 34% of primary and secondary franchisees who received the document in sub-paragraph (n) viewed the document; and
- 29C.16. admits sub-paragraph (o) and says further that approximately 32% of primary and secondary franchisees who received the document in sub-paragraph (o) viewed the document.

29D. In answer to paragraph 29D:

29D.1. refers to and relies on paragraphs 27R and 27S above;

29D.2. says further the documents pleaded in that paragraph were:

29D.2.1. not Disclosure Documents;

29D.2.2. not made available to Prospective Franchisees;

29D.2.3. only made available to Franchise Operators (as admitted hereafter) while they were part of the Domino's Business; and

29D.2.4. each, part of Domino's Business' Internal Existing Employment Systems;

29D.3. save to say that the documents were provided by email on 2 May 2012 to existing Franchise Operators, Domino's admits sub-paragraph (a);

29D.4. admits sub-paragraph (b);

29D.5. admits sub-paragraph (c) and says further that:

29D.5.1. the Franchisee R/L Target Group was the only group comprised of Franchise Operators;

29D.5.2. the 'Fair Work Laws: Franchisee Orientation Program' document (DPE.001.001.0087) was downloaded by approximately less than 1% of all primary and secondary franchisees;

29D.5.3. the 'Fair Work Laws – Australia' document (DPE.001.001.0131) was downloaded by approximately 4% of all primary and secondary franchisees;

29D.5.4. the 'Workplace Law Training Manual' document (DPE.002.002.0015) was downloaded by approximately 10% of all primary and secondary franchisees; and

29D.6. admits sub-paragraph (d).

30. In answer to paragraph 30, Domino's:

30.1. objects to the paragraph on the basis that the paragraph is:

30.1.1. embarrassing;

30.1.2. evasive; and/or

30.1.3. ambiguous,

in that the paragraph fails to provide the necessary particulars of each of the representations alleged, which are also rolled up, and the particulars provided do not support the allegations made;

30.2. under cover of that objection, Domino's:

30.2.1. refers to and relies on paragraphs 27R, 27S and 29B to 29D above and otherwise admits that since about 2012 various documents, each part of Domino's Business' Internal Existing Employment Systems, have been provided to, and/or were made available to, Franchise Operators from time to time that included statements to the effect alleged in paragraph 30(aa);

30.2.2. denies that it provided any relevant documents to Prospective Franchise Operators, which included statements to the effect alleged in paragraph 30(aa);

30.2.3. denies the statements admitted in paragraph 30.2.1 were representations of fact;

30.2.4. says the statements admitted in paragraph 30.2.1 were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers;

Particulars

See, for example, *Norton Property Group Pty Ltd v Ozzy States Pty Ltd (in liq)* [2020] NSWCA 23 at [89], [100], [115] and [116]; *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 at [94].

- 30.2.5. says further that a number of the documents admitted in paragraph 30.2.1 also included the following statement (or a disclaimer to substantially the same effect):

“Disclaimer

The content of this document is intended as a guide only and in no way constitutes legal advice on behalf of [Domino’s]. When making any decisions regarding employee, advice should be sought from Fair Work Australia, the Fair Work Ombudsman, or an independent legal advisor”;

- 30.3. refers to and relies on paragraphs 28 to 29D above and says further that:
- 30.3.1. subject to their production at trial and reference being made to the whole of the terms of each of the documents pleaded in Annexure A to the SFASOC (collectively, **Annexure A Documents**) for their effect, admits that they include the “Extract” alleged;
- 30.3.2. save for their proposed form of SFA, the Disclosure Document [DPE.001.001.0046], and (from about December 2013) the Bookkeeping Services Agreement, the Annexure A Documents were:
- 30.3.2.1. not Disclosure Documents;
- 30.3.2.2. not made available to Prospective Franchisees;

- 30.3.2.3. only made available to Franchise Operators (as admitted above) while they were part of the Domino's Business; and
- 30.3.2.4. each, part of Domino's Business' Internal Existing Employment Systems; and
- 30.3.3. if, which is denied, the representations pleaded in sub-paragraphs 30(a) to (e) were made by Domino's, any such representations were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

- 30.4. otherwise denies that paragraph.
- 30A. In answer to paragraph 30A, Domino's:
- 30A.1. objects to the paragraph on the basis that the paragraph is:
 - 30A.1.1. embarrassing;
 - 30A.1.2. evasive; and/or
 - 30A.1.3. ambiguous,

in that the paragraph fails to provide the necessary particulars of each of the opinions alleged, which are also rolled up, and the particulars provided do not support the allegations made;
 - 30A.2. under cover of the objections made at paragraph 30A.1 above, refers to and relies on paragraph 30 above and says further that:

- 30A.2.1. it refers to and relies on the terms of the documents comprising the Franchise Information, the Franchise Agreement Documents, the Franchise Disclosure Documents and the Compliance Information for their effect;
- 30A.2.2. the statements referred to in paragraph 30A(a)(i) were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers;
- 30A.2.3. if, which is denied, the representations pleaded in sub-paragraphs 30A(a)(ii) to (vi) were made by Domino's, any such representations were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

- 30A.2.4. otherwise denies the paragraph.

31. In answer to paragraph 31, Domino's:

- 31.1. refers to and repeats paragraphs 30 and 30A above and otherwise denies sub-paragraph 31(a):
- 31.2. in answer to sub-paragraph 31(b):
 - 31.2.1. refers to and relies on sub-paragraph 31.1 above;
 - 31.2.2. otherwise it does not plead to the sub-paragraph as the sub-paragraph makes no allegation against it;

- 31.3. save to refer to and rely on paragraphs 28 to 30 above, admits sub-paragraph 31(c);
- 31.4. save to refer to and rely on the terms of the Pre-2015 Code and the 2015 Code as to their effects, otherwise denies sub-paragraph 31(d);
- 31.5. save to refer to and rely on paragraphs 29B to 29D and 30 above, otherwise admits sub-paragraph 31(e);
- 31.6. save to refer to and rely on the terms of:
 - 31.6.1. the Pro-active Compliance Deed dated 19 December 2011;
 - 31.6.2. the “Employer’s Response to Application to Terminate an Agreement Based Transitional Instrument” dated 7 December 2012;
 - 31.6.3. the transcript of oral submissions of Maree Skinner to FWC dated 22 November 2012;
 - 31.6.4. the statement of Mr Van Schyndel to FWC dated 31 October 2017;
 - 31.6.5. the transcript of oral evidence of Mr Van Schyndel to the FWC on 1 November 2017; and
 - 31.6.6. the email from Mr Van Schyndel to Mr Cullinan with the subject ‘Domino’s 2005 Agreement Coverage’ dated 25 September 2017,otherwise denies sub-paragraph 31(f);
- 31.7. subject to the production of the 2011 Compliance Deed at the trial and reference to its terms for their effect, admits it prepared the documents listed in sub-paragraphs (fa)(i) to (iv) as part of Domino’s Business’ Internal Existing Employment Systems, and that it (as admitted in paragraphs 29B to 29D above):

- 31.7.1. provided the documents titled Fair Work Laws – Australia and Workplace Laws Training Manual to existing Franchise Operators by email on 2 May 2012;
- 31.7.2. provided the documents listed in sub-paragraphs (fa)(i) to (iv) to new Franchise Operators after 2 May 2012 during induction training; and
- 31.7.3. provided Franchise Operators with access to the documents listed in sub-paragraphs (fa)(i) to (iv) through its training platform known as DOTTI;
- 31.8. subject to the production of the 2013 Compliance Deed Final Report at the trial and reference to its terms for their effect, admits sub-paragraph 31(fb);
- 31.9. save to refer to and rely on paragraph 31.7 above and subject to the production of the 2014 Compliance Deed at the trial and reference to its terms for their effect, admits, as part of Domino’s Business’ Internal Existing Employment Systems, it prepared the documents listed in sub-paragraphs (fc)(i) to (iv);
- 31.10. in answer to sub-paragraph 31(fd):
 - 31.10.1. admits that since about 1 September 2012, as part of Domino’s Business’ Internal Existing Employment Systems, new Franchise Operators not related to another existing Franchise Operator were required to use DBS for a period of 24 months;
 - 31.10.2. admits that existing Franchise Operators were permitted to engage DBS to provide payroll services, as part of Domino’s Business’ Internal Existing Employment Systems;
 - 31.10.3. admits that DBS offered payroll services, as part of Domino’s Business’ Internal Existing Employment Systems, that included processing the weekly payroll, the provision of payslips to employees, and the preparation of bank upload files to Franchise Operators;

- 31.10.4. admits that, in accordance with the 2005 Agreement Opinion, and by reference to the terms of the Agreements, the agreements made by Domino's (on its own behalf and on behalf of the Franchise Operators) with the SDA, and Domino's MFA Compliance Obligation, DBS (as part of Domino's Business' Internal Existing Employment Systems) had been configured to calculate amounts to be paid to employees in accordance with the Agreements and those agreed rates but subject to the Deemed Base Rate during the Relevant Period, that had been approved by the FWO (as per the Summary of Legal Opinion); and
- 31.10.5. otherwise denies that sub-paragraph;
- 31.11. in answer to sub-paragraph 31(g):
 - 31.11.1. admits that TANDA was part of Domino's Business' Internal Existing Employment Systems and was able to be used by Franchise Operators from about 2016;
 - 31.11.2. admits that from 1 July 2017 those Franchise Operators who had engaged DBS, as part of Domino's Business' Internal Existing Employment Systems, to provide payroll services were also required to use TANDA;
 - 31.11.3. admits that TANDA, as part of Domino's Business' Internal Existing Employment Systems, constructs rosters and records employee time and attendance;
 - 31.11.4. admits that, during the Relevant Period, in accordance with the 2005 Agreement Opinion, and by reference to the terms of the Agreements, the agreements made by Domino's (on its own behalf and on behalf of the Franchise Operators) with the SDA, and Domino's MFA Compliance Obligation, TANDA (as part of Domino's Business' Internal Existing Employment Systems) had been configured to calculates amounts to be paid to an employees

in accordance with the Agreements and those agreed rates but subject to the Deemed Base Rate during the Relevant Period that had been approved by the FWO (as per the Summary of Legal Opinion);

- 31.11.5. otherwise denies that sub-paragraph;
- 31.12. save to refer to and rely on the terms of the email from Mr Van Schyndel to Mr Cullinan with the subject 'Domino's 2005 Agreement Coverage' dated 25 September 2017, it otherwise denies sub-paragraph 31(h);
- 31.13. save to refer to and rely on the 'Outline of Submissions for Domino's Pizza Enterprises Limited' dated 31 October 2017 and the statement of Mr Van Schyndel dated 31 October 2017, it otherwise denies sub-paragraph 31(i); and
- 31.14. otherwise denies that paragraph.

D.2 The Alleged Franchise Conduct

- 32. Domino's admits paragraph 32 and says further that the activities alleged were part of Domino's Business' Internal Existing Employment Systems.
- 32A. In answer to paragraph 32A, Domino's:
 - 32A.1. admits that statements were made to the effect alleged;
 - 32A.2. says that the statements were:
 - 32A.2.1. statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

32A.2.2. made in accordance with the 2005 Agreement Opinion, and by reference to the terms of the Agreements, the agreements made by Domino's (on its own behalf and on behalf of the Franchise Operators) with the SDA, and Domino's MFA Compliance Obligation; and

32A.3. otherwise denies that paragraph.

33. In answer to paragraph 33, Domino's:

33.1. refers to and relies on paragraphs 31.10 and 31.11 above;

33.2. admits that the Payroll Services were provided;

33.3. says the Payroll Services were part of Domino's Business' Internal Existing Employment Systems;

33.4. otherwise denies that paragraph; and

33.5. says further that, in accordance with the 2005 Agreement Opinion, and by reference to the terms of the Agreements, the agreements made by Domino's (on its own behalf and on behalf of the Franchise Operators) with the SDA, and Domino's MFA Compliance Obligation, the Payroll Services (as part of Domino's Business' Internal Existing Employment Systems) were configured to calculate amounts to be paid to employees in accordance with the Agreements and those agreed rates but subject to the Deemed Base Rate during the Relevant Period that had been approved by the FWO (as per the Summary of Legal Opinion).

33A. In answer to paragraph 33A, Domino's:

- 33A.1. refers to and relies on paragraph 33 above;
- 33A.2. subject to the production of the Domino's Bookkeeping Services Agreement at the trial and reference to its terms for their effect, admits sub-paragraph 33A(a);
- 33A.3. refers to and relies on cl.16.7 of Domino's Bookkeeping Services Agreement, which states that Domino's does not provide any legal or accounting services, opinions or advice in respect of the Bookkeeping Services or the results of the performance of the Bookkeeping Services;
- 33A.4. subject to the production of the documents alleged therein at the trial and reference to their terms for their effect, admits sub-paragraph 33A(b); .
- 33A.5. says that the documents alleged formed part of Domino's Business' Internal Existing Employment Systems; and
- 33A.6. says further that the statements alleged were:
 - 33A.6.1. statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

- 33A.6.2. made in accordance with the 2005 Agreement Opinion, and by reference to the terms of the Agreements, the agreements made by Domino's (on its own behalf and on behalf of the Franchise Operators) with the SDA, and Domino's MFA Compliance Obligation.

33B. Save to say that the Payroll Services and each of the computer systems alleged were part of Domino's Business' Internal Existing Employment Systems and configured to calculate employee entitlements in accordance with the 2005 Agreement Opinion, and by reference to the terms of the Agreements, the agreements made by Domino's (on its own behalf and on behalf of the Franchise Operators) with the SDA, and in compliance with Domino's MFA Compliance Obligation, Domino's otherwise admits paragraph 33B.

34. In answer to paragraph 34, Domino's:

34.1. objects to the paragraph on the basis that the paragraph is:

34.1.1. embarrassing;

34.1.2. evasive; and/or

34.1.3. ambiguous,

in that the paragraph fails to provide the necessary particulars of each of the representations alleged;

34.2. under cover of that objection, otherwise denies that paragraph; and

34.3. says further that if the conduct relied on constituted any of the representations alleged or conveyed the meanings alleged (which is denied), that conduct:

34.3.1. did not constitute a representation of fact but rather conveyed a statement of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

34.3.2. was conduct in accordance with the 2005 Agreement Opinion, and by reference to the terms of the Agreements, the agreements made by Domino's (on its own behalf and on behalf of the Franchise Operators) with the SDA, and Domino's MFA Compliance Obligation.

34A. In answer to paragraph 34A, Domino's:

34A.1. objects to the paragraph on the basis that the paragraph is:

34A.1.1. embarrassing;

34A.1.2. evasive; and/or

34A.1.3. ambiguous,

in that the paragraph fails to provide the necessary particulars of each of the representations alleged; and

34A.2. under over of that objection:

34A.2.1. refers to and relies on paragraphs 34 above; and

34A.2.2. otherwise denies that paragraph.

D.3 Fair Work Ombudsman

34B. Save to say the agreement alleged was made by Domino's on its own behalf and on behalf of the Franchise Operators, Domino's otherwise admits paragraph 34B.

34C. Save to refer to and rely on paragraph 34B above, Domino's otherwise admits paragraph 34C.

E TRADE OR COMMERCE

35. Subject to the admissions and denials made above insofar as Domino's is alleged by the SFASOC to have engaged in conduct (within the meaning of s.18 ACL), Domino's:

35.1. denies that such conduct would have been in trade or commerce;

35.2. says that such conduct was in respect of the trade or commerce of Domino's and the Franchise Operators, namely in respect of their internal affairs and their existing relationship with their employees as part of Domino's Business' Internal Existing Employment Systems; and

35.3. otherwise denies paragraph 35.

36. Save to refer to and rely on paragraph 35 above, Domino's otherwise denies paragraph 36.

F THE ALLEGED TRUE POSITION

The Transmission of Business and Transmission of Business Provisions

36A. Save to also refer and rely and rely on paragraphs 12 to 14 above, Domino's otherwise admits paragraph 36A.

36B. Save to refer to and rely on paragraphs 12 to 14 above, Domino's admits paragraph 36B.

Greenfields Stores

36C. Domino's does not plead to paragraph 36C as it makes no allegations against it.

Greenfields opened in the Pre-Reform WR Act Period

36D. In answer to paragraph 36D, Domino's:

36D.1. Domino's denies that paragraph;

36D.2. says further that a transmission of part of the Domino's Business occurred, by reason of s.170MB of the WR Act, when a Franchise Operator started operating a Greenfields Store because by entering into:

36D.2.1. a SFA with Domino's; and

36D.2.2. where applicable, a Store Licence Agreement with Domino's that gave the Franchise Operator a licence to occupy the Store for the purpose of conducting the business in the territory in accordance with the SFA,

that Franchise Operator became the successor, transmittee or assignee of that part of the Domino's Business constituted by the exclusive right to prepare and sell fast food, predominantly pizza, in the "Territory" (as defined in the SFA) from a Domino's Pizza Store using the Domino's System and Marks; and

36D.3. says further that it refers to and relies on paragraphs 12 to 14 above.

Greenfields opened in the Post-Reform WR Act Period

36E. Save to refer to and rely on paragraphs 12 to 14 above, Domino's otherwise denies paragraph 36E.

Greenfields opened in the Fair Work Act Period

36F. In answer to paragraph 36F, Domino's:

36F.1. admits that in the circumstances alleged therein, there would have been no transmission of business within the meaning of s.311 of the FW Act;

36F.2. refers to and relies on paragraphs 12 to 14 above; and

36F.3. otherwise denies that paragraph.

Coverage and Application of the WR Act Agreements

37. In answer to paragraph 37, Domino's:

37.1. refers to and relies on paragraphs 7, 11-15, 18, 22, and 25 above;

37.2. says that at all relevant times, it, and the Franchise Operators (from time to time) constituted, for the purposes of the WR Act:

- 37.2.1. one employer within the meaning of ss.170LB(2) of the (pre-reform) WR Act and s.322 of the WR Act (WorkChoices amended); and
 - 37.2.2. single interest employers within the meaning of s.172 of the FW Act;
 - 37.2.3. conducting:
 - 37.2.3.1. a single business within the meaning of ss.170LB and 322 of the WR Act; and
 - 37.2.3.2. a single enterprise within the meaning of s.172 of the FW Act, namely the “Domino’s Business”;
 - 37.3. says that all of the WR Act Agreements were certified as single business agreements within the meaning of the WR Act;
 - 37.4. says further that all of the FW Act Agreements were certified as single interest and single enterprise agreements within the meaning of the FW Act; and
 - 37.5. otherwise admits that paragraph.
38. In answer to paragraph 38, Domino’s:
- 38.1. refers to and relies on paragraph 37 above;
 - 38.2. otherwise denies that paragraph; and
 - 38.3. says further that by reason of the matters set out in paragraphs 12 to 14 above and the operation of ss.54 and 58 of the FW Act, during the Relevant Period: In-Store Workers and Delivery Drivers not otherwise covered by a WR Act Agreement or a FW Act Agreement were covered by the 2005 Agreement.
- 38A. Save to refer to and rely on paragraph 36D above, Domino’s denies paragraph 38A.
- 38B. Save to refer to and rely on paragraph 36A above, Domino’s denies paragraph 38B.
- 38C. Save to refer to and rely on paragraph 36F above, Domino’s denies paragraph 38C.

38D. Save to refer to and rely on paragraph 36F above, Domino's denies paragraph 38D.

38E. In answer to paragraph 38E, Domino's:

38E.1. refers to and relies on paragraphs 36A, 36D and 36F above;

38E.2. admits sub-paragraph (a);

38E.3. admits sub-paragraph (b);

38E.4. denies sub-paragraph (c);

38E.5. denies sub-paragraph (d);

38E.6. admits sub-paragraph (e); and

38E.7. denies sub-paragraph (f).

38F. In answer to paragraph 38F, Domino's:

38F.1. refers to and relies on paragraphs 36A and 36F above;

38F.2. Domino's admits sub-paragraph (a);

38F.3. admits sub-paragraph (b);

38F.4. admits sub-paragraph (c);

38F.5. denies sub-paragraph (d); and

38F.6. denies sub-paragraph (e).

39. Domino's denies paragraph 39.

40. Domino's denies paragraph 40 and says further that:

40.1. it refers to and relies on paragraph 30 above;

40.2. Domino's did not make the Franchise Representations or engage in the Franchise Conduct;

- 40.3. alternatively, if (which is denied) Domino's did make the Franchise Representations or engage in the Franchise Conduct, the allegations in sub-paragraphs 40(aa) to (e) are wrong as a matter of law;
- 40.4. alternatively, if (which is denied) Domino's did make the Franchise Representations or engage in the Franchise Conduct and the allegations in sub-paragraphs 40(aa) to (e) are correct as a matter of law:
- 40.4.1. the Franchise Representations and the Franchise Conduct were not misleading or deceptive (nor likely to be so);
- 40.4.2. the Franchise Representations and the Franchise Conduct were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

- 40.4.3. the Franchise Representations and the Franchise Conduct was conduct in accordance with the 2005 Agreement Opinion, and by reference to the terms of the Agreements, the agreements made by Domino's (on its own behalf and on behalf of the Franchise Operators) with the SDA, and Domino's MFA Compliance Obligation.
- 40A. In answer to paragraph 40A, Domino's:
- 40A.1 objects to the paragraph on the basis that the paragraph is:
- 40A.1.1. embarrassing;
- 40A.1.2. evasive; and/or

40A.1.3. ambiguous,

in that the paragraph fails to provide the necessary or proper particulars in support of the allegation made by sub-paragraph 40A(b) that Domino's did not have reasonable grounds for the alleged Franchise Opinion and/or the alleged Conduct Opinion;

40A.2 under cover of that objection, Domino's:

40A.2.1. refers to and relies on paragraph 40 above;

40A.2.2. denies sub-paragraph (a); and

40A.2.3. denies sub-paragraph (b) as the matters particularised do not constitute the absence of reasonable grounds.

Coverage and Application of the FW Act Agreements

41. In answer to paragraph 41, Domino's:

41.1. refers to and relies on paragraph 37 above;

41.2. otherwise denies that paragraph.

42. In answer to paragraph 42, Domino's:

42.1. refers to and relies on paragraph 41 above;

42.2. otherwise denies that paragraph; and

42.3. says further that by reason of the matters set out in paragraphs 12 to 14 above, and the operation of ss 54 and 58 of the FW Act, during the Relevant Period In-Store Workers not covered by a FW Act Agreement were covered by the 2005 Agreement.

42A. Save to refer to and rely on paragraph 36D above, Domino's denies paragraph 42A.

42B. Save to refer to and rely on paragraph 42A above, Domino's denies paragraph 42B.

- 42C. Save to refer to and rely on paragraphs 36F and 42A above, Domino's denies paragraph 42C.
- 42D. Save to refer to and rely on paragraph 42C above, Domino's denies paragraph 42D.
- 42E. In answer to paragraph 42E, Domino's:
- 42E.1. refers to and relies on paragraph 42C above;
 - 42E.2. admits sub-paragraph (a);
 - 42E.3. admits sub-paragraph (b);
 - 42E.4. admits sub-paragraph (c);
 - 42E.5. denies sub-paragraph (d);
 - 42E.6. denies sub-paragraph (e); and
 - 42E.7. denies sub-paragraph (f).
43. Domino's denies paragraph 43.
44. Domino's denies paragraph 44 and says further that:
- 44.1. it refers to and relies on paragraph 30 above;
 - 44.2. Domino's did not make the Franchise Representations or engage in the Franchise Conduct;
 - 44.3. alternatively, if (which is denied) Domino's did make the Franchise Representations or engage in the Franchise Conduct, the allegations in sub-paragraphs 44(aa) to (e) are wrong as a matter of law; and
 - 44.4. alternatively, if (which is denied) Domino's did make the Franchise Representations or engage in the Franchise Conduct and the allegations in sub-paragraphs 44(aa) to (e) are correct as a matter of law:

- 44.4.1. the Franchise Representations and the Franchise Conduct were not misleading or deceptive (nor likely to be so);
- 44.4.2. the Franchise Representations and the Franchise Conduct were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

- 44.4.3. the Franchise Representations and the Franchise Conduct was conduct in accordance with the 2005 Agreement Opinion, and by reference to the terms of the Agreements, the agreements made by Domino's (on its own behalf and on behalf of the Franchise Operators) with the SDA, and Domino's MFA Compliance Obligation.

44A. In answer to paragraph 44A, Domino's:

44A.1. objects to the paragraph on the basis that the paragraph is:

44A.1.1. embarrassing;

44A.1.2. evasive; and/or

44A.1.3. ambiguous,

in that the paragraph fails to provide the necessary or proper particulars in support of the allegation made by sub-paragraph 44A(b) that Domino's did not have reasonable grounds for the Franchise Opinion and/or the Conduct Opinion;

44A.2. under cover of that objection, Domino's:

- 44A.2.1. refers to and relies on paragraphs 43 and 44 above;
- 44A.2.2. denies sub-paragraph (a); and
- 44A.2.3. sub-paragraph (b) as the matters particularised do not constitute the absence of reasonable grounds.

G THE ALLEGED CONTRAVENING CONDUCT

- 45. Domino's denies paragraph 45 and says further that:
 - 45.1. [Not Used];
 - 45.2. Domino's did not make the Franchise Representations and/or Franchise Opinion Representations; and
 - 45.3. alternatively, if (which is denied) Domino's did make the Franchise Representations and/or Franchise Opinion Representations:
 - 45.3.1. the Representations were not misleading or deceptive (nor likely to be so);
 - 45.3.2. the Franchise Representations and/or Franchise Opinion Representations were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

- 45.3.3. the Franchise Representations and/or Franchise Opinion Representations was conduct in accordance with the 2005 Agreement Opinion, and by reference to the terms of the Agreements, the agreements made by Domino's (on its own

behalf and on behalf of the Franchise Operators) with the SDA, and Domino's MFA Compliance Obligation.

46. Domino's refers to and repeats paragraph 45 above and denies paragraph 46.

47. Domino's denies paragraph 47 and says further:

47.1. [Not Used];

47.2. Domino's did not engage in the Franchise Conduct and/or the Franchise Opinion Conduct; and

47.3. alternatively, if (which is denied) Domino's did engage in the Franchise Conduct and/or the Franchise Opinion Conduct:

47.3.1. the Conduct was not misleading or deceptive (nor likely to be so);

47.3.2. the Franchise Conduct and/or the Franchise Opinion Conduct constituted statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

47.3.3. the Franchise Conduct and/or the Franchise Opinion Conduct was conduct in accordance with the 2005 Agreement Opinion, and by reference to the terms of the Agreements, the agreements made by Domino's (on its own behalf and on behalf of the Franchise Operators) with the SDA, and Domino's MFA Compliance Obligation.

H THE ALLEGED CAUSATION

H.1 The alleged Award Workers

48. In answer to paragraph 48, Domino's:

48.1. objects to the paragraph on the basis that the paragraph:

48.1.1. does not disclose a cause of action;

48.1.2. is embarrassing;

48.1.3. is evasive; and/or

48.1.4. is ambiguous,

in that the paragraph does not plead legal causation or the material facts said to constitute the causal relationship between the conduct relied upon and the damage alleged to be caused thereby, and paragraph 48 ought, therefore, to be struck out;

48.2. under cover of that objection, denies that paragraph; and

48.3. says further that:

48.3.1. it refers to and relies on paragraph 30.2.5 above and says that Franchise Operators were told to seek advice from Fair Work Australia, the FWO, or an independent legal advisor when making any decisions regarding their employees; and

48.3.2. if the matters particularised to paragraph 40A(b) of the SFASOC constituted the basis for why the Franchise Opinion if made (which is denied) was not reasonable (which is also denied), then that conduct was not capable of misleading a reasonable person in the position of a Franchise Operator.

49. In answer to paragraph 49, Domino's:

49.1. refers to and relies on paragraph 48 above; and

49.2. otherwise denies that paragraph;

- 49.3. says that during the Relevant Period all Delivery Drivers and In-Store Workers employed by Domino's and the Franchise Operators were to be paid rates and afforded conditions of employment in accordance with the terms of the Agreements and as agreed with the SDA, as affected by the Deemed Base Rates, and in accordance with the Domino's Business' Internal Existing Employment System and the MFA Compliance Obligation; and
- 49.4. says further, that if, as alleged, Delivery Drivers and Instore Worker were required to be (which is denied) but were not, paid rates and afforded the conditions provided for in the Award by their employer and suffered loss within the meaning of s.545 of the FW Act, then that loss was caused by the breach of s.45 of the FW Act and those Delivery Drivers and Instore Workers have the rights afforded to them by the FW Act to be compensated by their employer for that loss under ss.539 and 545 of the FW Act (**FW Act Entitlement**).
- 49AA. Further, if (which is denied) the Award applied to it during the Relevant Period, a Franchise Operator would have reconfigured its operations to ensure that its total employment costs did not materially increase and therefore would not have employed Delivery Drivers or Instore Workers or employed them in the same capacity, on the same roster or on the same terms and conditions as occurred on the basis that an Agreement applied. Rather, the Franchise Operator would have restructured the way in which it utilised employees including by:
- 49AA.1. increasing the minimum hours worked by each employee in a shift and thereby reducing the number of overall shifts available to be worked by employees;
- 49AA.2. shifting work that would have been performed at times when penalty rates would have otherwise applied to other periods of time that did not attract penalty rates;
- 49AA.3. employing workers as part-time employees instead of as casual employees;
- 49AA.4. employing more junior staff and less senior staff; and

49AA.5. using company-owned vehicles for deliveries.

Particulars

Particulars will be provided before trial.

H.2 The Applicant

49A. Domino's admits paragraph 49A.

50. In answer to paragraph 50, Domino's:

50.1. objects to the paragraph on the basis that the paragraph is:

50.1.1. embarrassing;

50.1.2. evasive; and/or

50.1.3. ambiguous,

in that the paragraph fails to provide the necessary particulars of each of the representations alleged, which are also rolled up, and the particulars provided do not support the allegations made, and the paragraph ought, therefore, to be struck out;

50.2. under cover of that objection, Domino's:

50.2.1. refers to and repeats relies on paragraphs 27R, 27S and 29B to 29D above and otherwise admits that since about 2012 various documents, each part of Domino's Business' Internal Existing Employment Systems, have been provided to, and/or were made available to, Dominoids from time to time that included statements to the effect alleged in paragraph 50(aa);

50.2.2. denies the statements admitted in paragraph 50.2.1 were representations of fact;

50.2.3. says the statements admitted in paragraph 50.2.1 were statements of opinion and/or statements of a legal conclusion regarding the

legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers;

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

- 50.2.4. says further that a number of the documents admitted in paragraph 50.2.1 also included the following statement (or a disclaimer to substantially the same effect):

“Disclaimer

The content of this document is intended as a guide only and in no way constitutes legal advice on behalf of [Domino's]. When making any decisions regarding employee, advice should be sought from Fair Work Australia, the Fair Work Ombudsman, or an independent legal advisor”;

- 50.3. refers to and relies on paragraphs 28 to 29D above and says further that:

- 50.3.1. subject to their production at trial and reference being made to whole of the terms of each of the Annexure A Documents for their effect, admits that they include the “Extract” alleged;

- 50.3.2. save for their proposed form of SFA, the Disclosure Document [DPE.001.001.0046], and (from about December 2013) the Bookkeeping Services Agreement, the Annexure A Documents were:

- 50.3.2.1. not Disclosure Documents;

- 50.3.2.2. not made available to Dominoids before it became a Franchise Operator;

- 50.3.2.3. only made available to Dominoids (as admitted above) while it was part of the Domino's Business; and
- 50.3.2.4. each, part of Domino's Business' Internal Existing Employment Systems;
- 50.4. says further that if, which is denied, the representations pleaded in subparagraphs 50(a) to (e) were made by Domino's, any such representations were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

- 50.5. otherwise denies that paragraph.
- 50A. In answer to paragraph 50A, Domino's:
 - 50A.1. objects to the paragraph on the basis that the paragraph is:
 - 50A.1.1. embarrassing;
 - 50A.1.2. evasive; and/or
 - 50A.1.3. ambiguous,

in that the paragraph fails to provide the necessary particulars of each of the opinions alleged, which are also rolled up, and the particulars provided do not support the allegations made;
 - 50A.2. under cover of that objection, refers to and relies on the terms of the documents relied upon by the applicant for their effect, and otherwise denies that paragraph; and
 - 50A.3. refers to and relies on paragraph 50 and says further that:

- 50A.2.1. the statements referred to in paragraph 50A(a)(i) were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and
- 50A.2.2. if, which is denied, the representations pleaded in sub-paragraphs 50A(a)(ii) to (vi) were made by Domino's, any such representations were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers.

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

50B. In answer to paragraph 50B, Domino's:

- 50B.1. admits that throughout the period that Dominoids held the franchise for the North Caboolture Store, Dominoids used the following internal information systems that formed part of the Domino's business:
 - 50B.1.1. a point of sale system known as Pulse;
 - 50B.1.2. DOTTI; and
 - 50B.1.3. GPS Tracker (from its commencement in 2015); and
- 50B.2. otherwise denies that paragraph.

50C. In answer to paragraph 50C, Domino's:

- 50C.1. admits that throughout the period that Dominoids held the franchise for the North Caboolture Store, Dominoids used the following internal information systems that formed part of the Domino's business:
 - 50C.1.1. bookkeeping and payroll services; and;

50C.1.2. Payroll Award Interpreter

50C.2. refers to and relies on paragraph 33 above; and

50C.3. otherwise denies that paragraph.

50D. Save to refer to and rely on paragraphs 32 and 32A above, otherwise Domino's admits paragraph 50D.

50E. Domino's refers to and relies on paragraph 34 above, and otherwise denies paragraph 50E.

50F. Domino's admits paragraph 50F.

51. In answer to paragraph 51, Domino's:

51.1. objects to the paragraph on the basis that the paragraph, is:

51.1.1. embarrassing;

51.1.2. evasive; and/or

51.1.3. ambiguous,

in that the paragraph fails to provide the necessary particulars of each of the representations alleged, which are also rolled up, and the particulars provided do not support the allegations made;

51.2. under cover of that objection, Domino's:

51.2.1. refers to and repeats relies on paragraphs 27R, 27S and 29B to 29D above and otherwise admits that since about 2016 various documents, each part of Domino's Business' Internal Existing Employment Systems, have been provided to, and/or were made available to, MC Pizza from time to time that included statements to the effect alleged in paragraph 51(aa);

51.2.2. denies the statements admitted in paragraph 51.2.1 were representations of fact;

- 51.2.3. says the statements admitted in paragraph 51.2.1 were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers;

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

- 51.2.4. says further that a number of the documents admitted in paragraph 51.2.1, also included the following statement (or a disclaimer to substantially the same effect):

“Disclaimer

The content of this document is intended as a guide only and in no way constitutes legal advice on behalf of [Domino's]. When making any decisions regarding employee, advice should be sought from Fair Work Australia, the Fair Work Ombudsman, or an independent legal advisor”;

- 51.3. refers to and relies on paragraphs 28 to 29D above and says further that:
- 51.3.1. subject to their production at trial and reference being made to whole of the terms of each of the Annexure A Documents for their effect, admits that they include the “Extract” alleged;
- 51.3.2. save for their proposed form of SFA, the Disclosure Document [DPE.001.001.0046], and (from about December 2013) the Bookkeeping Services Agreement, the Annexure A Documents were:
- 51.3.2.1. not Disclosure Documents;
- 51.3.2.2. not made available to MC Pizza before it became a Franchise Operator;

- 51.3.2.3. only made available to MC Pizza (as admitted above) while it was part of the Domino's Business; and
- 51.3.2.4. each, part of Domino's Business' Internal Existing Employment Systems;
- 51.3.3. if, which is denied, the representations pleaded in sub-paragraphs 51(a) to (e) were made by Domino's, any such representations were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and

Particulars

Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

- 51.4. otherwise denies that paragraph.
- 51A. In answer to paragraph 51A, Domino's:
 - 51A.1. objects to the paragraph on the basis that the paragraph is:
 - 51A.1.1. embarrassing;
 - 51A.1.2. evasive; and/or
 - 51A.1.3. ambiguous,

in that the paragraph fails to provide the necessary particulars of each of the opinions alleged, which are also rolled up, and the particulars provided do not support the allegations made;
 - 51A.2. under cover of that objection, refers to and relies on paragraph 51 above and says further that:

- 51A.2.1. it refers to and relies on the terms of the documents relied upon by the applicant for their effect;
- 51A.2.2. the statements referred to in paragraph 51A(a)(i) were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and
- 51A.2.3. if, which is denied, the representations pleaded in sub-paragraphs 51A(a)(ii) to (vi) were made by Domino's, any such representations were statements of opinion and/or statements of a legal conclusion regarding the legal entitlements as to the rates of pay and terms and conditions of all of the Delivery Drivers and Instore Workers; and

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Domino's refers to and repeats the particulars to paragraph 30.2.4 above.

- 51A.3. otherwise denies that paragraph.
- 51B. In answer to paragraph 51B, Domino's:
- 51B.1. admits that throughout the entire period that MC Pizza held the franchise for the North Caboolture Store while the applicant was employed (29 August 2016 to 18 March 2018), MC Pizza did not use DBS but did use the following internal information systems that formed part of the Domino's business:
 - 50B.1.1. Pulse;
 - 50B.1.2. DOTTI; and
 - 50B.1.3. GPS Tracker; and
 - 51B.2. otherwise denies that paragraph.
- 51C. In answer to paragraph 51C, Domino's:

- 51C.1 admits that by 1 July 2017, Dominoids, and as part of the Payroll Services, used TANDA, which was an internal information systems that formed part of the Domino's business;
 - 51C.2. refers to and relies on paragraph 33 above; and
 - 51C.3. otherwise denies that paragraph.
- 51D. Domino's refers to and relies on paragraphs 27R, 27S and 34.3 above and denies paragraph 51D.
- 51E. In answer to paragraph 51E, Domino's:
- 51E.1. admits that:
 - 51E.1.1. during his employment with Dominoids and MC Pizza, the applicant logged into and logged out of Pulse;
 - 51E.1.2. Pulse also had the functionality to record when a Delivery Driver leaves and returns to a store after completing a delivery order; and
 - 51E.1.3. the applicant's log in, log out and delivery data recorded in Pulse was accessible by Domino's, and
 - 50B.2. otherwise does not admit that paragraph.
52. In answer to paragraph 52, Domino's:
- 52.1. denies that paragraph; and
 - 52.2. says further that by reason of the matters set out in paragraphs 12 to 14 and 42 above,
 - 52.2.1. all Delivery Drivers employed by Dominoids were covered by the 2005 Agreement because by executing its Franchise Agreement it became "*the employer*" within the meaning of s.170MA of the WR Act and bound by the 2005 Agreement;

- 52.2.2. any In-Store Workers who were transferring employees within the meaning of s.311 of the FW Act in connection with Dominoids' acquisition of the North Caboolture store franchise from Domino's were covered by the 2009 Agreement;
 - 52.2.3. In-Store Workers employed by Dominoids who were not covered by the 2009 Agreement were covered by the 2005 Agreement because by executing its Franchise Agreement it became "the employer" within the meaning of s.170MA of the WR Act and bound by the 2005 Agreement; and
- 52.3. by reason of the matters set out in paragraphs 12 to 14 and 42, all Delivery Drivers and In-Store Workers employed by MC Pizza were covered by the 2005 Agreement.
53. Subject to the admissions and denials made above insofar as Domino's is alleged by the SFASOC to have engaged in conduct (within the meaning of s.18 ACL), Domino's:
- 53.1. denies that such conduct was in trade or commerce;
 - 53.2. says that such conduct was in respect of the trade or commerce of Domino's and Dominoids and MC Pizza, namely in respect of their internal affairs and their existing relationship with their employees as part of Domino's Business' Internal Existing Employment Systems; and
 - 53.3. otherwise denies paragraph 53.
54. Save to refer to and rely on paragraphs 27R, 27S, 40, 40A, 44, 44A, and 50 to 53 above, Domino's otherwise denies paragraph 54.
- 54A. In answer to paragraph 54A, Domino's:
- 54A.1. refers to and relies on paragraphs 50A, 51A and 54 above;
 - 54A.2. denies sub-paragraph (a); and

- 54A.3. denies sub-paragraph (b) as the matters particularised do not constitute the absence of reasonable grounds.
55. Save to refer to and rely on paragraph 54 above, Domino's denies paragraph 55.
- 55A. In answer to paragraph 54A, Domino's:
- 55A.1. refers to and relies on paragraph 54A above;
- 55A.2. denies sub-paragraph (a); and
- 55A.3. denies sub- paragraph (b) as the matters particularised do not constitute the absence of reasonable grounds.
56. In answer to paragraph 56, Domino's:
- 56.1. objects to the paragraph on the basis that the paragraph:
- 56.1.1. does not disclose a cause of action;
- 56.1.2. is embarrassing;
- 56.1.3. is evasive; and/or
- 56.1.4. is ambiguous,
- in that the paragraph does not plead legal causation or the material facts said to constitute the causal relationship between the conduct relied upon and the damage alleged to be caused thereby, and ought, therefore, to be struck out;
- 56.2. under cover of that objection, refers to and relies on paragraphs 54 to 55A above, and otherwise denies that paragraph.
57. In answer to paragraph 57, Domino's refers to and relies on paragraphs 54 to 55A above and denies paragraph 57.
- 57.1. objects to the paragraph on the basis that the paragraph:
- 57.1.1. does not disclose a cause of action;

57.1.2. is embarrassing;

57.1.3. is evasive; and/or

57.1.4. is ambiguous,

in that the paragraph does not plead legal causation or the material facts said to constitute the causal relationship between the conduct relied upon and the damage alleged to be caused thereby, and ought, therefore, to be struck out;

57.2. under cover of that objection, refers to and relies on paragraphs 54 to 55A above, and otherwise denies that paragraph.

58. Save to refer to and rely on paragraphs 56 and 57 above, and paragraphs 49 and 49AA above, Domino's otherwise denies paragraph 58.

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59. Domino's denies paragraph 59.

59A. Domino's denies paragraph 59A.

60. Domino's denies paragraph 60.

60A. Domino's denies paragraph 60A.

61. Domino's denies paragraph 61.

61A. Domino's denies paragraph 61A.

62. Domino's denies paragraph 62.

62A. Domino's denies paragraph 62A.

63. In answer to paragraph 63, Domino's:

63.1. objects to the paragraph on the basis that the paragraph:

63.1.1. does not disclose a cause of action;

63.1.2. is embarrassing;

63.1.3. is evasive; and/or

63.1.4. is ambiguous,

in that the paragraph is impermissibly conclusionary, does not plead, or properly plead, material facts that constitute the alleged loss or damage within the meaning of s.236 of the ACL, whether as a loss of opportunity or otherwise, and ought, therefore, to be struck out; and

63.2. under cover of that objection, otherwise denies that paragraph; and

63.3. refers to and relies on paragraphs 49 and 49AA above and says further that:

63.3.1. if the loss or damage alleged by the Group Members was suffered and is compensable, it is loss within the meaning of s.545 of the FW Act (**FW Act Loss**) due to their employer breaching s.45 of the FW Act constituted by:

63.3.1.1. the under payment or non-payment of Award entitlements (**Award Under Payment**); and

63.3.1.2. loss or damage consequent on their employer's detention of the Award Under Payment (**Award Detention Loss and Damage**);

63.3.2. each of the Award Under Payment and the Award Detention Loss and Damage are a FW Act Entitlement;

63.3.3. the applicant in his own capacity and in his representative capacity does not allege that he suffered any loss or damage in addition to his alleged FW Act Loss constituted by his FW Act Entitlement; and

- 63.3.4. the applicant admits that his FW Act Entitlements for his FW Act Loss has not been impaired or removed by that conduct alleged against Domino's;

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Admission made by Senior Counsel for the applicant at the hearing on 9 June 2020, at pg 83(5).

- 63.3.5. the rights of compensation afforded to the Group Members in the circumstances they allege are those afforded by the FW Act and not otherwise;
- 63.3.6. in the circumstances alleged by the SFASOC, the Group have suffered no loss or damage within the meaning of s.236 of the ACL;
- 63.3.7. further or in the alternative, the Award Under Payment is a debt owed by the employer to the Group Member and does not constituted loss or damage within the meaning of s.236 of the ACL caused by the conduct alleged against Domino's;
- 63.3.8. further or in the alternative the loss of the opportunity to pay for good or services:
- 63.3.8.1. the Group Member needed or wanted to buy; and/or
- 63.3.8.2. of superior quality than those which the Group Member in fact bought,
- during their period of employment with a Franchise Operator does not constitute a compensable loss or damage within the meaning of s.236 of the ACL because:
- 63.3.8.3. the Group Member did not incur any additional cost or expense because of the detention of their Award Under Payment;

63.3.8.4. the opportunity, if taken, would not have been profitable or resulted in a financial benefit to the Group Member;

63.3.8.5. it is not a claim that is within the principles established by *Hungerford v Walker* (1989) 171 CLR 125 or *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 331; and

63.3.8.6. it is a claim in the nature of inconvenience, which is not separately compensable to the Group Member's claim for interest.

64. In answer to paragraph 64, Domino's:

64.1. objects to the paragraph on the basis that the paragraph:

64.1.1. does not disclose a cause of action;

64.1.2. is embarrassing;

64.1.3. is evasive; and/or

64.1.4. is ambiguous,

in that the paragraph is impermissibly conclusionary, does not plead, or properly plead, material facts that constitute the loss or damage, whether as a loss of opportunity or otherwise, and ought, therefore, to be struck out; and

64.2. under cover of that objection, refers to and relies on paragraph 63 above and otherwise denies that paragraph.

65. Save to refer to and rely on paragraph 63 above, otherwise Domino's denies paragraph 65.

66. Domino's denies paragraph 66.

Date: 24 August 2021

A handwritten signature in black ink, appearing to read "Prescott". The signature is written in a cursive, flowing style.

Signed by Liam Prescott
DLA Piper Australia
Lawyer for the Respondent

This amended pleading was prepared by Gregory Harris QC and Edward Gisonda of Counsel.

Certificate of lawyer

I, Liam Prescott, 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: 24 August 2021



Signed by Liam Prescott
DLA Piper Australia
Lawyer for the Respondent