

## NOTICE OF FILING

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*Sia Lagos*

Registrar

### Important Information

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

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



## Defence and Statement of Cross-claim

No. VID15 of 2026

Federal Court of Australia  
District Registry: Victoria  
Division: Fair Work

### ALEXANDER WILDING

Applicant

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

Respondent

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

Cross-claimant

### ALEXANDER WILDING

Cross-respondent

## Defence

In answer to the Statement of Claim filed 12 January 2026 (**SOC**), and adopting the defined terms used in the SOC except where otherwise indicated, the Respondent pleads as follows.

### A. THE PARTIES

1. As to paragraph 1, it:

- (a) says that the Applicant was employed by the Respondent from 12 September 2017 to 28 December 2020 as a Level 1 store team member and that during that time, the Applicant:
  - (i) was employed as a casual team member from 12 September 2017 to 24 June 2018;

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Filed on behalf of (name & role of party)	Coles Supermarkets Australia Pty Ltd (Respondent and Cross-claimant)		
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- (ii) was employed as a part-time team member from 25 June 2018 to 24 November 2019;
  - (iii) was employed as a full-time team member from 25 November 2019 to 8 December 2019; and
  - (iv) was employed as a part-time team member from 9 December 2019 to 28 December 2020;
  - (v) performed nightfill manager or second-in-charge – nightfill duties, from time to time;
- (b) admits subparagraph 1(c); and
  - (c) otherwise denies paragraph 1.
2. It admits paragraph 2.
  3. As to paragraph 3, it:
    - (a) assumes that the word “or” at the end of subparagraph 3(a) was intended to read “and”, and pleads accordingly;
    - (b) admits that the Applicant brings this proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) on his own behalf and on behalf of each person who satisfies the criteria in all of subparagraphs 3(a) (as interpreted above), (b) and (c) of the SOC; and
    - (c) otherwise does not know and therefore cannot admit the paragraph.
  4. It admits paragraph 4.

## **B. COLES**

5. It admits paragraph 5.
6. It admits paragraph 6 save that the reference to “Schedule A” in subparagraph (b)(i) should read “Schedule B” and the reference to “Schedule B” in subparagraph (b)(ii) should read “Schedule A”.
7. It admits paragraph 7.

## **C. INDUSTRIAL LAWS AND INSTRUMENTS**

8. It admits paragraph 8 save that during the Claim Period, s 115(1)(a)(vi) referred to “the Queen’s birthday holiday” rather than “the holiday for the birthday of the Sovereign”.
9. It admits paragraph 9.
10. It admits paragraph 10 save that:

- (a) between 23 December 2019 and 31 January 2023, the provision referred to in paragraph 10 was numbered s 98 rather than s 98(1), the heading read “Employee taken not to be on paid personal/carer’s leave on public holiday”, and there was no sub-heading “Public holidays”; and
- (b) from 1 February 2023 to 23 December 2023, s 98(1) of the FW Act was in the terms pleaded in paragraph 10, save that the text appearing after the sub-heading “Public holidays” was numbered “(1)”.

11. It denies paragraph 11.

### Particulars

Section 115(1) of the FW Act relevantly provided that the following are public holidays: (a) each of the days identified in s 115(1)(a); and (b) any other day, or part-day, declared or prescribed by or under a law of a State to be observed generally within the State as a public holiday.

Properly construed, the reference to “any other day, or part-day” in s 115(1)(b) was to a day which occurred once each year, and not to a day of the week occurring 52 times each year (or 53 times in some years).

Further, on a proper construction of the term “public holiday” in s 115(1)(b) of the FW Act, and a proper construction of the Holidays Act 1910, Sunday, in the sense of the day of the week occurring 52 times each year (or 53 times in some years), was not any other day declared or prescribed by or under the Holidays Act 1910 to be observed generally within South Australia as a “public holiday” within the meaning of s 115(1)(b).

The Respondent will refer at trial to the full history of the Holidays Act 1910 as informing the proper construction of the text of that Act in light of its context and purpose.

The Holidays Act 1910 relevantly replaced and consolidated the *Bank Holidays Act 1873 (SA)* (**Bank Holidays Act**) and s 31 of the *Civil Service Act 1874 (SA)* (**Civil Service Act**), the former of which dealt with bank holidays and included Sundays, the latter of which dealt with public holidays in public offices and did not include Sundays.

The Second Schedule to the Holidays Act 1910 listed days that were said by s 3 to be public holidays and bank holidays, including, in Part I, “Sunday”. Sections 6 and 7 of the Holidays Act 1910 identified the consequences of a day being a public holiday and bank holiday under that

Act. These were relevantly limited to closure of public offices and banks (s 6, a provision with its origins in the Bank Holidays Act and s 31 of the Civil Service Act) and non-compellability of payments or acts “that ... would not be compellable ... on Sunday” except where specially required by law (s 7, a provision with its origins in the Bank Holidays Act).

Properly construed, the effect of this was not to make Sunday, in the sense of the day of the week occurring 52 times each year (or 53 times in some years), a “public holiday” within the meaning of s 115(1)(b) of the FW Act, such that South Australia, uniquely, would have had at least 52 additional public holidays each year beyond those public holidays which occurred once each year, for the purposes of the FW Act. At most, the effect was to make Sunday a public holiday if and only if a day occurring once each year and identified in the Holidays Act 1910 as a public holiday fell on a Sunday, was not already covered by s 115(1)(a) of the FW Act, and was not substituted by another day.

Further particulars may be provided before trial.

12. It denies paragraph 12 and repeats paragraph 11 above.
13. It admits paragraph 13.
14. It admits paragraph 14.
15. It admits paragraph 15, save that:
  - (a) the Coles Agreement did not cover and apply to all Group Members as alleged in the alternative in paragraph 15(c)(ii);
  - (b) the Respondent interprets the defined term Coles Agreement Employees to refer to the employees described in paragraph 15(a) of the SOC and pleads accordingly.
16. It admits paragraph 16.
17. It admits paragraph 17.
18. It admits paragraph 18 and says further that clause 8.6.1 of the Coles Agreement, together with Appendix F to the Coles Agreement, also provided for penalties that were to apply in other circumstances, including for ordinary hours worked between 9am and 11pm on a Sunday during the Claim Period which penalties were:
  - (a) from 23 December 2019 to 30 June 2020:
    - (i) 65% of the base rate of pay in clause 5.2 for full-time and part-time employees;

- (ii) 75% of the base rate of pay in clause 5.2 for casual employees;
- (b) from 1 July 2020 to 31 December 2023:
  - (i) 50% of the base rate of pay in clause 5.2 for full-time and part-time employees; and
  - (ii) 75% of the base rate of pay in clause 5.2 for casual employees.
- 19. It admits paragraph 19, subject to reference to the full terms of clause 8.6.2.
- 20. It denies paragraph 20, and it:
  - (a) repeats paragraph 11 above; and
  - (b) says further that properly construed, and when read as a whole, the Coles Agreement does not have the effect that employees performing work on Sundays in South Australia during the Claim Period were to be paid the rates under the Coles Agreement applicable to “public holidays” instead of the rates applicable to “Sundays”, except in circumstances where a public holiday (being a day which occurred once each year) occurred on a Sunday.

#### **Particulars**

The particulars to paragraph 11 above are repeated.

Under the Coles Agreement, Sundays and public holidays are treated separately and distinctly – see for example clauses 5.3.6, 8.5.2(c), 8.5.3(b), 8.6.1, 8.7.4, 9.1.

The unreasonable result that would occur if time worked on a Sunday during the Claim Period by Coles Agreement Employees in South Australia was required to be paid at public holiday rates under the Coles Agreement means that, as a matter of objective analysis, the parties to the Coles Agreement cannot have intended it.

The Coles Agreement is a national enterprise agreement and, as a matter of objective analysis, reasonable persons in the position of the parties would not have understood the parties to the Coles Agreement to be agreeing that provisions dealing with rates payable on Sundays would have no operative effect with respect to employees working in South Australia, in circumstances where that intention was not made abundantly clear.

Further particulars may be provided before trial.

- 21. It denies paragraph 21, repeats paragraphs 11 and 20 above, and says that, subject to reference at trial to the full terms and effect of the Coles Agreement in the Claim Period,

for hours worked by Coles Agreement Employees in South Australia on Sundays that were not public holidays in South Australia:

- (a) the applicable rate of pay for full-time and part-time Coles Agreement Employees was:
- (i) 165% of the base rate of pay in clause 5.2 for all ordinary hours worked on a Sunday between the hours of 9am and 11pm in the period 23 December 2019 to 30 June 2020;
  - (ii) 150% of the base rate of pay in clause 5.2 for all ordinary hours worked on a Sunday between the hours of 9am and 11pm in the period 1 July 2020 to 23 December 2023; and
  - (iii) 200% of the base rate of pay in clause 5.2 for all overtime hours worked on a Sunday during the Claim Period;

**Particulars**

Clause 8.6.1; Appendix F; clause 8.5.2(c) of the Coles Agreement.

- (b) the applicable rate of pay for casual Coles Agreement Employees was:
- (i) 175% of the base rate of pay in clause 5.2 for all ordinary hours worked on a Sunday between the hours of 9am and 11pm during the Claim Period; and
  - (ii) 225% of the base rate of pay in clause 5.2 for all overtime hours worked on a Sunday during the Claim Period;

**Particulars**

Clause 8.6.1; Appendix F; clause 8.5.3(b) of the Coles Agreement.

- (c) it assumes the reference to "(i) above" in paragraph 21(b)(i)(2) the SOC was intended to read "(1) above" and pleads accordingly; and
- (d) as to paragraph 21(b)(i)(2) of the SOC, if the Coles Agreement required the Respondent to pay an employee, who had agreed to take time off instead of being paid for an amount of overtime, for untaken time off, the applicable rate of pay was the overtime rate applicable to the overtime when worked.

**Particulars**

Clauses 8.5.4(d), (e) and (h) of the Coles Agreement.

22. It admits paragraph 22.

23. It admits paragraph 23.

24. It admits paragraph 24.
25. It admits paragraph 25.
26. As to paragraph 26, subject to reference at trial to the full terms and effect of the Retail Award, it:
- (a) admits subparagraphs 26(a)(i), 26(b), 26(d) and says that the employee's minimum rate referred to therein, and elsewhere in paragraph 26 of the SOC, was the minimum rate under the Retail Award for that employee's classification;
  - (b) denies subparagraph 26(a)(ii) and says further that, under the Retail Award up to 30 September 2020, by mutual agreement between an employer and an employee, an employee could, instead of receiving payment in accordance with subparagraph 26(a)(i) above, agree to:
    - (i) have a day off or equivalent time off without loss of pay, so long as the time off was taken within four weeks of the public holiday occurring (or the time off would be paid out); or
    - (ii) an additional day or equivalent time of annual leave;

**Particulars**

Clause 29.4(f) of the Retail Award up to 30 September 2020.

- (c) denies subparagraph 26(a)(iii) and says further that under the Retail Award from 1 October 2020, by mutual agreement between an employer and an employee, an employee could, instead of receiving payment in accordance with subparagraph 26(a)(i) above, agree:
  - (i) to be paid at the minimum hourly rate of pay for hours worked on the public holiday; and
  - (ii) to the addition of an amount of paid time equivalent to the hours worked on the public holiday to the employee's annual leave, or to be allowed to take that time off within a period of 28 days after the public holiday (with such time off not taken within that period then being paid out);

**Particulars**

Clause 22.2 of the Retail Award on and from 1 October 2020.

- (d) admits subparagraph 26(c), save that it denies subparagraph 26(c)(ii) and says that the span of hours on a Sunday that was also a public holiday within the meaning of s 115(1) of the FW Act outside of which overtime was payable depended on a retailer's trading hours;

### Particulars

Clause 27.2 of the Retail Award up to 30 September 2020.

Clause 15.2 of the Retail Award on and from 1 October 2020.

- (e) admits subparagraph 26(e), save that it denies subparagraph 26(e)(ii) and says that the span of hours on a Sunday that was also a public holiday within the meaning of s 115(1) of the FW Act outside of which overtime was payable depended on a retailer's trading hours; and

### Particulars

The particulars to subparagraph 26(d) above are repeated.

- (f) admits subparagraph 26(f) save that under the Retail Award, on and from 1 October 2020, any agreement between the employee and the Respondent had to be in writing.

27. It denies paragraph 27, and it:

- (a) repeats paragraph 11 above;
- (b) says that properly construed, and when read as a whole, the Retail Award does not have the effect that employees performing work on Sundays in South Australia during the Claim Period were to be paid the rates under the Retail Award applicable to "public holidays" instead of the rates applicable to "Sundays", except in circumstances where a public holiday (being a day which occurred once each year) occurred on a Sunday; and

### Particulars

The particulars to paragraph 11 above are repeated.

Under the Retail Award, Sundays and public holidays are treated separately and distinctly, see for example —

- (i) clauses 29.2(d) and 29.2(e); 29.4(e) and 29.4(f); 30.3 and 34 of the Retail Award up to 30 September 2020; and
- (ii) clauses 21.2(e); 22.2; 25.1; 25.3; 33 in the Retail Award on and from 1 October 2020.

The Retail Award is a national instrument providing a mandatory safety net for covered employees in all states and territories.

To construe the Retail Award such that it required during the Claim Period time worked on a Sunday during the Claim Period by Award Employees in

South Australia to be paid at public holiday rates under the Retail Award, an objectively unreasonable result, does not give effect to the Retail Award's evident purposes.

Further particulars may be provided before trial.

- (c) says further that, subject to reference at trial to the full terms and effect of the Retail Award in the Claim Period, for hours worked by Award Employees in South Australia on Sundays that were not public holidays in South Australia:
- (i) the applicable rate of pay for full-time and part-time Award Employees was:
- A. for ordinary hours worked on a Sunday
    - a. between the start of the Claim Period and 30 June 2020 — 165% of the applicable minimum hourly rate of pay in the Retail Award; and
    - b. from 1 July 2020 — 150% of the applicable minimum hourly rate of pay in the Retail Award; and
  - B. 200% of the applicable minimum hourly rate of pay in the Retail Award for overtime hours worked on a Sunday; and

#### **Particulars**

Clauses 29.4(e) and 29.2(d) of the Retail Award up to 30 September 2020.

Clauses 22.1(a) and 21.2(a), (b) and (e) of the Retail Award on and from 1 October 2020.

- (ii) the applicable rate of pay for casual Award Employees was:
- A. 175% of the applicable minimum hourly rate of pay in the Retail Award for ordinary hours worked on a Sunday; and
  - B. 225% of the applicable minimum hourly rate of pay in the Retail Award for overtime hours worked on a Sunday.

#### **Particulars**

Clauses 29.4(e) and 29.2(e) of the Retail Award up to 30 September 2020.

Clauses 22.1(b) and 21.2(c) and (e) of the Retail Award on and from 1 October 2020.

### **D. ALLEGED CONTRAVENTIONS – APPLICANT**

28. As to paragraph 28, it:

- (a) admits subparagraph 28(a);
- (b) denies subparagraphs 28(b) to (e); and

- (c) says that at all times during his Coles Employment, the Applicant was classified under the Coles Agreement as a Retail Employee Level 1.

29. As to paragraph 29, it:

- (a) admits subparagraph 29(a);
- (b) as to paragraph 29(b), it repeats paragraphs 11 and 20 above and:
  - (i) admits that it did not pay the Applicant 225% of his base rate of pay for ordinary hours worked by the Applicant on Sundays;
  - (ii) denies that it “failed” to make the payment described in subparagraph 29(b)(i) of the SOC because there was no requirement on the Respondent to make that payment under the Coles Agreement;
  - (iii) says that for all ordinary hours worked by the Applicant on Sundays between 23 December 2019 and 30 June 2020, it was required to pay, and did pay, the Applicant, 165% of his base rate of pay; and
  - (iv) says that for all ordinary hours worked by the Applicant on Sundays between 1 July 2020 and until the end of the Applicant’s employment with Coles, it was required to pay, and did pay, the Applicant, 150% of his base rate of pay; and
- (c) denies subparagraph 29(c).

30. As to paragraph 30, it:

- (a) admits subparagraph 30(a);
- (b) as to subparagraph 30(b), it repeats paragraphs 11 and 20 above and:
  - (i) admits that it did not pay the Applicant 250% of his base rate of pay for the overtime hours he worked on any Sunday or provide the Applicant with any time off or annual leave as described in subparagraph 30(b)(ii) of the SOC;
  - (ii) denies that it “failed” to do the things described in subparagraph 30(b) of the SOC, because it was not required to do so under the Coles Agreement; and
  - (iii) says that for all overtime hours worked by the Applicant on Sundays during the Claim Period, it was required to pay, and did pay, the Applicant, 200% of his base rate of pay; and
- (c) denies subparagraph 30(c).

31. As to paragraph 31, it:

- (a) admits subparagraph 31(a) and says that the Applicant took paid annual leave on the following Sundays during the Claim Period —
  - (i) 5 January 2020;
  - (ii) 15 March 2020;
  - (iii) 12 April 2020;
  - (iv) 27 September 2020;
  - (v) 22 November 2020;
  - (vi) 29 November 2020; and
  - (vii) 27 December 2020(collectively, **Annual Leave Sundays**);
- (b) denies subparagraph 31(b) and repeats paragraph 11 above;
- (c) admits subparagraph 31(c); and
- (d) denies subparagraph 31(d).

32. As to paragraph 32, it:

- (a) admits subparagraph 32(a) and says further that the Applicant took paid personal leave on the following Sundays during the Claim Period —
  - (i) 2 August 2020;
  - (ii) 18 October 2020;
  - (iii) 6 December 2020;
  - (iv) 13 December 2020;
- (b) denies subparagraph 32(b) and repeats paragraph 11 above;
- (c) admits subparagraph 32(c); and
- (d) denies subparagraph 32(d).

33. It denies paragraph 33.

#### **E. ALLEGED CONTRAVENTIONS – GROUP MEMBERS**

33A. As to the whole of section E, it says that further pleas by way of defence in respect of each Group Member's claims cannot be determined until after the Group Member's claims have been identified for the purpose of those claims being heard and determined following the trial of common questions or otherwise as the Court may direct, and the Respondent reserves the right to make such further pleas at that time.

34. As to paragraph 34, it:

- (a) admits that during the Claim Period some Coles Agreement Employees worked ordinary hours on one or more Sundays; and
  - (b) otherwise repeats paragraph 33A above and does not know and therefore cannot admit paragraph 34.
- 35. As to paragraph 35, it repeats paragraphs 11, 20 and 21 above and:
  - (a) says that, to the extent that ordinary hours were worked by Coles Agreement Employees in South Australia in the Claim Period on a Sunday that was not a public holiday in South Australia, it:
    - (i) admits that it did not pay, or provide TOIL or annual leave to, those employees at the rate referred to in subparagraph 35(a)(i), or pay those employees at the rate referred to in subparagraph 35(b), of the SOC;
    - (ii) denies that it was obliged to do so; and
  - (b) otherwise repeats paragraphs 33A and 34 above and does not know and therefore cannot admit paragraph 35.
- 36. As to paragraph 36, it repeats paragraphs 33A to 35 above and otherwise does not know and therefore cannot admit paragraph 36.
- 37. As to paragraph 37, it:
  - (a) admits that during the Claim Period, some Coles Agreement Employees worked overtime hours in accordance with the clauses referred to in paragraph 37 on one or more Sundays; and
  - (b) otherwise repeats paragraph 33A above and does not know and therefore cannot admit paragraph 37.
- 38. As to paragraph 38, it repeats paragraphs 11, 20 and 21 above and:
  - (a) says that, to the extent that overtime hours were worked by Coles Agreement Employees in South Australia in the Claim Period on a Sunday that was not a public holiday in South Australia, it:
    - (i) admits that it did not pay, or provide TOIL or annual leave to, those employees at the rate referred to in subparagraph 38(a)(i), or pay those employees at the rate referred to in subparagraph 38(b), of the SOC;
    - (ii) denies that it was obliged to do so; and
  - (b) otherwise repeats paragraphs 33A and 37 above and does not know and therefore cannot admit paragraph 38.

39. As to paragraph 39, it repeats paragraphs 33A, 37 and 38 above and otherwise does not know and therefore cannot admit paragraph 39.
40. As to paragraph 40, it repeats paragraphs 33A to 39 above and otherwise does not know and therefore cannot admit paragraph 40.
41. As to paragraph 41, it:
- (a) admits that during the Claim Period some Coles Award Employees worked ordinary hours on one or more Sundays; and
  - (b) otherwise repeats paragraph 33A above and does not know and therefore cannot admit paragraph 41.
42. As to paragraph 42, it repeats paragraphs 11 and 27 above and:
- (a) says that, to the extent that ordinary hours were worked by Award Employees in South Australia in the Claim Period on a Sunday that was not a public holiday in South Australia, it:
    - (i) admits that it did not pay, or provide TOIL or annual leave to, those employees at the rate referred to in subparagraph 42(a)(i), or pay those employees at the rate referred to in subparagraph 42(b), of the SOC;
    - (ii) denies that it was obliged to do so; and
  - (b) otherwise repeats paragraph 33A and 41 above and does not know and therefore cannot admit paragraph 42.
43. As to paragraph 43, it repeats paragraphs 33A, 41 and 42 above and otherwise does not know and therefore cannot admit paragraph 43.
44. As to paragraph 44, it:
- (a) admits that during the Claim Period, some Coles Award Employees worked full-time Award overtime hours or part-time Award overtime hours on one or more Sundays;
  - (b) says that during the Claim Period, the Respondent did not employ casual Award Employees; and
  - (c) otherwise repeats paragraph 33A above and does not know and therefore cannot admit paragraph 44.
45. As to paragraph 45, it repeats paragraphs 11 and 27 above and:

- (a) says that, to the extent that overtime hours were worked by Award Employees in South Australia in the Claim Period on a Sunday that was not a public holiday in South Australia, it:
    - (i) admits that it did not pay, or provide TOIL or annual leave to, those employees at the rates referred to in subparagraphs 45(a) or 45(b) of the SOC;
    - (ii) denies that it was obliged to do so; and
  - (b) otherwise repeats paragraph 33A and 44 above and does not know and therefore cannot admit paragraph 45.
46. As to paragraph 46, it repeats paragraphs 33A, 44 and 45 above and otherwise does not know and therefore cannot admit paragraph 46.
47. As to paragraph 47, it repeats paragraphs 33A and 41 to 46 above and otherwise does not know and therefore cannot admit paragraph 47.
48. As to paragraph 48, it:
- (a) admits that during the Claim Period, some Coles Employees who were employed on a full-time or part-time basis took paid annual leave or paid personal/carer's leave on a Sunday; and
  - (b) otherwise repeats paragraph 33A above and does not know and therefore cannot admit paragraph 48.
49. It denies paragraph 49 and repeats paragraph 11 above.
50. As to paragraph 50, it repeats paragraphs 11, 20 and 27 above and:
- (a) says that, to the extent that full-time and part-time Coles Employees took paid annual leave on a Sunday that was not a public holiday in South Australia during the Claim Period, it deducted their annual leave balances and was entitled to do so; and
  - (b) otherwise repeats paragraph 33A, 48 and 49 above and does not know and therefore cannot admit paragraph 50.
51. As to paragraph 51, it repeats paragraphs 33A and 48 to 50 above and otherwise does not know and therefore cannot admit paragraph 51.
52. It denies paragraph 52 and repeats paragraph 11 above.
53. As to paragraph 53, it repeats paragraphs 11, 20 and 27 above and:

- (a) says that, to the extent that full-time and part-time Coles Employees took paid personal/carer's leave on a Sunday that was not a public holiday in South Australia during the Claim Period, it deducted their personal/carer's leave balances and was entitled to do so; and
- (b) otherwise repeats paragraphs 33A, 48 and 52 above and does not know and therefore cannot admit paragraph 53.

- 54. As to paragraph 54, it repeats paragraphs 33A, 48, 52 and 53 above and otherwise does not know and therefore cannot admit paragraph 54.
- 55. As to paragraph 55, it repeats paragraphs 33A and 48 to 54 above and otherwise does not know and therefore cannot admit paragraph 55.
- 56. It denies the Applicant and Group Members are entitled to the relief set out in the Originating Application filed on 12 January 2026.

## **F. FURTHER DEFENCES IN RESPECT OF THE APPLICANT**

### **F.1 Mistaken payments for Annual Leave Sundays**

- 57. For each of the Applicant's Annual Leave Sundays, the Applicant was paid, by way of annual leave loading, the applicable Sunday penalty rate for the hours he would have worked that day had he not been on annual leave.

#### **Particulars**

For each of 5 January 2020, 15 March 2020 and Sunday 12 April 2020, the Applicant was paid 165% of his base rate of pay for the hours he would have worked on those days had he not been on leave (pursuant to clauses 8.6.1 and 9.2.11 and Appendix F of the Coles Agreement).

For each of 27 September 2020, 22 November 2020, 29 November 2020 and 27 December 2020, the Applicant was paid 150% of his base rate of pay for the hours he would have worked on those days had he not been on leave (pursuant to clause 8.6.1 and 9.2.11 and Appendix F of the Coles Agreement).

- 58. If (which is denied) the Respondent was obliged to treat the Applicant's Annual Leave Sundays as public holidays, then:
  - (a) the Applicant was only entitled to be paid for his ordinary rostered hours on the Annual Leave Sundays at his base rate of pay pursuant to clause 9.2.8 of the Coles Agreement and s 116 of the FW Act;

- (b) the Respondent mistakenly believed the Applicant should be paid, by way of annual leave loading, the Sunday penalty rates for the Annual Leave Sundays pursuant to clauses 8.6.1 and 9.2.11 and Appendix F of the Coles Agreement;
- (c) but for the mistaken belief pleaded in subparagraph 58(b) above, the Respondent would not have paid the Applicant, by way of annual leave loading, the Sunday penalty rates for the Annual Leave Sundays as described in paragraph 57 above;
- (d) by reason of the matters pleaded in subparagraphs 58(a), (b) and (c) above, the Applicant has been unjustly enriched at the expense of the Respondent and the Respondent is entitled to restitution of:
  - (i) 65% of the Applicant's base rate of pay for his ordinary rostered hours on 5 January 2020, 15 March 2020 and 12 April 2020; and
  - (ii) 50% of the Applicant's base rate of pay for his ordinary rostered hours on 27 September 2020, 22 November 2020, 29 November 2020 and 27 December 2020; and
- (e) accordingly, the Respondent is entitled to set off, and hereby sets off, against the amounts claimed in the SOC in respect of the Applicant, the amounts in subparagraph 58(d) above.

## **F.2 FW Act s 545**

59. Further and in the alternative to the matters pleaded in paragraph 58 above, if the Court concludes that the amounts described in subparagraph 58(d) above cannot at law be set off against any amounts claimed in the SOC in respect of the Applicant, then it would not be appropriate, within the meaning of s 545 of the FW Act, to make an order for compensation in respect of the Applicant in circumstances where such an order failed to accord with the compensatory and remedial purposes of s 545 by failing to take into account the amounts paid to the Applicant as described in subparagraph 58(d) above.

## **G. FURTHER DEFENCES IN RESPECT OF THE GROUP MEMBERS**

### **G.1 Mistaken payments for Sundays taken as annual leave by the Group Members**

60. For each Sunday during the Claim Period that was taken as annual leave by Group Members, the Respondent paid the Group Members a payment equivalent to the applicable Sunday penalty rate, by way of annual leave loading, for the hours they would have worked on those days had they not been on leave.

### **Particulars**

Clauses 8.6.1 and 9.2.11 and Appendix F of the Coles Agreement.

Clauses 32.3 and 29.4(e) of the Retail Award up to 30 September 2020.

Clauses 28.3 and 22.1 of the Retail Award on and from 1 October 2020.

61. If (which is denied) the Respondent was obliged to treat as public holidays the Sundays during the Claim Period that were taken as annual leave by Group Members, then:
- (a) the Group Members were only entitled to be paid for their ordinary rostered hours or ordinary hours of work (as applicable) for those Sundays at their base rate of pay;

### **Particulars**

Section 116 of the FW Act.

Clause 9.2.8 of the Coles Agreement (for Coles Agreement Employees).

- (b) the Respondent mistakenly believed the Group Members should be paid a payment equivalent to the applicable Sunday penalty rates, by way of annual leave loading, for those Sundays;
- (c) but for the mistaken belief pleaded in subparagraph 61(b) above, the Respondent would not have paid the Group Members the Sunday penalty rates for those Sundays as described in paragraph 60 above;
- (d) by reason of the matters pleaded in subparagraphs 61(a), (b) and (c) above, the Group Members have been unjustly enriched at the expense of the Respondent and the Respondent is entitled to restitution of:
- (i) 65% of each Group Member's base rate of pay for each Group Member's ordinary rostered hours or ordinary hours of work (as applicable) on every Sunday taken as annual leave by each Group Member in the period 23 December 2019 to 30 June 2020; and
- (ii) 50% of each Group Member's base rate of pay for each Group Member's ordinary rostered hours or ordinary hours of work (as applicable) on every Sunday taken as annual leave by each Group Member in the period 1 July 2020 to 31 December 2023; and
- (e) accordingly, the Respondent is entitled to set off, and hereby sets off, against the amounts claimed in the SOC in respect of Group Members, the amounts in subparagraph 61(d) above.
62. Further, in respect of any Group Members who were Award Employees and who were paid an annualised salary during the Claim Period, the Respondent is entitled to set off, against the amounts claimed in the SOC in respect of Group Members, any component of

a Group Member's annualised salary paid over and above an amount satisfying all entitlements owed to that employee under the Retail Award.

**G.2 FW Act s 545**

63. Further and in the alternative to the matters pleaded in paragraph 61 above, if the Court concludes that the amounts described in subparagraph 61(d) above cannot at law be set off against any amounts claimed in the SOC in respect of Group Members, then it would not be appropriate, within the meaning of s 545 of the FW Act, to make an order for compensation in respect of the Group Members in circumstances where such an order failed to accord with the compensatory and remedial purposes of s 545 by failing to take into account the amounts paid to the Group Members as described in subparagraph 61(d) above.
64. Further and in the alternative to the matters pleaded in paragraph 62 above, if the Court concludes that the Group Member's annualised salary cannot be set off as described in that paragraph, then it would not be appropriate, within the meaning of s 545 of the FW Act, to make an order for compensation in respect of the Group Members in circumstances where such an order failed to accord with the compensatory and remedial purposes of s 545 by failing to take into account any component of the Group Member's annualised salary paid over and above an amount satisfying all entitlements owed to that employee under the Retail Award.

## Statement of Cross-claim

In accordance with their Notice of Cross-claim dated 10 April 2026, the Cross-claimant claims against the Cross-respondent as follows.

1. It repeats paragraphs 1, 2, 5, 8, 9, 11, 13, 14, 15, 16, 17, 18, 20, 21, 28, 29, 30, 31, 33, 57 and 58 of the Defence above.
2. To the extent the Court may hold that the Respondent and Cross-claimant is not entitled to set off the amounts sought to be set off in paragraph 58(d) of the Defence, the Respondent and Cross-claimant cross-claims against the Applicant and Cross-respondent for those amounts.

The Respondent also reserves the right to apply to join and make corresponding cross-claims against Group Members as appropriate.

**JONATHAN KIRKWOOD**

**CATHERINE PASE**

Date: 10 April 2026

*Damian Grave*

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Signed by Damian Grave  
Herbert Smith Freehills Kramer  
Lawyer for the Respondent / Cross-claimant

### **Certificate of lawyer**

I Damian Grave certify to the Court that, in relation to the defence and statement of cross claim filed on behalf of the Respondent and Cross-claimant, 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: 10 April 2026

*Damian Grave*

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Signed by Damian Grave  
Lawyer for the Respondent / Cross-claimant